

# The Consumer's Choice to Boycott

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## INTRODUCTION

In the wake of employees losing their jobs upon voicing their political opinions concerning Israel,<sup>1</sup> Harvard and Columbia law students' job offers being rescinded upon expressing support for Palestine,<sup>2</sup> and the names and social media profiles of individuals who support Palestine being collected and listed on Canary Mission,<sup>3</sup> such backlash may leave

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1. Timothy Bella, *Online Posts About Israel-Gaza War Are Costing Some People Their Jobs*, WASH. POST (Oct. 12, 2023), <https://www.washingtonpost.com/world/2023/10/12/israel-gaza-war-social-media-job-firings/> [<https://perma.cc/62KF-7JBZ>].

2. Mike Wendling, *Harvard Letter: Law Students Who Took Anti-Israel Stance Lose Job Offers*, BBC NEWS (Oct. 18, 2023), <https://www.bbc.com/news/world-us-canada-67152271> [<https://perma.cc/Y4FV-DG5F>].

3. See, e.g., Katherine M. Franke, *The Pro-Israel Push to Urge US Campus Critics*, N.Y. REV. (Dec. 12, 2018), <https://www.nybooks.com/online/2018/12/12/the-pro-israel-push-to-purge-us-campus-critics/>; Nathan Thrall, *BDS: How a Controversial Non-Violent Movement Has Transformed the Israeli-Palestinian Debate*, GUARDIAN (Aug. 14, 2018),

many Americans wondering what form of resistance to settler-colonialist apartheid is acceptable in the twenty-first century. Recently, the movement to collectively boycott brands like Starbucks, which sued its Worker's Union for a tweet expressing support for Palestine;<sup>4</sup> Disney, which donated money to Israel;<sup>5</sup> and McDonald's, where a location gave away free Happy Meals to IDF soldiers,<sup>6</sup> have gained momentum on social media websites like TikTok and Instagram.<sup>7</sup> Perhaps this trend garnered attention because it allows Americans who feel disheartened by what their tax dollars pay for in the Middle East to refuse to continue putting dollars in the pockets of corporations that either directly or indirectly support Israel.<sup>8</sup>

However, boycotting Israel in the United States did not begin recently. Rather, the official Palestinian Boycott, Divest, Sanctions Movement (BDS) was formulated in 2005.<sup>9</sup> The ability to boycott and resist oppression in a nonviolent manner is not available to everyone. As of October 2023, thirty-eight states have enacted anti-boycott legislation that restricts an individual's ability to boycott Israel when they are a contractor acting in a contractual capacity.<sup>10</sup> This Note addresses how the BDS Movement has unfolded in the United States and has sparked litigation surrounding the issue of protected speech under the First Amendment. Part

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<https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate> [https://perma.cc/5BL3-T2S3].

4. Kat Tenberge, *Social Media Fuels Boycotts Against McDonald's and Starbucks Over Israel-Hamas War*, NBC NEWS (Dec. 1, 2023), <https://www.nbcnews.com/tech/social-media/social-media-fuels-boycotts-mcdonalds-starbucks-israel-hamas-war-rcna125121> [https://perma.cc/B63N-C9E5].

5. Jess Colopy, *Disney Sees Backlash, Boycott for Support of Israel*, INSIDE THE MAGIC (Nov. 16, 2023), <https://insidethemagic.net/2023/11/disney-israel-palestine-boycott-jc1/> [https://perma.cc/3AR3-AQR4].

6. Jaba Ahmed, *McDonald's Chief Says Anti-Israel Boycotts Hitting Sales*, INDEP. (Jan. 5, 2023), <https://www.independent.co.uk/news/business/mcdonalds-israel-palestine-boycott-b2473702.html> [https://perma.cc/2GXE-6PJK].

7. Nina Hernandez, *'It's Literally Been Empty for a Few Days Now': Starbucks Barista Says Pro-Palestine Boycott Is Taking Effect*, DAILY DOT (Oct. 25, 2023), <https://www.dailymag.com/news/starbucks-israel-palestine-boycott/> [https://perma.cc/P3MN-PUB7]. See also Whizy Kim, *The Boycott Movement Against Israel, Explained*, VOX (Oct. 28, 2023), <https://www.vox.com/world-politics/23935054/boycott-movement-palestine-against-israel-bds> [https://perma.cc/M5FC-G3QW].

8. According to the U.S. Department of State, the United States provides Israel with \$3.3 billion under the Foreign Military Financing program, and \$500 million for cooperative programs for missile defense annually. *U.S. Security Cooperation with Israel*, BUREAU OF POL. MIL. AFFS. (Oct. 19, 2023), <https://www.state.gov/u-s-security-cooperation-with-israel/> [https://perma.cc/P3XN-62XH]. For an interactive map that shows how much of this annual funding that taxpayers contribute to Israel by city, see *U.S. Military Funding to Israel Map*, U.S. CAMPAIGN FOR PALESTINIAN RTS., <https://uscpr.org/activist-resource/us-military-funding-to-israel-map/> [https://perma.cc/K6ZX-9TJS] (last visited Aug. 16, 2024).

9. *What Is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> [https://perma.cc/VUM6-5B9Y] (last visited Aug. 16, 2024).

10. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/anti-bds-legislation> [https://perma.cc/RPB6-VCD3] (last visited Aug. 16, 2024).

I provides an overview of the formation and purpose of the BDS Movement. Part II examines common anti-BDS statutory schemes. Part III discusses the reasoning in prominent First Amendment lawsuits challenging anti-BDS statutes. Finally, Part IV argues that it is important for the United States Supreme Court to review *Arkansas Times v. Waldrip* because it leaves open a pathway for policymakers to both restrict ordinary Americans' ability to participate in some boycotts but not others and to restrict business owner's practices and choices.

### I. BACKGROUND ON THE BDS MOVEMENT

BDS describes itself as a loosely connected, nonhierarchical network of activists, though coordination is provided by the Palestinian BDS National Committee.<sup>11</sup> Affiliated groups such as Students for Justice in Palestine, Jewish Voice for Peace, Palestine Solidarity Campaign, and War on Want lead the charge for BDS.<sup>12</sup> Although Palestinians living under Israeli rule may not have the choice to participate in BDS because Israeli goods are the only products available to them, a 2015 poll indicates that 86% of respondents support BDS.<sup>13</sup> Elsewhere, the movement appeals to those who are frustrated by the Israeli occupation of the West Bank, and the blockade and frequent bloodshed in Gaza.<sup>14</sup>

However, in the United States, relatively few Americans are aware of the BDS movement.<sup>15</sup> In a 2022 survey of adults in the United States, 84% of respondents reported that they have "heard 'not much' or 'nothing at all'" about the BDS movement.<sup>16</sup> Meanwhile, a mere 5% of respondents reported to have "heard at least 'some'" about the BDS movement.<sup>17</sup> Of the 5% of respondents who express support for the BDS movement, 2% express strong support.<sup>18</sup>

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

12. *Id.*

13. Yousef Munayyer, *BDS and Palestinian Rights: An Assessment*, ARAB CTR. D.C., (July 18, 2018), <https://arabcenterdc.org/resource/bds-and-palestinian-rights-an-assessment/> [<https://perma.cc/3Q6Q-AFY2>].

14. *Id.*

15. Becka A. Alper, *Modest Warming in U.S. Views on Israel and Palestinians*, PEW RSCH. CTR., (May 26, 2022), <https://www.pewresearch.org/religion/2022/05/26/modest-warming-in-u-s-views-on-israel-and-palestinians/> [<https://perma.cc/SD2W-U5AG>].

16. *Id.*

17. *Id.*

18. *Id.*

### A. The Formation and Goals of BDS

The Palestinian Boycott, Divestment, and Sanctions movement was originally launched by Palestinian Civil Society Organizations at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa.<sup>19</sup> The conference organizers chose Durban, South Africa as an appropriate location for the conference because it served as a symbolic representation of the struggle of the South African people against apartheid.<sup>20</sup> At this conference, the United Nations specifically addressed the plight of the Palestinian people and their inalienable right to an independent state.<sup>21</sup> The conference provided “momentum for the implementation of a second BDS campaign, which was launched in 2005.”<sup>22</sup> Similarly to the South African movement, the Palestinian BDS Movement “focused on the use of international law, non-violent disobedience, and grassroots organizations tethered to an analysis of Israel as a racist, apartheid state.”<sup>23</sup> Proponents of BDS liken the movement to the anti-apartheid movement in South Africa, where experts claim that public awareness and boycotting had a great effect on the apartheid in South Africa.<sup>24</sup> In Pretoria, South Africa, then-President Nelson Mandela included the plight of Palestinians in his speech, saying, “[W]e know too well that our freedom is incomplete without the freedom of the Palestinians” and “[A]ll of us need to do more in supporting the struggle of the people of Palestine for self-determination; in supporting the quest for peace, security, and friendship in the region.”<sup>25</sup>

In July 2005, more than 170 Palestinian civil society groups, led by the Palestinian BDS National Committee, issued a “Call for BDS,” creating an acronym that stands for “Boycott, Divestment, Sanctions.”<sup>26</sup> According to the website for the BDS Committee, the BDS Movement is committed to the principle that “Palestinians are entitled to the same rights as the rest of humanity.”<sup>27</sup> Moreover, the BDS movement “draws

19. World Conf. Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *Declaration and Programme of Action*, 3, U.N. Doc. A/CONF.189/1 (Sept. 8, 2001).

20. *Id.*

21. *Id.* at 13.

22. Bill V. Mullen, *The Palestinian BDS Movement as a Global Antiracist Campaign*, *INTERFACE*, Dec. 2021, at 312, 313.

23. *Id.*

24. Chris McGreal, *Boycotts and Sanctions Helped Rid South Africa of Apartheid—Is Israel Next in Line?*, *GUARDIAN* (May 23, 2021), <https://www.theguardian.com/world/2021/may/23/israel-apartheid-boycotts-sanctions-south-africa> [<https://perma.cc/ZH86-MN24>].

25. Nelson Mandela, President, Address by President Nelson Mandela at International Day of Solidarity with Palestinian People, Pretoria (Dec. 4, 1997) [http://www.mandela.gov.za/mandela\\_speeches/1997/971204\\_palestinian.htm](http://www.mandela.gov.za/mandela_speeches/1997/971204_palestinian.htm).

26. *Palestinian Civil Society Call for BDS*, PALESTINIAN CIV. SOC’Y (July 9, 2005), <https://bdsmovement.net/call> [<https://perma.cc/NJ3E-6D38>].

27. BDS MOVEMENT, *supra* note 9.

inspiration from decades of Palestinian popular resistance, from the South African anti-apartheid struggle, from the US Civil Rights movement, amongst others.”<sup>28</sup> The BDS movement “inspires Palestinians and supporters of Palestinian rights worldwide to speak truth to power, to challenge hegemonic, racist power structures, and to assert that Palestinian rights must be respected and implemented.”<sup>29</sup> The website explains that Palestinians are calling for BDS against Israel because Israel is occupying and colonizing Palestinian land, discriminating against Palestinian citizens of Israel, and denying Palestinian refugees the right to return to their homes.<sup>30</sup> Israel “maintains a regime of settler colonialism, apartheid, and occupation over the Palestinian people. This is only possible because of international support. Governments fail to hold Israel to account, while corporations and institutions across the world help Israel to oppress Palestinians.”<sup>31</sup> In this light, the BDS movement urges action to pressure Israel to comply with international law by:

