

No. 19-50384

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BAHIA AMAWI,

Plaintiff-Appellee,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF TEXAS,

Defendant-Appellant.

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI;
GEORGE HALE,

Plaintiffs-Appellees,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM;
TRUSTEES OF THE KLEIN INDEPENDENT SCHOOL DISTRICT;
TRUSTEES OF THE LEWISVILLE INDEPENDENT SCHOOL DISTRICT;
BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case Nos. 1:18-CV-1091-RP and 1:18-CV-1100-RP

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

Counsel listed on next page

Radhika Sainath
Palestine Legal
55 Exchange Place, Suite 402
New York, NY 10005
(312) 212-0448

Maria C. LaHood
Center for Constitutional
Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

Attorneys for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendants-Appellants:

Pflugerville Independent School District
Ken Paxton, Attorney General of Texas (in his official capacity)
Board of Regents of the University of Houston System
Trustees of the Klein Independent School District
Trustees of the Lewisville Independent School District
Board of Regents of the Texas A&M University System

Counsel for State Defendants-Appellants Ken Paxton, Board of Regents of the University of Houston System, and Board of Regents of the Texas A&M University System:

Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins
Matthew H. Frederick
Michael R. Abrams
Office of the Attorney General

Counsel for Defendants-Appellants Klein Independent School District and Lewisville Independent School District:

Thomas P. Brandt
Francisco J. Valenzuela
Laura O'Leary

Counsel for Pflugerville Independent School District:

Todd Aaron Clark
Joey W. Moore

Plaintiffs-Appellees:

Bahia Amawi

John Pluecker
Obinna Dennar
Zachary Abdelhadi
George Hale

Counsel for Plaintiff-Appellee Bahia Amawi:

Gadeir Abbas
Christopher M. Choate
John T. Floyd
Carolyn Homer
Lena F. Masri

Counsel for Plaintiffs-Appellees John Pluecker, Obinna Dennar, Zachary Abdelhadi, and George Hale:

Thomas Buser-Clancy
Kevin Dubose
Vera Eidelman
Brian Hauss
Adriana Piñon
Edgar Saldivar
Andre Segura

***Amici Curiae* in Support of Defendants-Appellants:**

American Jewish Committee
David Bernstein, Richard A Epstein, Jesse Fried, Tonja Jacobi, Eugene Kontorovich, Julian Ku, Jeremy Rabkin, Maimon Schwarzschild, Steven Davidoff Solomon, Alexander Tsesis and Louise Weinberg
Michael C. Dorf, Andrew Koppelman and Eugene Volokh
Louis D. Brandeis Center, Inc.
Shurat Hadin-Israel Law Center
StandWithUs, Union of Orthodox Jewish Congregations of America and Agudath Israel of America
State of Arizona, State of Arkansas, State of Georgia, State of Indiana, State of Kansas, State of Missouri, State of Ohio, State of Utah and State of West Virginia
Zachor Legal Institute

Counsel for *Amici Curiae* in Support of Defendants-Appellants:

Mark M. Baker (Shurat HaDin-Israel Law Center)
Michal Baum (Agudath Israel of America and Union of Orthodox Jewish Congregations of America)

Stephen R. Blacklocks (Agudath Israel of America and Union of Orthodox Jewish Congregations of America)

Adam Howard Charnes (David Bernstein et al.)

Drew C. Ensign (State of Arizona et al.)

Jay Mark Goldstein (Shurat HaDin-Israel Law Center)

Marc Greendorfer (Zachor Legal Institute)

Nathan Lewin (Louis D. Brandeis Center, Inc.)

Jerome M. Marcus (David Bernstein et al.)

Gregory E. Ostfeld (American Jewish Committee)

Edward L. Rothberg (Shurat HaDin-Israel Law Center)

Jonathan M. Rotter (Stand With Us)

Eugene Volokh (Michael C. Dorf et al.)

Amici Curiae in Support of Plaintiffs-Appellees:

American Friends Service Committee, Israel Palestine Mission Network of The Presbyterian Church (USA), A Jewish Voice For Peace, Inc., US Campaign For Palestinian Rights, US Palestinian Community Network, US Campaign For The Academic and Cultural Boycott of Israel, and Friends of Sabeel North America Center for Constitutional Rights and Palestine Legal

Counsel for Amici Curiae in Support of Plaintiffs-Appellees:

Jethro M. Eisenstein (American Friends Service Committee et al.)

Maria LaHood (Center for Constitutional Rights and Palestine Legal)

Radhika Sainath (Center for Constitutional Rights and Palestine Legal)

Amici curiae The Center for Constitutional Rights and Palestine Legal each hereby certify that they have no parent corporation and have not issued any shares of stock to any publicly held corporation.

s/Maria C. LaHood

Maria C. LaHood

*Attorney of record for Amici Curiae
The Center for Constitutional Rights and
Palestine Legal*

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Other Authorities

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INTERESTS OF *AMICI CURIAE*¹

The Center for Constitutional Rights is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. For over fifty years, the Center for Constitutional Rights has protected the rights of marginalized political activists and litigated historic First Amendment cases, such as *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990); and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). More recently, this has meant increasing representation of advocates of Palestinian rights whose protected speech has been suppressed. See *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015); *Bronner v. Duggan*, 364 F. Supp. 3d 9 (D.D.C. 2019), *appeal filed*, No. 19-7017 (D.C. Cir. Mar. 5, 2019); *Awad v. Fordham Univ.*, No. 153826/17, 2019 WL 4180730 (N.Y. Sup. Ct. July 29, 2019); *Davis v. Cox*, No. 11-2-01925-7 (Wash. Super. Ct. Mar. 30, 2018) (order granting defs. mot. for summ. j.), *appeal filed*, No. 51770-1-II (Wash. Ct. App. Apr. 28, 2018).

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

Palestine Legal is a non-profit legal and advocacy organization specifically dedicated to protecting the civil and constitutional rights of people in the U.S. who speak out for Palestinian freedom. Palestine Legal tracks incidents of censorship and efforts to suppress expression supporting Palestinian rights, including the numerous anti-boycott bills of the kind at issue in this case. Palestine Legal has advised hundreds of clients whose rights have been violated because of anti-boycott laws and other censorship campaigns targeting speech supporting Palestinian rights.

Together, *amici* have relevant, first-hand knowledge of the consequences of laws such as House Bill 89, codified at TEX. GOV'T CODE ANN. § 2270.001 et seq. (“H.B. 89”), as well as other viewpoint-based censorship campaigns directed at advocacy for Palestinian rights, which have the purpose and effect of chilling an important perspective on an issue of significant public concern. *Amici* write to situate H.B. 89 in the context of this broader, coordinated and well-financed effort to stifle viewpoints that support Palestinian rights and to urge this Court to fulfill its constitutional role in protecting First Amendment-protected expressive activity, including that which challenges the status quo.

INTRODUCTION AND SUMMARY OF ARGUMENT

The 70-plus-year-long quest for Palestinian freedom and self-determination is among the world’s most contested issues. In recent years, an increasing number

of individuals and organizations inside the United States have engaged in various forms of expressive conduct to oppose the state of Israel's military occupation and discriminatory treatment of Palestinians. Many individuals and entities have heeded the call for "Boycott, Divestment and Sanctions" (BDS) that was issued by Palestinian civil society and endorsed by a diverse array of religious, ethnic, and social-justice entities in the U.S. Individuals like Appellees Bahia Amawi, John Pluecker, Zachary Abdelhadi, Obinna Dennar and George Hale promote or engage in boycotts of companies and institutions on the conviction that they are complicit in Israel's abuses against Palestinians and in a manner that mirrors social justice boycotts challenging discrimination throughout history, from the Montgomery bus boycotts to the South African anti-apartheid boycotts.

This growing movement for Palestinian rights, and especially the call for boycotts, has in turn been met aggressively by its target, the Israeli government, which, along with aligned private groups, has devoted significant financial resources to quash it. Since 2016, the Israeli government has allotted over \$100 million to fight BDS.² This government funding, combined with the resources of numerous Israel-aligned private organizations, has produced seemingly unprecedented success: twenty-seven states in the past four years have adopted

² Nathan Thrall, *How the Battle Over Israel and Anti-Semitism is Fracturing American Politics*, N.Y. TIMES MAG. (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/magazine/battle-over-bds-israel-palestinians-antisemitism.html>.

laws that seek to punish individuals or entities that engage in boycotts for Palestinian rights.³ Legislators have not been subtle in surfacing the viewpoint discrimination embedded in their efforts; as one prominent U.S. Senator revealed, the goal of one such bill is to “send[] a clear message that politically-motivated boycotts of Israel are unacceptable to the United States.”⁴

Indeed, these legislative enactments, conjoined with efforts of private groups pressing for censorship on college campuses, in artistic venues, and in the broader public square, represent, as the *New York Times* described, “a larger, ominous trend in which the political space for opposing Israel is shrinking.”⁵

Contrary to the claims of putative censors, boycotts for Palestinian rights are not commercial activities or in any way expressions of hatred or discrimination against Jewish people or Israelis. They are situated at the heart of protected expressive conduct critical of an unjust status quo, as was the boycott the Supreme Court held was unambiguously protected by the First Amendment in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Like the boycott of white-owned stores in the 1950s and 60s—which emerged from a racial justice movement that

³ *Anti-Boycott Legislation Around the Country*, PALESTINE LEGAL, <https://palestinelegal.org/righttoboycott> (last visited Nov. 30, 2019).

⁴ Press Release, U. S. Senate Comm. on Foreign Relations, Cardin, Portman, Roskam, and Vargas Lead Bipartisan, Bicameral Bill to Reject Attempts to Economically Isolate Israel (Mar. 23, 2017), <https://www.foreign.senate.gov/press/ranking/release/cardin-portman-roskam-and-vargas-lead-bipartisan-bicameral-bill-to-reject-attempts-to-economically-isolate-israel>.

⁵ The Editorial Board, *Curbing Speech in the Name of Helping Israel*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/opinion/editorials/israel-bds.html>.

utilized boycotts among other forms of protest—boycotts challenging Israeli state practices are a form of political protest arising from a movement demanding freedom, justice and equality.

Yet absent an injunction against H.B. 89, that law and others like it will continue to punish and chill one side of this critical debate, in self-perpetuating favor of the now-dominant viewpoint. The Constitution does not permit the government to use its power to regulate the exercise of viewpoints with which it disagrees.

ARGUMENT

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

Almost every major social movement has at some point utilized boycotts as a method to raise awareness about a persistent social injustice, by leveraging political and economic mobilization to urge changes in government or private practices. In this way, boycotts stand alongside other forms of expressive political activity such as demonstrations, picketing, and sit-ins. Their historical pedigree and legitimacy as a tool to challenge injustice, including against another country, is unimpeachable. Boycotts were crucial to the founding of the United States, as colonists boycotted British goods to protest taxation without representation. In the early 1790s, supporters of abolition of the slave trade in Britain urged a boycott of

slave-produced sugar.⁶ In 1903, anti-colonial actors in India launched an independence movement by calling for a boycott of British goods.⁷ In 1905, Chinese citizens boycotted American products to protest the extension of the Chinese Exclusion Act.⁸ In 1955, when Rosa Parks protested racial segregation by refusing to give up her bus seat for a white person, she helped spark the Montgomery bus boycott, which began a chain reaction of similar boycotts throughout the South.⁹ In 1965, Cesar Chavez led the National Farm Workers Association to join a strike to protest working conditions for grape growers in California that eventually led to a nationwide boycott and major reforms.¹⁰ And

⁶ Mike Kaye, *The Tools of the Abolitionists*, BBC.CO.UK, http://www.bbc.co.uk/history/british/abolition/abolition_tools_gallery_07.shtml (last updated Feb. 17, 2011).

⁷ CHARLES ANDREW ORR, A STUDY OF INDIAN BOYCOTTS (1940). The word “boycott” originates from 1880’s Ireland, when tenant workers, unhappy with the refusal of their English land agent – Charles Cunningham Boycott – to decrease rents when crops were poor, refused to sell him goods. Steven Greenhouse, *IDEAS & TRENDS: A Weapon for Consumers; The Boycott Returns*, N.Y.TIMES (Mar. 26, 2000), <https://www.nytimes.com/2000/03/26/weekinreview/ideas-trends-a-weapon-for-consumers-the-boycott-returns.html>.

⁸ Jane Leung Larson, *The 1905 Anti-American Boycott as a Transnational Chinese Movement*, 21 CHINESE AM.: HIST. & PERSPS. 191 (2007); see also John W. Foster, *The Chinese Boycott*, 97 THE ATLANTIC MONTHLY 118 (1906), available at <https://www.theatlantic.com/past/docs/unbound/flashbks/china/foster.htm>.

⁹ See E.R. Shipp, *Rosa Parks, 92, Founding Symbol of Civil Rights Movement, Dies*, N. Y. TIMES (Oct. 25, 2005), <https://www.nytimes.com/2005/10/25/us/25parks.html>.

¹⁰ See Maureen Pao, *Cesar Chavez: The Life Behind the Legacy of Farm Labor Rights*, NPR (Aug. 12, 2016), <https://www.npr.org/2016/08/02/488428577/cesar-chavez-the-life-behind-a-legacy-of-farm-labor-rights>.

quite notably, a global boycott, divestment, and sanctions movement helped dismantle apartheid in South Africa.¹¹

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

In 2005, a diverse coalition of over 170 Palestinian civil society organizations located in Israel, the occupied Palestinian territory, and the diaspora—including unions, academic institutions, cultural and arts groups, and non-governmental organizations—issued a call to “international civil society organizations and people of conscience all over the world to impose broad boycotts,” “implement divestment initiatives,” and pressure “states to impose embargoes and sanctions” to pressure Israel to abide by international law.¹² This peaceful call for solidarity from the international community sought to mirror the political tactics used by social justice activists with regard to South Africa, who challenged the apartheid regime through direct action, including calling for non-violent boycotts, divestment, and sanctions.¹³

¹¹ See William Finnegan, *Postscript: Nelson Mandela, 1918-2013*, NEW YORKER, (June 8, 2013), <https://www.newyorker.com/news/news-desk/postscript-nelson-mandela-1918-2013>. “The anti-apartheid movement gained traction globally. Economic sanctions and the divestment campaign, although opposed by conservative Western leaders, including Ronald Reagan and Margaret Thatcher, who continued to call the A.N.C. a ‘terrorist organization,’ began to take their toll.” *Id.* See also Håkan Thörn, *Solidarity Across Borders: The Transnational Anti-Apartheid Movement*, 17 VOLUNTAS: INT’L J. VOLUNTARY & NONPROFIT ORGS. 285 (2006).

¹² *Palestinian Civil Society Call for BDS*, BDSMOVEMENT.NET (July 9, 2005), <https://bdsmovement.net/call>.

¹³ See Desmond Tutu, *Tutu: Israel’s Humiliation of Palestinians ‘Familiar to Black South Africans’*, HAARETZ (Mar. 10, 2014), <http://www.haaretz.com/israel-news/1.578872>; Nathan Thrall, *BDS: how a controversial non-violent movement has transformed the Israeli-Palestinian*

Anchored in the Universal Declaration of Human Rights, the call for BDS espouses equal rights for all and categorically opposes all forms of racism, including antisemitism. The call urges nonviolent pressure on Israel until it “meets its obligation to recognize the Palestinian people’s inalienable right to self-determination and fully complies with the precepts of international law.”¹⁴ Specifically, it includes several demands: an end to the discrimination and second-class status that Palestinian citizens of Israel experience; the right of Palestinian refugees to return to their lands; and an end to Israel’s military occupation, settlements, checkpoints, and “apartheid Wall,” which force Palestinians in the West Bank to live in ghettos and those in Gaza to live in the largest open air prison in the world.¹⁵

debate, THE GUARDIAN (Aug. 14, 2018), <https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate>; AJ+, *What Does BDS Mean for Palestine?*, YOUTUBE (Oct. 26, 2017), <https://www.youtube.com/watch?v=RAxYkenR48w>.

¹⁴ *Palestinian Civil Society Call for BDS*, *supra* note 12.

¹⁵ Advocates for BDS maintain that the Israeli government has and continues to engage in systematic practices to deny Palestinians justice and equality under the law—practices that international bodies have found to violate well-established international legal obligations. These unlawful practices include: the prolonged belligerent military occupation of Gaza and the West Bank, including East Jerusalem; the decade-long closure that prevents the movement of people and goods into and out of Gaza, and denies the enjoyment of a range of fundamental rights to the two million Palestinians in Gaza; the expropriation of, and building of settlements on, Palestinian land; the unlawful transfer of members of its population into the occupied Palestinian territory and the forcible displacement of Palestinians therein; the annexation of Palestinian land through, among other methods, the construction of a Separation Barrier that the International Court of Justice has found to violate international law; the expropriation of Palestinian natural resources; the demolition of Palestinian homes; and the maintenance of a facially discriminatory legal system, including the use of excessive force, mass incarceration, indefinite detention without charge, discriminatory arrests of Palestinians living in the occupied Palestinian territory, and over fifty laws that discriminate against Palestinian citizens of Israel because they are not Jewish.

B. These Boycotts Are Protected by the First Amendment.

Pursuant to this call, Appellee Amawi participates “in the BDS movement because she advocates for Palestinian human rights and justice.” *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 731 (W.D. Tex. 2019) (internal quotations omitted). Appellee Pluecker participates in BDS campaigns “with the goal of promoting justice and effectuating human rights in Israel and the Palestinian territories.” *Id.* at 732 (internal quotations omitted). Appellee Abdelhadi “is an active participant in the BDS movement because he agrees with their efforts to seek an end to the Israeli occupation of Palestinian homelands, equal rights for Arab-Palestinian citizens of Israel, and the right of return for Palestinians.” *Id.* at 733 (internal quotations omitted). Appellee Dennar participates in BDS “in protest of what he believes to be Israel’s occupation of Palestinian lands, illegal settlements . . . and violation of the human rights of Palestinians.” *Id.* (internal quotations omitted). And Appellee Hale “previously boycotted consumer goods offered by businesses” complicit in Israel’s occupation until he “was forced to sign a No Boycott of Israel certification as a condition of his employment.” *Id.* at 734 (internal quotations omitted). As described above, such boycotts are historically a central form of resistance and protest protected by the U.S.

See, e.g., World Report 2019: Israel and Palestine: Events of 2018, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/israel/palestine#> (last visited Dec. 1, 2019); *The Discriminatory Laws Database*, ADALAH: THE LEGAL CTR. FOR ARAB MINORITY RIGHTS IN ISR., <https://www.adalah.org/en/content/view/7771> (last updated Sept. 25, 2017).

Constitution. In 1982, the Supreme Court recognized that the First Amendment protects politically motivated peaceful boycotts, reaffirming our “‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust and wide-open.’” *Claiborne Hardware*, 458 U.S. at 913 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). “It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (internal quotations omitted).

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

Rent Control/ Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981)).

Locating boycotts within the constitutional norm that recognizes that advocacy can alter orthodoxy, the Court affirmed that “[t]hrough speech, assembly, and petition – rather than through riot or revolution – [the boycotters] sought to change a social order that had consistently treated them as second-class citizens.” *Id.* at 912.

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

II. H.B. 89 IS PART AND PARCEL OF A BROADER EFFORT TO SUPPRESS GROWING ADVOCACY IN SUPPORT OF PALESTINIAN RIGHTS.

The legislative history of H.B. 89 expressly reveals that its goal is to sanction citizens whose views are not in accordance with the State’s views. *Amawi*, 373 F. Supp. 3d at 750. As the District Court observed, State Representative Phil King—H.B. 89’s sponsor—and Texas Governor Gregg Abbott have made statements that H.B. 89 was a reaction to the BDS movement, calling it the “anti-BDS bill.” *Id.* King has stated that BDS “is not something most Texans approve of when it’s aimed against a friend of Texas,” and that H.B. 89’s purpose is to “send[] a strong message” that Texas sides with Israel. When signing the bill into law, Governor Abbott stated that “we will not tolerate [boycott] actions against an important ally.” *Id.*

That H.B. 89 was intended to punish a political viewpoint is further supported by the wave of similar legislative efforts—and related, coordinated campaigns—driven by the Israeli government and aligned private groups attempting to silence Americans seeking to change Israeli state policies that continue to oppress Palestinians.

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

An increasing number of prominent individuals and institutions are protesting Israeli state practices that violate Palestinian rights, including by

endorsing BDS as a tactic to effect change. Several major U.S.-based religious institutions have endorsed and participated in BDS initiatives, including the Evangelical Lutheran Church in America, the Presbyterian Church (USA), the Mennonite Church, and the United Methodist Church.¹⁶ Numerous foundations and pension funds—including the Bill and Melinda Gates Foundation, the Soros Fund, and TIAA-CREF—have divested from companies in response to their facilitation of human rights violations in Israel and the occupied Palestinian territory.¹⁷ Student governments at approximately 50 universities across the country have passed resolutions and referenda calling on their universities to divest from companies that are complicit in Israel’s human rights abuses.¹⁸ Acclaimed

¹⁶ See Anna Baltzer, *Churches are Standing Up!*, U.S. CAMPAIGN FOR PALESTINIAN RIGHTS (July 23, 2017), <https://uscpr.org/churches-are-standing-up/>; Annie Robbins, *In overwhelming vote, leading Lutheran branch calls on US to cut off aid to Israel*, MONDOWEISS (Aug. 12, 2016), <https://mondoweiss.net/2016/08/lutherans-say-cut-off-aid-toisrael/>.

¹⁷ See Marjorie Cohn, *Israel Hits Back Against Boycott*, HUFFINGTON POST (Mar. 30, 2017), https://www.huffingtonpost.com/entry/israel-hits-back-against-boycott_us_58dd41ffe4b0fa4c095986fa (last updated Apr. 3, 2017); Gabrielle Coppola, *Soros Fund No Longer Holds Shares of SodaStream*, BLOOMBERG.COM (Aug. 4, 2014), <https://www.bloomberg.com/news/articles/2014-08-04/soros-fund-no-longer-holds-shares-of-sodastream>; *Bill Gates Sells Shares in U.K. Firm Linked to Israeli Security Services*, HAARETZ (May 31, 2014), <https://www.haaretz.com/bill-gates-sells-shares-in-g4s-1.5250315>; Ora Coren, *TIAA-CREF Confirms Africa Israel Divestment*, HAARETZ (Sept. 13, 2009), <https://www.haaretz.com/1.5491792>; Abraham Greenhouse, *Pension giant TIAA-CREF drops Veolia from Social Choice fund*, ELECTRONIC INTIFADA (Nov. 15, 2013), <https://electronicintifada.net/blogs/abraham-greenhouse/pension-giant-tiaa-cref-drops-veolia-social-choice-fund>.

¹⁸ See *US Campus Victories in the Boycott, Divestment, and Sanctions Movement*, NAT’L STUDENTS FOR JUSTICE IN PALESTINE, <https://www.nationalsjp.org/bds-victories.html> (last visited Dec. 1, 2019). See also Aiden Pink, *One Of The Most Jewish Colleges In The Country Just Voted For BDS By Nearly 2-1 Margin*, THE FORWARD (Apr. 19, 2018), <https://forward.com/fast-forward/399159/one-of-the-most-jewish-colleges-in-the-country-just-voted-for-bds-by/> (an all-

writers, artists, and professional athletes such as Natalie Portman, Lorde, Lana del Rey, Lauren Hill, Cornell West, Roger Waters, Michael Bennett, and others have endorsed or participated in a cultural boycott of Israel—or refused to travel there—on account of its human rights violations.¹⁹ United Electrical, Radio and Machine Workers of America (UE), a member-run union representing 30,000 workers, endorses BDS.²⁰ In 2015, a “Black Solidarity Statement with Palestine” endorsed BDS and was signed by over 1000 individuals and nearly 40 Black-led organizations.²¹ Archbishop Emeritus and 1984 Nobel Peace Prize Winner Desmond Tutu has been a longtime vigorous supporter of BDS, recognizing that it falls within the social justice protest tradition of the South African anti-apartheid movement.²²

women college with a large Jewish population votes to divest from companies that “profit from or engage in the State of Israel’s treatment of Palestinians” with a near 2/3 majority).

