
RECENT LEGISLATION

FIRST AMENDMENT — POLITICAL BOYCOTTS — SOUTH CAROLINA DISQUALIFIES COMPANIES SUPPORTING BDS FROM RECEIVING STATE CONTRACTS. — S.C. CODE ANN. § 11-35-5300 (2015).

The Boycott, Divestment, and Sanctions (“BDS”) movement is an international campaign launched in July 2005 that aims to put economic pressure on the State of Israel until it meets certain conditions with respect to the Palestinian people.¹ The movement, which is modeled on the South Africa divestment campaign, has garnered little commercial support in the United States, but has been endorsed by several religious and academic associations.² Although BDS leaders do not officially prefer either a one- or two-state solution, the movement’s critics charge that its goals are incompatible with Israel’s continued existence as a Jewish state.³

Recently, largely in response to BDS, South Carolina passed a law that disqualifies companies participating in boycotts against any of the state’s trading partners from receiving state contracts.⁴ Several states are considering similar legislation. There has been surprisingly little discussion of the constitutionality of these bills. Opponents of the laws have not publicly discussed the laws’ potential First Amendment infirmities at any length, and supporters have either ignored constitutional issues or dismissed them summarily. Nonetheless, Supreme Court precedent directly establishes that the South Carolina anti-BDS statute is unconstitutional as applied to independent contractors that have existing contracts with the state, and other cases indicate that it is also unconstitutional as applied to new bidders for government contracts. In short, despite assurances from supporters and relative quiet from critics, the anti-BDS statute passed by South Carolina and those being considered by several other states are likely unconstitutional in nearly all of their applications.

¹ See *Introducing the BDS Movement*, BDS MOVEMENT, <http://bdsmovement.net/bdsintro> [<http://perma.cc/N2JL-KZ4D>].

² See, e.g., Laurie Goodstein, *Presbyterians Vote to Divest Holdings to Pressure Israel*, N.Y. TIMES (June 20, 2014), <http://www.nytimes.com/2014/06/21/us/presbyterians-debating-israeli-occupation-vote-to-divest-holdings.html>; Lidar Gravé-Lazi, *US Anthropological Group Votes to Boycott Israeli Universities*, JERUSALEM POST (Nov. 21, 2015, 7:53 PM), <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/American-Anthropological-Association-votes-to-back-boycott-of-Israeli-academic-institutions-434864> [<http://perma.cc/742B-9GZS>].

³ See, e.g., Yair Rosenberg, *NY Times, MSNBC Whitewash BDS*, TABLET (Feb. 6, 2013, 10:15 AM), <http://www.tabletmag.com/scroll/123598/ny-times-msnbc-whitewash-bds> [<http://perma.cc/WL2P-T6G4>].

⁴ See S.C. CODE ANN. § 11-35-5300(A) (2015).

On June 4, 2015, Governor Nikki Haley signed bill H.3583 into law after both houses of the South Carolina legislature passed it unanimously.⁵ The operative provision of the statute states that:

A public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade⁶

Though the law applies to boycotts of any of the state's trading partners, legislators made clear they were targeting BDS. Representative Alan Clemmons, the primary sponsor of the bill, criticized "[t]he anti-Semitic hatred that permeates the BDS movement," and hailed "the country's first legislation confronting BDS."⁷ Clemmons also thanked Professor Eugene Kontorovich, a prominent commentator on legal issues relating to the Israeli-Palestinian conflict,⁸ for helping to "develop" the bill and "ensure its effectiveness and Constitutionality."⁹

The law defines a "jurisdiction with whom South Carolina can enjoy open trade" as "World Trade Organization [WTO] members and those with which the United States has [trade agreements]."¹⁰ Israel is a member of the WTO, but the West Bank and Golan Heights settlements are not considered a part of Israel's territory under international law.¹¹ However, the United States has a free trade agreement with Israel that has been interpreted to include settlement products.¹² Because the United States has trade agreements covering the settlements, the South Carolina statute would disqualify contractors who support boycotts of Israeli settlements in the West Bank and Golan Heights, in addition to those who boycott Israel as a whole.

