
WIELDING ANTIDISCRIMINATION LAW TO SUPPRESS THE MOVEMENT FOR PALESTINIAN RIGHTS

The United States is seeing a cultural shift toward increased concern over Israel's human rights record. Over the past decade, groups from the Bill & Melinda Gates Foundation to the United Methodist Church to dozens of university student governments have taken steps that challenge the status quo of abuses of Palestinian rights.¹ Meanwhile, opponents have long argued that Palestinian rights work is anti-Semitic or anti-Israeli.² In recent years, these accusations have escalated from a merely political or rhetorical argument to a claim of legally cognizable discrimination. Since 2014, twenty-seven states have adopted laws penalizing businesses' participation in the Palestinian-led Boycott, Divestment, Sanctions (BDS) movement, and such laws are pending in another fourteen states.³ Facing First Amendment challenges, states have justified anti-BDS measures as standard antidiscrimination laws, combatting religious discrimination against Jewish people and national-origin discrimination against Israelis. Similar discrimination claims have been raised in other contexts, including: lawsuits against Airbnb under the Fair Housing Act⁴ (FHA) for withdrawing from West Bank settlements; Title VI⁵ complaints against universities for pro-Palestine student activism; and a new legal definition of anti-Semitism that includes criticism of Israel that is deemed disproportionate.⁶ Across these contexts, civil rights law has been leveraged to defend Israel against the movement for Palestinian rights. This Note focuses on anti-BDS laws as the most significant manifestation of the claim that anti-Zionist movement work unlawfully discriminates.

Much has been written arguing that anti-BDS laws violate the First Amendment.⁷ However, there has been far less focus on the discrimination claim itself. This Note debunks the claim that BDS constitutes legally cognizable discrimination. It argues that antidiscrimination

¹ Brief of *Amici Curiae*, the Center for Constitutional Rights and Palestine Legal, In Support of Plaintiffs-Appellees and Affirmance at 13–15, *Jordahl v. Arizona*, No. 18-16896 (9th Cir. Jan. 24, 2019) [hereinafter CCR and PalLegal Brief].

² See, e.g., David French, *The Anti-Semitic BDS Movement Advocates Illegal Discrimination*, NAT'L REV. (July 18, 2019, 3:59 PM), <https://www.nationalreview.com/2019/07/the-anti-semitic-bds-movement-advocates-illegal-discrimination> [https://perma.cc/ZFF5-GDY9].

³ *Anti-boycott Legislation Around the Country*, PALESTINE LEGAL, <https://palestinelegal.org/righttoboycott> [https://perma.cc/YBJ4-K2QQ].

⁴ 42 U.S.C. §§ 3604–3619 (2012).

⁵ *Id.* § 2000(d).

⁶ See *infra* section II.B, pp. 1366–68.

⁷ See, e.g., Timothy Cuffman, Note, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT'L L. 115, 134–62 (2018); Recent Legislation, S.C. CODE ANN. § 11-35-5300 (2015), 129 HARV. L. REV. 2029 (2016).

doctrines do not support this claim. While BDS has grown into a diffuse, multistakeholder movement, this analysis focuses on BDS as led by the Palestinian BDS National Committee (BNC).⁸ Part I explains the background of BDS and anti-BDS laws. Part II explores how the discrimination claim has gained legal force through anti-BDS laws and other legal tools. Part III summarizes the implications of the anti-discrimination argument for First Amendment challenges to anti-BDS bills. A strong antidiscrimination justification for these laws would constitute a compelling state interest that could trump countervailing First Amendment interests. However, as Part IV explains, anti-BDS laws are not backed by a valid antidiscrimination interest.

I. THE BDS MOVEMENT AND ANTI-BDS LAWS

A. *Palestinian Rights & the Birth of BDS*

The Palestinian community today is made up of distinct populations, each facing a range of human rights abuses by the Israeli government. In Gaza, 1.8 million people live under an air, land, and sea blockade that restricts movement out of the Gaza Strip and access to basic necessities.⁹ Palestinians in the West Bank face a military occupation marked by segregated roads, home demolitions,¹⁰ unprecedented settlement expansion,¹¹ and widespread military detentions — with as much as 40% of the male population having been detained by Israeli authorities.¹² Palestinians in East Jerusalem without Israeli citizenship are regularly dispossessed of their property and residency permits.¹³ A matrix of over sixty-five laws systematically discriminates against Palestinian citizens of Israel,¹⁴ and Israel's 2018 Basic Law established that only Jewish people have the right of national self-determination.¹⁵ Finally,

⁸ *Palestinian BDS National Committee*, BDS, <https://bdsmovement.net/bnc> [<https://perma.cc/3B9T-LG9Z>].

⁹ *Gaza Blockade*, UNITED NATIONS OFF. FOR COORDINATION HUMANITARIAN AFF., <https://www.ochaopt.org/theme/gaza-blockade> [<https://perma.cc/G8PR-A7JS>].

¹⁰ See HUMAN RIGHTS WATCH, *SEPARATE AND UNEQUAL* 4, 11, 66 (2010), https://www.hrw.org/sites/default/files/reports/iropt1210webwcover_o.pdf [<https://perma.cc/489V-9VYD>].

¹¹ See NOURA ERAKAT, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* 211 (2019) (noting a 200% increase in settler population since 1993).

¹² ADDAMEER PRISONER SUPPORT & HUMAN RIGHTS ASS'N, *PALESTINIAN POLITICAL PRISONERS IN ISRAELI PRISONS* 4 (2014), [http://www.addameer.org/files/Palestinian%20Political%20Prisoners%20in%20Israeli%20Prisons%20\(General%20Briefing%20January%202014\).pdf](http://www.addameer.org/files/Palestinian%20Political%20Prisoners%20in%20Israeli%20Prisons%20(General%20Briefing%20January%202014).pdf) [<https://perma.cc/S2QY-YUQS>].

¹³ *East Jerusalem*, B'TSELEM (Jan. 27, 2019), <https://www.btselem.org/jerusalem> [<https://perma.cc/CBS3-UARP>].

¹⁴ *The Discriminatory Laws Database*, ADALAH (Sept. 25, 2017), <https://www.adalah.org/en/content/view/7771> [<https://perma.cc/2J4V-CQFL>].

¹⁵ *Basic Laws*, THE KNESSET, <https://m.knesset.gov.il/EN/activity/Pages/BasicLaws.aspx> [<https://perma.cc/8EST-R72Z>].

Palestinian refugees comprise one of the world's largest stateless populations,¹⁶ while a Jewish individual from any country who was "born of a Jewish mother or has become converted to Judaism" is automatically entitled to Israeli citizenship.¹⁷ Meanwhile, efforts to improve the situation for Palestinians have been almost uniformly unsuccessful. A generation of Palestinians has grown up seeing the Oslo Accords fail to produce discernable change, subsequent negotiation efforts break down, peaceful protests met with crackdowns, and construction of a separation wall that violates international law.¹⁸

Against this backdrop, BDS was founded in 2005 to leverage non-violent pressure on Israel, based on the recognition that "[t]he most fundamental problem . . . [is] not in deciding what sort of arrangement should replace the current system; the problem [is] forcing Israel to change it at all."¹⁹ The movement aims to: (1) end the occupation and dismantle the wall; (2) secure the equal rights of Arab-Palestinian citizens of Israel; and (3) uphold the right of Palestinian refugees to return to their homes, per UN Resolution 194.²⁰ Inspired by the antiapartheid movement in South Africa, BDS leverages boycotts, institutional divestment, and government sanctions to target entities deemed complicit in Israel's violations of Palestinian rights.²¹ The international movement has become increasingly mainstream²² and has successfully moved some companies to cease operations implicated in Israel's rights abuses.²³

¹⁶ See INST. ON STATELESSNESS & INCLUSION, *THE WORLD'S STATELESS* 127–32 (2014), <https://files.institutesi.org/worldsstateless.pdf> [<https://perma.cc/97V6-MTVZ>].

¹⁷ Law of Return, 5730–1970, § 4B, 24 LSI 28 (1969–70).

¹⁸ See Human Rights Council, Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, ¶¶ 20, 101, U.N. Doc. A/HRC/40/74 (Feb. 25, 2019).

¹⁹ Nathan Thrall, *BDS: How a Controversial Non-violent Movement Has Transformed the Israeli-Palestinian Debate*, THE GUARDIAN (Aug. 24, 2018, 7:00 AM), <https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate> [<https://perma.cc/9XGE-5RV9>].

²⁰ Palestinian Civil Soc'y, *Palestinian Civil Society Call for BDS*, BDS (July 9, 2005), <https://bdsmovement.net/call> [<https://perma.cc/C33F-CUYL>].

