ANTIBDS LAWS AND THE POLITICS OF POLITICAL BOYCOTTS

OSAMA ALKHAWAJA*

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INTRODUCTION

It is not illegal to boycott Israel, but over thirty states have enacted laws requiring individuals

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1 See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912–15 (1982) (holding that peaceful political boycotts are

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doing business with public entities to certify that they do not and will not boycott Israel. This means that most Americans live in a state where their ability to boycott Israel is restricted to some degree. In January 2019, a federal judge in Arkansas became the first judge to uphold one of these laws. In dismissing the First Amendment challenge, the Arkansas district court held that a political boycott of Israel is neither speech nor inherently expressive conduct, therefore, it is not protected by the First Amendment. To quote a group of First Amendment scholars, who had previously written an Amici Curiae about a similar law, the constitutional issues in question here create “an easy First Amendment case.” It has been Supreme Court precedent for more than 40 years that political boycotts were protected by the First Amendment, and that the government may not deny a benefit to individuals in order to hamper their ability to express a particular viewpoint. Despite this clear precedent, the Eighth Circuit affirmed the district court’s decision on the grounds that the Arkansas law “only prohibits economic decision that discriminate against Israel,” and because “those decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment.” This decision marks the beginning of a perilous chapter in First Amendment jurisprudence, in which well-established legal principles that protect free speech are now vulnerable. In some ways, it is not surprising that these protections are waning in the context of the Palestinian-Israeli issue—a notoriously contentious topic. However, it is precisely this contention that requires courts to be extra vigilant in their defense of speech.

The statute upheld in Arkansas is one of thirty-four similar state laws that target the Boycott, Divestment, and Sanctions (BDS) Movement. These laws attempt to limit criticism of Israel by leveraging state contracts and investment portfolios against natural and corporate persons who engage in BDS-related activity. This article refers to these laws as “anti-BDS laws.” The first section tracks the development of both the BDS movement and anti-BDS laws. The second section discusses the key legal issues against the backdrop of ongoing litigation. The third section discusses additional considerations—including limitations—on protected boycotts and copycat laws. This analysis implicates both settled First Amendment issues and novel questions that remain unresolved. While

protected under the First Amendment).

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2 See infra note 59 and accompanying discussion of these state laws.
4 Id.
5 Brief of Amici Curiae First Amendment Scholars in Support of Plaintiffs-Appellees, at 1; Jordahl v. Brnovich, 789 F. App’x 589 (9th Cir. 2020) (No. 18-16896) [hereinafter First Amendment Scholars’ Brief].
6 See Clahorn v. Hardware Co., 458 U.S. at 933-34.
8 Arkansas Times LP v. Waldrip as Trustee of University of Arkansas Board of Trustees, 37 F. 4th 1386, 1394 (8th Cir. 2022) (emphasis added).
9 See generally GEOFFREY R. STONE, PERILOUS TIMES: CIVIL LIBERTIES IN WARTIME (James P. eds., 2013) (investigating how civil liberties in America, especially suppression of speech, have been consistently compromised during wartime).
11 See infra note 59 and accompanying discussion of these state laws.
12 See infra section II.B.1 (discussing anti-orthodoxy principles and the protected expression of political boycotts).
13 See infra, section III (noting open questions regarding the scope of governmental power, exercised indirectly or
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this topic has been discussed by other authors, this article asserts that the broader political context is an essential element of the legal analysis. Judges that uphold the constitutionality of anti-BDS laws likely misunderstand (or misconstrue) the BDS movement and are therefore more likely to tolerate suppression of it. Once the politics behind anti-BDS legislation are properly contextualized, the legal conclusions become simple. Accordingly, the purpose of this article is to provide context for the legal decisions that follow.

I. TWO OPPOSING POLITICAL MOVEMENTS

Judges ought to avoid politics. But judges cannot decide legal issues in an apolitical vacuum, particularly when those legal issues are inextricably intertwined with political developments. In fact, when it comes to political boycotts in particular, judges are required to engage with the relevant political undercurrents; this is supported by a close reading of the seminal political boycott case N.A.A.C.P v. Claiborne and its progeny. Courts must not simply ask abstract questions regarding the expressive activity of a political boycott. Rather, a court must examine “the source, context, and nature of the anticompetitive restraint at issue.” Thus, the question of whether a boycott is subject to constitutional protection invites judicial examination of “its impact” and “the context and nature of the activity.”

A. BDS and Anti-BDS Movement

Reasonable minds can disagree on the efficacy of the BDS Movement, but its history, tactics, and goals are clear. The BDS Movement began in 2005 when more than 170 Palestinian civil society groups issued a call to the international community to boycott, divest from, and sanction Israeli institutions. Their goal, which continues to this day, is to escalate non-violent international pressure achieved through other means; the extent to which courts should examine broader social and political trends when examining discrete legal issues; and the tension between discrimination and constitutionally protected viewpoints).

15 See Colegrove v. Green, 328 U.S. 549, 556 (1946) (“Courts ought not to enter [the] political thicket.”); see also Pew Research Center, Public’s Views of Supreme Court Turned More Negative Before News of Breyer’s Retirement (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ (finding that 84% of American adults believe Supreme Court justices should not bring their own political views into the cases they decide).
19 Id. at 504.
20 See Cuffman, supra note 14, at 126 nn. 52; see also Israeli Settler Colonialism and Apartheid, BDS, https://bdsmovement.net/colonialism-and-apartheid/summary (last visited Feb. 27, 2023).
21 See What is BDS?, BDS, https://bdsmovement.net/what-is-bds (last visited Feb. 6, 2023) [https://perma.cc/QGW6-KSCP].
22 Id.; see also Time for a Summary: The BDS-Movement after 17 years of activism, DISORIENT (Mar. 30, 2023),
on Israel until it (1) ends the military occupation of the West Bank, Gaza, and the Golan Heights, (2) recognizes the fundamental rights of Palestinian “citizens of Israel to full equality,” and (3) respects and promotes the rights of Palestinian refugees to return to their homes and properties as stipulated in United Nation resolutions.

It is necessary to briefly note the motivations of proponents and opponents of the BDS movement. For Palestinians and those who support Palestinian self-determination, the BDS movement presents an opportunity to challenge the status quo after decades of political stagnation. Rather than focusing on the off-and-on again bilateral negotiations between the Palestinian Authority and Israel, or the politicking between global superpowers and various Arab regimes, the BDS movement targets individuals across the world, and calls on them to act in support of the Palestinian people in mass scale non-violent resistance.

This strategy shifts the focus away from the traditional halls of power onto diverse and egalitarian decision-making bodies. For institutional actors, sidestepping the well-established rules of engagement is more of a bug than a feature. For Israel in particular, the BDS movement seemingly presents an existential threat, because it asks the international community to determine whether the country—in its current form—is an apartheid state worthy of continued financial and military support. The demands of the movement, which call for equal status and rights in all the territories currently controlled by Israel, seemingly run counter to Israeli’s desire to remain a Jewish state for the Jewish people and bring to head the issue of whether Israel is capable of being both a democratic and Jewish state.

https://disorient.de/magazin/time-summary-bds-movement-after-17-years-activism (interviewing Omar Barghouti, the co-founder of the BDS movement); Daniel Boguslaw, In Building Israeli Democracy, Benjamin Netanyahu Could Become the BDS Movement’s Greatest Ally, THE INTERCEPT (Mar. 5, 2023), https://theintercept.com/2023/03/05/israel-benjamin-netanyahu-bds-boycott/ (reporting PA president Mahmoud Abbas’ critique of the legality of BDS and lack of “a democratic mandate”).

See What is BDS?, supra note 21.


26 Tal Keinan, BDS is an existential threat, YNETNEWS (Mar. 26, 2016), https://www.ynetnews.com/articles/0,7340,J-4782703,00.html [https://perma.cc/62DL-SMZM] (claiming that the success of the BDS movement cause a damning economic recession “against which internal tools are ineffective”).


28 Basic Law: the Knesset, 5778-2018, SIH 2743 (Ist.).

29 If the demands of BDS are followed through to their logical conclusion, all of the individuals who currently live between the Jordan River and the Mediterranean Sea would be given full equal and civil rights. The demographic shift would
Despite its organized and lucid inception, the BDS movement, by design, remains decentralized and nonhierarchical. BDS related activity, therefore, is a result of individuals and organizations choosing to respond to the BDS call in their respective communities and capacities.\textsuperscript{30} Efforts to engage in the BDS movement have spurred debates in universities, churches, and academic associations.\textsuperscript{31} Around the turn of the decade, the movement began to achieve significant victories across the United States. Several major U.S.-based religious institutions endorsed and participated in BDS initiatives, including the Evangelical Lutheran Church in America, the Presbyterian Church (USA), the Mennonite Church, and the United Methodist Church.\textsuperscript{32} Numerous foundations and pension funds, including the Bill and Melinda Gates Foundation, the Soros Fund, and TIAA-CREF, divested from companies in response to their facilitation of human-rights violations in Israel and the occupied Palestinian territory.\textsuperscript{33} Acclaimed writers, artists, and professional athletes such as Natalie Portman, Lorde, Lana del Rey, Lauryn Hill, Cornell West, Roger Waters, and Michael Bennett endorsed or participated in a cultural boycott of Israel or refused to travel there on account of its human rights violations.\textsuperscript{34} Student governments at approximately 50 universities across the country passed possibly render Jews a minority in this hypothetical political landscape. Miriam Berger, "Israel's hugely controversial "nation-state" law explained," Vox (Jul. 31, 2018), https://www.vox.com/world/2018/7/31/17623976/israel-jewish-nation-state-law-bill-explained-apartheid-netanyahu-democracy.

