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Israel and the Boycott, Divestment, and Sanctions (BDS) Movement

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Israel and the Boycott, Divestment, and Sanctions (BDS) Movement

Israeli officials seek to prevent a boycott, divestment, and sanctions (BDS) movement against Israel from gaining strength. The BDS movement is a loose grouping of actors from various countries that advocate or engage in economic measures against Israel or Israel-related individuals or organizations. Defining precisely who may or may not constitute the BDS movement, or what may or may not constitute BDS activity, is subject to debate.

Congress and the executive branch have taken actions to counter BDS measures, and Members of Congress debate how best to do so in light of various constitutional issues, as well as foreign policy questions regarding Israeli-developed settlements whose legality is uncertain under international law.

The BDS movement that announced itself in 2005 calls for BDS as a means to change Israel's treatment of Palestinians. Because the movement appears by its own words to equate Zionism with "settler colonialism," observers generally conclude that the movement is anti-Zionist and seeks to delegitimize the specifically Jewish character of Israel.

Debate is ongoing in the United States and elsewhere about whether economic differentiation between Israel in general and Israeli-controlled areas and settlements in the West Bank, East Jerusalem, and Golan Heights—areas that Israel has controlled and administered since the 1967 Arab-Israeli war—constitutes a form of BDS. Some international organizations—including the European Union and United Nations—have taken actions that either encourage states to differentiate between Israel and its settlements, or could make it easier for political or economic differentiation to take place. Israel's government and many of its leading political figures draw little or no distinction between economic measures targeting settlements and those targeting areas clearly inside of Israel.

To date, BDS or differentiation measures have not significantly affected Israel's economy or relations with countries around the world. However, these measures exist within a larger context of international criticism of Israel on its dealings with Palestinians. Israel and many of its supporters regularly raise the possibility of Israel's political isolation, asserting that it could lead toward Israel's delegitimization. Israeli anti-BDS and anti-differentiation efforts in the United States apparently have included public diplomacy, outreach to allies within the Jewish diaspora, and countering activist groups in contexts where pro-BDS sentiment and criticism of settlements is particularly strong—including college campuses and social media.

Pending legislation for the 116th Congress includes the Combatting BDS Act (CBDSA), which is part of a larger bill known as Strengthening America's Security in the Middle East Act of 2019 (S. 1). CBDSA would protect state and local government measures from federal preemption if they prohibit investment in or contracts with certain business or government entities engaging in economic measures targeting Israel or Israel-controlled territories. The Senate passed S. 1 in February 2019, and it is the subject of robust debate among Members of Congress.

Both federal and state laws regulating BDS activity may implicate the protections of the First Amendment, insofar as these laws might affect constitutionally protected speech. In particular, a number of state measures restricting government contractors' ability to engage in BDS activity have been challenged in the courts, with varying results. State-level measures also may raise three related constitutional issues: (1) whether they are preempted by federal law under the Constitution's Supremacy Clause, (2) whether they burden foreign commerce in violation of the dormant Foreign Commerce Clause and, if so, whether they are protected by the market participant exception; and (3) whether they impermissibly interfere with the federal government's exclusive power to conduct the nation's foreign affairs.

SUMMARY

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Introduction

This report provides information and analysis on the following issues that Congress and the Trump Administration currently face:

- Background on the BDS (boycott, divestment, and sanctions) movement against Israel. The BDS movement is a loose grouping of actors from various countries that advocate or engage in economic measures against Israel or Israel-related individuals or organizations. Defining precisely who may or may not constitute the BDS movement, or what may or may not constitute BDS activity, is subject to debate.[1]
- Actions by international organizations and governments, as well as private economic measures, that "differentiate" between (1) Israel in general and (2) entities linked with Israeli-developed areas and settlements in the West Bank, East Jerusalem, and Golan Heights (areas that Israel has controlled and administered since the 1967 Arab-Israeli war).[2]
- The impact of BDS and differentiation on Israel, and Israeli measures to counter them.
- Anti-BDS or anti-differentiation efforts to date, including federal and state legislation and proposals.
- Legislative and constitutional considerations arising from existing antiboycott law, First Amendment issues, and issues regarding congressional powers over commerce and foreign affairs.

The BDS movement's activities differ from the longtime Arab League boycott against Israel (see "General Antiboycott Legislative Considerations" below) in part because the movement is comprised of various non-state actors. The movement exists within a larger context of Israel's complex economic and political relations with the world. For more information, see CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti.

[1] See, e.g., Nathan Thrall, "BDS: how a controversial non-violent movement has transformed the Israeli-Palestinian debate," *Guardian*, August 14, 2018; Sean F. McMahon, "The Boycott, Divestment, Sanctions Campaign: Contradictions and Challenges," *Race & Class*, vol. 55, issue 4, July-September 2014. Some critics of the BDS movement have claimed that a number of the civil society groups involved receive a large amount of their funding from European governments. See, e.g., Testimony submitted for a July 28, 2015, hearing of the House Oversight and Government Reform Committee, Subcommittee on National Security, by SodaStream CEO Daniel Birnbaum and law professor Eugene Kontorovich, available respectively at https://docs.house.gov/meetings/GO/GO06/20150728/103839/HHRG-114-GO06-Wstate-BirnbaumD-20150728.pdf, pp. 59-60; and https://republicans-oversight.house.gov/wp-content/uploads/2015/07/7-28-2015-Natl-Security-Hearing-on-BDS-Kontorovich-Northwestern-Testimony.pdf, p. 3 and footnote 5.

[2] The United States recognized the Golan Heights as part of Israel in 2019; however, U.N. Security Council Resolution 497, adopted on December 17, 1981, held that the area of the Golan Heights controlled by Israel's military is occupied territory belonging to Syria.

Background

The BDS Movement

As mentioned above, defining precisely who may or may not constitute the BDS movement, or what may or may not constitute BDS activity, is subject to debate. Those who profess to be part of the movement or support it generally express sympathy for the Palestinian cause. No foreign government has acknowledged participating in the BDS movement.

In July 2005, various Palestinian civil society groups issued a "Call for BDS" and have since identified themselves as leading the BDS movement.[3] These groups compared their grievances against Israel to the "struggle of South Africans against apartheid," and sought international support for "non-violent punitive measures"[4] against Israel unless and until it changes its policies by (in the words of the "call")

1. "ending its occupation and colonization of all Arab lands and dismantling the Wall;"[5]
2. "recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality;" and
3. "respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN [General Assembly] resolution 194."[6]

Specifically, these Palestinian civil society groups called upon "international civil society organizations and people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel similar to those applied to South Africa in the apartheid era," and sought to have this audience pressure their "respective states to impose embargoes and sanctions against Israel."[7]

In support of its three core demands, the BDS movement's website states that "Israel's oppression of Palestinians involves settler colonialism: Zionism seeks to establish a distinct new society, take over control of land and resources and forcibly remove Palestinians."[8] Observers generally conclude, therefore, that the movement is anti-Zionist and seeks to delegitimize the specifically Jewish character of Israel.[9] For example, the American Jewish interest group J Street has stated

> The Global BDS Movement does not support the two-state solution, recognize the right of the Jewish people to a state or distinguish between opposition to the existence of Israel itself and opposition to the occupation of the territory beyond the Green Line. Further,

[3] See http://www.bdsmovement.net/call.

[4] Ibid.

[5] The "Wall" is a term commonly used by Palestinians to describe the separation barrier that Israel has built in various areas roughly tracking (though departing in significant ways at some points from) the 1949-1967 Israel-Jordan (West Bank) armistice line, also known as the "Green Line."

[6] These three objectives are found at http://www.bdsmovement.net/call.

[7] See https://bdsmovement.net/call.

[8] See https://bdsmovement.net/colonialism-and-apartheid/summary.

[9] See, e.g., David M. Halbfinger, "A Look at the International Drive to Boycott Israel," *New York Times*, July 28, 2019.

> some of the Movement's supporters and leaders have trafficked in unacceptable anti-Semitic rhetoric.[10]

The BDS movement's website claims that the movement is "an inclusive, anti-racist human rights movement that is opposed on principle to all forms of discrimination, including anti-semitism and Islamophobia."[11] Additionally, the website does not "call for either a 'one state solution' or a 'two state solution,' instead focusing on the "realization of basic rights and the implementation of international law."[12]

Israeli officials strenuously oppose the BDS movement, and statements by U.S. officials have consistently denounced any boycotts or other punitive economic measures targeting Israel.[13]

Differentiation Between Israel and the Settlements

Debate is ongoing in the United States and elsewhere about whether economic differentiation between Israel in general and Israeli-controlled areas and settlements in the West Bank, East Jerusalem, and Golan Heights constitutes a form of BDS. Some individuals and groups who say that they support Israel's Jewish identity publicly oppose BDS measures against companies inside Israel, but voice support for economic measures that target the settlements or those doing business there.[14] For example, the advocacy group Americans for Peace Now (a sister organization to Peace Now in Israel) rejects "efforts to conflate Israel and the settlements" and recognizes "the legitimacy and potential value of activism and boycotts that squarely target settlements and the [Israeli] occupation [of the West Bank]."[15] However, Israel's government and many of its leading political figures draw little or no distinction between economic measures targeting settlements and those targeting areas clearly inside of Israel.[16]

[10] See https://jstreet.org/policy/boycott-divestment-and-sanctions-bds/#.XZIu00ZKiUl.

[11] See https://bdsmovement.net/what-is-bds.

[12] See https://bdsmovement.net/faqs#collapse16233

[13] See, e.g., Department of State Press Statement, Decision by EU Court of Justice on Psagot Case, November 13, 2019; Secretary of State Michael Pompeo, Remarks at the AIPAC Policy Conference, Washington, DC, March 25, 2019. In April 2019, BDS movement co-founder Omar Barghouti, a permanent resident of Israel, was prohibited by U.S. government officials from making a trip to the United States despite holding valid travel documents. Noa Landau, "U.S. Denies Entry to BDS Founder Omar Barghouti," haaretz.com, April 11, 2019.

[14] See, e.g., Todd Gitlin, et al., "For an Economic Boycott and Political Nonrecognition of the Israeli Settlements in the Occupied Territories," *New York Review of Books*, October 13, 2016; Ron Kampeas, "4 takeaways from the House's big vote against the Israel boycott movement," Jewish Telegraphic Agency, July 26, 2019. The most-cited international law pertaining to Israeli settlements is the Fourth Geneva Convention, Part III, Section III, Article 49 *Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, which states in its last sentence, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Israel insists that the West Bank does not fall under the international law definition of "occupied territory," but is rather "disputed territory" because the previous occupying power (Jordan) did not have an internationally recognized claim to it, and given the demise of the Ottoman Empire at the end of World War I and the end of the British Mandate in 1948, Israel claims that no international actor has superior legal claim to it.

[15] See https://peacenow.org/page.php?name=bds-name-and-shame-them#.XY0MDkZKiUk

[16] See, e.g., Yossi Klein Halevi, "Boycotting Israel won't end the Palestinian tragedy," *Los Angeles Times*, February 19, 2019.

Developments Involving International Organizations

Some international organizations have taken actions that either encourage states to differentiate between Israel and its settlements, or could make it easier for political or economic differentiation to take place.

November 2015 - European Commission Product Labeling Notice

On November 11, 2015, the European Commission issued a notice setting forth guidelines regarding labeling of certain products imported into European Union countries from areas that Israel captured in the 1967 Arab-Israeli war, along with an accompanying factsheet.[17] The labeling notice provides that products in question coming from Israeli settlements in the West Bank (including East Jerusalem) or Golan Heights should be clearly differentiated from products coming from Israel and those produced (generally by Palestinian-run businesses) outside of settlements in the West Bank, Golan Heights, and Gaza Strip. The factsheet accompanying the notice stated

> The EU does not support any form of boycott or sanctions against Israel. The EU does not intend to impose any boycott on Israeli exports from the settlements. The Commission will only help Member States to apply already existing EU legislation. The indication of origin will give consumers the possibility to make an informed choice.

