

No. 18-16896

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.,

*Plaintiffs-Appellees,*

v.

THE STATE OF ARIZONA and MARK BRNOVICH, ARIZONA

ATTORNEY GENERAL,

*Defendants-Appellants,*

and JIM DRISCOLL, COCONINO COUNTY SHERIFF, *et al.*,

*Defendants.*

On Appeal from the United States District Court  
for the District of Arizona  
Case No. 3:17-cv-08263

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BRIEF OF *AMICI CURIAE*, THE CENTER FOR CONSTITUTIONAL RIGHTS  
AND PALESTINE LEGAL, IN SUPPORT OF  
PLAINTIFFS-APPELLEES AND AFFIRMANCE

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici curiae* hereby certify that they have no parent corporation and have not issued any shares of stock to any publicly held corporation.

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*Hearing on HB2617 Before the S. Comm. on Federalism, Mandates and Fiscal Responsibility*, 52d Leg., 2d Sess. (Ariz. 2016) (statement of Sen. Nancy Barto, Member, S. Comm. on Federalism, Mandates, and Fiscal Responsibility), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=26&clip\\_id=17074&meta\\_id=349699](http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=17074&meta_id=349699).....12

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## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

The Center for Constitutional Rights is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. For over fifty years, the Center for Constitutional Rights has protected the rights of marginalized political activists, and litigated historic First Amendment cases, such as *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), *United States v. Eichman*, 496 U.S. 310 (1990), and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). More recently, this has meant increasing representation of advocates of Palestinian rights whose protected speech has been suppressed. *See Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015); *Bronner v. Duggan*, No. 16-00740 (D.D.C. filed Apr. 20, 2016); *Awad v. Fordham*, Index No. 153826-2017 (N.Y. Sup. Ct. filed Apr. 26, 2017); *Davis v. Cox*, No. 11-2-01925-7 (Wash. Super. Ct. Mar. 30, 2018) (order granting defs. mot. for summ. j.), *appeal filed*, No. 51770-1-II (Wash. Ct. App. Apr. 28, 2018).

Palestine Legal is a non-profit legal and advocacy organization specifically dedicated to protecting the civil and constitutional rights of people in the U.S. who

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<sup>1</sup> This Brief of Amici Curiae is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29. It is filed in support of Plaintiffs-Appellees and seeks affirmance of the district court's decision. Appellants and Appellees have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no one other than amicus curiae contributed money intended to fund preparing or submitting the brief.

speak out for Palestinian freedom. Palestine Legal tracks incidents of censorship and efforts to suppress expression supporting Palestinian rights, including the numerous anti-boycott bills of the kind at issue in this case. Palestine Legal has advised hundreds of clients whose rights have been violated because of anti-boycott laws and other censorship campaigns targeting speech supporting Palestinian rights.

Together, *amici* have relevant, first-hand knowledge of the consequences of laws such as ARIZ. REV. STAT. ANN. § 35-393 et seq. (2016), as well as other viewpoint-based censorship campaigns directed at advocacy for Palestinian rights, which have the purpose and effect of chilling an important perspective on an issue of significant public concern. *Amici* write to situate § 35-393 in the context of this broader, coordinated and well-financed effort to stifle viewpoints that support Palestinian rights and to urge this Court to fulfill its constitutional role in protecting First Amendment-protected expressive activity, including that which challenges the status quo.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

The 70-plus-year-long quest for Palestinian freedom and self-determination is among the world's most contested issues. In recent years, an increasing number of individuals and organizations inside the United States have engaged in various forms of expressive conduct to oppose the state of Israel's military occupation and



discriminatory treatment of Palestinians. Many individuals, like Appellee Mikkel Jordahl, have heeded the call for “Boycott, Divestment and Sanctions” (BDS) that was issued by Palestinian civil society and endorsed by a diverse array of religious, ethnic, and social-justice entities in the U.S., including Jewish Voice for Peace (JVP), of which Appellee Jordahl is a member. Individuals like Appellee Jordahl promote or engage in boycotts of companies and institutions on the conviction that they are complicit in Israel’s abuses against Palestinians and in a manner that mirrors social justice boycotts challenging discrimination throughout history, from the Montgomery bus boycotts to the South African anti-apartheid boycotts.

This growing movement for Palestinian rights, and especially the call for boycotts, has in turn been met aggressively by its target, the Israeli government, which, along with aligned private groups, has devoted significant financial and strategic resources to quashing it. In 2017, the Israeli government set aside \$72 million to “fight against the de-legitimization of Israel,”<sup>2</sup> *i.e.* criticism of core Israeli policies toward Palestinians, and recently set out its plans to establish and fund an “international legal network” to stop the BDS movement.<sup>3</sup> This

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<sup>2</sup> *Israeli government OKs \$72 million anti-BDS project*, JEWISH TELEGRAPH AGENCY (Dec. 29, 2017, 8:51 AM), <https://www.jta.org/2017/12/29/news-opinion/israel-middle-east/israeli-government-oks-72-million-anti-bds-project>.

<sup>3</sup> Maayan Jaffe-Hoffman, *Strategic Affairs Ministry to Form Anti-BDS Legal Network*, JERUSALEM POST (Dec. 20, 2018, 5:17 PM), <https://www.jpost.com/Arab-Israeli-Conflict/Ministry-of-Strategic-Affairs-to-create-international-anti-BDS-legal-team-574946>.

government funding, combined with the work of numerous Israel-aligned private organizations and resources, has produced seemingly unprecedented success: twenty-six states in the past four years have adopted laws that seek to punish individuals or entities that engage in advocacy for Palestinian rights, especially boycotts.<sup>4</sup> U.S. legislators have not been subtle in surfacing the viewpoint discrimination embedded in their efforts; as one prominent U.S. Senator revealed, the goal of one such bill is to “send[] a clear message that politically-motivated boycotts of Israel are unacceptable to the United States.”<sup>5</sup>

Indeed, these legislative enactments, conjoined with efforts of private groups pressing for censorship on college campuses, in artistic venues, and in the broader public square, represent, as the *New York Times* described, “a larger, ominous trend in which the political space for opposing Israel is shrinking.”<sup>6</sup>

Contrary to the claims of putative censors, boycotts for Palestinian rights are not commercial activities or in any way expressions of hatred or discrimination against Jewish people or Israelis. They are situated at the heart of protected

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<sup>4</sup>*Anti-Palestinian Legislation*, PALESTINE LEGAL, <https://palestinelegal.org/righttoboycott> (last visited Jan. 23, 2019).

<sup>5</sup> Press release, Sen. Rob Portman, Portman, Cardin, Roskam, and Vargas Lead Bipartisan, Bicameral Bill to Reject Attempts to Economically Isolate Israel (Mar. 23, 2017), <https://www.portman.senate.gov/public/index.cfm/2017/3/portman-cardin-roskam-and-vargas-lead-bipartisan-bicameral-bill-to-reject-attempts-to-economically-isolate-israel>.

