No. 18-16896

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.
Plaintiff-Appellees,

v.

THE STATE OF ARIZONA and MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,
Defendant-Appellants,

and

JIM DRISCOLL, COCONINO COUNTY SHERIFF,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 3:17-cv-08263

STATE OF ARIZONA'S OPENING BRIEF

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Dated: December 18, 2018

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The district court entered the preliminary injunction on appeal on September 27, 2018. E.R.1-36. Defendants, the State of Arizona and Mark Brnovich, Arizona Attorney General (hereinafter, the "State"), filed a timely notice of appeal on October 1, 2018. E.R.67-69. The district court asserted jurisdiction under 28 U.S.C. §1331. This Court has jurisdiction under 28 U.S.C. §1292(a).

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that the Act violated the First Amendment, either facially or as-applied.
2. Whether the district court erred in concluding that Plaintiffs' conjectural harms established the requisite likely irreparable harm under *Winter v. NRDC*, 555 U.S. 7 (2008).
3. Whether the district court erred and/or abused its discretion in issuing a blanket, statewide injunction without conducting any severability analysis.

STATUTORY ADDENDUM

Pursuant to Circuit Rule 28-2.7, a statutory addendum is attached.

STATEMENT OF THE CASE

This case involves a First Amendment challenge to an Arizona statute, A.R.S. §§35.393-393.03 (the "Act"). The Act generally bars the State (and its subdivisions) from entering most contracts with businesses engaged in statutorily defined "boycott[s] of Israel," thereby denying public subsidization of these boycott actions. Such prohibitions are common—24 other states have equivalent statutes or executive orders. *See* Appendix. And federal law criminally prohibits all participation by anyone (public contractor or not) in boycotts of Israel led by foreign states.

Plaintiffs (a solo-practitioner law firm and its owner) challenged the Act under the First Amendment, both facially and as-applied. Plaintiffs wish to boycott some companies for transacting with Israel, with Hewlett-Packard ("HP") being the only company identified in its preliminary injunction motion and declaration. E.R.288. Plaintiffs identified the purchase of a printer and desktop computer as the principal decisions implicating their boycott. E.R.181.

It is undisputed that Plaintiffs may say what they wish vis-a-vis Israel, or nothing at all. Nor is it disputed that the Act prevents no one, including Plaintiff Jordahl, from boycotting Israel in a personal capacity. The chief issue is whether the First Amendment mandates that the State subsidize companies that refuse to deal economically with Israeli/Israelis (and those contracting with them).

The district court saw a First Amendment violation and entered a blanket, statewide injunction. E.R.1-36. To reach that merits conclusion, Plaintiffs and the district had to overcome at least three successive hurdles that are each insurmountable under binding Supreme Court precedent.

First, the boycotting conduct here must be "inherently expressive," else the First Amendment would not apply, as the Supreme Court unanimously explained in *Rumsfeld v. FAIR*. 547 U.S. 47, 66 (2006). Under *FAIR*, if explanatory speech is needed to convey a boycott's message then the boycotting conduct is not inherently expressive. *Id.* at 66. And the commercial purchase of a printer or desktop computer is not inherently conveying a message about Israeli governmental policy absent explanatory speech; instead these appear as ordinary business-supply decisions turning on factors like price, features, or warranty. *FAIR* plainly controls here.

Second, even if Plaintiffs' business-supply decisions were inherently expressive, any First Amendment value would need to be balanced against the State's compelling interests in prohibiting discrimination and regulating commerce. This is hardly the first challenge to an anti-discrimination measure under the First Amendment, which have nearly always failed. And even in those rare exceptions, the Supreme Court has only recognized *as-applied exceptions*,

rather than *facial invalidation*. The district court's facial nullification of the anti-discrimination measure here is nearly unprecedented.

Third, even if the State could not prohibit commercial boycotting of Israel directly, the Act would still stand because it merely denies public-fund subsidization through public contracts for those engaged in boycotts of Israel. The Supreme Court, weighing a denial of public subsidies to organizations engaged in lobbying—an activity unquestionably protected by the First Amendment—has made plain that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right[.]" *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). The same result should obtain here: Plaintiffs may boycott Israel, but the First Amendment does not command the State to subsidize those boycotts with taxpayer funds.

Moving beyond the First Amendment failings here, the injunction entered by here is gravely defective for three fundamental reasons. *First*, the injunction here is unsupported by any lawful finding of likely irreparable harm. By Plaintiffs' own admission, it is no more than conjecture that the Act will affect their actual purchasing decisions. E.R.181. But the district court sidestepped this evidentiary failing by relying on entirely abstract First Amendment injury as "irreparable [harm] per se." E.R.35. That was error, and splits with at least four other circuits.

Second, the district court's blanket, statewide injunction is plainly and palpably overbroad. The district court notably did not offer a single word to justify the scope of its injunction. Its complete failure to consider tailoring the scope of its injunction is both legal error and an abuse of discretion.

Third, the district court refused to conduct any severability analysis at all—despite the Act's express severability provision. Even under the district court's reasoning, there are still numerous applications and provisions of the Act that are lawful. The district court's injunction thus palpably "nullif[ies] more of a legislature's work than is necessary[.]" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006).

For all of these reasons, the district court's statewide injunction should be reversed.

STATEMENT OF FACTS

Statutory And Historical Background

Federal Law Regarding Anti-Israel Boycotts

Although Israel has survived multiple wars since its founding in 1948, it has also been the target of economic warfare for decades. Indeed, the League of Arab States adopted a complete economic boycott of Israel in 1954. *Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307, 1309 (E.D. Wis. 1982), *affirmed and adopted*, 728 F.2d 915, 916 (7th Cir. 1984). That boycott extends beyond those

countries' bilateral trade with Israel to blacklisting any firm that "trades with Israel or … has a relationship with a firm that trades with Israel." *Id.*

To counter the Arab League boycott, the United States enacted the Export Administration Act of 1979 (the "EAA"). *Briggs*, 539 F. Supp. at 1310. The EAA in relevant part directs the "President [to] issue regulations prohibiting any United States person … from... support[ing] any boycott fostered or imposed by a foreign country against a [friendly] country [*e.g.*, Israel]." 50 U.S.C. §4607 (1979). The EAA imposes criminal felony liability for violations, including by "[f]urnishing information about … hav[ing] any business relationship … with or in the boycotted country." ADD-28. The EAA has survived First Amendment challenge, including in *Briggs*. The EAA does not appear to have been challenged since *Briggs* (1984), although numerous EAA enforcement actions have been brought since then.

The EAA was recently re-enacted by Congress this year as part of the Defense Authorization Act. *See* Anti-Boycott Act of 2018, Pub. L. No. 115-232 §§1771-74, ADD-19. That Act passed 359-54 in the House and 87-10 in the Senate.

BDS Boycotts

When the EAA was enacted, the predominant Israel-boycott form was foreign-state led. Since then, a new boycott type has emerged through the Boycott,

Divestment, and Sanctions ("BDS") movement. The BDS movement "seek[s] to apply economic pressure on Israel," E.R.268-269, with the BDS National Committee "call[ing] for a boycott of all Israeli products," E.R.218. The BDS Movement also calls for divestment from all Israeli companies and imposition of sanctions against Israel, though those objectives are not at issue here. Because BDS boycotts are not foreign-state-led, they fall outside of the EAA.

The Act

Twenty-five states, including Arizona, have taken legislative or executive action to restrict non-foreign-state-directed boycotts of Israel. *See* Appendix. The Act was passed by bipartisan supermajorities: 42-16 in the Arizona House and 23-6 in the Arizona Senate. E.R.246-249.

The Act (like other states' counterparts) differs in two key respects from the federal EAA in that it: (1) applies to non-foreign-state-led boycotts of Israel, and (2) is not a direct regulation of the general public's conduct enforceable by felony prosecution. Instead, the Act denies public contracts to businesses that are engaged in "boycotts of Israel." A.R.S. §35-393.01(A). The Act thus requires public contractors to certify "that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel." *Id.*

The Arizona Legislature had three principal aims for the Act. The first was to deny subsidies of public funds to those engaged in conduct that the Legislature

deemed discriminatory. ADD-12 (finding that "[c]ompanies that refuse to deal with … Israel, or entities that do business with or in [Israel], make discriminatory decisions on the basis of national origin."); A.R.S. §35-393(1)(b) (defining "boycott" to include refusals to deal that are conducted "[i]n a manner that discriminates on the basis of nationality, national origin or religion[.]"). This determination mirrors express federal policy. 19 U.S.C. §4452(b)(5) (BDS boycotts "are contrary to principle of nondiscrimination").

The second motivation was to prevent the State's public contracts from being used to further "economic warfare that threaten[s] the sovereignty" of Israel. ADD-12, which again mirrors the federal EAA's purposes, *see Briggs*, 539 F. Supp. at 1310. The final aim was to avoid entangling the State with contractors that are unreliable due to their fixation on political matters rather than efficient performance. ADD-12 (companies boycotting Israel are engaged in "unsound business practice[s] making the company an unduly risky contracting partner[.]").

The Act's definition of "boycott" has two different triggers. The Act applies to boycotts with discriminatory animus: *i.e.*, boycotts conducted "[i]n a manner that discriminates on the basis of nationality, national origin or religion and that [are] not based on a valid business reason." A.R.S. §35-393 (1)(b). The Act also applies to boycotts that the Legislature determined were discriminatory (and material) in effect, *i.e.*, those "[i]n compliance with or adherence to calls for a

boycott of Israel other than those boycotts to which 50 United States Code §4607(c) applies." *Id.* §35-393(1)(a). The reference to federal law avoids the Act duplicating the EAA's prohibitions (where preemption might apply).

The prohibition of conduct either motivated by animus or likely to have discriminatory effects is fairly common in anti-discrimination laws. *See*, *e.g.*, *Crowder v. Kitagawa*, 81 F.3d 1480, 1483-84 (9th Cir. 1996) (The Americans with Disabilities Act prohibits both intentional discrimination *and* actions with discriminatory effect.).

The Act only applies to public contracts with a "company." A.R.S. §35-393.01(A). The parties agree that "company" does not include persons in their individual/personal capacities. E.R.81, 272. The State also reads the Act to permit individuals and businesses to create separate entities to perform their public contracts. E.R.81.

The Act contains an express severability provision. A.R.S. §35-393.03.

Other Relevant Enactments

Twenty-Four other states (including the ten most populous) have similar laws. *See* Appendix. Those states and Arizona account for more than three quarters of the U.S. population, are found in every regional circuit except for the D.C. Circuit, and include California and Nevada in this Circuit. *Id.*

Only one other state's law (Kansas's) has been challenged. *See Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018). After Kansas did not defend the constitutionality of its law, the district court entered a preliminary injunction. *See generally id.*; E.R.60, 139-40. That suit was subsequently vacated as moot after Kansas amended its law. E.R.72.

In 2016, Congress passed a comprehensive trade bill, which included a provision that expressly declared U.S. policy is to "oppose[] … boycotts of … Israel" and declared that BDS boycotts are "contrary to principle of nondiscrimination." *Id.* §4452(b)(4)-(5).

Factual Background

Plaintiffs and Plaintiffs' Boycott

Plaintiffs are attorney Mikkel Jordahl ("Jordahl") and his solo-practitioner law firm/business entity, Mikkel (Mik) Jordahl, P.C. ("Jordahl P.C."). E.R.265.

Jordahl is engaged in several boycotts, including of certain entire countries (*e.g.*, Egypt and Myanmar, but not Israel). E.R.173. Jordahl disagrees with the Israeli government's policies in the West Bank, and therefore boycotts "businesses supporting Israel's occupation of the Palestinian territories." E.R.265. Plaintiffs' declaration identifies only one such company: HP. E.R.288.

Because of the Act, Jordahl P.C. is not engaged in the same Israel boycott as Jordahl, although Jordahl wishes his company to do so. *Id*. In a 30(b)(6)

deposition, Jordahl P.C. identified only one future purchase that might be implicated by the boycott of HP identified in Plaintiffs' declaration: a desktop computer for Jordahl's home office. E.R.181-182. Jordahl P.C. admitted it had performed no research as to whether HP or another company sold the most suitable computer for its needs (*i.e.*, whether that purchase implicated Jordahl's boycott at all). E.R.182.

Jail District Contract

Jordahl has long contracted to perform prisoner legal services with the Coconino County Jail District ("Jail District Contract"). E.R.286. The Jail District Contract has generally been a series of one-year July-June contracts. E.R.273.

In 2016, the Jail District sought a certification under the Act, which had recently become effective. E.R.200. Plaintiffs signed the requested certification and separately wrote Coconino County officials to confirm that Jordahl's signature was "not in [his] personal capacity unrelated to any government contract." E.R.294. The Jail District accepted this certification (as does the State). E.R.272.

In 2017, however, Plaintiffs refused to sign the required certification and ultimately filed this suit. E.R.192. Notwithstanding, Jordahl P.C. continued to perform under the Jail District Contract and admitted that it "expect[ed] to get paid" for its work. *Id*.

Proceedings Below

Briefing And Hearing

Plaintiffs filed this suit on December 6, 2017, against Attorney General Mark Brnovich and several Coconino County officials, and sought a preliminary injunction the next day. E.R.318. The State successfully intervened to defend the Act. E.R.322.

