

February 12, 2024

**RE: Vote No on HR 3016, the IGO Anti-Boycott Act**

Dear Representative,

The American Civil Liberties Union (ACLU) strongly urges you to oppose H.R. 3016, the IGO Anti-Boycott Act, which would amend the Anti-Boycott Act of 2018 to extend its provisions to encompass boycotts fostered or imposed by international governmental organizations against countries friendly to the United States or U.S. persons. In 2017 and 2018, the ACLU sent letters to Members of Congress opposing a similar bill, the Israel Anti-Boycott Act, on First Amendment grounds. The Israel Anti-Boycott Act never became law. But H.R. 3016 presents the same fundamental defect -- it unconstitutionally targets political boycotts for criminal penalties. Although the ACLU does not take a position on particular boycotts of foreign countries, we stand firmly against any infringement of fundamental First Amendment rights, including the right to boycott. If the bill were to pass and take effect, we would consider challenging it in court.



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Like the failed Israel Anti-Boycott Act before it, H.R. 3016 proposes to 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. H.R. 3016 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. In fact, H.R. 3016 would turn the EAA on its head. Whereas the EAA was meant to protect American companies from economic coercion by foreign governments, H.R. 3016 would punish Americans for their purely voluntary, and constitutionally protected, participation in political boycott campaigns. H.R. 3016 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 Israel Anti-Boycott Act stated that Congress opposed 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."<sup>1</sup> Similar sentiments presumably underly H.R. 3016. But the First Amendment strictly prohibits the

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<sup>1</sup> Israel Anti-Boycott Act, S. 720, 115th Cong. § 2 (2017)



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government from criminalizing political dissent, including when that dissent is expressed through a voluntary boycott. 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 – matters of overwhelming public concern and debate in the present moment.

This type of boycott participation is core political expression and association lying at the heart of the First Amendment. And as the Supreme Court recognized in *NAACP v. Claiborne Hardware Co.*, the government’s authority “to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott.”<sup>2</sup> That is because, going all the way back to the colonial boycott of British goods in the runup to the American Revolution, consumer boycotts have been “deeply embedded in the American political process” as a form of popular protest that enables individuals to band together and collectively “make their views known when, individually, their voices would be faint or lost.”<sup>3</sup> Boycotts are ubiquitous across the political spectrum—from progressive boycotts of companies that support the National Rifle Association to conservative boycotts of companies that support Planned Parenthood.<sup>4</sup> And boycotts have been essential to important movement for social justice, including the Civil Rights movement, the struggle against apartheid, and the fight for LGBT equality.<sup>5</sup> In short, consumer boycotts are a form of “expression on public issues [that] ‘has always rested on the highest rung of the hierarchy of First Amendment values.’”<sup>6</sup>

In recent years, numerous federal courts have applied *Claiborne Hardware* to conclude that politically-motivated consumer boycotts of foreign countries are constitutionally protected—and, in particular, that state laws conditioning government contracts on the contractor’s avowed non-participation in boycotts of Israel violate the First Amendment.<sup>7</sup> As these courts explained, such laws “threaten[] ‘to suppress unpopular ideas’ and ‘manipulate

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<sup>2</sup> 458 U.S. 886, 914 (1982).

<sup>3</sup> *Id.* at 907–08 (quoting *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981))

<sup>4</sup> See Tiffany Hsu, *Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate*, N.Y. TIMES, Feb. 28, 2018, at A12; Tamar Lewin, *Anti-Abortion Group Urges Boycott of Planned Parenthood Donors*, N.Y. Times, Aug. 8, 1990, at A13;

<sup>5</sup> See generally Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 538–544 (2012).

<sup>6</sup> *Id.* at 913 (quoting *Carey v. Brown*, 447 U. S. 455, 467 (1980)).

<sup>7</sup> See, e.g., *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1226–29 (N.D. Ga. 2021), *aff’d on other grounds sub nom Martin v. Chancellor for the Bd. of the Univ. of Ga.*, No. 22-12827, 2023 WL 4131443 (11th Cir. June 22, 2023); *Amawi*, 373 F. Supp. 3d at 743–45; *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1041–42 (D. Ariz. 2018), *vacated as moot*, 789 F. App’x 589 (9th Cir. 2020); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1021–24 (D. Kan. 2018).



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the public debate through coercion rather than persuasion.”<sup>8</sup> And “[t]he type of collective action targeted by [these laws] specifically implicates the rights of assembly and association that Americans . . . use ‘to bring about political, social, and economic change.’”<sup>9</sup> This reasoning applies with even greater force to H.R. 3016, which makes it a federal felony, threatening up to 20 years’ imprisonment and \$1 million in fines, to participate in a proscribed boycott of any country friendly to the United States.

Voluntary participation in a politically motivated consumer boycott is qualitatively different from the commercial activity regulated by the 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.”<sup>10</sup> Courts have readily acknowledged that *Briggs’* reasoning does not extend to politically-motivated boycott participation, such as that targeted by H.R. 3016.<sup>11</sup>

While it is true that the U.S. Court of Appeals for the Eighth Circuit upheld Arkansas’ Israel anti-boycott law in *Arkansas Times v. Waldrip*,<sup>12</sup> “[t]hat ruling was based on an unusually convoluted logic that said the law was intended to regulate commercial activity, not speech.”<sup>13</sup> And although the Eighth Circuit (wrongly) concluded that the First Amendment does not protect “the purchasing decisions at the heart of a boycott,” it still acknowledged that “expressive activities *accompanying* a boycott” are constitutionally protected.<sup>14</sup> The Eighth Circuit construed Arkansas’ law not to reach any such activities, but H.R. 3016 plainly extends to voluntary, politically-motivated *speech* seeking to support proscribed boycotts. The bill would make it a federal felony to furnish information to an international governmental organization, such as the U.N. Human Rights Council, about whether any person has business relationships with or in the boycotted country. Such naming-and-shaming techniques were among the forms of boycott-facilitating speech expressly identified in *Claiborne*

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<sup>8</sup> *Amawi*, 373 F. Supp. 3d at 763–64 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994)).

<sup>9</sup> *Jordahl*, 336 F. Supp. 3d at 1043 (quoting *Claiborne Hardware*, 458 U.S. at 911).

<sup>10</sup> See *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917 (7th Cir. 1984).

<sup>11</sup> See *Amawi*, 373 F. Supp. 3d at 746; *Jordahl*, 336 F. Supp. 3d at 1043–44.

<sup>12</sup> *Arkansas Times LP v. Waldrip*, 37 F.4th 1386, 1392 (8th Cir. 2022), *cert. denied*, 143 S.Ct. 774 (2023).

<sup>13</sup> Editorial Board, *When States Try to Take Away Americans’ Freedom of Thought*, N.Y. Times, SR 11 (Jan. 21, 2024), available at <https://www.nytimes.com/2024/01/20/opinion/campus-free-speech.html>.

<sup>14</sup> *Arkansas Times*, 37 F.4th at 1392.

*Hardware*.<sup>15</sup> While Congress has every right to oppose boycotts fostered or imposed by international governmental organizations, such opposition is not a sufficient ground to ban Americans from communicating accurate factual information to an international governmental body, nor may Congress obstruct Americans from exercising their own freedom to express their political beliefs in the form of a boycott.

In light of the foregoing, the ACLU strongly urges you to oppose H.R. 3016. If you have any questions please don't hesitate to reach out to [jleventoff@aclu.org](mailto:jleventoff@aclu.org).


Sincerely,



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<sup>15</sup> See 458 U.S. at 909 (“In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper.”).