<sup>6</sup> The Editorial Board, *Curbing Speech in the Name of Helping Israel*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/opinion/editorials/israel-bds.html>.

expressive conduct critical of an unjust status quo, just as with the boycott the Supreme Court held was unambiguously protected by the First Amendment in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). As with the boycott of white-owned stores in the 1950s and 60s—which emerged from a racial justice movement that utilized boycotts among other forms of protest—boycotts challenging Israeli state practices are a form of political protest arising from a movement demanding freedom, justice and equality.

Yet absent a continuing injunction against A.R.S. § 35-393 et seq., that law and others like it will continue to punish and chill one side of this important critical debate, in self-perpetuating favor of the now-dominant viewpoint. As the district court correctly understood, the Constitution does not permit the government to use its power to regulate the exercise of viewpoints with which it disagrees.

## ARGUMENT

### **I. BOYCOTTS TO ADVANCE PALESTINIAN RIGHTS FALL WITHIN A HISTORIC TRADITION OF CONSTITUTIONALLY-PROTECTED EXPRESSIVE ACTIVITY.**

Almost every major social movement has at some point utilized boycotts as a method to raise awareness about a persistent social injustice, by leveraging political and economic mobilization to urge changes in government or private practices. In this way, boycotts stand alongside other forms of expressive political activity such as demonstrations, picketing, strikes, and sit-ins. Their historical

pedigree and legitimacy as a tool to challenge injustice, including against another country, is unimpeachable. Boycotts were crucial to the founding of the United States, as colonists boycotted British goods to protest taxation without representation.<sup>7</sup> In the early 1790s, supporters of abolition of the slave trade in Britain urged a boycott of slave-produced sugar.<sup>8</sup> In 1903, anti-colonial actors in India launched an independence movement by calling for a boycott of British goods.<sup>9</sup> In 1905, the Chinese boycotted American products to protest the extension of the Chinese Exclusion Act.<sup>10</sup> In 1955, when Rosa Parks refused to give up her bus seat for a white person in Montgomery, Alabama, she sparked the Montgomery bus boycott to protest racial segregation in public transportation and

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<sup>7</sup> *Jun 29, 1767 CE: Taxation Without Representation*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/thisday/jun29/taxation-without-representation/> (last visited Jan. 23, 2019).

<sup>8</sup> Mike Kaye, *The Tools of the Abolitionists*, BBC.CO.UK, [http://www.bbc.co.uk/history/british/abolition/abolition\\_tools\\_gallery\\_07.shtml](http://www.bbc.co.uk/history/british/abolition/abolition_tools_gallery_07.shtml) (last updated Feb. 17, 2011).

<sup>9</sup> CHARLES ANDREW ORR, *A STUDY OF INDIAN BOYCOTTS* (1940). The word “boycott” originates from 1880’s Ireland, when tenant workers, unhappy with the refusal of their English land agent – Charles Cunningham Boycott – to decrease rents when crops were poor, refused to sell him goods. Steven Greenhouse, *IDEAS & TRENDS: A Weapon for Consumers; The Boycott Returns*, N.Y.TIMES (Mar. 26, 2000), <https://www.nytimes.com/2000/03/26/weekinreview/ideas-trends-a-weapon-for-consumers-the-boycott-returns.html>.

<sup>10</sup> Jane Leung Larson, *The 1905 Anti-American Boycott as a Transnational Chinese Movement*, 21 CHINESE AM.: HIST. & PERSPS. 191 (2007); *see also* John W. Foster, *The Chinese Boycott*, 97 THE ATLANTIC MONTHLY 118 (1906), *available at* <https://www.theatlantic.com/past/docs/unbound/flashbks/china/foster.htm>.

began a chain reaction of similar boycotts throughout the South.<sup>11</sup> In 1965, Cesar Chavez led the National Farm Workers Association to join a strike to protest working conditions for grape growers in California that eventually led to a nationwide boycott and major reforms.<sup>12</sup> And quite notably, a global boycott, divestment, and sanctions movement helped dismantle apartheid in South Africa.<sup>13</sup>

**A. The Politically Expressive Goals of Boycotts for Palestinian Rights.**

In 2005, a diverse coalition of over 170 Palestinian civil society organizations located in Israel, the occupied Palestinian territory, and the diaspora—including unions, academic institutions, cultural and arts groups, and non-governmental organizations—issued a call to “international civil society organizations and people of conscience all over the world to impose broad boycotts,” “implement divestment initiatives,” and pressure “states to impose

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<sup>11</sup> See E.R. Shipp, *Rosa Parks, 92, Founding Symbol of Civil Rights Movement, Dies*, N. Y. TIMES (Oct. 25, 2005), <https://www.nytimes.com/2005/10/25/us/25parks.html>.

<sup>12</sup> See Maureen Pao, *Cesar Chavez: The Life Behind the Legacy of Farm Labor Rights*, NPR (Aug. 12, 2016), <https://www.npr.org/2016/08/02/488428577/cesar-chavez-the-life-behind-a-legacy-of-farm-labor-rights>.

<sup>13</sup> See William Finnegan, *Postscript: Nelson Mandela, 1918-2013*, NEW YORKER, (June 8, 2013), <https://www.newyorker.com/news/news-desk/postscript-nelson-mandela-1918-2013>. “The anti-apartheid movement gained traction globally. Economic sanctions and the divestment campaign, although opposed by conservative Western leaders, including Ronald Reagan and Margaret Thatcher, who continued to call the A.N.C. a “terrorist organization,” began to take their toll.” *Id.* See also Håkan Thörn, *Solidarity Across Borders: The Transnational Anti-Apartheid Movement*, 17 *Voluntas: Int’l J. Voluntary & Nonprofit Orgs.* 285 (2006).

embargoes and sanctions” against the state of Israel.<sup>14</sup> This peaceful call for solidarity and support from the international community intentionally sought to mirror the political tactics used by social justice activists with regard to South Africa, who challenged the apartheid regime through direct action, including calling for non-violent boycotts, divestment, and sanctions.<sup>15</sup>

Anchored in the Universal Declaration of Human Rights, the call for BDS espouses equal rights for all and categorically opposes all forms of racism, including antisemitism. The call urges nonviolent pressure on Israel until it “meets its obligation to recognize the Palestinian People’s inalienable right to self-determination and fully complies with the precepts of international law.”<sup>16</sup> Specifically, it includes several demands: an end to the discrimination and second-class status that Palestinian citizens of Israel experience; the right of Palestinian refugees to return to their lands; and an end to Israel’s military occupation, settlements, checkpoints, and “apartheid Wall,” which force Palestinians in the

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<sup>14</sup> *Palestinian Civil Society Call for BDS*, BDSMOVEMENT.NET (July 9, 2005), <https://bdsmovement.net/call>.