- 1) Ending [Israel’s] occupation and colonization of all Arab lands [including the West Bank, Gaza, and the Golan Heights] and dismantling the Wall [around Gaza;]
- 2) Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality [and;]
- 3) Respecting, protecting, and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.<sup>32</sup>

Specifically, the 2005 Palestinian call for Boycott, Divestment, and Sanctions made explicit the ethnonationalist basis of Israel’s apartheid state. The call stated, “Fifty-seven years after the state of Israel was built mainly on land ethnically cleansed of its Palestinian owners, a majority of Palestinians are refugees, most of whom are stateless. Moreover, Israel’s entrenched system of racial discrimination against its own Arab-Palestinian citizens remains intact.”<sup>33</sup>

The Palestinian BDS National Committee (BNC) focuses boycott efforts on a small number of companies and products for maximum impact, particularly those that “play a clear and direct role in Israel’s crimes.”<sup>34</sup>

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28. *FAQs*, BDS MOVEMENT, <https://bdsmovement.net/faqs#collapse16232> [https://perma.cc/AD25-WXM6] (last visited Aug. 16, 2024).

29. *Id.*

30. *Id.*

31. BDS MOVEMENT, *supra* note 9.

32. *Id.*

33. PALESTINIAN CIV. SOC’Y, *supra* note 26.

34. *Get Involved*, BDS MOVEMENT, <https://bdsmovement.net/get-involved/what-to-boycott> (last visited Aug. 16, 2024).

The BDS Movement calls for a boycott of Israel's entire regime of oppression, including all the Israeli companies and institutions that are involved in its violations of international law.<sup>35</sup> BDS specifies that it does not target identity but instead strictly targets companies and institutions based on complicity in denying Palestinian rights.<sup>36</sup> For example, BDS calls for a boycott of all Israeli fruit and vegetables, regardless of whether they are grown inside Israel or in illegal Israeli settlements because all Israeli agricultural businesses are involved in human rights violations.<sup>37</sup> BDS also calls for a boycott of "all Israeli universities, because they are implicated, to various degrees, in the design, implementation, justification, or white-washing of Israel's crimes against Palestinians."<sup>38</sup>

The economic boycott of Israel aims to put pressure on Israel to comply with international law and to persuade private companies to end their participation in Israel's crimes.<sup>39</sup> Activists have waged consumer boycotts against Israel-based and multinational corporations—in particular those that are perceived as actively facilitating Israeli settlement-building—including Hewlett-Packard, which provided, among other things, the identification system installed at Israeli military checkpoints.<sup>40</sup> Also, Caterpillar, whose bulldozers have been used in the demolition of Palestinian homes in the West Bank; G4S, a British security company that has provided equipment for Israeli military checkpoints and prisons; and Elbit Systems, Israel's largest military company, which produced its self-proclaimed "field tested" armed drones used in attacks on unarmed civilians in Gaza.<sup>41</sup>

The overarching goals and message of BDS have garnered wider public participation in the form of artists and academics cancelling appearances in Israel and viral brand boycotts on social media. For example, several musicians, including BadBadNotGood, Big Thief, Lana Del Ray, Lauryn Hill, and Snoop Dogg cancelled or postponed their concerts in Israel in solidarity with the Palestinian people.<sup>42</sup> Another notable figure includes Stephen Hawking, who cancelled his appearance at a high-profile

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Palestinian BDS National Committee, *Freedom and Justice for Gaza: Boycott Action Against 7 Complicit Companies*, BDS MOVEMENT (Aug. 15, 2014), <https://bdsmovement.net/news/freedom-and-justice-gaza-boycott-action-against-7-complicit-companies> [https://perma.cc/JR85-6CV9].

40. *Id.*

41. *Id.*

42. *US BDS Victories*, U.S. CAMPAIGN FOR PALESTINIAN RTS. (Nov. 4, 2022), <https://uscpr.org/activist-resource/boycott-divestment-and-sanctions/bdswins/> [https://perma.cc/CM7X-XVVP].

conference in Israel where he was scheduled to speak.<sup>43</sup> When asked why he decided to cancel his appearance, Dr. Hawking explained that he would not be attending “based on advice from Palestinian academics that he should respect the boycott.”<sup>44</sup> Although such artists and academics do not specifically subscribe to BDS, their acknowledgment of the issues occurring in Palestine and Israel indicates that the BDS goals and message are reaching the public.

Currently, wider public participation in BDS has taken the form of viral social media posts that call for the boycott of brands due to their links to Israel following the beginning of the war in Gaza. One such instance is the clothing brand Zara, which, after a promotional campaign featured mannequins wrapped in white cloth and plastic, caused many to claim that either the campaign was inspired by the traditional all-white shrouds common in Gaza or the campaign was insensitive to the suffering there.<sup>45</sup> Meanwhile, the use of the hashtag “#boycottstarbucks” on TikTok has received a combined 51 million views after Starbucks sued the Starbucks Workers United Union when the union posted “Solidarity with Palestine” following the attacks on Israel on October 7, 2023.<sup>46</sup>

### *B. The Effects of BDS*

Overall, the BDS Movement is controversial, and its actual effects are inconclusive and largely depend on who you ask. Despite concern that boycott efforts are generally unsuccessful, recent boycotts have resulted in real change. In 2020, the American Friends Service Committee led a successful boycott against Pillsbury.<sup>47</sup> At the time, the popular baked goods company operated a factory in an Israeli settlement in East Jerusalem.<sup>48</sup> The campaign against Pillsbury, titled “No Dough for the Occupation,”

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43. *How Stephen Hawking Supported the Palestinian Cause*, AL JAZEERA (Oct. 1, 2020), <https://www.aljazeera.com/news/2018/3/14/how-stephen-hawking-supported-the-palestinian-cause> [https://perma.cc/4KNE-MS4U].