Plaintiffs advanced five First Amendment arguments against the Act: (1) it impermissibly restricted speech/expressive conduct, (2) it impermissibly mandated speech, (3) it was a content- or viewpoint-based regulation of speech, (4) it discriminated based on belief, and (5) it infringed upon Plaintiffs' freedom of association. D.Ct. Doc. 6. Because the Act is not a direct regulation of conduct, Plaintiffs presented their arguments under the unconstitutional-conditions doctrine. *Id.*

The State opposed Plaintiffs' arguments/preliminary-injunction request and also moved to dismiss. The State's motion included arguments regarding standing, and ripeness and immunity with respect to Defendant Brnovich. The State further argued that the Supreme Court's decisions in *FAIR*; *International Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 214 (1982); and *Regan* were controlling. *See* D.Ct. Docs. 28, 46.

The State further argued that (1) Plaintiffs had failed to establish irreparable harm, (2) any preliminary injunction should be limited to Plaintiffs alone, and (3) the district court should sever any part of the Act found unconstitutional. *Id.*

Six different organizations/states (including Nevada and Texas) sought leave to file *amicus* briefs supporting the State. E.R.143-144. The district court denied all six motions for leave. *Id*.

Preliminary Injunction

On September 27, 2018, the district court resolved all pending motions, denying the State's motion to dismiss, rejecting the State's standing and immunity arguments, E.R.5-17, and granting a blanket, statewide injunction on enforcement of the Act, E.R.1-36. The district court noted the State's ripeness argument, E.R.4, 6, but did not decide it. The district court also did not rule upon Plaintiffs' compelled speech and belief-discrimination claims, E.R.1-36, and included only oblique references to viewpoint discrimination: once in discussing the balance of equities, E.R.35, and twice in citation parentheticals, E.R.26, 33.

The district court's decision instead rested on Plaintiffs' restriction-on-expression and expressive-association claims. E.R.18-34. The district court acknowledged that First Amendment protection extends only to inherently expressive conduct, and explained that, under *FAIR*, it "agree[d] that the commercial actions (or non-actions) of one person, *e.g.*, the decision not to buy a

particular brand of printer to show support for a political position, may not be deserving of First Amendment protections on the grounds that such action is typically only expressive when explanatory speech accompanies it." E.R.23.

The district court distinguished *FAIR*, however, on the basis that the Act regulates "certain actions that are taken in response to larger calls to action that the state opposes[.]" E.R.23-24. The district court did not address the scope of the boycott in *FAIR*, which involved virtually every U.S. law school boycotting the military in response to broad calls to do so. *Id.*; *infra* at 28. The district court instead relied primarily on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). E.R.21-34.

After concluding that Plaintiffs' boycotts were protected under the First Amendment, the district court rejected the State's compelling interest in prohibiting discrimination. E.R.32-34. First, the court doubted the sincerity of that anti-discrimination interest in light of a press release. E.R.33. Second, the court rejected that boycotting Israel/Israelis was *ipso facto* discrimination on the basis of Israeli national origin/nationality and therefore concluded that "[t]he State has [] produced no evidence that Arizona businesses have or are engaged in discriminatory practices[.]" E.R.34.

The district court next rejected the State's argument that the First Amendment does not mandate that the State subsidize Israel boycotts with public

funds/contracts. E.R.27-34. The court denied that the transfer of public funds to contractors was a form of public subsidy, reasoning that the State's "fears of subsidizing boycotts of Israel" were "speculative" and thus "do[] not justify the [Act's] broad prospective restriction on boycotting activity[.]" E.R.34. The district court did not address *Regan*'s refusal to require proof that specific dollars would subsidize specific activities or that federal law has banned the provision of even a single federal dollar to contractors that engaged in national-original discrimination since 1965. *See, e.g.*, E.R.154.

In a section analyzing whether it would require a bond (sought by no one), the district court announced that the Act "violates the First Amendment on its face." E.R.36. The district court did not conduct any analysis of overbreadth doctrine or the ordinary no-set-of-circumstances/*Salerno* standard for facial relief to support that facial holding. E.R.36.

The district court further concluded that Plaintiffs had made the requisite showing of likely irreparable harm. E.R.35. The district court relied entirely on the purported deprivation of Plaintiffs' First Amendment rights in the abstract, and did not require any concrete manifestation of that injury. E.R.35. Instead, it reasoned such abstract harms were "irreparable per se." E.R.35.

The district court did not include any analysis discussing the appropriate scope of injunctive relief. Instead, its conclusion simply announced that its

injunction would be a blanket and statewide in nature—"Defendants are enjoined from enforcing [the Act]." E.R.36. Nor did the district court conduct any severability analysis, although the State expressly requested it. E.R.263.

Stay Proceedings

The State sought a stay pending appeal from the district court, which was denied. E.R.37-41. In the denial, the district court further explained that the First Amendment issues were "not … issue[s] of first impression … as stated in the Order." E.R.39. It is undisputed, however, that neither this Court nor the district court has considered a First Amendment challenge to an anti-Israel-boycott law.

The State sought a stay pending appeal from this Court, which was denied on October 31, 2018. Dkt. 26. Judge Ikuta dissented from that order. *Id.*

SUMMARY OF THE ARGUMENT

The district court's preliminary injunction rests on at least seven fundamental errors and/or abuses of discretion that fairly mandate reversal. In nearly every instance, the district court decision conflicts with binding precedent from the Supreme Court and/or this Court.

I.A. The district court first erred by concluding that the First Amendment applied here at all. This Court and the Supreme Court (in unanimous decisions in *FAIR* and *Longshoremen*) have clarified that conduct that is not "inherently expressive" enjoys no constitutional protection at all. *FAIR* both (1) expressly

rejected the proposition that boycotting conduct was inherently expressive *per se*, instead independently analyzing the expressive value of *each* action at issue, and (2) made plain that if explanatory speech is required to convey conduct's message then the conduct is not "inherently expressive." Plaintiffs' boycott flunks both holdings: Plaintiffs' printer and computer purchases are scarcely expressive at all on their own, and Plaintiffs have squarely conceded that the pertinent boycotting actions are expressive solely because of their accompanying explanatory speech. E.R.160 (actions "are expressive because Mr. Jordahl explicitly characterizes them as part of his … boycott.").

Longshoremen also controls here, as it expressly held that boycotts of foreign nations based on their governmental-occupation policies involved no "protected activity under the First Amendment"; indeed, this case merely swaps (1) "lawyer" for "union," and (2) "Israel" for "Soviet Union." 456 U.S. at 226-27. The district court distinguished *Longshoremen* as resting on the government's interest in regulating labor law. But *Longshoremen* rejected the union's invocation of the First Amendment at its threshold, rather than engaging in any balancing.

Plaintiffs' claim further fails because the Supreme Court has repeatedly made clear that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citing *FAIR*). That is just so here.

I.B. Even if Plaintiffs' boycotting conduct was entitled to any First Amendment consideration, the State's compelling interests in prohibiting discrimination and regulating commerce easily sustain the Act. Anti-discrimination measures have been widely upheld against First Amendment challenge even where they burden expression/association. The district court wrongly discounted the State's anti-discrimination interests by (1) seizing a single press release to impugn the Arizona Legislature's sincerity and (2) implausibly denying that intentional refusals to transact business with Israelis as a nationality could be deemed discrimination on the basis of nationality/national origin.

I.C. Even if Plaintiffs had a right to boycott Israel generally, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan*, 461 U.S. at 549. The district court squarely contravened *Regan* by demanding that the State prove that specific public dollars would be spent on specific boycotts. *Regan* required no such thing. Moreover, the district court's holding is directly at odds with federal anti-discrimination law, which for *50-plus-years* has refused to furnish even a single federal dollar to federal contractors engaged in national-origin discrimination. But the district court made no effort to reconcile its holding with this settled federal law.

I.D. The district court's conclusion that the Act "violate[d] the First Amendment on its face," E.R.36—which is bizarrely found in a section declining

to impose a security requirement sought by no one—is entirely unsupported. The district court never considered Plaintiffs' overbreadth arguments—indeed, the words "overbreadth" or "overbroad" are nowhere to be found in its opinion. E.R.1-36. Instead, its facial holding is simply naked judicial *fiat*, unsupported by any actual reasoning.

II. The district court's injunction is also unsupported by the required showing of "likely" irreparable harm. *Winter*, 555 U.S.at 20 (2008). Instead, Plaintiffs' alleged harm here is conjectural and contrived. The district court sidestepped these deficiencies by relying on abstract First Amendment injuries, untethered from a concrete harm, which the court believed were "irreparable per se." E.R.35. That was error; indeed, at least four other circuits have squarely rejected that "per se irreparable harm" approach.

III.A-C. There is also no justification for the blanket, *statewide* injunction issued here. Indeed, the preliminary injunction opinion provides *not a single word* to justify the injunction's scope. That is a flagrant abuse—indeed outright abdication—of discretion. And the district court compounded these errors by refusing to engage in any genuine balancing of harms or consider the express declarations of public policy by Congress, the Arizona Legislature, and 24 other states.

III.D. Finally, the district court committed fundamental legal error by refusing to engage in any severability analysis to determine if any parts of the Act could be saved. Yet the State explicitly raised the issue, the Act has an express severability clause, and there are several obvious ways in which parts of the Act could be saved.

STANDARDS OF REVIEW

"[P]laintiff[s] seeking a preliminary injunction must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

This Court "review[s] [a] district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (*en banc*). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review[.]" *Id.*

"'An overbroad injunction is an abuse of discretion.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (citation omitted).

ARGUMENT

I. PLAINTIFFS' FIRST AMENDMENT CLAIM FAILS

The district court committed multiple legal errors in holding that the Act was facially unconstitutional. Those errors include concluding that: (1) the boycotting conduct at issue was "inherently expressive" and thus entitled to any consideration of the First Amendment at all; (2) the State's compelling interests in prohibiting discrimination and regulating commerce did not sustain the Act; (3) the First Amendment compelled the State to subsidize BDS boycotts with public funds; and (4) the Act was facially unconstitutional, without conducting any overbreadth or facial-claim analysis *at all*. Each of these errors independently requires reversal. And reversal is particularly warranted given the extremely grave implications that an affirmance would have on federal sanctions law and the EAA.

A. Plaintiffs' Boycott Enjoys No Protection Under The First Amendment

Plaintiffs' claim fails most obviously because the boycotting conduct regulated by the Act is not "inherently expressive," and thus is not protected by the First Amendment at all.

1. Plaintiffs' Conduct Is Not Inherently Expressive

Before turning to the boycott-specific case law, it is useful to focus on general First Amendment principles. The Act does not regulate Plaintiffs' actual

speech whatsoever. Plaintiffs' speech as to Israel, Arizona, the Act, or any other related topic is entirely unhindered here. Plaintiffs may, for example:

- Criticize any and all policies of the governments of Israel or the United States with which they disagree, as softly or as loudly, and as politely or profanely, as they desire;
- Support vocally and/or through monetary contributions the election of candidates for Congress or state elected office that would change U.S. or Arizona policy more to Plaintiffs' liking;
- Criticize the Act, advocate for its repeal, and support candidates for state office pledging to do so;
- Call for others to boycott Israel, and explain why boycotts are desirable; and
- Explain that Plaintiffs' Israel-related dealings have are solely due to the Act, and under their most vigorous protest.

Rather than pure speech, Plaintiffs seek First Amendment protection for purportedly expressive conduct—here, the conduct of engaging in a boycott of certain companies that deal with Israel. As this Court has explained, however, "[t]he Supreme Court has made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive.'" *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) (quoting *FAIR*, 547 U.S. at 66).

FAIR and *Longshoremen* make clear that Plaintiffs' boycotting conduct is not inherently expressive. But even if this Court were considering the issue on a blank slate, it is obvious that Plaintiffs cannot satisfy the threshold inherently-expressive requirement.

The only company Plaintiffs identified in their declaration as a target of their desired boycott is HP. E.R.288. In a 30(b)(6) deposition, Plaintiffs pointed only to a past purchase of a printer and future purchase of a desktop computer as implicating Jordahl P.C.'s boycott. E.R.181.

But for virtually everyone, a company's selection of a Lexmark printer instead of one from HP would likely be perceived as a decision about price, features, service, or warranty—not an expressive political act. Just about the last thing any observer is likely to think is: "That company bought a Lexmark printer; that must be because it opposes Israeli governmental policy." Similarly, if clients see an HP desktop in Jordahl's office, they are hardly likely to think: "Jordahl has an HP desktop; he must be an ardent supporter of Israel and its policies in Palestine."

Moreover, Jordahl's desktop computer purchases are *uniquely unlikely* to be expressive: Jordahl has admitted that no client has ever set foot in his office, E.R.189, leaving no one to perceive whatever "message" the desktop's decal

purportedly conveys. Plaintiffs' "inherently expressive" argument thus rests on the non-observation of a non-observable message.

Common sense thus confirms the conclusion that controlling precedent mandates: Plaintiffs' boycotting conduct is minimally expressive at best, and certainly cannot qualify as "inherently expressive." Indeed, the district court notably *agreed* with this general premise: "The Court agrees that the commercial actions (or non-actions) of one person, e.g., the decision not to buy a particular brand of printer … is typically only expressive when explanatory speech accompanies it." E.R.23.

The district court should have simply stopped there.

