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## State-Level Anti-BDS Legislative Initiatives – Overview and Recommendations

While the Boycott, Divestment, Sanctions (BDS) movement, as a part of a wider effort to delegitimize Israel, has been active and growing since 2005, the past year saw the emergence of a new trend in this dynamic – state-level anti-BDS legislative initiatives in the United States that either practically block BDS efforts or take a strong public position against them.

However, while these initiatives are important, the pro-Israel community should not view them as a panacea to the challenge presented by the BDS movement. That is, since it does not address the underlying problem of the very battle and debate over the narrative of Israel's legitimacy, of which BDS is an important part of the anti-Israel tool kit. If utilized properly, these efforts can however offer a cushion of breathing space for pro-Israel activists in order to re-establish the narrative around Israel's legitimacy.

### Overview of the Legislative Initiatives <sup>1</sup>

There are, at time of writing, 11 U.S. states that have passed some sort of pro-Israel or anti-BDS legislation, one state (New York) with an executive order, and a number of states that are in various stages of the legislative process. Three more states passed non-Israel specific anti-discrimination laws that, in practice, help block BDS (although defending Israel sits at the heart of these), while one more state's legislature passed such a law, and is awaiting its respective governor's signature

There are essentially four different legislative models in play, with slight differences from state to state:

1. **Binding and punitive** legislation that prohibits the state from entering into contracts with companies that boycott Israel or divest from it.

2. **Binding and punitive** legislation that divests state pension funds from companies that divest from Israel.
3. **Generic binding and punitive** anti-discrimination legislation aimed at those who boycott American allies and trade partners by barring the state from entering into contracts with any entity that boycotts "based on race, color, religion, gender or national origin".
4. **Non-binding and declarative** anti-BDS resolutions that express support for Israel and condemn the BDS movement, without taking concrete action.

We note that some states have combined certain legislative models or have first introduced the non-binding resolution and later the punitive legislation. Many of the Israel-specific legislation efforts refer to Israel as the only democracy in the Middle East and a U.S. ally and trade partner. Many clearly state that BDS seeks to de-legitimize Israel's existence. Some note that the boycott enterprise leads directly to a "climate of intimidation, fear and violence on campuses throughout America" and helps to spread anti-Semitism, and would be "damaging (to) the cause of peace, justice, equality, democracy and human rights." Some of the states that have passed generic anti-discrimination legislation specifically mention Israel as a key ally and trade partner, either in the text itself or in the press release announcing the legislation.

Advocates note that it is realistic to expect that anti-BDS or anti-discriminatory legislation will pass in 10 or more states throughout 2017.

## Legislative Efforts on the National and International Level

On the federal level, the pro-Israel Combatting BDS Act of 2016 has been introduced in Congress,<sup>2</sup> which would support the states' efforts thus far, and proactively block federal level challenges to them.<sup>3</sup> Last year, President Obama signed into law a broader trade bill that included anti-BDS provisions.<sup>4</sup>

Internationally, a number of countries and major cities have come out against BDS: Canada passed an anti-BDS resolution earlier this year<sup>5</sup>; the UK is considering banning BDS action against Israel, and France banned discrimination based on national origin back in 2003.<sup>6</sup> Earlier this year, the city of Paris passed further anti-BDS resolutions.<sup>7</sup>

## Behind the Scenes – Advocates and Opponents

These legislative efforts are largely grassroots in nature, often initiated by pro-Israel legislators seeking to defend Israel as a key U.S. ally and the sole democracy in a restive region, at a time when it is increasingly under attack, especially on campuses. Many of them have noted a connected spike in anti-Semitic acts and sentiments. They sometimes reach out to foster cooperation with the local Jewish and pro-Israel community. Of course, in some cases, it is the pro-Israel community that initiates the contact. These include groups like the Israel Action Network (IAN), The Israel Project (TIP), The American Jewish Committee (AJC), Stand With Us, the Israel Allies Foundation as well as Christian groups such as

Christians United for Israel (CUFI) and Proclaiming Justice to the Nations. There are also a number of prominent think-tanks and legal experts ensuring the constitutionality of these efforts. On the local level, legislators often work with JCRC's (Jewish Community Relations Councils) and Jewish federations. These organizations provide resources, tool-kits and expertise to local activists who generally liaison with state-level legislators. They also provide assistance in coalition building and ascertaining which model would be most appropriate for that state.

In large part, the bills have passed with bi-partisan support and with overwhelming majorities. Some have noted that in states that have yet to pass or failed to pass legislation, it is less due to opposition than to legislative priorities, schedules, or procedures. Some states don't wish to get involved in matters they see as divisive (Israeli-Palestinian conflict), or in foreign affairs generally. Pro-BDS groups have attempted to claim these delays as their own successes.