¹⁹ Dana Kennedy, *Is Natalie Portman’s Israel Protest a Tipping Point?*, DAILY BEAST (Apr. 21, 2018), <https://www.thedailybeast.com/is-natalie-portmans-israel-protest-a-tipping-point>; Letter to the Editor, *Lorde’s artistic right to cancel gig in Tel Aviv*, THE GUARDIAN (Jan. 5, 2018), <https://www.theguardian.com/music/2018/jan/05/lordes-artistic-right-to-cancel-gig-in-tel-aviv>; *Natalie Portman: Israel’s Nation-state Law is ‘Racist’ and a ‘Mistake,’* HAARETZ (Dec. 20, 2018), <https://www.haaretz.com/us-news/natalie-portman-israel-s-nation-state-law-is-racist-and-a-mistake-1.6744158>; August Brown, *Lauren Hill cancels Israel concert after bungled Nigeria date*, L.A. TIMES (May 5, 2015), <https://www.latimes.com/entertainment/music/posts/la-et-ms-lauryn-hill-cancels-israel-concert-20150505-story.html>; Steve Almasy, *Michael Bennett boycotts trip, says he won’t be used by Israel*, CNN (Feb. 12, 2017), <https://www.cnn.com/2017/02/12/middleeast/nfl-players-boycott-israel-trip/index.html>.

²⁰ Press Release, UE Endorses BDS Movement for Peace and Justice in Israel and Palestine (Sept. 1, 2015), <https://www.ueunion.org/political-action/2015/BDS>.

²¹ *2015 Black Solidarity Statement with Palestine*, BLACKFORPALESTINE.COM, <http://www.blackforpalestine.com/read-the-statement.html> (last visited Dec. 1, 2019).

²² *See Tutu: Israel’s Humiliation of Palestinians ‘Familiar to Black South Africans,’ supra* note 13.

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

In the past several years, increasing advocacy in support of Palestinian rights has been met with aggressive efforts by legislators, academic institutions, and others to suppress such speech, often at the urging of the Israeli government and Israel-aligned private groups.²³ Anti-boycott legislation like H.B. 89 is one of many tools intended to discourage and stop criticism of Israel's treatment of Palestinians as it increasingly filters into the mainstream. From 2014-2018, Palestine Legal responded to nearly 1,250 incidents of censorship, punishment, and other burdening of advocacy for Palestinian rights.²⁴ This number understates the phenomenon, as many activists are unaware of their rights or do not report incidents of suppression. These incidents affect playwrights, school teachers, artists, chefs, musicians, professors, students, and authors.²⁵ These censorship

²³ See CTR. FOR CONSTITUTIONAL RIGHTS. & PALESTINE LEGAL, THE PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER ATTACK IN THE US (2015), *available at* <https://ccrjustice.org/the-palestine-exception>.

²⁴ 2018 Year-In-Review: Censorship of Palestine Advocacy in the U.S. Intensifies, PALESTINE LEGAL, <https://palestinelegal.org/2018-report> (last visited Dec. 1, 2019).

²⁵ *Id.*; THE PALESTINE EXCEPTION TO FREE SPEECH, *supra* note 23. See also, e.g., Jennifer Schuessler, *Jewish Center Faces Backlash After Canceling Play Criticized as Anti-Israel*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/arts/jewish-center-faces-backlash-after-canceling-play-criticized-as-anti-israel.html>; Ben Norton, *Palestinian-American artist detained for sketches & Arabic writing falsely accused of terrorism by right-wing media*, SALON.COM (Dec. 22, 2015), https://www.salon.com/2015/12/22/palestinian_american_artist_detained_for_sketching_in_arabic_falsely_accused_of_terrorism_by_right_wing_media/; Leena Trivedi-Grenier, *The Tenacity of Chef Reem Assil*, VICE.COM (May 11, 2018), https://munchies.vice.com/en_us/article/mbkqv/the-tenacity-of-chef-reem-assil; Sam Sodomsky & Amy Phillips, *Lawmaker Calls for Lorde Florida Concert Cancellations Over Israel*, PITCHFORK.COM (Feb. 14, 2018), <https://pitchfork.com/news/lawmaker-calls-for-lorde-florida>

campaigns and legal threats frequently conflate criticism of Israel's treatment of Palestinians with bias against Jewish people, as supporters of Texas' law do in the instant case.

One prominent example is the filing of complaints against universities with the U.S. Department of Education (DOE)'s Office for Civil Rights (OCR), alleging that by tolerating campus events that criticize Israeli policies, universities violate Title VI of the Civil Rights Act, which prohibits discrimination by programs receiving federal funds. Complaints have targeted speech like a film and panel discussion on Palestine, a teach-in on Gaza, a program on the costs of war on Israeli society, street theatre depicting Palestinians navigating Israeli army checkpoints, T-shirts encouraging students to support Palestine and debates concerning university divestment from companies that support Israel's human rights abuses.²⁶ In dismissing such complaints as meritless, OCR found they were based on First Amendment-protected political expression, and did not amount to

[concert-cancellations-over-israel/](https://www.dailynorthwestern.com/2014/08/04/city/evanston-public-library-reinstates-canceled-book-talk-after-accusations-of-censorship/); Alice Yin, *Evanston Public Library reinstates canceled book talk after accusations of censorship*, DAILY NORTHWESTERN (Aug. 4, 2014), <https://www.dailynorthwestern.com/2014/08/04/city/evanston-public-library-reinstates-canceled-book-talk-after-accusations-of-censorship/>.

²⁶ Letter from Zachary Pelchat, Team Leader, U.S. Dep't of Educ., to Carole E. Rossi, Chief Campus Counsel, Univ. Cal. Santa Cruz (Aug. 19, 2013), *available at* https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf; letter from Zachary Pelchat, Team Leader, U.S. Dep't of Educ., to Robert J. Birgeneau, Chancellor, Univ. Cal. Berkeley (Aug. 19, 2013), *available at* https://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf; letter from Zachary Pelchat, Team Leader, U.S. Dep't of Educ., to Dr. Michael V. Drake, Chancellor, Univ. Cal. Irvine (Aug. 19, 2013), *available at* https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf.

discrimination or harassment against Jewish students who disagreed with viewpoints in favor of Palestinian rights.²⁷

Kenneth Marcus—an architect of this Title VI strategy, a supporter of anti-BDS legislation, founder and past president and general counsel of the Brandeis Center, and current head of DOE’s OCR—explained that even when rejected, Title VI complaints have the effect they “set out to achieve,” of “expos[ing] administrators to bad publicity,” as well as making it harder for critics of Israel “to recruit new adherents,” or obtain future employment.²⁸

Groups opposing Palestinian rights are renewing their efforts to file meritless Title VI complaints targeting advocacy for Palestinian rights after Kenneth Marcus’ appointment as Assistant Secretary for Civil Rights at DOE.²⁹ For example, the Zachor Legal Institute filed an OCR complaint against the University of California at Los Angeles hours after a 2018 student conference on the topic of Palestinian equality commenced, claiming that discussion of

²⁷ *Id.*

²⁸ Kenneth L. Marcus, *Standing Up for Jewish Students*, JERUSALEM POST (Sept. 9, 2013), <https://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648>.