Israel and the United States (under the Obama Administration) had varying responses. The Israeli Foreign Ministry stated, among other things, "We regret that the EU has chosen, for political reasons, to take such an exceptional and discriminatory step, inspired by the boycott movement."[18] The Obama Administration's State Department deputy spokesperson said that the Administration did "not believe that [EU] labeling [of] the origin of products is equivalent to a boycott."[19] He further said that U.S. laws for Israeli settlement exports are somewhat similar in requiring them to be marked as products of the West Bank, but that the U.S. laws and regulations do not require further differentiation between products from and not from settlements.[20]

France adopted the European Commission's product labeling guidelines in 2016, and a case challenging their enforcement came before the European Union Court of Justice (CJEU).[21] In November 2019, the CJEU ruled that "foodstuffs originating in territories occupied by the State of Israel must bear the indication of their territory of origin, accompanied, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, by the indication of that provenance."[22] The spokesperson from the EU's embassy to Israel

[17] The text of the notice is available at http://eeas.europa.eu/delegations/israel/documents/news/20151111_interpretative_notice_indication_of_origin_of_goods_en.pdf, and the factsheet at http://eeas.europa.eu/delegations/israel/documents/news/20151111_indication_of_origin_fact_sheet_final_en.pdf. The labeling rules are required for fresh fruit and vegetables, wine, honey, olive oil, eggs, poultry, organic products, and cosmetics; and are optional for pre-packaged foodstuffs and the majority of industrial products.

[18] Text of statement available at http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-condemns-EU-decision-on-labeling-11-Nov-2015.aspx.

[19] Bradley Klapper, "US OK With New EU Labeling Rule for Israeli Settlement Goods," *Associated Press*, November 12, 2015. At a daily press briefing the day before the European Commission issued its labeling notice, the deputy spokesperson had said that it could be "perceived as a step on the way" to a boycott.

[20] Ibid. See U.S. Customs and Border Protection, West Bank Country of Origin Marking Requirements, Cargo Systems Messaging Service #16-000047, January 23, 2016.

[21] Andrew Rettman, "Shops should label Israeli settler goods, EU jurist says," EUObserver, June 13, 2019.

[22] CJEU, Press Release No 140/19, Judgment in Case C363/18 Organisation juive européenne, Vignoble Psagot Ltd v

reiterated that the EU rejects "any form of boycott or sanctions against Israel."[23] However, the State Department spokesperson stated that the United States is "deeply concerned" by the EU labeling requirement identified in the CJEU ruling, saying that circumstances surrounding the requirement suggest "anti-Israel bias," and that the requirement "serves only to encourage, facilitate, and promote" BDS measures against Israel.[24] According to a study of the EU's enforcement of the 2015 guidelines to date, "Only 10% of the settlement wines on sale in the EU have correct or partially correct origin indication in line with EU rules, i.e. 'Product of West Bank/Golan Heights (Israeli settlement).'"[25]

March 2016 - U.N. Human Rights Council Resolution: Database of Companies

In March 2016, the U.N. Human Rights Council (UNHRC) adopted a resolution that, among other things, requested that the U.N. Office of the High Commissioner for Human Rights (OHCHR) produce a database of all business enterprises that have "directly and indirectly, enabled, facilitated and profited from the construction and growth of the (Israeli) settlements."[26] This action was denounced by Israel as a "blacklist" and also vehemently criticized by the United States.[27] The United States withdrew from the Council in July 2018, citing as a key grievance what Secretary of State Michael Pompeo and then-Permanent Representative to the United Nations Nikki Haley characterized as the Council's bias against Israel.[28]

The Council's 2016 resolution anticipated that OHCHR would share the requested database with the Council by 2017, but it has not done so to date. In March 2018, OHCHR reported to the Council that it was still gathering information for the list.[29] In March 2019, OHCHR wrote to the Council that it needed more time "given the novelty of the mandate and its legal, methodological and factual complexity," fueling debate over whether OHCHR has delayed releasing the database due to political pressure from Israel and its supporters.[30]

Ministre de l'Économie et des Finances Luxembourg, November 12, 2019.

[23] Raphael Ahren, "In landmark ruling, EU's top court says settlement product labeling mandatory," *Times of Israel*, November 12, 2019.

[24] Department of State Press Statement, Decision by EU Court of Justice on Psagot Case, November 13, 2019.

[25] European Middle East Project MORE INFO. https://www.timesofisrael.com/europe-failing-to-implement-eu-settlement-labeling-directive-study-shows/

[26] See U.N. Human Rights Council resolution 31/36 (A/HRC/31/L.39), March 22, 2016, paragraph 17; and paragraphs 96 and 117 of Human Rights Council Document, A/HRC/22/63, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, February 7, 2013.

[27] Mohamad Torokman, "U.S. condemns U.N. call for list of firms operating in West Bank," Reuters, March 31, 2016; Transcript of Remarks by Ambassador Nikki Haley, U.S. Permanent Representative to the United Nations, Geneva, Switzerland, June 6, 2017, available at https://usun.state.gov/remarks/7828.

[28] United States Mission to the United Nations, Remarks on the UN Human Rights Council, July 19, 2018.

[29] U.N. Human Rights Council, Thirty-seventh session (26 February-23 March 2018), *Database of all business enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, Report of the United Nations High Commissioner for Human Rights. For some names of companies that might be included in a database, see Itamar Eichner, "Top companies face UN blacklist over operations in settlements," Ynetnews, February 12, 2019; Tovah Lazaroff, "Companies on UNHRC settler blacklist: We're doing nothing wrong," jpost.com, October 26, 2017.

[30] Nick Cumming-Bruce, "U.N. Database on West Bank Is Postponed," *New York Times*, March 6, 2019.

December 2016 - U.N. Security Council Resolution 2334

On December 23, 2016, the U.N. Security Council adopted Resolution 2334 (or UNSCR 2334) by a vote of 14 in favor, zero against, and one abstention by the United States. The resolution, among other things

- reaffirms that settlements established by Israel in "Palestinian territory occupied since 1967, including East Jerusalem," constitute "a flagrant violation under international law" and a "major obstacle" to a two-state solution and a "just, lasting and comprehensive peace";
- reiterates the Council's demand that Israel "immediately and completely cease all settlement activities"; and
- calls upon all states to "distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967."

Following the adoption of UNSCR 2334, Palestinian political leaders indicated that they would campaign "to require that other countries not just label products made in the settlements, but ban them."[31] Since 2018, parliaments in Ireland and Chile have taken legislative steps toward measures—though not enacted to date—that would ban or discourage imports from West Bank settlements.[32] Additionally, in 2019, a Canadian court ruled that its government's labeling of settlement products as Israeli was improper, leading the government to appeal the ruling.[33]

In Israel: Impact and Responses

BDS or economic differentiation measures exist within a larger context of international criticism of Israel on its dealings with Palestinians. Israel and many of its supporters regularly raise the possibility of Israel's political isolation, asserting that it could lead toward Israel's delegitimization.[34] The international debate around BDS has grown more prominent since the latest round of U.S.-mediated Israeli-Palestinian talks ended unsuccessfully in 2014. It takes place amid general skepticism about the near-term possibility that diplomacy can end large-scale Israeli control over Palestinians in the West Bank and Gaza Strip. Additionally, in July 2018, the Israeli Knesset (parliament) passed a Basic Law defining Israel as the national homeland of the Jewish people. The law's enactment triggered domestic and international debate about the rights of Israel's Arab citizens, who largely identify as Palestinians and comprise about 20% of Israel's population.[35]

Some Israeli officials and observers have downplayed the threat of isolation, pointing to improvements in Israel's relations with a number of countries.[36] Moreover, while some institutional investors (including a few Western government funds and U.S.-based Christian churches) and private companies have withdrawn investments from or canceled contracts in

[31] Peter Baker, "A Defiant Israel Vows to Expand Its Settlements," *New York Times*, December 27, 2016.

[32] Amir Prager, "The Decisions by Ireland and Chile to Ban Products from the Settlements," Institute for National Security Studies Insight No. 1142, February 26, 2019.

[33] "Canada to appeal ruling that settlement wines can't be labeled 'Made in Israel,'" *Times of Israel*, September 7, 2019.

[34] Chuck Freilich, "Israel is fighting BDS the wrong way," blogs.timesofisrael.com, February 12, 2018.

[35] See, e.g., Ruth Eglash, "Jewish or democratic? Israel debates its founding principles," *Washington Post*, July 12, 2018; Dov Lieber, "Law Sets Israel as 'Jewish State,'" *Wall Street Journal*, July 20, 2018.

[36] See, e.g., Ido Aharoni, "Israel at 70: Not as isolated as Israelis think," October 1, 2018; Thrall, op. cit. footnote 1.

Israeli entities,[37] apparently owing largely to settlement-related concerns, such measures appear to have had little overall effect on Israel's economy. To illustrate, a July 2019 media report said that foreign direct investment in Israel is at an all-time high, while explaining

> Israel's economy is well-suited to resist boycotts because it is less dependent on exports of commodities, which can be sourced elsewhere, than on sales of intellectual property, like software, and business-to-business products, against which it is harder to mobilize consumers.[38]

In a 2018 report that contained data and findings largely in line with the above explanation, two analysts concluded that Israel could be vulnerable to boycotts in some sectors (including tourism, some services and agricultural products, non-complex manufacturing, and academia), but that such measures would probably have more of a cultural or psychological impact than an economic one.[39]

Israelis hold varying views about the best way to counter BDS and differentiation, reflecting the fact that some have concerns about international isolation, but the country has yet to experience major economic setbacks.[40]

The SodaStream Case and Palestinian Employment

In 2015, the private Israeli company SodaStream (acquired by PepsiCo in 2018) closed its West Bank factory and relocated its operations inside Israel, though its CEO claimed that the BDS movement had only a "marginal" effect on these changes.[41] Reportedly, all of SodaStream's West Bank-based Palestinian employees (between 500 and 600) were laid off because none could obtain permits from Israeli authorities to work at the new location.[42] In May 2017, 74 of these employees received permits after persistent requests from the company.[43]

Israeli observers have routinely asserted that the SodaStream case demonstrates that BDS advocates or those who differentiate economically between Israel and West Bank settlements harm Palestinians who work for Israeli employers based in settlement areas.[44] Many Palestinians and some international human rights groups counter that Palestinians would be able to enjoy greater job prospects if Israeli settlements and movement/access/zoning restrictions in the West Bank did not constrain Palestinians' entrepreneurial capacities or their ability to attract international employers or outside investment.[45] Some Israelis defend constraints on West Bank Palestinians by citing concerns about security for Israeli citizens located in Israel proper and the settlements.

Israel's Ministry of Strategic Affairs has reportedly allocated about $100 million to oppose BDS-related activities since 2016.[46] Such countermeasures in the United States have included assertive

[37] See https://bdsmovement.net/economic-boycott.

[38] Halbfinger, op. cit., footnote 9.

[39] Dany Bahar and Natan Sachs, "How much does BDS threaten Israel's economy?" Brookings Institution, January 26, 2018.

[40] Ariel Kahana, "Bringing BDS to its knees," israelyahom.com, August 17, 2019; Yuli Novak, "The BDS Monster," haaretz.com, September 27, 2018; Maayan Jaffe-Hoffman, "What Israel is doing wrong in the battle against BDS," jpost.com, August 9, 2019.

[41] "SodaStream Leaves West Bank as CEO Says Boycott Antisemitic and Pointless," *theguardian.com*, September 2, 2015.

[42] "SodaStream fires last Palestinian workers after permit row," Agence France Presse, February 29, 2016.

[43] "SodaStream bringing 74 West Bank Palestinians back to work at Negev plant," Jewish Telegraphic Agency, May 23, 2017.

[44] See, e.g., David Horovitz, "Victory for BDS as SodaStream's last Palestinian workers lose their jobs," *Times of Israel*, February 29, 2016.

[45] See, e.g., Human Rights Watch, *Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violation of Palestinian Rights*, 2016.