The success of these legislative efforts has taken the BDS movement by surprise, and some experts say it has placed it in a confused, defensive, and reactive position.

### **Constitutional and Legal Questions**

Main opposition, thus far, has been relatively minor and uncoordinated, and has come from pro-BDS groups like Jewish Voice for Peace, the Methodist Church in some states, minority groups in certain areas, Palestine Legal, and the ACLU (American Civil Liberties Union).

The main critique of these opponents thus far has been that they limit First Amendment rights. As noted, the pro-Israel community has employed the use of think-tanks and legal experts to ensure the constitutionality of such efforts.

As Northwestern University Law Professor Eugene Kontorovich explains:<sup>8</sup>

"None of these laws ban or punish criticism of Israel, or stops anyone from boycotting Israel. They apply solely to businesses that contract with or get investment money from state governments. These laws simply say: If you want the state to do business with you, you need to abide by the state's policies of sound and fair business practices, including anti-discrimination rules. These laws are not about speech or viewpoints. They are about unfair and discriminatory business decisions. And whether one agrees or not with such laws as a policy matter, there is no question they do not pose a First Amendment problem."

Kontorovich further points to a "well-established Supreme Court precedent" saying that, "...states can choose not to do business with companies they regard as ... discriminatory."

While a business or organization is free to criticize Israel and even engage in boycott activities, the state is similarly free to disassociate itself from them.

Of the pro-Israel organizations, all of whom oppose BDS, only the Anti-Defamation League (ADL) has refrained from supporting these legislative efforts,<sup>9</sup> noting they may infringe on First Amendment rights.

## Implications and Dilemmas

On the symbolic level, these Anti-BDS efforts send a clear message that the states, with broad bi-partisan backing, either support Israel or are, in principle, against discriminatory action and language.

On the practical level, these efforts are accomplishing two main things. First, they keep anti-Israel activists busy. A key element of the BDS movement's strategy has been to continuously press new anti-Israel initiatives. This places

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Israel supporters on the defensive, having to explain why Israel is **not** committing genocide or apartheid or ethnic cleansing, or any one of a number of other loaded accusations

Moreover, these initiatives provide an out for companies that have been pressured into divesting from Israel having never wished to do so.

Moreover, These laws, in at least one instance, even

snatched away a false propaganda victory from the BDS movement. For example the BDS movement had claimed it caused the British security firm G4S to pull out of Israel after a long and arduous harassment campaign. But having to answer to the state of Illinois lest it lose state contracts, G4S eventually clarified that not only was it not pulling

out of Israel but it intends to remain there for the foreseeable future.<sup>10</sup>

There are some ongoing debates as to the most effective model. One relates to whether legislative language should be explicitly anti-BDS and pro-Israel or if general anti-discrimination legislation is preferable. Israel-specific legislation provides important public support for Israel at a time when it is under attack on campuses and progressive groups and helps shore up public opinion that a bi-partisan majority supports Israel. However, this runs the risk of further encouraging the image among minority and progressive groups that Israel is indeed a key issue of intersectionality, and that, by extension, Jews are a privileged group. This is especially true in states with large minority and progressive communities, and where support for Israel might be lower. This also runs the risk of increasing public awareness of the BDS movement, something critical to its growth strategy.

Other issues are becoming clearer however. Binding legislation seems more preferable to non-binding resolutions. Within this category, states that include pension fund divestment and prohibiting state contracts are preferable. It is important to note, however, that some states' pension funds are complex to the point legislators would prefer not to touch them. In such states, it is best to defer to local legal and financial experts regarding this issue.

## Seeing the Bigger Picture – the Limitations of anti-BDS Legislation

It is important to recognize that although these successes are important, they should not distract Israel supporters from the larger issue. Many (including some BDS supporters) are mistaken in thinking that the struggle is a limited one surrounding BDS campaigns and the damage they could cause to Israel's economy – i.e. that enough economic damage will convince Israel to change its policies. However, these initiatives cannot alone defeat anti-Israel activists.

As noted, the real achievement is that these legislative initiatives, in blocking a key tool from the anti-Israel activist's arsenal, force the BDS movement into a reactive position, and provide a cushion of breathing space for pro-Israel activists.

In this crucial time, it is imperative that the pro-Israel community, including the Government of Israel, work diligently, cooperatively, proactively and creatively to reclaim and reframe the positive narrative surrounding Israel's legitimacy.

### Policy Recommendations

1. The success of these efforts and the momentum they create must be utilized within the context of a wider and long-term strategy to reclaim the narrative of Israel's legitimacy.
2. We recommend expanding legislative efforts to as many states as possible, as much as it depends on pro-Israel advocates.

