

**No. 19-50384**

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**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT**

BAHIA AMAWI,  
*Plaintiff-Appellee,*

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY  
GENERAL OF TEXAS,  
*Defendants-Appellants.*

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI;  
GEORGE HALE,  
*Plaintiffs-Appellees,*

v.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM;  
TRUSTEES OF THE KLEIN INDEPENDENT SCHOOL DISTRICT; TRUS-  
TEES OF THE LEWISVILLE INDEPENDENT SCHOOL DISTRICT;  
BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM,  
*Defendants-Appellants.*

On Appeal from the United States District Court  
For the Western District of Texas, Austin Division

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**BRIEF OF AMICUS CURIAE SHURAT HADIN-ISRAEL LAW  
CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS**

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### **Certificate of Interested Persons**

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

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Trustees of the Lewisville Independent School District  
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**Shurat** HaDin is an Israeli nonprofit corporation that has not issued stock and has no parent corporation. No other corporation owns 10% or more of its stock.

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## STATEMENT OF INTEREST

Shurat HaDin-Israel Law Center (“SHD”) respectfully submits this *amicus* brief in support of Defendants-Appellants. This brief will explain the background of the Boycott, Divestment and Sanctions (“BDS”) movement, and how its iniquitous discriminatory conduct targeting Jews, Israelis, and those affiliated with Israel is not protected under settled First Amendment jurisprudence. Counsel for both Plaintiffs-Appellees and Defendants-Appellants consent to filing of this brief.<sup>1</sup>

SHD is a not-for-profit human rights law organization organized under Israeli law and dedicated to protecting Israel and the rights of Jews worldwide by assisting victims of terrorism, fighting boycotts, and challenging those who seek to delegitimize Israel. SHD has spearheaded the fight against discriminatory conduct by the BDS movement and assisted in the representation of numerous terror victims in cases brought against state-sponsors of terror, as well as financial institutions and others who have given material support to terrorism. These cases

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<sup>1</sup> Pursuant to Rule 29(a)(4)(E), no party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than Amicus SHD, its members, and its counsel contributed money intended to fund preparing or submitting this brief.

have led to judgments exceeding \$1 billion, freezing of over \$600 million in terrorist assets, and securing over \$120 million in recoveries to victims and their families. SHD's efforts to fight BDS include: blocking hostile blockade-running flotillas from infiltrating Gaza; pressuring academic institutions not to condone anti-Semitism on campus; countering boycotts against Israeli companies and academics; suing to revoke the tax exempt status of organizations that promote boycotts against Israel; and assisting terror victims to bring suit under anti-terrorism statutes, torture victim-protection conventions, civil-rights laws, consumer fraud statutes, state and federal education laws, and whistleblower statutes.

Recently, SHD assisted twelve Jewish-American families to bring suit in federal district court in Delaware alleging that Airbnb's policy of boycotting Jewish-owned properties in Israel's Judea and Samaria regions violated the Fair Housing Act of 1968 (42 U.S.C. § 3601, et seq.). *Silber v. Airbnb, Inc.* (1:18-cv-01884) (D. Del.). As a result of that litigation, on April 9, 2019 Airbnb reversed its policy and now permits all homeowners in Judea and Samaria, regardless of their religion, race or nation origin, to list their houses for rent on its web platform.

The BDS movement perpetuates a long history of boycotts that have exclusively singled out Jews and Israel. Yet, Plaintiff and *amici* would have this Court afford “constitutional” protection to BDS’ religious and nationality-based discrimination and sanction the economic and cultural destruction of the Jews, Israel, and anyone who dares do business with them. BDS’ abhorrent conduct would be loudly condemned were it directed towards women, African Americans, or other minorities. It cannot be countenanced simply because BDS disguises itself as political opposition worthy of “free speech” protection under the First Amendment.

