



NYCLU

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NYCLU opposes state legislation that prohibits use of state funds by academic groups that support or promote boycotts against academic institutions or their host countries¹

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New York's state legislature is poised to pass legislation that would prohibit any college or university from using state monies to fund academic groups that support or promote a boycott against institutions of higher education or their host countries. The prohibition would apply to any such institution chartered by New York's Board of Regents of the state university.

The proposed legislation is a response to an endorsement by the American Studies Association (ASA) of a boycott directed at Israeli academic institutions. The ASA has explained its support of the boycott as an effort to address infringements of Palestinian students' right to an education, and of the academic freedom of Palestinian scholars and students in the West Bank, Gaza, and Israel.²

In advancing this bill, the legislature has assumed a role that is inimical to democratic principles. The bill purports to protect academic freedom by penalizing a point of view deemed unacceptable by government officials. It would arrogate to the state the role of censor in matters of academic controversy.

As *Nation* magazine writer Michelle Goldberg observed last week, "New York, it seems, is about to boycott the American Studies Association to show that academic boycotts are wrong."³

The legislation presents complex issues of law, policy and politics – issues that require rigorous analysis, debate and deliberation. The Supreme Court has held that the advocacy of boycotts is a form of ideological expression protected by the First Amendment. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). This legislation does not begin to come to grips with that precedent. It does not in any serious and refined way explore the limits of the First Amendment in protecting such advocacy. Instead, in a vastly overbroad manner it seeks to punish advocacy of boycotts directed at academic institutions. Such an overbroad effort to punish peaceful protest and advocacy cannot possibly satisfy close constitutional scrutiny.

¹ A8392 (Silver); S6438 (Klein).

² American Studies Association Resolution on Academic Boycott of Israel, Dec. 4, 2013, available at http://www.theasa.net/american_studies_association_resolution_on_academic_boycott_of_israel

³ Michelle Goldberg, "New York's Outrageous Attempt to Ban Academic BDS," *The Nation*, January 29, 2014, available at <http://www.thenation.com/blog/178152/new-yorks-outrageous-attempt-ban-academic-bds#>

Speaker Silver has argued that academic boycotts are an assault on academic freedom. But surely not all academic boycotts can be viewed in this way. Discussion of the proposed anti-boycott legislation has been defined solely by ASA's position on the Israeli-Palestinian conflict. Would lawmakers take a different position on this legislation if it were 1968 and the academic boycott of South Africa's apartheid regime were the political issue of the day?

Suppose a university had been found to discriminate repeatedly against women or people of color or those of a particular religion. Would advocacy urging students not to apply for admission to such a university until it ends its discriminatory practices constitute an assault on academic freedom? There may be circumstances where a boycott of scholars might violate principles of academic freedom. But this legislation is not limited to such circumstances.⁴

Instead the proposed legislation makes the state another adversarial party in a complex international political conflict. And the State of New York would now enter into this dispute, wielding the power of the state to disburse or withhold funds, with the statutory authority to coerce those on one side of the dispute to shut up.

This is not the manner in which the State of New York should engage controversy that has profound implications for constitutional freedoms and global politics.

The NYCLU would welcome the opportunity to engage lawmakers regarding the constitutional principles and standards implicated by this legislation, but this appears unlikely. The bill, which was introduced on January 10, is scheduled for two committee meetings today, Monday, February 3; a floor vote is likely soon thereafter.

This situation holds a darker irony. The proposed legislation implicates core principles of First Amendment doctrine as regards academic freedom, as well as complex issues of foreign policy – not to mention important questions about the role of the state legislature in addressing such issues.

And as with many complex and politically provocative issues that come before New York's legislature, this one is likely to be resolved in a few short weeks, in the absence of public hearings, and with little opportunity for either lawmakers or the general public to engage in a meaningful discourse on the merits of the legislation.

What is at stake here – both in the bills and the legislative process – is the free and open exchange of ideas: democracy.

Lawmakers should table this legislation; and before taking any action, undertake a deliberative process that actually informs and elucidates the issues at stake.

⁴ Senator Klein's bill (S.6438) includes an exception to the prohibition on boycotts when they are undertaken for the purpose of "protesting unlawful discriminatory practices as determined by the laws, rules or regulations of this state." Even with this exception, the legislation would permit the state to prohibit ideological expression, in the form of an academic boycott that seeks to address, for example, economic injustice or discriminatory mistreatment of transgender persons.