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The Right to Boycott: Anti-BDS Laws Violate the First Amendment to Protect Apartheid

Buchanan Waller†

Introduction

Israel is an apartheid state.¹ Palestinians in the West Bank are restricted from traveling on the same roads as Israeli settlers.² They are restricted in where they can travel, whom they can marry, and which political parties they can join.³ Israel’s National Security Minister has ordered the police to forcibly prohibit any display of the Palestinian flag.⁴ Palestinians can be forcibly evicted from their

†. Buchanan Waller is a 2023 graduate of the University of Minnesota Law School. I would like to thank the entire team at the *Minnesota Journal of Law & Inequality*. As always, I want to thank my wife Nycole for her unwavering love and support. I would like to thank Brian Chval, Maysa Alqaisi, and Andrea McGauley. Above all, I would like to recognize the many people who have lost their lives in the fight for a free Palestine, or while simply trying to survive, including Rachel Corrie, Aaron Bushnell, Shireen Abu Akleh, and Yazan al-Kafarneh.

1. See sources cited *infra* note 8; see also B’TSELEM, FORBIDDEN ROADS: ISRAEL’S DISCRIMINATORY ROAD REGIME IN THE WEST BANK (2004) (describing the system of checkpoints and restrictions which govern the ability of Palestinians to travel in the West Bank).

2. See *Over 700 Road Obstacles Control Palestinian Movement Within the West Bank*, UNITED NATIONS OFF. FOR COORDINATION HUMANITARIAN AFFS. (Oct. 8, 2018), <https://www.ochaopt.org/content/over-700-road-obstacles-control-palestinian-movement-within-west-bank> [<https://perma.cc/RL5A-DPDW>] (describing the effect of travel restrictions and road checkpoints on Palestinians).

3. See B’TSELEM, *supra* note 1; Josef Federman, *New Israeli Rules on Foreigners Tighten Control in West Bank*, AP NEWS (Sept. 5, 2022), <https://apnews.com/article/travel-middle-east-israel-west-bank-205608f835d54039a878cabe153ed5d> [<https://perma.cc/9PBL-HY2P>] (detailing strict new Israeli restrictions on foreign spouses of Palestinians); Henriette Chacar, *Israel’s Knesset Passes Law Barring Palestinian Spouses*, REUTERS (Mar. 10, 2022), <https://www.reuters.com/world/middle-east/israels-knesset-passes-law-barring-palestinian-spouses-2022-03-10/> [<https://perma.cc/2PST-2USU>] (describing a new Israeli law “denying naturalization to Palestinians from the occupied West Bank or Gaza married to Israeli citizens, forcing thousands of Palestinian families to either emigrate or live apart.”); AMNESTY INT’L, ISRAEL’S APARTHEID AGAINST PALESTINIANS 108–13 (2022) (detailing the various ways Palestinians in the occupied territories and Israel proper are excluded from the formal political process).

4. Elliot Gotkine, *Israel’s Ben Gvir Orders Police to Take Down Palestinian Flags, Testing Limits of his Authority*, CNN (Jan. 9, 2023), <https://www.cnn.com/2023/01/09/middleeast/israel-ben-gvir-palestinian-flags-intl/index.html> [<https://perma.cc/5YMY-Q6Y7>] (describing how an extremist member of the newly formed government ordered the removal of Palestinian flags, and noting

homes with no recourse.⁵ Palestinian journalists and civilians are murdered with impunity.⁶ Israeli settlers undertake pogroms—violent mob attacks—with tacit support from their government.⁷ It

that while this order may face legal scrutiny, the Israeli government has forcibly prohibited flying the Palestinian flag in the past, such as when police beat mourners to remove Palestinian flags at the funeral of Shireen Abu Akleh).

5. See Bethan McKernan & Quique Kierszenbaum, *Israeli Court Paves Way for Eviction of 1,000 Palestinians from West Bank Area*, *GUARDIAN* (May 5, 2022), <https://www.theguardian.com/world/2022/may/05/israeli-court-evict-1000-palestinians-west-bank-area> [<https://perma.cc/N4H5-YFC5>] (describing a ruling by Israel’s Supreme Court holding that Israel can evict over 1,000 rural villagers to make room for facilities to train Israel Defense Forces (IDF) soldiers); see generally *Maps Illustrating the Changing Face of Palestine / Israel*, *ISRAELI COMM. AGAINST HOUSE DEMOLITIONS*, <https://icahd.org/maps-maps-illustrating-demolitions-and-displacements-by-month/> [<https://perma.cc/6BXZ-2YH9>] (documenting home demolitions and Palestinian displacements by month).

6. See Murtaza Hussain, *Israel Killed Up to 192 Palestinian Civilians in 2021 Attacks on Gaza*, *INTERCEPT* (Dec. 9, 2021), <https://theintercept.com/2021/12/09/israel-attacks-gaza-palestine-civilians-killed/> [<https://perma.cc/PL5V-B2A2>] (“More than 70 percent of the reported attacks that killed civilians had no corresponding reports of militants hit alongside them, meaning civilians were the only victims.”); Zeena Saifi, Eliza Mackintosh, Celine Alkhaldi, Kareem Khadder, Katie Polgase, Gianluca Mezzofiore & Abeer Salman, *They Were Shooting Directly at the Journalists: New Evidence Suggests Shireen Abu Akleh was Killed in a Targeted Attack by Israeli Forces*, *CNN* (May 26, 2022), <https://www.cnn.com/2022/05/24/middleeast/shireen-abu-akleh-jenin-killing-investigation-cmd-intl/index.html> [<https://perma.cc/JK3Q-CSXF>] (providing extensive evidence that a prominent Palestinian journalist was assassinated by Israel); *UN: Possible Israel Crimes against Humanity in Gaza*, *AL JAZEERA* (Feb. 28, 2019), <https://www.aljazeera.com/news/2019/2/28/un-possible-israel-crimes-against-humanity-in-gaza> [<https://perma.cc/7AL8-6UHP>] (citing a UN report which found that “snipers targeted people clearly identified as children, health workers and journalists.”); *Journalists Casualties in the Israeli-Gaza War*, *COMM. TO PROTECT JOURNALISTS*, <https://cpj.org/2024/03/journalist-casualties-in-the-israel-gaza-conflict/> [<https://perma.cc/JJN4-4CCA>] (finding that 89 Palestinian journalists had been killed in approximately four months of war in Gaza, with others missing and family members of journalists also killed; the IDF has refused to guarantee the safety of journalists).

7. Bethan McKernan, *‘Never Like This Before’: Settler Violence in West Bank Escalates*, *GUARDIAN* (Feb. 27, 2023), <https://www.theguardian.com/world/2023/feb/27/israeli-settler-violence-in-west-bank-escalates-huwara> [<https://perma.cc/6B74-CHQA>] (describing how, with the support of IDF soldiers, Israeli settlers killed a Palestinian civilian, injured around 100 civilians, and burned dozens of houses down in a riot dubbed “Kristallnacht in Huwara” by an Israeli commentator); *Settler Extremists are Sowing Terror, Huwara Riot was a ‘Pogrom,’ Top General Says*, *TIMES ISR.* (Feb. 28, 2023), <https://www.timesofisrael.com/settler-extremists-sowing-terror-huwara-riot-was-a-pogrom-top-general-says/> [<https://perma.cc/8LVW-FS7S>] (“[H]undreds of people ran riot through Huwara and other nearby towns, leaving one Palestinian dead and several others badly injured, as well as torching homes and cars, and killing sheep. Two days later, no one is still held [in custody] over the unprecedented rampage.”); Rina Bassist, *Israel Should ‘Wipe Out’ Palestinian Village of Huwara, Says Far-Right Minister Smotrich*, *AL-MONITOR* (Mar. 1, 2023), <https://www.al-monitor.com/originals/2023/03/israel-should-wipe-out-palestinian-village-huwara-says-far-right-minister> [<https://perma.cc/KFG2-LELV>] (quoting Israeli Finance

is simple: between the Jordan River and the Mediterranean Sea, Israel is in complete control, and Palestinians are second class citizens. International human rights groups—including Amnesty International, Human Rights Watch, and B’Tselem—have described Israel’s treatment of the Palestinians as “apartheid.”⁸

The United States is the biggest financial and political supporter of Israel.⁹ However, over the past twenty years, American citizens have become increasingly critical of Israel’s apartheid policies.¹⁰ In 2005, Palestinian civil society groups issued a call for an international movement to boycott, divest, and sanction (BDS) Israel.¹¹ Modeled after the South African anti-apartheid strategy, BDS has gained supporters in the United States.¹² Troubled by this development, thirty-eight U.S. states have passed legislation to penalize supporters of BDS.¹³ These anti-BDS laws typically take two forms. First, they condition state contracts on the contractor signing a pledge not to boycott Israel.¹⁴ Second, they require state investment funds to divest from any business or organization which boycotts Israel.¹⁵ In Texas, for example, this meant that Hurricane Harvey victims had to sign a pledge vowing they would not boycott Israel in order to get relief from the government.¹⁶

Minister Bezalel Smotrich voicing his qualified support for the pogrom: “The Palestinian Village of Hawara should be wiped out of the Earth. The Israeli government needs to do it and not private citizens.”)

8. AMNESTY INT’L, *supra* note 3; HUM. RTS. WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION 1 (2021); B’TSELEM, A REGIME OF JEWISH SUPREMACY FROM THE JORDAN RIVER TO THE MEDITERRANEAN SEA: THIS IS APARTHEID 1 (2021) (“The Israeli regime implements laws, practices, and state violence designed to cement the supremacy of one group—Jews—over another—Palestinians.”).

9. Jake Horton, *Israel-Gaza: How Much Money Does Israel Get from the US?*, BBC NEWS (May 24, 2021), <https://www.bbc.com/news/57170576> [<https://perma.cc/S7ND-XAW5>].

10. *See, e.g.*, Lydia Saad, *Americans Still Pro-Israel, Though Palestinians Gain Support*, GALLUP (Mar. 17, 2022), <https://news.gallup.com/poll/390737/americans-pro-israel-though-palestinians-gain-support.aspx> [<https://perma.cc/5HPX-ZZ39>] (finding that a near-majority of young people and a majority of liberals support Palestine more than Israel).

11. *What is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> [<https://perma.cc/YGP6-SX2U>].

12. *Id.*

13. *Legislation*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/> [<https://perma.cc/PQN4-6U59>].

14. *Id.*

15. *Id.*

16. *Texas City Requires Israel Pledge for Hurricane Relief*, BBC NEWS (Oct. 20, 2017), <https://www.bbc.com/news/world-us-canada-41688999> [<https://perma.cc/J9U2-AS45>].