## **ARGUMENT**

### **I. INTRODUCTION**

Invidious discriminatory conduct targeting Jews, Israel, or any party doing business with them is not protected speech. As discussed more fully below at page 13, on multiple occasions the Supreme Court has upheld as not violative of the first amendment conditions such as certification of non-discrimination in order to obtain a benefit. Such conditions in no way prevent a person from exercising his, her or its right to speak freely. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976), *Grove City College v. Bell*, 465 U.S. 555, 575 (1984), *Cutter v. Wilkinson*,

544 U.S. 709, 732-33 (2005); *Lyng v. Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America*, 485 U.S. 360, 369 (1988), *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

The modern BDS movement is an open and notorious well-organized worldwide effort to demonize, delegitimize, and destroy the only Jewish state.<sup>2</sup> With just over six million individuals, Israel hosts the world's largest concentration of Jews. Out of 195 countries, Israel is the only expressly Jewish and Jewish majority state (75%) in the world.<sup>3</sup> BDS exclusively targets Jews, Israel and its supporters. Disregarding countries engaged in egregious behavior, the campaign isolates Israel, the only Jewish State, as uniquely evil among all other nations. Furthermore, BDS does not merely target any individual Israeli policy or regime. Rather, it rejects Jewish self-determination outright. Omar Barghouti, cofounder of BDS, opposes a Jewish State "in any part of Palestine," which those supporting the BDS movement believe encompasses all of Israel.

No other organized world-wide boycott movement solely targets a single

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<sup>2</sup> See n. 1, *supra*; *see also* <https://www.israeliamerican.org/national-headquarters/media/bigotry-discrimination-anti-semitism>.

<sup>3</sup> <https://www.jewishvirtuallibrary.org/latest-population-statistics-for-israel>



country and people of a single origin, that is, Jewish. The First Amendment does not leave the State powerless to address such anti-Semitism.

Responding to BDS' relentless discriminatory efforts to impede commerce with Israel under the pretense of "protesting Israeli government policy," the Texas legislature enacted Tex. Gov't Code § 2270.001 *et seq.*, introducing a prohibition on contracting with entities that boycott Israel.<sup>4</sup> Texas, along with over two dozen other states that enacted similar prohibitions through legislation or Executive Orders, delivered "the unambiguous message that discrimination will not be tolerated in their backyards."<sup>5</sup> It is well settled that states have a compelling interest in ensuring taxpayers do not fund discriminatory behavior or underwrite political views of parties that contract with the state. It is also constitutionally permissible to condition contracts upon adherence to lawful conditions. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Regan v. Taxation with Representation of Washington*, 461

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<sup>4</sup> On May 6, 2019, Texas Governor Greg Abbott signed into law H.B. 793, Act of May 6, 2019, 86th Leg., R.S., ch. 30, which removes sole proprietors from the class of "companies" required to certify that they do not boycott Israel. This amendment does not diminish or detract from the original statute's purpose; to combat the invidious discrimination against Jews and the State of Israel and to prevent the Texas taxpayers from funding such discrimination.

<sup>5</sup> Over twenty-four states have enacted similar legislation or issued Executive Orders prohibiting state entities from contracting with parties who boycott Israel. See <https://www.wsj.com/articles/state-efforts-to-quell-israel-boycott-movement-raise-free-speech-objections-11557943165> ; Also see <https://www.jpost.com/Blogs/Rebooting-the-Script/Mass-legislative-committee-bows-to-BDS-by-killing-anti-discrimination-bills-543873>

U.S. 540, 549-50 (1983). Texas' certification requirement not only falls squarely within the State's foundational nondiscrimination principles found in Article 1, Section 3a of the Texas State Constitution, it no more infringes upon Plaintiff's right of expression or association than do a myriad of federal, state, and local statutes that regularly condition government contracts to combat discrimination. These fundamental long-held principles in First Amendment jurisprudence, are dispositive of this case.

## **II. BDS SEEKS THE DESTRUCTION OF THE JEWISH STATE.**

Contrary to plaintiff's portrayal of BDS as a universal civil rights movement, BDS perpetuates a long history of boycotts targeting Jews.

Undoubtedly, the Constitution protects one's right to criticize Israel and to espouse hate speech. Framing this issue as one of traditional First Amendment concerns, however, ignores the historic relationship between BDS and anti-Semitism, and the broad latitude federal and state governments have to prevent discrimination, in this case, invidious nationality-based discrimination against Jews, Jewish-owned businesses, and any party affiliated with Israel. Texas cannot be required to fund BDS' conduct any more than it could would be if BDS directed its boycott to any other protected class.

Boycotts against Jews and Jewish-owned businesses have an extensive and malicious history.<sup>6</sup> They originated long before the establishment of Israel or any instance of “settlement” or “occupation,” which BDS claims justifies its “vendetta” against Israel and Jews. At the 1922 Fifth Arab Congress in Nablus, Arab leaders declared a boycott of Jewish businesses in the British Mandate for Palestine.<sup>7</sup> Participants at the 1937 Pan-Arab Conference in Syria approved a resolution and boycott against Jews, deeming it a “patriotic duty.” *Id.*

In 1945, the newly formed Arab League Council, using the terms “Zionist” and “Jewish” interchangeably, declared all Jewish goods undesirable, and called for Arab countries to boycott all Zionist products. *Id.* After Israel was founded in 1948, the Arab League in 1949 established the Central Boycott Office to isolate the Jewish state from the international community and to coordinate further Arab boycotts against any party tied to Israel. *Id.* This boycott prompted the passage of

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<sup>6</sup> Gil Feiler, *From Boycott to Economic Cooperation: The Political Economy of the Arab Boycott of Israel* (Routledge, 1998); see also Jewish Political Studies Review, Jerusalem Center for Public Affairs, 2003: <http://www.jcpa.org/phas/phas-gersten-f03.htm> citing Dan S. Chill, *The Arab Boycott of Israel: Economic Aggression and World Reaction* (New York: Praeger Publishers, 1976), p 1.

<sup>7</sup> <http://www.jcpa.org/phas/phas-gersten-f03.htm>.

federal and state anti-boycott legislation, cementing U.S. policy against international boycotts solely targeting Israel.<sup>8</sup> Nevertheless, the Arab League Boycott still exists in various forms.

In Germany, the Nazis implemented the first nationwide planned action against Jews by targeting Jewish businesses in April 1933.<sup>9</sup>

The current BDS movement, which Texas seeks to combat with its certification requirement, picked up the mantle of the earlier boycotts and adopted the anti-Israel boycott agenda from the 2001 United Nations Conference Against Racism, and in particular its NGO Forum held in Durban, South Africa. The late Congressman Tom Lantos, a Holocaust labor-camp survivor, described the forum as the most sickening display of anti-Semitism he had witnessed since the Holocaust.<sup>10</sup> Anti-Israel groups organized anti-Semitic rallies and distributed anti-Semitic flyers. One flyer depicted Hitler asking, “What if I had won?” The answer,

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<sup>8</sup> Congressional Research Service, Arab League Boycott of Israel (April 19, 2006), <http://www.fas.org/sgp/crs/mideast/RS22424.pdf>.

<sup>9</sup> See <http://jcpa.org/unmasking-bds>; <https://encyclopedia.ushmm.org/content/en/article/boycott-of-jewish-businesses>.

<sup>10</sup> The Durban Debacle: An Insider’s View of the UN World Conference Against Racism, <https://web.archive.org/web/20100611233823/http://www.fletcher.tufts.edu/forum/archives/pdfs/26-1pdfs/Lantos9.pdf>

“There would be no Israel....” *Id.* The anti-Semitic nature of the event prompted the United States to walk out.<sup>11</sup>

In keeping with its true mission, the mainstream BDS movement openly courts as speakers and leaders, convicted terrorists and members and former members of designated terrorist organizations that advocate for Israel’s destruction. One such organization responsible for scores of terrorist attacks in Israel is the Popular Front for the Liberation of Palestine (“PFLP”), a designated terrorist organization in the United States, European Union, Canada and Israel.<sup>12</sup>

Instead of disavowing PFLP’s influence, BDS has empowered it.<sup>13</sup> Often invited to speak at BDS events is “top billed speaker” Rasmia Odeh. *Id.* Odeh has a criminal record for her terrorism and membership in the PFLP, including convictions for murdering two, one of whom was a U.S. citizen, and injuring nine.<sup>14</sup> In 2017, the United States stripped Odeh of her citizenship, deporting her

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<sup>11</sup> U.S., Israel Walk out of U.N. Conference, [http://archive.adl.org/durban/durban\\_090401d.html](http://archive.adl.org/durban/durban_090401d.html).

<sup>12</sup> See <https://www.bbc.com/news/world-middle-east-30099510>.

<sup>13</sup> See <https://bdsmovement.net/news/jewish-voice-heart-boycott-israel-movement>.

<sup>14</sup> See <https://4il.org.il/exclusive-msa-report-proves-human-rights-ngo-leaders-in-the-service-of-designated-terror-organizations/>; See also “Terrorists-in-Suits” (a recent study disclosing the ties between the BDS movement and designated terrorist organizations at <https://4il.org.il/wp-content/uploads/2019/02/MSA-Terrorists-In-Suits-English-1.pdf>

for not disclosing her participation in the bombings.<sup>15</sup> Yet, despite Odeh’s blatant disregard for human rights, Jewish Voice for Peace and Students for Justice in Palestine, two of the most widely regarded BDS organizations, have idolized her and presented her with “honorary awards.” *See Id.*

JVP’s branch in Germany, Jewish Voice For Just Peace in the Middle East (“EJJP”), followed suit by inviting Odeh to speak in Berlin in March 2019.<sup>16</sup> Despite event organizers casting Odeh as a staunch human rights advocate, the Administrative Court of Berlin affirmed the cancellation of Odeh’s visa deeming her a “threat to Germany.”<sup>17</sup>

PFLP members also head organizations championing BDS. Al-Haq, a boycott promoting organization based in Ramallah, classifies itself as a human rights NGO. Yet its General Director Shawan Jabarin was convicted for recruiting and arranging training for PFLP members. The Israeli Supreme Court banned his

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<sup>15</sup> <https://www.ice.gov/news/releases/convicted-terrorist-stripped-citizenship-ordered-deported-failing-disclose-ties-deadly>

<sup>16</sup> <https://www.timesofisrael.com/convicted-palestinian-terrorist-invited-to-speak-at-bds-event-in-berlin/>

<sup>17</sup> <https://www.juedische-stimme.de/2019/03/26/juedische-stimme-demands-the-right-of-free-speech-for-rasmea-odeh-in-berlin/>

travel, ruling he “acted some of the time as the CEO of a human rights organization, and at other times as an activist in a terror organization which has not shied away from murder and attempted murder...nothing to do with rights.”<sup>18</sup>

Addameer, another Palestinian BDS-affiliated organization and supposed civil and human-rights NGO, is a PFLP affiliate. Addameer’s chairperson and co-founder, Abdul-Latif Ghaith, was banned by Israel from travelling internationally due to his PFLP membership; Khalida Jarrar, Addameer’s former vice-chairperson, is a senior PFLP official convicted for kidnapping and for her PFLP membership.<sup>19</sup> Likewise, founder and director of the Palestinian Center for Human Rights and PFLP operative, Raji Souranihas provided legal advice to Hamas, a terrorist organization that shares the PFLP’s vision of destroying Israel.<sup>20</sup>

BDS cofounder Omar Barghouti confirmed that the true nature of BDS is to “oppose a Jewish State in any part of Palestine.” See <https://vimeo.com/75201955> at 5:54. Other BDS leaders have also confirmed BDS’s goal to eliminate Israel, urging that “bring[ing] down the state of Israel” “should be stated

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<sup>18</sup> [https://www.ngo-monitor.org/ngos/al\\_haq/](https://www.ngo-monitor.org/ngos/al_haq/)

