



July 5, 2016

Hon. Kay Granger
Chairwoman, State and Foreign Operations Appropriations Subcommittee
1026 Longworth House Office Building
Washington, DC 20515

Hon. Nita Lowey
Ranking Member, State and Foreign Operations Appropriations
Subcommittee
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Washington, DC 20515

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**RE: Oppose Any Anti-BDS Amendment to State/Foreign Operations
Appropriations Bill**

Dear Chairwoman Granger and Ranking Member Lowey:

We write today in opposition to any proposed amendment to the State and Foreign Operations Appropriations bill that would condone state laws penalizing businesses and individuals who express support for a boycott, divestment, or sanctions (“BDS”) against Israel. The full bill is due to be marked up in the Subcommittee on Wednesday morning, where such an amendment may be offered to match a similar amendment to the Senate bill. While the proposal attached to the Senate version of the bill, S. 3117¹ - approved by the committee last week² - is of questionable impact, its intent is contrary to the spirit and letter of the First Amendment guarantee of freedoms of speech and association and any attempt to attach it to the House bill should be rejected.

The so-called BDS movement aims to bring international pressure on Israel to change its policies and actions with respect to Palestine and Palestinians.³ In response, at least 22 states have considered or adopted bills to bar the state from doing any business with or investing in businesses or individuals who express support for the BDS movement.⁴ We take no position on either side of that debate but we do assert that states should not be deciding with whom they should do business on the basis of ideological predisposition. This is especially true where the ideological position has no connection whatsoever with the business relationship at stake.

¹ See S. 3117 at pp. 350-55 (<http://www.appropriations.senate.gov/imo/media/doc/FY2017-State-Foreign-Operations-Appropriations-Bill-S3117.pdf>) (accessed 07/05/16).

² Lifhits, J., Anti-BDS Measure Passes Senate Committee, *The Weekly Standard* (June 30, 2016) (<http://www.weeklystandard.com/anti-bds-measure-passes-senate-committee/article/2003092>) (accessed 07/05/16).

³ See BDS Movement website. (<https://bdsmovement.net/bdsintro>) (accessed 07/05/16).

⁴ See Right to Boycott website (<http://www.righttoboycott.org/>) (accessed 07/05/16).

While each state measure is slightly different, they share the same core – barring certain people and companies from doing business with the state solely because they have expressed support for the aims of the BDS movement. A number of our state affiliates have opposed the state bills imposing such penalties.⁵ The proposal attached to the Senate bill does not impose similar sanctions at the federal level, but rather offers support for these state laws and bars pre-emption as a basis for challenging them. Instead of a bill having little or no impact, Members of the Committee should demonstrate the value they place on pluralism and diversity of opinion by rejecting such an unwarranted amendment.

Make no mistake: the underlying state bills discriminate solely on the basis of the viewpoint of those impacted. There is a large class of businesses and individuals who do no business with Israel. Indeed the vast majority of America does no business with Israel. Those who choose not to engage with Israel on a commercial basis do so for many reasons. Some, like those impacted by these state laws, oppose Israel's actions on ideological grounds, voice that opinion, and then follow through. Others may hold similar beliefs and also refrain from engaging with Israel, but choose not to publicly announce their ideological reasoning. Still others don't do business with Israel simply because it doesn't fit within their business model. Only those who affirmatively express support for the BDS movement are barred from state contracts and investments even though there are others who refrain to the very same extent. They are penalized solely because they choose to express their opinion and because their opinion is disfavored by the political class in the states in question. Such a penalty flies in the face of the First Amendment's guarantee that the state should impose no law infringing on the right to speak freely and to associate with those of like minds.

Because the amendment to the Senate bill does not impose a penalty at the federal level, its impact is difficult to gauge. The operative provision of the amendment in the Senate bill gives state and local government permission to “adopt and enforce [anti-BDS] measures.”⁶ But, of course, an expression of congressional approval cannot render an unconstitutional law constitutional. So, if a state law fails under the First Amendment, this bill will not change that verdict. And if a state law is drafted in a way that passes muster constitutionally, this federal proposal will not alter that result either. On that score, this bill is akin to a resolution – expressing a sense of Congress that it supports such state laws.

