**Statement Regarding Maryland Legislative Proposals, H.B. 998 and S.B. 647, to Prohibit Certain Institutions of Higher Education from Using Funds for Certain Purposes**

From the National Coalition Against Censorship and the American Association of University Professors

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The National Coalition Against Censorship and the American Association of University Professors (AAUP) strongly oppose legislative proposals to withhold funding for academic institutions that provide financial support for expenses incurred in connection with activities of professional organizations that endorse academic boycotts of other countries.

The impetus for the recent proposals is the December 2013 resolution by the American Studies Association (ASA) endorsing a limited boycott of Israeli academic institutions. The ASA describes its policy as "limited to a refusal on the part of the Association in its official capacities to enter into formal collaborations with Israeli academic institutions, or with scholars who are expressly serving as representatives or ambassadors of those institutions, or on behalf of the Israeli government, until Israel ceases to violate human rights and international law."[1] The action is intended is to take an "ethical stance" that expresses "solidarity with scholars and students deprived of their academic freedom and an aspiration to enlarge that freedom for all, including Palestinians." *Id.*

The proposals would require state colleges and universities, which routinely support such professional activities, to deny funding to faculty members to participate in intellectual and scholarly activities solely because the activity is sponsored by an organization that espouses an officially disfavored political view.

In our view, the effort to penalize members of ASA and other professional organizations[2] is deeply flawed, as a matter of policy and law. While state universities are free to allocate funds for research and travel based on academic merit, they are not free to pick and choose which activities to support based on the political views or positions of sponsoring organizations. Such

[1] *See* American Studies Association, Council Statement on the Boycott of Israeli Academic Institutions, Dec. 4, 2013, *available at* http://www.theasa.net/from_the_editors/item/council_statement_on_the_academic_boycott_of_israel_resolution/

[2] The proposals would affect the members of the American Studies Association, Association for Asian American Studies, and the Native American and Indigenous Studies Association, which have adopted similar boycott resolutions. The bills might affect other organizations that have expressed approval of or sympathy with such a boycott, but not formally endorsed it, since they also target organizations that have "issued a public resolution or statement" about academic boycotts.

proposals would deny funding *even if the purpose of participation was to express opposition to the boycott.*

The proposals threaten the fundamental rights to free speech and association by singling out organizations solely because they have taken an unpopular political position and enforced it through a boycott, and by penalizing individuals solely because of their affiliation with those organizations. If adopted, such a policy would set a dangerous precedent, opening the door for state officials to impose economic and other penalties on members of other professional and scholarly associations if they adopt controversial positions on social or political issues.

Such a result is deeply at odds with long-settled law and policy:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.… The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967).

Our defense of the right of organizations to boycott Israeli academic institutions does not imply an endorsement of that action. As the AAUP previously explained in a statement issued in response to an academic boycott of two Israeli institutions by the British Association of Teachers in 2005,[3] academic boycotts, unlike economic boycotts, undermine academic freedom and threaten free speech because they

> strike directly at the free exchange of ideas…. The form that noncooperation with an academic institution takes inevitably involves a refusal to engage in academic discourse with teachers and researchers, not all of whom are complicit in the policies that are being protested. Moreover, an academic boycott can compound a regime's suppression of freedoms by cutting off contacts with an institution's or a country's academics. [4]

[3] The AUT's boycott was subsequently rescinded. http://www.theguardian.com/education/2005/may/26/highereducation.uk1

[4] AAUP, Report On Academic Boycotts (*Academe*, September – October 2006, pp. 39 – 43), http://www.aaup.org/file/On-Academic-Boycotts_0.pdf.