²⁹ See Letter from Emily Frangos, Compliance Team Leader, U.S. Dep’t of Educ., to Morton A. Klein, President, Zionist Org. of Am. (July 31, 2014), *available at* <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html>; Erica L. Green, *Education Dept. Reopens Rutgers Case Charging Discrimination Against Jewish Students*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/us/politics/rutgers-jewish-education-civil-rights.html>.

Palestinian rights would be an attack on Jewish students.³⁰ Zachor Institute, whose “primary current focus is combatting BDS,” has pressed the outlandish and Islamophobic notion that groups that call for non-violent boycotts for Palestinian rights are controlled by designated foreign terror organizations.³¹ A legislature and the court cannot sanction the ugly reflex to conflate calls for equality for Arab and Muslim populations with terrorism. Such attempts to smear by association simply reveal the intent to silence dissent rather than engage in open debate.

The Israeli government and allied groups that seek to silence criticism of Israel have specifically targeted BDS and its supporters, in part because of the tactic’s growing effectiveness in mobilizing political pressure against Israel’s international law violations. They have thus leveraged considerable, coordinated resources to stifle BDS supporters through legislative channels.³² Referring to the

³⁰ Devorah Norton, *A Peek Inside the National Students for Justice in Palestine Conference*, HA’AM (Nov. 27, 2018), <https://haam.org/a-peek-inside-the-national-students-for-justice-in-palestine-conference/>. See Zachor Legal Institute (@ZachorLegal), TWITTER (Nov. 19, 2018), <https://twitter.com/ZachorLegal/status/1064587903177617414>. Zachor also threatened a New Jersey public library with a civil rights complaint if it allowed a reading of the children’s alphabet book, *P is for Palestine*, to take place. Nada Elia, *P is for Palestine: Fear and loathing at the children’s library*, MIDDLE EAST EYE (Nov. 4, 2019), <https://www.middleeasteye.net/opinion/p-palestine-fear-and-loathing-childrens-library>.

³¹ *About us*, ZACHOR LEGAL INSTITUTE, <https://zachorlegal.org/about-us/> (last visited Nov. 23, 2019); Brief of Amicus Curiae Zachor Legal Institute in Support of Defendants-Appellants at 3, 12-16, *Amawi v. Paxton*, No. 19-50384 (5th Cir. Sept. 5, 2019).

³² See, e.g., *The Lobby – USA, Episode 1*, YOUTUBE (Nov. 3, 2018), <https://www.youtube.com/watch?v=3ISjXhMUVKE> (statement of Yisrael Katz, Israeli Minister of Intelligence, “Israel must carry out a targeted civil thwarting of the leadership of BDS activists.”); Nathan Guttman, *Sheldon Adelson To Host Secret Anti-BDS Summit for Jewish Donors*, THE FORWARD (June 1, 2015), <https://forward.com/news/309227/sheldon-adelson-to-host-secret-anti-bds-summit-for-jewish-donors/>.

growing support for Palestinian rights among college students, a lobbyist supporting anti-boycott bills highlighted both their disdain for such expressive activity and their goal to squash it: “While you were doing your campus antics, the grown-ups were in the state legislatures *passing laws that make your cause improbable*” (emphasis added).³³ Elected officials have readily admitted that they have introduced or passed anti-boycott measures because Israeli government officials have lobbied them or requested they do so. For example, during the signing of an anti-boycott executive order in December 2018, Kentucky governor Matt Bevin said that Israeli Prime Minister Benjamin Netanyahu personally lobbied for the order when Bevin visited Israel the previous summer.³⁴ New York governor Andrew Cuomo signed an anti-BDS executive order flanked by representatives of the Israeli government and the Israel lobby group AIPAC, among others.³⁵ It has been reported that “[i]n cooperation with Jewish and pro-

³³ *As BDS opponents move from campuses to state capitols, California is up next*, JEWISH NEWS SYNDICATE (Apr. 13, 2016), <https://www.jns.org/as-bds-opponents-move-from-campuses-to-state-capitols-california-is-up-next/>.

³⁴ “While we were having that conversation he was talking to me about the significance of this and asking me if I would do the very thing that we are here to do today.” Ryland Barton, *Bevin To Require State Contractors Promise They Don’t Boycott Israel*, 89.3 WPFL NEWS LOUISVILLE (Nov. 18, 2018), <https://wfpl.org/bevin-to-require-state-contractors-promise-they-dont-boycott-israel/>. See also Alfred Miller, *Bevin bars state agencies from doing business with Israel boycotters*, LOUISVILLE COURIER JOURNAL (Nov. 15, 2018), <https://www.courier-journal.com/story/news/politics/2018/11/15/governor-matt-bevin-bars-business-israel-boycotters/2019298002/>.

³⁵ Press Release, New York Governor Cuomo, Governor Cuomo Signs First-in-the-Nation Executive Order Directing Divestment of Public Funds Supporting BDS Campaign Against Israel (June 5, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-first-nation-executive-order-directing-divestment-public-funds-supporting>; Philip Weiss & Adam Horowitz,

Israeli organizations, the [Israeli foreign] ministry convinced several American states to pass legislation against the boycott of Israel.”³⁶

In the past four years alone, twenty-seven states have adopted laws that target advocacy for Palestinian rights, especially boycotts. At least 100 more bills and resolutions have been introduced in U.S. states, local governments, and Congress.³⁷ This remarkably broad and fast legislative activity is a direct result of the immense and heavily funded lobbying campaign to limit criticism of Israel’s policies.³⁸ In addition, governors from all fifty states joined the American Jewish Committee’s “Governors United Against BDS” campaign, which “reject[s] efforts to demonize and delegitimize Israel” and condemns BDS “as incompatible with the values of [their] states.”³⁹

Numerous politicians have been remarkably candid about the goals of this legislation, acknowledging their intent to chill boycotts for Palestinian rights. Then-New York Assemblyman Dov Hikind described the chilling effect of the

Flanked by AIPAC and Israeli consul, Cuomo signs anti-BDS order, MONDOWEISS (June 6, 2016), <https://mondoweiss.net/2016/06/flanked-israeli-consul/>.

