

**ANALYZING THE CONSTITUTIONALITY OF ANTI-BDS LAWS:  
INDIVIDUAL RIGHTS VERSUS STATE INTERESTS**

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I. INTRODUCTION

As of 2021, thirty-five states (hereinafter “the States”) have enacted legislation to restrict political boycotts by those that engage in and support the Boycott, Divestment, Sanction (“BDS”) movement in protest against Israeli

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government policies affecting the Palestinian people.<sup>1</sup> These laws are implemented through anti-BDS legislation that targets the speech and conduct of individuals, organizations, and companies that enter into government contracts.<sup>2</sup> Members of Congress have introduced legislation to prohibit boycotts against Israel, but the introduced legislation has not passed due to concerns regarding their constitutionality.<sup>3</sup> Those who advocate for anti-BDS legislation assert that the BDS movement displays discrimination and prejudice towards Jewish individuals.<sup>4</sup> The BDS movement and its supporters argue that their call for boycotting, divesting from, and sanctioning Israel is rooted in opposition to the Israeli government's policies affecting Palestinians, asserting that it is not antisemitic but rather a form of peaceful protest.<sup>5</sup> Section III of this Comment further addresses the characterization of the BDS movement as antisemitic by some states.<sup>6</sup>

As anti-BDS laws expanded, federal courts began striking them down as unconstitutional, citing the constitutional right to political boycotts.<sup>7</sup> However, there is a lack of uniformity in the constitutional analyses and decisions of federal courts regarding anti-BDS laws, leading to a risk of inconsistent interpretations of constitutional rights across the Nation.<sup>8</sup> The aim of this Comment is to

1. Lara Friedman, *Legislation in US States Targeting Boycotts of Israel and/or Settlements 2014-Present*, FOUND. FOR MIDDLE E. PEACE 1, 13 <http://fmep.org/wp/wp-content/uploads/State-BDS-and-Settlement-legislation-table.pdf> (Feb. 27, 2023, 1:24 PM). As of the date of this Comment, the thirty-five states that have enacted anti-BDS legislation are: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.*

2. *Types of Legislation*, PALESTINE LEGAL, <http://legislation.palestinelegal.org/types-of-legislation/> (last visited Apr. 14, 2023).

3. H.R. 6940, 117th Cong. (2022); S. 2119, 117th Cong. (2021); H.R. 1697, 115th Cong. (2017); S. 720, 115th Cong. (2017).

4. See Press Release, Lee Zeldin, Representative, House of Representatives, Rep. Zeldin Introduces "Israel Anti-Boycott Act" to Combat BDS Movement, Anti-Israel Boycotts (Mar. 3, 2022), <http://web.archive.org/web/20220303202645/http://zeldin.house.gov/media-center/press-releases/rep-zeldin-introduces-israel-anti-boycott-act-combat-bds-movement-anti>; N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2023) (discussing a prohibition of boycotting against Israel that is intended to "inflict economic harm" with Israel).

5. *What Is BDS?*, BOYCOTT, DIVESTMENT, SANCTIONS, <http://bdsmovement.net/what-is-bds> (last visited Apr. 14, 2023).

6. See discussion *infra* Section III.A.

7. Press Release, ACLU of Texas, Third Federal Court Blocks Anti-BDS Law as Unconstitutional (Apr. 25, 2019, 9:15 PM), <http://www.aclu.org/press-releases/third-federal-court-blocks-anti-bds-law-unconstitutional>.

8. Ark. Times L.P. v. Waldrip, 988 F.3d 453, 467 (8th Cir. 2021), *rev'd en banc*, Ark. Times L.P. v. Waldrip, 37 F.4th 1386 (8th Cir. 2022) (holding that Arkansas' anti-BDS law

scrutinize the language of anti-BDS legislation to analyze its constitutionality, with a specific focus on the First Amendment's Freedom of Speech Clause and the Fourteenth Amendment's Due Process Clause.<sup>9</sup> Section II explains the BDS movement.<sup>10</sup> Section III discusses the States' legislative intent behind anti-BDS laws.<sup>11</sup> Section IV analyzes the various forms of anti-boycott laws and their impact on multiple parties.<sup>12</sup> Section IV also sets forth the newest anti-BDS law introduced in Congress and discusses the likelihood of its enactment.<sup>13</sup> Section V analyzes the constitutionality of anti-BDS laws under the First Amendment's Freedom of Speech Clause and the Fourteenth Amendment's Due Process Clause.<sup>14</sup> Additionally, this Comment discusses whether such laws are preempted by federal law on foreign affairs<sup>15</sup> and proposes a uniform federal policy and federal law that will promote consistency in the American Jurisprudence.<sup>16</sup> It is important to note that this Comment does not endorse or encourage antisemitism and solely focuses on analyzing the constitutionality of anti-BDS laws.

## II. WHAT IS THE BOYCOTT, DIVESTMENT, SANCTION MOVEMENT?

In 2005, the Palestinian Civil Society (the "PCS") established the BDS movement, seeking freedom, justice, and equality for the Palestinian people through non-violent punitive measures such as boycotts, divestments, and sanctions against the Israeli government's policies that affect Palestinians.<sup>17</sup> The movement's primary objective is to pressure Israel to recognize "the Palestinian people's inalienable right to self-determination" and comply with current

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violates the First Amendment due to its restrictive application impeding on contractors' constitutionally protected speech); *A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 421 (S.D. Tex. 2022) (addressing that decisions of several courts addressing anti-BDS laws have not been uniform); *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1230 (N.D. Ga. 2021); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1049 (D. Ariz. 2018); *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 763–64 (W.D. Tex. 2019), *vacating as moot sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020).

9. See discussion *infra* Sections III.A–B, V.A–C.
10. See discussion *infra* Part II.
11. See discussion *infra* Part III.
12. See discussion *infra* Part IV.
13. See discussion *infra* Section IV.B.
14. See discussion *infra* Section V.A.
15. See discussion *infra* Section V.B.
16. See discussion *infra* Parts VI, VII.
17. *What Is BDS?*, *supra* note 5.

international law.<sup>18</sup> The BDS movement provides a list of three demands for Israel, which read as follows: (1) “ending its occupation and colonization of all Arab lands and dismantling the Wall”; (2) “recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality”; and (3) “respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.”<sup>19</sup> The BDS movement advocates its goal to encourage citizens and governments of the world to boycott, divest, and sanction Israel “until Israel complies with international law.”<sup>20</sup>

The BDS movement thoroughly outlines the history of the Israeli-Palestinian feud; here, however, the history will be condensed and begin with U.N. Resolution 181.\* The United Nations (“U.N.”) passed Resolution 181 in 1947 that directed the establishment of separate Arab and Jewish states and a Special International Regime for the City of Jerusalem.<sup>21</sup> According to the Office of the Historian, the Palestinians rejected Resolution 181, citing concerns over the allocation of land and the effect on “the Arab population that would remain in Jewish territory under the partition.”<sup>22</sup> This rejection contributed to the 1948 Arab-Israeli war.<sup>23</sup> In response, the U.N. created Resolution 194, which allowed for Palestinian refugees to return to their homes or to receive compensation if they lost their home and did not wish to return.<sup>24</sup>

The dispute has seen an increase of violence and casualties over the years, exacerbated by tension between Israel and nearby Arab countries.<sup>25</sup> The tension culminated in the Arab-Israeli war in 1967, which resulted in Israel

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18. Palestinian Civil Society, *Palestinian Civil Society Call for BDS*, BOYCOTT, DIVESTMENT, SANCTIONS (July 9, 2005), <http://bdsmovement.net/call>.

19. *What Is BDS?*, *supra* note 5.

20. *Id.*

21. G.A. Res. 181 (II), at 133 (Nov. 29, 1947). This Comment briefly discusses some of the historical background that the BDS movement indicates to be significant in leading to its establishment, which will only serve to provide an adequate understanding of the movement. Thus, the historical background provided here is not intended to be a comprehensive analysis of the history behind the Israeli-Palestinian feud.

22. *The Arab-Israeli War of 1948*, OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1945-1952/arab-israeli-war>, (last visited Apr. 14, 2023). The allocation of land concerns reportedly stemmed from the Arab State receiving a disproportionate amount of the territory that would deprive it of essential agricultural lands and seaports. *The Nakba Did Not Start or End in 1948*, ALJAZEERA (May 23, 2017), <http://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948>.

23. *The Nakba Did Not Start or End in 1948*, *supra* note 22.

24. G.A. Res. 194 (III), ¶ 11 (Dec. 11, 1948).

25. See Jeremy Bowen, *1967 War: Six Days That Changed the Middle East*, BBC (June 5, 2017), <http://www.bbc.com/news/world-middle-east-39960461>. The surrounding Arab countries in the 1967 war included Egypt, Jordan, and Syria. See *id.*

occupying portions of Palestinian territory.<sup>26</sup> The U.N. intervened by passing Resolution 242, which emphasized the need to establish peace in the Middle East and “the inadmissibility of the acquisition of territory by war.”<sup>27</sup> The resolution called for Israel to withdraw its armed forces from territory occupied during the war, as well as “[t]ermination of . . . belligerency and . . . acknowledgement of the sovereignty . . . of every State in the area . . . .”<sup>28</sup>

An international human rights organization, Human Rights Watch, reports that the Israeli government implemented laws, policies, and official statements, as well as expanded into settlements, to maintain control over demographics, political power, and land.<sup>29</sup> The BDS movement documents that this has resulted in the disposition, confinement, and separation of Palestinians.<sup>30</sup> The U.N. Special Rapporteurs reported that there are 700,000 Israeli settlers living in Palestinian territories in East Jerusalem and the West Bank.<sup>31</sup> The BDS movement argues that the occupation in these territories violates the 1949 Geneva Conventions, which prohibit the transfer of an Occupying Power’s civilian population into the occupied territory.<sup>32</sup> While the Gaza Strip is a Palestinian exclave containing two million Palestinians, it is nearly uninhabitable and Israel controls its air space, sea, and borders, which the BDS movement argues is a concern that highlights the extent of Israeli control over Palestinian

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26. *See id.*

27. *Id.*; S.C. Res. 242, at 8 (Nov. 22, 1967).

28. S.C. Res. 242, *supra* note 27, ¶ 1.

29. *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, HUM. RTS. WATCH (Apr. 27, 2021), <http://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>. The Special Rapporteur’s report submitted to the United Nation’s Human Rights Council discusses the impact of Israel’s military legal system on the lives of Palestinians in the West Bank. *See* Michael Lynk (Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967), *Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967*, U.N. Doc. A/HRC/49/87 (Mar. 21, 2022). The military legal system focuses on the regulation of security. *Id.* Palestinians arrested for security offenses, such as “participating in protests and non-violent civil disobedience, standard criminal acts, traffic violations, terrorism, membership in over 400 banned organizations, taking part in political meetings and engaging in civil society activities,” face trials conducted in Hebrew—despite the fact that many Palestinians do not speak Hebrew—with few procedural and substantive legal protections, restricted access to evidence, and a conviction rate of over ninety-nine percent at the time of the report. *Id.*

30. *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, *supra* note 29.

31. Lynk, *supra* note 29, at 3; *Israel Settlement Expansion ‘Tramples’ on Human Rights Law, Experts Contend*, UN NEWS (Nov. 3, 2021), <http://news.un.org/en/story/2021/11/1104792>.

32. *See* Lynk, *supra* note 29, at 2–3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

territories.<sup>33</sup> However, according to Al Jazeera, the increase in Palestinian uprising to end Israel's alleged occupation is arguably a contributing factor to the Gaza strip blockade.<sup>34</sup>

In the 1990s, the government of Israel and the leaders of the Palestinian Liberation Movement (“PLO”) entered into two agreements known as the Oslo Accords (the “Accords”), which resulted in the PLO’s formal recognition of the state of Israel and provided for Palestinian self-governance in Gaza and the West Bank.<sup>35</sup> Following ratification of the Accords, Palestinian officials claimed that Israel did not comply with troop withdraws agreed to in the Accords, while critics of the Accords argue that the Palestinian Authority was not adequately policing areas under its control.<sup>36</sup> Critics further argue that the unsuccessful peace attempts were in part due to the ongoing occupation of Palestinian territory and as a result of the failed attempts to reconcile, the Palestinian militants launched a second intifada in 2000.<sup>37</sup> In 2002, Israel built a wall cutting through the West Bank and Jerusalem.<sup>38</sup> Israel asserts that the wall is a security measure necessary to protect itself, whereas the Palestinians view it as an “illegal land grab” supported by the International Court of Justice in 2004 declaring the wall to be “contrary to international law.”<sup>39</sup>

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33. *The Nakba Did Not Start or End in 1948*, *supra* note 22; *see also What Is BDS?*, *supra* note 5. Israel controls the goods that enter and exit the Gaza Strip. Lynk, *supra* note 29, at 14. With low supplies of drugs and medicine, lack of healthcare professionals, inadequate treatment equipment, and restricted ability to travel outside the Gaza Strip, Gazans are deprived of a proper healthcare system and “the fundamental right of freedom of movement.” *Id.*

34. *Gaza Strip: A Beginner’s Guide to an Enclave Under Blockade*, ALJAZEERA, <http://www.aljazeera.com/news/2021/3/14/a-guide-to-the-gaza-strip> (Aug. 5, 2022, 3:51 PM); *Oslo Explained*, ALJAZEERA (Sept. 13, 2013, 1:55 AM), <http://america.aljazeera.com/articles/2013/9/13/oslo-accords-explained.html>.

35. *The Oslo Accords and the Arab-Israeli Peace Process*, OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1993-2000/oslo> (last visited Apr. 14, 2023); *Oslo Accords*, HIST., <http://www.history.com/topics/middle-east/oslo-accords> (Aug. 21, 2018).

36. *The Oslo Accords and the Arab-Israeli Peace Process*, *supra* note 35; *Oslo Accords*, *supra* note 35.

37. *The Oslo Accords and the Arab-Israeli Peace Process*, *supra* note 35; *Oslo Accords*, *supra* note 35; *see also* Jeremy Pressman, *The Second Intifada: Background and Causes of the Israeli-Palestinian Conflict*, 23 J. CONFLICT STUD. 114, 114 (2003).

38. Oded Balilty, *AP Photos: Israel’s Separation Barrier, 20 Years on*, AP NEWS (June 27, 2022), <http://apnews.com/article/politics-middle-east-jerusalem-israel-west-bank-2ce5d9956b729ad6169c880d00068977>; *see also* Andrei Popviciu & Lubna Masarwa, *Gaza: What the Iron Wall Built by Israel Means for Besieged Palestinians*, MIDDLE E. EYE, <http://www.middleeasteye.net/news/israel-iron-wall-gaza-palestinians-siege> (last visited Apr. 14, 2023).

39. Balilty, *supra* note 38.

Israel addresses that the wall surrounding the Gaza Strip is a security measure but never intended to be a permanent border.<sup>40</sup> In 2022, the Special Rapporteur submitted a report to the Human Rights Council, which concluded that some aspects of Israel’s “apartness rule” in occupied territories constitute apartheid, such as “segregated highways, high walls, extensive checkpoints, a barricaded population, missile strikes and tank shelling of a civilian population, and the abandonment of the Palestinians’ social welfare to the international community.”<sup>41</sup> Additionally, U.N. experts have reported that Palestinians “have been subject to [Israel’s] zoning and planning” policies that would eliminate the Palestinian people’s access to “housing, safe drinking water and sanitation . . . healthcare and educational facilities.”<sup>42</sup> Overall, the BDS movement asserts that the treatment described, as well as certain resolutions passed by the U.N., evidence the need for non-violent punitive measures to be pursued until Israel complies with international law.<sup>43</sup>

### III. THE STATES’ LEGISLATIVE INTENT IN OPPOSING THE BDS MOVEMENT

As the BDS movement’s campaign gained momentum in the United States, anti-boycott legislation emerged.<sup>44</sup> Currently, many states have passed anti-boycott legislation that restricts the BDS movement’s supporters from boycotting Israeli goods.<sup>45</sup> The States use anti-BDS legislation to penalize companies, organizations, and/or individuals who engage in boycotts proscribed by the legislation.<sup>46</sup>

The States’ legislation take on various forms, ranging from broadly prohibiting boycotts of allied countries to more narrowly prohibiting boycotts of territories controlled by Israel and of goods and services from Israel.<sup>47</sup> Some versions of anti-BDS laws are narrowed to state contracts and state investments.<sup>48</sup> Some assert that “[t]his type of legislation generally attempts to use economic

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40. *Id.*

41. *See* Lynk, *supra* note 29, at 18.

42. Press Release, Off. High Comm’r for Hum. Rts., United Nations, Israel’s Housing Policies in Occupied Palestinian Territory Amount to Racial Segregation – UN Experts (Apr. 27, 2022), <http://www.ohchr.org/en/press-releases/2022/04/israels-housing-policies-occupied-palestinian-territory-amount-racial>.

43. *What Is BDS?*, *supra* note 5; *see also* Palestinian Civil Society, *supra* note 18.

44. *See Types of Legislation*, *supra* note 2.

45. *US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019, 12:00 AM), <http://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses>.

46. *Id.*

47. *Id.*

48. *Id.*

coercion to suppress boycotts, primarily through prohibitions on state contracts with and state investment[s] in individuals and entities that boycott [Israel] in support of Palestinian rights.<sup>49</sup> When implementing anti-boycott legislation, some States have made their legislative intent clear.<sup>50</sup> For example, New York, through executive order, emphasized its desire to implement the anti-BDS directive to preserve its ally relationship with Israel.<sup>51</sup>

#### A. *Antisemitism*

Some supporters of the anti-BDS laws equate the BDS movement with antisemitism.<sup>52</sup> The BDS movement, however, expresses that it encourages inclusivity and explicitly opposes all forms of discrimination including antisemitism and Islamophobia.<sup>53</sup> Antisemitic policies seek to force Jewish individuals to the margins of society.<sup>54</sup> The marginalization of Jewish individuals can be conducted in several ways, including but not limited to, discriminatory limitations on religious observance, on political participation, education, and residence.<sup>55</sup> Antisemitism denies Jewish individuals of the opportunity to add to society and prevents society from being able to benefit from their contributions.<sup>56</sup> Antisemitism against Jewish individuals is classified as a form of racial discrimination, which the BDS movement claims to oppose.<sup>57</sup> The BDS movement's opponents assert that the movement is antisemitic.<sup>58</sup> One critic in favor of this argument asserts that the movement does not pass the "3-D" test, which was formulated by Nathan Sharansky to distinguish legitimate criticism of the Israeli government from antisemitism.<sup>59</sup> Under this test, if the criticism

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49. *Types of Legislation*, *supra* note 2.

50. N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2023); H.B. 89, 85th Leg., Reg. Sess. (Tex. 2017); Assemb. B. 2844, 2015-16 Leg., Reg. Sess. (Cal. 2016).

51. tit. 9, § 8.157 (2023); *see also* Tex. H.B. 89.

52. Press Release, Lee Zeldin, *supra* note 4.

53. *What Is BDS?*, *supra* note 5. According to the U.S. Department of State's website, *anti-semitism* is defined as "a certain perception of [Jewish individuals], which may be expressed as hatred towards [Jewish individuals]." *Defining Antisemitism*, U.S. DEP'T OF STATE, <http://www.state.gov/defining-antisemitism/> (last visited Apr. 14, 2023).

54. Anthony Julius et al., *Antisemitism: An Assault on Human Rights*, AM. JEWISH COMM., <http://www.ajc.org/antisemitism-an-assault-on-human-rights> (last visited Apr. 14, 2023).

55. *Id.*

56. *Id.*

57. *Id.*

58. David M. Halbfinger et al., *Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign*, N.Y. TIMES (July 27, 2019), <http://www.nytimes.com/2019/07/27/world/middleeast/bds-israel-boycott-antisemitic.html>.

59. *Id.*



delegitimizes, applies double standards to, or demonizes Israel, it is deemed antisemitic.<sup>60</sup> These opponents argue that the BDS movement delegitimizes Israel by “questioning Israel’s right to exist”; applies double standards to Israel by “singling [it] out . . . for its treatment of Israel’s Arab citizens when minorities in some countries suffer far more”; and demonizes Israel when BDS supporters “portray the country as ‘the great danger to humanity.’”<sup>61</sup> The supporters of the BDS movement, however, refute these arguments, stating “Palestinians fighting for their own rights should not be expected to give equivalent treatment to abused minorities elsewhere.”<sup>62</sup> The 3-D test itself has been criticized as being “intrinsically problematic.”<sup>63</sup> The BDS movement’s goal is to isolate Israeli companies and institutions “[e]ngaged in violations of Palestinian human rights.”<sup>64</sup> The BDS movement reiterates that it does not discriminate against any one person or group and only narrows its focus to Israel’s alleged international law violations, resulting in a Palestinian human rights crisis.<sup>65</sup> While some argue that the BDS movement is antisemitic, others argue that those opposed to the BDS movement conflate criticism of Israel’s policies with antisemitism to stifle objections to Israel’s alleged human rights violations.<sup>66</sup> Moreover, the Jewish Voice for Peace, an organization led by U.S. Jewish advocates, stands in solidarity for Palestinian rights and Palestinian freedom, as well as recognizes intimidation as an attempt to censor support for Palestinian human rights.<sup>67</sup>

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60. *Id.*

61. *Id.*

62. *Id.*

63. Shai Franklin, *Road Testing Natan Sharansky’s 3 Ds of Anti-Semitism*, HUFFPOST, [http://www.huffpost.com/entry/road-testing-natan-sharanskys-criteria-for-anti-semitism\\_b\\_3346143](http://www.huffpost.com/entry/road-testing-natan-sharanskys-criteria-for-anti-semitism_b_3346143) (July 29, 2013).

64. *What Is BDS?*, *supra* note 5.

65. *See id.*

66. Jill Jacobs, *How to Tell When Criticism of Israel Is Actually Anti-Semitism: Calling Out Human Rights Violations Shouldn’t Stray into Bias Against Jews*, WASH. POST (May 18, 2018, 6:00 AM), [http://www.washingtonpost.com/outlook/how-to-tell-when-criticism-of-israel-is-actually-anti-semitism/2018/05/17/cb58bf10-59eb-11e8-b656-a5f8c2a9295d\\_story.html](http://www.washingtonpost.com/outlook/how-to-tell-when-criticism-of-israel-is-actually-anti-semitism/2018/05/17/cb58bf10-59eb-11e8-b656-a5f8c2a9295d_story.html); Amos Goldberg, *Anti-Zionism and Antisemitism: How Right and Left Conflate Issues to Deny Palestinian Rights*, MIDDLE E. EYE (Apr. 28, 2022), <http://www.middleeasteye.net/opinion/israel-broad-coalition-conflates-anti-zionism-antisemitism>.

67. *See Solidarity with the U.S. Campaign for Palestinian Rights*, JEWISH VOICE FOR PEACE (Mar. 5, 2020), <http://www.jewishvoiceforpeace.org/2020/03/solidarity-uscpr/>.

## IV. THE STATES AND THEIR ANTI-BDS LAWS

A. *The States' Legislation*

The anti-BDS laws first emerged in 2015.<sup>68</sup> The States' anti-BDS legislation is composed of statutes and executive orders that target the speech and conduct of individuals and entities that enter into government contracts.<sup>69</sup> The States' legislation may vary, but the effect is arguably the same—to eliminate boycotts directed at Israel by restricting the expansion of the BDS movement.<sup>70</sup> The specific speech and conduct restricted by such legislation differs from state to state because the laws differ as to the definition of the term “boycott” and the forms of boycotting proscribed.<sup>71</sup> For example, certain laws impose broad restrictions on boycotts of allied countries,<sup>72</sup> while other laws more narrowly impose restrictions on boycotts of Israel and its occupied territories,<sup>73</sup> and still, some laws even more narrowly impose restrictions on boycotts of goods and services originating from Israel.<sup>74</sup> Advocates of the movement argue that the legislation intends to disrupt and intimidate supporters and would-be supporters by making them believe that a political boycott of Israel is illegal.<sup>75</sup> Politicians and elected officials have spoken negatively about the boycotts of Israel.<sup>76</sup> Proponents of the BDS movement feel that such comments aim to instill a sense of fear and reluctance in those desiring to advocate for Palestinian human rights through boycotting.<sup>77</sup>

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68. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/anti-bds-legislation> (last visited Apr. 14, 2023); S.J. Res. 170, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015). Tennessee is the first U.S. state to enact anti-BDS legislation with the objective to condemn the BDS movement. Tenn. S.J. Res. 170.

69. *Types of Legislation*, *supra* note 2.

70. *Id.*

71. *Id.*

72. *Id.*; see also S.C. CODE ANN. § 11-35-5300(A)–(B)(1) (2023).

73. *Types of Legislation*, *supra* note 2; see also S.B. 1761, 2015 Leg., 99th Gen. Assemb. (Ill. 2015).

