Corporate Activism on Israel-Palestine and the Unconstitutionality of State Anti-Boycott Laws

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I. INTRODUCTION

Perhaps no phrase that conjures up as much controversy as "Israel-Palestine." In the past, companies have hesitated to take a stand on divisive issues. However, as corporate activism on social issues becomes the norm,[1] some companies are speaking out on Israel-Palestine by boycotting Israel for its alleged abuses of human rights.[2] In response to such boycotts, 35 states have passed anti-boycott bills.[3] Some of these laws make it illegal for government contractors to boycott Israel, while others require state pension funds to divest from companies that boycott Israel.[4] These states justify anti-boycott laws by arguing they are necessary to curb several forms of anti-Israeli discrimination and to support an important American ally.[5]

This Note does not take a position on whether companies should or should not boycott Israel. Rather, this Note argues that companies have a constitutional right to boycott, which they are free to exercise at their own peril. State anti-boycott laws infringe on this right and are therefore unconstitutional.

Part II of this Note provides a brief summary of helpful terminology and then discusses the current state of corporate activism on Israel-Palestine, focusing on Ben & Jerry's recent decision to stop selling its products in the West Bank. Additionally, Part II distinguishes between the three main movements to boycott Israel. Finally, Part II outlines precedents showing that boycotting is First Amendment-protected free speech and that regulations burdening this right are subject to heightened scrutiny.

Part III of this Note begins with a discussion of the current state of anti-boycott laws, none of which have withstood judicial scrutiny. It argues that, because anti-boycott laws burden a fundamental First Amendment right, heightened scrutiny applies. Part III proceeds with an application of heightened scrutiny to state anti-boycott laws, analyzing states' alleged rationales for anti-boycott laws. Part III then rebuts the proposition that anti-boycott laws are merely economic regulations and argues that boycotts of Israel are discriminatory. Further, it argues that investment-based anti-boycott laws are also unconstitutional. Finally, Part III compares the movement to boycott Israel with similar movements in the past, none of which were regulated by states.

Part IV of this Note argues that if states truly wish to curb discrimination, they should repeal anti-boycott laws and pass new legislation that effectively addresses discrimination. Part IV then recommends that courts continue to strike down anti-boycott laws as unconstitutional infringements on First Amendment rights; finally, Part V concludes.

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1. *See* Brayden King, *Why Companies Should Engage with Activists*, KELLOGG INSIGHT: KELLOGG SCH. OF MGMT. AT NW. UNIV. (Apr. 28, 2021), https://insight.kellogg.northwestern.edu/article/why-companies-should-engage-with-activists [https://perma.cc/CT2J-T43R] (noting an increase in corporate activism to bring about social change).

2. *See* David Rosenberg, *Not Just Ben & Jerry's: BDS Efforts to Get Companies to Boycott Israel*, HAARETZ (July 21, 2021), https://www.haaretz.com/israel-news/2021-07-21/ty-article/.premium/not-just-ben-jerrys-bds-efforts-to-get-companies-to-boycott-israel/0000017f-e4a4-d38f-a57f-e6f625e90000 [https://perma.cc/C3PF-ENTZ] (discussing companies' boycotts of and withdrawals from Israel).

3. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/5KY5-BSGF].

4. *Id.*

5. Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1360 (2020).

II. BACKGROUND

A. Terminology: Israel, the West Bank, and the Occupied Territories

Before discussing boycotts of Israel, it is necessary to define the term "Israel," because the name has various geographical meanings.[6] Generally, "Israel" means the sovereign nation within the 1949 Armistice Lines—also known as the State of Israel or "Israel Proper."[7] Outside of its 1949 borders, Israel also has military control of the West Bank, Gaza, and the Golan Heights.[8] The West Bank is the area theoretically reserved for a future Palestinian state and is so named because it is on the western bank of the Jordan River.[9] Gaza is a Palestinian enclave on the Mediterranean Coast of Israel that will also theoretically become part of a future Palestinian state.[10] Finally, the Golan Heights is a strategic area on the border of Israel and Syria.[11]

The West Bank, Gaza, and the Golan Heights are not internationally recognized as part of "Israel Proper."[12] The U.N. views Israeli control of these territories as an illegal military occupation and refers to them as the Occupied Territories.[13] Nonetheless, Israeli citizens have access to the West Bank and the Golan and are able to build homes and start businesses there.[14] These territories are especially attractive to Israeli citizens because approved enterprises pay a significantly reduced tax rate.[15] While Israeli citizens can move freely in these territories, the U.N. has stated that Palestinians live under military occupation.[16] Palestinians do not possess passports, must apply for permits to move from one city to another, and often face violence and the threat of home demolitions.[17]

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6. *See Israel's Borders Explained in Maps*, BBC NEWS (Sept. 16, 2020), https://www.bbc.com/news/world-middle-east-54116567 [https://perma.cc/6XTN-XY4U] (explaining the various definitions of "Israel").

7. *Id.* For purposes of this Note, "Israel Proper" refers to Israel within the 1949 Armistice Lines.

8. *Id.*

9. *Id.*

10. *Id.*

11. BBC NEWS, *supra* note 6.

12. *Id.*

13. *Id.*

14. *See* Mitchell G. Bard, *Facts About Jewish Settlements in the West Bank*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/facts-about-jewish-settlements-in-the-west-bank [https://perma.cc/QR4B-DM3D] ("A third group of Jews who are today considered 'settlers,' [sic] moved to the West Bank primarily for economic reasons; that is, the government provided financial incentives to live there, and the towns were close to their jobs. In recent years, many of these Jews have come from more religious communities because of housing shortages . . . .").

15. *See* Steven Scheer & Tova Cohen, *Israel's West Bank Businesses Face Growing Pressure to Uproot*, REUTERS (Feb. 22, 2016), https://www.reuters.com/article/us-israel-palestinians-business/israels-west-bank-businesses-face-growing-pressure-to-uproot-idUSKCN0VV1JC [https://perma.cc/P6VH-4RUE] (stating that approved Israeli businesses are taxed at 9%, while others are taxed at 25%).

16. David M. Halbfinger & Adam Rasgon, *Life Under the Occupation: The Misery at the Heart of the Conflict*, N.Y. TIMES (Aug. 24, 2021), https://www.nytimes.com/2021/05/22/world/middleeast/israel-gaza-conflict.html [https://perma.cc/ED54-CASJ].

17. *Id.*

B. Types of Boycotts of Israel

To urge the Israeli government to end its occupation and negotiate an end to the conflict, individuals and organizations have called for a boycott of Israel.[18] These boycotts are not a monolith, but are instead composed of several different movements with a variety of political ideologies.[19] Understanding the differences between these boycott movements is essential to understanding the constitutionality of the state laws that seek to ban them.

There are three main boycotts of Israel: the Arab League Boycott of 1945, the Boycott, Divestment, Sanctions Movement (BDS), and a general boycott.[20] These boycotts are united by their disapproval of Israeli policies towards Palestinians and a desire to reach a negotiated end to the conflict. Because these movements have different origins, goals, and practitioners, [21] each one is subject to a different constitutional analysis.[22]

The Arab League Boycott is a boycott of Israel enforced by 22 Arab states.[23] The Arab League Boycott consists of primary, secondary, and tertiary boycotts.[24] The Congressional Research Service describes the levels of boycotts as follows:

> The primary boycott prohibits citizens of an Arab League member from buying from, selling to, or entering into a business contract with either the Israeli government or an Israeli citizen. The secondary boycott extends the primary boycott to any entity world-wide that does business in Israel. A blacklist of global firms that engage in business with Israel is maintained by the Central Boycott Office, and disseminated to Arab League members. The tertiary boycott prohibits an Arab League member and its nationals from doing business with a company that deals with companies that have been blacklisted by the Arab League.[25]

Today, only the primary boycott remains, and even that boycott has waned as Arab countries, including the United Arab Emirates, normalize relations with Israel.[26]

In contrast to the Arab League Boycott, which is organized by Arab sovereign nations, BDS was founded by Palestinian and pro-Palestine activists across the world.[27] These activists model their organization on the anti-apartheid boycotts of South Africa.[28] BDS seeks to use academic, economic, and diplomatic boycotts of Israel to pressure the country

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18. *See generally* MARTIN A. WEISS, CONG. RSCH. SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 8 (2017) (discussing the current state of Israel boycotts).

19. *Id.* at 2–3.

20. *Id.* at 2.

21. *See id.* at 2–3 (explaining the differences between the three tiers of boycotts).

22. *See generally* Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018) (analyzing the constitutionality of boycotts).

23. These states are "Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, the Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen." WEISS, *supra* note 18, at 1.

24. *Id.* at 2.

25. *Id.*

26. OMAR RAHMAN, *The Emergence of GCC-Israel Relations in a Changing Middle East*, (July 28, 2021), https://www.brookings.edu/research/the-emergence-of-gcc-israel-relations-in-a-changing-middle-east/), https://www.brookings.edu/wp-content/uploads/2021/07/English_The-emergence-of-GCC-Israel-relations-in-a-changing-Middle-East.pdf [https://perma.cc/LK4B-5T6G].