<sup>15</sup> See Desmond Tutu, *Tutu: Israel’s Humiliation of Palestinians ‘Familiar to Black South Africans’*, HAARETZ (Mar. 10, 2014 10:38 AM), <http://www.haaretz.com/israel-news/1.578872>; Nathan Thrall, *BDS: how a controversial non-violent movement has transformed the Israeli-Palestinian debate*, THE GUARDIAN (Aug. 14, 2018 1:00 AM), <https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate>; AJ+, *What Does BDS Mean for Palestine?*, YOUTUBE (Oct. 26, 2017), <https://www.youtube.com/watch?v=RAxYkenR48w>.

<sup>16</sup> *Palestinian Civil Society Call for BDS*, *supra* note 14.

West Bank to live in ghettos and those in Gaza to live in the largest open air prison in the world.<sup>17</sup>

**B. These Boycotts Are Protected by the First Amendment.**

Pursuant to this call, Appellee “participates in a boycott of consumer goods and services offered by businesses supporting Israel’s occupation of the Palestinian territories.” *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1028 (D. Ariz. 2018). As described above, such boycotts are historically a central form of resistance and protest. They are also protected by the U.S. Constitution. In 1982, the Supreme

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<sup>17</sup> Advocates for BDS maintain that the Israeli government has and continues to engage in systematic practices to deny Palestinians justice and equality under the law—practices that international bodies have found to violate well-established international legal obligations. These unlawful practices include: the prolonged belligerent military occupation of Gaza and the West Bank, including East Jerusalem; the decade-long closure that prevents the movement of people and goods into and out of Gaza, and denies the enjoyment of a range of fundamental rights to the two million Palestinians in Gaza; the expropriation of, and building of settlements on, Palestinian land; the unlawful transfer of members of its population into the occupied Palestinian territory and the forcible displacement of Palestinians therein; the annexation of Palestinian land through, among other methods, the construction of a Separation Barrier that the International Court of Justice has found to violate international law; the expropriation of Palestinian natural resources; the demolition of Palestinian homes; and the maintenance of a facially discriminatory legal system, including the use of excessive force, mass incarceration, indefinite detention without charge, discriminatory arrests of Palestinians living in the occupied Palestinian territory and over fifty laws that discriminate against Palestinian citizens of Israel because they are not Jewish. *See, e.g., World Report 2019: Israel and Palestine: Events of 2018*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine#> (last visited Jan. 23, 2019); *The Discriminatory Laws Database*, ADALAH: THE LEGAL CTR. FOR ARAB MINORITY RTS. IN ISRAEL, <https://www.adalah.org/en/content/view/7771> (last updated Sept. 25, 2017).



Court recognized that the First Amendment protects politically motivated peaceful boycotts, reaffirming our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *Claiborne Hardware*, 458 U.S. at 913 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotations omitted)). “It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (internal quotations omitted).

In *Claiborne Hardware*, civil rights activists promoted a boycott of white merchants to “vindicate rights of equality and of freedom.” *Claiborne Hardware*, 458 U.S. at 914. Individuals who participated in the boycott “withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality,” which the Supreme Court found was protected activity. *Id.* at 918. The Court recognized that each of the “elements” of the boycott—“people banding together” to pressure civil and business leaders to abide by a “list of demands for equality and racial justice,” supporting the boycott by “speeches and nonviolent picketing,” and encouraging “others to join its cause”—is a “form of speech or conduct that is ordinarily entitled to protection.” *Id.* at 907. Collective action is “deeply embedded in the American political process.” *Id.* (quoting *Citizens Against*



*Rent Control/ Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)). Locating boycotts within the constitutional norm that recognizes that advocacy can alter orthodoxy, the Court affirmed that “[t]hrough speech, assembly, and petition – rather than through riot or revolution – [the boycotters] sought to change a social order that had consistently treated them as second-class citizens.” *Id.* at 912.

As detailed above, the boycott for Palestinian rights in which Appellee Jordahl engages and wants his firm to also engage in shares all the central elements of protected expressive activity. BDS supporters in the U.S. similarly engage in collective action, withdrawing their support from businesses and institutions in an effort to draw attention to and bring an end to Israel’s oppression of Palestinians. Like the boycotts in *Claiborne Hardware*, these boycotts stem from an organized call from civil society and proceed on a model of collective political association to advance their common message of coordinated action; they have a clear set of demands for social justice; they mobilize interrelated forms of expressive activity; and they seek to persuade others to “join the common cause,” and thereby leverage the movement’s power “to challenge a political and economic system that had denied them the basic rights of dignity and equality.” *Id.* at 909, 918. The expressive activity engaged in by Appellee is thus no different than that deemed fully entitled to First Amendment protection in *Claiborne Hardware*.

## II. ARIZONA’S LAW IS PART AND PARCEL OF A BROADER EFFORT TO SUPPRESS GROWING ADVOCACY IN SUPPORT OF PALESTINIAN RIGHTS.

The district court observed that the legislative history of the Act expressly reveals its goal of “penaliz[ing] the efforts of those engaged in political boycotts of Israel and those doing business in Israeli-occupied territories because such boycotts are not aligned with the State’s values.” *Jordahl*, 336 F. Supp. 3d at 1048-1049 (citing Ariz. House Republican Caucus News Release, Feb. 4, 2016) (representing that the purpose of the Act is to penalize “politically motivated” boycotts).<sup>18</sup> The Legislative Findings in the Act itself expressly confirm that

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<sup>18</sup> Other statements by legislators confirm the Act’s purpose. In introducing HB2617, Speaker of the Arizona House David Gowan described the bill as being “aimed at showing Arizona’s support of Israel.” *Hearing on HB2617 Before the H. Comm. on Federalism and States’ Rights*, 52d Leg., 2d Sess. (Ariz. 2016) (statement of H. Speaker David Gowan), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=26&clip\\_id=16722](http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=16722). Gowan stated that “the whole reason for [HB2617]” is to respond to the “movement underway,” referring to the campaign for Boycott, Divestment, and Sanctions. *Hearing on HB2617 Before the H. Floor Sess. Part 4 – Third Reading #1*, 52d Leg., 2d Sess. (Ariz. 2016) (statement of H. Speaker David Gowan), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=26&clip\\_id=16881](http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=16881). Senator Nancy Barto, who voted in favor of the legislation, discussed “universities that are openly boycotting the country of Israel” as being “emblematic of the need for a bill like this, to make sure that we are supporting our friend Israel.” *Hearing on HB2617 Before the S. Comm. on Federalism, Mandates and Fiscal Responsibility*, 52d Leg., 2d Sess. (Ariz. 2016) (statement of Sen. Nancy Barto, Member, S. Comm. on Federalism, Mandates, and Fiscal Responsibility), [http://azleg.granicus.com/MediaPlayer.php?view\\_id=26&clip\\_id=17074&meta\\_id=349699](http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=17074&meta_id=349699). Senator Sylvia Allen also described the legislation as a direct response to BDS. *Hearing on HB2617 Before the S. Comm. on Gov’t*, 52d Leg., 2d Sess. (Ariz. 2016) (statement of Sen. Sylvia Allen, Vice-Chair, S. Comm. on Gov’t)