74. *Types of Legislation*, *supra* note 2; see also S.B. 1923, 217th Leg., Reg. Sess. (N.J. 2016).

75. *Types of Legislation*, *supra* note 2.

76. *Id.*

77. Sanya Mansoor, *The Trump Administration Is Cracking Down Against a Global Movement to Boycott Israel. Here's What You Need to Know About BDS*, TIME, <http://time.com/5914975/what-to-know-about-bds/> (Dec. 7, 202, 1:31 PM); see also *Types of Legislation*, *supra* note 2; Press Release, Lee Zeldin, *supra* note 4 (discussing the Israel Anti-Boycott Act introduced by Congressman Lee Zeldin “to prohibit boycotts or boycott requests

One form of the anti-BDS laws is the preclusion of state and local governments from entering into business contracts with companies, organizations, and individuals that support boycotts of Israel for Palestinian human rights.<sup>78</sup> This form of legislation often requires contractors entering into a business contract with a state or local government to sign a written certification agreeing that they will not boycott Israel or its goods and services.<sup>79</sup> Human Rights Watch claims that these laws aim to discourage companies from ceasing business operations in Israel and penalize companies for withdrawing their business from occupied territories, even though some companies do not want to do business with these settlements because they believe it contributes to human rights violations.<sup>80</sup>

Another form of anti-BDS legislation is the ban of state investments against entities that support Israeli boycotts for Palestinian human rights.<sup>81</sup> Furthermore, some of the States' anti-BDS legislation "requires the state to create a blacklist of individuals or entities that support BDS . . ."<sup>82</sup> The blacklist serves to notify governmental entities of the business groups that support the BDS movement to avoid conducting business with those blacklisted.<sup>83</sup> For example, Florida requires the State Board of Administration to identify companies that boycott Israel and prohibit state agencies and local governmental entities from contracting for goods and services with the blacklisted companies.<sup>84</sup> Florida's legislation includes several conditions that must be adhered to by its state agencies and governmental entities pertaining to blacklisted companies.<sup>85</sup> Further, under Florida law, a company might be confronted with a penalty if it submits a false written certificate.<sup>86</sup> Likewise, Texas passed anti-BDS legislation resulting in the Texas Comptroller of Public Accounts updating Texas' blacklist to include Airbnb.<sup>87</sup> As soon as Texas' blacklist was posted, the University of

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imposed by international governmental organizations against Israel" and "reinforce[] congressional opposition to the BDS movement").

78. *Types of Legislation, supra* note 2.

79. *Id.*; see also, e.g., IDAHO CODE § 67-2346 (2023).

80. See US: *States Use Anti-Boycott Laws to Punish Responsible Businesses, supra* note 45.

81. *Types of Legislation, supra* note 2.

82. *Id.*; see also, e.g., FLA. STAT. § 215.4725(2) (2023).

83. *Types of Legislation, supra* note 2.

84. S.B. 86, 2016 Leg., 118th Reg. Sess. (Fla. 2016); FLA. STAT. §§ 215.4725(2), 287.135(2)(a) (2023).

85. FLA. STAT. §§ 215.4725(2)–(3), 287.135(4).

86. *Id.* § 287.135(5)(a).

87. TEX. GOV'T CODE ANN. § 808.051(1) (West 2021); Phil Prazan, *UT Employees Notified of Airbnb Blacklist*, KXAN, <http://www.kxan.com/news/texas/ut-employees-notified-of-airbnb-blacklist> (last visited Apr. 14, 2023).

Texas, a governmental entity, quickly advised its employees that they are unable to use Airbnb.<sup>88</sup>

Although the anti-BDS legislation mainly targets state business contractors and business investments, some of the bills introduced make it possible to defund universities that support boycotts of Israel by either reducing or prohibiting them from receiving disbursements of federal or state funds.<sup>89</sup> These bills enable financial penalization of universities if academic organizations support boycotts against Israel, even if the support is solely intended to stand in solidarity with the PCS.<sup>90</sup> Despite these measures failing, politicians such as Inna Vernikov, a Brooklyn councilwoman, pulled funding from CUNY Law School for endorsing a resolution in support of the BDS movement.<sup>91</sup> She argued that the endorsement supported antisemitism, and CUNY Law was defunded \$50,000 as a result.<sup>92</sup>

Beginning in 2015, Tennessee, South Carolina, and Illinois were the first states to enact anti-BDS legislation.<sup>93</sup> Tennessee's legislation directly condemns the BDS movement.<sup>94</sup> Tennessee's bill opposes the BDS movement's purpose, stating that the BDS movement spreads antisemitism and advocates for the elimination of the Jewish State.<sup>95</sup> South Carolina's legislation, on the other hand, does not name the BDS movement or Israel, but broadly proscribes public entities from entering into contracts with businesses that boycott entities located in or doing business with a jurisdiction that South Carolina can trade with.<sup>96</sup> Illinois' legislation takes it a step further, requiring the Investment Policy Board to create a blacklist of all companies that boycott Israel then notify the companies that they are blacklisted, which subjects them to removal by the retirement system's investment advisors who can sell, redeem, divest, or withdraw all funds from the blacklisted companies' assets.<sup>97</sup>

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88. See Prazan, *supra* note 87.

89. *Types of Legislation*, *supra* note 2.

90. *See id.*

91. *Id.*; see also Carl Campanile, *NYC's Inna Vernikov Pulls CUNY Law School Funding Over Israel Stance*, N.Y. POST, <http://nypost.com/2022/05/27/inna-vernikov-pulls-cuny-law-school-funding-over-israel-stance/> (May 27, 2022, 4:53 PM).

92. Campanile, *supra* note 91.

93. S.J. Res. 170, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015); S.C. CODE ANN. §§ 11-35-5300(A)–(B)(1) (2023); S.B. 1761, 2015 Leg., 99th Gen. Assemb. (Ill. 2015).

94. *See* Tenn. S.J. Res. 170.

95. *See id.*; *FAQs*, BDS, <http://bdsmovement.net/faqs#collapse16233> (last visited Apr. 14, 2023) (asserting that the BDS movement opposes antisemitism and does not promote a specific resolution to the ongoing feud or advocate for either a one-state or two-state solution).

96. S.C. CODE ANN. § 11-35-5300(A)–(B)(1).

97. Ill. S.B. 1761.

In 2016, an additional fifteen states enacted anti-BDS legislation.<sup>98</sup> Eight states, Alabama, Arizona, Georgia, California, Rhode Island, Pennsylvania, Ohio, and Michigan, enacted anti-BDS laws that forbid state governmental entities from entering into a contract with a company without written certification that the company agrees not to engage in boycotts of Israel or other boycotts of an entity based on the entity's national origin.<sup>99</sup> Six states, Colorado, Indiana, Florida, Iowa, New York, New Jersey, and California, passed legislation that requires the creation of a blacklist of companies that boycott Israel, and if the blacklisted companies do not cease their boycotts against Israel, then the state's investment advisors are required to withdraw, restrict, or cease any state fundings and investments to those blacklisted companies.<sup>100</sup> The fifteenth state, Virginia, passed a nonbinding resolution declaring support for Israel while opposing the BDS movement.<sup>101</sup> At the time of this writing, Virginia does not have a law that prohibits public entities from contracting with companies that boycott Israel; however, an anti-boycott bill was introduced in January 2023 and is still pending.<sup>102</sup>

Moreover, the anti-BDS laws continued with another eight states that enacted legislation in 2017.<sup>103</sup> Arkansas, Texas, Minnesota, Nevada, Kansas, North Carolina, Maryland, and Wisconsin, have anti-BDS legislation that requires state contractors to certify in writing that they will not engage in or vouch for boycotts of Israel and further requires the creation of a blacklist indicating companies that boycott Israel.<sup>104</sup> The state governments will restrict

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98. *Anti-Semitism: State Anti-BDS Legislation*, *supra* note 68.

99. S.B. 81, 2016 Leg., Reg. Sess. (Ala. 2016); H.B. 2617, 52d Leg., 2d Reg. Sess. (Ariz. 2016); S.B. 327, 153d Gen. Assemb., Reg. Sess. (Ga. 2016); Assemb. B. 2844, 2015–16 Leg., Reg. Sess. (Cal. 2016); H.B. 7736, 2016 Gen. Assemb., Jan. Sess. (R.I. 2016); H.B. 2107, 2015 Gen. Assemb., Reg. Sess. (Pa. 2016); H.B. 476, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); H.B. 5822, 98th Leg., Reg. Sess. (Mich. 2016).

