A NEW LOYALTY OATH: NEW YORK'S TARGETED BAN ON STATE FUNDS FOR PALESTINIAN BOYCOTT SUPPORTERS

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ABSTRACT

New York State's Executive Order 157 (2016) prohibits a single political group from receiving state funds: supporters of Palestinian Boycott, Divestment, Sanctions (BDS), a civil movement aimed at influencing Israeli government policy. This article analyzes the constitutional validity of New York's order and similar official sanctions on BDS throughout the United States. I argue that Executive Order 157 runs afoul of the First Amendment in two ways. First, it targets BDS because of its communicative intent, in violation of the First Amendment's "hard stop" on government regulation with the improper purpose of suppressing a specific message. Second, it fails to comport with the First Amendment's limits on restrictions of government contractor speech, overburdening contractors' and the public's right to make and hear political speech without valid justification. Executive Order 157 embodies a troubling trend toward state condemnation of disfavored political opinion and its clear disregard for constitutional mandates urges legal challenge.

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I.
INTRODUCTION

Over the past decade, states and municipalities throughout the United States have passed dozens of orders, ordinances, resolutions, and statutes restricting the First Amendment activity of a single political group: supporters of the Palestinian Boycott, Divestment, Sanctions ("BDS") movement. New York joined their ranks in June 2016 with New York State Executive Order 157 ("E.O. 157"), which bans BDS supporters from receiving any state funds under the Governor's control and creates a public blacklist of supporters identified by the state. Why should a discrete, nonviolent political movement be the target of such unique government sanction? I begin this article by addressing that question, outlining the history of the BDS movement, its political status in the United States, and the factors that may lead American politicians to rally against it.

Next, I turn to New York's Executive Order 157 itself and examine the order's improper purpose of suppressing a specified political opinion, demonstrated by both its explicit language and the operation of the blacklist so far. I trace the First Amendment's "hard stop" on government regulation that specifically targets communicative content—i.e., the aspect of activity or speech which expresses a certain stance or idea—even where the regulated activity or speech is of a kind not otherwise protected by the First Amendment. I then turn to the current blacklist to develop an understanding of what kinds of entities have been targeted in practice, and what underlying "BDS activity" supports New York's determination that an entity should be blacklisted. This analysis provides further support for the proposition that E.O. 157 is constitutionally invalid solely because it has the improper purpose of stifling disfavored speech.

Then I address New York State's arguments that the order is constitutional either because it regulates unprotected economic conduct or because BDS itself is discriminatory. Setting aside the order's impermissible purpose, I respond by examining whether BDS is the type of communication that implicates the First

Amendment. I examine the relevance of boycott as conduct rather than pure speech, rebutting New York's argument that BDS is unprotected economic conduct rather than political communication. I then tackle New York's claims that BDS is unlawful, apolitical discrimination against Jewish people or Israeli nationals and that BDS has illegal aims and is therefore unprotected by the First Amendment.

Finally, I analyze E.O. 157 as a state regulation situated within the unique context of government employment, where it is unclear how seriously a court will take the "hard stop" of improper purpose. Because the order, by its terms, does not clearly define its scope of regulated action, I start by looking to the state's own representations, as well as its budget documents, to determine the likely impact of the order. I then apply existing First Amendment doctrine to the state action contemplated by the order, looking at two distinct groups: (1) entities seeking to contract with the state government to provide goods and services and (2) entities seeking access to public benefits, such as investment in their companies or eligibility for public grants. I conclude that the First Amendment protects contractors from having their eligibility for government work conditioned upon their political beliefs, a clear-cut and longstanding doctrine dating back to the years after McCarthyism and the nation's rejection of political witch hunts. Additionally, I find that the state's proffered justifications do not persuasively overcome this protection. I also outline the current circuit split on whether first-time applicants for public contracts are protected from politically-motivated rejections. This issue will be especially critical for standing where, as here, New York has blacklisted only entities that have no current business with the state.

A. A Note on Other Potential Legal Claims

E.O. 157 could give rise to a number of serious legal claims not pursued in depth in this article. I have chosen to focus on First Amendment protections for public contractors and those seeking access to fora, to the exclusion of the claims summarized below, because I believe litigating E.O. 157 on public contracting and public fora grounds provides a better chance at judicial enforcement of the First Amendment. While the legal strategies discussed below may succeed on the merits, they will likely not prevent the New York Legislature or United States Congress from accomplishing the same political oppression with a different set of tools.

First, the order's possible violation of state or federal separation of powers doctrine could invalidate the Executive Order but leave the door open for the New York State Legislature or the United States Congress to replace it with validly enacted legislation. At the state level, E.O. 157 could be interpreted as a redefinition or revision of the Legislature's existing requirements for contract eligibility. Especially because the Legislature was considering several bills on BDS at the time Governor Andrew Cuomo issued the order, there may be a strong argument that the order circumvented the legislative process in a way that violates

New York State's separation of powers doctrine.[1] Success on this claim would provide temporary relief from the order but would do nothing to prevent the Legislature from enacting an anti-BDS statute applying to state contracting.

Similarly, at the federal level, E.O. 157 may be invalid on the basis of federal preemption, a federal separation of powers doctrine that forbids the states from enacting legislation in an area in which the federal government has primacy or exclusive control.[2] Although the federal government has not evinced a strong interest in controlling how state agencies invest their money, federal law currently prohibits American persons from complying with the Arab League boycott of Israel, which could evince a federal intent to preempt state legislation in the field of boycotts with foreign policy implications.[3] In fact, a number of state-level boycott laws have previously been struck down as infringing on federal foreign policy powers.[4]

Invalidating E.O. 157 on federal preemption grounds would preclude future state legislative efforts to enact similar laws. However, it would also leave the door open to federal anti-boycott legislation. In addition, in February 2016, bills were introduced in both the House and Senate to specifically authorize states to adopt their own anti-BDS measures, including language that an anti-BDS measure implemented "by a state or local government is not preempted by any federal law."[5] Though such a statement would not bind a court, even if the bills became law, it indicates the unfavorable political climate toward a preemption claim.

Second, E.O. 157 raises due process concerns. As noted in a memo jointly authored by Palestine Legal, the Center for Constitutional Rights, and the National Lawyers' Guild, the order may be unconstitutionally vague in defining the conduct it punishes.[6] Does it prohibit New York from working with an entity based on its constituents' "[a]ttending a protest in support of BDS? Encouraging friends to

1. *See, e.g.*, Dorst v. Pataki, 633 N.Y.S.2d 730, 733 (Sup. Ct. 1995) (invalidating governor's executive order that redefined a term laid out by the legislature). *But cf.* Ass'd Gen. Contractors v. N.Y. State Thruway Auth., 666 N.E.2d 185, 194 (N.Y. 1996) ("[S]eparation of powers doctrine is not implicated" where public benefits corporations added new requirements for bidding contractors "because the particular interests embodied in New York's competitive bidding statutes have long been clearly articulated as standards for agency action.").

2. *See, e.g.*, Nat'l Foreign Trade Council v. Natsios, 1818 F.3d 38, 73 (1st Cir. 1999).

3. 50 U.S.C. § 4607, described in more detail in section IV.C, *infra*.

4. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (Massachusetts state law denying contract eligibility to business dealing with Burma was unconstitutional because it undermined federal government's comprehensive plan dealing with Burma).

5. Combating BDS Act of 2016, S. 2531, 114th Cong. (2016); Combating BDS Act of 2016, H.R. 4514, 114th Cong. (2016). Similar bills were introduced in 2017 but have not moved out of committee as of this writing. Combating BDS Act of 2017, S. 170, 115th Cong. (2017); Combating BDS Act of 2017, H.R. 2856, 115th Cong. (2017).

6. PALESTINE LEGAL, CENTER FOR CONST. RIGHTS, & NAT'L LAWYERS' GUILD NYC CHAPTER, LEGISLATIVE MEMORANDUM: ANTI-BOYCOTT BILLS 3 (2016), https://ccrjustice.org/sites/default/files/attach/2016/04/2016-04-12%20LegislativeMemoNY_Updated.pdf [https://perma.cc/Q872-RGPY]. Although the memo deals with bills introduced in the New York legislature, the concerns it raises are applicable to both the proposed bills and Executive Order 157.

boycott Israel? Signing a petition? Abstaining from buying specific goods?"[7] The order could punish omissions—such as refusals to do business—in addition to affirmative activity. It does not limit itself on its face to an institution or company's official policies, but could punish an entity based on the acts of any of its employees. Section III.B of this article supports the viability of a due process challenge by setting out the highly arbitrary application of the Executive Order. However, I do not explore a legal challenge based on due process defects because a ruling invalidating the order on those grounds would still permit a new, less procedurally offensive order or statute targeting the same First Amendment-protected activity.

Third, E.O. 157 could also infringe on the free exercise of religion by entities that have divested from Israel for moral and religious reasons and thus may be found ineligible for state contracts to provide, for instance, social services.[8] Religious organizations throughout the United States have divested from companies like G4S, Motorola, and Caterpillar based on their involvement in building and arming the Annexation Wall, as well as providing surveillance systems, weapons, and home destruction equipment used to sustain the Israeli occupation of the Palestinian territories.[9] These groups include the Presbyterian Church (U.S.A.),[10] the Unitarian Universalist Church,[11] the American Friends Service Committee (a Quaker organization),[12] and the United Church of Christ.[13] The threat of backlash against religious organizations for involvement in BDS is not far-fetched: in 2018, the American Friends Service Committee, a Quaker organization that received a Nobel Peace Prize for its role in aiding victims of the Nazis following World War II, found its members banned from entry into Israel because of the organization's divestment activities.[14]

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7. *Id.*

8. *See* U.S. CONST. amend. I. *Sherbert v. Verner* established the principle that the government may not require a person to violate her religious beliefs in order to have access to government benefits. 374 U.S. 398, 410 (1963).

9. *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 [https://perma.cc/YA4T-ZJAF].

10. *Id*.

11. *Unitarian Universalists Divest from Companies Profiting from Israel's Occupation,* MONDOWEISS, Apr. 8, 2016, http://mondoweiss.net/2016/04/unitarian-universalists-divest-from-companies-profiting-from-israels-occupation [https://perma.cc/GU8A-JJYM].

12. *Our Divestment List*, AM. FRIENDS SERV. COMM., http://investigate.afsc.org/screens/afscdivestment [https://perma.cc/Z7XK-N56R].

13. *UCC Votes for Divestment, Boycott of Companies that Profit from Occupation of Palestinian Territories*, UNITED CHURCH OF CHRIST, June 30, 2015, http://www.ucc.org/news_general_synod_israel_palestine_resolution_06302015 [perma.cc/28XX-2PLA].

14. Allison Kaplan Sommer, *How a U.S. Quaker Group that Won the Nobel Peace Prize Ended Up on Israel's BDS Blacklist*, HAARETZ, Jan. 8, 2018, https://www.haaretz.com/israel-news/1.833556 [https://perma.cc/Y2EN-TEZ3].

Religious organizations frequently participate in government programs to provide social services,[15] and the threat of exclusion from these programs may chill the practice of religiously-motivated divestment. A free exercise claim would be narrowly applicable, but could be useful within this context.

B. A Note on Standing

There are no published reports that New York State has used the blacklist to reject a contract bid or terminate an existing contract. This is unsurprising because none of the blacklisted entities have current business with the state, which has the consequence of insulating the order from judicial scrutiny. Nonetheless, the potential impact of the order, as outlined below, supports standing for entities with current or prospective business ties to New York and that fall under the blacklist's eligibility criteria.[16]

I leave the in-depth examination of standing to others, but note briefly that First Amendment standing is especially permissive. Anticipated injuries often suffice for the injury-in-fact requirement, especially when the harm alleged is a chilling effect. For example, the Supreme Court recently decided in *Susan B. Anthony v. Driehaus* that a credible threat of enforcement of a statute can suffice for injury-in-fact, even where plaintiffs did not confirm that their future speech would violate the challenged law.[17]

Standing is still more achievable in government contracting cases. The case law on standing to challenge affirmative action and minority-preference government contracting programs strongly supports standing in anti-BDS contract regulations. In *Northeastern Florida Chapter of Associated General Contractors of America v. Jacksonville*, the Court examined the standing of a contracting association to challenge a program that set aside a certain number of contracts for minority-owned businesses.[18] The Court found standing was clearly established even without a showing that the contractor would otherwise have been awarded the contract because "the 'injury in fact' is the inability to compete on an equal

15. For examples in New York State, *see* LISA M. MONTIEL, THE ROUNDTABLE ON RELIGION & SOC'L WELFARE POL., GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS IN NEW YORK STATE: A CASE STUDY (Apr. 2004), http://www.rockinst.org/pdf/faith-based_social_services/2004-04-government_partnerships_with_faith-based_organizations_in_nys_a_case_study.pdf [https://perma.cc/9WM5-GDHA].

16. TOBAM Core Investments, for example, appears on the current blacklist and operates a financial services office in New York. *TOBAM Opens a New York Office*, TOBAM CORE INVESTMENTS, Dec. 13, 2013, http://www.tobam.fr/tobam-opens-new-york-office/ [https://perma.cc/3NDL-D6TC].

17. 134 S. Ct. 2334, 2338 (2014). *See* Wetzel v. Town of Orangetown, 308 F. App'x 474, 476 (2d Cir. 2009) ("[T]he fact that a plaintiff's speech has actually been chilled can establish an injury in fact," though plaintiff must also allege "specific present objective harm or a threat of specific future harm."); Nitke v. Ashcroft, 253 F. Supp. 2d 587, 596 (S.D.N.Y. 2003) ("In the First Amendment context, a plaintiff's injury in fact often derives from the chilling effect caused by the allegedly unconstitutional statute.").

18. 508 U.S. 656 (1993).

footing in the bidding process, not the loss of a contract."[19] The "set-aside" program, rather than considering race as one of a number of holistic factors, meant there were a certain number of contracts for which the *Jacksonville* plaintiffs could not fairly compete, echoing the complete ineligibility of BDS supporters for New York State contracts under E.O. 157.[20]

Similarly, the Court found standing in *Clements v. Fashing* for prospective candidates for public office to challenge a provision requiring that they immediately resign from their current positions in order to run.[21] None of the challengers had actually declared their candidacy, but the Court nonetheless found a non-hypothetical case or controversy when the challengers alleged they had not declared candidacy *because* doing so would trigger enforcement of the challenged provision.[22] Against this backdrop, a court would likely find standing for a company or institution that fairly alleges it would participate in BDS but for the likelihood that doing so would result in their blacklisting pursuant to E.O. 157.

II.
HISTORY OF THE BDS MOVEMENT

Understanding the BDS movement and its chilly reception by American politicians requires some historical background. For nearly fifty years, Palestinians in the West Bank and East Jerusalem have lived under Israeli military occupation. Throughout this period, the State of Israel has engaged in an ongoing project to forcibly annex the Occupied Palestinian Territory.[23] Annexation takes place by two methods: by transferring Israeli civilians into state-funded West Bank and East Jerusalem colonies, euphemistically called "settlements," and by building a wall that carves out large swaths of Palestinian territory, with less than 15% of its length following the 1967 United Nations Green Line, the official border between Israel and the Occupied Territory.[24] Between the Green Line and

19. *Id.* at 666. The Court relied on *Jacksonville* in later affirmative action cases, including *Gratz v. Bollinger*. 539 U.S. 244, 261 (2003).

20. *See infra* section V.A.

21. 457 U.S. 957, 961–62 (1982).

22. *Id.*

23. I use the terms "Occupied Territory" and "Occupied Palestinian Territory" interchangeably throughout this article to denote the portions of historic Mandatory Palestine which have been under continuous military occupation by Israel since 1967, defined by the United Nations-designated Green Line. This includes the entirety of the West Bank, part of historic Transjordan before the 1967 war, as well as East Jerusalem, which was unilaterally annexed by the Israeli Knesset in 1980 but is still considered occupied under international law. *See, e.g.*, U.N. Secretary-General, *Rep. Submitted to the Security Council by the Secretary-General in Accordance with Res. 672*, ¶¶ 2–3, U.N. Doc. S/21919 (Oct. 31, 1990). I exclude the Syrian Golan Heights, occupied in the 1967 war, because it is not a focus of the BDS movement. I exclude Gaza due to a lack of international consensus on its status as occupied versus seized and blockaded.

24. LISA MONAGHAN & GRAZIA CARECCIA, AL-HAQ, THE ANNEXATION WALL AND ITS ASSOCIATED REGIME 13 (2012), http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item_id=44&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download [https://perma.cc/R3FZ-4UX3].

the completed wall lies 9.4% of the total landmass of the West Bank, land accessible only from the Israeli side of the border.[25]

Israel is the sole nation to contend that its Occupied Territory settlements, which comprise over 200 residential communities, multiple industrial zones, and around 650,000 Israeli civilians, are legal under international law.[26] The Israeli government maintains that the settlements are not formally part of its territory and thus are not an illegal annexation, but rather a form of voluntary relocation pending final status negotiations.[27] At the same time, the settlements receive substantial financial assistance from the government[28] and their residents are subject to civilian law, rather than the military law that applies to Palestinian residents of the West Bank.[29] The formal status of the settlements could soon be in greater flux because the central committee of Israel's current ruling party recently voted to support formal annexation of the settlements to Israel.[30]

Meanwhile, the international community has continuously condemned the settlements as violating, among other obligations, the Geneva Conventions.[31] Article 49(6) of the Fourth Geneva Convention prohibits an occupying power from "transfer[ring] parts of its own civilian population into the territory it occupies." Even the United States, long Israel's staunch defender and ally, has

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25. *Id.*

26. Jodi Rudoren & Jeremy Ashkenas, *Netanyahu and the Settlements*, N.Y. TIMES, Mar. 12, 2015, https://www.nytimes.com/interactive/2015/03/12/world/middleeast/netanyahu-west-bank-settlements-israel-election.html [https://perma.cc/483B-SY3D]; Yotam Berger, *Israel Builds Industrial Zones to Deepen Control of West Bank*, HAARETZ, Feb. 20, 2017, https://www.haaretz.com/israel-news/.premium-israel-builds-industrial-zones-to-deepen-control-of-west-bank-1.5438524 [https://perma.cc/A4QW-9FJ4].