44. Isabel Kershner, *Stephen Hawking Joins Boycott Against Israel*, N.Y. TIMES (May 8, 2013), <https://www.nytimes.com/2013/05/09/world/middleeast/stephen-hawking-joins-boycott-against-israel.html>.

45. Safaa Kasraoui, *Zara Triggers Boycott for Controversial ‘Gaza-War Inspired’ Collection*, MOROCCO WORLD NEWS (Dec. 10, 2023), <https://www.morocoworldnews.com/2023/12/359441/zara-triggers-boycott-for-controversial-gaza-war-inspired-collection> [https://perma.cc/6CYW-7NG2].

46. *Social Media Fuels Boycotts Against McDonald's and Starbucks Over Israel-Hamas War*, NBC NEWS (Dec. 1, 2023), <https://www.nbcnews.com/tech/social-media/social-media-fuels-boycotts-mcdonalds-starbucks-israel-hamas-war-rcna125121> [https://perma.cc/7ZXD-H2D3].

47. *Pillsbury Campaign*, AM. FRIENDS SERV. COMM., <https://afsc.org/topics/pillsbury-campaign> [https://perma.cc/7LUD-3MRK] (last visited Sept. 14, 2024).

48. Pete Evans, *Israel's War with Hamas Brings Renewed Focus to BDS Movement and Role of Boycotts to Effect Change*, CBC NEWS (Nov. 29, 2023), <https://www.cbc.ca/news/business/bds-boycott-explainer-1.7042139> [https://perma.cc/A72Z-FLSJ].

was a two-year campaign led by a Quaker organization known as the American Friends Service Committee.<sup>49</sup> It “called on consumers to boycott Pillsbury products until General Mills stopped producing them in Israeli settlements on occupied Palestinian land.”<sup>50</sup> The boycott was supported by many organizations, namely the Palestinian BDS Committee, Jewish Voice for Peace, and American Muslims for Palestine.<sup>51</sup> Organizers employed petitions, shareholder activism, and other public pressure strategies.<sup>52</sup> Additionally, five members of the Pillsbury family wrote an op-ed in which they promised that “as long as General Mills continues to profit from the dispossession and suffering of the Palestinian people, we will not buy any Pillsbury products.”<sup>53</sup> In 2022, the company declared that none of its products would be produced there going forward.<sup>54</sup>

Rhia Capatano, a marketing professor at the Rotman School of Management at the University of Toronto, says while many groups see boycotts as a preferred method of effecting change, there is little evidence they end up achieving their aims.<sup>55</sup> She reported that “[b]oycotts work in terms of mobilizing media attention and creating a threat in terms of the reputation for companies, . . . but there is little evidence consumers follow through on all but a few of them,” most notably because “[p]eople are not always willing to follow through on those intentions, even when brands are acting in ways that are very much not aligned with their values.”<sup>56</sup> However, she further noted, “[w]here communities are more organized and the behaviours are more visible to others in your community, those are the cases where boycotts are going to potentially succeed in the economic sense of harming the business immediately.”<sup>57</sup>

Critics allege that boycotts targeting Israel are antisemitic and racist, despite BDS’s specific stance that it is opposed in principle to all forms of discrimination, including antisemitism.<sup>58</sup> Moreover, even though BDS claims not to advocate for either a one-state or two-state solution,<sup>59</sup> some

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49. Madeleine Moffatt, *Pillsbury Ends Business in Israeli Settlements*, CJPME (Aug. 2022), [https://www.cjpme.org/fs\\_231](https://www.cjpme.org/fs_231).

50. *Id.*

51. *Id.*

52. *Id.*

53. Charlie Pillsbury, *Why We Must Boycott Pillsbury*, MINN. STAR TRIB. (Apr. 28, 2021), <https://www.startribune.com/why-we-must-boycott-pillsbury/600051334>.

54. Evans, *supra* note 47.

55. *Id.*

56. *Id.*

57. *Id.*

58. Timothy Cuffman, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT’L L. 115, 125 (2018).

59. For an explanation of a one-state or two-state solution with regards to the Israel-Palestine conflict, see Martin Indyk, *The Strange Resurrection of the Two-State Solution: How an Unimaginable War Could Bring About the Only Imaginable Peace*, 103 FOREIGN AFFS. 8, 10 (2024).



critics claim that BDS aims to accomplish more than its three demands and aims to destroy Israel itself.<sup>60</sup> Others criticize BDS for hurting the Palestinian economy. When Soda Stream, an Israeli soda manufacturing company, shut down its factory in the West Bank, critics blamed BDS activists for aiming to “obliterate the vast trade surplus Israel extends to Palestine” while “offer[ing] nothing in its place.”<sup>61</sup> On the other hand, others argue that BDS activism has helped to spread awareness of the Palestinian cause by giving “bad publicity to major businesses tied up in Israel’s occupation” and has “disrupted film festivals, concerts, and exhibitions around the world.”<sup>62</sup>

Usually, however, any effects of BDS are often immeasurable because it is difficult to pinpoint certain economic consequences as unequivocally attributable to boycotts.<sup>63</sup> Nevertheless, public awareness of the Palestine issue is an important piece of the BDS campaign.<sup>64</sup> The boycott efforts may be successful in this realm as Israel’s image has declined in Europe and the United States among broad segments of the population, particularly amongst individuals who received higher education.<sup>65</sup>

As such, the broader socio-political implications of BDS take form in two significant ways. First, because Israel relies on its alliance with the United States for military and financial backing, its image to the rest of the world is important.<sup>66</sup> In 2001, Prime Minister Benjamin Netanyahu specifically declared BDS a threat and created a special budget and new governmental positions to fight against BDS.<sup>67</sup> Later, overseas, Netanyahu’s major American donor, Sheldon Adelson, held a meeting in 2015 to find ways to combat BDS in American universities where there was increasing support for the BDS campaign.<sup>68</sup>

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60. Cuffman, *supra* note 58, at 122.