100. H.B. 16-1284, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016); H.B. 1378, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016); H. File 2331, 86th Gen. Assemb., 2d Sess. (Iowa 2015); S.B. 1923, 217th Leg., Reg. Sess. (N.J. 2016); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2023); S.B. 86, 2016 Leg., Reg. Sess. (Fla. 2016); *see also* Cal. Assemb. B. 2844 (covering two forms of boycott prohibitions).

101. H.J. Res. 177, 2016 Leg., Reg. Sess. (Va. 2016); *Legislation: Virginia*, PALESTINE LEGAL, <http://legislation.palestinelegal.org/location/virginia/> (Feb. 3, 2023).

102. H.B. 1898, 2023 Leg., Reg. Sess. (Va. 2023); *Legislation: Virginia*, *supra* note 101.

103. *Anti-Semitism: State Anti-BDS Legislation*, *supra* note 68.

104. S.B. 513, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 89, 85th Leg., Reg. Sess. (Tex. 2017); H.R. 400, 90th Leg., Reg. Sess. (Minn. 2017); S.B. 26, 79th Leg., Reg. Sess. (Nev. 2017); H.B. 2409, 2017 Leg., Reg. Sess. (Kan. 2017); H.B. 161, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017); Md. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017), [http://content.govdelivery.com/attachments/MDGOV/2017/10/23/file\\_attachments/900819/Exec](http://content.govdelivery.com/attachments/MDGOV/2017/10/23/file_attachments/900819/Exec)

state funding to companies or groups on the blacklist.<sup>105</sup> By 2018, more than half of the states passed anti-BDS laws and, in that same year, Louisiana continued the pattern by passing its own anti-BDS legislation.<sup>106</sup> Louisiana's anti-boycott law prohibits state contractors from entering into a government contract without a written certification that the contractor will not engage in boycotts of Israel.<sup>107</sup> In 2019, Mississippi and Kentucky passed legislation that requires written certification that the state contractor will not boycott any World Trade Organization and the creation of a blacklist to ban state investments and funds to the companies listed.<sup>108</sup>

More recently, in 2020 and 2021, the last six of the thirty-five states—South Dakota, Oklahoma, Missouri, Utah, Idaho, and West Virginia—passed anti-BDS legislation.<sup>109</sup> Like the earlier anti-BDS laws, these laws require state contractors to complete a written certification that confirms the contractor will not boycott Israel during the duration of the contract.<sup>110</sup> South Dakota is also one of the several states that explicitly refers to the BDS movement in its anti-BDS legislation.<sup>111</sup> Nonetheless, states have introduced additional legislation and legislative amendments following the enactment of the laws described above because federal courts ruled certain anti-BDS laws unconstitutional and ordered injunctions to block the enforcement of some.<sup>112</sup>

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utive%2BOrder%2B01.01.2017.25.pdf; Wis. Exec. Order No. 261 (Oct. 27, 2017), [https://docs.legis.wisconsin.gov/code/executive\\_orders/2011\\_scott\\_walker/2017-261.pdf](https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2017-261.pdf).

105. Ark. S.B. 513; Tex. H.B. 89; Minn. H.R. 400; Nev. S.B. 26; Kan. H.B. 2409; N.C. H.B. 161; Md. Exec. Order No. 01.01.2017.25; Wis. Exec. Order No. 261.

106. La. Exec. Order No. JBE 2018-15 (May 22, 2018), <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE-18-15>.

107. *Id.*

108. H.B. 761, 2019 Leg., Reg. Sess. (Miss. 2019); S.B. 143, 2019 Leg., Reg. Sess. (Ky. 2019).

109. *Anti-Semitism: State Anti-BDS Legislation*, *supra* note 68.

110. S.D. Exec. Order No. 2020-21 (Jan. 14, 2020), <http://sdsos.gov/general-information/executive-actions/executive-orders/assets/2020-01>; H.B. 3967, 2020 Leg., Reg. Sess. (Okla. 2020); S.B. 739, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); S.B. 186, 2021 Leg., Gen. Sess. (Utah 2021); S.B. 1086, 66th Leg., 1st Reg. Sess. (Idaho 2021); H.B. 2933, 2021 Leg., Reg. Sess. (W. Va. 2021).

111. *See* S.D. Exec. Order No. 2020-21.

112. *See US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, *supra* note 45. In 2022, Tennessee enacted a bill that requires a contractor to sign a written certification before working with a government entity. S.B. 1993, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022). Virginia introduced a bill in 2022 that aimed to prohibit state contractors from boycotting Israel, but the bill failed to pass. H.B. 1161, 2022 Gen. Assemb., Reg. Sess. (Va. 2022).

## B. Congress's Legislation

The previously failed attempts to enact the Combating BDS Act has not stunted the efforts of Congress members as they pursue the enactment of a newer version introduced in 2021, although the record indicates that it may fail.<sup>113</sup> The Combating BDS Act of 2021 seeks to allow the state and local governments' to divest against entities that support the BDS movement.<sup>114</sup> The pending Act authorizes U.S. states to enforce measures on activities that are "commerce-related or investment-related boycott, divestment, or sanctions in the course of interstate or international commerce intended to penalize, inflict harm on, or otherwise limit commercial relations with Israel . . . or Israeli-controlled territories for purposes of coercing political action by, or imposing policy positions on, the Government of Israel."<sup>115</sup> Another federal bill targeting the BDS movement was introduced in 2022 titled Israel Anti-Boycott Act, and it is also predicted to fail.<sup>116</sup> The Israel Anti-Boycott Act focuses on opposing the BDS movement and strives to "counter the effects of actions to boycott, divest from, or sanction Israel" by having "the Government of the United States . . . actively oppose politically motivated actions to boycott, divest from, or sanction Israel."<sup>117</sup>

## V. CONSTITUTIONAL ANALYSIS OF THE ANTI-BDS LAWS

This section analyzes the constitutionality of anti-BDS laws under the First Amendment of the U.S. Constitution.<sup>118</sup> There are various forms of speech and conduct that are entitled to protection under the First Amendment, including political boycotts depending on the elements of speech found in a particular boycott.<sup>119</sup> "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."<sup>120</sup> The States have a right to regulate local economic activities, but do

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113. See S. 2531, 114th Cong. (2016); S. 170, 115th Cong. (2017); H.R. 336, 116th Cong. (2019); S. 2119, 117th Cong. (2021).

114. See S. 2119, § 2.

115. *Id.*

116. Israel Anti-Boycott Act, H.R. 6940, 117th Cong. (2022); see also discussion *infra* Section V.A–B.

117. H.R. 6940.

118. U.S. CONST. amend. I.

119. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

120. *Id.*

not have the authority to prohibit nonviolent, politically motivated boycotts.<sup>121</sup> The States' anti-BDS laws arguably infringe on a citizen's protected right to speech and, although the First Amendment explicitly applies to the federal government, its application extends to the states through the incorporation doctrine of the Fourteenth Amendment.<sup>122</sup> To pass constitutional muster, the States' must show that their anti-BDS laws are necessary to further a compelling state interest.<sup>123</sup> Finally, this section addresses the fact that foreign affairs are exclusively within the jurisdiction of the federal government, and discusses when a state's intrusion into such matters may obstruct the balance between state and federal government powers.<sup>124</sup> More specifically, if state laws intrude into international and foreign relations, the U.S. government's system of checks and balance will be thwarted.<sup>125</sup> As such, state and local laws that undermine the federal government's authority over foreign affairs are constitutionally impermissible.<sup>126</sup> Below, this Comment analyzes whether the States' legislation intrudes into foreign affairs.<sup>127</sup>

#### A. *Constitutional Analysis Under the First and Fourteenth Amendments of the U.S. Constitution*

Every citizen is guaranteed a constitutionally protected right to freedom of speech.<sup>128</sup> Courts have repeatedly understood that the interpretation of the First Amendment does not end at a spoken or written word.<sup>129</sup> The First Amendment specifically protects inherently expressive speech and, when the activity is not spoken or written speech, courts analyze "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was [so] great that the message would be understood by those who viewed it.'" <sup>130</sup> The advocates and supporters of the BDS movement who engage in economic

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121. *Id.* at 914.

122. *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1229 (N.D. Ga. 2021); U.S. CONST. amend. XIV, § 1; *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014).