27. *Israeli Settlements and International Law*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, Nov. 30, 2015, http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israeli%20Settlements%20and%20International%20Law.aspx? [https://perma.cc/Z4SB-JWTK].

28. Hagai Amit, *Israeli Government Allocates Disproportionate Aid to Settlements, Study Finds*, HAARETZ, Nov. 20, 2017, https://www.haaretz.com/israel-news/business/israel-allocates-disproportionate-aid-to-settlements-study-finds-1.5466853 [https://perma.cc/UKD2-KWPM].

29. Daniel Estrin & Josef Federman, *Do West Bank Israelis, Palestinians Live Under Different Set of Laws?*, CHRISTIAN SCIENCE MONITOR, Apr. 20, 2014, https://www.csmonitor.com/World/Latest-News-Wires/2014/0420/Do-West-Bank-Israelis-Palestinians-live-under-different-set-of-laws [https://perma.cc/XR5M-6EQE].

30. David M. Halbfinger, *Emboldened Israeli Right Presses Moves to Doom 2-State Solution*, N.Y. TIMES, Jan. 1, 2018, https://www.nytimes.com/2018/01/01/world/middleeast/israeli-jerusalem-west-bank.html [https://perma.cc/49QF-PVX9].

31. *See* HUMAN RIGHTS WATCH, SEPARATE AND UNEQUAL: ISRAEL'S DISCRIMINATORY TREATMENT OF PALESTINIANS IN THE OCCUPIED PALESTINIAN TERRITORIES (Dec. 19, 2010), https://www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied [https://perma.cc/JK9X-H23P] ("Israel appears to be the only country to contest that its settlements are illegal."). According to the International Committee of the Red Cross, the settlements violate the Fourth Geneva Convention in multiple respects. Peter Maurer (President of the Int'l Comm. of the Red Cross), *Challenges to International Humanitarian Law: Israel's Occupation Policy*, 94 INT'L REV. RED CROSS 1503, 1507 (Winter 2012) ("The ICRC's publicly stated position is that [Israel's settlement] policy amounts to a violation of IHL, in particular the provision of the Fourth Geneva Convention prohibiting the transfer of part of the population of the Occupying Power – in this case Israeli citizens – to the occupied territory.").

historically permitted the United Nations Security Council to take the position that the Israeli settlements violate international law.[32] Security Council Resolutions 446, 452, 465, 471, 476, and 2334 declare that the settlements in the West Bank and East Jerusalem are illegal, with Resolutions 465 and 476 further stating that the settlements constitute a "flagrant violation" of the Fourth Geneva Convention.[33] Security Council Resolution 478, which the United States likewise did not veto, further declared that Israel's purported annexation of East Jerusalem in 1980 is illegal and does not alter the legal status of East Jerusalem as occupied territory.[34]

As for the Annexation Wall, Israel began construction in 2000 with the stated purpose that it would serve as a "security fence" to protect Israelis from terrorists.[35] The security rationale, however, is disputed, including, as described below, by the International Court of Justice. The U.N. Special Rapporteur on Human Rights likewise found that portions of the wall were specifically designed to allow for the expansion of illegal settlements and to reduce the Palestinian population in specified areas.[36] Public statements of Israeli politicians support this

32. Such state practice is a key component of determining what obligations exist under customary international law. Evidence of state practice includes "diplomatic acts," "public measures and other governmental acts," and "official statements of policy," whether unilateral or in a multilateral organization. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §102 cmt. b (Am. Law Inst. 1987).

33. S.C. Res. 446, ¶¶ 1, 3 (Mar. 22, 1979); S.C. Res. 452, preamble (July 20, 1979); S.C. Res. 465, ¶ 5 (Mar. 1, 1980); S.C. Res. 471, preamble (June 5, 1980); S.C. Res. 476, ¶ 3 (June 30, 1980); S.C. Res. 2334, ¶ 1 (Dec. 23, 2016).

34. S.C. Res. 478 ¶¶ 2–3 (Aug. 20, 1980). Although in 2011 the United States vetoed a Security Council resolution explicitly declaring the Israeli settlements to be illegal and calling on Israel to immediately end all settlement activity, it accompanied its vote with a statement that the United States "reject[s] in the strongest terms the legitimacy of continued Israeli settlement activity." Richard Roth, *U.S. Vetoes U.N. Resolution Declaring Israeli Settlements Illegal*, CNN, Feb. 18, 2011, http://www.cnn.com/2011/WORLD/meast/02/18/un.israel.settlements [http://perma.cc/Z52T-EAAA]. In addition, the White House recently affirmed that the United States does not take a position on the specific boundaries of Israeli sovereignty in Jerusalem, avoiding recognizing the annexation of East Jerusalem as legal despite moving the American embassy to Israel from Tel Aviv to Jerusalem. *Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem*, THE WHITE HOUSE, Dec. 6, 2017, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/ [https://perma.cc/FN99-99UV].

35. Since the wall functions to annex territory to Israel, Palestinian organizations, such as Al-Haq, refer to the separation barrier as the Annexation Wall because 85% of the wall cuts through Palestinian territory and essentially annexes that land on the Israeli side. This terminology is also preferred by John Dugard, the former U.N. Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967. *See* MONAGHAN & CARECCIA, *supra* note 24. The Israel Ministry of Foreign Affairs uses the terminology "security fence." *Saving Lives – Israel's Security Fence*, ISR. MINISTRY OF FOREIGN AFFAIRS (Nov. 26, 2003), http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/saving%20lives-%20israel-s%20security%20fence.aspx [https://perma.cc/B9WU-XKK5].

36. John Dugard (Special Rapporteur of the Comm'n on Human Rights), *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, ¶ 16, U.N. Doc. E/CN.4/2006/29 (Jan. 17, 2006).

analysis: former Israeli Justice Minister Tzipi Livni asserted that the wall will serve as "the future border of the state of Israel,"[37] while former chief of the Israel Security Agency Avraham Shalom criticized the wall as "expropriat[ing] land and annex[ing] hundreds of thousands of Palestinians to the state of Israel."[38] The Israeli Supreme Court nullified several planned sections of the wall, holding that it could not be legally used to draw political borders or to fulfill a "Zionist perspective of settling the entire land of Israel."[39]

These issues came to a head in 2004, when the International Court of Justice ("I.C.J."), which serves as the supreme judicial body of the United Nations, issued an advisory opinion finding that both the settlements and the Annexation Wall constituted violations of Israel's international obligations.[40] The ruling noted that international law obligated Israel to immediately dismantle the wall and pay reparations to Palestinians who had been displaced or whose property had been destroyed to make way for the wall and the settlements.[41] However, Israel did not comply with the I.C.J.'s interpretation of Israel's international legal obligations. Instead, senior government leaders vowed to flout the I.C.J.'s order, which they decried as "unjust" and suitable for the "garbage can of history."[42]

One year after the I.C.J. ruling, a group of 170 Palestinian civil society organizations launched the Boycott, Divestment, Sanctions movement through an open letter published on July 9, 2005. The letter called upon international civil society, including "conscientious Israelis," to impose boycotts and divestment measures against Israel "similar to those applied to South Africa in the apartheid era" in order to challenge Israel's policies of "settler-colonialism, apartheid, and occupation."[43] The movement suggests supporters boycott "Israel and Israeli and international companies that are involved in the violation of Palestinian human rights;" divest "from all Israeli companies and from international companies

37. Yuval Yoaz, *Justice Minister: West Bank Fence Is Israel's Future Border*, HAARETZ, Dec. 1, 2005, http://www.haaretz.com/news/justice-minister-west-bank-fence-is-israel-s-future-border-1.175645 [https://perma.cc/NCM2-RK9G].

38. Molly Moore, *Security Veterans Criticize Sharon*, THE WASHINGTON POST, Nov. 16, 2003, https://www.washingtonpost.com/archive/politics/2003/11/16/security-veterans-criticize-sharon/172e4716-e251-41a3-b8d6-42d7423fe1b3/?utm_term=.460e8c39f17d [http://perma.cc/UL56-K9SA].

39. HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel ¶ 27, http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf [http://perma.cc/M38J-4BPY] [unofficial English translation].

40. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep 136, ¶¶ 120, 147 (July 9).

41. *Id.* at ¶ 151.

42. Shlomo Shamir, Aluf Benn, & Yuval Yoaz, *Israel Firmly Rejects ICJ Fence Ruling*, HAARETZ, July 11, 2004, http://www.haaretz.com/israel-firmly-rejects-icj-fence-ruling-1.128143 [https://perma.cc/RC5T-QK49].

43. *Palestinian Civil Society Calls for Boycott, Divestment and Sanctions against Israel Until it Complies with International Law and Universal Principles of Human Rights*, BDS MOVEMENT (July 9, 2005), https://bdsmovement.net/call [https://perma.cc/97N7-FMDT] [hereinafter "*Civil Society Call for BDS*"]; *Israeli Settler Colonialism and Apartheid*, BDS MOVEMENT, https://bdsmovement.net/colonialism-and-apartheid/summary [https://perma.cc/P22X-4GK2].

involved in violating Palestinian rights;" and use sanctions campaigns to "pressure governments" to "hold Israel to account including by ending military trade, free-trade agreements and expelling Israel from international forums,"[44] the last of which recalls South Africa's suspension from the General Assembly for human rights violations in the 1970s. The BDS movement asks that "nonviolent pressure" as described above continue until Israel complies with three political demands:

> 1. Ending its occupation and colonization of all Arab lands and dismantling the Wall;
> 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
> 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in U.N. resolution 194.[45]

Thirteen years later, the BDS movement has seen a number of successes. Foreign direct investment in Israel dropped by nearly 50% in 2014 as a result of both BDS and the critical international response to the Israeli offensive in Gaza.[46] In response, the Israeli government has cracked down on BDS with the full weight of the law, imposing severe economic penalties on people who advocate for BDS within Israel and banning members of BDS-supporting organizations from entering the country.[47] BDS calls for *neither* the dissolution of the State of Israel within its 1967 borders *nor* the removal of non-Arab Israelis from any territory, and it self-identifies as an "inclusive, anti-racist human rights movement that is opposed on principle to all forms of discrimination, including anti-Semitism and Islamophobia."[48] Despite this, many opponents of BDS seem to conclude that its three demands—an end to the military occupation, equal treatment of Arab citizens, and a path for refugee resettlement—are either anti-Semitic or threaten Israel's existence.[49]

Understanding why American politicians have so forcefully targeted a civil society political movement from a foreign country is more puzzling. This is especially so because many American supporters of BDS practice a more limited

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44. *What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/Y784-UMTW].

45. *Civil Society Call for BDS*, *supra* note 43.

46. Moshe Glantz, *Foreign Direct Investment in Israel Cut by Half in 2014*, YNETNEWS, June 24, 2015, https://www.ynetnews.com/articles/0,7340,L-4672509,00.html [http://perma.cc/46KK-L4BJ] (quoting Dr. Roni Manos, author of U.N.'s 2014 World Investment Report).

47. *Israeli Supreme Court Upholds the Law Prohibiting Calls for Boycott Against Israel and the Settlements in the West Bank,* ADALAH: THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL (Apr. 15, 2015), https://www.adalah.org/en/content/view/8525 [http://perma.cc/GGQ7-364T]; Sommer, *supra* note 14.

48. *What is BDS?*, *supra* note 44.

49. *See, e.g.*, Ben-Dror Yemeni, *Opinion: BDS Is a Threat to Israel's Very Existence*, YNETNEWS, June 1, 2016, http://www.ynetnews.com/articles/0,7340,L-4663436,00.html [https://perma.cc/RLK4-632B]; Jodi Rudoren, *Netanyahu Lashes Out at Criticism of Israel*, N.Y. TIMES, May 31, 2015, http://www.nytimes.com/2015/06/01/world/middleeast/netanyahu-lashes-out-at-criticism-of-israel.html [https://perma.cc/V5DQ-Z4HX].

form of boycott, avoiding, for example, only products manufactured in illegal settlements or only companies that profit from weapons or the Annexation Wall. Such a limited boycott does not implicate the concerns of national origin discrimination or interference in foreign affairs that state governments often cite to justify their opposition to BDS. Yet the anti-BDS statutes and orders described below have, up to now, been applied haphazardly to individuals and companies that engage in a range of explicitly expressive BDS-related activities, including these more limited forms. The only common thread is that the targeted entities express, through spending choices, *some* disapproval of *some* activity taking place in Israel and/or the Occupied Palestinian Territory.

Pro-Israel lobbying groups are a clear contributing factor to this trend in the United States and have frequently equated supporting BDS, or even merely tolerating it, with anti-Semitism.[50] The argument seems to go that, because Israel is a self-defined Jewish state, any generalized criticism of or pressure on the state (even based upon specific governmental policies) is de facto anti-Semitic, leaving few options for effective advocacy regarding those policies. This reading conflicts with both the BDS movement's own materials and the existence of support for both full BDS and more limited types of boycott within the American Jewish community.[51] Nonetheless, there has been a widespread and, apparently, effective rhetorical campaign to link criticism of Israel's policies with hatred of or discrimination against Israeli or Jewish people.[52] On the federal level, nationwide anti-BDS bills were introduced in both the House and Senate after extended lobbying by the American Israel Public Affairs Committee, a group that advocates for pro-Israeli policies; however, both bills died in committee.[53] In addition,

50. See, for example, a recent op-ed by the national chairman of the Israeli-American Council. Adam Milstein, *BDS Is Continuing to Spread Hate and Anti-Semitism Across the U.S.*, HUFFINGTON POST, May 30, 2017, https://www.huffingtonpost.com/entry/bds-is-continuing-to-spread-hate-and-anti-semitism_us_592dab59e4b075342b52c080 [http://perma.cc/7QYT-QXF6]. See also the Anti-Defamation League's materials, which describe "denying the Jewish people the universal right of self-determination" as one of BDS's "founding goals." The ADL does not include a citation to this proposition, which contradicts the BDS movement's published materials. *BDS: The Global Campaign to Delegitimize Israel*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/resources/backgrounders/bds-the-global-campaign-to-delegitimize-israel [https://perma.cc/MLF6-YRST].

51. *See, e.g.*, *Mission*, JEWISH VOICE FOR PEACE, https://jewishvoiceforpeace.org/mission/ [https://perma.cc/S746-TRJE] ("Jewish Voice for Peace members are inspired by Jewish tradition to work together for peace, social justice, equality, human rights, respect for international law, and a U.S. foreign policy based on these ideals. . . JVP answers the call for Boycott, Divestment, and Sanctions (BDS) made by Palestinian civil society through strategic, dynamic, and effective local and national campaigns.").

Jewish Voice for Peace members have been banned from entry into Israel as a result of this stance. Sommer, *supra* note 14.

52. For two divergent views on the relationship between criticism of Israel's policies and anti-Semitism, compare Elli Tikvah Sarah, *When Anti-Zionism Becomes Anti-Semitism and Zionism Becomes Anti-Palestinian*, 32 TIKKUN 59 (2017), with Judith Butler, *No, It's Not Anti-Semitic*, 25 LONDON REV. BOOKS 19 (2003).

53. Michael Wilner, *AIPAC Lauds Senate for Additional Foreign Aid, Anti-BDS Action for Israel*, JERUSALEM POST, July 1, 2016, http://www.jpost.com/Israel-News/Politics-And-Diplomacy/

lobbying efforts have enlisted state governors to suppress criticism of Israel's policies; all 50 U.S. state governors recently signed a pledge opposing BDS following the Governors Against BDS initiative organized by the American Jewish Committee ("AJC").[54]

Largely as a result of this lobbying, at least 22 American state legislatures have passed legislation punishing both individuals and corporate entities for supporting BDS through denial of public investment, contracting, employment, or some combination thereof.[55] A recent extreme example appeared in the city of Dickinson, Texas. In the devastating aftermath of Hurricane Harvey in 2017, the municipal government required applicants for a hurricane repair grant to "verif[y] that the Applicant: (1) does not boycott Israel; and (2) will not boycott Israel during the term of this Agreement."[56] At least one otherwise-eligible individual expressed concern that he would be unable to obtain state aid in repairing his home as a result of this provision.[57] Interestingly, Dickinson city management told a news organization that the city "will not be verifying compliance with the clause," indicating that the language was intended to make political gains and chill political views, not to achieve a concrete policy goal.[58]

AIPAC-lauds-Senate-for-additional-foreign-aid-anti-BDS-action-for-Israel-459231 [http://perma.cc/M266-27BF]. *See also* Combating BDS Act of 2016, S. 2531, 114th Cong. (2016); Combating BDS Act of 2016, H.R. 4514, 114th Cong. (2016); Connie Bruck, *Friends of Israel*, THE NEW YORKER, Sept. 1, 2014, https://www.newyorker.com/magazine/2014/09/01/friends-israel [https://perma.cc/QB6B-G7G4] (describing AIPAC's influence on American politics, including, in 2011, "help[ing] persuade four hundred and forty-six members of Congress to co-sponsor resolutions opposing the idea" of Palestinian statehood in the U.N.).

