

WHAT'S IN A BOYCOTT?: UNTANGLING THE CHALLENGES
IMPEDING ANALYSIS OF THE CONSTITUTIONALITY OF
STATE ANTI-BDS LEGISLATION

*Juliana Cosenza**

INTRODUCTION

Since its establishment in 2005, the Palestinian-led Boycott, Divestment, and Sanctions (BDS) movement has strived to effectuate political change in Israel and Palestine by relying on nonviolent, economic measures, such as boycotting certain businesses or products originating from or associated with the State of Israel.¹ Since its inception twenty years ago, the BDS movement has garnered the support of many pro-Palestinian activists and sympathizers alike, such as Dr. Steve Feldman.²

In 2023, Dr. Feldman, a dermatologist, delivered a lecture at a public medical school in Arkansas, but the Arkansas state government withheld his payment because he would not comply with the state's anti-BDS law.³ Under Arkansas's anti-BDS statute, government contractors, including lecturers at public universities such as Feldman, were required to sign a pledge certifying that they would not participate in any boycotts of the State of Israel.⁴ Feldman refused to sign the

* J.D. 2025, George Mason University Antonin Scalia Law School. Thank you to my family and friends for supporting me while I was writing this Comment. First and foremost, I would like to denounce all forms of anti-Semitism and Islamophobia, and in writing this Comment, I am not taking a political stance on the BDS movement or any other boycotts against the State of Israel. Rather, this Comment examines whether those who support the BDS movement and other boycotts of Israel have valid First and Fourteenth Amendment claims when they experience an adverse employment action by a public employer in response to their affiliation with such boycott activities or affiliations.

¹ *What is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> (last visited Sept. 11, 2023).

² See, e.g., *Ali v. Hogan*, 26 F.4th 587, 591–92 (4th Cir. 2022); *A&R Eng'g & Testing, Inc. v. Scott*, 72 F.4th 685, 688 (5th Cir. 2023); see also Andrew Lapin, *Jewish Doctor Denied Payment From Arkansas After Refusing to Rule Out Israel Boycott*, THE JERUSALEM POST (May 4, 2023, 4:39 PM), <https://www.jpost.com/bds-threat/article-742035>.

³ Lapin, *supra* note 2.

⁴ *Id.*

pledge, claiming that it conflicted with his Jewish faith as well as his self-identification as a “pro-Palestinian activist.”⁵ Since Arkansas still has not compensated Feldman, he is considering filing a lawsuit against the state that would challenge the constitutionality of its anti-BDS statute.⁶

Arkansas is one of over thirty-five states that have enacted some form of anti-BDS legislation.⁷ While anti-BDS laws may differ across various states, each aims to prohibit the state government from economically engaging with contractors who support or choose to participate in any boycott of the State of Israel, like BDS.⁸ In effect, anti-BDS laws boycott state contractors who boycott Israel.⁹ This double-boycott effect has led legal scholars to question the constitutionality of anti-BDS statutes since those who boycott the State of Israel through BDS typically do so because of their personal or political views.¹⁰ Thus, the enforcement of state anti-BDS laws has, in turn, affected individual government contractors’ ability to exercise their constitutional rights to free speech, expression, and association.¹¹

While litigants have challenged the constitutionality of numerous states’ anti-BDS statutes in federal court, the federal judicial system has failed to holistically resolve the constitutional dilemma surrounding state anti-BDS legislation. The Supreme Court has refused to grant certiorari petitions that raise constitutional challenges to state

⁵ *Id.*

⁶ *Id.*

⁷ *New Resource on the Right to Boycott*, PALESTINE LEGAL (Dec. 8, 2022), <https://palestinelegal.org/news/2022/11/14/new-resource-on-the-right-to-boycott>; Aila Slisco, *Companies Boycotting Israel Can't Do Business With These U.S. States*, NEWSWEEK (May 19, 2021, 9:44 PM), <https://www.newsweek.com/companies-boycotting-israel-cant-do-business-these-us-states-1593099>. At the time this Comment was being published, the number of states that have signed anti-BDS statutes into law has risen to thirty-eight. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/anti-bds-legislation> (last visited Dec. 20, 2024).

⁸ Slisco, *supra* note 7.

⁹ See Andrew Cuomo, *Gov. Andrew Cuomo: If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html.

¹⁰ See, e.g., *Jordahl v. Brnovich*, 789 F. Appx. 589, 590–91 (9th Cir. 2020).

¹¹ See, e.g., *id.* at 590 (lawyer); *Martin v. Chancellor for the Bd. of Regents of the Univ. Sys. of Ga.*, No. 22-12827, 2023 U.S. App. LEXIS 15673, at *3 (11th Cir. June 22, 2023) (filmmaker); *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1223 (N.D. Ga. 2021) (journalist); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1013–14 (D. Kan. 2018) (teacher).

anti-BDS laws.¹² Consequently, there is no clear precedent for lower courts to adhere to.¹³ Additionally, federal circuit courts have issued decisions based on threshold procedural matters, avoiding an analysis of the constitutional issues on the merits.¹⁴ Although federal district courts have ruled on the constitutional issues on the merits, these lower courts have applied varying standards of review.¹⁵ Overall, the federal judiciary's inability to resolve the constitutional issues underlying state anti-BDS legislation leaves individual governmental contractors' constitutional rights at potential risk. Furthermore, the courts' collective silence on the constitutional merits of state anti-BDS legislation has raised concerns that state legislatures could enact similar laws refusing to conduct business with individual contractors who have engaged in other boycotts, such as those of the fossil fuel industry, because of their personal or political affiliations.¹⁶

This Comment will examine the various challenges that have prevented courts from deciding on the constitutionality or lack thereof of state anti-BDS legislation. First, Part I will introduce the BDS movement as it is viewed by its proponents. Part II will summarize the significant political events that contextualize the formation and existence of BDS, as well as include a timeline of the recent emergence of anti-BDS legislation across the United States. Part III focuses on three main challenges that have impeded the courts' ability to answer the constitutional questions underlying state anti-BDS legislation: (1) the lack of Supreme Court jurisprudence and precedent; (2) the prevalence of circuit court decisions primarily based on threshold procedural, rather than substantive, questions; and (3) the application

¹² *US Supreme Court Will Not Hear Challenge to Arkansas Anti-BDS Law*, MIDDLE EAST EYE (Feb. 21, 2023), <https://www.middleeasteye.net/news/us-supreme-court-will-not-hear-challenge-arkansas-anti-bds-law>.

¹³ *Id.*

¹⁴ See *Martin*, 2023 U.S. App. LEXIS 15673 at *16; *A&R Eng'g*, 72 F.4th at 687; *Ark. Times LP v. Waldrip*, 37 F.4th 1386, 1390, 1394–95 (8th Cir. 2022); *Jordahl*, 789 F. Appx. at 591; *Amawi v. Paxton*, 956 F.3d 816, 819 (5th Cir. 2020).

¹⁵ See *Wrigley*, 540 F. Supp. 3d at 1229 (intermediate scrutiny standard of review); *Koontz*, 283 F. Supp. 3d at 1022 (blend of rational basis and strict scrutiny standard of review); Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 240 (2009).

¹⁶ See *Boycott* (Julia Bacha dir., 2021); see, e.g., Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels*, IN THESE TIMES (Mar. 19, 2021), <https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil> (“The proposed law ... is based on a 2017 bill that banned Texas from investing in funds that boycott, divest from, or sanction Israel.”).

of varying standards of review by federal district courts. Altogether, these challenges present a dead-end for federal courts faced with similar issues. Part IV concludes by proposing an alternate analysis of the constitutionality of state anti-BDS legislation through a public employment lens and will conclude by conducting this proposed analysis.

BACKGROUND

I. WHAT EVEN IS THE BDS MOVEMENT?

A. *Events Leading to the Formation of the BDS Movement*

Several significant historical and political events catalyzed the formation of the BDS movement. The founders of BDS claim that the movement was established as a response to numerous diplomatic attempts aimed at Israeli-Palestinian peace-building that ultimately failed to bring sustainable political change and unfolding events that only intensified tensions on the ground.¹⁷ Since an in-depth historical analysis of the Israeli-Palestinian conflict is outside of this Comment's scope, this Section will instead focus on influential historical events that occurred in the fifteen years leading up to BDS's formation in 2005.

The 1993 Oslo Accords was the first significant peace negotiation held directly between Israeli and Palestinian political leaders.¹⁸ By signing the Oslo Accords, the Palestinian Liberation Organization (PLO), the political representative for the Palestinian people, agreed to formally recognize the State of Israel.¹⁹ As a result, the State of Israel agreed to end its military occupation in the West Bank territories through the establishment of the Palestinian Authority (PA), a government entity that was authorized to control the West Bank and Gaza Strip.²⁰ The signing of the Oslo Accords in 1993 had a global effect, as many African, Asian, Latin American, and Arab countries

¹⁷ See Richard Falk, GENERATION PALESTINE: VOICES FROM THE BOYCOTT, DIVESTMENT AND SANCTIONS MOVEMENT 86–87 (Rich Wiles ed., Pluto Press 2013); *The Oslo Accords and the Arab-Israeli Peace Process*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/oslo> (last visited Oct. 23, 2023).

¹⁸ *What Were The Oslo Accords Between Israel And The Palestinians?*, AL JAZEERA (Sept. 13, 2023), <https://www.aljazeera.com/news/2023/9/13/what-were-oslo-accords-israel-palestinians>.

¹⁹ U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, *supra* note 17.

²⁰ *Id.*

consequently lifted their embargoes and began trading with the State of Israel.²¹ Despite its successes, the diplomacy behind the Oslo Accords quickly fell apart once the State of Israel failed to leave the occupied Palestinian territories and instead expanded Israeli settlement communities there.²²

The fallout of the Oslo Accords in the 1990s led to the need for further negotiations at Camp David in 2000, where the United States attempted to facilitate another successful Israeli-Palestinian peace agreement.²³ But the Camp David peace negotiations ended without any settlement because the Israeli and Palestinian leaders failed to agree on major issues such as the borders surrounding the West Bank and Gaza Strip territories.²⁴ Within months of the failed Camp David negotiations, the Second Intifada,²⁵ a Palestinian-led uprising, ensued, resulting in thousands of Israeli and Palestinian casualties.²⁶

In the midst of the Second Intifada, the State of Israel began constructing a separation wall alongside the West Bank to prevent Palestinian militants from committing terrorist attacks within Israel.²⁷ Pro-Palestinian advocates claimed that Israel had violated international law by using the wall's construction to illegally encroach upon Palestinian land in the West Bank, leading them to file a lawsuit challenging the wall's legality in the International Court of Justice (ICJ).²⁸ In its 2004 advisory opinion, the ICJ concluded that Israel's separation wall was illegal, and its construction had violated international law.²⁹ Despite this ruling, a majority of Israel's separation wall currently stands, and

²¹ Omar Barghouti, *Putting Palestine Back on the Map: Boycott as Civil Resistance*, 35 J. PALESTINE STUD. 51, 56 (2006).

