

# United States Senate

WASHINGTON, DC 20510

December 5, 2023

## VIA ELECTRONIC TRANSMISSION

The Honorable Julie Su  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Washington, DC 20210

Dear Acting Secretary Su:

On October 8, the day after Hamas terrorists invaded Israel, killed 1,400 Israelis, and kidnapped at least 203 people, most of whom were civilians, anti-Israel activists flocked to rallies at college campuses across the United States where speakers and attendees openly celebrated these brutal attacks. We are deeply concerned that, in this environment of unrest, there is likely to be a resurgence in the international Boycott, Divestment, and Sanctions (BDS) movement, which will be used to economically harm and delegitimize the state of Israel.<sup>1</sup>

Over the last decade, supporters of the BDS movement have focused their U.S. campaign on college campuses. While reaching a high of 44 BDS votes during the 2014-2015 school year, the popularity of such petitions had steadily declined.<sup>2</sup> However, since the October 7 attack on Israel, there have been at least three instances where student protestors have urged their college to adopt a pro-BDS stance: Arizona State University (ASU), Vassar College, and Grinnell College.

The ASU chapter of Students for Justice in Palestine (SJP) intends to deliver a petition to the ASU Dean of Students Office and Undergraduate Student Government calling on ASU to boycott Israel and divest from companies supporting the country.<sup>3</sup> Similarly, Vassar College's SJP chapter staged a walkout on October 25, demanding that the college divest from weapons manufacturers arming Israel while publicizing its independent contractors' investments, boycott two study abroad programs in Israel, and call for an end to the blockade and U.S. funds to Israel.<sup>4</sup> The protestors also asked the Vassar Student Association to reintroduce pro-BDS legislation.<sup>5</sup> On October 27, Grinnell College's SJP leaders similarly demanded the college immediately divest from any and

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<sup>1</sup> AMCHA INITIATIVE, *BDS Background*, <https://amchainitiative.org/BDS-background/> (last visited Nov. 15, 2023).

<sup>2</sup> Haley Cohen, *BDS resolutions on college campuses have almost disappeared. What comes next?*, EJEWISH PHILANTHROPY (Oct. 5, 2023), <https://ejewishphilanthropy.com/bds-resolutions-on-college-campuses-have-almost-entirely-disappeared-what-comes-next/#:~:text=The%20drop%20in%20BDS%20resolutions,by%20the%20Anti%20Defamation%20League.>

<sup>3</sup> Phineas Hogan, *Student Organizations Call on ASU to Boycott and Divest From Companies Supporting Israel*, THE STATE PRESS (Nov. 1, 2023), <https://www.statepress.com/article/2023/11/sjp-petition-statement-response#:~:text=The%20petition%20organized%20by%20ASU's,in%20Israel%20until%20the%20conflict.>

<sup>4</sup> William Sorge, *Vassar SJP stages walkout*, THE MISCELLANY NEWS (Nov. 1, 2023), <https://miscellanynews.org/2023/11/01/news/vassar-sjp-stages-walkout/>.

<sup>5</sup> *Id.*

all investments that financially support Israel or its military and release a statement calling for an end to U.S. military aid to Israel.<sup>6</sup>

Although student government resolutions are not binding, support for these initiatives can lead to a divisive atmosphere on campus.<sup>7</sup> Furthermore, if the sentiments expressed in these resolutions are shared by a college or university system's trustees, the institution's affirmation of a pro-BDS position would have very real consequences for Israel, a military and cultural ally. While there are valid and varied views about the Israeli-Palestinian conflict, and some who want their investment portfolio to reflect their political views, BDS campaigns tend to be heavy-handed, one-sided, and will place the onus for changed policies and behaviors only on Israel.

The Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) administers and enforces the Employee Retirement Income Security Act of 1974 (ERISA).<sup>8</sup> Among other things, ERISA requires plans to provide participants with information regarding plan features and funding and to provide fiduciary duties of care and loyalty for those who manage and control plan assets (e.g., trustees and members of a plan's investment committee).<sup>9</sup> Under ERISA, the primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses.<sup>10</sup> ESG factors can only be considered if they are appropriate for retirement savings and are in the best interest of plan participants, and cannot be considered solely for ancillary political or social reasons.<sup>11</sup>

Complicating matters, a 2022 Biden DOL rule, entitled Prudence and Loyalty in Selecting Plan Investments and Analyzing Shareholder Rights, empowered fiduciaries to consider ESG factors in their risk-return analysis of potential investments and use impact issues as a "tie breaker" when choosing between equally competitive funds.<sup>12</sup> This rule may allow activist university trustees to

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<sup>6</sup> Zack Spindler-Krage, *Grinnell College students stage protest walkout in support of Palestine*, DES MOINES REGISTER (Oct. 27, 2023), <https://www.desmoinesregister.com/story/news/education/2023/10/27/grinnell-college-students-rally-for-palestine/71328932007/>.