2. This Case Is Controlled By *FAIR*, *Longshoremen*, And Incidental-Burden Case Law

This case falls within three separate controlling lines of authority: (1) *FAIR*, (2) *Longshoremen* and (3) "incidental burden" cases, each of which is dispositive here. The district court's decision further violates the Seventh Circuit's decision in *Briggs*.

a. *FAIR*

This case is squarely controlled by the Supreme Court's unanimous decision in *FAIR*, which also involved the attempted invocation of a wide variety of First Amendment doctrines to protect a boycott. Specifically, *FAIR* addressed the Solomon Amendment, which coerced law schools (on pain of losing all federal

funds) into engaging in conduct with which they disagreed—allowing the military equal access to their campuses for recruiting purposes. 547 U.S. at 51-55. The law schools desired to boycott the military based on political disagreement with then-U.S. policy regarding homosexuals in the military, but were unwilling to forego federal funds. *Id.* at 51-52.

The law schools therefore challenged the Solomon Amendment on First Amendment grounds that are strikingly similar to those advanced here. The Supreme Court, however, had little difficulty unanimously dismantling all of the law schools' arguments decisively, concluding that Congress could even have imposed the requirements as a direct mandate. *Id.* at 58-70.

FAIR is dispositive of Plaintiffs' claims here for four reasons. *First*, the Court made clear that governmental regulation of boycotting activity neither compels nor prohibits any actual speech: "The Solomon Amendment neither limits what law schools may say nor requires them to say anything." *Id.* at 60. Thus, "the Solomon Amendment regulate[d] conduct, not speech. It affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.*

So too here. The Act does not require Plaintiffs to *say* anything or refrain from *saying* anything; it only constrains what they must *do*—*i.e.*, not boycott Israel.

Second, the Court made clear that for express-conduct claims "First Amendment protection [extends] only to conduct that is inherently expressive." *Id.* at 66. Excluding the military from campus did not qualify: if explanatory speech is needed to explain the "message" of conduct, it by definition is not *inherently* expressive. *Id.* Thus, "[t]he expressive component of a law school's actions [wa]s not created by the conduct itself but by the speech that accompanie[d] it." *Id.* And "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* The *FAIR* plaintiffs' challenge thus failed.

The same result should obtain here. Nothing about Plaintiffs' desired conduct is inherently—or even particularly—expressive. *Supra* at 21-24. And so, just as in *FAIR*, the "actions [at issue] were expressive only because [plaintiffs] accompanied their conduct with speech explaining it." 547 U.S. at 66.

Indeed, Plaintiffs themselves have explicitly admitted as much, telling the district court: "***These [purchasing] decisions are expressive because Mr. Jordahl explicitly characterizes them*** as part of his participation in a BDS boycott." E.R.160. This candid admission is fatal here.

Third, *FAIR* rejected the law schools' bootstrapping of the required "inherently expressive" analysis by pointing to the action being part of a larger campaign or message. The Supreme Court thus considered the inherent

expressiveness of each action *individually*. 547 U.S. at 64-66. But the district court erred here by indulging precisely that type of circumvention-by-bootstrapping.

Fourth, the Court rejected the law schools' freedom-of-association claim, explaining that "[s]tudents and faculty [were] free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group[.]" *Id.* at 69-70. That is equally true here. Plaintiffs are free to associate with anyone they want to "voice their disapproval" of Israel's policies. What Plaintiffs may not do is engage in particular economic conduct.

* * *

For all of these reasons, *FAIR* is controlling here and mandates reversal. Attempting to evade its controlling effect, Plaintiffs and the district court have serially offered one facile distinction of *FAIR* after another. None can withstand scrutiny. But like an ill-conceived game of judicial whac-a-mole, another distinction pops up just as soon as the prior one is knocked down.

(1) Plaintiffs originally distinguished *FAIR* by contending that it was "inapplicable here because *political boycotts*, including BDS boycotts, are inherently expressive." E.R.159 (emphasis added). That "political boycott" distinction was baseless, since the boycott in FAIR—*i.e.*, a disagreement with *governmental policy*—was patently political.

(2) The district court did not accept Plaintiffs' "political boycott" distinction, but instead invented another—which Plaintiffs notably did not advance. The district court thus explained, as its *sole* basis for distinguishing *FAIR*, that the precedent did not apply "when a statute requires a company … to promise to refrain from … [boycotting] taken in response to *larger calls* to action," E.R.23 (emphasis added), and repeated this "larger call" rationale four times. E.R.10, 17, 32, 34.

That "larger call" distinction of *FAIR* is demonstrably inapt. The boycott in *FAIR* manifestly was in response to a "larger call" for a boycott. Indeed, virtually every law school in the nation opposed the military's then Don't-Ask-Don't-Tell policy, and each boycotted the military based on that "larger call"—including an express call by the accrediting Association of American Law Schools. *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 280-81 (D.N.J. 2003); *see also* E.R.61-62.

(3) Plaintiffs made no attempt to defend this "larger call" formulation in stay briefing below (or in this Court). E.R.57. Instead, as a new third distinction, Plaintiffs argued that *FAIR* arose in the academic context, rather than dealing with "consumer goods": "Whereas [*FAIR*] held that blocking military recruiters from law school campuses is not inherently expressive conduct, *Claiborne* held that political boycotts of consumer goods are inherently expressive." *Id.*

This distinction fails on two levels. First, the Supreme Court has recognized First Amendment protections are uniquely potent in the academic context. *See, e.g.*, *Keyishian v. Board of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967). Second, the boycott at issue here is actually a commercial-supply boycott by a business entity, rather than a "consumer" boycott by individuals; the Supreme Court has refused to extend *Claiborne* to commercial-boycotting conduct. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507-08 (1988) (*Claiborne*'s protections did not extend to "commercial activity with a political impact"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (declining to extend *Claiborne* to commercial boycott by attorneys).

(4) After the State raised these arguments below, E.R.43, Plaintiffs shifted gears yet again into two new distinctions. Plaintiffs' principal new distinction (*i.e.*, their fourth) was that "neither a citation to *Claiborne* nor the word 'boycott' appears anywhere in [*FAIR*]." Dkt. 22-1 at 10.

That is specious. The conduct at issue in *FAIR*—*i.e.*, a concerted refusal to deal with the military—was unambiguously boycotting conduct. *See American Heritage Dictionary* 178 (5th ed. 2015) (defining "boycott" as "To abstain from or act together in abstaining from using, buying, *dealing with*, or participating in…." (emphasis added)).

Indeed, the *FAIR* plaintiffs themselves had no difficulty understanding that they were engaged in a boycott, describing themselves as having engaged in a "*boycott* of any institution that discriminates." Brief for Respondents, *FAIR*, 2005 WL 2347175, at *29 (Sept. 21, 2005) (emphasis added). And they notably cited *Claiborne* four separate times. *Id.* at 17, 29-30. The *FAIR* Court thus was not unaware of *Claiborne*; it simply found *Claiborne* of such minimal relevance as to be unworthy of citation by a single Justice.

(5) Plaintiffs also sought in this Court to distinguish *FAIR* because "the law[] at issue in … [*FAIR*] did not seek to penalize expressive conduct on the basis of hostility to its message." Dkt. 22-1 at 2. But that ignores the legislative history, which confirms that the Solomon Amendment was targeted at one—and *only one*—particular type of boycott and was designed to penalize those who engaged in it. *FAIR*, 547 U.S. at 57-58.

Notably, Plaintiffs' own counsel *used* to understand this, telling the Supreme Court that "[t]he legislative history of the Solomon Amendment makes clear that it was enacted to retaliate against law schools for expressing disapproval of the employment policies of military employers." Brief for ACLU, *FAIR*, 2005 WL 2376813, at *6 (Sept. 21, 2005). Plaintiffs' revisionist recasting of the Solomon Amendment fails.

* * *

Plaintiffs and the district court have thus offered one implausible and ephemeral distinction of *FAIR* after the other. Not one of them can withstand scrutiny.

b. *Longshoremen*

This case is similarly controlled by *Longshoremen*. There, the Supreme Court decisively rejected the proposition that there was any First Amendment right for a union to boycott goods from a country based on political disagreement with its policies.

In *Longshoremen*, a union "stop[ped] handling [Russian] cargoes … to protest the Russian invasion of Afghanistan." 456 U.S. at 214. The "'[u]nion's sole dispute [wa]s with the USSR over its invasion of Afghanistan,'" which the Court acknowledged was necessarily political. *Id.* at 223-26. Faced with an unlawful secondary-boycott claim, the union attempted to raise a First Amendment defense. To no avail.

The Court had little difficulty *unanimously* rejecting the purported "right" to engage in a political boycott against the U.S.S.R.: prohibiting the union's boycott did "not infringe upon the First Amendment rights of the [union] and its members." *Id.* at 226. The Court further explained that it was "even clearer that conduct designed not to communicate but to coerce merits still less consideration

under the First Amendment." *Id.* at 226. The BDS-type boycotts regulated by the Act similarly do not seek to persuade Israel that its policies should be changed because they are in error, but instead seek to coerce a change in those policies through deliberate infliction of economic pain.

Longshoremen is on all fours here: Replace "union" with "lawyer," "Soviet Union" with "Israel," and occupation of "Afghanistan" with "the West Bank," and that effectively is this case. Indeed, Plaintiffs admit they are similarly engaged in a secondary boycott. E.R.107. The district court attempted to distinguish *Longshoremen* on a single ground, reasoning that *Longshoremen* "does not purport to state that there is no constitutional right to engage in boycotting activities," but instead relied upon "the [labor-law] context in which this type of governmental infringement … is justified." E.R.21.

That was patent error. *Longshoremen* did not recognize a First Amendment interest and then conclude that "governmental infringement" of that interest was justified by the government's purportedly unique interest in regulating labor law. Indeed, *Longshoremen*'s terse analysis is dismissive of the idea that any First Amendment interest existed *at all*, announcing succinctly what all nine Justices considered obvious: there was no "protected activity under the First Amendment." 456 U.S. at 226-27. That conclusion is underscored by the absence of any discussion of compelling state interests or narrow tailoring.

The district court's distinction of *Longshoremen*—which rests on a purported balancing of interests found nowhere in that decision—thus cannot stand.

c. Incidental-Burden Cases

Plaintiffs' First Amendment claim also fails under a long line of cases recognizing that economic regulations imposing only incidental burdens on expression do not violate the First Amendment. That is precisely the case here.

"[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.... [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell*, 564 U.S. at 567 (citing *FAIR*); *accord International Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Sorrell*). The Supreme Court has thus "distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose 'incidental burdens' on expression." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1741 (2018).

This well-established incidental-burden rule is "why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs; … and

why antitrust laws can prohibit 'agreements in restraint of trade[.]'" *Sorrell*, 564 U.S. at 567 (citations omitted).

Here, the State has the power to both prohibit discriminatory conduct by businesses and regulate intra-state commerce. *See also infra* Section I.B. Those regulations of commercial conduct at most impose incidental burdens on expression. And that minimal burden is perhaps best expounded by Justice O'Connor, who explained that "[t]he Constitution does not guarantee a right to choose employees, customers, *suppliers, or those with whom one engages in simple commercial transactions*, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (emphasis added).

Any incidental burden the Act imposes thus does not violate the First Amendment.

d. *Briggs*

The district court's opinion also conflicts with the Seventh Circuit's decision in *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984)—the only precedential decision to consider a First Amendment challenge to a statute restricting boycotts of Israel. In *Briggs*, businesses sought to engage in *actual speech* in violation of the federal EAA, in the form of answering questionnaires from boycotting states. *Id.* at 916-18. But even though the companies desired to

speak truthful information (*i.e.*, *pure speech*), the Seventh Circuit rejected the First Amendment challenges.

Briggs has effectively become the authoritative and final word on the constitutionality of anti-Israel boycott prohibitions. Since *Briggs* was decided in 1984, no one has challenged the EAA, even though numerous subsequent enforcement actions were brought. *Supra* at 6.

The district court distinguished *Briggs* principally on the basis that the *Briggs* plaintiffs "were not politically-motivated and thus not deserving of First Amendment protection." E.R.25. But there is nothing talismanic about being "politically-motivated"—for example, uncontested political motivation failed to carry the day in *Longshoremen*. *Supra* at 31-33.

Moreover, the district court simply missed the larger point that *Briggs* involved actual *speech*: the *Briggs* plaintiffs were prevented from *speaking* truthful information by *felony* statute. Here, however, the Act does not prevent any actual speech. Plaintiffs thus at best can advance an expressive-conduct claim, which is analyzed under an intermediate form of scrutiny (*O'Brien*) substantially similar to that applicable to commercial speech (*Central Hudson*). *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987) (explaining that *O'Brien* and *Central Hudson* standards were "substantially similar"). And Plaintiffs' claims thus fail for the same substantial reasons as in *Briggs*.

3. *Claiborne* Does Not Extend To Plaintiffs' Boycotts

Disregarding all of this controlling case law, the district court relied almost entirely on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). But *Claiborne* cannot remotely bear the weight Plaintiffs and the district court placed on it. Indeed, in the 36 years since *Claiborne* was decided, no appellate court has ever found another boycott protected under *Claiborne*. Instead, *every* time a plaintiff has tried to extend *Claiborne* in the Supreme Court or circuit courts, the effort has been rejected. *See, e.g.*, *FTC*, 493 U.S. at 426 (1990); *Allied Tube*, 486 U.S. at 507-08; *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 297 (2d Cir. 1992). The same result should obtain here for three reasons.

