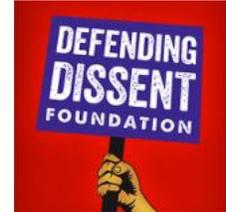




Maryland Chapter



March 3, 2014

Attn: Senator, General Assembly of Maryland
James Senate Office Building or Miller Senate Building
11 Bladen Street
Annapolis, MD 21401-1991

Attn: Delegate, General Assembly of Maryland
House Office Building
6 Bladen Street
Annapolis, MD 21401-1991

RE: Senate Bill 647 and House Bill 998 – “Anti-Boycott Bills”

Dear Senator or Delegate:

We at the Center for Constitutional Rights, the Maryland and D.C. Chapters of the National Lawyers Guild, and the Defending Dissent Foundation, organizations dedicated to upholding the rights of individuals to express their political views without repression, are writing to convey our serious concerns with Senate Bill 647 and House Bill 998, which prohibit public colleges and universities from using any funds to support academic boycotts of certain countries, including Israel.

Despite claims to the contrary – including from the Assistant Attorney General of Maryland – these bills threaten core First Amendment principles, have mobilized strong opposition from a spectrum of academic and civil society groups,¹ and will no doubt trigger constitutional challenges in the courts. Accordingly, we urge you to oppose these bills.

¹ The New York State legislature recently proposed two bills, S.6438 and A.8392, aimed at denying state funds to universities that fund organizations that support the academic boycott of Israel and three other countries. Overwhelming opposition there caused the Assembly bill to be delayed. The New York Times reported, “the turnout has been described by some as a political earthquake in Albany.” See http://takingnote.blogs.nytimes.com/2014/02/07/boycotting-israel-and-the-first-amendment/?_php=true&_type=blogs&_r=0; See also Editorial, *A Chill on Speech*, N.Y. TIMES, Feb. 3, 2014, at <http://www.nytimes.com/2014/02/04/opinion/a-chill-on-speech.html> (“NY Times Editorial”); Center for Constitutional Rights and National Lawyers Guild – New York City Chapter letter to Assembly members, <http://ccrjustice.org/files/1%2030%2014%20%20CCR%20NLG%20NYC%20Letter%20to%20NY%20Assembly%20Members%20FINAL.pdf>; New York Civil Liberties Union letter to Assembly Members, <http://coreyrobin.files.wordpress.com/2014/02/academic-boycott-bill-a8392-s6438-nyclu-statement-final.pdf>; American Association of University Professors’ statement, <http://aaup.org/sites/default/files/files/AAUPstatementboycottlegislation.pdf>; Columbia University Faculty Statement, <http://coreyrobin.files.wordpress.com/2014/02/columbia-faculty-boycott-letter-with-signatures-11.pdf>; City University of New York faculty and staff union statement,

A. These Bills Target Core Political Speech in Violation of Fundamental First Amendment Principles

The Supreme Court has held that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”² Boycotts “to bring about political, social and economic change” involve speech, association and petition activities unquestionably protected under the First Amendment.³ This is no accident. The United States itself is a product of a colonial boycott against British, Irish, and West Indian goods, issued by the First Continental Congress on October 20, 1774, in an effort to avoid war, persuade British lawmakers, and influence British public opinion.⁴ Since then, our country has had a long tradition of boycotts, from pre-Civil War protests against slavery to the Montgomery bus boycott led by Dr. Martin Luther King, Jr., to the boycott of apartheid South Africa.

The American Studies Association’s (ASA) resolution to boycott Israeli academic institutions – at which this bill is directed⁵ – was passed in response to the absence of “substantive academic freedom for Palestinian students and scholars under conditions of Israeli occupation,” and because “Israeli institutions of higher learning are a party to Israeli state policies that violate human rights and negatively impact the working conditions of Palestinian scholars and students.”⁶

Resolutions such as the ASA’s are core political speech and thus deserve the “special protection” afforded by the First Amendment. Indeed, the ASA’s boycott resolution takes inspiration from the boycott campaign against the apartheid regime in South Africa.⁷ Had a bill such as this been passed during that era, public universities across Maryland would have had to choose between allowing academic organizations to express opposition to the South African apartheid regime and keeping their full state funding. It would have been an unacceptable outcome then, and it is an unacceptable outcome now – regardless of the current unpopularity of the ASA’s position among legislators.