123. *See Martin*, 540 F. Supp. 3d at 1229.

124. *See United States v. Pink*, 315 U.S. 203, 232 (1942).

125. *Id.*

126. MICHAEL JOHN GARCIA & TODD GARVEY, CONG. RSCH. SERV., RL33948, STATE AND LOCAL ECONOMIC SANCTIONS: CONSTITUTIONAL ISSUES 5 (2013).

127. *See discussion infra* Section V.B.

128. U.S. CONST. amend. I.

129. *See A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 429 (S.D. Tex. 2022) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

130. *Id.* (first and second alteration in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)); *see also Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006).



boycotts of Israeli goods are not engaged in activities involving spoken or written speech.<sup>131</sup> Nevertheless, such boycotts are arguably a form of inherently expressive speech entitled to First Amendment Protection because those who engage in the boycott intend to convey a particularized message.<sup>132</sup>

In the staple case for political boycotts, *NAACP v. Claiborne*,<sup>133</sup> after African American citizens demanded racial equality and integration from their elected officials and were not satisfied with the response, hundreds of individuals boycotted white merchants and picketed directly in front of the merchants' stores.<sup>134</sup> The white merchants filed a complaint against 144 individuals and two corporations for economic losses and the lower state courts rejected the defendants argument that their boycott was protected by the First Amendment's Freedom of Speech Clause.<sup>135</sup> However, the Supreme Court of the United States addressed that an advocate is entitled to freely encourage others with spontaneous and emotional appeals for solidarity and action aimed at a common goal, in the absence of speech that incites unlawful conduct or violence.<sup>136</sup> Ultimately, the Court held that the nonviolent, political boycott demonstrated against the merchants was considered speech protected by the First Amendment.<sup>137</sup> Similarly, the BDS movement's platform serves to encourage the world to boycott, divest, and sanction Israel to help end the alleged humanitarian crisis affecting Palestinians.<sup>138</sup>

As a result of the BDS movement's call, companies and individuals across the world have joined in opposing Israeli goods.<sup>139</sup> Thus, there is a strong argument that the nonviolent call to boycott—as well as the resulting conduct (i.e., the nonviolent, political boycott of)—Israeli goods is arguably protected by the First Amendment.<sup>140</sup> Political expression is not an illegal activity, rather it is a protected constitutional right.<sup>141</sup> The collective expression to boycott in demonstration against the Israeli government's alleged human rights abuse and treatment to the Palestinians conveys a practice of people sharing common views

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131. See *A&R Eng'g & Testing, Inc.*, 582 F. Supp. 3d at 429.

132. See *id.* at 430; *What Is BDS*, *supra* note 5 (indicating that the growth of the BDS movement conveys a message from its supporters, expressing their unwillingness to accept certain Israeli policies they argue violate international law).

133. 458 U.S. 886 (1982).

134. *Id.* at 889.

135. *Id.* at 889, 892.

136. *Id.* at 928.

137. *Id.*

138. Palestinian Civil Society, *supra* note 18.

139. *Economic Boycott*, BOYCOTT, DIVESTMENT, SANCTIONS, <http://bdsmovement.net/economic-boycott#impact> (last visited April 14, 2023).

140. See *Claiborne Hardware Co.*, 458 U.S. at 907.

141. *Id.* at 908–09 (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

and coming together to reach a resolution, which exemplifies the core roots of the American political process.<sup>142</sup> The BDS movement advertises through its campaigns for nonparticipants to join a common cause and stand in solidarity with Palestinians, which is an element found in the constitutional right to boycott; thus, political boycotts of Israel are arguably a protected form of speech.<sup>143</sup> Therefore, it can be argued that citizens participating in a boycott of Israeli goods engage in protected political speech, which is inherently expressive speech shielded by the First Amendment, as confirmed in *Claiborne*.<sup>144</sup>

Moreover, since the States' anti-BDS laws arguably burden the citizens' protected speech, the States carry the burden to prove the constitutionality of abridging the citizens' First Amendment right under the Fourteenth Amendment's Due Process Clause.<sup>145</sup> Because the States' anti-BDS laws define regulated speech by its function and purpose, it is a content-based regulation, which falls under the strict scrutiny analysis; however, the courts will analyze the protected right to free speech while also balancing government interests.<sup>146</sup> The strict scrutiny test requires the government to show that (1) the law serves a compelling governmental interest; (2) the burden on speech is necessary; and (3) the law is narrowly tailored to further that interest.<sup>147</sup>

Under the first prong of the strict scrutiny test, the compelling government interest is analyzed through the circumstances of the law's enactment.<sup>148</sup> The States' anti-BDS laws are consistent in their narrative and follow the general tone—to prevent boycotts that harm Israel's economy or prevent antisemitism and, in doing this, the States preserve their close-ally relationship with Israel.<sup>149</sup> When the legislative intent behind such anti-boycott laws is to inhibit the message of those engaging in the boycott, “[it] is either viewpoint based discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel.”<sup>150</sup> In particular, the First Amendment protects citizens against the government limiting expression based on “its message, its ideas, its subject matter, or its content.”<sup>151</sup> Further, some of the States' legislative intent is to protect the Jewish population

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142. See *id.* at 907.

143. *Id.* at 909.

144. See *id.* at 911; *A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 433 (S.D. Tex. 2022).

145. *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014).

146. *Id.*; see also *Martin v. Wrigley*, 540 F. Supp 3d 1220, 1230 (N.D. Ga. 2021).

147. *Martin*, 540 F. Supp. 3d at 1229, 1230.

148. *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018).

149. See *id.*; discussion *supra* Sections III.A–B, IV.A.

150. See *Koontz*, 283 F. Supp. 3d at 1022.

151. *Id.*

from a rise in antisemitism, which states have an interest in doing.<sup>152</sup> It has been held, however, that this state interest cannot be the basis for restricting a citizen's First Amendment right to political speech, as the right to free speech protects an individual's beliefs and prevents the government from restricting protected expression.<sup>153</sup>

In addition, plaintiffs challenging such anti-boycott legislation have successfully argued that advocating for the boycott does not hinder the States' ability to maintain strong foreign relations with Israel.<sup>154</sup> It has been held that preventing such speech is not essential to the States' interest because political speech does not detrimentally impact the States' ability to deliver government services efficiently.<sup>155</sup> Courts have also determined that certain anti-BDS laws are unconstitutional because of their overinclusiveness and underinclusiveness.<sup>156</sup> This holds true regardless of whether the law pursued a constitutionally permissible objective because speech restrictions that are not narrowly tailored to fulfill their permissible state objectives are deemed unconstitutional.<sup>157</sup> The anti-BDS laws prohibit all economic boycotts of Israel, which is overinclusive because it is not narrowly tailored to a sufficient government interest to also ban protected speech (i.e., political boycotts) through economic boycotts.<sup>158</sup> Similarly, anti-BDS laws that aim to ban boycotts of Israel to promote trade or foreign relations with Israel have been deemed underinclusive as they solely regulate boycotts and disregard other activities that could impact trade and foreign relations.<sup>159</sup> Therefore, the States' anti-BDS laws are arguably unconstitutional by regulating inherently expressive speech protected by the First Amendment, and as such, the States' objectives do not outweigh an individual's right to free speech.<sup>160</sup>

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152. *A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 435 (S.D. Tex. 2022).

153. *E.g., id.*

154. *See id.* at 437; *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1230 (N.D. Ga. 2021).

155. *See A & R Eng'g & Testing, Inc.*, 582 F. Supp. 3d at 437; *Martin*, 540 F. Supp. 3d at 1230; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *Koontz*, 283 F. Supp. 3d at 1023 (supporting political speech and stating it is not only the citizens' self-expression but a natural occurrence of self-government).

156. *See Koontz*, 283 F. Supp. 3d at 1023; *Martin*, 540 F. Supp. 3d at 1230.

157. *See Koontz*, 283 F. Supp. 3d at 1023; *Martin*, 540 F. Supp. 3d at 1230.

158. *See Koontz*, 283 F. Supp. 3d at 1023.

159. *See id.*

160. *See id.* at 1024, 1027.