Supporters of BDS have challenged the constitutionality of anti-BDS laws. District courts in Kansas, Texas, and Arizona have found that those states' anti-BDS laws violate the First Amendment by prohibiting political expression and compelling speech.¹⁷ However, in June 2022, the Eighth Circuit upheld an Arkansas anti-BDS law as constitutional.¹⁸ The ACLU appealed the decision, but the Supreme Court declined to hear the case.¹⁹

This Article will examine the history of the anti-apartheid movement and development of anti-BDS laws, analyze the Eighth Circuit's decision in *Arkansas Times LP v. Waldrip*, and suggest a path forward for opponents of anti-BDS laws. Part I of this Article will explore the history of political boycotts in the United States. In particular, this section will focus on boycotts by civil rights leaders in opposition to discriminatory regimes in the United States, South Africa, and Israel. Part I will conclude by providing background on the development of anti-BDS laws in the United States and legal challenges to them, culminating in the Eighth Circuit's decision in *Arkansas Times LP v. Waldrip*. Part II of this Article will analyze the *Waldrip* decision. Part II will argue that the Eighth Circuit should have ruled that Arkansas's anti-BDS statute violates the First Amendment by restricting political expression and compelling speech. Further, the Eighth Circuit's *Waldrip* decision disregards both important legal precedents and the general importance of political boycotts to American civic life. This Article will conclude by outlining future strategies for opponents of anti-BDS laws to use as the courts continue to deliberate on the ability of state governments to restrict boycotts.

I. Background

The boycotts which anti-BDS laws seek to prohibit are nothing new. Economic boycotts have been used in the United States since the American Revolution.²⁰ In particular, Americans—from

17. See *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019) (holding that a Texas anti-BDS law unconstitutionally compelled speech and restricted a protected right to boycott); *Jordahl v. Brnovich*, 366 F. Supp. 3d 1016 (D. Ariz. 2018) (granting a preliminary injunction to an attorney who participated in BDS, causing the state to later change its law); *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018) (holding that a Kansas anti-BDS law unconstitutionally compelled speech).

18. *Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022).

19. Eugene Volokh, *S. Ct. Denies Review of Eighth Circuit En Banc Case Upholding Arkansas "Anti-BDS" Statute*, REASON (Feb. 21, 2023), <https://reason.com/volokh/2023/02/21/s-ct-denies-review-of-eighth-circuit-en-banc-case-upholding-arkansas-anti-bds-statute/> [<https://perma.cc/76L9-YA6B>].

20. JOHN W. TYLER, SMUGGLERS AND PATRIOTS: BOSTON MERCHANTS AND THE

abolitionists seeking to end slavery to civil rights activists protesting Jim Crow segregation—have historically used boycotts and other forms of economic divestment to protest racial discrimination.²¹ More recently, American activists engaged in boycotts to help end South Africa’s regime of racial apartheid.²² The BDS movement is simply a continuation of this age-old strategy.

A. *Boycotts in the American Civic Tradition*

The Supreme Court has acknowledged boycotts are “deeply embedded in the American political tradition.”²³ Indeed, the practice of political boycotting predates the founding of the United States. Merchants in colonial America signed agreements not to buy or sell British goods in response to British taxes on imported goods.²⁴ Several founding fathers helped to organize these boycotts, culminating in the Boston Tea Party.²⁵

Boycotts have also been a common tactic for political activists fighting for racial equality. Around 1790, Quakers started the international Free Produce Movement, urging their followers to boycott food harvested by slaves.²⁶ Quaker abolitionist Elizabeth Heyrick wrote a widely distributed pamphlet advocating a boycott of slave-harvested sugar, calling it “The Shortest, Safest, and Most Effectual Means of Getting Rid of Slavery.”²⁷ At the height of the Free Produce Movement, it is estimated that 400,000 British and American boycotters had completely given up sugar in protest of slavery.²⁸ The boycott movement spread from Quakers to Black activists. Black abolitionist Frances Ellen Watkins described the Free Produce boycott as “the harbinger of hope, the ensign of

ADVENT OF THE AMERICAN REVOLUTION 111–16 (1986).

21. Willy Blackmore, *The Boycott’s Abolitionist Roots*, NATION (Aug. 14, 2019), <https://www.thenation.com/article/archive/boycott-sugar-slavery-bds/> [https://perma.cc/G8CX-7HES]; *Montgomery Bus Boycott*, C.R. DIGIT. LIBR., https://crdl.usg.edu/events/montgomery_bus_boycott/ [https://perma.cc/6Z2E-QZQM].

22. *How U.S. Activists Helped Push South Africa Away From Apartheid*, NPR (Dec. 7, 2013), <https://www.npr.org/templates/story/story.php?storyId=249494278> [https://perma.cc/MM22-QC6N].

23. *Citizens against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

24. TYLER, *supra* note 20.

25. *See id.* at 171–210 (describing the roles of John Hancock and Samuel Adams in organizing opposition to the importation of British goods).

26. *See* Carol Faulkner, *The Root of the Evil: Free Produce and Radical Antislavery, 1820-1860*, 27 J. EARLY REPUBLIC 377, 380 (2007) (describing how “calls for abstinence from slave products accompanied the earliest calls for abolition”).

27. *Id.*

28. *Id.*

progress, and a means of proving the consistency of our principles and the earnestness of our zeal.”²⁹

In the twentieth century, U.S. civil rights activists continued to use boycotts as a tactic. Most famously, civil rights activists including Rosa Parks and Martin Luther King Jr. organized the Montgomery Bus Boycott in Alabama.³⁰ The boycott was a massive success, resulting in reduced revenue for Montgomery’s bus company and, eventually, a court decision prohibiting segregation on buses.³¹ The Montgomery Bus Boycott galvanized the civil rights movement, but it was just one of many boycotts successfully employed by civil rights activists. After the Montgomery boycott, a similar boycott was carried out by civil rights activists in Tallahassee, Florida.³² Boycotts were a common and often effective tactic used by civil rights activists.

At the height of the civil rights movement in the 1960s, the Supreme Court had not yet considered the constitutionality of political boycotts.³³ The Supreme Court had only ruled on the right to use boycotts in labor disputes and non-economic forms of advocacy which didn’t target businesses.³⁴ Modern precedent for the constitutional protection of boycotts was established in *NAACP v. Claiborne Hardware Co.*, in which white business owners tried to hold civil rights boycotters liable for financial losses caused by the boycott.³⁵

The boycott in Claiborne County, Mississippi, began in 1966.³⁶ Local Black leaders called for the integration of public schools, desegregation of bus stations, hiring of Black police officers, and better treatment of Black residents by the police.³⁷ When the white community did not accept the demands, several hundred Black

29. BENJAMIN QUARLES, *BLACK ABOLITIONISTS* 76 (1969).

30. C.R. DIGIT. LIBR., *supra* note 21.

31. *Id.*

32. See Gerald Ensley, *The Ride to Equality Started 60 Years Ago*, TALLAHASSEE DEMOCRAT (May 23, 2016), <https://www.tallahassee.com/story/news/2016/05/20/bus-boycott-60-years-later/84546580/> [<https://perma.cc/9N8P-JGK3>] (describing the seven-month boycott of buses in Tallahassee, initiated a few months after the beginning of the Montgomery boycott).

33. *Boycotting A Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U.L. REV. 1301, 1315 (2018).

34. *Id.*

35. 458 U.S. 886 (1982).

36. *Id.* at 889.

37. *Id.* The list of demands, entitled “Demands for Racial Justice,” also included “public improvements in black residential areas, selection of blacks for jury duty . . . [and] that ‘Negroes are not to be addressed by terms as ‘boy,’ ‘girl,’ ‘shine,’ ‘uncle,’ or any other offensive term, but as ‘Mr.,’ ‘Mrs.,’ or ‘Miss,’ as is the case with other citizens.” *Id.*

residents unanimously voted at a National Association for the Advancement of Colored People (NAACP) meeting to boycott Claiborne County's white-owned businesses.³⁸ Black members of the community almost universally observed the boycott.³⁹ In 1969, a group of white business owners sued the NAACP, Mississippi Action for Progress, and 146 individuals who participated in the boycott, seeking damages for lost profits and an injunction to end the boycott.⁴⁰ After years of litigation, the Supreme Court finally heard the case in 1982.⁴¹ In an 8-0 opinion, the Court held "the boycott clearly involved constitutionally protected activity."⁴² Crucially, Justice Stevens distinguished the NAACP action from mere economic action and recognized withholding patronage as "peaceful political activity" protected by the First Amendment.⁴³ *Claiborne's* protection of political boycotts under the First Amendment recognized the long history of boycotts as part of the American civic tradition.

Since *Claiborne*, political boycotts have been consistently employed by activists from across the political spectrum. In 2016, North Carolina passed House Bill 2 (HB2), mandating that residents only use restrooms corresponding to the gender they were assigned at birth.⁴⁴ In response, activists from across the country organized a boycott of North Carolina.⁴⁵ Bruce Springsteen canceled a concert in Greensboro.⁴⁶ PayPal canceled a plan to expand into the state, leading to an estimated loss of 450 jobs and \$25 million for the local economy.⁴⁷ The NBA moved its 2017 All-Star Game out of

38. *Id.* at 900.

39. *Id.*

40. *Id.* at 889.

41. *Id.* at 889–98.

42. *Id.* at 911.

43. *Id.* at 913.

44. Colleen Jacobs & Daniel Trotta, *Seeking End to Boycott, North Carolina Rescinds Transgender Bathroom Law*, REUTERS (Mar. 30, 2017), <https://www.reuters.com/article/us-north-carolina-lgbt/seeking-end-to-boycott-north-carolina-rescinds-transgender-bathroom-law-idUSKBN1711V4> [<https://perma.cc/TYZ6-5R9M>].

45. *Id.*

46. Amanda Holpuch, *Bruce Springsteen Pulls out of North Carolina Concert over Anti-LGBT Law*, GUARDIAN (Apr. 9, 2016), <https://www.theguardian.com/music/2016/apr/08/bruce-springsteen-cancels-north-carolina-concert-lgbt-discrimination-law> [<https://perma.cc/MEE6-7ZPG>] (noting that Springsteen said of the cancellation, "Some things are more important than a rock show . . .").

47. Jon Kamp & Valerie Bauerlein, *PayPal Cancels Plan for Facility in North Carolina, Citing Transgender Law*, WALL ST. J. (Apr. 5, 2016), <https://www.wsj.com/articles/paypal-cancels-plans-for-operations-center-400-jobs-over-north-carolinas-transgender-law-1459872277> [<https://perma.cc/U7BD-9WYD>].

the state.⁴⁸ Additionally, many government entities joined the boycott of North Carolina. Six states and numerous city governments issued orders prohibiting their government employees from traveling to North Carolina.⁴⁹ Eventually, the economic strain of the boycott forced North Carolina to repeal HB2.⁵⁰ The North Carolina boycott demonstrated both the effectiveness of political boycotts and their widespread acceptance from institutions of American civic life.⁵¹

B. *The South African Anti-Apartheid Movement*

Activists in the United States have also used boycotts and advocacy for economic sanctions to help end discriminatory regimes in other countries. In the case of South Africa, a broad coalition of American activists joined an international movement to use boycotts to put pressure on the apartheid regime.⁵² This effort was massively successful and the main precedent for the movement to boycott Israel.⁵³

48. Jill Martin, *NBA Moves 2017 All-Star Game to New Orleans*, CNN (Aug. 19, 2016), <https://www.cnn.com/2016/08/19/sport/nba-all-star-game-moved-to-new-orleans> [https://perma.cc/D3PK-KA3A].

49. See *Bathroom Bill to Cost North Carolina \$3.76 Billion*, CNBC (Mar. 27, 2017), <https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html> [https://perma.cc/3R47-K735].

50. Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals 'Bathroom Bill'*, CNN (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [https://perma.cc/Z4PQ-Q8EC].

51. See, e.g., Samantha Schmidt, *Sean Hannity's Fans Call for Keurig Boycott After Coffeemaker Company Pulls Ads from His Show*, WASH. POST (Nov. 13, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/11/13/sean-hannitys-fans-call-for-keurig-boycott-after-coffee-maker-pulls-ads-from-his-show> [https://perma.cc/MCU9-Y7WG] (describing a conservative boycott of Keurig after they pulled advertising from a Fox News show); *Why Donald Trump Wants Fans to Boycott the NFL*, ECONOMIST (Sept. 27, 2017), <https://www.economist.com/the-economist-explains/2017/09/26/why-donald-trump-wants-fans-to-boycott-the-nfl> [https://perma.cc/2L8U-QG5W] (describing then-President Trump's advocacy for a boycott of the NFL over Colin Kaepernick's national anthem protest); Paige McGlaflin, *Stacey Abrams Warns Businesses in Antiabortion States to 'Do What is Best for Women' as Calls for Boycotts Grow Louder*, FORTUNE (June 28, 2022), <https://fortune.com/2022/06/28/stacey-abrams-warns-businesses-antiabortion-states-do-whats-best-women-talent-attraction-boycott> [https://perma.cc/DR83-EML7] (discussing the possibility of a boycott movement to protest state anti-abortion legislation).

52. Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States, 1969-1986*, 73 POL. SCI. Q. 127, 133–35 (discussing the civil society actors in the United States that composed the anti-Apartheid movement).

53. See OMAR BARGHOUTI, BDS: BOYCOTT, DIVESTMENT, SANCTIONS 64 (2011) (calling for a “South Africa Strategy for Palestine” and comparing apartheid in South Africa and Palestine).

The apartheid regime solidified itself in South Africa in 1948.⁵⁴ The white supremacist regime created a legal framework of separation of races (apartheid literally means “separation” in Afrikaans) to enforce its control over the Black majority.⁵⁵ These laws included a prohibition on interracial marriage, restrictions on Black political involvement, and forced removals of the Black population to “Bantustan” settlements.⁵⁶

Between 1948 and the eventual end of the apartheid regime in 1994, an international movement opposing apartheid gradually gained traction. The Anti-Apartheid Movement (AAM) was founded in 1959 in London and urged its followers to boycott South African goods.⁵⁷ The movement successfully pressured the International Olympic Committee to prohibit South African participation in the Olympics.⁵⁸ American trade unions, student groups, and civil rights groups also joined the boycott movement.⁵⁹ Despite the growing momentum of the AAM, the United States government and its allies continued to support South Africa’s apartheid regime. The U.S. was

54. *The End of Apartheid*, U.S. DEPT OF STATE, <https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm> [<https://perma.cc/2VJ6-2NME>].

55. *Id.*

56. *Id.*; *The Homelands*, S. AFRICAN HIST. ONLINE, <https://www.sahistory.org.za/article/homelands> [<https://perma.cc/263E-NJFK>].

57. *The British Anti-Apartheid Movement*, S. AFRICAN HIST. ONLINE, <https://www.sahistory.org.za/article/british-anti-apartheid-movement> [<https://perma.cc/7RHP-2ZKB>].

58. Youssef M. Ibrahim, *OLYMPICS; Olympics Committee Ends Its Ban on Participation by South Africa*, N.Y. TIMES (Jul. 10, 1991), <https://www.nytimes.com/1991/07/10/sports/olympics-olympics-committee-ends-its-ban-on-participation-by-south-africa.html> [<https://perma.cc/7XPY-F4UN>]; see also Douglas Booth, *Hitting Apartheid for Six? The Politics of the South African Sports Boycott*, 38 J. CONTEMP. HIST. 477 (discussing the sports boycott movement against South Africa).

59. Peter Cole, *Bay Area Longshore Workers Fought Against Apartheid*, FOUNDSF, https://www.foundsf.org/index.php?title=Bay_Area_Longshore_Workers_Fought_Against_Apartheid [<https://perma.cc/QA5X-R5EN>] (“The SALSC had greatly heightened awareness of the struggle against apartheid. The longshore workers also had signaled to others in the Bay Area and across the nation what could be done to combat apartheid.”); Paige Cromley, *The First Student Movement to Call for Divestiture: Protests Against Apartheid South Africa*, DAILY PRINCETONIAN (Nov. 9, 2023), <https://www.dailyprincetonian.com/article/2023/11/princeton-features-retrospective-student-protests-for-divestiture-from-south-africa> [<https://perma.cc/9JH5-H9U6>] (discussing the origins of divestment activism at Princeton University); Zeb Larson, *Atlanta, Georgia, Was a Center of Anti-Apartheid Organizing*, JACOBIN (Oct. 10, 2022), <https://jacobin.com/2022/10/anti-apartheid-movement-atlanta-civil-rights> [<https://perma.cc/N32Q-VBV3>] (discussing the early work by civil rights activists in the American South, such as Martin Luther King Jr., in opposing South African apartheid).

South Africa's second-largest investor.⁶⁰ U.S. leaders also viewed the fanatical anti-communism of the South African regime as strategically useful in fighting the Cold War.⁶¹ The U.S. consistently blocked attempts at the United Nations to put pressure on the apartheid regime through sanctions.⁶²

In a speech in 1978, New Hampshire Governor Meldrim Thomson Jr. called South African Prime Minister John Vorster "one of the great world statesmen of today" and criticized the global press for not covering South Africa's "free elections."⁶³ He added, "I was greatly impressed by the constructive manner in which he and his administration are resolving the internal problems of their country with calmness, compassion, and courage."⁶⁴ He did not, however, mention the recent massacre of more than 176 students protesting the apartheid system.⁶⁵ President Ronald Reagan's administration favored constructive engagement with the apartheid regime and supported its proxy war against Soviet and Cuban-backed forces in Angola.⁶⁶ Key U.S. allies also supported the apartheid regime, in opposition to the AAM. For example, British Prime Minister Margaret Thatcher called Nelson Mandela's African National Congress (ANC) a "typical terrorist organization" and favored "constructive engagement" with the apartheid regime.⁶⁷

Israel itself was a close ally of the apartheid regime in the 1980s.⁶⁸ In 2010, *The Guardian* published a report based on declassified documents showing that Israel attempted to sell nuclear weapons technology to the apartheid regime in 1975.⁶⁹ In

60. *Partners in Apartheid: U.S. Policy on South Africa*, 11 AFR. TODAY 2, 2 (1964) (detailing the importance of U.S. trade relations to the stability of the apartheid regime).

61. U.S. DEP'T OF STATE, *supra* note 54.

62. *Id.*

63. RICK PERLSTEIN, REAGANLAND, AMERICA'S RIGHT TURN 1976-80, at 230-31 (2020).

64. *Id.*

65. *Id.* at 231.

66. U.S. DEP'T OF STATE, *supra* note 54.

67. Erin Conway-Smith, *For Margaret Thatcher, Few Tears Shed in South Africa*, WORLD (Apr. 8, 2013), <https://theworld.org/stories/2013-04-08/margaret-thatcher-few-tears-shed-south-africa> [<https://perma.cc/C7JZ-DRD6>].

68. Chris McGreal, *Israel and Apartheid: A Marriage of Convenience and Military Might*, GUARDIAN (May 23, 2010), <https://www.theguardian.com/world/2010/may/23/israel-apartheid-south-africa-nuclear-warheads> [<https://perma.cc/3HXS-ZAS6>].

69. Chris McGreal, *Revealed: How Israel Offered to Sell South Africa Nuclear Weapons*, GUARDIAN (May 24, 2010), <https://www.theguardian.com/world/2010/may/23/israel-south-africa-nuclear-weapons> [<https://perma.cc/P439-66V6>] (detailing minutes from a top-secret meeting between representatives of both countries in which Israeli representative Shimon

1988, after even the United States ended its support for the apartheid regime, Israel sold the regime hundreds of millions of dollars worth of weapons.⁷⁰ Israel's support for the apartheid regime was partially strategic, as most other African countries distanced themselves from Israel following the Yom Kippur War of 1973.⁷¹ However, among some of the most committed Zionists, there was also an ideological component to their support. This attitude was summarized succinctly by former Chief of the General Staff of the Israel Defense Forces Rafael Eitan, who said in a speech at Tel Aviv University, "Blacks in South Africa want to gain control over the white minority just like Arabs here want to gain control over us. And we too, like the white minority in South Africa, must act to prevent them from taking us over."⁷²

Despite the support of the United States and its allies, the anti-apartheid movement won significant victories in the 1980s. In 1986, the U.S. Congress overrode President Reagan's veto to place sanctions on South Africa.⁷³ Without its previous ally, and under increasing pressure by the international campaign of boycotts and sanctions, the apartheid regime set out to reach a negotiated settlement with the ANC.⁷⁴ In 1990, Nelson Mandela was released from prison, and South Africa officially repealed its apartheid laws in 1991.⁷⁵ Multiracial elections were held in 1994, with Mandela's ANC winning massive majorities.⁷⁶

The victory of the ANC and the international anti-apartheid movement over the apartheid regime is a testament to the efficacy of their strategy. While it took several decades to gain traction, the

Peres offered nuclear warheads "in three sizes.").

70. Duncan Clarke, *Israel's Unauthorized Arms Transfers*, 99 FOREIGN POL'Y 89, 103 (1995) ("Among the U.S.-origin parts or technology re-exported by Israel to South Africa were aircraft engines, anti-tank missiles, armored personnel carriers, and recoilless rifles.").

71. See Avi Shilon, *Why Israel Supported South Africa's Apartheid Regime*, HAARETZ (Dec. 11, 2013), <https://www.haaretz.com/opinion/2013-12-11/ty-article/.premium/why-israel-supported-apartheid-regime/0000017f-e3ae-df7c-a5ff-e3fe965a0000> [https://perma.cc/5XKG-UV8D] (describing that Israel developed a relationship with South Africa because of the "1973 war, in which Israel refrained from firing the opening shot that led most African countries to break off their ties with Israel . . .").

72. ILAN PAPPE, *ISRAEL AND SOUTH AFRICA: THE MANY FACES OF APARTHEID* 1 (Zed Books 2015).

73. Andrew Glass, *House Overrides Reagan Apartheid Veto, Sept. 29, 1986*, POLITICO (Sept. 29, 2017), <https://www.politico.com/story/2017/09/29/house-overrides-reagan-apartheid-veto-sept-29-1986-243169> [https://perma.cc/CN7H-AQ5W].

74. U.S. DEP'T OF STATE, *supra* note 54.

75. *Id.*

76. *Id.*

international boycott movement, and eventually the sanctions by South African allies, were integral in ending the apartheid regime.

There are many parallels between supporters of BDS and the South African anti-apartheid movement. Indeed, many South African leaders have gone on to become vocal advocates for the Palestinian cause generally and BDS specifically. In a 1997 speech, Nelson Mandela said, “We know too well that our freedom is incomplete without the freedom of the Palestinians.”⁷⁷ Desmond Tutu drew explicit comparisons between apartheid in Israel and South Africa.⁷⁸ Tutu was also a vocal supporter of BDS, writing, “Those who continue to do business with Israel . . . are contributing to the perpetuation of a profoundly unjust status quo.”⁷⁹ With the support of former South African leaders, and using their model, BDS is trying to develop a movement just as successful.

