



## LEGISLATIVE MEMORANDUM

**Subject:** Anti-Boycott Bills, A925 and S1923  
**Position:** Oppose  
**Date:** June 24, 2016

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As civil and human rights organizations committed to upholding the rights of individuals and entities to express their political beliefs without fear of government retaliation or retribution,<sup>1</sup> we write to convey our strong opposition to A925 and S1923. These bills would require New Jersey to create a blacklist of companies that abide by boycott, divestment, and sanctions (BDS) campaigns for Palestinian rights and bar the state from investing its pension or annuity funds in them.

**Despite recent amendments, A925 and S1923 are still unconstitutional and violate basic American values and democratic principles.** Regardless of one's views on Israel and Palestine, A925 and S1923 target core political speech and infringe on the freedom to express political beliefs.

We urge you to oppose A925 and S1923.

**A. Denial of public investments, where motivated by a desire to suppress core political speech, violates the First Amendment**

A925 and S1923 were introduced at a time when Palestinian human rights activists in the United States and elsewhere have embraced boycotts as a way to peacefully pressure Israel to respect the human rights of Palestinians and to influence public opinion in the United States in favor of Palestinian rights. These bills seek to stifle this human rights movement by blacklisting companies that decide for ethical reasons to boycott Israel because of its human rights abuses, and prohibiting the state from investing in blacklisted companies.

Government actions and restrictions cannot be based on the desire to punish First Amendment activities that aim to encourage social and political change in a nation's policies. 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."<sup>2</sup> The Court has specifically held that boycotts "to bring about political, social and economic change," like human rights boycotts of Israel, are unquestionably protected under the First Amendment.<sup>3</sup>

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<sup>1</sup> For more information, visit Palestine Legal ([www.palestinelegal.org](http://www.palestinelegal.org)) and Center for Constitutional Rights ([www.ccrjustice.org](http://www.ccrjustice.org)).

<sup>2</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Carey v. Brown*, [447 U. S. 455](http://www.ccrjustice.org)).

<sup>3</sup> *Id.*

The state may not condition the receipt of certain government benefits on the requirement that a person forgo core political speech activity or certify that their political views are acceptable to state officials.<sup>4</sup> Allowing for such conditions would violate First Amendment rights by compelling speech, and would undermine the First Amendment by permitting the state to dictate preferred political views indirectly where it cannot do so directly. By denying public investment in businesses because they boycott Israel, A925 and S1923 seek to unconstitutionally penalize and inhibit protected speech.

### **B. Despite amendments, A925 and S1923 are still unconstitutional**

On June 16, amendments were adopted to A925 and S1923, in an apparent effort to alleviate constitutional concerns with the bill. Unfortunately, the amendments did not overcome A925 and S1923's constitutional problems. The amendment deleted the words "politically motivated" as an element of the bills' definition of "boycott."<sup>5</sup> In doing so, the bills now cover a broader range of boycotts – those that are politically motivated and those that are not. Broadening the scope of the bills does not remedy their unconstitutionality.

### **C. Penalizing those that boycott Israel will have a chilling effect on protected speech**

A925 and S1923 also infringe on protected First Amendment activities by subjecting political positions to government approval and penalty. If enacted, these bills will chill the free speech rights of individuals and businesses by effectively dictating that a position supporting human rights is unacceptable. These individuals and businesses may refrain from adopting ethical political stances regarding Israel/Palestine—a matter of public concern—if they know that making business decisions based on human rights concerns could result in the denial of state investments.

In addition, these bills would discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. They would effectively chill advocates' voices by undermining their goal of influencing companies to take ethical political stances, and by stigmatizing their speech. Notably, courts have long recognized that even if a party continues to exercise its First Amendment rights, it "does not mean that it was not being chilled into engaging in less speech than it otherwise would have."<sup>6</sup>

### **D. Conclusion**

We are committed to upholding the First Amendment rights of those opposing human rights abuses, and ensuring that they are able to challenge orthodox views on a sensitive political issue like Israel/Palestine without government obstruction. A925 and S1923 would punish

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<sup>4</sup> See *Regan v. Taxation with Representation of Washington* (1983) 461 U.S. 540, 545, citing *Perry v. Sindermann* (1958) 408 U.S. 593, 597; see also *Speiser v. Randall* (1958) 357 U.S. 513, especially at 518-519; *Federal Communications Commission v. League of Women Voters* (1984) 468 U.S. 364; *Legal Services Corporation v. Velazquez* (2001) 531 U.S. 533; *Rumsfeld v. Forum for Academic and Institutional Rights* (2006) 574 U.S. 47, 59.; *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

<sup>5</sup> The original bill defined "boycott" as "engaging in actions that are politically motivated and are intended to penalize, inflict economic harm on, or otherwise limit commercial relations with another state or nation." The amended bill removed the words "politically motivated and are" from the definition.

<sup>6</sup> *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

individuals and companies that use an honored American tactic to effect political change, solely because public officials disagree with that tactic in this context. These bills are constitutionally indefensible, and their passage could invite a legal challenge in order to protect the right to engage in speech activities such as boycotts intended to effect social, political and economic change. Allowing these bills to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard.