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## Targeting Free Speech & Redefining Antisemitism: How Pro-Israel Actors Are Using US Laws to Attack Palestinian Activism & Solidarity

Lara Friedman

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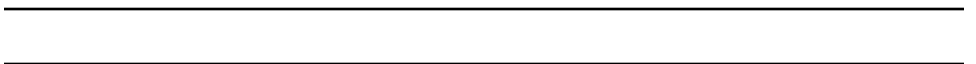
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# UNIVERSITY OF THE PACIFIC LAW REVIEW



# Targeting Free Speech & Redefining Antisemitism: How Pro-Israel Actors Are Using US Laws to Attack Palestinian Activism & Solidarity

Lara Friedman\*

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## I. INTRODUCTION

In 2005, Palestinian civil society activists launched the “Boycott, Divestment, and Sanctions movement,” aka, the BDS movement.<sup>1</sup> As the name suggests, the

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\* President, Foundation for Middle East Peace. I want to thank the *University of the Pacific Law Review* for devoting space and the talents of its extraordinary editorial staff to these critically important matters, which are at the nexus of law, foreign affairs, and domestic policy. I also want to express my admiration for Professor Omar Dajani, who made this all possible, and my appreciation for the encouragement he gave to me in writing this article.

1. BDS MOVEMENT, <https://bdsmovement.net/> (last visited Apr. 1, 2023) (on file with the *University of the*

BDS movement promotes the use of boycotts, divestment, and sanctions as means “to end international support for Israel’s oppression of Palestinians and pressure Israel to comply with international law.”<sup>2</sup> The movement is organized around three objectives: “Ending its [Israel’s] occupation and colonization of all Arab lands and dismantling the Wall;” “Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality;” and “Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.”<sup>3</sup>

As the BDS Movement gained momentum, primarily with respect to campus activism and calls for academic boycotts, it was denounced by Israel and supporters of Israel as, among other things, antisemitic. This accusation was grounded in a newly formulated set of arguments promulgated in 2004 by then-Israeli minister of Jerusalem and Diaspora affairs Natan Sharansky, in the context of criticizing European countries’ response to alleged antisemitism against their Jewish citizens. Sharansky contended that, in addition to traditional antisemitism (e.g., discrimination, incitement, or violence against Jews, because they are Jewish), the world must now recognize a “new antisemitism.” His paper, entitled, “3D Test of Anti-Semitism: Demonization, Double Standards, Delegitimization,”<sup>4</sup> explains:

The first “D” is the test of demonization. When the Jewish state is being demonized; when Israel’s actions are blown out of all sensible proportion; when comparisons are made between Israelis and Nazis and between Palestinian refugee camps and Auschwitz – this is anti-Semitism, not legitimate criticism of Israel. The second “D” is the test of double standards. When criticism of Israel is applied selectively; when Israel is singled out by the United Nations for human rights abuses while the behavior of known and major abusers, such as China, Iran, Cuba, and Syria, is ignored; when Israel’s Magen David Adom, alone among the world’s ambulance services, is denied admission to the International Red Cross – this is anti-Semitism. The third “D” is the test of delegitimization: when Israel’s fundamental right to exist is denied – alone among all peoples in the world – this too is anti-Semitism.

Critics assert the BDS Movement fails all three of these tests. They say that its criticisms of Israel’s actions and policies are unfair and blown out of proportion— notwithstanding the fact that similar criticisms of Israel are regularly made by international and Israeli human rights groups, based on decades of meticulous

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*Pacific Law Review*).

2. *Id.*

3. *What Is BDS?*, BDS MOVEMENT, <https://bdsmovement.net/what-is-bds> (last visited Apr. 1, 2023) (on file with the *University of the Pacific Law Review*).

4. Natan Sharansky, *3D Test of Anti-Semitism, Double Standards, Delegitimization*, JERUSALEM CTR. FOR PUB. AFFS. (Oct. 21, 2004), <https://jcpa.org/article/3d-test-of-anti-semitism-demonization-double-standards-delegitimization/> (on file with the *University of the Pacific Law Review*).

documentation. Likewise, they contend that the BDS Movement's call for a Palestinian right of return is, in fact, a call to use influx of refugees to destroy Israel as a state with a Jewish majority and Jewish political, economic, religious, and social dominance (aka, "Jewish character") and thereby deny the Jewish people's right to self-determination—notwithstanding the fact that the right of refugees to return to their homes in the wake of a war is enshrined in international law. Finally, they argue that the BDS Movement is *ipso facto* antisemitic, since its claims against Israel are based on international law and the rights of the oppressed, but it criticizes only Israel—despite the fact that other countries are guilty of the same, or worse, alleged violations of international law and human rights. They argue this, notwithstanding the fact that single-issue and identity-based advocacy groups and movements are common in the U.S. and around the world, including a vibrant ecosystem of single-issue organizations working exclusively in support of or to defend Jewish and/or Israeli interests. Yet this argument insists, in effect, that a Palestinian rights group's decision to focus narrowly on Israel for its actions against Palestinians—or the decision of any organization or individual to focus their activism solely on Israel—represents an effort to hold Israel to a different standard than all other countries, which in turn can only be evidence of anti-Jewish animus.<sup>5</sup>

Four years after the launch of the BDS Movement, in February 2009, Benjamin Netanyahu returned to the Prime Ministership of Israel, where he would remain until June 2021. During this period, Netanyahu headed successive governments that embodied policies that implicitly—and often explicitly—rejected the political process known as the "peace process," launched (publicly) in 1993 in Oslo, Norway, and that made clear their goal of changing facts on the ground in a manner designed to prevent the realization of the internationally-endorsed goal of a two-state solution.<sup>6</sup> The Netanyahu governments' policies, and in particular the reinvigoration of official Israeli government support for the West Bank settlement movement (including East Jerusalem),<sup>7</sup> sparked significant opposition, including from Israeli activists, from Israel's more progressive supporters in the international community, and from some foreign governments closely allied with Israel. It likewise energized and legitimized the BDS Movement, even as the Netanyahu government and its allies sought to fight it.

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5. This argument bears a strong resemblance to what was seen in recent years in the United States, when opponents of the Black Lives Matter movement responded with, "All Lives Matter."

6. Max Fisher, *Did Netanyahu Just Reject the Two-State Solution?*, VOX (Mar. 8, 2015), <https://www.vox.com/2015/3/8/8171001/netanyahu-two-state> (on file with the *University of the Pacific Law Review*).

7. 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> (on file with the *University of the Pacific Law Review*); Carrie Keller-Lynn, *I've Done It: Netanyahu Announces His 6<sup>th</sup> Government, Israel's Most Hardline Ever*, TIMES OF ISRAEL (Dec. 21, 2022), <https://www.timesofisrael.com/netanyahu-announces-his-sixth-government-israels-most-hardline-yet/> (on file with the *University of the Pacific Law Review*).

Recent polls suggest that many Americans,<sup>8</sup> including scholars,<sup>9</sup> support boycotts of Israel, settlements, or both. Further, many Americans,<sup>10</sup> including Jewish Americans,<sup>11</sup> do not consider the BDS movement, or the tactics it endorses, to be antisemitic. Yet, almost twenty years on, it remains an article of faith among most Israelis and most supporters of Israel—with the latter including the vast majority of elected officials in the U.S., from both parties—that the BDS movement is *ipso facto* antisemitic. Moreover, many supporters of Israel believe that the tried-and-true, mainstream protest tactics themselves—boycotts, divestment, and sanctions—are intrinsically antisemitic if applied to Israel or to Israeli interests in the territories it occupied in 1967 (i.e., areas that are outside Israel’s recognized sovereign borders).

Post-2005 saw a growing effort to redefine the concept of “antisemitism” based on Sharansky’s “3 D’s.” This shifted focus from combating anti-Jewish actions and views to fighting criticism and activism targeting Israel. This redefinition provided the framing, fuel, and political cover for an unprecedented and highly consequential shift in pro-Israel advocacy in the United States. The fight against “the new antisemitism” became a weapon wielded not only to fight BDS,<sup>12</sup> but also to normalize pro-settlement, anti-two-state Israeli policies. That new approach is the subject of the remainder of this paper, which will examine the ongoing campaign to enact laws—both at federal and state levels—that, in the name of fighting BDS and antisemitism, are legislating U.S. support for Israel’s *de facto* annexation of the West Bank via settlements, eroding political free speech, quashing Israel-critical protests, and, more broadly, undermining Americans’ rights to political free speech and protest.

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8. Shipley Telhami, *What Do Americans Think of the BDS Movement, Aim at Israel?*, BROOKINGS (Jan. 8, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/01/08/what-do-americans-think-of-the-bds-movement-aimed-at-israel/> (on file with the *University of the Pacific Law Review*).

9. MARK LYNCH & SHIBLEY TELHAMI, MIDDLE EAST SCHOLAR BAROMETER (2020), [https://criticalissues.umd.edu/sites/criticalissues.umd.edu/files/Middle%20East%20Barometer%20Fall2022\\_Questionnaire%20with%20Results.pdf](https://criticalissues.umd.edu/sites/criticalissues.umd.edu/files/Middle%20East%20Barometer%20Fall2022_Questionnaire%20with%20Results.pdf) (on file with the *University of the Pacific Law Review*).

10. AM. JEWISH COMM., THE STATE OF ANTISEMITISM IN AMERICA 2021: AJC’S SURVEY OF THE GENERAL PUBLIC (2021), <https://www.ajc.org/AntisemitismReport2021/GeneralPublic> (on file with the *University of the Pacific Law Review*).

11. *Id.*

12. RONNIE FRASER & LOLA FRASER, CHALLENGING THE BOYCOTT, DIVESTMENT AND SANCTIONS (BDS) MOVEMENT 5 (2023).

## II. ANTI-BDS LAWS

### A. *The Rise of Anti-Boycott Legislation in Israel*

In August 2010, a group of Israeli actors, directors, and playwrights published an open letter,<sup>13</sup> addressed to the boards of a number of Israeli theaters, expressing their refusal to perform in Israeli settlements—residential developments for Israeli citizens, built by Israel illegally under international law, on lands occupied in the 1967 War.<sup>14</sup> They wrote, “[t]he actors among us hereby declare that we will refuse to perform in Ariel, as well as in any other settlement. We urge the boards to hold their activity within the sovereign borders of the State of Israel within the Green Line.”

In response, and in a move that in retrospect was an important sign of things to come, then-Prime Minister Netanyahu publicly attacked<sup>15</sup> the signers of the letter by equating them with the BDS movement, a movement that by this time had, for most Israelis and their supporters in the international community, become synonymous with antisemitism and Israel hatred. He said:

the State of Israel is under an attack of delegitimization by elements in the international community. This attack includes attempts to enact economic, academic and cultural boycotts. The last thing we need at this time is to be under such an attack – I mean this attempt at a boycott – from within.

In so doing, Netanyahu laid out a rhetorical, political, and moral framework designed to achieve three key objectives. First, the delegitimization of domestic opponents of his policies toward Palestinians. Second, the erasure of the distinction being made increasingly by some left-wing Israelis and some liberal Zionists in the international community between boycotting Israel (thought of as the “real” BDS) and boycotting settlements (later to be referred to by Jewish journalist Peter Beinart as “Zionist BDS”<sup>16</sup>). Third, the rejection of any distinction between the BDS movement itself, and the overall tactic of using boycotts as a means of protesting Israeli policies vis-à-vis the Palestinians.

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13. Merav Yudilovitch, *Artists to Refuse to Perform in in Ariel Culture Hall*, YNETNEWS (Aug. 27, 2010), <https://www.ynetnews.com/articles/0,7340,L-3944791,00.html> (on file with the *University of the Pacific Law Review*).

14. For more on the artists’ letter and international attention it generates, see generally Rebecca Vilkomerson, *Israeli Artists Condemn Settlements*, JEWISH VOICE FOR PEACE (Sept. 6, 2010), <https://www.jewishvoiceforpeace.org/2010/09/israeli-artists-condemn-settlements/> (on file with the *University of the Pacific Law Review*).

15. Rebecca Anna Stoil, *PM Blasts Artists Ariel Culture Center*, JERUSALEM POST (Aug. 29, 2010), <https://www.jpost.com/israel/pm-blasts-artists-boycotting-ariel-culture-center> (on file with the *University of the Pacific Law Review*).

16. Peter Beinart, *To Save Israel, Boycott the Settlements*, N.Y. TIMES (Mar. 18, 2012), <https://www.nytimes.com/2012/03/19/opinion/to-save-israel-boycott-the-settlements.html> (on file with the *University of the Pacific Law Review*).

Less than a year later, in July 2011, Israel passed a new law, entitled the “Law for Prevention of Damage to State of Israel through Boycott”.<sup>17</sup> This law bars Israeli citizens from calling for or supporting boycotts of Israel, and explicitly defines “boycott of the State of Israel” to include boycotts targeting “any area under its [Israel’s] control.” Under this law, violators may be punished with fines and the withholding of government funding. In addition, the law opened the door for civil actions brought by Israelis who claim harm by boycotts, with the threat of courts ordering defendants to pay unlimited compensation, irrespective of any proven damages. In 2015, Israel’s Supreme Court struck down the unlimited compensation provision, but upheld all other parts of the law.<sup>18</sup> Notably, nothing in the law prevents Israelis from calling for or engaging in boycotts of other Israelis over any other issue.<sup>19</sup>

Reaction to Israel’s anti-boycott law—which was correctly understood by the Israeli Left, progressive pro-Israel activists, and international human rights groups<sup>20</sup> as an effort to leverage opposition to the BDS Movement in order to shut down activism against settlements—was swift. The day after Israel’s anti-boycott law was passed, the Israeli Peace Now movement launched a campaign entitled, “So Sue Me—I boycott Products of the Settlements;”<sup>21</sup> some U.S. liberal Zionist groups, including Peace Now’s American sister organization,<sup>22</sup> subsequently announced that while they continued to oppose boycotts of Israel—and were in no way embracing the BDS Movement and its goals—they would henceforth support

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17. Law Preventing Harm to the State of Israel by Means of Boycott, 5771-2011, SH No. 2304 (Isr.), <https://www.adalah.org/uploads/oldfiles/Public/files/Discriminatory-Laws-Database/English/34-Bill-to-Prohibit-Imposing-Boycott-2011.pdf> (on file with the *University of the Pacific Law Review*).

18. Yonah Jeremy Bob, *High Court Upholds Part of Anti-Boycott Law, Strikes Part and Splits on ‘1967 Israel’*, JERUSALEM POST (Apr. 15, 2015), <https://www.jpost.com/Israel-News/Politics-And-Diplomacy/High-Court-rules-on-boycott-law-398206> (on file with the *University of the Pacific Law Review*).

19. As I wrote in July 14, 2011:

“[P]eople are still free to use boycotts to express their views on consumer prices (like the recent cottage cheese boycott), their religious intolerance (like regular boycotts by religious Jews of businesses that open on the Sabbath), and even their unconcealed racism (like boycotts of businesses that employ Arabs and boycotts of anything Arab at all). In Israel, one can still in fact use boycotts to protest anything and everything. Except, that is, to protest Israeli government policy as it relates to settlements and the occupation.”