⁵ *South Carolina Governor Signs Anti-Boycott Bill*, TOWER (June 5, 2015, 1:42 PM), <http://www.thetower.org/2126-south-carolina-governor-signs-anti-boycott-bill> [<http://perma.cc/E8GL-AHYS>].

⁶ § 11-35-5300(A).

⁷ Rep. Alan Clemmons, Statement on Enactment of H. 3583 (June 4, 2015), <https://web.archive.org/web/20150812095414/http://alanclemmons.com/index.html> [<http://perma.cc/Y6RA-5BEK>].

⁸ See Eugene Kontorovich, JEWISH NAT'L FUND, <http://www.jnf.org/about-jnf/in-your-area/speakers/eugene-kontorovich.html> [<http://perma.cc/D8YF-2RGY>].

⁹ *Id.*

¹⁰ § 11-35-5300(B)(3).

¹¹ See, e.g., JAMES CRAWFORD, OPINION: THIRD PARTY OBLIGATIONS WITH RESPECT TO ISRAELI SETTLEMENTS IN THE OCCUPIED PALESTINIAN TERRITORIES ¶ 133 (2012), <https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf> [<http://perma.cc/AKV4-F78T>]. Accordingly, international law experts have concluded that WTO members could completely ban imports from the settlements without running afoul of their treaty obligations. See *id.*

¹² See Proclamation No. 6955, 61 Fed. Reg. 58,761 (Nov. 18, 1996).

The South Carolina statute is part of a flurry of anti-BDS legislative activity. In May 2015 Illinois passed a bill that bars the state's pension fund from investing in companies that boycott Israel or the settlements,¹³ and Indiana and Colorado have followed suit.¹⁴ Florida and Arizona have enacted statutes that combine Illinois's divestment measure with South Carolina's disqualification of contractors. As of early April 2016, more than 20 states were considering some form of anti-BDS legislation.¹⁵

Opponents of the anti-BDS statutes have asserted their unconstitutionality in passing, and civil rights organizations including Palestine Legal and the Center for Constitutional Rights have written legislators letters arguing briefly that the statutes violate the First Amendment.¹⁶ This comment makes a more thorough case for the unconstitutionality of the bills that disqualify businesses participating in BDS from receiving government contracts. The argument that these laws are unconstitutional turns on two propositions: (1) participation in political boycotts is protected First Amendment activity, and (2) governments cannot condition a contract for services on the relinquishing of First Amendment rights.

The Supreme Court established the first principle in *NAACP v. Claiborne Hardware Co.*¹⁷ In that case, the Court reviewed a state tort claim against a local NAACP chapter that had organized a boycott of white-owned businesses to pressure city officials to meet a number of demands for racial equality and integration.¹⁸ The Court recognized that political boycotts involve a range of expressive activity and rely on the First Amendment freedoms of "speech, assembly, association,

¹³ Eugene Kontorovich, *Illinois Passes Historic Anti-BDS Bill, as Congress Mulls Similar Moves*, WASH. POST: VOLOKH CONSPIRACY (May 18, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves> [http://perma.cc/YHH7-GPY9].

¹⁴ See Joshua Sharf, *BDS on the Run in State Legislatures*, THE HILL: CONG. BLOG (Mar. 28, 2016, 8:00 AM), <http://thehill.com/blogs/congress-blog/274202-bds-on-the-run-in-state-legislatures> [http://perma.cc/FHR3-B7NF].

¹⁵ Valerie Richardson, *Anti-Israel BDS Movement Dealt Series of Setbacks in State Legislatures*, WASH. TIMES (Mar. 16, 2016), <http://www.washingtontimes.com/news/2016/mar/16/anti-israel-bds-movement-dealt-series-of-setbacks-> [http://perma.cc/TUP7-TWLF].