\textsuperscript{30} See What is BDS?, BDS, https://bdsmovement.net/what-is-bds (last visited Feb. 6, 2023) [https://perma.cc/QGWA-K5CP].


resolutions and referenda calling on their universities to divest from companies that are complicit in Israel’s human rights abuses. In response to these developments, the Israeli government has funneled millions of dollars to non-profit organizations in the United States to advocate against the BDS movement. In 2019 report, Humans Right Watch described this activity as part of an “increasingly global campaign” against Palestinian rights advocates. However, the Israeli regime has not acted alone to combat the BDS movement. Many U.S. government officials have also condemned the BDS movement, and others have taken a more aggressive counter strategy, which takes advantage of an asymmetrical power dynamic: state legislation that restricts BDS-related activity. In 2016, Stanley Tate, a founding member of the American Israel Public Affairs Committee (AIPAC), wrote that,
which must eradicate BDS from their institutions.41

Mr. Tate was right. Compared to Congress, state legislators are often able to pass laws at a quicker rate, and because of their smaller scale, are also more susceptible to interest groups.42 The decision to target state legislators was rewarded. Within two years of Mr. Tate’s statement, twenty-eight anti-BDS laws were passed across the country.43 Now, that number is up to thirty-four and counting.44

As early as 2013, the anti-BDS movement set off to win victories at the state level. Two principal actors deserve credit for this success: former South Carolina state representative Alan Clemmons and Professor Eugene Kontorovich. Their relationship began in 2013, when Representative Clemmons was invited to speak at the Knesset for his role in passing a symbolic law in South Carolina expressing support for Israel.45 At the time, Kontorovich taught at Northwestern University School of Law and worked for the Kohelet Policy Forum in Israel.46 During this initial meeting, Clemmons asked Kontorovich if he had “ideas for combating BDS.”47 In response, Kontorovich crafted a model anti-BDS law—which has since become the prototype—centered on the idea that “a state does not have to use its funds with those they view as involved in discriminatory activities.”48 Simple and powerful, this idea would fuel the wave of anti-BDS legislation in the coming years.49 In June 2015, South Carolina became the first state to pass an anti-BDS law based on this principle.50 Following South Carolina’s lead, Alabama, Arizona, Illinois, and other states passed the same or similar legislation.51

While Clemmons, Kontorovich, and AIPAC were all influential in passing early anti-BDS laws, they were not the only institutional actors involved. When Illinois passed an anti-BDS law in 2015, the Jewish United Fund (JUF) issued a statement indicating that they “worked closely with the sponsors [of the bill] in Springfield [state capital of Illinois] to move the legislation forward,” and, “in addition

42 See THE FEDERALIST NO. 10 (James Madison); Sarah Anzia, Most Research Finds Little Evidence that Interest Groups Influence US Politics, but that’s because it’s focused on the Federal Government, LONDON SCL. OF ECON. AND POL. SCI. BLOG (Oct. 1, 2019), https://blogs.bsc.ac.uk/usappblog/2019/10/01/most-research-finds-little-evidence-that-interest-groups-influence-us-politics-but-thats-because-it-focused-on-the-federal-government/ [https://perma.cc/S2WQ-LDHQ].
43 See discussion infra Section I.B. and note 59.
44 For an entire list of state laws, see infra note 59.
46 Id.
47 Id.
48 Id.
49 Joseph Sabag, the founder of the Israel Allies Foundation, an organization that provides resourcing, networking, and an umbrella network for legislative efforts to combat BDS, credited Kontorovich for coming up with an “innovative idea” that was “palatable enough” to allow the Israel Allies Foundation to “get some major players around the table,” and thanked Clemmons for allowing “South Carolina . . . to be the laboratory.” Sabag described the main goal of the anti-BDS movement as “the uniform expression of law in as many states as possible.”
51 Not shy to take credit for his work, Kontorovich cites “[t]he anti-BDS laws in Florida, Iowa, New Jersey and other state legislatures” as some examples of states where he helped develop anti-BDS laws. Bob, supra, note 45.
26 U. PA. J.L. & SOC. CHANGE 2 (2023)

to lobbying in Springfield, JUF helped mobilize voter outreach to legislators.” 52 This support was also acknowledged by then-Governor Bruce Rauner's political aids. 53

The cast of institutional actors advocating for these anti-BDS bills also included the American Legislative Exchange Council (ALEC), a conservative venture backed by the Koch Brothers, which drafts legislation for state and federal governments on a host of issues. 54 At ALEC’s summit in December 2015, the organization proposed two model anti-BDS bills. While the language of the bills has never been released, ALEC said the goal of the bills is to “to create disincentives to engaging in . . . boycott activities . . . [that have] the intention of creating significant economic harm to Israeli or Jewish entities by exerting coercive economic pressure on those doing business with them.” 55 Reports linked Wisconsin State Senator and ALEC national chairwoman Leah Vukmir to the model legislation. 56 Two years after introducing anti-BDS legislation to ALEC as the group’s national chairwoman, Senator Vukmir authored legislation introduced in her own state legislature in late 2017. 57 That bill was signed into law in April 2018. 58 There is no doubt that these initial movers have had an impact on the direction of the anti-BDS movement, and they have demonstrated an organized and coordinated effort to combat the BDS movement.

B. Form and Scope of Anti-BDS Laws

Since 2014, thirty-four states have passed anti-BDS laws. 59 Although these different laws


53 Id. ("JUF played a critical role in the passage of this important legislation.").


55 Id., at Part 3.

56 See id. at Part 3. See also ALEC Goes After BDS, INSTITUTE FOR PALESTINIAN STUDIES (July 25, 2016), https://www.palestine-studies.org/en/node/232267 [https://perma.cc/PAW8-EMWG] (emphasizing that Senator Vukmir has taken the lead on anti-BDS legislation).


59 Alabama, ALA. CODE § 41-16-5 (2016); Arizona, ARIZ. REV. STAT. ANN. §§ 35-393.00 to 35-393.03 (2016); Arkansas, ARK. CODE ANN. §§ 25-1-503 to 25-1-504 (2017); California, CAL. PUB. CONT. CODE § 2010(c)(1) (2017); Colorado, Colo. REV. STAT. § 24-54.8-201 (2016); Florida, FLA. STAT. §§ 215.4725, 287.135 (2016); Georgia, GA. CODE ANN. § 50-5-85 (2016); Idaho, SB 1086 (2021); Illinois, 40 ILL. COMP. STAT. 5/1-110.16 (2016); Indiana, IND. CODE §§ 5-10.2-11-1 to 5-10.2-11-26 (2016); Iowa, IOWA CODE §§ 12J.1-7 (2016); Kansas, KAN. STAT. ANN. §§ 75-374(b)(1) (2017); Kentucky, SB 143 (2019); Louisiana, HB 245 (2019); Maryland, EO 01.01.2017.25 (2017); Michigan, MICH. COMP. LAWS §§ 18.1241c, 18.1261 (2016); Mississippi, HB 761 (2019); Missouri, SB 739 (2020); Minnesota, MINN. STAT. § 3.226 (2017); Nevada, NEV. REV. STAT. §§ 332.065(2), 355.300 to 355.350 (2018); N.J. REV. STAT. § 52:18A-89.14 (2016); N.C. GEN. STAT. § 147-86.80-86.84 (2017); OHIO REV. CODE. ANN. § 9.76 (West 2022); ORLA. STAT. tit. 74 § 582 (2020); 62 PA. STAT. AND CONS. STAT. ANN. §§ 3601-3606 (West 2016); 37 R.I. GEN. LAWS § 37-2.6-3 to 37-2.6-4 (2016); S.C. CODE ANN. § 11-35-5000 (2015); S.D. Exec. Order No. 2020-01 (Jan. 14, 2020); S.J. Res. 170, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015); TEX. GOV’T CODE ANN. § 808.001 (West 2017); S.B. 186, 64th Leg., 2021 Gen. Sess. (Utah 2021); H.J. Res. 177, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.B. 2933,
attempt to accomplish the same expressive purpose—prohibiting individuals and groups from expressing support for the BDS movement—they are written in three functionally distinct forms. First, contract-restriction laws typically require persons to certify (during the bidding process) that they are not engaged in a boycott of Israel and that they will not engage in a boycott of Israel for the duration of the contract. Second, divestment-restriction laws require state pension funds and other public investments to divest from, or refrain from investing in, entities that engage in boycotts of Israel. These laws generally require the state to produce a list of entities that engage in BDS-related activity from which the funds must divest. In essence, they are divesting from those who are divesting from Israel: boycotting the boycotters. Third are symbolic laws that condemn boycotts of Israel but have no binding effect or state action.

Another distinguishing factor between the laws is whether they explicitly target BDS activity. Kontorovich drew a distinction between the South Carolina model that he created, which does not mention BDS, and the Illinois model, which is BDS-specific, noting, “[i]t simply depends on how much one wants to focus on Israel or throw a broader net.” 60 At least seven anti-BDS laws or executive orders reference the BDS movement. 61 The Indiana law condemns efforts to “delegitimize Israel’s existence, demonize the Jewish state, or undermine the Jewish people’s right to self-determination through” BDS. 62 The Arkansas law explicitly says that boycotting Israel constitutes making “discriminatory decisions on the basis of national origin.” 63 The California law states that it intends to “ensure that taxpayer funds are not used to . . . support any state or private entity that engages in discriminatory actions,” including “discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel.” 64 These laws place BDS at the center of the discussion regarding the state’s intent to silence a political viewpoint. Another

2021 Leg., Reg. Sess. (W. Va., 2021); Wis. Exec. Order No. 261 (Oct. 27, 2017). Although not all sources explicitly mention BDS or Israel, they all include anti-boycott efforts. Further, it can be inferred based on the date that these refer to Israel.

60 Bob, supra note 45.
61 Ark. Code Ann. § 25-1-501 (2017) (stating that Arkansas “seeks to act to implement the United States Congress’s announced policy of ‘examining a company’s promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel.’”); 2016 Cal. Legis. Serv. Ch. 581 (A.B. 2844) (West) (“It is the intent of the Legislature to ensure that taxpayer funds are not used to do business with or otherwise support any state or private entity that engages in . . . discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel.”); Ky. Exec. Order No. 2018-905 (2018) (stating that “the Commonwealth of Kentucky should take action to protect its trade relationships . . . and to renounce restrictive trade practices based upon discrimination, such as the BDS movement”); Ind. Code § 5-10.2-11-1 (2021) (stating that efforts such as the BDS movement “disproportionately harm thousands of Palestinian workers employed by Israeli owned firms; and . . . are antithetical and deeply damaging to the cause of peace, justice, equality, democracy, and human rights for all people in the Middle East”); 2019 La. Acts No. 155 (“The state of Louisiana unequivocally rejects the BDS campaign and stands firmly with Israel.”); N.J. Rev. Stat. § 52:18A-89.13 (2016) (declaring that New Jersey “is deeply concerned about the Boycott, Divestment and Sanctions (BDS) effort” and concluding that “a statutory prohibition be enacted to prohibit the investment of public employee retirement funds in companies boycotting Israel”); N.Y. Exec. Order No. 157 (2016) available at https://www.governor.ny.gov/sites/default/files/atoms/files/E0_157_new.pdf [https://perma.cc/DLN2-J28L] (stating that “the State of New York unequivocally rejects the BDS campaign and stands firmly with Israel”).
distinguishing factor is whether the law has limiting applications. For example, some laws have monetary thresholds, others only apply to corporations, and a few include ipse dixit provisions claiming that BDS activity is not protected by the First Amendment.

C. Ongoing Litigation

Of the thirty-four states with binding anti-BDS laws, at least four have been challenged on First Amendment grounds. Three of these challenges—in Arizona, Kansas, and Texas—resulted in a district court enjoining enforcement of the anti-BDS law. As previously discussed, the Arkansas court became the first district court to dismiss the First Amendment challenge. The Eighth Circuit originally overturned this decision, but then affirmed on rehearing en banc. The following is a brief summary of the four cases.

In Koontz, a Kansas public school teacher was required to certify that she was not “currently engaged in a boycott of Israel” in order to participate in a teacher training program. Responding to BDS calls made by members of her church, Koontz decided not to buy consumer products made by companies operating in illegal Israeli settlements. When she was asked to certify that she was not participating in a boycott of Israel, she said that she could not sign the form in good conscience. As a result, the state refused to contract with her. She filed a lawsuit and won a preliminary injunction on First Amendment grounds. While on appeal in the Sixth Circuit, the Kansas state legislature added a

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65 See, e.g., ALA. CODE § 41-16-5 (2016) (stating that the anti-boycott provision “does not apply to contracts with a total potential value of less than fifteen thousand dollars”).

66 See, e.g., COLO. REV. STAT. § 24-54.8-201 (specifying application to divestment from companies); ILL. COMP. STAT. 5/1-110.16 (2015) (prohibiting transactions by “companies that boycott Israel…”).

67 See, e.g., 2016 Cal. Legis. Serv. Ch. 581 (A.B. 2844) (West) (stating that “[t]he exercise of one’s First Amendment rights is not a justification for engaging in acts of unlawful discrimination. . . This includes, but is not limited to, discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel.”).


69 See Koontz, 283 F. Supp. 3d at 1027; Jordahl, 336 F. Supp. 3d at 1050-51; Amawi, 373 F. Supp. 3d at 759.


71 Arkansas Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021), aff’d 37 F.4th 1386 (8th Cir. 2022), cert. denied 143 S. Ct. 774 (rehearing en banc).


73 Id. at 1013.

74 Id. at 1014.

75 Id. at 1027.
monetary threshold to the law, mooting her standing, and the plaintiff agreed to dismiss the case.76

In Jordahl, Arizona attorney Mikkel Jordahl had a yearly renewable contract to provide legal advice to inmates in the county jail.77 Jordahl responded to the BDS call in his personal capacity by refusing to purchase consumer goods from companies operating in illegal Israeli settlements. He wanted to extend his boycott to his solely owned law firm, but after Arizona passed an anti-BDS law, Jordahl received the renewable contract with a new provision that required him to certify that his firm "is not currently engaged in a boycott of Israel."78 He signed the contract under protest, but when it came time to renew his contract in 2017, he filed a lawsuit instead, claiming that the law violated his First Amendment rights.79 The district court issued a preliminary injunction preventing Arizona from enforcing the certification requirement.80 While on appeal in the Ninth Circuit, the Arizona state legislature took a page out of the Kansas state legislature's playbook and amended the law to moot Jordahl's standing.81 The case was subsequently dismissed.82

Texas' anti-BDS law is similar to the Kansas and Arizona laws.83 In Amawi, plaintiffs, including a speech language pathologist, a high school debate judge, a reporter for Texas A&M radio station, and a writer for the University of Houston, faced the potential loss of employment contracts with Texas due to their support of the BDS movement.84 After filing suit, the district court declared the Texas anti-BDS law unconstitutional under the First Amendment.85 On appeal, Texas followed Kansas and Arizona's lead by altering the law to moot the plaintiffs' standing, and the Fifth Circuit subsequently dismissed the case.86


78 Id.
79 Id.
80 Id. at 1051.
82 Jordahl v. Arizona, 789 F. App’x 589, 590 (9th Cir. 2020).
83 Compare TEX. GOV’T CODE ANN. §§ 2270.001, 2270.002, 808.001 (West 2017) (in relevant part, “A governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract”) with KAN. STAT. ANN. §§ 75-3740e-f (2017) (in relevant part, “the state shall not enter into a contract with an individual or company to acquire or dispose of services, supplies, information technology or construction, unless such individual or company submits a written certification that such individual or company is not currently engaged in a boycott of Israel”) and ARIZ. REV. STAT. ANN. §§ 35-393.01(A) (2016) (in relevant part, “A public entity may not enter into a contract with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel.”)
85 Id. at 758.
86 Id. at 822.
Lastly, there is the *Arkansas Times* case, which involved an anti-BDS law that is almost identical to the ones amended during the course of the cases described above. The Arkansas law prohibited state entities from contracting with private companies unless the company “is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel.” Mr. Leveritt, publisher of the *Arkansas Times* (a local newspaper), had a renewing contract with the University of Arkansas. When it came time for a contract renewal, the university strictly enforced the contract provision required by the Arkansas law. Although Mr. Leveritt had never previously endorsed BDS, he took issue with the law because it forced his businesses to take a political stance, which he argued was unconstitutional. He filed a lawsuit challenging the enforcement of the law, which led to the first time a federal court upheld a constitutional challenge to an anti-BDS law.

II. POLITICAL BOYCOTTS UNDER THE LAW

This section will discuss the major legal questions currently at issue in the ongoing litigation: the expressive conduct test and the unconstitutional conditions doctrine. It will then apply these principles to the contract-restriction, divestment-restriction, and symbolic anti-BDS laws in turn.

A. Expressive Conduct Test

To receive First Amendment protection, BDS-related activity must be a form of expressive conduct. Under the *Texas v. Johnson* two-prong test, conduct is expressive if there is an intent to convey a message and the message is likely to be understood. The Supreme Court has held all kinds of conduct to be expressive, including raising a red flag, saluting a flag, burning a draft card, flag burning, the freedom to associate and assemble, picketing, and even distributing literature. Whether political boycotts are expressive conduct depends on a court’s interpretation of *N.A.A.C.P. v. Claiborne*.
ANTI-BDS LAWS AND THE POLITICS OF POLITICAL BOYCOTTS

Hardware Co and “the source, context, and nature of the anticompetitive restraint [boycott] at issue.”

The facts of Claiborne are familiar; during the height of the civil rights movement, a local branch of the National Association for the Advancement of Colored People (NAACP) launched a boycott of white merchants in Claiborne County, Mississippi. The goal was to pressure elected officials to adopt a series of racial justice measures, including the desegregation of public schools and facilities, the hiring of black police officers, public improvements in black residential areas, and other demands that would help ensure equal rights and opportunities for black citizens. Although the boycott was a non-violent means of protest, some acts and threats of violence did occur as a result. White merchants in Claiborne County responded to the boycotts by suing the NAACP for interfering with their business. Initially, the Mississippi Supreme Court ruled that the “boycott was illegally operated” and that each individual boycotter was liable for all economic consequences. Fortunately, the Supreme Court unanimously reversed, holding that “the boycott clearly involved constitutionally protected activity” through which the NAACP “sought to bring about political, social, and economic change.” The Court recognized that boycotts are composed of numerous speech and conduct “elements . . . that [are] ordinarily entitled to protection under the First and Fourteenth Amendments.” These elements are protected because they involve a practice that is “deeply embedded in the American political process,” in which individuals “banding together” to “make their views known, when, individually, their voices would be faint or lost.” Regarding the incidental violence that occurred during the NAACP boycotts, the Supreme Court held that, “[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual [boycotter] held a specific intent to further these illegal aims.” Finding no actual, apparent, or ratified unlawful goal or intent, the Supreme Court concluded that the boycott constituted a protected form of political expression under the “speech, assembly, association and petition” clauses of the First Amendment.

Koontz, Jordahl, and Amawi all relied on Claiborne to conclude that individual boycotts of Israel were expressive conduct protected by the First Amendment because they were part of a collective effort to effectuate political change. The Koontz court explicitly said that the individual action to engage in BDS is expressive, because “Ms. Koontz [and] other members of the Mennonite Church . . . have ‘banded together’ to express, collectively, their dissatisfaction with Israel and to influence governmental action.” The court noted that anti-BDS laws directly “oppose ‘Boycott, Divestment, Sanctions’

103 Id. at 899, 900.
104 Id. at 920; see also Eugene Volokh, Menacing Speech, Today and During the Civil Rights Movement, WALL STREET JOURNAL, Apr. 3, 2001, http://www.law.ucla.edu/volokh/menacing.htm [https://perma.cc/73LE-TBHV].
105 NAACP v. Claiborne Hardware Co., 393 So.2d 1290, 1301-1302 (Miss. 1980).
106 Claiborne Hardware Co., 458 U.S. at 911.
107 Id. at 907.
108 Id. at 907-08 (internal citation omitted).
109 Id. at 920.
110 Id. at 911, 931.
111 Koontz v. Watson, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018) (“She and others participating in this boycott of
campaigns, which protest the Israeli government’s treatment of Palestinians in the occupied Palestinian territories and Israel by applying economic pressure to Israel.”

The Jordahl court affirmed that “collective boycotting activities undertaken to achieve social, political or economic ends is conduct that is protected by the First Amendment.” It held that in accordance with Claiborne, individual boycotts are “entitled constitutional protections” when they “include the practice of persons sharing common views banding together to achieve a common end.”

The Amawi court found that “under Claiborne, Plaintiffs’ BDS boycotts were not only inherently expressive, but as a form of expression on a public issue, rest on the highest rung of the hierarchy of First Amendment values.”

Despite this clear-cut legal application, the Arkansas Times court held that boycotting Israel is not expressive conduct, and therefore not protected by the First Amendment. In arriving at this conclusion, the court narrowed the issue, ignored the broader political context, and only focused on the individual plaintiff's choice to not purchase a commercial product. Once these parameters were set, the court held it was “highly unlikely that, absent any explanatory speech, an external observer would ever notice that a contractor is engaging in a primary or secondary boycott of Israel.”

Continuing to ignore the basic factual premise of a consumer boycott, the court reasoned that, very few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the absence of certain goods from a contractor’s office mean that the contractor is engaged in a boycott of Israel.

In a further divergence from the decisions of her sister courts, the Arkansas Times court claimed that the controlling case was not Claiborne, but Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR).

In FAIR, the court unanimously dismissed a First Amendment challenge to a federal law which conditioned receipt of federal funds on permitting military recruiters to enter law school campuses. This law, known as the “Solomon Amendment,” was passed after various law schools refused to allow the military to recruit on campus in protest of the “Don’t Ask, Don’t Tell” policy. The Supreme Court determined that preventing military recruiters from speaking on campus was not “inherently expressive” conduct as it required accompanying “explanatory speech” for its

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112 Id. at 1013.
114 Id. at 1042.
116 See First Amendment Scholars’ Brief, supra note 5, at 1, 8 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982)) (arguing Claiborne was an “easy First Amendment case” because anti-BDS laws “are materially indistinguishable from the boycott at issue in Claiborne”).
118 Id. at 624.
119 Id.
120 Id. (citing Rumsfeld v. F. for Acad. & Inst. Rts. Inc., 547 U.S. 47 (2006)).
121 Rumsfeld, 547 U.S. at 1302.
message to be understood.123

Setting aside the specific language of the Arkansas state law, FAIR does not apply to the BDS movement, or anti-BDS laws in general, for the following reasons. First, there is a difference between an individual action to protest a specific policy, as was the case in FAIR, and a protester who is part of a larger social movement, like those in Claiborne. Because FAIR did not involve organized collective action, the court asked whether an observer would understand the law schools’ exclusion of military recruiters as expressive.124 The court concluded that an observer would not, because the purpose of the exclusion, which had the effect of “requiring military interviews to be conducted [off] campus,” would not be “overwhelmingly apparent.”125 However, the test applied in FAIR is inoperable when there is a recognized political movement that provides meaning to individual actions, as there is with the BDS movement.126 Second, there is a difference in subject matter. FAIR dealt with the issue of military recruiters and thus was not a consumer boycott case.127 Whereas both Claiborne and the BDS movement involve consumers banding together to boycott a product for a political purpose.128 The cases are distinguishable on this fact alone, because consumer boycotts have earned a certain historical pedigree in the law that neither boycotting the draft nor military recruitment services have earned.129 This level of deference is not offered to state legislatures in consumer boycott cases such as this one. Third, as First Amendment scholars have noted, “nothing in FAIR calls into question Claiborne’s central holding.”130 The fact that FAIR does not cite—let alone overturn—Claiborne indicates that the decisions are not in conflict because they address different issues.

The Arkansas Times judge could not have been unaware of these arguments. In fact, the judge explicitly considered that individual actions taken pursuant to a larger boycott movement might become expressive, pursuant to Claiborne, but he rejected the argument as “ultimately unpersuasive.”131 The judge did not give a clear reason for this conclusion. Nonetheless, that decision was affirmed by the Eighth Circuit, which read FAIR to mean that the First Amendment “does not extend to non-

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123 Id. at 1310-11.
124 Id. at 1311.
125 First Amendment Scholars’ Brief, supra note 5, at 10.
126 Jordahl, 336 F.Supp.3d at 1042 (stating that an attempt to apply FAIR to the anti-BDS laws “would completely undermine the First Amendment’s long-held precedents protecting First Amendment rights to assemble” and engage in political boycotts); Koontz, 283 F.Supp.3d at 1024 (FAIR does not apply because “the conduct the Kansas Law aims to regulate is inherently expressive” due to its taking place as part of a larger movement).
127 Amanu v. Pfingstville Indep. Sch. Dist., 373 F.Supp.3d 717, 743 (W.D. Tex. 2019) (“Claiborne deals with political boycotts; FAIR, in contrast, is not about boycotts at all. The Supreme Court did not treat the FAIR plaintiffs’ conduct as a boycott: the word ‘boycott’ appears nowhere in the opinion, the decision to withhold patronage is not implicated, and Claiborne is not discussed.”).
128 Id.
129 See First Amendment Scholars’ Brief, supra note 5, at 13 fn. 3, 17. Notably, the FAIR opinion mentioned that “judicial deference is at its apogee when Congress legislates under its authority to raise and support armies.” Rumsfeld, 547 U.S. at 57 (internal quotation marks and alterations omitted).
130 First Amendment Scholars’ Brief, supra note 5, at 9.
131 Arkansas Times LP v. Waldrip, 362 F.Supp.3d 617, 624 (E.D. Ark. 2019) (“the Arkansas Times’s argument that an individual’s refusal to deal, or his purchasing decisions, when taken in connection with a larger social movement, become inherently expressive is well-taken but ultimately unpersuasive.”).
expressive conduct intended to convey a political message.” 132 The issue, according to the Eighth Circuit, was not whether someone “intended to express an idea, but whether a neutral observer would understand that they’re expressing an idea.” 133 Strangely, the Eighth Circuit explained that Claiborne only discussed “protecting expressive activity accompanying a boycott, rather than the purchasing decisions at the heart of a boycott.” 134 The Eighth Circuit’s logic would upset decades of precedent leading all the way back to Claiborne, which stands for the proposition that an individual “purchasing decision” (as the Eighth Circuit put it) can derive protected expressive meaning from the larger political context.

