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THE INAPPLICABILITY OF FIRST AMENDMENT PROTECTIONS TO BDS MOVEMENT BOYCOTTS

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INTRODUCTION AND SUMMARY

This paper has been derived from, and is an expansion of, certain arguments the author made in an earlier legal study of the BDS Movement under United States law entitled, "The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal,"[1] and is meant to rebut recent misleading assertions that the First Amendment protects participation by United States persons in foreign boycotts of Israel.[2]

The BDS Movement[3] is a Palestinian Arab organization with

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[1] Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, (January 7, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531130 [hereinafter *BDS Legal Study*]. The BDS Legal Study has also been published as a book, with a publication date of January 12, 2015 and the ISBN numbers of ISBN-10:1512115185 and ISBN-13:978-1512115185. The BDS Legal Study was cited by the Supreme Court of Israel in its 2015 decision upholding Israel's domestic anti-boycott law, the "Law for the Prevention of Damage to the State of Israel through Boycotts." HCJ 5239/11 Avnery v. Knesset of Israel (2015) (Isr.), http://elyon1.court.gov.il/files/11/390/052/k21/11052390.k21.htm.

[2] *See infra* note 4. Additionally, the legal analyst for the California Assembly recently made a misinterpretation about the application of the First Amendment to foreign boycotts in a legal analysis provided to the Assembly Judiciary Committee. STATE OF CAL. ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS, PUBLIC CONTRACTS: CALIFORNIA COMBATING THE BOYCOTT, DIVESTMENT, AND SANCTIONS OF ISRAEL ACT OF 2016, AB 2844, Reg. Sess., at 6 (2016), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_2801-2850/ab_2844_cfa_20160417_192827_asm_comm.html. This legal analysis erroneously asserted that under First Amendment caselaw, the Supreme Court "has held that a boycott is a form of protected speech." *Id.* at 11. This is a misstatement of the law and a significant and unsupportable expansion of the reach of the First Amendment. There are numerous exceptions to the assertion that boycotts are always protected speech. *See, e.g.*, Int'l Longeshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) (upholding the anti-boycott provisions of the National Labor Relations Labor Act under the First Amendment).

[3] "BDS" is an acronym standing for "boycott, divestment and sanctions" that is used by a number of affiliated groups seeking to foster, *inter alia*, boycotts of Israel. *See Palestinian BDS National Committee*, BDS MOVEMENT, http://www.bdsmovement.net/bnc (last visited July 17, 2016). Though the history of the BDS Movement is not clearly defined, according to the BDS National Committee, the self-acknowledged organizing and coordinating entity of the BDS Movement globally, BDS:

> [W]as launched in July 2005 with the initial endorsement of over 170 Palestinian organizations. . . . [E]fforts to coordinate the BDS campaign, that began to grow rapidly since the 2005 Call was made public, culminated in the first Palestinian BDS Conference held in Ramallah in November 2007. Out of this conference emerged the BDS National Committee (BNC) as the Palestinian coordinating body for the BDS campaign worldwide.

Id. The website claims to be the official outlet for the BDS National Committee, which in turn claims to be the Palestinian Arab authority in charge of the BDS Movement. The designated terrorist organization Hamas and the government of Iran, among others, are believed to be associated with the formation and continuing operation of the BDS Movement. *See generally*, *BDS Legal Study*, *supra* note 1, at 13–17, 108–119 (referring to sections titled "The Durban Conference and the Rise of the NGO arm of the Arab League" and "Material Support to

supporters and affiliates throughout the world. This movement, publicly operating under the false banner of promoting civil rights, seeks to destroy the State of Israel through coordinated international commercial and institutional attacks consisting, in part of, a boycott and divestment campaign against Israel. As the BDS Legal Study demonstrated, BDS Movement activity in the United States violates a number of federal and state laws and support for the BDS Movement subjects participants to significant risks, including monetary penalties and criminal liability under federal anti-boycott, anti-trust and anti-racketeering laws.[4]

As part of its public relations campaign to lure unwitting American citizens and entities into support for unlawful BDS activity, the BDS Movement, through affiliated groups, has published a number of quasi-legal memoranda that wrongfully deem BDS support as being protected by the First Amendment.[5]

While it is true that commercial boycotts have a storied history in the United States, as with any other right, the right to boycott is not without its limitations. When the desire of individuals to effect change through boycotts intersects with the legitimate goals of government, the right to boycott is often inhibited, if not suppressed in its entirety. This is particularly true for boycotts that conflict with established

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Terrorists as a BDS Movement RICO Predicate Offense").

[4] *See BDS Legal Study*, *supra* note 1, at 46–119 (referring to sections titled "The BDS Movement under the EAA Anti-Boycott Law" and "Beyond the EAA Anti-Boycott Law: The BDS Movement, Anti-Trust laws and RICO").