C. *The Palestinian Anti-Apartheid Movement*

Palestinian activists have employed a variety of tactics to fight Israeli apartheid over the years. The First Intifada (Arabic for “uprising”), which began in 1987, was characterized largely by strikes, protests, and civil disobedience.⁸⁰ Following the failure of the Camp David Summit, the Second Intifada, which lasted from 2000 to 2005, was characterized by more violent methods, including stone throwing, rocket attacks, and suicide bombing.⁸¹ Scholar Rashid Khalidi has argued the increased violence of the Second Intifada “constituted a major setback for the Palestinian national movement.”⁸²

77. Huthifa Fayyad, *Nelson Mandela and Palestine: In His Own Words*, MIDDLE EAST EYE (Feb. 11, 2020), <https://www.middleeasteye.net/news/nelson-mandela-30-years-palestine> [https://perma.cc/594H-XQMV].

78. Desmond Tutu, *Desmond Tutu to Haaretz: This is My Plea to the People of Israel*, HAARETZ (Dec. 26, 2021), <https://www.haaretz.com/israel-news/2021-12-26/ty-article/desmond-tutu-to-haaretz-this-is-my-plea-to-the-people-of-israel/0000017f-dbe4-d856-a37f-ffe4e4080000> [https://perma.cc/Y4WR-XM8F].

79. *Id.*

80. RASHID KHALIDI, *THE HUNDRED YEARS’ WAR ON PALESTINE 173–74* (1st Picador Paperback ed., Metropolitan Books 2020) (describing the nonviolent tactics of the First Intifada); see also *Fatalities in the First Intifada*, B’TSELEM, https://www.btselem.org/statistics/first_intifada_tables [https://perma.cc/PC6S-DCXR] (showing that Israel killed 1,491 Palestinians during the First Intifada, compared with the 409 Israelis killed by the Palestinians).

81. See KHALIDI, *supra* note 80, at 212–16 (comparing the violence of the Second Intifada unfavorably to the first). An estimated 1,100 Israelis and 4,916 Palestinians were killed in the Second Intifada. Most Israelis were killed by suicide bombings, the majority of which were carried out by Hamas and Islamic Jihad. *Id.*

82. *Id.* at 214.

After the Second Intifada ended, a coalition of 170 Palestinian civil society groups issued a call for a nonviolent, international movement of boycotts, divestment, and sanctions against Israel.⁸³ The BDS movement coalesced around three demands for Israel: (1) ending its illegal occupation of the West Bank, East Jerusalem, Gaza, and the Golan Heights; (2) full equality for the remaining Palestinian citizens of Israel; and (3) allowing a right of return for Palestinian refugees as stipulated by United Nations Resolution 194.⁸⁴ These demands are all based in established international law.⁸⁵

BDS has attracted a wide range of international adherents, such as The Israeli Committee against House Demolitions (an Israeli non-governmental organization (NGO)), Jewish Voice for Peace (a U.S. organization of diaspora Jews), Students for Justice in Palestine (a student advocacy group), the African National Congress, the Irish Congress of Trade Unions, American Studies Association, Democratic Socialists of America, and the United Church of Christ.⁸⁶ Musicians including Lorde, Lauryn Hill, The Roots, Roger Waters, Future, and Snoop Dogg have joined the boycott by refusing to perform in Israel.⁸⁷ Renowned scientist Stephen Hawking supported BDS and canceled his appearance at a

83. BDS MOVEMENT, *supra* note 11.

84. *Id.*

85. *Id.*

86. *Boycott, Divestment, Sanctions*, ISRAELI COMM. AGAINST HOUSE DEMOLITIONS, <https://icahd.org/get-the-facts/boycotts-divestments-sanctions/> [<https://perma.cc/PG9V-2AGS>]; Noa Landau, *Israel Publishes BDS Blacklist: These Are the 20 Groups Whose Members Will be Denied Entry*, HAARETZ (Jan. 7, 2018), <https://www.haaretz.com/israel-news/2018-01-07/ty-article/israel-publishes-bds-blacklist-these-20-groups-will-be-denied-entry/0000017f-e58f-da9b-a1ff-edeffb140000> [<https://perma.cc/YN9X-7Y4S>]; Jeremy Gordin, *South Africa's Ruling Party Endorses BDS Campaign Against Israel*, HAARETZ (Dec. 21, 2012), <https://www.haaretz.com/2012-12-21/ty-article/premium/top-s-africa-party-backs-anti-israel-move/0000017f-f637-d47e-a37f-ff3f7a7c0000> [<https://perma.cc/5DQ9-Z9VV>]; *Palestine Solidarity*, IRISH CONG. TRADE UNIONS, <https://ictu.ie/motions/2017/palestine-solidarity> [<https://perma.cc/2BXG-ZRWL>]; *What Does the Boycott Mean?*, AM. STUD. ASS'N, <https://www.theasa.net/what-does-boycott-mean> [<https://perma.cc/WH6Z-WHRQ>]; Zaid Jilani, *As Congress Tries to Criminalize BDS, The Democratic Socialists of America Endorse It*, INTERCEPT (Aug. 6, 2017), <https://theintercept.com/2017/08/06/dsa-democratic-socialists-bds-israel-palestine/> [<https://perma.cc/VMR4-RSYH>]; Rick Gladstone, *United Church of Christ Approves Divestment to Aid Palestinians*, N.Y. TIMES (June 30, 2015), <https://www.nytimes.com/2015/07/01/us/united-church-of-christ-to-divest-israel-to-aid-palestinians.html>.

87. *More Than 600 Musicians Sign Letter Pledging to Boycott Israel*, MIDDLE EAST EYE (May 28, 2021), <https://www.middleeasteye.net/news/israel-boycott-musicians-pledge-stand-solidarity-palestine> [<https://perma.cc/3U9X-EFW2>].

conference in Israel.⁸⁸ In 2014, the Israeli company SodaStream—under pressure from BDS activists—closed a factory it was operating in an illegal settlement in the West Bank.⁸⁹ In 2021, Ben & Jerry’s Ice Cream announced it would no longer sell its products in the Occupied Palestinian Territories, saying, “We believe it is inconsistent with our values for our product to be present within an internationally recognized illegal occupation.”⁹⁰ With younger Americans, particularly younger Jewish Americans, increasingly supportive of the Palestinian cause, BDS is likely to continue gaining support in the United States.⁹¹

Support for BDS is also likely to increase as both the Israeli government and its backers in the United States get more extreme and disconnected from liberal democratic norms. In November 2022, Benjamin Netanyahu’s Likud Party won a plurality of votes in Israel’s parliamentary elections.⁹² To secure a majority, Netanyahu formed a coalition with the Jewish Power party.⁹³ He selected Jewish Power leader Itamar Ben-Gvir for the cabinet position of National Security Minister.⁹⁴ Rabbi Rick Jacobs has compared Netanyahu’s embrace of Ben-Gvir to an American

88. Hilary Rose & Steven Rose, *Stephen Hawking’s Boycott Hits Israel Where it Hurts: Science*, GUARDIAN (May 13, 2013), <https://www.theguardian.com/science/political-science/2013/may/13/stephen-hawking-boycott-israel-science> [<https://perma.cc/H6G7-3D36>].

89. Jodi Rudoren, *Israeli Firm, Target of Boycott, to Shut West Bank Plant*, N.Y. TIMES (Oct. 30, 2014), <https://www.nytimes.com/2014/10/31/world/middleeast/sodastream-to-close-factory-in-west-bank.html> [<https://perma.cc/P9BY-8FVX>].

90. *Ben & Jerry’s Will End Sales of Our Ice Cream in the Occupied Palestinian Territories*, BEN & JERRY’S (July 19, 2021), <https://www.benjerry.com/about-us/media-center/opt-statement> [<https://perma.cc/238L-5JP7>].

91. See Saad, *supra* note 10; Justin Nortey, *American Jews Have Widely Differing Views on Israel*, PEW RSCH. CTR. (May 21, 2021), <https://www.pewresearch.org/fact-tank/2021/05/21/u-s-jews-have-widely-differing-views-on-israel> [<https://perma.cc/S8K4-PNSN>] (showing that only 24% of American Jews 18 to 29 believe the Israeli government is making sincere efforts towards peace, only 27% strongly oppose BDS, and only 32% approve of Netanyahu’s performance as Prime Minister).

92. Patrick Kingsley, *Yapid Concedes in Israel, Paving Way for Netanyahu’s Return to Power*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/world/middleeast/israel-netanyahu-election.html> [<https://perma.cc/6A82-DKFP>]; *Netanyahu and Far Right Allies Win Israeli Election*, AL JAZEERA (Nov. 3, 2022), <https://www.aljazeera.com/news/2022/11/3/netanyahu-and-far-right-declared-winners-in-israeli-elections> [<https://perma.cc/P7SF-FY69>].

93. Mazal Mualem, *Netanyahu Offers National Security Post to Ultranationalist Ben-Gvir*, AL-MONITOR (Nov. 28, 2022), <https://www.al-monitor.com/originals/2022/11/netanyahu-offers-national-security-post-ultranationalist-ben-gvir> [<https://perma.cc/V9V5-8LM9>].

94. *Id.*

president “putting [Ku Klux Klan leader] David Duke . . . as attorney general.”⁹⁵ Ben-Gvir is an avowed anti-Arab racist and terrorist sympathizer.⁹⁶ Until 2020, Ben-Gvir displayed a portrait of Baruch Goldstein, who massacred 29 Muslim worshippers and wounded 125 in a mosque shooting, in his home.⁹⁷ In 1995, Ben-Gvir stole the hood ornament off then-Prime Minister Yitzhak Rabin’s car, saying “We got to his car, we’ll get to him, too.”⁹⁸ A few weeks later, Rabin was assassinated by a far-right extremist.⁹⁹ Since entering politics, Ben-Gvir has advocated for the expulsion of Palestinian citizens who don’t pass a loyalty test.¹⁰⁰ While campaigning in the 2022 elections, Ben-Gvir brandished a gun in the occupied Sheikh Jarrah neighborhood of East Jerusalem, telling the Palestinian residents, “We’re the landlords here, remember that, I am your landlord.”¹⁰¹

Netanyahu has also appointed Bezalel Smotrich as Finance Minister.¹⁰² Smotrich’s views and public statements are completely unaligned with the vast majority of Jewish Americans. Smotrich has described himself as a “fascist homophobe” and said of Arab legislators in Israel, “[I]t’s a mistake that [former Israel Prime Minister David] Ben-Gurion didn’t finish the job and throw you out in 1948.”¹⁰³ Following the outbreak of hostilities with Gaza in

95. *Id.*

96. *See id.*

97. *Ben-Gvir Responds to Bennett: Fine, I’ll Take Down Baruch Goldstein’s Picture*, TIMES ISR. (Jan. 15, 2020), https://www.timesofisrael.com/liveblog_entry/ben-gvir-responds-to-bennett-fine-ill-take-down-baruch-goldsteins-picture [<https://perma.cc/WVVS4-RF94>] (quoting a Ben-Gvir Facebook post: “[F]or the sake of unity and a right-wing victory in the elections, I’m removing the photograph in my living room.”).

