

**An Analysis Calling for Opposition to
"An Act Prohibiting Contracting with Discriminatory Businesses"**

To: MA State Legislators

From: Massachusetts Peace Action, Jewish Voice for Peace-Boston, and the Alliance for Water Justice in Palestine

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The Massachusetts legislature is considering a bill entitled **An Act Prohibiting Discrimination in State Contracts**, filed by Representatives Paul McMurtry and Steve Howitt (HD.779), and Senators Cynthia Creem and Bruce Tarr (SD.922). This legislation misleadingly framed as an anti-discrimination act, is in fact a veiled attack on the Palestinian-led Boycott, Divestment and Sanctions (BDS) movement and, as such, on our right to boycott.

Drafted in conjunction with pro-Israel lobbyists, it is an attempt to suppress peaceful activities directed at ending Israel's violations of international law and Palestinian human rights. As such, it aligns with Trump's agenda of attacking freedom of speech and social justice activism. We call on our elected officials to oppose this legislation.

Is the bill intended to apply to Boycott, Divestment, and Sanction (BDS)?

Yes. Although the act appears to propose progressive anti-discrimination legislation, there can be no doubt that it is intended to penalize the BDS movement. A set of "Talking Points" distributed with a draft of the legislation indicates that it is clearly intended to penalize those participating in BDS. *Eighteen of the twenty talking points reference BDS, the right to boycott and/or Israel.*

- The "Talking Points" contend that "This law would extend to the Boycott, Divestment and Sanctions ('BDS') movement against Israel and would prevent the state from awarding contracts to those who boycott Israeli businesses and goods manufactured in Israel solely on the basis of nation origin."
- The JCRC confirms the intent of the bill in its January 24 Action Alert ("Support Israel") by claiming, "This bill follows similar anti-BDS laws passed in several other states as well as an executive order in New York and underscores the strength of the Massachusetts-Israel relationship."

For its supporters, then, this act is an anti-BDS bill masquerading as an anti-discrimination bill.

Does BDS constitute a form of discrimination?

No. The authors of this bill seem to believe that BDS constitutes a form of discrimination based on national origin. However, by definition, anyone who participates in BDS is doing so in order to protest Israeli policies for the purpose of changing those policies (not to target anyone by virtue of their national origin or place of birth).

SD.922 and HD.779 require prospective contractors to certify that they comply with MA Anti-Discrimination Laws. These laws are concerned solely with discrimination against individuals. The BDS movement, however, does not target individuals, but rather corporations, goods, or governmental entities.

Nevertheless, as Palestine Legal points out (with reference to a similar California law), “It is important to recognize the disconnect between the intent behind [this bill] (to chill and stigmatize BDS activism) and its wording. Because of its wording and because Israel-aligned organizations have threatened to use it to instigate investigations against BDS supporters, businesses and organizations that engage in boycott campaigns for Palestinian rights and that bid on or propose state contracts could be exposed to unfair government scrutiny. Perjury is a felony crime, and these investigations – and possible subsequent prosecutions – should be considered seriously.”

Thus, the bill is misleading both for those who oppose BDS and for those who support BDS. It would likely could not survive legal challenges if applied to BDS but it would be used to intimidate supporters of BDS.

Why, then, has this act been filed?

We believe that this act has been filed to appease pro-Israel lobbyists like the Jewish Community Relations Council (JCRC). Across the country, legislation to penalize BDS is being promoted by major pro-Israel lobbyists in response to the growing condemnation of Israeli policies – what these lobbyists call attempts to “de-legitimize” Israel.

The question for MA elected officials is whether they choose to appease pro-Israel lobbyists or to defend the free-speech rights of citizens of the Commonwealth.

Why should you oppose this legislation?