[5] For example, a BDS Movement front group, formerly known as "Palestine Solidarity Legal Support" and (for now) operating as "Palestine Legal," has published a legal guide titled "Boycott and Divestment, Frequently Asked Questions." *Boycott and Divestment, Frequently Asked Questions*, PALESTINE SOLIDARITY LEGAL SUPPORT (March 2015), http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/55a006a3e4b01f5eb3cfd32e/1436550819443/Legal+FAQ+BDS+March+2015.pdf [hereinafter *BDS Pamphlet*]. This BDS front group either intentionally misstates Supreme Court case law or engages in apparent legal malpractice in misreading First Amendment jurisprudence, stating:

> Boycotts have long played a significant role in U.S. history, and the Supreme Court has held that political and human rights boycotts are protected under the First Amendment. In the landmark civil rights case *NAACP v. Claiborne Hardware Co.*, a local branch of the NAACP boycotted white merchants in Claiborne County, Mississippi to pressure elected officials to adopt racial justice measures. The merchants fought back, suing NAACP for interference with business. Ultimately, the Supreme Court found that 'the boycott clearly involved constitutionally protected activity' through which the NAACP 'sought to bring about political, social, and economic change.' Justice Stevens concluded that the civil rights boycott constituted a political form of expression under the speech, assembly, association and petition clauses of the First Amendment.

Id. One clue to the shoddy legal reasoning in the BDS Pamphlet is the disclaimer on the first page of the document, which states that the legal analysis that follows is not legal advice and the reader should consult with an attorney before acting on the (misleading) statements made in the BDS Pamphlet. This is the only good advice in the BDS Pamphlet, as anyone who follows the rest of the legal analysis in that document will likely violate numerous laws. This paper explains the true holding of *Claiborne* and the impact of subsequent case law, and demonstrates why BDS Movement activity is clearly not protected by the First Amendment.

government policy.

I. *NAACP v. CLAIBORNE*: THE FIRST AMENDMENT PROTECTS ONLY CERTAIN BOYCOTT ACTIVITY

The leading case on this proposition is *NAACP v. Claiborne Hardware Co.*[6] In *Claiborne*, notwithstanding the fact that the Fourteenth Amendment to the United States Constitution explicitly prohibits discrimination against black Americans and the Civil Rights Act of 1964[7] codified further prohibitions on such discrimination, local governments in certain areas of the country, including Mississippi, defied the law and perpetuated anti-black discrimination.[8] In response, and to apply pressure for compliance with applicable domestic anti-discrimination laws, local civil rights activists boycotted businesses in Mississippi that were affiliated with local civic and political leaders who were refusing to abide by federal anti-discrimination laws.[9]

The Supreme Court recognized First Amendment protection for the boycotters because the activity was undertaken on a local level by those directly affected by flagrant violations of enumerated constitutional protections and federal laws, and because the boycott was directed at the local perpetrators of the violations. The Court was clear on why it found the boycott activity to be protected, even though it had a disruptive effect on commerce:

> Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[10]

Claiborne does not stand for a blanket First Amendment protection for any and all boycott activity, especially activity that is in

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6 458 U.S. 886 (1982).

7 Pub. L. No. 88-352, 78 Stat. 241 (Jan. 7, 1964) (codified as amended in sections of 42 U.S.C.)

8 *Claiborne*, 458 U.S. at 889.

9 *Id.* at 889, n.3 ("The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were Aldermen in Port Gibson, Record 15111; Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, *id.*, at 15160; respondents Abraham and Hay had served on the school board, *id.*, at 14906, 14678; respondent Hudson served on the Claiborne County Democratic Committee, *id.*, at 840.").

10 *Id.* at 914.

contravention of United States law and policy and which has only an attenuated nexus to domestic concerns. The mere fact that there may be some distant and speculative offshore effect on a foreign conflict from commercial coercion occasioned by the boycotters who choose to agitate in United States commercial markets does not vest that activity with First Amendment protections. The *Claiborne* ruling was predicated on the boycott being implemented to vindicate rights "that lie at the heart of the Fourteenth Amendment itself . . . to effectuate rights guaranteed by the Constitution itself."[11]

To reiterate this point, which is clear in *Claiborne* but ignored by those who seek to legitimize BDS Movement activity in the United States, the *Claiborne* Court specifically tied First Amendment protections for boycott activity to the effect that the underlying boycott would have on the assertion of Fourteenth Amendment rights of those engaging in the boycott. Whatever one may think of the conflict between the State of Israel and Palestinian Arabs, it is not an issue governed by the Fourteenth Amendment or any other provision of the United States Constitution; the rights of the parties involved are outside the scope and reach of United States' laws. Thus, BDS Movement boycott activity in the United States is not covered by the protections afforded under *Claiborne*.

Speaking on this point, the Court noted that while the boycott in *Claiborne* was protected due to its specific facts:

> Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. The right of business entities to "associate" to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."[12]

In other words, the rights of United States citizens to engage in a boycott of certain local commercial enterprises controlled by civic leaders who are violating enumerated constitutional and statutory rights of the boycotters are certainly protected by the First Amendment, but boycotts that relate to distant disputes unrelated to domestic laws (and,

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[11] *Id.*

[12] *Id.* at 912 (internal citations omitted).

in fact, are in contravention of law and policy), that embroil consumers in foreign disputes that impact the free flow of commerce, are not.[13] BDS Movement boycotts of Israel conducted in the United States are a perfect example of the type of unprotected boycott that the *Claiborne* Court was describing.