27. WEISS, *supra* note 18, at 7–8.

28. CHARLES TRIPP, THE POWER AND THE PEOPLE: PATHS OF RESISTANCE IN THE MIDDLE EAST 125 (2013).

to adhere to its obligations under international law.[29] According to BDS, these obligations include a full Israel withdrawal from the Occupied Territories, dismantlement of the West Bank separation barrier, full equality for Arab citizens of Israel, and the right of Palestinians to return to where they have been exiled since 1948.[30]

The last type of boycott includes independent individuals, organizations, and corporations. These "independent boycotters" do not refer to themselves as part of any collective movement, but choose to boycott for their own individual reasons.[31] Generally, these independent boycotters are frustrated with Israel's continued support of settlements, Israel's unequal treatment of Arab and Jewish citizens in the country, and its alleged bad faith negotiations for a two-state solution.[32] These independent boycotters may divest from all Israeli products or services, or only those produced in the Occupied Territories of the West Bank and Golan Heights.[33] Because corporations are hesitant to affiliate with outside organizations—especially those as controversial as BDS—corporations that boycott Israel are usually independent boycotters.[34] Companies such as Ben & Jerry's fall into this category.[35]

C. Ben & Jerry's and Corporate Activism on Israel-Palestine

Companies that take a stand on Israel-Palestine have done so with mixed results. In 2019, Airbnb announced that it would no longer allow listings for properties in the Occupied Territories.[36] Public outrage was swift.[37] Airbnb quickly reversed its stance and put out a conciliatory public statement, claiming that "Airbnb has never boycotted Israel, Israeli businesses, or the more than 20,000 Israeli hosts who are active on the Airbnb platform."[38]

In 2014, SodaStream had its own run-in with the movement to boycott Israel.[39] SodaStream, an Israeli company, operated a factory in a West Bank settlement.[40] Activists

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29. *Id.*

30. *What is BDS?*, PALESTINIAN BDS NAT'L COMM., https://bdsmovement.net/what-is-bds [https://perma.cc/9VJV-CN3Z].

31. Steven Levitsky & Glen Weyl, Opinion, *We Are Lifelong Zionists. Here's Why We've Chosen to Boycott Israel*, WASH. POST (Oct. 23, 2015), https://www.washingtonpost.com/opinions/a-zionist-case-for-boycotting-israel/2015/10/23/ac4dab80-735c-11e5-9cbb-790369643cf9_story.html [https://perma.cc/BT5V-RCSD].

32. *Id.*

33. *See Impact of the Boycott, Divestment, and Sanctions Movement: Hearing Before the Subcomm. on Nat'l Sec. of the H. Comm. on Oversight and Gov't Reform*, 114th Congress 7–8 (2015) [hereinafter *BDS*] (statement of Daniel Birnbaum, CEO, SodaStream International) (describing divestment from Israeli products and services, specifically in the context of SodaStream International).

34. *See* WEISS, *supra* note 18, at 8 (explaining that the BDS boycotts appear "to essentially be an informal grouping of civil society organizations" that do not directly involve foreign states or companies)

35. *See generally* Rosenberg, *supra* note 2 (discussing how Ben & Jerry's implemented its boycott of Israel). However, Ben & Jerry's made it clear that they would continue to sell their products in Israel Proper. *Id.*

36. *Id.*

37. *Id.*

38. *Airbnb Reverses Ban on West Bank Settlement Listing*, BBC NEWS (Apr. 10, 2019), https://www.bbc.com/news/world-middle-east-47881163 [https://perma.cc/Z8HS-FGEY].

39. *See SodaStream Leaves West Bank as CEO Says Boycotts Antisemitic and Pointless*, GUARDIAN (Sept. 2, 2015), https://www.theguardian.com/world/2015/sep/03/sodastream-leaves-west-bank-as-ceo-says-boycott-antisemitic-and-pointless [https://perma.cc/82UN-JHXF] (explaining how SodaStream's decision to close its West Bank factory eventually led to public criticism and allegations of antisemitism).

40. *Id.*

urged consumers to boycott SodaStream's products, claiming that the factory was illegal because it was built on land reserved for a future Palestinian State.[41] After a messy public outcry, SodaStream shut down its West Bank factory and relocated to Israel Proper.[42] SodaStream released an official statement claiming that its relocation was a "purely commercial" decision and not influenced by the boycotts of its factory.[43]

In July 2021, Ben & Jerry's became the latest company to take a stand on Israel-Palestine.[44] Ben & Jerry's announced its decision to formally end ice cream sales in the Occupied Territories, stating that selling their products in an "internationally recognized illegal occupation"[45] is "inconsistent with [their] values."[46] Ben & Jerry's cited Israel's alleged human rights abuses of Palestinians, specifically the Israeli Supreme Court's May 2021 decision to evict six Palestinian families from the neighborhood of Sheikh Jarrah.[47]

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41. *Id.* Companies—Israeli or otherwise—that operate in the West Bank are exempt from numerous taxes levied against companies operating in Israel Proper. As a result, investors view the West Bank as enormously attractive.; Adam Chandler, *Why SodaStream will Disengage from the West Bank*, ATLANTIC (Oct. 29, 2014), https://www.theatlantic.com/international/archive/2014/10/sodastream-moves-west-bank-factory/382086/ [https://perma.cc/5FYP-6JMC].

42. GUARDIAN, *supra* note 39.

43. Chandler, *supra* note 41. SodaStream CEO Daniel Birnbaum later testified in Congress about the negative effects of boycott movements on his company. *BDS*, *supra* note 33, at 7–8. Significantly, Birnbaum referred to the West Bank as Judea and Samaria, provinces of the ancient Kingdom of Judah. *Id.* The phrase in its modern usage was coined by Israeli Prime Minister Menachem Begin, who advocated extending Israeli sovereignty to the entire West Bank. *See* Arye Naor, *Menachem Begin and "Basic Law: Jerusalem, Capital of Israel*,*"* 21 ISR. STUD. 36, 48 n.24 (2016) (stating that "[Prime Minister] Begin accepted in full the legal reasoning of Prof[essor] Yehuda Blum on the issue of Jerusalem and Judea and Samaria"); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 294 (1968) ("The legal standing of Israel in the territories in question [Jerusalem, Judea, and Samaria] is thus that of a State which is lawfully in control of territory in respect of which no other States can show a better title. Or, if it is preferred to state the matter in terms of belligerent occupation, then the legal standing of Israel in the territories in question is at the very least that of a belligerent occupant of territory in respect of which Jordan is *not* entitled to the reversionary rights of a legitimate sovereign . . . .") (emphasis in original). Today, the terms Judea and Samaria are associated with the far-right Likud government, and use of these terms in Modern Israeli parlance can signal approval of Israeli settlements on the West Bank. MYRON J. ARONOFF, ISRAELI VISIONS AND DIVISIONS: CULTURAL CHANGE AND POLITICAL CONFLICT 10 (1991) ("'Judea and Samaria', the biblical terms that the Likud government succeeded in substituting for what had previously been called by many the West Bank, the occupied territories, or simply the territories. The successful gaining of the popular acceptance of these terms was a prelude to gaining popular acceptance of the government's settlement policies.").

44. Wilson Ring & Josef Federman, *Ben & Jerry's to Stop Sales in West Bank, East Jerusalem*, AP NEWS (July 19, 2021), https://apnews.com/article/ben-and-jerrys-ice-cream-palestinian-territories-d8488b4c9c19dac11e2c253530d63014 [https://perma.cc/VYX8-UJCV]. However, Ben & Jerry's made it clear they would continue to sell their products in Israel Proper. *Id.* Ultimately, however, Unilever—Ben and Jerry's parent company—reversed Ben and Jerry's decision. *Ben & Jerry's Fails to Stop Sales in Israeli Settlements*, BBC News (Aug. 23, 2022), https://www.bbc.com/news/world-middle-east-62643392 [https://perma.cc/5EG6-RR37]. Instead, the company continues to offer its products in Palestinian territories under local names. *Id.*

45. Zachy Hennessey, *Ben & Jerry's Israel CEO Calls Retaliation Against Ice Cream Maker*, JERUSALEM POST (Jan. 30, 2022), https://www.jpost.com/business-and-innovation/article-694993 [https://perma.cc/Z6F5-5DT9].

46. Ring & Federman, *supra* note 44.

47. Sheikh Jarrah is in East Jerusalem, which the international community considers to be illegally occupied by Israel. Halbfinger & Rasgon, *supra* note 16. Palestinians protested the evictions; some began throwing rocks at Israeli soldiers. *International Condemnation of Israel Grows Over Jerusalem Violence, Evictions*, TIMES OF ISR. (May 10, 2021), https://www.timesofisrael.com/international-condemnation-of-israel-grows-over-

In response to Ben & Jerry's boycott of Israel, several states—including Texas, Arizona, Florida, and New Jersey—announced that they would divest their pension funds from Ben & Jerry's parent company, Unilever.[48] Each of these states passed laws that (a) prohibited state pension funds from investing in corporations that boycott Israel, and (b) prevented states from contracting with corporations that boycott Israel.[49]

D. State Anti-Boycott Laws

As of October 2021, governors of all 50 states have signed symbolic resolutions condemning the BDS movement), and 35 states have enacted laws making boycotts of Israel illegal.[50] While these laws are referred to as "anti-BDS laws," they not only ban BDS-associated boycotts, but rather, they ban all boycotts of Israel. To avoid confusion, this Note will refer to these laws as "anti-boycott laws."

Anti-boycott laws come in two main forms: "contract-focused laws that condition the receipt of government contracts on an entity certifying that it is not boycotting Israel," and "investment-focused laws that mandate public investment funds to divest from entities involved in boycotts of Israel."[51] States that adopt anti-boycott laws usually include both provisions.[52] The following is one such law from Arizona:

> A. A public entity may not enter into a contract WITH A VALUE OF $100,000 OR MORE 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 GOODS OR SERVICES FROM Israel. . . .
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> B. A public entity may not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person or company to boycott Israel.[53]

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jerusalem-violence-evictions/ [https://perma.cc/S3UM-S5LA]. In retaliation, Israeli forces stormed Al-Aqsa Mosque and used tear gas and rubber bullets against worshippers. *Id.* The international community heavily condemned Israel's attacks, especially because they coincided with Laylat-al-Qadr, the holiest night of Ramadan. *Id.* (noting that the "violent confrontations [took place] at the Haram al-Sharif/Temple Mount during the last days of Ramadan").