[46] Nathan Thrall, "How the Battle Over Israel and Anti-Semitism Is Fracturing American Politics," *New York Times*

public diplomacy, outreach to enlist anti-BDS allies within the Jewish diaspora, and digital initiatives like gathering intelligence on and countering activist groups in contexts where pro-BDS sentiment is particularly strong—including college campuses and social media.[47] Israel and a number of organizations also have sponsored anti-BDS conferences at the U.N. General Assembly in 2016 and 2017.[48]

Additionally, In March 2017, the Knesset passed a law that allows the government to block entry into the country of nonresidents who publicly call for a boycott against Israel or Israelis in West Bank settlements, or are associated with organizations that do so.[49] Since then, this law has been applied in some prominent cases, such as

- In 2018, the Israeli government ordered the Israel and Palestine director for Human Rights Watch to leave the country. A court ruling upholding the government's decision was based on both the man's past activism supporting boycotts against Israel, and his more recent work for Human Rights Watch opposing businesses' activities in West Bank settlements.[50]
- Also in 2018, Israeli authorities initially denied entry to an American student traveling to Israel to enroll in a Hebrew University graduate program, but Israel's Supreme Court ruled that the denial was improper after the student provided evidence showing that she had ceased her pro-BDS activism some months before.[51]
- In August 2019, Israel cited the law to deny entry to U.S. Representatives Rashida Tlaib and Ilhan Omar, the two Members of Congress who have voiced support for the BDS movement to date.[52] Israel's denial of entry to Tlaib and Omar, among other things, has contributed to speculation that U.S. policy on Israel could become a more contentious domestic issue.[53]

A case involving the online housing rental service Airbnb (a U.S.-based company) has attracted significant attention in Israel and beyond. In November 2018, Airbnb announced its intent to no

Magazine, March 28, 2019.

[47] Ilanit Chernick, "Fighting BDS online," jpost.com, June 16, 2019; "Israel battles BDS with viral videos," i24News, November 6, 2019; Amir Tibon, "'We Are Working on Foreign Soil and Have to Be Very Cautious': Shelved Al Jazeera Film Details Israel's 'Covert War' Against BDS in U.S.," haaretz.com, October 23, 2018; Lidar Grave-Lazi, "First Situation Room to Combat BDS Opens in US," jpost.com, January 24, 2017.

[48] Cathryn J. Prince, "Israel hosts first-ever anti-BDS conference at UN," *Times of Israel*, June 1, 2016; Ben Sales, "Thousands gather at United Nations to oppose BDS," Jewish Telegraphic Agency, March 29, 2017.

[49] Ruth Levush, "Israel: Prevention of Entry of Foreign Nationals Promoting Boycott of Israel," Law Library of Congress Global Legal Monitor, March 17, 2017.

[50] Human Rights Watch, "Israel: Supreme Court Greenlights Deporting Human Rights Watch Official," November 5, 2019.

[51] The student cited her decision to enroll at an Israeli university as evidence that she no longer held pro-BDS views. Lila Margalit, "Israel's Supreme Court Hands a Victory to Lara Alqasem, But the Future of Foreigners' Free Speech Remains Uncertain," Lawfare, November 14, 2018.

[52] Niraj Chokshi, "The Anti-Boycott Law Israel Used to Bar Both Omar and Tlaib," nytimes.com, August 15, 2019. During the week before Israel decided to bar Representatives Tlaib and Omar, Israel's ambassador to the United States Ron Dermer had said that their trip would be permitted. Some observers have asserted that the Trump Administration may have influenced the changed Israeli decision. Israel informed Representative Tlaib that she would be permitted to visit family in the West Bank if she refrained from political criticism of Israel during the trip, but she declined coming under those conditions.

[53] See, e.g., Dennis Ross and Stuart Eizenstat, "Israel should resist Trump's efforts to politicize support," *The Hill*, August 22, 2019.

longer list properties connected with Jewish West Bank settlements. Although Airbnb asserted that it did not identify with the BDS movement, Vice President Mike Pence and some other U.S. and Israeli figures criticized the company's decision and linked it with BDS.[54] After the announcement triggered several lawsuits against Airbnb in the United States and Israel alleging unfair discrimination, the company reversed its decision in April 2019 and pledged to donate all its profits from the settlements to charity.[55]

Anti-BDS or Anti-differentiation Legislative Action

For additional analysis of enacted and proposed legislation discussed in this section, see "General Antiboycott Legislative Considerations," "First Amendment Questions," and "Federal Preemption Questions: Commerce Clause and Foreign Affairs" below.

In Congress

Some Members of Congress argue that the BDS movement is discriminatory and have sought legislative options to limit its influence. Other Members have voiced various reservations about anti-BDS legislation. Some of these concerns focus on possible constraints to domestic civil liberties, particularly freedom of speech and political action. Others are that legislation might apply not just to BDS economic actions against Israel, but also differentiation measures against Israeli West Bank settlements. The following are summaries of relevant anti-BDS or anti-differentiation legislation, proposed or enacted.

114th Congress

Bipartisan Congressional Trade Priorities and Accountability Act

In June 2015, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26) was enacted into law. This law provided trade promotion authority (TPA)[56] to the President regarding the negotiation of certain U.S. trade agreements, including the proposed U.S.-EU Transatlantic Trade and Investment Partnership (T-TIP). The law included a trade negotiating objective for T-TIP (U.S.-EU negotiations to achieve a comprehensive and "high-standard" free trade agreement) aimed at BDS-related activity. The trade negotiating objective, as enacted, discouraged politically motivated economic actions "intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories."

During and after congressional deliberations, public debate regarding this trade negotiating objective focused on whether EU "differentiation" between commerce with Israeli settlements and commerce with Israel constitutes or promotes BDS-related activity.[57] The State Department

[54] Biz Carson, "Airbnb Boycotted and Sued for Discrimination Following Israel Settlement Ban," forbes.com, December 11, 2018.

[55] Julia Jacobs, "Airbnb Reverses Its Policy Banning Listings in Settlements in the West Bank," *New York Times*, April 11, 2019.

[56] For more information, see CRS In Focus IF10038, *Trade Promotion Authority (TPA)*, by Ian F. Fergusson.

[57] Sarah Saadoun, "Don't Protect Israeli Settlement Trade," *The Hill*, May 15, 2015; Melissa Apter, "Home Run for Cardin," *Baltimore Jewish Times*, April 30, 2015; Lara Friedman, "The Stealth Campaign in Congress to Support Israeli Settlements," December 1, 2015.

spokesperson's office weighed in on the debate with a statement following the enactment of P.L. 114-26 that included the following passage:

> The United States has worked in the three decades since signing the U.S.-Israel Free Trade Agreement – our first such agreement with any country – to grow trade and investment ties exponentially with Israel. The United States government has also strongly opposed boycotts, divestment campaigns, and sanctions targeting the State of Israel, and will continue to do so.
>
> However, by conflating Israel and "Israeli-controlled territories," a provision of the Trade Promotion Authority legislation runs counter to longstanding U.S. policy towards the occupied territories, including with regard to settlement activity. Every U.S. administration since 1967 – Democrat and Republican alike – has opposed Israeli settlement activity beyond the 1967 lines. This [Obama] Administration is no different. The U.S. government has never defended or supported Israeli settlements and activity associated with them and, by extension, does not pursue policies or activities that would legitimize them.[58]

Trade Facilitation and Trade Enforcement Act

In February 2016, President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 (the Customs Act, P.L. 114-125) into law. The act contains a provision similar to the one in P.L. 114-26 that opposes punitive economic measures (such as measures advocated by a nongovernmental boycott, divestment, and sanctions [BDS] movement) against businesses in Israel or Israeli-controlled territories. However, the Obama Administration asserted—including in a presidential signing statement echoing the Administration's response to P.L. 114-26—that certain provisions in P.L. 114-125 that seek to treat "Israeli-controlled territories" beyond 1949-1967 armistice lines (including West Bank settlements) in the same manner as Israel itself are not in line with U.S. policy.[59]

115th Congress - Proposed Israel Anti-Boycott Act

In the 115th Congress, two Senators and four Representatives introduced the Israel Anti-Boycott Act (IABA, S. 720/H.R. 1697). IABA's main provisions would have applied the legal framework for countering the Arab League boycott against Israel that was in the Export Administration Act of 1979 (EAA) (see "General Antiboycott Legislative Considerations" below) and is also in the Anti-Boycott Act of 2018 (P.L. 115-232, div. A, title XVII, subtitle B, part II) to international governmental organizations such as the United Nations and European Union. The findings in Section 2 of IABA likened the U.N. Human Rights Council's March 2016 resolution, which (as described above) requested a database of companies doing business in West Bank settlements, to the Arab League boycott.

Some groups, including the American Civil Liberties Union (ACLU), claimed that certain provisions of IABA would have unconstitutionally imposed criminal penalties on free speech (see "First Amendment Questions").[60] These IABA provisions focused on preventing U.S. businesses from furnishing information to foreign governments or international organizations if doing so could support restrictive trade practices against Israel.

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[58] Full text of statement cited by an *AP* reporter at https://twitter.com/APDiploWriter/status/615969535087218688, June 30, 2015.

[59] See, e.g., a presidential signing statement for P.L. 114-125 (H.R. 644) at https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/signing-statement-hr-644.

[60] See https://www.aclu.org/sites/default/files/field_document/2017_07_17_aclu_letter_opposing_s_720_israel_anti-boycott.pdf.

In response to public debate, Senators Rob Portman and Ben Cardin publicized a revised version of S. 720 in March 2018 that apparently sought to narrow the bill's restrictions in such a way that it would target official commercial activity rather than individual political expression. In a press release, Senator Cardin's office said

> After months of a healthy dialogue with the public and consultations with outside groups, lawmakers and other legal experts, Cardin and Portman have worked to address concerns that have arisen regarding the legislation, which protects U.S. business from being pressured into complying with unsanctioned foreign boycotts by extending provisions of the 40-year-old Export Administration Act to activity by international governmental organizations.[61]

Additionally, Section 6(b) of the revised version of S. 720 contained language saying that the bill was not to be construed to alter or establish new U.S. policy "concerning final status issues associated with the Arab-Israeli conflict, including border delineation, that can only be resolved through direct negotiations between the parties."

The ACLU said that the revised version of S. 720 was an improvement upon the original, but maintained that it was still unconstitutional. A March 2018 ACLU letter read, "Whereas the EAA was meant to protect American companies from economic coercion by foreign governments, S. 720 would punish Americans who participate in constitutionally protected political boycotts."[62]

Separately, in June 2018, the House Foreign Affairs Committee ordered a new version of H.R. 1697 to be reported as an amendment in the nature of a substitute. In seeking to restrict official commercial activity that complies with restrictive trade practices from international organizations, the new version of H.R. 1697 largely mirrored the revised version of S. 720, but H.R. 1697 sought to accomplish this purpose by requiring the President to issue regulations on the subject rather than directly amending the EAA. The ACLU also opposed this version of IABA.[63]

No version of IABA came to a House or Senate vote in the 115th Congress, and no version has been introduced during the 116th Congress.

116th Congress

Proposed Combatting BDS Act

The Combatting BDS Act (CBDSA) was first introduced during the 115th Congress (as S. 170/H.R. 2856), but did not go through a committee approval process. In the 116th Congress, CBDSA was introduced as part of a larger bill known as Strengthening America's Security in the Middle East Act of 2019 (S. 1). S. 1 passed the Senate in February 2019 in a 77-23 vote. A counterpart bill (H.R. 336) was introduced in the House shortly after S. 1 passed the Senate. CBDSA would protect state and local government measures from federal preemption if they prohibit investment in or contracts with certain business or government entities engaging in economic measures targeting Israel "or persons doing business in Israel or in Israeli-controlled territories for purposes of coercing political action by, or imposing policy positions on, the Government of Israel."

[61] Office of Senator Ben Cardin, Cardin, Portman Amend Israel Anti-Boycott Act, March 3, 2018.

[62] See https://www.aclu.org/sites/default/files/field_document/aclu_letter_on_revised_s._720_-_3-6-18.pdf.

[63] See https://www.aclu.org/sites/default/files/field_document/2018-7-10_aclu_letter_house_h.r.1697-israel_anti-boycott_act_0.pdf.

Although CBDSA would not protect state or local measures from free speech challenges, several Members of Congress have objected to it,[64] presumably because it may make it easier for states to enact constitutionally questionable anti-BDS or anti-differentiation measures. These objections have been part of a robust public debate on CBDSA.[65]

CBDSA also could face objections based on claims that the executive branch has exclusive constitutional authority to conduct foreign relations (see "Federal Preemption Questions: Commerce Clause and Foreign Affairs" below), as raised in President George W. Bush's signing statement related to nonpreemption language in the Sudan Accountability and Divestment Act of 2007 (P.L. 110-174).[66] Another law with similar nonpreemption language is the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (P.L. 111-195).

