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NEW YORK CIVIL LIBERTIES UNION

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By First Class Mail

Carnell Foskey
Nassau County Attorney
One West St.
Mineola, NY 11501

Edward Mangano
Nassau County Executive
1550 Franklin Ave.
Mineola, NY 11501
FAX: 516-571-0260

Re: Nassau County's Threatened Enforcement of Its Anti-BDS Law

Dear Mr. Foskey and Mr. Mangano,

On behalf of the New York Civil Liberties Union, we write about the threat reportedly levied by Mr. Foskey, as the Nassau County Attorney, to take “appropriate legal action” against the Nassau Events Center (NEC) unless it cancels concerts by musician Roger Waters at the Nassau Veterans Memorial Coliseum because of Mr. Waters’s support for the Boycott, Divestment, and Sanctions (BDS) movement.¹ This threatened legal action apparently refers to the County enforcing its law prohibiting contracts with businesses engaged in BDS activities.² While the NYCLU takes no position on the BDS movement, the County’s anti-BDS law is unconstitutional, and any action taken by the County to enforce the law and any rescission of the County’s contract with NEC in retaliation for allowing Mr. Waters’s performance would violate the First Amendment of the U.S. Constitution.

¹ Robert Brodsky, “Officials Want Nassau Events to Cancel Roger Waters Concert,” *NEWSDAY*, July 11, 2017, <https://www.newsday.com/long-island/nassau/some-officials-want-nassau-events-to-cancel-waters-concert-1.13795104>.

² Nassau Cnty. Admin. Code § 7-5.0.

Last year, Nassau County enacted Local Law No. 3-2016, which prohibits businesses participating in BDS activities from entering into or maintaining contracts with the County.³ Boycotts aimed at affecting political change are a form of expression protected by the First Amendment,⁴ and the United States Supreme Court has held that the government cannot condition the eligibility for government contracts on whether it agrees with the contractor's political expression or affiliations.⁵ Under the County law, any contractor who engages in BDS activities must choose between keeping its contract with the government and expressing its political views, which plainly violates the First Amendment. We also note that the guarantees of free speech under the New York State Constitution are often broader than the minimum required by the First Amendment.⁶

The BDS movement advocates for boycotts and other activities that are politically motivated and thus clearly protected expression under the First Amendment. BDS organizers describe their movement as using boycott, divestment, and sanction tactics “to end international support for Israel’s oppression of Palestinians and pressure Israel to comply with international law.”⁷ Indeed, the County’s own law defines “BDS activities” as “*politically motivated*” action.⁸ By the County’s own framing, its law targets a form of political expression for punishment. That County officials disagree with the views or tactics of BDS is irrelevant because the movement’s First Amendment protection “does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.”⁹

Because the County’s anti-BDS law violates the First Amendment, any attempt to enforce the statute would be unconstitutional. Further, any attempt to rescind NEC’s contract because it is providing Mr. Waters with “a forum or platform to express his BDS ideology,”¹⁰ as threatened by the County Attorney, would run afoul of these established First Amendment principles. Should the County take any action towards these ends, it will run the risk of inviting legal action.

For these reasons, the County should withdraw its threats against NEC, should cease any efforts to enforce the ordinance, and take steps to repeal its unconstitutional law. We also ask, pursuant to the Freedom of Information Law, that the County provide us with copies of all

³ Nassau Cnty. Local Law 3-2016; *see* Admin. Code § 7-5.0(b).

⁴ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-15 (1982) *see id.* at 911 (noting that the “established elements of speech, assembly, association, and petition” are inseparable).

⁵ *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 714 (1996) (city could not terminate trucking company’s municipal contract for owner’s refusal to support a particular political candidate); *Bd. Of Cty. Comm’rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 685 (1996).

⁶ *O’neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 535 n.3 (N.Y. 1988).

⁷ Palestinian BDS National Committee, “Open Letter: Palestinian Civil Society Call for BDS,” July 9, 2005, <https://bdsmovement.net/call>.

⁸ Nassau Cnty. Admin. Code § 7-5.0(a) (emphasis added).

⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

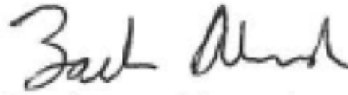
¹⁰ *See supra* note 1.

correspondence between the County and NEC with regards to this matter; a copy of any contract between the County and NEC; and a list of any other business against which the County has enforced or threatened to enforce Local Law No. 3-2016.

Sincerely,



Susan Gottehrer
Nassau County Chapter Director



Zachary Ahmad
Policy Counsel



Philip Desgranges
Staff Attorney