54. *Governors Against BDS*, AMERICAN JEWISH COMMITTEE, https://www.ajc.org/governors [https://perma.cc/F69Y-XZZR]. According to *The Nation*, "[o]ne Jewish community relations expert admitted to Haaretz that advocacy by [Israeli lobby] groups had been critical to [American] politicians' interest in the legislation." Dima Khalidi, *Andrew Cuomo's BDS Blacklist Is a Clear Violation of the First Amendment*, THE NATION, June 23, 2016, https://www.thenation.com/article/andrew-cuomos-bds-blacklist-is-a-clear-violation-of-the-first-amendment/ [http://perma.cc/RA9S-V9JV].

55. *Anti-BDS Legislation by State*, PALESTINE LEGAL, https://palestinelegal.org/righttoboycott [https://perma.cc/XD4P-R7EL]. As of this writing, these states include Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, and Texas. This does not include the proliferation of anti-BDS ordinances at the municipal and county level or the anti-BDS executive orders signed in Louisiana, Maryland, and Wisconsin. Similar legislation has been introduced in at least 12 other state legislatures.

56. *Exhibit A: Application for Hurricane Harvey Repair Grant*, CITY OF DICKINSON, http://www.ci.dickinson.tx.us/documentcenter/view/2016 [https://perma.cc/P2QX-L3WQ]. The city has since removed the first three pages of this document from its website, on which appeared the anti-boycott recitals; the permalink directs to the original document.

57. Brooke A. Lewis & Margaret Kadifa, *Dickinson Demands Hurricane Harvey Victims Agree to Not Boycott Israel*, HOUSTON CHRONICLE, Oct. 22, 2017, http://www.chron.com/neighborhood/bayarea/news/article/Dickinson-claims-no-Hurricane-Harvey-relief-if-12292001.php [http://perma.cc/3DMZ-GHMF].

58. *Texas Pol Says Israel Boycott Law Doesn't Apply to Town's Hurricane Relief Fund*, JEWISH TELEGRAPH AGENCY, Oct. 22, 2017, https://www.jta.org/2017/10/22/news-opinion/united-states/confusion-over-state-law-led-texas-town-to-require-no-boycott-against-israel-pledge [http://perma.cc/QGT2-EQGX].

New York was the first state to take anti-BDS action via executive order, avoiding what Governor Andrew Cuomo described as the "tedious" legislative process after several anti-BDS bills failed to pass the State Legislature.[59] Cuomo signed New York State Executive Order 157 ("E.O. 157") on June 5, 2016, during the Celebrate Israel Parade.[60] The Governor's remarks upon the occasion included a statement of "solidarity with Israel today and always" and a commitment to "end this hateful, intolerant campaign," referring to the BDS movement.[61] He went on to describe the "tenacity" and "obsession" of BDS supporters "bent on destroying Israel."[62] New York's response to a recent Freedom of Information Law request by *AlterNet* and journalist Max Blumenthal sheds some light on the impetus for the order: the request revealed correspondence between the Governor and the aforementioned lobbying organization AJC in the months before E.O. 157 "pressuring Cuomo's office into signing on to a national anti-BDS initiative" and "offering the governor a platform to defend himself against a Jewish critic of the executive order."[63]

The order requires New York State to maintain a public list of companies and institutions that participate in or support the BDS movement and forbids state entities from investing money or assets in blacklisted companies and

59. Ben Norton, *The New McCarthyism Is Pro-Israel: Legal Groups Slam NY Gov. Andrew Cuomo for Creating "Unconstitutional" Blacklist of BDS Supporters*, SALON, June 6, 2016, https://www.salon.com/2016/06/06/the_new_mccarthyism_is_pro_israel_legal_groups_slam_ny_gov_andrew_cuomo_for_creating_unconstitutional_blacklist_of_bds_supporters/ [https://perma.cc/U7UR-L3KY] (noting that "[f]or months, the New York legislature has unsuccessfully tried to pass anti-boycott legislation. Cuomo circumvented this legal process completely"). Since that time, at least two other state governors have issued similar executive orders. *Executive Order #261, Relating to the Prohibition of Discriminatory Boycotts of Israel in State Contracting*, STATE OF WISC. OFF. OF THE GOV'R, Oct. 27, 2017, https://walker.wi.gov/sites/default/files/executive-orders/EO%20%23261_0.pdf [https://perma.cc/XW4R-VQ4T]; *Executive Order 01.01.2017.25, Prohibiting Discriminatory Boycotts of Israel in State Procurement*, STATE OF MD. EXEC. DEP'T, Oct. 23, 2017, https://content.govdelivery.com/attachments/MDGOV/2017/10/23/file_attachments/900819/Executive%2BOrder%2B01.01.2017.25.pdf [http://perma.cc/T8QA-LQVJ].

60. *Video, Audio, Photos, & Rush Transcript: Governor Cuomo Signs First-in-the-Nation Executive Order Directing Divestment of Public Funds Supporting BDS Campaign Against Israel*, N.Y. STATE, June 5, 2016, https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-signs-first-nation-executive-order-directing [http://perma.cc/A8YK-GKGD].

61. *Id.*

62. *Governor Cuomo Signs First-in-the-Nation Executive Order Directing Divestment of Public Funds Supporting BDS Campaign Against Israel*, N. Y. STATE (June 5, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-first-nation-executive-order-directing-divestment-public-funds-supporting [http://perma.cc/M5HN-2XU8].

63. Max Blumenthal & Sarah Lazare, *Freedom of Information Request Reveals Pro-Israel Lobbying Push Behind Gov. Cuomo's Disturbing BDS Blacklist*, ALTERNET, Dec. 5, 2016, https://www.alternet.org/grayzone-project/freedom-information-request-reveals-pro-israel-lobbying-push-behind-gov-cuomos [http://perma.cc/4JMB-U9ZQ]. AlterNet posted the documents received in response to its request online for public view. Max Blumenthal, *Cuomo & AJC Correspondence on BDS*, SCRIBD, https://www.scribd.com/document/333451001/Cuomo-and-AJC-Correspondence-on-BDS [http://perma.cc/HQS8-LAZA].

institutions.[64] Media outlets and legal organizations have condemned the Executive Order as a return to McCarthyism and a blatant violation of the right to free speech.[65] Nonetheless, it appears to be fully implemented: the current blacklist, updated June 1, 2018, names twelve foreign entities[66] that conduct no business with New York, but its criteria could easily apply more widely, as described in section III.B, and its chilling effect cannot be effectively limited to those currently on the blacklist.

So far, the political process has failed to protect the First Amendment rights of politically unpopular BDS supporters. Advocates have begun to resort to the courts: nationally, at least two lawsuits have been filed challenging state restrictions on the exercise of First Amendment rights by BDS supporters. *Koontz v. Watson*, filed by the ACLU in October 2017, was brought on behalf of a teacher trainer and member of the Mennonite Church whose BDS activity made her ineligible for state teaching assignments under a Kansas state statute requiring contractors to self-certify they are not involved in a boycott of Israel.[67] The court granted Ms. Koontz's motion for a preliminary injunction in January 2018, finding that the Kansas legislature's goals in enacting the statute clearly constituted improper viewpoint or content discrimination.[68] Interestingly, Kansas's response brief opposing the preliminary injunction did not make any reference to the First Amendment.[69] The ACLU filed an additional case in December 2017 challenging an Arizona law requiring all state contractors to certify they do not support the

64. N.Y.S. Exec. Ord. No. 157 (June 5, 2016), https://www.governor.ny.gov/news/no-157-directing-state-agencies-and-authorities-divest-public-funds-supporting-bds-campaign [https://perma.cc/3C3G-WRQ8] [hereinafter "E.O. 157"].

65. *See, e.g.*, Norton, *supra* note 59 (noting that among the groups criticizing the order are the Center for Constitutional Rights; the New York Civil Liberties Union; and Palestine Legal); Khalidi, *supra* note 54 (criticizing the order as violating the First Amendment); Glenn Greenwald & Andrew Fishman, *Andrew Cuomo and Other Democrats Launch Severe Attack on Free Speech to Protect Israel*, THE INTERCEPT, June 6, 2016, https://theintercept.com/2016/06/06/andrew-cuomo-and-other-democrats-launch-severe-attack-on-free-speech-to-protect-israel/ [http://perma.cc/46XA-EC29].

66. N.Y. STATE OFF. OF GEN. SERVS., INSTITUTIONS OR COMPANIES DETERMINED TO PARTICIPATE IN BOYCOTT, DIVESTMENT, OR SANCTIONS ACTIVITY TARGETING ISRAEL (June 1, 2018), https://www.ogs.state.ny.us/eo/157/Docs/EO157_Institutions_Companies_List.pdf [https://perma.cc/Y6Q9-NY52] [hereinafter "O.G.S. LIST OF COMPANIES (June 2018)"].

67. Compl. at ¶ 1, *Koontz v. Watson*, No. 5:17-cv-04099 (D. Kan. Oct. 11, 2017), https://www.aclu.org/sites/default/files/field_document/koontz_v._watson_complaint.pdf [http://perma.cc/S9AF-BKLK].

68. *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018). The case was subsequently dismissed with prejudice by agreement of the parties after the state amended the law to apply to only contracts with entities, not individuals, and with a value in excess of $100,000, effectively ensuring Ms. Koontz no longer had standing to sue. Agreed Order of Dismissal, *Koontz v. Watson*, No. 5:17-cv-04099 (D. Kan. June 29, 2018); KAN. STATE. ANN. § 75-3740e(c) (2018). If intended to thwart Ms. Koontz's lawsuit, as the timing suggests, Kansas's actions exemplify state reluctance to defend these anti-BDS bills in court.

69. Defs.' Resp. to Pl.'s Mot. for Prelim. Inj., *Koontz v. Watson*, No. 5:17-cv-04099 (D. Kan. Nov. 17, 2017), https://www.aclu.org/legal-document/koontz-v-watson-defendants-response-motion-preliminary-injunction [http://perma.cc/8JWR-B8N6].

BDS movement.[70] Again, the plaintiff, an attorney who contracts with the state to represent incarcerated people, seeks a preliminary injunction.[71] These lawsuits provide valuable information on how courts may respond to the proliferation of anti-BDS legislation.

New York's E.O. 157 is overdue for legal challenge, before the Palestinian exception to freedom of speech becomes entrenched in the constitutional and political mainstream. If permitted to stand, E.O. 157 will give executive officers throughout the country the green light to follow suit, chilling disfavored core political speech with no legal repercussions or recourse.

III.
EXECUTIVE ORDER 157'S IMPROPER PURPOSE: A "HARD STOP" ON CONSTITUTIONALITY

Where a government regulation relates to a type of communication that has First Amendment significance—as scholar Robert Post describes it, a "medi[um] for the communication of ideas"—it may be struck down *either* because it has an improper purpose *or*, even if its purpose is legitimate, because it fails to meet the First Amendment's requirements for the protection of that type of speech.[72] New York's arguments in favor of the Executive Order's constitutionality, outlined in section IV, *infra*, conflate these two distinct paradigms of First Amendment analysis. The state argues the order is constitutional because BDS-related activity has no First Amendment protections. But whether BDS itself is protected is irrelevant to the question of constitutionality if the state's purpose is to suppress a particular viewpoint. Stated differently, where a government regulation *aims* at an improper purpose, it simply cannot be a valid exercise of government power,[73] regardless of whether the regulated material is independently protected by the First Amendment. Below, I examine both the validity of the order in light of its improper purpose and the validity of the order assuming its purpose were found valid by a court, but begin here with improper purpose.

A. The "Hard Stop" of Improper Purpose

The government may not regulate conduct based on what the conduct tries to say—in other words, based on its communicative content. The language of Executive Order 157 explicitly embraces a government purpose of suppressing the

70. Compl., *Jordahl v. Brnovich*, Case No. 3:17-cv-08263 (D. Ariz. Dec. 7, 2017), https://www.aclu.org/legal-document/jordahl-v-brnovich-complaint [https://perma.cc/TT2Q-4KVR].

71. Pls.' Mot. for Prelim. Inj. with Accomp. Decl. & Memo. of Law, *Jordahl v. Brnovich*, Case No. 3:17-cv-08263 (D. Ariz. Dec. 7, 2017), https://www.aclu.org/legal-document/jordahl-v-brnovich-memorandum-support-plaintiffs-motion-preliminary-injunction [http://perma.cc/S99T-WH8Z].

72. *See* Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255–56 (1994-95). I adopt Post's terminology here because I find it a more useful and precise formulation than simply referring to "speech" and "nonspeech."

73. *See id.* at 1255.

communicative elements of BDS, rather than, for example, any economic or disruptive elements. Section I.B of the order defines "boycott, divestment, and sanctions activity targeting Israel" as:

> engag[ing] in any activity, or promot[ing] others to engage in any activity, that is intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel or persons doing business in Israel *for purposes of coercing political action by, or imposing policy positions on, the government of Israel*.[74]

Any company or institution participating in such activity will be put on a public blacklist on New York State's website. Affected state entities, outlined in section V.A, *infra*, must immediately break ties with those blacklisted and may not conduct any future business with them. The text of the order itself makes it clear that only conduct with a specific *communicative* goal is targeted.

This language is not the only indication of E.O. 157's improper purpose to suppress a message to which the state is hostile. Rather, this improper purpose is built into the regulation's structure, demonstrating that removing the offending text may not cure the order's constitutional infirmity. There are self-evident workable principles when the government seeks to *prohibit* persons from doing business with a foreign state or its nationals in order to achieve its foreign policy goals,[75] as in the Iran divestment bill. But when the government seeks to achieve those goals by *forcing* people to do business with a foreign state or its nationals (in other words, to prohibit them from refraining from such business), there are no such principles and enforcement of such a ban becomes highly impractical. There are many reasons why a company or institution might not do business with Israel or Israeli companies: it could operate a purely domestic business; Israeli companies may not provide the service or product it needs; it may wish to cultivate business relationships elsewhere; or other vendors may have better prices or quality. This asymmetry between a government ban on doing business and a government ban on *not* doing business, even if both were to aim at permissible foreign policy goals, shows the difficulty of enforcing the latter.[76]

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74. E.O. 157, *supra* note 64 (emphasis added).

75. When a state may validly enforce its own, as opposed to federal, foreign policy goals is a separate question beyond the scope of this article. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

76. *Cf.* Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, THE NEW YORKER, June 16, 2016, http://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott [https://perma.cc/P3WP-Y2HE]. Along these lines, E.O. 157 stands in clear contrast to the Iran Divestment Bill of 2012, § 165-a of the New York State Finance Law, which prohibits the state from investing in entities that do business with Iran's energy sector. The Governor's office, when questioned by a *New Yorker* reporter about E.O. 157, pointed to the Iran bill as proof of the order's validity. However, a ban on doing business does not require a limiting principle in the same way as a ban on *not* doing business, so the Iran Divestment Bill does not present the same problem as E.O. 157, namely, singling out politically-motivated refusals to do business. *See also* Errol Louis interview of Alphonso David, *Inside City Hall: BDS Controversy*, NY1 ONLINE (June 10, 2016, 11:43 PM), at 2:00, http://www.ny1.com/nyc/all-boroughs/inside-city-hall/2016/06/10/ny1-online—bds-controversy.html [https://perma.cc/E9TZ-RLG8] [hereinafter

Therefore, for New York's anti-BDS order to be workable in practice, it must contain a narrowing principle. It would be impractical (and politically unwise) for the state to blacklist every entity that does not do business with Israel for whatever reason. (The corner deli comes to mind as an entity that would be subject to blacklisting absent some limiting principle, as it is unlikely to trade with Israeli companies.) The limiting principle chosen by New York—singling out only *politically motivated* refusals to do business—is improper because it is based on the communicative goal of the refusal.

Government action like E.O. 157 is unconstitutional if its purpose is to "prohibit[] conduct *precisely because of its communicative attributes*," regardless of whether BDS is properly classified as speech or conduct.[77] In *Texas v. Johnson*, overturning a criminal conviction for flag desecration, the Court found that the classification of flag-burning as speech or conduct was not dispositive. Instead, the Court relied on "the governmental interest at stake" to determine the statute's validity.[78] Because the statute, on its face, criminalized only desecration of a flag in a way likely to "seriously offend" observers, the Court invalidated the statute because the government interest it advanced was the interest in suppressing Johnson's intended message.[79]

A government regulation that "makes *communicative harm* the basis for liability" may be invalid under the First Amendment as applied to even expressive conduct and speech that is otherwise unprotected by the First Amendment,[80] for example, the "historical and traditional" low-value speech categories of fighting words, incitement, and some types of libel.[81] In *R.A.V. v. City of St. Paul*, the Court invalidated a criminal statute because the government's purpose was "based on hostility . . . toward the underlying message expressed."[82] This was true even

"Alphonso David Interview"] (describing E.O. 157 as "similar" to the Iran bill and "very different to what happened in South Africa").

77. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring); *see* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

78. Texas v. Johnson, 491 U.S. 397, 406–07 (1989).

79. *Johnson* stands in stark contrast to New York State's argument that E.O. 157 is constitutional because BDS is conduct, not speech, discussed at section IV.A, *infra*. As *Johnson* acknowledges, the government generally has a "freer hand in restricting expressive conduct" than in restricting speech or writing. "It may not, however, proscribe particular conduct *because* it has expressive elements." 491 U.S. at 406.

80. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 774, 777 (Apr. 2001). Rubenfeld argues that the Court relies on improper government purpose to determine validity of First Amendment-implicating regulations, while at the same time discounting the role of purpose in its analysis. *Id.* at 768. Justice Elena Kagan adopts this view as well in her article *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, explaining First Amendment doctrine as a "kind of motive hunting." 63 UNIV. CHICAGO L. REV. 413, 414, 423–37 (Spring 1996).