<sup>19</sup> <https://www.ngo-monitor.org/ngos/addameer/>

<sup>20</sup> <https://4il.org.il/exclusive-msa-report-proves-human-rights-ngo-leaders-in-the-service-of-designated-terror-organizations/>.

as an unambiguous goal” of BDS.<sup>21</sup>

Anti-Semitism defines the BDS movement. Politicians and global leaders have deemed BDS anti-Semitic for subjecting the only Jewish state to unfair scrutiny. Recently, Germany’s parliament passed legislation classifying BDS as “anti-Semitic.”<sup>22</sup> France’s President, Emmanuel Macron,<sup>23</sup> Spain’s prior prime minister, Jose Maria Aznar,<sup>24</sup> Great Britain’s former foreign minister, Jeremy Hunt,<sup>25</sup> as well as Canada’s prime minister, Justin Trudeau,<sup>26</sup> have likewise classified BDS as anti-Semitic. Further, high-profile recent American politicians have outrightly opposed BDS, with Senator Ted Cruz deeming it anti-Semitic,<sup>27</sup> and Hillary Clinton denouncing how BDS uniquely “isolate[s] the State of Israel.”<sup>28</sup> Re-

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<sup>21</sup> <https://web.archive.org/web/20160427221237/http://english.al-akhbar.com/node/4289>

<sup>22</sup> <https://www.nytimes.com/2019/05/17/world/europe/germany-bds-anti-semitic.html>

<sup>23</sup> <https://www.jpost.com/International/Macron-expected-to-support-two-state-solution-says-BDS-is-antisemitic-490710>

<sup>24</sup> <https://www.jpost.com/Middle-East/BDS-movement-seeks-to-empty-Israel-of-Jews-former-Spanish-PM-says-406608>

<sup>25</sup> <http://www.israelnationalnews.com/News/News.aspx/263512>

<sup>26</sup> <https://www.timesofisrael.com/trudeau-blasts-bds-movement-as-anti-semitic/>

<sup>27</sup> [https://www.cruz.senate.gov/?p=press\\_release&id=4395](https://www.cruz.senate.gov/?p=press_release&id=4395)

<sup>28</sup> <https://www.ngo-monitor.org/key-issues/bds/bds-condemnation-by-world-leaders/>



ardless of political allegiance, a strong consensus amongst world leaders confirms that BDS is anti-Semitic. BDS' malicious and hostile boycotts targeting all facets of Jewish life and existence in Israel is the very definition of invidious discrimination.

**III. DISCRIMINATORY SPEECH IS NOT CONSTITUTIONALLY PROTECTED AND THE STATE MAY CONDITION ITS CONTRACTS UPON ADHERENCE TO LAWFUL CONDITIONS.**

1. *It Is Constitutionally Permissible to Condition State and Federal Contracts to Ensure Compliance With Certain Requirements*

Plaintiffs' claim challenges long-standing Supreme Court authority. As the State of Texas has done here, states and the federal government may condition contracts and grants to ensure the recipient's compliance with conditions. Courts have regularly upheld such terms against First Amendment challenges. *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (rejecting university's First Amendment challenge to requirement that recipient of federal tuition assistance certify the university does not discriminate based on sex); *Cutter v. Wilkinson*, 544 U.S. 709, 732-33 (2005) (noting "while Congress' condition stands, the States

subject themselves to that condition by voluntarily accepting federal funds,” rejected a First Amendment challenge against a condition that States receiving federal funds for prison programs must comply with federal statute protecting free exercise of religion). *See also Lyng v. Int’l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America*, 485 U.S. 360, 369 (1988) (First Amendment challenge to a law that made households ineligible for food stamps while “any member of the household [was] on strike” was rejected because “it d[id] not require [plaintiffs] to participate in political activities or support political views with which they disagree. It merely decline[d] to extend additional food stamp assistance to striking individuals”).