98. Judy Maltz, *The Lawyer for Jewish Terrorists Who Started Out by Stealing Rabin’s Car Emblem*, HAARETZ (Jan. 4, 2016), <https://www.haaretz.com/israel-news/2016-01-04/ty-article/.premium/jewish-terrorisms-star-lawyer/0000017f-ed1-da6f-a77f-fdaff1f00000> [<https://perma.cc/5KCF-KK58>].

99. *Id.*

100. Orly Halpern, *With Netanyahu Elected, Liberal Israelis Fear for the Future of Democracy*, TIME (Nov. 7, 2022), <https://time.com/6230211/netanyahu-israel-palestine-ben-gvir/> [<https://perma.cc/W7BV-6QR6>].

101. *Extremist MK Ben Gvir Pulls out Gun During Sheikh Jarrah Clash*, TIMES ISR. (Oct. 14, 2022), <https://www.timesofisrael.com/extremist-mk-ben-gvir-pulls-out-gun-during-sheikh-jarrah-clashes> [<https://perma.cc/D9MZ-FPC2>].

102. *Netanyahu Announces Agreement to Hand Some West Bank Authority to Smotrich*, TIMES ISR. (Feb. 23, 2023), https://www.timesofisrael.com/liveblog_entry/netanyahu-announces-agreement-to-hand-some-west-bank-authority-to-smotrich/ [<https://perma.cc/QSF9-V97C>].

103. Amy Spiro, *Smotrich at Knesset: Ben-Gurion Should Have Finished the Job, Thrown out Arabs*, TIMES ISR. (Oct. 13, 2021), <https://www.timesofisrael.com/smotrich-at-knesset-ben-gurion-should-have-finished-the-job-thrown-out-arabs> [<https://perma.cc/EFR9-AUJJ>]; *Israel’s Far-Right*

October 2023, Israel's Heritage Minister, Amihai Eliyahu, suggested dropping a nuclear bomb on Gaza.¹⁰⁴ He was reprimanded for his comments but remains a cabinet minister in Israel's government.¹⁰⁵ Israel's Agriculture Minister was not disciplined for saying the war would be "Gaza's Nakba," a reference to the 1948 ethnic cleansing of more than 700,000 Palestinians.¹⁰⁶ Now that Israel's majority government has embraced open racism and violent incitement against Palestinians, Americans concerned about racism and violent extremism in their own country will likely struggle to reconcile their beliefs with continued support for Israel.¹⁰⁷

Should these trends continue, a successful BDS movement could be catastrophic for the apartheid policies of the Israeli government. A 2015 study by the RAND Corporation estimated that if boycotts could shrink Israel's GDP by a modest 2%, it would cost Israel at least \$3.2 billion a year.¹⁰⁸ Due to boycotts of Israeli dates, between 2015 and 2018, exports to the U.S. dropped from 23.6 million pounds to seven million pounds.¹⁰⁹ The Israeli government

Finance Minister Says He's 'A Fascist Homophobe' but 'Won't Stone Gays.' HAARETZ (Jan. 16, 2023), <https://www.haaretz.com/israel-news/2023-01-16/ty-article/premium/israels-far-right-finance-minister-im-a-fascist-homophobe-but-i-wont-stone-gays/00000185-b921-de59-a98f-ff7f47c70000> [https://perma.cc/7ZYS-38MR].

104. Michael Bachner, *Far-Right Minister Says Nuking Gaza an Option, PM Suspends Him from Cabinet Meetings*, TIMES ISR. (Dec. 5, 2023), <https://www.timesofisrael.com/far-right-minister-says-nuking-gaza-an-option-pm-suspends-him-from-cabinet-meetings> [https://perma.cc/BB9D-ENSR].

105. *Id.*

106. Chantal Da Silva, *'Nakba 2023': Israel Right-Wing Ministers' Comments Add Fuel to Palestinian Fears*, NBC NEWS (Nov. 13, 2023), <https://www.nbcnews.com/news/world/gaza-nakba-israels-far-right-palestinian-fears-hamas-war-rcna123909> [https://perma.cc/QD62-DGGX].

107. See Mualem, *supra* note 93 (quoting Jeremy Ben Ami of J Street, an American liberal Zionist group: "I think there is a lot of real concerns about the direction that this new government would take and what it means for Israel-US-Jewish relations.").

108. C. ROSS ANTHONY, DANIEL EGEL, CHARLES RIES, CRAIG BOND, ANDREW LIEPMAN, JEFFREY MARTINI, STEVEN SIMON, SHIRA EFRON, BRADLEY STEIN, LYN SAYS AYER & MARY VALANA, *THE COSTS OF THE ISRAELI-PALESTINIAN CONFLICT* 28 (RAND Corp. 2015) ("The recent estimate of the potential cost of the BDS movement to the Israeli economy at \$3.2 billion . . . is, if anything, an understatement of the magnitude of the potential BDS movement effect."). For other reading on the financial implications of Israel's policies both in Israel proper and the West Bank, see Steven Scheer & Maayan Lubell, *Israeli Judicial Reforms a 'Downside Risk' for Credit Rating, says S&P*, REUTERS (Jan. 12, 2023), <https://www.reuters.com/business/finance/sp-sees-israeli-judicial-reforms-downside-risk-credit-rating-2023-01-12> [https://perma.cc/7HDR-CNXJ] (noting an S&P spokesman said the agency "was closely following moves Prime Minister Benjamin Netanyahu's cabinet might make in the occupied West Bank . . .").

109. Taher Herzallah & Tarek Khaill, *Boycotting Israeli Dates is Working and We*

has taken steps to counter the potential influence of BDS. An ethics code adopted by the Council for Higher Education prohibits faculty members at Israeli universities from voicing support for BDS.¹¹⁰ International supporters of BDS are formally barred from entering Israel.¹¹¹ In 2017, Israel Katz, then serving as Israeli Intelligence Minister, publicly suggested that supporters of BDS should be assassinated.¹¹² Many supporters of BDS have faced physical intimidation and harassment from the Israeli government.¹¹³ These extraordinary countermeasures show the potential effectiveness of BDS in ending Israel's apartheid policies.

D. *The Development of Anti-BDS Laws*

One of Israel's main tactics in opposing the BDS movement has been supporting the passage of anti-BDS laws in the United States. Since the first anti-BDS law was passed in 2015, thirty-eight states have passed some form of anti-BDS law.¹¹⁴ Most of these laws require any individual, entity, or business that contracts with the state to sign a pledge not to boycott Israel.¹¹⁵ Some laws also require state investment funds to divest from any business which boycotts Israel.¹¹⁶ As now-disgraced former Governor of New York Andrew Cuomo put it in a *Washington Post* op-ed, "If you boycott Israel, New York state will boycott you."¹¹⁷

Need to Keep Going, AL JAZEERA (Apr. 24, 2020), <https://www.aljazeera.com/opinions/2020/4/24/boycotting-israeli-dates-is-working-and-we-need-to-keep-going> [<https://perma.cc/S984-X9CQ>].

110. Yarden Zur, *Israeli Universities Urged to Bar Professors from Calling to Boycott Israel*, HAARETZ (Mar. 25, 2018), <https://www.haaretz.com/israel-news/2018-03-25/ty-article/universities-urged-to-bar-professors-from-calling-to-boycott-israel/0000017f-db6a-df62-a9ff-dffb3c40000> [<https://perma.cc/X8AR-6E78>].

111. Oren Liebermann, *Israel's Travel Ban: Boycott Supporters to be Turned Away*, CNN (Mar. 7, 2017), <https://www.cnn.com/2017/03/07/middleeast/israel-bds-boycott-law> [<https://perma.cc/CLB4-8ELP>].

112. *Israeli Government Must Cease Intimidation of Human Rights Defenders, Protect them From Attack*, AMNESTY INT'L (Apr. 12, 2016), <https://www.amnestyusa.org/press-releases/israeli-government-must-cease-intimidation-of-human-rights-defenders-protect-them-from-attacks> [<https://perma.cc/S8T2-S7U9>] (explaining that Katz called for "targeted civil eliminations," a reference to the euphuism for Israel's program of targeted assassinations of Palestinian militants).

113. *See, e.g., id.* (denouncing Israel's intimidation and threats against Omar Barghouti, Imad Abu Shamsiyeh, the Palestinian NGO al-Haq, and the Israeli NGO Breaking the Silence).

114. PALESTINE LEGAL, *supra* note 13.

115. *Id.*

116. *Id.*

117. Andrew Cuomo, *Gov. Andrew Cuomo: If You Boycott Israel, New York State will Boycott You*, WASH. POST (June 10, 2016), <https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel->

The pro-Israel lobby was instrumental in conceiving, drafting, and lobbying for anti-BDS laws.¹¹⁸ An investigation by the Center for Public Integrity and USA Today found that several states' anti-BDS laws were copied and pasted from model legislation drafted by pro-Israel lobbyists.¹¹⁹ Proponents of anti-BDS laws usually cited two main justifications: (1) anti-BDS laws protect a vital American ally, and (2) anti-BDS laws use the state government's power to combat a movement viewed as antisemitic, or at least anti-Israel.¹²⁰

The question of American national interest is ultimately a normative one that would be outweighed by an interest in preserving free expression. However, the antisemitism claim is pervasive enough to merit a rebuttal.¹²¹ First, and most importantly, criticism of Israel simply cannot be conflated with antisemitism. The BDS movement unequivocally condemns antisemitism.¹²² Second, the most prominent American supporters of Israel are typically not Jewish Americans, but rather evangelical Christians.¹²³ This sentiment was perhaps best expressed by former President Donald Trump, who wrote:

No President has done more for Israel than I have. Somewhat surprisingly, however, our wonderful Evangelicals are far more appreciative of this than the people of the Jewish faith, especially those living in the U.S. . . . U.S. Jews have to get their act together and appreciate what they have in Israel –

new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985ff6a265c_story.html [https://perma.cc/E76Y-SW9K].

118. Liz Essley Whyte, *One Way to Silence Israel Boycotts? Get Lawmakers to Pass Anti-BDS Bills*, USA TODAY (May 1, 2019), <https://www.usatoday.com/story/news/investigations/2019/05/01/statehouse-model-bills-bds-protest-bans/3575083002> [https://perma.cc/8NRB-787E] (“In Louisiana, Democratic Gov. John Bel Edwards did not write his anti-boycott executive order nor the news release accompanying it. Both drafts were sent to him by Mithun Kamath, a pro-Israel advocate for the Jewish Federation of Greater New Orleans . . . [and] reviewed by AIPAC . . .”).

119. *Id.*

120. *See, e.g.*, Cuomo, *supra* note 117.

121. *See* David M. Halbfinger, Michael Wines, & Steven Erlanger, *Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign*, N.Y. TIMES (Oct. 4, 2023), <https://www.nytimes.com/2019/07/27/world/middleeast/bds-israel-boycott-antisemitic.html> [https://perma.cc/94PJ-QDEZ].

122. *See What is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> [https://perma.cc/YGP6-SX2U] (“BDS is an inclusive, anti-racist human rights movement that is opposed on principle to all forms of discrimination, including antisemitism and Islamophobia.”).

