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## Restricting Your Right to Boycott: Free Speech Implications Regarding Legislation Targeting the Boycott, Divestment, and Sanctions (BDS) Movement in the United States and the European Union

Jad Essayli

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# **Restricting Your Right to Boycott: *Free Speech Implications Regarding Legislation Targeting the Boycott, Divestment, and Sanctions (BDS) Movement in the United States and the European Union***

JAD ESSAYLI\*

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#### ABSTRACT

On December 11, 2019, President Trump signed Executive Order 13899, which directs government agencies charged with enforcing Title VI of the Civil Rights Act to adopt a distorted definition of antisemitism intended to censor advocacy for Palestinian rights. The order conflates political criticism of the state of Israel with antisemitism—the primary reason why past attempts to pass similar legislation in Congress have consistently failed. Nonetheless, this uniliteral action taken by the President to redefine antisemitism as a means to censure criticism of Israeli polices raises genuine legal concern. Particularly considering that the same year, on February 4, 2019, the United States Senate passed The Combating BDS Act S.1. The law allows state governments to include a certification requirement that state-contractors—including lawyers, journalists, teachers, newspapers and even students who want to judge high school debate tournaments—will not participate in politically motivated boycotts against Israel, namely the Boycott, Divestment, and Sanctions (BDS) movement. To date, twenty-eight states have enacted legislation prohibiting participation in the BDS movement

as a prerequisite to contract with the state. The constitutionality of such legislation, which restricts the receipt of government contracts based on one's political speech, is especially precarious considering that participation in political boycotts is a form of speech safeguarded under the First Amendment principle of free political association.

Legislative actions targeting the BDS movement are on the rise not only in the United States, but also in Europe. Several European Union member states have enacted similar legislation to varying degrees. For instance, France has forged ahead by making it illegal simply to call for BDS, a judgment which fundamentally undermines the principles of freedom of expression and freedom of association found in The European Union's Charter of Fundamental Rights, and in Article 10 of the European Convention on Human Rights. Accordingly, France's anti-BDS law has been challenged for its non-compliance with EU Law.

This Comment explains the objectives of the BDS movement and explores the legality of legislative actions targeted at the movement in the United States and in the EU. This Comment argues that the wave of anti-BDS laws sweeping across international legal systems has a chilling effect on our civil liberties as it constrains freedom of speech and freedom of association. This Comment further contends that such legislation discriminates against disfavored political expression and aims to silence the budding global movement calling on Israel to adhere to its human rights obligations under international law.

## I. INTRODUCTION

### *A. Origins and Objectives of the Boycott, Divestment, and Sanctions (BDS) Movement*

#### *1. What is the BDS Movement?*

In 2005, Palestinian civil society organizations published a letter calling upon the international community to boycott, divest from, and sanction Israel until Israel complies with international law and universal principles of human rights.<sup>1</sup> The call was made by a collective of more than 170 Palestinian unions, women's organizations, professional associations, refugee

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1. *Open Letter: Palestinian Civil Society Call for BDS*, BDS MOVEMENT, <https://bdsmovement.net/call> [<https://perma.cc/R6KM-9R9H>] (last visited Apr. 11, 2020) [hereinafter *Open Letter*].

networks, political parties, and popular resistance committees.<sup>2</sup> The movement's call to employ the tactics of boycotts, divestment, and sanctions was deliberately designed as a non-violent approach to put pressure on Israel until it complies with international law.<sup>3</sup> The founders of the BDS movement assert the importance of global support as a necessary indication of "solidarity with the Palestinian struggle for freedom, justice and equality."<sup>4</sup> The movement's mission consists in advocating for the human rights of all Palestinians, including Palestinians exiled from Israel in 1948, Palestinians living in the occupied territories, and Palestinians who are Arab citizens of Israel.<sup>5</sup>

## 2. *The BDS Movement's Objectives Regarding the International Community*

The founders of the BDS movement maintain that the international community has failed to hold Israel accountable for its "regime of settler colonialism, apartheid and occupation over the Palestinian people."<sup>6</sup> However, they do acknowledge that "people of conscience in the international community have historically shouldered the moral responsibility to fight injustice."<sup>7</sup> A prominent template cited by the movement's founders is the model employed by the international community in applying economic pressure to the apartheid government in South Africa.<sup>8</sup> Palestinian civil society modeled the BDS movement after the anti-apartheid South Africa movement, which through diverse forms of boycott, divestment, and sanctions, contributed to the demise of the apartheid government in South Africa.<sup>9</sup>

Economic, political, academic, and cultural boycotts are understood as non-violent methods to persuade a state to change its practices when the avenue of customary diplomacy no longer proves to be effective.

The BDS movement fundamentally employs three strategies: boycott, divest, and sanction. The first process of placing pressure on Israel to restore Palestinian rights in accordance with international law is through boycott.<sup>10</sup> The BDS movement's call for boycott includes "withdrawing support for Israel and Israeli and international companies that are involved in the

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2. *What Is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> [<https://perma.cc/GYQ6-C8ZQ>] (last visited Apr. 11, 2020) [hereinafter *What is BDS?*].

3. *Id.*

4. *Id.*

5. *Open Letter*, *supra* note 1.

6. *What is BDS?*, *supra* note 2.

7. *Open Letter*, *supra* note 1.

8. *Id.*

9. *Id.*

10. *What is BDS?*, *supra* note 2.

violation of Palestinian human rights, as well as complicit Israeli sporting, cultural, and academic institutions.”<sup>11</sup> The boycott strategy is not limited to Israeli products but also extends to Israeli institutions and associations.<sup>12</sup>

The second way of placing pressure on the Israeli state is through divestment.<sup>13</sup> The BDS movement’s call for divestment includes encouraging the international community to divest funds from both Israeli companies and international companies involved in violating Palestinian rights.<sup>14</sup> Companies included are those operating in Israel and its settlements, and those foreign companies profiting from the Israeli occupation.

The third process of placing pressure on Israel is through the application of sanctions.<sup>15</sup> The call for sanctions on Israel includes “ending military trade, free-trade agreements and expelling Israel from international forums such as the U.N. and FIFA.”<sup>16</sup>

The BDS movement advocates for “these non-violent punitive measures [to] be [employed] until Israel meets its obligation to recognize the Palestinian people’s inalienable right to self-determination and fully complies with the precepts of international law.”<sup>17</sup> Proponents of the BDS movement insist that in order for these three tactics, boycott, divestment, and sanction, to be effective, a unified and global effort is necessary.<sup>18</sup>

### *3. The BDS Movement’s Objectives Regarding the State of Israel*

BDS founders assert that the movement emerged to pressure Israel “to comply with humanitarian law, to respect fundamental human rights and to end its occupation and oppression of the people of Palestine.”<sup>19</sup> The movement explicitly defines the people of Palestine to include those Palestinians exiled from Israel in 1948, Palestinians living in the occupied territories, and Palestinians who are Arab citizens of Israel.<sup>20</sup> Today, the majority of the Palestinian people are classified as refugees, and most live

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11. *Id.*
  12. *Id.*
  13. *Id.*
  14. *Id.*
  15. *Id.*
  16. *Id.*
  17. *Open Letter, supra* note 1.
  18. *See id.*
  19. *Id.*
  20. *See id.*

outside both the occupied territories and the state of Israel.<sup>21</sup> Many Palestinian refugees are stateless and the BDS movement is steadfast in including these nationless Palestinians in its call for justice.<sup>22</sup>

BDS objectives therefore embody the demands of Palestinians both inside and outside the Israeli state. The movement's objectives are built on three pillars that the BDS founders maintain Israel must satisfy to comply with the precepts of international law: (1) ending its occupation and colonization of all Arab lands and dismantling the Wall; (2) recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and (3) respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in the U.N. resolution 194.<sup>23</sup> Omar Barghouti, the main architect behind the movement, has clarified that the movement does not threaten Israel's survival, but rather seeks to end Israel's "unjust order."<sup>24</sup>

### *B. Reactions to the BDS Movement*

The tactics advocated for by the BDS movement have been polarizing opinions across the globe, leading to both ardent support and vehement disdain. At the forefront of the fight against the movement is the Anti-Defamation League (ADL), which asserts that "the predominant drive of the BDS campaign and its leadership is not criticism of [Israeli] policies, but the demonization and delegitimization of [the State of] Israel."<sup>25</sup> In a speech to the American Israel Public Affairs Committee (AIPAC), Israel's Prime Minister Benjamin Netanyahu claimed that "[t]hose who wear the BDS label should be treated exactly as we treat any anti-Semite or bigot. They should be exposed and condemned. The boycotters should be boycotted."<sup>26</sup> Within Israel, reactions to the BDS movement vary, ranging from those on the far right calling for advocates of BDS to be barred from entering the Israeli state and those even calling for criminal prosecution of such people, to progressives who support the movement's mission of ending

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21. *Id.*

22. *See id.*

23. *Id.*

24. Omar Barghouti, *Why Israel Fears the Boycott*, N.Y. TIMES (Jan. 31, 2014), [https://www.nytimes.com/2014/02/01/opinion/sunday/why-the-boycott-movement-scars-israel.html?\\_r=1](https://www.nytimes.com/2014/02/01/opinion/sunday/why-the-boycott-movement-scars-israel.html?_r=1) [<https://perma.cc/CA4S-FRUC>].

25. *BDS: The Global Campaign to Delegitimize Israel*, ADL, <https://www.adl.org/resources/backgrounders/bds-the-global-campaign-to-delegitimize-israel> [<https://perma.cc/9MAT-NQHH>] (last visited Feb. 14, 2020).

26. Prime Minister Benjamin Netanyahu, Remarks at the American Israel Public Affairs Committee Annual Policy Conference, Washington, D.C. (Mar. 4, 2014) (transcript available at <https://www.timesofisrael.com/full-transcript-of-netanyahus-aipac-address/>).

the occupation and in favor of recognizing the Palestinian struggle for human rights.<sup>27</sup>

While the Israeli government and many of its global allies vehemently oppose BDS, the movement has been endorsed by individuals, unions, churches, academic associations, and grassroots movements across the world.<sup>28</sup> Noteworthy endorsements include the American Anthropological Association, the American Studies Association, the Green Party of the United States, the National Women's Studies Association and the International Jewish Anti-Zionist Network.<sup>29</sup> Several major U.S. churches have endorsed BDS, including the Presbyterian Church, the United Church of Christ, and the United Methodist Church.<sup>30</sup> Additionally, all but one University of California campuses have demanded that the UC Board of Regents divest from American companies profiting from the Israeli occupation.<sup>31</sup> This increase in support of BDS and solidarity with the Palestinian struggle has led to what some consider a crackdown on the movement and its proponents.<sup>32</sup>

The movement is challenged by Israel and its lobby groups across the globe, with confirmation of the "Israeli foreign ministry's direct lobbying and political interference in domestic legislation in several countries."<sup>33</sup> Israel's influential Reut Institute has identified the BDS movement as an "existential threat" to Israel and called on the Israeli government to direct

27. Nathan Thrall, *BDS: How a Controversial Non-Violent Movement Has Transformed the Israeli-Palestinian Debate*, THE GUARDIAN (Aug. 14, 2018), <https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate> [perma.cc/AS4S-ZWVA].

28. *What is BDS?*, supra note 2.