²² Ali Adam, *Palestinian Intifada: How Israel Orchestrated a Bloody Takeover*, AL JAZEERA (Sept. 28, 2020), <https://www.aljazeera.com/news/2020/9/28/palestinian-intifada-20-years-later-israeli-occupation-continues>.

²³ U.S. DEP'T OF STATE OFF. OF THE HISTORIAN, *supra* note 17.

²⁴ *Id.*

²⁵ In Arabic, the word "Intifada" (انتفاضة) means "the act of shaking off," but it has come to be widely used to refer to Palestinian uprisings against the Israeli occupation forces, more specifically the uprisings that occurred in 1987 and 2000. *Intifada Definition & Meaning*, Merriam-Webster, (Jan. 20, 2025), <https://www.merriam-webster.com/dictionary/intifada>.

²⁶ *Id.*; Adam, *supra* note 22.

²⁷ Oded Balilty, *AP PHOTOS: Israel's Separation Barrier, 20 Years On*, AP (June 27, 2022), <https://apnews.com/article/politics-middle-east-jerusalem-israel-west-bank-2ce5d9956b729ad6169c880d00068977>.

²⁸ *Id.*

²⁹ *Id.*; Barghouti, *supra* note 21, at 54.

its construction has resulted in the encroachment of approximately ten percent of Palestinian land in the West Bank.³⁰

In response to the large number of Palestinian casualties during the Second Intifada, various American universities started divestment campaigns against companies that had supported Israel's military occupation, and these divestment campaigns were intended to protest the human rights violations committed against Palestinians.³¹ These university-sponsored campaigns inspired the individuals who founded BDS, not even a year after the end of the Second Intifada and the ICJ ruling.³² The founders of BDS were significantly influenced to create the BDS movement after diplomatic negotiations, an uprising, and an international court opinion were incapable of changing the political status quo in Israel and Palestine.³³ Through the establishment of BDS, pro-Palestinian advocates shifted from relying on political initiatives, such as diplomacy and uprisings, to instead relying on economic initiatives, such as boycott and divestment campaigns, to effectuate political change in Israel and Palestine.³⁴

B. *The Establishment of the BDS Movement and Its Goals*

In 2005, over one hundred Palestinian civil society organizations created BDS as a movement that encouraged the international community to "impose broad boycotts and implement divestment initiatives against [the State of] Israel" until it complied with international law.³⁵ According to the founders of BDS, the State of Israel would not comply with international law until it met three principal demands, including:

- (1) ending [the State of Israel's] occupation and colonization of all Arab lands and dismantling the Wall [bordering Israel and the occupied

³⁰ Balilty, *supra* note 27.

³¹ Barghouti, *supra* note 21, at 53.

³² *Palestinian Civil Society Call for BDS*, BDS, <https://bdsmovement.net/call> (last visited Sept. 27, 2023).

³³ See Falk, *supra* note 17, at 86–87.

³⁴ *Id.*; see also CAROLINE HELDMAN, *PROTEST POLITICS IN THE MARKETPLACE: CONSUMER ACTIVISM IN THE CORPORATE AGE*, (Cornell Univ. Press) (2017) 25–26, 53.

³⁵ BDS, *supra* note 32. While some critics may view BDS as a form of anti-Semitism, the question of whether BDS is anti-Semitic is outside of the scope of this Comment, and so this Comment will not address this matter of socio-political debate. See Halbfinger, David, et al., *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>.

West Bank territories]; (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 U.N. Resolution 194.³⁶

In response to the Israeli government's failure to satisfy these demands, the BDS movement has unleashed its boycott, divestment, and sanctions strategies against the State of Israel.³⁷ The organization's website states that the BDS movement primarily relies on three strategies—boycott, divestment, and sanctions—to accomplish its political goals aimed at improving Palestinians' rights in Israel and the West Bank.³⁸ BDS prioritizes its efforts in Western countries, especially the United States, because of its significant power within the global economy and significant influence in Israeli politics.³⁹ BDS uses boycotts to diminish any support of Israel's military occupation.⁴⁰ Such boycotts can extend to Israeli or non-Israeli products, companies, or institutions that assist in maintaining Israel's military occupation.⁴¹ Through its divestment campaigns, BDS encourages entities to "withdraw [their] investments from the State of Israel and all Israeli and international companies that sustain Israeli apartheid."⁴² These campaigns target various entities ranging from local councils to universities.⁴³ Finally, BDS advocates for sanctions imposed against the State of Israel.⁴⁴ BDS urges international governments to "fulfill their legal obligations to end Israeli apartheid" by issuing sanctions against the State of Israel that aim "to end Israeli apartheid, and not aid or assist [in its] maintenance."⁴⁵ Specifically, BDS specifies for international governments to terminate any military or trade agreements with the State of Israel, as well as move to suspend Israel's membership in international forums like the United Nations.⁴⁶ Although BDS is a

³⁶ BDS MOVEMENT, *supra* note 1.

³⁷ *See id.*

³⁸ *Id.*; BDS, *supra* note 32.

³⁹ Barghouti, *supra* note 21, at 56.

⁴⁰ BDS MOVEMENT, *supra* note 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ BDS MOVEMENT, *supra* note 1.

⁴⁶ *Id.*

Palestinian-led movement, it claims that it does not endorse any specific political solution to the ongoing Israeli-Palestinian conflict; rather, the organization emphasizes that any just or sustainable solution to the conflict must address and resolve BDS's three principal demands.⁴⁷

Pro-Israel advocates directly oppose BDS's principal demands, claiming that the BDS movement itself promotes anti-Semitism by supporting discriminatory boycotts of all Israeli products, companies, and institutions.⁴⁸ Founders of BDS countered that the movement condemns all forms of discrimination, including anti-Semitism, because it self-identifies as an "anti-racist human rights movement."⁴⁹ Additionally, BDS sympathizers emphasize that the movement does not support discriminatory boycotts of all Israeli products, companies, or institutions because they are Israeli or Jewish.⁵⁰ BDS specifically boycotts some Israeli products, companies, or institutions because not only do they comply with Israel's military occupation on the ground, but they also bolster it.⁵¹ By targeting those specific products, companies, or institutions that maintain the status quo of Israel's military occupation, BDS claims that its efforts are distinguishable as a means to a political rather than discriminatory end.⁵²

II. THE EMERGENCE OF ANTI-BDS LAWS IN THE UNITED STATES

Since the outset of the Israel-Hamas War,⁵³ BDS has become an even more controversial issue since BDS's opponents claim that the movement is pure "economic anti-Semitism."⁵⁴ But even before the

⁴⁷ Noura Erakat, *BDS in the USA, 2001-2010*, 255 MIDDLE E. REPORT 34, 35 (2010).

⁴⁸ See SHLOMO ABRAMOVICH, *ANTI-SEMITISM ON THE RISE: THE 1930S AND TODAY* (Ari Kohen & Gerald J. Steinacher eds., Univ. of Nebraska Press) 206, 211 (2021); Miriam F. Elman & Asaf Romirowsky, *Postscript: BDS*, 24 ISRAEL STUDIES 228, 229 (2019).

⁴⁹ BDS MOVEMENT, *supra* note 1.

⁵⁰ For a list of some of the products, businesses, or organizations targeted by BDS boycotts, see *Boycotts List*, ETHICAL CONSUMER, <https://www.ethicalconsumer.org/ethicalcampaigns/boycotts/>.

⁵¹ See ABRAMOVICH, *supra* note 48, at 211; OMAR BARGHOUTI, *BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS*, 147 (Haymarket Books 2011); Erakat, *supra* note 47, at 34.

⁵² Erakat, *supra* note 47, at 34.

⁵³ At the time this Comment was going through publication, the State of Israel and Hamas had agreed to a temporary ceasefire agreement. Jon B. Alterman, *Israel and Hamas Reach a Ceasefire*, CTR. FOR STRATEGIC AND INT'L STUDIES, (Jan. 21, 2025), <https://www.csis.org/analysis/israel-and-hamas-reach-ceasefire>.

⁵⁴ Timothy Cuffman, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT'L L. 115, 118, 124-25 (2019); *BOYCOTT* (Julia Bacha dir., 2022).

Israel-Hamas War, a majority of states enacted some form of anti-BDS legislation in the form of statutes, executive orders, or resolutions to combat the BDS movement and its economic impact on the State of Israel.⁵⁵ Tennessee became the first state to pass an anti-BDS law in 2015.⁵⁶ Within a year, fourteen other states, including Illinois, had passed their own form of anti-BDS legislation.⁵⁷ Some states, such as Virginia, New York, and Iowa, have enacted anti-BDS resolutions, which express outright support for the state's diplomatic relationship with Israel by condemning the BDS movement.⁵⁸ In February 2024, Alaska became the thirty-eighth state to pass an anti-BDS law or executive order.⁵⁹

State legislatures have passed anti-BDS legislation to influence their diplomatic relationship with the State of Israel as well as overall U.S.-Israeli relations.⁶⁰ For example, Tennessee used the enactment of its anti-BDS law to signal the state legislature's political support for the State of Israel by condemning the BDS movement as a tool "for spreading anti-Semitism and advocating [for] the elimination of the Jewish state."⁶¹ State officials who have proposed anti-BDS legislation, such as former Governor of New York Andrew Cuomo, have done so to voice their personal support for the State of Israel and promote a pro-Israel political agenda.⁶² When issuing an anti-BDS executive order in 2016, Governor Cuomo solidified his pro-Israel political stance by declaring, "If you boycott Israel, New York will boycott you."⁶³ Additionally, state and local governments have affirmed their commitment to enacting and enforcing their anti-BDS laws in response to unfolding political events in Israel and Palestine, such as the Israeli-Hamas war.⁶⁴

⁵⁵ PALESTINE LEGAL, *supra* note 7; Slisco, *supra* note 7.