See Lara Friedman, *Israel’s New Boycott Law and U.S. Law: Like Apples and Orangutans*, HUFFINGTON POST (July 14, 2011), [https://www.huffpost.com/entry/israel-boycott-law\\_b\\_898317](https://www.huffpost.com/entry/israel-boycott-law_b_898317) (on file with the *University of the Pacific Law Review*).

20. *Israel: Anti-Boycott Bill Stifles Expression*, HUM. RTS. WATCH (July 13, 2011), <https://www.hrw.org/news/2011/07/13/israel-anti-boycott-bill-stifles-expression> (on file with the *University of the Pacific Law Review*).

21. *Peace Now’s FB Page “So Sue Me—I Boycott Products of the Settlements” Ranked 5th Most Important Israeli Protest Page*, PEACE NOW (Mar. 8, 2011), <https://peacenow.org.il/en/peace-nows-fb-page-so-sue-me-i-boycott-products-of-the-settlements-ranked-5th-most-important-israeli-protest-page> (on file with the *University of the Pacific Law Review*).

22. Marcy Oster, *Americans for Peace Now Backing Settlement Boycott*, JEWISH TELEGRAPHIC AGENCY (July 20, 2011), <https://www.jta.org/2011/07/20/united-states/americans-for-peace-now-backing-settlement-boycott> (on file with the *University of the Pacific Law Review*).



boycotting settlements. Shortly thereafter, Peter Beinart published his landmark essay in the *New York Times* endorsing “Zionist boycott.”<sup>23</sup>

Yet, most legacy Jewish American organizations and leaders rejected<sup>24</sup> (and still reject) settlement boycotts, as do some liberal Zionists.<sup>25</sup> They do so based on the same arguments that are mustered to attack the BDS Movement as antisemitic—i.e., that boycotting settlements involves holding Israel to a different standard; and that boycotts of anything related to Israel represents an effort to destroy Israel, and thereby deny the Jewish people’s right to self-determination (an argument that *de facto* embraces Netanyahu’s formula of opposing boycotts by erasing the distinction between Israel and settlements).

### B. Europe & Differentiation between Israel and Settlements

On July 20, 2015, following six and a half years of Netanyahu-led anti-two-state, pro-settlement policies,<sup>26</sup> the European Council issued its Council Conclusions on the Middle East Peace Process.<sup>27</sup> Among other things, the Council stated:

The EU and its Member States reaffirm their commitment to ensure continued, full and effective implementation of existing EU legislation and bilateral arrangements applicable to settlement products. The EU expresses its commitment to ensure that - in line with international law - all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967.

Shortly thereafter, a European think tank published a report<sup>28</sup> laying out recommendations for ways the EU could bring the operations of European financial institutions doing business in the West Bank into line with the EU’s newly-announced policy of differentiating between Israel and settlements.

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23. Beinart, *supra* note 16.

24. Lara Friedman & Daniel Gordis, *Is a Settlement Boycott Best for Israel?*, N.Y. TIMES (Mar. 2, 2014), <https://www.nytimes.com/roomfordebate/2014/03/02/is-a-settlement-boycott-best-for-israel> (on file with the *University of the Pacific Law Review*).

25. Michael J. Koplow, *What’s the Problem with Boycotting Settlements?*, ISR. POL’Y F. (July 29, 2011), <https://israelpolicyforum.org/2021/07/29/whats-the-problem-with-boycotting-settlements/> (on file with the *University of the Pacific Law Review*).

26. Dan Perry & Josef Federman, *Jewish Settlements Surge Under Netanyahu*, LEDGER (Dec. 15, 2014), <https://www.theledger.com/story/news/2014/12/16/jewish-settlements-surge-under-netanyahu/8203839007/> (on file with the *University of the Pacific Law Review*).

27. Press Release, Council of the Eur. Union, Council Conclusions on the Middle East Peace Process (July 20, 2015) (IP/11095/15), <https://www.consilium.europa.eu/en/press/press-releases/2015/07/20/fac-mepp-conclusions/> (on file with the *University of the Pacific Law Review*).

28. HUGH LOVATT & MATTIA TOALDO, EUR. COUNCIL ON FOREIGN RELS., EU DIFFERENTIATION AND ISRAELI SETTLEMENTS (2015), <https://ecfr.eu/archive/page/-/EuDifferentiation-final3.pdf> (on file with the *University of the Pacific Law Review*).

Immediately after that report hit the news, the Tel Aviv banking index dropped<sup>29</sup> appreciably—sending a shock through Israel’s financial sector as Israeli analysts realized that, given the degree to which settlements are woven into the fabric of Israel’s financial system (most notably via mortgages), any European move putting teeth into its policy of differentiation could have serious impacts on Israel’s financial sector and economy.

Months later, on November 11, 2015, the European Parliament issued its “Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967,”<sup>30</sup> calling for the accurate labeling of goods produced in Israeli settlements (i.e., since these goods are not produced in Israel, they cannot be labeled “made in Israel” or the like). This policy notice earned sharp condemnation from Prime Minister Netanyahu, who called it “heinous” and went so far as to invoke the Holocaust, stating, “[t]his is absolutely absurd. It’s morally abhorrent because on the soil of Europe, within living memory, Jewish products were labeled. Jewish stores were labeled. And I’d expect, with all the frustration, for Europe not to adapt this heinous act which has such horrible historic overtones.”<sup>31</sup>

To be clear: the settlement-related policies articulated by the EU in 2015 could have been adopted and articulated by the EU at any time in the preceding years. The decision to refrain from doing so, despite decades of Israeli policies in the West Bank that represent *prima facie* violations of international law, appears to have reflected Europe’s focus on supporting the political process launched in 1993 in Oslo, and hope for a political solution that would render moot concerns about Israeli violations of international law. Europe’s decision in 2015 to finally lay down a marker on this matter suggested that hope for such a political solution had evaporated, replaced with concern that Europe’s silence on the matter was directly contributing to the cementing of a permanent illegal *status quo*, and to the erosion of respect for international law writ large, with the risk of direct harm to European interests and objectives around the globe.

### *C. Congress Takes a Stand (with an Assist from Obama)*

As Europe was putting down a marker on the imperative to draw a bright line between sovereign Israel and settlements, pressure—from a constellation of Israel-

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29. Noam Sheizaf, *Tel Aviv Bank Index Drops Following Think Tank Report on Settlements*, +972 MAG. (July 22, 2015), <https://www.972mag.com/tel-aviv-bank-index-drops-following-think-tank-report-on-settlements/> (on file with the *University of the Pacific Law Review*).

30. Interpretive Notice on Indication of Origin of Goods from the Territories Occupied by Israel Since June 1967, 2015 O.J. (C 374) 4, [https://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/dpal/dv/4a\\_interpretativenoticeindicationorigin/4a\\_interpretativenoticeindicationoriginen.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/documents/dpal/dv/4a_interpretativenoticeindicationorigin/4a_interpretativenoticeindicationoriginen.pdf) (on file with the *University of the Pacific Law Review*).