House Resolution 246

In July 2019, the House passed H.Res. 246 ("Opposing efforts to delegitimize the State of Israel and the Global Boycott, Divestment, and Sanctions Movement targeting Israel") by a vote of 398-17, with five voting present. The non-binding resolution opposed the BDS movement and efforts to delegitimize Israel. It also specified its opposition to "efforts to target United States companies that are engaged in commercial activities that are legal under United States law," a statement that could be construed as opposing economic measures against companies doing business with West Bank settlements.[67] The resolution also reaffirmed strong support for direct Israeli-Palestinian negotiations and a two-state solution to the Israeli-Palestinian conflict. In the same month, three Representatives introduced a draft resolution (H.Res. 496) that would affirm Americans' First Amendment rights to participate in boycotts "in pursuit of civil and human rights at home and abroad" and would oppose "unconstitutional legislative efforts to limit the use of boycotts."

State-level Measures

Since 2015, various U.S. states have enacted or proposed anti-BDS or anti-differentiation legislation, or promulgated similar executive orders. Some measures explicitly apply to situations involving both Israel and "Israeli-controlled territories,"[68] while the territorial applicability of other measures are less explicit. A number of these state measures have been challenged via lawsuits on First Amendment grounds (see "First Amendment Questions" below).

State-level measures come under two broad categories:

- **Investment-Focused.** Measures that appear to require state investment vehicles to divest from or avoid investing in companies that engage in or advocate economic measures antithetical to Israel.[69]

[64] Amir Tibon, "Anti-BDS Bill Passed Senate, but Trouble Awaits in House," haaretz.com, February 10, 2019.

[65] Marco Rubio, "The Truth About B.D.S. and the Lies About My Bill," *New York Times*, February 5, 2019; Ron Kampeas, "Congress tackles the anti-Israel boycott, but bipartisanship is fleeting," Jewish Telegraphic Agency, July 19, 2019.

[66] See https://www.presidency.ucsb.edu/documents/statement-signing-the-sudan-accountability-and-divestment-act-2007.

[67] Kampeas, op. cit. footnote 14.

[68] States in which this is the case include Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Nevada, New Jersey, North Carolina, Ohio, and Texas.

[69] States that have measures to this effect include Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Nevada, New Jersey, New York, North Carolina and Texas.

- **Contracting-Focused.** Measures that appear to prohibit public entities from transacting business with entities that engage in or advocate economic measures antithetical to Israel.[70]

Additionally, at various times, governors of all 50 U.S. states and the mayor of Washington, DC, have reportedly signed onto an initiative sponsored by the American Jewish Committee (AJC) entitled "Governors United Against BDS."[71]

General Antiboycott Legislative Considerations[72]

The existing U.S. antiboycott regime was largely crafted to address the Arab League (League of Arab States) boycott of Israel. Members might consider the extent to which the existing regime could be applied or modified with respect to efforts to address the BDS movement.

The Arab League boycott has three tiers. The primary boycott prohibits citizens of an Arab League member state 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 worldwide that does business in Israel. The tertiary boycott prohibits Arab League members and their nationals from doing business with a company that deals with companies that have been blacklisted by the Arab League.

In the late 1970s, the United States passed antiboycott legislation establishing a set of civil and criminal penalties to discourage U.S. individuals from cooperating with the Arab League boycott.[73] U.S. antiboycott efforts are targeted at the secondary and tertiary boycotts. U.S. legislation was enacted to "encourage, and in specified cases, require U.S. firms to refuse to participate in foreign boycotts that the United States does not sanction. They have the effect of preventing U.S. firms from being used to implement foreign policies of other nations which run counter to U.S. policy."[74] According to the Department of Commerce, in FY2018, 178 requests to participate in the boycott were reported to U.S. officials. The majority (94 requests) were from the United Arab Emirates, followed by Iraq (21) and Qatar (16).[75]

[70] States that have measures to this effect include Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, and Wisconsin. California enacted legislation in September 2016 that requires parties seeking state contracts to certify that any policy that they have adopted against a sovereign nation or people (including Israel) is not discriminatory under specified civil rights or employment and housing legislation.

[71] See https://www.ajc.org/governors.

[72] This section was authored by Martin A. Weiss, Specialist in International Trade and Finance.

[73] See CRS Report RL33961, *Arab League Boycott of Israel*, by Martin A. Weiss. U.S. regulations define cooperating with the boycott as (1) agreeing to refuse or actually refusing to do business in Israel or with a blacklisted company; (2) agreeing to discriminate or actually discriminating against other persons based on race, religion, sex, national origin, or nationality; (3) agreeing to furnish or actually furnishing information about business relationships in Israel or with blacklisted companies; and (4) agreeing to furnish or actually furnishing information about the race, religion, sex, or national origin of another person. The export-related antiboycott provisions are administered by the Department of Commerce and potentially fine and/or imprison U.S. persons participating in the boycott. The Internal Revenue Service (IRS) administers tax-related antiboycott regulations that deny tax benefits to U.S. taxpayers that participate in the boycott.

[74] Website of the Office of Antiboycott Compliance; http://www.bis.doc.gov/AntiboycottCompliance/oacrequirements.html.

[75] U.S. Department of Commerce, Bureau of Industry and Security, *Annual Report to the Congress for Fiscal Year 2018*, Washington, DC.

Participating in the BDS movement would not appear to place a U.S. organization in violation of existing federal antiboycott legislation, which targets organizations' participation in foreign boycotts. No foreign state has proclaimed that it participates in the BDS movement.

As mentioned above, the Israel Anti-Boycott Act introduced in the 115th Congress (S. 720/H.R. 1697) would have applied federal antiboycott legislation to boycotts fostered by international governmental organizations against Israel. Members might also consider legal and regulatory frameworks that Congress and the executive branch have used to designate actors of concern under various rubrics having to do with trade and/or national security. One option would be to create a dual system under which Congress could explicitly designate foreign BDS "offenders" (either individuals or entities) through legislation, while also authorizing executive branch agencies (including the State, Treasury, or Commerce Departments) to designate foreign "offenders" via case-by-case determinations based on a number of criteria. Such criteria could include market behavior and its impact or potential impact on Israel, evidence of intent, coordination with other parties, etc. Congress could require the executive branch to justify its designations/nondesignations through reports, either as a matter of course or upon congressional or congressional leadership request.

First Amendment Questions[76]

Government regulation of BDS-related activity or economic "differentiation" (between Israel and Israeli settlements) may implicate the protections of the First Amendment's Free Speech Clause. The First Amendment provides that the government "shall make no law ... abridging the freedom of speech."[77] Some have argued that laws regulating BDS activity are susceptible to First Amendment challenges, viewing such laws as government efforts to regulate expressive political activities.[78] Others have countered that proposed or enacted BDS regulations qualify as permissible commercial regulations, noting that the First Amendment generally does not prevent the government from regulating commercial activity.[79] States have also argued that some anti-BDS laws are a permissible exercise of their ability to impose conditions on government funding and contractors.[80] Ultimately, courts' review of BDS-related regulation—particularly laws prohibiting or penalizing boycott activity—has thus far mostly turned on whether the court views the law as regulating expressive activity or commercial conduct.

[76] This section was authored by Valerie Brannon, Legislative Attorney.

[77] U.S. CONST. amend. I. The First Amendment was incorporated against the states by the Fourteenth Amendment. Near v. Minnesota, 283 U.S. 697, 707 (1931).

[78] *See, e.g.*, Brief of *Amici Curiae* First Amendment Scholars in Support of Plaintiffs–Appellees, Jordahl v. Brnovich, No. 18-16896 (9th Cir. Jan. 24, 2019); Recent Legislation, *First Amendment – Political Boycotts – South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts*, 129 HARV. L. REV. 2029, 2034–35 (2015); David Cole & Faiz Shakir, *This Piece of Pro-Israel Legislation is a Serious Threat to Free Speech*, WASH. POST. (July 24, 2017), https://www.washingtonpost.com/opinions/this-piece-of-pro-israel-legislation-is-a-serious-threat-to-free-speech/2017/07/24/0752d408-7093-11e7-8f39-eeb7d3a2d304_story.html.

[79] *See, e.g.*, 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); Michael C. Dorf, *Anti-BDS Laws, Anti-Discrimination Laws, Subjective Legislative Intent, and the First Amendment*, DORF ON LAW (Feb. 25, 2019), http://www.dorfonlaw.org/2019/02/anti-bds-laws-anti-discrimination-laws.html; Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAG. (July 13, 2015), https://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds.

[80] *See, e.g.*, Defendants-Appellees' Brief at 32, Ark. Times LP v. Waldrip, No. 19-1378 (8th Cir. May 31, 2019). *Cf., e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (upholding federal funding condition prohibiting discrimination against First Amendment challenge).

Most of the First Amendment challenges to existing BDS regulations have concerned state anti-BDS laws that condition the receipt of government funds or public employment on a commitment by the grantee or employee not to engage in BDS activity.[81] This report focuses on the First Amendment analysis that has been applied to these laws prohibiting government contractors from engaging in BDS activity.

General Background

A court's review of a First Amendment challenge to a law regulating BDS activity would depend on the terms of the regulation and the type of activity it regulates. For example, product labeling requirements that differentiate between Israel and the West Bank or Golan Heights on the basis of geographic origin could be challenged under the First Amendment insofar as they compel speech—but they may be subject to a lower standard of scrutiny that applies to certain commercial disclosure requirements and thus more likely to be upheld under that more relaxed standard.[82] To take another example (discussed in more detail below), a court might analyze a divestiture law placing conditions on government spending under a more lenient standard, particularly as compared to a law directly prohibiting private parties from engaging in BDS activity.[83] For instance, in 2016, the governor of New York signed an executive order requiring all state agencies to divest funds from entities engaging in BDS activity.[84] A number of commentators argued that this New York order violated the First Amendment because it effectively penalized protected expressive activity.[85] This executive order remains in effect and has not been assessed by courts.[86]

To determine whether a challenged regulation is unconstitutional under the First Amendment, a threshold issue is whether the government action is targeting "speech" protected by the First Amendment.[87] In general, the Supreme Court has distinguished statutes that regulate conduct

[81] *See* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019); Ark. Times LP v. Waldrip, No. 4:18-CV-00914 BSM, 2019 U.S. Dist. LEXIS 27147 (E.D. Ark. Jan. 23, 2019), *appeal filed*, No. 19-1378 (8th Cir. Feb. 25, 2019); Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018), *appeal pending*, No. 18-16896, 2019 U.S. App. LEXIS 28556 (9th Cir. Sep. 20, 2019) (granting motion to stay preliminary injunction because parties agreed that legislative action rendered the appeal moot); Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

[82] *See generally* CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment*, by Valerie C. Brannon.

[83] *Cf., e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587–88 (1998) ("[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.").

[84] N.Y. Codes R. & Regs. tit. 9, § 8.157, Executive Order No. 157, Directing State Agencies and Authorities to Divest Public Funds Supporting BDS Campaign Against Israel, signed on June 5, 2016.

[85] *See, e.g.*, Simon McCormack, *Gov. Cuomo's BDS Blacklist Is an Affront to Free Expression*, ACLU (June 9, 2016), https://www.aclu.org/blog/free-speech/gov-cuomos-bds-blacklist-affront-free-expression; Daniel Sieradski, *Andrew Cuomo's Anti-Free Speech Move on B.D.S.*, N.Y. TIMES (June 12, 2016), https://www.nytimes.com/2016/06/13/opinion/andrew-cuomos-anti-free-speech-move-on-bds.html?emc=eta1&_r=0. *Cf., e.g.*, Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, NEW YORKER (June 16, 2016), https://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott (saying that "according to several prominent scholars, … the issue isn't so clear-cut").

[86] *But cf.* Ali v. Hogan, No. 1:19-cv-00078, 2019 U.S. Dist. LEXIS 171670, at *1 (D. Md., Oct. 1, 2019) (resolving First Amendment challenge to Maryland Governor's 2017 executive order prohibiting state "agencies from executing procurement contracts with business entities that boycott Israel").