123. *See* Tom Gjelten, *As U.S. Jews Cool to Israel, Evangelicals Flock There as Tourists*, NPR (Aug. 25, 2019), <https://www.npr.org/2019/08/25/753720351/as-u-s-jews-cool-to-israel-evangelicals-flock-there-as-tourists> [https://perma.cc/6WM5-ZU7H] (citing polling which shows much higher rates of support for Israel among American evangelicals than Jews).

Before it is too late!¹²⁴

This statement by Trump exemplifies both the support of American evangelicals for Israel, as well as the implicit (and in this case, arguably, explicit) antisemitism of Christian Zionism. Third, the Israeli government itself has had no problem allying with individuals and governments who traffic in blatant antisemitism, such as Viktor Orban, Jair Bolsonaro, and members of Ukraine’s neo-Nazi Azov Battalion.¹²⁵ Israel’s supporters in the U.S. will undoubtedly continue to use claims of antisemitism to deflect legitimate criticism of Israel’s apartheid policies, but the hypocrisy of Israel’s government and its international supporters make this claim tough to believe. In any case, these dubious claims of antisemitism do not justify the passage of anti-BDS laws.

Some anti-BDS laws have been struck down by courts on First Amendment grounds.¹²⁶ In Kansas, a 2017 anti-BDS law required all state contractors “to certify that they are not engaged in a boycott of Israel.”¹²⁷ At the time, plaintiff Esther Koontz worked for the Wichita Public School District training math teachers.¹²⁸ Koontz was a member of the Mennonite Church, which calls on its members to “boycott products associated with Israel’s occupation of Palestine.”¹²⁹ When the anti-BDS law passed and Koontz was presented with a pledge not to engage in a boycott of Israel, she

124. C. Mandler, *Trump Critical of “U.S. Jews” in Social Media Post*, CBS NEWS (Oct. 17, 2022), <https://www.cbsnews.com/news/trump-truth-social-post-us-jews> [<https://perma.cc/Z2RF-BQYE>].

125. See William Echikson, *Viktor Orban’s Anti-Semitism Problem*, POLITICO (May 13, 2019), <https://www.politico.eu/article/viktor-orban-anti-semitism-problem-hungary-jews> [<https://perma.cc/JKW9-ZKKK>] (“[Hungarian President] Orban promoted anti-semitic imagery of powerful Jewish financiers scheming to control the world.”); Rafael Kruchin & Sebastiao Nascimento, *‘Pro-Israel’ Meets Neo-Nazi: Brazil’s Bolsonaro Unveils His Best Friends on the German Far Right*, HAARETZ (Aug. 9, 2021), <https://www.haaretz.com/world-news/2021-08-09/ty-article-opinion/premium/pro-israel-meets-neo-nazi-brazils-bolsonaro-unveils-his-german-far-right-allies/0000017f-f48b-d487-abff-f7ff4d260000> [<https://perma.cc/43JN-LPFC>] (detailing the antisemitic ties of former Brazilian President Jair Bolsonaro, a staunch supporter and ally to Israel); Tzvi Joffre, *Ukraine’s Azov Regiment Visits Israel: ‘Mariupol is our Masada’*, JERUSALEM POST (Dec. 20, 2022), <https://www.jpost.com/international/article-725351> [<https://perma.cc/NF7S-VMCL>]; see also Daniel Estrin, *Netanyahu’s Son Yair Stirs Up Controversy with Anti-Semitic Cartoon*, NPR (Sept. 11, 2017), <https://www.npr.org/2017/09/11/550058346/netanyahus-son-yair-stirs-up-controversy-with-anti-semitic-cartoon> [<https://perma.cc/BZ7B-PVWX>] (describing how Benjamin Netanyahu’s son posted a blatantly antisemitic meme on Facebook).

126. *E.g.*, Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

127. *Id.* at 1012–13.

128. *Id.* at 1013.

129. *Id.*

refused to sign.¹³⁰ As a result, Koontz was not allowed to contract with the state and lost her job in the Wichita Public School District.¹³¹ The ACLU represented Koontz, and the District Court of Kansas preliminarily enjoined enforcement of the anti-BDS law on the grounds that it violated Koontz's First Amendment right to engage in a boycott.¹³²

Opponents of anti-BDS laws won similar victories in Arizona and Texas. In Arizona, Mikkel Jordahl, an attorney and member of Jewish Voice for Peace, was asked to sign a pledge not to boycott Israel in order to continue contracting with the state.¹³³ When Jordahl refused to sign the pledge, the county he contracted with stopped paying him for his services.¹³⁴ The District Court of Arizona ruled in Jordahl's favor and held that Arizona's anti-BDS law unconstitutionally compelled speech and violated a protected right to engage in boycotts.¹³⁵ In Texas, the Western District court held that the state violated the First Amendment rights of a speech pathologist, Amawi, who was fired by the school district for refusing to sign an anti-BDS pledge.¹³⁶ None of these cases reached a ruling on the laws' constitutionality on federal appeal, as states have responded by amending their anti-BDS laws to raise the threshold for government contracts (usually to \$100,000) to nullify the complaints.¹³⁷

The Eighth Circuit is the only federal appellate court to hold that an anti-BDS law complies with the First Amendment. In *Arkansas Times LP v. Waldrip*, it reviewed the constitutionality of an Arkansas anti-BDS law.¹³⁸ In 2018, the *Arkansas Times* ran an

130. *Id.* at 1014.

131. *Id.*

132. Koontz, 283 F. Supp. 3d at 1007.

133. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018), *vacated as moot*, 789 Fed. Appx. 589, 590 (9th Cir. 2020).

134. *Id.*

135. *Id.* at 1017.

136. *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated as moot*, 956 F.3d 816 (5th Cir. 2020).

137. See *After Court Defeat, Kansas Changes Law Aimed at Boycotts of Israel*, ACLU (June 29, 2018), <https://www.aclu.org/press-releases/after-court-defeat-kansas-changes-law-aimed-boycotts-israel> [<https://perma.cc/3Y9U-EXVX>]; Jerod MacDonald-Evoy, *Ducey Signs Bill Loosening Anti-BDS Law in Attempt to Stop Litigation*, ARIZ. MIRROR (Apr. 16, 2019), <https://azmirror.com/briefs/ducey-signs-bill-loosening-anti-bds-law-in-attempt-to-stop-litigation/> [<https://perma.cc/H7DQ-Y4UT>]; Ron Kampeas, *After Legal Challenges, Texas Moves to Amend Anti-BDS Law*, FORWARD (Oct 4, 2023), <https://forward.com/fast-forward/422449/texas-anti-bds-israel-law/> [<https://perma.cc/58ML-E97L>].

138. *Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022).

advertisement for the University of Arkansas.¹³⁹ In order to get paid for running the advertisement, the newspaper was asked to sign an anti-BDS pledge.¹⁴⁰ While the *Arkansas Times* had no involvement with BDS, it refused on principle and brought a claim against the University of Arkansas Board of Trustees.¹⁴¹ Unlike the district courts in Kansas, Arizona, and Texas, the Eighth Circuit ruled in favor of the state and upheld Arkansas’s anti-BDS law as constitutional.¹⁴² The ACLU appealed the decision, but the Supreme Court declined to hear the case.¹⁴³

II. Analysis

This section will examine the Eighth Circuit’s decision in *Arkansas Times v. Waldrip*. In assessing the constitutionality of Arkansas’s anti-BDS law (“Act 710”), the Eighth Circuit asked two questions: (1) does Act 710 regulate “expressive conduct” or merely “unexpressive commercial conduct”?, and (2) does Act 710 compel speech?¹⁴⁴ In upholding Arkansas’s statute, the Eighth Circuit answered that the statute regulated only unexpressive commercial conduct and did not compel speech.¹⁴⁵ On both issues, the Eighth Circuit is wrong.

This section will then address how opponents of anti-BDS laws should proceed. Further steps will include both legal appeals and political reforms.

A. Arkansas Times LP v. Waldrip

i. The Eighth Circuit Misreads *Claiborne* to Conclude that Boycotts are Not Expressive Conduct

The deciding question in this case is whether Act 710 regulates “expressive conduct.” The First Amendment prohibits government regulations that infringe on a right to free speech.¹⁴⁶ This includes not just verbal speech, but also nonverbal conduct intended to

139. *Id.* at 1390.

140. *Id.*

141. *Id.*

142. *Id.* at 1395.

143. *Supreme Court Declines to Review Challenge to Law Restricting Israel Boycotts*, ACLU (Oct. 4, 2023), <https://www.aclu.org/press-releases/supreme-court-declines-to-review-challenge-to-law-restricting-israel-boycotts> [<https://perma.cc/WN5H-ELX4>].

144. *Waldrip*, 37 F.4th at 1391, 1394 (8th Cir. 2022).

145. *Id.*

146. *Id.* at 1391.

convey a message.¹⁴⁷ The state may not prohibit expressive conduct or make government benefits contingent on voicing, or not voicing, a particular opinion.¹⁴⁸ In the past, the courts have ruled on what activities constitute “expressive conduct.” For example, in *Texas v. Johnson*, the Supreme Court ruled that flag burning is protected as expressive conduct, as it is an activity aimed at conveying a political message.¹⁴⁹ The Court has ruled on other acts considered expressive conduct, such as wearing a black armband to protest the Vietnam War, displaying a red flag, and wearing clothing expressing anti-war sentiments.¹⁵⁰

In *Claiborne*, the Supreme Court held that the NAACP’s boycott of white-owned businesses in Mississippi constituted expressive conduct.¹⁵¹ Justice Stevens wrote, “While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case.”¹⁵² Justice Stevens asserted that boycotts fall outside of the scope of economic activity which the government may regulate, as opposed to acts of political violence, which may be prohibited.¹⁵³ This interpretation is made clear when he concludes, “We hold that the nonviolent elements of petitioners’ activities are entitled to the protection of the First Amendment.”¹⁵⁴ Crucially, Stevens references the boycotters’ “activities,” not merely their “speech.”¹⁵⁵ He further clarified that “[t]he established elements of speech, assembly, . . . and petition, ‘though not identical, are inseparable.’”¹⁵⁶ Stevens’ language would suggest that *Claiborne* considers boycotts themselves to be expressive conduct protected by the First Amendment.

147. *Id.*

148. *Id.*

149. *Texas v. Johnson*, 491 U.S. 397 (1989).

150. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students who wore black armbands to protest the Vietnam War were engaged in nonverbal expressive conduct); *Stromberg v. California*, 283 U.S. 359 (1931) (ruling on expressive conduct for the first time by overturning the conviction of a woman who displayed a red flag as a nonverbal expression of her anarchist views); *Cohen v. California*, 403 U.S. 15 (1971) (holding that the wearing of a jacket with the slogan “Fuck the Draft” was protected expressive conduct).

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

152. *Id.* at 913.

153. *Id.* at 913.

154. *Id.* at 915.

155. *Id.*

156. *Id.* at 911.