29. Bernard Avishai, *Endorsers of the US Campaign for the Academic and Cultural Boycott of Israel*, U.S. Campaign for the Academic and Cultural Boycott of Israel, <https://usacbi.org/endorsers/#academic> [perma.cc/XU4K-SAP6] (last visited Feb. 7, 2020); Bernard Avishai, *The E.U. vs. B.D.S.: The Politics of Israel Sanctions*, THE NEW YORKER (Jan. 22, 2016), <https://www.newyorker.com/news/news-desk/the-e-u-vs-b-d-s-the-politics-of-israel-sanctions> [perma.cc/33UB-A69Z].

30. *Major Churches Divest*, BDSMOVEMENT.NET, <https://bdsmovement.net/impact/major-churches-divest> [perma.cc/9E58-VE4L] (last visited Feb. 7, 2020).

31. Marcy Oster, *UC Santa Barbara Student Government Rejects Divestment from Israel, Again*, THE TIMES OF ISRAEL (Apr. 11, 2019), <https://www.timesofisrael.com/uc-santa-barbara-student-government-rejects-divestment-from-israel-again/> [perma.cc/Q6FK-XYRQ].

32. *Dutch Government Affirms the Right to Endorse the BDS Movement*, THE PALESTINIAN CHRONICLE (May 27, 2016), <http://www.palestinechronicle.com/dutch-government-affirms-the-right-to-endorse-bds-movement/> [https://perma.cc/7M3W-JUGH].

33. Ali Abunimah, *Israel "Quietly" Pushed for Anti-BDS Legislation in US, UK*, ELECTRONIC INTIFADA (Feb. 24, 2016), <https://electronicintifada.net/blogs/ali-abunimah/israel-quietly-pushed-anti-bds-legislation-us-uk> [perma.cc/W4V2-CLHK].



substantial resources to ‘attack’ and possibly engage in criminal ‘sabotage’ of this movement.”<sup>34</sup>

Recently, the Israeli Parliament relied on national legislation to counter the global progression of the BDS movement.<sup>35</sup> In March of 2017, the Israeli Parliament enacted a law that forbids entry visas or residency rights to foreign nationals who support BDS, and blacklists international NGO’s and human rights organizations who support the movement.<sup>36</sup> The legislation has come into full effect and in some cases, the Israeli government has extended the application of the law beyond its proposed authority. For instance, Omar Shakir, a U.S. citizen and the Human Rights Watch director for Israel and Palestine, was ordered by Israel’s Supreme Court to leave Israel.<sup>37</sup> Israeli officials labeled Mr. Shakir as an enemy to the State of Israel, and accused Human Rights Watch of being a propaganda tool used to delegitimize the State.<sup>38</sup> While the Israeli government has previously denied entry to foreign nationals for their criticism of Israeli policies—for instance, Amnesty International staffer Raed Jarrar and Dutch journalist Derk Walters—the decision to oust Mr. Shakir from Israel was unprecedented.<sup>39</sup> The government’s decision to expel Mr. Shakir from Israel “is [the] first case of its kind in which a foreign national already living and working in Israel with an existing visa has had their work permit—and thus visa—

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34. Ali Abunimah, *Israel’s New Strategy: “Sabotage” and “Attack” the Global Justice Movement*, ELECTRONIC INTIFADA (Feb. 14, 2010), <https://electronicintifada.net/content/israels-new-strategy-sabotage-and-attack-global-justice-movement/8683> [perma.cc/HRT5-CCWT].

35. See, e.g., Patrick Smyth, *Budapest to Ask EU to Halt Money to NGOs Opposed to Israel*, THE IRISH TIMES (Oct. 15, 2018), <https://www.irishtimes.com/news/world/europe/budapest-to-ask-eu-to-halt-money-to-ngos-opposed-to-israel-1.3663445> [https://perma.cc/P3QH-5PWK].

36. *Id.*

37. *Israel: Decision to Expel HRW Country Director Exposes Growing Intolerance of Criticism*, AMNESTY INT’L (May 9, 2018), <https://www.amnesty.org/en/latest/news/2018/05/israel-decision-to-expel-hrw-country-director-exposes-growing-intolerance-of-criticism/> [https://perma.cc/27D9-9YK8]; Rami Ayyub, *Israel Expels Human Rights Watch Official Over Accusations he Backs an International Pro-Palestinian Boycott*, INDEPENDENT.IE (Feb. 1, 2020), <https://www.independent.ie/world-news/middle-east/israel-expels-human-rights-watch-official-over-accusations-he-backs-an-international-pro-palestinian-boycott-38725244.html> [https://perma.cc/9CHL-HGM2].

38. William Booth, *Israel Calls Human Rights Watch a Propaganda Tool, Says it is Not Welcome*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/world/middle-east/israel-calls-human-rights-watch-a-propaganda-tool-says-it-is-not-welcome/2017/02/23/799aed5c-f9bf-11e6-be05-1a3817ac21a5\\_story.html?utm\\_term=.149d675697d9](https://www.washingtonpost.com/world/middle-east/israel-calls-human-rights-watch-a-propaganda-tool-says-it-is-not-welcome/2017/02/23/799aed5c-f9bf-11e6-be05-1a3817ac21a5_story.html?utm_term=.149d675697d9) [https://perma.cc/T3R4-LXPX].

39. Mairav Zonszein, *Human Rights Watch Sues Israel in First Challenge to Anti-Boycott Travel Ban*, +972MAG (May 16, 2018), <https://972mag.com/human-rights-watch-sues-israel-in-first-challenge-to-anti-boycott-travel-ban/135491/> [https://perma.cc/T3R4-LXPX].

revoked for alleged support of [the] boycott.”<sup>40</sup> Critics condemned this decision, and cited it as “yet another worrying sign of the country’s growing intolerance of critical voices.”<sup>41</sup> Among the critics were sixteen Israeli human rights organizations who issued a statement condemning the government’s decision to expel Mr. Shakir.<sup>42</sup>

The Israeli government has used the newly enacted law against not only human rights advocates, but also against foreign students attempting to study in Israel.<sup>43</sup> Lara Alqasem, an American student, obtained a visa to study at the Hebrew University in Jerusalem; yet she was banned from entering Israel for allegedly supporting BDS and pro-Palestinian activism on her social media pages while she was an undergraduate student.<sup>44</sup> Critics of the Israeli law—which bars alleged BDS supporters from entering Israel—have called attention to Ms. Alqasem’s case by highlighting it as an example of the Israeli government’s attack on freedom of expression.<sup>45</sup>

Anti-BDS obstructions have not only made their way into Israeli legislation, but also into legal systems across the globe.<sup>46</sup> Notably, governments in the United States, the United Kingdom, France, and Canada have passed anti-BDS legislation.<sup>47</sup>

In the United States, pro-Israel lobby groups play an active role in enacting anti-BDS legislation both at the federal and state level.<sup>48</sup> Political analysts have attributed this surge in anti-BDS legislation as a “response to the multifaceted threat posed by BDS—including on college campuses and in mainline Protestant churches.”<sup>49</sup> The permissibility of anti-BDS

40. *Id.*

41. *Israel Orders Human Rights Watch Activist to Leave For ‘Supporting Boycott’*, BBC (May 9, 2018), <https://www.bbc.com/news/world-middle-east-44052733> [<https://perma.cc/F4RD-9V6U>].

42. Zonszein, *supra*, note 39.

43. *See, e.g., American Student Challenges Israeli Entry Ban in Court*, FRANCE 24 (Nov. 10, 2018), <https://www.france24.com/en/20181011-israel-american-student-alqasem-bds> [<https://perma.cc/75J2-RTWX>].

44. *Id.*

45. *Id.*

46. Nathan Thrall, *supra* note 27.

47. Michael Deas, *BDS is Free Speech, Says Dutch Government*, ELECTRONIC INTIFADA, May 25, 2016, <https://electronicintifada.net/blogs/michael-deas/bds-free-speech-says-dutch-government>.

48. Ali Abunimah, *Israel “Quietly” Pushed for Anti-BDS Legislation in US, UK*, *supra* note 33.

49. Sean Savage, *Israel Advocates Defend Arizona’s Anti-BDS Law Following Setback in Kansas*, THE ALGEMEINER (Feb. 14, 2018, 9:33 AM), <https://www.algemeiner.com/>

legislation at the state, federal, and international level has raised numerous legal concerns, with some arguing such legislation violates both national and international laws.<sup>50</sup>

## II. APPLICABLE LAW

### A. U.S. State Legislation in Response to the BDS Movement

Over the past three years, anti-BDS laws have been enacted in more than half of U.S. states, and the governors of Louisiana, Maryland, New York, Wisconsin, Kentucky, and most recently, South Dakota signed anti-BDS executive orders.<sup>51</sup> Overall, twenty-eight states have enacted anti-BDS laws, and in thirteen other states, anti-BDS legislation has been introduced or is currently pending.<sup>52</sup>

In the United States, neither state nor federal legislation explicitly takes away the right to call for BDS; however, anti-BDS legislation does establish restrictions and penalties targeted at proponents of the BDS movement.<sup>53</sup> Many proposed and enacted state laws have been considered a form of unconstitutional censorship by civil liberty organizations including the American Civil Liberties Union (ACLU).<sup>54</sup>

Several reasons explain the unconstitutionality of state and federal anti-BDS bills. Some bills require blacklisting individuals and entities engaging in BDS, other bills aim to punish individuals and entities that support BDS by prohibiting state or local governments from contracting with them, and still other bills require state pension funds to divest from companies that boycott Israel.<sup>55</sup> These bills have been challenged for violating the First Amendment's protection of free speech by criminalizing unpopular political opinion.<sup>56</sup> Since 2014, over 100 measures have been introduced targeting

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2018/02/14/israel-advocates-defend-arizonas-anti-bds-law-following-setback-in-kansas/ [https://perma.cc/N3B2-WQVX].

50. *Ten Things to Know About Anti-Boycott Legislation*, PALESTINE LEGAL (last updated Jan. 17, 2020), <https://palestinelegal.org/news/2016/6/3/what-to-know-about-anti-bds-legislation> [https://perma.cc/D58R-LVF9].

51. *Id.*; *Bevin Signs Order to Support Israel Against BDS Movement*, WKYT (Nov. 15, 2018), <https://www.wkyt.com/content/news/Bevin-signs-order-to-support-Israel-against-BDS-movement-500644262.html> [https://perma.cc/KX3L-39PS].

52. *Anti-Boycott Legislation Around the Country*, PALESTINE LEGAL, <https://palestinelegal.org/righttoboycott/> [https://perma.cc/LG7Z-2TB8] (last updated Jan. 17, 2020).

53. *Ten Things to Know About Anti-Boycott Legislation*, *supra* note 50.

54. *Id.*

55. *Id.*

56. *See Anti-Boycott Legislation Around the Country*, *supra* note 52.

speech supportive of Palestinian rights, some enacted by state legislatures and others enacted through executive orders.<sup>57</sup>

In 2018, two federal district judges in Arizona and Kansas blocked anti-BDS laws because of First Amendment free speech concerns.<sup>58</sup> Other bills are called into question for their discriminatory practices. Three illustrations discussed below review the current status of anti-BDS legislation in New York, Arizona, and Kansas.

