Chairwoman Rosenthal, Councilmembers Johnson, Koo, Constantinides, Miller, Wills and Deutsch thank you for giving me the opportunity to testify on Resolution No. 1058-A.

I am the Sulzbacher Professor of Law at Columbia Law School in New York City, and the Chair of the Board of Trustees of the Center for Constitutional Rights, a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

Introduction

In my own capacity as a scholar and professor of constitutional law and civil rights, and on behalf of the Center for Constitutional Rights, I offer the following historical and legal analysis of Resolution No. 1058-A. First, the resolution embodies a regretful departure from the support that the New York City Council, its individual members, and other elected officials in New York have given to social movements in a wide range of contexts in the United States that have used boycotts as a tactic in their larger political struggles. Second, the resolution identifies for condemnation political activity that the Supreme Court of the United States has clearly held as constitutionally protected under the First Amendment to the U.S. Constitution. As such, the resolution, if adopted, would mete out state sponsored censure toward citizens who are
exercising constitutionally protected rights and would, as a result, chill that protected speech. Finally, the resolution itself rests on findings and premises that misstate the aims of the BDS movement in this context and the political commitments of those who support the use of a boycott and other similar tactics in their efforts to contest human rights violations committed by the state of Israel.

**History of Boycotts as a Political Tactic Used by Social Movements**

Almost every social movement has at some point deployed boycotts as a tactic to advance its political goals, along with demonstrations, picketing, strikes, sit-ins, and other forms of direct action. The Boston Tea Party figured centrally in the larger boycott of British goods by American colonists and was used as part of a protest by the Sons of Liberty to foreground the problem of “taxation without representation.”¹ In 1791, supporters of abolition of the slave trade in Britain urged a boycott of slave-produced sugar.² In 1902 the Chinese boycotted U.S. products to protest the extension of the Chinese Exclusion Act in 1902.³ In 1903 Mohandas

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Gandhi and other anti-colonial actors in India called for a boycott of British goods, launching the *Swadeshi* (self-sufficiency) movement.\(^4\) In 1955 when Rosa Parks refused to give up her seat in the “white section” of a bus in Montgomery, Alabama, she sparked the Montgomery bus boycott to protest racial segregation in public transportation and began a chain reaction of similar boycotts throughout the South.\(^5\) In 1959 the African National Congress in South Africa called for British subjects to boycott South African goods, which grew in deliberate steps to include a world-wide boycott, sanctions and divestment movement.\(^6\)

Interestingly, boycotts have figured centrally in the Jewish social justice tradition. Jewish philosopher Martin Buber recounted the story from the late 1700s of Rabbi Levi Yitzhak of Berdichev, Ukraine on the eve of Passover, declared the local matzoh factory *treif* (not kosher) because “the women in this factory work from early morning until late at night. They are laboring too long and too hard. They are not being paid fairly for their labors.” In so doing, he triggered a boycott of the factory’s matzoh by Jews in the community.\(^7\) In 1933 an anti-Nazi boycott of German goods began in the U.S., Lithuania, Britain, Poland, and Mandatory Palestine on account of the Nazi’s growing anti-Semitism.\(^8\) In 2008 Rabbi Shlomo Riskin, Ruth

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4 S.N. Sen, *History of the Freedom Movement in India (1857-1947)* (1997) p. 95-96 (“Swadeshi and Boycott are the two necessary aspects of one and the same thing. One cannot flourish and strive without the help of the other … These two economic weapons rapidly developed into a political agitation aimed at securing freedom from British bondage.”)


Messinger, and Rabbi Avi Weiss were among 1,000 Jewish leaders who endorsed a boycott of kosher meatpacker, Agriprocessors. The boycott was organized by Uri L’zedeck, a group founded by students at the seminary Yeshivat Chovevei Torah in New York.  

The frontal attack on boycotts as a political tactic made by supporters of Israel is truly ironic given the endorsement that prominent Jewish and Zionist organizations have given to boycotts in other contexts. For instance, American Jews convinced the World Jewish Congress to endorse a resolution calling for a boycott of German goods in 1936. And when the Supreme Court considered the constitutionality of black citizens’ boycott of racist businesses in Mississippi in the 1960s the American Jewish Congress submitted a friend of the court brief co-authored by Nathan Dershowitz (brother of Alan Dershowitz) arguing that “politically motivated economic boycotts have a long and honored history in our nation,” and that boycotts “are forms of expression undoubtedly protected by the First Amendment.”

Just thirty years ago some of New York’s most prominent politicians strongly endorsed a financial boycott and divestment of public funds from companies that did business in South Africa. These boycott supporters included Mayor Ed Koch, Manhattan Borough President Ruth Messinger, Comptroller Harrison Goldin, union leader Victor Gotbaum, and Carol Bellamy, the City Council President.

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Anti-Nazi Boycott Movement in 1939–1941, 62 American Jewish Historical Quarterly 146 (172).


