



July 10, 2018

The Honorable Paul D. Ryan
Speaker
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

RE: ACLU Opposes Revised Version of H.R. 1697 – the Israel Anti-Boycott Act

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The American Civil Liberties Union (“ACLU”) urges you to oppose H. R. 1697, the Israel Anti-Boycott Act, which is expected to come before you for a vote on the suspension calendar in the coming weeks. Though the bill has been completely rewritten in recent weeks in response to widespread criticism of its restrictions on freedom of speech and belief, the key provision of the bill would still impose civil and criminal liability on Americans’ who engage in or otherwise support certain political boycotts. **We urge leadership to remove this highly controversial measure from the suspension calendar and we urge all members to vote against this matter as an unconstitutional infringement of core political speech rights.**

ACLU opposed this bill in its original form. In a letter sent to all members in July 2017, we opposed the original bill, which expanded upon restrictions in current law to impose civil and criminal penalties on Americans who expressed support for a boycott of Israel.¹ A substitute adopted in a June 28 mark-up of the bill in the House Committee on Foreign Affairs boiled the original bill down to its core. The substitute, adopted by voice vote, would mandate adoption of new regulations imposing criminal and civil penalties upon those who comply with, further, or support boycotts of countries friendly to the United States, if those boycotts have been imposed or “fostered” by an international governmental organization such as the United Nations.

The amended bill’s title and statements of policy make clear that it primarily targets boycotts of Israel. In particular, the bill expresses opposition to the U.N. Human Rights Council’s March 2016 resolution urging businesses to avoid supporting the establishment and maintenance of Israeli settlements in the occupied Palestinian territories, and calling for the establishment of a database of businesses engaged in certain settlement activity in the occupied Palestinian territories. The bill would thus undoubtedly lead to new regulations imposing civil and criminal penalties for supporting the boycott of Israel. But it would also authorize the Trump Administration and its successors to penalize any

¹ See Letter to U. S. House of Representatives (Jul. 17, 2017) (opposing H.R. 1697) available at <https://www.aclu.org/letter/aclu-letter-house-opposing-israel-anti-boycott-act>.

person who supports a boycott called for by an international governmental organization, such as the U.N. Human Rights Council, unless that boycott is also supported by the United States Government.

Both the original bill and the substitute seek to expand the Export Administration Act (“EAA”), which lapsed in 1994, and its implementing regulations, which remain in effect. The EAA was a federal law that prohibited 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. Congress enacted the EAA to prevent foreign governments from coercing U.S. businesses into supporting these compulsory boycotts. 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. In that case, however, the court focused on the purely commercial nature of the restricted speech. The plaintiffs – both major manufacturing companies - 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”, and the court declined to treat their speech as political, entitled to a higher standard of protection.²

Whereas the EAA was meant to protect American companies from economic coercion by foreign governments, H. R. 1697 – both as introduced and in its current form - would punish Americans who seek to participate in political boycotts called for by international governmental organizations like the U.N. Human Rights Council. This type of boycott participation is core political expression and association lying at the heart of the First Amendment.³ It is therefore qualitatively different from the speech at issue in the precedent cases upholding the EAA.

As a federal district court in Kansas recently held, political boycotts of foreign countries—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.⁴ 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*.⁵

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

² See *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917 (7th Cir. 1984).

³ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

⁴ *Koontz v. Watson*, 5:17-cv-04099 (D. Kan. 2018).

⁵ *Id.* (Slip Op. at 17).

subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment.”

The court’s reasoning applies with equal force to the Israel Anti-Boycott Act, regardless of whether the bill applies only to boycotts of Israel, as may be the immediate effect, or whether it may also apply to the next boycott called for by the U.N. Human Rights Council and opposed by the United States. In either case, Americans have a right to participate in political boycotts of foreign countries, regardless of whether the boycotted countries are “friendly to the United States” or not. Indeed, whereas the Kansas law prohibited the state from contracting with individuals who participate in boycotts of Israel, the Israel Anti-Boycott Act would authorize the Administration to criminalize participation in boycotts called for by international governmental organizations against countries friendly to the United States.

The substitute bill includes some improvements over the initial draft. For example, the bill now 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.” And an amendment to the substitute bill attempts to narrow the bill’s application to those solely engaged in commercial activities.⁶ These amendments do not resolve the bill’s fundamental constitutional defect. The bill still prohibits any U.S. person from taking action intending to “comply with, further, or support a restricted trade practice or boycott fostered or imposed by any international governmental organization against a country which is friendly to the United States.”

In addition to prohibiting a large amount of constitutionally protected boycott participation, the bill violates the First Amendment’s prohibition against content and viewpoint discrimination, because it penalizes only boycotts aimed at countries friendly to the United States. In particular, the bill targets boycotts of Israel, reiterating Congress’s opposition to “actions to boycott, divest from, or sanction Israel”. There are similar statements throughout the bill’s legislative history, making clear the bill’s fundamental purpose to suppress one side of the Israel-Palestine debate. 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.”⁷ That is precisely what the Israel Anti-Boycott Act seeks to accomplish in both its original and present form.

As a final matter, we are troubled that this bill may be offered for consideration on the suspension calendar, a device designed for non-controversial measures. Surely a bill that directly impacts the political speech rights of Americans cannot be deemed to be so trivial a matter. Even if this bill comes to the floor, at the very least we urge leadership to take the bill up in the normal course and provide an opportunity for free and full debate over whether Americans should be able to protest its government’s foreign trade policy without being subject to fine and possible imprisonment.

The ACLU continues to oppose H.R. 1697. We urge House leadership to remove the bill from the suspension calendar and we urge all members to oppose the measure when it comes to the

⁶ Unfortunately, the amendment fails to achieve the intended result. A reasonable construction of the bill would still authorize regulations punishing boycott participation by individuals and not-for-profit organizations.

⁷ *Id.* (Slip Op. at 18).

floor. We also encourage members to review the recent Kansas ruling addressing the very same issues at the state level. If you have any questions or comments about our position on this bill, please contact First Amendment advisor Michael Macleod-Ball at 202.253.7589.

Sincerely,

A handwritten signature in black ink, appearing to read "Faiz Shakir". The signature is fluid and cursive, with the first name "Faiz" written in a larger, more prominent script than the last name "Shakir".

Faiz Shakir
National Political Director

cc: Members of the U. S. House of Representatives