81. United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) (describing which types of speech may be regulated based on content).

82. 505 U.S. 377, 386 (1992).

though the underlying activity, cross-burning, constituted "fighting words" that would not otherwise be protected by the First Amendment from content-based regulation.[83] Thus, without even determining that boycott is a protected "medium of communication," as I do in section IV.A, *infra*, it is clear that BDS may not be regulated based on hostility to its message.

This point is critical as there is some indication New York will attempt to sidestep the clear precedent that an impermissible purpose invalidates government regulation of even otherwise-unprotected speech. E.O. 157 refers to BDS as "threaten[ing] the sovereignty and security" of Israel and official statements refer to BDS as violating state antidiscrimination law, implying the state might try to characterize BDS as "fighting words" or incitement, categories of speech which lack First Amendment protections.[84] I address New York's argument that BDS is categorically unprotected in section IV.C, *infra*, but emphasize here that even unprotected speech may not be regulated for the purpose of suppressing its message.

Finally, the order—along with similar restrictions on BDS throughout the country—could not be cured by resort to neutral operative language in an attempt to avoid constitutional scrutiny. First, for the reasons outlined above, any similar ban on refusing to do business must contain some limiting principle. Second, even if the limiting principle in question were less facially hostile to a particular belief, the strategic selection of entities to be blacklisted belies the order's hostile purpose.

B. The Blacklist's Embrace of Improper Purpose

The selection of entities for inclusion on the blacklist further illustrates the speech-suppressing purpose of the order and undercuts New York's claim that the order is motivated by a valid state purpose.

The Executive Order states that entities will be selected for blacklisting "using credible information available to the public" that indicates "participat[ion] in boycott, divestment, or sanctions activity targeting Israel."[85] However, the blacklist itself gives no basis for the inclusion of each entity. Further, entities are notified of their inclusion on the blacklist via a form letter containing boilerplate language and pointing to no specific instances of so-called "BDS Activity."[86] Thus far, blacklisted entities have included mostly European banks, investment

83. *Id.*

84. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (incitement); Melzer v. Bd. of Educ., 336 F.3d 185, 198 (2d Cir. 2003) (incitement); UWM Post v. Bd. of Regents of Univ. of Wisc. Sys., 774 F. Supp. 1163, 1171, 1173 (E.D. Wisc. 1991) (citing *Johnson,* 491 U.S. 397) (fighting words).

85. E.O. 157, *supra* note 64.

86. *Accord* Form letter from RoAnn M. Destito, Comm'r, N.Y. State Off. of Gen. Servs., to Betsah Invest SA (Sept. 2, 2016), http://www.politico.com/states/f/?id=00000158-d65c-d51b-a35a-df5f44690001 [https://perma.cc/JQ4L-SDWK].

firms, and consumer products chains.[87] The order requires the list to be updated every 180 days,[88] and, while a number of entities have been removed from or added to the blacklist during these updates, no comment or justification has been given for these changes.[89]

The selection of entities appears arbitrary and politically motivated rather than reflecting any specific entity's actual practice of a BDS-style boycott. None of the companies is American or has any current (or likely future) business with the state of New York. Yet despite the apparent randomness of the selection, 14 of the 17 entities blacklisted since E.O. 157 was signed appear on the blacklist of at least one other state, and the other three are noted as potential boycotters in the minutes of a recent Illinois blacklist meeting.[90] FreedomCall Ltd., which has appeared on each iteration of New York's blacklist, is an especially odd selection for an American state's blacklist. A United Kingdom telecom company[91] that cut

87. The first-round blacklist was released on December 2, 2016, without a press release or other comment by the Governor. N.Y. STATE OFF. OF GEN. SERVS. INSTITUTIONS OR COMPANIES DETERMINED TO PARTICIPATE IN BOYCOTT, DIVESTMENT, OR SANCTIONS ACTIVITY TARGETING ISRAEL (Dec. 2, 2016) [https://perma.cc/TQ9U-3NPD]. The entities included ASN Bank NV; Betsah SA; Betsah Invest SA; Cactus SA; The Co-operative Group; Danske Bank; FreedomCall UK; Guloguz Dis Deposu Ticaret Ve Pazarlama Ltd. ["Guloguz Ltd."]; KLP Kapitalforvaltning; Kommunal Landspensjonskasse (KLP); Royal HaskoningDHV; Triodos Bank; and Vitens NV. An updated list was released May 31, 2017, adding De Volksbank NV (formerly SNS Bank NV), the parent company of ASN Bank NV. INSTITUTIONS OR COMPANIES DETERMINED TO PARTICIPATE IN BOYCOTT, DIVESTMENT, OR SANCTIONS ACTIVITY TARGETING ISRAEL, N.Y. STATE OFF. OF GEN. SERVS. (May 31, 2017) [https://perma.cc/6T32-GQ9V]; *Mission & Strategy*, DE VOLKSBANK, https://www.devolksbank.nl/about-us/mission-strategy.html [http://perma.cc/TX2R-ARTC]. The next list as of December 1, 2017 removed, without comment or justification, Danske Bank, Royal HaskoningDHV, and Vitens NV. INSTITUTIONS OR COMPANIES DETERMINED TO PARTICIPATE IN BOYCOTT, DIVESTMENT, OR SANCTIONS ACTIVITY TARGETING ISRAEL, N.Y. STATE OFF. OF GEN. SERVS. (Dec. 1, 2017) [https://perma.cc/J256-X5LH]. The most recent list, as of June 1, 2018, removed ASN Bank NV and added PFA Pension Forsikrings AS, Storebrand ASA, and TOBAM Core Investments (TOBAM SAS). O.G.S. LIST OF COMPANIES (June 2018), *supra* note 66.

88. E.O. 157, *supra* note 64.

89. *See supra* note 87.

90. STATE BD. OF ADMIN. OF FLA., SCRUTINIZED COMPANIES THAT BOYCOTT ISRAEL (Aug. 2016), https://www.sbafla.com/fsb/Portals/FSB/Content/GlobalGovernanceMandates/QuarterlyReports/2016/2016_08_Israel_scrutinized_companies_list.pdf?ver=2016-10-28-000000-000 [http://perma.cc/QJZ2-DLEY]; PROHIBITED INVESTMENT LIST: COMPANIES THAT BOYCOTT ISRAEL, ILL. INV. POLICY BD., https://www2.illinois.gov/sites/iipb/Pages/ProhibitedInvestmentList.aspx [https://perma.cc/UY38-4QZF]; MINUTES OF THE REGULAR MEETING OF THE BOARD, ILL. INV. POLICY BD., Jan. 18, 2018, https://www2.illinois.gov/sites/iipb/Documents/IIPB-Minutes-1-18-18.pdf [https://perma.cc/JJB8-83Y3]; COMPANIES BOYCOTTING ISRAEL FINAL DIVESTMENT LIST, NORTH CAROLINA DEP'T OF STATE TREAS., INV. MGMT., Feb. 28, 2018, https://www.nctreasurer.com/inside-the-department/OpenGovernment/Documents/Companies%20Boycotting%20Israel%20Final%20Divestment%20List%20-%20February%202018.pdf [https://perma.cc/KJ7R-PXPB]. Florida and Illinois are the only two states besides New York to make their blacklists publicly available online. However, a list of prohibited companies under the Arizona anti-BDS law, ARIZ. REV. STAT. § 35-393, is hosted on a website that advocates against BDS. ARIZ. STATE RET. SYS., PROHIBITED INVESTMENT LIST (Mar. 10, 2017), https://www.jewishvirtuallibrary.org/jsource/anti-semitism/AZ_boycott.pdf [https://perma.cc/8644-Y5FD].

91. Its website notes a copyright date of 2008 to 2014. FREEDOMCALL RETAIL, http://www.freedomcall.co.uk/ [https://perma.cc/EN23-VBW2].

ties with an Israeli partner in 2009[92] is now defunct but nonetheless appears on Illinois's, Arizona's, North Carolina's and Florida's blacklists in addition to New York's. A Turkish dental equipment company and a Dutch engineering firm are among the other selections included on all five lists.

The degree of "boycott" practiced by the blacklisted entities is wide-ranging and rarely the complete boycott called for by the BDS movement. Most maintain active economic ties with Israeli companies, while excluding only specific projects or companies based on sustainability or ethical and legal considerations.[93] For example, Cactus SA and The Co-operative Group are consumer products chains that exclude from their shelves products made in illegal Israeli settlements (as well as products made in other disputed territories, like the Occupied Western Sahara), but that continue to sell Israeli products.[94]

Those entities that appear to fully boycott Israel do so for political or otherwise expressive motives. For example, Guloguz Ltd., the Turkish dental equipment company, cut ties with its Israeli counterpart in response to the 2008-2009 Israeli Defense Forces offensive in Gaza,[95] which a U.N. report deemed a "collective punishment" of Palestinian civilians, a grave breach of the Geneva Convention, and a war crime.[96]

Other entities have divested from Israeli companies due to concerns about their own contributions to and potential liability for violations of international law. Dutch water company Vitens NV broke ties with Israeli national water company Mekorot in 2014 following a United Nations report that Mekorot extracts water

92. Meir Orbach, *British Telecom Firm Severs Ties with Israeli Counterparts*, YNETNEWS, Dec. 31, 2008, http://www.ynetnews.com/articles/0,7340,L-3648346,00.html [https://perma.cc/Z7KE-U7RJ].

93. As to the inclusion of Betsah SA on the blacklist (and Betsah Invest SA, its subsidiary), I could not locate a single public mention of Israeli divestment activity. Its only public "connection" to a boycott of Israel is its inclusion on the Florida state government list of "Scrutinized Companies that Boycott Israel." SCRUTINIZED COMPANIES THAT BOYCOTT ISRAEL (Aug. 2016), *supra* note 90. https://www.sbafla.com/fsb/Portals/FSB/Content/GlobalGovernanceMandates/QuarterlyReports/2016/2016_08_Israel_scrutinized_companies_list.pdf?ver=2016-10-28-000000-000 [http://perma.cc/QJZ2-DLEY].

94. *See* Nathan Guttman, *Did Illinois Bungle First-in-Nation Anti-BDS Blacklist?*, THE FORWARD, Apr. 15, 2016, http://forward.com/news/338058/did-illinois-bungle-first-in-nation-anti-bds-blacklist/ [https://perma.cc/QQ3W-8ML8]. The Co-operative Group has a general policy against sourcing products "where there is a broad international consensus that the status of a designated region or state is illegal," including the Occupied Palestinian Territory and Occupied Western Sahara. *Trading with Illegal Settlements or Occupied Territories*, THE CO-OPERATIVE GROUP WEBSITE, https://www.co-operative.coop/ethics/illegal-settlements [http://perma.cc/K8ZU-625C]. It continues to hold supply agreements with 20 other Israeli suppliers who do not work in the settlements. *Id.*

95. Avi Shauly, *Turkish Co Cancels Order from Israel, Citing Gaza*, GLOBES, Jan. 15, 2009, https://www.globes.co.il/en/article-1000417069 [https://perma.cc/5S6S-4YQG].

96. Human Rights Council, Human Rights in Palestine & Other Occupied Arab Territories, Rpt. of the U.N. Fact-Finding Mission on the Gaza Conflict, ¶¶ 60, 1171–75, U.N. Doc. A/HRC/12/48, (Sept. 25, 2009).

from Palestinian territories for the use of the illegal settlements.[97] A Vitens spokesperson said the company was concerned about its own financial contribution to this illegal activity.[98] Likewise, Dutch engineering firm Royal HaskoningDHV, which has ongoing environmental and infrastructure projects in Israel,[99] withdrew from construction of a wastewater treatment plant for settler use in Occupied East Jerusalem following the advice of the Dutch Ministry of Foreign Affairs that participating in the project would violate international law.[100]

Finally, the remaining entities on the list are European financial institutions that exclude companies worldwide based on consistently- and broadly-applied social responsibility guidelines, clearly a communicative form of conduct. For example, ASN Bank NV, a Dutch bank known for social responsibility, excludes Israeli government bonds from its portfolio for ethical reasons; it likewise excludes American, Chinese, Mexican, and Polish government bonds,[101] but maintains investments in the Israeli private sector.[102] Likewise, Norwegian bank KLP and its subsidiary KLP Kapitalforvaltning currently hold $65 million in investments in Israel. However, because they follow the Norwegian Sovereign Wealth Fund's decisions on ethical investing, they exclude some companies with activities in the Occupied Palestinian Territory.[103] For example, KLP excludes Africa Israel Investments (AFI Group), Danya Cebus, and Shikun & Binui because they develop and construct buildings in "the Israeli settlements [which] are illegal" under international law, and excludes Elbit Systems on the basis that the Annexation Wall, for which Elbit develops technology, is illegal under

97. Janene Pieters, *New York Blacklists Dutch Companies for Boycotting Israel*, NL TIMES, Dec. 7, 2016, http://nltimes.nl/2016/12/07/new-york-blacklists-dutch-companies-boycotting-israel [https://perma.cc/S5PE-4LUU].

98. *Id.*

99. Conor Skelding, *Cuomo Quietly Releases Israel-Boycott Opposition List, Perplexing Targeted Companies*, POLITICO, Dec. 9, 2016, http://www.politico.com/states/new-york/albany/story/2016/12/muted-release-of-and-mixed-reaction-to-cuomos-bds-blacklist-107815 [https://perma.cc/F786-H2GH].

100. Pieters, *supra* note 97. *See also* Barak Ravid, *Dutch Engineering Giant Cancels East Jerusalem Project*, HAARETZ, Sept. 6, 2013, http://www.haaretz.com/israel-news/.premium-1.545605 [https://perma.cc/ZKQ8-P6WQ].

101. Skelding, *supra* note 99. ASN Bank NV may also have been excluded because of its 2006 publicized exclusion of Veolia, a French multinational corporation holding a 5% stake in the Jerusalem Light Rail consortium. ASN Bank explained via letter to Veolia that the light rail project violated the "U.N.'s demand to stop all support for Israel's settlement activities" and thus violated its sustainable investment policy. Letter from ASN Bank to Veolia, Nov. 20, 2006, *quoted in* Adri Nieuwhof, *Principled Dutch Bank Ends Relations with Veolia*, THE ELECTRONIC INTIFADA, Nov. 26, 2006, https://electronicintifada.net/content/principled-dutch-asn-bank-ends-relations-veolia/6547 [http://perma.cc/BB9T-MJJ7].

102. Pieters, *supra* note 97 (ASN Bank NV's private sector investments include the water filter company Amiad).

103. Skelding, *supra* note 99. KLP also excludes companies that mine natural resources in the Occupied Western Sahara. KLP LIST, COMPANIES EXCLUDED AS OF DECEMBER 1ST, 2016, http://english.klp.no/polopoly_fs/1.35190.1481279099!/menu/standard/file/KLP-LISTEN_01%2012%202016_ENGLISH.pdf [https://perma.cc/SD3V-TACD].

international law.[104] KLP further expressed an ethical opinion in its exclusion of HeidelbergCement AG, a German firm that quarries natural resources in the Occupied West Bank. KLP explained its exclusion of Heidelberg by reference to "the international legal principle that occupation should be temporary" and to the fact that "[n]ew exploitation of natural resources in occupied territory offers a strong incentive to prolong a conflict" and "may weaken the future income potential" of Palestinian residents.[105]

Danske Bank, a Danish bank that appeared on New York's initial blacklist but was subsequently removed, previously excluded from its investment portfolio three companies that construct and finance illegal settlements in the Occupied Palestinian Territory.[106] These companies were excluded, according to the bank, due to "activities in conflict with international humanitarian law" and because, "[a]ccording to standard international law, the [Israeli] settlements are considered illegal and [a] hindrance to achieving peace."[107] When pressured by American state governments regarding its stance towards BDS, the bank asserted that it does *not* boycott Israel, but rather only invests in companies that comport with international standards like the U.N. Global Compact.[108] Nonetheless, several months later, Danske Bank removed all references to settlement construction activities from its website and removed the three settlement companies from its exclusion list.[109] Subsequently, in December 2017, Danske Bank was removed from New York's blacklist without any comment or explanation by the state.[110] Troublingly, the Danske Bank episode suggests that the state can and will use E.O.

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104. KLP LIST, COMPANIES EXCLUDED AS OF DECEMBER 1ST, 2016, *supra* note 103. AFI Group and Danya Cebus have physically constructed multiple Israeli settlements in the Occupied West Bank, violating the ICJ's Wall Opinion and the Fourth Geneva Convention. For a detailed description of the two firms' activities, *see* NORWEGIAN GLOB. PENSION FUND, COUNCIL ON ETHICS, RECOMMENDATION TO EXCLUDE THE COMPANIES AFRICA ISRAEL INVESTMENTS LTD. AND DANYA CEBUS LTD. FROM THE INVESTMENT UNIVERSE OF THE GOVERNMENT PENSION FUND GLOBAL [unofficial English translation] (Nov. 1, 2013), https://etikkradet.no/files/2017/02/Africa_Israel_ENG_nov_2013.pdf [https://perma.cc/6JGF-R926].

105. *Ten New Companies Excluded*, KLP (June 11, 2015), http://english.klp.no/about-klp/press-room/ten-new-companies-excluded-1.31188 [https://perma.cc/7UXB-UV5K]. *Decision to Exclude from Investments*, KLP (June 1, 2015), https://www.article1collective.org/0.3/wp-content/uploads/2015/06/Heidelberg-og-CEMEX-beslutning-om-utelukkelse-ENG-1.pdf [https://perma.cc/E6WC-UFL3].