It is fundamental First Amendment jurisprudence that “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.” *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) In *American Library* the Court held a condition requiring libraries to install content-filtering software on public computers in order to receive funding did not violate the First Amendment. The Court stated “assuming...that public libraries have First Amendment rights [,] [the statute] does not ‘penalize’ libraries that choose not to install such software or deny them the right to provide their patrons

with unfiltered Internet access,” and held that “... a refusal to fund protected activity...cannot be equated with the imposition of a penalty.” *Id.* at 212. Instead, the statute “simply reflects Congress’ decision not to subsidize their doing so.” *Id.* See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (same). See also *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983) (“[t]his Court has never held that the Court must grant a benefit . . . to a person who wishes to exercise a constitutional right.”). That is the case here.

Contractors are free to refuse to certify their compliance. They do so, however, knowing that just as any other contractor that is non-compliant with a state law, in this case a statute targeting discriminatory conduct, they will be ineligible to contract with and receive funds from the state. This does not infringe upon their First Amendment rights. It serves a public and State interest.

2. *The State Has a Compelling Interest in Discouraging Invidious Discrimination Based on Nationality, Religion and National Origin*

The above principles apply more so when the state or federal government imposes restrictions on conduct to address obvious invidious discrimination. See e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (state’s compelling

interest in eradicating gender discrimination permitted it to require a club to fully admit women members; “[t]he right to associate for expressive purposes is not absolute”). “The Constitution places no value on discrimination” and discriminatory conduct is not protected speech. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

For example, Titles VI and VII of the Civil Rights Act of 1964—42 U.S.C. §§ 2000D, *et. seq.*, and 42 U.S.C. § 2000e-2(a)(1), as well as a myriad of other federal and state statutes and regulations aimed at preventing discrimination apply to all the Defendants with which Plaintiffs seek to contract.<sup>29</sup>

Both statutes prohibit discrimination, often requiring employers to certify compliance with the law. Title VII makes it unlawful for employers (with more than 15 employees) “to fail or refuse to hire or to discharge any individual, or...discriminate...with respect to...compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or

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<sup>29</sup> <https://employees.tamu.edu/ocrm/eeo/>; The University of Houston system states it also complies with Title IX of the Educational Amendments of 1972 and all other federal and state regulations <https://www.uh.edu/marcom/guidelines-policies/statements/> ; <https://www.lisd.net/cms/lib/TX01918037/Centricity/Domain/5629/2018.pdf> ; [https://pol.tasb.org/Policy/Download/595?filename=DAA\(LEGAL\).pdf](https://pol.tasb.org/Policy/Download/595?filename=DAA(LEGAL).pdf)

national origin.” 42 U.S.C. § 2000e-2(a)(1). *See, e.g., EEOC v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028 (2015) (holding employer cannot make an applicant’s religious practice in employment decisions). Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000D, *et. seq.*, likewise, prohibits discrimination based on race, color, and national origin in programs receiving federal financial assistance.

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Additionally, the Export Administration Act of 1979 (EAA), deeming boycotts of Israel as discriminatory and racist, created criminal liability for those engaged in prohibited boycotts. 50 U.S.C. §4607. The Act passed constitutional scrutiny and its enforcement has since gone unchallenged. *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984). To this day, the U.S. Department of Commerce Bureau of Industry and Security, Office of Antiboycott Compliance administers and enforces the Antiboycott laws under the EAA.<sup>31</sup> The legislative history behind Texas’ law parallels that behind federal “congressional hearings

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<sup>30</sup> See for example, Office of Civil Rights compliance form. <https://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf>

<sup>31</sup> The authority of export regulations was continued by executive order with Presidents Reagan and Clinton each reauthorizing all EAA export regulations deeming it a national emergency. President Trump continued export control authority under the EAA on August 8, 2018. [See https://www.whitehouse.gov/briefings-statements/text-notice-president-speaker-house-representativespresident-senate/](https://www.whitehouse.gov/briefings-statements/text-notice-president-speaker-house-representativespresident-senate/)

on the anti-boycott provisions of the Export Administration Act, [during which] numerous legislators and experts confirmed the racist and discriminatory origins and intentions of boycotts targeting Israel.”<sup>32</sup>