First, *Claiborne's* central holding invalidated Mississippi's attempt to impose liability on the NAACP purely for *speech*. The Court thus explained that Mississippi could "not award compensation for the consequences of nonviolent, protected activity," and "[t]he use of speeches, marches, and threats of social ostracism cannot be the basis for a damages award." 458 U.S. at 918, 933. In stark contrast, the Act does not impose any liability on the basis of pure speech. Only conduct. Therefore, *Claiborne's* holding is not applicable here.

Second, *Claiborne* addressed a *consumer* boycott by individuals, rather than a *commercial* boycott by businesses. Consumers' personal choices about the

companies to buy from implicate expression far more readily than commercial-supply decisions (which are far more likely to be governed by mundane economic considerations unrelated to expression). Conversely, the governmental interest in regulating commercial conduct by businesses is more compelling. The Supreme Court therefore made clear that *Claiborne* does not extend to commercial boycotting conduct in *Allied Tube* and *FTC*. *Supra* at 29. The district court at one point seems to have agreed, stating that "the facts in *Claiborne* are very different than the facts we have here," and further that "the First Amendment jurisprudence has developed along the way." E.R.95. But those quite-correct acknowledgements fell somewhere along the wayside.

Third, the *Claiborne* boycott "sought only the equal respect and equal treatment to which [the boycotters] were constitutionally entitled." *FTC*, 493 U.S. at 426. Indeed, "[e]quality and freedom are preconditions of the free market, and not commodities to be haggled over within it." *Id.* at 427. BDS boycotts, however, do not seek to vindicate anyone's constitutional rights. Indeed, they actually *perpetuate* discriminatory conduct—by deliberate infliction of economic injury on Israelis and those doing business with them. The Second Circuit thus found *Claiborne* "readily distinguishable" where the desired boycott sought "to achieve an objective prohibited by valid state and federal [anti-discrimination] statutes." *Jews for Jesus*, 968 F.2d at 297-98. So too here.

4. The Act Is Viewpoint Neutral

It appears that the district court may have viewed the Act as not being viewpoint neutral, reasoning (as part of balancing the equities) that "the State clearly has less intrusive and more viewpoint-neutral means to combat such discrimination." E.R.35. Any such reliance on purported viewpoint discrimination was error.

As an initial matter, the district court likely erred in viewing viewpoint neutrality as a spectrum (*i.e.*, "more viewpoint-neutral means") rather than a binary characteristic. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 479 (2009) (discussing viewpoint-neutrality as a simple requirement rather than spectrum). In any event, it is well-established that anti-discrimination laws "make[] no distinctions on the basis of the organization's viewpoint.'" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Instead, "federal and state antidiscrimination laws … [are] *permissible content-neutral regulation[s] of conduct*." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (emphasis added).

B. The State's Compelling Interests Outweigh Any First Amendment Interests Here

Even if Plaintiffs' boycotting conduct were entitled to any First Amendment consideration, the State's compelling interests motivating passage of the Act are amply sufficient to sustain it against constitutional challenge here.

Because the Act at most regulates expressive conduct, it is at most subject to scrutiny under *O'Brien*—not strict scrutiny. *FAIR*, 547 U.S. at 67. Under that standard, "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* And the Act is constitutional under *O'Brien* for the same reasons here as the Solomon Act was under *FAIR*'s alternative holding. *Id.*

Here, the burden the Act places on expression—denial of public funds—is directly equivalent to the burden placed by the Solomon Amendment, and thus equally "incidental." *Id.* Further, the Act is supported by four compelling government interests: (1) prohibiting discrimination, (2) regulating commerce/general police power, (3) denying state subsidies to actions contrary to state public policy, and (4) denying contracts to unreliable businesses. And the Act promotes all of these interests here *at least* as well as the Solomon Amendment did in *FAIR*—where "the issue [wa]s not whether other means of raising an army and providing for a navy might be adequate," but rather it "suffice[d] that the means chosen by Congress add to the effectiveness of military recruitment." *Id.* The Act here easily "adds to the effectiveness" of all of those four interests.

1. The State Has Compelling Interests In Prohibiting Discrimination

The Act expressly states its anti-discrimination rationale: "Companies that refuse to deal with … Israel, or entities that do business with or in [Israel], make discriminatory decisions on the basis of national origin[.]" ADD-12; *see also* A.R.S. §35-393(1)(b) (prohibiting actions taken "[i]n a manner that discriminates on the basis of nationality, national origin or religion").[1] The State's interest in combatting discrimination is "unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

That "compelling state interest[] of the highest order" is readily sufficient to sustain the Act against First Amendment challenge. The district court appears to have discounted the State's compelling anti-discrimination interests because (1) it imputed illicit motives to the Arizona Legislature based on a single press release and (2) it did not believe that the Act implicated discrimination at all. Both rationales fail.

[1] The Act's prohibition on secondary discrimination (*i.e.*, boycotting companies that do business with Israel/Israelis) is a common feature of federal civil rights laws. *See, e.g.*, *Holcomb v. Iona College*, 521 F.3d 130, 132 (2d Cir. 2008); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) ("[D]iscrimination on the basis of racial affiliation and association is a form of racial discrimination.").

a. The District Court Wrongly Discounted The State's Anti-Discrimination Interests Based On A Press Release

The district court appeared to discount the State's compelling anti-discrimination interests based on its citation to a single press release issued by the Arizona House Republican Caucus. E.R.33. That rationale cannot withstand scrutiny for four reasons.

First, the entire enterprise of imputing improper motives to an entire legislative body based on isolated statements is improper. After all, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *accord DNC v. Reagan*, 904 F.3d 686, 719-20 (9th Cir. 2018). And here, there is no indication that the press release was reviewed by even a single legislator, rather than staffers.

Second, the Act passed by bipartisan supermajorities, so even if there was any disqualifying "taint" at all, it would have to be *very* widespread to deprive the Act of simple majorities. Specifically, the Act passed 42-16 in the House and 23-6 in the Senate. E.R.246-249. Unless that press release somehow disqualified more than three-fourths of Arizona House Republicans, the Act still would have passed by a majority of State Representatives whose motives are unimpeached.

Third, even the district court's cherry-picked language does not preclude a valid anti-discrimination motive. While the district court thought the press release was evidence that legislators believed that anti-Israel boycotts were "not aligned with the State's values," E.R.33, that hardly precludes a valid anti-discrimination rationale: prohibiting discrimination based on national origin and religion (and other grounds) is *very much* one of the State's values. *See, e.g.*, A.R.S. §§41-1441-1443 (Arizona's Public Accommodations Law). Similarly, the district court seized on language that the Act sought to "penalize" those "engaging in actions … intended to penalize [and] inflict economic harm on … Israel, its products or partners." E.R.33. That too is hardly inconsistent with anti-discrimination interests. Title VII, for example, seeks to penalize (by a cause-of-action for damages) those who engage in actions designed to "inflict economic harm" on the basis of race, gender, national origin or religion in employment decisions, and that hardly renders it unconstitutional. 42 U.S.C. 2000e-2.

The district court's real objection appears to be the reference to "politically motivated" actions. E.R.33. But actions being "politically motivated" is not mutually exclusive with—or a get-out-of-jail-free card from—those actions being discriminatory. Jim Crow segregation, for example, was the prevailing ideology and practice of much of the South for decades, and it was very much politically motivated. But that hardly means that Civil Rights Act of 1964 violates the First

Amendment. Moreover, Congress itself declared its opposition to BDS boycotts as "politically motivated actions" in the actual *text* of the 2016 Trade Bill. 19 U.S.C. §4452(b)(4).

Fourth, the dangers of the approach adopted by the district court are difficult to overstate. If applied consistently, there are huge numbers of statutes that will be invalidated because one or a few supporting legislators (or their staff) spoke out-of-turn. And if applied inconsistently, the district court's approach is an invitation to judicial activism as judges deploy it selectively—and solely—against laws that contravene their own policy preferences.

For all of these reasons, the district court's discounting of the State's anti-discrimination motivation based on a single press release was clear legal error.

b. The State Permissibly Concluded That Boycotters Of Israel Discriminate Based On Nationality, National Origin And Religion

The district court also appears to have discounted the State's anti-discrimination interests because, in its view, "boycotts of Israel" and those doing business with Israel do not involve any discriminatory conduct against Israelis at all. *See* E.R.34 (reasoning that "[t]he State … produced no evidence that Arizona businesses have or are engaged in discriminatory practices against Israel, Israeli entities, or entities that do business with Israel"). That is both semantic and substantive nonsense.

To refuse to do business with individuals and entities on the basis of their nationality is to discriminate on the basis of nationality/national origin[2]—*by definition*. *See, e.g.*, *Athenaeum v. National Lawyers Guild, Inc.*, No. 653668/16, 2017 WL 1232523, at *5-7 (N.Y. Sup. Ct. Mar. 30, 2017) (holding that blanket refusal to deal "because Plaintiff [wa]s an Israeli corporation" stated viable claim of national-origin discrimination). Boycotts against Israel and Israelis are national-origin discrimination under any reasonable construction of that term, just as blanket refusals to conduct any business with Canadians, Mexicans, or the Dutch would be. The district court's and Plaintiffs' reasoning flouts the obvious truism that Israel is overwhelmingly populated by *Israelis*—i.e., individuals and businesses with Israeli national origin. To boycott Israel is necessarily to discriminate on the basis of Israeli national origin. And such boycotts necessarily inflict uniquely disfavored treatment—*i.e.*, *discrimination*—on one particular group: those with Israeli national origin, who bear the brunt of the economic pain that BDS boycotts specifically intend to inflict upon them.

The Act also reflects the reality that boycotts against Israel disproportionately impact members of the Jewish faith, and such boycotts often have anti-Semitic motivations. *See, e.g.*, Greendorfer, Marc A., *The BDS*

[2] Because the distinction between nationality and national origin is immaterial for present purposes, those terms are used synonymously herein.

Movement: That Which We Call A Foreign Boycott, by Any Other Name, Is Still Illegal, 22 Roger Williams U. L. Rev. 1, 29, 37 (2017); *see also Sinai v. New England Tel. & Tel. Co.*, 3 F.3d 471, 474 (1st Cir. 1993) ("That Israel is a Jewish state, albeit not composed exclusively of Jews, is well established."). The First Amendment does not leave the State powerless to address such anti-Jewish animus.

More fundamentally, the district court's error was to arrogate to itself the power of deciding what classes of persons may be protected—or not—from discrimination by commercial businesses; that is a decision for legislators, not judges. *See, e.g.*, *Masterpiece Cakeshop*, 138 S.Ct. at 1728 ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals[.]"). Congress, for example, has chosen to protect only those who are 40-or-more years old from age discrimination. *See* 29 U.S.C. §631. Federal courts have no license to invalidate that law or draw different lines based on their views of whether age discrimination against 41-year-olds is actually benign.

So too with the district court's apparent view that systematic disfavoring Israelis in economic decisions is a benign form of discrimination. Israelis, of course, surely (and correctly) disagree. But the broader—and controlling—point is that governments have the constitutional power to define that discrimination as malignant, rather than benign. History is replete with individuals that thought

discrimination against Israelis/Jews was benign or outright desirable. The State can constitutionally disagree.

c. The State's Compelling Interest In Prohibiting Discrimination Sustains The Act

Because the district court discounted the State's anti-discrimination interests entirely, it never genuinely balanced them against the purported First Amendment considerations at issue. Here, that balancing mandates upholding the Act.

The Supreme Court has repeatedly upheld anti-discrimination laws against First Amendment challenges. In *Jaycees*, for example, the Court upheld a Minnesota law forbidding gender discrimination, acknowledging that the state's anti-discrimination interests may justify potential infringements on First Amendment interests. 468 U.S at 612, 628. That same year, the Court upheld Title VII against First Amendment challenge by a large law firm that discriminated in their hiring and promotion activities, stating "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but *it has never been accorded affirmative constitutional protections*." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)) (emphasis added) (quotation marks omitted).

Similarly, when private clubs challenged anti-discrimination laws in New York and California that prevented "an association from using race, sex, and

[other] specified characteristics" in determining its membership, the Court rejected their First Amendment claims. *See N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *Rotary Club*, 481 U.S. at 539, 550.[3]

This Court reiterated these fundamental principles of First Amendment/anti-discrimination laws as recently as last month in *National Association of African-American-Owned Media v. Charter Communications, Inc. ("NAAAOM")*, 908 F.3d 1190 (9th Cir. 2018). There, this Court rejected a First Amendment challenge to an anti-discrimination statute where (as here) at most intermediate scrutiny applied. *Id.* at 1201-04. This Court again concluded that an anti-discrimination measure was viewpoint neutral and narrowly tailored. *Id.* This Court further explained that discriminatory acts "cause *unique evils* that government has a *compelling interest* to prevent" and that "'such practices are entitled to *no constitutional protection*.'" *Id.* at 1203 (quoting *Jaycees*, 468 U.S. at 628) (emphasis added). And, if anything, *NAAAOM* involved a stronger First Amendment claim—there the statute forced a company to express/carry *content* it desired not to, rather than merely impacting scarcely expressive computer and printer commercial-purchasing decisions.

[3] Even in cases where the Supreme Court has blessed a First Amendment speech challenge to an anti-discrimination law, that has led only to an as-applied exception, not facial invalidation. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

2. The Act Is A Permissible Exercise Of The State's Police Power And Power To Regulate Commerce

It is "beyond dispute" that even those engaged in inherently expressive activities, such as publishing newspapers, may still be subject "to generally applicable economic regulations[.]" *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). Newspapers can thus be subjected to antitrust laws, labor laws, and investigatory subpoenas even though such laws might incidentally burden expression. *Id.* (collecting cases).