It is not surprising that the *Claiborne* Court found the specific boycotts at issue to be protected, but in so doing reiterated that the situation would have been dramatically different if the government had interposed a compelling rationale for limiting the right to boycott, such as protecting the right of "consumers to remain free from coerced participation in industrial strife."[14] Justice Stevens' opinion in *Claiborne* made an important point about what was *not* being decided:

> We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law.[15]

As is shown in the next section of this paper, BDS Movement boycotts are prohibited by a host of valid federal, state, and international laws. Both the United States Congress and the Supreme Court have followed the general principle that when a boycott interferes with commerce or disrupts important policy goals of the government, especially those codified in law, the right to boycott is vulnerable to government infringement, particularly if the boycott is not in furtherance of the protection of a substantive right held by United States citizens.[16]

II. BOYCOTTS DIRECTED AT FOREIGN AFFAIRS ARE SUBJECT TO GOVERNMENT LIMITATIONS

Indeed, in *International Longshoremen's Association, AFL-CIO v.*

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 915 n. 49 (internal citations omitted). As was discussed in the BDS Legal Study, this distinction is critical in understanding why the existence of federal anti-boycott laws undermines any claim that there is a constitutional right to engage in a secondary or tertiary boycott of Israel fostered by foreign countries. *See BDS Legal Study*, *supra* note 1.

[16] It would be circular to argue that a boycott that is premised on the right to voice an opinion under the First Amendment is a boycott in furtherance of a substantive protected right. If that were the case, all boycotts, simply by virtue of being a form of communication, would be protected speech. A long line of cases, including those discussed *infra*, proves this to be false. The First Amendment right must be coupled with another protected right for the boycott to be eligible for First Amendment protections. In *Claiborne*, for example, the substantive right being furthered was the civil rights protections of the Fourteenth Amendment.

Allied International, Inc.,[17] a case that was decided little more than a month after oral arguments in *Claiborne*, the Supreme Court found that boycotts impeding United States commerce that are political protests intended to punish foreign nations for their offshore conduct may be limited by the government.

The *Longshoremen* case is illustrative as it includes two important and distinct legal elements: a federal law that prohibits boycott activity (which also exists in the case of BDS Movement boycotts, in the form of the Export Administration Act) and a determination of the permissibility of such prohibition under the First Amendment.

The *Longshoremen* case was couched in facts strikingly similar to that of the illegal BDS Movement boycotts of Israel.[18] At the time, the Soviet Union had invaded Afghanistan. In response, the United States undertook a series of boycott and embargo actions including prohibitions on the sale of certain goods to the Soviet Union.[19] As part of that embargo, however, the United States explicitly exempted certain goods, including those that were to be loaded and unloaded by the union in *Longshoremen*.[20] Notwithstanding the government's directives on the scope of the embargo, the union unilaterally expanded the embargo and instituted a blanket boycott on the handling of any and all cargo from the Soviet Union.[21] The president of the union, Thomas Gleason, explained that the union felt compelled to act in contravention of the government's foreign relations policy because "[p]eople are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys."[22]

As a result, the union refused to handle the cargo of a company that dealt in wood products from the Soviet Union (which products were explicitly exempted from the government's embargo).[23] The boycotted company registered a complaint with the National Labor Relations Board, alleging that the union was engaging in an unlawful boycott under section 8(b)(4) of the National Labor Relations Act[24] and also filed suit against the union in federal court (the suit was filed under the

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17 456 U.S. 212 (1982).

18 The facts of *Longshoremen* are recited in both the Supreme Court's opinion, as well as the underlying National Labor Relations Board Decision and Order. *See id.*; Int'l Longshoremen's Ass'n, AFL-CIO and Local 799, Int'l Longshoremen's Ass'n, AFL-CIO and Allied Int'l, Inc., 257 N.L.R.B. 1075 (1981) [hereinafter *NLRB Decision*].

19 *See NLRB Decision*, 257 N.L.R.B. at 1077.

20 *Id.*

21 *Longshoremen*, 456 U.S. at 214.

22 *NLRB Decision*, 257 N.L.R.B. at 1075. However true Mr. Gleason's simplistic statements may have been, they belie the fact that the federal government, not labor unions (or, in the case of the BDS Movement, local affiliates of foreign actors), has exclusive control of governmental policy for foreign affairs.

23 *Longshoremen*, 456 U.S. at 215.

24 *Id.* at 214. The National Labor Relations Act provision prohibiting secondary boycotts is codified at 29 U.S.C. § 158(b)(4) (2012).