It is hard to understand what is left of Claiborne and the right to engage in political boycotts if the Eighth Circuit’s logic would be broadly applied. The civil rights movement was to Claiborne what the BDS movement should be to any lawsuit challenging anti-BDS laws. Just as the civil rights movement gave a discernable meaning to the boycotts of white-owned businesses, the BDS movement gives an equally cognizable meaning to an individual action to boycott Israel. Yet, the Eighth Circuit did not even mention the colossal elephant in the room, the BDS movement. 135 This seriously undermines its decision and casts doubt on the motivations behind it. 136 Context matters. Otherwise, all manner of previously held expressive conduct would be categorized as inexpressive once stripped of its place in the broader social and political context. For example, what does a salute of the flag mean, 137 absent nationalism, patriotism, and history? It would just be a meaningless hand gesture. For that matter, what is a flag, but colored cloth tied to a pole?

B. Unconstitutional Conditions Doctrine

Truthful expressions concerning matters of public concern are protected by the First Amendment. 138 Because speech related to BDS clearly relates to political issues in the public sphere, it is presumptively protected. 139 If state legislatures sought to directly suppress BDS related speech, the

132 Arkansas Times LP v. Waldrip, 37 F.4th 1386, 1391 (8th Cir. 2022).
133 Id. at 1392.
134 Id. at 1392.
135 The Eighth Circuit did not use the word “Palestine” once in the decision. The degree to which the court managed to avoid any mention of the underlying political context is astonishing. The only mention of a broader political movement is buried in a footnote, where the court “acknowledge[s] that one of the Act’s six legislative findings suggests a broader purpose,” and quotes a line that says Arkansas seeks to divest from companies that promote boycotts, divestments, and sanctions of Israel. Arkansas Times, 37 F.4th at 1394 n.2. The court dismissed this clear statement of intent in favor of a nebulous conclusion that Arkansas seeks to “regulate commercial conduct, not political speech.” Id. (emphasis in original).
136 Compare infra Section III.B (describing how proponents of anti-BDS legislation characterize the boycotts as low value speech in the public domain, but not in the courtroom) with First Amendment Scholars’ Brief, supra note 5 at 17 (“Prohibiting discrimination is undoubtedly a compelling interest in many contexts, but its invocation here is a pretext, and transparently so.”).
137 Sw. West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (“There is no doubt that, in connection with the pledges, the flag salute is a form of utterance.”).
139 Amawi, 373 F. Supp. 3d at 745 (“Plaintiffs’ BDS boycotts are not only inherently expressive, but as a form of expression on a public issue, rest on the highest rung of the hierarchy of First Amendment values.”) quoting Claiborne, 485 U.S. at 913; Jordan, 336 F. Supp. 3d at 1047 (“The Act also unquestionably touches on matters of public concern.”).

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courts would likely apply strict scrutiny and strike the laws down.\textsuperscript{140} Anti-BDS laws do not directly ban BDS-related speech; instead, state legislatures indirectly employ divestment and contract restrictions to target BDS. Therefore, as demonstrated in \textit{Koontz, Jordahl, Amawi}, and the dissent in \textit{Arkansas Times}, the courts will need to apply the unconstitutional conditions doctrine, which prohibits the state from imposing conditions on government funds that infringe on a recipient's constitutionally protected rights.\textsuperscript{141}

\textit{U.S. Agency for International Development v. Alliance for Open Society International, Inc.} (hereinafter USAID) illustrates the unconstitutional conditions doctrine.\textsuperscript{142} There, the Supreme Court struck down a statute that required nongovernmental organizations to adopt a policy against prostitution and sex trafficking in order to receive federal funds.\textsuperscript{143} The Court held that the statute violated the First Amendment because "the [requirement] by its very nature affect[ed] "protected conduct outside the scope of the federally funded program."\textsuperscript{144} Expanding on this principle, the Court held that "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."\textsuperscript{145} While Congress is not required to fund any individual program, when it does decide to do so, it cannot withdraw that funding merely because an entity holds certain views.\textsuperscript{146}

Proponents of anti-BDS legislation cite \textit{Rust v. Sullivan} for the proposition that the government does not have to subsidize views it does not like.\textsuperscript{147} In \textit{Rust}, Congress gave federal money to clinics on the condition that doctors do not counsel their patients about abortion. The Court upheld this action because the government did not deny a benefit to anyone. The Court held this was not an unconstitutional condition, because Congress did not place a restriction on an individual outside the scope of the reason for the funding. Rather, this law simply insisted that public funds be spent for purposes for which they were authorized. This condition on clinics is an example of a valid restriction on government contracts. The Court in \textit{Rust} contrasted the law at issue with "cases involv[ing] situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federal funded program."\textsuperscript{148}

The Eighth Circuit's decision in \textit{Arkansas Times} did not reference \textit{Rust, USAID, Legal Services Corporation},\textsuperscript{149} or any other related case, because the majority opinion began and ended with the

\begin{footnotes}
\item[141] See discussion infra Section II.B. and note 150.
\item[142] 570 U.S. 2321 (2013).
\item[143] Id. at 2321.
\item[144] Id. at 2324 (quoting Rust v. Sullivan, 500 U.S. 173, 197 (1991)).
\item[145] Id. at 2328.
\item[146] Id. This rule was further fleshed out in \textit{Legal Services Corporation v. Velázquez}, where the Court held that a dispositive factor is whether the government restriction provides alternatives for those receiving federal funding to speak out. 531 U.S. 533, 1055 (2001).
\item[148] Rust, 500 U.S. at 197 (emphasis in the original). As noted infra at note 176, the court has not yet ruled on the status of public investments as subsidies or benefits.
\item[149] See infra note 146.
\end{footnotes}
expressive conduct test. However, the dissenting opinion offered a more complete analysis of the unconstitutional conditions doctrine. Judge Kelly began by noting that "[s]upporting or promoting boycotts of Israel is constitutionally protected under Claiborne." She also stated that "[w]ithout any explanation of how this condition seeks to 'define the limits of [the State's] spending program,' it can only be viewed as seeking to 'leverage funding to regulate speech outside the contours of the program itself.'" Thus, she concluded that the anti-BDS law "prohibits the contractor from engaging in boycott activity outside the scope of the contractual relationship. . . . Such a restriction violates the First Amendment." This application of the unconstitutional conditions doctrine should inform future decisions.

i. Applying the Unconstitutional Conditions Doctrine to Contract-Restriction Laws

State legislators argue that contract-restriction laws are merely meant to control the use of state funds by its contractors. But as Judge Kelly explained with regards to the Arkansas law in Arkansas Times, these statutes instead place restrictions on government contracts outside the scope of the funding. Specifically, they prohibit state contractors from engaging in a political boycott of Israel even if that boycott has no relationship to the state contract itself. This is "fatal to the State's reliance on its spending power, because the government may not, as a general matter, condition the award of a contract on the political views or political activities of the applicants."

To determine whether the contract-restriction laws infringe on an independent contractor's rights under the First Amendment, courts use guidelines developed in Pickering v. Board of Education, commonly known as the "Pickering Test." Under this test, a plaintiff must first show that the law in question infringes protected speech, which requires application of the expressive conduct test. If the plaintiff meets this initial showing, the burden shifts to the state to show that there is adequate justification to restrict BDS-related activity, which may implicate issues such as hate speech, as discussed in the sections below.

Applying the Pickering Test, the lower court found that the Plaintiffs' challenge of the anti-BDS law satisfied the burden of showing that the contract restriction at issue is an unconstitutional

150 Arkansas Times LP v. Waldrip, 37 F.4th 1386, 1398 (8th Cir. 2022) (Kelly, J., dissenting).
151 Id.
152 Id. (citing U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214-15 (2013)).
153 Id.
154 Arkansas Times LP, 37 F.4th at 1398 (Kelly, J., dissenting).
155 Id.
156 First Amendment Scholars' Brief, supra note 5, at 19; see also Fed. Commc'ns Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 399-401 (1984); USAID, 570 U.S. at 217-21.
158 Id. at 574-75.
159 See infra section II.A.
161 See infra, section III.B. (noting that state legislatures have been successful in arguing that limiting hate speech justifies passing anti-BDS laws, but courts have not been receptive to this claim).
condition on government contractors.\textsuperscript{162} After recognizing the protected status of BDS, the court in \textit{Jordahl} reasoned, "[t]here is no plausible relationship between the execution of the Firm's representation of their clients under the County contract and the Firm's avowal to refrain from engaging in a boycott of Israel," and that "the prohibited acts also have no relation to official contractors' duties in general."\textsuperscript{163} Said differently, the state could not meet its burden of showing that the contract provisions had a necessary impact on the actual operations of the state, and pursuant to the unconstitutional conditions doctrine, the anti-BDS law was struck down. Similarly, the court in \textit{Koontz} found that the Plaintiff met her initial burden under the \textit{Pickering} Test, because "[t]he First Amendment protects the right to participate in a boycott as the Supreme Court held explicitly in \textit{NAACP v. Claiborne Hardware Co.}"\textsuperscript{164} The court then dismissed the proffered government interests, which characterized as an effort "to undermine the message of those participating in a boycott of Israel" and "to minimize any discomfort that Israeli businesses may feel from the boycotts," as impermissible under the First Amendment.\textsuperscript{165} Thus, the \textit{Koontz} court held that even if the goals of the Kansas state anti-BDS law were constitutionally permissible, the contract-restriction would fail because it was not narrowly tailored to achieve its interest.\textsuperscript{166}

Applying this logic to the contract-restrictions found in anti-BDS statutes more broadly would require a court to analyze engagement in BDS-related activity under the \textit{Pickering} test. It is difficult to imagine a legitimate showing that BDS-related activity relates to a company's ability to perform a contract for which it bids, or that it relates to any official state activity. Even if economic motivations were truly the purpose of anti-BDS laws, the laws would be struck down for being both overinclusive for including boycotts of Israel that would not harm the business of state contractors and underinclusive for not including other political boycotts that might actually harm the business of the state.\textsuperscript{167} However, this analysis is not necessary because state legislators have not attempted to hide the fact that anti-BDS laws use the state's economic leverage to discourage political expression.