²¹ See *id.*; Email from Omar Barghouti, Co-founder of BDS, to author (Aug. 24, 2019) (on file with the Harvard Law Review).

²² ERAKAT, *supra* note 11, at 229.

²³ Examples include telecommunications company Orange ending its partnership with an Israeli company operating in settlements, see Jack Moore, *Orange to End Partnership with Israeli Company as BDS Claims Another Scalp*, NEWSWEEK (Jan. 6, 2016, 1:19 PM), <https://www.newsweek.com/orange-ends-partnership-israeli-company-bds-claims-another-scalp-412202> [<https://perma.cc/KT4W-ZFA3>], and the U.S. Presbyterian Church divesting from companies complicit in the occupation, see *Presbyterian Church Votes to Divest Holdings to Sanction Israel*, THE GUARDIAN (June 21, 2014, 12:01 PM), <https://www.theguardian.com/world/2014/jun/21/presbyterian-church-votes-divest-holdings-to-sanction-israel> [<https://perma.cc/XU3V-YBBF>]. However, Israel's overall international trade has actually increased since BDS began. See Thrall, *supra* note 19.

B. Emergence of U.S. Anti-BDS Laws

Alongside its wins, BDS has seen substantial political opposition. In 2014, Israeli Prime Minister Netanyahu's administration devoted \$25.5 million to an anti-BDS task force²⁴ and reportedly discussed "whether to activate the pro-Israel lobby in the US . . . to promote legislation" to undermine BDS.²⁵ By September 2014, the American Israeli Public Affairs Committee (AIPAC) was drafting legislation to counteract BDS in the United States.²⁶ In 2015, fifty organizations met to coordinate a U.S. anti-BDS strategy, amidst concern over increasing criticism of Israel's policies.²⁷ As a former leader of Israel's anti-BDS efforts conveyed, "The key for Israel . . . was winning the hearts and minds of centrist liberals and progressives abroad."²⁸ Part of this strategy became reclaiming the moral high ground by labeling BDS efforts anti-Semitic, including through anti-BDS laws.

In July 2015, Illinois became the first state to pass an anti-BDS law.²⁹ Today, all but nine states have introduced or instituted anti-BDS measures that either require state contractors to pledge that they will not boycott Israel or require the divestment of state funds from boycotting companies that are placed on a "blacklist."³⁰ One anti-BDS law was met with international outrage in 2017 when Hurricane Harvey victims were required to pledge not to boycott Israel before receiving relief aid.³¹ Still, such laws have received support across most states, and fifty governors have signed a statement rejecting BDS.³²

²⁴ Doron Peskin, *Israel Commits \$25 Million to New Anti-BDS Task Force, but What Exactly Will They Do?*, AL-MONITOR (Dec. 23, 2015), <https://www.al-monitor.com/pulse/originals/2015/12/boycott-bds-movement-israel-government-office-gilad-erdan.html#ixzz6oAkZIHbV> [<https://perma.cc/PDB4-ZCNM>].

²⁵ Thrall, *supra* note 19.

²⁶ Rosie Gray, *Pro-Israel Activists Aim to Block Boycott Movement with Legislation*, BUZZFEED NEWS (Sept. 9, 2014, 5:17 PM), <https://www.buzzfeednews.com/article/rosiegray/pro-israel-activists-aim-to-block-boycott-movement-with-legi#xhgAjgm5> [<https://perma.cc/Y9FP-CH6Q>].

²⁷ Nathan Guttman, *Secret Sheldon Adelson Summit Raises up to \$50M for Strident Anti-BDS Push*, FORWARD (June 9, 2015), <https://forward.com/news/israel/309676/secret-sheldon-adelson-summit-raises-up-to-50m-for-strident-anti-bds-push> [<https://perma.cc/WXK8-ZDP7>].

²⁸ Thrall, *supra* note 19.

²⁹ *Illinois Governor Signs Anti-BDS Bill into Law*, PALESTINE LEGAL (July 24, 2015), <https://palestinelegal.org/news/2015/7/24/illinois-governor-signs-anti-bds-bill-into-law?rq=illinois> [<https://perma.cc/TE9X-XLYF>].

³⁰ *Ten Things to Know About Anti-Boycott Legislation*, PALESTINE LEGAL (Mar. 27, 2019), <https://palestinelegal.org/news/2016/6/3/what-to-know-about-anti-bds-legislation> [<https://perma.cc/2DSC-48XC>].

³¹ Anat Rosenberg, *Still Recovering from Harvey, Texas Hit with "Hurricane Israel" over Anti-BDS Provision*, HAARETZ (Oct. 21, 2017, 7:17 PM), <https://www.haaretz.com/us-news/recovering-from-harvey-texas-suburb-hit-with-hurricane-israel-1.5459316> [<https://perma.cc/DZH5-R99G>].

³² *50 U.S. Governors Unite to Support Israel, Fight BDS*, AM. JEWISH COMMITTEE, https://www.ajc.org/sites/default/files/pdf/2017-09/AJC_WSJAD%202017_FINAL.PDF [<http://perma.cc/TK6F-3K65>].

Recently, federal anti-BDS laws have also arisen, harkening back to 1970s legislation opposing the Arab League's boycott of Israel.³³ In 2017, Congress considered the Israel Anti-Boycott Act (IABA), which would have criminalized supporting anti-Israel boycotts fostered by international governmental organizations.³⁴ In 2019, the Senate passed the Combatting BDS Act to clarify that state anti-BDS bills are not preempted by federal law,³⁵ while the House passed a resolution condemning BDS and "all efforts to delegitimize the State of Israel."³⁶

II. CLAIMS OF UNLAWFUL DISCRIMINATION

A. *Claims of Discrimination Used Against BDS*

Anti-BDS laws have been justified as tools for combatting religious discrimination against Jewish people and national-origin discrimination against Israelis. As nine states argued in an amicus brief: it is "intuitively obvious . . . [that] targeting a particular group (and those associating with them) for the intentional infliction of economic harm *is discrimination, by definition*," and BDS does just that.³⁷ Some note, just because BDS does not target *all* Israelis does not make the movement any less discriminatory: "[D]iscrimination is not immunized simply because it is not carried out to its furthest ends."³⁸ Moreover, the claim goes, BDS "doesn't pass the anti-Semitism smell test"; supporters feed anti-Semitic stereotypes³⁹ and single out the world's only Jewish state — a democracy — "for the most exacting scrutiny," while ignoring worse human rights abuses elsewhere.⁴⁰ Opponents claim, of all groups on Earth, BDS denies only the Jewish people the right of national self-determination.⁴¹ Many trace a line from centuries-old exclusions of Jewish people from commerce to BDS, arguing that BDS is the latest manifestation of "economic warfare" against the Jewish people.⁴²

³³ See *Office of Antiboycott Compliance (OAC)*, BUREAU INDUSTRY & SECURITY, U.S. DEP'T COM., <https://www.bis.doc.gov/index.php/enforcement/oac> [<https://perma.cc/6PGB-7ZGQ>] (discussing 1976 Ribicoff Amendment to the Tax Reform Act and 1977 amendments to the Export Administration Act).

³⁴ Israel Anti-Boycott Act, S.720, 115th Cong. (2017).

³⁵ Strengthening America's Security in the Middle East Act of 2019, S.1, 116th Cong. (2019).

³⁶ H.R. Res. 246, 116th Cong. (2019).

³⁷ Brief of *Amici Curiae* States of Arizona et al. at 21–22, *Amawi v. Paxton*, No. 19-50384 (5th Cir. Sept. 6, 2019).

³⁸ State of Arizona's Reply Brief at 19, *Jordahl v. Arizona*, No. 18-16896 (9th Cir. Feb. 28, 2019).

³⁹ Gil Troy, *The BDS Movement Is Nefarious, but It's Better to Push Back Politically — Not Legally*, CBC (Mar. 10, 2019, 4:00 AM), <https://www.cbc.ca/news/opinion/bds-law-1.5034567> [<https://perma.cc/32DV-KE6H>].

⁴⁰ French, *supra* note 2.

⁴¹ David Harris, Letter to the Editor, *Why Anti-Zionism Is Malign*, N.Y. TIMES (Dec. 12, 2018), <https://nyti.ms/2GcOn77> [<https://perma.cc/U36W-JE35>].

⁴² DAN DIKER, UNMASKING BDS: RADICAL ROOTS, EXTREMIST ENDS 5, 8–10 (2015).