Labor Management Relations Act, which provided for a private right of action for victims of unlawful boycotts).[25]

When the Supreme Court took up the case, it decided that the applicable provisions of the National Labor Relations Act did not infringe the union's First Amendment rights. In so finding, the Court explained:

> Application of [the prohibition on boycotts] to the [union's] activity in this case will not infringe upon the First Amendment rights of the [union] and its members. We have consistently rejected the claim that secondary picketing by labor unions in violation of [the prohibition on boycotts] is protected activity under the First Amendment. It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment. . . . There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others.[26]

In support of the Supreme Court's ruling that a boycott directed at a foreign nation may not be protected by the First Amendment, it is important to note the position taken by the National Labor Relations Board in its proceeding (which ultimately found the union's boycott was violative of applicable federal law). That tribunal found that "this case presents the novel situation of a labor union establishing a national boycott contravening a Federal policy."[27] This is precisely the situation we find ourselves in today, where an organization (the BDS Movement) is attempting to establish a national boycott in contravention of federal policy that prohibits the establishment or promotion of foreign boycotts against Israel.[28]

III. THE ANTI-BOYCOTT PROVISIONS OF THE EXPORT ADMINISTRATION ACT ARE LAWFUL LIMITATIONS ON ALL BDS MOVEMENT ACTIVITY

In *Longshoremen*, the unlawful boycott consisted of a union interfering with the purchase and sale of goods in the United States as a means to oppose the actions of a foreign government. To the extent the BDS Movement's activities employ unions to further the unlawful boycotts of Israel, such activity obviously violates the National Labor Relations Act's prohibitions on secondary boycotts. But the Supreme

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[25] *Longshoremen*, 456 U.S. at 216.

[26] *Id.* at 226–27 (internal citations omitted).

[27] *NLRB Decision*, 257 N.L.R.B. at 1077.

[28] *See* the *BDS Legal Study*, *supra* note 1, at 46–75 (demonstrating that Congress enacted the anti-boycott provisions of the Export Administration Act to prevent foreign boycotts against Israel from being enforced or promoted in the United States and further establishing that the BDS Movement is a party whose boycotts are subject to that law).

Court's *Longshoremen* ruling was not limited to union boycotts. In *Longshoremen*, the Supreme Court had to determine whether federal law, under the National Labor Relations Act or otherwise, could restrict boycott activity in the United States without violating the First Amendment rights of the actors.[29] It is from this general legal question that an unambiguous rule emanates: where a federal law regulates boycott activity and the purpose of that law is a legitimate expression of national policy in the realm of foreign relations and commerce, and the law does not relate to the suppression of speech on substantive matters subject to constitutional protections, the First Amendment does not protect the boycott activity.

The issue of primary versus secondary boycotts is something of a red herring in this regard, unless the law in question specifically deals with such distinctions (as is the case with the National Labor Relations Act). Certainly, for union boycotts, a secondary boycott is illegal *de jure*.[30] Furthermore, as the *Longshoremen* Court noted, there is no First Amendment protection for union boycotts that are "in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity."[31] Protests against Israel, like protests against the former Soviet Union, are squarely outside of the realm of legitimate union activity.

In some cases, such as where unions act in sympathy with the BDS Movement to promote illegal boycotts of Israel, the National Labor Relations Act will be directly on point and the union boycotts will clearly be in violation of federal law. For non-union actors that promote BDS Movement boycotts, however, there is another federal law that explicitly prohibits boycotts of any nature against Israel. Those anti-boycott provisions are contained in the Export Administration Act and are based on a longstanding United States policy to protect American commerce and consumers from the effects of foreign boycotts.[32]

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[29] *Longshoremen*, 456 U.S. at 218.

[30] Secondary boycotts are explicitly prohibited under the National Labor Relations Act. *See supra* note 24. This prohibition was enacted with a Congressional purpose of protecting neutral third parties (i.e., consumers) and preventing commercial disruptions. *See* John Rubin, *The Primary-Secondary Distinction without the Primary: The New Secondary Boycott Law of* Allied International, Inc. v. International Longshoremen's Association, 6 BERKELEY J. EMP. & LAB. L. 94, 107 (1984). This Congressional purpose is the same as in the enactment of the Export Administration Act's anti-boycott provisions. *See infra* note 32. It is clear that Congress, and the Supreme Court, have consistently found exceptions to First Amendment protections when it comes to regulating boycott activity that is not directly related to the substantive constitutional rights of those participating in the boycotts.

[31] *Longshoremen*, 456 U.S. at 225–26.

[32] The anti-boycott provisions are codified at 50 U.S.C. § 4607 (2012). For the legislative history of the anti-boycott provisions of the Export Administration Act, see *BDS Legal Study*, *supra* note 1, at 38–45 (referring to the section entitled "The Legislative Tide Turns: Enactment of the EAA Anti-Boycott Law"). While supporters of the BDS Movement claim that they are not subject to the provisions of the Export Administration Act since the BDS Movement is not a

Like the anti-boycott provision of the National Labor Relations Act at issue in *Longshoremen*, the anti-boycott provisions of the Export Administration Act have been challenged under, *inter alia*, the First Amendment.[33] In each case, and for similar legal and policy reasons, the anti-boycott provisions were upheld. The Eastern District of Wisconsin in *Briggs I*, in particular, justified the government's right to prohibit foreign sponsored anti-Israel boycott activity by noting that:

> [T]he regulations prevent American companies from being used as agents of [the boycotters], and the regulations also advance the stated interest in keeping Americans out of the boycott struggle. . . . What can be safely concluded . . . is that the rule has directly advanced the governmental interest by preventing information from flowing to the boycotters.[34]

The *Briggs I* Court thus concluded that preventing the spread of a foreign boycott against Israel is a substantial state interest. It is critical to note that the consolidated appeal of these challenges to the anti-boycott provisions of the Export Administration Act was decided after publication of the decisions in both *Claiborne* and *Longshoremen* and it, as well as the underlying district court opinions (*Briggs I* and *Trane*) are fully consistent with the principles announced by the Supreme Court in both decisions.