³⁶ See Ali Abunimah, *Israel “quietly” pushed for anti-BDS legislation in US, UK*, ELECTRONIC INTIFADA (Feb. 24, 2016), <https://electronicintifada.net/blogs/ali-abunimah/israel-quietly-pushed-anti-bds-legislation-us-uk>.

³⁷ *Anti-Boycott Legislation Around the Country*, *supra* note 3.

³⁸ See *How the Battle Over Israel and Anti-Semitism is Fracturing American Politics*, *supra* note

2.

³⁹ *Governors Against BDS*, AMERICAN JEWISH COMMITTEE, https://www.ajc.org/sites/default/files/pdf/2017-09/GOVERNORS_AGAINST_BDS_STATEMENT.PDF (last visited Dec. 1, 2019); see also American Jewish Committee, *50 U.S. Governors Join AJC Initiative to Support Israel, Fight BDS*, PRNEWSWIRE.COM (May 17, 2017), <https://www.prnewswire.com/news-releases/50-us-governors-join-ajc-initiative-to-support-israel-fight-bds-300459614.html>.

New York anti-boycott Executive Order as “absolutely great,” stating that it “meant the list was working exactly as [Governor] Cuomo intended.”⁴⁰ Washington State Senator Michael Baumgartner, in vowing to introduce a bill that would prohibit public and private universities that receive state funding from participating in a boycott of Israel, was explicit that his intention was to “prohibit” BDS and “say it is illegal and that way I can just shut down these conversations and everybody can focus on teaching class and educating rather than being a politically-correct weapon.”⁴¹

Several anti-boycott bills have also been introduced in Congress, the most draconian of which could have punished Americans with 20-year prison sentences for violations. The federal Israel Anti-Boycott Act bill, which died in the last Congress, would have subjected participants of boycotts fostered or imposed by the United Nations or the European Union to exorbitant criminal fines.⁴²

⁴⁰ Conor Skelding, *Cuomo quietly releases Israel-boycott opposition list, perplexing targeted companies*, POLITICO (Dec. 9, 2016), <http://www.politico.com/states/new-york/city-hall/story/2016/12/muted-release-of-and-mixed-reaction-to-cuomos-bds-blacklist-107815>.

(According to Hikind, “the point is being made. ... By doing this, in a sense, anyone who wants to participate in a BDS thing will think ten times... Who in New York would want to participate with all the focus and all the attention? They wouldn’t be able to do business in New York.”)

⁴¹ Dyer Oxley, *Senator: Colleges are being used as ‘politically-correct batons,’* MYNORTHWEST.COM (Jan. 2, 2017), <http://mynorthwest.com/500618/senator-baumgartner-bds-bill>; Nora Barrows-Friedman, *Activists fight new anti-BDS legislation across US*, ELECTRONIC INTIFADA (Feb. 9, 2017), <https://electronicintifada.net/blogs/nora-barrows-friedman/activists-fight-new-anti-bds-legislation-across-us>.

⁴² Israel Anti-Boycott Act, S. 720, 115th Cong. (2017).

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

These anti-boycott laws have tangible consequences beyond the direct effects of denying contracts and compelling speech. Musicians, teachers, students, professors, and grassroots activists have reported ways that anti-boycott laws have been used to threaten careers, homes, and educations and to condition broad swaths of activity only upon pledges of allegiance and orthodoxy that approach loyalty oaths routinely administered—and struck down—in the 1950s. For example, based on a mistaken application of H.B. 89, hurricane victims in Dickinson, Texas were required to pledge not to boycott Israel as a condition of receiving relief aid.⁴³

In 2017, the Nassau County Attorney in New York threatened to take legal action if a local venue did not cancel performances by Pink Floyd co-founder Roger Waters because of his publicly professed support for BDS, citing the county's anti-boycott law.⁴⁴ The concerts were allowed to proceed after the New York Civil Liberties Union intervened.⁴⁵ Florida lawmakers similarly invoked

⁴³ Kyle Swenson, *This Texas town offers hurricane relief — if your politics are right*, WASH. POST (Oct. 20, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/20/texas-town-makes-hurricane-harvey-aid-applicants-pledge-not-to-boycott-israel/>.

⁴⁴ Robert Brodsky, *Officials want Nassau Events to cancel Roger Waters concert*, NEWSDAY (July 11, 2017), <https://www.newsday.com/long-island/nassau/some-officials-want-nassau-events-to-cancel-waters-concert-1.13795104>; Cathryn J. Prince, *Nassau county executive attempts to sever stadium contract with Waters*, TIMES OF ISR. (July 24, 2017), <https://www.timesofisrael.com/nassau-county-executive-attempts-to-sever-stadium-contract-with-waters/>.

⁴⁵ Letter from Susan Gottehrer, Nassau Cnty. Chapter Dir., Zachary Ahmad, Pol'y Couns., & Philip Desgranges, Staff Att'y, NYCLU, to Carnell Foskey, Nassau Cnty. Att'y, & Edward Mangano, Nassau Cnty. Exec. (Sept. 11, 2017), *available at*

their state’s anti-boycott law in pushing for the cancellation of Grammy Award winner Lorde’s concerts in early 2018 after she refused to perform in Israel, citing support for the boycott movement.⁴⁶

Palestine Legal has received reports from individuals in California, Texas, Ohio, and Washington who lost contracts, believed they lost contracts, or declined or were denied payment because of their support for BDS.⁴⁷ Students, professors and speakers have reported being questioned by administrators or student governments about whether it was lawful to allow a speaker to give a talk supportive of BDS—or whether a speaker who publicly supports BDS and was brought to lecture about a different topic was allowed to speak at all.

For example, at Indiana University, the student government, citing Indiana’s anti-boycott law, passed a resolution prohibiting the university and all of its divisions from “hosting lecturers, events, and demonstrations which incorporate

https://www.nyclu.org/sites/default/files/field_documents/bds_letter_final.pdf; see also Jake Offenhartz, *Roger Waters Shows Will Go On Despite Nassau County Anti-BDS Law*, GOTHAMIST.COM (Sept. 13, 2017), http://gothamist.com/2017/09/13/roger_waters_nassau.php.