31. Raphael Ahren, *Netanyahu Hints at Possible Annexations in West Bank*, TIMES ISR. (Nov. 18, 2015), <https://www.timesofisrael.com/netanyahu-hints-at-possible-annexations-in-west-bank/> (on file with the *University of the Pacific Law Review*).

aligned actors—was growing for the U.S. Congress to do precisely the opposite.<sup>32</sup> These efforts came to fruition, most notably, on June 24, 2015, when Congress passed a piece of major Europe-focused trade negotiations legislation<sup>33</sup>—subsequently signed into law by President Obama<sup>34</sup>—that included a provision making it U.S. policy in these negotiations to “discourage politically motivated actions to boycott, divest from, or sanction Israel . . . .”<sup>35</sup> Notably, at the time this law was introduced and passed, no European country was boycotting, or in any way contemplating boycotting, the state of Israel (indeed, no European country has ever done so). What Europe was doing at that time, in contrast, was calling for differentiation between Israel and settlements. It was this differentiation that was the true target of this new U.S. law, as is clear in language in the law explicitly defining “actions to boycott, divest from, or sanction Israel” to mean: “actions . . . that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or **in Israeli-controlled territories.**”<sup>36</sup>

With this law, Congress broke with decades of U.S. policy opposing the West Bank settlement enterprise, replacing it with a policy that formally embraced Prime Minister Netanyahu’s conflation of settlements and Israel. Congress’s policy shift reflected the very successful efforts of Netanyahu<sup>37</sup> and pro-Israel actors,<sup>38</sup> Jewish and non-Jewish, to first sow, and then hijack, panic and outrage over BDS, to normalize Israeli control over, and settlement of, the West Bank. In effect, by 2015 the view in Congress was that pro-Israel equaled anti-BDS, and that anti-BDS meant opposition to boycotts of anything related to Israel. In February 2016, Congress doubled down, passing another piece of major trade legislation—a law with much broader impact—that included the same conflation of Israel and

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32. Chris McGreal, *Sheldon Adelson Looks to Stamp Out Growing US Movement to Boycott Israel*, GUARDIAN (June 5, 2015), <https://www.theguardian.com/us-news/2015/jun/05/sheldon-adelson-looks-to-stamp-out-growing-us-movement-to-boycott-israel> (on file with the *University of the Pacific Law Review*).

33. Defending Public Safety Employees’ Retirement Act, H.R. 2146, 114th Cong. (2015).

34. Nathal Toosi, *Administration Objects to Israeli-Linked Provision in Trade Bill*, POLITICO (June 30, 2015), <https://www.politico.com/story/2015/06/administration-objects-to-israeli-settlements-provision-in-trade-bill-119620> (on file with the *University of the Pacific Law Review*).

35. 19 U.S.C. § 4201(b)(20)(ii) (emphasis added).

36. 19 U.S.C. § 4201(b)(20)(B) (emphasis added).

37. Peter Beaumont, *Israel Brands Palestinian-Led Boycott Movement a ‘Strategic Threat’*, GUARDIAN (June 3, 2015), <https://www.theguardian.com/world/2015/jun/03/israel-brands-palestinian-boycott-strategic-threat-netanyahu> (on file with the *University of the Pacific Law Review*); Benjamin Netanyahu, Prime Minister of Isr., Remarks at the Am. Isr. Pol. Action Comm. (Mar. 4, 2014), <https://embassies.gov.il/chicago/News/CurrentAffairs/Pages/PM-Netanyahu—Full-Remarks-at-the-2014-AIPAC-Conference.aspx> (on file with the *University of the Pacific Law Review*).

38. To get a sense of the range of these groups and their activities, see *AJC: Presbyterian Divestment a Breach with Jews, Undermines Israeli-Palestine Peace*, AM. JEWISH COMM. (June 20, 2014), <https://www.ajc.org/news/ajc-presbyterian-divestment-a-breach-with-jews-undermines-israeli-palestinian-peace> (on file with the *University of the Pacific Law Review*); Caleb Parke, *Pastor Hagee Calls Iran Nuke Agreement ‘Historic, Bad Deal for the World’*, FOX NEWS (Nov. 21, 2015), <https://www.foxnews.com/us/pastor-hagee-calls-iran-nuke-agreement-historic-bad-deal-for-the-world> (on file with the *University of the Pacific Law Review*); McGreal, *supra* note 32.

settlements.<sup>39</sup> Signing that bill into law, President Obama issued a non-legally binding signing statement<sup>40</sup> rejecting the conflation of settlements and Israel. The moment Obama left office, that signing statement and the policy perspective it expressed were instantly consigned to the dustbin of history.<sup>41</sup>

Since then, Congress has sought multiple times to pass two additional pieces of legislation directly related to boycotts of Israel and settlements. Both measures have thus far failed to pass into law, but both are important for what they tell us about the views of many in Congress, the priorities of pro-Israel lobby groups, and the kind of activism that can have impact. They are also important for the fact that they could very well be reintroduced, and passed, in the future.

The first of these bills is the Combating BDS Act (the CBA).<sup>42</sup> This legislation seeks to give cover and encouragement for state laws targeting boycotts of both Israel and settlements [discussed in detail in the next section of this essay]. Its official title explicitly adopts the conflation of settlements and Israel first seen in Israel's own anti-boycott law.<sup>43</sup>

First introduced in the Senate in 2017,<sup>44</sup> the CBA failed to gain traction, likely due to strong pushback<sup>45</sup> from civil rights organizations, as well as a lack of demonstrated enthusiasm for the bill from pro-Israel lobby groups who were more focused on a different anti-boycott measure (discussed below).<sup>46</sup> The CBA was reintroduced and passed in the Senate in 2019 as part of the very first Senate bill introduced in that new session of Congress—put there, by all appearances, to create friction among Democrats and to give Republicans an opportunity to claim to be the more pro-Israel party.<sup>47</sup> That bill subsequently died in the House. The CBA was reintroduced as a freestanding Senate bill in 2021,<sup>48</sup> but again went

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39. Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, 114th Cong. (2015).

40. Ron Kampeas, *Obama Weighs in on BDS Settlement Fight—But Battle Likely Won't End There*, JEWISH TELEGRAPHIC AGENCY (Feb. 25, 2016), <https://www.jta.org/2016/02/25/united-states/battle-over-defining-bds-makes-it-into-presidential-signing-statement-but-that-wont-end-it> (on file with the *University of the Pacific Law Review*).

41. Eugene Kontorovich, *Obama Signs Israel Anti-Boycott Provisions into Law, Settlements and All*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/25/obama-signs-israel-anti-boycott-provisions-into-law-settlements-and-all/> (on file with the *University of the Pacific Law Review*).

42. Combating BDS Act of 2021, S. 2119, 117th Cong. (2021–2022) (emphasis added).

43. *Id.* (“To provide for nonpreemption of measures by State and local governments to divest from entities that engage in certain boycott, divestment, or sanctions activities targeting Israel or persons doing business in Israel or **Israeli-controlled territories**, and for other purposes.”) (emphasis added).

44. Combating BDS Act of 2017, S. 170, 115th Cong. (2017–2018).

45. Letter from Faiz Shakir, Nat'l Political Dir., ACLU, to Sen. Mike Crapo & Sen. Sherrod Brown, Senate Comm. on Banking, Hous., & Urb. Affs. (May 10, 2018), <https://www.aclu.org/letter/aclu-letter-senate-banking-housing-and-urban-affairs-committee-s-170-combating-bds-act> (on file with the *University of the Pacific Law Review*).

46. Which is not to say it wasn't supported by AIPAC—it was. See *Myths and Facts About the Combating BDS Act*, AM. ISR. PUB. AFFS. COMM., <https://www.aipac.org/resources/myths-and-facts-combating-bds-act-84j6h-rr6c7-ghnxh?rq> (last visited Apr. 1, 2023) (on file with the *University of the Pacific Law Review*).

47. Strengthening America's Security in the Middle East Act of 2019, S. 1, 116th Cong. (2019–2020).

48. Combating BDS Act of 2021, S. 2119, 117th Cong. (2021–2022).

nowhere. On May 17, 2023, the CBA was reintroduced in the 118th Congress. It remains to be seen if Republicans' control of the House means it will pass.