106. The excluded companies were Africa Israel Investments, Danya Cebus, and Bank Hapoalim. *Excluded Companies*, DANSKE BANK, https://web.archive.org/web/20150629181852/http://www.danskebank.com/en-uk/CSR/business/SRI/Pages/exclusionlist.aspx [https://perma.cc/2827-WJLF].

107. *Id.*; *Areas of Conflict*, DANSKE BANK (Jan. 4, 2013), https://www.danskebank.com/en-uk/CSR/business/SRI/Pages/areasofconflict.aspx [https://perma.cc/HU9H-JTFG]. Between January 2017 and January 2018, Danske Bank removed from its website this material regarding its investment policy on areas of conflict.

108. Skelding, *supra* note 99.

109. *Excluded Companies*, DANSKE BANK (Jan. 2, 2017), https://danskebank.com/-/media/danske-bank-com/file-cloud/2017/2/excluded-companies.pdf [https://perma.cc/76VC-R8QC].

110. O.G.S. LIST OF COMPANIES (Dec. 1, 2017), *supra* note 87.

157 to coerce a third party into changing a politically-motivated investment policy with regard to the illegal settlements.

The blacklist is not only overinclusive, as described above, capturing a number of entities that clearly do not partake in a BDS-style boycott of Israel, but also underinclusive.[111] Some American entities more likely to do business with New York (and that consequently have more standing to sue) have made the same divestments as the 17 entities that have appeared on the list, yet somehow were not themselves included. For example, TIAA, the American financial services giant headquartered in New York, like KLP, excluded Africa Israel Investments based on its activity in Israeli settlements, but inclusion of TIAA on the blacklist could lead to judicial scrutiny of the order.[112] The Quaker Church likewise excludes Africa Israel Investments Ltd. and Danya Cebus Ltd. from its investment portfolio[113] and is thus vulnerable to exclusion from social services contracts in New York State under the Executive Order. Elbit Systems, which develops and maintains security systems specifically for use in the Annexation Wall, was excluded from investment by entities including Danske Bank for "[i]nvolve[ment] in supplying electronic equipment in conflict with human rights norms,"[114] but is also boycotted by American university student groups,[115] numerous European funds,[116] and the Quaker Church.[117]

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111. The due process and equal protection analyses of the implications of overinclusive and/or underinclusive restrictions on speech are outlined adequately in other sources and have thus been omitted here. *See, e.g.*, R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279 (Fall 1994).

112. Giovanni Legorano, *TIAA-CREF Divests from Israeli Company*, PROFESSIONAL PENSIONS, Sept. 14, 2009, http://www.professionalpensions.com/global-pensions/news/1533443/tiaa-cref-divests-israeli-company [https://perma.cc/WWR4-S6Z6].

113. *Investigate: Africa Israel Group*, AM. FRIENDS SERV. COMM., http://investigate.afsc.org/company/africa-israel-group [https://perma.cc/MPT3-XRFK]; *Investigate: Danya Cebus Ltd.*, AM. FRIENDS SERV. COMM., http://investigate.afsc.org/company/danya-cebus-ltd [https://perma.cc/H8LJ-QGS9].

114. *Excluded Companies*, DANSKE BANK, *supra* note 106 ; NORWEGIAN GOV'T PENSION FUND GLOB., COUNCIL ON ETHICS, RECOMMENDATION REGARDING ELBIT SYSTEMS LTD. [unofficial English translation] (May 15, 2009), https://www.regjeringen.no/contentassets/f507de70bf0b4235bf760746452cf192/elbit_engelsk.pdf [https://perma.cc/G3UN-BMHQ].

115. *Resolution for Wesleyan Divestment from Occupation of Palestine*, FACEBOOK (May 20, 2014), https://www.facebook.com/notes/wesleyan-students-for-justice-in-palestine/resolution-for-wesleyan-divestment-from-occupation-of-palestine/1422539348013451 [https://perma.cc/2MUZ-KTCH]; *Resolution*, UNIV. OF N.M., GRADUATE & PROF. STUDENT ASS'N (2014 Spring Session), https://docs.google.com/viewer?url=http://unmsjp.files.wordpress.com/2014/04/final-sjp-resolution-gpsa.docx&chrome=true [https://perma.cc/TYY7-S4Y3]; Adam Horowitz, *Loyola University Chicago Student Union Passes Resolution to Divest from Israeli Occupation*, MONDOWEISS, Mar. 19, 2014, http://mondoweiss.net/2014/03/university-resolution-occupation/ [https://perma.cc/P44K-WCRN].

116. *See Investigate: Elbit Systems Ltd.*, AM. FRIENDS SERV. COMM., http://investigate.afsc.org/company/elbit-systems-ltd [http://perma.cc/EUK7-JK75].

117. *Id.*

New York's apparent criteria for designating an entity a "BDS supporter" are so broad that, if consistently applied, they would prevent New York itself from doing business with other states and even with sovereign nations. Domestically, the exclusion of Triodos Bank is a clear example. Based on publicly available information, Triodos Bank[118] appears to have been blacklisted for its publicized 2011 divestment from Dexia, a French-Belgian bank that provides mortgages for Israeli settlements and funds other settlement projects in Occupied East Jerusalem.[119] Ironically, Illinois and North Carolina also boycott Dexia directly. Thus, if New York were to fully apply its own blacklisting criteria, then it must refuse to do business with either state.[120]

The potential application of the blacklist to sovereign European entities is still more problematic. Were New York to apply E.O. 157 consistently, by punishing foreign sovereign banks and pension funds from nations friendly to the United States for compliance with U.N. resolutions and international law, E.O. 157 would likely constitute an unconstitutional interference with federal foreign relations power, having more than an "incidental or indirect effect in foreign countries."[121] Several sovereign European entities have cut ties with the same companies as the blacklisted entities, but were not themselves blacklisted by New York State. The Norwegian Global Pension Fund, for example, like KLP, does not invest in Elbit Systems, Danya Cebus, or Africa Israel Investments.[122] The Luxembourg sovereign pension fund does not invest in Elbit Systems.[123] Even the British embassy in Tel Aviv cut off a contract with Africa Israel Investments because of

118. Triodos affirmed it does not boycott Israel in a press release on its website, published shortly after it appeared on the New York list. *Statement Triodos Bank on Blacklist State of New York: Triodos Bank Does Not Boycott Israel*, TRIODOS BANK (Dec. 8, 2016), https://www.triodos.com/en/about-triodos-bank/news/press-releases/statement-triodos-bank-on-blacklist-state-of-new-york/ [https://perma.cc/9D7F-UBLM]. Triodos' Sustainable Investment Pioneer Fund includes SolarEdge, an Israeli solar power technology company. TRIODOS BANK, PORTFOLIO TRIODOS SUSTAINABLE PIONEER FUND 9 (Sept. 2016), https://www.triodos.com/downloads/investment-management/research/sustainable-pioneer-fund-portfolio.pdf [https://perma.cc/GZ3P-4CDT].

119. TRIODOS BANK, *Dexia Excluded for Involvement in Israel* (Mar. 8, 2011), https://www.triodos.com/en/about-triodos-bank/news/articles/Dexia-excluded-for-involvement-in-Israel/ [https://perma.cc/T4VP-MEU8]. Dexia is notable for being the subject of a determination by the U.N. Special Rapporteur that it *specifically* violated international law and may be subject to international criminal liability based on its settlement financing. Richard Falk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967), *Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 37, U.N. Doc. A/68/376 (Sept. 10, 2013).

120. PROHIBITED INVESTMENT LIST: COMPANIES THAT BOYCOTT ISRAEL, ILL. INV. POLICY BD., *supra* note 90; COMPANIES BOYCOTTING ISRAEL FINAL DIVESTMENT LIST, NORTH CAROLINA DEP'T OF STATE TREAS., INV. MGMT., *supra* note 90.

121. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 52 (1st Cir. 1999) (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)).

122. COUNCIL ON ETHICS, GOV'T PENSION FUND GLOB., *supra* note 104, at 1; NORWEGIAN GOV'T PENSION FUND GLOB., COUNCIL ON ETHICS, *supra* note 114, at 2.

123. Fonds de Compensation [FDC], *FDC Exclusion List (as of 8th June 2018)*, at 2, https://www.fdc.lu/fileadmin/file/fdc/Liste_d_exclusion_finale_20180608.pdf [https://perma.cc/QE99-NAFP].

its settlement activities.[124] States could also make the decision to divest from companies operating in the settlements in order to comply with their perceived obligations under international law, creating further complications.[125]

The order clearly targets politically-motivated boycott that expresses a particular point of view. It has also been applied in a deeply arbitrary way, blacklisting some entities while ignoring others that meet the same criteria, but are either present in New York State or would trigger federalism problems if blacklisted. The order's operation thus far betrays both the state's impermissible motive and a lack of tailoring to a valid government interest, setting the stage for a First Amendment challenge.

IV.
NEW YORK'S JUSTIFICATIONS FOR EXECUTIVE ORDER 157

New York State's arguments for the constitutionality of E.O. 157 thoroughly sidestep the order's improper message-suppressing purpose. In addition, the state does not attempt to prove that the order comports with First Amendment requirements applicable to public contracting, were the order based on a proper purpose. Instead, New York has taken the position that expressive conduct related to the BDS movement is completely unprotected by the First Amendment because it aims solely at inflicting economic harm. New York has also claimed that the regulation is constitutional because BDS discriminates on the grounds of ethnicity and national origin or because BDS's aims are illegal. Below, I will address these justifications in the abstract and then evaluate whether they are valid state objectives or merely a pretext for punishing protected political speech when applied to the blacklisted entities.

124. Barak Ravid, *U.K. Embassy Nixes Move to Offices of Company Behind West Bank Construction*, HAARETZ, Apr. 3, 2009, http://www.haaretz.com/u-k-embassy-nixes-move-to-offices-of-company-behind-west-bank-construction-1.271376 [https://perma.cc/M62C-8FH8].

125. For example, a state may make investment decisions to avoid liability for rendering aid or assistance to an internationally wrongful act under the International Law Commission Draft Articles of State Responsibility, Articles 16 and 41(2). JAMES CRAWFORD, U.K. TRADE UNIONS CONGRESS, OPINION: THIRD PARTY OBLIGATIONS WITH RESPECT TO ISRAELI SETTLEMENTS IN THE OCCUPIED PALESTINIAN TERRITORIES ¶¶ 84–85 (2012), https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf [http://perma.cc/L2SZ-ED6Q].

Some states may also believe they must refuse to engage in commercial dealings with illegal settlements to comply with their duty under international law not to recognize the unlawful situation of the settlements. The duty of non-recognition in international law was first recognized in the I.C.J.'s Namibia opinion. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. at 16 (June 21). Law professor James Crawford, in an official legal opinion commissioned by the U.K. Trade Unions Congress, warned that such economic and commercial dealings with the settlements could amount to a breach of this obligation. CRAWFORD at ¶¶ 84–92.

A. Significance of BDS as Conduct, Not Speech

As established above, *see supra* section III.A, regulation that aims at suppressing the communicative elements of pure conduct is unconstitutional. Here, I argue that government regulations of BDS are *separately* subject to First Amendment scrutiny because they regulate a "medium for the communication of ideas": boycott.

The BDS movement, like the boycotts against Jim Crow-era policies or South African companies during apartheid, is political. It has three explicitly political demands, each of which is grounded in Israel's widely-acknowledged violations of its human rights and humanitarian law obligations. BDS makes clear historical reference to the "struggle of South Africans against apartheid"[126] and uses the tactics of boycott, divestment, and sanctions, a set of tools appropriately situated within a long line of First Amendment-protected activity in the United States.

In *NAACP v. Claiborne Hardware*, the seminal freedom-to-boycott case, the Mississippi Supreme Court held 92 boycott organizers, supporters, and participants, including the NAACP as an organization, liable in common law tort for all economic damages resulting from a boycott of white merchants.[127] The Supreme Court reversed, holding that nonviolent boycott activity was entitled to First Amendment protection despite causing economic deprivation.[128] Boycott fell within the First Amendment-protected "practice of persons sharing common views banding together to achieve a common end," which "is deeply embedded in the American political process," especially when those persons advocate "controversial" points of view.[129] Even an *explicit* aim of economic deprivation does not move a boycott outside the bounds of the First Amendment: *Claiborne Hardware* forecloses a state's right to regulate peaceful political activity for economic reasons where boycotters aim at "effectuat[ing] rights" rather than at "parochial economic interests," such as destroying competition.[130] Notably, *Claiborne Hardware* is not limited by its terms to individuals. It also deals with the NAACP's expression as an organization, and subsequent Supreme Court precedent firmly establishes that "First Amendment protection extends to

126. *Civil Society Call for BDS*, *supra* note 453, at 8.

127. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 894 (1982).

128. *Id.* at 908.

129. *Id.* at 907–908 (quoting Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294, 295 (1981)).

130. *Claiborne Hardware*, 458 U.S. at 913–15. The fact that the state burden here is defined by the political content of the burdened activity makes it difficult for New York to argue it has pure motives of economic regulation. *See also id.* at 909 (citing Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that First Amendment protects picketing even where purpose is to induce customers not to do business with employer by exposing relationship between employer and employees)). *But cf.* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426–27 (1990) (applying a reasonableness standard, rather than *Claiborne Hardware's* narrow tailoring requirement, to determine whether antitrust laws could be applied to boycott enacted by lawyers with purpose of increasing their own salaries).

corporations," specifically in the context of politically-motivated spending decisions.[131]

Although political boycott has historically been considered expressive, Alphonso David, counsel to Governor Cuomo, characterizes the BDS movement as unprotected by the First Amendment because it is "conduct," rather than expressive speech, "that is being advanced to inflict economic harm" on businesses that "do business with, or engage in any way, with Israel."[132] According to this argument, the primary goal of the BDS movement is purely economic, rather than political. David seems to conclude from this premise that the First Amendment cannot protect BDS supporters from generally applicable economic regulations, such as that at issue in *Claiborne Hardware*, because boycott is not speech.[133]

Yet under Supreme Court precedent, otherwise valid conduct-regulating statutes must meet the stringent requirements of the First Amendment if they bar conduct *because* of what it communicates—a point missed by David's willful ignorance of the fact that E.O. 157 defines the conduct it burdens in terms of its communicative import.[134] In *Cohen v. California*, the Court held that a statute barring "offensive conduct" in the courtroom was unconstitutional as applied to a man wearing a jacket with a four-letter word printed on it–conduct which the lower court had only found "offensive" because of its communicative content, i.e., the language used and viewpoint presented.[135] *Linmark Associates v. Willingboro* likewise invalidated a neutrally-drafted statute that restricted communications whose "primary effect" would be to "cause those receiving the information to act on it," again defining prohibited conduct by reference to its communicative import.[136] Robert Post draws from *Cohen* the conclusion that "perfectly proper state interests when applied to general behavior" may nonetheless fail to meet the requirements of the First Amendment when applied to communicative media.[137]

Setting aside for the moment the "hard stop" of improper purpose, there are some contexts in which the nonspeech elements of "expressive conduct" are entitled to lesser First Amendment protection. Courts have recognized the validity

131. Citizens United v. FEC, 558 U.S. 310, 342–43 (2010) (gathering cases, including First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978), holding that political speech is not outside bounds of First Amendment merely because speaker is a business).

132. Edelman, *supra* note 76; *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment to the states under the Fourteenth Amendment).

133. *See also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426–28 (1990) (explaining that state contract lawyers' strike is subject to antitrust rules because "it is undisputed that their immediate objective was to increase the price that they would be paid for their services [and] . . .[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself").

134. *See* E.O. 157, *supra* note 64.

135. 403 U.S. 15, 18 (1971). The law would be valid only if it met the stricter requirements of the First Amendment and was backed by a "particularized and compelling" justification. *Id.* at 26.

136. 431 U.S. 85, 94 (1977).

137. Post, *supra* note 72, at 1258–59.

of some economic regulation, given the state's valid interest in the economy, where such regulation is narrow and has only "an incidental effect on First Amendment freedoms."[138] Some examples include antitrust laws or prohibitions on picketing or secondary boycotts by labor unions.[139] Under the Supreme Court's decision in *United States v. O'Brien*, such regulations are valid only if the government asserts an important and legitimate state interest that is not "directly related to expression,"[140] and if any incidental restriction on First Amendment rights is "no greater than is essential" to serve that interest.[141]

On the other hand, "[a] law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires" rather than simply by meeting the more lenient *O'Brien* test.[142] According to E.O. 157's introductory language, the "State of New York unequivocally rejects the BDS campaign" and "will not permit" its activity "to further the BDS campaign in any way, shape, or form,"[143] revealing that the state's putative concern with BDS's economic effects is tied to an underlying interest in suppressing messages that favor BDS, thus precluding the government's resort to *O'Brien*'s more permissive standard. Rather, when it comes to the application of economic regulations to expressive activity, the First Amendment holds a special place for speech or conduct aimed at "coercing" its listeners into changing their policies,[144] whether or not it causes business losses along the way.[145]

B. The BDS Movement as a "Discriminatory," Thus Unlawful, Boycott

Alphonso David, in his capacity as counsel to the Governor's office, has also argued that BDS is unprotected because it calls for discrimination "based on nothing more than a person's national origin or ethnicity" and thus violates state anti-discrimination law.[146] This argument is frivolous in light of the "hard stop" on E.O. 157's impermissible purpose: Restrictions like E.O. 157 that burden

138. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982).

139. *Id.*

140. Spence v. Washington, 418 U.S. 405, 414 n.8 (1974) (describing requirements for government to rely on more lenient standard of United States v. O'Brien, 391 U.S. 367, 377 (1968)).