⁴⁶ Colin Wolf, *Lawmakers are trying to cancel Lorde's upcoming Florida shows because of her stance on Israel*, ORLANDO WEEKLY (Feb. 8, 2018), <https://www.orlandoweekly.com/Blogs/archives/2018/02/08/lawmakers-are-trying-to-cancel-lordes-upcoming-florida-shows-because-of-her-stance-on-israel>; see also Nadeem Muaddi, *Lorde cancels Israel concert amid calls for cultural boycott*, CNN.COM (Dec. 27, 2017), <https://www.cnn.com/2017/12/25/entertainment/lorde-concert-israel/index.html>.

⁴⁷ In California, the City of Alameda cancelled voting on (and never reconsidered) a sister city relationship with a Palestinian village after Israeli Deputy Consul General Ravit Baer raised the issue of California’s anti-boycott law, which did not apply to the proposal, and the city attorney requested time to explore the law’s implications. See Alameda City Council, Minutes of the Regular City Council Meeting (Dec. 5, 2017), available at <https://alameda.legistar.com/View.ashx?M=M&ID=576621&GUID=65267B83-7612-4875-A2B3-50C9875BFF0A>, at 8-10.

speakers and participants who have advocated or supported the anti-Semitic BDS movement.”⁴⁸ The resolution, which was introduced in response to a visiting lecture on human rights in Israel and Palestine, would have also prohibited speakers who “previously advocated for the BDS movement even if the BDS movement is not the topic of the lecture.”⁴⁹ In fall 2016, the student government at Fordham University questioned students wishing to start a club which endorsed the principles of the call for BDS, asking whether it would be lawful to permit such a club under New York’s anti-BDS executive order.⁵⁰ A grassroots volunteer group that participates in boycott campaigns told Palestine Legal and the Center for Constitutional Rights that it had trouble getting a venue for a poetry reading in New York because the vendor received state funding that it feared losing if it contracted with the volunteer group.⁵¹

Anti-BDS laws have been misused, often intentionally, in order to censor or scare people from engaging in boycotts for Palestinian rights or even supporting Palestinian freedom more generally.

⁴⁸ Indiana Univ. Student Cong., Cong. Res. No. 18-19-12, Resolution to Prevent Anti-Semitism on Campus (Nov. 2, 2018) (on file with Palestine Legal).

⁴⁹ *Id.* The student government president vetoed the resolution. Aaron Bandler, *Indiana University Student President Vetoes Resolution Condemning Pro-BDS Speaker*, JEWISH JOURNAL (Nov. 9, 2018), <https://jewishjournal.com/news/nation/241792/indiana-university-student-president-vetoes-resolution-condemning-pro-bds-speaker/>.

⁵⁰ *Awad*, 2019 WL 4180730 at *2.

⁵¹ Though the group was ultimately permitted to hold the event, the venue refused to publicly list the event on its website after learning the group supported the boycott. The group had been counting on the partnership to reach the poetry community and lost an important element of their outreach strategy. Interview by Palestine Legal with volunteer, in N.Y., N.Y. (Oct. 28, 2016 & Jan. 17, 2019).

For example, in September 2017, over thirty New Yorkers received messages citing *failed* New York anti-BDS legislation threatening “legal proceedings” if these individuals did not “cease and desist” from supporting BDS.⁵² Nearly two years later, investigative reporters at *The New Yorker* discovered that this scare campaign was the work of ex-Mossad agents.⁵³

In May 2019, an occupational speech therapist at a middle school in Queens, New York was told by the school principal that he had to remove several items relating to Palestine from his workspace and to stop wearing a Jewish Voice for Peace T-shirt on the mistaken belief that these items violated New York State Executive Order No. 157, which directs the State of New York to divest from companies that engage in BDS.⁵⁴ Only after attorneys with Palestine Legal and the Center for Constitutional Rights intervened did New York City’s Department of Education agree that the principal’s reliance on the anti-BDS order “was misguided.”⁵⁵

Although none of these laws should prevent the type of speech activity described in these incidents—poetry readings, starting a student group, singing,

⁵² *Over 30 New York scholars and activists spied on by former Mossad agents*, PALESTINE LEGAL (Feb. 28, 2019), <https://palestinelegal.org/news/2019/2/28/over-30-new-york-scholars-and-activists-spied-on-by-former-mossad-agents>.

⁵³ Adam Entous & Ronan Farrow, *Private Mossad for Hire*, NEW YORKER (Feb. 11, 2019), <https://www.newyorker.com/magazine/2019/02/18/private-mossad-for-hire>.

⁵⁴ *New York Department of Education: Stop Censoring Pro-Palestine Educator*, PALESTINE LEGAL (Dec. 2, 2019), <https://palestinelegal.org/news/2019/12/2/nyc-department-of-education-stop-censoring-pro-palestine-educator>.

⁵⁵ *Id.*

wearing a T-shirt, a talk on human rights—confusion over their scope or deliberate misapplication did ultimately punish, or attempt to punish, speakers supporting Palestinian rights. They are part of a tapestry of laws of which H.B. 89 is a central piece, which are designed to silence expressive advocacy that challenges the injustices of Israeli state policy.

CONCLUSION

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

Dated: December 3, 2019

Respectfully submitted,

s/Maria C. LaHood

Maria C. LaHood

Center for Constitutional Rights

666 Broadway, 7th Floor

New York, NY 10012

Tel: (212) 614-6430 / Fax: (212) 614-6499

mlahood@ccrjustice.org

Radhika Sainath

Palestine Legal

55 Exchange Place, Suite 402

New York, New York 10005

Tel: (312) 212-0448

radhika@palestinelegal.org

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 3, 2019

s/Maria C. LaHood

Maria C. LaHood

Center for Constitutional Rights

666 Broadway, 7th Floor

New York, NY 10012

Tel: (212) 614-6430 / Fax: (212) 614-6499

mlahood@ccrjustice.org

Attorney for Amici Curiae

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2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 5th Cir. R. 32.1 because this document has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font, except for footnotes which are in 12-point Times New Roman font.

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s/Maria C. LaHood

Maria C. LaHood

Center for Constitutional Rights

666 Broadway, 7th Floor

New York, NY 10012

Tel: (212) 614-6430 / Fax: (212) 614-6499

mlahood@ccrjustice.org

Attorney for Amici Curiae