

December 3, 2018

RE: Oppose S. 720, the Israel Anti-Boycott Act

Dear Senator,

On behalf of the American Civil Liberties Union (ACLU), we write to express our continued opposition to S. 720, the Israel Anti-Boycott Act. We understand the Senate is considering attaching a revised version of S. 720 to the end-of-the-year omnibus spending bill, and we urge you to oppose its inclusion.



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Earlier this year, the ACLU sent a letter to the Senate Banking, Housing and Urban Affairs Committee stating our opposition to a previously revised version of S. 720.¹ While that revised version included several improvements, it failed to resolve the bill's fundamental constitutional defects. It is our understanding that the most recently revised text fails to address these constitutional concerns. S. 720 in both its previous versions would unconstitutionally target political boycotts for criminal penalties, thereby infringing on First Amendment protected activities. This position has been validated by two federal courts, which independently held that the First Amendment protects the right to participate in political boycotts of Israel, as well as any other country.² If this bill were to pass, we would consider challenging it in court as well.

S. 720 would amend the Export Administration Act (EAA), a federal law that prohibits U.S. persons from complying with boycotts fostered or imposed by foreign governments. That law was passed in response to Arab League policies requiring U.S. companies to boycott Israel as a condition of doing business in Arab League states. S. 720 would apply EAA's restrictions to calls for boycott by international governmental organizations, such as the United Nations and the European Union. At first glance, these alterations may seem relatively minor.

¹ The ACLU originally stated our opposition to S. 720 in a letter submitted to the full Senate, dated July 17, 2017. We subsequently sent a letter to the Senate Banking, Housing, and Urban Affairs Committee opposing the previously revised version of the bill. See <https://www.aclu.org/letter/aclu-letter-revised-version-s720-israel-anti-boycott-act>.

² See *Koontz v. Watson*, 283 F. Supp.3d 1007(D. Kan. 2018); Order, *Jordahl v. Brnovich*, 3:17-cv-08263, Dkt No. 63 (D. Ariz. Sept. 28, 2018) available at <https://www.aclu.org/legal-document/jordahl-v-brnovich-courts-order-granting-pi>.

In fact, S. 720 would turn the EAA on its head. Whereas the EAA was meant to protect American companies from economic coercion by foreign governments, S. 720 would punish Americans who participate in constitutionally protected political boycotts.

S. 720 would apply to participation in calls for boycott by international governmental organizations, such as the UN Human Rights Council (UNHRC), that exercise only persuasive authority. On March 24, 2016, the UNHRC called for the establishment of a database of companies profiting from Israel's occupation of the Palestinian territories. The bill states that Congress opposes the UNHRC resolution because it "lay[s] the groundwork for a politically motivated boycott," and "views such policies as furthering and supporting actions to boycott, divest from, or sanction Israel or persons doing business in Israel or Israeli-controlled territories." Americans who support calls for boycott by international governmental organizations do so not for commercial reasons, but because they wish to express their political opposition to Israeli government policies.

This type of boycott participation is core political expression and association lying at the heart of the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). It is therefore qualitatively different from the speech at issue in the precedent cases upholding the then-existing EAA. In a case decided shortly after the EAA was enacted, the Seventh Circuit held that the EAA could constitutionally be applied to the plaintiff businesses because the plaintiffs conceded that their desire to comply with the Arab League's boycott demands was "motivated by economics," particularly their "hope to avoid the disruption of trade relationships that depend on access to the Arab states." The court accordingly rejected the plaintiffs' contention that they had a "protected interest in political speech." *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917 (7th Cir. 1984).

By contrast, as a federal district court in Kansas recently held, political boycotts—including boycotts of Israel—are constitutionally protected. In that case, the court agreed with the ACLU's First Amendment challenge to a law requiring state contractors to certify that they are not participating in boycotts of Israel. *See Koontz v. Watson*, 283 F.Supp.3d, 1007, 1022 (D.Kan. 2018). The court granted a preliminary injunction against the law, holding:

The conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in Claiborne was protected. . . . Namely, its organizers have banded together to express collectively their dissatisfaction with the injustice and violence they perceive, as experienced by both Palestinians and Israeli citizens. [The plaintiff] and others participating in this boycott of Israel seek to amplify their voices to influence change, as did the boycotters in Claiborne." Koontz, 283 F.Supp.3d at 1022.

The court concluded that this conduct is "inherently expressive." The court also concluded that the law's fundamental goal, to undermine the message of those

participating in a boycott of Israel, “is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment.”³ The court’s reasoning applies with equal force to the Israel Anti- Boycott Act.

