

Oppose the amended Israel Anti-Boycott Act

December 5, 2018

We are a diverse coalition of over 100 civil and human rights organizations writing to express our strong opposition to the Israel Anti-Boycott Act (S. 720) (“the Act”). We opposed the original version of the Act¹ as well as proposed amendments that were unveiled (but never adopted) in the Spring of 2018.² We wrote in September 2018 to oppose the third iteration of the bill, offered as a substitute bill by Congressman Ed Royce in June 2018.³ We now understand that the Senate is considering attaching an amended version of this bill to the end-of-year omnibus spending bill. Previous amendments do not solve the Act’s underlying constitutional infirmities, as described below.⁴

We call on members of Congress to oppose the inclusion of this unconstitutional bill in the omnibus spending bill, and to affirm the First Amendment right of all people in the United States to support political boycotts as a means to achieve justice and equality for Palestinians.

Summary

All versions of the Act require the amendment of existing regulations issued under the anti-boycott provisions of the federal Export Administration Act (EAA), enacted in 1979.⁵ Those provisions prohibit specific actions taken to comply with, further, or support a boycott of “countries friendly to the United States” that is “fostered or imposed” by a foreign country. The EAA was intended to apply to the Arab League boycott of Israel.⁶

The Act, which explicitly names boycotts of Israel as its intended target, would adopt new restrictions on boycotts fostered or imposed by International Governmental Organizations (IGOs) such as the European Union or the United Nations.

Previous versions of the Act prohibit a variety of actions, including participating in boycotts as well as “furnishing information” that could be used to further or support a boycott. Violations may be punishable by criminal and civil penalties.

¹ See <https://palestinelegal.org/s/Oppose-Israel-Anti-Boycott-Act-Jan-3-2018.pdf>.

² See <https://palestinelegal.org/s/Oppose-Amended-Israel-Anti-Boycott-Act-April-6-2018-t5n4.pdf>.

³ See <https://palestinelegal.org/news/amended-unconstitutional-iaba?rq=israel%20anti%20boycott%20act>. Text of the Royce amendment is available at <https://docs.house.gov/meetings/FA/FA00/20180628/108503/BILLS-115-HR1697-R000487-Amdt-003.PDF>.

⁴ The ACLU has also opposed the different versions of this bill, and now opposes its inclusion in an omnibus bill. See <https://www.aclu.org/letter/aclu-statement-s-720-israel-anti-boycott-act>.

⁵ The NDAA, enacted in July 2018, included an apparent reauthorization of the EAA by “incorporate[ing] longstanding current law anti-boycott provisions from the expired Export Administration Act of 1979 (50 U.S.C. 4601 et seq.) continued in effect under IEEPA,” under the title of Anti-Boycott Act of 2018. See Congressional Conference Report at <https://www.congress.gov/115/crpt/hrpt874/CRPT-115hrpt874.pdf>. See NDAA at <https://www.congress.gov/bill/115th-congress/house-bill/5515/text?q=%7B%22search%22%3A%5B%22H.R.+5515%22%5D%7D&r=1#toc-HA5ABF2CDA2A2464B96585ABF16E07BB4>;

⁶ See <https://www.bis.doc.gov/index.php/enforcement/oac>.

The Act, even as amended, would seriously threaten fundamental First Amendment freedoms by targeting political boycotts for Palestinian rights suggested by the EU or UN, and prohibiting companies (including sole proprietorships), organizations, and their “owners, officers, directors, employees or agents” from taking action to “comply with, further, or support” such boycotts. While the amended bill no longer covers individuals acting in their personal capacity, it would continue to cover ethical business owners seeking to follow socially responsible practices. For example, if a business owner or their agent were to cease doing business with companies operating in illegal West Bank settlements, and did so in response to an EU or UN boycott or “restrictive trade practice,” which the Act describes broadly to include merely urging companies not to operate in illegal settlements, they would be in violation of this law. It could also affect employees of companies and nonprofit organizations, as described below.

