



June 16, 2016

Via fax and mail

The Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

Dear Governor Cuomo:

On behalf of the Center for Competitive Politics,<sup>1</sup> we write in regards to Executive Order No. 157, which you issued on June 5, and which requires “all agencies and departments over which the Governor has executive authority” and all public corporations, authorities, boards, and commissions “for which the Governor appoints the Chair, Chief Executive, or the majority of Board Members,” except for the Port Authority of New York and New Jersey, “to divest their money and assets from any investment in any institution or company,” that “engage[s] in any activity, or promote[s] others to engage in any activity, that is intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel or persons doing business in Israel...” (emphasis added).

The scope of this Order, we believe, constitutes an unacceptable and unconstitutional assault on freedom of speech and expression, and we urge you to modify or rescind the Order so as to protect the First Amendment rights of the citizens of New York and of other states.

It is well established that, under the market participation doctrine, states have the power to place certain conditions on state investments without running afoul of the Commerce Clause of the U.S. Constitution. *See e.g. White v. Massachusetts Council of Construction Employers*, 460 U.S. 210 (1983). Although use of the state’s proprietary activities to engage in socially activist investing has been sharply criticized as poor trusteeship of public employee pensions and state assets, *see e.g. Jon Entine, The Politicization of Public Investments*, in *Pension Fund Politics* 1-12 (J. Entine, ed. 2005) (and quoting then-New York City Mayor Michael Bloomberg, “I don’t think that we should be using the city’s investments policies . . . to advance social goals, no matter how admirable those goals are and no matter how much I believe in it.”), such activist investing by state governments is, within limits, constitutionally permissible.

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<sup>1</sup> The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Delaware and Utah. We are also involved in litigation against official actions taken by state officials in California and New York.

E.O. 157 goes further, however, by specifically basing state investment decisions not only on whether a company or other institution complies with state laws, but on a company's or institution's willingness to surrender its First Amendment rights as a condition of state investment. Indeed, under the Order, an institution wishing to maintain its eligibility for New York state investments must refrain not only in its own actions, it may not even "promote others" to engage in certain activities pertaining to the state of Israel. This appears to run afoul of the doctrine of "unconstitutional conditions." See e.g. *O'Hare Truck Svc. v. City of Northlake*, 518 U.S. 712, 726 (1996). Under that rule, the Supreme Court has held that a state may not condition the awarding of government contracts on a contractor's political affiliations or speech about public issues. *Id.*; *Board of Commissioners v. Umbehr*, 518 U.S. 668, 675 (1996) ("The First Amendment's guarantee of freedom of speech protects government employees from termination *because of* their speech on matters of public concern," and clarifying that the right also applies to government contractors) (emphasis in original).

The Order's breadth is, we believe, unprecedented, applying not only to "any activity" but to merely "promoting" others to engage in certain lawful, indeed Constitutionally-protected, activities. Mere criticism of Israeli government policies, even those unrelated to the issues motivating the so-called "BDS" campaign, could be deemed to fall within the Order. While the Commissioner's restraint in preparing a list of companies and institutions subject to the Order might ameliorate some such overreach, the very judgments involved in determining which companies and institutions have "promote[d] others" to engage in BDS activities will likely foster mistrust and confusion, and will broadly chill public discourse.

Again, we recognize the authority of the State to use its power as a market participant to place conditions, within limits, on certain of the State's investments. But that power is not unlimited, and may not – and, equally important to liberal minds and mores, *ought* not – be used to attempt to limit public advocacy on issues of policy in violation of the First Amendment. This is just as inappropriate in the service of an anti-"BDS" policy as it would be if another state announced that it would divest from any company that refused to use its resources to *promote* a "BDS" policy.

As drafted, E.O. 157 treads not warily, but openly and heavily on core First Amendment rights of advocacy and association. If the Order is not rescinded, it should, at a minimum, be modified to remove from coverage the mere "promot[ion]" of activities by others.

Very truly,



Bradley A. Smith  
Chairman



David Keating  
President