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Dear Honorable Member of the Maryland General Assembly

We are writing as organizations that cherish the First Amendment's protections of free expression. We are deeply disturbed by reports that four members of this body are planning to introduce legislation targeting proponents of Boycotts, Divestment, and Sanctions against Israel (BDS).¹

While we understand that the bill in question has yet to be introduced, the bill's sponsors have made a number of comments describing the bill that raise Constitutional red flags. We therefore write to remind you that the right to boycott and the right to hold dissenting views are protected by the Constitution. The proposed anti-boycott bill could run afoul of these protections.

Regardless of one's personal opinion of BDS, the First Amendment of the United States Constitution gives all people the right to criticize the policies of both our own government, and that of foreign government's. We recognize that the co-sponsors of the forthcoming bill feel passionately about their opposition to BDS, and that the First Amendment protects those views no less than it protects the views of those who support BDS. The First Amendment, however, prohibits one side of a contentious debate on a matter of great public interest from using the legislative process to silence the other.

¹ Please see Justin Silberman, "Maryland Legislators Will Introduce Anti-BDS Bill," Baltimore Jewish Times (January 18, 2017). Available at <http://jewishtimes.com/57394/maryland-legislators-will-introduce-anti-bds-bill/news/>

Statements by the bill's sponsors have indicated that the bill will use the state's procurement powers to deny public investment and state contracts to those who support the BDS movement. While the state has broad procurement powers, these powers are not exempt from the First Amendment's protection of free speech. Furthermore, the measures would create a classification based on a fundamental right, political speech, that would violate the Equal Protection Clause of the Fourteenth Amendment.

We have laid out all of our concerns with the proposed bill, as described by its sponsors, and our concerns with anti-boycott legislation more generally below. This will enable you to assess the constitutionality of the proposed bill when the text is available so that you can oppose any unconstitutional legislation.

First Amendment Concerns with Anti-Boycott Legislation

In 1982, the Supreme Court ruled that boycotts to “bring about political, social, and economic change” are a form of political speech.² Political speech receives the maximum protection afforded by the First Amendment. The BDS movement is a response to a 2005 call from Palestinian civil society for broad boycotts to be imposed against Israel until it complies with three demands concerning its treatment of the Palestinian people. They are, in the words of the call itself, as follows:

- 1. Ending its occupation and colonization of all Arab lands and dismantling the Wall;*
- 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and*
- 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.³*

² See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886

³ Please See “Palestinian Civil Society Calls for Boycott, Divestment and Sanctions against Israel Until it Complies with International Law and Universal Principles of Human Rights” (July 9, 2005). Available at <https://bdsmovement.net/call>

Regardless of what one thinks of these demands, their justness, the rhetoric used, the framing of the conflict, or their veracity, these are undeniably demands for political and social change. As such, boycotts seeking Israel's compliance with these three demands are political speech.

Additionally, the First Amendment requires that laws be viewpoint neutral, that is, they cannot discriminate against a particular point of view. A law that singles out speech critical of Israel or supportive of Palestinian human rights to be penalized would be subjecting a particular point of view to state sanction. According to reports from the bill's sponsors, the bill will amend Maryland's Iran and Sudan divestment acts to include divestment from supporters of BDS. This demonstrates a glaring lack of viewpoint neutrality. The state of Maryland openly participates in boycotts and divestment aimed against Sudan and Iran, but penalizes individuals for engaging in the exact same speech when it is critical of Israel.

The First Amendment issues outlined above could not be rectified by extending the scope of the speech penalized beyond just speech critical of Israel or supportive of Palestinian human rights. A number of states have considered similar bills aimed at any boycott of a US ally. Yet, these bills still only target speech critical of certain entities and not others. The state cannot create a list of which foreign states may be criticized and which may not be. And since boycotts are political speech any attempt to target boycotts broadly is an attempt to broadly target political speech.

According to the bill's sponsors, the bill would deny public benefits, in the form of pension fund investment or contracts, to entities that support BDS. While the state has broad procurement powers and there is no right to receive a public benefit, the Supreme Court has for decades articulated what is known as the unconstitutional conditions doctrine. According to this

doctrine, even if someone does not have a right to receive a public benefit they cannot be denied one due to their exercise of First Amendment protected speech.

In the 1950s, the state of California required individuals to sign a loyalty oath in order to receive a tax benefit for veterans. California argued that this was not an infringement of the First Amendment, as the tax benefit was privilege not a right. However, the Supreme Court stated that “To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”⁴

This principle has been applied more broadly than just tax benefits; it has been applied to any public benefit. The Supreme Court has found that the government can not elect not to renew an employee’s contract because of their First Amendment protected speech, nor could the government require that recipients of funding to fight HIV/AIDS be opposed to the legalization of sex work.⁵ Government contracts are such a public benefit and thus cannot be denied on the basis of political views. The Supreme Court has explicitly ruled that one cannot be denied a government contract based on their First Amendment protected political views.⁶ The state’s procurement powers are not exempt from the First Amendment’s protection of free speech

The bill’s lead sponsor, Sen. Bobby Zirkin (D-District 11), was quoted in the *Baltimore Jewish Times*, as saying “I just want to ensure that this ridiculous messenger movement against Israel never sees the light of day in our state.”⁷ Making sure that political movement does not

⁴ See *Speiser v. Randall*, 357 U.S. 513 (1958).

⁵ See *Perry v. Sindermann*, 408 U.S. 593 (1972); *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013)).

⁶ See *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

⁷ Please see Justin Silberman, “Maryland Legislators Will Introduce Anti-BDS Bill,” *Baltimore Jewish Times* (January 18, 2017). Please see Justin Silberman, “Maryland Legislators Will Introduce Anti-BDS Bill,”

“see the light of day” is exactly the type of government suppression of political expression the First Amendment was designed to prevent.