The U.S. Supreme Court has long held that political boycotts are protected by the First Amendment.⁷ A federal court recently blocked Kansas from enforcing an anti-boycott law targeting boycotts for Palestinian rights.⁸ The judge in that case noted that,

the conduct the Kansas Law aims to regulate is inherently expressive. It is easy enough to associate plaintiff’s conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians. And boycotts—like parades—have an expressive quality. Forcing plaintiff to disown her boycott is akin to forcing plaintiff to accommodate Kansas’s message of support for Israel.⁹

Another federal court enjoined Arizona from applying its similar anti-boycott law, stating, “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.”¹⁰

The government may not enact laws that discriminate against certain viewpoints, or that would punish those who support political boycotts or compromise the right to support political boycotts.

The amended version of the Act adds language, aimed at alleviating First Amendment concerns that civil liberties groups have raised, stating that only commercial speech, which receives a lower level of constitutional protection than political speech, can be used “as evidence to prove a violation.” But the types of boycotts targeted by the Act – boycotts for Palestinian rights – are inherently political boycotts aimed at effecting change for Palestinians living under Israeli military occupation and subjugation for over seven decades, and the Act prohibits a wide variety of actions to comply with, further, or support these political boycotts.

The Act goes far beyond the original EAA, relevant provisions of which were intended to protect US companies from a mandatory Arab League boycott of Israel that some US companies complied with for purely commercial reasons.¹¹ Unlike with the original EAA, there is no

⁷ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

⁸ *Koontz v. Watson*, 5:17-cv-04099. Kansas is one of twenty-six states to enact a law in recent years aimed at punishing those who engage in boycotts for Palestinian rights. For more information, visit www.righttoboycott.org.

⁹ *Id.*

¹⁰ See *Jordahl v. Brnovich*, 2018 WL 4732493 (D.Ariz. 2018), currently on appeal to the 9th Circuit.

¹¹ See *supra*, note 6.

compulsory boycott at issue that would be covered by the Act's expansion of the EAA, and any company or organization that supports boycotts initiated by IGOs would be doing so for ethical and political reasons, in support of Palestinian rights.

We therefore remain opposed to the Act for the following reasons:

- *Political speech activities would be directly prohibited by the amended Act, in violation of the First Amendment.*

Under its terms, the Act should not reach many of the boycott activities related to Israeli government policies. Generally, boycotts for Palestinian rights are not conducted in response to a call for boycott from a foreign country or IGO, but are acts of conscience seeking justice and equality for Palestinians and Israel's compliance with international law. Indeed, people across the United States are increasingly using boycotts as tactics to pressure Israel to respect Palestinian rights.

Nevertheless, the Act will directly prohibit some First Amendment protected political speech. Consider the situation of a human rights organization that distributes research on companies operating in illegal West Bank settlements. This organization and its employees could be in violation of the Act – and face criminal or civil penalties – if they adopt an organizational policy (or distribute information about a policy) not to purchase goods based on an IGO's recommendations for a boycott or restrictive trade practices related to Israeli abuses of Palestinian rights.

Consider also a sole proprietorship – an individual lawyer for example – who seeks to align their one-person business with international law and ethical standards, as suggested by the UN Human Rights Council. This individual could be considered in violation of the Act for refusing to purchase goods made by companies that operate in illegal West Bank settlements.

- *The Act would empower overzealous presidential administrations to target supporters of political boycotts.*

We have no doubt that the Act would be used as a pretext for overzealous presidential administrations, lobbied by Israel-aligned groups (including those that support this bill), to investigate and even punish supporters of Palestinian rights, whether or not their actions “comply with, further, or support” an IGO action, as the Act requires. Arab and Muslim communities will likely face the brunt of this potential for overbroad enforcement.

From 2014 through 2018, Palestine Legal responded to nearly 1000 incidents of suppression nationwide targeting speech supportive of Palestinian rights, an additional 257 requests for legal assistance in anticipation of such incidents, and dozens of efforts to enact federal, state and local laws aimed at punishing BDS activism and chilling speech

supportive of Palestinian rights.¹² Palestine Legal and the Center for Constitutional Rights documented this pattern of suppression of Palestinian rights advocacy in a 2015 report, *The Palestine Exception to Free Speech: A Movement Under Attack in the U.S.*¹³

As such, our belief that if enacted, the Act would be enforced to intimidate and chill advocacy for Palestinian rights is based on a well-researched pattern of suppression of First Amendment-protected speech and actions in support of Palestinian rights. This involves heightened government surveillance, investigations and prosecutions of individuals due to their support for Palestinian freedom, as well as private harassment and targeting, including by organizations that support the Act.