⁵⁶ Slisco, *supra* note 7.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ James Brooks, *Alaska Governor Bans Big New Contracts with Companies that Boycott Israel*, ALASKA BEACON (Feb. 7, 2024), <https://alaskabeacon.com/2024/02/07/alaska-governor-bans-big-new-contracts-with-companies-that-boycott-israel/>.

⁶⁰ See, e.g., Joshua Lafazan, 'Never again' is Right Now, LI HERALD (Oct. 19, 2023), <https://www.liherald.com/lynbrook/stories/never-again-is-right-now,198009> (enforcing local anti-BDS law in response to Israel-Hamas War); Slisco, *supra* note 7.

⁶¹ Slisco, *supra* note 7.

⁶² See, e.g., Cuomo, *supra* note 9.

⁶³ *Id.*

⁶⁴ Lafazan, *supra* note 60.

While each state's anti-BDS laws differ, the legislation can be categorized into four general types.⁶⁵ The first type, which this Comment mainly focuses on, is contract-based. Contract-based anti-BDS legislation prohibits state governments from contracting with anyone, including individuals and companies, who engage in any boycott of the State of Israel.⁶⁶ The second type is investment-based, meaning such legislation directs the divestment of all state funds from any contractor who participates in any boycott of the State of Israel.⁶⁷ The third type is anti-discrimination-based because such legislation bars states from doing business with anyone that discriminatorily boycotts because of one's membership in a protected class, such as national origin or religion.⁶⁸ Anti-BDS laws based on anti-discrimination measures work by expanding the state's definition of anti-Semitism to include critiques of the State of Israel.⁶⁹ By conflating criticism of the State of Israel with anti-Semitism, one's participation in a BDS boycott of Israel would violate such a statute because BDS constitutes a discriminatory, and thus illegal, boycott.⁷⁰ The fourth type is resolution-based⁷¹ as it creates a solution that merely expresses support for the State of Israel by condemning all anti-Israel boycotts, including BDS.⁷²

Of the four types of anti-BDS legislation, contract-based legislation is the most common type that has been implemented throughout the country.⁷³ Such legislation poses a significant threat to the protection of individual civil rights because it may impede individuals' ability

⁶⁵ Ellen Cannon, *The BDS and Anti-BDS Campaigns: Propaganda War vs. Legislative Interest-Group Articulation*, 30 JEWISH POL. STUDIES REVIEW 5, 43–44 (2019).

⁶⁶ *Id.*; see, e.g., *Arkansas Times*, 37 F.4th at 1390.

⁶⁷ Cannon, *supra* note 65, at 44; see, e.g., N.Y. Executive Order No. 157.

⁶⁸ Cannon, *supra* note 65, at 44.

⁶⁹ See, e.g., Tex. H.B. 3257 (2021), <https://capitol.texas.gov/tlodocs/87R/billtext/html/HB03257F.htm>; see also *What is Antisemitism?*, THE INT'L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>, (last visited Oct. 24, 2023).

⁷⁰ See, e.g., *What is Antisemitism?*, THE INT'L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>, (last visited Oct. 24, 2023).

⁷¹ These resolutions do not have any binding legal effect on any parties involved or affiliated with a boycott against the State of Israel. Rather, such resolutions are passed to express public support. See Cannon, *supra* note 65, at 44; see generally *Ali*, 26 F.4th at 590 (Maryland anti-BDS executive order prohibits boycotts of Israel that undermine diplomacy between Maryland and Israel).

⁷² See Cannon, *supra* note 65, at 44; see generally *Ali*, 26 F.4th at 590.

⁷³ See PALESTINE LEGAL, *supra* note 7.

to contract with the state, especially if they hold certain personal or political affiliations.⁷⁴ Due to these civil rights concerns, this Comment will delve into the legal challenges associated with initiating a lawsuit that challenges the constitutionality of such anti-BDS legislation.

ANALYSIS

I. CHALLENGES IMPEDING JUDICIAL ANALYSIS

What do federal courts have to say about the constitutionality of anti-BDS legislation? If you are an individual affected by such legislation—whether because of your personal support for BDS or general opposition to these types of laws—and you initiate legal action, what kind of relief is available? What challenges are individuals presented with when pursuing these constitutional claims in federal court? This Comment aims to help answer these questions by analyzing three primary challenges for individual plaintiffs. First, at the highest level of the federal judiciary, the Supreme Court has not yet weighed in on the constitutionality of state anti-BDS legislation.⁷⁵ Second, while circuit courts have published decisions discussing state anti-BDS legislation, those decisions are based on procedural, rather than substantive, matters.⁷⁶ And finally, district courts that have rendered substantive decisions have varied methods of interpretation, adding further uncertainty.⁷⁷

A. *The Lack of Supreme Court Jurisprudence and Precedent*

The first challenge to the federal judiciary's analysis of the constitutionality of anti-BDS legislation is the lack of binding authority. While the Court has affirmed the constitutionality of boycotts,⁷⁸ it has

⁷⁴ See Cannon, *supra* note 65, at 44; see, e.g., *Amawi*, 956 F.3d at 820.

⁷⁵ See MIDDLE EAST EYE, *supra* note 12.

⁷⁶ See *Amawi*, 956 F.3d at 819 (turning on mootness); *Martin*, 2023 U.S. App. LEXIS 15673 at *16, F.7 (stating the Eleventh Circuit is not making any “conclusion[s] on the underlying constitutionality of [the anti-BDS statute.]”); *Ali*, 26 F.4th at 595 (turning on lack of standing); *Jordahl*, 789 Fed. Appx. at 591 (turning on mootness).

⁷⁷ Compare *Martin*, 540 F. Supp. 3d at 1229, 1234, with *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022, 1024 (D. Kan. 2018).

⁷⁸ See generally *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426 (1998).

yet to rule on the constitutionality of boycotts in the context of BDS or anti-BDS legislation or executive orders.⁷⁹ As it stands, the federal judiciary must rely on lower courts' interpretations to resolve any cases challenging the constitutionality of state anti-BDS legislation.⁸⁰ This Comment is a call to the Court to grant the next certiorari petition that comes before it to address the constitutionality of state anti-BDS legislation or executive action to further guide the lower courts' constitutional decision-making.

B. *Circuit Court Decisions Based on Procedure Rather Than Substance*

The second challenge to the federal judiciary's analysis of the constitutionality of anti-BDS legislation is that various circuit courts have failed to address this issue on the merits.⁸¹ Most of the circuit courts presented with a constitutional challenge to anti-BDS legislation or executive action have dodged an analysis of the constitutional issues⁸² by instead determining whether certain threshold procedural requirements, such as mootness and standing, have been met.⁸³ Since the circuit courts have declined to provide any constitutional analysis on state anti-BDS legislation or executive action, lower courts remain unable to consistently adjudicate similar cases.⁸⁴

⁷⁹ See MIDDLE EAST EYE, *supra* note 12.

⁸⁰ In the absence of Supreme Court precedent, courts view appellate court decisions as binding authority. See generally *Davis v. United States*, 564 U.S. 229 (2011) (relying on appellate precedent due to lack of Supreme Court precedent).

⁸¹ See *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *16, F.7; *Ali*, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591.

⁸² See *Martin*, 2023 U.S. App. LEXIS 15673 at *13, F.7 (stating the Eleventh Circuit is not making any "conclusion[s] on the underlying constitutionality of [the anti-BDS statute.]").

⁸³ See *Amawi*, 956 F.3d at 819 (mootness); *Martin*, 2023 U.S. App. LEXIS 15673 at *16, F.7 (a motion to dismiss on the grounds of qualified immunity); *Ali*, 26 F.4th at 595 (standing); *Jordahl*, 789 Fed. Appx. at 591 (mootness).

⁸⁴ See *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *13, F.7; *Ali*, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591; see also *Peters*, *supra* note 15, at 240.

1. The Fourth, Fifth, Ninth, and Eleventh Circuits Have Failed to Address the Constitutional Issues Underlying State Anti-BDS Legislation

By deciding cases regarding anti-BDS laws based on threshold procedural matters, the Fourth, Fifth, Ninth, and Eleventh Circuits have avoided analyzing the constitutionality of such legislation.⁸⁵ In *Ali v. Hogan*, the Fourth Circuit analysis was limited to the plaintiff's standing to challenge the anti-BDS executive order rather than its constitutionality.⁸⁶ There, the Fourth Circuit was presented with a constitutional challenge to Maryland's anti-BDS executive order, which prohibited all entities that wished to bid on any of the state's procurement contracts from engaging in any boycott of the State of Israel, including BDS.⁸⁷ The executive order required "any 'contractor, supplier or vendor...that has submitted a bid or proposal for...providing goods or services'" for the Maryland state government to sign a certification form guaranteeing they will not boycott the State of Israel.⁸⁸ The State of Israel's definition of boycotts expansively included actions that are "not commercial in nature."⁸⁹

The plaintiff in *Ali* challenged Maryland's anti-BDS executive order after claiming that he was unable to submit a bid for a government contract due to his personal and political opinions in support of the BDS movement.⁹⁰ The lower court concluded that the plaintiff lacked standing because there was no direct injury since the plaintiff did not submit a bid on a state procurement contract that was rejected by the state government.⁹¹ By primarily basing its decision on the standing issue, the lower court failed to address whether Maryland's anti-BDS executive order was constitutional.⁹² The Fourth Circuit affirmed the lower court's decision and again avoided addressing the constitutional issue on its merits.⁹³

⁸⁵ See *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *13, F.7; *Ali*, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591.

⁸⁶ See *Ali*, 26 F.4th at 595, 597.

⁸⁷ See *id.* at 590.

⁸⁸ *Id.* at 590–91.

⁸⁹ *Id.* at 591.

⁹⁰ See *id.* at 590–92.

⁹¹ See *id.* at 592–93.

⁹² See *Ali*, 26 F.4th at 598.

⁹³ *Id.* at 597.