This claim of discrimination is not new. It is commonplace to allege that anti-Zionism⁴³ is anti-Semitic.⁴⁴ A primary tool of Israeli advocacy organizations has long been public vilification of Palestinian rights supporters as anti-Semitic,⁴⁵ a charge that carries a powerful chilling effect.⁴⁶ However, in recent years, this allegation of anti-Jewish and anti-Israeli discrimination has transitioned from a political and rhetorical claim to one treated as legally cognizable. Several anti-BDS laws rest on the antidiscrimination rationale, alongside other justifications.⁴⁷ Many of the laws penalize limiting business with Israel “in a manner that discriminates on the basis of nationality, national origin or religion.”⁴⁸ For other laws, the antidiscrimination rationale is absent from the text but emerges in the legislative history.⁴⁹ Alongside contracting laws, several states have passed virtually identical resolutions naming BDS “one of the main vehicles for spreading anti-Semitism.”⁵⁰

States have partially relied on the antidiscrimination justification when defending anti-BDS laws against First Amendment challenges. Thus far, five federal cases have been decided at the preliminary injunction stage, reviewing challenges to anti-BDS laws in Maryland, Texas, Arkansas, Arizona, and Kansas.⁵¹ Texas defended that BDS engages in

⁴³ Anti-Zionism can be defined as “a loose term referring to criticism of the current policies of the Israeli state, and/or moral, ethical, or religious criticism of the idea of a Jewish nation-state.” *Our Approach to Zionism*, JEWISH VOICE FOR PEACE, <https://jewishvoiceforpeace.org/zionism> [<https://perma.cc/W4KX-HAJ3>].

⁴⁴ For example, in 2002, then-president of Harvard University Lawrence Summers called a petition to divest the university from Israel “anti-Semitic.” Karen W. Arenson, *Harvard President Sees Rise in Anti-Semitism on Campus*, N.Y. TIMES (Sept. 21, 2002), <https://www.nytimes.com/2002/09/21/us/harvard-president-sees-rise-in-anti-semitism-on-campus.html> [<http://perma.cc/k56Z-LLY2>].

⁴⁵ PALESTINE LEGAL & CTR. FOR CONSTITUTIONAL RIGHTS, THE PALESTINE EXCEPTION TO FREE SPEECH 17 (2015), <https://ccrjustice.org/sites/default/files/attach/2015/09/Palestine%20Exception%20Report%20Final.pdf> [<https://perma.cc/PV5S-8M25>] [hereinafter PALESTINE EXCEPTION]; see, e.g., *About Us*, CANARY MISSION, <https://canarymission.org/about> [<https://perma.cc/54Z2-YSVX>] (labeling anti-Zionist activists anti-Semitic).

⁴⁶ See Judith Butler, *No, It's Not Anti-Semitic*, 25 LONDON REV. BOOKS 19, 19 (2003) (“If we think that to criticise Israeli violence . . . is to be ‘effectively anti-semitic’, we will fail to voice our opposition for fear of being named as part of an anti-semitic enterprise.”).

⁴⁷ Other rationales include: protecting trade relations with Israel; avoiding contractors that make “unsound business practice[s]”; and honoring Israel as a “key all[y].” See, e.g., MINN. STAT. § 16C.053(b)(2) (2017); 2017 N.C. Sess. Laws 193.

⁴⁸ NEV. REV. STAT. § 332.065(5)(a) (2019); see also GA. CODE ANN. § 50-5-85(a)(1)(B) (West 2017); MINN. STAT. § 16C.053(b)(2) (2017); ARIZ. REV. STAT. ANN. § 35-393(1)(b) (2016); Md. E.O. 01.01.2017.25; CAL. PUB. CONT. § 2010 (2016).

⁴⁹ See, e.g., Leah Vukmir, *AB 553*, Assembly Committee on Government Accountability and Oversight 3 (Jan. 17, 2018), http://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/ab553/ab0553_2018_01_17.pdf [<https://perma.cc/U2NP-DKZE>] (“This bill shows that we will not stand for anti-Semitic policies . . .”).

⁵⁰ S. Res. 136, 2015 Gen. Assemb. (Pa. 2015); see also Assemb. J. Res. 122, 216th Leg. (N.J. 2015).

⁵¹ *Ali v. Hogan*, No. 19-0078, 2019 WL 4861198 (D. Md. Oct. 1, 2019) (dismissed for lack of standing); *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019); Ark. Times

“invidious, status-based discrimination,” and the State has the power to prohibit “discrimination based on historically protected characteristics.”⁵² Arizona, Maryland, and Arkansas similarly argued that BDS is quintessentially discriminatory, “rooted in animus” toward Jewish people⁵³ and constituting “national-origin discrimination under any reasonable construction of that term.”⁵⁴

B. Claims of Discrimination Beyond BDS

Not only has the discrimination claim been used defensively against legal challenges to anti-BDS laws, but it has also been wielded offensively in complaints against entities advancing Palestinian rights work.

1. *Airbnb Cases.* — In November 2018, following advocacy by human rights groups,⁵⁵ Airbnb announced that it would delist rentals in Israeli West Bank settlements,⁵⁶ which violate Article 49 of the Fourth Geneva Convention.⁵⁷ The company was promptly met with four lawsuits.⁵⁸ Some plaintiffs alleged that Airbnb’s policy violated the FHA by discriminating on account of race, religion, and national origin because it “effectively targets only those residential dwellings and accommodations in Judea and Samaria that are owned or managed by Jews.”⁵⁹ In April 2019, Airbnb settled by reversing its policy, announcing that it “always opposed the BDS movement.”⁶⁰

2. *Title VI.* — The discrimination claim has also gained traction through the U.S. Department of Education’s (DOE) response to Title VI complaints. As of 2015, at least six Title VI complaints had been filed against universities alleging that Palestine-related events harassed,

LP v. Waldrup, 362 F. Supp. 3d 617 (E.D. Ark. 2019) (dismissed); Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018); Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

⁵² Defendant Ken Paxton’s Omnibus Response to Plaintiffs’ Motions for Preliminary Injunction at 21, 25, *Amawi*, 373 F. Supp. 3d 717 (No. 18-CV-1091). The district court rejected this rationale, finding that the law was aimed not at combatting national-origin discrimination, but instead at “silenc[ing] speech with which Texas disagrees.” *Amawi*, 373 F. Supp. 3d at 749.

⁵³ Defendants-Appellees’ Brief at 2, Ark. Times LP v. Waldrup, No. 19-1378 (8th Cir. May 31, 2019); see also State of Arizona’s Reply Brief, *supra* note 38, at 18.

⁵⁴ Memorandum in Support of Governor Hogan’s Motion to Dismiss at 30, *Ali*, 2019 WL 4861198.

⁵⁵ See, e.g., HUMAN RIGHTS WATCH, BED AND BREAKFAST ON STOLEN LAND 2 (2018), https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_o.pdf [<https://perma.cc/2HQ2-V9Y8>].

⁵⁶ *Listings in Disputed Regions*, AIRBNB NEWSROOM (Nov. 19, 2018), <https://press.airbnb.com/listings-in-disputed-regions> [<https://perma.cc/9URZ-SYLS>].

⁵⁷ See ERAKAT, *supra* note 11, at 61–62, 68–69.

⁵⁸ Julia Jacobs, *Airbnb Reverses Policy Banning Listings in Israeli Settlements in West Bank*, N.Y. TIMES (Apr. 9, 2019), <https://nyti.ms/2KnXgSk> [<https://perma.cc/5Q4W-UBGK>].

⁵⁹ Complaint at 15–16, Harow v. Airbnb, Inc., No. 19-cv-00395 (N.D. Cal. Jan. 22, 2019); see also Amended Complaint at 9–10, Silber v. Airbnb, Inc., No. 18-cv-01884 (D. Del. Dec. 21, 2018).