These principles are best described by the court in *Trane* (one of the two lower court cases decided after both the *Claiborne* and *Longshoremen* opinions were published):

> The Court concludes that the governmental interest here is

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government of a country, this argument is without merit. The anti-boycott provisions of the Export Administration Act were intended to apply to all foreign boycotts of friendly countries, without regard to whether the promoter of the boycott is organized as a government. The text of the Export Administration Act is clear on this point and the legislative history of the law demonstrates that it was not intended to be limited in application solely to governmental boycotts. Indeed, the fact that the law was enacted in response to the boycott sponsored by the Arab League, an international organization that is not a foreign country's government, demonstrates the illogic of BDS Movement supporter's false limitations. *See generally*, *BDS Legal Study*, *supra* note 1, at 45–75 (referring to the section entitled "The BDS Movement under the EAA Anti-Boycott Law"). Whether one views the BDS Movement as a new foreign boycott of Israel or an alter-ego of the Arab League's boycott of Israel, the Export Administration Act's anti-boycott provisions apply in each case.

33 *See e.g.*, Trane Co. v. Baldrige, 552 F. Supp 1378 (W.D. Wisc. 1983) (finding that the Export Administration Act's anti-boycott provisions do not violate the First, Fifth and Ninth Amendments and, in particular, that the governmental interest in conducting foreign policy through legislation such as the Export Administration Act is substantial and the law directly advances the government's interests); Briggs & Stratton Corp. v. Baldrige, 539 F. Supp. 1307 (E.D. Wisc. 1982) (hereinafter *Briggs* I). For the consolidated appeal of *Briggs I* and *Trane*, see Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984) (hereinafter *Briggs* II) (finding that the anti-boycott provisions of the Export Administration Act did not infringe speech protected by the First Amendment).

34 *Briggs I*, 539 F. Supp. at 1319 (citing to the Senate report relating to debate on the anti-boycott provisions of the Export Administration Act).

> substantial, "involving delicate foreign policy questions and the interest of the government in forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.'" The statutory policy underlying the challenged prohibition is stated in 50 U.S.C.App. § 2402(5) (A):
>
> > It is the policy of the United States . . . to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person . . . .
>
> In light of the statements regarding the purpose of the challenged legislation, noted both in the 1977 Amendments and the legislative history, the Court concludes that there is, in fact, a substantial governmental interest underlying the challenged prohibition . . . [and] the Court holds that the challenged portions of the statute and regulation do not violate plaintiffs' First Amendment rights.[35]

There is a compelling policy reason for the limitations on First Amendment protections for certain boycotts like those in *Longshoremen* (or those fostered by the BDS Movement). Where there is an infringement of individual or group rights that are protected by law (whether enumerated Constitutional protections or statutory protections), it is most certainly the essence of the First Amendment for those affected to raise their voices and demand redress. However, where no protected individual or group right is involved and the purpose of the protest is to affect international relations, especially in contravention of United States policy and commercial interests, not only is there no rational basis for First Amendment protections, such protections would frustrate the purpose of the federal government, the entity vested with exclusive power to conduct foreign relations and to regulate commerce under the Constitution.

In the case of the BDS Movement, since the State of Israel has no power to affect the rights of American citizens in the United States, there is no domestic individual or group right being protected by BDS Movement boycotts. Most importantly, those boycotts upend United States foreign policy efforts and interfere with the functioning of United States' commercial markets and harm United States' consumers. It is in situations like this one that the Supreme Court has denied the protection of the First Amendment for those seeking to advance a boycott barred by United States law.

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[35] *Trane*, 552 F. Supp. at 1386–88 (footnotes omitted) (citations omitted).

IV. POLICY CONSIDERATIONS AND LAWS RESTRICTING BOYCOTT ACTIVITY IN THE UNITED STATES

The objective of the BDS Movement, as set forth in its founding document and its countless public statements, is to disrupt commerce in the United States as a means of inflicting economic harm on an ally of the United States. The purpose of the anti-boycott provisions of the Export Administration Act is to protect American commerce and to prevent Americans from being coerced into participating in foreign conflicts in contravention of United States policy. While the First Amendment generally protects the right to engage in a wide variety of protest activities, as the *Claiborne and Longshoremen* courts explained generally, and other cases have held specifically,[36] the First Amendment is not absolute.