The second bill in this category is the misleadingly named “Israel Anti-Boycott Act” (the IABA). Contrary to its name, the IABA has nothing to do with boycotts of Israel; it is exclusively about boycotts or policies that pressure Israel over settlements. In order to fight such policies, this legislation seeks to prohibit and punish *non-coerced* support for and cooperation with (1) EU policies calling for differentiation between Israel and settlements (policies that are advisory and involve no enforcement mechanism), and (2) the United Nations database<sup>49</sup> of companies working in, or contributing to, settlements (a database of information that, like the EU policy, has no enforcement mechanism). That is, in the name of defending Israel, members of Congress introduced, and widely supported, legislation designed to prohibit and punish Americans from taking entirely voluntary actions reflecting their own political or moral convictions—something that in any other context would be immediately understood as violating the First Amendment.<sup>50</sup>

The IABA was first introduced in 2017 in the House<sup>51</sup> (where it had 292 cosponsors) and in the Senate<sup>52</sup> (where it had 58 cosponsors), framed misleadingly as a commonsense “updating” of longstanding U.S. antiboycott law<sup>53</sup> that prohibits compliance with *coercive* boycotts (i.e., cases where the act of boycotting is not a matter of political free speech, but a matter of obeying the *dictats* of another country as a condition for doing business). Despite the large numbers of cosponsors and despite enjoying wall-to-wall support from, and active lobbying by, an array of legacy pro-Israel Jewish groups and pro-Israel Christian Evangelical groups, the IABA hit a wall in the form of ferocious opposition from the grassroots<sup>54</sup> and free speech and civil rights groups. In response, the authors of the IABA tweaked the bill slightly, lessening the penalties for violators (removing the threat of jail time).<sup>55</sup> This change, which did nothing to remedy the aspects violating the First Amendment, failed to mollify opponents.

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49. *Israel: New Database Will Aid Corporate Accountability*, HUM. RTS. WATCH (Feb. 13, 2020), <https://www.hrw.org/news/2020/02/13/israel-new-database-will-aid-corporate-accountability> (on file with the *University of the Pacific Law Review*).

50. Anika Raihan, *Nearly 50 Senators Want to Make It a Felony to Boycott Israel*, NATION (Aug. 4, 2017), <https://www.thenation.com/article/archive/nearly-50-senators-want-to-make-it-a-felony-to-boycott-israel/> (on file with the *University of the Pacific Law Review*).

51. Israel Anti-Boycott Act, H.R. 1697, 115th Cong. (2017–2018).

52. Israel Anti-Boycott Act, S. 720, 115th Cong. (2017–2018).

53. Martin A. Weiss, Cong. Rsch. Serv., RL33961, Arab League Boycott of Israel 5 (2017).

54. *See, e.g., 100 Groups Call on Congress to Oppose Israel Anti-Boycott Act (Updated)*, PALESTINE LEGAL, <https://palestinelegal.org/news/2017/8/9/civil-rights-groups-to-congress-oppose-unconstitutional-israel-anti-boycott-act> (last updated Jan. 3, 2018) (on file with the *University of the Pacific Law Review*); *Legislative Advocacy Challenging Anti-BDS Bills*, CTR. FOR CONST. RTS. (Feb. 21, 2017), <https://ccrjustice.org/legislative-advocacy-challenging-anti-bds-bills> (on file with the *University of the Pacific Law Review*); Zaid Jilani, *J Street, a Reliable For of BDS, Urges Congress to Oppose Israel Anti-Boycott Act for Now*, INTERCEPT (July 20, 2017), <https://theintercept.com/2017/07/20/j-street-a-reliable-foe-of-bds-urges-congress-to-oppose-israel-anti-boycott-act-for-now> (on file with the *University of the Pacific Law Review*).

55. Lara Friedman, *What Would the [“Softened”] Israel Anti-Boycott Act Actually Do?*, FOUND. FOR

A new version<sup>56</sup> of the bill—slightly modified<sup>57</sup> but again preserving the underlying free-speech-quashing objectives and impacts—was reintroduced in the House in 2020, and likewise went nowhere. On April 28, 2023, yet another version of the IABA was introduced in the House, and like the CBA, there is a strong likelihood that this time the IABA will pass. Based on President Biden’s record in office thus far, it seems likely he will be unwilling to spend the political capital necessary to prevent it becoming law.

*D. The Emergence of Anti-Boycott Laws in U.S. States*

Laws in U.S. states targeting companies that boycott Israel or settlements (from this point forward referred to in this article simply as “anti-BDS laws”) first appeared in 2015, coinciding with Europe’s move to differentiate between Israel and settlements. In the years since, these laws have proliferated along two distinct tracks: one set of laws barring states from contracting with companies or individuals unless they commit to not boycott Israel or settlements; and another set of laws barring investment of state pension funds in, and requiring divestment of state pension funds from, companies that boycott Israel or settlements. In some cases where there was strong opposition to passing an anti-boycott measure, governors enacted it via executive orders. Overall, the enactment of these measures has proceeded as follows:<sup>58</sup>

2015 - Illinois, South Carolina, and Tennessee

2016 - Alabama, Arizona, California, Colorado, Florida, Georgia, Indiana, Iowa, New Jersey, New York (by executive order), Ohio, Pennsylvania, Rhode Island

2017 - Arkansas, Kansas, Maryland (by executive order), Michigan, Minnesota, Nevada, North Carolina, Texas, Wisconsin (by executive order)

2018 - Florida, Kansas, Kentucky (by executive order), Louisiana (by executive order), Wisconsin

2019 - Arizona, Kentucky, Louisiana, Mississippi

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MIDDLE E. PEACE (Mar. 5, 2018), <https://fmep.org/resource/softened-israel-anti-boycott-act-actually-%e2%80%a8/> (on file with the *University of the Pacific Law Review*).

56. Israel Anti-Boycott Act, H.R. 5595, 116th Cong. (2019-2020).

57. Lara Friedman, *The New Israel Anti-Boycott Act—What It Actually Says/Does*, FOUND. FOR MIDDLE E. PEACE (Jan. 14, 2020), <https://fmep.org/resource/the-new-israel-anti-boycott-act-what-it-actually-says-does> (on file with the *University of the Pacific Law Review*).

58. Lara Friedman, *Legislation in US States Targeting Boycotts of Israel and/or Settlements 2014–Present*, FOUND. FOR MIDDLE E. PEACE, <https://fmep.org/wp/wp-content/uploads/State-BDS-and-Settlement-legislation-table.pdf> (last updated Apr. 17, 2023) (on file with the *University of the Pacific Law Review*).

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2020 - Missouri, Oklahoma, South Dakota (by executive order)

2021 - Idaho, West Virginia

2022 - Arizona, Georgia, Iowa, Ohio, Tennessee

2023 (as of June 20, 2023) - North Dakota, Texas – in addition to bills introduced in Alaska, Nebraska, New Hampshire, New York, and Virginia

Almost all these laws include language similar to the aforementioned provision in Israel’s own 2011 anti-boycott law—the one that explicitly conflates settlements and Israel (the exact formula in U.S. state laws varies and has evolved over time). From their earliest appearance to the present day, these laws, while referring to boycotts of Israel, have been used primarily, if not exclusively, to target boycotts of settlements. This is clear in the lists published by many states, as required by most anti-BDS laws, of companies ineligible for business with or investment from the states due to alleged boycotting of Israel; analysis of the companies on these lists<sup>59</sup> suggests that in the overwhelming majority of cases, listed companies are being targeted for refusing to do business with or in settlements, rather than for boycotting Israel. Indeed, the two highest-profile cases where the laws have been invoked—the cases of Airbnb<sup>60</sup> and Ben & Jerry’s—<sup>61</sup>were both instances of companies that manifestly did not engage in, call for, or support boycotting Israel; rather, both companies merely adopted policies that rejected doing business in West Bank settlements.