⁶⁰ *Update on Listings in Disputed Regions*, AIRBNB NEWSROOM (Apr. 9, 2019), <https://press.airbnb.com/update-listings-disputed-regions> [<https://perma.cc/B2Q3-C56H>].

targeted, or “create[d] a ‘hostile educational environment’ for Jewish students.”⁶¹ Under the Obama Administration, the DOE dismissed such complaints for lack of legal merit.⁶² According to Kenneth Marcus, the “architect of [this] Title VI strategy,” even when rejected, these Title VI complaints successfully chilled speech by “expos[ing] administrators to bad publicity” and “getting [students] caught up in a civil rights complaint.”⁶³ In 2018, Marcus was appointed by President Trump to serve as the DOE’s Assistant Secretary for Civil Rights.⁶⁴ Marcus is working to shift DOE policy toward upholding discrimination claims that were rejected under the Obama Administration through steps like reopening a previously terminated investigation against Rutgers University for alleged anti-Semitism.⁶⁵

3. *Redefining Anti-Semitism.* — The discrimination claim is also gaining legal force through the formal redefining of anti-Semitism to include anti-Zionism. In 2010, the U.S. State Department adopted a definition of anti-Semitism that includes the “3 D’s” of demonizing, delegitimizing, and applying double standards to Israel.⁶⁶ This definition regards as anti-Semitic acts like: “[m]ultilateral organizations focusing on Israel only for peace or human rights investigations” and “requiring of [Israel] a behavior not expected or demanded of any other democratic nation.”⁶⁷ In 2019, the Florida legislature passed HB 741, requiring state educational institutions to treat anti-Semitism — as defined by the State Department — the same as racial discrimination.⁶⁸ A town in Florida has gone further, passing an ordinance that integrates this definition of anti-Semitism into its criminal law and directs police to investigate instances of demonizing, delegitimizing, or applying double standards to Israel.⁶⁹ In 2016, the International Holocaust Remembrance Alliance promulgated a similar definition,⁷⁰ which has

⁶¹ See PALESTINE EXCEPTION, *supra* note 45, at 36.

⁶² *Id.* at 36–37.

⁶³ *Id.* at 37.

⁶⁴ *President Donald J. Trump Announces Key Additions to His Administration*, WHITE HOUSE (Oct. 26, 2017), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-key-additions-administration-18> [<https://perma.cc/8SCL-9HTR>].

⁶⁵ Letter from Kenneth L. Marcus, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Susan B. Tuchman, Zionist Org. of Am. (Aug. 27, 2018), https://www.insidehighered.com/sites/default/server_files/media/Rutgers%20Appeal.pdf [<https://perma.cc/5HJ3-GSX9>].

⁶⁶ *Defining Anti-Semitism*, U.S. DEP’T OF STATE (June 8, 2010), <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm> [<https://perma.cc/W7QX-98EZ>].

⁶⁷ *Id.*

⁶⁸ FLA. STAT. § 1000.05 (2019).

⁶⁹ BAL HARBOR, FLA., CODE OF ORDINANCES § 2-112 (2019).

⁷⁰ See *Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/working-definition-antisemitism> [<https://perma.cc/Y6WK-KLM9>].

been adopted by thirty-one countries, and eight have enshrined it into national law.⁷¹

In these ways, the claim that anti-Zionism constitutes religious and national-origin discrimination has gone from a merely rhetorical argument to one taken seriously by legislatures, federal agencies, and courts as legally cognizable.

III. IMPLICATIONS FOR FIRST AMENDMENT CHALLENGES

The discrimination claim impacts whether anti-BDS laws that burden political speech can withstand First Amendment scrutiny. This Part explores whether BDS is First Amendment-protected and, if so, whether a valid antidiscrimination rationale could save anti-BDS laws from constitutional rebuke. The First Amendment protects both speech and expressive conduct.⁷² Under strict scrutiny, a content-based regulation of protected expression must be justified by a compelling state interest and be narrowly tailored to further that interest.⁷³

A preliminary question in anti-BDS litigation is whether BDS is protected expression. Litigants who consider anti-BDS laws unconstitutional cite *NAACP v. Claiborne Hardware Co.*⁷⁴ for the proposition that the First Amendment protects nonviolent, politically motivated consumer boycotts.⁷⁵ Some note that anti-BDS laws are content-based by “singling out only *politically motivated* refusals to do business” with Israel, and even if BDS does not qualify as speech, the First Amendment still restrains the government from forbidding conduct precisely because of what it communicates.⁷⁶ Conversely, supporters of anti-BDS laws’ constitutionality argue that BDS is not protected because it is merely the nonexpressive conduct of withholding business and requires additional explanation in order to be expressive,⁷⁷ citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*⁷⁸ They interpret *Claiborne* to mean that,

⁷¹ See Daniel Sugarman, *What Is the IHRA Definition of Antisemitism? And Why Has Labour Outraged Jews by Rejecting It?*, JEWISH CHRON. (July 20, 2018, 3:31 PM), <https://www.thejc.com/comment/analysis/what-is-the-ihra-definition-of-antisemitism-and-why-has-labour-outraged-jews-by-rejecting-it-1.467511> [<https://perma.cc/A2KQ-7MPE>].

⁷² See *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

⁷³ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015).

⁷⁴ 458 U.S. 886 (1982).

⁷⁵ See Brief of *Amici Curiae* First Amendment Scholars in Support of Plaintiffs-Appellees at 12–13, *Jordahl v. Arizona*, No. 18-16896 (9th Cir. Jan. 24, 2019) [hereinafter Knight Brief].

⁷⁶ Lindsey Lawton, *A New Loyalty Oath: New York’s Targeted Ban on State Funds for Palestinian Boycott Supporters*, 42 N.Y.U. REV. L. & SOC. CHANGE 649, 666 (2019).

⁷⁷ See, e.g., Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as *Amici Curiae* in Support of Defendants-Appellees at 14, *Ark. Times LP v. Waldrip*, No. 19-1378 (8th Cir. June 5, 2019) [hereinafter Dorf Brief].

⁷⁸ 547 U.S. 47 (2006) (holding that ROTC boycott was unprotected conduct).

while expression supporting a boycott (picketing, marches, speeches) is protected, the act of boycotting itself is not.⁷⁹

Almost all federal courts that have ruled on this matter have concluded that BDS is constitutionally protected expression.⁸⁰ Therefore, if subject to strict scrutiny, anti-BDS laws can survive only if narrowly tailored to advance a compelling state interest. *Roberts v. U.S. Jaycees*⁸¹ and its progeny establish that “the State’s strong historical commitment to eliminating discrimination . . . serves compelling state interests of the highest order.”⁸² Thus, a compelling antidiscrimination justification could possibly trump BDS’s First Amendment protections. However, the Supreme Court has not fully resolved the core constitutional tension between First Amendment interests and neutral antidiscrimination laws.⁸³ Under Supreme Court precedent such as *Boy Scouts of America v. Dale*,⁸⁴ First Amendment interests may override antidiscrimination laws when discrimination is integral to the expression and the law forces individuals to “alter the[ir] expressive content.”⁸⁵ If BDS’s policy of anti-Zionism were considered discriminatory, plaintiffs could argue that anti-Zionism is core to the organization’s purpose, at least as much as anti-homosexuality was core to the Boy Scouts’s mission in *Dale*,⁸⁶ and BDS’s integral expressive message is being unconstitutionally undermined. Thus, anti-BDS laws may not survive strict scrutiny even if a compelling antidiscrimination interest is at stake.

Still, the State may argue that it has an additional defense to First Amendment challenges when it contracts with private entities. Several cases affirm that the State may decline to contract with a private actor when doing so would effectively subsidize violations of public policy.⁸⁷ Under this principle, in 2014 President Obama passed an executive order that prohibits federal contractors from practicing anti-LGBT employment discrimination.⁸⁸ Obama announced that “America’s Federal contracts should not subsidize discrimination against the

⁷⁹ See, e.g., Dorf Brief, *supra* note 77, at 6–8, 10.

⁸⁰ See *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 745 (W.D. Tex. 2019); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1043 (D. Ariz. 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1023 (D. Kan. 2018). *But see* *Ark. Times LP v. Waldrip*, 362 F. Supp. 3d 617 (E.D. Ark. 2019).

⁸¹ 468 U.S. 609 (1984).

⁸² *Id.* at 624 (citation omitted).

⁸³ This issue was raised but not reached in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), because the state displayed religious animus. See *id.* at 1727–31.

⁸⁴ 530 U.S. 640 (2000).

⁸⁵ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572–73 (1995); see Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 599 (2001).

⁸⁶ *Dale*, 530 U.S. at 649.

⁸⁷ See Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1924–27 (2006) (providing examples of activities the state has no duty to subsidize).

⁸⁸ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

American people”⁸⁹ — mirroring the justification States now use for anti-BDS laws.

Indeed, strong antidiscrimination interests *should* trump First Amendment rights. Progressive activists and lawyers have worked for decades to ensure that entities cannot opt out of antidiscrimination laws simply by raising an associational or expressive interest in discriminating.⁹⁰ And labeling discriminatory acts a political boycott shouldn’t shield them from antidiscrimination contracting laws. If Obama’s executive order were challenged by contractors claiming a First Amendment interest in banning LGBT employees, the Administration’s antidiscrimination interest should trump. If a white supremacist organization coordinates a boycott of black-owned businesses, the State should be entitled to refuse to contract with the organization. Likewise, if BDS were to invidiously discriminate based on religion or national origin, the State’s interest in combatting such discrimination may outweigh countervailing First Amendment claims. However, as explained below, BDS cannot properly be considered discriminatory. The State therefore has no legitimate antidiscrimination interest in suppressing BDS activity.