The Eighth Circuit reasons, however, that boycotts of Israel are of a different nature.¹⁵⁷ It reverse-engineers this conclusion with a few different arguments. First, the court applies the precedent of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, along with an extremely narrow interpretation of *Claiborne*.¹⁵⁸ In *Rumsfeld*, the Supreme Court held that the federal government could prohibit law schools from banning military recruiters, which some schools had done as a protest against “Don’t Ask, Don’t Tell.”¹⁵⁹ The Court ruled that banning military recruiters falls outside the scope of expressive conduct, as the refusal itself did not take the form of speech or nonverbal communication.¹⁶⁰

In *Waldrip*, the state argued that boycotts of Israel should be viewed similarly to *Rumsfeld*, as opposed to *Claiborne*.¹⁶¹ Again, the question comes down to whether boycotts of Israel are expressive. The Eighth Circuit held that they are not.¹⁶² It did so by misreading *Claiborne*, holding that “*Claiborne* only discussed protecting expressive activities accompanying a boycott, rather than the purchasing decisions at the heart of a boycott.”¹⁶³ There is no language in *Claiborne* in which the Supreme Court explicitly held the decision only applied to expressive activities, and not the boycott itself.¹⁶⁴ The Eighth Circuit was only able to reach this conclusion by extending an artificial divide between “speech accompanying a boycott” and “unexpressive economic activity” and holding that only the former is expressive and, therefore, eligible for First Amendment protections. However, no such distinction was intended in *Claiborne*, which held that “the nonviolent elements of petitioners’ activities are entitled to the protection of the First Amendment” and explicitly enumerated one of these nonviolent elements as the decision to “[withhold] patronage from the white establishment of Claiborne County.”¹⁶⁵ To the extent that the Eighth Circuit excluded the withholding of patronage from expressive conduct, it did so by misreading and distorting *Claiborne*.

157. Ark. Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022).

158. *Id.* at 1391–92.

159. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006).

160. *Id.*

161. *Waldrip*, 37 F.4th at 1391–92.

162. *Id.*

163. *Id.* at 1392.

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

165. *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 744 (W.D. Tex. 2019) (quoting *Claiborne*, 458 U.S. 886 at 915)).

ii. The Eighth Circuit Erred in Finding that Act 710 did not Compel Speech

To uphold Act 710, the Eighth Circuit also had to find that it did not compel speech. Under the First Amendment, “The government may not ... compel the endorsement of ideas that it approves.”¹⁶⁶ For example, the Supreme Court has held that students in schools cannot be forced to salute the flag.¹⁶⁷ In *Wooley v. Maynard*, the Supreme Court ruled that New Hampshire could not require all state license plates to have the state motto of “Live Free or Die,” as this compelled residents to adopt and display a message.¹⁶⁸ In this case, the *Arkansas Times* argued that a state requirement to certify that they will not boycott Israel necessarily compels them to adopt the state’s political view.¹⁶⁹ Indeed, other state anti-BDS statutes that have been found unconstitutional by the courts have all run afoul of the First Amendment’s protections against compelled speech.¹⁷⁰ Given that Arkansas required a newspaper to sign a document promising to adopt the state’s preferred political views, it is hard to see how this would not be a textbook example of compelled speech.

However, the Eighth Circuit found a clever workaround to hold that Act 710 did not compel speech. Because it already decided that boycotts are not “expressive conduct,” the statute thus only compels “nonexpressive economic conduct,” not speech.¹⁷¹ This reasoning is flawed for four reasons. First, the restriction on boycotts clearly restricts more than just economic activity. The statute requires vendors, such as the *Arkansas Times*, to sign a declaration that they will not boycott Israel.¹⁷² The effect this forced declaration has on the newspaper’s expressive conduct can be shown with a thought experiment. What if Caterpillar, the construction equipment company whose bulldozers are used by the IDF to demolish homes in the West Bank, wanted to run an advertisement for its products in the *Arkansas Times*?¹⁷³ What if

166. See *Waldrip*, 37 F.4th at 1391 (citing *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 309 (2012)).

167. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

168. 430 U.S. 705 (1977).

169. Brief for Appellants at 6–8, *Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (No. 19-1378).

170. See *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019); *Jordahl v. Brnovich*, F. Supp. 3d 1016 (D. Ariz. 2018); *Koontz v. Watson*, F. Supp. 3d 1007 (D. Kan. 2018).

171. *Waldrip*, 37 F.4th at 1394.

172. Ark. Code Ann. § 25-1-503 (2017).

173. See, e.g., Miguel Ortiz, *The Israel Defense Forces Operate the Most Heavily*

the newspaper's staff, because of their personal political views, wanted to boycott Caterpillar because of its complicity in Israel's apartheid policies? Under Act 710, would they be allowed to make a decision on what to publicize, or not publicize, based on their political convictions? Or would they be required to run the advertisement? Would they be able to publish an editorial explaining their decision not to run the advertisement? Would they be able to publish an editorial urging their readers to join them in boycotting Israeli companies? The answer to all of these questions is no. They would not be able to freely express their beliefs. Simply put, Act 710 would compel the *Arkansas Times* to run this advertisement and would forbid them from writing any such editorial. In this sense, Act 710 restricts expressive conduct. The expressive conduct which is necessarily restricted is not extraneous to the act of boycotting, but an essential part of it. Therefore, the state's requirement does compel speech.

Second, the court's chosen dichotomy between expressive and nonexpressive conduct ignores the fact that boycotts of Israel necessarily are a way of expressing a political viewpoint. The Supreme Court ruled in *Citizens United v. FEC* that independent corporate expenditures for political donations are expressive.¹⁷⁴ Further, the court's *Janus v. AFSCME* decision held that compelling state employees to pay union dues unconstitutionally compelled speech.¹⁷⁵ These are both examples where an economic activity is treated as expressive conduct.¹⁷⁶ Therefore, if the decision to donate money to a political candidate or pay dues to a union is expressive, then the decision of whether to do business with a company must also be expressive and similarly subject to First Amendment protections.

Third, the plain meaning of the text shows that the state intended to regulate expressive conduct. In the Act's definition of

Armored Bulldozer in the World, WE ARE THE MIGHTY (Oct. 15, 2022), <https://www.wearethemighty.com/articles/idf-bulldozers> [<https://perma.cc/KN2N-HFJB>] (describing the Caterpillar D9 bulldozer, which is designed to include a mounted machine gun and nicknamed "The Teddy Bear" by the IDF); see also Andrew Buncombe, *Rachel Corrie Was Killed in Gaza by the IDF. 20 Years On, Her Parents Are Still Fighting for Justice*, INDEPENDENT (Mar. 2, 2023), <https://www.independent.co.uk/news/world/americas/rachel-corrie-gaza-death-parents-idf-b2288296.html> [<https://perma.cc/C3FP-JK66>] (describing how a Caterpillar bulldozer was used to kill an American activist who was protesting the demolition of a Palestinian home).

174. Hunter Pearl, *Political Nonexpenditures: "Defunding Boycotts" as Pure Speech*, 45 HARV. J.L. & PUB. POL'Y 703, 716 (2022).

175. *Id.*

176. *Id.*

“boycott of Israel,” it clarifies that “[a] company’s statement that it is participating in boycotts of Israel . . . can be considered by the Arkansas Development Finance Authority as a type of evidence, among others, that a company is participating in a boycott of Israel.”¹⁷⁷ This shows that the state may consider the boycotter’s speech in determining whether they are in compliance with the law.¹⁷⁸ Indeed, it would be difficult to determine whether an individual is participating in a boycott without considering their public statements.

Fourth, the legislative intent of Act 710 makes it clear that the bill was intended to regulate expressive conduct. Under Arkansas law, “When a statute is ambiguous, [we] must interpret it according to legislative intent and our review becomes an examination of the whole act.”¹⁷⁹ At the very least, the plain language of the Act and the court’s use of canons of construction suggest that the Act is ambiguous as to whether it prohibits expressive conduct.¹⁸⁰ The Eighth Circuit’s majority opinion does not dispute that this ambiguity exists.¹⁸¹ Therefore, the intent of the Arkansas legislature that enacted the law should be consulted to determine whether the statute regulates expressive conduct. There is an indication in the legislative history that the law was intended to regulate expressive conduct. In the enumerated legislative findings supporting passage of the Act, the sixth finding references “examining a company’s promotion or compliance with unsanctioned boycotts . . .”¹⁸² This shows the legislature intended to monitor not just company’s boycotting activity, but also their *promotion* of boycotts. Even if the economic activity of boycotts is not considered expressive, these legislative findings make it clear the legislature also intended to regulate the expressive conduct associated with boycotts.

There are many flaws with the Eighth Circuit’s decision in *Waldrip*. The court takes an extremely narrow reading of *Claiborne* to redefine “boycotts” as an act lacking in expressive or political quality. It ignores the obvious ways that, even with such a narrow definition of “boycott,” the statute still compels speech. To arrive at

177. Ark. Code Ann. § 25-1-502(1)(B) (2019).

178. See Ark. Times LP v. Waldrip, 37 F.4th 1386, 1395 (8th Cir. 2022) (Kelly, C.J., dissenting).

179. *Id.* (quoting Simpson v. Cavalry SPV I, LLC, 440 S.W.3d 335, 338 (Ark. 2014)).

180. *Waldrip*, 37 F.4th 1386.

181. *Id.*

182. Ark. Code Ann. § 25-1-501(6) (2017).

this conclusion, the court ignored the plain meaning of “boycott” offered in the statute and ignores legislative history showing an intent to restrict expressive conduct.

B. The Future of Challenges to Anti-BDS Laws

i. Legal Challenges will be Difficult in Federal Courts

After the Eighth Circuit upheld Act 710, the ACLU appealed the case to the Supreme Court, which in turn declined to hear the case.¹⁸³ Currently, the Eighth Circuit is the only appellate court to rule on the constitutionality of anti-BDS laws.¹⁸⁴ District courts in Arizona, Texas, and Kansas all held their states’ anti-BDS laws to be unconstitutional on First Amendment grounds.¹⁸⁵ Following the district court opinions in *Koontz*, *Jordahl*, and *Amawi*, legislators in Kansas, Arizona, and Texas amended their anti-BDS laws to exempt the plaintiffs, preventing appellate rulings from the Tenth, Ninth, and Fifth Circuits, respectively, on First Amendment grounds.¹⁸⁶

In order to combat anti-BDS legislation, BDS advocates should introduce impact litigation targeted at creating a circuit split with the best possible facts to support an appeal to the Supreme Court. With the Eighth Circuit’s decision to uphold Arkansas’ Act 710, BDS supporters will need the Supreme Court to weigh in for anti-BDS laws to be struck down nationwide.¹⁸⁷

The first step to creating a circuit split is finding a plaintiff who cannot be retroactively exempted from the law. For example, in Arizona, following the district court’s ruling in *Jordahl v. Brnovich*, the state legislature amended the law to only apply to “(1) companies with ten or more full-time employees, and (2) contracts valued at \$100,000 or more.”¹⁸⁸ A similar maneuver was done in

183. See Chris McGreal, *ACLU Asks Supreme Court to Overturn Arkansas’ Anti-Boycott Law Against Israel*, GUARDIAN (Oct. 20, 2022), <https://www.theguardian.com/world/2010/may/23/israel-south-africa-nuclear-weapons> [<https://perma.cc/P439-66V6>] (noting the ACLU has asked the Supreme Court to overturn an Arkansas anti-BDS law).

184. Daniel Klein, *State Statutes or Executive Orders Restricting Boycotts of Israel*, 46 A.L.R.7th Art. 4 (2019).

185. *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019); *Jordahl v. Brnovich*, F. Supp. 3d 1016 (D. Ariz. 2018); *Koontz v. Watson*, F. Supp. 3d 1007 (D. Kan. 2018).