48. Patrick McGeehan, *N.J. to Pull $182 Million out of Unilever over Ben & Jerry's and Israel*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/09/16/nyregion/ben-and-jerrys-israel-unilever.html [https://perma.cc/K7SD-2QYA]; Nick Kostov, *State Funds Drop Unilever After Ben & Jerry's Israel Clash*, WALL ST. J. (Sept. 17, 2021), https://www.wsj.com/articles/state-funds-drop-unilever-after-ben-jerrys-israel-clash-11631903926 [https://perma.cc/322C-KZA2].

49. McGeehan, *supra* note 48; Kostov, *supra* note 48.

50. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/BR7U-Y9YC].

51. Timothy Cuffman, Note, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDSBDS Laws*, 57 COLUM. J. TRANSNAT'L L. 115, 115 (2018).

52. *See generally* JEWISH VIRTUAL LIBR., *supra* note 50 50(compiling legislation related to boycotts). Legislation banning boycotts of Israel is similar from state to state. *Id.* Usually, the only variation is the minimum dollar amount of contracts affected by the law; in Arizona's case, the minimum amount is $100,000. *Id.*

53. S.B. 1167, 54th Leg., Reg. Sess. (Ariz. 2019) (emphases in original).

The bill then concludes with a discussion of legislative findings, in which the Arizona Legislature argues that anti-boycott laws are necessary to prevent discrimination and help an important American ally.[54]

Anti-boycott legislation is similar from state to state[55] and, therefore, the analysis in this Note applies to all current anti-boycott laws. As courts overturn anti-boycott laws, some states amend their laws in an effort to put them beyond the reach of these rulings. South Carolina, for example, amended its anti-boycott law to exempt individuals, but still requires corporations to take a pledge not to boycott.[56] South Carolina also avoided a specific mention of Israel in its statute, instead mandating the following:

> A public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article.[57]

Yet, South Carolina legislators have made it clear that boycotts of Israel are their main target.[58] South Carolina Representative Alan Clemmons, who pioneered the legislation, stated:

> Discriminatory boycotts have historically been used as a form of economic warfare to forward the purposes of hatred and bigotry . . . . In this day and age,

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54. H.B. 2617, 52nd Leg., Reg. Sess. (Ariz. 2016). Additional text of the bill provides:

> D. It is the public policy of the United States, as enshrined in several federal acts, including 50 United States Code section 4607, to oppose such boycotts, and Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness.
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> E. Israel in particular is known for its dynamic and innovative approach in many business sectors, and a company's decision to discriminate against Israel, Israeli entities or entities that do business with Israel or in Israel is an unsound business practice making the company an unduly risky contracting partner or vehicle for investment.
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> F. This state seeks to implement Congress's [sic] announced policy of ""examining a company's
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> 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." *Id.*

55. For an example of such state anti-boycott legislation, see S.C. CODE ANN. § 11-35-5300 (2015). South Carolina's law, however, applies to all boycotts of entities with which "the United States has free trade or other agreements aimed at ensuring open and nondiscriminatory trade relations," although South Carolina legislators have made it clear that their primary purpose for passing the law is to fight boycotts of Israel. *Id.* South Carolina Representative Alan Clemmons called the law "the country's first legislation confronting BDS." Rep. Alan Clemmons, State Rep., Statement on Enactment of H. 3583 (June 4, 2015), https://web.archive.org/web/20150812095414/http://alanclemmons.com/index.html.

56. *See* S.C. CODE ANN. § 11-35-5300 (2015) (providing that the statute applies when public entities enter into contracts with businesses rather than individuals).

57. S.C. CODE ANN. § 11-35-5300(A) (2015).

58. Michael Wilner, *South Carolina Becomes First U.S. State to Take Action Against Anti-Israel Boycotts*, JERUSALEM POST (June 5, 2015), https://www.jpost.com/diaspora/south-carolina-becomes-first-us-state-to-take-action-against-anti-israel-boycotts-405120 [https://perma.cc/C6A7-84F4] ("South Carolina's governor has signed into law a bill to stop efforts to boycott, divest[,] and sanction Israel on Thursday afternoon . . . .").

> no group better demonstrates this fact than the Boycott, Divestment and Sanctions movement in its effort to harm our great ally, Israel.[59]

The broad scope of South Carolina's amended boycott law affects a far wider range of corporate speech than the previous anti-boycott law. Indeed, South Carolina's law is so broad that it could theoretically apply to any boycott.

Anti-boycott laws also burden corporations far more than they do individuals. While several states have amended their anti-boycott laws to exempt individual contractors,[60] no state has exempted corporations.[61] Further, because most anti-boycott laws only apply to contracts above a certain dollar amount, corporations are most likely to be affected.[62]

Arkansas' law, like South Carolina's, bans the state from contracting with corporations that boycott Israel unless those corporations agree to complete the government contract for a 20% discount,[63] which the ACLU has called a "tax on free speech."[64] This Note will analyze whether such anti-boycott laws, in fact, curb corporations' free speech, or if they are a valid exercise of states' sovereignty.

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59. *Id.* (quoting South Carolina Representative Alan Clemmons).

60. *See generally* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated and remanded*, 956 F.3d 816 (5th Cir. 2020) (dismissing complaints under Texas statute prohibiting state entities from contracting with companies boycotting Israel because legislative action rendered the complaints moot); *see also* Allyson Waller, *Texas Law Barring State Contractors from Boycotting Israel Violates Firm's Free Speech, Federal Judge Rules*, TEX. TRIB. (Jan. 31, 2022), https://www.texastribune.org/2022/01/31/texas-boycott-israel-lawsuit [https://perma.cc/XCF2-WGZU] ("Texas passed an anti-BDS law in 2017. In 2019, it was rewritten to exclude individual contractors and only pertain to businesses with 10 or more full-time employees and when the contract is for $100,000 or more."); JEWISH VIRTUAL LIBR., *supra* note 50 (stating that Texas Senator Brandon Creighton described the changes in legislation as a means of "primarily mak[ing the state's] original intent clear, which is . . . [that the law] was not to pertain to small contracts and individuals"). Arizona has enacted similar legislation to exempt individuals. *Id.* ("[T]he [Arizona] legislature passed a new law in April 2019, which 'limits the anti-boycott certification to for-profit companies with more than 10 employees and government contracts worth more than $100,000.' . . . The change means that many individuals and businesses who contract with the government are no longer subject to certification.") (citation omitted).

61. *See* JEWISH VIRTUAL LIBR., *supra* note 50 (providing an overview of anti-boycott laws adopted in various states, none of which include exemptions for corporations).

62. Most states set the threshold amount at $100,000. *See generally id.* However, Iowa's anti-boycott law does not allow the state to enter into a contract for more than $1,000 with any entity that boycotts Israel. *Id.*

63. Andrew DeMillo, *Appeals Court Upholds Arkansas' Israel Boycott Pledge Law*, AP NEWS (June 22, 2022), https://apnews.com/article/middle-east-israel-boycotts-arkansas-government-and-politics-514cac508c401a86393705c7142aa1b0 [https://perma.cc/64FW-4SQ8] (reporting that Arkansas' law "requires contractors with the state to reduce their fees by 20% if they don't sign the [anti-boycott] pledge"). The ACLU and ACLU of Arkansas, on behalf of Arkansas Times LP, sued, claiming that "the law unconstitutionally penalizes participation in politically-motivated consumer boycotts and suppresses one side of a public debate."; *Arkansas Times LP v. Waldrip*, ACLU (May 9, 2019), https://www.aclu.org/cases/arkansas-times-lp-v-waldrip. [https://perma.cc/393U-TZVJ].

64. Andrew DeMillo, *Arkansas Newspaper Sues Over No-Boycott Pledge for Vendors*, AP NEWS (Dec. 11, 2018), https://apnews.com/article/4bc6e59c3bf6407f9e0932823af9f3df [https://perma.cc/V7G5-RN7D].

E. The Purpose of the First Amendment Is to Protect Political Expression, Including Boycotts

The Supreme Court has repeatedly held that political boycotts are protected First Amendment speech.[65] Boycotts align with the purposes of the First Amendment, which are to preserve democracy by promoting a marketplace of ideas and allow citizens to self-govern.[66] Protecting unusual or unpopular opinions is essential to this endeavor.

First, under the marketplace theory, truth emerges from the free competition of ideas in open, transparent debate.[67] Rather than advocating for imposing external restrictions that limit "false or pernicious" ideas, the marketplace theory instead trusts that society itself will reason its way to truth.[68] The Supreme Court has stated that prior restraints can be "repugnant"[69] to free speech because there is "no way of suppressing the false [opinions] without suppressing the true [opinions]."[70] Without full access to all viewpoints, public debate is stunted, and citizens cannot properly assess the values of competing ideas.[71] Boycotts are a way of putting forward such viewpoints and allowing individuals to demonstrate their opposition to corporate values or business practices they believe objectionable.[72]

Second, under the self-governance theory, the First Amendment exists to protect "the right of all members of society to form their own beliefs and communicate them freely to others."[73] The ability to criticize the government, its officials, and its domestic and foreign policy is essential to fostering free and open debate.[74] Boycotts can serve as a method of

65. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) ("It is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (citations omitted). Other courts have reiterated the Supreme Court's sentiment. *See, e.g.*, United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (stating that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection").

66. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963) (explaining purposes behind the First Amendment).

67. *Id.* at 881.

68. *Id.* at 882.

69. Near v. Minnesota, 283 U.S. 697, 727 (1931); WILLIAM C. SPRAGUE, ABRIDGMENT OF BLACKSTONE'S COMMENTARIES 427–28 (3d ed. 1895).

70. Emerson, *supra* note 66, at 882.

71. *Id.* at 902.