IV. DEBUNKING THE DISCRIMINATION CLAIM

Courts soon may have to decide whether BDS is unlawfully discriminatory. This question arises indirectly in First Amendment challenges to anti-BDS laws as a prerequisite to deciding whether states have a compelling antidiscrimination interest in penalizing BDS. The question also arises directly in lawsuits alleging that BDS participants violate existing public accommodation laws.⁹¹ And as anti-BDS legal strategies develop,⁹² a hypothetical state or federal statute could even be passed to prohibit religious or national-origin discrimination in commercial transactions, including consumer purchases, and be used to bring suit against BDS participants. In each scenario, courts should consider whether a valid, nonpretextual discrimination claim has been raised and whether BDS constitutes illegal discrimination. Because there is no specific test for whether a consumer boycott constitutes discrimination, courts can instead look to two types of discrimination widely recognized in existing law: discriminatory intent and disparate impact discrimination. This Part analyzes whether BDS can be considered discriminatory,

⁸⁹ Remarks on Signing an Executive Order on Lesbian, Gay, Bisexual, and Transgender Employment Discrimination, 2014 DAILY COMP. PRES. DOC. 552 (July 21, 2014).

⁹⁰ Cf. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944–45 (D.S.C. 1966).

⁹¹ See, e.g., *Athenaeum v. Nat’l Lawyers Guild, Inc.*, No. 653668/16, 2017 WL 1232523, at *3 (N.Y. Sup. Ct. Mar. 30, 2017) (reviewing whether National Lawyers Guild’s BDS participation was discriminatory).

⁹² See Barak Ravid, *Netanyahu Convenes Ministers to Discuss Growing Israel Economic Boycott Threats*, HAARETZ (Feb. 9, 2014, 7:09 PM), <https://www.haaretz.com/premium-1.5320445> [<https://perma.cc/W6KM-2AS4>] (discussing strategy to bring suit against BDS proponents).

borrowing from intent and impact doctrines developed to address employment, public accommodations, disability, and housing discrimination. Section A argues that the discrimination claim levied against BDS is likely pretextual. Section B explains why BDS cannot be considered discriminatory based on discriminatory intent and disparate impact doctrines.

A. *Pretextual Nature of the Discrimination Claim*

Governments likely adopted the discrimination rationale as pretext to help overcome anticipated constitutional challenges. Consider what these laws would look like if their goal were actually to root out religious and national-origin discrimination by state contractors engaged in boycotts. Anti-BDS laws as written would be both oddly underinclusive and overinclusive. They would be underinclusive because the vast majority apply only to discrimination against Israelis.⁹³ Despite the range of boycotts practiced in the United States,⁹⁴ no other nationality is protected by most anti-BDS laws. This sets anti-BDS laws apart from standard public accommodations laws, which “protect broad categories of people against discrimination,” regardless of the viewpoint expressed.⁹⁵ As noted by the court reviewing Texas’s anti-BDS law, “[s]uch ‘[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.’”⁹⁶

At the same time, many of the laws would be overinclusive by prohibiting not just boycotts of Israel that are deemed discriminatory but all boycotts of Israeli goods, even absent a finding of discrimination. Kansas’s anti-BDS bill describes two categories of prohibited boycotts: (1) those undertaken “in . . . adherence to calls for a boycott of Israel” and (2) those that “discriminate[] on the basis of nationality, national origin or religion, and . . . [are] not based on a valid business reason.”⁹⁷ If the second definition does any work, it must indicate that the Kansas

⁹³ See Knight Brief, *supra* note 75, at 2; *Anti-boycott Legislation Around the Country*, *supra* note 3 (compiling anti-BDS laws, of which only seven of the twenty-seven appear to apply beyond boycotts targeting Israel).

⁹⁴ E.g., Alistair, *Blog: Should We Boycott Chinese Goods?*, FREE TIBET (Dec. 4, 2015), <https://www.freetibet.org/news-media/na/blog-should-we-boycott-chinese-goods> [<https://perma.cc/N9EA-8LLF>] (pro-Tibet boycott of Chinese goods); *Sever Ties with the Saudi Regime*, CODEPINK, <https://www.codepink.org/boycottsaudi> [<https://perma.cc/VG6E-V4WF>] (boycott of Saudi Arabia).

⁹⁵ Amanda Shanor, *Laws Aimed at Silencing Political Boycotts of Israel Are Categorically Different Than Public Accommodations Laws*, TAKE CARE (Feb. 21, 2019), <https://takecareblog.com/blog/laws-aimed-at-silencing-political-boycotts-of-israel-are-categorically-different-than-public-accommodations-laws> [<https://perma.cc/M6L3-8JR6>].

⁹⁶ *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 749 (W.D. Tex. 2019) (alteration in original) (quoting *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018)).

⁹⁷ 2017 Kan. Sess. Laws 1126; see also GA. CODE ANN. § 50-5-85 (West 2017).

legislature does not consider *all* boycotts of Israeli goods to be discriminatory⁹⁸ — undermining the claim that BDS is inherently discriminatory. Meanwhile, some bills provide exemptions from the certification requirement for contractors who bid 20% less than the lowest business that is certified.⁹⁹ If anti-BDS laws were meant to combat invidious discrimination, it would be inconsistent for states to freely permit such discrimination as long as the contractor offered a low enough bid. Finally, the legislative history of several bills reveals a desire to undermine BDS's growth,¹⁰⁰ further suggesting that the goal of chilling a disfavored political movement, rather than genuine concern over discrimination by state contractors, motivated the passage of anti-BDS bills.

B. Doctrinal Weakness of the Discrimination Claim

Even if we assume that combatting discrimination were the true motive behind anti-BDS bills, the argument would be legally baseless. This section explains that BDS does not manifest discriminatory intent or produce a disparate impact. Constitutional claims of discrimination under the Fourteenth Amendment require showing that a government actor has discriminatory intent.¹⁰¹ Conversely, many federal and local statutes address private discrimination and recognize disparate impact claims.¹⁰²

i. No Discriminatory Intent. — The doctrine of discriminatory intent, or “disparate treatment,” entails decisionmaking that was “*actually motivated* by [one’s] . . . membership in a . . . protected class.”¹⁰³ Intent can be shown through direct or circumstantial evidence.¹⁰⁴

(a) Direct Evidence. — First, there is no direct evidence that BDS exhibits discriminatory intent toward Jewish or Israeli individuals. Direct evidence is evidence that facially links behavior to a discriminatory motive, such as “conduct or statements . . . [that] directly reflect[]

⁹⁸ Knight Brief, *supra* note 75, at 14–16.

⁹⁹ See, e.g., ARK. CODE ANN. § 25-1-503 (West 2017).

¹⁰⁰ See, e.g., Press Release, U.S. Senate Comm. on Foreign Relations, Cardin, Portman, Roskam, & Vargas Lead Bipartisan, Bicameral Bill to Reject Attempts to Economically Isolate Israel (Mar. 23, 2017) (on file with the Harvard Law School Library) (sponsor statement that IABA “sends a clear message that politically-motivated boycotts of Israel are unacceptable to the United States”); *Hearing on HB2617 Before the H. Comm. on Federalism and States’ Rights*, 52d Leg., 2d Sess. (Ariz. 2016), http://azleg.granicus.com/MediaPlayer.php?view_id=26&clip_id=16722 [<https://perma.cc/569C-C4W3>] (“[T]he whole reason for [HB2617]” is to address the “movement underway.”).

¹⁰¹ See *Washington v. Davis*, 426 U.S. 229, 240–41 (1976).

¹⁰² See, e.g., Equal Employment Opportunities Act, 20 U.S.C. § 2000e-2(k) (2012); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2012) (established in *Smith v. City of Jackson*, 544 U.S. 228 (2005)); New York City Human Rights Law, N.Y.C., N.Y., 8 ADMIN. CODE §§ 8-101–8-703 (2019).

¹⁰³ Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 402 (1996) (emphasis added).