<sup>7</sup> Haley Cohen, *BDS resolutions on college campuses have almost disappeared. What comes next?*, EJEWISH PHILANTHROPY (Oct. 5, 2023), <https://ejewishphilanthropy.com/bds-resolutions-on-college-campuses-have-almost-entirely-disappeared-what-comes-next/#:~:text=The%20drop%20in%20BDS%20resolutions,by%20the%20Anti%20Defamation%20League.>

<sup>8</sup> DEP'T OF LABOR, EMPLOYEE BENEFITS SEC. ADMIN., HISTORY OF EBSA AND ERISA [https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa#:~:text=The%20Employee%20Benefits%20Security%20Administration,Welfare%20Benefits%20Administration%20\(PWBA\).](https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa#:~:text=The%20Employee%20Benefits%20Security%20Administration,Welfare%20Benefits%20Administration%20(PWBA).)

<sup>9</sup> DEP'T OF LABOR, EMPLOYEE BENEFITS SEC. ADMIN., FAQs ABOUT RETIREMENT PLANS AND ERISA, <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf>.

<sup>10</sup> DEP'T OF LABOR, FIDUCIARY RESPONSIBILITY, <https://www.dol.gov/general/topic/retirement/fiduciaryresp#:~:text=The%20primary%20responsibility%20of%20fiduciaries,the%20risk%20of%20large%20losses.>

<sup>11</sup> Elizabeth S. Goldberg and Rachel Mann, *The Interplay Between ESG Investing and ERISA's Fiduciary Duties*, MORGAN LEWIS (Sept. 21, 2022), <https://www.morganlewis.com/pubs/2022/09/the-interplay-between-esg-investing-and-erisas-fiduciary-duties#:~:text=In%20particular%2C%20ERISA's%20fiduciary%20duties,ancillary%20political%20or%20social%20Reasons.>

<sup>12</sup> 29 C.F.R. pt. 2550 (2022).

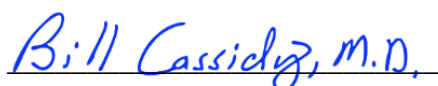
target Israel and companies doing business with Israel, thereby politicizing the retirement savings of our nation's educators.

The American people must be confident that pension investors will not override the economic goals, or personal views, of beneficiaries to pursue their own political agenda. Therefore, in order to understand DOL's approach to this potential problem, we request you answer the following questions, on a question-by-question basis, by January 2, 2024:

1. What effect does the Biden rule have on retirement plan trustees/fiduciaries considering BDS (a factor unlikely to relate to benefitting plan beneficiaries) when evaluating potential investments?
2. What steps, if any, would DOL's EBSA take to investigate complaints regarding BDS-informed investment strategies using teachers' pensions?
3. Has DOL's EBSA received any complaints regarding BDS-informed investment strategies using teachers' pensions? If so, how many? And, from which university?
4. Does DOL plan to publish any proactive guidance or technical assistance to discourage trustees/fiduciaries from capitulating to the BDS movement and improperly imposing their own political viewpoints on plan beneficiaries? If so, when do you anticipate releasing such guidance or technical assistance?

Thank you for your prompt response to this very important matter.

Sincerely,



Bill Cassidy, M.D.  
Ranking Member  
U.S. Senate Committee on Health,  
Education, Labor, and Pensions



Susan Collins  
U.S. Senator



Mike Crapo  
U.S. Senator



Roger Wicker  
U.S. Senator



James E. Risch  
U.S. Senator



Ron Johnson  
U.S. Senator



Thom Tillis  
U.S. Senator



M. Michael Rounds  
U.S. Senator



Marsha Blackburn  
U.S. Senator



Kevin Cramer  
U.S. Senator



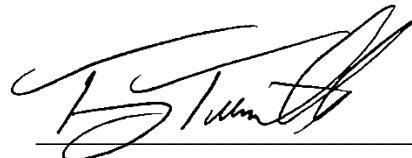
Mike Braun  
U.S. Senator



Rick Scott  
U.S. Senator



Roger Marshall  
U.S. Senator



Tommy Tuberville  
U.S. Senator

*Katie Boyd Britt*

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Katie Boyd Britt  
U.S. Senator