### *I. New York Legislation*

In 2016, New York Governor Andrew Cuomo issued Executive Order 157, which requires compiling into a list companies that endorse BDS, and punishes institutions and companies that “participate in boycott, divestment, or sanctions activity targeting Israel, either directly or through a parent or subsidiary.”<sup>59</sup> Furthermore, Executive Order 157 specifies that state entities are required to “divest their money and assets from any investment in any institution or company that is included on the . . . list.”<sup>60</sup>

Independent contractors, whether a business or an individual, are denied a government contract in New York if they support the BDS movement. Businesses placed on the list have the burden of proof in establishing that they are not affiliated with BDS.<sup>61</sup> Cuomo threatened on his personal Twitter account, “if you boycott Israel, New York will boycott you.”<sup>62</sup> When asked

57. *2017 Year in Review*, PALESTINE LEGAL (Jan. 30, 2018), [https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5ab2b6c0f950b74f9911075c/1521661640387/PalLegal\\_YiR2017\\_digital.pdf](https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5ab2b6c0f950b74f9911075c/1521661640387/PalLegal_YiR2017_digital.pdf) [<https://perma.cc/BM3V-UMUZ>].

58. See Press Release, American Civil Liberties Union, *Federal Court Blocks Arizona Law Aimed at Anti-Israel Boycotts* (Sept. 27, 2018) (on file at <https://www.aclu.org/press-releases/federal-court-blocks-arizona-law-aimed-anti-israel-boycotts>) [<https://perma.cc/GJ3K-RL34>]; see also Chip Gibbons, *Victory for the Right to Boycott, As Federal Court Blocks Arizona Anti-BDS Law*, DEFENDING RTS & DISSENT (Sept. 28, 2018), <https://rightsanddissent.org/news/victory-for-the-right-to-boycott-as-federal-court-blocks-arizona-anti-bds-law/> [<https://perma.cc/WXZ8-5K4K>]. For a discussion of the cases, see *supra*, subsections 2 and 3.

59. N.Y. Exec. Order No. 157, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016).

60. *Id.*

61. Noah Daponte-Smith, *Conservatives Should Be Wary of Andrew Cuomo's Anti-BDS Proclamation*, NATIONAL REV. (June 7, 2016), <https://www.nationalreview.com/2016/06/andrew-cuomo-anti-bds-order-new-york-boycott-israel/> [<https://perma.cc/T5BH-HMGU>].

62. Robby Soave, *Andrew Cuomo's Executive Order on Israel Boycott Is Brazenly Autocratic*, REASON (June 6, 2016), <https://reason.com/2016/06/06/andrew-cuomos-executive-order-on-israel/> [<https://perma.cc/X8WS-KVR7>].

why the executive order was passed without the input of the legislative body, Cuomo said that the legislative process was too “tedious.”<sup>63</sup>

Since Executive Order 157, three anti-protest bills targeting advocacy for Palestine have been passed by the New York State Senate and New York State Assembly.<sup>64</sup> Currently, five additional bills are pending in the New York State legislature aiming to expand on previous anti-BDS laws; one bill will prohibit funding student organizations at public universities in New York for organizations advocating for boycotts of “allied nations,” including Israel.<sup>65</sup>

## 2. Arizona Legislation

In 2016, Arizona passed HB 2617; like New York’s Executive Order 157, HB 2617 requires the state “to create a blacklist of companies, organizations, and entities that boycott Israel.”<sup>66</sup> The law also prohibits the state “from investing in blacklisted entities.”<sup>67</sup> Arizona went one step further with the enactment of the Revised Statute § 35-393.01, which prohibits the state from contracting with companies unless the contract includes “a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of goods or services from Israel.”<sup>68</sup>

In 2017, the ACLU filed a federal lawsuit on behalf of an independent contractor, Mikkel Jordahl, claiming the law was unconstitutional because it violated the First Amendment right to engage in political boycott.<sup>69</sup> Mr. Jordahl, a lawyer with a state contract to provide legal services to incarcerated individuals, claimed that the law’s certification requirement prevented him from supporting a political cause he believed in, and attacked his constitutionally

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63. *Id.*

64. *New York*, PALESTINE LEGAL, <https://palestinelegal.org/newyork> [<https://perma.cc/H69L-QC2C>] (last visited Feb. 2, 2020).

65. *Id.* In late 2019, bills S. 2715, A. 7340, S. 5805, S. 2430 and A. 5847 were still pending. S. 5805’s draft includes the following provision: “The state university trustees shall adopt rules that any student group or student organization that receives funding from the state university of New York that directly or indirectly promotes, encourages, or permits discrimination, intolerance, hate speech or boycotts against a person or group based on race, class, gender, nationality, ethnic origin or religion, shall be ineligible for funding, including funding from student activity fee proceeds.”

66. *Anti-Boycott Legislation Around the Country: Arizona*, PALESTINE LEGAL (Apr. 16, 2019), <https://palestinelegal.org/arizona> [<https://perma.cc/P6XX-NAKK>].

67. *Id.*

68. ARIZ. REV. STAT. § 35-393.01 (LexisNexis 2020).

69. *Federal Court Blocks Arizona Law Aimed at Anti-Israel Boycotts*, ACLU (Sept. 27, 2018), <https://www.aclu.org/news/federal-court-blocks-arizona-law-aimed-anti-israel-boycotts> [<https://perma.cc/M5DS-UU48>].

protected right to political boycott.<sup>70</sup> He filed the case in federal court, in Arizona.

Judge Diane J. Humetewa blocked the enforcement of Revised Statute § 35-393.01, stating that the law causes irreparable harm and “specifically implicates the rights of assembly and association that Americans and Arizonans use ‘to bring about political, social, and economic change.’”<sup>71</sup> Judge Humetewa further reasoned that the act had an unconstitutional goal, which was to penalize those engaged in political boycotts of Israel because such “boycotts are not aligned with the State’s values.”<sup>72</sup> Using Arizona’s economic power to deny a citizen a contract due to their political speech was deemed unconstitutional.<sup>73</sup> Consequently, Arizona state attorneys submitted a legal brief to the Court of Appeals for the Ninth Circuit requesting the injunction be lifted.<sup>74</sup> The appellate court denied the request, and the state notified all of its agencies that they could no longer deny a contract to anyone simply because the bidder refuses to sign an agreement not to participate in BDS.<sup>75</sup>

On April 16, 2019, in response to the federal court ruling against the enforceability of HB 2617, Arizona’s governor signed a bill amending the law.<sup>76</sup> The amended bill enables the state to enforce the anti-boycott certification against for-profit companies with ten or more employees and where the government contract is worth more than \$100,000, a tactical move designed to remove plaintiffs like Mr. Jordahl.<sup>77</sup> The ACLU has stressed that while the new statute may reduce the number of individuals affected by the law, the underlying constitutional issues remain.<sup>78</sup> ACLU attorneys explained that amendments to this legislation were designed to thwart judicial review

70. *Id.*

71. *Victory: Arizona Federal Court Blocks Anti-Boycott Law*, PALESTINE LEGAL (Sept. 28, 2018), <https://palestinelegal.org/news/victory-federal-court-az-law?rq=Arizona> [<https://perma.cc/HG2E-UGQ8>].

72. *Id.*

73. Howard Fischer, *Arizona Appeals Decision to Strike Law Banning State Contractors from Boycotting Israel*, ARIZ. CAPITOL TIMES (Nov. 6, 2018), <https://azcapitoltimes.com/news/2018/11/06/arizona-appeals-decision-to-strike-law-banning-state-contractors-from-boycotting-israel/> [<https://perma.cc/2SSY-CEKS>].

74. *See id.*

75. *Id.*

76. *Arizona*, *supra* note 66.

77. Brian Hauss, *Arizona Lawmakers Running Scared After Anti-Boycott Law Ruled Unconstitutional*, ACLU (Apr. 16, 2019), <https://www.aclu.org/blog/free-speech/arizona-lawmakers-running-scared-after-anti-boycott-law-ruled-unconstitutional> [<https://perma.cc/SUW4-CG3M>].

78. *Id.*

without addressing the fundamental First Amendment violations federal courts have expressly identified.<sup>79</sup>

### 3. *Kansas Legislation*

In 2016, the Kansas State Legislature enacted HB 2409, which prohibits the state from contracting with or procuring from companies and individuals unless they certify that they are not boycotting Israel.<sup>80</sup> A public school teacher and member of the Mennonite Church, Esther Koontz, represented by the ACLU, filed a lawsuit in federal court to challenge the constitutionality of HB 2409.<sup>81</sup> The Mennonite Church released a resolution calling on Mennonites to boycott products associated with Israel's occupation of Palestine, and accordingly, Ms. Koontz declined to sign the certification her employer presented to her to confirm that she was not participating in a boycott of Israel.<sup>82</sup>

In 2018, U.S. District Judge Daniel Crabtree issued a preliminary injunction blocking the enforcement of HB 2409, finding that “the Supreme Court has held that the First Amendment protects the right to participate in a boycott like the one punished by the Kansas law.”<sup>83</sup> The certification requirement constituted a violation of Ms. Koontz's First Amendment rights.<sup>84</sup> In response to the preliminary injunction, through an action similar to that taken by the Arizona governor, the Kansas legislature amended the law “to narrow its scope so that the certification is only required of companies [or individuals] that do \$100,000 or more of business with the state, effectively carving out the plaintiff math teacher, Esther Koontz.”<sup>85</sup> Ms. Koontz eventually settled the case, and the ACLU dropped the lawsuit for lack of standing; however, the ACLU warned that the underlying constitutional issues remained the same, as the amended law still purports to use state economic power

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79. *Id.*

80. 2017 Kan. Sess. Laws 1126.

81. *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2017).

82. *Seeking Peace in Israel and Palestine: A Resolution for Mennonite Church USA*, MENNONITE CHURCH USA, <http://mennoniteusa.org/wp-content/uploads/2017/01/IP-Resolution.pdf> [https://perma.cc/WX7N-J577] (last visited Feb. 15, 2020).

83. *In First, Judge Blocks Kansas Law Aimed At Boycotts of Israel*, ACLU (Jan. 30, 2018), <https://www.aclu.org/press-releases/first-judge-blocks-kansas-law-aimed-boycotts-israel> [https://perma.cc/9B4E-GPRH].

84. *Kansas*, PALESTINE LEGAL, <https://palestinelegal.org/kansas> [https://perma.cc/78K9-WTUY] (last visited Feb. 11, 2020).

