



Legislative Memorandum

Subject: **Anti-boycott bills**
 S6086/Gianaris and A8220/Lavine
 (Relates to purchasing restrictions on persons boycotting Israel and the investment of certain public funds in companies boycotting Israel)
 S6378A/Martins and A9036/Weinstein
 (Relates to purchasing restrictions and persons boycotting American allies)

Position: **OPPOSE**

S6086/A8220 and S6378A/A9036 require the State of New York to create a list of persons and entities that express a particular political viewpoint, and then bars New York from doing business with and investing in persons and entities on that list. These bills harken back to the McCarthy era when the state sought to deny the right to earn a livelihood to those who express controversial political views. The courts long ago found such McCarthy-era legislation to be at war with the First Amendment.

The viewpoint targeted by these bills is support for a boycott of Israel (S6086/A8220) and/or “American allies” (S6378A/A9036). Those who support human rights boycotts - like the boycott of Israel - see boycotts as a peaceful means of putting an end to injustice, just as supporters of the Montgomery bus boycott in the 1950s, of the California grape boycott in the 1960s, and of the boycott of apartheid South Africa in the 1980s saw those boycotts as a means of overcoming other forms of injustice. While some may disagree that one or another of those boycotts addressed injustice, just as proponents of these bills presumably disagree with those promoting the Palestinian cause, the law is well settled that participation in and support of such boycotts is a form of political expression fully protected by the Constitution.

While people may have differing opinions about the issues pertaining to Israel and Palestine, debate on issues of public concern is the lifeblood of the First Amendment, and the State of New York should not be in the business of punishing those who line up on one side or the other of such debates.

These bills seek to unconstitutionally punish human rights boycotts of Israel (and other “American allies” in the case of S6378A/A9036) by:

1. Creating an online blacklist of individuals, non-profit organizations, companies, and other entities that support politically motivated boycotts;
2. Prohibiting blacklisted individuals and entities from doing business with the state of New York, and
3. Prohibiting state pension funds from investing in companies engaged in politically motivated boycotts of Israel.

S6086/A8220 and S6378A/A9036 are a blatantly unconstitutional attack on freedom of speech and establish a dangerous precedent reminiscent of McCarthyism.

I. Understanding BDS. The global movement for a campaign to boycott, divest from and sanction (BDS) Israel until it complies with international law and respects Palestinian rights was initiated by Palestinian civil society in 2005, following the example of the struggle against apartheid South Africa. BDS is a nonviolent strategy that allows people of conscience to play an effective role in the Palestinian struggle for freedom, justice and equality in their homeland when all other diplomatic efforts have failed to achieve their rights. Supporters of BDS include South African rights activist Archbishop Desmond Tutu and “The Color Purple” author Alice Walker, among many others.¹ Religious institutions, including the United Church of Christ and the Presbyterian Church (USA) have embraced BDS,² as have many racial justice activists,³ immigrant rights activists, and labor organizations. Most recently, the Connecticut AFL-CIO passed a resolution supporting the BDS movement.⁴

II. First Amendment Concerns.

- **Human rights boycotts are protected First Amendment activities.** Boycotts are a constitutionally protected form of speech, association and assembly, and have a long history of being used successfully to address injustice and demand political change. 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.”⁵ The Supreme Court has specifically held that advocacy of and support for boycotts “to bring about political, social, and economic change” – like boycotts of Israel – are unquestionably protected under the First Amendment.⁶
- **The denial of public contracts and public investment in order to punish speech violates the First Amendment.** The State of New York cannot punish individuals, businesses, organizations, and other entities because of their speech and political views. Such actions would violate well-established First Amendment principles.⁷
- **Creating a blacklist of boycotters and denying public contracts with and public investment in boycotting entities will have a chilling effect on protected speech, in violation of the First Amendment.** It is unprecedented for the state to create a list of all individuals and entities that support or engage in a First Amendment-protected political activity. Such a list would chill First Amendment-protected activities by requiring persons to renounce such activities before they can be considered beneficiaries of public funds. This violates the Constitution and the principles on which this country was built.

III. Due Process Concerns. In addition to violating well-established First Amendment principles, this bill also presents serious constitutional problems given the vast and imprecise net that the bill casts with its requirement to create a blacklist, and the practical difficulties of creating and maintaining a blacklist of individuals, non-profit organizations, and other entities based on their First Amendment-protected speech. In particular:

- **Procedural impracticality.** The bill requires the commissioner to use “credible information available to the public” to create a list of persons and entities “engag[ed] in actions” that are “politically-motivated”

¹ See Palestinian BDS National Committee, Cultural Boycott, <http://bdsmovement.net/activecamps/cultural-boycott>.

² See United Church of Christ, UCC votes for divestment, boycotts of companies that profit from occupation of Palestinian territories, June 30, 2015, http://www.ucc.org/news_general_synod_israel_palestine_resolution_06302015.

³ See Ishaan Tharoor, The growing solidarity between #BlackLivesMatter and Palestinian activists, Washington Post, Oct. 15, 2015, <https://www.washingtonpost.com/news/worldviews/wp/2015/10/15/the-growing-solidarity-between-blacklivesmatter-and-palestinian-activists/>.

⁴ Ali Abunimah, Connecticut labor federation backs Israel boycott, Electronic Intifada, Nov. 11, 2015, <https://electronicintifada.net/blogs/ali-abunimah/connecticut-labor-federation-backs-israel-boycott>.

⁵ Connick v. Myers, 461 U.S. 138 (1983).

⁶ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

⁷ See O’Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996).

and “intended to inflict economic harm on Israel.” There is no geographic scope to this list, and the task would create a time-consuming and bureaucratic nightmare that would infringe on individuals’ constitutional due process rights. For example:

- The commissioner would be required to give written notice to all individuals who will be blacklisted and to “make every effort to avoid” blacklisting errors. How will the commissioner find individuals’ contact information, especially for individuals who are not residents of New York? What process is afforded to individuals or entities that are erroneously blacklisted? How do individuals and entities challenge blacklisting errors? Who is responsible for reviewing blacklisting errors, and what criteria will they use to make their determinations?
- **Vagueness.** What does the bill actually punish? The average person would not be able to discern what actions would land them on the blacklist. For example: What qualifies as “engaging in actions”? Attending a protest in support of BDS? Encouraging friends to boycott Israel? Signing a petition? Abstaining from buying specific goods?
- **Overbreadth:** The bill’s vagueness would deter constitutionally protected speech by intimidating persons from engaging in actions they think would land them on the blacklist, but that are in fact constitutionally protected speech activities.

These bills will lead to confusion, both on the part of potential bidders, as well as the commissioner, and will likely invite legal challenges.

IV. Iran Divestment. New York law prohibits state contracts and procurement from certain entities doing business in or with Iran. While we take no position on the wisdom of the Iran divestment law, it is important to note its key difference with S6086/A8220 and S6378A/A9036. The Iran divestment law does not penalize individuals/entities for their First Amendment-protected conduct. Rather, it penalizes businesses doing business with a country on the U.S. State Department’s State Sponsors of Terrorism list. S6086/A8220 and S6378A/A9036, on the other hand, penalize individuals and entities who have responded to Palestinian civil society’s nonviolent human rights campaign to boycott, divest from, and sanction Israel due to grave human rights concerns. These bills therefore punish political speech activities, in violation of the First Amendment.

S6086/A8220 and S6378A/A9036 unconstitutionally target core political speech activities and infringe on the freedom to express political beliefs, a fundamental American value. These bills should be withdrawn.