



January 30, 2014

Assembly Member
Legislative Office Building
Albany, NY 12248

RE: A.08392 (Silver) and S.06438 (Klein) – “Anti-Boycott Bills”

Dear Assembly Member:

As organizations dedicated to upholding the rights of individuals to express their political views without repression, we are writing to express our serious concerns with S.6438 and A.8392, which were drafted “[i]n response to the American Studies Association’s (ASA) boycott of Israel and its academic institutions.”¹ S.6438 was already passed by the Senate this week, and we understand that A.8392 is on the agenda for Tuesday’s Higher Education Committee meeting. Regardless of one’s views on the Israeli-Palestinian question, and despite claims to the contrary, these bills target core political speech and infringe on the academic freedom of individuals to express their political beliefs which raises a number of constitutional red flags. Accordingly, we urge you to oppose A.8392.

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

This legislation attempts to stifle constitutionally protected speech by denying aid to colleges and universities who fund membership in organizations that support boycotts of an enumerated list of countries, including Israel. But government restrictions and regulations cannot be based on the desire to punish speech that aims to influence public opinion on a nation’s policies and actions, such as the ASA’s boycott resolution.

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” are unquestionably protected speech 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

¹ News Release, Assembly Speaker Sheldon Silver, Assembly to Introduce Legislation in Response to the American Studies Association Boycott of Israel (Jan 10, 2014) <http://assembly.state.ny.us/Press/20140110/> (“Silver Release”).

² *Connic v. Myers*, 461 U.S. 138, 145 (1983).

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

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, recently celebrated at the passing of President Nelson Mandela.

The ASA's resolution to boycott Israeli academic institutions was made in response to "the illegal occupation of Palestine, the infringements of the right to education of Palestinian students, and the academic freedom of Palestinian scholars and students in the West Bank, Gaza, and Israel." This underscores that this is core political speech and thus deserves the "special protection" afforded by the First Amendment. Indeed, the ASA's boycott resolution "takes inspiration" from the boycott campaign against South African Apartheid. The participation of numerous academic organizations and universities in the South African boycott would have led to the denial of funds to those universities had there been bills such as these directed at silencing opposition to that apartheid regime. It would have been an unacceptable outcome then, and it is an unacceptable outcome now.

Regardless of whether one agrees or disagrees with the cause that a boycott is addressing, it is undisputed that academic organizations may participate in and organize boycotts in response to issues of public concern. The boycott of Israeli academic institutions cannot be differentiated from the historical examples above, simply because it may be unpopular with elected representatives today.

B. Denial of Funding, Where Motivated By a Desire to Suppress Speech, Violates the First Amendment

Moreover, a public official's denial of funding, where motivated by a desire to suppress speech, is prohibited by the First Amendment.⁵ The U.S. Supreme Court has repeatedly affirmed the supremacy of individuals' First Amendment rights to freely express their political views over government officials' determinations about what views are acceptable for others to express.⁶ Thus, courts have found "where the denial of a benefit, subsidy or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial [of funding] will be enjoined."⁷

Indeed, courts have clearly stated that:

Although the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First Amendment rights and obtaining the benefit [T]he

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 *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 640 (1943); *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F.Supp.2d 184, 201 (E.D.N.Y. 1999).

⁶ *Barnette*, 319 U.S. at 642 ("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.")

⁷ *Brooklyn Institute*, 64 F.Supp.2d at 200.

government cannot avoid the reach of the First Amendment by acting indirectly rather than directly.⁸

Assembly Speaker Sheldon Silver has unequivocally stated that the purpose of these bills is to cut state aid to academic institutions which fund memberships and activities with groups such as the ASA that support political boycotts.⁹ Similarly, Senate co-leader Jeffrey Klein and Assemblyman Dov Hikind made clear that these bills were being introduced in response to the ASA's boycott resolution.¹⁰

These bills are therefore exactly the type of action by public officials who dislike the content of certain speech activities that courts have recognized as violating the First Amendment. If passed, a constitutional challenge would likely succeed.

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

A.8392 and S.6438 infringe on academic freedom by dictating to universities that attendance and participation in certain organizations may not be funded by the university because of the content of the entity's speech activities. They thereby aim to discourage and make more difficult participation in ASA activities, including the vast majority of its activities that have nothing to do with the academic boycott it endorsed, as a punishment for its endorsement.

It is important to emphasize that courts have long recognized that just because a party continues to exercise its First Amendment rights "does not mean that it was not being chilled into engaging in less speech than it otherwise would have."¹¹ Even if expressive activity like attending academic conferences, talks and seminars organized by the ASA are not prohibited by the state's withholding of aid, the speech activities of other associations contemplating similar boycott resolutions and individual academics who support such resolutions may very well be chilled. This concern is not hypothetical; in fact it is the stated intention of the bill. A news release issued by Assembly Speaker Silver states that A.8392 was¹² being introduced in response to the ASA's boycott of Israel to prohibit colleges and universities from using state aid to fund any academic group that passes a similar resolution.

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

Sponsors of these bills, along with other 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 ASA boycott's attempt to address the discrimination that Israel practices against Palestinians by mislabeling its supporters as the offending parties.

⁸ *Id.*

⁹ Silver Release, <http://assembly.state.ny.us/Press/20140110/>

¹⁰ News Release, Dov Hikind, Klein, Hikind Announce New Legislation Aimed at Cutting Off Taxpayer Dollars to Colleges and Universities that Support Boycott (December 27, 2013) http://dovhikind.blogspot.com/2013_12_01_archive.html.

¹¹ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

¹² Silver Release, <http://assembly.state.ny.us/Press/20140110/>.

The academic boycott is politically motivated; it targets institutions, not individuals. The individuals who could be affected by the ASA's boycott are those who directly represent Israeli state institutions in an official capacity. The boycott does not target institutions or individuals based on their Jewish identity or Israeli citizenship. To equate criticism of the Israeli state, or a boycott of Israeli institutions, with anti-Semitism is as absurd 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.¹³

These attempts to paint the ASA's principled action 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.

E. Conclusion

We are committed to upholding the First Amendment rights of those challenging orthodox views. A.8392 and S.6438 punish universities and colleges that may fund participation in an academic group that has used an honored American tactic to effect political change, solely because public officials disagree with that tactic. 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 speech activities such as boycotts intended to effect social, political and economic change. To allow these bills to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard.

Sincerely,



Baher Azmy
Legal Director
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Elena L. Cohen
President
National Lawyers Guild-NYC Chapter

¹³ 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-complaints>.