[87] *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 572 (1995) (noting that a challenged law does not, on its face, "target speech").

from those regulating speech.[88] If a law primarily targets conduct and "only incidentally burdens" protected expression, an "intermediate scrutiny" standard would likely apply, "under which a 'content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'"[89]

On the other hand, if the government is "target[ing] speech based on its communicative content," the policy will generally be subject to strict scrutiny and be "presumptively unconstitutional" unless the government can show that the law is "narrowly tailored to serve compelling state interests."[90] The Supreme Court has said that a law will be impermissibly content-based "if a law applies to particular speech because of the topic discussed or the idea or message expressed."[91] If a law discriminates based on a speaker's viewpoint, or targets "particular views taken by speakers on a subject," it will also likely be unconstitutional.[92] Additionally, a government action targeting conduct may be subject to heightened scrutiny if the targeted conduct "possesses sufficient communicative elements to bring the First Amendment into play."[93] However, if the government is speaking for itself, it may make content and viewpoint distinctions in choosing that speech.[94] The "government speech" doctrine, explained in more detail below, recognizes that the government "is entitled to promote a program, to espouse a policy, or to take a position."[95]

The fact that a law targets private speech or expressive conduct does not necessarily render that regulation unconstitutional. In rare circumstances, a law directed at expressive activity because of its content may survive strict scrutiny.[96] Further, there are certain types of speech that the government may more freely regulate without triggering strict scrutiny.[97] One of these categories is commercial speech, defined alternatively as speech that "does 'no more than propose a commercial transaction'"[98] or that is "related solely to the economic interests of the speaker and

[88] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.").

[89] Holder v. Humanitarian Law Project, 561 U.S. 1, 26–27 (2010) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)). In some cases, the Court has suggested an even more relaxed standard may apply to generally applicable regulatory schemes that only incidentally burden speech—or that the First Amendment may not apply at all in such a situation. *See, e.g.*, Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469–70 (1997); Arcara v. Cloud Books, Inc., 478 U.S. 697, 706–07 (1986).

[90] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

[91] *Id.* at 2227. It is possible that a law targeting speech would nonetheless be content-neutral. For example, the Supreme Court has said that "a prohibition against the use of sound trucks emitting 'loud and raucous' noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising." Cincinnati v. Discovery Network, 507 U.S. 410, 428 (1993) (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949)).

[92] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[93] Texas v. Johnson, 491 U.S. 397, 404 (1989); *see also id.* at 406 (holding that flag burning is expressive conduct and that a government law prohibiting this conduct because of its expressive elements was subject to strict scrutiny).

[94] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.").

[95] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) (quoting Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000)) (internal quotation marks omitted).

[96] *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010) (holding that a law prohibiting material support for foreign terrorist organizations could apply to certain types of speech without violating the First Amendment).

[97] *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992) (recognizing that the government may regulate a few limited categories of speech based on their content, including obscenity, defamation, and fighting words). *See generally* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

[98] Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

its audience."[99] Governments may prohibit commercial speech that is misleading or related to unlawful activity, and regulations of other types of commercial speech are generally subject to an intermediate level of review, rather than strict scrutiny.[100] Under this intermediate standard, courts will uphold regulations of commercial speech so long as the regulation "directly advances" a "substantial" government interest and "is not more extensive than is necessary to serve that interest."[101] And as suggested above, a regulatory scheme that primarily targets commercial *conduct* may be subject to even more relaxed review under the First Amendment.[102]

As a result, resolving any First Amendment challenge to an anti-BDS law requires analysis of a number of different issues. To determine what level of scrutiny to apply, a court would ask whether these laws target protected speech activity or merely regulate conduct. If they regulate speech, the next question is what type of speech is regulated by the law. And depending on the nature of the challenged law and the regulated speech, a number of other First Amendment doctrines may come into play, including the government speech doctrine, the unconstitutional conditions doctrine, the *Pickering* balancing test, and the presumption against content- and viewpoint-based laws, all of which are discussed below.

Boycotts as Conduct or Expressive Activity

To determine whether the First Amendment is implicated by laws that prohibit companies or individuals contracting with the government from engaging in BDS activity, one critical preliminary question is whether BDS activity qualifies as constitutionally protected speech. The answer to this question depends on the particular activity at issue in any given dispute, as the Supreme Court has previously said that laws prohibiting boycott activities do not necessarily violate the First Amendment.[103] In general terms, a law will be more likely to violate free speech guarantees if it targets political speech, as opposed to economic activity or non-expressive conduct.[104]

In *NAACP v. Claiborne Hardware*, the Supreme Court held that the First Amendment protected certain activities related to a boycott.[105] The NAACP had organized a boycott of white businesses after local governments responded unfavorably to a petition concerning a series of demands for racial equality.[106] A number of the white merchants subject to the boycott sued the NAACP under common law theories as well as state statutes prohibiting anticompetitive activity.[107] The Supreme Court noted that this boycott included expressive activities that were, under prior case law, constitutionally protected types of speech and association:

> The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott

[99] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

[100] *Id.* at 563–64.

[101] *Id.* at 566.

[102] *See, e.g.*, Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469 (1997).

[103] *See, e.g.*, NLRB v. Retail Store Emps. Union, 447 U.S. 607, 616 (1980).

[104] NAACP v. Claiborne Hardware, 458 U.S. 886, 913 (1982).

[105] *Id.*

[106] *Id.* at 915. Although the Supreme Court ruled on the case in 1982, the boycott began in 1966 and continued for a number of years. *Id.* at 898. The NAACP's petition included demands for the desegregation of public facilities and the inclusion of black people on juries—seeking to vindicate constitutionally protected rights. *Id.* at 899–900.

[107] *Id.* at 889–93.

> was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.[108]

Nonetheless, the *Claiborne* Court's analysis was not complete once it concluded that the boycott involved protected activity.[109] The Court acknowledged that in prior cases, it had held that Congress could prohibit "secondary boycotts and picketing by labor unions" as unfair trade practices, even if these regulations had "an incidental effect on First Amendment freedoms."[110] In *Claiborne*, however, the Court said that the government's interest in these types of economic regulations could justify regulating speech activity only in "certain narrowly defined instances."[111] Accordingly, the government's "broad power to regulate economic activity" did not provide it the "right to prohibit peaceful political activity such as that found in the boycott in this case."[112]

After *Claiborne*, the Supreme Court has emphasized that the government may regulate the non-expressive aspects of boycott activities without violating the First Amendment, so long as it is not targeting political speech itself. For instance, in *Federal Trade Commission (FTC) v. Superior Court Trial Lawyers Association*, the Court upheld an order from the FTC concluding that a group of lawyers had engaged in unfair trade practices and violated federal law by refusing "to represent indigent criminal defendants … until the District of Columbia government increased the lawyers' compensation."[113] The Supreme Court acknowledged that the group's "efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation" were protected activity, but concluded that the FTC order did not "curtail" or "condemn[]" those speech activities.[114] Instead, the order permissibly targeted only the boycotters' economically motivated conduct: the "concerted refusal by [the] lawyers to accept any further assignments until they receive[d] an increase in their compensation."[115] In light of this precedent, some have argued that while expressive activity surrounding boycotts may be protected, a refusal to deal is not itself protected by the First Amendment.[116]

Somewhat similarly, the Supreme Court concluded that the First Amendment did not protect a number of law schools attempting to protest the Solomon Amendment in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*.[117] Under the Solomon Amendment, higher

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[108] *Id.* at 907.

[109] *Id.* at 912.

[110] *Id.* The National Labor Relations Act "protects the right to strike or picket a primary employer—an employer with whom a union has a labor dispute," but prohibits secondary boycotts against "neutral employers," making it "unlawful for a union to coerce a neutral employer to force it to cease doing business with a primary employer." *Secondary Boycotts (Section 8(b)(4))*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/rights-we-protect/whats-law/unions/secondary-boycotts-section-8b4 (last visited Dec. 2, 2019). While the Supreme Court has recognized that activities such as "peaceful consumer picketing at secondary sites" may be protected by the First Amendment and are not within the scope of the federal prohibition, *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 63 (1964), it has generally upheld the ban on secondary boycotts as applied to conduct that "spreads labor discord by coercing a neutral party to join the fray." NLRB v. Retail Store Emps. Union, 447 U.S. 607, 616 (1980).

[111] *Claiborne Hardware*, 458 U.S. at 912.

[112] *Id.* at 913. The Court also ruled that even though some participants in the boycott engaged in unlawful and unprotected violence, this was not sufficient to "taint … the entire collective effort." *Id.* at 933.

[113] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 414 (1990).

[114] *Id.* at 426.

[115] *Id.* at 426–27.

[116] *See, e.g.*, Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, & Eugene Volokh as *Amici Curiae* in Support of Defendants-Appellants at 8–9, Amawi v. Pflugerville Indep. Sch. Dist., No. 19-50384 (5th Cir. Sept. 3, 2019).

[117] 547 U.S. 47, 65 (2006).

education institutions "would lose certain federal funds" if they "denie[d] military recruiters access equal to that provided other recruiters."[118] Prior to the passage of the Solomon Amendment in 1996, some law schools, in actions that some have equated to a boycott,[119] had restricted military recruiting on campus on the basis that the military's "policy on homosexuals in the military" violated the schools' nondiscrimination policies.[120] FAIR argued that by forcing the schools to "disseminate or accommodate a military recruiter's message," the Solomon Amendment violated their First Amendment rights.[121]

The Supreme Court disagreed, concluding that the schools were not actually engaging in protected speech when they hosted interviews and other recruiting efforts.[122] Considering the requirement that schools host recruiters, the Court said that "a law school's decision to allow recruiters on campus is not *inherently expressive*," explaining that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[123] In the Court's view, the schools' actions were expressive only because they accompanied that conduct "with speech explaining it."[124] The Court further held that even though the Solomon Amendment might sometimes compel schools to speak—such as when they send notifications about military recruiting activities—this did not violate the First Amendment because the speech regulation was "incidental to the Solomon Amendment's regulation of conduct."[125]

This distinction between expressive and nonexpressive conduct has been central to the lower court decisions reviewing challenges to state laws prohibiting contractors from boycotting Israel. One of the key preliminary questions has been whether the regulated BDS activities are protected by the First Amendment, as in *Claiborne*, or whether instead they are economic or non-expressive conduct that the state may regulate, as in *Superior Court Trial Lawyers Association* and *FAIR*. For instance, one federal trial court in *Arkansas Times LP v. Waldrip* concluded that an Arkansas law requiring companies doing business with the state to "certify that they are not boycotting Israel" did not regulate protected speech.[126] The court said that the boycotts prohibited by the state law included only "a contractor's purchasing activities with respect to Israel" and did not include "criticism of [the state law] or Israel, calls to boycott Israel, or other types of speech."[127] The court held that the prohibited boycott activities, like the activities at issue in *FAIR*, were not "inherently expressive."[128] The court reached this conclusion after deciding that "a refusal to deal,

[118] *Id.* at 51.

[119] *See, e.g.*, Burt v. Gates, 502 F.3d 183, 192 (2d Cir. 2007) (characterizing these actions as a boycott). *But see* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 743 (W.D. Tex. 2019) ("*FAIR* … is not about boycotts at all."), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019).

[120] 547 U.S. at 51–52.

[121] *FAIR*, 547 U.S. at 53.

[122] *Id.* at 68. The Court held that the funding limitation did not violate the unconstitutional conditions doctrine because "the First Amendment would not prevent Congress from directly imposing" this requirement. *Id.* at 60.

[123] *Id.* at 64–65 (emphasis added). *Accord id.* at 66 ("[T]he conduct regulated by the Solomon Amendment is not inherently expressive.").

[124] *Id.* at 66.

[125] *Id.* at 62.

[126] No. 4:18-CV-00914 BSM, 2019 U.S. Dist. LEXIS 27147, at *2, 9 (E.D. Ark. Jan. 23, 2019), *appeal filed*, No. 19-1378 (8th Cir. Feb. 25, 2019). *Cf.* Ali v. Hogan, No. 1:19-cv-00078, 2019 U.S. Dist. LEXIS 171670, at *12 (D. Md., Oct. 1, 2019) (dismissing challenge to anti-BDS order on justiciability grounds, given the fact that during arguments in the case, the government had advanced a narrower construction of the order that might not infringe protected speech).