B. Denial of Funding to Institutions of Higher Learning for the purpose of Suppressing Expressed Political Viewpoints of Scholars and Academic Groups Violates the First Amendment

[boycott-bill-attacks.html](#). A similar mobilization of Maryland groups intent on protecting free speech and academic freedom have organized in opposition to these bills as well.

² *Connic v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations and citations removed).

³ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

⁴ Cong. Journal, 1st Cont’l Cong., 1st Sess. (Oct. 20, 1774), reprinted in 1 *Journals of the Cont’l Congress 75-81* (Worthington C. Ford et al. eds., 1903); *see also* David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (1974).

⁵ Kate S. Alexander, *Kramer bill puts reins on college memberships*, GAZZETTE.NET, Feb. 14, 2014, at <http://www.gazette.net/article/20140214/NEWS/140219559/-1/kramer-bill-puts-reins-on-college-memberships&template=gazette>; Suzanne Pollack and Hearther Norris, *Jewish Organizations Face Off*, BALTIMORE JEWISH TIMES, Feb. 27, 2014, at <http://jewishtimes.com/jewish-organizations-face-off/#.UxSlgeOwJcQ>.

⁶ American Studies Association Resolution on the Academic Boycott of Israel, *available at* http://www.theasa.net/american_studies_association_resolution_on_academic_boycott_of_israel.

⁷ ASA Academic Boycott Resolution: Frequently Asked Questions, *available at* http://www.theasa.net/images/uploads/ASA_Boycott_FAQs.pdf.

The proposed legislation also strikes at the heart of the First Amendment in its attempt to silence those on one side of a contentious debate through the reduction of state funds to public universities and colleges. The bills punish a range of academic activities if an organization even merely advocates for an academic boycott against an unidentified number of countries that have signed a “declaration of cooperation” with the State of Maryland. But the bills clearly target a particular viewpoint being expressed in boycotts of Israeli academic institutions, as legislators have made clear.⁸ The government is never permitted to legislate in a manner that gives preference to certain political viewpoints over others,⁹ as such viewpoint discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”¹⁰

The Assistant Attorney General of Maryland has opined that these bills are constitutional because the General Assembly can choose what they want to fund, and because the funding prohibitions do not prevent individuals from paying their own expenses for membership and participation in organizations, even if they can’t use university funds.

This is an inaccurate reading of the law. Direct or indirect restrictions in public funding aimed at suppressing particular political perspectives are unconstitutional. The Supreme Court has held that the government may not deny a benefit or impose restrictions on entities to suppress certain political perspectives.¹¹ These bills amount to “a penalty on disfavored viewpoints,” which violates the First Amendment.¹² All of the cases cited by the Maryland Attorney General’s office uphold this principle, and none supports its position that these bills are constitutional.

The Assistant Attorney General relies on *Rumsfeld v. FAIR*, a case upholding a law denying federal funding to law schools that deny access to U.S. military recruiters. The Court said the law at issue in *Rumsfeld* was not an unconstitutional condition on funding because requiring access to recruiters did not infringe on speech but regulated the schools’ conduct, and because great deference to Congress is required when it comes to military recruitment.¹³ The

⁸ See Kate S. Alexander, Kramer bill puts reins on college memberships, Gazette.Net, Feb. 14, 2014, at <http://www.gazette.net/article/20140214/NEWS/140219559/-1/kramer-bill-puts-reins-on-college-memberships&template=gazette>; Melissa Gerr, *Tackling a ‘Challenging Point’*, JEWISH TIMES, Jan. 31, 2014 at <http://jewishtimes.com/tackling-a-challenging-point/#.Uv6UJGJdWSo> (Quoting Senator Roger Manno: “My responsibility as a lawmaker and as a member of the Senate budget and taxation committee, which writes that check, is to ensure that the dollars are spent wisely and that it reflects the values of our community... And we don’t support [the boycott that the ASA is supporting.]”); Suzanne Pollack and Hearther Norris, *Jewish Organizations Face Off*, BALTIMORE JEWISH TIMES, Feb. 27, 2014, at <http://jewishtimes.com/jewish-organizations-face-off/#.UxSlgeOwJcQ> (Quoting Sen. Richard Madaleno Jr. “[T]he boycott movement is wrong and should be stopped... We are not talking about a North Korea or a Syrian institution. The Israeli higher education facilities operate much like ours do. Why would I want to boycott them?”).