The regulated conduct at issue is plainly commercial activity. And the State has properly acted to regulate that commercial activity to align it with the State's public policy objectives and values. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power … to provide for the public health, safety, and morals" and is a proper "basis for legislation."). Israel is one of the precious few democracies in the Middle East and an important U.S. trading partner and ally. 19 U.S.C. §4452(a)(1). The State has reasonably acted to prevent commerce within the State from being used as an economic weapon against Israel and Israelis.

That is particularly true as the effect—and often goal—of BDS boycotts is to strengthen the hand of the Palestinian Liberation Organization, which pays cash stipends to the families of terrorists, and its governmental coalition partner—and terrorist organization—Hamas. E.R.230, 235, 242. The First Amendment does not

leave the State powerless to prevent its commerce from furthering such unsavory—and frequently murderous—ends.

3. The State's Interest In Declining To Subsidize Boycotts That Are Discriminatory And Contrary To State Public Policy Sustains The Act

The State also has a compelling interest in not subsidizing activities that are contrary to State public policy. As a practical matter, this interest is subsumed into the unconstitutional-conditions doctrine, discussed next. *Infra* Section I.C.

C. The First Amendment Does Not Compel The State To Subsidize Plaintiffs' Boycotts, Even If They Cannot Be Outright Prohibited

As explained above, the Act would be constitutional even as a direct, criminal prohibition of conduct by *everyone* in Arizona—much as the EAA is nationally. That alone is sufficient to sustain the Act against any "unconstitutional condition" argument. *See FAIR*, 547 U.S. at 59-60.

But the Act is not nearly so coercive. Instead, it merely affects those who may obtain public monies from government contracts. The Act thus merely denies a *subsidy* to those engaged in conduct defined by the Act. They are still free to engage in boycotts of Israel; they just cannot demand public financial assistance from the State in carrying out those boycotts.

1. The First Amendment Does Not Compel The State To Subsidize Boycotts Of Israel

The Supreme Court has long made clear that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right[.]" *Regan*,

461 U.S. at 549; *accord United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."). For that reason, governments may impose criteria "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). And the government's prerogative to deny public subsidies is uniquely powerful when discrimination is at issue. *See Bob Jones Univ.*, 461 U.S. at 604; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion) ("It is beyond dispute that any public entity … has a compelling interest in assuring that public dollars … do not serve to finance the evil of private prejudice.").

Regan is particularly instructive. It is undisputed that citizens and organizations have a First Amendment right to lobby the government. Congress, however, chose to give organizations engaging in lobbying activities (501(c)(4) organizations) less favorable tax treatment than those that do not (501(c)(3) organizations). *See Regan*, 461 U.S. at 543-44. That tax differential was challenged as placing an "unconstitutional condition" on exercising the right to lobby. *Id.* at 545. Unsuccessfully.

The *Regan* Court explained that "Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant

a benefit … to a person who wishes to exercise a constitutional right." *Id.* The Court "again reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.* at 546 (citation omitted); *see also Norwood*, 413 U.S. at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."). The *Regan* Court also did not require the government to show that the marginal dollars that would otherwise obtain to the organization through more-favorable tax treatment would be spent on lobbying; it was sufficient that the organization engaged in lobbying *at all*. 461 U.S. at 544.

The Court further explained that the plaintiff organization could "obtain [the desired tax treatment] for its non-lobbying activity by returning to [a] dual structure … with a §501(c)(3) organization for non-lobbying activities and a §501(c)(4) organization for lobbying." *Id.*

The same result should obtain here. The State's decision not to subsidize Plaintiffs' boycott with public funds "has not infringed any First Amendment rights[.]" *Id.* at 546. And if Jordahl would like to boycott outside of his governmental contracts, he may do so either in his personal capacity or by setting up a separate business entity to perform his non-governmental work. *See id.* at 544-46; *Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017, 1024-

1029 (9th Cir. 1998) (affirming regulation that allowed that "if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient" as "consistent with … *Regan*"); E.R.254, 256-257.

Regan and *Legal Aid Society* are hardly outliers. Cases where governments have constitutionally declined to fund activities they could not prohibit outright are numerous—often with Plaintiffs' counsel filing *amicus* briefs in support of the government. *See, e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010). In particular, governments may condition public monies on acceptance of non-discrimination policies. *See Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (Congress could require universities to provide equal treatment to women as a condition of receiving federal funds); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004) (same for non-discrimination based on disability). There is no legitimate reason why Congress may compel universities and agencies not to discriminate on the basis of sex/disability to receive federal funds, but the State cannot condition receipt of state funds on non-discrimination on the basis of national origin and religion.

The State's anti-subsidization interests are particularly compelling here, given the Arizona Legislature's finding that contractors engaged in boycotts of Israel are unreliable contracting partners. ADD-12. The State could constitutionally conclude that companies overly concerned with political matters

are less reliable and efficient than those focused solely on conducting the business they contracted to perform. *Cf. Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 598 (2008) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated … to a significant one" when it acts as "a proprietor"); *see also* Dkt. 30 at 18-19 (AJC Amicus Brief).

2. The District Court Erred By Holding There Was No Evidence Of Subsidization

The district court refused to follow *Regan* and its progeny because, in its view, the State had only "speculative fears of subsidizing boycotts of Israel" and and that "by including politically-motivated boycotts of Israel … the Act is unconstitutionally over-inclusive." E.R.34. That reasoning was erroneous for three reasons.

First, money is fungible, and the provision of public funds inevitably results in a subsidization of the activities of the fund recipient. The *Regan* Court, for example, did not examine specifically whether the marginal funds that would otherwise accrue to an organization by more favorable 501(c)(3)-tax-treatment would actually be spent directly on lobbying. Instead, it was sufficient for unconstitutional-conditions-doctrine purposes that *any* funds would be spent on lobbying. *Regan*, 461 U.S. at 544-46.

So too here. The provision of *any* public funds to an entity engaged in discriminatory conduct in contravention of Arizona public policy is necessarily a

subsidy of that activity. Given the fungibility of money, the State was not required to prove trace specific public dollars to specific discriminatory acts.

Second, the district court's view that inclusion of any "politically-motivated" conduct rendered the Act "over-inclusive," E.R.34, is utterly impossible to reconcile with *Regan*. There, the activity that the government refused to subsidize was lobbying, *Regan*, 461 U.S. at 545—about as "politically motivated" of an activity as one can possibly imagine.

Third, the district court's error is particularly apparent given in its failure to address that federal law has banned national-origin discrimination in employment by all federal contractors for more than 50 years. *See* Exec. Order No. 11, 246 (1965); E.R.154. No court has ever required the federal government to prove that the funds from a contract at issue were directly subsidizing such discrimination. And there is no doubt, for example, that even if the federal government only contracts with one division of a company, it may nonetheless fairly demand the entire company refrain from prohibited discrimination.

Indeed, it has been virtually unquestioned law for more than half a century that the government can constitutionally decide that even a single federal dollar spent on a contractor engaged in national-origin discrimination is too much. The district court's rupture from all previous precedent on this point merits reversal.

3. This Case Is Governed By The Unconstitutional Conditions Doctrine, Not *Pickering*

The district court may have thought that *Regan* did not apply here because *Pickering v. Board of Education, 205*, 391 U.S. 563 (1968) governed instead. E.R.29 & n.9. If so, that was both erroneous and irrelevant.

The district court notably quoted the Supreme Court's recognition in *Janus v. AFSCME*, that *Pickering* was a "poor fit" for mandates imposed as a condition of public employment. E.R.29 n.8 (quoting *Janus v. AFSCME*, 138 S.Ct. 2448, 2473 (2018)). But although the district court noted this obvious tension with a "*But see*" citation, it made no effort to reconcile its opinion with *Janus*.

In any event, *Pickering* is only triggered by when a party "[(1)] spoke as a citizen [(2)] on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Plaintiffs cannot satisfy either requirement. As an initial matter, the regulation at issue here governs *conduct*, not speech, and the district court did not cite any precedential authority extending the protections of *Pickering* to economic conduct. E.R.27-29. It certainly never cited anything recognizing a public contractor's desire to violate a state anti-discrimination requirement as "speech" on a "matter of public concern." Moreover, Plaintiffs themselves admitted below that "[f]unding conditions requiring an entity to comply with antidiscrimination laws primarily regulate unprotected conduct[.]" E.R.162-163 n.10. Plaintiffs' "unprotected conduct" is thus not protected speech under *Pickering*.

Nor was Jordahl's business entity speaking as a "citizen" when it performed the Jail District Contract. "When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer." *Janus*, 138 S.Ct. at 2474. Thus, in performing the Jail District Contract—and buying printers and computers necessary for that task—it is really the government "speaking"—not Jordahl (to the extent that anyone is "speaking" at all). *See also Garcetti*, 547 U.S. at 421 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes[.]"); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

And, to the extent that Jordahl wishes to have a business entity that can boycott Israel outside of his public contracts, he can establish a separate business entity to do so, *supra* at 9—just as the organizations in *Regan* could set up a separate 501(c)(4) organization to perform their lobbying activities, *supra* at 51-52. The Act thus does not regulate any "speech" "on matters of public concern" that Jordahl's business makes "as a citizen."

4. Plaintiffs' Claim Fails Under *Pickering*.

Even if *Pickering* applied, however, the Act is still constitutional. *Pickering* notably provides a balancing test that is move favorable to the government than that applicable to speech of the general public. *See, e.g.*, *San Diego v. Roe*, 543 U.S. 77, 80, 82-84 (2004). Anti-discrimination statutes regulating the general public have been widely upheld against First Amendment challenge because of governments' compelling interests in prohibiting discrimination anywhere within their borders. *Supra* at 46-47. *A fortiori*, anti-discrimination measures solely applicable to government contractors are even more plainly constitutional under *Pickering*'s more-generous balancing test.

Moreover, neither Plaintiffs nor the district court have cited *any* precedential authority striking down an anti-discrimination statute under *Pickering*, either as-applied or facially. There is no reason for this case to be the first.

D. The District Court's Facial Holding Is Unreasoned And Patently Erroneous

The district court also committed clear and fundamental error by conflating as-applied and facial challenges. Just as in *Stormans*, "the district court erroneously treated the as-applied challenge brought in this case as a facial challenge." 586 F.3d at 1140. Reversal is equally warranted here.

After analyzing Plaintiffs' as-applied challenge, the district court here notably announced, *ipse dixit*, that the Act "violate[d] the First Amendment on its

face"—strangely as part of declining to impose a security requirement (which no party actually sought). E.R.36. But that court provided *absolutely no analysis* that could support such a holding, which appears to have been a misplaced afterthought. Plaintiffs notably relied on an overbreadth theory to advance their facial claim. E.R.161 n.7, 283. But the words "overbroad" and "overbreadth" simply do not appear *anywhere* in the district court's opinion. Nor did the district court ever analyze the Act under the "no set of circumstances" standard of *Salerno*. 481 U.S. at 745.

There is thus *no* reasoning that could support the district court's facial holding. Instead, that court committed flagrant error by leaping from its as-applied analysis to a conclusion of facial invalidity. That error is remarkably disrespectful of the profound federalism and judicial restraint concerns necessarily raised whenever a federal court is asked to invalidate facially a statute enacted by state elected representatives. It merits swift and firm correction here.

E. Accepting Plaintiffs' Arguments Would Upend Federal Sanctions And Export Control Laws

The district court's opinion is also bereft of any serious grappling with the practical consequences of its facial constitutional holding—which, if affirmed by this Court, would likely have grievous consequences for the EAA and federal sanctions laws generally.

The district court notably distinguished the boycott at issue in *Briggs*, in which the Seventh Circuit upheld the EAA, largely on the basis that the business in *Briggs* lacked any political motivation. E.R.25-26. But if all it took to evade EAA was to mouth the words "political boycott," the Act would have sunk under a wave of as-applied challenges long ago. Instead, the complete absence of post-1984 challenges is strong evidence that few besides Plaintiffs and the district court believe that the EAA and *Briggs* can so easily be bypassed/distinguished.

Moreover, the concern of the EAA was that the Gulf States would be able to use their economic leverage to coerce companies into boycotting Israel. *Supra* at 5-6. But if the Gulf States could successfully coerce companies into boycotting Israel, there is little reason to doubt that they could further coerce the companies into mouthing the words that their boycott was "political," rather than the product of economic duress.

More generally, the district court's reasoning could upend federal sanctions law. If Plaintiffs have a First Amendment right not to do business with Israel, why would they also not have a corresponding right to do business *with* countries like North Korea, Iran, Sudan, or Apartheid South Africa? Certainly doing business with such countries would have far more obvious expressive value than commercial supply decisions: intentionally buying a product with a "Made in North Korea" label is, after all, *a lot* more expressive than buying a printer with a

"Lexmark" decal. And if the Act is impermissible viewpoint discrimination because it only addresses Israel, how is a North Korean sanctions measure any different?

The State raised this argument below, E.R.152, 258-259 n.9, but neither the district court nor Plaintiffs ever offered any explanation of how accepting their First Amendment arguments would not unravel federal sanctions law. Those perhaps unintentional—but quite unavoidable—consequences are another reason why reversal is warranted here.

II. THE DISTRICT COURT IMPROPERLY RELIED ON HARMS THAT ARE CONJECTURAL AND CONTRIVED

The district court also committed legal error by failing to require Plaintiffs to demonstrate that they were "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Here, Plaintiffs' injuries were entirely conjectural and artificial, rather than concrete and likely.

