Testimony in Opposition to HB 476
Ohio General Assembly | House of Representatives
Committee on Government Accountability & Oversight
May 3, 2016 | Columbus, OH

Chairman Brown, Vice Chair Blessing, Ranking Member Clyde, and Members of the Committee:

I. Background & Statement of Interest

I thank you for this opportunity to present testimony today.
My name is Benjamin G. Davis. I am a tenured professor of law at the University of Toledo College of Law where I teach contracts, international law, and international business transactions. Prior to entering teaching, I worked for 13 years at the International Chamber of Commerce (the World Business Organization) in Paris, France as the American Legal Counsel at the ICC International Court of Arbitration, and then promoted to Manager, Institute of World Business Law, and Director, Conference Programmes. I am currently Vice Chair of the American Bar Association Section of Dispute Resolution as well as a member of the ABA Standing Committee on Law and National Security.

These comments are provided solely in my personal capacity and do not engage any of these institutions.

II. Comments on HB 476

A. Definition of company is too broad and in conflict with federal antiboycott provisions. The Ohio HB 476 definition encompasses a range of U.S. persons beyond those covered by anti-boycott federal law as well as a wealth of non-U.S. persons including foreign entities, conducting business abroad and with no present ties to Ohio or Israel with the only limiting factor being that it operate to earn a profit.

	Ohio HB 476 language	Federal Anti-boycott
Proposed Section 9.75 A (1)	Company" means a sole proprietorship, partnership, corporation, national association, societe anonyme, limited liability company, limited partnership, limited liability partnership, joint venture, or other business organization, including their subsidiaries and affiliates, that operates to earn a profit.	The anti-boycott provisions by foreign nations of the federal Export Administration Regulations (EAR) apply only to the activities of **U.S. persons in the interstate or foreign commerce of the United States**. These U.S. persons are further defined to **"include[s] all individuals, corporations and unincorporated associations resident in the United States, including the permanent domestic affiliates of foreign concerns, and U.S. citizens abroad (except when they reside abroad and are employed by non-U.S. persons) and the controlled in fact**

		affiliates of domestic concerns. The test for "controlled in fact" is the ability to establish the general policies or to control the day to day operations of the foreign affiliate.[1]

B. **Most likely preempted by federal law under foreign affairs or other preemption**. Inclusion of the phrase"in territory controlled by Israel" places the State of Ohio and each other state passing such legislation directly in the foreign affairs of the United States.

C. **Business complexity increased for no apparent benefit to American business**. Inclusion of "as an expression of protest against the policies of the government of Israel" is extremely vague and deprives the incredibly broad group of companies covered by the proposed legislation of the ability to have legitimate business and/or non-political as well as legitimate non-business and/or political disagreements with policies of the government of Israel whether or not they are supportive of Israel. To the extent that United States policy in any manner diverges from the policies of the government of Israel at any time (national security, taxation, intellectual property, etc), the language may create difficult questions for the covered contractors as a matter of Ohio law as to how to operate in a manner consistent with United States law and policy and Israeli law and policy.

D. **Relinquishing of Ohio State contract negotiation power for uncertain benefit**. As a matter of contract negotiation, the state insistence that "the contract declares that the company is not boycotting Israel or disinvesting from Israel, and includes a term obligating the company, for the duration of the contract, not to boycott Israel or disinvest from Israel" is bargaining away a portion of the plenary Ohio State governmental contracting power for no clear fiscal benefit or consideration.

E. **Inevitability of a court challenge.** One can expect a court challenge in which the Ohio Supreme Court or United States Supreme Court will be guided by prior decisions in this arena in which the United States Supreme Court has " balance(d) the degree to which the statute intrudes on foreign affairs against the degree to which the exercise of the state power falls within traditional state powers."[2] It is difficult to imagine a more broadly drawn state law attempting to assert non-traditional state powers over companies with effect in Ohio, extraterritorial effect in the United States as well as extraterritorial to the United States in the rest of the world as it implicates 1) any company (as defined) in the world and 2) is concerned with foreign relations of the United States and 3) foreign relations of any country with companies with respect to 4) one specific foreign nation and territories it controls. Moreover, one can expect foreign states to view

[1]Office of Antiboycott Compliance, Bureau of Industry and Security, U.S. Department of Commerce available at https://www.bis.doc.gov/index.php/enforcement/oac (last visited on April 29, 2016)

[2] Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 U.S. Op. Off. Legal Counsel 49, 61-62 (1986); Crosby, Secretary of Administration and Finance of Massachusetts v. National Foreign Trade Council 530 U.S. 363 (2000) (Congressional preemption of state law); American Insurance Association v/ Garamendi Insurance Commissioner, State of California, 539 U.S. 396 (2003) ("California seeks to use an iron fist where the President has consistently chosen kid gloves…But, our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress….")

this legislation as a thinly disguised trade distorting non-tariff barrier subject to dispute resolution at the World Trade Organization or in other trade fora.[3]

III. Conclusions

Characterized by the proponents and opponents as anti-BDS, the central problem is this legislation is most likely preempted under field or foreign affairs preemption in our federalism. I would dare say that a similarly drafted pro-BDS state statute would also be so preempted. Either way, I believe as drafted HB 476 is unconstitutional.

Put simply,

1) the task of the federal government and particularly the President in foreign affairs is complicated by this statute that is likely preempted as drafted in any event,
2) if somehow not preempted, the bargaining power of the state is diminished for no apparent fiscal benefit, and
3) the difficult and contradictory burden placed on fragile companies seeking to comply does a disservice to their shareholders, management, employees, and suppliers increasing costs for unclear and at most speculative benefit to the State of Ohio and its ordinary citizens.

Thank you, I would be pleased to answer your questions.

[3] BDS and anti-BDS issues are clearly occupying the federal government during present trade negotiations of the United States with our foreign trading partners. See June 2015 Trade Promotion Authority discussed at (https://nebula.wsimg.com/2c08e1d15a386249b5ab8515392ef6fe?AccessKeyId=7BB3DAA86ABC0388A877&disposition=0&alloworigin=1)