72. *See, e.g.*, Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 660–61 (1978) (describing boycotts that allowed individuals to protest matters pertaining to "civil rights groups, pressure by consumer groups for lower prices, the organized opposition of religious groups to the showing of movies deemed objectionable, and actions by political groups against private sector employers hiring persons considered subversive"); *see also Boycotts List*, ETHICAL CONSUMER (Feb. 2023), https://www.ethicalconsumer.org/ethicalcampaigns/boycotts [https://perma.cc/L8UC-JEW9] (compiling a list of companies believed to be unethical and the reasons consumers should boycott).

73. Emerson, *supra* note 66, at 883.

74. *Id.*

critiquing the government for contracting with certain corporations,[75] or for allowing certain human rights violations to continue.[76]

The controversial nature of some boycotts does not exempt them from First Amendment protections. In fact, the more controversial the issue, the more necessary it is to open the debate to conflicting viewpoints.[77] John Stuart Mill stated, "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[78]

The importance of open debate and free expression is reflected in First Amendment case law. The Supreme Court stated that "[i]t is fundamental that the First Amendment 'was fashioned to assure an unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[79] In *Turner Broadcasting System, Inc. v. FCC*, the Court reaffirmed this principle, stating that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[80] The Supreme Court went so far as to say that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[81]

Additionally, historical evidence demonstrates that the Founding Fathers intended the First Amendment to protect boycotting activity. The Founding Fathers used boycotts as a form of political resistance during the Stamp Act and the Boston Non-Importation Agreement.[82] Perhaps the most famous demonstration of free speech was a boycott: the Boston Tea Party, which eventually resulted in the Revolutionary War.[83] Given the importance of boycotts in the Revolutionary War, and in American history as a whole, the Founding Fathers intended to include the right to boycott in the First Amendment.

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75. Kevin Roose, *Why Napalm Is a Cautionary Tale for Tech Giants Pursuing Military Contracts*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/technology/technology-military-contracts.html [https://perma.cc/VLJ3-KHAU] ("Activists boycotted Dow Chemical's products, staged protests at its recruiting events on college campuses and barraged its executives with accusations of unethical war profiteering.").

76. *Id.*

77. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 20 (Neff ed. 1926).

78. *Id.* at 21.

79. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

80. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

81. West Virginia State Bd. of Educ. V. Barnette, 319 U.S. 624, 642 (1943).

82. *See* George H. Smith, *The Boston Tea Party*, LIBERTARIANISM.ORG (Jan. 17, 2012), https://www.libertarianism.org/publications/essays/excursions/boston-tea-party [https://perma.cc/LLJ5-VQNN] (discussing the Boston Tea Party and its role as a boycott to the Boston Non-Importation Agreement); Robert J. Chaffin, *The Townshend Acts Crisis, 1767–1770*, *in* THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 126 (Jack P. Greene & J.R. Pole, eds. 1991).

83. Smith, *supra* note 82.

F. The Case Law Clearly Shows That Boycotts Are Protected by the First Amendment

First, the landmark case *Citizens United* confirmed the century-long precedent that corporations have First Amendment rights.[84] The First Amendment right to boycott discussed in this Section is not limited to individuals; it applies to corporations as well.[85] In *NAACP v. Claiborne Hardware Co.*, the Supreme Court found that boycotts were protected First Amendment speech.[86] In *Claiborne*, an African American community protested for racial equality and integration by boycotting white-owned stores.[87] When some participants used violence to enforce the boycott, a local court enjoined future boycott activity and demanded that protesters reimburse the white merchants for lost sales.[88] The Supreme Court vacated the lower court's decision, holding that boycotts and other activities aimed at bringing about social, political, and economic change occupy "the highest rung of the hierarchy of First Amendment values."[89] Thus, the government's "broad power to regulate economic activity" does not allow it "to prohibit peaceful political activity such as that found in the boycott in [*Claiborne*]."[90]

Claiborne made clear that First Amendment protections apply to political boycotts, even those that have the unintended effect of reducing economic competition.[91] However, boycotts with the *sole* purpose of eliminating economic competition are not protected under the First Amendment.[92] In *Federal Trade Commission v. Superior Court Trial Lawyers Association*, a group of court-appointed lawyers refused to take on new clients, hoping that the boycott would force the District of Columbia to increase their salaries.[93] The Court found that the lawyers' actions were not political boycotts, but were rather aimed at restraining trade since the end goal was to increase the lawyers' compensation.[94] The Court contrasted *Superior Court Trial Lawyers' Association* with *Claiborne* by noting that, while the *Claiborne* boycotters "certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign,"[95] this was not their main goal.[96] Instead, unlike the boycotters in *Superior*, the *Claiborne* boycotters "sought to

84. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (stating that "the Government may not suppress political speech on the basis of the speaker's corporate identity").

85. *Id.*

86. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982).

87. *Id.* at 889.

88. *Id.* at 892–93.

89. *Id.* at 913 (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)); *see also id.* ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)). Additionally, there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

90. *Claiborne*, 458 U.S. at 913.

91. *Id.*

92. FTC. v. Superior Ct. Trial Law. Ass'n, 493 U.S. 411, 424–25 (1990).

93. *Id.* at 414.

94. *Id.* at 423–25.

95. *Claiborne*, 458 U.S. at 914.

96. *See Superior Ct. Trial Law. Ass'n*, 493 U.S. at 412 (holding that the boycott at issue "is not immunized from antitrust regulation by [*Claiborne*]" because in that case, "the undenied objective of [the] boycott was to gain an economic advantage for those who agreed to participate").

vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself."[97]

Courts analyzing the constitutionality of anti-BDS laws have used the *Claiborne* test to delineate the difference between economic and political boycotts;[98] however, courts also use variations on the *Spence* test to analyze whether expressive conduct deserves First Amendment protection.[99] The *Spence* test for political conduct holds that an action, such as boycotting, is First Amendment-protected political speech if the action is (1) intended to convey a specific message, and (2) if an observer is reasonably likely to understand that message. [100] The *Spence* standard thus takes into account prevailing societal interpretations of the conduct in question. In order to qualify for First Amendment protection, corporate boycotts of any country—including Israel—must pass this test.

III. ANALYSIS

A. Case Law Coalesces Around the Principles That Anti-Boycott Laws Cannot Pass Heightened Review and Corporate Boycotts Are Not Economic Activity but Protected First Amendment Speech

The purpose of this Section is to offer a unified theory of the unconstitutionality of both contract-based and investment-based anti-boycott laws. While contract-based laws have repeatedly been found unconstitutional, courts' rationales vary.[101]

Courts' rationales for the unconstitutionality of anti-boycott laws coalesce around two main principles. The first principle is that boycotting, even when practiced by corporations, is not economic activity.[102] Rather, it is political activity that is protected by the First Amendment and thus is entitled to heightened scrutiny.[103] The second principle is that when such heightened scrutiny is applied, anti-boycott laws fail the test.[104] This is because states' interests in passing these laws are both suspect and not substantially related to the means of accomplishing the stated interest.

1. Boycotting Is a Fundamental Right, and Legislation Burdening this Fundamental Right Receives Heightened Review

Citizens United made it clear that corporations have First Amendment rights,[105] and *Brnovich* and *Waldrip* further clarified that this right includes the right to boycott.[106] In

97. Superior. Ct. Trial Laws. Ass'n. v. FTC, 856 F.2d 226, 245 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

98. *Id.*

99. Koontz v. Watson, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018) ("It is easy enough to associate plaintiff's conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians.").

100. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

101. *See supra* Part II (analyzing common law).

102. Ark. Times LP v. Waldrip, 988 F.3d 453, 459 (8th Cir. 2021), *reh'g en banc granted, opinion vacated* (June 10, 2021); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1049 (9th Cir. 2020); Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 743 (W.D. Tex. 2019), *vacated and remanded sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1021 (D. Kan. 2018).

103. *See* cases cited *supra* note 102.

104. *Id*.

105. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

106. *See generally Brnovich*, 336 F. Supp. 3d 1016; *Waldrip*, 988 F.3d 453.

Waldrip, the plaintiff was a newspaper and, in *Brnovich*, the plaintiff was a single-practitioner law firm.[107] Both plaintiffs were required by their states to sign "anti-boycott" pledges as a condition of receiving state contracts.[108] In both cases, the fact that the plaintiffs were businesses did not deter the court from finding that they had First Amendment rights.[109]

Furthermore, in *Koontz v. Watson*, the court made it clear that corporate boycotts of Israel pass the *Spence* test and are "inherently expressive" even "without any spoken or written explanation."[110] According to the *Koontz* court, corporate boycotts of Israel are easily associated "with the message that the boycotters believe Israel should improve its treatment of Palestinians," and are therefore protected First Amendment speech.[111]

2. Corporate Boycotts Are Not Economic Refusals to Deal

While corporate boycotts of Israel are political,[112] there are some scholars who dispute this. Constitutional scholar Eugene Volokh posits that boycotts of Israel are not political speech, but rather economic refusals to deal, and can be regulated as such.[113] According to Volokh, anti-boycott laws, like anti-discrimination laws, "are constitutional precisely because they do not inherently burden First Amendment rights, not because they burden First Amendment rights but pass strict scrutiny."[114]

In support of this proposition, Volokh cites *Allied Longshoremen*, in which, according to Volokh, "union members engaged in a purely politically motivated boycott of cargoes shipped from the USSR . . . ."[115] Despite the fact that the conduct was clearly political, the Court prohibited the boycott.[116] Volokh believes the Court's ban was justified. He claims it aligns with the Court's previous position that "even outright speech—secondary picketing—in support of refusals to deal might sometimes be properly restricted notwithstanding the First Amendment . . . ."[117]

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107. *See* cases cited *supra* note 106.