61. Carrie Sheffield, *Boycott Israel Movement Stunts the Palestinian Economy*, FORBES (Feb. 22, 2015), <https://www.forbes.com/sites/carriesheffield/2015/02/22/boycott-israel-movement-stunts-the-palestinian-economy/?sh=7217f8961648>.

62. Thrall, *supra* note 3.

63. Amir Prager, *Achievements According to the BDS Movement: Trends and Implications*, 22 STRATEGIC ASSESSMENT 39, 47 (2019), <https://www.inss.org.il/wp-content/uploads/2022/12/fe-3431799181.pdf>.

64. *Id.*

65. *Id.*

66. *Id.*

67. Marcelo Svirsky, *BDS as a Mediator*, CONCENTRIC: LITERARY & CULTURAL STUDIES 41.2 (Sep. 2015), [https://www.researchgate.net/profile/Marcelo-Svirsky/publication/283518277\\_BDS\\_as\\_a\\_mediator/links/565cf53108aef619b254d2c/BDS-as-a-mediator.pdf](https://www.researchgate.net/profile/Marcelo-Svirsky/publication/283518277_BDS_as_a_mediator/links/565cf53108aef619b254d2c/BDS-as-a-mediator.pdf).

68. *Id.*

## II. ANTI-BDS STATUTES IN THE UNITED STATES

In the United States, there is a wide array of statutory schemes in thirty-eight states that aim to prohibit individuals from boycotting Israel in some form or another.<sup>69</sup> Israel has called such boycotts discriminatory and antisemitic.<sup>70</sup> For example, in November 2018, after Airbnb announced that it would stop listing properties situated in illegal settlements on Palestinian territory as part of a policy to bar listings that contribute to existing “human suffering,”<sup>71</sup> Israeli strategic affairs minister, Gilan Erdan, promptly sent written communication to the governors of several states and “encouraged them to take action ‘in relation to commercial dealings’ with Airbnb.”<sup>72</sup> After a “flood of litigation,” Airbnb repealed the boycott policy and did not remove settlement listings from its website.<sup>73</sup>

### A. Federal Law

Congress has declared that it “opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel.”<sup>74</sup> Moreover, in January 2019, the United States Senate passed a bill that endorsed state anti-boycott legislation, including those that include business activities in settlements.<sup>75</sup> Additionally, in 2017, lawmakers introduced resolutions in both the Senate and the House to condemn boycotts of Israel, but none of those resolutions have become law.<sup>76</sup> More recently, the Combating BDS Act of 2023,<sup>77</sup> which was reintroduced by Senator Marco Rubio, would:

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69. JEWISH VIRTUAL LIBR., *supra* note 10.

70. Andrew Chung, *U.S. Supreme Court Spurns Challenge to Arkansas Law Against Contractors*, REUTERS (Feb. 21, 2023), <https://www.reuters.com/legal/us-supreme-court-spurns-challenge-arkansas-law-against-contractors-boycotting-2023-02-21/>.

71. Julia Jacobs, *Airbnb Reverses Policy Banning Listings in Israeli Settlements in West Bank*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/09/world/middleeast/airbnb-israel-west-bank.html>.

72. Noa Landau & Amir Tibon, *Israeli Minister Calls on U.S. Governors to Act Against Airbnb Over Settlement Ban*, HAARETZ (Nov. 28, 2018), <https://www.haaretz.com/israel-news/2018-11-28/ty-article/.premium/israeli-minister-calls-on-u-s-governors-to-act-against-airbnb-over-settlement-ban/0000017f-eaff-d639-af7f-ebff1b960000?v=1726360146194> [https://perma.cc/ZP2S-JFPW].

73. Jacobs, *supra* note 71.

74. 19 U.S.C. § 4452(b)(4).

75. S. 1, 116th Cong. §§ 401–05 (2019); *see also* US: States Use Anti-Boycott Laws to Punish Responsible Businesses, HUM. RTS. WATCH (Apr. 23, 2019), <https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses> [https://perma.cc/E7U9-PXX7].

76. *See, e.g.*, Israel Anti-Boycott Act, S. 720, 115th Cong. (2017); Combatting BDS Act of 2017, S. 170, 115th Cong. (2017). *See also* Cuffman, *supra* note 60, at 126–27 & nn.53 & 55.

77. Combatting BDS Act of 2023, S. 1637, 118th Cong. § 2 (2023).

[H]elp state and local governments stand up to the anti-Israel BDS movement, which seek to delegitimize the Jewish state of Israel by inflicting economic damage and starve it of commerce. The bill would increase protections for state and local governments in the United States that divest from, prohibit investment in, or otherwise restrict contracting with firms that knowingly engage in commerce-related or investment-related BDS activity attacking Israel, as well as persons doing business in Israel or Israeli-controlled territories.<sup>78</sup>

### *B. State Law*

Overall, state laws that prohibit individuals from either directly or indirectly participating in the boycott of Israel take place in three broad forms: (1) resolutions that are not binding, but rather are symbolic in nature; (2) laws that prohibit state pension funds and other public investments from investing in entities that boycott Israel in some form; and (3) laws that prohibit public entities from doing business with those who boycott Israel in some form.<sup>79</sup>

More than half of the states have laws barring contractors that refuse to do business with Israel.<sup>80</sup> For example, an Arizona statute specifically defines “boycott” as:

[E]ngaging in refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with entities doing business in Israel or in territories controlled by Israel, if those actions are taken either:

- (a) Based in part on the fact that the entity does business in Israel or in territories controlled by Israel.
- (b) In a manner that discriminates on the basis of nationality . . . and . . . not based on a valid business reason.<sup>81</sup>

The statute continues to prohibit a public entity from:

[Entering] into a contract with a value of \$100,000 or more with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for

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78. Press Release, Rubio Colleagues Reintroduce Legislation to Combat Anti-Israel BDS Campaign, Marco Rubio U.S. Sen. for Fla. (July 27, 2023), <https://www.rubio.senate.gov/rubio-colleagues-reintroduce-legislation-to-combat-anti-israel-bds-campaign/> [https://perma.cc/9FCU-VRMG].

