

October 10, 2018

**RE: Oppose S. 170, the Combating BDS Act**

Dear Senator,

On behalf of the American Civil Liberties Union (ACLU), we write to express our continued opposition to S. 170, the Combating BDS Act. We understand the Senate is currently considering this legislation and we urge you to oppose it.



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**Earlier this year, the ACLU sent a letter to the Senate Banking, Housing, and Urban Affairs Committee, stating that S. 170 would likely encourage states to adopt unconstitutional laws that would unjustly punish those doing business with the state based solely on their political beliefs.<sup>1</sup> This position has been validated by two federal court decisions which independently held that anti-boycott state laws were unconstitutional and violated free speech rights under the First Amendment.<sup>2</sup>**

S. 170 would condone state laws penalizing businesses and individuals who express support for a boycott, divestment, or sanctions (“BDS”) activities against Israel. It would prevent anyone barred from doing business with a state for participating in BDS activities from using a federal pre-emption argument to avoid state penalties. While the proposal is of questionable impact, its intent and the intent of the underlying state laws it purports to uphold are contrary to the spirit and letter of the First Amendment guarantee of freedoms of speech and association. Any attempt to advance the bill should be rejected.

BDS activists seek to bring international pressure on Israel to change its policies and actions with respect to Palestine and Palestinians. Thirty-seven states have considered bills to restrict the state from doing business with or investing in businesses or individuals who participate in BDS activities and 25 have adopted such measures.<sup>3</sup>

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<sup>1</sup> ACLU first opined on this issue in 2016 when an amendment containing similar language was considered for insertion in the State/Foreign Operations funding bill. We sent a subsequent vote recommendation in anticipation of a committee markup in May 2018. See <https://www.aclu.org/letter/aclu-letter-senate-banking-housing-and-urban-affairs-committee-s-170-combating-bds-act>.

<sup>2</sup> 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>.

<sup>3</sup> See Right to Boycott website (<http://www.righttoboycott.org/>).

We take no position on BDS but we do assert that states should not be deciding with whom they do business on the basis of protected expression and association or ideological predisposition, as we have consistently argued in situations where government entities have threatened to boycott Nike in response to its message of support for Colin Kaepernick.<sup>4</sup> This is especially true where the ideological position has no connection whatsoever with the business relationship at stake.

While each state measure is slightly different, they share the same core – barring or restricting certain people and companies from doing business with the state solely because they participate in BDS campaigns. Make no mistake: these 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 participate in BDS campaigns are barred from state contracts and investments even though there are others who refrain from such business opportunities to the very same extent. They are penalized solely because they choose to engage in protected expression disfavored by government officials 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 mind.

A number of ACLU’s state affiliates have opposed bills seeking to impose such penalties.<sup>5</sup> Just as significantly, ACLU has successfully challenged such laws in Arizona and Kansas, and will continue to do so as we identify more local individuals and businesses who are penalized by state governments as a consequence of expressing their beliefs.<sup>6</sup>

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<sup>4</sup> Emerson Sykes, *The First Amendment Bars Officials from Targeting Nike Because They Don’t Like Colin Kaepernick*, ACLU Speak Freely (Sept. 20, 2018) available at <https://www.aclu.org/blog/free-speech/first-amendment-bars-officials-targeting-nike-because-they-dont-colin-kaepernick>.

<sup>5</sup> 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>); 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>); 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](https://www.aclu-nj.org/files/7214/6540/3543/2016_06_06_israel_boycott.pdf)).

<sup>6</sup> 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 Kansas, a federal district court held that political boycotts—including boycotts of Israel—are constitutionally protected.<sup>7</sup> The court granted a preliminary injunction against the law requiring state contractors to certify that they are not participating in boycotts of Israel, holding:

*The conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in [NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982)] 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 Kansas court concluded that such 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.”<sup>8</sup>

Just last week, another federal district court granted a preliminary injunction against a similar law in Arizona. 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.’” Slip Op. at 24 (citing Claiborne, 458 U.S. at 911).*

While S. 170 does not have the same impact as laws such as those in Kansas and Arizona, it does seek to remove barriers to the passage of such laws. Congress should send a message about the value it places on freedom of speech, pluralism, and diversity of opinion by rejecting this unwarranted bill.

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<sup>7</sup> See *Koontz v. Watson*, 283 F. Supp. 3d at 1022; see also Judge Blocks Kansas Law Barring Boycotts of Israel after Wichita Teacher Sued, *Wichita Eagle* (Jan. 30, 2018) *available at* <http://www.kansas.com/news/politics-government/article197386094.html>.

<sup>8</sup> Since 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.

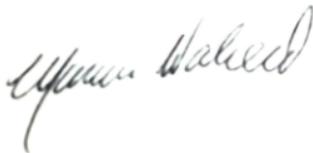
ACLU's state affiliates, faced with a wave of bills and executive orders attempting to punish those participating in BDS, have roundly criticized those attempts as unconstitutional attacks on individual speech rights. So, too, must we criticize this effort to ratify the efforts of anti-free speech advocates around the country. S. 170 sends a message to Americans who 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 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.

For the foregoing reasons, we urge you to oppose S. 170. If you have any additional questions, please feel free to contact Manar Waheed at [mwaheed@aclu.org](mailto:mwaheed@aclu.org).

Sincerely,



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