A wide range of pro-Israel organizations, Jewish and Christian Zionist, have from the start lobbied energetically in support of state-level anti-BDS laws.<sup>62</sup> A

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59. *Companies that Boycott Israel in Violation of State Laws by State*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/companies-that-boycott-israel-in-violation-of-state-laws-by-state> (last updated 2021) (on file with the *University of the Pacific Law Review*).

60. Ben Sales, *What Airbnb’s Decision to Delete West Bank Listings Could Mean for Israel’s Settlements*, JEWISH TELEGRAPHIC AGENCY (Nov. 21, 2018), <https://www.jta.org/2018/11/21/israel/what-airbnbs-decision-to-delete-west-bank-listings-will-mean-for-israels-settlements> (on file with the *University of the Pacific Law Review*); James Call, *Florida Sanctions Airbnb Over West Bank Policy, Declares Jerusalem ‘Undivided Capital’*, TALLAHASSEE DEMOCRAT (Jan. 29, 2019), <https://www.tallahassee.com/story/news/2019/01/29/florida-sanctions-airbnb-over-west-bank-policy/2713008002> (on file with the *University of the Pacific Law Review*).

61. *Ben & Jerry’s Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY’S HOMEMADE, INC. (July 19, 2021), <https://www.benjerry.com/about-us/media-center/opt-statement> (on file with the *University of the Pacific Law Review*); Ron Kampeas, *5 States Are Considering Sanctions on Ben & Jerry’s After West Bank Pullout*, JEWISH TELEGRAPHIC AGENCY (July 23, 2021), <https://www.jta.org/2021/07/23/politics/5-states-are-considering-sanctions-on-ben-jerrys-after-west-bank-pullout> (on file with the *University of the Pacific Law Review*).

62. “The Jewish and pro-Israeli forces have established strong support networks over many years through communal, faith-based, Zionist, and Jewish-defense organizations including the American Jewish Committee, the Jewish Federations of North America, the Anti-Defamation League, AIPAC, state and regional Jewish Community Relations Councils, Hillel, Chabad, the Israel Project, the Israel Alliance, StandWithUs, and the Academic Engagement Network, which have mobilized in various ways resulting in 25 states adopting some form of anti-BDS legislation. Essential to the passing of state anti-BDS legislation is the strong support from the pro-Israeli Christian-community groups including CUFU (Christians United for Israel) with 2.8 million supporters, Proclaiming Justice to the Nations (PTJN), United with Israel with three million supporters, the Christian Allies

smaller circle of actors has publicly claimed credit for conceiving and drafting the laws themselves. These actors include Joseph Sabag, the Executive Director of the Israeli-American Coalition for Action<sup>63</sup> (IAC), a 501(c)(4) group funded by hardline pro-Israel funder Sheldon Adelson,<sup>64</sup> that “advocates to policymakers nationwide on behalf of the pro-Israel and Israeli-American Communities.” Appearing on a recent webinar,<sup>65</sup> Sabag bragged that he and Eugene Kontorovich—internal law director of the hugely influential right-wing Israeli think tank, the Kohelet Policy Forum<sup>66</sup>—developed the model for anti-BDS laws that prohibit states from awarding contracts to anyone who won’t promise to forego boycotts of Israel and settlements; and that Richard Goldberg, now Senior Advisor at the Foundation for Defense of Democracies,<sup>67</sup> developed the model for anti-BDS laws that require divestment from companies that boycott Israel or settlements.

In addition, the government of Israel has not hidden the fact that it has played a role in this legislative onslaught. In June 2019, then-Israeli Minister of Strategic Affairs Gilad Erdan stated in a public gathering, “Our efforts are producing results. 27 US states now have counter-BDS legislation. Let’s give a hand to all the governors and state legislators who supported this law. They deserve it.”<sup>68</sup> Not long thereafter, then-Prime Minister Netanyahu tweeted, “In recent years, we have

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Conference, the Christian Empowerment Council, and the Church4Israel organization in Alabama. These well-established organizations have helped clarify issues, educate communities, and have worked directly with state legislators in the writing of legislation; mobilized public support; and lobbied in their state capitals on behalf of Israel and security for Jews worldwide.”

Ellen Cannon, *The BDS and Anti-BDS Campaigns: Propaganda War vs. Legislative Interest-Group Articulation*, 30 JEWISH POL. STUD. REV. 5, 40 (2019), <https://jcpa.org/article/the-bds-and-anti-bds-campaigns-propaganda-war-vs-legislative-interest-group-articulation/> (on file with the *University of the Pacific Law Review*).

63. Zvika Klein, *This Israel-American Philanthropist Is Advocating for IHRA Definition in 7 US States*, JERUSALEM POST (Aug. 8, 2022), <https://www.jpost.com/diaspora/antisemitism/article-714187> (on file with the *University of the Pacific Law Review*); Joseph Sabag, *Executive Director, IAC for Action*, ISR.-AM. COUNCIL, <https://www.israeliamerican.org/iac-national-summit/team-member/joseph-sabag> (last visited Apr. 1, 2023) (on file with the *University of the Pacific Law Review*).

64. Josh Nathan-Kazis, *Breaking with Script, Adelson Portrays IAC as a Hardline AIPAC Alternative*, FORWARD (Nov. 6, 2017), <https://forward.com/news/386949/breaking-with-scrip-adelson-says-iac-is-a-hardline-aipac-alternative> (on file with the *University of the Pacific Law Review*).

65. See Middle East Forum, *Fighting BDS, One American State at a Time with Joseph Sabag*, YOUTUBE (July 22, 2022), [https://youtu.be/fNf9q24xN\\_k](https://youtu.be/fNf9q24xN_k); see also Aiden Pink, *How Anti-BDS Laws Went Viral*, FORWARD (Feb. 4, 2019), <https://forward.com/news/418629/how-anti-bds-laws-went-viral> (on file with the *University of the Pacific Law Review*) (“You likely haven’t heard of Alan Clemmons or Eugene Kontorovich, but around three-quarters of Americans live in states with laws written or inspired by them—laws that aim to protect Israel from the boycott, divestment and sanctions (BDS) campaign . . . .”).

66. See *Our Team, Prof. Eugene Kontorovich*, KOHELET POL’Y F., <https://en.kohelet.org.il/author/prof-eugene-kontorovich> (last visited Apr. 1, 2023); see also Shuki Sadeh, *The Right-Wing Think Tank That Quietly ‘Runs the Knesset’*, HAARETZ (Oct. 5, 2018), <https://www.haaretz.com/israel-news/2018-10-05/ty-article/.premium/the-right-wing-think-tank-that-quietly-runs-the-knesset/0000017f-e7af-df5f-a17f-ffffa2df0000> (on file with the *University of the Pacific Law Review*).

67. Richard Goldberg, FOUND. FOR DEF. OF DEMOCRACIES, <https://www.fdd.org/team/richard-goldberg> (last visited Apr. 1, 2023) (on file with the *University of the Pacific Law Review*).

68. Philip Weiss, *Israeli Government Minister Takes Credit for 27 U.S. States Passing Anti-BDS Laws*, MONDOWEISS (July 2, 2019), <https://mondoweiss.net/2019/07/israeli-government-minister> (on file with the *University of the Pacific Law Review*).



promoted laws in most US states, which determine that strong action is to be taken against whoever tries to boycott Israel.”<sup>69</sup>

### *E. Constitutionality & Litigation*

From early on, the American Civil Liberties Union (ACLU) and other free speech advocates raised the alarm about anti-BDS laws being passed in the U.S., noting that these laws are constitutionally problematic. As the ACLU noted in testimony<sup>70</sup> before one state legislature:

The bill penalizes a point of view deemed unacceptable by government officials. It would allow the state to assume the role of censor in matters of political controversy.