## 1. Federal Court Holdings

In January 2018, a federal court in Kansas decided the first precedent case regarding the constitutionality of anti-BDS laws.<sup>161</sup> Under *Koontz v. Watson*,<sup>162</sup> the court held that the Kansas anti-BDS law is unconstitutional because a political boycott is protected speech guaranteed in the First Amendment and the compelling government interest to prevent discrimination against Israeli businesses is insufficient to suppress the public's interest in protecting the citizens' right to speech.<sup>163</sup> In September 2018, a federal court reviewed Arizona's anti-BDS law under *Jordahl v. Brnovich*<sup>164</sup> and ruled that a boycott of Israel is expressive political conduct protected under the First Amendment.<sup>165</sup> Further, the court found that, even assuming Arizona's interests in passing the law were valid,<sup>166</sup> the restriction was constitutionally impermissible because the restriction was not narrowly tailored to advance Arizona's interests.<sup>167</sup> Specifically, the restriction was not necessary to advance Arizona's interests and was overinclusive in that it included restrictions on politically-motivated boycotts.<sup>168</sup>

Similarly, Texas federal courts dealt with the same constitutional issues in two cases, one in 2019 and the other in 2022.<sup>169</sup> In 2019, a federal court reviewed the constitutionality of a Texas anti-BDS law in *Amawi v. Pflugerville Independent School District*<sup>170</sup> and ruled that boycotts of Israel are inherently expressive conduct protected under the First Amendment.<sup>171</sup> The court also

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161. *Id.* at 1027.

162. 283 F. Supp. 3d 1007 (D. Kan. 2018).

163. *Koontz*, 283 F. Supp. 3d at 1023, 1027.

164. 336 F. Supp. 3d 1016 (D. Ariz. 2018).

165. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1044 (D. Ariz. 2018), *vacating as moot*, 789 Fed. App'x 589, 591 (9th Cir. 2020) (discussing that Arizona's revised anti-BDS law no longer applied to the plaintiff in the case but not addressing the constitutionality of the revised Arizona anti-BDS legislation).

166. *See id.* at 1049. Arizona's two interests in passing the law were to regulate "commercial activity to align with the State's policy objectives and values" and to prevent discrimination based on national origin. *Id.* at 1048. The court addressed that the legislative history of the law "call[ed] these interests into doubt" but assumed that the interests were valid for purposes of analysis. *Id.* at 1049.

167. *See id.*

168. *Jordahl*, 336 F. Supp. 3d at 1049.

169. *See A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 421 (S.D. Tex. 2022); *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 730 (W.D. Tex. 2019), *vacating as moot sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020).

170. 373 F.3d 717 (W.D. Tex. 2019).

171. *Id.* at 745, 747.

found that the Texas anti-BDS law, H.B. 89, is unconstitutional and fails to justify its burden on protected speech by serving no compelling government interest that is narrowly tailored because H.B. 89 only aims to unlawfully restrict a message expressed to guard a foreign-nation ally.<sup>172</sup> In 2022, in *A & R Engineering & Testing, Inc. v. City of Houston*,<sup>173</sup> a federal court decided that a second Texas anti-BDS law, found under Chapter 2271, contains plain language that prevents political boycotts of Israel, which infringes on the citizen's First Amendment right.<sup>174</sup> The court also held that the application of Texas' anti-BDS law is unconstitutional because it is not narrowly tailored to a government interest as the evidence did not support the argument that the anti-BDS law will maintain Israeli business or prevent antisemitism.<sup>175</sup> Even with such evidence, however, Texas's interests would not be adequate government justifications to burden the plaintiff's right to speech.<sup>176</sup> In 2021, in *Martin v. Wringley*,<sup>177</sup> a Georgia federal court held that Georgia's anti-BDS law restricts government contractors' constitutional right to boycott.<sup>178</sup> The court found that without a correlation between boycotts of Israel and the hindrance of foreign policy, the restriction is not narrowly tailored to further foreign policy goals.<sup>179</sup> Following the Georgia court's decision in 2021, a federal court in Arkansas reviewed *Arkansas Times L.P. v. Waldrip*,<sup>180</sup> and also held that the anti-BDS law implicates the plaintiffs' First Amendment rights and that such prohibitions extend beyond the bounds of the contractual relationship.<sup>181</sup> However, in 2022, the appellate court's decision was reversed by the United States Court of Appeals for the Eighth Circuit, which held that the statute did not violate the First Amendment "[b]ecause those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment."<sup>182</sup>

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172. *See id.* at 748–52.

173. 582 F. Supp. 3d 415 (S.D. Tex. 2022).

174. *Id.* at 432.

175. *Id.* at 435, 437.

176. *Id.* at 435.

177. 540 F. Supp. 3d 1220 (N.D. Ga. 2021).

178. *Id.* at 1230.

179. *Id.*

180. 988 F.3d 453 (8th Cir. 2021).

181. *Ark. Times L.P. v. Waldrip*, 988 F.3d 453, 467 (8th Cir. 2021), *rev'd en banc*, *Ark. Times L.P. v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022).

182. *Ark. Times L.P. v. Waldrip*, 37 F.4th 1386, 1394 (8th Cir. 2022) (en banc).

## B. *Constitutional Analysis Under the Supremacy Clause*

The States' anti-BDS laws arguably fall under the domain of foreign affairs because the legislation prohibits a business contracting with the government from engaging in certain activities related to a foreign country.<sup>183</sup> Thus, such laws involve a constitutional issue of whether the state governments impermissibly intervene into the enumerated powers of foreign affairs designated to the federal government by the Constitution.<sup>184</sup> The federal government's exclusive power in foreign affairs is expressed in the Constitution under the Foreign Commerce Clause and provides Congress the authority to regulate both interstate and foreign commerce.<sup>185</sup> The states have limited authority in regulating foreign commerce even absent an expressed federal law regulating that specific commerce,<sup>186</sup> thus the States' anti-BDS legislation arguably impedes the federal government's constitutional authority in regards to foreign affairs.<sup>187</sup> Federal statutes, treaties, and the U.S. Constitution are "the supreme Law of the Land" and, therefore, preempt state law from regulating in these areas if federal law is thereby disrupted.<sup>188</sup> Furthermore, absent an express provision from Congress preempting a field, state law must still acquiesce to a congressional act when (1) Congress intends for federal law to occupy the field or (2) if the field is not occupied by Congress, then state law is preempted if a conflict or inconsistency with a federal law arises that prevents the accomplishment of Congress's purpose or objective.<sup>189</sup>

Congress enacted a federal law for the purpose of enhancing their trade and commercial relationship with Israel, which also sets forth objectives to combat the BDS movement globally, including Congress authorizing the President to submit a report regarding politically motivated boycotts.<sup>190</sup> Congress specifically delegated a duty to the President to report the steps facilitated by the United States in an effort to overcome the boycotts globally and in doing so, would not compromise the President's effectiveness by allowing the

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183. See GARCIA & GARVEY, *supra* note 126, at 2, 6; *Zschernig v. Miller*, 389 U.S. 429, 436 (1968).

184. See U.S. CONST. art. I, § 8, cl. 3; GARCIA & GARVEY, *supra* note 126, at 2, 6; *Zschernig v. Miller*, 389 U.S. 429, 436 (1968).

185. U.S. CONST. art. I, § 8, cl. 3; see also GARCIA & GARVEY, *supra* note 126, at 2.

186. See GARCIA & GARVEY, *supra* note 126, at 2–3.

187. See *id.* at 5.

188. *Id.* at 6; U.S. CONST. art. VI, cl. 2.

189. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 373 (2000); see also U.S. CONST. art. VI, cl. 2.

190. 19 U.S.C. § 4452 (2016).

states to undermine the discretionary Presidential action.<sup>191</sup> Regardless of the shared goals between Congress and the States to strengthen the Nation's relationship with a foreign ally by taking active measures to suppress economic boycotts of Israel, the conflicting means are still present by way of preventing a purpose and objective for the President to facilitate and control the type of action fulfilled by the United States.<sup>192</sup>

Additionally, the express command of Congress directing the President to develop an annual report on behalf of the United States describing politically motivated acts to boycott, divest from, and sanction Israel, including steps by the United States to encourage foreign countries and international organizations to break down any current barriers to trade with Israel, directly grants the President with authority in this area.<sup>193</sup> Congress makes it clear that the objective is to combat *any* economic discrimination against Israel<sup>194</sup> and so, it can be argued that Congress controls that particular regulated field with its enumerated powers under the Foreign Commerce Clause.<sup>195</sup> Because the States' anti-BDS laws conflict with the purpose and objective of Congress to combat economic discrimination against Israel while simultaneously interfering with the duty delegated by Congress to the President, these laws are arguably impermissible.<sup>196</sup> By hindering the constitutional authority of Congress in foreign affairs and disregarding federal law that regulates an area preempted by Congress, the States' actions arguably violate the Supremacy Clause.<sup>197</sup>

### C. *Congress's Combatting BDS Act*

The Combatting BDS Act of 2021, as well as the Israeli Anti-Boycott Act, arguably violate the First Amendment and thwart the Constitution's principles by creating an unstable democratic institution.<sup>198</sup> To avoid that outcome, the Constitution vests limited and strict powers to Congress.<sup>199</sup> The Constitution grants Congress powers to enact federal legislation through the Commerce Clause,<sup>200</sup> and according to the Combatting BDS Act of 2021, the

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191. *See id.* § 4452(d)(1), (2)(B).