85. *Federal Judge Issues Injunction Against Kansas Anti-Boycott Law (Updated)*, PALESTINE LEGAL (Feb. 6, 2018), <https://palestinelegal.org/news/2018/2/6/federal-judge-issues-injunction-against-kansas-law> [https://perma.cc/U4S9-7WAS].

through the use of certification requirements to punish participation in political boycott.<sup>86</sup>

*B. U.S. Federal Legislation in Response to the BDS Movement*

Anti-BDS legislation has been introduced at the federal level as well. In 2017, the Combating BDS Act S.170 was introduced in the Senate's Banking, Housing and Urban Affairs Committee.<sup>87</sup> The act was presented "[t]o provide for non-preemption of measures by State and local governments to divest from entities that engage in commerce-related or investment-related boycott, divestment, or sanctions activities targeting Israel, and for other purposes."<sup>88</sup> The bill proposed to authorize state governments to pass laws prohibiting the state from contracting with or divesting from entities that boycott Israel, by providing that such laws were not preempted by federal law.<sup>89</sup> The act was introduced to the Senate, but was referred back to the Committee on Banking Housing and Urban Affairs.<sup>90</sup>

Later in 2017, S.720 and its sister bill H.R. Res. 1697, known as the Israeli Anti-Boycott Act, were introduced in both the House and Senate.<sup>91</sup> These acts "would expand a 1970s-era export law and expose a range of activity to sweeping penalties, including criminal prosecution."<sup>92</sup> The acts contend to expand the Export Administration Act of 1979 in a way that would prohibit U.S. citizens and U.S. companies from taking certain actions to support a boycott against a country that is friendly with the United States.<sup>93</sup> The proposed acts came in response to a wave of recommendations by international governmental organizations like the United Nations and the European Union, which called for the boycott of Israeli businesses operating in the internationally recognized occupied Palestinian territories.<sup>94</sup> The bills were unparalleled because they stipulated that violators would be punishable

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86. *Federal Court Blocks Arizona Law Aimed At Anti-Israel Boycott*, *supra* note 69.

87. Combating BDS Act, S. 170, 115th Cong. (1st Sess. 2017).

88. *Id.*

89. *Federal Legislation*, PALESTINE LEGAL, <https://palestinelegal.org/federal> (last visited Apr. 11, 2020) [ <https://perma.cc/M9UE-GXFW>].

90. S. 170, 115th Cong. (1st Sess. 2017).

91. Israel Anti-Boycott Act, H.R. 1697, 115th Cong. (1st Sess. 2017).

92. *How the Israel Anti-Boycott Act Threatens First Amendment Rights*, ACLU (July 26, 2017), <https://www.aclu.org/blog/free-speech/how-israel-anti-boycott-act-threatens-first-amendment-rights> [ <https://perma.cc/5R9P-LNQ5>].

93. *Id.*

94. *Id.*



by civil penalty up to \$250,000, and also risk criminal prosecution for which the sentence could be a fine of \$1 million and up to twenty years in prison.<sup>95</sup> The acts would effectively prohibit a U.S. citizen from adhering to the U.N.'s request to terminate business relationships with a company operating in Israel's illegal settlements, or even from furnishing information about the boycott.<sup>96</sup>

Essentially, the acts intended to prohibit people from partaking in certain boycotts—those that target Israel—and more concerningly, they propose to punish citizens who choose to adhere to U.N. recommendations. Civil liberties concerns were raised by the ACLU and other groups, and the bills were consequently revised in March of 2018.<sup>97</sup> The amended bills removed the possibility of imprisonment for violators, but still include civil and criminal financial penalties up to \$1 million.<sup>98</sup> The ACLU and other civil liberty groups continue to contest the constitutionality of the amended bills as they continue to maintain criminal penalties and target political boycotts.<sup>99</sup>

Immediately after the U.S. government shutdown in early 2019, the Senate voted 74-19 to advance a bill known as S.1 which allows states to pass laws banning business with supporters of the BDS campaign.<sup>100</sup> S.1 was the first bill introduced in the new session of Congress, and the bill strategically incorporates provisions found in S.170.<sup>101</sup> S.1 supports measures prohibiting states from contracting or investing with entities that boycott Israel, by determining that such state laws are not pre-empted by federal law.<sup>102</sup> The Senate adopted the bill on February 4, 2019, by a vote of 77-23.<sup>103</sup> Some U.S. senators have explicitly vocalized their opposition to the Bill; for instance, Senator Bernie Sanders tweeted that “we must defend every American’s constitutional right to peacefully engage in political activity. It is clear to me that S.1 would violate Americans’ First Amendment rights.”<sup>104</sup>

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95. *Id.*

96. *Id.*

97. *ACLU says revised anti-BDS bill remains unconstitutional, in blow to pro-Israel groups*, MIDDLE EAST MONITOR (Mar. 7, 2018, at 10:28 AM), [https://www.middleeastmonitor.com/20180307-aclu-says-revised-anti-bds-bill-remains-unconstitutional-in-blow-to-pro-israel-groups/\[https://perma.cc/B7VL-H6L2\]](https://www.middleeastmonitor.com/20180307-aclu-says-revised-anti-bds-bill-remains-unconstitutional-in-blow-to-pro-israel-groups/[https://perma.cc/B7VL-H6L2]).

98. *Federal Legislation*, PALESTINE LEGAL, *supra* note 89.

99. Letter from Faiz Shakir, Nat’l Political Dir., ACLU, to U.S. Senate Comm. on Banking, Housing, and Urban Affairs (Mar. 6, 2018) (on file with ACLU) [hereinafter *Letter from ACLU*].

100. Aiden Pink, *Senate Advances Combating BDS Act After Shutdown Delay*, FORWARD.COM (Jan. 28, 2019), [https://forward.com/fast-forward/418348/senate-advances-combating-bds-act-after-shutdown-delay/\[https://perma.cc/PN4K-NDUV\]](https://forward.com/fast-forward/418348/senate-advances-combating-bds-act-after-shutdown-delay/[https://perma.cc/PN4K-NDUV]).

101. *Federal Legislation*, PALESTINE LEGAL, *supra* note 89.

102. *Id.*

103. *Id.*

104. Pink, *supra* note 100.

Since then, both the House and the Senate have advanced legislation targeting BDS activity and most recently an executive order was signed by President Trump on December 11, 2019.<sup>105</sup> Many have noted that the resurgence of anti-BDS bills has been a result of Republicans and President Trump's ambition to reaffirm America's pro-Israel position.<sup>106</sup> For instance, H. R. Res. 246, a resolution which blatantly condemns the BDS movement, passed the House by a vote of 398-17 on July 23, 2019.<sup>107</sup> While the resolution does not bear the force of law, "the resolution's language is a broad condemnation of individuals who boycott for human rights, raising concerns that it will reinforce and legitimize other legislative attacks on protected speech, including anti-boycott laws."<sup>108</sup> The introduction of the Israel Anti-Boycott Act (H.R. Res. 5595) provides another example of how language from H.R. Res. 246 may support subsequent legislative attacks on free speech.<sup>109</sup> H.R. Res. 5595 amends the Export Control Reform Act of 2018 to prohibit U.S. companies and non-profits

from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by any foreign country or an international governmental organization, or efforts by a foreign country or international governmental organization to collect information that have the effect of furthering or supporting restrictive trade practices or boycotts fostered or imposed by a foreign country or international governmental organization against [Israel].<sup>110</sup>

Although the legislation does not expressly address commercial boycotts of Israel, it is however focused on preventing any boycotts or economic pressure on Israeli settlements.<sup>111</sup> Violators may face "severe civil [punishment] (up to \$300,000) and criminal (up to \$1 million) monetary penalties, though the possibility of prison time included in previous iterations has been removed."<sup>112</sup> While "similar bills failed to pass in the last Congress after

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105. *Id.*

106. *See, e.g.,* Josh Ruebner, *Republicans push BDS bill to paint Dems as anti-semites, and party leadership falls for the trap*, MONDOWEISS (May 17, 2019), <https://mondoweiss.net/2019/05/republicans-semite-leadership/> [<https://perma.cc/BRV4-ZLYP>].

107. H.R. 246, 116th Cong. (2019).

108. *Federal Legislation*, PALESTINE LEGAL, *supra* note 89.

109. *See* Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2019).

110. *The New Israel Anti-Boycott Act—What it Actually Says/Does*, FOUND. FOR MIDDLE EAST PEACE, <https://fmep.org/resource/the-new-israel-anti-boycott-act-what-it-actually-says-does/> [<https://perma.cc/6LBW-HZML>] (last visited Feb. 1, 2020).

111. *Id.*

112. *Federal Legislation*, PALESTINE LEGAL, *supra* note 89.

multiple revisions” and despite these revisions’ failures “to address the underlying constitutional concerns raised by targeting political boycotts with criminal penalties,” H.R. Res. 5595 was nevertheless referred to the House Committee on Foreign Affairs on January 13, 2020.<sup>113</sup>

In addition to several anti-BDS legislation promulgated through Congress,<sup>114</sup> on December 11, 2019, President Trump signed Executive Order 13899 on Combating Anti-Semitism.<sup>115</sup> Executive Order 13899 directs government agencies charged with enforcing Title VI of the Civil Rights Act to adopt a distorted definition of antisemitism, which in practice intends to censor advocacy for Palestinian rights.<sup>116</sup> The order conflates political criticism of the state of Israel with antisemitism, the same reason why past attempts to pass similar legislation in Congress have repeatedly failed.<sup>117</sup> President Trump’s unilateral action to redefine antisemitism as a means of censoring criticism of Israel raises genuine legal concern.<sup>118</sup> The executive order, using as a pretext the distorted definition of anti-Semitism (according to which political criticism of the Israeli state is antisemitic), will prevent the allocation of federal funds to colleges where students are not necessarily protected from anti-Semitism as defined by the order.<sup>119</sup> This unilateral decision is no surprise to many. The Trump administration has unprecedentedly disregarded international law and legal precedent by adopting overtly pro-Israel policies, including: declaring Jerusalem as Israel’s capital and the consequent move of the U.S. Embassy to Jerusalem; cutting U.S. aid to the United Nations Relief and Works Agency for Palestinian Refugees; reversing longstanding U.S. policy by recognizing Israeli settlements in the West Bank; recognizing Israeli sovereignty over the Golan Heights; and most recently, proposing the highly contested Mideast Peace Plan.<sup>120</sup> The recent signing of Executive Order 13899 has been described as just another attempt

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113. *Id.*; Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2019).

114. *E.g., id.*; see also H.R. 246, 116th Cong. (2019).

115. Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019).

116. See Masha Gessen, *The Real Purpose of Trump’s Executive Order on Anti-Semitism*, THE NEW YORKER (Dec. 12, 2019), [https://www.newyorker.com/news/our-columnists/the-real-purpose-of-trumps-executive-order-on-anti-semitism#\[https://perma.cc/Q5AV-SY43\]](https://www.newyorker.com/news/our-columnists/the-real-purpose-of-trumps-executive-order-on-anti-semitism#[https://perma.cc/Q5AV-SY43]).

117. *Federal Legislation*, PALESTINE LEGAL, *supra* note 89.

118. *Id.*

119. Lara Friedman, *How Donald Trump is Saving the Occupation by Dismantling the First Amendment*, RESPONSIBLE STATECRAFT (Dec. 12, 2019), [https://responsiblestatecraft.org/2019/12/12/how-donald-trump-is-saving-the-occupation-by-dismantling-the-first-amendment/\[https://perma.cc/5HKQ-64CC\]](https://responsiblestatecraft.org/2019/12/12/how-donald-trump-is-saving-the-occupation-by-dismantling-the-first-amendment/[https://perma.cc/5HKQ-64CC]).