Arizona sought to deny contracts to companies that promote or comply with “boycotts, divestment from, or sanctions against Israel.” HB 2617, Sec. 2.F., 52d Leg., 2d Sess. (Ariz. 2016) (enacted), *available at* <https://www.azleg.gov/legtext/52leg/2R/bills/HB2617P.pdf>. That the Act was intended to punish a political viewpoint is further supported by the wave of similar legislative efforts—and related, coordinated campaigns—driven by the Israeli government and aligned private groups attempting to silence Americans seeking to change Israeli state policies that continue to oppress Palestinians.

**A. Increasing Engagement in BDS to Protest Israeli Human Rights Violations.**

An increasing number of prominent individuals and institutions are protesting Israeli state practices that violate Palestinian rights, including by joining the calls for BDS. Several major U.S.-based religious institutions have endorsed and participated in BDS initiatives, including the Evangelical Lutheran Church in America, which moved Appellee Jordahl to action, as well as the Presbyterian Church (USA), the Mennonite Church, and the United Methodist Church.<sup>19</sup> Numerous foundations and pension funds—including the Bill and Melinda Gates

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[http://azleg.granicus.com/MediaPlayer.php?view\\_id=26&clip\\_id=17148&meta\\_id=351185](http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=17148&meta_id=351185).

<sup>19</sup> See Anna Baltzer, *Churches are Standing Up!*, U.S. CAMPAIGN FOR PALESTINIAN RIGHTS (Jul. 23, 2017), <https://uscpr.org/churches-are-standing-up/>; Annie Robbins, *In overwhelming vote, leading Lutheran branch calls on US to cut off aid to Israel*, MONDOWEISS (Aug. 12, 2016), <https://mondoweiss.net/2016/08/lutherans-say-cut-off-aid-toisrael/>.

Foundation, the Soros Fund, and TIAA-CREF—have divested from companies in response to their facilitation of human rights violations in Israel and the occupied Palestinian territory.<sup>20</sup> Student governments at approximately 50 universities across the country have passed resolutions and referenda calling on their universities to divest from companies that are complicit in Israel’s human rights abuses.<sup>21</sup> Acclaimed writers, artists, and professional athletes such as Natalie Portman, Lorde, Lana del Rey, Lauren Hill, Cornell West, Roger Waters, Michael Bennett, and others have endorsed or participated in a cultural boycott of Israel—

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<sup>20</sup> See Marjorie Cohn, *Israel Hits Back Against Boycott*, HUFFINGTON POST (Mar. 30, 2017 1:38 PM), <https://www.huffingtonpost.com/entry/israel-hits-back-against-boycott-us-58dd41ffe4b0fa4c095986fa> (last updated Apr. 3, 2017); Gabrielle Coppola, *Soros Fund No Longer Holds Shares of SodaStream*, BLOOMBERG.COM (Aug. 4, 2014 12:18 PM), <https://www.bloomberg.com/news/articles/2014-08-04/soros-fund-no-longer-holds-shares-of-sodastream>; *Bill Gates Sells Shares in U.K. Firm Linked to Israeli Security Services*, HAARETZ (May 31, 2014 11:39 AM), <https://www.haaretz.com/bill-gates-sells-shares-in-g4s-1.5250315>; Ora Coren, *TIAA-CREF Confirms Africa Israel Divestment*, HAARETZ (Sept. 13, 2009 2:10 AM), <https://www.haaretz.com/1.5491792>; Abraham Greenhouse, *Pension giant TIAA-CREF drops Veolia from Social Choice fund*, ELECTRONIC INTIFADA (Nov. 15, 2013), <https://electronicintifada.net/blogs/abraham-greenhouse/pension-giant-tiaa-cref-drops-veolia-social-choice-fund>.

<sup>21</sup> See *US Campus Victories in the Boycott, Divestment, and Sanctions Movement*, NAT’L STUDENTS FOR JUSTICE IN PALESTINE, <https://www.nationalsjp.org/bds-victories.html> (last visited Jan. 23, 2019). See also Aiden Pink, *One Of The Most Jewish Colleges In The Country Just Voted For BDS By Nearly 2-1 Margin*, THE FORWARD (Apr. 19, 2018), <https://forward.com/fast-forward/399159/one-of-the-most-jewish-colleges-in-the-country-just-voted-for-bds-by/> (an all women college with a large Jewish population votes to divest from companies that ‘profit from or engage in the State of Israel’s treatment of Palestinians’ with a near 2/3 majority).

or refused to travel there—on account of its human rights violations.<sup>22</sup> United Electrical, Radio and Machine Workers of America (UE), a member-run union representing 30,000 workers, endorses BDS.<sup>23</sup> In 2015, a “Black Solidarity Statement with Palestine” endorsed BDS and was signed by over 1000 individuals and nearly 40 Black-led organizations.<sup>24</sup> Archbishop Emeritus and 1984 Nobel Peace Prize Winner Desmond Tutu has been a longtime vigorous supporter of BDS, recognizing that it falls within the social justice protest tradition of the South African anti-apartheid movement.<sup>25</sup>

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<sup>22</sup> Dana Kennedy, *Is Natalie Portman’s Israel Protest a Tipping Point?*, DAILY BEAST (Apr. 21, 2018 5:50 AM), <https://www.thedailybeast.com/is-natalie-portmans-israel-protest-a-tipping-point>; Letter to the Editor, *Lorde’s artistic right to cancel gig in Tel Aviv*, THE GUARDIAN (Jan. 5, 2018 6:26 PM), <https://www.theguardian.com/music/2018/jan/05/lordes-artistic-right-to-cancel-gig-in-tel-aviv>; *Natalie Portman: Israel’s Nation-state Law is ‘Racist’ and a ‘Mistake,’* HAARETZ (Dec. 20, 2018 10:54 AM), <https://www.haaretz.com/us-news/natalie-portman-israel-s-nation-state-law-is-racist-and-a-mistake-1.6744158>; August Brown, *Lauren Hill cancels Israel concert after bungled Nigeria date*, L.A. TIMES (May 5, 2015 8:57 AM), <https://www.latimes.com/entertainment/music/posts/la-et-ms-lauryn-hill-cancels-israel-concert-20150505-story.html>; Steve Almasy, *Michael Bennet boycotts trip, says he won’t be used by Israel*, CNN (Feb. 12, 2017 1:36 PM), <https://www.cnn.com/2017/02/12/middleeast/nfl-players-boycott-israel-trip/index.html>.