Any injury from the purported "denial" of the public contracts at issue is strained to the point of contrivance. Although Plaintiffs were allegedly denied the Jail District Contract, Jordahl P.C. continued to perform under that contract and admitted he fully expected to be paid for his work. E.R.63, 261. The kabuki dance of not signing the certification while continuing to perform the contract and expecting to be paid might have created a justiciable controversy, but it hardly

warrants an "extraordinary remedy [that is] never awarded as of right." *Winter*, 555 U.S. at 24.

As Plaintiffs expected all along, Plaintiffs have by now been paid. *See* Dkt. 8-4. Any complaints about the timing of payment are the quintessential sort of injuries that are reparable by monetary damages. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974).

In addition, any impact on Plaintiffs' expression is purely conjectural. The putative First Amendment "expression" that Plaintiffs seek to engage in here is boycotting conduct, which can only be effectuated by purchasing/non-purchasing decisions. Plaintiffs notably identified only a *single* relevant potential purchase on the horizon that might be affected by Plaintiffs' boycott: a desktop computer. E.R.181. There is also only one seller of computers that Plaintiffs are boycotting: HP. E.R.288. Both of these facts were undisputed below. E.R.63-64, 261.

Plaintiffs further admit that Jordahl has not performed the basic research to determine whether HP—or Dell or Lenovo, for example—sells the desktop best suited for Plaintiffs' needs. E.R.181. If, for example, Plaintiffs conclude a Dell desktop is most suitable, Plaintiffs' boycotts—and thus Plaintiffs' putative First Amendment rights—are not implicated *at all*. Thus, Plaintiffs' failure to conduct that commercial research necessarily means that their injury is entirely speculative:

even Plaintiffs do not know if their boycott actually implicates the sole relevant purchasing decision. Such purely hypothetical injury fails under *Winter*.

Moreover, the purported First Amendment injury is even more attenuated here. The desktop (and non-portable) computer would be placed in Jordahl's office, where no client has ever set foot. *Supra* at 23-24. The "harm" to Plaintiffs' expression is thus effectively imperceptible.

The district court attempted to circumvent *Winter*'s requirement of likely irreparable harm by relying on the abstract alleged deprivation of First Amendment rights—which it viewed as "irreparable per se"—without requiring that the "injury" have any concrete manifestation in the real world. E.R.35. This was error. Even in the First Amendment context, "conjectural chill is not sufficient to establish real and imminent irreparable harm." *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999).

Indeed, affirmance of the district court's "irreparable per se" holding would inescapably create a square circuit split with *at least* the D.C., Second, Third and Fifth Circuits. *Id.*; *Google, Inc. v. Hood*, 822 F.3d 212, 227-28 (5th Cir. 2016) (plaintiffs must demonstrate that their "First Amendment interests are either threatened or in fact being impaired"); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006); *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). Notably, the D.C. Circuit has explicitly rejected the "per se irreparable

harm" rationale the district court embraced here. *Compare England*, 454 F.3d at 301 ("'There is no *per se* rule that a violation of freedom of expression *automatically* constitutes irreparable harm[.]'") *with* E.R.35.

In addition, the contrived nature of Plaintiffs' injury further precludes injunctive relief. Plaintiffs *refused* to sign a certification under the Act. Both Jordahl and Jordahl P.C. were thus entirely unconstrained by the Act from engaging in any boycotting conduct they wished; nor did the Act meaningfully deprive Plaintiffs of the Jail District Contract. Plaintiffs' quite-successful evasion of the Act precludes any irreparable injury: Plaintiffs are not suffering any injury from an Act they successfully eluded—and effectively rendered irrelevant—even before any injunction was ever entered.

III. THE PRELIMINARY INJUNCTION IS PLAINLY OVERBROAD

Even if any injunctive relief were appropriate, the blanket and statewide injunction ordered by the district court rests on legal errors and is an abuse—indeed abdication—of discretion. It is axiomatic that "a district court abuses its discretion when it makes an error of law." *Shelley*, 344 F.3d at 918. And it is equally well established that "'[a]n overbroad injunction is an abuse of discretion.'" *Stormans*, 586 F.3d at 1140 (citation omitted).

Here the district court abused its discretion in four distinct ways: (1) in its balancing of the equities, (2) by failing to provide any reasoning to support

injunction's scope, (3) by issuing an overbroad injunction, and (4) by failing to consider severability.

A. The District Court Failed To Balance The Equities Properly

The district court was required to evaluate whether Plaintiffs had "establish[ed] … that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The lower court, however, devoted only a terse paragraph to both requirements, which relied almost entirely on its finding of a First Amendment violation. E.R.35. That threadbare, bootstrapping analysis cannot sustain the injunction's maximalist scope.

The district court gave virtually no weight to the State's harms because it reasoned the Act "infringes on First Amendment protections." *Id.* But this Court has made plain that "simply raising a serious First Amendment claim is not enough to tip the hardship scales." *Stormans*, 586 F.3d at 1138. But that is precisely what the district court held, and in doing so committed the same error as in *Stormans*. E.R.34-35.

The district court similarly failed to consider this Court's categorical holding that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wil*son, 122 F.3d 718, 719 (9th Cir. 1997). Indeed, the district court's opinion is remarkably blasé about thwarting the will of Arizona's elected legislators—a conclusion

underscored by its complete failure to engage in any tailoring or severability analysis (as well as its blanket refusal to consider the views of *any amici*, E.R.143).

The district court's analysis of the public interest was similarly cramped and deficient. The lower court ignored entirely that Congress had expressly declared "boycotts … against Israel … are contrary to the principle of nondiscrimination," 19 U.S.C. §4452(b)(5), giving that unchallenged declaration no weight at all. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" (citation omitted)). It similarly gave no weight to the express declaration of public policy of the Arizona Legislature, as well as 24 other states. *See* Appendix. Nor did the lower court consider the minimal (at best) harms to non-parties. *See Stormans*, 586 F.3d at 1139 ("[T]he overbreadth of the district court's injunction implicates the public interest.").

Indeed, Plaintiffs presented scant evidence that any party other than Plaintiffs objected to the Act under the First Amendment. And the State is only aware of two such parties, who notably lacked Article III standing and ripeness. *See American Muslims for Palestine, v. ASU,* No. 18-670, 2018 WL 6250474 (D. Ariz. Nov. 29, 2018). Given the extremely low rate of objectors, the district court should have given serious consideration as to whether an injunction limited to

Plaintiffs would better serve the public interest. Instead, it gave none at all. E.R.35.

B. The District Court Completely Failed To Justify Its Statewide Injunction

The district court's order simply leapt from its as-applied merits reasoning to a blanket, statewide injunction against *all* enforcement of the Act, E.R.36—without a single word of explanation for the scope of the injunction. In doing so, the district court simply abdicated its duty to tailor injunctive relief. That alone constitutes an abuse of discretion. *See*, *e.g.*, *Taylor v. Soc. Sec. Admin.*, 842 F.2d 232, 233 (9th Cir. 1988) ("A district court's failure to exercise discretion constitutes an abuse of discretion.").

In particular, the Supreme Court has mandated that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted) (emphasis added). At a bare minimum, the district court was required to provide *some* explanation of why an injunction limited to Plaintiffs would not provide them complete relief. *Cf. Horne v. Flores*, 557 U.S. 433, 471 (2009) (reversing statewide injunction where district court provided unpersuasive rationale in support).

The district court's lack of reasoning may have flowed from its failure to distinguish between as-applied and facial challenges. *See supra* at 57-58. If so,

that was legal error independently requiring reversal. *See Stormans*, 586 F.3d at 1140.

C. The District Court's Injunction Is Overbroad

Even if the injunction's blanket, statewide scope was robustly—rather than non-existently—reasoned, reversal would still be required because the injunction is plainly overbroad for three reasons.

First, the district court's constitutional analysis cannot support the injunction's broad scope. Here, the court wrongly extended its injunction to all boycotts of Israel—*e.g.*, even those boycotts that are non-political and/or flagrantly based on discriminatory animus. But the district court's reasoning—even if correct—could at most support injunctive relief for boycotts that are (1) political in nature and (2) are not motivated by discriminatory animus. By issuing a blanket injunction, the district court failed to "'tailor[] to remedy the specific harm alleged.'" *Id.*

As in *Stormans*, the injunction is "fatally overbroad because it is not limited to the only type of refusal that may be protected by the First Amendment[.]" *Id.* at 1141. So too here: the district court's injunction extends to purely commercial and/or discriminatory boycotts that are not protected by the First Amendment even under its order. That is particularly problematic here as Plaintiffs did not provide

any evidence that anyone else is engaged in such putatively political/non-discriminatory boycotts.

Second, the district court violated this Court's general rule that "'in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs.'" *Takiguchi v. MRI Int'l, Inc.*, 611 F. App'x 919, 920 (9th Cir. 2015). That rule is particularly appropriate for *preliminary* injunctions, because this Court "particularly disfavor[s]" preliminary injunctions that "go[] well beyond simply maintaining the status quo *pendente lite*.'" *Stanley v. USC*, 13 F.3d 1313, 1320 (9th Cir. 1994) (cleaned up). But the district court offered no basis for extending its injunction beyond named Plaintiffs, and therefore abused its discretion.

Third, the Supreme Court has explained that "two instances [of constitutional violations] were a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." *Lewis v. Casey*, 518 U.S. 343, 359 (1996). But here Plaintiffs have at most established *one* such violation. Similarly, *Horne v. Flores* reversed a statewide injunction where "the only violation claimed or proven was limited to a single district." 557 U.S. at 470-71. The district court's injunction thus flouts *Lewis* and *Horne*.

D. The District Court Committed Legal Error In Failing To Conduct Any Severability Analysis

The district court also committed patent legal error by its blanket refusal to engage in any severability analysis. That error is particularly egregious as the Act contains an express severability provision requiring maximum possible severance. A.R.S. §35-393.03. The district court, however, never acknowledged either the *existence* of that severability clause or its own independent obligation to consider severability. This is clear, reversible error. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996).

The Supreme Court has repeatedly instructed federal courts to "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte*, 546 U.S. at 329 (2006). Courts thus must "try not to nullify more of a legislature's work than is necessary, for [courts] know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* (citation omitted)

The district court's injunction flouts the judicial restraint that *Ayotte* demands. Rather than trying to save any part of the Act, it enthusiastically jumped at the opportunity to invalidate it *in toto*. Its blasé dismissal of fundamental principles of federalism and judicial restraint requires reversal for four reasons.

First, the district court failed to analyze whether allowing contractors to set up separate business entities to perform governmental contracts would address the

constitutional problems it identified. That arrangement was endorsed by the Supreme Court in *Regan*. 461 U.S. at 544. And the State specifically argued that the Act allows an equivalent arrangement here. E.R.155, 254, 256-257; *supra* at 9, 51-52. And even if the district court disagreed with that conclusion, it could have severed that aspect of the Act—which the State specifically argued. E.R.155 n.8.

Second, the district court wrongly failed to preserve the Act insofar as it bans boycotts that "discriminate[] on the basis of nationality, national origin or religion[.]" A.R.S. §35-393(1)(b). Where there is specific evidence that a boycott is discriminatory, the district court's opinion fails to establish that the Act is unconstitutional. E.R.34-36.

That error is particularly important here as typical BDS boycotts—unlike Plaintiffs'—are *blanket* boycotts of all of Israel, which engage in *per se* discrimination on the basis of national origin. E.R.218; *see also generally* Greendorfer, *supra* at 44-45. Where there is clear evidence of discriminatory animus—a frequent occurrence with BDS boycotts—the State should be permitted to enforce the Act.

Third, the district court erred by failing to save the Act insofar as it applies to commercial—*i.e.*, non-political—boycotts. That court distinguished *Briggs* largely because the *Briggs* boycotts "were not politically-motivated." E.R.25. But

the district court offered no reason at all why non-political boycotts could not be constitutionally prohibited under *Briggs*.

Fourth, the district court should have saved the Act insofar as it applies to boycotts that are not in response to "larger calls." That is the sole basis on which the district court distinguished *FAIR*, E.R.23-24, *supra* at 28—which should otherwise control absent that distinction (assuming that distinction was legally sound at all).