120. Lara Jakes & David M. Halbfinger, *In Shift, U.S. Says Israeli Settlements in West Bank Do Not Violate International Law*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/world/middleeast/trump-israel-west-bank-settlements.html> [https://perma.cc/SHL6-QAEH].

by the Trump administration to “quash the defense—and even the discussion—of Palestinian rights. Its victim will be free speech.”<sup>121</sup>

### C. EU Member States’ Response to the BDS Movement

Legislative reactions to the BDS movement have emerged not only in the United States, but also in many European Union member states’ legislatures as well.<sup>122</sup> While the EU’s official policy does not support the boycott of Israel, the EU requires products made in illegal Israeli settlements to be labeled to enter the EU.<sup>123</sup> The EU’s policy of carefully targeted sanctions has been attacked by anti-BDS proponents and Israeli government officials, but the EU maintains the legality of its policy.<sup>124</sup>

Moreover, although the EU does not endorse BDS, it does recognize the rights of its citizens to boycott Israel and Israeli products.<sup>125</sup> European Union Foreign Policy Chief Minister, Fedrica Mogherini, told the European Parliament “[t]he EU stands firm in protecting freedom of expression and freedom of association in line with the Charter of Fundamental Rights of the European Union, which is applicable on EU member states’ territory, including with regard to BDS actions carried out on this territory.”<sup>126</sup> Member states have embraced or rejected BDS’s activities through national legislation to varying degrees. The strongest anti-BDS reactions have emerged in France and Hungary, while the most BDS-protective responses have emerged in Ireland and Sweden; in other countries, for instance the Netherlands, BDS activity continues to be litigated and debated within national legislative bodies.<sup>127</sup>

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121. Gessen, *supra* note 116.

122. This section provides some examples and discusses BDS activity’s treatment in France, the Netherlands and Sweden.

123. Avishai, *The E.U. vs. B.D.S.: The Politics of Israel Sanctions*, *supra* note 29.

124. Stuart Winer & Raphael Ahren, *EU: Israel spreads ‘disinformation’ by alleging we fund terror-tied BDS efforts*, TIMES OF ISRAEL (July 17, 2018), <https://www.timesofisrael.com/eu-accuses-israel-of-disinformation-campaign-on-boycott-funding/> [<https://perma.cc/3D2W-45BE>].

125. Ali Abunimah, *EU Recognizes Right to Boycott Israel*, ELECTRONIC INTIFADA (Oct. 28, 2016), <https://electronicintifada.net/blogs/ali-abunimah/eu-recognizes-right-boycott-israel> [<https://perma.cc/WP4W-3UGH>].

126. Eur. Parl. Doc. (SEC E-005122) 2016 (answers of Vice-President Mogherini).

127. Thus, despite European Law being binding on the states, conflicts of interpretation exist. *E.g.*, Ali Abunimah, *Sweden Denies Israeli Claim That It Opposes BDS*, *supra* note 125.

## I. Reactions to BDS in France

France has enacted the most anti-BDS legislation in all Europe and has even criminalized BDS activities.<sup>128</sup> While the EU has declared that engaging in BDS to be a protected right, strict anti-discrimination laws have allowed for courts in France to equate engagement in BDS as incitement to hatred.<sup>129</sup> In 2015, “France’s highest court of criminal appeals [the Court of Cassation] upheld the conviction of a dozen Palestine solidarity activists for publicly calling for the boycott of Israeli goods.”<sup>130</sup> French law allows for citizens to be held criminally liable and jailed for advocating for the boycott of Israeli goods.<sup>131</sup> The Court of Cassation found pro-BDS activity to be illegal, and to this end relied upon an anti-discrimination law from 1972 to uphold the convictions.<sup>132</sup> The Court of Cassation “sanctioned the illegality of boycotting Israeli products.”<sup>133</sup> The campaign group BDS France condemned the application of the law and claimed that the government could “distort the spirit of the law whenever it affects a political partner.”<sup>134</sup> Civil rights activists in France assert classifying BDS activity as an attack on people of Israeli origin, and not as a form of criticism of Israeli policies, was a false and dangerous correlation to make.<sup>135</sup>

Additionally, in 2018, the French government found the labeling of products produced in Israeli settlements to be discriminatory, contrary to longstanding EU policy which requires the labeling of products manufactured in Israeli settlements.<sup>136</sup> The French Government’s legal adviser took the case to the EU’s top court, the Court of Justice of the European Union (CJEU), to resolve the discrepancy between French Law and EU Law.<sup>137</sup> On November, 12, 2019, the CJEU ruled that all EU member states must identify products

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128. Hassina Mechai, *BDS is the French Exception to International Boycotts*, MIDDLE EASTERN MONITOR (Feb. 6, 2017), <https://www.middleeastmonitor.com/20170206-bds-is-the-french-exception-to-international-boycotts/> [<https://perma.cc/L2Q7-P9AN>].

129. Benjamin Dodman, *France’s Criminalisation of Israel Boycotts Sparks Free-Speech Debate*, FRANCE 24 (Jan. 21, 2016), <https://www.france24.com/en/20160120-france-boycott-israel-bds-law-free-speech-antisemitism> [<https://perma.cc/VVY7-EYYW>].

130. Ali Abunimah, *France Now More Repressive of Boycott Calls Than Israel*, ELECTRONIC INTIFADA (Nov. 4, 2015), <https://electronicintifada.net/blogs/ali-abunimah/france-now-more-repressive-boycott-calls-israel> [<https://perma.cc/WXQ9-DSFF>].

131. *Id.*

132. *Id.*

133. Dodman, *supra* note 129.

134. Abunimah, *France Now More Repressive of Boycott Calls Than Israel*, *supra* note 130.

135. *Cf.* Dodman, *supra* note 129.

136. *Pro-Israel Lobby Forces France to Stop Labelling Settlement Products*, MIDDLE EAST MONITOR (Oct. 4, 2018), <https://www.middleeastmonitor.com/20181004-pro-israel-lobby-forces-france-to-stop-labelling-settlement-products/> [<https://perma.cc/A9UX-QHAT>].

137. *Id.*

originating from an Israeli settlement on their labels, effectively holding that the French Law was in contravention to EU policy.<sup>138</sup> The CJEU ruling articulated that “consumers must [be able] to make informed choices, with regard not only to health, economic, environmental and social considerations, but also to ethical considerations and considerations relating to the observance of international law.”<sup>139</sup> The CJEU’s decision is politically significant, particularly because the challenged law was considered to be another attempt at thwarting BDS activity within the EU.<sup>140</sup> However, although the EU has consistently spoken out against Israeli settlement expansion, and continuously recognizes the rights of its citizens to boycott Israel and Israeli products, it does not endorse BDS.<sup>141</sup>

## 2. Reactions to BDS in Sweden

Unlike the French government, the Swedish government has fiercely protected the rights of its citizens to engage in BDS activity under both Swedish law and EU Law.<sup>142</sup> In 2016, in response to anti-BDS calls demanding the Swedish government to thwart growing support for the BDS movement, the Foreign Minister of Sweden, Margot Wallström, stated that BDS “is a civil society movement. Governments should not interfere in civil society organization views.”<sup>143</sup> The Swedish government’s commitment to the principle that governments should not impede on beliefs of civil society movements stands in stark contrast to the decision by the French government to criminalize BDS activity. Furthermore, Sweden’s protection

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138. Lorne Cook & Joseph Federman, *Court Says EU States Must Label Israeli Settlement Products*, AP NEWS (Nov. 12, 2019), <https://apnews.com/977d91e19d6c4f3c8eb9eb0d1491184a> [<https://perma.cc/3DND-LLT4>].

139. Court of Justice of the European Union Press Release No. 140/19: Foodstuffs originating in the territories occupied by the State of Israel must bear the indication of their territory of origin, accompanied, where those foodstuffs come from an Israeli settlement within that territory, by the indication of that provenance (Nov. 12, 2019), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190140en.pdf>.

140. Yumna Patel, *EU High Court: Member States Must Clearly Label Israeli Settlement Products*, MONDOWEISS (Nov. 14, 2019), <https://mondoweiss.net/2019/11/eu-high-court-member-states-must-clearly-label-israeli-settlement-products/> [<https://perma.cc/R7ZM-3B9L>].

141. *Products from Israeli Settlements Must be Labelled*, *EU Court Rules*, THE GUARDIAN (Nov. 12, 2019), <https://www.theguardian.com/world/2019/nov/12/products-israeli-settlements-labelled-eu-court> [<https://perma.cc/XV3X-S7T9>]; Abunimah, *EU Recognizes Right to Boycott Israel*, *supra* note 125.

142. See Abunimah, *Sweden Denies Israeli Claim That It Opposes BDS*, *supra* note 125.

143. *Id.*

of the right to advocate for BDS and Palestinian rights complies with free expression and free political association rights protected under EU law.<sup>144</sup> Other countries have joined Sweden; for instance, the Dutch government publicly stated that calls for a boycott of Israel are legitimate through nonviolent methods like BDS and are “protected by the freedom of expression.”<sup>145</sup>

### 3. *Reactions to BDS in The Netherlands*

The current state of affairs in the Netherlands illustrates that BDS activity continues to be litigated and debated within various EU state legislatures. In 2014, “[the] Dutch pension fund PGGM withdrew investments worth tens of millions of euros from five Israeli banks, citing the banks unethical and illegal activities in the occupied West Bank as reasons for the divestment.”<sup>146</sup> PGGM decided to withdraw investments after a long process of trying to persuade Israeli banks to stop financially supporting illegal settlements in the West Bank.<sup>147</sup> In 2016, two political parties in the Netherlands called for sanctions to be placed on Israel and a suspension of the EU-Israel Association Agreement if illegal Israeli settlements continued to expand into Palestinian territory.<sup>148</sup> Anti-BDS supporters called on the Dutch government to intervene, claiming that supporting BDS was hate speech, and further claimed that the Dutch government heavily subsidized organizations that supported BDS.<sup>149</sup> During a debate in the Foreign Affairs Committee of the Dutch Parliament, Foreign Minister Bert Koenders, maintained that “[s]tatements or meetings concerning BDS are protected by freedom of expression and freedom of assembly, as enshrined in the Dutch Constitution and the European Convention on Human Rights.”<sup>150</sup> Koenders also announced that “the Dutch government would not revoke the tax-exempt status of nonprofits supporting BDS.”<sup>151</sup>

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144. E.U. Charter of Fundamental Rights art. 11–12, Dec. 18, 2000, 2000 O.J. (C 364) 01; European Convention on Human Rights (Protocol No. 15) art.10, CETS 231 (2013).

145. *Irish And Dutch Governments Join Sweden in Speaking Out for Right to Call For BDS*, BDSMOVEMENT.NET (May 26, 2016), <https://bdsmovement.net/news/irish-and-dutch-governments-join-sweden-speaking-out-right-call-bds> [<https://perma.cc/W89X-S4BG>].

146. *Dutch Government Affirms the Right to Endorse the BDS Movement*, *supra* note 32.

147. *Id.*

148. *See Dutch Political Parties Call for Sanctions on Israel*, BDSMOVEMENT.NET (May 6, 2016), <https://bdsmovement.net/news/dutch-political-parties-call-sanctions-israel/> [<https://perma.cc/3W2B-JDVW>].

149. Manfred Gerstenfeld, *How the Dutch Government Subsidizes BDS Supporters—Heavily*, ISRAEL NAT’L NEWS (June 28, 2016), <http://www.israelnationalnews.com/Articles/Article.aspx/19105> [<https://perma.cc/9D4B-SFQS>].

150. *See id.*

151. *Dutch Parliament Calls for Stripping BDS Groups of Government Funding*, THE JERUSALEM POST (June 16, 2016), <https://www.jpost.com/International/Dutch-parliament->

While the Dutch government explicitly affirmed the right of individuals and groups to engage in BDS, its official policy is still one that opposes the boycott of Israel.<sup>152</sup> Dutch policy regarding BDS activity has shifted lately. Most recently, in reaction to the CJEU decision that ordered the labeling of Israeli goods produced in settlements, the Dutch Parliament approved a motion (by a vote of 82-68) objecting to the ruling and calling it discriminatory.<sup>153</sup> The motion was largely symbolic as EU member states must abide by EU law; however, as the Israeli Ambassador to the Netherlands put it, the motion encourages other European countries to question the ECJ ruling.<sup>154</sup> More concerningly, it may be a glimpse into future Dutch government policy regarding BDS activities.<sup>155</sup>

### III. LEGAL ANALYSIS

Assessing the legality of legislative reactions to the BDS movement differs when examined in an American legal context as compared to a European legal context. In the U.S., constitutional protection of speech, even hate speech, has prevented state laws and federal laws from criminalizing *the call* for BDS. Instead, concerns with anti-BDS legislation center on the conditioning of government contracts on a basis that infringes on one's constitutionally protected interest in free speech. In the EU, where EU law governs all member states, but each country maintains its own constitution and laws, anti-BDS legislation is not confronted through the same free speech constitutional reasoning. Instead, individual states' anti-BDS legislation is challengeable if non-compliant with EU law. For this reason, in France, where hate speech is not constitutionally protected speech, criminalizing *the call* for BDS is legally permissible according to French courts. Compliance of individual French Laws with EU policy can later be challenged in the EU's highest courts. Accordingly, constitutional principles argued from a U.S. legal standpoint do not stand when examining legislative actions in the EU.

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calls-for-stripping-BDS-groups-of-government-funding-457004 [https://perma.cc/ALM2-599A].

152. *Dutch Government Affirms the Right to Endorse the BDS Movement*, *supra* note 32.

153. *Dutch parliament passes motion against mandatory labeling of settlement products*, TIMES OF ISRAEL (Nov. 20, 2019, 5:08 AM), <https://www.timesofisrael.com/dutch-parliament-passes-motion-opposing-labeling-of-settlement-products/> [https://perma.cc/MNM5-2C9L].

154. *Id.*

155. *Id.*



### A. Constitutional Precedents in the United States

No anti-BDS laws enacted in more than twenty-eight U.S. states explicitly take away one's right to call for BDS.<sup>156</sup> Constitutional concerns regarding anti-BDS legislation are primarily founded in the protections effectuated by the First Amendment, specifically the right to free speech and free political association. The principal concerns about the constitutionality of anti-BDS laws are centered on: (1) the right to participate in political boycott, and (2) the receiving of government benefits, specifically pertaining to contracts between a government and independent contractors.<sup>157</sup> In particular, the central constitutional question pertains to the government's ability to terminate or deny the renewal of contracts based on a contractor's political speech, and to whether the presence of a preexisting commercial relationship between the government and the independent contractor is a factor that must be considered in these instances.<sup>158</sup>

Currently, there is a circuit split as to whether a preexisting commercial relationship should affect the constitutionality of laws allowing state governments to deny contracts based on an independent contractor's political speech.<sup>159</sup>

#### 1. Political Boycott is a Protected First Amendment Activity

Political boycott is a right safeguarded under the First Amendment principle of free political association. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Supreme Court recognized that participation in political boycott was a form of speech protected by the First Amendment.<sup>160</sup> In *Claiborne Hardware*, white merchants in Mississippi filed a suit for losses they sustained as a consequence of a seven-year boycott of their businesses by black merchants and organizations calling for racial equality and integration.<sup>161</sup> The Court explained that political boycott was a nonviolent practice designed to force governmental and economic change and to effectuate rights guaranteed in the Constitution.<sup>162</sup> The Court ultimately held that First Amendment freedom of speech, assembly, association and petition precluded imposing liability on participants of a boycott.<sup>163</sup>

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156. Discussion about legislation in the United States, *supra* Section II.

157. Recent Legislation, *First Amendment-Political Boycotts-South Carolina Disqualifies Companies Supporting Bds from Receiving State Contracts.-S.C. Code Ann. S 11-35-5300 (2015)*, 129 HARV. L. REV. 2029, 2031 (2016).

158. See *Letter from ACLU, supra* note 99.

159. Recent Legislation, *supra*, note 157.

160. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

161. *Id.* at 889.

162. *Id.* at 911.

163. *Id.*

Claims doubting the constitutionality of anti-BDS laws do not simply rest on the Supreme Court precedent that political boycott is a protected First Amendment activity; they also rely upon the Supreme Court's holding that a government cannot condition a contract for services or employment on the relinquishing of First Amendment rights.

## 2. Government Benefits Cannot Be Conditioned on the Relinquishing of First Amendment Rights

In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court held that “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in free speech.”<sup>164</sup> In *Sindermann*, a state college professor in Texas claimed his contract of employment was not renewed because of his criticism of the regents and the college president.<sup>165</sup> The Court found that states cannot terminate or refuse to renew a contract in response to a contractor exercising their First Amendment rights.<sup>166</sup>

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court recognized free speech protections for public employees who are fired in reprisal for commenting on matters of public concern.<sup>167</sup>

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court held that free speech protections apply to federal employees and the government cannot discharge non-policymaking employees solely based on their political party affiliation.<sup>168</sup>

In *Board of Commissioner, Wabaunsee County v. Umbehr, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996),<sup>169</sup> and in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996),<sup>170</sup> the Court extended free speech protections not only to government employees, but also to independent contractors. The Court held that the government cannot condition a contract on the relinquishing of First Amendment rights in relation to government employees, and also in relation to independent contractors.<sup>171</sup> These Supreme Court cases establish that the government cannot condition the receipt of benefits to employees and independent contracts on the requirement that

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164. *Perry v. Sindermann*, 408 U.S. 593 (1972).

165. *Id.*

166. *Id.*

167. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

168. *Elrod v. Burns*, 427 U.S. 347 (1976).

169. *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996).

170. *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996).

171. *Umbehr*, 518 U.S. at 683.

they forego their First Amendment right to political speech activity.<sup>172</sup> Constitutional commentators stress the importance of these cases because conditioning government benefits on the renunciation of First Amendment rights has been described as “the most dangerous kind of censorship.”<sup>173</sup>

3. *Independent Contractors Seeking to Contract with the Government Are Protected by the First Amendment, Regardless of Whether a Preexisting Commercial Relationship with the Government Exists*

Following the Supreme Court’s ruling in *Umbehr*, a government cannot terminate or refuse to renew a contract with an independent contractor in retaliation to the contractor exercising their First Amendment rights.<sup>174</sup> Yet, the Court has not explicitly determined whether the government can refuse to enter into a new contract based on a bidder’s political speech in circumstances where no preexisting commercial relationship between the government and the bidder exists.

Notably, in both *Umbehr*<sup>175</sup> and *O’Hare Truck Service*,<sup>176</sup> the Court did not determine whether First Amendment free speech protections also apply to new bidders of government contracts when no preexisting commercial relationship exists. In the Court’s opinion in *Umbehr*, Justice O’Connor stated: “we emphasize the limited nature of our decision today. Because *Umbehr*’s suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.”<sup>177</sup> Some constitutional commentators justify this absence of an answer to the question regarding a preexisting commercial relationship because the preexisting relationship factor was not at issue in either case presented to the Court— thus, the Court’s analysis naturally indicates that the holding should apply to all independent contracts, whether or not a preexisting commercial relationship exists.<sup>178</sup>

Since *Umbehr* and *O’Hare Truck Service*, the Supreme Court has not heard a case concerning the government’s ability to deny a contract to a new bidder based on the bidder’s political speech. However, the Court of Appeals for the Third Circuit and the Court of Appeals for the Fifth Circuit have both

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172. *Id.* at 668.

173. *See, e.g.,* Soave, *Andrew Cuomo’s Executive Order*, *supra* note 62.

174. *Umbehr*, 518 U.S. at 668.

175. *Id.* at 684.

176. *O’Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996).

177. *Umbehr*, 518 U.S. at 688.

178. *McClintock v. Eichelberger*, 169 F.3d 812, 818 (1999) (Roth, J., dissenting).

addressed this specific issue and have come to opposing conclusions, creating a circuit split that the Court will likely have to resolve in the future.

In *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378 (2006), the Court of Appeals for the Fifth Circuit held that a company was not required to have a prior commercial relationship in order to establish a claim that its bid was rejected by the city as a retaliation against the company's protected speech.<sup>179</sup> The court reasoned that "since First Amendment rights have been afforded to individuals applying for employment with the government, no different result should be afforded to bidders applying for 'employment' with the government under a bidding arrangement."<sup>180</sup> The court maintained that First Amendment protections afforded to individuals applying for employment with the government should be extended to bidders on government contracts as well, even when no prior commercial relationship exists.<sup>181</sup> Judge Davis explained that a contractor, like an individual job applicant, is protected under the First Amendment if their bid is rejected in retaliation for their exercise of protected free speech.<sup>182</sup> Judge Davis also stated that "the Court's analysis in *Umbehr* [led them] to conclude that the Court would not require a contractor to have a prior relationship with a governmental entity before being able to assert a First Amendment claim."<sup>183</sup> Consequently, First Amendment protections for contractors bidding for employment with the government should not be decided on whether a prior commercial relationship exists between the government and the contractor.

Conversely, in *McClintock v. Eichelberger*, 169 F.3d 816 (3rd Cir. 1999), the Court of Appeals for the Third Circuit held that First Amendment protections do not extend to circumstances in which the government refuses to enter into contracts with bidders where no preexisting commercial relationship existed.<sup>184</sup> The Third Circuit Court found that a government entity's refusal to award a contract based on the contractor's political activities was not a constitutional violation because there was no ongoing business relationship between the government entity and the contractor.<sup>185</sup> The Third Circuit Court reasoned that the lack of a resolution on the factor of a preexisting commercial relationship in the Supreme Court's opinions

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179. *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 386 (2006).

180. *Id.*

181. *Id.* at 385.

182. *Id.*

183. *Id.* at 386.

184. *McClintock v. Eichelberger*, 169 F.3d 812, 816 (3rd Cir. 1999).