186. See Klein, *supra* note 184.

187. McGreal, *supra* note 183.

188. *Jordahl v. Brnovich*, 789 Fed. Appx. 589, 590 (9th Cir. 2020) (holding that “[b]ecause the Act no longer applies to Jordahl or his Firm, his claims for declaratory and injunctive relief are moot.”).

Kansas to render moot the claim brought by the plaintiff in *Koontz v. Watson*.¹⁸⁹ A similar amendment could have been made in Georgia, where pro-BDS activist Abby Martin sued after being prevented from speaking at a state university, but the 11th Circuit made doing so unnecessary for Georgia by affirming the district court's dismissal on qualified immunity grounds, avoiding the First Amendment questions.¹⁹⁰ In order to bypass these sorts of amendments which render challenges moot, impact litigation targeting anti-BDS laws would preferably involve a large company or institution.

In addition to finding the right litigant, impact litigation targeting anti-BDS laws should also identify a case with favorable facts, compared with *Waldrip*. The decision in *Waldrip* came down to whether the boycott was expressive in nature.¹⁹¹ An ideal case would trigger the state's anti-BDS law through an act of advocacy. Although the political and economic aspects of boycotts are "inseparable," as Justice Stevens asserted in *Claiborne*,¹⁹² having an act of advocacy trigger the law would make it harder for a court to find that boycotts are not expressive acts. By focusing on finding a larger institution as a litigant and triggering sanction through indisputably expressive advocacy, BDS advocates will have a better chance at creating a circuit split. This will lead to more favorable circumstances for an appeal to the Supreme Court.¹⁹³

However, there are still challenges to advocates seeking to overturn anti-BDS laws through the courts. The federal courts, including the Supreme Court, have grown increasingly partisan in recent years.¹⁹⁴ One good example of the increasingly political nature of the courts is the author of the Eighth Circuit's *Waldrip* opinion, Judge Jonathan Kobes. Appointed to the Eighth Circuit in

189. *See Legislation – Kansas*, PALESTINE LEGAL (Dec. 16, 2020), <https://legislation.palestinelegal.org/location/kansas/> [https://perma.cc/PQN4-6U59].

190. *Martin v. Chancellor for the Bd. of Regents of the Univ. Sys. of Ga.*, No. 22-12827, 2023 U.S. App. LEXIS 15673, at *17 (11th Cir. June 22, 2023) ("Martin has failed to show that it was clearly established that Defendants' inclusion of the anti-boycott clause in Martin's contract . . . was a constitutional violation. As such, we affirm the district court's grant of Defendants' motion to dismiss on the ground of qualified immunity.")

191. *Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022).

192. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 528 (1945)).

193. Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1152 (2011).

194. Adam Liptak, *On Federal Appeals Courts, a Spike in Partisanship*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/22/us/politics/courts-partisanship.html> [https://perma.cc/5FVY-PAXQ].

2018 by President Trump, Judge Kobes was rated “Not Qualified” by the ABA.¹⁹⁵ Kobes had previously only tried six cases in his legal career, all of which the ABA deemed “not legally complex.”¹⁹⁶ The ABA committee further wrote, “None of the writing we reviewed is reflective of complex legal analysis, knowledge of the law, or ability to write about complex matters in a clear and cogent manner”¹⁹⁷ He was confirmed by a 50-49 vote, the first confirmation of a federal judge via a tiebreaking vote from the Vice President in U.S. history.¹⁹⁸

Before joining the Eighth Circuit, Kobes’ resume mostly consisted of serving as General Counsel to U.S. Senator Mike Rounds.¹⁹⁹ In 2018, a few months before Kobes was nominated for the Eighth Circuit, Senator Rounds co-sponsored the Israel Anti-Boycott Act in the U.S. Senate.²⁰⁰ It is entirely possible that there is no legal challenge which would persuade a judge like Judge Kobes—or, for that matter, any of the six conservative members of the Supreme Court—to strike down an anti-BDS law as unconstitutional.

ii. Political Challenges at the State Level will be Needed to Challenge Anti-BDS Laws

While legal challenges filter through the federal courts, opponents of anti-BDS laws will need to consider political challenges to state anti-BDS laws. It is perhaps outside the scope (and ability) of this Article to fully outline a strategy for repeal of anti-BDS laws. However, there are a few general strategies which may be useful.

Repeal of anti-BDS laws will require public engagement. Many anti-BDS laws were passed almost thoughtlessly by legislators who did not read—and, in some cases, did not even write—the

195. Debra Cassens Weiss, *Pence Breaks Tie to Confirm 8th Circuit Nominee with ‘Not Qualified’ Rating from ABA Committee*, ABA J. (Dec. 12, 2018), https://www.abajournal.com/news/article/pence_breaks_tie_to_confirm_8th_circuit_nominee_with_not_qualified_rating [https://perma.cc/BL35-CF3Z].

196. *Id.*

197. *Id.*

198. *Id.*

199. Catie Edmondson, *Trump’s Judicial Nominees Take Heat but Largely Keep Marching through Senate*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/republicans-judges-confirmation-votes.html> [https://perma.cc/GJ62-72PY].

200. Eric Levitz, *43 Senators Want to Make it a Federal Crime to Boycott Israeli Settlements*, N.Y. MAG. (July 19, 2017), <https://nymag.com/intelligencer/2017/07/senate-bill-would-make-it-a-federal-crime-to-boycott-israel.html> [https://perma.cc/382G-DVX7].

legislation.²⁰¹ This is not a coincidence. Israel is a close U.S. ally and has a strong lobbying machine.²⁰² There can be severe consequences for opposing the Israeli lobby, with little to no countervailing pressure for lawmakers to consider Palestinian interests.²⁰³ Public pressure will be necessary for any political reversals on this issue. In some cases, state lawmakers with little background in foreign policy may be engaged for the first time.²⁰⁴ In any case, opponents of anti-BDS laws will need to convert the growing disillusionment with Israel's policies (particularly among the young and politically liberal) into political pressure.²⁰⁵

Activists will need to create engagement outside of groups that are already focused on this issue. One way to do this would be to emphasize the ways in which anti-BDS laws create a precedent to outlaw other boycotts. This could help engage libertarian-minded political conservatives who are worried about government overreach.²⁰⁶ Most importantly, this strategy could help to engage environmental activists who are worried about political repression in favor of the fossil fuel industry.²⁰⁷ As broad of a coalition as

201. See Whyte, *supra* note 118.

202. See *id.*; see also Tom Perkins, *Pro-Israel Donors Spent over \$22m on Lobbying and Contributions in 2018*, GUARDIAN (Feb. 15, 2019), <https://www.theguardian.com/us-news/2019/feb/15/pro-israel-donors-spent-over-22m-on-lobbying-and-contributions-in-2018> [<https://perma.cc/6626-CJ59>] (“The pro-Israel lobby’s contributions reach a majority of American politicians. In 2018, it spent money on 269 representatives’ and 57 senators’ campaigns . . . [and it is] highly likely that there’s far more pro-Israel lobby money flowing into American politics than is tracked [through dark money contributions.]”); see generally JOHN MEARSHEIMER & STEPHEN WALT, *THE ISRAEL LOBBY AND U.S. FOREIGN POLICY* 3–355 (Farrar, Straus and Giroux, 2007) (describing the function and impact of the Israeli lobby on U.S. foreign policy; the authors argue that, similar to other well-funded political lobbies, the Israel lobby has influenced U.S. legislators to take positions which are not necessarily in the national interest).

203. Whyte, *supra* note 118.

204. See, e.g., *id.*

205. See Saad, *supra* note 10; see also Nortey, *supra* note 91.

206. See, e.g., Jacob Sullum, *Are Boycotts Protected by the First Amendment?*, REASON (Jan. 9, 2019), <https://reason.com/2019/01/09/are-boycotts-protected-by-the-first-amen> [<https://perma.cc/BM2Z-6M8M>] (containing a libertarian-minded conservative columnist’s argument that boycotts should be protected by the First Amendment, regardless of whether one agrees with the boycotters).

207. See Inara Scott, *The Trouble with Boycotts: Can Fossil Fuel Divest Campaigns Be Prohibited?*, 57 AM. BUS. L.J. 537 (2020) (discussing the potential effect of boycott restrictions on divestment campaigns targeting fossil fuel interests); see also Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels*, IN THESE TIMES (Mar. 19, 2021), <https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil> [<https://perma.cc/4SZG-8AYK>] (discussing state-level efforts to prevent divestment from fossil fuels).

possible is needed to counter the considerable resources and organization of the Israel lobby.

Opponents of anti-BDS laws seeking repeals of these laws would also do well to focus their efforts. While both political parties are overwhelmingly supportive of Israel, Republicans are even more so, and the growing opposition to Israel's policies is disproportionately found amongst the young and liberal.²⁰⁸ Therefore, activists should look to repeal anti-BDS laws in states with a trifecta of Democratic governors, state houses, and state senates. There are currently ten states with active anti-BDS laws and Democratic trifectas: California, New Mexico, Colorado, Minnesota, Illinois, Michigan, New York, Maryland, New Jersey, and Rhode Island.²⁰⁹ Opponents of anti-BDS laws should focus their efforts on these states, with a strategy of mobilizing both those concerned about Israeli apartheid and those who simply support a right to boycott.

Conclusion

The right to boycott has been an essential part of the American civic tradition since the country's founding. From the Founding Fathers who boycotted British goods to Quaker activists who boycotted slave goods, boycotts were used as a tactic to express political views in the early history of the United States.²¹⁰ In the twentieth century, Americans used boycotts to protest Jim Crow segregation at home and South African apartheid abroad.²¹¹ Likewise, BDS activists seek to use boycotts to protest Israeli apartheid and U.S. support for apartheid.²¹²

The Eighth Circuit's decision in *Waldrip* will have wide-ranging consequences for Americans seeking to use boycotts in the coming years. It is quite possible that anti-boycott laws may be extended to crack down on citizens who would boycott fossil fuels.²¹³ Given the important role of boycotts in political expression for

208. See Saad, *supra* note 10; see also Nortey, *supra* note 91.

209. State Government Trifectas, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [<https://perma.cc/74EP-BVQV>]; PALESTINE LEGAL, *supra* note 13.

210. Brian Hauss, *The Right to Boycott is Under Threat*, ACLU (Oct. 11, 2017), <https://www.aclu.org/news/free-speech/right-boycott-under-threat> [<https://perma.cc/QP7D-366G>] (“[P]olitical boycotts empower individuals to collectively express their dissatisfaction with the status quo and advocate for political, social, and economic change.”).

211. See Ensley, *supra* note 32; see also S. AFRICAN HIST. ONLINE, *supra* note 57.

212. BDS MOVEMENT, *supra* note 11.

213. Scott, *supra* note 207.

Americans of all beliefs, the Eighth Circuit's opinion will be disastrous for free expression in the United States.

Opponents of anti-BDS laws should look to use impact litigation to create a favorable case for a circuit split. They should also pursue a political strategy of repealing anti-BDS laws at the state level. This strategy is needed to combat the suppression of free speech on behalf of an apartheid state.