In September 2018, another federal district court, granted a preliminary injunction against a similar law in Arizona. *See Jordahl v. Brnovich*, 2018 WL 4732493 (D.Ariz. 2018). The court held:

*A restriction of one’s ability to participate in collective calls to oppose Israel unquestionably burdens the protected expression of companies wishing to engage in a boycott. The type of collective action targeted by the [law] specifically implicates the rights of assembly and association that Americans and Arizonans use ‘to bring about political, social, and economic change.’” Jordahl, --- F.Supp.3d ----, 2018 WL 4732493, at *13. (citing Claiborne, 458 U.S. at 911).*

A restriction of one's ability to participate in collective calls to oppose Israel unquestionably burdens the First Amendment-protected speech of companies wishing to engage in such a boycott.

To be sure, the previously amended bill includes some significant improvements over the initial draft. For example, the bill now makes clear that those who violate the bill’s provisions cannot be subject to imprisonment, and it states that “a person’s noncommercial speech or other noncommercial expressive activity” cannot be used “as evidence to prove a violation” or “as support for initiating an investigation into whether such a violation has occurred.” These significant changes ameliorate some of the dangers posed by the bill. But while they offer some protection to those who may be accused by offering tools for use in their defense, they do not resolve the bill’s fundamental constitutional defects. The bill still prohibits U.S. “domestic concerns,” among others, from participating in political boycotts called for by international governmental organizations, such as the UNHRC.⁴

³ Since the ACLU’s successful challenge, the state changed the anti-boycott certification law, so that it no longer applies to individuals or sole proprietors, applies to companies only if they have a contract for more than \$100,000 worth of business with the state, and requires companies to certify that they are not boycotting Israeli/settlement goods or services “integral” to their contract with the state. The case was dismissed pursuant to settlement, since the new law no longer required Ms. Koontz to sign the certification.

⁴ The bill does not include a definition for the term “domestic concern.” However, the Foreign Corrupt Practices Act defines the term to include both: “(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of the United States or a territory, possession, or commonwealth of the United States.” 15 U.S.C. § 78dd-2. Thus, the bill’s potential application is exceedingly broad. Even if the bill is applied only to businesses and non-profit organizations, those organizations also have First Amendment rights. See *Citizens United v. FEC*, 558 U.S. 310, 343 (2010).

The critical failure in the bill lies in its overarching framework, which unconstitutionally seeks to suppress one side of the public debate over Israel and Palestine. The bill reiterates Congress’s opposition to “actions to boycott, divest from, or sanction Israel or persons doing business in Israel or Israeli-controlled territories,” which it defines to include “politically motivated” boycotts aimed at Israel. In the press release accompanying the bill, both of you acknowledged the focus on boycotts, by describing the bill as an attempt to “combat Boycott, Divestment, and Sanction (BDS) efforts targeting Israel,” (Chairman Crapo) and as “anti-BDS legislation” (Senator Brown). These statements are in addition to similar statements throughout the legislative history of the legislation, which specify the intent to punish boycotters. As the Kansas court recognized in *Koontz*, the government cannot use its legislative power “to undermine the message of those participating in a boycott of Israel.” That is precisely what the Israel Anti-Boycott Act seeks to accomplish.

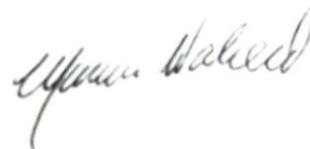
Because the bill’s fundamental purpose violates the First Amendment, it cannot be rescued by its First Amendment savings clause. The clause states: “Nothing in this Act or an amendment made by this Act shall be construed to diminish or infringe upon any right protected under the First Amendment to the Constitution of the United States.” Although the ACLU appreciates the sentiment expressed by this savings provision, it cannot override the bill’s plain terms, which primarily apply to political boycotts. *See, e.g., Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (holding that generic savings clause could not override statute’s plain text). Even if the bill were susceptible to alternative interpretations, members of the public should not be forced to predict— on pain of criminal financial penalties—whether a court would agree that the First Amendment protects their boycott participation. This “attempt to charge people with notice of First Amendment case law would undoubtedly serve to chill free expression.” *Long v. State*, 931 S.W.2d 285, 295 (Tex. Ct. Crim. App. 1996). Instead, the proper course would be to make clear that the bill does not prohibit politically motivated boycott participation.

For the foregoing reasons, we urge you to oppose the inclusion of S. 720 in an omnibus spending bill. If you have any additional questions, please feel free to contact Manar Waheed at mwaheed@aclu.org.

Sincerely,



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