¹⁶ Letter from Rahul Saxena, Staff Attorney, Palestine Legal, et al. to Senator Joe Negron (Oct. 19, 2015), <http://palestinelegal.org/s/SB-86-PL-CCR-NLG-CAIR-Opposition-Letter.pdf> [http://perma.cc/FL27-DB5G].

¹⁷ 458 U.S. 886 (1982); see also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) ("In [*Claiborne Hardware*] we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the [NAACP] . . ."). The holding of *Claiborne Hardware* categorically extends First Amendment protection to political boycotts, even if most of the opinion is spent discussing the individual elements of the boycott. See Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531, 546 n.91 (2012).

¹⁸ *Claiborne Hardware*, 458 U.S. at 889-91.

and petition.”¹⁹ And because political boycotts are directed at issues of public concern, they are protected activities that “rest[] on the highest rung of the hierarchy of First Amendment values.”²⁰

Claiborne Hardware forecloses the argument that the South Carolina statute regulates discriminatory conduct rather than speech. Kontorovich has advanced this conduct-based argument, analogizing the anti-BDS statute to President Obama’s executive order forbidding federal contractors from discriminating against employees on the basis of sexual orientation.²¹ The statute itself gestures at this defense, defining a boycott as a “refus[al] to deal with a person or firm when the action is based on race, color, religion, gender, or national origin of the targeted person or entity.”²² But this definition would cover the *Claiborne Hardware* boycott, which was directed at white merchants. Participation in a political boycott, even if it has a racial dimension, cannot be equated with a simple act of discrimination. An employer’s refusal to hire a qualified black or gay applicant involves no expressive speech and furthers no political goals. By contrast, the *Claiborne Hardware* boycotters and BDS supporters have exercised their rights to free speech and association to build movements with specific political demands.

Nor can South Carolina’s statute escape the scope of *Claiborne Hardware* because it regulates businesses rather than individuals. In the age of *Citizens United*, laws that burden political speech receive strict scrutiny regardless of whether the speaker is an individual, corporation, or any other business association.²³

¹⁹ *Id.* at 911. The Court observed that the organizers of the *Claiborne Hardware* boycott launched their campaign at a public meeting, sought to influence the behavior of public officials, supported their cause with speeches and picketing, and encouraged others to join. *See id.* at 900, 907.

²⁰ *Id.* at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). The Court was careful to restrict its holding to *political* boycotts, as opposed to labor boycotts and other boycotts organized for *economic* ends. *See id.* at 912–14; *see also* *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426–27 (1990) (distinguishing political boycotts from those undertaken for economic advantage); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (“A group boycott or refusal to deal for political purposes may be speech, though a similar boycott for purposes of maintaining a cartel is not.” (citation omitted)).

²¹ Eugene Kontorovich, *Can States Fund BDS?*, TABLET (July 13, 2015), <http://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds> [<http://perma.cc/T775-MXG9>]. For further support Kontorovich points to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), in which the Court held that a law school’s decision not to provide equal access to military recruiters was not protected by the First Amendment. *See id.* at 60. But while barring military recruiters is only an expressive act if accompanied by an explanation, *see id.* at 66, participation in political boycotts always implicates First Amendment rights to free association and speech, as the Court recognized in *Claiborne Hardware*.

²² § 11-35-5300(B)(1).

²³ *See* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

Still, a defender of the anti-BDS law might dispute the proposition that governments cannot condition a contract for services on the surrender of First Amendment rights, pointing out that the state tort judgment invalidated in *Claiborne Hardware* effectively prohibited boycotts, whereas the South Carolina statute only withdraws a privilege from businesses participating in boycotts. But under the doctrine of “unconstitutional conditions,” which holds that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech,”²⁴ this distinction between direct and indirect burdens on protected speech makes no constitutional difference. In fact, the Supreme Court has applied the doctrine to directly hold that the state cannot terminate contracts in retaliation for a contractor’s exercise of First Amendment rights.