The United States government has enacted a number of laws, including the anti-boycott provisions of the Export Administration Act, the Ribicoff Amendment to the Tax Reform Act of 1976[37] and anti-BDS Movement provisions in the recently enacted Trade Promotion Authority,[38] that evince its intention to be the sole arbiter of American

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[36] *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (finding that providing material support to terrorists, even with the intent of providing humanitarian aid, was not protected by the First Amendment). *See also* Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006) (imposing significant limitations on boycott activity at abortion clinics); Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) (finding that while RICO may apply to abortion clinic protests, an economic motive was needed to support a Hobbs Act predicate charge in this case); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (finding that RICO may apply to abortion clinic protests).

[37] The "Ribicoff Amendment" to the Tax Reform Act of 1976, 26 U.S.C. § 999 (2012). The Ribicoff Amendment was enacted in the same period and for the same purpose as the anti-boycott provisions of the Export Administration Act. This tax code amendment was enacted to counter anti-Israel boycotts and penalizes those who participate in such unsanctioned boycotts with the denial of otherwise available tax benefits.

[38] The Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 909(b) (2015) [hereinafter the TPA] explicitly provides that the United States oppose BDS Movement activity and deems BDS activity to be discriminatory and contrary to U.S. commercial and policy interests ("Congress . . . (4) opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel; (5) notes that boycotts of, divestment from, and sanctions against Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities are contrary to principle of nondiscrimination under the GATT 1994 (as defined in section 2(1)(B) of the Uruguay Round Agreements Act (19 U.S.C. 3501(1)(B))) . . . ."). The anti-BDS language in this law originated with Representative Peter Roskam's stand-alone anti-BDS legislation, H.R. 825, 114th Cong., 1st Sess. (2015). *See* Press Release, Rep. Peter Roskam, *Roskam Anti-BDS Provisions Signed Into Law* (June 29, 2015), https://roskam.house.gov/media-center/press-releases/roskam-anti-bds-provisions-signed-into-law-0 ("Today, Congressman Peter Roskam (IL-06), co-chair of the House Republican Israel Caucus, released the following statement after President Obama signed into law Trade Promotion Authority (TPA) legislation, which contains provisions authored by Roskam to combat the Boycott, Divestment, and Sanctions (BDS) movement against Israel. These provisions, which were originally introduced as Roskam's H.R. 825, the U.S.-Israel Trade and Commercial

tolerance for foreign boycotts involving American businesses and individuals. These laws explicitly prohibit support for foreign boycotts of Israel. In addition to these laws, which are specifically directed at BDS Movement activity, a host of other anti-discrimination laws prohibit the type of discrimination fostered by BDS Movement activities.[39] Indeed, a number of recent cases in various states have found that anti-discrimination laws can trump First Amendment protections.[40] There should be no question that anti-Israel boycotts are borne of discriminatory intent. Throughout congressional hearings on the anti-boycott provisions of the Export Administration Act, numerous legislators and experts testified to the racist and discriminatory origins and intentions of boycotts targeting Israel, including the Arab League's

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Enhancement Act, were unanimously adopted into the House and Senate versions of TPA in April. 'This is an historic milestone in the fight against Israel's enemies, as American opposition to insidious efforts to demonize and isolate the Jewish state is now the law of the land. The bipartisan bill enacted today conditions any free trade agreement with the European Union on its rejection of BDS. This will force companies like telecom giant Orange, which is partially owned by the French government, to think twice before engaging in economic warfare against Israel. No longer will these companies be able to freely attack a key U.S. ally without consequence. Nevertheless, what we accomplished today is just the beginning. As the BDS movement continues to evolve, so too must our response. I look forward to working with my colleagues to ensure the U.S.-Israel relationship remains strong now and in the future.'"). Shortly after President Obama signed the TPA into law, the State Department issued a vague statement on U.S. policy on Israel's activity in territories under its control. The State Department's statement has no effect on the operation of the TPA and mischaracterizes the history of American policy on the topic. *See* Professor Eugene Kontorovich, *The State Department's Response to Israel Boycott Law—A Line-item Veto for Trade Legislation?*, WASH. POST (July 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/10/the-state-departments-response-to-israel-boycott-law-a-line-item-veto-for-trade-legislation/ ("The State Department's comments also badly mischaracterize U.S. policy on the matter. The United States has not consistently opposed settlements. . . . If the Executive were considering not enforcing the law, it would be extraordinary constitutional usurpation by the Executive, effectively giving State Department spokesmen line-item veto power over enacted trade laws.").

[39] *See, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 2016) (the New York Human Rights Law prohibits boycotts based on race and national origin); CAL. CIV. CODE §§ 51, 51.5 (West 2012) (California's analogous anti-boycott law). A number of states, including Tennessee and Indiana, have also enacted laws that specifically oppose BDS Movement activity. *See, e.g.*, H.B. 1378, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016); S.J. RES. 170, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015). The United States is also a signatory to the World Trade Organization's Agreement on Government Procurement, which prohibits discrimination on the basis of national origin in government procurement. *Agreement on Government Procurement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited July, 17, 2016). The BDS Movement's activities clearly discriminate on the basis of national origin, as the activities are directed at the State of Israel.