The contract-restriction laws resemble the regulations that were struck down in \textit{USAID} more than the ones upheld in \textit{Rust}. Like the statutes in \textit{USAID}, "the Act is not restricted to conduct within the scope of the State-funded program. Instead, it prohibits a contractor's boycott activity even if it is entirely unrelated to a state contract."\textsuperscript{168} And unlike the restriction in \textit{Rust}, which targets specific behavior related to the funding itself, the anti-BDS laws apply broadly and indiscriminately to any state contractor. Whether they are a teacher, engineer, or food vendor—anyone doing business with the state must sign a contract certifying they do not support a boycott of Israel. This blanket application illuminates the lack of connection between the condition and the purposes of the underlying contract.

Furthermore, these contract-restriction laws run afoul of the anti-orthodoxy principle expressed in \textit{West Virginia State Board of Education v. Barnette}.\textsuperscript{169} That case established the principle that

\textsuperscript{163} Id.
\textsuperscript{164} Koontz, 283 F. Supp. 3d at 1021.
\textsuperscript{165} Id. at 1022.
\textsuperscript{166} Id. at 1023.
\textsuperscript{167} For example, states with economies that rely on the energy sector ought to ban fossil fuel boycotts and divestment initiatives. Similarly, states with economies that rely on the weapons industry ought to ban anti-war boycotts. Both have a far more plausible connection to state economies than the BDS movement.
\textsuperscript{168} First Amendment Scholars' Brief, supra note 5, at 20.
\textsuperscript{169} 319 U.S. 624 (1943).
the government cannot prescribe truth in matter of opinion. Subsequent cases reaffirmed that free speech entails both the right to speak freely and the right to refrain from speaking at all.\textsuperscript{170} In the \textit{Arkansas Times} case in particular, the plaintiff did not have a pre-existing view on BDS, but he filed suit because the contract-restrictions forced him to adopt an opinion on a political issue and he believed this violated his First Amendment rights. This article contends that he was correct.

\section*{ii. Applying the Unconstitutional Conditions Doctrine to Divestment-Restricition Laws}

Divestment-restrictions in anti-BDS litigation have received far less analysis and inquiry than contract-restriction laws. As the previous section explained, the \textit{Pickering} test considers whether the activity targeted by government regulation is protected by the First Amendment and, if so, does the government regulation unconstitutionally restrict that activity. In this section, I argue that the two-step constitutional inquiry ought to remain the same for divestment-restriction laws.

In defense of divestment-restriction laws, state legislators claim that the government has no obligation to subsidize a private party’s political efforts, and in turn, states do not have to fund parties that engage in BDS-related activity.\textsuperscript{171} The opinion that supports these views is \textit{Regan v. Taxation Without Representation of Washington}.\textsuperscript{172} In \textit{Regan}, the Supreme Court upheld a law that prohibited nonprofit organizations seeking tax-exempt status from engaging in substantial lobbying efforts.\textsuperscript{173} The Court rejected the organization’s First Amendment claim on the grounds that the tax-exempt status had “much the same effect as a cash grant to the organization,”\textsuperscript{174} and that Congress did not violate the organization’s First Amendment right to lobby, rather, it merely chose not to “subsidize” it.\textsuperscript{175}

Reliance on \textit{Regan} ignores key factual distinctions with the anti-BDS laws.\textsuperscript{176} The tax code in \textit{Regan} allowed the plaintiff nonprofit group to continue lobbying and, simultaneously, “receive

\begin{itemize}
  \item \textsuperscript{170} See e.g., \textit{Woosley v. Maynard}, 430 U.S. 705, 714 (1977).
  \item \textsuperscript{171} For example, when former New York Governor Andrew M. Cuomo signed an executive order directing state entities to divest all funds from businesses supporting the BDS campaign, he said, “[a]s a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that New York state is constitutionally obligated to support the BDS Movement, which is not only irrational but also has no basis in law.” Andrew Cuomo, \textit{Gov. Andrew Cuomo: If You Boycott Israel, New York State Will Boycott You}, WASHINGTON POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boo.jpg [https://perma.cc/SAH5-7ACH]. New York State Senator Simcha Felder defended the executive order on the same grounds, stating, “The [anti BDS] legislation doesn’t prevent anyone from speaking or promoting a boycott, nor from making other vile and prejudicial statements... That’s a person’s constitutional right. But they don’t have a constitutional right to be a New York State contractor.” Ron Kampeas, \textit{Anti-BDS Laws Gain Momentum Across U.S., but Some Say They Go Too Far}, JEWISH TELEGRAPHIC AGENCY (Feb. 23, 2016) https://www.jta.org/2016/02/23/united-states/critics-charge-some-state-anti-bds-laws-surm-o-to-legitimize-israeli-settlements [https://perma.cc/6KXU-D8F1],
  \item \textsuperscript{173} \textit{Regan} 461 U.S. 540 (1983) at 544.
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.}
  \item \textsuperscript{176} The Supreme Court has already held that government contracts are benefits that cannot be unduly restricted. \textit{See} Bd. of Cty. Comm’rs v. Umbehr, 518 U.S. 668, 672 (1996) (treating government contracts as benefits in applying \textit{Pickering}). However, the Court has not yet ruled on whether public investments are subsidies or benefits. The case law on this issue is far more nebulous.
\end{itemize}
deductible contributions to support its non-lobbying activity.”\footnote{Regan, 461 U.S. at 553.} Although Regan upheld the challenged tax code provision, the bar on lobbying applied only to activities paid for with governmental subsidized funds.\footnote{\textit{See id.}} As a result, the nonprofits could continue to lobby if they used non-government funds to do so. Later courts styled this the “alternative channels test,”\footnote{For example, in \textit{FCC v. League of Women Voters of California}, the Court distinguished \textit{Regan} precisely because \textit{Regan} allowed for an adequate alternate channel of communication. 468 U.S. 364, 399-400 (1984).} which states that “in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with \textit{adequate alternative channels for protected expression}.”\footnote{\textit{Velazquez v. Legal Servs. Corp.}, 164 F.3d 757 at 766 (2d Cir. 1999) (emphasis added).}

Whether the government regulation in question provides alternative avenues of speech is crucial. Anti-BDS divestment laws do not create an alternative forum for BDS supporters doing business with the state, either outside their employment or separate from activity related to the federal funding, because they must certify that they categorically do not engage in boycotts of Israel.\footnote{\textit{See e.g., N.Y. Exec. Order No. 157 (2016) (directing the state to divest from any companies participating in BDS either directly or through a parent of subsidiary); Florida, Fl.A. STAT. §§ 215.4725, 287.135 (2016) (targeting any company that participates in a boycott of Israel).} Conversely, a benefit need not be called a subsidy for purposes of the law.”\footnote{\textit{Amawi F. Supp. 3d 717, 753 (describing the government’s reliance on \textit{Regan} as to “circumvent” the “heavy burden” of the \textit{Pickering test} as “unavailing.”).} In short, the legal issue is whether the government is deliberately burdening one group of people by refusing to invest in them because of a political view they hold that is unrelated to the investment. Although the government can deny funding

\footnote{\textit{Compare Regan}, 461 U.S. at 545 (“the government may not deny a benefit to a person because he exercises a constitutional right”) with \textit{Regan}, 461 U.S. at 549 (“a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.”) (emphasis added) and Amawi F. Supp. 3d 717, 753 (“The distinction between denying a public benefit and denying a subsidy was central to \textit{Regan}.”).}

Amendment scrutiny. When the government is speaking, with the funding itself, they should be struck down in Virginia, government speech is crucial not regarded no benefits participates principle that the government should burdened. Because state efforts to divest funds from entities that engage in BDS have nothing to do with Israel are unduly burdened. Because state efforts to divest from entities that engage in BDS have nothing to do with the funding itself, they would be struck down as an unconstitutional use of funds.

C. Symbolic Laws

Symbolic anti-BDS laws condemn the BDS movement in strong unequivocal terms but have no enforcement power. For example, the Virginia legislator passed a resolution "[e]xpressing the sense of the General Assembly in condemning the anti-Israel Boycott, Divestment, and Sanctions movement in Virginia, as its agenda is inherently antithetical and deeply damaging to the cause of peace, justice, equality democracy, and human rights for all peoples in the Middle East." Unlike the contract and divestment-restriction laws, this bill compels no action on behalf of the state. Therefore, it is likely a form of government speech.