In two seminal unconstitutional conditions cases, the Court vindicated the free speech and association rights of individuals and businesses working for the government. First, in *Pickering v. Board of Education*,²⁵ the Court held that the First Amendment protects public employees who are fired in retaliation for commenting on matters of public concern, and fashioned a balancing test to determine the extent of the protection.²⁶ A decade later, *Elrod v. Burns*²⁷ established a categorical rule that governments cannot discharge nonpolicymaking employees solely because of their party affiliation.²⁸

The Court extended the protections of *Pickering* and *Elrod*, respectively, to independent contractors in a pair of cases decided the same day in 1996: *Board of County Commissioners v. Umbehr*²⁹ and *O’Hare Truck Service, Inc. v. City of Northlake*.³⁰ As Justice O’Connor noted in *Umbehr*, to hold otherwise “would leave First Amendment rights unduly dependent on whether state law labels a government service provider’s contract as a contract of employment or a contract for ser-

²⁴ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

²⁵ 391 U.S. 563 (1968).

²⁶ *Id.* at 568. The balancing test weighs “the interests of the [employee], as a citizen, in commenting upon matters of public concern[,] and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* Though this balancing test is analytically distinct from an unconstitutional conditions approach, the Court’s subsequent application of *Pickering* has been more consistent with the unconstitutional conditions doctrine. See generally Michael Toth, *Out of Balance: Wrong Turns in Public Employee Speech Law*, 10 U. MASS. L. REV. 346 (2015).

²⁷ 427 U.S. 347 (1976).

²⁸ *Id.* at 372–73; see also *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (“[T]he question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”).

²⁹ 518 U.S. 668 (1996).

³⁰ 518 U.S. 712 (1996).

vices, a distinction which is at best a very poor proxy for the interests at stake.”³¹ In fact, she added, the government’s interests in maintaining harmonious working environments and avoiding association with controversial speech are generally less pressing for independent contractors than for employees, and political party membership is less likely to be a legitimate qualification for an independent contractor than for an employee.³²

Umbehr and *O’Hare*, read alongside *Claiborne Hardware*, leave little doubt that the South Carolina statute is unconstitutional as applied to businesses that have existing contracts with the state. *O’Hare* condemned the actions of a suburban mayor who terminated the contract of a towing service whose owner supported his political opponent.³³ The Court stated that “government may not coerce support in this manner, unless it has some justification beyond dislike of the individual’s political association.”³⁴ As the Court recognized in *Claiborne Hardware*, participation in a political boycott is a paradigmatic exercise of the right to free political association. With that in mind, it would be difficult to describe the termination of a contract under South Carolina’s anti-BDS statute as motivated by anything other than “dislike of the [business’s] political association.”³⁵

All that said, it is possible that the Court might balk at applying *O’Hare* to protect support for a boycott, as *O’Hare* and all its predecessor cases concerned the right to freely choose which political party to join or which political candidate to support. But even if the anti-BDS statute did not fall to the categorical rule of *Elrod* and *O’Hare*, it would still be subject to the *Pickering* balancing test because it burdens pro-boycott speech. It is very difficult to imagine the statute surviving such review. Even on the most uncharitable interpretation of the BDS movement and its goals, it is clearly directed at a matter of public concern,³⁶ and it is unlikely that a company’s participation in a boycott of Israel would interfere with its ability to efficiently carry out the duties required by its contract.³⁷

³¹ *Umbehr*, 518 U.S. at 679.

³² *See id.* at 680.

³³ *O’Hare*, 518 U.S. at 715–16.

³⁴ *Id.* at 721.

³⁵ *Id.*

³⁶ *Cf.* *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (“The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”).