CONCLUSION

For the foregoing reasons, the district court's order issuing a blanket, statewide preliminary injunction should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The State is not aware of any related cases pending in this Court that are related to this appeal, as defined and required by Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

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Signature: s/ Drew C. Ensign **Dated:** December 18, 2018

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing State of Arizona's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 18, 2018, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign

APPENDIX

STATES THAT HAVE ADOPTED PROHIBITIONS ON FORMS OF BOYCOTTS AGAINST ISRAEL

Alabama
- SB 81, passed and signed into law in 2016
- https://legiscan.com/AL/text/SB81/2016

Arizona
- HB 2617, passed and signed into law in 2016
- https://www.azleg.gov/legtext/52leg/2r/bills/hb2617p.pdf

Arkansas
- SB 513 passed and signed into law in 2017
- https://legiscan.com/AR/text/SB513/id/1551482

California
- AB 2844, passed and signed into law in 2016
- https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2844

Colorado
- HB 16-1284 passed and signed into law in 2016
- http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/FFEE6B72C4AB699C87257F240063F4A6?open&file=1284_rer.pdf

Florida
- SB 86 passed and signed into law in 2016
- https://www.flsenate.gov/Session/Bill/2016/0086

Georgia
- SB 327 passed and signed into law in 2016
- http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/327

Illinois

- SB 1761 passed and signed into law in 2015
- http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=SB&DocNum=1761&GAID=13&LegID=&SpecSess=&Session=

Indiana

- HB 1378 passed and signed into law in 2016
- https://iga.in.gov/legislative/2016/bills/house/1378#document-916c8474

Iowa

- HF 2331 passed and signed into law in 2016
- https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=HF%202331

Kansas

- HB 2482 passed and signed into law in 2018
- http://www.kslegislature.org/li/b2017_18/measures/hb2482/

Louisiana

- Governor Edwards signed an executive order in 2018
- https://www.doa.la.gov/osp/PC/EO_JBE_2018-15_BDS_Israel.pdf

Maryland

- Governor Hogan signed an executive order in 2017
- https://content.govdelivery.com/attachments/MDGOV/2017/10/23/file_attachments/900819/Executive%2BOrder%2B01.01.2017.25.pdf

Michigan

- HB 5821 and HB 5822 were passed and signed into law in 2017
- https://trackbill.com/bill/mi-hb5821-state-financing-and-management-purchasing-prohibition-of-contracting-with-certain-discriminatory-businesses-that-boycott-certain-entities-provide-for-amends-sec-261-of-1984-pa-431-mcl-18-1261/1308784/

- https://trackbill.com/bill/mi-hb5822-state-financing-and-management-purchasing-prohibition-of-contracting-with-certain-discriminatory-businesses-provide-for-amends-1984-pa-431-mcl-18-1101-18-1594-by-adding-sec-241c-tie-bar-with-hb-582116/1308785/

Minnesota

- HF 400 passed and signed into law in 2017
- https://www.revisor.mn.gov/bills/bill.php?f=HF0400&y=2017&ssn=0&b=house

Nevada

- SB 26 passed and signed into law in 2017
- https://www.leg.state.nv.us/Session/79th2017/Reports/history.cfm?BillName=SB26

New Jersey

- A 925 passed and signed into law in 2016
- http://www.njleg.state.nj.us/2016/Bills/A1000/925_I1.PDF

New York

- Governor Cuomo signed an executive order in 2016
- https://www.governor.ny.gov/news/no-157-directing-state-agencies-and-authorities-divest-public-funds-supporting-bds-campaign

North Carolina

- HB 161 passed and signed into law in 2017
- https://ncleg.net/Sessions/2017/Bills/House/HTML/H161v0.html

Ohio

- HB 476 passed and signed into law in 2016
- https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-476

Pennsylvania

- HB 2107 passed and signed into law in 2016
- http://www.legis.state.pa.us/cfdocs/billInfo/BillInfo.cfm?syear=2015&sind=0&body=H&type=B&bn=2107

Rhode Island

- H 7736 passed and signed into law in 2016
- http://webserver.rilin.state.ri.us/billtext16/housetext16/h7736.pdf

South Carolina

- H 3583 passed and signed into law in 2015
- http://www.scstatehouse.gov/sess121_2015-2016/prever/3583_20150319.htm

Texas

- HB 89 passed and signed into law in 2017
- http://www.legis.state.tx.us/tlodocs/85R/billtext/html/HB00089I.htm

Wisconsin

- Governor Walker signed an executive order in 2017
- https://walker.wi.gov/sites/default/files/executive-orders/EO%20%23261_0.pdf

No. 18-16896

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.
Plaintiff-Appellees.

v.

THE STATE OF ARIZONA and MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,
Defendant-Appellants

and

JIM DRISCOLL, COCONINO COUNTY SHERIFF,
Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 3:17-cv-08263

STATUTORY ADDENDUM

MARK BRNOVICH
ATTORNEY GENERAL

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Oramel H. (O.H.) Skinner
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Dated: December 18, 2018

STATUTORY ADDENDUM CONTENTS

A.R.S. § 35-393

§ 35-393. Definitions

In this article, unless the context otherwise requires:

1. “Boycott” means engaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with Israel or with persons or entities doing business in Israel or in territories controlled by Israel, if those actions are taken either:

(a) In compliance with or adherence to calls for a boycott of Israel other than those boycotts to which 50 United States Code § 4607(c) applies.

(b) In a manner that discriminates on the basis of nationality, national origin or religion and that is not based on a valid business reason.

2. “Company” means a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company or other entity or business association, and includes a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate.

3. “Direct holdings” means all publicly traded securities of a company that are held directly by the state treasurer or a retirement system in an actively managed account or fund in which the retirement system owns all shares or interests.

4. “Indirect holdings” means all securities of a company that are held in an account or fund, including a mutual fund, that is managed by one or more persons who are not employed by the state treasurer or a retirement system, if the state treasurer or retirement system owns shares or interests either:

(a) Together with other investors that are not subject to this section.

(b) That are held in an index fund.

5. “Public entity” means this state, a political subdivision of this state or an agency, board, commission or department of this state or a political subdivision of this state.

6. “Public fund” means the state treasurer or a retirement system.

7. “Restricted companies” means companies that boycott Israel.

8. “Retirement system” means a retirement plan or system that is established by or pursuant to title 38

A.R.S. § 35-393.01

§ 35-393.01. Contracting; procurement; investment; prohibitions

A. A public entity may not enter into a contract with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel.

B. A public entity may not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person or company to boycott Israel.

A.R.S. § 35-393.02

§ 35-393.02. Investment; restricted companies list; notice; immunity; exception

A. On or before April 1 of each year, each public fund shall prepare a list of restricted companies and shall provide a copy of the list on request.

B. In preparing the list of restricted companies, the public fund may consider at least the following:

1. Publicly available information, including information provided by nonprofit organizations, research firms and government entities.

2. Information prepared by an independent research firm retained by the public fund.

3. A statement by a company that it is participating in a boycott of Israel or that it has taken a boycott action at the request of, in compliance with or in furtherance of calls for a boycott of Israel.

C. The public fund shall notify each company that is included on the list of restricted companies that the company is subject to divestment by the state treasurer and the retirement systems.

D. If a company that receives notice pursuant to subsection C of this section submits a written certification to the public fund that it has ceased its boycott of Israel and will not engage in a boycott of Israel for the period of time that the state treasurer or a retirement system invests in the company, the public fund shall remove the company from the restricted list.

E. Each public fund shall:

1. Sell, redeem, divest or withdraw all direct holdings of a restricted company from the assets under its management in an orderly and fiducially responsible manner within three months after preparing the list of restricted companies pursuant to subsection A of this section. On or before August 1 of each year, the state treasurer and each retirement system shall post on their websites a list of investments that are sold, redeemed, divested or withdrawn pursuant to this paragraph.

2. Not acquire securities of a restricted company as part of its direct holdings.

3. Request that managers of its indirect holdings consider selling, redeeming, divesting or withdrawing holdings of a restricted company from the assets under its management.

F. With respect to any action performed pursuant to this section, the state treasurer, each retirement system and any person acting on behalf of the state treasurer or the retirement system:

1. Are exempt from any conflicting statutory or common law obligation or fiduciary duties with respect to choice of asset managers, investment funds or investments.

2. Are subject to title 12, chapter 7, article 2 regarding immunity for acts and omissions.

3. Are indemnified and held harmless by this state from claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including attorney fees, and against all liability, losses and damages because of a decision to sell, redeem, divest or withdraw holdings of a restricted company made pursuant to this section.

G. This section does not apply to investments that are made by the state treasurer pursuant to § 35-314.01.

A.R.S. § 35-393.03

§ 35-393.03. Severability

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

The Act - 2016 Ariz. Legis. Serv. Ch. 46 (H.B. 2617)

PUBLIC CONTRACTS—INVESTMENTS—ISRAEL BOYCOTT
AN ACT AMENDING TITLE 35, CHAPTER 2, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 9; RELATING TO PUBLIC CONTRACTS AND INVESTMENTS.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 35, chapter 2, Arizona Revised Statutes, is amended by adding article 9, to read:

ARTICLE 9. ISRAEL BOYCOTT DIVESTMENTS

§ 35–393. Definitions

In this article, unless the context otherwise requires:

1. "Boycott" means engaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with Israel or with persons or entities doing business in Israel or in territories controlled by Israel, if those actions are taken either:
(a) In compliance with or adherence to calls for a boycott of Israel other than those boycotts to which 50 United States Code section 4607(c) applies.
(b) In a manner that discriminates on the basis of nationality, national origin or religion and that is not based on a valid business reason.

2. "Company" means a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company or other entity or business association, and includes a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate.

3. "Direct holdings" means all publicly traded securities of a company that are held directly by the state treasurer or a retirement system in an actively managed account or fund in which the retirement system owns all shares or interests.

4. "Indirect holdings" means all securities of a company that are held in an account or fund, including a mutual fund, that is managed by one or more persons who are not employed by the state treasurer or a retirement system, if the state treasurer or retirement system owns shares or interests either:

(a) Together with other investors that are not subject to this section.
(b) That are held in an index fund.

5. "Public entity" means this state, a political subdivision of this state or an agency, board, commission or department of this state or a political subdivision of this state.

6. "Public fund" means the state treasurer or a retirement system.

7. "Restricted companies" means companies that boycott Israel.

8. "Retirement system" means a retirement plan or system that is established by or pursuant to title 38.

§ 35–393.01. Contracting; procurement; investment; prohibitions

A. A public entity may not enter into a contract with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel.

B. A public entity may not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person or company to boycott Israel.

§ 35–393.02. Investment; restricted companies list; notice; immunity; exception

A. On or before April 1 of each year, each public fund shall prepare a list of restricted companies and shall provide a copy of the list on request.

B. In preparing the list of restricted companies, the public fund may consider at least the following:
1. Publicly available information, including information provided by nonprofit organizations, research firms and government entities.
2. Information prepared by an independent research firm retained by the public fund.
3. A statement by a company that it is participating in a boycott of Israel or that it has taken a boycott action at the request of, in compliance with or in furtherance of calls for a boycott of Israel.

C. The public fund shall notify each company that is included on the list of restricted companies that the company is subject to divestment by the state treasurer and the retirement systems.

D. If a company that receives notice pursuant to subsection C of this section submits a written certification to the public fund that it has ceased its boycott of Israel and will not engage in a boycott of Israel for the period of time that the state treasurer or a retirement system invests in the company, the public fund shall remove the company from the restricted list.

E. Each public fund shall:
1. Sell, redeem, divest or withdraw all direct holdings of a restricted company from the assets under its management in an orderly and fiducially responsible manner within three months after preparing the list of restricted companies pursuant to subsection A of this section. On or before August 1 of each year, the state treasurer and each retirement system shall post on their websites a list of investments that are sold, redeemed, divested or withdrawn pursuant to this paragraph.
2. Not acquire securities of a restricted company as part of its direct holdings.
3. Request that managers of its indirect holdings consider selling, redeeming, divesting or withdrawing holdings of a restricted company from the assets under its management.

F. With respect to any action performed pursuant to this section, the state treasurer, each retirement system and any person acting on behalf of the state treasurer or the retirement system:
1. Are exempt from any conflicting statutory or common law obligation or fiduciary duties with respect to choice of asset managers, investment funds or investments.
2. Are subject to title 12, chapter 7, article 2 regarding immunity for acts and omissions.
3. Are indemnified and held harmless by this state from claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including attorney fees, and against all liability, losses and damages because of a decision to sell, redeem, divest or withdraw holdings of a restricted company made pursuant to this section.

G. This section does not apply to investments that are made by the state treasurer pursuant to section 35–314.01.

§ 35–393.03. Severability

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Section 2. Legislative findings

A. Boycotts and related tactics have become a tool of economic warfare that threaten the sovereignty and security of key allies and trade partners of the United States.

B. The state of Israel is the most prominent target of such boycott activity, beginning with the Arab League Boycott adopted in 1945, even before Israel's declaration of independence as the reestablished national state of the Jewish people.

C. Companies that refuse to deal with United States trade partners such as Israel, or entities that do business with or in such countries, make discriminatory decisions on the basis of national origin that impair those companies' commercial soundness.

D. It is the public policy of the United States, as enshrined in several federal acts, including 50 United States Code section 4607, to oppose such boycotts, and Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness.

E. Israel in particular is known for its dynamic and innovative approach in many business sectors, and a company's decision to discriminate against Israel, Israeli entities or entities that do business with Israel or in Israel is an unsound business practice making the company an unduly risky contracting partner or vehicle for investment.

F. This state seeks to implement Congress's announced policy of “examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of State assets from companies that support or promote actions to boycott, divest from, or sanction Israel.”

Approved by the Governor, March 17, 2016.
Filed in the Office of the Secretary of State, March 18, 2016.

Trade Facilitation and Trade Enforcement Act of 2015

19 U.S.C. § 4452

§ 4452. United States-Israel trade and commercial enhancement

(a) Findings

Congress finds the following:

(1) Israel is America's dependable, democratic ally in the Middle East--an area of paramount strategic importance to the United States.

(2) The United States-Israel Free Trade Agreement formed the modern foundation of the bilateral commercial relationship between the two countries and was the first such agreement signed by the United States with a foreign country.

(3) The United States-Israel Free Trade Agreement has been instrumental in expanding commerce and the strategic relationship between the United States and Israel.

(4) More than $45,000,000,000 in goods and services is traded annually between the two countries, in addition to roughly $10,000,000,000 in United States foreign direct investment in Israel.

