

Fact-Checking AIPAC'S Fact Sheet on The Combating BDS Act

AIPAC is circulating to members of Congress a [memo](#) defending the Combating BDS Act (CBA) – the controversial measure included as part of the first Senate bill of 2019, sparking an ongoing battle in the Senate. So how good are AIPAC's facts? Let's have a look.

AIPAC: "The Combating BDS Act, included as part of S.1, simply clarifies that state and local governments have the right to counter boycotts of Israel without fear that they are preempting the authority of the federal government."

FACT CHECK: The purpose of the CBA is to give political and legal cover to, and encouragement for, state laws that violate the First Amendment of the Constitution. Adopted in various forms by more than a dozen U.S. states so far, these laws compel contractors and any entity in which the state invests to formally commit not to boycott Israel or Israeli settlements in the Occupied Territories, as a requirement of maintaining their relationship with the state.

Senators Rubio (R-FL) and Manchin (D-WV), the original sponsors of the measure in the last Congress, themselves made clear the intent of the bill. In a [press release](#) Rubio bragged: "This legislation supports efforts by state governments and local communities to use the power of the purse to counter the BDS movement's economic warfare targeting Israel..." And Manchin added: "This bipartisan legislation gives state and local governments a legal way to combat the shameful boycott, divestment and sanctions movement against Israel."

In the words of [the ACLU](#), "The intent of the underlying state laws it purports to uphold is contrary to the spirit and letter of the First Amendment guarantee of freedoms of speech and association."

Backers of the CBA might hope it will offer political cover for these laws, but what they can't do is override the Constitution. Even if it passes, the bill won't change the fact that these state laws are already being ruled unconstitutional.

AIPAC: "The law does not apply to individuals. The law only recognizes that state and local governments may adopt policies related to corporations, companies, business associations, partnerships, or trusts."

FACT CHECK: The laws condoned and encouraged by the CBA punish businesses and individuals, in their capacity as independent contractors or sole proprietors, who choose, as a matter of free political expression, to boycott either Israel or Israeli and international businesses supporting Israel's occupation of the Palestinian territories.

Attesting to this reality are the numerous lawsuits that have already been filed in state courts by those forced to choose between work with the government and free speech. So far, there have been lawsuits in [Kansas](#), [Arizona](#), [Arkansas](#), two in Texas ([here](#) and [here](#)), and [Maryland](#). These cases involve individuals — including a math teacher and speech pathologist — contracting with the state government as sole proprietors. But even business entities like a [newspaper](#) or a [one-person law firm](#) have First Amendment rights, as the Supreme Court has [long recognized](#). The crucial point is that for a contractor to receive even one cent of state money, it is required to disavow participation in any boycott of Israel, regardless of whether the boycott is in any way related to the contractor's work for the state.

As [noted by the ACLU](#): “While each state measure is slightly different, they share the same core – barring or restricting certain people and companies from doing business with the state solely because they participate in politically-motivated expressive boycotts.”

AIPAC: “The law only impacts commerce-related or investment-related activities in the course of interstate or international commerce. The law does not punish companies for expressing their opposition to Israel or engaging in anti-Israel expressions through boycotts.”

FACT CHECK: The Supreme Court made clear in [NAACP v. Claiborne Hardware Co.](#) that political boycotts are a form of “expression on public issues,” which rests on the “highest rung of the hierarchy of First Amendment values.” Both the [Kansas](#) and [Arizona](#) courts have held that this principle applies to the Israel boycotts targeted by these state laws.

The publicly stated intent of the laws condoned by the CBA is penalizing those who boycott Israel or its settlements. When the Texas law was passed, its drafter [crowed](#), “When the 10th-largest economy in the world says we’re not going to let people boycott Israel, that’s a big statement.” When the governor of Pennsylvania signed the anti-boycott bill into law, he [declared](#), “This legislation makes it very clear that companies can either perform a BDS action or they can do business with Pennsylvania. However, they cannot do both.” And commenting on his state’s policy, New York’s governor penned an [op-ed](#) entitled, “If you boycott Israel, New York state will boycott you.”