³⁷ Kontorovich speculates that “a company may fail to use the best subcontractors, products, or partners because of their national origin and thus simply do a worse job.” Kontorovich, *supra* note 21. This could be true in rare instances where Israeli products are truly essential and no adequate replacement exists, but *Pickering* requires those situations to be identified on a case-by-case basis to avoid penalizing boycott activity that does not affect job performance. *See* 391 U.S.

The fate of the anti-BDS law is less certain as applied to new bids for government contracts, but it is still likely unconstitutional. Because the plaintiffs in *Umbehr* and *O'Hare* contested the termination of or failure to renew an existing commercial relationship,³⁸ the Court reserved judgment on whether its holdings extended to “bidders or applicants for new government contracts who cannot rely on [a preexisting commercial relationship].”³⁹ Justice Scalia, known for his prophetic dissents, expressed disbelief that the Court would draw the line at the denial of a contract to a new bidder, describing this extension as “the natural and foreseeable jurisprudential consequence[]” of *Umbehr* and *O'Hare*.⁴⁰

In the nearly twenty years since this dissent, the Court has not had an opportunity to do what Justice Scalia considered inevitable. In that same period, two circuit courts of appeals have addressed the question and have come to opposite conclusions.⁴¹ The Third Circuit has said that First Amendment liability does not extend to decisions to deny government contracts to new bidders.⁴² Two members of the panel reasoned that “a situation involving ongoing contracts obviously presents a clear set of dynamics,” whereas the consequences of extending *Umbehr* and *O'Hare* to new bidders were unclear and potentially troubling.⁴³ In dissent, Judge Roth argued that “the Supreme Court’s First Amendment jurisprudence does not support the kind of status-based limitation on individuals’ rights of political expression and association that the majority’s decision endorses.”⁴⁴ Judge Roth stressed the significance of *Rutan v. Republican Party of Illinois*,⁴⁵ in which the Court extended the protection of *Elrod* to applicants for government jobs, establishing the principle that certain applicants are entitled to First Amendment protection, even in the absence of a preexisting employment relationship.⁴⁶ Judge Roth cited *Rutan* for the proposition that under the unconstitutional conditions doctrine “entitlement to employment is immaterial to a government employee’s First Amendment claim.”⁴⁷ Because the Court expressly stated in *Umbehr* and *O'Hare* that individual contractors should be treated the same as em-

563, 568 (1968). It is even less likely that such a rationale could justify refusing to renew a contract with a company participating in an anti-*settlement* boycott.

³⁸ *Umbehr*, 518 U.S. 668, 708–09 (1996) (Scalia, J., dissenting).

³⁹ *Id.* at 685 (majority opinion).

⁴⁰ *Id.* at 709 (Scalia, J., dissenting).

⁴¹ Compare *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378 (5th Cir. 2006), with *McClintock v. Eichelberger*, 169 F.3d 812 (3d Cir. 1999).

⁴² *McClintock*, 169 F.3d at 817.

⁴³ *Id.*

⁴⁴ *Id.* at 818 (Roth, J., dissenting).

⁴⁵ 497 U.S. 62 (1990).

⁴⁶ See *id.* at 66–67, 79.

⁴⁷ *McClintock*, 169 F.3d at 820 (Roth, J., dissenting) (citing *Rutan*, 497 U.S. at 71–72).

ployees under the First Amendment, Judge Roth saw no reason to decline to recognize a First Amendment violation when new bidders are denied contracts for the exercise of their rights of free speech and free association.⁴⁸ The Fifth Circuit, the only other appellate court to directly address this issue,⁴⁹ adopted Judge Roth's reasoning in *Oscar Renda Contracting, Inc. v. City of Lubbock*.⁵⁰ A divided panel read *Umbehr* and *Rutan* together to conclude that "[s]ince First Amendment rights have been afforded to individuals applying for employment with the government, no different result should be afforded to bidders."⁵¹ District courts have divided on the question as well.⁵²