[40] *See, e.g.*, Mullins v. Masterpiece Cakeshop, Inc., 2015 WL 4760453 (Colo. App. Aug. 13, 2015), *cert. denied* 2016 Colo. LEXIS 429 (Col. Apr. 25, 2016) (finding that state anti-discrimination law compelling a bakery to provide cakes for same-sex weddings was not a violation of the bakery owner's First Amendment rights); *see also*, Elane Photography, LLC v. Willock, 309 P.3d 53, 61 (N.M. 2013) (finding a state anti-discrimination law compelling a photographer to provide services to a same sex couple was not a violation of the photographer's First Amendment rights), *cert. denied*, 134 S. Ct. 1787 (2014).

boycott (the predecessor of the BDS Movement's boycott).[41]

Moreover, as the BDS Legal Study sets out in detail, a strong case can be made that because there are ties between designated terrorist organizations, such as Hamas, and the BDS Movement, support for the BDS Movement is a violation of the RICO statute under, among other things, a material support to terrorism predicate.[42] This case became significantly more apparent on April 19, 2016, when the House Foreign Affairs Committee heard testimony regarding the BDS Movement's sources of funding.[43] In this testimony, Dr. Jonathan Schanzer provided explicit evidence tying at least one BDS entity to supporters of a designated terrorist organization under the USA PATRIOT Act.[44] Dr. Schanzer chronicled the transformation of the now-defunct Holy Land Foundation for Relief and Development, an entity controlled by individuals who were convicted of providing material support to Hamas—a designated terrorist organization—into a new organization known as American Muslims for Palestine, an entity that is "a leading driver of the BDS campaign."[45]

It is no coincidence that the Holy Land Foundation rose from the dead in this context. In 2003, the United States Court of Appeals for the District of Columbia Circuit upheld a district court decision regarding the designation of Holy Land Foundation as a terrorist organization affiliated with Hamas.[46] In dismissing the Holy Land Foundation's claim that its First Amendment rights were violated by being subjected to the restrictions of the material support to terrorism laws, the D.C.

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41 *See generally*, REPORT BY THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, WITH ADDITIONAL AND MINORITY VIEWS, UNITED STATES HOUSE OF REPRESENTATIVES, THE ARAB BOYCOTT AND AMERICAN BUSINESS, H.R. Doc. No. 75-384, 94th Cong. 2d Sess. (Sept. 1976). This report found that:

> Despite emphatic Arab statements that the boycott is not directed against Jews, in practice the boycott is directed against supporters of Israel, including those living in the United States, many of whom are also members of the Jewish faith. The belief that the boycott is based on religious discrimination tends to generate a profound American reaction because it strikes closely at U.S. ideals.

Id. at 2. The House Boycott Report was a comprehensive study of the background and effects of the Arab League Boycott prepared in the wake of the OPEC oil crisis of 1973. This report was the primary source of information for Congressional consideration of the anti-boycott provisions of the Export Administration Act.

42 *See BDS Legal Study*, *supra* note 1, at 108–110 (referring to the section titled "Material Support to Terrorists as a BDS Movement RICO Predicate Offense").

43 *Israel Imperiled: Threats to the Jewish State, Joint Hearing Before H. Foreign Affairs Comm., Subcomm. on Terrorism, Nonproliferation, and Trade and the Subcomm. on the Middle East and North Africa*, 114th Cong., 2d Sess. (Apr. 19, 2016) (statement of Jonathan Schanzer, Vice President of Research Foundation for Defense of Democracies), http://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf [hereinafter *Schanzer Testimony*].

44 *Id.* at 2–4. The relevant section of the PATRIOT Act is codified at 18 U.S.C. § 2339A.

45 *Schanzer Testimony*, *supra* note 43 at 2.

46 Holy Land Found. for Relief and Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003).

Circuit agreed with the lower court's finding that "there is no constitutional right to facilitate terrorism."[47] This conclusion was subsequently upheld by the United States Supreme Court in *Holder v. Humanitarian Law Project*, another case dealing with a First Amendment challenge to a material support to terrorism statute.[48]

As a demonstration of the consanguinity between BDS supporters and previous "rights" organizations that violated the material support to terrorism law, the plaintiffs in an earlier case involving the Humanitarian Law Project attempted to use *Claiborne* to assert a First Amendment right to support terrorism.[49] The United States Court of Appeals for the Ninth Circuit refused to expand *Claiborne* in such a manner.[50]

Dr. Schanzer's testimony to Congress was quite clear in demonstrating the many faces of Hamas in the United States:

> In short, at least seven individuals who work for or on behalf of AMP have worked for or on behalf of organizations previously shut down or held civilly liable in the United States for providing financial support to Hamas: the Holy Land Foundation, the Islamic Association for Palestine, and KindHearts.
>
> AMP states that it was founded in 2005. They were, in their words, "a strictly volunteer organization" until 2008, when they opened their national headquarters in Palos Hills, Illinois. Their mission statement does not include raising money for causes abroad, and we have seen no evidence of illicit activity. Its mission, however, is troubling. A recent photo from their headquarters features an Arabic-language poster that includes the phrase, "No Jew will live among them in Jerusalem." It is also troubling that at their 2014 annual conference, AMP invited participants to "navigate the fine line between legal activism and material support for terrorism." That invitation is troubling because it appears that some of AMP's officers and donors came from organizations that have failed to navigate that "fine line" in the past.[51]

Dr. Schanzer's testimony should not be taken lightly. Designated terrorist organizations are actively shifting shapes to evade federal anti-terror laws and the BDS Movement is simply the latest iteration of these Hamas offshoots. There may be a fine line between legal activism and material support for terrorism, but that line has been demonstrably crossed by supporters of the BDS Movement.

