Legislative Memorandum

Subject: **Anti-boycott bills:**
S6086/Gianaris and **A8220A/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**

***Update (4/7/2016*): This memorandum has been updated to reflect amendments made to A8220 on March 29, 2016. Despite these amendments, our legal analysis remains unchanged. For more details, see section V of this memorandum.**

S6086/A8220A and S6378A/A9036 require the State of New York to create a list of persons[1] 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 expressed 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/A8220A) 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 United States Constitution.

While people may have differing opinions about the issues pertaining to Israel and Palestine, unfettered 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 (excluded from A8220A), 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/A8220A and S6378A/A9036 are a blatantly unconstitutional attack on freedom of speech and establish a dangerous precedent reminiscent of McCarthyism.

[1] As noted in Section V of this memorandum, A8220A was amended to exclude "natural persons" from the definition of "person."

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.[2] Religious institutions, including the United Church of Christ and the Presbyterian Church (USA) have embraced BDS,[3] as have many racial justice activists,[4] immigrant rights activists, and labor organizations. Most recently, the Connecticut AFL-CIO passed a resolution supporting the BDS movement.[5]

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."[6] 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.[7]
- **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.[8]
- **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 individuals and/or 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.

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

- **Procedural impracticality.** These bills require the commissioner to use "credible information available to the public" to create a list of persons and/or entities engaged in boycott activities "intended to inflict economic harm on Israel." There is no geographic scope to the required list, and the task would create a time-consuming and bureaucratic nightmare that would infringe on individuals' constitutional due process rights. For example:

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[2] See Palestinian BDS National Committee, Cultural Boycott, http://bdsmovement.net/activecamps/cultural-boycott.

[3] 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.

[4] 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/.

[5] 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.

[6] *Connick v. Myers*, 461 U.S. 138 (1983).

[7] *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982).

[8] See *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

    - The commissioner would be required to give written notice to all individuals and/or entities who will be blacklisted and to "make every effort to avoid" blacklisting errors. How will the commissioner contact blacklisted individuals/entities? 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/A8220A 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/A8220A 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.

V. Amendments to A8220. On March 29, 2016, Assemblymember Lavine amended A8220. The amendments, reflected in A8220A and enumerated below, do not resolve our legal and policy concerns with the bill.

- Despite deleting the words "politically motivated" from the definition of "boycott Israel" and "boycott activities," the amended bill still targets core political speech and activities protected by the First Amendment, as described above. If anything, this amendment expands, rather than limits, the scope of boycotts covered by the bill.
- Adding an exemption for "boycotts" that are necessary to comply with applicable laws in a person's home jurisdiction similarly does not overcome the fundamental problem with this bill, namely, that it infringes on First Amendment-protected activity.
- Removal of "natural persons" from the definition of "person" only removes one outrageous aspect of the bill, but does not address the fact that the bill would still blacklist and punish non-profit organizations, associations, and other entities based on their First Amendment-protected speech.
- Adjustments to the notice and process requirements regarding persons who are blacklisted similarly do not overcome the fundamental constitutional problems described above.

No amendments, whether cosmetic or substantial, can overcome the basic fact that bills that deny public contracts with or public investment in entities that are blacklisted due to First Amendment protected activity, if enacted, would target and violate constitutional protections. The only viable "fix" to these fundamentally flawed bills would be withdrawal of them altogether.

S6086/A8220A 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.