Similarly, the Fifth Circuit's decision in *Amawi v. Paxton* and the Ninth Circuit's decision in *Jordahl v. Brnovich* also failed to analyze the constitutionality of anti-BDS legislation and limited their decisions to analyzing whether the claims were moot after the challenged anti-BDS statutes were amended.⁹⁴ Similarly, in *Amawi*, the Fifth Circuit was presented with a constitutional challenge under the First Amendment to the certification requirements under Texas's anti-BDS statute, yet declined to address that issue.⁹⁵ The statute required all government contractors, including individuals and companies, to sign a form certifying that they would not participate in any boycott of the State of Israel throughout the term of their contract.⁹⁶ The plaintiff, a speech pathologist in a public school, refused to sign the certification form because she personally supported BDS and other boycotts of the State of Israel.⁹⁷ The lower court held that Texas's anti-BDS status was unconstitutional.⁹⁸ As a result, the State of Texas was enjoined from enforcing the state statute's anti-boycott certification requirement in all contracts involving a government entity.⁹⁹

Less than two weeks after the lower court's decision, the Texas legislature amended its anti-BDS statute by excluding individual state contractors from the anti-boycott certification requirement.¹⁰⁰ Under the amended statute, the anti-boycott certification requirement would only apply to companies with at least ten full-time employees, as well as contracts with a minimum value of \$100,000.¹⁰¹ Limiting its decision to the mootness of the plaintiff's claim on appeal, the Fifth Circuit concluded that the plaintiff's claim was moot because the amended statute's anti-boycott certification requirement no longer applied to the plaintiff as an individual state contractor.¹⁰² Thus, the Fifth Circuit vacated the claim because of its mootness instead of analyzing the constitutionality of Texas's anti-BDS law.¹⁰³

⁹⁴ See *Amawi*, 956 F.3d at 819, 821; *Jordahl*, 789 Fed. Appx. at 591.

⁹⁵ See *Amawi*, 956 F.3d at 819.

⁹⁶ *Id.*

⁹⁷ *Id.* at 820.

⁹⁸ See *id.* at 819.

⁹⁹ See *id.*

¹⁰⁰ *Id.* at 819–21.

¹⁰¹ *Amawi*, 956 F.3d at 819–21.

¹⁰² See *id.* at 819, 821.

¹⁰³ See *id.* at 819, 821–22.

In *Jordahl*, the Ninth Circuit addressed a constitutional challenge to Arizona's anti-BDS law, which required all government contractors, including individuals and companies, to sign a form certifying that they would not boycott the State of Israel.¹⁰⁴ The plaintiff, an attorney who contracted with the state to provide legal services to incarcerated individuals within state prisons, refused to sign the certification form due to his personal and political views regarding the Israeli-Palestinian conflict.¹⁰⁵ As a result of failing to sign the certification form, Arizona withheld payment from the plaintiff.¹⁰⁶ Subsequently, he filed a lawsuit challenging the constitutionality of Arizona's anti-BDS law, specifically its anti-boycott certification requirement.¹⁰⁷

The district court concluded that the anti-boycott certification requirement was unconstitutional and enjoined Arizona from applying or enforcing it in any government contract.¹⁰⁸ While the appeal was pending, the Arizona legislature amended its anti-BDS statute by exempting individual state contractors from the anti-boycott certification requirement.¹⁰⁹ Under the amended anti-BDS statute, the anti-boycott certification requirement would only apply to companies with at least ten full-time employees and contracts with a minimum value of \$100,000.¹¹⁰ Subsequently, the Ninth Circuit declined to analyze the constitutionality of Arizona's anti-BDS law, instead vacating the preliminary injunction because the amended anti-BDS statute rendered the plaintiff's claims moot.¹¹¹

In *Martin v. Chancellor for the Board of Regents of the University System of Georgia*, the Eleventh Circuit stated that although the lower court held that Georgia's anti-BDS status was unconstitutional, its decision would not address the constitutionality of the statute.¹¹² The plaintiff in *Martin* was a journalist who wanted to contract with Georgia to deliver a keynote speech for a conference at a state university.¹¹³

¹⁰⁴ *Jordahl*, 789 Fed. Appx. at 590.

¹⁰⁵ *Id.* at 591.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Jordahl*, 789 Fed. Appx. at 591.

¹¹¹ *Id.*

¹¹² See *Martin*, 540 F.Supp.3d at 1229; *Martin*, 2023 U.S. App. LEXIS 15673 at *13 F.7.

¹¹³ *Martin*, 2023 U.S. App. LEXIS 15673 at *3.

To contract with the state university, the plaintiff had to comply with Georgia's anti-BDS law, which required all government contractors to sign a form certifying not to boycott the State of Israel.¹¹⁴ The plaintiff refused to sign the anti-boycott certification form because of her support of the BDS movement.¹¹⁵ The plaintiff subsequently brought a 42 U.S.C. § 1983 claim against a group of university employees, and she also challenged the constitutionality of the Georgia statute's anti-boycott certification requirement under the First and Fourteenth Amendments.¹¹⁶ The lower court granted the motion to dismiss the 42 U.S.C. § 1983 claim in part by concluding that the university employees were protected under a qualified immunity theory.¹¹⁷ The Eleventh Circuit affirmed, and a footnote in its decision stated that this circuit would not analyze the constitutionality of Georgia's anti-BDS law.¹¹⁸

While the Fourth, Fifth, Ninth, and Eleventh Circuits have been presented with cases that challenge the constitutionality of a state's anti-BDS legislation or executive action, these circuit courts have declined to address their constitutionality on the merits.¹¹⁹ Without a constitutional analysis provided by the circuit courts, any lower court presented with a similar case challenging a state's anti-BDS statute cannot rely on the circuit courts' decisions; instead, it must attempt to provide its own constitutional analysis.¹²⁰

2. The Eighth Circuit Is the Only Circuit Court That Has Analyzed the Constitutionality of State Anti-BDS Legislation

In *Arkansas Times LP v. Waldrip*, the Eighth Circuit became the only circuit court that analyzed the constitutional issues underlying a state's anti-BDS legislation.¹²¹ On a rehearing en banc, the Eighth Circuit analyzed Arkansas's anti-BDS statute, which prohibited the state government from contracting with any company that failed to sign

¹¹⁴ See *id.* at *2.

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.* at *4.

¹¹⁷ *Id.* at *1.

¹¹⁸ See *id.* at *16 n.7.

¹¹⁹ See *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *16 n.7; Ali, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591.

¹²⁰ See *Jordahl*, 789 Fed. Appx. at 591; MIDDLE EAST EYE, *supra* note 12; Peters, *supra* note 15, at 235.

¹²¹ See *Ark. Times*, 37 F.4th at 1394.

a certification form guaranteeing that it would not participate in any boycott of the State of Israel.¹²² The statute defines a “boycott of [the State of] Israel” as any action “intended to limit commercial relations with [the State of] Israel, or persons or entities doing business in Israel or in Israeli-controlled territories in a discriminatory manner.”¹²³ The *Arkansas Times*, a private newspaper that received state funding for advertisements, refused to sign the certification form required under Arkansas’s anti-BDS statute.¹²⁴ It subsequently filed a lawsuit that claimed the state statute’s anti-boycott certification requirement violated the First Amendment.¹²⁵ The lower court dismissed the *Arkansas Times*’s claim.¹²⁶ A divided panel on the Eighth Circuit reversed the lower court’s ruling, concluding that the anti-BDS statute’s certification requirement violated the First Amendment because boycotting the State of Israel constituted protected speech under the First Amendment.¹²⁷ The Eighth Circuit subsequently granted a rehearing en banc.¹²⁸

Using a three-prong analysis, the Eighth Circuit reversed the divided panel opinion, holding that Arkansas’s anti-BDS statute was constitutional under the First Amendment.¹²⁹ The issue was whether the Arkansas anti-BDS statute’s use of the phrase “boycott of Israel” prohibited expressive conduct that is protected under the First Amendment.¹³⁰ First, the Eighth Circuit conducted a free speech analysis.¹³¹ Protected free speech includes nonverbal conduct intended to express a particularized message.¹³² Even though the government can limit free speech when it benefits them, the government cannot “compel the endorsement of ideas that [the government] approves.”¹³³ While nonviolent elements of a political boycott, such as picketing, are

¹²² *See id.* at 1390.

¹²³ *Id.* at 1393.

¹²⁴ *See id.* at 1390; *BOYCOTT* (Julia Bacha dir., 2021).

¹²⁵ *See Ark. Times*, 37 F.4th at 1390.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1390–91.

¹²⁸ *Id.* at 1391.

¹²⁹ *See id.* at 1394.

¹³⁰ *Id.* at 1391.

¹³¹ *See Ark. Times*, 37 F.4th at 1391.

¹³² *Id.* at 1391 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

¹³³ *See id.* (quoting *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 309 (2012)); *Dolan v. City of Tigara*, 512 U.S. 374, 385 (1994).

constitutionally protected under the First Amendment,¹³⁴ it is unclear whether the economic choices “at the heart of a boycott,” such as whether to purchase a certain product, are also constitutionally protected.¹³⁵

Second, the Eighth Circuit relied on the canons of statutory interpretation to determine whether a “boycott of Israel” qualified as expressive activity.¹³⁶ The Eighth Circuit first applied the avoidance canon because the Arkansas Times’s claims relied on an interpretation of the anti-BDS statute that directly conflicted with the state’s interpretation of the statute.¹³⁷ Under the avoidance canon, courts presume the challenged statute is constitutional, so any conflicting interpretations are resolved in favor of the statute’s constitutionality.¹³⁸ By applying the avoidance canon, the Eighth Circuit concluded that Arkansas’s anti-BDS statute was constitutional.¹³⁹ Next, the Eighth Circuit applied the ejusdem generis canon.¹⁴⁰ Under the ejusdem generis canon, courts interpret general words following an enumeration of words as words of the same general kind that were previously mentioned.¹⁴¹ By applying the ejusdem generis canon, the Eighth Circuit concluded that a “boycott of Israel” is a solely commercial activity because the phrases preceding “boycott of Israel” are related to commercial activities.¹⁴²

Third, the Eighth Circuit conducted a compelled speech analysis.¹⁴³ Under the compelled speech doctrine, a state government is prohibited from making an individual disseminate a certain political ideology.¹⁴⁴ According to the Eighth Circuit, the certification requirement within Arkansas’s anti-BDS statute does not restrict free speech by prohibiting “economic decisions that discriminate against Israel.”¹⁴⁵

¹³⁴ N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

¹³⁵ See *Ark. Times*, 37 F.4th at 1392.

¹³⁶ See *id.* at 1393–94.

¹³⁷ *Id.* at 1393.

¹³⁸ Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 595–96 (2021).

¹³⁹ See *Ark. Times*, 37 F.4th at 1394; see generally Slocum, *supra* note 138 at 595–96 (discussing the avoidance canon of statutory interpretation).

¹⁴⁰ *Ark. Times*, 37 F.4th at 1393; see generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 169 (2012) (discussing the ejusdem generis canon of statutory interpretation).

¹⁴¹ SCALIA & GARNER, *supra* note 140, at 169; see, e.g., *Ark. Times*, 37 F.4th at 1393.