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[47] *Id.* at 164–65.

[48] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (finding that providing material support to terrorists, even with the intent of providing humanitarian aid, was not protected by the First Amendment).

[49] Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).

[50] *Id.*

[51] *Schanzer Testimony*, *supra* note 43, at 8 (footnotes omitted).

It is curious that the BDS Movement attempts to cloak its unlawful activities with First Amendment protections using *Claiborne*. If there are any analogies between the facts of *Claiborne* and the BDS Movement's current activities, it would be the connection between the racist and discriminatory policies promulgated by the store owners in *Claiborne* and the attempts by the BDS Movement to implement the same types of discriminatory policies against commerce tied to Israel (and thus, Jews) in the United States. Far from being civil rights activists, the BDS Movement is nothing more than a thinly-veiled hate group, reminiscent of those that operated in the American south at the time of *Claiborne*.

If American commerce is to be used as a weapon against foreign countries, it is up to the United States' government to make that decision. Certainly an organization affiliated with and controlled by foreign nations and terrorists such as the BDS Movement should not outline the methodology and implementation of such policy. In fact, the only governmental action regarding boycotts of Israel has been to prohibit them.

One BDS Movement claim in particular needs to be clarified. The BDS Movement claims that it is a modern iteration of the South African anti-apartheid movement. There is a key distinction to be made in this regard, in addition to the fact that Israel is not engaging in apartheid.[52] United States policy was opposed to South African apartheid and Congress enacted a law imposing sanctions on South Africa until the apartheid system was dismantled.[53] Not only has the United States not declared Israel to be an apartheid state or imposed sanctions on Israel, the Export Administration Act explicitly announced that "[i]t is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person."[54] This law was enacted specifically in opposition to boycotts of Israel and the policy statement reflects longstanding American policy in support of, not in opposition to, Israel.

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[52] *See* Richard J. Goldstone, *Israel and the Apartheid Slander*, N.Y. TIMES (Oct. 31, 2011), http://www.nytimes.com/2011/11/01/opinion/israel-and-the-apartheid-slander.html?_r=0 (Goldstone, the author of a critical United Nations report on Israel and a former justice of the South African Constitutional Court during the apartheid era, unequivocally stated that Israel is not an apartheid state).

[53] Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (Oct. 2, 1986) (codified at 22 U.S.C. §§ 5001–5117 (repealed Nov. 1993)).

[54] 50 U.S.C. § 4602 (2012).

CONCLUSION

The BDS Movement, however, in its short history has proven to be adept at getting issues wrong, and it has erred monumentally in asserting that its activities are legal by virtue of its own hijacking of the anti-apartheid label and history. The United States opposes, rather than supports, sanctions against Israel, a longstanding and important ally of the United States. United States law and policy support unfettered commercial relations with Israel, and thus promotion of BDS boycotts against Israel in the United States is in violation of United States' laws.

Congress and various states have made it clear that foreign boycotts of Israel cannot be tolerated. Enforcement of these laws clearly supersedes any First Amendment rights that may be claimed in connection with participation in the BDS Movement.[55] As the *Longshoremen* court noted, the prohibition on boycotts does not leave individuals with no voice to express opinions about foreign affairs. However, engaging in activities like the promotion of foreign boycotts that interfere with government policy and the free functioning of commercial markets is not protected by the First Amendment.

Regulation of BDS Movement boycotts in the United States has ample precedent, with the *Longshoremen* case being most analogous. Moreover, regulation of these boycotts is necessary to preserve the federal government's exclusive power over the conduct of foreign affairs and to protect the integrity and efficient functioning of American commercial markets.[56]

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[55] *See, e.g.*, Trane Co. v. Baldrige, 552 F. Supp. 1378 (W.D. Wisc. 1983) (finding that the Export Administration Act's anti-boycott provisions advanced a substantial government interest and was narrowly drawn, thus it did not violate First Amendment rights).

[56] This paper has set forth the case that laws relating to BDS Movement activity should not be subject to First Amendment strict scrutiny review. Whether the laws should be subject to intermediate scrutiny or rational basis review is a topic for another paper. The important policy goals attendant to such laws (preventing discrimination, defending foreign policy goals and protecting commercial markets) should, however, allow for the laws to survive any challenge presented. Because laws regulating BDS activity do not prohibit the voicing of opinions on any topic, including disapprobation of Israel, and instead focus on the regulation of the deleterious commercial and societal effects of speech, it is likely the case that the applicable standard of review will be quite low. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.").