141. 391 U.S. at 377.

142. Cmty. for Creative Non-Violence v. Watt, 703 F. 2d 586, 622–623 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

143. E.O. 157, *supra* note 64.

144. *Claiborne Hardware*, 458 U.S. at 909–10 (speech is still protected where it "may embarrass others or coerce them into action"). *See also* Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (stating that First Amendment protects communications "intended to exercise a coercive impact"); *Claiborne Hardware*, 458 U.S. at 911–12, 907 n.43 (citing Edwards v. South Carolina, 372 U.S. 229, 235 (1963)). However, the *Claiborne Hardware* court suggests the outcome might be different if there were a narrowly tailored statute in place or if the aim of the boycott itself were prohibited by valid state legislation. 458 U.S. at 915 n.49.

145. *Claiborne Hardware*, 458 U.S. at 911–12, 926.

146. Edelman, *supra* note 76.

speech *because of* what it says are presumptively unconstitutional.[147] The First Amendment protects even blatant discrimination from content-based restriction. The NAACP boycott in *Claiborne Hardware*, for instance, specifically targeted *all* white business owners in the area based on their race alone.

Even if E.O. 157 did not have a facially improper purpose, the argument that BDS is unprotected discrimination is inapposite. First, BDS is anti-apartheid, not anti-Semitic or anti-Israeli national origin. Second, only the two blacklisted entities that engage in full divestment from Israel and Israeli companies could possibly fall within the provisions of laws preventing national origin discrimination. However, these two companies boycott for explicit political reasons: to express their outrage at the 2008-2009 Gaza offensive recognized as a war crime by the United Nations. These entities' activities come closest to what David describes as targeting a "protected class" "simply based on their national origin and ethnicity."[148] It is true that, as in *Claiborne Hardware*, the groups to be boycotted are defined by a protected characteristic—national origin.[149] Yet it cannot be the case that a state or government can insulate itself from speech critical of its policies simply by declaring an official religion or ethnicity,[150] any more than Iran or Vatican City are insulated from criticism by having official religions. A state employer, when charged with discriminating against an employee on the basis of national origin, can rebut the allegation by showing a non-pretextual, "legitimate, nondiscriminatory reason" for the employment action.[151] What holds a government contractor to a standard so high that its criticism of an entity with protected group status via political boycott is irrefutable evidence of invidious discrimination?

More practically, given the few entities that have embraced full BDS, New York has not explained how a company such as KLP, which holds $65 million in

147. *See* section III.A, *supra*; R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (1995); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

148. Alphonso David Interview, *supra* note 76. Incidentally, New York State law prohibits economic boycotts only when they target New York persons based upon protected statuses. N.Y. EXEC L. §296(13) (unlawful discriminatory practice "to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of . . . national origin . . ."); N.Y. STATE FIN. LAW. §139-h (no state contractor or affiliate "shall participate in an international boycott" in violation of federal law; *see* 50 U.S.C. § 2401 *et seq.*). The actual content of the blacklist belies E.O. 157's incompatibility with an anti-discrimination purpose.

149. It is worth noting that BDS's platform, by its terms, asks its members to boycott *Israeli* businesses, not distinguishing those owned or operated by the 25% of Israeli citizens who are not Jewish. *People and Society: Israel*, THE WORLD FACTBOOK, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/is.html [https://perma.cc/2AKM-G5XQ].

150. *See, e.g.*, Raoul Wootliff, *Final Text of Jewish Nation-State Law, Approved by the Knesset Early on July 19*, TIMES OF ISRAEL, July 19, 2018, https://www.timesofisrael.com/final-text-of-jewish-nation-state-bill-set-to-become-law/ [https://perma.cc/K3M4-UKEP] ("The right to exercise national self-determination in the State of Israel is unique to the Jewish people.").

151. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

investments in Israeli companies,[152] may be properly characterized as a "discriminatory" boycotter. Rather, many of the blacklisted entities apply specific and consistent exclusion criteria that are not based on nationality but on violations of specific environmental, ethical, or legal guidelines, irrespective of national origin of the violator. These institutions exclude companies operating in the Occupied Western Sahara and the Occupied Palestinian Territory alike; they divest from Israeli government bonds along with American, Mexican, and Polish bonds when those countries' governments violate sustainability or ethical guidelines. There is no indication that these entities' proffered justifications—cutting business ties based on specific illegal activity—are pretextual cover for racist or otherwise discriminatory motives, as required under New York antidiscrimination law.[153]

The argument unravels further where the blacklist singles out institutions that have divested only from business activity and security infrastructure in Israeli settlements in the Occupied Palestinian Territory. The United States, as a foreign policy matter, does not consider the settlements to be part of Israel; thus New York's stance that boycotting illegal settlements constitutes anti-Semitism or discrimination against Israelis is disingenuous. For example, Treasury Decision 97-16 requires products produced in the West Bank or Gaza be marked as from "West Bank" or "Gaza," and not as from "Israel" or "Made in Israel," relying on advice of the State Department in defining the term "Country" within the meaning of the Customs Regulations.[154]

Nor need New York be concerned that, as a state actor, it would violate civil rights law if its contractors practice BDS. The Governor's comparison of E.O. 157 to the Iran Divestment Bill of 2012 illustrates this point.[155] While E.O. 157, according to the state, *combats* national origin discrimination by third parties, the Iran bill *requires* the state to engage in explicit national origin discrimination, belying the state's shifting set of justifications. Equating the two exposes a further conflict: though both are regulations of third-party trade with a country self-defined by its religious beliefs, New York readily accepts a state ban on investment with the Islamic Republic of Iran as policy-driven, not Islamophobic, while it views a civil society-driven boycott on investment with the self-identified Jewish and democratic State of Israel as anti-Semitic rather than political.

The First Amendment has only narrow carve-outs from its protections for controversial speech; despite David's comments, discrimination, even if proven,

152. Skelding, *supra* note 99.

153. *See, e.g.*, Voltaire v. Home Servs. Sys., 823 F. Supp. 2d 77, 93 (E.D.N.Y. 2011) (employment discrimination claim rebutted by defendant's showing of non-pretextual motive for adverse employment action).

154. *See, e.g.*, Country of Origin Marking of Products from the West Bank and Gaza, T.D. 97–16, 62 FED. REG. 12269-70 (Mar. 14, 1997) (reissued Jan. 23, 2016, CSMS #16-000047).

155. Edelman, *supra* note 76. *See also* Alphonso David Interview, *supra* note 76, at 2:00 (describing E.O. 157 as "similar" to the Iran bill and "very different to what happened in South Africa").

is not among them. Thus, any burden New York places upon BDS-related speech must be justified under existing First Amendment law relating to government employment, which permits consideration of discrimination as a state interest to a limited extent.[156] Moreover, the implementation of the blacklist so far severely undercuts any argument that E.O. 157 legitimately advances the state interest of preventing national origin or religious discrimination. Instead, it effectively works to insulate Israel's settlement and occupation policies from criticism on the basis of political disagreement, blatant violations of international law, or third-party ethical guidelines for business engagement.

C. The BDS Movement as a Boycott with Illegal Aims

Boycotts face another specific restriction from which other types of political speech are exempt: they may be unprotected if their goal violates the law.[157] David argues that the BDS movement is ineligible for First Amendment protection because it violates state anti-discrimination laws, as discussed above. Other critics allege that BDS's aims are illegal because they violate the 1970s-era federal boycott law aimed at penalizing companies that participated in the Arab League boycott of Israel.[158] The law:

> prohibit[s] any United States person . . . from taking or knowingly agreeing to take any of [a list of 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.[159]

Apart from its intended application to a specific, non-BDS boycott, by its terms, this law is inapplicable to the BDS movement. BDS is a civil society movement of individuals, organizations, and associations and cannot be fairly read to fall under the terms of the Foreign Boycott Law.[160] It is not an official state policy and has not been endorsed by the Palestinian Authority ("P.A."). If the BDS movement were to be formally endorsed by the P.A., applicability of this law to BDS turns on the definition of "imposed by a foreign country" and whether Palestine constitutes such a foreign country under U.S. law.

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156. *See infra* section V.

157. *See, e.g.*, Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, 968 F.2d 286, 297–99 (2d Cir. 1992). *But cf.* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (regulation based on content of advocating lawless action is not content-neutral).

158. Edelman, *supra* note 76.

159. 50 U.S.C. § 4607.

160. A New York State anti-foreign boycott law tracks the language of the federal bill only "prohibits participation in state-sponsored international boycotts that are proscribed under federal law." *Legislative Memo: In Opposition of Prohibiting Politically Motivated Boycotts*, N.Y. CIVIL LIBERTIES UNION (Apr. 15, 2016), http://www.nyclu.org/content/opposition-of-prohibiting-politically-motivated-boycotts [http://perma.cc/A9KD-CR7J] (citing N.Y. STATE FIN. LAW § 139-h).

Palestine declared independence in 2011 and subsequently joined the United Nations as a non-member observer state,[161] but has not been recognized by the United States as a sovereign nation. "[T]he scope of [U.S.] relations with foreign states is a subject solely within the purview of the executive branch to determine in the first instance," and courts are discouraged from interfering with this determination.[162]

A statutory argument for the application of the Foreign Boycott Law to Palestine might go as follows. The definitional section of Title 50, which covers war and national defense, 50 U.S.C. § 4618, does not define the term "foreign country." However, Title 22, the Foreign Relations and Intercourse section of the Code, defines "government of a foreign country" as "any person or group of persons exercising sovereign *de facto* or *de jure* political jurisdiction over any country . . . or over any part of such country," including "any faction or body of insurgents within a country assuming to exercise governmental authority" regardless of whether that body has been recognized by the United States.[163] This may imply Palestine is regarded as a "foreign country" under U.S. law even without recognition; however, such an interpretation conflicts with U.S. practice regarding other non-recognized entities. For example, 22 U.S.C. § 3303(b)(1) makes special provision to apply U.S. laws relating to "foreign countries" to Taiwan, which it does not formally recognize. Comparison to 22 U.S.C. § 3303(b)(1) indicates that an analogous exception would also need to be made to extend this law to Palestine. In addition, courts have denied the P.A. sovereign immunity because it does not sufficiently control its territory or its foreign relations.[164] This case law cuts against an argument that the P.A. exercises *de facto* or *de jure* control over Palestinian territory and thus constitutes a "foreign government."

Even the most plausible reading of New York's argument for burdening BDS supporters due to the boycott's "illegal aims" does not square with the actual implementation of the blacklist. As outlined above, 15 of the 17 blacklisted entities have active economic ties to Israel and are clearly not partaking in a boycott barred by the Foreign Boycott Law.

161. G.A. Res. 67/19 (Dec. 4, 2012).

162. Knox v. PLO, 306 F. Supp. 2d 424, 445 (S.D.N.Y. 2004). *See also* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) ("[T]he President since the founding has exercised this unilateral power to recognize new states—and the Court has endorsed the practice.").

163. Foreign Agent Registration Act, 22 U.S.C. § 611(e) (2018).

164. *Knox*, 306 F. Supp. 2d at 434; *see also* Estates of Ungar ex rel. Strachman v. Palestinian Auth., 315 F. Supp. 2d 164, 183 (D.R.I. 2004) (holding that the West Bank is under Israeli, not P.A., control).

V.
EXECUTIVE ORDER 157'S REGULATION OF GOVERNMENT EMPLOYEE SPEECH THAT IMPLICATES FIRST AMENDMENT CONCERNS

Because government employment raises unique concerns under the First Amendment, a court may look beyond the threshold question of improper purpose and nonetheless evaluate the regulation under the First Amendment's ordinary requirements for this type of regulation. Therefore, I proceed in this section to analyze the order under the standards for First Amendment validity of restrictions on government employee speech.

First, I look at the scope of E.O. 157 to determine whether it extends to state contracting in addition to traditional state investment. Interpretation of the term "investment" is key to determining which legal constraints apply to the order. If the Executive Order only covers stocks and bonds, then it would likely be constrained only by the relatively weak government subsidy doctrine. If, on the other hand, it governs contracting, the order would be evaluated under the more rigorous public employment doctrine.

Concluding E.O. 157 regulates government contracting, I apply the traditional First Amendment protections for speech made by a government employee, tracing what types of communications are covered, what state interests are valid in seeking to regulate those communications, and how closely the regulations must be tied to those interests. I conclude that even the permissible state interests New York raises in support of the Executive Order are not sufficient to justify such a sweeping restriction on communicative activity with a political purpose.

A. The Scope of State Activity Regulated by Executive Order 157: Both "Traditional" and Capital Investment

It is initially unclear whether enforcement of the Executive Order implicates contractors in addition to entities in which the state holds stocks or corporate bonds. E.O. 157's operative language directs state entities to "divest their money and assets from any investment" in a blacklisted institution or company. While some practitioners have interpreted the order as applying only to "investments" in the form of purchase of stocks and bonds,[165] Black's Law Dictionary defines "investment" as "[a]n expenditure to acquire property or assets to produce revenue; a capital outlay,"[166] implying a more expansive definition that may include purchasing.[167] Because the order does not specify the meaning of "investment" by its terms, and because the order has yet to be enforced against

165. Confidential conversations between the author and New York-area civil liberties attorneys.

166. *Investment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

167. *See* People v. Esposito, 553 N.Y.S.2d 612, 616 (Sup. Ct. 1990) (dictionary definitions are valid source for statutory interpretation).

any company or institution, the definition of "investment" may be construed using the traditional tools of statutory interpretation.[168]

There are a number of reasons that the order should be understood as applying to contractors. First, Governor Cuomo's statement introducing the order, along with the wide range of "affected state entities" the order binds, implies a wider applicability than to stocks and bonds. Although the Governor's introductory comments on E.O. 157 are not binding interpretations, courts often accept statements on an executive order by the executive officer who enacted it as a means of resolving ambiguity.[169]

Upon signing the order, Governor Cuomo summed up its effect: "If you boycott against Israel, New York will boycott you."[170] Alphonso David confirmed in an interview that the order prohibits New York from doing business with entities that participate in the BDS movement.[171] He specified contracting as one of the areas E.O. 157 would affect, saying of the order, "The State of New York has the right to determine who to contract with and under what circumstances, and that's what we're doing here."[172] In addition, upon release of the first blacklist on December 2, 2016, Office of General Services press secretary Heather Groll noted that none of the businesses listed had "investments or contracts with executive-controlled state agencies," a further indication that contracts are subject to E.O. 157.[173]

Second, reading the term "affected state entities" as used in the order to exclude contracting leads to an implausible outcome. Although E.O. 157 does not list "Affected State Entities," it uses a definition[174] identical to that of New York Executive Order 88 (2012), which *does* publish a list of affected entities. E.O. 88 thus provides a useful starting point to understand the potential scope of E.O. 157. This method of interpretation, reading like terms alike where two sources of law relate to the "same or cognate subject" and are relatively contemporaneous, has been endorsed by the New York Court of Appeals as relates to statutes and is analogous in the case of executive orders.[175]

The list of "covered" entities in E.O. 88's current publications is expansive.[176] However, if the "money and assets" referred to in the order

168. *See* Singh v. Gantner, 503 F. Supp. 2d 592, 595–96 (E.D.N.Y. 2007) ("In the construction and interpretation of a statute or an Executive Order, accepted canons of statutory construction must be applied.").

169. *See, e.g.*, Dondi v. Jones, 351 N.E.2d 650, 657–58 (N.Y. 1976) (citing to Governor's statement upon signing executive order and to his statements in later press release to eliminate ambiguity in order's plain language).

170. Skelding, *supra* note 99.

171. Alphonso David Interview, *supra* note 76.

172. *Id.* at 2:40.

173. Skelding, *supra* note 99.

174. E.O. 157, *supra* note 64.

175. *E.g.*, Plato's Cave Corp. v. State Liquor Auth., 498 N.E.2d 420, 421 (N.Y. 1986).

176. Interested persons may consult the list at N.Y. POWER AUTH., BUILDSMART NY: EXEC. ORDER 88 GUIDELINES, NEW YORK STATE GOVERNMENT BUILDINGS 23–24 (Sept. 2013),

consisted of *only* stocks and bonds, the order would have a very limited effect. New York State's pensions, retirement funds, and most other forms of traditional investment are managed by the Comptroller, who is independently elected and whose office is not subject to gubernatorial authority. Recall that E.O. 157 applies *only* to funds subject to the Governor's control.[177] The Comptroller possesses joint custody of the deposits in the State Treasury, along with the Commissioner of Taxation and Finance, and exclusively administers the state's cash balances in a "short-term investment pool."[178] Only a handful of the E.O. 88 "affected state entities" are both authorized to engage in "traditional" investment and administered by the Governor rather than the Comptroller, including the SUNY and CUNY systems, the Department of Tax and Finance, and the New York State Insurance Fund.[179] These funds would likely be subject to E.O. 157's regulations, but any First Amendment protection beyond the prohibition on regulation with an improper purpose would be fairly weak. This interpretation would lead to the strange result of an order that specifically covers a large number of "affected state entities" with no power to purchase stocks and bonds, which entities could not actually be affected by the order's terms.

Third, most of the other listed agencies and public corporations do not control traditional investment of their funds, but exercise power only in so-called "capital investment"—a term used euphemistically throughout New York state budget documents to refer to simple procurement and contracting. For example, the Fiscal Year 2017 budget contains multiple references to "investment" where the purchase of goods and services is implicated.[180] The budget notes, for example, that the Department of Health is allocated an "investment" of "$5 million [] set aside for the purchase of mobile mammography vehicles."[181] It also describes that SUNY will make a "capital investment" to "maintain existing capital

https://www.nypa.gov/-/media/nypa/documents/document-library/operations/buildsmart-ny-eo88-guidelines.pdf [https://perma.cc/DVZ3-7XUG].