- *The Act will have the effect of chilling First Amendment-protected political speech.*

In the past two years, 25 states have enacted laws aimed at punishing participation in political boycotts for Palestinian rights.¹⁴ Together with these state laws, the Act will create a severe chilling effect on people across the country who are otherwise inclined to support First Amendment-protected boycotts for Palestinian rights, or who are merely curious to learn more. The wave of anti-boycott legislation, promoted by Israel and Israel-aligned groups to undermine the movement for Palestinian rights in the United States, aims to send a clear signal that support for Palestinian rights is disfavored by our government and is potentially punishable.

Statements by lawmakers and advocates who support anti-boycott legislation illustrate their intent to thwart political boycott campaigns. For example, when the Act was first introduced, co-sponsor Senator Rob Portman stated in a press release, “[t]his bipartisan legislation sends a clear message that politically-motivated boycotts of Israel are unacceptable to the United States.”¹⁵ Similarly, when a state senator in Washington introduced an anti-boycott bill, he said, “[i]f students want to protest on campus and do what students do, that’s just fine. But we’ll settle the question for them, the adults in [the] legislature.”¹⁶ The leader of one Israel advocacy group lobbying for these laws similarly boasted, “[w]hile you were doing your campus antics, the grown-ups were in the state legislature passing laws that make your cause improbable.”¹⁷

¹² Palestine Legal, Year-in-Review: Palestine Legal Responded to 308 Suppression Incidents in 2017, Nearly 1000 in Last 4 Years, available at, <http://palestinelegal.org/2017-report>.

¹³ Palestine Legal and Center for Constitutional Rights, *The Palestine Exception to Free Speech: A Movement Under Attack in the U.S.* (2015), available at <https://www.palestinelegal.org/the-palestine-exception>.

¹⁴ www.RightToBoycott.org.

¹⁵ Press Release, Roskam, Vargas, Portman, Cardin Introduce Anti-BDS Bill, March 23, 2017, <https://roskam.house.gov/Roskam-Vargas-Portman-Cardin-BDS>.

¹⁶ Dyer Oxley, Senator: Colleges are being used as ‘politically-correct batons,’ MyNorthwest.com, Jan. 2, 2017, <http://mynorthwest.com/500618/senator-baumgartner-bds-bill>.

¹⁷ Eitan Arom, As BDS opponents move from campuses to state capitols ,California is up next, JNS.org, April 13, 2016, <http://www.jns.org/latest-articles/2016/4/13/as-bds-opponents-move-from-campus-to-state-capitols-california-is-up-next-1#.VzyMuULfjww>.

Conclusion

Recent amendments to the Act do not solve the underlying problems listed above, which illustrate its unconstitutional purpose and provisions.

We therefore urge you to oppose inclusion of S. 720 in an omnibus spending bill, and to affirm the First Amendment right to support political boycotts – including those aimed at achieving justice and equality for Palestinians.

Signatories

National Organizations

- American-Arab Anti-Discrimination Committee
- American Friends Service Committee
- American Muslims for Palestine
- Al-Awda: The Palestine Right to Return Coalition
- Center for Constitutional Rights
- CODEPINK
- Council on American-Islamic Relations
- Defending Rights and Dissent
- Friends of Sabeel – North America
- International Jewish Anti-Zionist Network
- Jewish Voice for Peace
- Jews for Palestinian Right of Return
- Labor for Palestine
- National Lawyers Guild and the National Lawyers Guild Palestine Sub-Committee
- Palestine Legal
- Palestinian Youth Movement
- Project South
- Unitarian Universalists for Justice in the Middle East
- United Church of Christ Palestine Israel Network
- United Methodists for Kairos Response
- USA-Palestine Mental Health Network
- U.S. Campaign for the Academic and Cultural Boycott of Israel
- U.S. Campaign for Palestinian Rights
- U.S. Council of Muslim Organizations
- U.S. Palestinian Community Network
- War Resisters League