It is well accepted that boycotts are fully protected speech under the First Amendment to the United States Constitution. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907–915 (1982) (holding politically motivated boycott of white businesses to be constitutionally protected expressive conduct, and rejecting imposition of tort liability on organizers and participants). Yet [the number of the bill being debated] directs the state to retaliate against individuals and entities that participate in a boycott of Israel, simply because the state disagrees with the boycott. Such a directive by the state violates the First Amendment. . . .

[T]he Bill raises an unconstitutional conditions problem often seen in government spending cases. As recently as 2013, the Supreme Court clarified the rule governing statutes that create explicit speech-burdening conditions on the expenditure of government funds: “[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.” . . . In this case, it is hard to see how a company’s decision to boycott a particular nation is related to its ability to perform a contract for which it bids. Instead, the Bill seeks to use the State’s economic leverage to discourage protected boycott activity, entirely unrelated to the contract.<sup>71</sup>

Notwithstanding these concerns, states across the U.S. adopted, and continue to adopt, these laws. The result has been a series of legal challenges, including in

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69. Prime Minister of Israel (@IsraeliPM), TWITTER, <https://twitter.com/IsraeliPM/status/1227660066700042242> (on file with the *University of the Pacific Law Review*).

70. Letter from Ajmel Quereshi, Dir., ACLU, to Senate Budget & Tax’n Comm. on SB 739 (Mar. 1, 2017), [https://fmep.org/wp-content/uploads/ACLU\\_Letter\\_Against\\_SB739.pdf](https://fmep.org/wp-content/uploads/ACLU_Letter_Against_SB739.pdf) (on file with the *University of the Pacific Law Review*).

71. *Id.*

Georgia, Texas, Arkansas, Arizona, and Kansas. Most of the lawsuits thus far involved individuals (acting as sole proprietors) who were denied contracts due to their refusal to forswear boycotts of Israel or settlements. In most of these cases, lower courts agreed that the laws appeared to violate the First Amendment and ordered injunctions against them. Yet, rather than leading to these laws being vacated, state legislatures responded to the court rulings by merely amending the laws to narrow their scope (e.g., by applying requirements only to companies that have at least ten employees and to contracts worth at least \$100,000—tweaks that quickly became part of the standard text of anti-BDS bills going forward). With these amendments the laws no longer negatively impacted the original plaintiffs, meaning the plaintiffs no longer enjoyed standing to challenge the laws in court, rendering the cases moot.

In this way, legal “victories” against anti-BDS laws have thus far had the perverse effect of not only failing to roll back the laws but actually helping backers of the laws make them harder to challenge, in part because large companies involved in large contracts with states are generally loath to engage in this kind of litigation, given the financial and potential reputational risks involved. In this same vein, a judge in Texas recently ruled that even the amended anti-BDS law was unconstitutional—but his reasoning was different from that of free speech defenders, and his ruling included, in effect, guidelines for how the law could be tweaked to make it, in his view, constitutional, without tempering its force in terms of delegitimizing boycotts and punishing boycotters.<sup>72</sup>

Finally, the most widely known legal challenge to the anti-BDS laws is the lawsuit brought by a local newspaper<sup>73</sup> against Arkansas’s anti-BDS law. In that case, the first judge who heard the case rejected it.<sup>74</sup> His ruling was overturned<sup>75</sup> on appeal to the Eighth Circuit, with the judge ruling that the measure was clearly unconstitutional. In response, the state asked for an *en banc* review of the case. That panel of judges from the Eighth Circuit reversed the prior decision,<sup>76</sup> ruling that the law is constitutional. Critically, its ruling is based on an alarming and novel interpretation of the Supreme Court’s prior decisions upholding the right to boycott. According to this interpretation, the Constitution protects a right to call for or express support for boycotts but does not protect the right to actually boycott anything, viewing the act of boycotting not as expressive political speech but as an unprotected economic action. This re-interpretation of Supreme Court precedent, in effect, renders the whole notion of a “right to boycott” meaningless, with alarming implications going far beyond Israel-Palestine issues.

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72. *A & R Eng’g & Testing, Inc. v. City of Houston*, 582 F. Supp. 3d 415, 430–432 (S.D. Tex. 2022).

73. Elliot Setzer, *Eighth Circuit Upholds Arkansas Anti-BDS Law*, *LAWFARE* (July 8, 2022), <https://www.lawfareblog.com/eighth-circuit-upholds-arkansas-anti-bds-law#> (on file with the *University of the Pacific Law Review*).

74. *Ark. Times LP v. Waldrip*, 362 F. Supp. 3d 617, 626 (E.D. Ark. 2019).

75. Max Brantley, *Arkansas Times Wins Challenge of State’s Israel Boycott Rule*, *ARK. TIMES* (Feb. 12, 2021), <https://arktimes.com/arkansas-blog/2021/02/12/arkansas-times-wins-challenge-of-states-israel-boycott-rule> (on file with the *University of the Pacific Law Review*).

76. *Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022).

On October 20, 2020, the ACLU appealed the Eighth Circuit ruling to the Supreme Court.<sup>77</sup> On February 21, 2023, the Supreme Court announced that it had declined to take up the case.<sup>78</sup> Commenting on the decision, an ACLU attorney observed:

The Supreme Court missed an important opportunity to reaffirm that the First Amendment protects the right to boycott . . . From the Boston Tea Party to the Montgomery Bus Boycott to the boycott of apartheid South Africa, Americans have proudly exercised that right to make their voices heard. But if states can suppress boycotts of Israel, then they can suppress boycotts of the National Rifle Association or Planned Parenthood. While we are disappointed with the result in this case, the ACLU will continue to defend the right to boycott in courts and legislatures throughout the country.<sup>79</sup>

*F. A Legislative Template to Target Protest of...Anything*

From the earliest days of the anti-boycott bills, some analysts began sounding the alarm, warning that what was being developed—and tested and perfected in state legislatures and state courts—was a legislative template that could be used to target any political free speech opposed by any state government.<sup>80</sup> In 2021, the accuracy of these warnings started to come into focus, with the introduction of bills in a handful of states that explicitly used anti-BDS laws as a model for bills targeting boycotts and “discrimination” against the fossil fuels industry and against the firearms and ammunition industry.<sup>81</sup> In 2021, such laws were passed in North Dakota, Oklahoma, Texas, and Ohio.

This trend continued in 2022, with anti-BDS legislation further metastasizing into legislation aimed at quashing protests of an ever-growing list of industries (including productive agriculture, mining, and timber), and more broadly targeting financial companies and businesses that adopt any form of values-based business

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77. Petition for Writ of Certiorari, *Ark.*, 37 F.4th 1386 (No. 19-1378), [https://www.aclu.org/sites/default/files/field\\_document/arkansas\\_times\\_v\\_waldrip\\_petition\\_for\\_a\\_writ\\_of\\_certiorari\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/arkansas_times_v_waldrip_petition_for_a_writ_of_certiorari_1.pdf) (on file with the *University of the Pacific Law Review*).

78. Brian Hauss, *Supreme Court Declines to Review Challenge to Law Restricting Israel Boycotts*, ACLU (Feb. 21, 2023), <https://www.aclu.org/press-releases/supreme-court-declines-to-review-challenge-to-law-restricting-israel-boycotts> (on file with the *University of the Pacific Law Review*).