79. Cuffman, *supra* note 60, at 123.

80. Chung, *supra* note 70.

81. ARIZ. REV. STAT. ANN. § 35-393 (2022).

the duration of the contract not to engage in, a boycott of goods or services from Israel.<sup>82</sup>

Furthermore, the statute requires that each public fund, on an annual basis, must “prepare a list of restricted companies”<sup>83</sup> and shall “[s]ell, redeem, divest, or withdraw all direct holdings of a restricted company from the assets under its management.”<sup>84</sup> It contains the caveat that a company shall be removed from the restricted list if it certifies that it will cease engaging in a boycott of Israel.<sup>85</sup> A similar Arkansas statute, passed in 2017, also requires public contracts<sup>86</sup> to include a certification that the contractor is not engaged in a boycott of Israel.<sup>87</sup>

### III. ANTI-BOYCOTT LEGISLATION

Although anti-BDS statutes are not meant to target individuals but rather contractors acting in a contractual capacity, some individuals feel that the anti-BDS laws infringe on their First Amendment right to boycott. One such individual is Alan Leveritt, the owner and publisher of Arkansas Times LP.<sup>88</sup> When it was time to renew an advertising contract with the Arkansas Pulaski Technical College, the college was required under state statute to request that Mr. Leveritt certify that he would not engage in a boycott of Israel.<sup>89</sup> Mr. Leveritt refused as a matter of principle and sued the Trustee of the University of Arkansas Board of Trustees affiliated with the Arkansas Pulaski Technical College.<sup>90</sup> Mr. Leveritt announced, “Our newspaper is not boycotting anyone, we cover local politics and issues, not the Middle East—but we do not allow the state to dictate our political positions on any issue in return for advertising dollars.”<sup>91</sup>

The ensuing lawsuit, *Arkansas Times LP v. Waldrip*, is an important case in a string of anti-BDS legislation because it was the first case

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82. ARIZ. REV. STAT. ANN. § 35-393.01 (2018).

83. “Restricted company” is defined as a company that boycotts Israel, according to ARIZ. REV. STAT. ANN. § 35-393(6) (2022).

84. ARIZ. REV. STAT. ANN. § 35-393.02 (2022).

85. *Id.*

86. ARK. CODE ANN. § 25-1-503 (2017). For a sample Israel Boycott Restriction Certification provided by the State of Arkansas, see DEP’T OF TRANSFORMATION & SHARED SERVS., ISRAEL BOYCOTT RESTRICTION CERTIFICATION (2017), <https://www.dfa.arkansas.gov/images/uploads/procurementOffice/RFPBoycottIsraelCertForm.pdf> [<https://perma.cc/KTY6-YGLU>].

87. Chung, *supra* note 70.

88. AMP Staff, *Supreme Court Will Not Hear Arkansas Times Lawsuit*, ARK. MONEY & POL. (Feb. 22, 2023), <https://armoneyandpolitics.com/supreme-court-arkansas-times-lawsuit/> [<https://perma.cc/4YKD-JA4A>].

89. Brian Hauss, *Supreme Court Declines to Review Challenge to Law Restricting Israel Boycotts*, ACLU (Feb. 21, 2023), <https://www.aclu.org/press-releases/supreme-court-declines-to-review-challenge-to-law-restricting-israel-boycotts> [<https://perma.cc/SK49-KFXQ>].

90. *Id.*

91. AMP Staff, *supra* note 88.

challenging anti-BDS legislation to reach a federal appellate court.<sup>92</sup> Although federal courts in Kansas, Arizona, Texas, and Georgia have held that laws penalizing boycotts of Israel violate the First Amendment, the Eighth Circuit in *Waldrip* departed from those decisions.<sup>93</sup>

The Texas District Court in *Amawi v. Plugerville Independent School District* found content and viewpoint-based restrictions on speech in Texas H.B. 89, which prohibited state entities from contracting with companies that “boycott Israel.”<sup>94</sup> The district court reasoned that it was content-based restriction because it singled out speech about Israel specifically, and it was a viewpoint-based restriction because it targeted only speech “intended to penalize, inflict harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israeli-controlled territory.”<sup>95</sup> The opinion highlights that, even if it were generally true that boycotts are not inherently expressive, H.B. 89, by its terms, applies to an expressive boycott by means of a refusal to buy things.<sup>96</sup>

By contrast, in *Arkansas Times v. Waldrip*, where the court acknowledged that First Amendment protections prevent chilling or deterring speech by requiring an individual to give up rights in exchange for a government benefit, it found the statute constitutional because commercial decisions are not expressive conduct, and therefore not protected by the First Amendment.<sup>97</sup> The Eighth Circuit reasoned that because those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment.<sup>98</sup>

In determining whether a boycott of Israel is First Amendment protected activity, the Texas District Court and Eighth Circuit differed in their approaches to applying the canon First Amendment cases *NAACP v. Claiborne Hardware Company* and *Rumsfeld v. FAIR*.<sup>99</sup> For example, the Texas District Court in *Amawi v. Plugerville Independent School District* chose to apply *NAACP v. Claiborne Hardware Company*, in which the Supreme Court held that the NAACP’s boycott clearly involved constitutionally protected activity. In this case, the State’s broad power to regulate

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92. Stephen Harrelson, *Preserving the Right to Boycott: How the Eighth Circuit Could Have Decided Arkansas Times v. Waltrip in a Manner That Provided First Amendment Protection to a Time-Honored Way of All Americans, Especially Ethnic and Religious Minorities, to Express Their Political Grievances*, Note, 22 FIRST AMEND. L. REV. 82, 84–85 (2023).