The [Kansas court](#), in its ruling against the state’s anti-boycott bill, observed: “The Kansas Law’s legislative history reveals that its goal is to undermine the message of those participating in a boycott of Israel, This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment.”

Likewise, the ruling from the federal court in [Arizona noted](#): “The Act’s history...suggests that the goal of the Act is to penalize the efforts of those engaged in political boycotts of Israel and those doing business in Israeli-occupied territories because such boycotts are not aligned with the State’s values. If so, such an interest is constitutionally impermissible.”

AIPAC: “U.S. courts have repeatedly ruled that states can choose not to invest or contract with companies whose actions are at variance with state law or policy. If individuals wish to challenge particular anti-boycott laws in court, nothing in this law would prevent those suits.”

FACT CHECK: U.S. courts have repeatedly ruled that states cannot condition contracts on the suspension of First Amendment-protected views. This is why in both cases where U.S. courts have ruled on the Israel-focused anti-boycott laws, they found them to be unconstitutional, violating individuals’ First Amendment rights to participate in political boycotts, which are protected under the First Amendment. And this is why these state laws are being challenged, and likely will continue to be challenged, in more and more states.

The CBA does nothing to prevent such suits; rather, it merely puts Congress in bed with those who support eroding the Constitution, and tries to legitimize and encourage the passage of laws that are wasting taxpayer money and courts’ time violating the Constitution.

AIPAC: “U.S. courts have further found the First Amendment does not prohibit Congress from barring compliance with foreign boycotts that conflict with U.S. interests, or restricting information Americans can provide to foreign governments with respect to foreign boycotts. See: *Trane Co. v. Baldrige*, 552 F. Supp. 1378 (W.D. Wis. 1983) and *Briggs and Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984).”

FACT CHECK: In using this argument to defend the CBA (and other laws intended to prevent politically-motivated boycotts of Israel and settlements), AIPAC is comparing apples and oranges.

The Arab League’s boycott of Israel – which is the boycott at the center of the legal rulings cited above – involves foreign governments requiring U.S. individuals and businesses to boycott Israel as a condition for doing business with them. With this coercive element in play, U.S. courts have viewed boycotts in compliance with the Arab League’s requirements as something other than political free speech.

The [Export Administration Act](#) was passed to protect American businesses from this type of foreign government coercion. When businesses challenged the law on First Amendment grounds, courts [held](#) that the desire to maintain trade relationships was not political expression, but rather commercial speech. And they [concluded](#) that Congress’s interest in preventing U.S. businesses from being coerced by foreign governments justified the law.

In contrast, the CBA encourages U.S. states to punish businesses for expressing their political beliefs through politically motivated and wholly voluntary boycotts. The BDS movement does not and cannot compel anyone to boycott Israel. Likewise, the EU’s policy calling for differentiation between Israel and settlements is non-binding, and the UN database of businesses operating in Israeli settlements – if it is ever released – will merely provide information that people and businesses are free to consult or ignore, according to their own personal inclinations and without consequence.

The bottom line is that people should be free to choose whether they want to participate in a political boycott or not — and neither the Arab League governments nor U.S. states should be leveraging their economic power to try to take that choice away.

AIPAC: “The Combating BDS Act has attracted widespread bipartisan support and was cosponsored in the previous Congress by the current Senate leaders of both parties, as well as the current Chairman and Ranking Members of the Senate Foreign Relations Committee and Senate Finance Committee.”

FACT CHECK: From the start, backers of the CBA and related legislation – most notably the Israel Anti-Boycott Act and the Anti-Semitism Awareness Act – have exploited bipartisan support for Israel and concerns about BDS. They have disingenuously framed each of these bills as a public referendum on BDS and a pass-fail test of members’ pro-Israel bona fides, while denying or downplaying the violation of First Amendment free speech rights these bills seek to legislate.

Regrettably, many members of Congress – out of fear, ignorance, or political expediency – have acquiesced to this framing. The current focus on the Combating BDS Act, as well as the focus at the end of the 115th Congress on the IABA, has shined a harsh spotlight on the unconstitutional intent that is at the core of these legislative efforts.