<sup>23</sup> Press Release, UE Endorses BDS Movement for Peace and Justice in Israel and Palestine (Sept. 1, 2015), <https://www.ueunion.org/political-action/2015/BDS>.

<sup>24</sup> *2015 Black Solidarity Statement with Palestine*, BLACKFORPALESTINE.COM, <http://www.blackforpalestine.com/read-the-statement.html> (last visited Jan. 16, 2019).

<sup>25</sup> *See Tutu: Israel’s Humiliation of Palestinians ‘Familiar to Black South Africans,’ supra* note 15.

## **B. Viewpoint-Based Anti-BDS Legislation Across the U.S.**

As *amici* have detailed elsewhere, in the past several years, increasing advocacy in support of Palestinian rights has been met with aggressive efforts by legislators, academic institutions, and others to suppress such speech, often at the urging of the Israeli government and Israel-aligned private groups.<sup>26</sup> Anti-boycott legislation like the Arizona law is one of many tools intended to discourage and stop criticism of Israel's treatment of Palestinians as it increasingly filters into the mainstream. From 2014-2018, Palestine Legal responded to nearly 1,250 incidents of censorship, punishment, and other burdening of advocacy for Palestinian rights.<sup>27</sup> This number understates the phenomenon, as many activists are unaware of their rights or do not report incidents of suppression. These incidents affect playwrights, school teachers, artists, chefs, musicians, professors, students, activists and authors.<sup>28</sup> These censorship campaigns and legal threats frequently

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<sup>26</sup> See CTR. FOR CONST. RTS. & PALESTINE LEGAL, *THE PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER ATTACK IN THE US* (2015), available at <https://ccrjustice.org/the-palestine-exception>.

<sup>27</sup> *2018 Year-In-Review: Censorship of Palestine Advocacy in the U.S. Intensifies*, PALESTINE LEGAL, <https://palestinelegal.org/2018-report> (last visited Jan. 23, 2019).

<sup>28</sup> *Id.*; THE PALESTINE EXCEPTION TO FREE SPEECH, *supra* note 26. See also, e.g., Jennifer Schuessler, *Jewish Center Faces Backlash After Canceling Play Criticized as Anti-Israel*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/arts/jewish-center-faces-backlash-after-canceling-play-criticized-as-anti-israel.html>; Ben Norton, *Palestinian-American artist detained for sketches & Arabic writing falsely accused of terrorism by right-*

conflate criticism of Israel's treatment of Palestinians with discrimination against Jewish people, as supporters of Arizona's law do in the instant case.

One prominent example is the filing of complaints against universities with the U.S. Department of Education (DOE)'s Office for Civil Rights (OCR), alleging that by tolerating campus events that criticize Israeli policies, universities violate Title VI of the Civil Rights Act, which prohibits discrimination by programs receiving federal funds. The complaints target speech like a film and panel discussion on Palestine, a teach-in on Gaza, a program on the costs of war on Israeli society, street theatre depicting Palestinians navigating Israeli army checkpoints, and debates concerning university divestment from companies that support Israel's human rights abuses.<sup>29</sup> In dismissing such complaints as meritless, OCR found they were based on First Amendment-protected expression.<sup>30</sup>

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*wing media*, SALON.COM (Dec. 22, 2015), [https://www.salon.com/2015/12/22/palestinian\\_american\\_artist\\_detained\\_for\\_sketching\\_in\\_arabic\\_falsely\\_accused\\_of\\_terrorism\\_by\\_right\\_wing\\_media/](https://www.salon.com/2015/12/22/palestinian_american_artist_detained_for_sketching_in_arabic_falsely_accused_of_terrorism_by_right_wing_media/); Leena Trivedi-Grenier, *The Tenacity of Chef Reem Assil*, VICE.COM (May 11, 2018), [https://munchies.vice.com/en\\_us/article/mbkqv/the-tenacity-of-chef-reem-assil](https://munchies.vice.com/en_us/article/mbkqv/the-tenacity-of-chef-reem-assil); Sam Sodomsky & Amy Phillips, *Lawmaker Calls for Lorde Florida Concert Cancellations Over Israel*, PITCHFORK.COM (Feb. 14, 2018), <https://pitchfork.com/news/lawmaker-calls-for-lorde-florida-concert-cancellations-over-israel/>; Alice Yin, *Evanston Public Library reinstates canceled book talk after accusations of censorship*, DAILY NORTHWESTERN (Aug. 4, 2014), <https://dailynorthwestern.com/2014/08/04/city/evanston-public-library-reinstates-canceled-book-talk-after-accusations-of-censorship/>.

<sup>29</sup> Letter from Zachary Pelchat, Team Leader, U.S. Dep't of Educ., to Carole E. Rossi, Chief Campus Counsel, Univ. Cal. Santa Cruz (Aug. 19, 2013), *available at* [https://news.ucsc.edu/2013/08/images/OCR\\_letter-of-findings.pdf](https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf); letter from



Kenneth Marcus—the architect of this Title VI strategy, a supporter of anti-BDS legislation, founder and previously the president and general counsel of the Brandeis Center, and current head of the DOE’s OCR— explained that these meritless complaints are *designed* to chill speech:

Seeing all these cases rejected has been frustrating and disappointing, but we are, in fact, comforted by knowing that we are having the effect we had set out to achieve . . . . These cases—even when rejected—expose administrators to bad publicity. . . . No university wants to be accused of creating an abusive environment. . . . Israel-haters now publicly complain that these cases make it harder for them to recruit new adherents . . . . Needless to say, getting caught up in a civil rights complaint is not a good way to build a resume or impress a future employer.<sup>31</sup>

Now that Kenneth Marcus is the Assistant Secretary for Civil Rights at DOE, groups opposing Palestinian rights, such as Zachor Legal Institute, which filed an

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Zachary Pelchat, Team Leader, U.S. Dep’t of Educ., to Robert J. Birgeneau, Chancellor, Univ. Cal. Berkeley (Aug. 19, 2013), *available at* [https://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR .pdf](https://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR.pdf); letter from Zachary Pelchat, Team Leader, U.S. Dep’t of Educ., to Dr. Michael V. Drake, Chancellor, Univ. Cal. Irvine (Aug. 19, 2013), *available at* (<https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine Letter of Findings to Recipient.pdf>).