177. *About the Comptroller's Office*, OFF. OF THE N.Y. STATE COMPTROLLER, http://www.osc.state.ny.us/about/response.htm [https://perma.cc/C8YE-SXFV] (noting that the Comptroller is responsible for "[a]dministering the New York State and Local Retirement System for public employees" and "[s]erving as sole trustee of the $192 billion New York State Common Retirement Fund.").

178. STATE OF N.Y., OFF. OF N.Y. STATE COMPTROLLER, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR FISCAL YEAR ENDED MAR. 31, 2016 62, http://osc.state.ny.us/finance/finreports/cafr/2016cafr.pdf [https://perma.cc/VL32-64RH].

179. *Id.* at 64. "The State Insurance Fund (SIF) is a not-for-profit agency of the State of New York that was established pursuant to the WCL in 1914 to provide a guaranteed source of workers' compensation insurance coverage at the lowest possible cost to employers within New York State." *Workers Compensation Coverage*, N.Y. STATE, EMPLOYERS/BUSINESS, http://www.wcb.ny.gov/content/main/Employers/parties.jsp [https://perma.cc/7USW-PZ9P].

180. ANDREW M. CUOMO, GOVERNOR & ROBERT F. MUJICA, JR., BUDGET DIRECTOR, NEW YORK FY 2017 ENACTED CAPITAL PROGRAM AND FINANCING PLAN (May 2016), https://www.budget.ny.gov/budgetFP/FY2017CPFP.pdf [https://perma.cc/JG84-ARGL] [hereinafter "N.Y. FY17 ENACTED CAPITAL PROGRAM"].

181. *Id.* at 43.

infrastructure in a state of good repair."[182] In addition, it calls for a "multi-year investment in affordable housing services," "investments in infrastructure," and "capital investments for transportation, for higher education, to protect the environment, to enhance the State's economic development, and to maintain correctional and mental hygiene facilities,"[183] all implicating contracting.

Further, several of the "affected state entities" are specifically charged with providing grants and making purchases to support economic development. For example, the Dormitory Authority ("DASNY") is a "[p]ublic benefit corporation authorized to finance and build higher education, health care, mental health, court and other public purpose facilities across New York State."[184] The DASNY also administers the "Nonprofit Infrastructure Capital Investment Program," which "provide[s] grants to make targeted investments in capital projects that will improve the quality, efficiency, and accessibility of eligible nonprofit human services organizations that provide direct services to New Yorkers."[185] If E.O. 157 applies to these and similar entities—as it would appear to by its terms—it will result in the denial of grants and contracts to institutions and business based on their First Amendment-implicating activity.

Taken together, the statements of the Governor's office and New York's budget documents indicate the order is intended to categorically revoke eligibility of pro-BDS entities for government contracts, while chilling any entities that may be interested in BDS but concerned about its effect on their business with the state.

B. First Amendment Protections for Government Contractors

E.O. 157 affects eligibility for public contracts and procurement by either blacklisting or threatening to blacklist entities that support the BDS movement. An independent contractor that suffers an adverse employment action by the State of New York as a result of BDS activity—for example, contract termination or rejection of a winning bid[186]—may bring a claim for political retaliation pursuant to the First and Fourteenth Amendments under 42 U.S.C. § 1983.[187] However, the

182. *Id.* at 46.

183. *Id.* at 11–12, 26. The Department of Environmental Conservation also runs an Environmental Protection Fund, which pays for the purchase of land and construction of facilities. *Environmental Protection Fund (EPF)*, DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/about/92815.html [https://perma.cc/R4NP-M98Q].

184. *Our Clients Overview*, DORMITORY AUTH. OF THE STATE OF N.Y., https://www.dasny.org/our-clients [https://perma.cc/87UP-KDJQ].

185. N.Y. FY17 ENACTED CAPITAL PROGRAM, *supra* note 180, at 44.

186. Circuit courts have split as to whether an action for retaliation is available for denial of bid on political grounds by a first-time bidder or a bidder without a preexisting, ongoing commercial relationship with the government. *See supra* section IV.A.

187. Most jurisprudence regarding unconstitutional conditions of government employment refers to direct employees, not contractors. However, the Supreme Court extended this jurisprudence to contractors, except for initial bidders, in *O'Hare*, so both lines of case law are included in this article's analysis. *See* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 714 (1996) (citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967); Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593

contractor can only prevail if it made its BDS-related speech "as a citizen" on a matter of "public concern," and if that speech was a motivating factor in an adverse employment decision. Boycott and advocacy thereof, as outlined in section IV.A, *supra*, are media for the communication of ideas and thus properly styled as speech rather than less-protected "expressive conduct."

The State may respond that it would have made the same decision absent the protected speech and that it had no retaliatory intent (such intent would render the action presumptively unconstitutional). If the State meets this burden, a court will balance the contractor's (and the public's) interests in free speech against the government's interest in providing public services efficiently, applying the Court's balancing test established in *Pickering v. Board of Education*.[188] Based on the weight of legal authority, a court would likely find that E.O. 157 signals an impermissible retaliatory motive. Even if a court proceeded to First Amendment balancing, several factors indicate that plaintiffs would prevail: the importance of advocacy-related speech, the lack of discretion in applying E.O. 157, the potential proximity of BDS-related speech to workplace activities, and the fact that E.O. 157 is not only content-based, but viewpoint-based, and thus is subject to the strictest level of scrutiny.

In addition to contracting, E.O. 157 will affect BDS supporters' access to state fora, grants, and other assets, including, perhaps, eligibility for traditional investment of state funds in a company's bonds or stocks. The line of case law analyzing this issue is more convoluted. Under *Rust v. Sullivan*, a government may create a program to fund only that speech with which it agrees.[189] But in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court qualified this rule, finding that *Rust* permits the government to *refuse* to fund disfavored speech only when the government is promoting its own message. When, on the other hand, the government provides funds to subsidize a variety of private speakers, it has created a limited public forum and cannot discriminate among private speakers based on their viewpoints.[190] The distinction between these two circumstances is a highly fact-specific inquiry based on the specific purpose of each individual government program.

The line between these two forms of analysis is somewhat blurry and, in borderline cases, a court may apply either the employment doctrine or the *Rust* doctrine to analyze the validity of a speech restriction. A New York district court, for example, recently found that the public employment analysis, rather than the *Rust* fora analysis, applied to the state's denial of a permit for the Summer Outdoor

(1972)); Richardson v. Pratcher, 48 F. Supp. 3d 651, 655 (S.D.N.Y. 2014) ("[I]ndependent contractors are entitled to the same First Amendment protections as public employees.").

188. *Pickering*, 391 U.S. 568.

189. 500 U.S. 173, 193–94 (1991).

190. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–31 (1995).

Lunch Program, where the state issued permits to vendors to sell food directly to the public.[191]

In any case the government may limit protected expression (such as BDS activity) of its employees or contractors to a greater degree than that of the general public because "the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer."[192] Still, "a state may not condition public employment on an employee's exercise of his or her First Amendment rights."[193] In other words, though the government can terminate an at-will employment relationship without cause, this power may not be used to "impose conditions on expressing, or not expressing, specific political views."[194] New York State or its agencies may not take an adverse employment action on the basis of an employee's First Amendment-protected speech.

Furthermore, government limits on employee or contractor speech are invalid if they are outweighed by the employee's and the public's interest in the protected speech. A court must strike a "balance between 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."[195]

1. Application of E.O. 157 Against a Government Employee Likely Analyzed as Political Retaliation Rather than Discrimination

Two separate frames of analysis have emerged to determine the validity of a government restriction on protected speech in the context of public employment, depending on whether the basis for the adverse employment decision is political speech or mere affiliation. A retaliation claim is cognizable when an adverse employment decision is made on the basis of protected *speech*, rather than protected association or affiliation. The government's action is analyzed under the *Pickering* balancing test, which weighs various factors to determine the appropriateness of the government's restriction based on the government's interest in efficiently providing public services as balanced against the employee's and the public's interest in free speech. A political discrimination claim, on the other hand, is cognizable when an adverse employment decision is made on the basis of protected *association* or *affiliation* (generally a party affiliation), rather than speech. The government's action is evaluated more strictly to determine only

191. Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053 (MAD/DJS), 2016 U.S. Dist. LEXIS 26046, at *69 (N.D.N.Y. Mar. 1, 2016), *rev'd on other grounds*, 879 F.3d 20 (2d Cir. 2018).

192. Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion).

193. *O'Hare*, 518 U.S. at 714 (citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967); Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593 (1972)).

194. *O'Hare*, 518 U.S. at 714.

195. *Pickering*, 391 U.S. at 568.

whether political affiliation was a reasonable requirement for the job in question.[196]

Here, although the order permits blacklisting for mere "participation," a court will likely analyze adverse employment actions taken as a result of E.O. 157 as retaliation, rather than political discrimination. Participation could easily encompass, for example, membership in an organization promoting BDS, which would seem to fit more naturally in political affiliation rather than retaliation for specific expressive activity. However, the Supreme Court in *O'Hare* noted that government contracting cases are probably better analyzed as retaliation because this factor-based approach will "allow the courts to consider the necessity of according the government the discretion it requires in the administration and awarding of contracts over the whole range of public works and the delivery of governmental services."[197] Further, in light of the recent determination by the Eastern District of New York that campaigning for a specific candidate is expressive speech, not mere affiliation, supporting BDS, an advocacy movement, will almost certainly be analyzed as speech.[198]

2. The Prima Facie Case

As stated above, to state a claim of political speech retaliation in the Second Circuit, where New York sits, a public employee or contractor must show that it made its BDS-related speech both as a citizen and on a matter of public concern; that it suffered an adverse employment action; and that the speech was a substantial or motivating factor in the adverse action.[199]

The First Amendment protects employee or contractor speech only when the employee or contractor is speaking "as a citizen on a matter of public concern."[200] Conversely, when an employee is speaking within the scope of job duties, her speech is not protected because the government "has commissioned or created" the speech itself.[201] If the employee or contractor is speaking as a citizen,

196. *O'Hare*, 518 U.S. at 714.

197. *Id.* at 719–20; *see also* Savoy of Newburgh, Inc. v. City of Newburgh, 657 F. Supp. 2d 437, 444–45 (S.D.N.Y. 2009) (applying *Pickering* retaliation test where contractor's speech at issue contained both affiliation and expressive speech).

198. Dejana Indus. v. Vill. of Manorhaven, No. 12-CV-5140(JS)(SIL), 2015 U.S. Dist. LEXIS 34384, at *18–19 (E.D.N.Y. Mar. 18, 2015). *See also* Melzer v. Bd. of Educ., 336 F.3d 185, 194–95 (2d Cir. 2003) (applying *Pickering* test when speech took place outside of work and when adverse employment action was based on "an associational activity of which speech was an essential component," in part because association had advocacy aims).

199. *See, e.g.*, Gill v. Pidlypchak, 389 F.3d 379, 382 (2d Cir. 2004); Johnson v. Ganim, 342 F.3d 105, 112 (2d Cir. 2003).

200. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

201. *Id.* at 422–23. The Supreme Court clarified in *Lane v. Franks* that *Garcetti* only excluded from protection speech that "is itself ordinarily within the scope of an employee's duties," not speech that "merely concerns those duties." 134 S. Ct. 2369, 2379 (2014), *vacated on other grounds sub nom.* Lane v. Cent. Ala. Cmty. College, 772 F.3d 1349 (11th Cir. 2014).

however, the only valid restrictions on that speech are those necessary for the government's efficient and effective operations.[202]

To be protected, political speech must also be on a matter of public concern.[203] Public concern is speech relating to "any matter of public, social, or other concern to the community."[204] In the Second Circuit, "[a]dvocacy for a change in public perception and law" is "a fundamental component of democracy" and "certainly a matter of public concern, regardless of the underlying subject matter."[205] The BDS movement, which advocates for, among other things, a change in the United States' policies regarding Israel and the Occupied Palestinian Territory, easily satisfies the public concern requirement.

Second, the actor must suffer an adverse employment action. Public employees as such are protected from firing, refusal to hire or promote, demotion, pay reductions, and reprimands on the basis of protected speech.[206] However, there is no consensus on whether the law protects independent government contractors from the same range of retaliatory adverse employment decisions. In *Board of County Commissioners v. Umbehr*, the Supreme Court found that a county's termination of an at-will contract based on the contractor's political speech was actionable retaliation, concluding that contract termination or nonrenewal constitutes an adverse employment action so long as the independent contractor has an ongoing or pre-existing commercial relationship with the government.[207] However, circuit courts have split on whether bidders without an ongoing relationship with the government can make a retaliation claim. Although the Second Circuit has only noted that this remains an open question,[208] the Eastern District of New York recently found "no principled reason" to deny contractors the same First Amendment protections government employees hold, including protection from retaliatory failure to hire a new applicant—a principle which would extend by analogy to first-time government contract bidders.[209]

Although the Court in *Umbehr* expressly declined to address this issue,[210] it did note that the Court has consistently rejected "[d]etermining constitutional

202. *See Garcetti*, 547 U.S. at 419.

203. Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality opinion); Connick v. Myers, 461 U.S. 138, 142 (1983). *See also* Golodner v. Berliner, 770 F.3d 196, 206–07 (2d Cir. 2014) (public employees' right to speak on matters of public concern is "beyond debate").

204. *Golodner*, 770 F.3d at 203 (quoting *Connick*, 461 U.S. at 146) (finding police department's policies a matter of public concern).

205. Melzer v. Bd. of Educ., 336 F.3d 185, 196 (2d Cir. 2003) (advocacy for lowering age of consent is a matter of "public concern").

206. Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 226 (2d Cir. 2006).

207. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 685 (1996).

208. Afr. Trade & Info. Ctr., Inc. v. Abromaitis, 294 F.3d 355, 359–60 (2d Cir. 2002).

209. A.F.C. Enters., Inc. v. N.Y.C. School Constr. Auth., No. 98 Civ. 4534 (CJS), 2001 U.S. Dist. LEXIS 24447, at *55 (E.D.N.Y. Sept. 6, 2001). *See also Dejana Indus.*, 2015 U.S. Dist. LEXIS 34384, at *17-18 ("[A]n independent government contractor [] enjoys the same First Amendment protections as a government employee.").

210. *Umbehr*, 518 U.S. at 685 ("[W]e need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.").

claims on the basis of [] formal distinctions, which can be manipulated largely at the will of the government agencies concerned."[211] *Umbehr*'s logic that there is "[n]o legally relevant distinction" between government employees and contractors strongly supports the conclusion that all bidders have access to a cause of action in these circumstances. This is further supported by the Supreme Court's holding in *Perry v. Sindermann* that the "lack of a contractual or tenure 'right' to re-employment . . . is immaterial to [an employee's] free speech claim."[212]

The Fifth and Sixth Circuits, like the Eastern District of New York, have found a valid cause of action for first-time bidders, analogizing them to individual job applicants who are protected from failure to hire in retaliation for First Amendment speech.[213] The availability of relief for bidders on government contracts remains an open question in the First Circuit,[214] though a First Circuit district court recognized that a plaintiff had stated a claim even without a prior business relationship with the government before dismissing the case on qualified immunity grounds.[215]

On the other hand, in *McClintock v. Eichelberger*, a divided Third Circuit panel explicitly precluded a retaliation claim for first-time bidders and all other contractors who did not have an active, ongoing relationship with the state at the time of the retaliatory action, based on its reluctance to extend First Amendment rights beyond the Supreme Court's holdings.[216] However, the contractor in *McClintock* argued that it did have such an ongoing relationship and did *not* plead that it was entitled to relief even absent such a relationship, so *McClintock*'s language beyond this point is likely dicta.[217] *McClintock* has not been well received outside of the Third Circuit. The Southern District of New York, for example, rejected *McClintock*'s holding as "seem[ing] to violate the spirit of *Sindermann*, *Rutan* and *Umbehr*."[218] Therefore the weight of authority still supports the availability of a claim of retaliation for all bidders on government contracts.

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211. *Id.* at 679–80 (citing, *inter alia*, Logue v. United States, 412 U.S. 521, 532 (1973) and Lefkowitz v. Turley, 414 U.S. 70, 83 (1973)).

212. 408 U.S. 593, 597–98 (1972).

213. Oscar Renda Contr., Inc. v. City of Lubbock, 463 F.3d 378, 380, 385 (5th Cir. 2006), *cert. denied*, 549 U.S. 1339 (2007); Lucas v. Monroe County, 203 F.3d 964, 973 (6th Cir. 2000).

214. Rosaura Bldg. Corp. v. Mun'y of Mayagüez, 778 F.3d 55, 63 n.5, 65 (1st Cir. 2015).

215. Del Valle Grp. v. P.R. Ports Auth., 756 F. Supp. 2d 169, 177–78 (D.P.R. 2010).

216. 169 F.3d 812, 816 (3d Cir. 1999), *cert. denied*, 538 U.S. 876 (1999).

217. The Fifth Circuit voiced this criticism, noting that "[t]here is some question as to whether the discussion [in *McClintock*] of the right of a contractor without a pre-existing relationship with the government to First Amendment protection is dicta since the court first stated that the only argument the contractor made was based on having a prior relationship." *Oscar Renda*, 463 F.3d at 385 n.4.