3. However, we recommend taking a "quality over quantity" approach. It is crucial to invest appropriate coalition building and outreach efforts to ensure bi-partisan and overwhelming support. A defeat in any state could be costly, and so no legislation is preferable to defeated legislation and possibly even to one that only narrowly passes.
4. Coordination between Israel advocacy groups is crucial. Lack of progress is often attributable to insufficient coordination among and between national level groups, local groups and state legislators. While binding legislations are preferable, the inclusion of state pension funds should be left up to the state as it is a complex matter that goes beyond support for Israel. Similarly, whether a state legislation is Israel specific or general should be decided on a state-by-state basis and in consultation with local actors.
5. One of the key messaging successes has been correctly labeling BDS as an anti-Israel and even anti-Jewish hate movement, rather than the human rights movement it tries to bill itself as.

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6. Federal legislation currently working its way through Congress should be proactively supported.
7. The Government of Israel should tread lightly and stay behind the scenes. The various pro-Israel groups in the United States and the U.S. Jewish community should continue taking the lead.

## **Annex: Breakdown of Current State-Level Legislative Initiatives (as of September 2016)**

### **Israel-specific binding legislation**

1. Illinois was the first to enact such legislation as Governor Bruce Rauner signed the bill on July 24, 2015.<sup>11</sup> The bill was approved unanimously, and creates a blacklist of companies who boycott Israel, requiring divestment of state pension funds.
2. Florida's bill was approved by Governor Rick Scott on March 10, 2016.<sup>12</sup> It creates a blacklist of companies boycotting Israel and prohibits public entities from entering state contracts with these on contracts worth USD 1 million or more. It also prohibits state pension funds from investing in such companies. This passed the Florida House 112-2 and the Florida Senate 38-0. Florida also passed a non-binding resolution<sup>13</sup> earlier that month.
3. Arizona Governor Doug Ducey signed into law this anti-BDS legislation on March 17, 2016,<sup>14</sup> after it passed the Arizona House 42-16 and the Senate 23-6. Like Florida, Arizona mandates creating a blacklist of companies and organizations that boycott Israel, and then prohibits state institutions from investing in such bodies. It similarly prohibits entering state contracts with entities that boycott Israel. The bill relates to the general importance of opposing discrimination based on national origins.
4. Colorado Governor John Hickenlooper signed the bill into law on March 18, 2016.<sup>15</sup> Colorado's law will require the state's pension funds to create a blacklist of boycotting entities and divest pension funds from these, as well as prohibit future investments. It passed 54-10. The 10 dissenters were Democrats. We should also note that much of the opposition in Colorado had to do with the politicization of the state's pension funds, and not specifically related to Israel. This bill is the only Israel-specific one that relates to "Israel's internationally recognized boundaries" and does not extend to territories beyond the 1967 lines.
5. Indiana Governor Mike Pence signed the bill into law on March 23, 2016,<sup>16</sup> which requires state pension funds to divest from companies that boycott, sanction or divest from Israel or businesses that operate in Israel. The Indiana law requires creating a blacklist of such companies and submitting regular reports to the legislative council. This was approved with bi-partisan backing and a 47-3 majority. Indiana had previously passed a non-binding resolution in support of Israel.<sup>17</sup>

6. Georgia Governor Nathan Deal signed the Georgia legislation into law on April 26, 2016.<sup>18</sup> It forbids the state from contracting with individuals or companies that boycott Israel, and creates a blacklist of such companies. The bi-partisan bill passed the Senate 41-8 and the House 95-71, perhaps making Georgia the state with the greatest opposition we have yet seen.
7. Iowa's anti-BDS legislation was signed into law by Governor Terry Branstad on May 10, 2016.<sup>19</sup> It will create a blacklist of businesses in which state institutions would be prohibited from contracting and investing state funds. The bill passed the House 70-24 and the Senate 38-9, and will only be take relevance on future investments.
8. New York took a slightly different route as Governor Andrew Cuomo signed an executive anti-BDS order on June 9, 2016,<sup>20</sup> that will require state agencies to divest from companies and organizations aligned with the BDS movement. New York is the only state to have taken such action, although two bills are currently in motion, one of which is Israel specific<sup>21</sup> and the other binding but as regards all U.S. allies and trading partners,<sup>22</sup> both of which are expected to pass in the coming months.
9. New Jersey's Senate passed bipartisan legislation on June 28, 2016,<sup>23</sup> which Governor Chris Christie signed on August 16, 2016.<sup>24</sup> The law will prohibit state pension and annuity funds from being invested in companies that boycott Israel or Israeli businesses. This bill

passed the senate unanimously 39-0 and the general assembly 69-3.