¹⁴² *Ark. Times*, 37 F.4th at 1393.

¹⁴³ *Id.* at 1394.

¹⁴⁴ *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

¹⁴⁵ *Id.*

Rather, the certification requirement is distinguishable from other compelled speech cases because it targets a “noncommunicative aspect of [a government] contractor’s conduct,” such as unexpressive commercial decisions, instead of requiring government contractors to publicly endorse a certain political message.¹⁴⁶ Since complying with “unexpressive conduct-based regulations” is not compelled speech, the Eighth Circuit concluded that the certification requirement within Arkansas’s anti-BDS statute was constitutional because it does not qualify as compelled speech.¹⁴⁷

The Eighth Circuit’s *Arkansas Times* decision addressed the constitutional issue underlying anti-BDS legislation on its merits; thus, a lower court within the Eighth Circuit can rely on the Eighth Circuit’s constitutional framework in *Arkansas Times* to consistently analyze future cases that present similar constitutional challenges.¹⁴⁸ The Supreme Court, however, refused to review an appeal of the Eighth Circuit’s *Arkansas Times* decision.¹⁴⁹ Without Supreme Court precedent, lower courts presented with similar challenges to a state’s anti-BDS legislation or executive action must choose between following the Eighth Circuit’s analysis or conducting their independent interpretation, which may lead to inconsistent adjudication of similar cases.¹⁵⁰ As such, other circuit courts should follow the Eighth Circuit’s lead and conduct similar constitutional analyses that focus on substantive matters underlying the constitutionality of state anti-BDS legislation or executive action so that lower courts presented with similar issues can consistently adjudicate such claims.

B. *District Court Decisions Applying Various Standards of Review*

Unlike most circuit courts, many U.S. district courts have addressed the constitutional issues underlying anti-BDS legislation on its merits, but the district courts have applied various standards of review in these decisions.¹⁵¹ The consistent application of a standard of review in similar cases allows litigants to accurately assess whether

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1394–95.

¹⁴⁸ See *Ark. Times*, 37 F.4th at 1394–95; see also Peters, *supra* note 15, at 235.

¹⁴⁹ MIDDLE EAST EYE, *supra* note 12.

¹⁵⁰ See *id.*; *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *13–14 n.7; *Ali*, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591; Peters, *supra* note 15, at 240.

¹⁵¹ See *Martin*, 540 F. Supp. 3d at 1229, 1234; *Koontz*, 283 F. Supp. 3d at 1022, 1024.

or not their claims would succeed in litigation.¹⁵² The district courts' inconsistent application in similar cases not only jeopardizes judicial efficiency by depriving litigants of the ability to determine their success rate in court, but it also makes it more difficult for such courts to resolve cases involving similar legal issues.¹⁵³ In both *Martin v. Wrigley* and *Koontz v. Watson*, the courts concluded that the challenged state anti-BDS statutes were unconstitutional, and each case was considered based on a different standard of review.¹⁵⁴

In *Martin v. Wrigley*, the Northern District of Georgia analyzed whether Georgia's anti-BDS statute was constitutional under the First and Fourteenth Amendments by applying the strict scrutiny standard of review.¹⁵⁵ According to strict scrutiny level of review, a statute is constitutional if it advances "compelling governmental ends;" (2) is necessary to advance such ends; and (3) is "the least restrictive effective means to advance these ends."¹⁵⁶ The defendant argued that the court should instead apply a lower standard of review, like intermediate scrutiny, because under strict scrutiny, a court will presume the government action is invalid unless the government bears its evidentiary burden.¹⁵⁷ In contrast, under intermediate scrutiny, a court will conclude that a statute is constitutional if it promotes an "important or substantial government end," is "substantially related" to the advancement of such ends, and is not "substantially more burdensome than necessary" to achieve those ends.¹⁵⁸

Here, the Northern District of Georgia applied strict scrutiny because it interpreted the Georgia statute as a content-based regulation based on the exemption of certain boycotts of Israel.¹⁵⁹ The court first determined that Georgia's intent to further its foreign policy goals with the State of Israel by enacting the state anti-BDS statute did not

¹⁵² Peters, *supra* note 15, at 240.

¹⁵³ See *id.*

¹⁵⁴ See *Martin*, 540 F. Supp. 3d at 1229, 1234; *Koontz*, 283 F. Supp. 3d at 1022, 1024.

¹⁵⁵ *Martin*, 540 F. Supp. 3d at 1224, 1230; see also R. Randall Kelso, *Clarifying the Four Kinds of "Exacting Scrutiny" Used in Current Supreme Court Doctrine*, 127 PENN ST. L. REV. 375, 378 (2023).

¹⁵⁶ Kelso, *supra* note 155, at 378.

¹⁵⁷ See *Martin*, 540 F. Supp. 3d at 1230; Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 310–11 (2015).

¹⁵⁸ Kelso, *supra* note 155, at 378.

¹⁵⁹ See *Martin*, 540 F. Supp. 3d at 1229–30.

constitute a “substantial” government interest.¹⁶⁰ Even if furthering Georgia’s foreign policy goals with the State of Israel was recognized as a “substantial” government interest, the court noted that the defendants failed to prove how the plaintiff’s participation in a boycott of Israel hindered the state’s ability to advance such foreign policy goals.¹⁶¹ Thus, the court found that Georgia’s anti-BDS statute neither involved a substantial government interest nor was necessary to advance such interests.¹⁶² Furthermore, the court determined that Georgia’s anti-BDS statute was not “the least restrictive effective means to advance these ends” because even if the statute was intended to achieve a constitutionally permissible goal, it would still unconstitutionally ban political boycotts, such as BDS.¹⁶³ Although the court did not conduct its analysis under the intermediate scrutiny standard of review, it noted the plaintiff’s claims would still prevail if analyzed under intermediate scrutiny.¹⁶⁴ For these reasons, it concluded that the Georgia anti-BDS statute was unconstitutional.¹⁶⁵

In *Koontz*, the District of Kansas concluded that Kansas’s anti-BDS statute was unconstitutional.¹⁶⁶ Under the statute, all state contractors were required to sign a certification form that guaranteed they would not participate in any boycott of the State of Israel throughout their government contract.¹⁶⁷ Additionally, the State Secretary of Administration could waive the certification requirement if “compliance [was] not practicable” for a state contractor.¹⁶⁸ The state had withheld payment from the plaintiff, a public school curriculum coach, because she refused to sign the anti-boycott certification form.¹⁶⁹ The plaintiff claimed that signing the certification form would conflict with her membership in the Mennonite Church, which influenced her support of BDS and other boycotts against the State of Israel.¹⁷⁰ The plaintiff subsequently filed a lawsuit that challenged the constitutionality of

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* at 1231; Kelso, *supra* note 155, at 378.

¹⁶⁴ *Martin*, 540 F. Supp. 3d at 1230–31.

¹⁶⁵ *See id.* at 1231, 1234.

¹⁶⁶ *Koontz*, 283 F. Supp. 3d at 1023.

¹⁶⁷ *Id.* at 1013.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1013–14.

¹⁷⁰ *Id.* at 1013.

the statute, specifically its certification requirement, under the First and Fourteenth Amendments.¹⁷¹

The district court analyzed the constitutional issue by applying a standard of review that blends elements of rational basis review and strict scrutiny.¹⁷² Under rational basis review, a government action, such as the enactment of a statute, is constitutional if it “advance[s] [a] legitimate government interest,” is “rationally related” to the advancement of such interest, and does not “impose [any] irrational burdens.”¹⁷³ The district court found that the anti-BDS statute did not involve a legitimate government interest because the statute’s legislative history revealed that the purposes for enacting the statute—(1) to undermine the message promulgated by those who participate in boycotts against the State of Israel and (2) minimize the discomfort that Israeli businesses may have felt from the boycotts—were impermissible.¹⁷⁴ Since no legitimate government interest existed, the anti-BDS statute was not “rationally related” to the advancement of any such interest.¹⁷⁵

Furthermore, the district court also noted that the anti-BDS statute could impose “irrational burdens” on individuals’ First Amendment rights because it coerced individuals to make an unconstitutional choice between contracting with the state or supporting a boycott against the State of Israel.¹⁷⁶ Thus, the district court noted that Kansas’s anti-BDS statute was likely to be found unconstitutional¹⁷⁷ and enjoined Kansas from enforcing the anti-BDS statute as well as enacting any other statute, policy, or practice that similarly requires government contractors to certify non-participation in any boycott of Israel.¹⁷⁸

Although the district court primarily analyzed the constitutional issue through the lens of rational basis review, the court tweaked the standard of review by adding another question for the court to consider.¹⁷⁹

¹⁷¹ *Id.* at 1012–13.

¹⁷² *See Koontz*, 283 F. Supp. 3d at 1018–20, 1022.

¹⁷³ *Kelso*, *supra* note 155, at 377–78.

¹⁷⁴ *Koontz*, 283 F. Supp. 3d at 1022.

¹⁷⁵ *See generally id.*

¹⁷⁶ *Id.* at 1026; *see Kelso*, *supra* note 155, at 377–78.

¹⁷⁷ *See Koontz*, 283 F. Supp. 3d at 1027.

¹⁷⁸ *Id.*; *see also Claiborne*, 458 U.S. at 915 (holding that nonviolent boycotts used as a means to a political end are protected under the First Amendment).

¹⁷⁹ *See id.* at 1023; *see also Peters*, *supra* note 15, at 253; *see generally Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (applying the strict scrutiny standard of review to evaluate whether a regulation prohibiting camping in public parks violated the First Amendment, which had prohibited a political demonstration).

Specifically, the district court additionally analyzed whether the statute was “narrowly tailored” to achieve a constitutionally permissible goal.¹⁸⁰ By adding this question, the district court modified its rational review analysis by incorporating a question typically used when courts apply the more stringent strict scrutiny analysis.¹⁸¹ Although similarly presented with cases challenging the constitutionality of state anti-BDS legislation, the district courts in *Martin* and *Koontz* do not conduct the same constitutional analysis, and these district courts do not apply the same standard of review.¹⁸² While these judicial challenges are best resolved with a top-down approach, in the absence of a Supreme Court or circuit court decision, district courts should rely on the Eighth Circuit’s constitutional analysis in *Arkansas Times* to promote consistent adjudication of such claims across various lower courts.¹⁸³

I. CONSIDERATIONS TO GUIDE FURTHER JUDICIAL ANALYSIS

As described above, various judicial challenges have resulted from the lack of Supreme Court precedent or substantive analyses by circuit courts and the inconsistent application of standards of review by district courts. Together, these challenges have impeded many federal courts from analyzing the constitutionality of anti-BDS legislation or executive action.¹⁸⁴ Courts should consider the following recommendations to guide future adjudication of cases that challenge the constitutionality of anti-BDS legislation or executive action.