93. Hauss, *supra* note 89.

94. *Amawi v. Plugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 730, 750–51 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020).

95. *Id.* at 756 (quoting TEX. GOV’T CODE. ANN. § 808.001 (West 2017)).

96. *Id.*

97. *Arkansas Times LP v. Waldrip*, 37 F.4th 1386, 1391–94 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

98. *Id.* at 1394.

99. *Compare Amawi*, 373 F. Supp. 3d at 743, *with Waldrip*, 37 F.4th at 1391.

economic activity could not justify a complete prohibition against a non-violent, politically motivated boycott, where the lawsuit sought to impose liability on Black citizens participating in a NAACP-organized boycott of white merchants in Mississippi.<sup>100</sup>

On the other hand, *Rumsfeld v. FAIR* involved several law schools' challenge to the Solomon Amendment, which conditioned the receipt of federal funds on permitting military recruiters to enter campuses.<sup>101</sup> There, the law schools wanted to prevent recruiters from conducting interviews on law school campuses in protest of the military's discriminatory policies.<sup>102</sup> In that case, the United States Supreme Court held that the Solomon Amendment did not compel the law schools' speech in violation of the First Amendment because "the schools are not speaking when they host interviews and recruiting receptions."<sup>103</sup> The law schools' protest was not inherently expressive because it requires explanatory speech to communicate its message.<sup>104</sup>

In *Amawi v. Plugerville Independent School District*, the Texas District court applied *Claiborne* rather than *FAIR* because the choice to boycott Israel was political, which was more similar to *Claiborne*'s political boycotts.<sup>105</sup> By contrast, *FAIR* did not involve boycotts. Rather, the decision to withhold patronage was never implicated.<sup>106</sup>

#### IV. THE IMPLICATIONS OF THE LEGALITY OF ANTI-BOYCOTT LEGISLATION

In response to the Eighth Circuit's holding in *Waldrip*, the Arkansas Times filed a petition for a writ of certiorari, asking the United States Supreme Court to issue a ruling on whether "a state law requiring government contractors to certify that they are not participating in, and will not participate in, boycotts of Israel or Israel-controlled territories [is] consistent with *NAACP v. Claiborne Hardware* and the First Amendment's central prohibition against content and viewpoint discrimination."<sup>107</sup> However, the Supreme Court declined to review in February 2023.<sup>108</sup> The Supreme Court should review *Waldrip* and clarify *Claiborne*'s applicability because anti-statutes repeatedly affect individuals and their livelihoods

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100. *Amawi*, 373 F. Supp. 3d at 743.

101. *Id.*

102. *Id.*

103. *Id.* (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006)).

104. *Id.* at 743.

105. *Id.*

106. *Id.*

107. Petition for Writ of Certiorari at i, *Arkansas Times LP v. Waldrip*, 143 S. Ct. 774 (2023) (No. 22-379) (citation omitted).

108. *Id.*

across the United States, and it is a relevant issue given the current state of the world.

First, anti-BDS legislation lawsuits have deeply affected ordinary Americans across the United States. For example, Bahia Amawi, a Palestinian and United States citizen, had been contracted with the Pflugerville Independent School District for nine years, where she was a speech therapist.<sup>109</sup> She stated that not only has she “seen . . . the brutality of the Israeli government against Palestinians,” where the government restricts the Palestinians by shutting down access to their roads in the West Bank, imposing weeks-long curfews, and subjecting Palestinians to constant searches and detentions, she has actually experienced these cruelties herself.<sup>110</sup> She “frequently make[s] economic decisions on the basis of [her] support for Palestine,” which includes purchasing Palestinian olive oil and not purchasing Sabra Hummus because of the company’s link to Israel.<sup>111</sup> When she refused to sign an addendum to her contract which required her to certify that she does not boycott Israel, the school district was forced to terminate her pursuant to H.B. 89.<sup>112</sup>

Another situation involved a woman named Esther Koontz, a member of the Mennonite Church USA.<sup>113</sup> Koontz was a math teacher for nine years.<sup>114</sup> She was also a contractor who trained educators in the Kansas Department of Education’s Math and Science Partnership program.<sup>115</sup> When members of the congregation and the church began to make calls to boycott, Koontz decided to refrain from purchasing products made by Israeli companies and companies operating in Israeli settlements in the occupied Palestinian territories.<sup>116</sup> When a Department of Education office asked Koontz to certify that she does not participate in a boycott of Israel, she said that she could not sign the form in good conscience.<sup>117</sup> As a result, the state refused to contract with her, and she is unable to participate as a trainer in the state’s program.<sup>118</sup>

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109. Jacey Fortin, *She Wouldn't Promise Not to Boycott Israel, So a Texas School District Stopped Paying Her*, N.Y. TIMES (Dec. 19, 2018) <https://www.nytimes.com/2018/12/19/us/speech-pathologist-texas-israel-oath.html>.

110. *Amawi*, 373 F. Supp. 3d at 731.

111. *Id.* (alterations in original).

112. *Id.* at 732.

113. Esther Koontz, *Kansas Won't Let Me Train Math Teachers Because I Boycott Israel*, ACLU (Oct. 12, 2017), <https://www.aclu.org/news/free-speech/kansas-wont-let-me-train-math-teachers-because-i-boycott-israel> [<https://perma.cc/9DNX-9WJS>].