¹⁰⁴ See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 717 (1983).

the alleged discriminatory attitude.”¹⁰⁵ Neither BDS’s conduct nor statements are facially discriminatory. The BNC’s official stance is that it “does not tolerate any act or discourse which adopts or promotes . . . anti-Semitism,” and it affirms Universal Declaration of Human Rights principles rejecting religious and national-origin discrimination.¹⁰⁶ The BNC encourages supporters to select targets based on their complicity in Israel’s human rights violations, potential for cross-movement solidarity, media appeal, and likelihood of success.¹⁰⁷ The movement does not select targets based on their national origin or religious identity.¹⁰⁸

Opponents counter that BDS leaders’ statements advocating the end of Israel’s existence as a Jewish state are direct evidence of anti-Semitism.¹⁰⁹ However, that argument assumes its own conclusion. Such statements are anti-Zionist, and equating anti-Zionism (a political ideology that opposes Jewish ethno-nationalism) with anti-Semitism (anti-Jewish animus) requires a logical leap that defeats finding direct evidence of religious discrimination. Similarly, opposing Israel’s existence as a Jewish state is logically distinct from animus toward individual Israelis on the basis of national origin, such that equating the two requires inferences, which are incompatible with what courts require for direct evidence.¹¹⁰ Because direct evidence requires facial proof without circumstantial inferences, such evidence of discrimination rarely exists¹¹¹ and is absent in this context.

(b) *Circumstantial Evidence.* — Second, there is no circumstantial evidence of discriminatory intent. BDS’s opponents often infer discriminatory intent from the premise that the movement ignores human rights abuses in other countries and singles out Israel, the world’s only Jewish state, for disproportionate critique.¹¹² This argument essentially says

¹⁰⁵ *Kriss v. Sprint Commc’ns Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995) (quoting *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992)).

¹⁰⁶ Palestinian BDS National Committee, “*Racism and Racial Discrimination are the Antithesis of Freedom, Justice & Equality*,” BDS (Mar. 7, 2017), <https://bdsmovement.net/news/%E2%80%9Cracism-and-racial-discrimination-are-antithesis-freedom-justice-equality%E2%80%9D> [<https://perma.cc/NC2C-UYZ9>].

¹⁰⁷ Palestinian BDS National Committee, *Join the BDS Movement and Make an Impact!*, BDS (Aug. 31, 2014), <https://bdsmovement.net/make-an-impact> [<https://perma.cc/3WH2-55RC>]; Email from Omar Barghouti, *supra* note 21.

¹⁰⁸ See Brief of *Amici Curiae*, American Friends Service Committee et al., In Support of Plaintiffs-Appellants and Affirmance at 16, *Jordahl v. Arizona*, No. 18–16896 (9th Cir. Jan. 22, 2019) [hereinafter AFSC Brief].

¹⁰⁹ See, e.g., Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 47–48 (2018).

¹¹⁰ See *Brown v. E. Miss. Elec. Power Ass’n*, 989 F.2d 858, 861 (5th Cir. 1993) (“Direct evidence is evidence which, if believed, proves the fact without inference or presumption.”).

¹¹¹ See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 526, 534–35 (1993) (Souter, J., dissenting).

¹¹² See, e.g., Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 234 (2018).

that anti-Jewish or anti-Israeli animus is a motivating factor, or even the but-for cause, behind BDS's focus on Israel. The *McDonnell Douglas Corp. v. Green*¹¹³ framework applies to discriminatory intent claims resting on circumstantial evidence and "but-for" causation.¹¹⁴ A plaintiff must first make a prima facie showing of discrimination due to her membership in a protected class; the burden of production then shifts to the defendant to offer a "legitimate, nondiscriminatory reason" for the conduct, which the plaintiff can rebut by showing that the proffered reason is pretextual.¹¹⁵ This framework was developed for employment discrimination cases and would not be directly applied to BDS, but it offers a useful guide for assessing the claim that BDS would not target Israeli companies *but for* their Jewish or Israeli identity.¹¹⁶

(i) *Prima Facie Showing*. — First, it must be shown that BDS participants discriminate *due to* national origin or religion. This nexus cannot be established. Under *Hazen Paper Co. v. Biggins*,¹¹⁷ discrimination against an identity cannot be inferred from actions penalizing an independent, analytically distinct category — even if that category is related to the identity.¹¹⁸ Here, disfavoring a nation-state for its governmental policies is analytically distinct from national-origin discrimination, defined as disfavoring an individual due to "the country where a person was born, or . . . from which his or her ancestors came."¹¹⁹ BDS can consider the former while ignoring the latter, which undermines a finding of discrimination based on national origin.¹²⁰ The Supreme Court has declined to expand national-origin discrimination to include citizenship discrimination,¹²¹ and targeting nation-states for their *policies* is even further removed from the concept of national-origin discrimination than citizenship. If political boycotts of countries were

¹¹³ 411 U.S. 792 (1973).

¹¹⁴ See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1237 (11th Cir. 2016) (explaining that most courts apply *McDonnell's* framework only to "but-for" claims). Some antidiscrimination laws require showing the discriminatory motive was the "but-for" motive behind the conduct, while others recognize mixed-motive claims where animus was a motivating factor alongside others. Compare *id.* at 1235 (allowing mixed-motive claim), with *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (disallowing mixed-motive claims under the Age Discrimination in Employment Act (ADEA)).

¹¹⁵ *McDonnell*, 411 U.S. at 802–04.

¹¹⁶ Alternatively, if a mixed-motive test were applied to BDS, challengers would have to prove that anti-Jewish or anti-Israeli animus is a "motivating factor" behind BDS's decisions, even if human rights motives also exist. See *Quigg*, 814 F.3d at 1235. While an in-depth analysis of a mixed-motives claim is beyond the scope of this Note, for the reasons discussed in section B, establishing a discriminatory motive would be difficult absent proof of animus.

¹¹⁷ 507 U.S. 604 (1993).

¹¹⁸ *Id.* at 611–12 (rejecting the claim that the employer penalizing years of service constituted age discrimination under ADEA because years of service was an independent category).

¹¹⁹ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

¹²⁰ See *Biggins*, 507 U.S. at 611.

¹²¹ *Espinoza*, 414 U.S. at 88–91.

cognizable as “national-origin discrimination,” all sorts of current and historical boycotts would be swept into the net of illegal discrimination.¹²² Furthermore, Israel’s religious character does not necessarily render such a boycott discriminatory. Analogously, Iran, like Israel, self-defines based on religion, yet current U.S. refusals to buy from Iran do not give rise to anti-Shia religious discrimination claims, because Iran’s national policies, rather than its identity, are the target.¹²³

BDS’s opponents might counter that Israeli and Jewish identities are “closely correlated” with the conduct of supporting Israel in ways that put an entity on the boycott list — and therefore to disfavor the latter is to disfavor the former. This argument mirrors one that arose in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹²⁴ where a baker refused to make a cake for a gay couple’s wedding ceremony¹²⁵ — which some have likened to BDS’s refusal to engage economically with Israel.¹²⁶ The baker argued that he was discriminating against the couple not based on their status as gay, but rather based on their conduct of entering into a same-sex marriage.¹²⁷ The Colorado court rejected such a distinction when conduct is “closely correlated” with status and concluded that same-sex marriage is closely correlated with being gay because “it is ‘engaged in exclusively or predominantly’ by gays, lesbians, and bisexuals.”¹²⁸ The Supreme Court has explained that, when *conduct* is disfavored, discrimination against a *status* can be inferred if the disfavored conduct is not only “engaged in exclusively or predominantly by a particular class of people,” but is also an “irrational object of disfavor.”¹²⁹ For example, “[a] tax on wearing yarmulkes is a tax on Jews,” because it is irrational to disfavor yarmulkes and they are worn predominately by Jews.¹³⁰ Conversely, disfavoring the conduct of abortion does not mean disfavoring the status of being a woman; even

¹²² Revolutionary War-era boycotts of Britain, antiapartheid boycotts of South Africa, and current boycotts of China would all constitute national-origin discrimination. *Cf.* Plaintiffs’ Combined Response to the State’s Motion to Dismiss and Reply in Support of Plaintiffs’ Motion for Preliminary Injunction, with Accompanying Declaration at 23, *Jordahl v. Arizona*, 336 F. Supp. 3d 1016 (D. Ariz. 2018) (No. 17-cv-08263).

¹²³ *See, e.g.*, Lawton, *supra* note 76, at 679–80.

¹²⁴ 138 S. Ct. 1719 (2018).

¹²⁵ *Id.* at 1723.

¹²⁶ *See, e.g.*, Andrew Koppelman, *BDS and Masterpiece Cakeshop*, BALKINIZATION (Feb. 12, 2019, 7:29 AM), <https://balkin.blogspot.com/2019/02/bds-and-masterpiece-cakeshop.html> [<https://perma.cc/G2N8-PDUG>].

¹²⁷ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 280 (Colo. App. 2015), *rev’d sub nom. Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719.

¹²⁸ *Id.* at 281.