A. *Whom Does the Anti-BDS Statute or Executive Action Apply To?*

When analyzing a constitutional challenge to a state’s anti-BDS legislation or executive action, courts should first determine whether the anti-BDS legislation or executive action applies to individual

¹⁸⁰ *Koontz*, 283 F. Supp. 3d at 1023.

¹⁸¹ See *id.*; see also Peters, *supra* note 15, at 253 (noting that courts that “alter the prevailing standard of review or create a new [blended] standard of review” creates inconsistency); see generally *Clark*, 468 U.S. at 293 (applying strict scrutiny to evaluate the constitutionality of a regulation that disrupted a political demonstration).

¹⁸² Compare *Martin*, 540 F. Supp. 3d at 1230, with *Koontz*, 283 F. Supp. 3d at 1027.

¹⁸³ See generally *Ark. Times*, 37 F.4th at 1394.

¹⁸⁴ See generally *MIDDLE EAST EYE*, *supra* note 12; *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *13 n.7; *Ali*, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591; *Martin*, 540 F. Supp. 3d at 1229, 1234; *Koontz v. Watson*, 283 F. Supp. 3d at 1022, 1024.

contractors, corporate contractors, or both.¹⁸⁵ For purposes of this issue, individual contractors are individuals who do not profit from a business opportunity with the state government. Individual contractors include individuals employed by the state government, such as the public school teacher plaintiffs in *Amawi* and *Koontz*.¹⁸⁶ Although individual contractors benefit from their employment with the state government, individual contractors remain distinguishable from corporate contractors because (1) corporate contractors can be individuals or entities that profit from a potential business opportunity with the state government, and (2) corporate contractors may not have an employment relationship with the state government.¹⁸⁷

Next, courts should determine whether the anti-BDS legislation or executive action broadly or narrowly applies to individual contractors, corporate contractors, or both.¹⁸⁸ Anti-BDS legislation or executive action broadly applies to such contractors when its scope includes “any” contractor or when its definition of boycotts of the State of Israel includes noncommercial activity.¹⁸⁹ Contrastingly, anti-BDS legislation or executive action narrowly applies to such contractors when it exclusively applies to certain contractors, such as employers with a certain number of employees, or matters, such as contracts beyond a certain price point.¹⁹⁰ Courts should carefully scrutinize anti-BDS legislation or executive action that broadly applies to individual or corporate contractors, such as the anti-BDS statute in *Jordahl*, because of the statute’s potential to limit individuals’ ability to exercise their constitutional rights to free speech, expression, and association.¹⁹¹

¹⁸⁵ See, e.g., *Ali*, 26 F.4th at 590–91 (anti-BDS statute broadly applying to both individual and corporate contractors); *A&R Eng’g*, 72 F.4th at 688 (anti-BDS statute exclusively applying to corporate contractors who meet certain baseline requirements).

¹⁸⁶ See *Amawi*, 956 F.3d at 820; *Koontz*, 283 F. Supp. 3d at 1013–14.

¹⁸⁷ Compare *Amawi*, 956 F.3d at 820, and *Koontz*, 283 F. Supp. 3d at 1013–14 (both plaintiffs in *Amawi* and *Koontz* were individual contractors because they are public school teachers who are public employees that do not profit from any business opportunity with the state government besides their employment), with *Ali*, 26 F.4th at 590–92 (plaintiff was a corporate contractor because he did not have an employment relationship with the state government, and he was seeking to profit from a potential business opportunity with the state government).

¹⁸⁸ See, e.g., *Ali*, 26 F.4th at 590–91 (anti-BDS statute broadly applying to both individual and corporate contractors); *A&R Eng’g*, 72 F.4th at 688 (anti-BDS statute exclusively applying to corporate contractors who meet certain baseline requirements).

¹⁸⁹ See, e.g., *Ali*, 26 F.4th at 590–91.

¹⁹⁰ See, e.g., *A&R Eng’g*, 72 F.4th at 688.

¹⁹¹ See, e.g., *Jordahl*, 789 Fed. Appx. at 590–91.

In *Jordahl*, the anti-BDS statute affected all government contractors because signing the anti-boycott certification was a blanket requirement to contract with the state government.¹⁹² The anti-BDS statute requires all government contractors, including individuals, to certify that they will not boycott Israel.¹⁹³ This requirement infringes on the plaintiff's First Amendment rights, including the right to free speech in support of boycotting Israel, as well as the right to freedom of association with BDS or other groups that engage in similar boycotts.¹⁹⁴ The Arizona state legislature may have been aware that the anti-BDS statute's broad language and blanket requirement for all government contractors was potentially unconstitutional because it swiftly amended the statute to exclusively apply to corporate contractors who met certain baseline requirements before the Ninth Circuit could review the *Jordahl* case on appeal.¹⁹⁵ It seems that the Arkansas state legislature knew that anti-BDS statutes narrowly written to apply to corporate contractors have an easier time passing constitutional muster because certain contractors, such as individuals, are excluded from the statute's anti-boycott certification requirements.¹⁹⁶ Thus, whenever an anti-BDS statute broadly applies to all contractors, courts should carefully scrutinize the anti-BDS statute, keeping in mind that the purpose of the First Amendment is to afford all individuals, even the "unpopular [ones]...and their [unpopular] ideas," with the utmost protection of their constitutional rights.¹⁹⁷

Courts reviewing anti-BDS legislation or executive action should be aware that anti-BDS legislation or executive action that exclusively applies to corporate contractors, like the amended anti-BDS statute considered in *Jordahl*, is distinguishable from anti-BDS legislation or

¹⁹² See *id.* at 590.

¹⁹³ See, e.g., *id.* at 590–91.

¹⁹⁴ See, e.g., *id.* (stating how the plaintiff boycotted certain products from the State of Israel for personal and political reasons).

¹⁹⁵ See *id.* at 591.

¹⁹⁶ See, e.g., *Ark. Times*, 37 F.4th at 1393 (the Arkansas statute at issue prohibited public entities from contracting with companies, thus excluding individuals, that refuse to certify that they will not boycott the State of Israel).

¹⁹⁷ Compare *Jordahl*, 789 Fed. Appx. at 590 (the pre-amended Arizona statute broadly encompassed individuals and small companies, including the plaintiff's firm), with *Ark. Times*, 37 F.4th at 1393 (the Arkansas statute narrowly applied to companies of a certain size); see generally *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("[T]he purpose...of the First Amendment [is] to protect unpopular individuals...and their [unpopular] ideas.").

executive action that broadly applies to such contractors.¹⁹⁸ In *A&R Engineering & Testing, Inc. v. Scott*, the amended Texas anti-BDS statute previously at issue in *Jordahl* exclusively applied to certain corporate contractors who satisfied several baseline requirements.¹⁹⁹ A&R Engineering & Testing, Inc. (A&R) was a corporate contractor that met those requirements. A&R denied renewing its contract with the City of Houston, Texas, because A&R refused to sign the statute's anti-boycott certification form due to the owner's support of the BDS movement.²⁰⁰ Since A&R had to comply with the state's anti-BDS statute, its contract with the city government was not renewed, resulting in a significant loss of business.²⁰¹

Anti-BDS statutes that exclusively apply to corporate contractors are distinguishable from those that apply broadly because corporations primarily enter into government contracts for commercial purposes, such as selling their goods or services and receiving a profit.²⁰² A broadly written anti-BDS statute will not raise as many constitutional red flags when it specifies that the certification requirement will only apply to "actions to limit commercial relations with Israel" because it primarily concerns corporations' commercial conduct directed towards the State of Israel, and its narrow language excludes prohibiting expressive or political boycotts of the State of Israel.²⁰³ Additionally, governments can easily regulate commercial, as compared to non-commercial, conduct without violating free speech, expression, or association rights.²⁰⁴ Since the Constitution does not fully protect purely commercial conduct, anti-BDS legislation or executive action that narrowly applies to corporate contractors can be a way for a state to constitutionally regulate commercial conduct based on support for the BDS movement.²⁰⁵ Although a corporation can be made up of

¹⁹⁸ See *Jordahl*, 789 Fed. Appx. at 590; *A&R Eng'g*, 72 F.4th at 688.

¹⁹⁹ *A&R Eng'g*, 72 F.4th at 688.

²⁰⁰ *Id.* at 687–88.

²⁰¹ See *id.* at 688.

²⁰² See *Bender v. City of Saint Ann*, 816 F. Supp. 1372, 1378 (E.D. Mo. 1993) (citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505–06 (1981)).

²⁰³ See, e.g., *Ark. Times*, 37 F.4th at 1393.

²⁰⁴ *Bender*, 816 F. Supp. at 1378.

²⁰⁵ See *Ark. Times*, 37 F.4th at 1394; see generally Eugene Volokh, *The First Amendment and Refusals to Deal*, at 735, <https://reason.com/volokh/2023/06/25/the-first-amendment-and-refusals-to-deal/> (arguing for courts to read anti-BDS statutes as purely commercial conduct so that plaintiffs will lack a First Amendment right).

individuals who have non-commercial reasons for deciding whether or not to enter into a government contract, the corporation makes decisions based on commercial reasons, such as whether a contract would be profitable or in the best interests of the entity. As such, a state government can constitutionally regulate these commercial reasons for corporate decision-making.²⁰⁶

Next, courts should analyze whether the anti-BDS legislation or executive action broadly or narrowly applies to such contractors. Courts should carefully scrutinize anti-BDS legislation or executive action that broadly applies to all government contractors to ensure that individual constitutional rights are protected. Since the language of anti-BDS legislation or executive action may trigger other constitutional considerations, courts analyzing the constitutionality of anti-BDS legislation or executive action should first consider to whom the anti-BDS statute or executive action applies, as well as to what extent it applies to such contractors.

B. *Which Constitutional Analysis to Follow*

Once a court has determined to whom and to what extent the state anti-BDS statute or executive action applies, a court should next decide which constitutional analysis to follow. The relevant constitutional analysis depends, however, on the specific facts or circumstances of a given case, meaning a court should be careful in identifying the most applicable constitutional analysis for the case before it.

