

MEMMO

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Rebutting False Claims: The Israel Anti-Boycott Act

The Israel Anti-Boycott Act (IABA) expands existing U.S. law to prohibit companies from complying with anti-Israel boycotts led by international governmental organizations. Federal courts have consistently upheld Congress' ability to regulate commercial activity in the manner proposed by the IABA. Despite claims to the contrary, the bill in no way restricts constitutionally-protected free speech. Instead, the legislation explicitly supports the rights of U.S. citizens to engage in personal boycott activity. Moreover, the IABA's authors have revised the original bill text to further clarify its commitment to free speech protections.

Contention: The Supreme Court found similar legislation unconstitutional.

Untrue. The bill's opponents improperly cite the Supreme Court's ruling in *NAACP v. Claiborne Hardware Co.* In that case, the Court held in favor of a group of African Americans who boycotted businesses discriminating against them personally. But the IABA differs dramatically from the situation in *Claiborne*. It deals exclusively with a matter of foreign policy, and does not involve any Americans trying to vindicate their rights.

By contrast, the Court has implied that it would support the IABA in a case decided a little more than a month after oral arguments in *Claiborne*. The Court held in *International Longshoremen's Association v. Allied International, Inc.*, that the First Amendment does not protect boycott activity when a federal law regulating boycott activity is a legitimate expression of foreign policy which does not suppress free speech.

That is the precise situation here. Just as Congress passed the Export Control Reform Act (formerly the Export Administration Act, or EAA) to prevent U.S. companies from complying with the Arab boycott of Israel and to protect U.S. companies, the new legislation serves a strong U.S. foreign policy interest. It reiterates Congress' long-time opposition to boycotts, divestment and sanctions efforts against Israel. It expresses particular U.S. opposition to the U.N. Human Rights Council (UNHRC) actions to foster a discriminatory international boycott against Israel. And it bars companies and individuals acting in a commercial capacity from refusing to conduct business with Israel or furnishing information to satisfy a boycott request from an international governmental organization.

Contention: The bill would restrict free speech.

Critics falsely charge that the bill criminalizes constitutionally-protect free speech and takes away an individual's right to boycott Israel. This charge is completely false. Nothing in this bill restricts constitutionally-protected free speech.

The IABA only affects *commercial* conduct intended to comply with unauthorized foreign boycotts. In upholding laws regulating commerce, American courts have routinely found that laws supporting U.S. foreign policy do not violate free speech. In two separate cases, the federal courts upheld the original boycott law against challenges under the First, Fifth and Fourteenth Amendments, and the U.S. Court of Appeals for the Seventh Circuit affirmed in a consolidated appeal. The courts said that the United States has a substantial foreign policy interest in regulating Americans' participation in boycotts by

foreign countries against an American ally, and that the anti-boycott law does not infringe individual constitutional rights.

To further put any free expression concerns to rest, the revised version of the IABA expressly states that nothing in it “shall be construed to diminish or infringe upon any right protected under the First Amendment to the Constitution of the United States.”

Contention: Individuals could be punished for criticizing Israel.

The legislation does not restrict any individual from criticizing Israel or supporting a boycott of Israel. In the 40-year history of the original anti-boycott legislation, the U.S. government has never prosecuted any individual for his or her political views concerning Israel or for personally supporting a boycott of Israel. The bill only applies to U.S. companies doing business in international or interstate commerce and individuals acting within the course and scope of their position as an owner, officer, director or employee of such companies. Individuals who personally express support for boycott efforts would clearly not be subject to the law. U.S. court rulings have affirmed Congress’ wide authority to put limits on international commercial conduct, distinguishing such activity that furthers economic interests from free speech protections under the First Amendment.

Contention: Individuals could go to jail for supporting boycotts of Israel.

The legislation explicitly states that a person who complies with an international governmental organization’s boycott “shall be subject to only a monetary penalty.” The legislation does not provide for any penalty that could result in incarceration.

Contention: This bill changes U.S. policy to support settlements.

Critics falsely charge that this bill is a backdoor way of supporting Israeli settlements. This bill takes no position on settlements, nor does it change existing U.S. policy in any way.

Contention: The recent court decisions against Kansas and Arizona anti-BDS laws prove the Israel Anti-Boycott Act is unconstitutional.

Attempts to conflate state laws in Kansas and Arizona with the Israel Anti-Boycott Act are unfounded. These state laws seek to regulate wholly different activities. In Kansas, the law required state contractors to certify that they were not participating in a boycott of Israel. In Arizona, the law prohibited the state from contracting with a company unless the company certified that it is not engaged in a boycott of Israel.

Unlike these state laws, the IABA does not condition state contracting on a company or individual’s decision to boycott Israel. Rather the IABA only applies to specific actions through which a business assists an unsanctioned boycott by a foreign government or IGO. The IABA does not apply to expression of political views and does not punish individuals or companies for electing to not do business in or with Israel. Rulings against the Kansas or Arizona laws have no relevance to the IABA.