Fourteenth Amendment Concerns with Anti-Boycott Legislation

Under the Fourteenth Amendment’s Equal Protection Clause, when the state creates classifications that implicate a fundamental right, the government must have a compelling interest and the law must be narrowly tailored, i.e. it must pass “strict scrutiny.”⁸ A bill denying BDS supporters public benefits would create classifications based on political speech and thus implicates a fundamental right. However, when a classification does not involve a fundamental right the Equal Protection Clause only requires the classification be rationally related to a legitimate government interest, i.e. it must pass rational basis review. A law based on animus fails to be rationally related to a legitimate government interest. A federal district court in Idaho struck down a law criminalizing certain speech in relationship to the agricultural industry as violating the Fourteenth Amendment’s Equal Protection Clause, as it was “motivated in substantial part by animus” towards those with unpopular political views.⁹

Supporters of an anti-boycott bill have made it clear that they hold animus towards the BDS movement. The lead sponsor has gone so-far as to state his desire to make sure the Constitutionally-protected political movement never “sees the light of day” in Maryland. An anti-boycott bill that is motivated in substantial part by animus towards the BDS movement would not pass rational basis review, much less the strict scrutiny which a court would subject such a bill to.

Baltimore Jewish Times (January 18, 2017). Available at <http://jewishtimes.com/57394/maryland-legislators-will-introduce-anti-bds-bill/news/>

⁸ *Massachusetts Bd. of Retirement v. Murgia* 427 U.S. 307 (1976)

⁹ See *Animal Legal Defense Fund, et al. v. Otter*, Case No. 1:14-cv-00104-BLW

Available online at <http://aldf.org/wp-content/uploads/2015/08/8-3-2015-ALDF-decision-ag-gag.pdf>

Public Policy Concerns with anti-Boycott Legislation.

Robust debate strengthens our democracy and boycotts have often played a role in that debate, including boycotts of “allied nations.” In the past, the US considered apartheid South Africa and the military junta of General Augusto Pinochet in Chile, allies. Responding to calls from the African National Congress and the Worker’s United Center of Chile, international solidarity activists boycotted South Africa and Chile. In many cases, these boycotts became the main nexus of organizing solidarity campaigns. In the United States, grassroots solidarity movements were able to alter US foreign policy towards both Apartheid South Africa and the military junta of General Augusto Pinochet in Chile. As a result, these early boycotters are today remembered as human rights pioneers, which illustrates why the freedom to boycott US “allies” is vital to a robust democracy.

The need for robust democratic debate is no less true of the Israel-Palestine conflict. Yet, instead of promoting such a debate an anti-boycott bill would chill speech. We know that whenever the state takes measures to repress a social movement, the effects of that repression are felt beyond the immediate targets of the legislation in question. While the anti-boycott bill as described by its sponsors would have legal implications only for those seeking certain public benefits, it will cast a wide chill over public discussion of the ongoing crisis in the Middle East. The BDS movement has in recent years gained significant traction, and churches, professional associations, labor unions and student governments have debated varying degrees of support for the BDS movement. While such institutions would not be penalized under the bill as it is currently described, once the state begins denying public benefits to individuals because of disfavored speech about Israel, other Marylanders might think twice before speaking in favor of

Palestinian rights. Given that the bill's chief sponsor's comments about wanting to ensure the BDS movement does not "see the light of day" in Maryland, this appears to be its intent.

Boycotts also have a rich political history domestically. During the colonial period those seeking independence boycotted British goods. Abolitionist boycotted goods produced by slave labor. Opponents of the Japanese invasion of China boycotted stockings made from Japanese silk. Boycotts were particularly of importance to the Civil Rights movements. The Maryland General Assembly passed resolutions in support of both the Grape Boycott and the boycott of Apartheid South Africa.

Once Maryland is in the business of ruling thumbs up or down on one kind of political boycott or divestment campaign, it opens the floodgates for trying the same with others. Environmental, immigration, LGBTQ, and labor movements (to name a few) have all turned to boycotts and divestment as nonviolent means of making their points — and making America, and the world, a better place. Unless you prevent it, efforts to stigmatize or penalize BDS will serve as an instruction manual for well-heeled or well-connected lobbyists to do the same again and again with other peaceful exercises of free speech.

Given this history of boycotts being used to advance human rights and social justice, and their unique role in US and Maryland history, the General Assembly should be promoting, protecting, and defending the right to boycott, not seeking to hamper it.

Conclusion

We recognize that this letter comes before you have had the chance to view the final language of the bill in question. We fully understand that you will have to review such language for yourself before you can make a final determination about the bill. However, given the urgency of the situation we wanted to make sure that you were fully briefed on the constitutional issues pertaining to anti-boycott legislation.

When you do see the final language of the bill, we ask you to assess its constitutionality based on the following questions:

- Does it recognize that boycotts are political expression under the First Amendment and seek to protect this right?
- Is the legislation viewpoint neutral?
- Does it create an unconstitutional condition, such as refraining from engaging in political expression, in order to receive a public benefit?
- Does it create a classification based on a fundamental right that is rooted in animus towards those with a particular political point of view?
- Does it foster a culture of robust democratic debate on issues of public concerns, such as foreign affairs?

Please feel free to contact Chip Gibbons, Bill of Rights Defense Committee/Defending Dissent Foundation Legislative and Policy at Chip@BORDC.org.

We look forward to working with you to keep free speech in the free state.

Sincerely,

Bill of Rights Defense Committee/Defending Dissent Foundation

Montgomery County Civil Rights Coalition