2016 Legislative Memorandum

Subject: An Act to amend the state finance law and the retirement and social security law, regarding economic sanctions for engaging in politically motivated boycotts
A.8220-A (Lavine) and S.6086 (Gianaris)
A.9036 (Weinstein) / S.6378-A (Martins)

Position: Opposed

This memorandum addresses bills that would prohibit politically motivated activity intended to limit “commercial relations” with the State of Israel, or with territories controlled by Israel.¹ Those that engage in such activity – defined as a boycott – would be barred from bidding on contracts with New York State, and would be subject to other financial and economic sanctions.² These measures direct the state finance commissioner to create, and publish, a list of persons and organizations that support the boycott, as defined in the bills.

In short, the proposed legislation authorizes the State of New York to maintain a blacklist of groups, businesses, and others that engage in politically motivated speech and association that is otherwise lawful, but would now be subject to severe financial penalties because the state’s lawmakers object to the political views that motivate such conduct.

The proposed legislation is outside the bounds of federal and state law; its proscriptions reach far beyond what is constitutionally permissible. The Supreme Court has clearly established that First Amendment protections apply to politically-motivated economic boycotts aimed at influencing public policy and advancing social change.³ The Court has also ruled that the Constitution prohibits government from conditioning eligibility for public contracts upon the political affiliation of those bidding for a contract.⁴

To legislators questioning whether this scheme is constitutional, the answer is no. Recent amendments to A.8220-A would drop the phrase “politically motivated” from the definition of restricted boycott activity, and would exempt “natural persons” from those who would be included in a blacklist for supporting boycott activity. However, boycotts seeking to effect legal and social change are inherently political, and thus subject to protection by the First Amendment. The Supreme Court has recognized that constitutional protections apply to such political activity when engaged in by groups, organizations, associations as well as by their principals or members.⁵

¹ Under the provisions of A.9036/S.6378-A, this prohibition would apply to “allied nations,” including Ireland, Japan, the Republic of Korea, members of the North Atlantic Treaty Organization.
² Under the bills, those that engage in boycotting activities would be ineligible to receive as investments any money in the state’s common retirement fund. The comptroller would be barred from investing state pension or annuity funds with corporations, banks or other financial institutions that engage in boycotting; the comptroller would be directed to sell, redeem, divest or withdraw investments that violate the prohibitions on boycotting.
⁵ See, e.g., notes 3 and 4, supra; neither the N.A.A.C.P. nor the O’Hare Trucking Company was a “natural person.”
The sponsors argue that, notwithstanding Supreme Court jurisprudence, politically motivated activity adverse to Israel’s economic interests is discriminatory, and that such activity is contrary to state and federal laws regarding international relations. This argument is misguided. New York State law does prohibit economic boycotts that are discriminatory; however, this conduct is limited to boycott activity targeting New York persons based upon race, creed, color, national origin, and other protected statuses.\(^6\) A boycott directed at policies pursued by a foreign national government is simply not covered by New York’s anti-discrimination laws. New York law also prohibits participation in state-sponsored international boycotts that are proscribed under federal law.\(^7\) This legislation, however, would proscribe constitutionally protected activity of individuals, organizations and associations.

The proponents of this legislation may insist that Israel presents a unique political situation, which calls for an exception to constitutional principles. The Supreme Court, however, has rejected this argument as well. “Constitutional protection” of political expression, the Court has observed, “does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.”\(^8\) It is not for the state to determine which political viewpoints are acceptable, or whose beliefs and motivations are politically correct. And it is not within the province of government to coerce into silence those whose politics differ from the views of state officials.

In advancing this legislation, its sponsors endorse a world view that is ahistorical, and a political philosophy that is hostile to broad-based movements for social justice. Persons involved in the anti-apartheid movement directed at South Africa would have been blacklisted, if that state were afforded the protected status given to Israel and other nations under the provisions of this legislation. Many New Yorkers support the use of economic pressure – through boycott, divestment and sanction – to oppose the continued occupation of the West Bank territory and to support the human rights of Palestinians. Many others think that a boycott is a bad idea.

In fact, whether or not one supports such a boycott, the proposed legislation is itself a bad idea simply because it seeks to punish individuals and organizations on the basis of their ideological positions. If the proposed legislation were to become law, many New York organizations would appear on the state’s blacklist – including secular and faith-based groups that provide social services under state contract; trade unions; Jewish philanthropic groups; academic associations; and political advocacy organizations.

To uphold the right to engage in a boycott is not necessarily to support its aims or objectives – just as to uphold freedom of speech is not to endorse the ideas expressed. However, when advancing a bill that addresses the scope of politically motivated speech, assembly, association and expression, lawmakers are bound by certain first principles of a constitutional democracy. These principles compel government to promote, and to protect, the robust contest of ideas. The proposed legislation would violate these constitutional principles.

The NYCLU calls upon the sponsors to withdraw the legislation.

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\(^6\) N.Y. Exec L. 296(13) (unlawful discriminatory practice “to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of [ ] race, creed, color, national origin, sexual orientation, military status, sex, disability or familial status…”).

\(^7\) N.Y. State Fin. L. 139-h (no state contractor or affiliate “shall participate in an international boycott” in violation of federal law; see 50 U.S.C.A. App. § 2401 et seq.).