⁹ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

¹⁰ *R.A.V.*, 505 U.S. at 387 (internal quotations and citations removed); *See also West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

¹¹ *Healy v. James*, 408 U.S. 169, 183 (1972).

¹² *NEA v. Finley*, 524 U.S. 569, 587 (1998).

¹³ *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 58-60 (2006). The Assistant Attorney General also misplaces reliance on *Rust v. Sullivan*, in which the federal funding program limiting abortion

Supreme Court recognized in *Rumsfeld*, however, that the denial of a benefit in a way that interferes with protected free speech rights is unconstitutional, as would be laws that “impose penalties or withhold benefits based on membership in a disfavored group.”¹⁴

The Assistant Attorney General’s memo itself reveals a basic misunderstanding of the purpose and effect of the proposed legislation. It states that, “So long as the legislation is applied so that it is not used to punish any staff or faculty member for exercising their individual rights of expression and association, it is my view that a court will find that the legislation is constitutional.” Unfortunately, that is exactly what the bills will do. By imposing a 3% penalty on a public university if it allows any university funds to be used to support membership and activities in organizations that advocate for academic boycotts, it indeed punishes the expressive political choices of university staff and faculty. If enacted, the law would be facially *unconstitutional*.

C. Cutting State Aid Can Have a Chilling Effect on Protected Speech Activities

Senate Bill 647 and House Bill 998 also infringe on academic freedom by penalizing universities and faculty for taking public positions based on their political and moral principles. The Assistant Attorney General’s memo observes that the American Association of University Professors (AAUP) disagrees with the academic boycott of Israel. Yet, the memo fails to mention that the AAUP has also strongly condemned the proposed legislation. In a [statement](#), the AAUP said that “this legislation undermines constitutionally protected academic speech and debate in order to promote a particular viewpoint,” and that “Academic freedom is meaningless if it does not protect those who support unpopular positions, including the advocacy of academic boycotts.”¹⁵

These bills inappropriately give legislators the power to censor academic exchange, and they cast exactly the “pall of orthodoxy” on academics and their institutions on matters of public concern that the Supreme Court has warned against.¹⁶ As the New York Times Editorial Board recently explained, in condemning a similar bill introduced in the New York legislature:

[This] bill is an ill-considered response to the American Studies Association Resolution and would trample on academic freedoms and chill free speech and dissent. Academics are rightly concerned that it will impose a political test on faculty members seeking university support for research meetings and travel.¹⁷

Even if scholars can continue to participate in academic associations that are denied state funding by using “personal funds to belong to or participate in” them, the message is clear that

counseling did not implicate the First Amendment rights of health care providers because the government was “simply insisting that public funds be spent for the purpose for which they are authorized,” not denying a benefit for the purpose of suppressing speech, as these anti-boycott bills would do. 500 U.S. 173, 196-200 (1991).

¹⁴ *Rumsfeld*, 547 U.S. at 69 (citing *Healy*, 408 U.S. at 180-184).

¹⁵ American Association of University Professors, Statement on Academic Boycott Legislation, Feb. 4, 2014, at <http://aaup.org/sites/default/files/files/AAUPstatementboycottlegislation.pdf>.

¹⁶ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); see also *Adler v. Board of Education*, 342 U.S. 485 (1952); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, (1961); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977).

¹⁷ NY Times Editorial, at <http://www.nytimes.com/2014/02/04/opinion/a-chill-on-speech.html>.

such activities are disfavored by the government. Courts have long recognized that speech may still be chilled even when a party continues to exercise its First Amendment rights.¹⁸ The chilling effect is felt in many ways, including by other associations contemplating similar boycott resolutions and individual academics who support such resolutions. This is, in fact, the stated intention of the bill.¹⁹

D. Academic Boycott Resolutions Such as the ASA’s Do Not Interfere with Maryland’s Cooperation Declaration with Israel

Furthermore, in contrast to the statements of some of the bill’s backers and the Assistant Attorney General’s opinion, academic boycott resolutions such as the ASA’s do not interfere with Maryland’s cooperation declaration with Israel.²⁰

Maryland’s Declaration of Cooperation with Israel, signed in 1988, is a nonbinding statement expressing nothing more than a “desire to strengthen” ties and relations between the two parties and an “intent...to cooperate in exploring arrangements between the Department of Economic Development of the State of Maryland, the respective ministries of the State of Israel as well as between academic institutions and private entities.”²¹ Despite the comments of some of the bill’s co-sponsors to voters, it is neither a treaty, nor a contract that is enforceable by law.