<sup>30</sup> *Id.* Similarly, Title VI federal lawsuits by anti-Palestinian groups against the University of California at Berkeley and San Francisco State University claiming that advocacy for Palestinian rights creates a hostile environment for Jewish students have been dismissed for failure to state a claim. *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188-1189 (N.D. Cal. 2011); *Mandel v. Bd. of Trs. of the Cal. State Univ.*, No. 17-CV-03511-WHO, 2018 WL 5458739 (N.D. Cal. Oct. 29, 2018), *appeal filed*, No. 18-17277 (9<sup>th</sup> Cir. Nov. 28, 2018), at \*26.

<sup>31</sup> Kenneth Marcus, *Standing Up for Jewish Students*, JERUSALEM POST (Sept. 9, 2013), <https://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648>.



amicus brief in this case,<sup>32</sup> are renewing their efforts to file meritless Title VI complaints targeting advocacy for Palestinian rights.<sup>33</sup> In its amicus brief, Zachor also presses the outlandish and Islamophobic notion that groups that call for non-violent boycotts for Palestinian rights, including Jewish Voice for Peace, are controlled by designated foreign terror organizations.<sup>34</sup> A legislature and the court cannot sanction the ugly reflex to conflate calls for equality for Arab and Muslim populations with terrorism. Such attempts to smear by association simply reveal the desperation of those seeking to silence dissent rather than engage in open debate.

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<sup>32</sup> Amicus Brief of Zachor Legal Institute, Nov. 13, 2018, ECF No. 31.

<sup>33</sup> For example, the Zachor Legal Institute filed an OCR complaint against the University of California at Los Angeles hours after a November 2018 student conference commenced, claiming that discussion of Palestinian rights would be an attack on Jewish students. The event convened students from diverse backgrounds to discuss achieving equality for Palestinians. *See* Zachor Legal Institute (@ZachorLegal), TWITTER (Nov. 19, 2018 10:35 AM), <https://twitter.com/ZachorLegal/status/1064587903177617414>. Within months of becoming Assistant Secretary, Marcus took the unprecedented step of reopening and expanding a previously dismissed Title VI complaint that the Zionist Organization of America had brought against Rutgers University, explaining that in investigating, OCR would use a definition of antisemitism that includes claiming that the State of Israel is a racist endeavor, or applying double standards to Israel. *See* Letter from Emily Frangos, Compliance Team Leader, U.S. Dep't of Educ., to Morton A. Klein, President, Zionist Org. of Am. (July 31, 2014), *available at* <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html>; Erica L. Green, *Education Dept. Reopens Rutgers Case Charging Discrimination Against Jewish Students*, N.Y.TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/us/politics/rutgers-jewish-education-civil-rights.html>.

<sup>34</sup> Amicus Brief of Zachor Legal Institute at 6-7.

The Israeli government and allied groups that seek to silence criticism of Israel have specifically targeted BDS and its supporters, in part because of the growth and effectiveness of this tactic in mobilizing political pressure against Israel's international law violations. They have thus leveraged considerable, coordinated resources to stifle BDS supporters through legislative channels.<sup>35</sup> Referring to the growing support for Palestinian rights among college students, a lobbyist supporting anti-boycott bills highlighted both their disdain for such expressive activity and their goal to squash it: "While you were doing your campus antics, the grown-ups were in the state legislatures *passing laws that make your cause improbable*" (emphasis added).<sup>36</sup> Elected officials have readily admitted that they have introduced or passed anti-boycott measures because Israeli government officials have lobbied them or requested they do so. For example, during the signing of an anti-boycott executive order in December 2018, Kentucky governor Matt Bevin said that Israeli Prime Minister Benjamin Netanyahu

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<sup>35</sup> See, e.g., *The Lobby – USA, Episode 1*, YOUTUBE (Nov. 3, 2018), <https://www.youtube.com/watch?v=3ISjXhMUVKE> (statement of Yisrael Katz, Israeli Minister of Intelligence, "Israel must carry out a targeted civil thwarting of the leadership of BDS activists."); Nathan Guttman, *Sheldon Adelson To Host Secret Anti-BDS Summit for Jewish Donors*, THE FORWARD (June 1, 2015), <https://forward.com/news/309227/sheldon-adelson-to-host-secret-anti-bds-summit-for-jewish-donors/>.

<sup>36</sup> *As BDS opponents move from campuses to state capitols, California is up next*, JEWISH NEWS SYNDICATE (Apr. 13, 2016), <https://www.jns.org/as-bds-opponents-move-from-campuses-to-state-capitols-california-is-up-next/>.

personally lobbied for the order when Bevin visited Israel last summer.<sup>37</sup> New York governor Andrew Cuomo signed an anti-BDS executive order flanked by representatives of the Israeli government and the Israel lobby group AIPAC, among others.<sup>38</sup> It has been reported that “[i]n cooperation with Jewish and pro-Israeli organizations, the [Israeli foreign] ministry convinced several American states to pass legislation against the boycott of Israel.”<sup>39</sup>

In the past four years alone, twenty-six states have adopted laws that target advocacy for Palestinian rights, especially boycotts. At least 100 more bills and

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<sup>37</sup> “While we were having that conversation he was talking to me about the significance of this and asking me if I would do the very thing that we are here to do today,” Bevin said. Ryland Barton, *Bevin To Require State Contractors Promise They Don’t Boycott Israel*, 89.3 WPFL NEWS LOUISVILLE (Nov. 18, 2018), <https://wfpl.org/bevin-to-require-state-contractors-promise-they-dont-boycott-israel/>. See also Alfred Miller, *Bevin bars state agencies from doing business with Israel boycotters*, LOUISVILLE COURIER JOURNAL (Nov. 15, 2018 8:44 PM), <https://www.courier-journal.com/story/news/politics/2018/11/15/governor-matt-bevin-bars-business-israel-boycotters/2019298002/>.

<sup>38</sup> Press Release, New York Governor Cuomo, Governor Cuomo Signs First-in-the-Nation Executive Order Directing Divestment of Public Funds Supporting BDS Campaign Against Israel (June 5, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-first-nation-executive-order-directing-divestment-public-funds-supporting>; Philip Weiss & Adam Horowitz, *Flanked by AIPAC and Israeli consul, Cuomo signs anti-BDS order*, MONDOWEISS (June 6, 2016), <https://mondoweiss.net/2016/06/flanked-israeli-consul/>.