1. Free Speech Analysis

Courts should apply a free speech analysis, as the Eighth Circuit did in *Arkansas Times*, when analyzing an anti-BDS statute or executive action that exclusively applies to corporate contractors.²⁰⁷ Applying this analysis, a court will determine the constitutionality of the anti-BDS statute or executive action by analyzing whether it prohibits inexpressive or expressive conduct.²⁰⁸ Specifically, courts will consider whether a corporate contractor's boycott of the State of Israel constitutes expressive conduct, such as by qualifying as a form of political

²⁰⁶ See *id.*; see, e.g., *A&R Eng'g*, 72 F.4th at 688.

²⁰⁷ See, e.g., *Ark. Times*, 37 F.4th at 1391.

²⁰⁸ See, e.g., *id.*

expression, protected under the First Amendment.²⁰⁹ For example, a boycott to promote political change would constitute expressive conduct that receives First Amendment protection.²¹⁰ Since nearly every boycott is “economic by nature,” courts should acknowledge that its analysis of any boycott will involve some economic or commercial element.²¹¹ As such, courts should acknowledge a boycott, by its definition, cannot be purely expressive because boycotts always include some commercial element.²¹² The more important question to guide a court’s analysis is to what extent, if any, is the boycott used as an expressive means to a constitutionally protected end.²¹³

2. Government Employee Speech Analysis

Alternatively, courts should apply a government employee speech analysis when considering an anti-BDS statute or executive action that applies to individual contractors.²¹⁴ Although some individual contractors may be independent contractors rather than employees, courts have held that anyone who works under the government is entitled to the same constitutional rights that they are granted as private citizens and that the government can neither indirectly nor directly infringe upon those constitutional rights when they speak on matters of public concern.²¹⁵ Since these legal principles apply equally to government

²⁰⁹ Cf. *id.* (analyzing whether “boycotting Israel” constitutes expressive conduct protected under the First Amendment); see *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981) (internal citations omitted); see also *Claiborne*, 458 U.S. at 915 (holding that a nonviolent political boycott was protected under the First Amendment).

²¹⁰ See, e.g., *Ark. Times*, 37 F.4th at 1391; see also *Claiborne*, 458 U.S. at 914.

²¹¹ See *Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301, 1315 (8th Cir. 1980).

²¹² See *id.*

²¹³ See, e.g., *Ark. Times*, 37 F.4th at 1391; see also *Claiborne*, 458 U.S. at 914 (concluding that a political boycott constituted political expression that guarantees First Amendment protections).

²¹⁴ See generally *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (discussing the constitutional protections afforded to public employee’s speech); see also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (discussing the balancing interests between the public employee versus the government employer).

²¹⁵ See *Garcetti*, 547 U.S. at 419; *Martin*, 540 F. Supp. 3d at 1225 (citing *Bd. of Cnty. Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 677–78 (1996)); see also *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting that states cannot impose conditions on an independent contractor that “infringes [upon] his constitutionally protected . . . freedom of speech.”).

contractors, the appropriate analysis will conflate the constitutional rights of public employees with those of government contractors.²¹⁶

An individual contractor who brings a First Amendment claim against a state government must first establish whether he or she engaged in constitutionally protected speech.²¹⁷ A contractor's speech is constitutionally protected under the First Amendment if the individual contractor exercises his or her right to speak as a private citizen on a matter of public concern.²¹⁸ An individual contractor speaks as a private citizen when the speech is not "pursuant to [his or her] official duties."²¹⁹ Speech constitutes "a matter of public concern" when it (1) relates to "any matter of political, social, or other concern to the community" or (2) "is a subject of legitimate news interest...[,] general interest [, or] concern to the public."²²⁰ Participating in a political protest is a "matter of public concern."²²¹ However, personal matters do not qualify as a "matter of public concern" because they involve private, rather than public, matters.²²² Even when a subject seems to qualify as "a matter of public concern," a court can still find that it does not constitute a "matter of public concern" when "the content, form, and context" show that the speech instead expresses a personal concern.²²³

If the government contractor's speech is constitutionally protected and on a matter of public concern, a court will then determine whether the government's adverse employment action against the public employee, such as termination, was justified by applying the *Pickering* balancing test.²²⁴ Under the *Pickering* test, a court will weigh the government contractor's interest in exercising his or her First Amendment right against the government's interest in efficiently providing public services through its workforce.²²⁵ Courts often interpret this balancing test in

²¹⁶ Cf. *Perry*, 408 U.S. at 597 (noting that the government cannot impose infringing conditions on independent contractors merely because they are not employees).

²¹⁷ *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

²¹⁸ *Garcetti*, 547 U.S. at 417.

²¹⁹ See *id.* at 421.

²²⁰ *Lane v. Franks*, 573 U.S. 228, 241 (2014).

²²¹ *Connick v. Myers*, 461 U.S. 138, 148 n. 8 (1983).

²²² See *id.* at 147.

²²³ See, e.g., *McKenzie v. Milwaukee Cnty.*, 381 F.3d 619, 626–27 (7th Cir. 2004) (distinguishing between speech made as an expression of personal concern, such as within an individual's diary, and speech as an expression of public concern).

²²⁴ *Pickering*, 391 U.S. at 568; see also *Garcetti*, 547 U.S. at 418 (describing a two-prong analysis for determining whether public employee speech is entitled to First Amendment protection).

²²⁵ *Pickering*, 391 U.S. at 568.

favor of the government, broadly deferring to the governmental interest in efficiently regulating conduct within its workforce, even if there is an infringement of individual First Amendment rights, if such speech would negatively impact the government's ability to maintain efficient operations.²²⁶

There is no general standard under the *Pickering* approach.²²⁷ Rather, the circuit courts have considered several non-dispositive factors when weighing a government contractor's interest against the government's interest.²²⁸ Some of these factors include: "(1) the need for harmony in the workplace; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties."²²⁹ Since no single factor of the *Pickering* balancing test is dispositive, courts consider the totality of the factual circumstances when determining the weight given to any factor in a specific case.²³⁰ Thus, a court's application of the *Pickering* analysis is highly fact-specific.²³¹

3. Does the BDS Movement Constitute Constitutionally Protected Speech?

As applied to anti-BDS statutes or executive action, courts should first analyze whether an individual contractor engages in constitutionally protected speech when he or she either participates in or supports a boycott of the State of Israel, like the BDS movement. The question of whether an individual's participation in or support of a boycott of the State of Israel is constitutionally protected is widely disputed.²³²

Those who claim that anti-boycott legislation or executive actions such as anti-BDS statutes are unconstitutional frequently cite *N.A.A.C.P. v. Claiborne Hardware Co.*, the leading Supreme Court case regarding the constitutionality of boycotts, to establish that participation in or support of BDS boycotts against the State of Israel is

²²⁶ See *Garcetti*, 547 U.S. at 418.

²²⁷ See *Pickering*, 391 U.S. at 569.

²²⁸ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

²²⁹ *Anzaldúa v. Northeast Ambulance & Fire Prot. Dist.*, 793 F.3d 822, 835 (8th Cir. 2015).

²³⁰ *Id.*

²³¹ See generally *id.*; see also *Pickering*, 391 U.S. at 569.

²³² See generally *Ark. Times*, 37 F.4th at 1391–95.

constitutionally protected speech.²³³ In *Claiborne*, the Court analyzed the constitutionality of a boycott against white businesspersons in Mississippi during the post-Civil Rights era.²³⁴ The boycott at issue in *Claiborne* was organized by the black citizens of Claiborne County after white elected officials ignored their list of demands for racial equality and integration.²³⁵ The Court held that since the boycott was a nonviolent, political boycott intended to ensure civic and economic leaders complied with demands for racial equality, it was constitutionally protected under the First Amendment.²³⁶ While the Court recognized that nonviolent political boycotts and any activities accompanying them are constitutional, its decision did not mean that all boycotts are afforded the same constitutional protections.²³⁷

To determine whether a boycott is constitutionally protected, courts consider whether that boycott aims to achieve “political, social, and economic change” through “governmental action.”²³⁸ Similar to the proposed free speech analysis mentioned in the previous subsection, a court should also consider whether the boycott is “organized for economic ends” because such boycotts are not granted the same constitutional protections.²³⁹ However, since all boycotts intend to accomplish some economic goal, courts should focus on deciphering whether a boycott’s economic goals are used as a means to further any political end, such as using a boycott campaign to compel a corporate actor to support a certain political stance.²⁴⁰ Although state governments may choose to regulate their economy at the expense of affecting a boycott, that government regulation cannot interfere with individuals’ First Amendment right to participate in a political

²³³ See, e.g., *Martin*, 540 F. Supp. 3d at 1226–28.

²³⁴ See *Claiborne*, 458 U.S. at 888.

²³⁵ See *id.*

²³⁶ See *id.* at 907, 911–12.

²³⁷ See *id.* at 907, 915.

²³⁸ See generally *id.* at 907–08, 911–12, 914; see also *Berkeley*, 454 U.S. at 294 (“[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.”); *Nat’l Org. for Women*, 620 F.2d at 1315 (Federal law does not prohibit “using a boycott in a . . . political arena for the purpose of influencing legislation.”).

²³⁹ *Claiborne*, 458 U.S. at 915.

²⁴⁰ *Id.* at 912; *Nat’l Org. for Women*, 620 F.2d at 1315; see, e.g., Kat Tenbarge, *Social Media Fuels Boycotts Against McDonald’s and Starbucks Over Israel-Hamas War*, NBC News (Dec. 1, 2023, 12:12 PM), <https://www.nbcnews.com/tech/social-media/social-media-fuels-boycotts-mcdonalds-starbucks-israel-hamas-war-rcna125121>.

boycott.²⁴¹ Additionally, a court should consider whether an economic refusal to deal analysis should apply and thus allow the anti-BDS statute to survive constitutional muster.²⁴²

Those who claim that the BDS movement's boycotts against the State of Israel are constitutionally protected under the First Amendment should compare the BDS movement's boycotts against the State of Israel to the boycott in *Claiborne*. Like the boycott in *Claiborne*, the BDS movement's boycotts are a means to a political end—promoting equality and justice for Palestinians, especially those in Israel and Palestine.²⁴³ Additionally, the BDS movement's boycotts originated after their demands were continuously ignored.²⁴⁴ Furthermore, just as the *Claiborne* boycott was intended to ensure civic and economic leaders comply with the boycotters' vision for racial equity, the BDS movement can similarly argue that its boycotts were intended to ensure civic and economic leaders throughout the international community comply with its vision for justice in Israel and Palestine.²⁴⁵ Since the nonviolent political boycott in *Claiborne* constituted constitutionally protected activity, courts should determine that the BDS movement's nonviolent, political boycotts against the State of Israel are to be granted the same constitutional protections.²⁴⁶

4. Does One's Participation in a BDS Boycott Constitute Speech "On a Matter of Public Concern"?

Once a court determines that the BDS movement's boycotts against the State of Israel are constitutionally protected, it would next analyze whether an individual contractor who participates in the BDS movement's boycotts of the State of Israel is exercising his or her right to speak as a public citizen on "a matter of public concern" by doing so.²⁴⁷ If an individual contracts with a state government to conduct a statistical analysis on the rise of the BDS movement's boycotts of the State of Israel, would participation in such a boycott qualify as speech

²⁴¹ *Claiborne*, 458 U.S. at 913.