Nothing in the ASA boycott resolution would interfere with this declaration. The ASA resolution is “limited to a refusal on the part of *the* ASA in its official capacity to enter into formal collaborations with Israeli academic institutions, or with scholars who are expressly serving as representatives or ambassadors of those institutions.”²² The ASA boycott resolution has no impact on Maryland’s Department of Economic Development. The resolution only has bearing on the official collaborations of the organization, and on the associational decisions of individuals who choose to observe a boycott, not on the ability of universities themselves or other state agencies to engage in activities with other countries.

E. Academic Boycott Resolutions Such as the ASA’s Are Neither Discriminatory Nor Anti-Semitic

Some detractors of the academic boycott allege that singling out Israeli academic institutions amounts to anti-Semitism and constitutes discrimination against Jewish and Israeli individuals because of their religion or national origin. This allegation aims to deflect from the academic boycott’s attempt to end Israeli discriminatory practices towards Palestinians by mislabeling the boycott’s supporters as the offending parties.

The ASA boycott resolution – to which this bill is responding – is politically motivated; it targets institutions, not individuals, in order to change the policies of politically accountable

¹⁸ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

¹⁹ Suzanne Pollack and Hearther Norris, *Jewish Organizations Face Off*, BALTIMORE JEWISH TIMES, Feb. 27, 2014, at <http://jewishtimes.com/jewish-organizations-face-off/#.UxSlgeOwJcQ>.

²⁰ *Id.* Delegate Benjamin F. Kramer, who introduced House Bill 998, stated that public dollars should not be used to fund “membership or participation in the activities of [the ASA] because it completely undermines state policy and its relationship, through a Declaration of Cooperation, with Israel.”

²¹ <http://pobdirectory.com/news/resources/economic-development-trade-assistance/>.

²² (Emphasis added.) American Studies Association, *What does the boycott mean for the ASA?*, available at http://www.theasa.net/what_does_the_academic_boycott_mean_for_the_asa/.

government actors in Israel and the U.S. The individuals who could be affected by the ASA resolution, for example, are only those who directly represent Israeli state institutions in an official capacity.²³ To equate criticism of the Israeli state or a boycott of Israeli academic institutions with anti-Semitism is as misguided as calling criticism of or sanctions against the Iranian government anti-Muslim or anti-Persian, and as illogical as classifying criticism of the Chinese occupation of Tibet as hateful against people of Chinese ethnicity. Common sense makes clear the distinction between anti-Jewish bias (based on the race, ethnicity or religious identity of Jewish people as individuals or as a group) and criticism of Israeli institutions. The law also recognizes the distinction.²⁴

Attempts to paint academic groups that support boycotts as anti-Semitic and discriminatory against Jews and Israelis are not only legally bankrupt; they also trivialize important struggles against anti-Semitism and all other forms of racism.

F. Conclusion

We are committed to upholding the First Amendment rights of those challenging orthodox views. Senate Bill 647 and House Bill 998 punish universities and colleges that may fund participation in an academic group that has used an honored American tactic to effect social, political and economic change, solely because public officials disagree with the message that these groups are expressing. These bills are constitutionally infirm, and their passage would necessitate a legal challenge in order to protect the right of any individual or organization to engage in such protected speech activities.

Sincerely,



Betsy G. Cunningham and Curtis Cooper
Co-Convenors
National Lawyers Guild – Maryland Chapter



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²³ASA Boycott Resolution, *What does the boycott mean for the ASA?*, available at http://www.theasa.net/what_does_the_academic_boycott_mean_for_the_asa/.

²⁴ See, e.g., recent letters by the U.S. Department of Education Office for Civil Rights dismissing several claims under Title VI of the Civil Rights Act alleging that campus activity critical of Israel created an anti-Semitic hostile environment. The letters explain that the allegations were not actionable because the activities complained of constitutionally protected First Amendment expression, and were based on political viewpoint, not race, ethnicity or national origin. For more information and to view the letters, see <http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech%2C-department-of-education-dismisses-complaint>.