192. *See Crosby*, 530 U.S. at 379–80; 19 U.S.C. § 4452(c)(1).

193. *See Crosby*, 530 U.S. at 381; 19 U.S.C. § 4452(d)(2)(B).

194. *See* 19 U.S.C. § 4452(b)(5)(6).

195. U.S. CONST. art. I, § 8, cl. 3.

196. *See Crosby*, 530 U.S. at 388.

197. *See id.*

198. *See id.*; Combatting BDS Act, S. 2119, 117th Cong. (2021); Israeli Anti-Boycott Act, H.R. 6940, 117th Cong. (2022).

199. *See* U.S. CONST. art. I.

200. *Id.* art. I, § 8, cl. 3.

legislation includes interstate or international commerce.<sup>201</sup> Precedent shows that the commerce power given to Congress reaches existing activity.<sup>202</sup> Yet, the Combatting BDS Act of 2021 arguably would not merely regulate existing activity but rather prohibit economic boycotts of Israel on the basis that these boycotts “intend[] to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel,” which will likely compel citizens to purchase Israeli products to avoid suffering any harm from the States’ penalty or restricted benefits.<sup>203</sup>

The Commerce Clause was not designed to compel commerce or order citizens to engage in commerce; instead, its purpose is to regulate commerce under existing activity.<sup>204</sup> Here, it can be argued that the Combatting BDS Act of 2021 is beyond the scope of the commerce powers granted to Congress because it will likely pressure citizens into commerce by intimidation tactics to either complete the States’ written certificate requirement—thereby agreeing not to engage in economic boycotts of Israel and, thus, potentially compelling citizens to purchase Israeli goods to avoid any negative repercussions—or otherwise, not retain any of the States’ would-be benefits.<sup>205</sup> Therefore, one may argue that the Combatting BDS Act of 2021 should fail constitutional muster for abridging citizens’ fundamentally protected right and exceeding the scope of Congress’s Commerce Clause powers.<sup>206</sup>

## VI. RETAINING UNIFORMITY UNDER THE AMERICAN JURISPRUDENCE

Several federal courts have found certain anti-BDS laws unconstitutional.<sup>207</sup> Ever since the States’ legislation has been constitutionally challenged, the meaning and interpretation of the Constitution have been distorted with a lack of uniformity in court decisions.<sup>208</sup> The lack of uniformity appears somewhat from the complexity of each case, but an adequate reflection of this detrimental effect may be due to the States’ justifying the enactment of unconstitutional and impermissible laws.<sup>209</sup> Where a lack of uniformity exists on

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201. S. 2119, 117th Cong. § 2(b).

202. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551 (2012).

203. S. 2119; *see also Sebelius*, 567 U.S. at 552; *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1232 (N.D. Ga. 2021).

204. *Sebelius*, 567 U.S. at 555, 588; U.S. CONST. art. I, § 8, cl. 3.

205. *See Koontz v. Watson*, 283 F. Supp. 3d 1007, 1026 (D. Kan. 2018).

206. *See Sebelius*, 567 U.S. at 558.

207. *See, e.g., A & R Eng’g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 438 (S.D. Tex. 2022).

208. *Id.* at 421.

209. *Id.* at 422, 435.



the interpretation of the freedom and liberty guaranteed by the First Amendment, one may argue that the traditions and customs of the U.S. Constitution have been defeated.<sup>210</sup> Thus, one may conclude that anti-BDS laws ignore the central purpose of the First Amendment, which allows for debates on public issues with minimum government imposed restrictions.<sup>211</sup> By disturbing the traditions and customs in which the First Amendment is rooted, the American Jurisprudence is exposed to discrepancies.<sup>212</sup>

To resolve the lack of uniformity and inconsistency in the interpretation of the First Amendment right when challenging the anti-BDS laws, the courts should adhere to the intent given by the Framers of the Constitution.<sup>213</sup> The freedom guaranteed by the First Amendment arguably allows nonviolent economic boycotts of Israel,<sup>214</sup> and courts should not conduct its analysis on political boycotts too narrowly as to restrict its essence, survival rate, or total use.\* By following the Framers' intent, the government is prohibited from banning non-violent political boycotts or attempting to utilize legislation to restrict the citizens' protected right to speech.<sup>215</sup> The public interest and the government interest should still be balanced to determine justification for government services, but courts should ensure the review process sets a high threshold for states to meet before diminishing the public's interest in protecting a citizen's right to speech.<sup>216</sup>

Furthermore, the U.S. Constitution explicitly grants powers only to the federal government as the Constitution is the federal government's only source of power.<sup>217</sup> Time and time again, the Supreme Court of the United States reiterates that regulation of foreign affairs is an enumerated power for only the federal government, thus that particular authority belongs only to Congress or the President.<sup>218</sup> One may argue that the States impermissibly intruded into foreign powers that expressly belong to Congress, and accordingly, Congress

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210. See *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

211. See *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014); Bahia Amawi, *Anti-BDS Laws in the U.S. Are an Unconstitutional Attack on Free Speech*, DEMOCRACY FOR THE ARAB WORLD NOW (Mar. 23, 2022), <http://dawnmena.org/anti-bds-laws-in-the-u-s-are-an-unconstitutional-attack-on-free-speech/>.

212. See *A & R Eng'g & Testing, Inc.*, 582 F. Supp. 3d at 435.

213. See *iMatter Utah*, 774 F.3d at 1263.

214. See U.S. CONST. amend. I; Brian Hauss, *The First Amendment Protects the Right to Boycott Israel*, ACLU (July 20, 2017), <http://www.aclu.org/news/free-speech/first-amendment-protects-right-boycott-israel>; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010).

215. See *Citizens United*, 558 U.S. at 324.

216. See *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

217. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012).

218. See, e.g., *United States v. Pink*, 315 U.S. 203, 232 (1942).

should enact legislation strictly prohibiting all states from intervening in such foreign affairs to avoid states from thwarting the Constitution and disrupting foreign policy between nations,<sup>219</sup> especially involvement with foreign nations that presently and historically deal with ongoing hostility.\* In turn, the proposed federal law would preempt anti-BDS legislations.<sup>220</sup> Consequently, the traditions and customs of the Constitution will be upheld and adhered to by both the state and federal governments to avoid frustrating the Framers' purpose.<sup>221</sup>

## VII. CONCLUSION

The proponents of the BDS movement argue that anti-BDS laws are repressive legislation that violate the constitutional right to political boycotts, which are inherently expressive speech protected by the First Amendment.<sup>222</sup> In addition to implicating the First Amendment right, proponents of the BDS movement argue that anti-BDS laws deprive citizens of their Due Process rights under the Fourteenth Amendment as the States unlawfully burden the citizens' protected right to speech without providing adequate justification to constitute a compelling government interest.<sup>223</sup> Further, it can be argued that the States also impermissibly invade the federal government's powers in foreign affairs by unlawfully regulating foreign commerce.<sup>224</sup> As a result of the States' arguably unconstitutional anti-BDS laws, there is a lack of uniformity, which one may argue hinders the American Jurisprudence's ordinary interpretation of the First Amendment's Freedom of Speech Clause.<sup>225</sup> In conclusion, it is possible that anti-BDS laws disrupt the public's interest in the right to freedom and liberty as intended to be protected by the Framers of the Constitution.<sup>226</sup>

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219. *See id.*

220. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

221. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

222. *See discussion supra* Section V.A.

223. *See, e.g., Koontz v. Watson*, 283 F. Supp. 3d 1007, 1024, 1027 (D. Kan. 2018).

224. *See Crosby*, 530 U.S. at 388.

225. *See A & R Eng'g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 421 (S.D. Tex. 2022).

226. *See U.S. CONST. amend. I; Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