<sup>39</sup> See Ali Abunimah, *Israel “quietly” pushed for anti-BDS legislation in US, UK*, ELECTRONIC INTIFADA (Feb. 24, 2016), <https://electronicintifada.net/blogs/ali-abunimah/israel-quietly-pushed-anti-bds-legislation-us-uk>.

resolutions have been introduced in U.S. states, local governments, and Congress.<sup>40</sup>

This remarkably broad and fast legislative activity is a direct result of the immense and heavily funded lobbying campaign to limit criticism of Israel's policies. In addition, governors from all fifty states joined the American Jewish Committee's "Governors United Against BDS" campaign, which "reject[s] efforts to demonize and delegitimize Israel" and condemns BDS "as incompatible with the values of [their] states."<sup>41</sup>

Numerous politicians have been remarkably candid about the goals of this legislation, acknowledging their intent to chill boycotts for Palestinian rights. New York Assemblyman Dov Hikind described the chilling effect of the New York anti-boycott Executive Order as "absolutely great," stating that "it meant the list was working exactly as [New York Governor] Cuomo intended."<sup>42</sup> Washington

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<sup>40</sup> *Anti-Palestinian Legislation*, *supra* note 4.

<sup>41</sup> *Governors Against BDS*, AMERICAN JEWISH COMMITTEE, [https://www.ajc.org/sites/default/files/pdf/2017-09/GOVERNORS\\_AGAINST\\_BDS\\_STATEMENT.PDF](https://www.ajc.org/sites/default/files/pdf/2017-09/GOVERNORS_AGAINST_BDS_STATEMENT.PDF) (last visited Jan. 16, 2019); *see also* American Jewish Committee, *50 U.S. Governors Join AJC Initiative to Support Israel, Fight BDS*, PRNEWSWIRE.COM (May 17, 2017 4:51 PM), <https://www.prnewswire.com/news-releases/50-us-governors-join-ajc-initiative-to-support-israel-fight-bds-300459614.html>.

<sup>42</sup> Conor Skelding, *Cuomo quietly releases Israel-boycott opposition list, perplexing targeted companies*, POLITICO (Dec. 9, 2016 5:42 AM), <http://www.politico.com/states/new-york/city-hall/story/2016/12/muted-release-of-and-mixed-reaction-to-cuomos-bds-blacklist-107815>. (According to Hikind, "the point is being made. ... It's gotten a lot of attention throughout our community . . . By doing this, in a sense, anyone who wants to participate in a BDS thing will think ten times," Hikind said. "Who in New York would want to participate with

State Senator Michael Baumgartner, in vowing to introduce a bill that would prohibit public and private universities that receive state funding from participating in a boycott of Israel, was explicit that his intention was to “prohibit” BDS and “say it is illegal and that way I can just shut down these conversations and everybody can focus on teaching class and educating rather than being a politically-correct weapon.”<sup>43</sup>

Several anti-boycott bills have also been introduced in Congress, the most draconian of which would have punished Americans with 20-year prison sentences. The federal Israel Anti-Boycott Act bill, which died in the last Congress, targeted boycotts fostered or imposed by the United Nations or the European Union, subjecting boycott-participants to exorbitant fines.<sup>44</sup> According to Ohio Senator Rob Portman, the goal of the Israel Anti-Boycott Act was to “send[] a clear message that politically-motivated boycotts of Israel are unacceptable to the United States” and to say that “the United States stands against illegitimate

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all the focus and all the attention? They wouldn’t be able to do business in New York.”)

<sup>43</sup> Dyer Oxley, *Senator: Colleges are being used as ‘politically-correct batons,’* MYNORTHWEST.COM (Jan. 2, 2017 6:28 PM), <http://mynorthwest.com/500618/senator-baumgartner-bds-bill>; Nora Barrows-Friedman, *Activists fight new anti-BDS legislation across US*, ELECTRONIC INTIFADA (Feb. 9, 2017), <https://electronicintifada.net/blogs/nora-barrows-friedman/activists-fight-new-anti-bds-legislation-across-us>.

<sup>44</sup> Israel Anti-Boycott Act, S. 720, 115<sup>th</sup> Cong. (2017).

attempts to isolate our ally Israel or impose policy solutions . . . .”<sup>45</sup> Other elected officials were clear that its purpose was to stop efforts to “force a solution” between Israel and Palestine, or efforts to “undermine” and “isolate” an ally.<sup>46</sup>

### **C. Anti-BDS Laws Chill Speech Supporting Palestinian Rights.**

These anti-boycott laws have tangible consequences beyond the direct effects of denying contracts and compelling speech. Musicians, teachers, students, professors, and grassroots activists have reported ways that anti-boycott laws have been used to threaten careers, homes, and educations and to condition broad swaths of activity only upon pledges of allegiance and orthodoxy that approach loyalty oaths routinely administered—and struck down—in the 1950s. For example, based on a mistaken application of a Texas anti-boycott law, hurricane victims in Dickinson, Texas were required to pledge not to boycott Israel as a condition of receiving relief aid.<sup>47</sup> A speech language pathologist who had worked in Austin suburban schools serving Arabic-speaking students since 2009 was unable to renew her contract with the school district because she could not, in good conscience, sign the required certification that she does not and will not boycott

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<sup>45</sup> Press release, Sen. Rob Portman, Portman, Cardin, Roskam, and Vargas Lead Bipartisan, Bicameral Bill to Reject Attempts to Economically Isolate Israel, *supra* note 5.

<sup>46</sup> *Id.*, quoting Sen. Rob Portman, Sen. Ben Cardin, and Rep. Juan Vargas.

<sup>47</sup> Kyle Swenson, *This Texas town offers hurricane relief — if your politics are right*, WASH. POST (Oct. 20, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/20/texas-town-makes-hurricane-harvey-aid-applicants-pledge-not-to-boycott-israel/>.

Israel.<sup>48</sup> Other examples include two students who were told they had to sign pledges not to boycott Israel in order to judge high school debate tournaments, a reporter who was compelled to sign the certification to keep his job at a Texas A&M radio station, a writer who lost two contracts as a translator and speaker, and a speaker at the University of Houston who was informed that payment was contingent on signing the certification.<sup>49</sup>

In 2017, the Nassau County Attorney in New York threatened to take legal action if a local venue did not cancel performances by Pink Floyd co-founder Roger Waters because of his publicly professed support for BDS, citing the county's anti-boycott law.<sup>50</sup> The concerts were allowed to proceed after the New

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<sup>48</sup> Complaint, *Amawi v. Pflugerville Indep. Sch. Dist.*, No. 18-cv-01091 (W.D. Tex. filed Dec. 16, 2018), available at <https://www.documentcloud.org/documents/5631742-Bahia-Amawi-s-Lawsuit-Against-Texas-Over-Israel.html>; see also Glenn Greenwald, *A Texas Elementary School Speech Pathologist Refused to Sign a Pro-Israel Oath, Now Mandatory in Many States — so She Lost Her Job*, THE INTERCEPT (Dec. 17, 2018 6:58 AM), <https://theintercept.com/2018/12/17/israel-texas-anti-bds-law/>.