[127] *Amawi*, 2019 U.S. Dist. LEXIS 27147, at *10.

[128] *Id.* at *12.

or particular commercial purchasing decisions," are expressive only if accompanied by explanatory speech.[129] The court further said that *Claiborne* protects only "nonviolent, primary political boycotts to vindicate particular statutory or constitutional interests."[130]

Three other trial courts, however, have concluded that similar state laws do regulate protected speech, concluding that the covered boycott activities are expressive in nature.[131] For instance, in *Amawi v. Pflugerville Independent School District*, a federal district court in Texas held that the regulated "BDS boycotts are inherently expressive conduct."[132] The court observed that, as conceded by the state, the boycotts were "political" and represented participants' disagreement with Israeli policy.[133] Quoting *Claiborne*, the court concluded that although the refusal to deal could be seen as conduct, in a political boycott, "the 'elements of speech, assembly, association, and petition … are inseparable' and are magnified by the 'banding together' of individuals 'to make their voices heard.'"[134] Under the circumstances, said the court, "'[r]efusing to buy things' … takes on special significance."[135] Further, the court said that even if political boycotts are not *generally* expressive, the Texas statute targeted only expressive boycotts because it was limited to actions that were "intended to penalize, inflict harm on, or limit commercial relations specifically with Israel."[136] In the court's view, the government was targeting conduct based on "the expressive purpose behind the refusal to buy things."[137]

Similarly, a federal district court in Arizona had previously held in *Jordahl v. Brnovich* that a state law regulated expressive conduct when it prohibited state entities from contracting with companies unless they certified that they were not boycotting Israel.[138] The court noted that the Arizona law prohibited boycott activities only "when taken 'in compliance with or adherence to calls for a boycott of Israel.'"[139] The court concluded that this language "necessarily contemplates prohibiting collective conduct aimed 'to achieve a common end'; here, a 'boycott of Israel.'"[140] The court held that because this law prohibited "the collective element" of these boycott activities, targeting actions "taken in response to larger calls to action that the state opposes," the law infringed on "the very kind of expressive conduct at issue in *Claiborne*."[141]

[129] *Id.* at *12–13.

[130] *Id.* at *16.

[131] Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 745 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018), *appeal pending*, No. 18-16896, 2019 U.S. App. LEXIS 28556 (9th Cir. Sep. 20, 2019) (granting motion to stay preliminary injunction because parties agreed that legislative action rendered the appeal moot); Koontz v. Watson, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018).

[132] *Amawi*, 373 F. Supp. 3d at 745.

[133] *Id.* at 743.

[134] *Id.* at 744 (quoting NAACP v. Claiborne Hardware, 458 U.S. 886, 907–08, 911 (1982)).

[135] *Id.*

[136] *Id.* at 745 (quoting TEX. GOV'T CODE § 808.001). The law exempted "refusing to contract with Israel 'for ordinary business purposes.'" *Id.*

[137] *Id.*

[138] 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018), *appeal pending*, No. 18-16896, 2019 U.S. App. LEXIS 28556 (9th Cir. Sep. 20, 2019) (granting motion to stay preliminary injunction because parties agreed that legislative action rendered the appeal moot).

[139] *Id.* (quoting ARIZ. REV. STAT. § 35-393(1)(a)).

[140] *Id.* (quoting NAACP v. Claiborne Hardware, 458 U.S. 886, 907 (1982)).

[141] *Id.*

Arizona argued in *Jordahl* that even if these boycotts were considered speech, at most, these activities qualified as "commercial" speech entitled to less protection under the First Amendment.[142] The state cited *Briggs & Stratton Corp. v. Baldridge*, a 1984 case from a federal appellate court that had concluded that certain boycott-related activities were commercial in nature.[143] In *Briggs & Stratton Corp.*, U.S. companies challenged a federal law preventing them from responding to questionnaires the Arab League circulated to assure the League that they were not violating a trade boycott of Israel.[144] The appellate court ruled that while the boycott itself might involve political speech, the companies' answers to these questionnaires were motivated solely by economic interests, making their responses commercial speech.[145] The *Jordahl* court concluded that unlike those companies, the Arizona law was being applied to plaintiffs whose actions were politically motivated, and therefore did not regulate only commercial speech.[146]

Finally, in *Koontz v. Watson*, a federal trial court in Kansas concluded that a state law similarly requiring contractors to certify that they are not boycotting Israel regulated conduct that was "inherently expressive."[147] The court said that "[c]onduct is inherently expressive when someone understands that the conduct is expressing an idea without any spoken or written explanation."[148] The regulated boycotts, according to the court, were inherently expressive because they were easily associated "with the message that the boycotters believe Israel should improve its treatment of Palestinians."[149] The court also concluded that forcing the plaintiff challenging the law "to disown her boycott is akin to forcing plaintiff to accommodate Kansas's message of support for Israel," distinguishing this case from *FAIR*.[150]

Thus, while a number of federal trial courts have concluded that BDS activity qualifies as expressive conduct protected by the First Amendment,[151] at least one trial court has reached the opposite conclusion, holding that boycott activity is not expressive.[152] Further, three of these cases are currently on appeal. Accordingly, whether state laws regulating BDS activity infringe on expressive activity protected by the First Amendment can fairly be described as an open question—although the majority view of reviewing courts so far appears to be that collective

[142] *Id.* at 1043.

[143] *Id.*; Briggs & Stratton Corp. v. Baldridge, 728 F.2d 915, 918 (7th Cir. 1984).

[144] 728 F.2d at 916.

[145] *Id.* at 917–18.

[146] 336 F. Supp. 3d at 1043–44. *Cf., e.g.*, *id.* at 1043 ("Mr. Jordahl was moved by calls by [advocacy groups] for individuals to collectively boycott products from companies doing business in Israeli-occupied settlements. Through this collective action, Mr. Jordahl and these organizations seek to promote the 'equal human dignity and rights for all people in the Holy Land' and 'an end to Israeli settlement building and the occupation of Palestinian land.' ... The type of collective action targeted by the Act specifically implicates the rights of assembly and association that Americans and Arizonans use 'to bring about political, social, and economic change.'" (citation omitted) (quoting NAACP v. Claiborne Hardware, 458 U.S. 886, 911 (1982))).

[147] 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018).

[148] *Id.* at 1023.

[149] *Id.* at 1024.

[150] *Id.*

[151] Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 745 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018), *appeal pending*, No. 18-16896, 2019 U.S. App. LEXIS 28556 (9th Cir. Sep. 20, 2019) (granting motion to stay preliminary injunction because parties agreed that legislative action rendered the appeal moot); *Koontz*, 283 F. Supp. at 1024.

[152] Ark. Times LP v. Waldrip, No. 4:18-CV-00914 BSM, 2019 U.S. Dist. LEXIS 27147, at *9 (E.D. Ark. Jan. 23, 2019), *appeal filed*, No. 19-1378 (8th Cir. Feb. 25, 2019).

boycott activity motivated by disapproval of the Israeli government's policy decisions is expressive conduct.[153]

Assuming that an anti-BDS law does regulate constitutionally protected speech, the next relevant question is what standard a court should apply to determine whether the law violates the First Amendment. Different doctrines may bear on this question, depending on the particular law at issue. Laws placing conditions on government funding or employment will likely implicate the government speech doctrine as well as the unconstitutional conditions doctrine or the *Pickering* balancing test. A law that discriminates on the basis of content or viewpoint is subject to heightened scrutiny.

Government Speech Doctrine

As mentioned above, the "government speech" doctrine permits the government to make content and viewpoint distinctions when it is speaking for itself.[154] Concurrently, the government is entitled to decide under certain circumstances that it will subsidize certain types of speech and not others.[155] Further, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[156] Thus, for example, in *Rust v. Sullivan*, the Supreme Court upheld federal provisions prohibiting health programs receiving federal funding from encouraging the use of abortion.[157] The Court said that Congress had permissibly decided that "abortion counseling and referral" were outside the scope of the grant program, and the federal regulations were appropriately "designed to ensure that the limits of the federal program are observed."[158] But the Supreme Court has also emphasized that the First Amendment may still prohibit certain types of funding limitations, particularly if they "discriminate invidiously … in such a way as to '[aim] at the suppression of dangerous ideas,'"[159] or impose "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[160] Anti-BDS spending limitations may implicate two different First Amendment doctrines: the unconstitutional conditions doctrine and the *Pickering* balancing test.

Unconstitutional Conditions Doctrine

While the government has significant discretion to define a program's scope, and in doing so, decide not to fund certain types of expressive activity,[161] the First Amendment may still limit its ability to place certain conditions on funds. As a general matter, Congress has significant discretion under the Constitution's Spending Clause "to tax and spend for the 'general Welfare,' including by funding particular state or private programs or activities."[162] This includes the power

[153] *See supra* note 151.

[154] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015).

[155] *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) (holding that Congress could permissibly decide not to exclude lobbying activities from tax exemption).

[156] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

[157] 500 U.S. 173, 193 (1994).

[158] *Id.*

[159] *Regan*, 461 U.S. at 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

[160] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

[161] *See, e.g.*, *Regan*, 461 U.S. at 550.

[162] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013) (quoting U.S. CONST. art. I, § 8, cl.

to fund only certain activities and exclude others, and to place reasonable conditions on funds to ensure they are used only for the intended purposes.[163] However, the government may not impose conditions that are unconstitutional.[164] Accordingly, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[165] Laws that condition a grant of federal or state funding on a recipient's speech will likely be analyzed under this unconstitutional conditions doctrine.[166]

Defenders of the state laws prohibiting contractors from engaging in BDS activity have argued that these conditions are permissible exercises of government speech.[167] Others have concluded that these laws violate the unconstitutional conditions doctrine, largely relying on a 2013 case, *Agency for International Development v. Alliance for Open Society International, Inc.*, in which the Supreme Court held that a federal spending condition violated the First Amendment.[168] The federal funds were part of a program "to combat the spread of HIV/AIDS around the world."[169] One condition required recipients to have "a policy explicitly opposing prostitution and sex trafficking."[170] The Supreme Court struck down that condition as unconstitutional.[171] Noting that prior cases had distinguished between "conditions that define the federal program and those that reach outside it," the Court concluded that this condition went beyond "defining the limits of the federally funded program" to limit the recipient's speech outside the bounds of that program.[172] The Court emphasized that another condition on the grant preventing the funds from being used to promote prostitution was sufficient to prevent misuse of federal funds—suggesting that the challenged condition had to "be doing something more."[173] In the Court's view, this limitation created an "ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete," violating the First Amendment.[174]

Some have argued that laws placing anti-BDS conditions on government funds could run afoul of the principle from *Alliance for Open Society*.[175] One law professor has suggested that at least some state policies could be characterized as "conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[176] Contractors subject to these laws have

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[163] *E.g.*, Rust v. Sullivan, 500 U.S. 173 (1991).

[164] Speiser v. Randall, 357 U.S. 513, 526 (1958). *See also id.* (noting that unconstitutional conditions on funding would "produce a result which the State could not command directly"). *See generally* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (outlining four limitations on Congress's ability to condition its spending).

[165] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[166] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 203 (2003).

[167] *See, e.g.*, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 748 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019).

[168] 570 U.S. 205, 213 (2013).

[169] *Id.* at 208.

[170] *Id.* (quoting 22 U.S.C. § 7361(f)) (internal quotation mark omitted).

[171] *Id.* at 217.

[172] *Id.* at 217–18.

[173] *Id.*

[174] *Id.* at 218, 221.

[175] *See* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 752 (W.D. Tex. 2019); Edelman, *supra* note 85; Lindsey Lawton, *A New Loyalty Oath: New York's Targeted Ban on State Funds for Palestinian Boycott Supporters*, 42 N.Y.U. REV. L. & SOC. CHANGE 649, 696 (2019); Note, *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U. L. REV. 1301, 1337 (2018).