108. *Id.*

109. *Id.*

110. Koontz v. Watson, 283 F. Supp. 3d 1007, 1023 (D. Kan. 2018).

111. *Id.* at 1024. The intense outrage that individuals and corporations face after boycotting Israel is proof that such boycotts are more than mere economic decisions. *See* Noa Landau, *Mossad Involved in Anti-Boycott Activity, Israeli Minister's Datebooks Reveal*, HAARETZ (June 12, 2019), https://www.haaretz.com/israel-news/.premium-mossad-involved-in-anti-boycott-activity-israeli-minister-s-diaries-reveal-1.7360253?=&utm_source=dlvr.it&utm_medium=tumblr&ts=_1560869194430 [https://perma.cc/8BFY-NAHM]. The Israeli government itself has also emphasized the -public relations dimension of the boycott movement much more than the economic dimension. *Id.* Analysis of the economic impact of BDS on Israel reveals that the movement's effects are more social than financial. *See* Dany Bahar & Natan Sachs, *How Much Does BDS Threaten Israel's Economy?*, BROOKINGS (Jan. 26, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/01/26/how-much-does-bds-threaten-israels-economy [https://perma.cc/2Y4D-DUMA] ("[A] significant portion of Israeli exports are in high demand—and this trend seems likely to continue—and most consumers (either firms or people) would be unable to replace them or unwilling to stop consuming them altogether.").

112. *See generally* Part III (discussing the political nature of the boycotts of Israel).

113. *See generally* Brief for Michael C. Dorf, Andrew M. Koppelman & Eugen Volokh as Amici Curiae Supporting Appellants, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019) (No. 19-50384). 19-50384) (arguing that boycotts are not protected political speech).

114. *Id.* at 18.

115. *Id.* at 12.

116. *Id.* at 20 (citing Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982)).

117. *Id*. at 12.

Volokh continues to say that the fact a boycott has some expressive elements does not necessarily mean it is protected by the First Amendment.[118] According to Volokh, the proper reading of *Claiborne* is that "*many but not all elements* of political boycotts are expressive."[119] Volokh then claims that the *Claiborne* court only protects "speech, assembly, association, and petition,"[120] and does not extend to "commercial dealing or nondealing."[121] Volokh summarizes his position by quoting from *Superior Court Trial Lawyers Ass'n*, stating that "[e]very concerted refusal to do business with a potential customer or supplier has an expressive component . . . [y]et that does not itself make refusals to deal constitutionally protected speech."[122] However, there are several gaps in Volokh's argument. First, *Longshoremen* stands not for any definitive principle of First Amendment rights, but for the Supreme Court's hesitancy to empower labor unions.[123] In *Longshoremen*, the Court indeed found that the First Amendment did not exempt the union from the ban on secondary boycotts.[124] However, the Supreme Court's opinion was not so much decided by any substantive reference to the First Amendment, but rather by the Court's fear of promoting unfair labor practices and disrupting the economy during the Cold War.[125]

Thus, the Court is more likely to perceive protected forms of First Amendment speech, such as picketing and boycotting, as coercive when they occur in a union context.[126] Significantly, *Longshoremen* was decided during the Cold War, a time when courts were eager to limit the influence of unions.[127] In *NLRB v. Retail Store Employees Union, Local 1001*, , "the Court upheld a ban on "peaceful picketing aimed at convincing consumers not to purchase a struck product."[128]

> [The Court] dismissed the First Amendment claim in a short, conclusory paragraph focusing upon the purpose of the picketing: "Congress may prohibit secondary picketing. . . . Such picketing spreads labor discord by coercing a

118. Brief for Michael C. Dorf, Andrew M. Koppelman & Eugen Volokh as Amici Curiae Supporting Appellants, *supra* note 113, at 22.

119. *Id.* at 14.

120. *Id.* (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982)).

121. *Id.*

122. *Id.* (quoting FTC v. Superior. Ct. Trial Law. Ass'n, 493 U.S. 411, 431 (1990)).

123. *See Claiborne Hardware*, 458 U.S. at 912 (citing Int'l Longshoremen Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 222–23, 223 n. 20 (1982)) (footnote drawing attention to a section of *Longshoremen* in which the Court deemed secondary boycotts by labor unions as unconstitutional).

124. *See* Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 14 (1984) (stating that the Court rejected the idea that secondary boycotts were protected First Amendment activity).

125. *Id.* (explaining that the Court deemed secondary boycotts as an unfair labor practice); for the Court's position on labor law during the Cold War, see Alec Thomson, *Smith Act of 1940*, FREE SPEECH CTR.: THE FIRST AMEND. ENCYC. (2009), [https://perma.cc/94DU-ND5A] (discussing the Smith Act, an anti-union statute); Rosemary Feurer, *Cold War in the American Working Class*, OXFORD UNIV. https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-869;jsessionid=381FCE26CFC5564B9ECC375078D0C52C?rskey=347GsP&result=30 [https://perma.cc/T6UZ-HWWN] (giving a general overview of the intersection of labor law and Cold War politics).

126. *See* Getman, *supra* note 124, at 12–14 (highlighting the Court's transition into picketing and boycotting as unprotected in the labor union context).

127. *Id.*

128. *Id.* at 14 (citing NLRB v. Retail Store Emps. Union, Loc. 1001, 447 U.S. 607 (1980)).

> neutral party to join the fray. . . . [A] prohibition on "picketing in furtherance of [such] unlawful objectives [does] not offend the First Amendment."[129]

This is the same paragraph that Volokh cites in support of his argument that "even outright speech—secondary picketing—in support of refusals to deal might sometimes be properly restricted notwithstanding the First Amendment."[130] In light of the Court's repeated history of banning labor activity at the cost of free speech, this paragraph reads not as a reasoned application of First Amendment principles but as an anachronistic relic of the Court's fear of ruling on secondary boycotts.[131] *Longshoremen* does not overrule the *Claiborne* Court's proposition that the government may only infringe on First Amendment rights for the purpose of economic regulations in very narrowly limited circumstances.

These limited circumstances may or may not include refusals to deal, but that point is irrelevant, as the Ben & Jerry's boycott is not a refusal to deal. In *Longshoremen*, the corporation had been hired *by an American company* and then refused to unload the American company's cargo because it was from the Soviet Union.[132] Here, Ben & Jerry's refused to sell its own products in the West Bank through Israeli suppliers and distributors, who, because they are non-American entities located outside the United States, are not protected by American law.[133]

Second, Ben & Jerry's actions align with the *Claiborne* standards. The main goal of Ben & Jerry's actions was not economic gain—quite the opposite, as. Ben & Jerry's overwhelmingly risked losing money because of its decision. Additionally, the fact that Ben & Jerry's actions happened to have an economic effect does not exempt them from First Amendment protections. Thus, corporate boycotts are First Amendment-protected speech.

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129. Getman, *supra* note 124, at 14 (quoting NLRB v. Retail Store Emps. Union, Loc. 1001, 447 U.S. 607, 617–18 (1980)).

130. Brief for Michael C. Dorf, Andrew M. Koppelman, & Eugene Volokh as Amici Curiae Supporting Appellants, *supra* note 113, at 12.

131. Getman, *supra* note 124. Once again, the Court's rulings are more motivated by anti-union animus than any substantive ruling on First Amendment rights. Getman states:

> Because so little is understood about the real impact of secondary boycott laws and union organizing regulations, and because the Court is lacking in labor expertise, it seems to shrink from the consequences of robust debate and freedom of association in labor relations in ways it would recognize as shameful in other contexts.

Id. at 22.

132. Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 214–15 (1982).

133. Agency for Int'l Dev. V. All. For Open Soc'y Int'l, Inc., 570 U.S. 205, 219 (2013). "First, it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U. S. Constitution. [That principle is not in dispute in this case]." *Id.* (citing transcript of oral arguments); *see, e.g.*, Boumediene v. Bush, 553 U.S. 723, 770–71 (2008) (holding that noncitizens do not share the same constitutional rights that citizens do); Hamdi v. Rumsfeld, 542 U.S. 507, 558–59 (2004) (Scalia, J., dissenting) (same); United States v. Verdugo-Urquidez, 494 U.S. 259, 265–75 (1990) (same); Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (same); United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904) (same).

B. While the Rationales States Present for Anti-Boycott Laws Are Important, the Means Are Not Substantially Related

Because free speech is a fundamental right, laws regulating boycotts receive heightened review.[134] The type of regulation determines the type of review. Content-neutral regulations are those that apply regardless of the message or substance of the expression.[135] These regulations are reviewed under intermediate scrutiny, which requires that (1) the interest the government seeks to accomplish is important and (2) the means are substantially related to that interest.[136] Content-based regulations are regulations that treat speech differently because of its message.[137] These regulations are reviewed under strict scrutiny, which requires that (1) the government have a compelling interest and (2) the means are narrowly tailored to achieving that interest.[138] Assuming that anti-boycott laws are content-neutral, states must prove (1) an important interest and (2) means that are substantially related to achieving that interest. [139]

The two most common rationales for passing anti-boycott laws are reducing discrimination and supporting an American ally.[140] While courts have found that these rationales are legitimate, they have also found that anti-boycott laws are not substantially related to accomplishing either of these rationales.[141]

In *Jordahl v. Brnovich*, the District Court for the District of Arizona found that "[a]lthough generally barring discrimination on the basis of national origin is a legitimate state interest, the State clearly has less intrusive and more viewpoint-neutral means to combat such discrimination."[142] The court went even further, declaring that legislative history of the Arizona statute casts doubt on Arizona's alleged anti-discrimination rationale.[143] According to the court, the Act's history suggests that the goal of the Act is to

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134. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94 (1984) (outlining the heightened review standard for free speech review).

135. *See* VICTORIA L. KILLION, CONG. RSCH. SERV., IF12308, FREE SPEECH: WHEN AND WHY CONTENT-BASED LAWS ARE PRESUMPTIVELY UNCONSTITUTIONAL (2023) (discussing the legal standards for content-based laws).

136. *O'Brien* stands for the proposition that even First Amendment rights can be regulated if the reason for the regulation has nothing to do with the content of the speech itself. United States v. O'Brien, 391 U.S. 367, 377 (1968).

137. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

138. *Id.*

139. This is merely hypothetical. Legislative findings and comments by legislators clearly state that the purpose of anti-boycott laws is to support Israel. *See* Brnovich, 336 F. Supp. 3d 1016, *infra* note 141, at 1044.

140. *See, e.g.*, H.B. 2617, 52nd Leg., Reg. Sess. (Ariz. 2016) (containing similar rationales).

141. *See, e.g.*, Ark. Times LP v. Waldrip, 988 F.3d 453, 459 (8th Cir. 2021) (holding that an antiboycott was not substantially related to the goals it sought to accomplish); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1049 (D. Ariz. 2018) (same); Amawi v. Paxton 956 F.3d 816, 816 (5th Cir. 2020) (same); Koontz v. Watson, 283 F. Supp. 3d 1007, 1022–23 (D. Kan. 2018) (same).

142. *Brnovich*, 336 F. Supp. 3d at 1050.

143. *See id.* at 1048. The opinion includes:

> The legislative history of the Act calls these stated interests into doubt. The Act's history instead suggests that the goal of the Act is to penalize the efforts of those engaged in political boycotts of Israel and those doing business in Israeli-occupied territories because such boycotts are not aligned with the State's values.

penalize the efforts of those engaged in political boycotts of Israel because such boycotts are not aligned with the State's values.[144]

More than that, the *Brnovich* court stated that Arizona has "produced no evidence that Arizona businesses have or are engaged in discriminatory practices against Israel, Israeli entities, or entities that do business with Israel."[145] Even if the State could produce such evidence, the court noted that "by including politically-motivated boycotts of Israel within the activity that is prohibited, the Act is unconstitutionally over-inclusive."[146] This is because the Arizona laws sought to regulate activity outside the bounds of government programs.

The *Brnovich* ruling clarifies that restricting First Amendment rights as a means of curbing discrimination does not pass intermediate scrutiny. This is because anti-boycott laws seek to regulate speech outside the contours of the government program, which is unconstitutional.[147] Contractors are required not merely to abstain from boycotting while carrying out their official duties, but also to abstain from all boycotting activity during the term of the contract.[148] Given the fact that discrimination is not sufficient to uphold

144. Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1049 (D. Ariz. 2018). The *Brnovich* court cited several cases and news releases:

> *See*[,] *e.g.*, Ariz. House Republican Caucus News Release, Feb. 4, 2016 (representing that the purpose of the Act is to penalize "companies engaging in actions that are politically motivated and intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel, its products, or partners"). If so, such an interest is constitutionally impermissible. *See* Koontz v. Watson, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018) (finding that goal behind Kansas law requiring that persons contracting with the state certify that they are not engaged in a boycott of Israel was "either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel" and that "[b]oth are impermissible goals under the First Amendment").

Id. at 1048–49.

145. *Id.* at 1049.

146. *Id.*

147. *See* Agency for Int'l Dev. V. All. For Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013) ("The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained."); Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617 (E.D. Ark. 2019), *rev'd*, 988 F.3d 453 (8th Cir. 2021) (noting that a "funding condition unconstitutionally burdens First Amendment rights where it 'seek[s] to leverage funding to regulate speech outside the contours of the program itself'").

148. *See* Koontz v. Watson, 283 F. Supp. 3d 1007, 1027 (D. Kan. 2018) (granting the plaintiff's motion for a preliminary injunction regarding the enforcement of a Kansas law that requires independent contractors to declare they are not participating in a boycott of Israel). Arkansas' law states that a boycotting corporation may nonetheless receive a government contract if it agrees to complete the contract for a 20% reduction in compensation. *See* Terry Wallace & Andrew DeMillo, *High Court Asked to Stop Arkansas Law against Israel Boycott*, ASSOCIATED PRESS (Oct. 20, 2022), https://apnews.com/article/american-civil-liberties-union-little-rock-arkansas-israel-middle-east-26b97113732286d2ff882eb7e61feb92 [https://perma.cc/487W-AWAG] (noting the 20% reduction requirement). The Arkansas Times newspaper sued, calling the law an "unconstitutional tax on free speech." *Court Cases: Arkansas Times LP v. Waldrip*, ACLU (May 19, 2019), https://www.aclu.org/cases/arkansas-times-lp-v-waldrip [https://perma.cc/X8QS-UXP9]. The Eighth Circuit agreed, ruling that the Arkansas statute imposed an unconstitutional burden on free speech because it sought to "leverage funding to regulate speech outside the contours of the program itself." Ark. Times LP v Waldrip, 988 F.3d 463, 467 (8th Cir. 2021) (quoting Agency for Int'l Dev. V. All. For Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013)). However, the Eighth Circuit later reversed the decision, stating that corporate boycotts of Israel

restrictions on First Amendment free speech, the potential concern of anti-Semitism cannot be used to uphold anti-boycott laws.

C. Applying the Boycotting Test to Ben & Jerry's Divestment

To review, in order for an action to be considered "speech," an action must (1) be intended to convey a specific message, and (2) the message must be reasonably likely to be understood by an observer.[149] Thus, if (1) Ben & Jerry's intended its divestment from Israel to be a political message, and (2) a reasonable observer would see it as such, then Ben & Jerry's boycott is protected under the First Amendment.

First, Ben & Jerry's has made it clear that it intended to make a political statement. On its website, Ben & Jerry's stated "we believe it is inconsistent with our values for Ben & Jerry's ice cream to be sold in the Occupied Palestinian Territory (OPT). We also hear and recognize the concerns shared with us by our fans and trusted partners."[150]
The founders of Ben & Jerry's also published an op-ed in *The New York Times* detailing the reasons behind the company's decision.[151] The founders of Ben & Jerry's stated that their decision was a rejection of Israeli policy, which Ben & Jerry's claims "perpetuates an illegal occupation that is a barrier to peace and violates the basic human rights of the Palestinian people who live under the occupation."[152]

On the second prong, objective observers understood Ben & Jerry's action as intended to send a political message. This was clear in the heavy press coverage in the days following Ben & Jerry's decision. Some observers praised Ben & Jerry's decision[153] while others condemned it as anti-Semitic[154]—but no one argued that Ben & Jerry's decision was merely economic. By boycotting Israel, Ben & Jerry's risked its profits and exposed itself to significant controversy—the exact opposite of a savvy business decision. However, even without Ben & Jerry's op-eds and explanations, their action would still be a political boycott, because "[i]t is easy enough to associate [the boycotter's] conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians."[155]

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were not expressive conduct, but were commercial activity outside the scope of First Amendment protection. Ark. Times LP v. Waldrip, 37 F.4th 1368, 1394 (8th Cir. 2022). This ruling shows that the deciding question in boycott cases is whether the conduct is commercial.

149. Spence v. Washington, 418 U.S. 405, 411 (1974).

150. *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY'S (July 19, 2021), https://www.benjerry.com/about-us/media-center/opt-statement [https://perma.cc/8BUZ-S2S2].

151. Bennett Cohen & Jerry Greenfield, Guest Essay, *We're Ben and Jerry. Men of Ice Cream, Men of Principle*, N.Y. TIMES (July 28, 2021), https://www.nytimes.com/2021/07/28/opinion/ben-and-jerry-israel.html [https://perma.cc/W4KD-CE8D].

152. *Id.*

153. Mark Silk, Opinion, *Why Jews Should Support Ben and Jerry's Boycott*, RELIGION NEWS SERV. (Aug. 16, 2021), https://religionnews.com/2021/08/16/why-jews-should-support-ben-and-jerrys-boycott [https://perma.cc/Z7U3-P4JZ].

154. JEWISH CMTY. RELATIONS OF GREATER ORLANDO, Opinion, *Calling Ben and Jerry's Boycott Antisemitic is Accurate*, ORLANDO SENTINEL (Nov. 20, 2021), https://www.orlandosentinel.com/opinion/guest-commentary/os-op-ben-jerrys-palestine-rebuttal-20211120-2ijhvq4jjbcdjca36u76ng3gby-story.html [https://perma.cc/ST7H-GVS5].

155. Koontz v. Watson, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018).

1. States' General Police Power Allows Them to Regulate Against Discrimination, but Not by Infringing on First Amendment Rights

States' general police power allows them to regulate for the health and well-being of their citizens, which includes regulation against discrimination.[156] Thus, states that have passed anti-boycott laws have justified their legislation by stating that boycotting Israel is discriminatory.[157] These resolutions conflate the Arab League Boycott of Israel, BDS, and independent boycotts of Israel.[158]

For example, some senators argue that all boycotts of Israel incidentally serve the Arab League's agenda and, therefore, can be banned under Congress's Foreign Powers.[159] One scholar, Marc Greendorfer, takes this position.[160] Greendorfer states that laws banning boycotts of Israel are nothing new, as the U.S. State Department has long prohibited American companies from participating in the Arab League Boycott.[161] However, this comparison is misleading. The Arab League Boycott is a political movement organized by foreign countries to serve foreign aims and objectives.[162] The U.S. is justified in prohibiting participation in the Arab League Boycott of Israel as a matter of foreign policy.[163] On the other hand, domestic boycotts of Israel are civil objections to Israel's perceived human rights abuses and should be analyzed under a domestic legal framework.

Legislators who have sought to pass anti-boycott laws have provided no evidence that the Arab League is involved in BDS or in independent boycotts of Israel.[164] Additionally, even if BDS *is* considered a foreign entity, banning boycotts associated with BDS does not justify treating all boycotts of Israel in the same manner.

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156. *See* U.S. CONST. amend. X (delegating the police power, among other federalist principles, to the states); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1049 (9th Cir. 2020) ("The State has similarly produced no evidence that Arizona businesses have or are engaged in discriminatory practices against Israel, Israeli entities, or entities that do business with Israel. And even if the State could make such a showing, by including politically-motivated boycotts of Israel within the activity that is prohibited, the Act is unconstitutionally over-inclusive.") (citing *Koontz*, 283 F. Supp. 3d at 1023). U.S. CONST. amend. X.