¹²⁹ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

¹³⁰ *Id.*

though abortions are engaged in predominately¹³¹ by women, in the Court's view there are "respectable reasons for opposing [abortion]."¹³²

By the Supreme Court's logic, the analogy of BDS to *Masterpiece Cakeshop* falls flat. Disfavoring conduct that is complicit in Israel's treatment of Palestinians does not imply an intent to disfavor the status of being Jewish or Israeli. If there are respectable political reasons for disfavoring abortion, there are certainly respectable reasons for disfavoring complicity in Israel's human rights record. Moreover, the status of being Jewish is not "inextricably tied" to such conduct of complicity — and to suggest otherwise would in fact ring anti-Semitic.¹³³ Zionism does not reflect the views of all Jewish people,¹³⁴ and the types of conduct that lead to becoming a BDS target are not done "exclusively or predominately" by Jewish individuals. Similarly, one's status as Israeli is not closely correlated with the conduct of operating a business that is implicated in Israel's rights violations. The majority of targeted businesses are in fact not Israeli but are instead foreign companies that operate inside Israel and Palestine.¹³⁵ Unlike *Masterpiece Cakeshop*, where the couple's status as gay was necessary for being subjected to the baker's discrimination, for BDS, it is neither necessary nor sufficient that an entity be Jewish or Israeli. To become a target, the entity must be actively complicit in Israel's violations of Palestinian rights¹³⁶ — conduct that is not closely correlated with a specific identity.

(ii) *Legitimate, Nondiscriminatory Justification.* — Even if a prima facie case of discrimination could be made, BDS can present a "legitimate, nondiscriminatory reason" for its actions through evidence that Israel's human rights record, rather than religious or national identity, motivates boycott decisions. Some BDS opponents might argue that BDS's political goals may constitute a legitimate justification but not a nondiscriminatory one, just as a boycott of Catholics to protest the Catholic Church's policies could be motivated by a legitimate political reason yet still be discriminatory.¹³⁷ However, this analogy fundamentally misunderstands BDS. Like boycotting Catholics, boycotting all Jewish people to challenge the Israeli government's policies would

¹³¹ The Supreme Court stated that abortion is practiced "only" by women, *id.* at 271, but this fails to account for transgender men.

¹³² *Id.* at 270.

¹³³ See Butler, *supra* note 46, at 21 ("To say that all Jews hold a given view on Israel[,] or . . . the acts of Israel . . . stand for the acts of all Jews, is to . . . commit an anti-semitic reduction of Jewishness.").

¹³⁴ See, e.g., *First-Ever: 40+ Jewish Groups Worldwide Oppose Equating Antisemitism with Criticism of Israel*, JEWISH VOICE FOR PEACE (July 17, 2018), <https://jewishvoiceforpeace.org/first-ever-40-jewish-groups-worldwide-oppose-equating-antisemitism-with-criticism-of-israel> [<https://perma.cc/XSU8-MAMX>].

¹³⁵ See Email from Omar Barghouti, *supra* note 21; *cf.* AFSC Brief, *supra* note 108, at 16.

¹³⁶ See CCR and PalLegal Brief, *supra* note 1, at 3.

¹³⁷ *Cf.* Dorf Brief, *supra* note 77, at 2 (offering such an analogy in the context of a brief on the constitutionality of anti-BDS laws).

indeed be discriminatory. But BDS does not boycott Jewish individuals. Nor does it categorically target goods made in Israel, individual Israelis, or Israeli-owned businesses operating exclusively outside of Israel and Palestine that are not involved in rights violations.¹³⁸ Instead, the movement relies on thorough documentation¹³⁹ to carefully select targets based on complicity in Israel's alleged violations of international law. Unlike the hypothetical anti-Catholic boycott, BDS targets individual complicity rather than group identity.

(iii) *Pretext*. — Opponents could attempt to demonstrate that BDS's human rights justification is pretextual by showing that it is implausible, inconsistent, incoherent, or contradictory.¹⁴⁰ Persuading a factfinder of this point would be difficult given thoroughly documented rights abuses in Israel-Palestine¹⁴¹ and the longstanding role of boycotts as a tool for addressing such abuses. Some maintain that the human rights justification is pretextual because BDS ignores severe rights abuses outside Israel.¹⁴² However, the argument that BDS has “singled out” Israel by not targeting similarly situated countries would seem to require that a human rights movement focus on all injustices in a region or facing a community to overcome a claim that it discriminatorily selected a particular injustice as its focus. Such logic might have required the antiapartheid movement to address not just injustice by white South Africans, but also abuses by the black African National Congress leadership or by other African countries. This requirement is neither politically reasonable nor supported by existing law.

A more persuasive argument of pretext might say: even though BDS does not target all Israelis and targets many non-Israeli entities, it is still discriminatory if animus is the impetus behind focusing on Israel. Discriminatory intent against a group can exist even when some members of the group are exempted from disfavor and some non-group members are included in the disfavor. For example, many consider President Trump's Muslim Ban discriminatory even though not all Muslim-majority nations are targeted and some non-Muslim countries are banned.¹⁴³ For that reason, discerning discriminatory intent requires context. To many, including Justices Ginsburg and Sotomayor,¹⁴⁴

¹³⁸ See AFSC Brief, *supra* note 108, at 16; Palestinian Campaign for the Acad. & Cultural Boycott of Isr., *PACBI Guidelines for the International Cultural Boycott of Israel*, BDS (July 16, 2014), <https://bdsmovement.net/pacbi/cultural-boycott-guidelines> [<https://perma.cc/J7K5-2HPG>].

¹³⁹ BDS reviews research by the Israeli organization Who Profits from the Occupation. *Who Profits Research Center*, WHOPROFITS, <https://whoprofits.org/about-who-profits> [<https://perma.cc/4449-MHXF>].

¹⁴⁰ See, e.g., *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994).

¹⁴¹ See, e.g., Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, U.N. Doc. A/HRC/25/67 (Jan. 13, 2014).

¹⁴² See, e.g., French, *supra* note 2.

¹⁴³ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (noting that “the policy covers just 8% of the world's Muslim population” and that North Korea and Venezuela were included in the ban).

¹⁴⁴ *Id.* at 2435–36 (Sotomayor, J., dissenting).

Trump's anti-Muslim campaign statements were crucial evidence that his national security justification was pretextual. For BDS, there is no comparable evidence of pretext. While the movement displays blatant anti-Zionism, there is no evidence that the official movement displays animus toward Jewish or Israeli individuals. BDS is a diffuse movement rather than a centralized organization and, like in any movement, some individual supporters may be motivated by animus and fail to abide by BDS's principles. But the principles, statements, and strategy of the official movement, as coordinated by the BNC, all point toward finding that the human rights motive is a genuine nondiscriminatory justification for its actions, defeating a discriminatory intent claim.

2. *No Disparate Impact.* — Second, BDS is not discriminatory under a disparate impact theory. The claim that BDS commits disparate impact discrimination says: in targeting entities complicit in Israeli rights violations, BDS may not *intend* to specifically hurt Israeli or Jewish entities, but in effect it disproportionately inflicts economic harm on them.¹⁴⁵ Disparate impact law prohibits conduct that is “fair in form, but discriminatory in operation.”¹⁴⁶ This doctrine was developed with employment discrimination in mind¹⁴⁷ and often does not apply to public accommodations statutes,¹⁴⁸ which anti-BDS laws are sometimes framed as.¹⁴⁹ And for BDS participants that are not public establishments but are individual consumer purchasers, a disparate impact theory may be even less applicable. Still, even if a disparate impact theory were applied to BDS, the discrimination claim would likely fail. Under the traditional test: A plaintiff must establish that the challenged practice *caused* a significant disparate effect on a particular group; statistical disparities alone cannot create liability.¹⁵⁰ The burden of proof then shifts to the defendant to show that its practice is based on a legitimate consideration, “consistent with business necessity.”¹⁵¹ The plaintiff can

¹⁴⁵ See, e.g., Michael Safyan, *On BDS, Anti-BDS Laws, and Anti-Semitism*, MEDIUM (Jan. 31, 2019), <https://medium.com/@michaelsafyan/on-bds-anti-bds-laws-and-anti-semitism-a67539e1c5bo> [<https://perma.cc/T7RB-EDYQ>] (“BDS has created a disparate impact . . . on Israeli citizens . . . [and] on non-Israeli Jewish Americans who are more likely to have Israeli relatives, . . . to travel to Israel, and for whom Israel holds a unique . . . significance.”).

¹⁴⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁴⁷ *Id.* at 424.

¹⁴⁸ See *Hardie v. Nat'l Collegiate Athletic Ass'n*, 876 F.3d 312, 319 (9th Cir. 2017) (citing cases).