185. *Id.* at 817.

in both *Umbehr* and *O'Hare Truck Service* justifies the holding that the protection should not be extended.<sup>186</sup> The court concluded that First Amendment protections for independent contractors established in *Umbehr* and *O'Hare Truck Service* should be limited to situations in which the retaliatory act involves the termination of an ongoing commercial relationship.<sup>187</sup>

However, the decision in *McClintock* was not unanimous. In fact, elements of Judge Roth's dissent were subsequently adopted by the Court of Appeals for the Fifth Circuit in *Oscar Renda Contracting*.<sup>188</sup> Judge Roth's main contention to the court's holding in *McClintock* was that "the Supreme Court's decision to extended First Amendment jurisprudence does not support the kind of status-based limitation on individual's rights of political expression and association that the majority's decision endorses."<sup>189</sup> Judge Roth further argued that the majority misinterpreted the language from the Supreme Court's holding in *Umbehr*, and that the following statement, "we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship,"<sup>190</sup> was in fact dictum.<sup>191</sup> Judge Roth further argued that the majority opinion "diminishe[d] the central proposition for which *Umbehr* stands: namely, the Court's '[recognition of] the right of independent contractors not to be terminated for exercising their First Amendment rights.'"<sup>192</sup> She relied upon the Supreme Court's decision in *Perry v. Sindermann*, a decision that "leads logically to the conclusion that independent contractors, like government employees, may not be disfavored by state actors in the employment process on grounds that offend the First Amendment."<sup>193</sup> She maintained that under the present state of the law, independent contractors have the same rights to sue as government employees who claim to have been denied employment for exercising their First Amendment rights.<sup>194</sup>

Judge Roth further asserted that even though the Supreme Court did not explicitly rule on the "preexisting commercial relationship" issue in *Umbehr* and *O'Hare Truck Service*, the "nature of the independent contractors' right to sue on First Amendment grounds when they are considered applicants for new contracts, rather than as having pre-existing business relationships

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186. *Id.*

187. *Id.*

188. *See Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378 (2006).

189. *McClintock*, 169 F.3d at 818.

190. *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 687 (1996).

191. *McClintock*, 169 F.3d at 818.

192. *See Umbehr*, 518 U.S. at 686; *see also McClintock*, 169 F.3d at 818.

193. *McClintock*, 169 F.3d at 818-19; *see generally Perry v. Sindermann*, 408 U.S. 593 (1972).

194. *McClintock*, 169 F.3d at 819.

with the government” can be inferred.<sup>195</sup> Therefore, it is reasonable to conclude that all, and not only some, contractors should fall within the standard set forth in both *Umbehr* and *O’Hare Truck Service*, and that the “opposite inference that this precedent should be understood to bar suits by contractors who are applicants for new contracts, is not logical.”<sup>196</sup>

Nevertheless, Judge Roth concludes her dissent by acknowledging that it “may be difficult for independent contractors . . . to prove that the government violated their First Amendment rights during the employment process . . . because a public employee who makes such a claim bears the burden of demonstrating that the alleged violation was a motivating factor in his failure to attain a contract.”<sup>197</sup> Yet, “the government is not entitled *per se* to a denial of liability simply because an independent contractor, who makes such a claim is bidding on a new contract.”<sup>198</sup> The same protections afforded to public employees, which are extended to independent contractors already working with the state, should also extend to independent contractors without an existing business relationship with the state. Having the protections differ based on the “status” of the relationship between the contractor and the state contradicts the protections the Supreme Court intended to affirm in the first place.

#### 4. States and Federal Legislatures Are Bound by the U.S. Constitution

Following Supreme Court precedents, political boycott is a form of protected free speech under the First Amendment,<sup>199</sup> and the government cannot condition a contract on the relinquishing of First Amendment rights.<sup>200</sup> This is precisely why Arizona Revised Statute § 35-393.01 and Kansas HB 2409 were held unconstitutional by two distinct federal courts.<sup>201</sup> In contrast, laws like New York’s Executive Order No. 157, which do not require a certification relinquishing First Amendments rights before entering into a state contract,<sup>202</sup> are not as blatantly unconstitutional. After all, a state

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195. *Id.* at 819–20.

196. *Id.* at 820.

197. *Id.*

198. *Id.*

199. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 886 (1982).

200. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

201. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1040 (2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1027 (D. Kansas 2018).

202. N.Y. COMP. CODES R. & REGS., tit. 9, § 8.157 (2016).

government is under no obligation to contract with anyone in the first place. Yet, such laws threaten freedom of conscience, and are a direct invasion upon one's protected civil liberties.<sup>203</sup> The legislative intent of such laws is to penalize American citizens who participate in political boycotts that the government dislikes. The legislative intent of such statutes is designed to discriminate against disfavored political expression.

Arizona's Revised Statute § 35-393.01 projected to prohibit the state from contracting with companies or individuals unless the contract includes "a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel."<sup>204</sup> This certification requirement unmistakably violates the Supreme Court's precedent from *Perry v. Sindermann* according to which "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest in free speech."<sup>205</sup> By requiring an independent contractor to forgo their protected interest in free speech by assuring non-engagement in BDS before obtaining a government contract, the law violates a well-established principle that the government cannot condition a contract on relinquishing First Amendment rights.

Kansas's HB 2409 similarly projected to require state employees, in their employment contract, to certify they would not engage in the BDS movement. The law conflicted with the individuals' protected interest in free speech and violates the First Amendment because: "It compels speech regarding protected political beliefs, associations and expression; restricts the political expression and association of government contractors; and discriminates against protected expression based on its content and viewpoint."<sup>206</sup> The law cannot stand under the Constitution because of its attempt to allow the state government to use its economic power to silence political speech. U.S. District Judge Crabtree's opinion granting a preliminary injunction blocking the enforcement of HB 2409 acknowledged that "[t]he Kansas Law's legislative history reveals that its goal is to undermine the message of those participating in a boycott of Israel. This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel."<sup>207</sup> Allowing the enforcement of HB 2409 would have essentially denied an independent contractor a state benefit, for which everyone else is eligible, only because

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203. Daponte-Smith, *supra* note 61.

204. ARIZ. REV. STAT. § 35-393.01 (LexisNexis 2020).

205. *Sindermann*, 408 U.S. at 597.

206. Nora Barrows-Friedman, *Federal Lawsuit Filed Against Kansas Anti-BDS Bill*, ELECTRONIC INTIFADA (Oct. 11, 2017), <https://electronicintifada.net/blogs/nora-barrows-friedman/federal-lawsuit-filed-against-kansas-anti-bds-bill> [<https://perma.cc/KH2A-M4YU>].

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

of the state's disapproval of their political views: this would have violated the First Amendment.

The same analytical framework can be used to argue against the constitutionality of anti-BDS laws in other states, and on the federal level. The legislative intent of these laws, regardless of whether the term BDS is found in the title or within the text, reveals that the objective is to deny individuals and companies benefits based on their political beliefs. While the government is free to decide who it contracts with, that decision cannot be based on a person relinquishing their protected interest in free speech.

At the federal level, S.720 and its sister bill H.R.1697, known as the Israeli Anti-Boycott Acts, also threaten constitutional precedent and First Amendment protections of free speech and free political association.<sup>208</sup> While these bills do not require a certification by a government employee, independent contractor, or business before entering into contract with the federal government, the same way proposed legislation in Arizona and Kansas did, they do propose imposing criminal financial penalties on companies engaging in BDS.<sup>209</sup> Although the revised bills remove the possibility of imprisonment for individuals engaging in BDS, the legislative intent is to criminalize participation in constitutionally protected boycotts.<sup>210</sup> By seeking to punish companies or individuals because of their political beliefs regarding Israel and Israeli policies, these measures are in contradiction with the Supreme Court's holdings that political boycotts are a protected form a free speech.<sup>211</sup> Thus, these measures constitute a grave attack on the First Amendment and civil liberties.<sup>212</sup> Even though the text found in S.720 reads that "[n]othing in this Act . . . shall be construed to diminish or infringe upon any right protected under the First Amendment,"<sup>213</sup> supplementary statements by the Bill's sponsors indicate otherwise. For example, Senator Mike Crapo (R-Idaho) described the bill as an attempt to "combat Boycott,

208. Israel Anti-Boycott Act, S. 720, 115th Cong. (1st Sess. 2017); Israel Anti-Boycott Act, H.R. 1697, 115th Cong. (1st Sess. 2017).

209. *Id.*

210. Brian Hauss, *The New Israel Anti-Boycott Act Is Still Unconstitutional*, ACLU (Mar. 7, 2018, 4:45 PM), <https://www.aclu.org/blog/free-speech/rights-protesters/new-israel-anti-boycott-act-still-unconstitutional> [<https://perma.cc/MT9G-FCCH>].

211. See NAACP v. Claiborne Hardware Co., 458 U.S. 891 (1982).

212. Glenn Greenwald, *In a Major Free Speech Victory, a Federal Court Strikes Down a Law that Punishes Supporters of Israel Boycott*, INTERCEPT (Jan. 31, 2018, 9:06 AM), <https://theintercept.com/2018/01/31/kansas-bds-law-free-speech/> [<https://perma.cc/PY6H-2M2M>].

213. Hauss, *supra* note 210.



Divestment, and Sanctions (BDS) efforts targeting Israel.”<sup>214</sup> Another sponsor, Senator Sherrod Brown (D-Ohio), also described the bill as “anti-BDS legislation.”<sup>215</sup>

5. *Anti-BDS Legislation: A New Era of McCarthyism in the United States*

While some anti-BDS laws may be revised and amended in order to pass constitutional muster, the legislative intent of these laws, i.e. to curtail political speech when directed at Israel, should be a matter of concern to all. Anti-BDS executive orders, like the ones made by the governors of Louisiana, Maryland, New York, Wisconsin, Kentucky, South Dakota, and most recently by President Trump, have been characterized as McCarthyistic attacks.<sup>216</sup> Unilaterally determining that private businesses and individual citizens are to be punished for holding political opinions that the government does not agree with, is “wholly illiberal . . . [c]ompanies should be able to engage in political activity—to support, or decline to support, various movements—without fearing retaliation from the government.”<sup>217</sup> The ACLU repeatedly advocates that campaigns to divest and boycott, like the ones employed against apartheid South Africa and the National Rifle Association, are a key feature of American politics.<sup>218</sup> Therefore, “[t]here should be no free speech exclusion for American citizens who support Palestinian rights.”<sup>219</sup>

B. *The European Union’s Charter of Fundamental Rights and the European Convention on Human Rights Allow for BDS Activities*

Concerns with the constitutionality of anti-BDS measures are raised not only in the United States, but internationally as well. Although the European Union’s official policy does not advocate for BDS, “[t]he EU stands firm in protecting freedom of expression and freedom of association in line

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214. Press Release, U.S. Senator Ben Cardin, Cardin, Portman Amend Isr. Anti-Boycott Act (Mar. 3, 2018) (on file with author) (quoting Senate Banking Committee Chairman Crapo), <https://www.cardin.senate.gov/newsroom/press/release/cardin-portman-amend-israel-anti-boycott-act> [<https://perma.cc/GJJ5-J33J>].

