



Published on *American Civil Liberties Union* (<https://www.aclu.org>)

The First Amendment Protects the Right to Boycott

Israel ^[1]

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Earlier this week, the ACLU sent a [letter](#) ^[2] to members of Congress opposing the [Israel Anti-Boycott Act](#) ^[3]. The bill would amend existing law to prohibit people in the United States from supporting boycotts targeting Israel — making it a felony to choose not to engage in commerce with companies doing business in Israel and its settlements in the occupied Palestinian territories. Violations would be punishable by a civil penalty that could reach \$250,000 and a maximum criminal penalty of \$1 million and 20 years in prison.

The bill is aimed at advocates of boycotts targeting Israel, most notably the Boycott, Divestment, Sanctions (BDS) movement — a global campaign that seeks to apply economic and political pressure on Israel to comply with international law. Specifically, the bill sponsors intend the act as a response to the U.N. Human Rights Council’s [2016 resolution](#) ^[4] calling on companies to respect [human rights](#) ^[5], including in occupied Palestinian territories.

No matter what you think about the Israeli-Palestinian conflict, one thing is clear: The First Amendment protects the right to engage in political boycotts.

In fact, the right to boycott is one of the brightest stars in our constitutional firmament. The American Revolution was [founded](#) ^[6] on boycotts against British goods to protest excessive taxes. John Jay [led](#) ^[7] a boycott against New York merchants who engaged in the slave trade. And the [Montgomery bus boycott](#) ^[8] of 1955–1956 was a major turning point in the struggle for civil rights in the Jim Crow South. In the 1970s and 1980s, colleges and universities led a widespread [campaign](#) ^[9] to boycott and divest from South Africa, in protest of apartheid. In 2015, football players at the University of Missouri went on [strike](#) ^[10] until the school addressed acute racial tensions on campus. And North Carolina’s law prohibiting transgender people from accessing restrooms and other facilities consistent with their gender identities [sparked](#) ^[11] massive boycotts by businesses and individuals.

Boycotts are a form of collective action that allows ordinary people to make their voices heard. For precisely this reason, the Supreme Court has held that the First Amendment protects the right to boycott. The court’s landmark decision in [NAACP v Claiborne Hardware Co.](#) ^[12] affirmed the constitutional right of NAACP activists to hold a mass economic boycott of white-owned businesses in Port Gibson, Mississippi, to protest the community’s persistent racial inequality and segregation. In ringing language, the court held that the boycotters’ exercise of their rights to “speech, assembly, and petition . . . to change a social order that had consistently treated them as second-class citizens” rested “on the highest rung of the hierarchy of First Amendment values.”

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This is a proud constitutional legacy. Today, though, the right to boycott is under assault. Over the past several years, federal, state, and local legislators have introduced [wave after wave](#) ^[13] of legislation seeking to stamp out boycotts and divestment campaigns aimed at Israel. One such law, passed earlier this year by Nassau County in New York, prohibits the county from doing business with people who support the BDS movement. As a result, Roger Waters of Pink Floyd fame [could be banned](#) ^[14] from playing at the Nassau Coliseum in New York. Similar laws have been passed in [Arizona](#) ^[15] and [Kansas](#) ^[16].

None of them comport with the First Amendment.

The Israel Anti-Boycott Act introduced in Congress goes a step further, threatening severe civil and criminal punishment against individuals who refrain from doing business with Israel because of their political opposition to

its government's actions. The bill amends two existing laws, the [Export Administration Act of 1979](#) [17] and the [Export-Import Bank Act of 1945](#) [18], which prohibit certain boycotts sponsored by foreign governments.

The bill would expand the application of those laws in a number of ways. It would expand the laws to prohibit boycotts called for by international organizations, like the United Nations and the European Union; it would threaten sanctions against people who boycott businesses operating in Israeli settlements in the occupied Palestinian territories; and it would prohibit even requests for information about companies' business relationships with Israel and Israeli companies. This expansive language would likely chill a wide range of political activity in the United States directed at the Israeli government — activity that is constitutionally protected, regardless whether members of Congress agree with it.

A number of the bill's sponsors were [apparently surprised](#) [19] by the ACLU's free speech concerns with the bill. Several of them have now expressed their intention to review the legislation with the ACLU's civil rights and civil liberties concerns in mind. We hope they do the right thing by backing away from any bill that violates our First Amendment rights.

This post was updated to reflect the fact that \$250,000 is not the minimum civil penalty for violating the law. Rather, the maximum civil penalty is either \$250,000 or twice the amount of the money at issue in the alleged violation, whichever is greater.

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