In light of this division in the lower courts, it is less certain that the anti-BDS law is unconstitutional as applied to new bidders for government contracts. However, the courts would certainly find a facial challenge to the South Carolina statute much easier to assess than the typical First Amendment retaliation suit. The latter type of suit alleges a specific, individualized instance of retaliation for some exercise of First Amendment rights, such as criticism of city administration or support for an opposing political candidate. In such cases it can be very difficult, as Justice Scalia's *Umbehr* dissent noted, to know "whether political affiliation or disfavored speech was the reason for the award or loss of the contract."⁵³ Indeed, the fact-bound nature of these cases, and the resulting excessive litigation, was one of the primary reasons Justice Scalia opposed the extension of First Amendment liability further into contracting decisions.⁵⁴ There would be no such practical difficulties in assessing the constitutionality of the anti-BDS statute. South Carolina has made explicit that it will terminate and deny contracts on the basis of boycott activity. The factual question would come to court resolved.

By explicitly making nonparticipation in boycotts a condition for receiving state contracts, the anti-BDS statute raises an unconstitutional conditions problem more often seen in government spending cases than the typical retaliation case. Recently, in *Agency for Interna-*

⁴⁸ *Id.* at 819–20.

⁴⁹ The Eleventh Circuit distinguished *McClintock* in *Mangieri v. DCH Healthcare Authority*, 304 F.3d 1072 (11th Cir. 2002), but did not adopt its holding. *See id.* at 1076.

⁵⁰ 463 F.3d 378 (5th Cir. 2006).

⁵¹ *Id.* at 385.

⁵² *Compare* *Del Valle Grp. v. P.R. Ports Auth.*, 756 F. Supp. 2d 169, 181 (D.P.R. 2010) (following *Oscar Renda*), *Snodgrass v. Doral Dental*, No. 3:08-0107, 2008 WL 2718911, at *11 (M.D. Tenn. July 10, 2008) (describing *McClintock* as not "particularly persuasive"), *and Yadin Co. v. City of Peoria*, No. CV-06-1317-PHX, 2007 WL 63611, at *4–5 (D. Ariz. Jan. 8, 2007) (also following *Oscar Renda*), *with A.A.A. Always Open Bail Bonds, Inc. v. DeKalb County*, No. 1:02-CV-2905, 2006 WL 5440395, at *10 (N.D. Ga., Aug. 4, 2006) (following *McClintock*), *and Housey v. McNeal*, No. 05-CV-74697-DT, 2006 WL 1047013, at *3–4 (E.D. Mich. Apr. 20, 2006) (same).

⁵³ *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 699 (1996) (Scalia, J., dissenting).

⁵⁴ *See id.* at 697–99.

*tional Development v. Alliance for Open Society International, Inc.*⁵⁵ (*AID*), the Court clarified the rule governing statutes or regulations that put explicit speech-burdening conditions on the expenditure of government funds: “[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”⁵⁶ As noted above, in the case of the anti-BDS statute, it is difficult to argue that a company’s decision to boycott a particular nation is related to its ability to perform a contract for which it bids. Instead, the state is using its economic leverage to discourage protected boycott activity. With the unconstitutional conditions doctrine “undergoing something of a renaissance in the Roberts Court,”⁵⁷ the Court could well use *AID*’s formulation of the doctrine to invalidate the anti-BDS statute even if it stopped short of extending First Amendment protection to all new bidders.⁵⁸

Though the weight of precedent indicates that the statute is unconstitutional, two federal statutes adopted in response to the Arab League’s boycott of Israel seem at first glance to suggest otherwise.⁵⁹ The Ribicoff Amendment to the Tax Reform Act of 1976⁶⁰ denies certain tax advantages to individuals and companies participating in “an international boycott,”⁶¹ and the Export Administration Act of 1979⁶² subjects participants in “any boycott fostered or imposed by a foreign country against a country which is friendly to the United States” to criminal penalties.⁶³

⁵⁵ 133 S. Ct. 2321 (2013).