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

Anti-BDS statutes caused delays in disaster relief after Hurricane Harvey hit Texas. In the application for hurricane relief, residents of the city of Dickinson were required to verify that they did not and would not boycott Israel.<sup>119</sup> This requirement stemmed from H.B. 89, a familiar anti-BDS statute prohibiting state agencies from contracting with companies engaged in boycotting Israel.<sup>120</sup> The requirement was revoked as it applied to homeowners following public pressure and criticism from the ACLU that such a requirement was an “egregious violation of the First Amendment.”<sup>121</sup> Nevertheless, in order to comply with H.B. 89, businesses were still required to verify that they would not boycott Israel.<sup>122</sup>

Not only do anti-BDS statutes clearly affect ordinary Americans across the United States, but the disagreement between the courts over the extent of an individual’s right to boycott will likely continue to affect Americans given the unfolding war between Israel and Palestine and continued efforts to boycott. The facts in *Arkansas Times LP v. Waldrip* are not a stand-alone incident in one part of the country, but rather a repetitive issue that has occurred in many states. Thirty-eight states have anti-BDS statutes<sup>123</sup> that will likely only continue to affect citizens because of the war between Israel and Palestine and the rise in public awareness of the boycotts on social media.<sup>124</sup> The BDS movement is increasing its calls for boycotts in response to the escalation of the war following the attacks on October 7, which makes it even more necessary for the Supreme Court to define expressive conduct and therefore protect this conduct under the First Amendment.<sup>125</sup>

Second, the United States’ public opinion has historically accepted boycotts<sup>126</sup> as a means for individuals to voice their political stances and opposition to certain regimes. It is a longstanding American practice that goes back as far as the Boston Tea Party, with other notable and impactful

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119. Claire S. Cardona & Tom Steele, *Residents of Texas Town No Longer Have to Vow Not to Boycott Israel to Get Harvey Relief Funds*, DALL. MORNING NEWS (Oct. 26, 2017), <https://www.dallasnews.com/news/texas/2017/10/26/residents-of-texas-town-no-longer-have-to-vow-not-to-boycott-israel-to-get-harvey-relief-funds/> [https://perma.cc/J8D6-BPGC].

120. *Id.* See also *Bill HB 89*, TEX. LEGISLATURE ONLINE, <https://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB89> [https://perma.cc/U9PY-NTJT] (last visited Aug. 11, 2024).

121. *Texas City Tells People No Hurricane Harvey Aid Unless They Promise Not to Boycott Israel*, ACLU (Oct. 19, 2017), <https://www.aclu.org/press-releases/texas-city-tells-people-no-hurricane-harvey-aid-unless-they-promise-not-boycott> [https://perma.cc/3GHB-T5HL].

122. Cardona & Steele, *supra* note 119.

123. JEWISH VIRTUAL LIBR., *supra* note 10.

124. See *supra* Part II.

125. See *supra* Part I.

126. See Lawrence B. Glickman, *The American Tradition of Consumer Politics*, ORG. OF AM. HISTORIANS, <https://www.oah.org/tah/may-3/the-american-tradition-of-consumer-politics/> (last visited Aug. 31, 2024).



boycotts being the Montgomery bus boycotts and the South African apartheid boycotts.<sup>127</sup> Anti-BDS legislation and the right to boycott are issues that most Americans would likely care about regardless of their political affiliations because free speech issues appeal to Democrats and Republicans alike.<sup>128</sup> This issue should be on the Supreme Court's radar because the rapidly unfolding war in Gaza will cause more BDS boycotts. Although advocates for anti-BDS legislation explain that it protects the state of Israel from unfair discrimination and therefore does not violate the First Amendment,<sup>129</sup> the Supreme Court should address this. If they agree with this claim, the Supreme Court should answer how exactly BDS boycotts differ from other boycotts that have been practiced in the United States in the past.

Third, individuals partaking in business activities or even simply contributing to the United States economy help to sustain illegal settlements and make them more economically viable when consumers purchase these products.<sup>130</sup> The United Nations' Guiding Principles on Business and Human Rights makes clear that businesses have a responsibility to take steps to identify and lessen serious human rights abuses and risks across their operations.<sup>131</sup> A business that contributes to human rights abuses should cease or prevent that contribution and should use its leverage to mitigate any remaining harm to the greatest extent possible.<sup>132</sup> If a company cannot prevent or mitigate this harm, one would think that the most responsible course of action would be to refrain from entering into such business as much as possible.<sup>133</sup> As described in Parts I and II, doing business with Israel's illegal settlements is likely something many companies and citizens across the United States can refrain from to avoid contributing to serious and well-documented human rights abuses.<sup>134</sup>

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127. *Id.*

128. *Id.*

129. Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, and Will be Again*, 74 ARK. L. REV. 607, 612–14 (2022).

130. *US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019), <https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses> [https://perma.cc/3A2Q-4CUF].

131. *Guiding Principles of Business and Human Rights*, UNITED NATIONS, [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) [https://perma.cc/K2NW-B9SB] (last visited Aug. 16, 2024).

132. *Id.* at 21.

133. *Id.*

134. Alia Chughtai, Marium Ali & Delaney Nolan, *Boycotts and Protests—How Are People Around the World Defying Israel?*, AL JAZEERA (Dec. 15, 2023), <https://www.aljazeera.com/news/2023/12/15/boycotts-and-protests-how-are-people-around-the-world-defying-israel> [https://perma.cc/VG8X-CN45].

## CONCLUSION

In summary, while the BDS movement remains controversial in the United States and while the war between Israel and Gaza unfolds and large numbers of Americans relating to both sides are affected, it is important that the Supreme Court review *Arkansas Times v. Waldrip*. This case touches on the First Amendment freedom to boycott and refrain from consumerism as a matter of principle is protected by legal precedent, and the Supreme Court should act to protect this freedom.