¹⁴⁹ For example, the Unruh Civil Rights Act, CAL. CIV. CODE §§ 51–52 (West 1872), a public accommodations law, justified California's anti-BDS law, but the statute doesn't recognize disparate impact claims, see *Harris v. Cap. Growth Inv'rs XIV*, 805 P.2d 873, 893 (Cal. 1991), except with disability discrimination, see *Munson v. Del Taco, Inc.*, 208 P.3d 623, 634 (Cal. 2009).

¹⁵⁰ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

¹⁵¹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074–75 (codified as amended in scattered sections of the U.S. Code); see also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577–78 (1978).

win by showing that a less exclusionary, “equally effective” alternative serves the same goal.¹⁵² Like the discriminatory intent test above, this framework was developed for employment discrimination cases and would not directly apply to BDS, but it offers a rough outline for analyzing whether BDS is discriminatory under a disparate impact theory.

First, it is unclear whether a prima facie case of disparate impact discrimination could be established. Because the majority of BDS targets are non-Israeli companies headquartered in Europe and the United States,¹⁵³ statistical analysis actually may not indicate a significant adverse impact on Israeli or Jewish businesses — though a second-order impact on communities indirectly affected by boycotts may exist. Second, if a causal disproportionate effect can be shown, a BDS participant could then present a defense akin to a “business necessity.” Courts have struggled to determine how “necessary” a practice must be to constitute a business necessity but generally do not require that the practice be indispensable.¹⁵⁴ Instead courts require it to be significantly related to the defendant’s goal, rather than an “artificial, arbitrary, or unnecessary barrier.”¹⁵⁵ The challenged practice of boycotting Israeli goods could be likened to a “business necessity” because it significantly serves the legitimate goal of shifting Israel’s human rights practices. Some argue that BDS’s strategy is disconnected from its goal because boycotted companies are private, often foreign, entities that lack the influence to pressure the Israeli government to change its policies.¹⁵⁶ While reasonable people can disagree about the efficacy of boycotts, they along with divestment and sanctions have helped shift government policies historically¹⁵⁷ and have long been recognized by U.S. courts as legitimate political strategies.¹⁵⁸ Though boycotting is not “indispensable” for individuals to assert political pressure, it does significantly serve to advance such pressure, and likely qualifies as a “business necessity.”

Third, once a business necessity defense is raised, BDS opponents must show equally effective ways to advance BDS’s goal without a disparate effect. While some strategies to advance Palestinian rights

¹⁵² *Hardie*, 876 F.3d at 319.

¹⁵³ See Email from Omar Barghouti, *supra* note 21; cf. AFSC Brief, *supra* note 108, at 16.

¹⁵⁴ See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 517–18, 522 (2003) (discussing doctrinal confusion following Congress’s 1991 amendment to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); see also *Miller-Spencer v. Dillon Cos., Inc.*, No. 09-2470-CM, 2010 WL 4792393, at *8 (D. Kan. Nov. 18, 2010).

¹⁵⁵ *Connecticut v. Teal*, 457 U.S. 440, 451 (1982); see also *Easterling v. Connecticut*, 783 F. Supp. 2d 323, 341 (D. Conn. 2011).

¹⁵⁶ See Greendorfer, *supra* note 109, at 58–59.

¹⁵⁷ Kathleen C. Schwartzman, *Can International Boycotts Transform Political Systems? The Cases of Cuba and South Africa*, 43 LATIN AM. POL. & SOC. 115, 117–20 (2001).

¹⁵⁸ See, e.g., *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1416 (9th Cir. 1996) (“Boycotts . . . have a time-honored place in American history . . .”).

may produce no disparate harm for Israeli or Jewish businesses, courts do not require that defendants in disparate impact cases “adopt alternatives that are less effective” or more burdensome.¹⁵⁹ Given the failure of other measures that have attempted to achieve basic rights for Palestinians,¹⁶⁰ BDS can convincingly argue that alternatives to boycotts, divestment, and sanctions are ineffective or overly burdensome. However, as noted above, this test was developed to assess employment practices rather than political movements, and there is danger in courts weighing the efficacy of protest tactics — highlighting the limits of this framework for assessing whether BDS is unlawfully discriminatory. Still, even under this traditional test, challengers cannot successfully argue that BDS commits disparate impact discrimination.

To underscore the weakness of this claim, consider *Claiborne*, which vindicated black Mississippi residents’ boycott of white-owned businesses during the Civil Rights Movement.¹⁶¹ The *Claiborne* boycott no doubt disproportionately affected the local white community, given that whites were more likely to own and be employed by the businesses. However, it was the exclusionary policies of the businesses themselves that made their staffs white-only,¹⁶² resulting in a disproportionate effect on whites. Equally, Israel’s policies of carefully maintaining a Jewish-majority state and Jewish-only settlements in the West Bank would be responsible for any disproportionate effect that boycotts have on Jewish communities, and are precisely the policies that BDS seeks to change. For *Claiborne*’s boycotters and BDS alike, there is irony in the claim that a boycott challenging a group’s exclusionary policies discriminates against that group because only they are affected by the boycott.

Finally, disparate impact claims have become increasingly difficult to raise successfully. Conservative Justices on the Supreme Court have narrowed the disparate impact theory,¹⁶³ and historically, “the Court has only seen discrimination . . . in the most overt or obvious situations . . . that could not be explained on any basis other than race”¹⁶⁴ — which is not the case in the BDS context. The difficulty of raising a successful disparate impact claim reflects the concerning shortcomings of antidiscrimination law, but also means allegations that BDS is discriminatory should almost certainly fail under existing U.S. law.

¹⁵⁹ Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657 & n.16 (2015) (“[C]ost or other burdens . . . are relevant . . . [to] whether [alternatives] would be equally as effective . . .” *Id.* at 657 n.16 (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 998 (1988) (plurality opinion))); *see also* *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 590 (1979).

¹⁶⁰ *See supra* section I.A, pp. 1361–62.

¹⁶¹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982).

¹⁶² *See* Brief for Petitioners at 2–3, *Claiborne*, 458 U.S. 886 (No. 81-202).

¹⁶³ Siegel, *supra* note 159, at 667 (noting “a stream of conservative challenges to disparate impact” law).

¹⁶⁴ Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997); *see, e.g., Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009).

CONCLUSION

At bottom, anti-BDS laws cannot properly be viewed as combatting discrimination. The claim that BDS constitutes religious and national-origin discrimination fits neither the framework of discriminatory intent nor disparate impact law. Some may counter that, while BDS may not be discriminatory as a doctrinal matter, BDS is *conceptually* discriminatory based on the legal philosophies underlying antidiscrimination law. However, common theories for when discrimination is wrongful — when it expresses prejudice, demeans individuals, structurally subordinates, classifies by identity, or penalizes identity-based expression — are inapposite in the context of BDS.¹⁶⁵ Thus, BDS cannot be considered discriminatory even on a philosophical basis.

The weakness of the discrimination claim is constitutionally significant for anti-BDS litigation. It reveals that, despite states' assertions to the contrary, the government does not have a compelling antidiscrimination interest that could trump countervailing First Amendment interests. Moreover, the weakness of the discrimination claim matters beyond anti-BDS laws. The past decade has seen antidiscrimination law weaponized to undercut a human rights movement that has opponents at the highest levels of the U.S. government — a trend that threatens other controversial political movements that the government may seek to undermine. Chilling disfavored political movements is precisely what the First Amendment is meant to protect against. While First Amendment protections can and should bow to strong antidiscrimination interests, governments must not adopt baseless discrimination claims in an attempt to override First Amendment protections.

A prior version of this Note incorrectly suggested that the authors of the Dorf Brief — Professors Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh — are supporters of anti-BDS laws in the text accompanying note 77 and opponents of BDS in note 137. Dorf, Koppelman, and Volokh do not advocate for or against the laws in their brief, but only evaluate the laws' constitutionality. The *Review* regrets the error.

¹⁶⁵ BDS's political boycott of Israeli goods does not: (1) manifest prejudice toward individual Israeli or Jewish people, see Richard J. Arneson, *What Is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 787 (2006) (animus theory); (2) demean Israeli or Jewish individuals as "less worthy of equal . . . respect," see Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3047 (2014) (demeaning theory); (3) classify targets by identity rather than treating them as individuals, see Sophia Moreau, *What is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147 (2010) (anticlassification theory); (4) contribute to the systematic exclusion of Jewish or Israeli communities from basic opportunities in the United States, see Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839–40 (2003) (structural subordination theory); or (5) unjustly penalize outward expressions of identity, see KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (accommodation theory). While some may sincerely believe that advancing Israel's policies is a core expression of Jewish religious beliefs, the accommodation theory does not protect expressions of identity when compelling countervailing interests are at stake, *id.* at 179–80 — such as preventing the material harm of Palestinians.