This amendment also declares that federal law shall not pre-empt state anti-BDS laws. We take no position on whether pre-emption is appropriate or not. However, the Trade Facilitation and Trade Enforcement Act, which was signed into law in February 2016, includes clear opposition to BDS and encourages states to consider BDS participation negatively in its commercial decision-making.⁷ In order for pre-emption to serve as a valid basis to challenge a state law, there must be some inherent conflict between that law and relevant federal law. In this case, the recent trade bill suggests any such pre-emption challenge would fall short even without an anti-BDS amendment in the appropriations bill.

⁵ See, e.g., Letter to Gov. Rick Scott (Feb. 26, 2016) (opposing Florida bill SB 86) (<https://aclufl.org/wp-content/uploads/2012/10/Senate-Bill-86-Veto-Recommendation.pdf>) (accessed 07/05/16); Letter to Va. House of Delegates Committee on General Laws (Feb. 2, 2016) (opposing BDS legislation) (<https://acluva.org/wp-content/uploads/2016/02/160203-HB1282-Israel-Boycott.pdf>) (accessed 07/05/16); Letter to NJ Legislature (June 6, 2016) (opposing BDS legislation) (https://www.aclu-nj.org/files/7214/6540/3543/2016_06_06_israel_boycott.pdf) (accessed 07/05/16)

⁶ See S. 3117 at pp. 350 (<http://www.appropriations.senate.gov/imo/media/doc/FY2017-State-Foreign-Operations-Appropriations-Bill-S3117.pdf>) (accessed 07/05/16).

⁷ See H. R. 644 (114th Congress) (enacted Feb. 24, 2016); see also Balofsky, A., Obama Reluctantly Signs BDS Bill, *Breaking Israeli News* (Feb 15, 2106) (<http://www.breakingisraelnews.com/61409/obama-reluctantly-signs-bds-bill-recognizing-territories-as-part-of-israel-jerusalem/#udWiFh6l0MmXJxzh.97>) (accessed 07/05/16).

The anti-BDS effort can be distinguished from the anti-apartheid movement of the 1970s and 1980s. At that time, there was a growing movement that spread to universities and municipalities to divest from anyone doing business in South Africa.⁸ The divestment from those doing business with South Africa fundamentally differs from boycotting those refusing to do business with Israel on ideological grounds. In the earlier case, the official sanction derived from a decision to engage in commercial transactions. In the latter case, there is no such commercial transaction, but merely the expression of a political position. The goal in one case was to stop trade – a goal that applied to everyone. The goal in the current situation is to compel trade – a goal that applies only to people of a particular ideological view.

Our state affiliates, faced with bills and executive orders attempting to punish those vocally supporting BDS principles, have roundly criticized those attempts as unconstitutional attacks on individual speech rights. While the amendment in the Senate bill does not go that far, it is a bad precedent. It sends a message to Americans who care enough to engage on issues of global importance that if they dare to disagree with their government, they will be penalized and placed in a lesser class with fewer opportunities. That message is an insult to our forebears and makes a mockery of the constitutional principle that Americans are free to believe as they choose. This is not about Israel and Palestine – but rather about whether states can treat their citizens differently based on the political positions they choose to express.

We urge you to reject any attempt in the Subcommittee to offer an anti-BDS amendment as an unwarranted slap at the First Amendment’s guarantee of free speech and association. Contact Michael Macleod-Ball at mmacleod@aclu.org or 202-675-2309 if you have questions or comments.

Sincerely,



Karin Johanson
Director



Michael Macleod-Ball
Chief of Staff/First Amendment Counsel

⁸ See Gethard, G., Protest Divestment and the End of Apartheid, *Investopedia* website (<http://www.investopedia.com/articles/economics/08/protest-divestment-south-africa.asp>) (accessed 07/05/16).