



March 6, 2018

The Honorable Mike Crapo
Chairman
U.S. Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Sherrod Brown
Ranking Member
U.S. Senate Committee on Banking, Housing, and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

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TREASURER

RE: ACLU Opposes Revised Version of S.720 – Israel Anti-Boycott Act

Dear Chairman Crapo and Ranking Member Brown:

The American Civil Liberties Union continues to strongly urge you to oppose the Israel Anti-Boycott Act, S. 720, notwithstanding revisions proposed last week by Senators Ben Cardin (D-MD) and Rob Portman (R-OH). Last year, the ACLU sent a letter to all senators opposing the bill on First Amendment grounds. Earlier this year, a federal court agreed with the ACLU that the First Amendment protects the right to participate in political boycotts of Israel, as well as any other country. The ACLU acknowledges the sincere efforts made by S. 720's sponsors to address free speech concerns, and the new draft reflects several improvements—but the amended bill still unconstitutionally targets political boycotts for criminal penalties. The ACLU therefore continues to oppose the bill as an infringement of fundamental First Amendment rights. If the bill were to pass in its revised form and take effect, we would consider challenging it in court.

The ACLU originally stated our opposition to S. 720 in a letter to the full Senate dated July 17, 2017. As discussed in that letter, 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. 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, *Koontz v. Watson*, 5:17-cv-04099, 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. 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*."

Slip Op. at 17. 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." The court's reasoning applies with equal force to the Israel Anti-Boycott Act.

To be sure, the 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.¹

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.” Slip Op. at 18. 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.

In light of the foregoing, the ACLU continues to oppose S.720. We are encouraged that the Kansas ruling provides strong support for our assessment. 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.

¹ 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).

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

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

Brian Hauss
Staff Attorney
Speech, Privacy and Technology Project

cc: Senator Ben Cardin (D-MD)
Senator Rob Portman (R-OH)
Members of the Senate