State Organizations

Alabama

- Birmingham Peace Project

California

- 14 Friends of Palestine
- Arab American Civic Council
- Buena Vista United Methodist Church
- Chico Palestine Action Group
- Claremont Students for Justice in Palestine
- Culture and Conflict Forum
- Democrats for Palestinian Equal Rights
- Friends of Sabeel, Sacramento Region
- International Committee for Peace, Justice and Dignity
- Israel Palestine Task Force of the California-Nevada Annual Conference of the United Methodist Church
- Jewish Voice for Peace, Bay Area Chapter
- Jewish Voice for Peace, Los Angeles Chapter
- Jewish Voice for Peace, Sacramento Chapter
- Jewish Voice for Peace, San Diego Chapter
- Northern California International Solidarity Movement
- QUIT: Queers Undermining Israeli Terrorism
- Sacramento Area Peace Action
- Sacramento Regional Coalition for Palestinian Rights
- Students for Justice in Palestine at California State University, Fullerton
- Students for Justice in Palestine at UCLA
- United Methodists' Holy Land Taskforce
- Wellstone Progressive Democrats of Sacramento

Connecticut

- Connecticut Peace and Solidarity Coalition
- Greater New Haven Peace Council
- Ironworkers Local 15
- Jewish Voice for Peace, New Haven Chapter
- Promoting Enduring Peace
- Tree of Life Educational Fund
- We Refuse to be Enemies

Florida

- Jewish Voice for Peace, South Florida Chapter
- National Lawyers Guild, South Florida Chapter

Illinois

- Arab Jewish Partnership for Peace and Justice in the Middle East
- Chicago Faith Coalition on Middle East Policy
- Committee for Just Peace in Israel-Palestine
- Jewish Voice for Peace, Chicago Chapter

- National Lawyers Guild, Chicago Chapter
- Students for Justice in Palestine at UIUC

Kentucky

- Israel Palestine Mission Network of the Presbyterian Church (USA)

Maryland

- Baltimore Palestine Solidarity
- Committee for Palestinian Rights
- Freedom2Boycott Maryland
- Friends of Sabeel DC Metro Area

Massachusetts

- Adalah Justice Project
- Alliance for Water Justice in Palestine
- Boston Coalition for Palestinian Rights
- Common Ground for Justice and Peace in the Holy Land, Inc.
- Divestment Task Force, New England Conference, United Methodist Church
- Jewish Voice for Peace, Boston Chapter
- Massachusetts Peace Action
- Watertown Citizens for Peace, Justice and the Environment

Missouri

- Mid-Missourians for Justice in Palestine

New York

- Adalah-NY: Campaign for the Boycott of Israel
- Black Movement-Law Project
- Brooklyn for Peace
- Columbia/Barnard Jewish Voice for Peace
- Columbia University Apartheid Divest
- Columbia University Students for Justice in Palestine
- Community of Living Traditions at Stony Point Center
- Concerned Families of Westchester
- Jewish Voice for Peace, Westchester Chapter
- Jews Say No!
- The Majlis Ash Shura (Islamic Leadership Council) of New York
- Muslim Peace Fellowship
- Palestine Solidarity Alliance of Hunter College
- Peace Action New York State
- Queers Against Israeli Apartheid
- Samidoun Palestinian Prisoner Solidarity Network
- Syracuse Peace Council
- WESPAC Foundation
- Westchester Coalition against Islamophobia

Oregon

- Americans United for Palestinian Human Rights
- Individuals for Justice
- Lutherans for Justice in the Holy Land
- Occupation-Free Portland

Pennsylvania

- Bryn Mawr Peace Coalition

Virginia

- Palestinian Christian Alliance for Peace
- Virginia Coalition for Human Rights

Vermont

- Green Mountain Solidarity with Palestine

Washington

- Rachel Corrie Foundation for Peace and Justice
- Vancouver for Peace
- Washington Freedom to Boycott