This position was reiterated in a statement issued by AAUP on December 16, 2013, in response to the ASA resolution.[5]

Open debate, the right to dissent, and freedom of association are core First Amendment values that are directly threatened by legislative efforts to penalize organizations like ASA for their political positions. Regardless of what position one takes on privately organized academic boycotts, the state has no business penalizing those who support and promote them.[6]

There can be no question that the First Amendment protects the right to boycott and engage in concerted political expression, as well as the right of association. Thus, faculty and staff at state-supported colleges and universities have a right to belong to the ASA, and ASA has a right to boycott. It is likewise well-established that state-supported institutions "may not discriminate based on the viewpoint of private persons whose speech it facilitates," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 US 819, 834 (1995). The present proposals run afoul of each of these settled constitutional principles.

It is by now axiomatic that boycotts are a form of political expression protected by the First Amendment. The Supreme Court settled that issue when, in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 911-12 (1982), it held that a boycott of white merchants in Claiborne County, Mississippi, to protest racial discrimination "clearly involved constitutionally protected activity…. Through exercise of these First Amendment rights [of speech, assembly, association, and petition], petitioners sought to bring about political, social, and economic change."

The right to boycott or engage in other concerted expressive activity would be relatively meaningless without protection for the right to associate. In *NAACP v. Claiborne Hardware*, The Court explicitly recognized "'the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues'"; this is because "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'" *Id.* at 907 - 08 (citations omitted). The Constitution thus prohibits "guilt by association," *id.* at 919, of precisely the sort at issue in the proposals, which would penalize anyone associated with any ASA activity, regardless of their views on academic boycotts or Israeli policies or the nature of that association.

These principles apply with equal or greater force in the university setting. In a case in which college officials denied recognition to a chapter of Students for Democratic Society (SDS), the Court in *Healy v. James*, 408 U.S. 169 (1972), held that state institutions may not deny "rights and privileges solely because of a citizen's association with an unpopular organization," and that

[5] See http://aaup.org/news/aaup-statement-asa-vote, in which AAUP not only repeated its principled opposition to academic boycotts, but also criticized proposals to deny support to faculty members who chose to exercise their right to protest, saying such a response "would only compound the violation of academic freedom."

[6] Indeed, NCAC has also defended the right of proponents of boycotts to speak on public campuses. *See*, for example, http://ncac.org/Academic-Boycott-Brooklyn-College-supports-free-debate-and-academic-freedom-in-midst-of-criticism.

a state institution "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Id.* at 186, 187-88

The Court in *Healy* recognized that denial of recognition did not prohibit or preclude students from associating with SDS or promoting its beliefs, but nonetheless held that the action infringed the students' First Amendment rights. Non-recognition interfered with "the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes," and it denied "access to the customary media for communicating with the administration, faculty members, and other students [which] cannot be viewed as insubstantial." *Id*. at 181-82. The Court found this sufficient to establish a constitutional violation: "the Constitution's protection is not limited to direct interference with fundamental rights….. 'Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference.'" *Id.* at 183.

The effort to deny funding to faculty members to participate in events sponsored by boycotting organizations is an example of precisely the same kind of "subtle government interference" that the Court condemned in *Healy*. The intent and predictable effect will be precisely what the Supreme Court has condemned: interference with "the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes."

The holding in *Healy* was reinforced in *Rosenberger*, *supra*, where the Court considered and rejected a state university's restrictions on funding for printing any publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823. Having offered to pay for printing other publications "on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Id.* at 825. The Court reasoned that "[v]ital First Amendment speech principles are at stake," citing the danger "to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition…. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Id.* at 835 -36. *See* also *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 - 30 (2000).

As in *Healy*, the *Rosenberger* Court struck down a practice that did not directly prohibit or foreclose the expression of certain viewpoints, but instead denied financial support that was available to those who expressed other viewpoints. These cases are directly applicable to the present proposals and strongly support the conclusion that they are constitutionally invalid.

Public officials have a clear obligation not to interfere with free and unfettered debate on controversial and hotly debated matters of public concern:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

We strongly urge Maryland elected officials to abandon the ill-considered and constitutionally flawed effort to suppress criticism of Israeli policies on U.S. campuses, and instead to undertake actions to promote constructive dialogue among students and scholars. Complex and challenging social and political problems cannot be understood and addressed, must less solved, by silencing discussion and debate.