- **It is an impediment to global human rights.** The Palestinian BDS National Committee (BNC) launched the BDS movement as “a Palestinian-led movement for freedom, justice, and equality.” The call for BDS is based on “the simple principle that Palestinians are entitled to the same rights as the rest of humanity.” BDS is rooted in international law and the furthering of human rights by peaceful means, whereas the campaign against it is fighting to eradicate a non-violent movement through suppression of speech and the right to boycott.
- **It is politically dangerous.** In this political moment, when the Trump administration threatens to wage a full-blown attack on fundamental rights, this legislation opens the door to further suppression of freedom of expression. *Whether or not one supports BDS, the right to boycott should be protected at all costs.* The fact that the legislation is couched in disingenuous anti-discrimination language makes it all the more dangerous.
- **It is strategically counterproductive.** Virtually the entire international community has condemned Israeli settlements, which are considered illegal under international law. Yet, the Israeli government has consistently undermined the peace process by expanding settlements (just last week approving the construction of 2500 new homes in illegal settlements in the West Bank). The current Trump administration intends to move the US embassy to Jerusalem in violation of international law. A bill designed to enable punitive action against critics of such actions feeds into the Trump agenda and undermines the chances of a just peace for Palestinians and Israelis.
- **Application of this legislation against BDS would be unconstitutional.** BDS boycotts are not based on national origin discrimination, and so they do not fall within this bill. But if the state chooses to use the bill to target constitutionally protected boycotts, then such action is unconstitutional. By requiring as a condition of contracting that persons relinquish this right to boycott, the bill clearly violates the

constitution. As a bill targeting political speech, it would be subject to the strictest scrutiny and would not survive a challenge on constitutional grounds.

- **It seeks to criminalize supporters of BDS.** Section 1 of the bill raises the possibility of charges of perjury against contractors accused of violating its purported anti-discrimination provision by engaging in BDS activities. This would criminalize the legitimate, non-violent, and time-honored action of boycott. Even if nobody is successfully prosecuted under the bill, the threat of prosecution would have a chilling effect on contractors wishing to exercise their constitutional rights.
- **It is ethically untenable.** First, it appears to be an attempt to fool both legislators and constituents by co-opting the discourse of discrimination in applying it to those who oppose violations of international law and human rights. Second, the legislation has been drafted and promoted by the Jewish Community Relations Council (JCRC), the very pro-Israel organization that has taken dozens of MA legislators on all-expense-paid junkets to Israel to meet with opponents of BDS. This clearly raises conflict of interest questions.
- **It is historically blind.** The Commonwealth of Massachusetts has a long history of using economic pressure in the form of boycotts to challenge violations of human rights. If this law had been in place at the time of South African apartheid, it would have penalized those who engaged in the boycott of apartheid, including workers who waged a successful boycott at Polaroid Corporation in Cambridge, Massachusetts to end Polaroid's dealings with the South African government.
- **It protects discrimination.** Despite purporting to oppose discrimination, the act actually attacks those who are fighting against discrimination. Israel has enacted more than 50 laws since 1948 that directly or indirectly discriminate against Palestinian citizens of Israel in all areas of life, including their rights to political participation, access to land, education, state budget resources, and criminal procedures. In the Occupied Territories (West Bank/Gaza), Palestinians must carry identity cards, similar to the infamous South African passbooks manufactured by Polaroid. A system of laws enforces roads for Jews only, a separation wall, and segregated public transportation systems for Israelis and Palestinians. Schools, housing, health care, and services are segregated and unequal. Boycott activities are peaceful actions opposing systemic discrimination based on ethnic identity.
- **It is economically counterproductive.** The act will impose additional costs on the state and create a hostile business environment. The bill requires contractors to certify that they are not engaging in discrimination under penalty of perjury. Given the disconnect between the plain meaning of the bill and its intended application, contractors will be confused about whether they can truthfully sign the certification and concerned about potential criminal penalties for perjury. Passage of the bill will inevitably give rise to accusations of perjury, requiring the state to incur costs in investigating these claims and frightening even potential contractors who have nothing to do with BDS.