In 2014 and 2015 Mayor Bill de Blasio boycotted the St. Patrick’s Parade in New York City because of its policy of prohibiting gay groups from marching openly.12 Last March, Mayor de Blasio and Governor Andrew Cuomo announced that they were boycotting the state of North Carolina, banning non-essential travel by public officials, after the state passed a law that was widely regarded as homophobic and transphobic. The Mayor went even further, threatening to boycott the state of Georgia if a law went into effect that would have allowed faith-based organizations to discriminate against people who identify as lesbian, gay, bisexual or transgender.13 And last May the Mayor urged New Yorkers to boycott fast food chain Chick-fil-A on account of its ownership’s biased statements toward LGBT people, “I’m certainly not going to patronize them and I wouldn’t urge any other New Yorker to patronize them.”14

To claim that the boycotts endorsed by public officials in New York were premised upon an animus toward South Africans, the Irish, North Carolinians, Georgians, or chicken sandwich retailers would be absurd. What our elected officials were doing was voicing opposition toward particular discriminatory policies, and they turned to a familiar organizing tool in doing so: the boycott. No one could, or did, plausibly argue that their use of boycotts in these contexts amounted to a form of bias toward specific ethnic, religious, or regional groups.


Yet that is the charge made against citizens who resort to a boycott to protest human rights violations committed by the state of Israel. They, like the supporters of boycotts enumerated above, regard boycott, divestment and sanctions as legitimate measures to be found in a larger social justice tool-kit that can be deployed to protest state policies that they find objectionable. Like the supporters of boycotts mentioned above, their use of a boycott does not express animus toward a particular racial or ethnic group.

**Boycotts as Constitutionally Protected Political Activity**

Government actions and restrictions cannot be based on the desire to punish First Amendment activities that aim to encourage social and political change in a nation’s policies. The Supreme Court most famously applied this principle to politically motivated boycotts in *NAACP v. Claiborne Hardware Co.*, a case in which the Court considered a challenge to a local NAACP chapter that had organized a boycott of white-owned businesses to pressure city officials in Port Gibson, Mississippi to meet a number of demands for racial equality and integration. The Court recognized that political boycotts involve a range of expressive activity and rely on the First Amendment freedoms of “speech, assembly, association, and petition.” They brought boycotts under the protective constitutional umbrella of the First Amendment because political boycotts are directed at issues of public concern, and as such they are protected activities that “rest[] on the highest rung of the hierarchy of First Amendment values and [are] entitled to special protection.”15 “Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”16

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16 *Id.* p. 910.
Calls to boycott Israel cannot be differentiated from these and other historical examples of boycotts simply because they may be unpopular with some elected representatives today. Such a differentiation would constitute viewpoint discrimination prohibited by the First Amendment. The broadest version of this content-based rule instructs that greater constitutional solicitude is appropriate for the interests of all boycotters with a clearly political message, such as calls to boycott racist Nazi policies, British imperialism, Chinese Exclusion laws, Jim Crow segregation, apartheid in South Africa, or the state of Israel’s treatment of the Palestinians in violation of international law.

**The Resolution Misconstrues the Motivations Behind the Turn to BDS in this Context**

Resolution No. 1058-A tragically reduces the use of a boycott in this context to a form of bigotry that is not born out by the facts. Those who support BDS point to a wide range of human rights violations committed by the State of Israel that include: the illegal 50-year occupation of the West Bank, Gaza, and East Jerusalem in violation of, among other legal texts, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949; the wall constructed by the Israelis that has been found by the International Court of Justice to violate multiple provisions of international law;\(^\text{17}\) the forcible dispossession and exile of Palestinians from their property and territory in 1948 with no right of return or reparation; military campaigns directed by the state of Israel against Palestinians living in Gaza that violated rules of proportionality, targeting of civilians and civilian institutions (such as hospitals, water supplies, sewer systems etc.), and use of chemical weapons; and discrimination against

Palestinians living in the state of Israel itself; among other charges of violations committed by the Israeli state against Palestinians. Disagreement exists among legal scholars, jurists, and relevant public officials about the merits of these claims, yet these claims have gained legitimate attention and concern in respected international legal bodies and tribunals. None of these claims, however, are premised upon an animus toward the Jewish people, but rather concern the actions of a state, in this case, the state of Israel. Rather, they raise serious matters of public concern that land in the core of political speech protected by the First Amendment. To reduce a political movement that seeks to hold a state accountable to international legal rules to a form of bigotry insults the very idea of international law and those who seek its enforcement.

Conclusion

The Center for Constitutional Rights was founded 50 years ago to support the Mississippi Freedom Democratic Party and its leaders – including Fannie Lou Hamer – who were organizing and risking their lives to register African American voters in a larger effort to end racial segregation and economic injustice in this country. Boycotts figured centrally in the work of Hamer, Rosa Parks and other African American women who formed the backbone of the civil rights movement. The Center for Constitutional Rights defended the rights of civil rights activists to engage in uncomfortable and transformative civil rights actions 50 years ago, and we continue to do so today, defending the rights of today’s activists to use boycott, divestment and sanctions as a tool by which to protest violations of international law committed by the state of Israel against Palestinians. We are deeply troubled that the New York City Council would consider endorsement of a resolution that ignores the political and constitutional history of boycotts. We are equally troubled that the New York City Council would allow itself to be
captured by extreme partisans whose aim is to deny fundamental constitutional rights of political expression and action to our fellow citizens.