218. Hous. Works v. Turner, 179 F. Supp. 2d 177, 199 (S.D.N.Y. 2001). *See also* Snodgrass v. Doral Dental of Tenn., LLC, No. 3:08-0107, 2008 U.S. Dist. LEXIS 52900, at *30 (M.D. Tenn. July 10, 2008) (calling *McClintock* "no[t] particularly persuasive); Yadin Co. v. Peoria, No. CV-06-1317-PHX-PGR, 2008 U.S. Dist. LEXIS 109501, at *6 (D. Ariz. Mar. 25, 2008) (following *Oscar Renda* as "better reasoned" and "specifically reject[ing]" *McClintock*'s reasoning).

Finally, the leading case on political speech retaliation toward independent contractors sheds some interpretive light on this issue. In *O'Hare*, the Supreme Court first extended protection from political speech retaliation to independent contractors.[219] The Court relied upon the magnitude of loss to which a contractor would be exposed upon retaliation, "fail[ing] to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor."[220] The threat of losing government business is equally coercive whether or not a contractor has an ongoing relationship with the government when it faces the threat of lost contracts. Following this logic as well as the leading jurisprudence from other circuits, New York courts will likely protect first-time contract bidders from political speech retaliation, just like they protect first-time job applicants. Finally, it is worth noting that where applicants for public programs, rather than for contracts, bring First Amendment retaliation claims, as in *Wandering Dago*,[221] at least one Circuit Court has held that a preexisting commercial relationship is not a prerequisite to a colorable claim.[222]

The final step in the prima facie retaliation case is to establish that "the protected speech was a substantial motivating factor in the adverse employment action."[223] Although private citizens must additionally prove that their speech was chilled, "a chilling effect is presumed" as to public employees because of the valuable monetary benefits inherent in commercial relationships with the government.[224] While most of the cases cited below refer to ad hoc decisions where an employer's discriminatory motive had to be ferreted out by the courts, here, New York State explicitly and publicly denies investment and contracting based on expressive political speech.[225] Thus in the case of E.O. 157, the causation prong is clearly met because the state has formally enshrined a policy of excluding speakers of certain messages from eligibility for public contracts. The Supreme Court has long held that First Amendment protections "extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory," invalidating a McCarthy-era state law requiring public

219. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 717 (1996) (holding that tow truck driver could not be removed from city's rotation because he opposed election of current mayor).

220. *Id.* at 722 (quoting *Lefkowitz*, 414 U.S. at 83).

221. Wandering Dago, Inc. v. Destito, No. 1:13-cv-1053 (MAD/DJS), 2016 U.S. Dist. LEXIS 26046 (N.D.N.Y. Mar. 1, 2016), *rev'd on other grounds*, 879 F.3d 20 (2d Cir. 2018).

222. Wishnatsky v. Rovner, 433 F.3d 608, 612 (8th Cir. 2006).

223. Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ., 444 F.3d 158, 167 (2d Cir. 2006) (quoting Morris v. Lindau, 196 F.3d 102, 196 (2d Cir. 1999)).

224. Gill v. Pidlypchak, 389 F.3d 379, 382 (2d Cir. 2004); Savoy of Newburgh, Inc. v. City of Newburgh, 657 F. Supp. 2d 437, 440 (S.D.N.Y. 2009) (citing Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996).

225. Again, E.O. 157 penalizes only boycotts that are "for purposes of coercing political action by, or imposing policy positions on, the government of Israel." E.O. 157, *supra* note 64.

employees to take an anti-Communist loyalty oath.[226] The present restriction is, like that statute, a formal declaration of State policy and a court will likely find that the causation prong is satisfied, establishing a prima facie case.

3. The State's Rebuttal of Claims of Retaliation

If the state refuses a bid or ends a contract with a retaliatory motive, that motive is impermissible and will invalidate even an otherwise legitimate adverse employment action.[227] This inquiry into motive functions similarly to the mechanism discussed in section III, *supra*, as the "hard stop" of impermissible purpose where the government seeks to suppress a particular message. After the prima facie case, the burden shifts to the state to show it acted without a retaliatory speech-related motive, but rather because the speech "so threatens the government's effective operation that discipline of the employee is justified."[228] This showing must demonstrate that the "employer's prediction of disruption [caused by the employee's speech] is reasonable" and that the employment decision was "based on this disruption and not in retaliation for the speech."[229]

However, threatening to use state power in order to "stifle protected speech" is a per se violation of the First Amendment and cannot be rebutted by government evidence of disruption.[230] A viewpoint-based restriction on speech, such as E.O. 157, falls squarely within courts' jurisprudence as an impermissible retaliatory motive.[231] The Second Circuit holds that "retaliatory discharge is *always* unconstitutional," even if a court finds under *Pickering* balancing that the potential disruption of the employee's speech outweighs its value.[232] It is thus extremely unlikely that enforcement, or threatened enforcement, of E.O. 157 against a

226. Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (nullifying Oklahoma law mandating public employees take oath that they were not members of subversive or Communist-front organizations, as deemed by Attorney General).

227. Heffernan v. Paterson, 136 S. Ct. 1412, 1417–18 (2016) (First Amendment cause of action exists when government takes adverse employment action with the desire to prevent unwanted political activity). In *Heffernan*, the Court further held that an adverse employment action may be invalid even if the affected person had not actually engaged in protected First Amendment activity, so long as the government acted in retaliation for what it *believed* was such activity. *Id.* at 1417–19.

228. Melzer v. Bd. of Educ., 336 F.3d 185, 193 (2d Cir. 2003). This burden-shifting mechanism for employment cases is established in *Mount Healthy City School District v. Doyle*. 429 U.S. 274, 287 (1977), *modified by* 5 U.S.C.A. § 1221(e)(2) (Supp. 1990) (modifying *Mt. Healthy* rule to require government to provide clear and convincing evidence rather than mere preponderance).

229. Locurto v. Giuliani, 447 F.3d 159, 172–73 (2d Cir. 2006) (quoting Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995)).

230. Richardson v. Pratcher, 48 F. Supp. 3d 651, 669 (S.D.N.Y. 2014) (quoting Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam)).

231. Note, however, that at least one district court in New York has permitted mixed-motive adverse employment actions, where a state entity could dismiss an employee for legitimate apolitical reasons even where those reasons were "coupled with" the impermissible motive of the employee's political beliefs. Visser v. Magnarelli, 530 F. Supp. 1165, 1173 (N.D.N.Y. 1982) (examining a claim of political discrimination, not retaliation).

232. Sheppard v. Beerman, 94 F.3d 823, 827 (2d Cir. 1996); *see also Richardson*, 48 F. Supp. 3d at 669 ("[I]t is never objectively reasonable to act with a retaliatory intent.").

contractor will survive First Amendment scrutiny, since the state's retaliatory intent is evinced by the very text of E.O. 157.

4. Balancing Free Speech Interests Against Efficiency

Although a contractor who supports the BDS movement is likely to prevail automatically under *Sheppard*, as noted above, it is still useful to understand how the *Pickering* test may incorporate claims New York State makes about the purpose of its anti-BDS order, such as claims that the BDS movement is discriminatory or unlawful. Under *Pickering*, a state may prevail if its "legitimate interests as contractor, deferentially viewed, outweigh the free speech interests" of both the employee or contractor and the public in hearing the employee or contractor's speech.[233] The disruption to efficiency and effectiveness cited by the state in its rebuttal showing is the only legitimate government interest that may be considered under *Pickering*.[234] Efficiency is defined expansively and includes promoting supervisory discipline and harmonious working relationships as well as the regular operation of the state office.[235] To show a threat to this efficiency, the government must only show likely, not actual, interference.[236]

According to the case law, then, New York could only prevail under *Pickering* balancing if it shows that contracting with BDS-supporting entities would likely damage the internal efficiency of the government by, for example, causing workplace friction. There is little precedent for such a showing, even crediting the state's antidiscrimination rationale. Most prior cases that consider how anti-discrimination policies improve efficiency involve racist jokes or comments. For example, in *Pereira v. Commissioner of Social Services*, the court found that the government's interest in efficiency outweighed an employee's interest in making a racist joke, especially since the employee lacked the motive to "engage in debate, raise awareness, or promote a position."[237] The Second Circuit similarly found that public racist speech threatened the government's efficiency because it posed a "reasonable threat of disruption in the context of the

233. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 685 (1996); *see* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("[T]he First Amendment interests at stake" in a political retaliation case "extend beyond the individual speaker" and also include "the public's interest in receiving the well-informed views of government employees engaging in civic discussion.")

234. *See, e.g.*, *Garcetti*, 547 U.S. at 419 ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."); Garcia v. State Univ. of N.Y. Health Sci. Ctr., 280 F.3d 98, 106 (2d Cir. 2001) ("[W]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions [in the name of efficiency] may well be appropriate." (quoting Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion)); *Richardson*, 48 F. Supp. 3d at 664 (weighing free speech interest against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

235. Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 570–73 (1968).

236. Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995) (citing *Waters*, 511 U.S. at 674).

237. 733 N.E.2d 112, 120–21 (2000).

jobs of police officers and firefighters," while noting that the public-facing nature of these positions was highly relevant to the finding that the state's interest outweighed the free speech interest.[238] Confidential and policymaking positions, like those with extensive public contact, may also be subject to greater restrictions by the government.[239] At the same time, however, the court held that mere controversy of an idea or a public desire to "shout down unpopular ideas that stir anger" is not generally a valid justification for restriction of speech.[240] BDS is far more likely to fall into this second category as an "unpopular idea" that stirs anger, rather than disruptive discrimination, for the reasons outlined in section IV.B.

On the other side of the *Pickering* scale, E.O. 157 has four features that are likely to outweigh any showing of disruption. First, the restriction is New York's official policy and applies a blanket restriction on a large group of prospective speakers. E.O. 157 thus "chills potential speech before it happens" and "singles out expressive," rather than disruptive, activity, indicating that the restriction is not proportional to a legitimate government goal of reducing disruption.[241] Because of this lack of case-by-case assessment of disruption, E.O. 157 also excessively burdens the public's right to hear what contractors would have otherwise said.[242] In addition, a sole executive decision such as E.O. 157 receives less deference under *Pickering* than a legislative decision.[243]

Second, E.O. 157 singles out advocacy activity for restriction. The Second Circuit has held that "[t]he more speech touches on matters of public concern, the greater the level of disruption the government must show" to justify a restriction.[244] BDS has explicitly political goals and only boycott with those political goals is barred by E.O. 157, indicating that the government must show a high level of disruption to justify its restriction.

Third, E.O. 157 applies to all BDS-related speech, whether or not it is made in the workplace or bears any relation to work. The Second Circuit views Supreme Court precedent as standing for the proposition that "the Government could not justify a ban on speech outside of the workplace and unrelated to Government employment on grounds of workplace disruption," implying that the potential disruption of BDS-related speech outside the workplace may not be a valid

238. Locurto v. Giuliani, 447 F.3d 159, 178–79 (2d Cir. 2006) (holding that "a Government employer may, in termination decisions, take into account the public's perception of employees whose jobs necessarily bring them into extensive public contact" such as police, firefighters, or public university department chairs).

239. Melzer v. Bd. of Educ., 336 F.3d 185, 197 (2d Cir. 2003).

240. *Id.* at 199 (citing Feiner v. New York, 340 U.S. 315, 320 (1951)).

241. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 468, 475 (1995) (striking down viewpoint-neutral ban on paid speeches by federal employees).

242. *See id.* at 470.

243. *Id.* at 468.

244. *Melzer*, 336 F.3d at 197 (stating that advocacy-related speech is strongly a matter of public concern).

countervailing government interest at all.[245] The more attenuated the time, place, and content of speech is from the workplace, the higher the bar for the government to show sufficient disruption.[246]

Finally, E.O. 157 is an explicitly viewpoint-based restriction. It does not exclude, for example, contractors who support Israeli policies in the Occupied Palestinian Territory, which undercuts any argument that the topic of the conflict is too inflammatory and disruptive for the workplace. Viewpoint-based restrictions on political speech are among the most "egregious" and "blatant" violations of the First Amendment.[247] Though New York is entitled to greater judicial deference when restricting the speech of its employees than that of the general public, the state still faces a heavier burden under *Pickering* balancing to justify a viewpoint- and content-based restriction than a facially neutral one, or even one that is only content-based.

C. First Amendment Protections Against Loss of Government Benefits Other than Employment

In the same way as the First Amendment prevents conditioning employment on protected speech, the government may not deny a benefit, such as a grant or access to a public forum, on the basis of protected speech, "even if [the potential recipient] has no entitlement to that benefit."[248] Courts have further held that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."[249] Because the State of New York may not command institutions and companies that support the BDS movement to end such support, it may not attempt to reach the same end through discriminatory use of its spending power. Such a use of state power creates an "unconstitutional condition" on receipt of the public benefit.[250]

However, the Court has also upheld a limiting principle that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the

245. Locurto v. Giuliani, 447 F.3d 159, 174 (2d Cir. 2006) (interpreting *Nat'l Treasury*, 513 U.S. 454).

246. *See Melzer*, 336 F.3d at 194.

247. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

248. Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc., 547 U.S. 47, 51 (2006) (quoting United States v. American Library Ass'n, Inc., 539 U.S. 194, 210 (1996)).

249. Sherbert v. Verner, 374 U.S. 393, 405 (1963), (citing Speiser v. Randall, 357 U.S. 513, 526 (1958) (striking down tax exemption granted only to those who affirmed their loyalty to state government)). *Spieser* held that while the State was not required to give an exemption at all, it could not use such a benefit to "produce a result [of inhibiting free speech] which the State could not command directly" (*Speiser*, 357 U.S. at 526).

250. There is an extensive history of quality scholarship on unconstitutional conditions in general. Therefore, here, I have only briefly summarized the doctrine in order to apply it to E.O. 157. For further discussion, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, Nov. 2001; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, Oct. 1992; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, May 1989.

right."[251] As the Court held in *Rosenberger*, the government may create content or viewpoint restrictions where it is subsidizing speech to promote its own message. But where the government creates a public forum, it may not deny access to that forum on the basis of political viewpoint.[252] Traditional investing likely falls in this first category, as articulated in *Rust v. Sullivan*.[253] *Rust* establishes the principle that governmental choice to merely "fund one activity to the exclusion of another" or spend its money to support viewpoints with which it agrees is not on its own impermissible viewpoint discrimination, as these expenditures may be such that the government itself is the speaker or is attempting to transmit a particular message through a private speaker.[254]

Some scholars conceptualize the *Rust*/*Rosenberger* split as a constitutionally relevant distinction between denial of a benefit and failure to subsidize exercise of a right. This distinction is based in part on the degree to which the government's action would impair the speaker's ability to exercise her protected rights. Making striking workers ineligible for food stamps for the duration of a strike, for example, is permissible, while publication of membership lists when it would expose those listed to "harassment, physical threats, and economic reprisals" could constitute an impermissible interference with the exercise of First Amendment rights.[255]

Notwithstanding the above, a recent Supreme Court case indicates that the *Rust* standard may be eroding, at least when the government selectively funds entities in order to control speech unrelated to the funded program. In a 2013 decision, the Court held that Congress could not condition the receipt of funding to fight HIV/AIDS on the adoption of an anti-prostitution political stance because

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251. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983) (upholding viewpoint-neutral denial of a tax exemption to an organization based on its attempt to influence legislation). *See also* Rust v. Sullivan 500 U.S. 173 (1991). (upholding restriction on Title X funding recipients participating in abortion-related activities). *But cf.* Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980) (striking down denial of tax exemption to an organization based on its feminist viewpoint as violating the First Amendment).

252. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("A State may not exercise viewpoint discrimination, even when the limited public forum is one of its own creation."). David Cole conceptualizes these public fora as "spheres of neutrality." *See* Cole, *supra* note 250.

253. 500 U.S. at 201 (holding, in the substantive due process context, that "[t]he Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected"); *Regan*, 461 U.S. at 548 (government may validly decline to subsidize First Amendment activity).

254. *Id.* at 193 (1991) (upholding against a First Amendment challenge a Congressional program that excluded abortions from a family planning program). *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (invalidating Congressional program that limited legal arguments available to government-funded attorneys for the indigent).

255. Lyng v. Automobile Workers, 485 U.S. 360, 368, 367 n.5 (1988) (upholding law prohibiting currently striking workers from receiving food stamps on the basis that even though "[s]trikers and their union would be much better off if food stamps were available," the "strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right").

such a requirement regulated speech outside the funding program itself.[256] Following this decision, a court analyzing E.O. 157 would likely undertake a highly fact-specific inquiry into its effect on access to public fora or eligibility for public investment in one's stocks or bonds based on the stated purposes of the government program at issue.

VI.
CONCLUSION

Executive Order 157 is a bald use of government power to burden a political viewpoint with which the State of New York disagrees. The order makes no attempt to hide its improper purpose: to take aim at the communicative content of a politically-motivated boycott. E.O. 157 clearly embraces McCarthy-era political belief intimidation, recalling a time when states regularly required government employees to pledge they had no political ties to ideologies disfavored by the government. These requirements were eventually struck down by the courts, but only after causing extensive damage to open political discourse in the United States.

Given the publication of the blacklist and its clearly arbitrary application, First Amendment advocates are well positioned to make a legal challenge to E.O. 157, especially given the proliferation of BDS blacklists throughout the country and the specter of federal legislation in this area. Far from punishing discriminatory speech or speech with illegal aims, E.O. 157 largely penalizes expression of the relatively uncontroversial and widely-adopted position that the Israeli settlements are illegal, while chilling criticism of Israel's state policies on political, ethical, and legal grounds. Accepting E.O. 157's "new normal" of official speech suppression will cause irreparable harm to the scope of the First Amendment, normalizing official state penalties for unpopular political beliefs.

256. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2328 (2013) ("[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.").