215. Hauss, *supra* note 210.

216. Soave, *Andrew Cuomo’s Executive Order*, *supra* note 62.

217. *Id.*

218. Hauss, *supra* note 210.

219. *Challenging Anti-BDS Legislation*, PALESTINE PORTAL, <https://www.palestineportal.org/action-advocacy/direct-action/what-is-bds/anti-bds-legislation/challenging-anti-bds-legislation/> [<https://perma.cc/V6YW-JXD4>] (last visited Apr. 11, 2020).

with the Charter of Fundamental Rights of the European Union, and in Article 10 of the European Convention on Human Rights.”<sup>220</sup>

Engaging in BDS is a protected activity under both the charter<sup>221</sup> and the convention.<sup>222</sup> However, member states like France have attacked BDS through national legislation, by using strict anti-discrimination laws allowing courts to determine pro-BDS speech as incitement to hatred.<sup>223</sup> In France, an individual can be criminally prosecuted just by advocating for BDS.<sup>224</sup> French laws criminalizing all BDS activity fundamentally undermine EU Law.<sup>225</sup>

In France, pro-BDS speech is considered to be hate speech, even though the EU affirms that pro-BDS speech is protected speech.<sup>226</sup> France is now one of the few countries in the world—and the only democracy—where it is illegal to call for BDS.<sup>227</sup> Human Rights League, a Paris-based NGO, said the French Court of Cassation ruling, which affirmed the criminal conviction of twelve BDS activists by classifying their pro BDS speech as incitement, constituted an “infringement of freedom of expression” and further described it as “a consequence of attempts to silence all criticism of the policies of Israeli governments.”<sup>228</sup> Furthermore, French legal experts have claimed that anti-BDS laws are “questionable in terms of freedom of expression . . . leav[ing] little or no room for differentiation between campaigns motivated by racist beliefs and those motivated by political considerations.”<sup>229</sup> Additionally, critics point to the hypocrisy of such a law in a country like France, which prides itself on principles of freedom of speech, particularly after the Charlie Hebdo attack.<sup>230</sup> Affirmed by the nation’s highest court, the judgment holding twelve activists criminally

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220. Eur. Parl. Doc. (SEC E-005122) 2016 (answers of Vice-President Mogherini).

221. E.U. Charter of Fundamental Rights art. 11–12, Dec. 18, 2000, 2000 O.J. (C 364) 01.

222. European Convention on Human Rights (Protocol No. 15) art. 10, CETS 231 (2013).

223. Dodman, *supra* note 129.

224. *Id.*

225. *Id.*

226. See Jean-Baptiste Jacquin, *L’appel à Boycotter Israël Déclaré Illegal*, LEMONDE (Nov. 6, 2015), [https://www.lemonde.fr/police-justice/article/2015/11/06/l-appel-au-boycott-de-produits-israeliens-est-illegal\\_4804334\\_1653578.html? \[https://perma.cc/XZQ6-EY6B\]](https://www.lemonde.fr/police-justice/article/2015/11/06/l-appel-au-boycott-de-produits-israeliens-est-illegal_4804334_1653578.html? [https://perma.cc/XZQ6-EY6B].).

227. See, *cf.*, *id.*

228. Dodman, *supra* note 129.

229. *Id.*

230. Greenwald, *supra* note 212.

liable for their pro-BDS speech is currently pending before the European Court of Human Rights.<sup>231</sup>

#### IV. PROPOSED SOLUTION

The wave of anti-BDS legislation has had a chilling effect on the civil liberties of U.S. and EU citizens, specifically on the right to free political expression and association. Anti-BDS legislation attempts to silence the budding global movement that calls on Israel to comply with international law and universal principles of human rights. American and European courts must evaluate anti-BDS laws with the urgency necessary to protect the civil liberties of their citizens, as well as the human rights of the Palestinian people. Prioritizing the interest of shielding a foreign government's practices from criticism instead of protecting people's civil liberties will set a dangerous precedent.

##### *A. U.S. Courts Should Uphold the First Amendment and Protect the Civil Liberties of the American People*

Now that anti-BDS laws have been passed in more than half of U.S. states, “the vast majority of American citizens are barred from supporting the BDS movement against the Israeli occupation without incurring some form of sanction or limitation imposed by their state.”<sup>232</sup> Furthermore, with Trump's Executive Order 13899 and various anti-BDS legislation pending in both the Senate and the House, growing fears regarding the penalization and criminalization of political speech are ever-present. Legislative actions to punish individuals for their political beliefs about Israel and its policies are unmistakably unconstitutional and represent an infringement on free speech and political activism.<sup>233</sup> By backing a free speech exception for Israel, both the federal and various state governments are creating a template for a broader assault on the First Amendment.<sup>234</sup>

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231. Marco Perolini, *Whose Human Rights? The Marginalisation of Dissent in France and Spreading*, OPENDEMOCRACY.NET (Apr. 20, 2018), <https://www.opendemocracy.net/marco-perolini/whose-human-rights-marginalisation-of-dissent-in-france-and-spreading> [perma.cc/Y84L-MXBR].

232. Greenwald, *supra* note 212.

233. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that political boycott is protected free speech).

234. Lara Friedman, *U.S. Politicians Are Backing a Free Speech Exception for Israel — & Creating a Template for Broader Assault on the First Amendment*, MEDIUM.COM (Mar. 19, 2019), [https://medium.com/@LFriedman\\_FMEP/u-s-politicians-are-backing-a-free-speech-exception-for-israel-creating-a-template-for-broader-cbe406fdf3b7](https://medium.com/@LFriedman_FMEP/u-s-politicians-are-backing-a-free-speech-exception-for-israel-creating-a-template-for-broader-cbe406fdf3b7) [https://perma.cc/6YMU-2SGE].

Courts have the duty to step in when legislation infringes on citizens' First Amendment rights. While no enacted anti-BDS laws explicitly take away the right to advocate for Palestinian rights, they do punish individuals for their political beliefs by allowing States to choose with whom to contract based on the other party's political association. U.S. District Judge Humetewa found Arizona Revised Statute § 35-393.01 (which demanded state contractors to renounce BDS in order to obtain a contract) unconstitutional because it would be using Arizona's economic power to deny a citizen a contract due to his or her political speech.<sup>235</sup> Likewise, U.S. District Judge Crabtree acknowledged that the goal of Kansas's HB 2409 was to "undermine the message of those participating in a boycott of Israel . . . [t]his is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel."<sup>236</sup> Denying an independent contractor a state benefit for which everyone else is eligible, only because of the state's disapproval of their political views, is a clear violation of the First Amendment.<sup>237</sup>

The central constitutional questions facing the majority of anti-BDS laws pertain to the government's ability to terminate or deny the renewal of contracts based on the political speech of an independent contractor, and whether the presence of a preexisting commercial relationship between the government and the independent contractor is a factor to be taken into consideration.<sup>238</sup> As Fifth Circuit Judge Davis contends, a company is not required to have a prior commercial relationship in order to establish a claim that its bid was rejected by the city in retaliation of its exercise of protected speech.<sup>239</sup> Conversely, the Third Circuit came to the opposite holding in *Oscar Renda Contr., Inc. v. City of Lubbock*, but Judge Roth in her dissent agrees with Judge Davis and adds, that "the Supreme Court's decision to extend First Amendment jurisprudence does not support the kind of status-based limitation on individual's rights of political expression and association."<sup>240</sup> Judge Roth's argument that the First Amendment protection should extend to independent contractors who do not have a preexisting commercial

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235. Fischer, *supra* note 73.

236. ARIZ. REV. STAT. § 35-393.01 (LexisNexis 2020).

237. See generally *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that political views cannot be a prerequisite to receiving a government contract).

238. *Letter from ACLU*, *supra* note 99.

239. *Oscar Renda Contracting v. City of Lubbock*, 463 F.3d 378, 386 (5th Cir. 2006).

240. *Id.* at 385 (citing *McClintock v. Eichelberger*, 169 F.3d 812, 816–17, 820 (3d Cir. 1999)).

relationship with the state is a particularly persuasive argument, founded in Supreme Court precedent.<sup>241</sup> Viewpoint discrimination and creating a status-based limitation on individual's political expression and association, is in direct violation of the protections found in the U.S. Constitution.

*B. European Union Enforcement Mechanisms Regarding the Non-Compliance of Member State Legislation with EU Law*

Pertaining to advocacy for Palestine within the European Union, the Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights both protect the freedom of expression and freedom of association of citizens, even when applied to BDS actions.<sup>242</sup> Nonetheless, some member states such as France have passed legislation in contravention to EU Law, as exemplified by the French Court Cassation ruling affirming the criminal conviction of twelve BDS activists for their political speech. This attack on free speech and political association is particularly disconcerting coming from a nation that prides itself on its free speech protections.<sup>243</sup> In France, the free speech exception as applied to critiques of the Israeli government for its noncompliance with international law is unprecedented.<sup>244</sup> Advocating for BDS is deemed as an illegal act in France and the criminal prosecution that can ensue violates the Charter of Fundamental Rights.<sup>245</sup> The French Court's decision will soon be reviewed by the European Court of Human Rights, which will likely determine the criminalization of BDS activists for their political speech to be non-compliant with EU policy.

Furthermore, the Court of Justice of the European Union's (CJEU) recent enforcement of the labeling requirement of products made in Israeli settlements when imported into EU territory has highlighted possible tensions between EU states' national legislation and EU Law pertaining to BDS activity.<sup>246</sup> However, the ruling also illustrates the importance of the CJEU in ensuring EU states comply with EU law: Although member states such as France and the Netherlands may continue voicing their disagreement with various EU policies, such as the labeling requirement, they continue

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241. See *Perry v. Sindermann*, 408 U.S. 597 (1972); see *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 716–17 (1996); see *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 673 (1996).

242. E.U. Charter of Fundamental Rights art. 11–12, Dec. 18, 2000, 2000 O.J. (C 364) 01; European Convention on Human Rights (Protocol No. 15) art. 10, CETS 231 (2013).

243. *Dodman*, *supra* note 129.

244. *Id.*

245. *Id.*

246. Avishai, *The E.U. vs. B.D.S.: The Politics of Israel Sanctions*, *supra* note 29; Ralph Ahren, *On Labeling Settlement Goods, the European Union is Far from United*, *TIMES OF ISRAEL* (Dec. 2, 2019), <https://www.timesofisrael.com/on-labeling-settlement-goods-the-european-union-is-far-from-united/>[<https://perma.cc/TD8E-75LL>].

to be subjected to CJEU jurisdiction and thus must abide by CJEU rulings.<sup>247</sup> Fundamentally, the CJEU must continue ensuring that member state legislation does not attack any EU citizen's right to freedom of expression and freedom of association.

### *C. The Effects of Anti-BDS Laws in Palestine*

Chilling and criminalizing free speech regarding BDS and advocating for Palestinian human rights advocacy has a direct effect on the ground in Palestine. Normal avenues of diplomacy have not been effective in compelling Israel to change its policies; thus, the BDS movement continues to put pressure on the Israeli state to comply with international law and universal principles of human rights. Israel continuously violates international laws, including numerous U.N. Resolutions and the Laws of War and Occupation as stated in the Fourth Geneva Convention.<sup>248</sup> By silencing calls for the recognition of Palestinian self-determination, anti-BDS legislation continues to allow the Israeli government to further subjugate the Palestinian people to various human rights abuses.<sup>249</sup> Advocating for Palestinian human rights is a political and humanitarian cause important to many, curtailing that right to call for justice will have a chilling effect on speech that will be felt across the globe.

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247. Court of Justice of the European Union (CJEU), EUROPA, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited Apr. 12, 2020).

248. *List of International Law Violations by the State of Israel*, ITISAPARTHEID.ORG, [http://itisapartheid.org/Documents\\_pdf\\_etc/IsraelViolationsInternationalLaw.pdf](http://itisapartheid.org/Documents_pdf_etc/IsraelViolationsInternationalLaw.pdf) [<https://perma.cc/Q66T-TXQK>] (last visited Apr. 12, 2020).

249. *Israel and Occupied Palestinian Territories*, AMNESTY INT'L, <https://www.amnestyusa.org/countries/israel-and-occupied-palestinian-territories/> (last visited Apr. 12, 2020).