157. *See* JEWISH VIRTUAL LIBR., *supra* note 3 ("To date, 36 states have adopted [anti-BDS] laws, executive orders or resolutions . . . ."). South Carolina's anti-boycott law does not explicitly mention boycotts of Israel or anti-Semitism. Rather, the law refers to "a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade." *Id.* Because South Carolina's law employs nearly identical language to other anti-boycott laws, this Note will treat South Carolina's law as an anti-boycott law. *Id.*

158. Donna Rachel Edmunds, *Missouri Joins 31 Other States in Passing Anti-BDS Legislation*, JERUSALEM POST (July 14, 2020), https://www.jpost.com/bds-threat/missouri-joins-31-other-states-in-passing-anti-bds-legislation-635025 [https://perma.cc/ZGR5-LLL9].

159. *Hearing on BDS*, *supra* note 33.

160. Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS L. REV. 1 (2017); Brief of Michael C. Dorf, Andrew M. Koppelman & Eugene Volokh as Amici Curiae Supporting Appellants, *supra* note 113, at 20.

161. Greendorfer, *supra* note 160, at 121.

162. WEISS, *supra* note 18, at 1–4.

163. *See id.* at 4–7 (discussing how the Arab League boycotts are harmful to U.S. policy and the legislative steps that can be taken to address those boycotts).

164. It is an open secret that the Arab League's economic boycott of Israel is essentially non-existent. CRS, *supra* note 18, at 4. While Israeli nationals cannot enter most Arab countries with an Israeli passport, Israeli firms have deep business ties to numerous Arab countries, especially the Gulf States. *Id.*

Constitutional scholar Eugene Volokh also takes the position that boycotts of Israel are discriminatory.[165] Volokh correctly posits that states have a broad power to legislate for the health, safety, and welfare of their citizens.[166] However, Volokh incorrectly argues that boycotts of Israel are analogous to a limousine driver who refuses to do business with a gay couple who then claims that his discriminatory action is a boycott protected by the First Amendment.[167]

This analogy fails on several levels. First, every case that Volokh cites implicates discrimination *in the United States*, *perpetrated on an individual protected by American law*. Israeli corporations are not protected by the Constitution and, therefore, a refusal to do business with these corporations does not violate the law.[168] States certainly have the power to legislate against discrimination, but they do not have the power to apply the Constitution to foreign entities,[169] especially not at the cost of their citizens' fundamental free speech rights.

Volokh continues to argue that banning corporate boycotts of Israel does not violate the Constitution because anti-boycott laws leave corporations numerous other channels for speech without having to resort to "discriminatory" boycotts of Israeli companies.[170] This is not true. Anti-boycott laws do not merely prevent companies from boycotting Israel; rather, contract-based anti-boycott laws prohibit boycotting even outside the scope of the government contract.[171] Anti-boycott laws define "boycott of Israel" so broadly that they prohibit nearly every conceivable activity. For example, one anti-boycott act defined "boycott of Israel" as "(1) 'engaging in refusals to deal'; (2) 'terminating business activities'; or (3) 'other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories,' 'in a discriminatory manner.'"[172] The phrase "other actions" is potentially unlimited in scope.[173] Thus, even if boycotting itself were not protected by the First Amendment, anti-

165. Brief of. Michael C. Dorf, Andrew M. Koppelman & Eugene Volokh as Amici Curiae Supporting Appellants, *supra* note 113, at 20.

166. *Id.* at 2.

167. *Id.*

168. *See* Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc., 140 U.S. 205, 221 (2020) (holding that foreign entities do not have First Amendment rights).

169. *Id.*

170. Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019);
Brief of Michael C. Dorf, Andrew M. Koppelman & Eugene Volokh as Amici Curiae Supporting Appellants, *supra* note 113, at 13.

171. Ark. Times LP v. Waldrip, 988 F.3d 453, 467 (8th Cir. 2021), *reh'g en banc granted, opinion vacated*, 37 F.4th 1386 (8th Cir. 2021).

172. *Id.* at 464 (citing ARK. CODE. ANN. § 25-1-503 (2017)).

173. *Id.* at 466–67. The relevant text includes:

> Considering the Act as a whole, we conclude that the term "other actions" in the definition of "boycott Israel" and "boycott of Israel" encompasses more than "commercial conduct" similar to refusing to deal or terminating business activities. Instead, the Act requires government contractors, as a condition of contracting with Arkansas, not to engage in economic refusals to deal with Israel *and* to limit their support and promotion of boycotts of Israel. As such, the Act restricts government contractors' ability to participate in speech and other protected, boycott-associated activities recognized by the Supreme Court in *Claiborne* . . . Therefore, the Act imposes a condition on government contractors that implicates their First Amendment rights.

Id. at 466 (citations omitted).

boycott laws would still infringe on the First Amendment because they limit speech that favors such boycotts.[174]

D. Investment-Based Laws

Investment-based laws also fail the "substantial relations" test under intermediate scrutiny. Investment-based anti-boycott laws require state pension funds to divest from entities that refuse to do business with Israel. In states that have these laws, the state treasury will circulate a list of companies that boycott Israel.[175] Pension fund managers must then sell off all assets in these companies, regardless of the companies' actual financial performance.[176] Such laws likely violate the states' fiduciary duty to act in the best interest of pension holders. Furthermore, the connection between investment-based laws and the states' alleged goals of ending discrimination and supporting an American ally is highly attenuated. Instead of making investment decisions based on political popularity, states should set guidelines based on financial considerations.

1. No Court Has Addressed the Question of Investment-Based Anti-Boycott Laws

For there to be an infringement on First Amendment rights, corporations must suffer an injury. In the case of contract-based laws, the injury is a denial of a contract due to the exercise of their First Amendment rights. When a state divests from a company that is boycotting Israel, the fiscal harm is minimal, but the social stigma can be significant. Divestment has been shown to have no effect on the long-term prices of company shares, and effects on a company's bottom line are negligible.[177] However, divestment campaigns can be highly effective in creating social pressure. A prime example of this is the state campaign to divest from South African companies during the Apartheid regime. State divestment had minimal effect on stock prices, but as the campaign reached its height companies doing business with South Africa were so stigmatized that the investors began to deny them critical funding and loans.[178] While divestment itself was not fatal, the consequences of that divestment were.[179]

In order to bring a case in court, a corporation that boycotts Israel would have to prove injury beyond the state's mere divestment. To date, it does not seem that any corporation has suffered such an injury. However, if a company that boycotts Israel were to suffer such a financial injury, it would have a strong case for First Amendment protections for the reasons discussed above.

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174. *Id.*

175. Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018), *vacated* and *remanded*, 789 F. App'x. 589 (9th Cir. 2020).

176. H.B. 2617, 52nd Leg., § Reg. Sess. (Ariz. 2016). The Arizona law claims that, because Israel is an innovative trade partner, a company's choice to divest from business is an unsound financial decision. *Id.*; *see also Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/8E2R-PNVF] (collecting various state anti-BDS laws).

177. William MacAskill, *Does Divestment Work?*, NEW YORKER (Oct. 20, 2015), https://www.newyorker.com/business/currency/does-divestment-work [https://perma.cc/C8ZZ-7DXF].

178. *Id.*

179. *Id.*

Second, corporations that boycott Israel have a stronger case for First Amendment protections than corporations that refused to boycott South Africa during Apartheid. Corporations that did business with South Africa were not attempting to make a political statement but were following the status quo.[180] These corporations did not release statements expressing their views on the Apartheid regime—quite the opposite, as these corporations tried to downplay their dealings with the Apartheid state.[181] These corporations did business with South Africa because profit outweighed outrage; as soon as this was no longer the case, the companies divested from South Africa as well.[182]

In contrast, companies boycotting Israel are not merely following a status quo, but instead are actively taking a controversial political position. These companies are risking public stigma and outrage that could have a serious impact on their reputation and bottom lines.[183] When states divested from companies doing business in South Africa, these states were attempting to discourage a business decision that supported a violation of human rights. However, when states divest from companies that boycott Israel, they are attempting to discourage corporations from holding a specific view and from expressing that view through First Amendment-protected boycotts.

E. The Sullivan Principles

Critics of the movement to boycott Israel paint it as exceptional, but what is truly exceptional are states' responses to corporations that choose to boycott Israel. Boycotts of Israel are no different from boycotts of any other country and should be treated as such. In the past, corporations have organized similar campaigns to divest from a certain country, and state and federal governments did not intervene.[184] One such boycott was the movement to divest from Apartheid South Africa. This movement was grounded in the Sullivan Principles, named after American preacher Leon Sullivan, who was also on the board of General Motors.[185] General Motors was the largest employer of Blacks in South Africa and one of the largest companies in the United States;[186] Sullivan hoped to use General Motors's economic clout to end South African Apartheid.[187] He then wrote the Sullivan Principles, a set of seven conditions that General Motors would insist upon for its employees in South Africa. These principles were:

1. Non-segregation of the races in all eating, comfort, and work facilities.
2. Equal and fair employment practices for all employees.

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180. RICHARD KNIGHT, SANCTIONING APARTHEID 69, 80–81, 85 (Afr. World Press 1990).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *The Sullivan Principles*, BOS. UNIV. TRS., https://www.bu.edu/trustees/boardoftrustees/committees/acsri/principles/ [https://perma.cc/BX64-HWMK].