<sup>49</sup> Complaint, *Pluecker v. Paxton*, No. 18-cv-01100 (W.D. Tex. filed Dec. 18, 2018), available at [https://www.aclutx.org/sites/default/files/anti\\_boycott\\_complaint.pdf](https://www.aclutx.org/sites/default/files/anti_boycott_complaint.pdf); see also Lindsay Ellis, *UH employee faked speaker's signature on no-boycott Israel form, officials find*, HOUSTON CHRON. (June 8, 2018 7:11 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/UH-employee-faked-speaker-s-signature-on-12979978.php>.

<sup>50</sup> Robert Brodsky, *Officials want Nassau Events to cancel Roger Waters concert*, NEWSDAY (July 11, 2017 7:36 PM), <https://www.newsday.com/long-island/nassau/some-officials-want-nassau-events-to-cancel-waters-concert-1.13795104>; Cathryn J. Prince, *Nassau county executive attempts to sever stadium contract with Waters*, TIMES OF ISR. (July 24, 2017 6:48 PM),



York Civil Liberties Union intervened.<sup>51</sup> Florida lawmakers similarly invoked their state's anti-boycott law in pushing for the cancellation of Grammy Award winner Lorde's concerts in early 2018 after she refused to perform in Israel, citing support for the boycott movement.<sup>52</sup>

Palestine Legal has received reports from individuals in California, Texas, Ohio, and Washington who lost contracts, believed they lost contracts, or declined or were denied payment because of their support for BDS.<sup>53</sup> Students, professors

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<https://www.timesofisrael.com/nassau-county-executive-attempts-to-sever-stadium-contract-with-waters/>.

<sup>51</sup> Letter from Susan Gottehrer, Nassau Cnty. Chapter Dir., Zachary Ahmad, Pol'y Couns., & Philip Desgranges, Staff Att'y, NYCLU, to Carnell Foskey, Nassau Cnty. Att'y, & Edward Mangano, Nassau Cnty. Exec. (Sept. 11, 2017), *available at* [https://www.nyclu.org/sites/default/files/field\\_documents/bds\\_letter\\_final.pdf](https://www.nyclu.org/sites/default/files/field_documents/bds_letter_final.pdf); *see also* Jake Offenhartz,

*Roger Waters Shows Will Go On Despite Nassau County Anti-BDS Law*, GOTHAMIST.COM (Sept. 13, 2017 3:55 PM), [http://gothamist.com/2017/09/13/roger\\_waters\\_nassau.php](http://gothamist.com/2017/09/13/roger_waters_nassau.php).

<sup>52</sup> Colin Wolf, *Lawmakers are trying to cancel Lorde's upcoming Florida shows because of her stance on Israel*, ORLANDO WEEKLY (Feb. 8, 2018 4:36 PM), <https://www.orlandoweekly.com/Blogs/archives/2018/02/08/lawmakers-are-trying-to-cancel-lordes-upcoming-florida-shows-because-of-her-stance-on-israel>; *see also* Nadeem Muaddi, *Lorde cancels Israel concert amid calls for cultural boycott*, CNN.COM (Dec. 27, 2017 7:44 AM), <https://www.cnn.com/2017/12/25/entertainment/lorde-concert-israel/index.html>.

<sup>53</sup> In California, the City of Alameda cancelled voting on (and never reconsidered) a sister city relationship with a Palestinian village after Israeli Deputy Consul General Ravit Baer raised the issue of California's anti-boycott law, which did not apply to the proposal, and the city attorney requested time to explore the law's implications. *See* Alameda City Council, Minutes of the Regular City Council Meeting (Feb. 5, 2017), *available at* <https://alameda.legistar.com/View.ashx?M=M&ID=576621&GUID=65267B83-7612-4875-A2B3-50C9875BFF0A>, at 8-10.



and speakers have reported being questioned by administrators or student governments about whether it was lawful to allow a speaker to give a talk supportive of BDS—or whether a speaker who publicly supports BDS and was brought to lecture about a different topic was allowed to speak at all.

For example, at Indiana University, the student government, citing Indiana’s anti-boycott law, passed a resolution prohibiting the university and all of its divisions from “hosting lecturers, events, and demonstrations which incorporate speakers and participants who have advocated or supported the anti-Semitic BDS movement.”<sup>54</sup> The October 2018 resolution, which was introduced in response to a visiting lecture on human rights in Israel and Palestine, would have also prohibited speakers who “previously advocated for the BDS movement even if the BDS movement is not the topic of the lecture.”<sup>55</sup> In fall 2016, the student government at Fordham University questioned students wishing to start a club which endorsed the principles of the call for BDS, asking whether it would be lawful to permit such a club under New York’s anti-BDS executive order.<sup>56</sup> A grassroots volunteer group

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<sup>54</sup> Indiana Univ. Student Cong., Cong. Res. No. 18-19-12, Resolution to Prevent Anti-Semitism on Campus (Nov. 2, 2018) (on file with Palestine Legal).

<sup>55</sup> *Id.* The student government president vetoed the resolution. Aaron Bandler, *Indiana University Student President Vetoes Resolution Condemning Pro-BDS Speaker*, JEWISH JOURNAL (Nov. 9, 2018), <https://jewishjournal.com/news/nation/241792/indiana-university-student-president-vetoes-resolution-condemning-pro-bds-speaker/>.

<sup>56</sup> Complaint, *Awad v. Fordham*, Index No. 153826-2017 (N.Y. Sup. Ct. filed Apr. 26, 2017), *available at*

that participates in boycott campaigns told Palestine Legal and the Center for Constitutional Rights that it had trouble getting a venue for a poetry reading in New York because the vendor received state funding that it feared losing if it contracted with the volunteer group.<sup>57</sup>

Although none of these laws were directed at preventing the type of speech activity described in these incidents—poetry readings, starting a student group, singing, giving a talk on human rights abuses—confusion over their scope or deliberate misapplication did ultimately chill, punish, or attempt to punish speakers supporting Palestinian rights. They are part of a tapestry of laws and practices of which the Arizona law is a central piece, which are designed to silence expressive advocacy that challenges the injustices of Israeli state policy.

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<https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5900bbcee6f2e1f94d241fa9/1493220307715/Final+Verified+Petition+4.26.17+web.pdf>, at ¶ 25.

<sup>57</sup> Though the group was ultimately permitted to hold the event, the venue refused to publicly list the event on its website after learning the group supported the boycott. The group had been counting on the partnership to reach the poetry community and lost an important element of their outreach strategy. Interview by Palestine Legal with volunteer, in N.Y., N.Y. (Oct. 28, 2016 & Jan. 17, 2019).

**CONCLUSION**

For the foregoing reasons, this Court should uphold the decision of the District Court granting Appellees' Motion for a Preliminary Injunction.

Dated: New York, New York  
January 24, 2019

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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