In fact, Texas’ statute does nothing more than federal law in regulating discrimination with the clear intent to discourage the discrimination underlying the boycott movement against Israel and the Jewish people. Representative Phil King, who filed the original legislation, confirmed the anti-discriminatory nature of the original bill when proposing the new draft enacted as H.B. 793, Act of May 6, 2019, 86th Leg., R.S., ch. 30. He noted that the intention was “to address companies involved in discriminatory commercial activity.” Other advisors in the drafting of the legislation such as Eugene Kontorovich, Director of the Kohelet Policy Forum and Professor at George Mason’s Antonin Scalia School of Law, and Sandra Hagee Parker, a representative from Christians United for Israel who testified before the House State Affairs Committee stated respectively, that the certification is about conduct, not speech and that the discriminatory nature of

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<sup>32</sup> Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 *CARDOZO L. REV. DE NOVO* 112, 124-25.

BDS amounts to “economic anti-Semitism.”<sup>33</sup> Texas. Code §§2270.001 *et seq.* was clearly enacted to eradicate discriminatory conduct, not perpetuate it.

Ultimately, the statute’s conditions for contracting with the State fall within settled jurisprudence upholding similar requirements in First Amendment challenges, especially where the state’s intent was to combat (and certainly not to subsidize) discrimination. *See Grove City College*, 465 U.S. at 575; *U.S. Jaycees*, 468 U.S. at 623. Plaintiff’s skewed view of the First Amendment contradicts the settled principles discussed above and challenges the constitutionality of numerous federal, state, and municipal laws that are conditioned upon compliance with conditions that advance legitimate state interests. SHD submits Plaintiffs cannot champion social justice shamelessly misappropriating the mantel of civil rights activists while simultaneously demanding this Court sanction their “right” to discriminate.

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<sup>33</sup> <https://www.statesman.com/news/20190118/does-texas-anti-israel-boycott-law-pass-constitutional-muster>

## CONCLUSION

BDS is inherently rooted in antisemitism, further perpetuating a long history of anti-Semitic boycotts that have targeted Jews, Israel and anyone daring to affiliate with Israel. It makes little effort to conceal its anti-Semitic motives and anti-Semitic leadership, unashamedly courting high-profile convicted terrorists who have murdered Jewish civilians and seek Israel's demise to spearhead a campaign founded for the sole purpose of destroying the Jewish State.

By mandating contracting parties certify they will not engage in boycotts against Israel, the State of Texas by no means stifles the speech of BDS supporters, any more than it would if it mandated parties to certify they will not engage in boycotts targeting African Americans, women or the disabled. They can all still engage in their discriminatory conduct without repercussion. Rather, through the statute, the State proclaims its right to condition eligibility for its award—a contract—to those who pledge not to discriminate. Such an incentive will inevitably reduce discrimination—a compelling state-interest.

For the foregoing reasons, the preliminary injunction should be vacated, and this matter should be remanded with instructions that the case be dismissed.



Respectfully submitted,

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The undersigned counsel of record hereby certifies, pursuant to Fed. R. App. P. 32(g), that:

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word using 14-point Times New Roman.

/s/ Edward L. Rothberg

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On September 6, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Bitdefender Endpoint Security Tools and is free of viruses.

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No. 19-50384 Bahia Amawi v. Pflugerville Indep Sch Dist,  
et al  
USDC No. 1:18-CV-1091  
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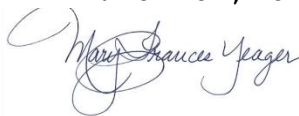
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Mr. Edgar Saldivar  
Mr. Andre Segura  
Mr. Francisco J. Valenzuela  
Mr. Eugene Volokh

Case No. 19-50384

BAHIA AMAWI

Plaintiff - Appellee

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Defendants - Appellants

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

Plaintiffs - Appellees

v.

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

Defendants - Appellants

***United States Court of Appeals***  
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No. 19-50384 Bahia Amawi v. Pflugerville Indep Sch Dist,  
et al  
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