²⁴² Cf. Eugene Volokh, *The First Amendment and Refusals to Deal*, 54 U. PAC. L. REV. 732, 733 (2023); see, e.g., *Ali*, 26 F.4th at 590–92.

²⁴³ See *Claiborne*, 458 U.S. at 888–89; BDS MOVEMENT, *supra* note 1.

²⁴⁴ See *Claiborne*, 458 U.S. at 888–89; BDS MOVEMENT, *supra* note 1; BDS, *supra* note 32.

²⁴⁵ See *Claiborne*, 458 U.S. at 888–89; BDS MOVEMENT, *supra* note 1; BDS, *supra* note 32.

²⁴⁶ See *Claiborne*, 458 U.S. at 888–89; BDS MOVEMENT, *supra* note 1; BDS, *supra* note 32.

²⁴⁷ See generally *Garcetti*, 547 U.S. at 416.

on a “matter of public concern?”²⁴⁸ Additionally, would participating in a boycott of the State of Israel qualify as speech “pursuant to [an individual contractor’s] official duties”?²⁴⁹ Since each case presents its specific factual circumstances, this part of a court’s analysis would be intensely fact-specific and would depend on whether a specific court chooses to impose a narrow or broad interpretation of what constitutes “a matter of public concern.”²⁵⁰

Individual plaintiffs bringing a constitutional claim against a state anti-BDS law in such a court should first argue that participating in such a boycott is speech that is exercised as a private citizen because an individual contractor’s participation in a boycott of the State of Israel is not pursuant to his or her official duties.²⁵¹ For example, the individual contractors in *Amawi*, *Jordahl*, and *Martin*—a speech pathologist, attorney, and journalist, respectively—were not acting pursuant to their official duties by choosing to participate in or support the BDS movement’s boycotts against the State of Israel since doing so is neither a core responsibility of any of their jobs nor tangentially related to any of their core job responsibilities.²⁵² Furthermore, participating in or supporting the BDS movement’s boycotts against the State of Israel is wholly unrelated to their professions.²⁵³

Individual plaintiffs should argue that participating in such a boycott constitutes speech on “a matter of public concern” because the Israeli-Palestinian conflict is a “subject of legitimate news interest.”²⁵⁴ Since the outbreak of the Israel-Hamas War in 2023, American news outlets have increasingly published news and media focusing on the Israeli-Palestinian conflict as a whole, making it a “subject of legitimate news interest” among the general American public.²⁵⁵ In response to any counterarguments that participating in such a boycott does not

²⁴⁸ See generally *id.*

²⁴⁹ See generally *id.* at 421.

²⁵⁰ *Id.* at 416.

²⁵¹ See *id.* at 421.

²⁵² See *Amawi*, 956 F.3d at 820; *Jordahl*, 789 Fed. Appx. at 591; *Martin*, 2023 U.S. App. LEXIS 15673 at *3.

²⁵³ See generally *id.*

²⁵⁴ See *Lane*, 573 U.S. at 241; see generally Laura Silver et. al., *Majority in U.S. Say Israel Has Valid Reasons for Fighting; Fewer Say the Same About Hamas: 1. Views of the Israel-Hamas War*, PEW RESEARCH CENTER, (Mar. 21, 2024), <https://www.pewresearch.org/2024/03/21/views-of-the-israel-hamas-war/>.

²⁵⁵ See generally *id.*

constitute speech on “a matter of public concern” because the Israeli-Palestinian conflict is not a “matter of political, social, or other concern to the community,” those who argue in favor of the BDS movement’s boycotts’ constitutionality should respond that the Israeli-Palestinian conflict is a “matter of political, social, or other concern to the community” because American taxpayer dollars significantly support both sides involved in the conflict.²⁵⁶

Furthermore, the Israeli-Palestinian conflict has become a “matter of political, social, or other concern to the community.”²⁵⁷ Anti-BDS legislation and executive actions have compelled individual contractors—who may have no personal stake in or opinion of the Israeli-Palestinian conflict—to engage with it because their contracts with state governments require them to pledge not to boycott the State of Israel.²⁵⁸ Additionally, individual contractors who do have either a personal stake in or opinion of the Israeli-Palestinian conflict, such as the plaintiffs in *Amawi* and *Jordahl*, can argue that their participation in a BDS boycott of the State of Israel is an act of political protest that would also constitute a “matter of public concern.”²⁵⁹

Finally, after a court finds that an individual contractor who participates in a BDS boycott of the State of Israel is exercising his or her right to speak as a public citizen on “a matter of public concern,” a court would then apply the *Pickering* balancing test.²⁶⁰ The government’s adverse action would be the individual contractors’ inability to contract with the government unless they comply with the state’s anti-BDS statute or executive action.²⁶¹ Applying the *Pickering* balancing test, a court will weigh an individual contractor’s interest in exercising their First Amendment right to participate in a BDS boycott of the State of Israel versus the state government’s interest in conducting efficient

²⁵⁶ See *Lane*, 573 U.S. at 241; Jonathan Masters and Will Merrow, *U.S. Aid to Israel in Four Charts*, COUNCIL ON FOREIGN RELATIONS (Nov. 13, 2024), <https://www.cfr.org/article/us-aid-israel-four-charts>; Rand Paul, *The U.S. Should Cut Off Aid to the Palestinians*, JEWISH NEWS SYNDICATE, (Jan. 24, 2024), <https://www.jns.org/the-us-should-cut-off-aid-to-the-palestinians/>.

²⁵⁷ See *Lane*, 573 U.S. at 241.

²⁵⁸ See *id.*; see, e.g., *Ali*, 26 F.4th at 590–91.

²⁵⁹ See *Lane*, 573 U.S. at 241; *Connick*, 461 U.S. at 148 n. 8; *Amawi*, 956 F.3d at 820; *Jordahl*, 789 Fed. Appx. at 591.

²⁶⁰ See generally *Garcetti*, 547 U.S. at 418; *Pickering*, 391 U.S. at 568; see, e.g., *Jordahl*, 789 Fed. Appx. at 590–91.

²⁶¹ See generally *Garcetti*, 547 U.S. at 418; *Pickering*, 391 U.S. at 568; see, e.g., *Jordahl*, 789 Fed. Appx. at 590–91.

operations through its workforce, including its contractors.²⁶² Courts will generally analyze whether the individual contractor's participation in a BDS boycott of the State of Israel impedes the state government's ability to maintain efficient operations.²⁶³ Since courts often defer to the government's interest, courts may similarly defer to the government's broad interest in maintaining efficient operations by prohibiting its contractors from participating in or engaging with any boycott of the State of Israel, including BDS.²⁶⁴

Those who argue that the BDS movement's boycotts are unconstitutional can argue that an individual contractor's participation in a boycott of the State of Israel interferes with the government's ability to maintain efficient operations by creating tensions and undermining "harmony in the workplace," particularly among Jewish individual contractors, who may be offended or distressed by any actions taken against the State of Israel.²⁶⁵ Moreover, if the government's services depend on a "close working relationship" between individual contractors, then a contractor's participation in a boycott of the State of Israel could hinder the ability for multiple contractors to collaborate effectively by creating friction and making it more difficult for them to work together.²⁶⁶ Those in favor of BDS boycotts and the constitutionality of such boycotts can rebut these counterarguments. But, these proponents will have a more difficult burden of persuading a court that the individual contractor's interest in exercising his or her First Amendment right, such as by participating in a BDS boycott of the State of Israel, outweighs the state government's interest in maintaining efficient operations throughout its workforce.²⁶⁷

²⁶² *Pickering*, 391 U.S. at 568.

²⁶³ See generally *Pickering*, 391 U.S. at 568.

²⁶⁴ *Garcetti*, 547 U.S. at 418.

²⁶⁵ See *Rankin*, 483 U.S. at 388; see, e.g., Lynne Curry, *Antisemitism? My Coworkers' Cheers for Hamas Shocked Me*, WORKPLACE COACH BLOG, (Oct. 31, 2023), <https://workplacecoachblog.com/2023/10/antisemitism-my-coworkers-cheers-for-hamas-shocked-me/>.

²⁶⁶ See *Rankin*, 483 U.S. at 388; see, e.g., Lynne Curry, *Antisemitism? My Coworkers' Cheers for Hamas Shocked Me*, WORKPLACE COACH BLOG, (Oct. 31, 2023), <https://workplacecoachblog.com/2023/10/antisemitism-my-coworkers-cheers-for-hamas-shocked-me/>.

²⁶⁷ See generally *Pickering*, 391 U.S. at 568.

CONCLUSION

Courts presented with a constitutional challenge to a state's anti-BDS legislation or executive action must also maneuver through other judicial challenges stemming from a lack of Supreme Court precedent, substantive analyses from the circuit courts, or consistent application of standards of review from the district courts.²⁶⁸ To promote consistent and substantive adjudication of constitutional challenges to a state's anti-BDS legislation or executive action, this Comment proposes two constitutional frameworks for courts to follow, with a primary focus on a potential government employee speech analysis. Through these proposed analyses, this Comment aims to ensure that courts consistently adjudicate any constitutional challenges to a state's anti-BDS legislation or executive action. Additionally, this Comment hopes that by consistently adjudicating such claims, courts will curtail any government action that prohibits individuals from exercising their First Amendment right to affiliate with or participate in constitutional boycott movements.

²⁶⁸ See generally *MIDDLE EAST EYE*, *supra* note 12; *Amawi*, 956 F.3d at 819; *Martin*, 2023 U.S. App. LEXIS 15673 at *16, F.7; *Ali*, 26 F.4th at 595; *Jordahl*, 789 Fed. Appx. at 591; *Martin*, 540 F. Supp. 3d at 1229, 1234; *Koontz v. Watson*, 283 F. Supp. 3d at 1022, 1024.