### **Binding, non-Israel Specific Legislation**

1. South Carolina Governor Nikki Haley signed anti-BDS legislation into law on June 4, 2015,<sup>25</sup> one of the first states to do so. The legislation is not Israel-specific, rather it bars public entities from contracting with companies that boycott "based on race, color, religion, gender or national origin," and references companies with whom South Carolina enjoys open trade. The bill, backed by pro-Israel organizations, passed the house 97-1 and the senate 44-0.
2. Alabama Governor Robert Bentley signed into law legislation on May 10, 2016,<sup>26</sup> prohibiting a public entity in the state from contracting with business and non-profit organizations that engage in boycotts that discriminate based on race, color, religion, gender or national origin, and with countries with whom Alabama enjoys open trade. The bill passed the house 84-5 and the senate 30-0. Earlier this year, in February, Alabama passed a non-binding resolution<sup>27</sup> condemning the BDS movement and affirming its support for Israel.
3. California Governor Jerry Brown signed the "anti-BDS bill", or Assembly Bill 2844 into law on September 24, 2016.<sup>28</sup> This was, after the State Assembly approved an updated anti-discrimination bill (60-0) less than a month before,<sup>29</sup> and after a long and complicated legislative process. The legislation will force companies that accept a state government

contract over USD 100,000 to verify that they are not in violation of California's civil rights laws. This bill in its current form is not specific to Israel (although Israel is the only country mentioned specifically) rather reinforces existing regulations in California. It does, however, draw a direct connection between BDS and anti-Semitism, noting "discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott... of ...Israel."

4. Rhode Island's General Assembly passed (63-4) this anti-discrimination bill on June 16, 2016.<sup>30</sup> It is currently in the State Senate and Governor Gina Raimondo is expected to sign it into law. The law would prohibit the state from contracting with companies that engage in boycotts of U.S. allies and those with whom the state enjoys open trade. While the bill itself does not mention Israel, the press statement put out by Rhode Island Rep. Mia Ackerman, one of the bill's sponsors, makes direct mention of Israel: "One of our greatest trading allies is the state of Israel, the only democratic, non-discriminatory country in the Middle East." The press statement also mentions that boycotting Israel could harm the state's economy.

### Non-binding anti-BDS resolutions

1. Tennessee passed a non-binding resolution condemning the BDS movement, the first state to do so, on April 21, 2015.<sup>31</sup> Although the legislation does not order Tennessee public institutions to "divest from entities

involved in boycotting Israel, it refers to BDS as "one of the main vehicles for spreading anti-Semitism and advocating the elimination of the Jewish state." This resolution passed 123-1 in the General Assembly and passed the Senate unanimously.

2. Pennsylvania's General Assembly<sup>32</sup> and Senate<sup>33</sup> both passed non-binding anti-BDS resolutions on June 24, 2015,<sup>34</sup> with bi-partisan and unanimous support. The Pennsylvania legislature is currently discussing three different binding anti-BDS resolutions (see below).
3. Virginia's legislature passed a non-binding anti-BDS resolution on March 9, 2016.<sup>35</sup> This passed the House 86-5 with 9 abstentions, and passed the Senate with a voice vote. Virginia is working to pass a binding anti-BDS law<sup>36</sup> (see below).

### States with Resolutions and Legislation Under Discussion

Currently, states with efforts in earlier stages include: **Oklahoma**<sup>37</sup> (non-binding resolution condemning BDS and reaffirming support for Israel); **Ohio**<sup>38</sup> (binding legislation that would prohibit state contracts with companies that boycott Israel); **Massachusetts**<sup>39</sup> (legislation that would divest pension funds from companies that boycott Israel – although not likely to happen in the coming year); **Maryland**<sup>40</sup> (a non-binding resolution supporting Israel and criticizing the BDS movement, although it might not pass and the end result may be a NY style executive

order); and **Pennsylvania** (see above - three bills introduced – one that would block state funding to academic institutions that boycott Israel, one that would prohibit state contracts with entities that boycott Israel, and one that would divest state pension funds from Israel boycotters". As mentioned, **Pennsylvania** and **Virginia**, which passed non-binding resolutions, are also seeking to pass binding legislation.

Notably, anti-discrimination and anti-BDS bills in **Kansas**<sup>41</sup> and **Wisconsin**<sup>42</sup> (non-binding) failed to pass. These failures, however, seem to be more a result of procedural issues than substantive ones.

## Endnotes

1 For the sake of this report, we consulted with the Israel Action Network (IAN) and The Israel Project (TIP) to get a sense of the national-level work on this issue, with Professor Eugene Kontorovich Head of International Law at the Kohelet Policy Forum, and with the JCRC of Indianapolis to get a sense of the state-level efforts. These are in addition to the sources mentioned

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