While the First Amendment protects individuals from government restrictions on speech, the "government speech doctrine" generally exempts the government's own speech from First Amendment scrutiny. When the government is speaking, it is "entitled to say what it wishes ... and to select the views it wants to express." Rather than applying strict scrutiny, courts will permit the government to speak if the state policy motivating the speech rationally furthers a legitimate government interest. Therefore, determining whether the symbolic anti-BDS bills constitute government speech is crucial to the analysis.

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187 Alliance for Open Soc'y Int'l., Inc. v. U.S. Agency for Int'l Dev., 430 F.Supp.2d 222, 255 (S.D.N.Y. 2006). ("[W]hich regard to the point that governmental power to deny a subsidy implies the power to condition its acceptance, while undoubtedly a truism, the principle by itself falls short of the broader conception of the unconstitutional conditions doctrine that has emerged from the most recent Supreme Court jurisprudence.").

188 See, e.g., Speiser v. Randall, 357 U.S. 513, 527 (1958) (noting that the government cannot manipulate the denial of benefits in order to "produce a result which it could not command directly.").

189 See, e.g., N.Y. Exec. Order No. 157 (2016) (directing the state to divest from any companies participating in BDS either directly or through a parent of subsidiary); Florida, Fla. STAT. §§ 215.4725, 287.135 (2016) (targeting any company that participates in a boycott of Israel).

190 Id. at 218. [relates to n. 198/Agency for Int'l Dev.]


193 American Atheists, Inc. v. Port Authority of New York and New Jersey, 760 F.3d 277 (2d Cir. 2014).

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Of course, not every government action is considered speech, otherwise the government’s powers would balloon endlessly under the First Amendment. To determine whether the government is speaking, the courts apply a three part test: first, whether the government historically uses the medium to convey a message to the public; second, whether the public is likely to identify the speaker of that message as the government; and third, whether the government maintains effective control of the message. None of these individual factors is dispositive. Rather, the courts conduct a fact specific inquiry and weigh the different factors against one another to determine whether the government is effectively speaking. Applying this doctrine in various circumstances, the courts have found the facts sufficient to support a finding of government speech (and therefore not subject to First Amendment protections) with respect to communications by government officials, public monuments, and restrictions of state license plates.

While symbolic anti-BDS laws have not yet been challenged in court, nor have other similar pieces of legislation, the courts will likely find that non-enforceable bills such as the anti-BDS laws are effectively government speech. First, states have historically used the legislature to communicate messages to the public. Second, the public will likely recognize these bills as a form of government speech, since the bills have no enforcement mechanism, and are self-titled as “denouncements” and “condemnations.” Third, the government has full control over the message, given that state legislators are passing these resolutions. Therefore, symbolic anti-BDS laws are likely a form of government speech and they do not violate the First Amendment.

III. ADDITIONAL CONSIDERATIONS

A. Limitations on Protected Boycotts

Proponents of anti-BDS laws offer an additional challenge to the traditional understanding of Claiborne: that it only protects national boycotts that seek to vindicate a constitutionally protected right. This argument was proffered by the state of Texas in Amawi and subsequently rejected by the

195 See Walker, 576 U.S. at 208 (“That is not to say that a government’s ability to express itself is without restriction.”).
197 Id. at 253.
199 See generally, Summum, 555 U.S. 460.
200 See RICHARD H. MCADAMS, THE EXPRESSION POWERS OF LAW 16 (2015) (explaining how the expressive power of law can change behavior and social norms and is “rarely ever merely symbolic.”).
Afghanistan was in the context of industrial strife. Laws, legal interest. The court attempted to distinguish *Claiborne* by characterizing it as a particular type of boycott, and cited *Longshoremen's v. Allied Int'l* to support this claim. In *Longshoremen*, the Supreme Court held that a labor union's secondary boycott of Soviet goods to protest the U.S.S.R.'s invasion of Afghanistan was not protected by the First Amendment. The Court reasoned that it was within Congress's discretion to strike a balance between a labor union's freedom of political, social and economic change and the ability of neutral employers, employees, and consumers to remain free from coerced participation in economic boycotts. However, the Supreme Court was not making a blanket judgement that only some political boycotts were protected speech. Indeed, only a few months after *Longshoremen* was decided, the Supreme Court unanimously found in *Claiborne* that non-union boycotting activities aimed “to bring about political, social and economic change” were protected activities under the First Amendment. *Claiborne* made clear that cases like *Longshoremen* establish only that “[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined circumstances.” The circumstances that justified government regulation in *Longshoremen* are far removed from the circumstances of the anti-BDS laws. For starters, the anti-BDS laws are not federal laws, nor are they an expression of a national policy. And even if they were, *Longshoremen* was decided in the context of unions and secondary boycotts. The Court sought to ensure that consumers were protected from collateral damages of business disputes that only tangentially touched on expressive conduct.

BDS does not affect a market in nearly the same way that a union boycott would—and where the purpose of union boycotts tends to be economic in nature with tangential First Amendment concerns, BDS is undoubtedly a political movement with merely tangential effects (if any) on the economy. The core and periphery are reversed. Despite these differences, the attempt to limit *Claiborne*’s holding via *Longshoremen* continues to find currency. For example, a legal analysis by the California Assembly stated that “the U.S. Supreme Court has held that a boycott is a form of protected speech.”

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206 *Id.* at 746 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)).
209 *Id.* at 218.
210 First Amendment Scholars’ Brief, supra note 5, at 12 (citing *Claiborne*, 458 U.S. at 912).
212 *Id.* at 912.
Prominent anti-BDS advocate Marc Greendorfer criticized this interpretation as “a misstatement of the law and a significant and unsupported expansion of the reach of the First Amendment,” citing *Longshoremen* as support. In response to the claim that *Longshoremen* applies in the context of anti-BDS laws, the *Jordahl* court stated, “[d]efendants overstate the meaning of *Int’l Longshoreman*, which was decided in the context of federal labor laws. *Int’l Longshoreman* does not purport to state that there is no constitutional right to engage in boycotting activities.” Instead, the court held that *Longshoreman* has long been understood to be limited to the context of unions, where courts generally apply a different standard. But “[o]utside of the labor union context . . . the government has a much higher burden when it infringes on such activity.” Once again, the legal basis to strike down anti-BDS laws to protect expressive boycotts flows directly from well-established precedent, which considers not just a statute on its face, but also the socio-political context surrounding it.

B. *Low Value Speech—A Lower Level of Scrutiny*

As more courts rule on this issue, we can expect to see the focus of litigation shift from the “expressive conduct” issue to the “low value speech” issue. If a state can convince a court that BDS is a form of low value speech, it would potentially have an easier time warding off a First Amendment challenge, because low value speech is reviewed under a lower level of scrutiny than expressive conduct. Hate speech (otherwise known as discriminatory speech or group libel) is the only low value speech category state legislators have used to justify passing anti-BDS laws. This idea—that “[t]he states


214 Greendorfer, supra note 204, at 113 n.2.
216 *Id.* (finding that unions are generally prohibited from secondary boycotts through national labor relations legislation in order to decrease their economic power and influence).
217 *Id.* (emphasizing the importance of context to this inquiry, and stating that “[L]ongshoreman” highlights the context in which this type of government infringement on the First Amendment rights . . . is justified.).
218 In low value speech cases, the court feels comfortable balancing the interest of society against free speech restrictions in a manner normally prohibited by the First Amendment. When it conducts this balancing act, the Court does not privilege certain ideas or viewpoints above others; rather, it considers certain speech to be outside of the legally applicable concept of speech because it does not communicate ideas. Traditional categories of low value speech distinguish between speech that targets emotion and speech that targets ideas. For example, libel is connected to lies, incitement to anger, obscenity to sexual impulse, and threats to violence. Because these categories are considered “low value,” the Courts allows the government to regulate them more aggressively than they would “high value” speech. For more on this issue, see generally Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).
219 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (discussing how the lower court rejected the petitioner’s First Amendment argument because the ordinance in question reached only “fighting words” and therefore did not run afoul of the First Amendment).
can define the terms by which they spend funds and can refuse to subsidize discriminatory conduct”—was originally conceived of by Eugene Kontorovich.221 However, state legislators have not argued that they are targeting hate speech in court, because to do so would be to admit that they are directly targeting expressive conduct.

Low value speech arguments would likely draw support from the well-established authority of states to enact antidiscrimination laws.222 The Supreme Court has held that “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.”223 But it is an open question whether a state’s interest in preventing discrimination would justify an outright prohibition on consumer boycotts. In the case of anti-BDS laws, a court need not reach an answer to this question if the BDS boycotts are indeed constitutionally protected expressive conduct.224 Additionally, anti-discrimination interest asserted post hoc is pre-textual, because anti-BDS laws were clearly designed to suppress a political viewpoint, not to prevent discrimination.225 For example, in Koontz, the court stated:

Kansas Law’s legislative history reveals that its goal is to undermine the message of those participating in a boycott of Israel. This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment.