(5) The United States continues to look for and find new opportunities to enhance cooperation with Israel, including through the enactment of the United States-Israel Enhanced Security Cooperation Act of 2012 (Public Law 112-150; 22 U.S.C. 8601 et seq.) and the United States-Israel Strategic Partnership Act of 2014 (Public Law 113-296; 128 Stat. 4075).

(6) It has been the policy of the United States Government to combat all elements of the Arab League Boycott of Israel by--

(A) public statements of Administration officials;

(B) enactment of relevant sections of the Export Administration Act of 1979 (50 U.S.C. 4601 et seq.) (as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), including sections to ensure foreign persons comply with applicable reporting requirements relating to the Boycott;

(C) enactment of the Tax Reform Act of 1976 (Public Law 94-455; 90 Stat. 1520) that denies certain tax benefits to entities abiding by the Boycott;

(D) ensuring through free trade agreements with Bahrain and Oman that such countries no longer participate in the Boycott; and

(E) ensuring as a condition of membership in the World Trade Organization that Saudi Arabia no longer enforces the secondary or tertiary elements of the Boycott.

(b) Statements of policy

Congress--

(1) supports the strengthening of economic cooperation between the United States and Israel and recognizes the tremendous strategic, economic, and technological value of cooperation with Israel;
(2) recognizes the benefit of cooperation with Israel to United States companies, including by improving American competitiveness in global markets;
(3) recognizes the importance of trade and commercial relations to the pursuit and sustainability of peace, and supports efforts to bring together the United States, Israel, the Palestinian territories, and others in enhanced commerce;
(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 3501(1)(B) of this title);
(6) encourages the inclusion of politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel such as boycotts of, divestment from, or sanctions against Israel as a topic of discussion at the U.S.-Israel Joint Economic Development Group (JEDG) to support the strengthening of the United States-Israel commercial relationship and combat any commercial discrimination against Israel; and
(7) supports efforts to prevent investigations or prosecutions by governments or international organizations of United States persons solely on the basis of such persons doing business with Israel, with Israeli entities, or in any territory controlled by Israel.

(c) Principal trade negotiating objectives of the United States
(1) Commercial partnerships
Among the principal trade negotiating objectives of the United States for proposed trade agreements with foreign countries regarding commercial partnerships are the following:
(A) To discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel.
(B) To discourage politically motivated boycotts of, divestment from, and sanctions against Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel.
(C) To seek the elimination of state-sponsored unsanctioned foreign boycotts of Israel, or compliance with the Arab League Boycott of Israel, by prospective trading partners.

(2) Effective date
This subsection takes effect on February 24, 2016, and applies with respect to negotiations commenced before, on, or after such date.

(d) Report on politically motivated acts of boycott of, divestment from, and sanctions against Israel
(1) In general
Not later than 180 days after February 24, 2016, and annually thereafter, the President shall submit to Congress a report on politically motivated boycotts of, divestment from, and sanctions against Israel.
(2) Matters to be included
The report required by paragraph (1) shall include the following:
(A) A description of the establishment of barriers to trade, including nontariff barriers, investment, or commerce by foreign countries or international organizations against United States persons operating or doing business in Israel, with Israeli entities, or in Israeli-controlled territories.
(B) A description of specific steps being taken by the United States to encourage foreign countries and international organizations to cease creating such barriers and to dismantle measures already in place, and an assessment of the effectiveness of such steps.
(C) A description of specific steps being taken by the United States to prevent investigations or prosecutions by governments or international organizations of United States persons solely on the basis of such persons doing business with Israel, with Israeli entities, or in Israeli-controlled territories.
(D) Decisions by foreign persons, including corporate entities and state-affiliated financial institutions, that limit or prohibit economic relations with Israel or persons doing business in Israel or in any territory controlled by Israel.

(e) Certain foreign judgments against United States persons
Notwithstanding any other provision of law, no domestic court shall recognize or enforce any foreign judgment entered against a United States person that conducts business operations in Israel, or any territory controlled by Israel, if the domestic court determines that the foreign judgment is based, in whole or in part, on a determination by a foreign court that the United States person's conducting business operations in Israel or any territory controlled by Israel or with Israeli entities constitutes a violation of law.

(f) Definitions
In this section:
(1) Boycott of, divestment from, and sanctions against Israel

The term “boycott of, divestment from, and sanctions against Israel” means actions by states, nonmember states of the United Nations, international organizations, or affiliated agencies of international organizations that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in any territory controlled by Israel.

(2) Domestic court

The term “domestic court” means a Federal court of the United States, or a court of any State or territory of the United States or of the District of Columbia.

(3) Foreign court

The term “foreign court” means a court, an administrative body, or other tribunal of a foreign country.

(4) Foreign judgment

The term “foreign judgment” means a final civil judgment rendered by a foreign court.

(5) Foreign person

The term “foreign person” means--

(A) an individual who is not a United States person or an alien lawfully admitted for permanent residence into the United States; or

(B) a corporation, partnership, or other nongovernmental entity which is not a United States person.

(6) Person

(A) In general

The term “person” means--

(i) a natural person;

(ii) a corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) any successor to any entity described in clause (ii).

(B) Application to governmental entities

The term “person” does not include a government or governmental entity that is not operating as a business enterprise.

(7) United States person

The term “United States person” means--

(A) a natural person who is a national of the United States (as defined in section 1101(a)(22) of Title 8); or

(B) a corporation or other legal entity that is organized under the laws of the United States, any State or territory thereof, or the District of Columbia, if natural persons described in subparagraph (A) own, directly or indirectly, more than 50

percent of the outstanding capital stock or other beneficial interest in such legal entity.

Anti-Boycott Act of 2018

19 U.S.C. § 4452

(a) Findings
Congress finds the following:
(1) Israel is America's dependable, democratic ally in the Middle East--an area of paramount strategic importance to the United States.
(2) The United States-Israel Free Trade Agreement formed the modern foundation of the bilateral commercial relationship between the two countries and was the first such agreement signed by the United States with a foreign country.
(3) The United States-Israel Free Trade Agreement has been instrumental in expanding commerce and the strategic relationship between the United States and Israel.
(4) More than $45,000,000,000 in goods and services is traded annually between the two countries, in addition to roughly $10,000,000,000 in United States foreign direct investment in Israel.
(5) The United States continues to look for and find new opportunities to enhance cooperation with Israel, including through the enactment of the United States-Israel Enhanced Security Cooperation Act of 2012 (Public Law 112-150; 22 U.S.C. 8601 et seq.) and the United States-Israel Strategic Partnership Act of 2014 (Public Law 113-296; 128 Stat. 4075).
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(B) enactment of relevant sections of the Export Administration Act of 1979 (50 U.S.C. 4601 et seq.) (as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), including sections to ensure foreign persons comply with applicable reporting requirements relating to the Boycott;
(C) enactment of the Tax Reform Act of 1976 (Public Law 94-455; 90 Stat. 1520) that denies certain tax benefits to entities abiding by the Boycott;
(D) ensuring through free trade agreements with Bahrain and Oman that such countries no longer participate in the Boycott; and
(E) ensuring as a condition of membership in the World Trade Organization that Saudi Arabia no longer enforces the secondary or tertiary elements of the Boycott.

(b) Statements of policy
Congress--

(1) supports the strengthening of economic cooperation between the United States and Israel and recognizes the tremendous strategic, economic, and technological value of cooperation with Israel;
(2) recognizes the benefit of cooperation with Israel to United States companies, including by improving American competitiveness in global markets;
(3) recognizes the importance of trade and commercial relations to the pursuit and sustainability of peace, and supports efforts to bring together the United States, Israel, the Palestinian territories, and others in enhanced commerce;
(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 3501(1)(B) of this title);
(6) encourages the inclusion of politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel such as boycotts of, divestment from, or sanctions against Israel as a topic of discussion at the U.S.-Israel Joint Economic Development Group (JEDG) to support the strengthening of the United States-Israel commercial relationship and combat any commercial discrimination against Israel; and
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(B) A description of specific steps being taken by the United States to encourage foreign countries and international organizations to cease creating such barriers and to dismantle measures already in place, and an assessment of the effectiveness of such steps.
(C) A description of specific steps being taken by the United States to prevent investigations or prosecutions by governments or international organizations of United States persons solely on the basis of such persons doing business with Israel, with Israeli entities, or in Israeli-controlled territories.
(D) Decisions by foreign persons, including corporate entities and state-affiliated financial institutions, that limit or prohibit economic relations with Israel or persons doing business in Israel or in any territory controlled by Israel.

(e) Certain foreign judgments against United States persons
Notwithstanding any other provision of law, no domestic court shall recognize or enforce any foreign judgment entered against a United States person that conducts business operations in Israel, or any territory controlled by Israel, if the domestic court determines that the foreign judgment is based, in whole or in part, on a determination by a foreign court that the United States person's conducting business operations in Israel or any territory controlled by Israel or with Israeli entities constitutes a violation of law.

(f) Definitions
In this section:
(1) Boycott of, divestment from, and sanctions against Israel

The term “boycott of, divestment from, and sanctions against Israel” means actions by states, nonmember states of the United Nations, international organizations, or affiliated agencies of international organizations that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in any territory controlled by Israel.

(2) Domestic court

The term “domestic court” means a Federal court of the United States, or a court of any State or territory of the United States or of the District of Columbia.

(3) Foreign court

The term “foreign court” means a court, an administrative body, or other tribunal of a foreign country.

(4) Foreign judgment

The term “foreign judgment” means a final civil judgment rendered by a foreign court.

(5) Foreign person

The term “foreign person” means--

(A) an individual who is not a United States person or an alien lawfully admitted for permanent residence into the United States; or

(B) a corporation, partnership, or other nongovernmental entity which is not a United States person.

(6) Person

(A) In general

The term “person” means--

(i) a natural person;

(ii) a corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) any successor to any entity described in clause (ii).

(B) Application to governmental entities

The term “person” does not include a government or governmental entity that is not operating as a business enterprise.

(7) United States person

The term “United States person” means--

(A) a natural person who is a national of the United States (as defined in section 1101(a)(22) of Title 8); or

(B) a corporation or other legal entity that is organized under the laws of the United States, any State or territory thereof, or the District of Columbia, if natural persons described in subparagraph (A) own, directly or indirectly, more than 50

percent of the outstanding capital stock or other beneficial interest in such legal entity.

Export Administration Act of 1979

PL 96–72, SEPTEMBER 29, 1979, 93 Stat 503
UNITED STATES PUBLIC LAWS
96th Congress - First Session
Convening January 15, 1979

An Act to provide authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE
Section 1. This act // 50 USC app. 2401 // may be cited as the “Export Administration Act of 1979”.

FINDINGS
Sec. 2. // 50 USC app. 2401. // The Congress makes the following findings:
(1) The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy.
(2) Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.
(3) It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which would strengthen the Nation's economy.
(4) The availability of certain materials at home and abroad varies so that the quantity and composition of United States exports and their distribution among importing countries may affect the welfare of the domestic economy and may have an important bearing upon fulfillment of the foreign policy of the United States.
(5) Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States.

(6) Uncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States.
(7) Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.
(8) It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States.
(9) Minimization of restrictions on exports of agricultural commodities and products is of critical importance to the maintenance of a sound agricultural sector, to achievement of a positive balance of payments, to reducing the level of Federal expenditures for agricultural support programs, and to United States cooperation in efforts to eliminate malnutrition and world hunger.

DECLARATION OF POLICY
Sec. 3. // 50 USC app. 2402. // The Congress makes the following declarations:
(1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.
(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—,
(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;
(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and
(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.
(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage

observance of a uniform export control policy by all nations with which the United States has defense treaty commitments.
(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.
(5) It is the policy of the United States—,
(A) 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;
(B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and
(C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.
(6) It is the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review by and consultation with representatives of appropriate United States Government agencies and private industry.
(7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on exports from the United States. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.
(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

(9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments.
(10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.
(11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

FOREIGN BOYCOTTS
Sec. 8. // 50 USC app. 2047. // (a) Prohibitions and Exceptions.—(1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act, the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:
(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.
(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.
(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.
(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.
(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.
(2) Regulations issued pursuant to paragraph (1) shall provide exceptions for—,
(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;
(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipment as may be permitted by such regulations in order to comply with precautionary requirements protecting against war risks and confiscation;
(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the

boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;
(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;
(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and
(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his own use, including the performance of contractual services within that country, as may be defined by such regulations.
(3) Regulations issued pursuant to paragraphs (2)(C) and (2)(F) shall not provide exceptions from paragraphs (1)(B) and (1)(C).
(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.
(5) This section shall apply to any transaction or activity undertaken, by or through a United States person or any other person, with intent to evade the provisions of this section as implemented by the regulations issued pursuant to this subsection, and such regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expressed or implied by a course of conduct, including a pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.
(b) Foreign Policy Controls.—(1) In addition to the regulations issued pursuant to subsection (a) of this section, regulations issued under section 6 of this Act shall implement the policies set forth in section 3(5).
(2) Such regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or tthe taking of any other action referred to in section 3(5) shall report that fact to the Secretary, together with such other information concerning such request as the Secretary may require for such action as the Secretary considers appropriate for carrying out the policies of that section. Such person shall also report to the Secretary whether such person intends to comply and whether such person has

complied with such request. Any report filed pursuant to this paragraph shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any goods or technology to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the United States person involved at a competitive disadvantage. The Secretary shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary, considers appropriate for carrying out the policies set forth in section 3(5) of this Act.

(c) Preemption.—The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.