

January 28, 2019

RE: Vote “NO” on Cloture for S. 1

Dear Senator,

On behalf of the American Civil Liberties Union (ACLU), and our more than 3 million members, supporters and activists, we strongly urge you to vote “NO” on cloture on the motion to proceed to S. 1. This bill includes the Combating BDS Act, legislation that was unable to move forward in the 115th Congress¹ primarily due to First Amendment concerns. Senators have yet again introduced a version of the Combating BDS Act that would encourage states to adopt unconstitutional measures intended to suppress protected political expression when those opinions are disfavored by the government.



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We urge you to vote “NO” on cloture on the motion to proceed to S. 1, the Strengthening America’s Security in the Middle East Act of 2019.

The Combating BDS Act would condone state laws penalizing businesses and individuals who participate in boycott, divestment, or sanctions (“BDS”) activities and other politically motivated boycotts against Israel and Israeli-controlled territories. This act condones state laws that compel contractors and any entity in which the state invests (e.g., through a state-run pension, retirement, or endowment fund) to sign an oath, promising not to boycott Israel, as a requirement of maintaining their relationship with the state.

It would prevent anyone barred from doing business with a state for participating in boycott activities against Israel and Israeli-controlled territories from using a federal pre-emption argument to avoid state penalties. The intent of the underlying state laws it purports to uphold is contrary to the spirit and letter of the First Amendment guarantee of freedoms of speech and association. Two federal courts agreed that similar laws are

¹ The Combating BDS Act of 2017, S. 170, 115th Cong. (2017). *See e.g.* Letter to Senate Banking, Housing and Urban Affairs Committee on S. 170, the Combating BDS Act (May 10, 2018) (opposing S. 170) (<https://www.aclu.org/letter/aclu-letter-senate-banking-housing-and-urban-affairs-committee-s-170-combating-bds-act>); Letter to Senate (Oct. 10, 2018) (Oppose S. 170, the Combating BDS Act) (<https://www.aclu.org/legal-document/aclu-statement-s-170-combating-bds-act>).

unconstitutional, holding that anti-boycott state laws violate free speech rights under the First Amendment.² Thirteen of the country's preeminent First Amendment scholars, including the former deans of Yale Law School and the University of Chicago Law School and the current dean of the UC Berkeley School of Law, have filed a brief explaining that these laws violate the First Amendment.³

Just this past week, a district court in Arkansas issued an incorrect ruling regarding this issue as it relates to investments or contracts with companies engaged in boycott.⁴ This district court's decision contradicts the two previously mentioned federal court decisions and would radically limit the First Amendment right to boycott, impacting the rights of all Americans. It also goes against the weight of existing caselaw and the analysis of First Amendment scholars. This recent development only further highlights precisely why Congress should not be considering legislation to encourage the enactment of these laws as they have real and harmful consequences for Americans exercising their constitutionally protected freedoms.

While we take no position on Israel boycotts, the BDS movement, or Israel-Palestine, we do maintain that states should not be sanctioning business on the basis of First Amendment-protected expression and association. This is especially true where the ideological position has no connection whatsoever with the business relationship at stake. Math teachers in Kansas⁵ and university students, writers, and journalists in Texas⁶ should not have to disavow participation in protected expression and association in order to do their jobs or engage in business relationships with the state; for contractors, this means penalizing their beliefs or advocacy by denying them work opportunities and income. With the Combatting BDS Act, Congress would be attempting to give legal cover to state laws imposing such unconstitutional requirements.

Thirty-nine states have considered bills to restrict the state from doing business with or investing in businesses or individuals who participate in BDS activities and

² See *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018).

³ Knight First Amendment Institute at Columbia University, *Knight Institute Files Brief in Ninth Circuit on Behalf of Prominent Legal Scholars, Explaining that BDS Boycotts are Protected by the First Amendment*, Jan. 24, 2019, <https://knightcolumbia.org/news/knight-institute-files-brief-ninth-circuit-behalf-prominent-legal-scholars-explaining-bds>.

⁴ *Arkansas Times v. Waldrip*, No. 4:18-CV-00914 (Jan. 23, 2019), available at https://www.arktimes.com/media/pdf/aclu_israel_order_denying_pi_and_dismissing_1.pdf.

⁵ Vera Eidelman, *Laws Targeting Israel Boycotts Fail First Legal Test*, ACLU Speak Freely (Jan. 30, 2018) available at <https://www.aclu.org/blog/free-speech/rights-protesters/laws-targeting-israel-boycotts-fail-first-legal-test>.

⁶ ACLU of Texas Files First Amendment Challenge to Anti-Boycott Law, ACLU of Texas (Dec. 18, 2018) available at <https://www.aclutx.org/en/press-releases/aclu-texas-files-first-amendment-challenge-anti-boycott-law>.

26 have adopted such measures.⁷ 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 politically-motivated expressive boycotts. 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 or Israeli-controlled territories. Indeed the vast majority of America does no business with Israel or the territories. 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, Israel boycotts, and boycotts of Israeli-controlled territories to achieve political change 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 state affiliates have opposed bills seeking to impose such penalties.⁸ Just as significantly, the 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.⁹

To be clear: this bill is not about Israel and Palestine – but rather about whether states can treat individuals differently based on the political positions they choose to express. The Combating BDS Act sends a clear message to Americans who engage on issues of global importance that if they dare to disagree with their

⁷ See Right to Boycott website (<http://www.righttoboycott.org/>).

⁸ 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).

⁹ See *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018). See also ACLU of Arkansas, *ACLU of Arkansas Files First Amendment Challenge to Law Targeting Anti-Israel Boycott* (Dec. 11, 2018) available at <https://www.acluarkansas.org/en/press-releases/aclu-arkansas-files-first-amendment-challenge-law-targeting-anti-israel-boycotts>.

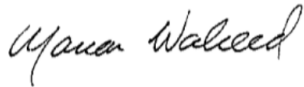
government, they will be penalized and placed in a lesser class with fewer opportunities. That message makes a mockery of the constitutional principle that Americans are free to believe as they choose.

We urge Senators to vote “NO” on cloture on the motion to proceed to S. 1. If you have any additional questions, please feel free to contact Manar Waheed (mwaheed@aclu.org) and Kate Ruane (kruane@aclu.org).

Sincerely,



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