More specifically, the court found that “[several] individuals emphasized the need to oppose ‘Boycott, Divestment, Sanctions’ campaigns, which protest the Israeli government’s treatment of Palestinians in the occupied Palestinian territories and Israel by applying economic pressure to Israel.”227 Additionally, the court noted that “[m]ultiple legislators made statements during debate about the Kansas Law that its purpose was to stop people from antagonizing Israel. And multiple private individuals testified to the same effect.”228

The Koontz court’s findings are not unique to Kansas. Inquiries into other anti-BDS laws have revealed the same sentiment: an overriding purpose that has little to do with discrimination and is

221 See supra Section IIA (describing how, in order for BDS-related activity to receive First Amendment protection, a court must find a form of expressive conduct).
222 See First Amendment Scholars’ Brief, supra note 5 at 17 (“Prohibiting discrimination is undoubtedly a compelling interest in many contexts, but its invocation here is a pretext, and transparently so.”).
224 Id.
225 Id. at 1013.

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instead targeted at suppressing the political views of the BDS movement.\(^{229}\) For example, when Governor Matt Bevin of Kentucky signed the anti-BDS bill, he described BDS as “a new form of anti-Semitism,” and he mentioned that Israeli Prime Minister Benjamin Netanyahu had personally requested the passage of this order when the governor visited Israel earlier in the year.\(^{230}\) When the state of Washington passed an anti-BDS law, state senator Michael Baumgartner was particularly candid describing its purpose. During an interview with the press, he said, “[i]f students want to protest on campus and do what students do, that’s fine. But we’ll settle the question for them, the adults in [the legislature].”\(^{231}\) For Senator Baumgartner, anti-BDS laws allow the state to “just shut down these conversations.”\(^{232}\) Mia Ackerman, Deputy Majority Leader of the Rhode Island state legislature said that the anti-BDS bill is a proactive step against the BDS movement, “which we want to get out in front of, as opposed to react to. Support for BDS is becoming a national trend, with a lot of that support stemming from universities. As a small state, we need to take a stand.”\(^{233}\) Representative Phil King of Texas wrote on his website prior to the passage of the anti-BDS bill that, “Texas will not tolerate national-origin discrimination against Israel, which is precisely what BDS is . . . BDS is not only Israel’s problem, its Texas’ problem as well.”\(^{234}\) California Assemblymember Travis Allen said, “[i]t’s my conviction that any company that is intentionally inflicting economic harm on the state of Israel is not economically aligned with the values of California’s residents and is undeserving of California’s financial investments.”\(^{235}\)

Even if the anti-BDS laws were a legitimate attempt to combat anti-Semitism, the government cannot discriminate on the basis of viewpoint—even against low value speech—unless it proves that this type of discrimination is the worst form of low value speech.\(^{236}\) BDS is a political movement targeting certain political activity conducted within Israel, not a class of people on account of their race or religion. A cursory analysis of the BDS movement’s history and goals offers clear evidence that the movement is politically motivated, not racially animated. Several eminent First Amendment scholars, representing different segments of the political spectrum, wrote an amicus-brief in which they described

\(^{229}\) First Amendment Scholars’ Brief, supra note 5, at 2-3 (“The [Arizona anti-BDS] Act’s legislative history confirms that Arizona’s legislators enacted the law to suppress a political viewpoint and political movement with which they disagree. Multiple legislators, including the Act’s primary sponsor, made statements throughout the legislative process highlighting their opposition to the BDS campaign and their intent to undermine the BDS movement. As explained below, the Act is little more than an effort to decide a controversial political debate by legislative fiat. The First Amendment forbids this kind of coercion.”).


\(^{232}\) Id.


\(^{235}\) Bitran, supra note 221, at 14.

\(^{236}\) See R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (allowing for content-based discrimination of low value speech by the government when the regulation is based on the very reasons why the particular class of speech is proscribable).
BDS as a form of “nonviolent, politically motivated boycott[] involving individual consumers who have ‘banded together and collectively expressed their dissatisfaction,’ with the policies of Israel and the policies of the United States toward Israel.” 237 The court in *Jordahl* came to the same conclusion, finding that the “[p]laintiff[] want[s] to participate in collective economic boycotts of goods and products from companies doing business in Israeli-occupied settlements in order to show their political discontent with Israel’s policies toward Palestine.” 238 The economic tactics employed in the BDS movement are a means to a political end, which the court identified as promoting “equal human dignity and rights for all people in the Holy Land” and “an end to Israeli settlement building and the occupation of Palestinian land.” 239 It makes no difference to supporters of the BDS movement whether the target of their boycott is Israeli, Palestinian, or any other race or ethnicity. What matters is whether the target company is perceived to be perpetuating the oppression of Palestine. Therefore, in targeting BDS, the law at issue in *Jordahl* and all anti-BDS laws sweep in all manner of constitutionally protected expression and association that touch at the core of First Amendment protections.

C. Implications of Copycat Laws

While anti-BDS laws are meant to target Palestinian advocacy in particular, the ramifications of the Eight Circuit’s decision in *Arkansas Times LP* will likely have broader free speech implications. Lawmakers of all stripes are paying attention to this low effort, high reward tactic to silence speech they disagree with. The research director of the Centre for Media and Democracy, David Armiak, explained how “[a]ctivists seriously concerned with the climate, the environment, and the future of our youth and the planet see divestment as an important strategy, to get corporations on board to do what they can . . . If governments enact these laws, [then] that could chill those corporations doing divestment. It’s going to make activists’ job much more difficult.” 240 Similarly, a senior staff attorney at Palestine Legal, Meera Shah, warned that these laws are “shrinking the space for public debate and action on some of the most important issues of our time.” 241

Copycat bills have begun to spring up across the country, using the anti-BDS laws as a template for suppressing climate change activism, gun control advocacy, and other contentious political

239 *Id.* at 1048.
241 *Id.*
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causes. The Supreme Court denied cert for the Eighth Circuit decision, which is likely a tactic to get more circuits to weigh in before they rule on the issue. While an analysis of the copycat laws is outside the scope of this article, it is not an overstatement to say that the judicial resolution of anti-BDS laws will affect the right to engage in political boycotts beyond just the Palestinian-Israeli conflict.

V. CONCLUSION

The right to engage in political boycotts has long been treated with reverence by both the public and the courts. However, in response to the growing success of the Boycott, Divestment, and Sanctions movement, thirty-four states have passed anti-BDS laws that seek to limit political boycotts of Israel by leveraging state contracts and investment portfolios against individuals who engage in BDS-related activity. This effort to suppress speech continues to have success at the highest levels of government: in 2016, both the Republican and the Democratic party platforms included language disavowing the BDS Movement. In May 2017, all 50 state governors signed on to an initiative sponsored by the American Jewish Committee called “Governors United Against BDS,” condemning BDS as incompatible with the values of our states and our country. In June 2021, Republican Senator Marco Rubio and Democratic Senator Joe Manchin introduced the “Combating BDS Act of 2021,” which is intended to “help state and local governments stand up to the anti-Israel boycott, divestment, and sanctions (BDS) movement” by “increasing protections for state and local governments in America that divest from, prohibit investment in, or otherwise restrict contracting with firms that knowingly engage in commerce-related or investment-related BDS activity attacking Israel, as well as persons doing business in Israel or Israeli-controlled territories.” In July 2022, Senator Tom Cotton, addressing the Christians United for Israel summit, previewed plans for a bill that denies military


244 See 2016 REPUBLICAN NATIONAL CONVENTION 47 (2016), https://prod-eon-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [https://perma.cc/6G5E-69J1] (“We reject the false notion that Israel is an occupier and specifically recognize that the Boycott, Divestment, and Sanctions Movement (BDS) is anti-Semitic in nature and seeks to destroy Israel.”); Democratic Party Platform, The American Presidency Project (July 21, 2016), https://www.presidency.ucsb.edu/documents/2016-democratic-party-platform/ [https://perma.cc/4FP1-GLX7] (“That is why we will always support Israel’s right to defend itself, including by retaining its qualitative military edge, and oppose any effort to delegitimize Israel, including at the United Nations or through the Boycott, Divestment, and Sanctions Movement.”).


contracts to any company that boycotts Israel.\textsuperscript{247} Not to be outdone by his colleagues in the Senate, Congressman Lee Zeldin—joined by 46 of his House Republican colleagues—introduced the “Israel Anti-Boycott Act,” which “affirms Congress’ opposition to the Boycott, Divestment and Sanctions (BDS) movement.”\textsuperscript{248} These efforts to chill speech critical of Israel will only be emboldened by the Eighth Circuit’s recent decision. And while these actions are presently focused on the BDS movement, they might prove to have larger ramifications on the right to engage in political boycotts more generally.

This article fills an analytical void in the literature by weaving a First Amendment analysis into the political and historical context that surrounds this growing controversy. Courts will be better equipped to answer the legal questions after confronting the history of the BDS movement and the efforts of government action to suppress it. The findings point to a clear motive: a concerted effort to chill speech critical of Israel. Until now, the majority of courts have recognized this political reality and have upheld the rights promised under the First Amendment. Whether the Eighth Circuit’s contrary decision will prove to be an aberration or a harbinger of things to come remains unclear. But given the divisive nature of this issue, there will likely continue to be a divergence between courts that recognize the speech-silencing motivations behind anti-BDS laws and courts that plead the ostrich defense. To protect freedom of expression, courts must recognize the nationwide attempt to enforce an orthodoxy as something antithetical to First Amendment principles. The legal analysis logically follows the political one. Both proponents and opponents of the BDS movement have the right to voice their opinions and disagreements. It should be speech that determines the outcome of those debates, not legislation.