186. *See* David Malone & Robin W. Roberts, *An Analysis of Public Interest Reporting: The Case of General Motors in South Africa*, 13 BUS. & PRO. ETHICS J. 71, 78 (1994) (reporting that 60% of GM's employees in South Africa were black); James Risen, *GM to Pull Out of South Africa: Cites Losses, Unwillingness of Regime to Dismantle Apartheid*, L.A. TIMES (Oct. 21, 1986), https://www.latimes.com/archives/la-xpm-1986-10-21-mn-6561-story.html [https://perma.cc/MZ9H-KRUA] (reporting that, at the time, "GM [was] the world's largest industrial company and until recently the largest American employer in South Africa").

187. *See* sources cited *supra* note 186 (discussing GM's strategy to address Apartheid in South Africa).

3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs.
5. Increasing the number of blacks and other nonwhites in management and supervisory positions.
6. Improving the quality of life for blacks and other nonwhites outside the work environment in such areas as housing, transportation, school, recreation, and health facilities.
7. Working to eliminate laws and customs that impede social, economic, and political justice. (Added in 1984.)[188]

The Sullivan Principles were formally adopted by 125 corporations, many of which fully withdrew their business operations from South Africa.[189] During this time, not one state passed legislation preventing corporations from adopting the Sullivan Principles, nor did any State require its pension funds to divest from corporations that adopted these principles.[190]

The Sullivan Principles, like corporate boycotts of Israel, are not business decisions, but rather political statements. The Preamble to the Principles reads:

> The objectives of the Global Sullivan Principles are to support economic, social and political justice by companies where they do business; to support human rights and to encourage equal opportunity at all levels of employment, including racial and gender diversity on decision making committees and boards; to train and advance disadvantaged workers for technical, supervisory and management opportunities; and to assist with greater tolerance and understanding among peoples; thereby, helping to improve the quality of life for communities, workers and children with dignity and equality.[191]

These principles are not a business plan, but rather a statement of what the corporation believes to be morally acceptable. Indeed, these principles closely echo the rationale of the movement to boycott Israel, specifically in the following statement by Ben & Jerry's:

> We're a values-led company with a long history of advocating for human rights, and economic and social justice. We believe it is inconsistent with our values for our product to be present within an internationally recognized [sic] illegal occupation.[192]

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188. BOS. UNIV. TRS., *supra* note 185.

189. *See* Mark Huber, *For U.S. Firms in South Africa, the Threat of Coercive Sullivan Principles*, HERITAGE FOUND. (Nov. 11, 1984), https://www.heritage.org/international-economies/report/us-firms-south-africa-the-threat-coercive-sullivan-principles-0 [https://perma.cc/LL7Q-E5YW] (reporting on the history regarding the Sullivan Principles and corporate movement in South Africa).

190. *See generally* AM. COMM. ON AFR., PUBLIC INVESTMENT AND SOUTH AFRICA 3–12 (1986).

191. *The Global Sullivan Principles*, HUM. RTS. LIBR., UNIV. OF MINN., http://hrlibrary.umn.edu/links/sullivanprinciples.html [https://perma.cc/6HGB-7YM5].

192. *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY'S (July 19, 2021), https://www.benjerry.com/about-us/media-center/opt-statement [https://perma.cc/8BUZ-S2S2].

If states truly wish to curb anti-Semitism, they should narrowly tailor their legislation to accomplish their goal. The link between boycotting activity and anti-Semitism is so attenuated that anti-boycott laws would likely not even pass intermediate scrutiny, much less the strict scrutiny required for content-based regulations of free speech.[193] Instead, states should focus on passing anti-discrimination laws and leave the free market to determine the viability of corporate boycotts of Israel.

States often attempt to justify anti-boycott laws by claiming that boycotting Israel is discriminatory. Texas attempted to defend its anti-boycott laws by claiming that BDS engages in "invidious, status-based discrimination," and that the state may prohibit "discrimination based on historically protected characteristics."[194] In similar lawsuits, Arizona, Maryland, and Texas also argued that BDS is "national origin" discrimination.[195] In all these cases, courts found that anti-boycott laws are unconstitutional and declined to enforce them.[196]

Anti-boycott laws stifle free speech and endanger the purpose of the First Amendment: to provide a forum for disagreement and political debate. Why should some boycotts be banned while others are allowed? Speculating on the reasons for this double standard is irrelevant—it is enough to note that such a double standard exists. And where the government allows one opinion to be voiced but not another, there is a clear violation of First Amendment rights.[197]

IV. RECOMMENDATIONS

This Note recommends that states invest based on actual financial considerations and narrowly tailor their anti-discrimination laws to avoid the problems of vagueness and overbreadth presented by anti-boycott laws. If states continue passing these laws, courts should refuse to enforce them.

One may argue that states are acting in their pension holders' best interests by refusing to do business with corporations that allegedly discriminate against Israel, but this argument is false. First, as established, boycotting Israel is not an act of discrimination against Jewish individuals or Israeli nationals but is an expression of free speech. Second, the "best interest" of pension holders is not a political concept. It is a quantifiable measurement of financial losses and gains, and not vague assumptions about whether pension holders would find a boycott of Israel morally repugnant.

When states begin making investment decisions based on politics, they open the door to financial chaos. Anthony Randazzo notes that "near-term political incentives threaten

193. *Supra* Part III.A.

194. Ali v. Hogan, No. 1:19-cv-00078-CCB, 2019 WL 11766290 (D. Md. Nov. 26, 2019) (trial motion, memorandum and affidavit) (memorandum in Support of Governor Hogan's Motion to Dismiss).

195. Ali Harb, *U.S. States Are Passing Anti-BDS Laws. But Are They Legal?*, MIDDLE EAST EYE (June 27, 2019), https://www.middleeasteye.net/news/three-legal-questions-around-anti-bds-laws-us [https://perma.cc/QWE8-Z5UN].

196. *See Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/KC4D-KSXD] (reporting on different state statutory schemes and their success, or lack thereof, in different judicial settings).

197. Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

the investment returns needed to fund promised pensions . . . . Administrations change, and the social and political views of one governor may not align with his or her successor."[198] Randazzo continues to say that "these laws . . . are not based on sound fiscal logic but rather on geopolitical grounds."[199]

Laws jumbling politics and fiduciary duties continue to proliferate. As mentioned earlier, 35 states have already passed anti-boycott laws. Illinois has an "Investment Policy Board" that exists solely to divest state pension funds from companies that, *inter alia*, boycott Israel.[200] Texas requires its pension funds to divest from companies that use environmental or social factors to make investment and business decisions.[201] Once again, states that wish to ban discrimination or support an American ally have much more straightforward means of doing so—ones that do not involve breaching their fiduciary duties.

If states truly wish to curb anti-Semitism, they should narrowly tailor their legislation to accomplish their goal. The link between boycotting activity and anti-Semitism is so attenuated that anti-boycott laws would likely not even pass intermediate scrutiny, much less the strict scrutiny required for content-based regulations of free speech.[202] Instead, states should focus on passing anti-discrimination laws and leave the free market to determine the viability of corporate boycotts of Israel.

Just as courts have refused to apply anti-boycott laws to individuals, they should refuse to apply those laws to corporations. Boycotts are clearly exercises of free speech, not merely economic decisions. The vitriol and outrage that boycotts of Israel inspire shows that these boycotts are perceived not as mere economic decisions, but as symbolic speech under *Spence*.[203]

The Supreme Court has a long history of erring on the side of free speech, and it should follow this precedent in ruling on anti-boycott laws.[204] While some individuals may indeed have discriminatory reasons for boycotting Israel, this is no reason to curb the free speech rights of others who have legitimate political reasons for boycotting. To do so would set a dangerous precedent for future cases.

V. CONCLUSION

Claiborne and other precedents establish that boycotting is protected free speech, while *Citizens United* grants corporations First Amendment rights. As such, corporate boycotts are not mere economic refusals to deal, but rather qualify for the highest level of constitutional protection. Any law that burdens these rights must pass strict scrutiny.

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198. Anthony Randazzo, *Ice Cream, Politics and Pension Funds Are Not a Winning Recipe*, THE HILL (Aug. 12, 2021), https://thehill.com/opinion/finance/567624-ice-cream-politics-and-pension-funds-are-not-a-winning-recipe [https://perma.cc/W45X-THUB].

199. *Id.*

200. *See generally Illinois Investment Policy Board*, STATE OF ILL., https://iipb.illinois.gov/ [https://perma.cc/QL3X-F29N].

201. J.W. Verret, *Texas Pension Bill Plays Politics with Retirees' Money*, THE HILL (May 29, 2021), https://thehill.com/opinion/finance/555980-texas-pension-bill-plays-politics-with-retirees-money [https://perma.cc/Y87P-C7GP].

202. *Supra* Part III.A.

203. Spence v. Washington, 418 U.S. 405 (1974).

204. Emerson, *supra* note 66.

Anti-boycott laws do not pass strict scrutiny. While the stated goal of anti-boycott laws is to fight discrimination, the link between boycotting Israel and discrimination is attenuated at best. Contract-based laws burden a broad range of free speech beyond the terms of government contracts, and unconstitutionally condition receipt of government benefits on relinquishing a First Amendment right. Investment-based laws, while not yet challenged in court, stigmatize corporations that legally exercise their First Amendment right to boycott.

In the past, state and federal governments have allowed corporations to boycott various countries. The divisiveness of the Israel-Palestine controversy does not justify silencing corporate free speech on the topic. And while fighting discrimination is a noble goal, there are other means of doing so that do not infringe on corporate free speech. Instead of relying on unconstitutional anti-boycott laws, states should tailor their legislation to fight discrimination and allow corporations to exercise their First Amendment rights.

The free market and the marketplace of ideas are no longer separate concepts. The modern economy is also a free marketplace of ideas, where companies articulate their own social and political stances, and where consumers buy into these companies' ideas, both literally and figuratively. Surely states have a right to regulate discrimination within the marketplace, but what is being regulated here is free speech, not discrimination. Both corporations and individuals should be free to exercise their First Amendment right to boycott.