⁵⁶ *Id.* at 2328. The South Carolina statute’s requirement that all businesses affirmatively certify that they are not engaging in a prohibited boycott is reminiscent of the anti-prostitution pledge that the Court invalidated in *AID*. *Id.* at 2321.

⁵⁷ *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 205 (2014) (citing LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE 281 (2014)).

⁵⁸ This same generalized unconstitutional conditions rationale would also be fatal for the statutes requiring state pension funds to divest from companies supporting BDS, because the purpose of disinvestment — to signal disapproval of a company’s political activity — is completely alien to the principal purpose of pension funds, which is to earn a return.

⁵⁹ See Joshua C. Zive & John R. Brantley, *Boycotts and Businesses in the Middle East*, NAT’L L. REV. (Dec. 19, 2011), <http://www.natlawreview.com/article/boycotts-and-business-middle-east-reminder-us-anti-boycott-laws> [<http://perma.cc/PD37-MMC8>].

⁶⁰ Pub. L. No. 94-455, § 1061, 90 Stat. 1520, 1649 (1976) (codified as amended at 26 U.S.C. § 999 (2012)).

⁶¹ See *id.*; see also Zive & Brantley, *supra* note 59. The act goes on to state that a person participates in an international boycott “if he agrees . . . as a condition of doing business . . . within a country . . . to refrain from doing business with or in [another] country.” § 1064, 90 Stat. at 1652.

⁶² Pub. L. No. 96-72, § 8(a)(1), 93 Stat. 503, 521 (1979). The Act expired in 1994, but has been extended thereafter by executive order. JOHN T. MASTERSON, JR., OFFICE OF THE CHIEF COUNSEL FOR INDUS. AND SEC., LEGAL AUTHORITY: EXPORT ADMINISTRATION REGULATIONS 2 n.1 (2016).

⁶³ § 8(a)(1), 93 Stat. at 521.

The first response to this argument is obvious: *Claiborne Hardware* had not yet been decided in 1979, so it was not yet clear that participation in a political boycott was protected First Amendment activity. Today, the federal antiboycott statutes may be unconstitutional. But a second argument could bless the federal statutes while still condemning South Carolina's. A key feature of both federal statutes is that they apply only to boycotts organized *by foreign nations* against allies of the United States. The involvement of foreign sovereigns implicates Congress's power over national security and foreign affairs. The Court is likely to defer to Congress's factual judgments regarding national security, even when First Amendment rights are at issue.⁶⁴ By contrast, BDS is led by civil society groups, not foreign sovereigns or terrorist organizations. And, of course, the anti-BDS statutes are being considered by states, which do not have the foreign affairs powers of Congress.⁶⁵

Given the present weakness of the BDS movement in the United States, the biggest hurdle to invalidating the South Carolina statute will not be First Amendment doctrine, but finding a boycotting company with standing to sue. The fact that these laws have limited practical impact at present makes clear that their significance is primarily symbolic. But that too is a problem. State legislatures are not seeking to defend a valued ally from a fearsome, rapidly growing boycott campaign. They are announcing their disdain for a marginal political movement whose goals they strenuously oppose. This motive could not be more antithetical to the core values of the First Amendment.⁶⁶ Fortunately, Supreme Court precedents make clear that attempts to disqualify contractors for support of BDS are foreclosed by the First Amendment. The states considering laws similar to South Carolina's should take heed.

⁶⁴ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 4–6 (2010) (rejecting a First Amendment challenge to the application of a federal statute and noting that evaluations of facts relating to national security by Congress and the executive are “entitled to deference,” *id.* at 33).

⁶⁵ *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (finding a federal statute that gave the President the authority to adjust economic sanctions against the country preempted a state law that forbade state entities from doing business with Burma).

⁶⁶ See *Gitlow v. New York*, 268 U.S. 652, 673 (Holmes, J., dissenting) (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”).