[176] Edelman, *supra* note 85 (quoting *All. for Open Soc'y Int'l, Inc.*, 570 U.S. at 214–15) (internal quotation mark

argued that they affect their "personal consumer decisions" and prevent them from speaking out about personal boycott activities.[177] Further, if courts believe that anti-BDS certification requirements compel contractors to express messages with which they do not agree[178] or "to accommodate [the state's] message of support for Israel,"[179] they might be concerned with whether this compelled speech is occurring outside the confines of the funded program, running afoul of *Alliance for Open Society*.[180] By contrast, at least one defender of a challenged anti-BDS law has argued that even if particular contractors are worried about specific expressive activities, the challenged law as a whole primarily governs the performance of state contracts, permissibly setting out how funds should be spent to further the state's goals.[181] So far, however, no courts have ruled on how this aspect of the unconstitutional conditions doctrine applies to existing state laws.[182]

Public Employee Speech

A related but distinct test would likely govern a court's analysis when it evaluated the application of anti-BDS laws to specific government contractors or employees: the *Pickering* balancing test.[183] The Supreme Court has recognized that the government has an interest in regulating the speech of employees to efficiently provide public services.[184] When employees perform their duties, they are generally speaking on behalf of the government, and the government can accordingly control their speech as a corollary of the government speech doctrine.[185] However, in *Pickering v. Board of Education*, the Supreme Court emphasized that when public employees speak *as citizens*, outside the course of their ordinary duties, they do not completely "relinquish the First Amendment rights they would otherwise enjoy" to discuss public issues, including matters related to the offices where they work.[186] The Court said in *Pickering* that to analyze the constitutionality of a restriction on an employee's speech, a reviewing court should balance the interests of the employee, as a citizen, against "the interest of the State, as an employer."[187] The

omitted).

[177] *See, e.g.*, Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018).

[178] *Amawi*, 373 F. Supp. 3d at 748.

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

[180] *See, e.g.*, Brief of *Amici Curiae* Council on American Islamic Relations and Bahia Amawi in Support of Appellant at 12, Ark. Times LP v. Waldrip, No. 19-1378 (8th Cir. Apr. 15, 2019).

[181] Brief of *Amicus Curiae* American Jewish Committee in Support of Defendants-Appellants at 18, *Amawi*, No. 19-50384 (5th Cir. Sept. 6, 2019).

[182] *But cf. Amawi*, 373 F. Supp. 3d at 748 (stating that a law may be upheld as government speech only if it advances permissible goals, and holding that the challenged anti-BDS law "was not enacted to advance a permissible goal of government").

[183] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[184] *E.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." (citation omitted)).

[185] *See id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

[186] *Pickering*, 391 U.S. at 568.

[187] *Id.* This balancing test also applies to independent contractors, although the fact that the worker is a contractor rather than an employee may be relevant in the application of the balancing test. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 678 (1996).

Pickering balancing test, therefore, protects a public employee's speech when they are speaking as a citizen on a matter of public concern, and when the employee's and the public's interest in that speech outweighs the government's interest as an employer.[188]

Pickering, however, resolved an employee's lawsuit alleging that his employer improperly retaliated against him for exercising his First Amendment rights—it was "a *post hoc* analysis of one employee's speech."[189] Where a court is not evaluating an individual retaliation suit, but instead reviewing a preemptive, government-wide policy, it may apply a stricter test pursuant to the Supreme Court's decision in *United States v. National Treasury Employees Union (NTEU)*.[190] *NTEU* involved a challenge to a federal statute that prohibited most government employees from receiving honoraria, including payments for speeches or articles.[191] After ruling that the ban did affect employees when speaking as citizens, the Court said that the government's burden in justifying this broad provision was especially "heavy" because the law represented a "wholesale deterrent to a broad category of expression by a massive number of potential speakers,"[192] imposing a more "significant burden on expressive activity."[193] Drawing from precedent outside the *Pickering* line of cases, the Supreme Court said that to justify the ban, the government would have to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[194] Ultimately, the Supreme Court held that the ban was unconstitutional.[195] The Court has described the *NTEU* standard as closer to "exacting scrutiny than the traditional *Pickering* analysis."[196]

Laws that require government employees or contractors to abstain from BDS activities are potentially subject to review under either *Pickering* or *NTEU*.[197] The trial courts that have evaluated state anti-BDS laws so far have struck down such laws under *NTEU*'s heightened standard,[198] given that the laws are "preemptive restriction[s] on the speech of numerous potential speakers."[199] States have primarily argued that *NTEU* is not implicated because they are not regulating speech,[200] but they have also argued that they meet the standard outlined in that case. For example, in *Jordahl*, the state asserted two different interests to justify its anti-BDS law—an interest in regulating commercial activity and an interest in preventing national-origin

[188] *See Pickering*, 391 U.S. at 568.

[189] United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 467 (1995).

[190] *Id.* at 466–67.

[191] *Id.* at 459–60.

[192] *Id.* at 467.

[193] *Id.* at 468.

[194] *Id.* at 475 (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994)) (internal quotation mark omitted).

[195] *Id.* However, the Court ruled only that the honoraria ban could not be applied to the parties before the Court, leaving open the question of whether it could constitutionally be applied to more senior officials. *Id.* at 475–76.

[196] Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2472 (2018).

[197] *See discussion supra*, "Boycotts as Conduct or Expressive Activity."

[198] *See, e.g.*, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 753 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1045 (D. Ariz. 2018), *appeal pending*, No. 18-16896, 2019 U.S. App. LEXIS 28556 (9th Cir. Sep. 20, 2019) (granting motion to stay preliminary injunction because parties agreed that legislative action rendered the appeal moot); Koontz v. Watson, 283 F. Supp. 3d 1007, 1021 (D. Kan. 2018). But at least one trial court that has concluded that the state law it was considering did not infringe on expressive activity protected by the First Amendment. Ark. Times LP v. Waldrip, No. 4:18-CV-00914 BSM, 2019 U.S. Dist. LEXIS 27147, at *14 (E.D. Ark. Jan. 23, 2019), *appeal filed*, No. 19-1378 (8th Cir. Feb. 25, 2019).

[199] *Amawi*, 373 F. Supp. 3d at 753.

[200] *See, e.g.*, *id.* at 753.

discrimination—but the trial court rejected both of them.[201] The court said that the law's "legislative history … call[ed] these stated interests into doubt."[202] Instead, in the view of the court, the goal of the law appeared to be "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."[203] This interest, said the court, was "constitutionally impermissible."[204]

But even assuming that the government's stated interests were the real justifications for the law, the *Jordahl* court held in the alternative that they could not justify the ban because it was not "necessary to advance" those interests.[205] Citing *NTEU*'s requirement that the state must offer evidence to prove that any harm caused by the regulated speech is real, the court said that the state had "failed to produce any evidence of Arizona's business dealings with Israel, Israeli entities, or entities that do business with Israel that would suggest the State was seeking to regulate boycotts of Israel that were intended to suppress economic competition."[206] The court ruled that the state's "speculative fears of subsidizing boycotts of Israel" could not suffice to justify the law's "broad prospective restriction on boycotting activity."[207]

Presumptions against Content and Viewpoint Discrimination

As mentioned above, a law that discriminates against certain speech or expressive conduct on the basis of its "communicative content" will be subject to strict scrutiny and will be "presumptively unconstitutional" unless the government can show that the law is "narrowly tailored to serve compelling state interests."[208] Some of the trial courts evaluating state anti-BDS laws have held that these laws target expressive conduct on the basis of its content or viewpoint and are therefore unconstitutional.[209] In *Koontz*, the court said that the legislative history of the Kansas law showed that its goal was "to undermine the message of those participating in a boycott of Israel."[210] In the view of the court, this record suggested "either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel," either of which was "impermissible" under the First Amendment.[211] The court further held that even if the law's goal was "to regulate boycotts intended to suppress economic competition coming from Israel—a goal that *Claiborne* permits," it would still fail First Amendment scrutiny because it was not "narrowly tailored" to achieve that goal.[212] Specifically, the Kansas court said that the law

[201] 336 F. Supp. 3d at 1048.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 1049.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

[209] Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 748 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019); Koontz v. Watson, 283 F. Supp. 3d 1007, 1023 (D. Kan. 2018).

[210] 283 F. Supp. at 1022.

[211] *Id.*

[212] *Id.* at 1023.

was "overinclusive" because it also banned "political boycotts," as well as "underinclusive" because it did not "regulate other conduct that affects trade."[213]

The *Amawi* court reached a similar conclusion, reasoning that the Texas anti-BDS law was "a content-based restriction because it singles out speech about Israel, not any other country," and was "a viewpoint-based restriction because it targets only speech 'intended to penalize, inflict harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory'"—which is to say, it targeted "only 'anti-BDS' speech."[214] The state argued in *Amawi* that it had a compelling interest in regulating commerce and in prohibiting contractors from "violating anti-discrimination principles," including preventing discrimination on the basis of national origin.[215] With respect to this first interest, the court concluded that an interest in regulating commerce could not justify a law that directly targeted speech, rather than merely imposing an incidental burden.[216] Turning to the second interest, the court concluded the law "was *not*," in fact, enacted to prevent national origin discrimination.[217] Noting that the law "target[ed] only boycotts of Israel," and on its own terms, left companies free to boycott persons or entities of Israeli national origin so long as they were outside Israel itself, the court said that the law was underinclusive if its goal was truly to prevent national-origin discrimination.[218] The court viewed the legislative history to further underscore that the law was singling out particular speech because of its message.[219]

Outside of *Amawi*, defenders of anti-BDS laws have similarly argued that the goal is not to prohibit or penalize certain speech, but instead to prevent discrimination.[220] It is largely an open question whether the government's interest in preventing discrimination could justify restricting speech on the basis of its content.[221] The Supreme Court has recognized that at least in some

[213] *Id.*

[214] 373 F. Supp. 3d at 428, 750 (quoting TEX. GOV'T CODE § 808.001).

[215] *Id.* at 749–51.

[216] *Id.* at 751.

[217] *Id.* at 750–51.

[218] *Id.* at 749.

[219] *Id.* at 750.

[220] *See, e.g.*, Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 230 (2018); Eugene Kontorovich, *Anti-BDS Laws Don't Perpetuate Discrimination. They Prevent It.*, JEWISH TELEGRAPHIC AGENCY (June 15, 2016), https://www.jta.org/2016/06/15/opinion/anti-bds-laws-dont-perpetuate-discrimination-they-prevent-it. *See also* Dorf, *supra* note 79 (agreeing that if justified on anti-discrimination grounds, anti-BDS laws are likely constitutional). Governments may also, in the future, raise other allegedly compelling state interests. For example, while applying intermediate rather than strict scrutiny, the federal district court in the *Briggs & Stratton Corp.* case ruled that the federal government's interest in enforcing a law preventing U.S. companies from responding to Arab League questionnaires was "substantial, involving delicate foreign policy questions and the interest of the government in forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.'" Briggs & Stratton Corp. v. Baldridge, 539 F. Supp. 1307, 1319 (E.D. Wis. 1082), *aff'd on other grounds*, 728 F.2d 915 (7th Cir. 1984).

[221] Some Supreme Court precedent suggests that anti-discrimination laws may not be applied to *compel* private speech. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 581 (1995). The Supreme Court was recently presented with a potentially similar legal question in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which a baker refused to make a cake for a same-sex wedding, violating a Colorado anti-discrimination law. 138 S. Ct. 1719 (2018). The appeal originally presented the question of whether, assuming that forcing the baker to make this cake would have compelled "speech," the state nonetheless could have justified this action in a strict scrutiny analysis. However, the Court resolved the case on narrower free-exercise grounds. *Id.* at 1723. *Cf.* Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (holding that federal funding condition prohibiting discrimination on the basis of sex did not implicate any First Amendment rights).

contexts, the government's interest in preventing discrimination is a "compelling" one.[222] But even if the government's interest is compelling, strict scrutiny also requires the government to show that its law is "narrowly tailored" to meet that interest.[223] As discussed above, some trial courts have concluded that current state anti-BDS laws are not sufficiently tailored to an anti-discrimination interest.[224] Nonetheless, Supreme Court precedent does suggest that in at least some circumstances, the government's interest in preventing discrimination might justify applying an anti-discrimination law to specific activity protected by the First Amendment.[225]

Federal Preemption Questions: Commerce Clause and Foreign Affairs[226]

As noted above, some state and local governments have enacted or are considering measures to counteract BDS-related or differentiation measures. State and local economic sanctions meant to influence foreign politics ordinarily raise three related constitutional issues: (1) whether they are preempted by federal law under the Constitution's Supremacy Clause; (2) whether they burden foreign commerce in violation of the dormant Foreign Commerce Clause and, if so, whether they are protected by the market participant exception; and (3) whether they impermissibly interfere with the federal government's exclusive power to conduct the nation's foreign affairs. The constitutionality of any given state or local measure would depend upon the particulars of the legislation at issue and whether Congress enacts any law to sanction BDS participants or prohibit BDS compliance. The preemption issue has not arisen in any BDS-related litigation to date.