Does opposing Israeli policies constitute a form of anti-Semitism?

No. Criticizing the State of Israel for its occupation frequently invites charges of anti-Semitism (the hatred of Jews for being Jews) from supporters of Israeli policies. Opposing Israeli government policies and tactics to support Palestinian human rights is not anti-Semitic. As Palestinian BDS co-founder Omar Barghouti explains, the BDS movement is "anchored in the Universal Declaration of Human Rights [and] is a human rights based, non-sectarian, inclusive movement that rejects all forms of racism, including anti-Semitism". This is a humanitarian and justice struggle, not one based on religion or ethnicity.

Calling BDS and opposition to Israeli policies anti-Semitic is a smokescreen tactic used to deflect legitimate critique of Israeli human rights violations and to silence non-violent resistance. We are incredibly disturbed by the current upsurge in anti-Semitic hate-speech and hate crimes. Genuine anti-Semitism is dangerous and must be fought wherever it appears. To label critique of Israel anti-Semitic actually detracts from opposing genuine forms of anti-Semitism – especially dangerous at a moment when white supremacy and Nazism are on the rise in this country.

Who opposes anti-BDS legislation?

- The National Council of Churches, representing 38 Christian faith groups in the US, 100,000 congregations and 40 million people, has called for “an end to the current wave of legislative efforts to penalize the use of non-violent economic measures to influence policy in Israel.”
- BDS is supported by moral, religious and civic leaders internationally. Former President Jimmy Carter and Archbishop Desmond Tutu are among the many moral leaders who support the BDS movement. Nine mainstream Christian denominations, including the United Methodist Church, the Presbyterian Church (USA), the American Friends Service Committee, and the United Church of Christ all participate in some form of BDS.
- Even rabbis who oppose BDS have spoken out against this legislation; as Rabbi Jill Jacobs said regarding NY’s anti-BDS law, “While billed as an initiative to prevent New York state from supporting the Boycott, Divestment, Sanctions (BDS) movement, the law actually constitutes a frightening attack on free speech while likely creating a backlash that will do harm both to Israel and the Jewish community.”
- In Massachusetts, almost 100 organizations have formed the Massachusetts Freedom to Boycott Coalition in response to proposed anti-BDS legislation, including groups representing Muslims, Christians, Jews, American Indians, immigrants, students, professors, labor unions, lawyers, and LGBTQ communities, as well as human rights, peace and justice, anti-racism, housing, criminal justice reform, corporate accountability, civil liberties, and climate change advocates. These organizations recognize that boycott is one of the most powerful tools that we have to fight injustice and that we must defend this right at all costs -- especially in these perilous and uncertain times.

We urge all MA elected officials to protect the right to boycott of MA citizens rather than prioritizing appeasement of pro-Israel lobbyists with this stealth anti-BDS legislation. We therefore ask you not to co-sponsor or support the Act Prohibiting Contracting with Discriminatory Businesses.

Thank you,

The Boston Alliance for Water Justice, Jewish Voice for Peace-Boston, and MA Peace Action (MAPA)

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For more information

- “What is BDS?” BDS Movement. <https://bdsmovement.net/what-is-bds>
- “Anti-BDS Legislation in the United States,” Palestine Legal. <http://palestinelegal.org/legislation/>
- “Lawmakers to Get Anti-Boycott Bill,” *The Jewish Advocate* (Dec. 30, 2016) http://www.thejewishadvocate.com/news/2016-12-30/Top_News/Lawmakers_to_get_antiboycott_bill
- “South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts,” *Harvard Law Review* (May 10, 2016). <http://harvardlawreview.org/2016/05/s-c-code-ann-11-35-3500-2015/>
- “Anti-BDS law can’t be ‘pro-Israel’ if it tramples on free speech,” *Jewish Telegraphic Agency (JTA)* (June 14, 2016)