Preemption by Federal Statute

The Supremacy Clause of the Constitution establishes that federal statutes, treaties, and the Constitution itself are "the supreme Law of the Land."[227] Accordingly, states can be precluded from taking actions that are otherwise within their authority if federal law is thereby impeded. The extent to which a federal statute preempts state law in a given area is within the control of Congress. Congress may, by clearly stating its intent, choose to preempt all state laws, no state laws, or only those state laws with certain attributes.[228] When Congress enacted the antiboycott provisions of the Export Administration Act (EAA) in 1977,[229] for example, it expressly preempted any state or local measure that "pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or

[222] Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (ruling that the IRS could deny a tax exemption to private schools that discriminated on the basis of race even if the denial infringed on the schools' religious beliefs and triggered a strict scrutiny analysis).

[223] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

[224] Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 751–52 (W.D. Tex. 2019), *appeal filed*, No. 19-50384, (5th Cir. May 2, 2019); Koontz v. Watson, 283 F. Supp. 3d 1007, 1023 (D. Kan. 2018).

[225] *See Bob Jones Univ.*, 461 U.S. at 604 (holding that a denial of a tax exemption was appropriately tailored to achieve the state's compelling interest in preventing racial discrimination).

[226] This section was authored by Jennifer K. Elsea, Legislative Attorney.

[227] U.S. CONST., Art. VI, cl. 2.

[228] *See generally* Retail Clerks Int'l Ass'n. v. Schermerhorn, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone" with respect to preemption questions).

[229] P.L. 96-72, § 8, Sept. 29, 1979, 93 Stat. 521.

boycotts fostered or imposed by foreign countries against other countries."[230] The Anti-Boycott Act of 2018[231] contains a similar preemption clause.[232]

Even absent an express preemption provision such as that found in the Anti-Boycott Act, an act of Congress can impliedly preempt state or local action. Where Congress has not expressly preempted state and local laws, two types of implied federal preemption may be found: *field preemption*, in which federal regulation is so pervasive that one can reasonably infer that states or localities have no role to play,[233] and *conflict preemption*, in which "compliance with both federal and state regulations is a physical impossibility,"[234] or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[235] The Supreme Court felled a Massachusetts law on the latter ground because the law imposed sanctions on Burma (Myanmar) in such a way that frustrated the implementation of a federal statutory scheme also targeting Burma.[236]

To preclude implied preemption, Congress may sometimes include nonpreemption language in sanctions legislation. The Combatting BDS Act of 2019, Title IV of S. 1 (see "Proposed Combatting BDS Act" above) would preserve state and local anti-BDS or anti-differentiation measures that meet certain requirements The bill would permit state and local governments to divest their own assets from, or prohibit government contracting with, certain entities that they determine engage in BDS-related activity, as defined by the bill and subject to its restrictions. The bill does not clarify whether state and local anti-BDS or anti-differentiation measures that do not meet the bill's qualifications would be considered preempted by any federal law.

Foreign Commerce Clause

The Constitution provides Congress with the authority to regulate both interstate and foreign commerce.[237] In addition to this affirmative grant of constitutional authority, the Supreme Court has recognized that the Commerce Clause implies a corresponding restraint on the authority of the states to interfere with commerce, even absent congressional action.[238] This inferred restriction arising from congressional inaction is generally referred to as the "dormant" Commerce Clause. Under this established principle, states and localities are prohibited from unreasonably burdening or discriminating against either interstate or foreign commerce unless they are authorized by Congress to do so.[239] In a series of cases involving state taxes, the Supreme

[230] *Id.*, previously codified at 50 USC § 4607(c).

[231] P.L. 115-232, div. A, title XVII, 132 Stat. 2234 (Aug. 13, 2018.)

[232] 50 U.S.C. § 4842(c).

[233] *See, e.g.*, Wardair Canada Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 6 (1986).

[234] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

[235] Arizona v. United States, 567 U.S. 387, 132 S. Ct. 2492, 2501 (2012) (quoting *Fla. Lime*, 373 U.S. at 142-43, and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). *See also, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 64-65 (2002); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000); Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248-49 (1984); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983).

[236] *Crosby*, 530 U.S. at 373-74 (noting that such obstacles are to be identified by "examining the federal statute as a whole and identifying its purpose and intended effects").

[237] U.S. CONST. Art. I, § 8, cl. 3.

[238] *See, e.g.*, Cooley v. Bd. of Wardens of Port of Philadelphia, 53 U.S. 299 (1851).

[239] *See* New York v. United States, 505 U.S. 144, 171 (1992) ("While the Commerce Clause has long been understood to limit the States' ability to discriminate against interstate commerce, that limit may be lifted…by an expression of the 'unambiguous intent' of Congress.") (internal citations omitted); South-Central Timber Dev., Inc. v. Wunnicke, 467

Court has set out criteria for examining whether state measures impermissibly burden *foreign* commerce where affirmative congressional permission is absent. In sum, the Court has required a closer examination of measures alleged to infringe the Foreign Commerce Clause than is required for those alleged to infringe its interstate counterpart,[240] but has also provided some room for state measures in situations where a federal role is not clearly demanded.[241]

Where Congress has not clearly immunized a state selective purchasing or divestment law, a state may defend a challenged law by invoking the market participant doctrine, which protects those laws in which the state or local government acts as a buyer or seller of goods rather than as a regulator.[242] Consequently, state and local measures that pertain to the investment of government funds, as well as measures that regulate government procurement, may be defended on the ground that the state or local government is merely making investment or purchasing choices for itself and not regulating other investors or buyers, as the case may be. The market participant doctrine, however, may not apply where the state seeks to affect behavior beyond the immediate market in which it is operating; the doctrine does not immunize laws from other constitutional challenges; and the Supreme Court has suggested the doctrine may not even apply in Foreign Commerce Clause cases.[243]

U.S. 82, 87-93 (1984). *See also* Kraft Gen. Foods v. Iowa Dept. of Revenue, 505 U.S. 71, 81 (1992)("Absent a compelling justification ... a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.").

[240] *See* Japan Line, Ltd. v. Cty. of Los Angeles, 441 U.S. 434 (1979). One reason for the difference was that the state tax at issue on an instrumentality in foreign commerce "may impair federal uniformity in an area where federal uniformity is essential," or, in other words, may "prevent [] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Id.* at 446-48, 451. *See also* Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 194 (1983).

[241] Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994) (holding that state statutes that might otherwise violate the "one voice" standard may be valid if there is no clear indication that Congress had intended to bar the state practice). The Court also suggested that "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential....'" *Id.* at 323. Moreover, it has indicated that Congress "need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce...." *Id.*

[242] *See, e.g.*, Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) ("Th[e] 'market-participant' exception reflects a 'basic distinction ... between States as market participants and States as market regulators, there being no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market,'") (internal citations omitted); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807-10 (1976) ("Nothing in the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.").

[243] *See, e.g., South-Central Timber Dev., Inc.*, 467 U.S. at 99 (downstream effects); United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208 (1984) (no immunity from other constitutional challenges); Reeves, Inc. v. Stake, 447 U.S. 429, 437-38, n.9 (1980) (application in Foreign Commerce Clause cases unclear).

The Federal Court of Appeals for the First Circuit in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), concluded that the State of Massachusetts was not acting as a market participant in enacting its Burma sanctions law because it was "attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts." *Id.* at 63. The court also concluded that in any event the state would not be shielded from scrutiny under the Foreign Commerce Clause because of questions as to whether the market participant exception "applies at all (or without a much higher level of scrutiny) to the Clause." *Id.* at 65. *See also* Antilles Cement Corp. v. Acevedo Vilá, 408 F.3d 41, 46-47 (1st Cir. 2005). The Supreme Court in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) struck the Massachusetts Burma law on federal preemption grounds without taking up the Foreign Commerce Clause issue; however, it rejected Massachusetts' argument that its "statutory scheme ... escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Id.* at 373 n. 7 (citing Wisconsin Dept. of Industry v. Gould, Inc., 475 U.S. 282, 287 (1986)). *See also* Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp., 715 F.3d 1268, 1286 (11th Cir. 2013) (rejecting Florida's argument that its procurement laws sanctioning Cuba reflect a choice of how to allocate and spend public

Intrusion into Foreign Affairs

"Power over external affairs is not shared by the States; it is vested in the national government exclusively."[244] Consequently, state or local laws that encroach on the federal government's authority over foreign affairs may be deemed constitutionally impermissible. In its 1968 decision in *Zschernig v. Miller*,[245] the Supreme Court struck down an Oregon law prohibiting nonresident aliens from inheriting property unless they could demonstrate to the Oregon state courts that their home countries allowed U.S. nationals to inherit estates on a reciprocal basis and that payments to foreign heirs from the Oregon estates would not be confiscated. Although the federal government had not exercised its power in the area, the Supreme Court nonetheless found that the inquiries required by the Oregon statute would result in "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[246] The Court distinguished an earlier decision, *Clark v. Allen*,[247] which had upheld a similar California statute on the ground that the statute in that case could be implemented through "a routine reading of foreign law" and did not require the particularized inquiries demanded by the Oregon statute.[248]

In 2003, the Supreme Court struck down a California law requiring insurers to report life insurance policies held by Holocaust victims because the law interfered with an executive agreement supporting a German initiative to resolve Holocaust insurance claims without litigation.[249] But while treating *Zschernig* as good law, the Court relied primarily on traditional preemption analysis rather than the dormant foreign affairs power,[250] leaving some ambiguity as to the continued vitality of the doctrine. Yet lower courts continue to rely on *Zschernig* to invalidate state laws deemed to conflict with the federal foreign affairs power.[251] Still, it appears to be an open question whether Congress can permit state and local regulations that conflict with federal foreign policy,[252] or whether states and localities that enact such measures can invoke a

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funds that should be immune from judicial review and not amenable to preemption analysis).

[244] United States v. Pink, 315 U.S. 203, 232 (1942). *See also, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("The Federal Government, representing as it does the collective interests of the…states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

[245] 389 U.S. 429 (1968).

[246] *Id.* at 432.

[247] 331 U.S. 503 (1947).

[248] *Zschernig*, 389 U.S. at 433-36.

[249] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

[250] *See id.* at 415, 419-20.

[251] *See, e.g.*, Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Circ. 2012) (applying *Zschernig* to rule invalid a California insurance statute extending statute of limitations for benefits claims on behalf of "Armenian genocide victim[s]").

[252] Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 206 (2011) (noting that President George W. Bush objected in a signing statement to nonpreemption language Congress included in the Sudan Accountability and Divestment Act of 2007). In his signing statement, President Bush wrote

> This Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy. However, as the Constitution vests the exclusive authority to conduct foreign relations with the Federal Government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.

Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 Weekly Comp. Pres. Doc. 1645 (Dec. 31, 2007).

The language in § 3 of the Sudan Accountability and Divestment Act, like similar language in S. 1, may arguably be interpreted to apply to preemption under the Supremacy Clause but not interference in foreign policy in conflict with the dormant foreign affairs power.

"market participation" exception to shield them from challenges on foreign policy grounds.[253] Prior to enactment of the Sudan Accountability and Divestment Act of 2007, a federal district court enjoined enforcement of an Illinois law that prohibited the deposit of state or municipal funds in any financial institution that does business in or with Sudan, on the basis that the law interfered with the federal government's dormant foreign policy power.[254] It does not appear that any court has yet addressed whether the nonpreemption language in the Sudan Accountability and Divestment Act of 2007 would effectively shield similar state laws from legal challenges.

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[253] Schaefer, *supra* note 252, at 260-61 (citing lower court cases finding a market participant exception to dormant foreign affairs doctrine but noting the Supreme Court has not expressly ruled on the issue).

[254] Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731 (N.D. Ill. 2007). The court also enjoined the law's provision regarding divestment of pension funds, but on foreign commerce grounds and not the dormant foreign affairs power.