79. *Id.*

80. See generally Lara Friedman, *U.S. Politicians Are Backing a Free Speech Exception for Israel—& Creating a Template for Broader Assault on the First Amendment*, MEDIUM (Mar. 19, 2018), [https://medium.com/@Lfriedman\\_FMEP/u-s-politicians-are-backing-a-free-speech-exception-for-israel-creating-a-template-for-broader-eb406fdf3b7](https://medium.com/@Lfriedman_FMEP/u-s-politicians-are-backing-a-free-speech-exception-for-israel-creating-a-template-for-broader-eb406fdf3b7) (on file with the *University of the Pacific Law Review*).

81. Josh Bryant, *The Growing Trend of Anti-Boycott Laws and the Effect on Public Finance—Is Arkansas Next?*, J.D. SUPRA (June 30, 2022), <https://www.jdsupra.com/legalnews/the-growing-trend-of-anti-boycott-laws-7441209> (on file with the *University of the Pacific Law Review*).

or investment policies, or policies linked to the environment, social issues, or governance (commonly referred to as “ESG”). In 2022, legislation based on anti-BDS laws, repurposed to protect the fossil fuel industry, was introduced in eight states, and passed in Kentucky, Oklahoma, and West Virginia. Similar legislation to protect the firearms and ammunition industries was introduced in nine states, and similar legislation targeting an array of industries and/or ESG was passed in Idaho and introduced in eight other states.

Notably, in December 2022, the American Legislative Exchange Council (ALEC)<sup>82</sup> advanced model legislation entitled “Eliminate Political Boycotts Act”—a bill explicitly<sup>83</sup> based on anti-BDS laws, which ALEC had previously supported,<sup>84</sup> repurposed to protect any company that “engages in the exploration, production, utilization, transportation, distribution, sale, or manufacturing of, fossil fuel-based energy, timber, mining, or agriculture”—with the words “insert additional industries if needed” included in brackets at the end of that sentence.

This trend has further picked up steam in 2023, with a flood of legislation in U.S. states aimed at protecting the fossil fuel industry, the guns and ammunition industries, and most startlingly, targeting an array of industries and/or ESG (and in some cases throwing in abortion and trans rights)—some directly modeled on anti-BDS laws, others clearly inspired by them.<sup>85</sup>

### *G. Anti-Boycott Legislation Spreads to the UK*

Efforts to promote anti-BDS legislation in the UK began as early as 2019,<sup>86</sup> likely inspired by the success of such efforts in U.S. states. After years of debate and grassroots lobbying (both for and against),<sup>87</sup> on June 19, 2023, the UK’s ruling Conservative Party tabled a bill targeting unsanctioned (by the UK government) boycotts of foreign countries in general, and boycotts of Israel and

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82. David Armiak, *ALEC Doubles Down on Punishing ESG Firms*, CTR. FOR MEDIA & DEMOCRACY (Dec. 9, 2022), <https://www.exposedbycmd.org/2022/12/09/alec-doubles-down-on-punishing-esg-firms> (on file with the *University of the Pacific Law Review*).

83. Letter from Jason A. Isaac, Dir., Tex. Pub. Pol’y Found. (Nov. 30, 2022), <https://www.documentcloud.org/documents/23404070-stand-with-america-and-against-esg-email-from-tppfs-jason-isaac-113022> (on file with the *University of the Pacific Law Review*).

84. *Id.* (“Texas Representative Dennis Paul has introduced model policy, which has previously passed both of these task forces, and is based on anti-BDS legislation supported by ALEC regarding Israel.”).

85. Lara Friedman, *Free Speech-Quashing Laws Based on Israel-Focused Anti-Boycott Laws & Related Articles*, FOUND. FOR MIDDLE E. PEACE, <https://fimep.org/wp/wp-content/uploads/BDS-Laws-as-Template-for-Laws-on-Other-Issues.pdf> (on file with the *University of the Pacific Law Review*).

86. Benjamin Mueller, *U.K. Plans to Pass Anti-B.D.S. Law*, NY TIMES (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/world/europe/britain-bds-boycott-israel.html> (on file with the *University of the Pacific Law Review*).

87. *British Lawmaker Preparing Bill to Ban BDS*, ISRAEL HAYOM (Dec.15, 2021), <https://www.israelhayom.com/2021/12/15/british-lawmaker-preparing-bill-to-ban-bds/> (on file with the *University of the Pacific Law Review*); Ryvka Barnard, *Britain’s Anti-BDS Law Is an Attack on Democracy*, JACOBIN (Feb.2, 2022), <https://jacobin.com/2022/02/uk-anti-boycott-divestment-sanctions-law-parliament> (on file with the *University of the Pacific Law Review*).

settlements in particular.<sup>88</sup> In contrast to the U.S., where anti-BDS legislation seeks to punish and deter individuals' decisions to boycott Israel and/or settlements (by depriving them of the ability to win contracts with states), the UK bill reflects the very different political atmosphere in the UK, in which some local government bodies (local councils) and universities have supported and embraced boycotts of Israel and/or settlements as a means of protesting Israeli policies/actions and supporting Palestinian rights.<sup>89</sup> In this context, the UK legislation seeks to legally prevent "public bodies" from supporting or engaging in non-approved boycotts of any foreign country in general—with explicit language expanding the ban to apply not only to Israel but also to the "Occupied Palestinian Territories," and the "Occupied Golan Heights."<sup>90</sup>

### III. LAWS REDEFINING ANTISEMITISM

#### A. The Birth & Evolution of the "Working Definition of Antisemitism"

In the early 2000s, concern was rising in Europe about growing antisemitism, in part due to protests related to Israeli actions and policies toward the Palestinians in the context of the Second Intifada. In light of this concern, in 2004 the European Monitoring Centre on Racism and Xenophobia (EUMC) carried out a survey and analysis, resulting in a 346-page report, *Manifestations of antisemitism in the EU 2002–2003*.<sup>91</sup> Among other things, that report asked the question, "Are Anti-Israeli and Anti-Zionist Expressions Antisemitic?"<sup>92</sup> The authors' somewhat tortured answer boiled down to: generally, no. That report was leaked before publication and ignited a backlash even before it was officially released, in large part over critics' insistence that present-day antisemitism in Europe could not be so easily divorced from anti-Israel beliefs.

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88. Jonathan Shamir, *U.K. Parliament Introduces Bill Outlawing BDS in Universities and Councils*, HAARETZ (June 19, 2023), <https://www.haaretz.com/world-news/europe/2023-06-19/ty-article/.premium/u-k-parliament-to-vote-on-making-bds-illegal-for-universities-and-councils/00000188-d395-dbf8-a3e8-dbb51f620000> (on file with the *University of the Pacific Law Review*).

89. *UK Ministers to Bring Forward Bill Stopping Councils Boycotting Israel*, FINANCIAL TIMES (May 9, 2023), <https://www.ft.com/content/9ccb1ae3-0a22-4fec-97a4-2105fd956dc6> (on file with the *University of the Pacific Law Review*); *Legal Challenge to Lancaster City Council's BDS Motion*, UKLFI (July 12, 2021), <https://www.uklfi.com/legal-challenge-to-lancaster-city-councils-bds-motion> (on file with the *University of the Pacific Law Review*); Kristy Buchanan, *Government Takes First Historic Step Towards Banning BDS in Britain*, JEWISH CHRONICLE (Feb. 22, 2022), <https://www.thejc.com/news/news/government-takes-first-historic-step-to-ban-bds-in-britain-3PwdQKkL5Kqg9FlohA5pQW> (on file with the *University of the Pacific Law Review*).

90. *British Lawmaker Preparing Bill to Ban BDS*, ISRAEL HAYOM (Dec. 15, 2021), <https://www.israelhayom.com/2021/12/15/british-lawmaker-preparing-bill-to-ban-bds/> (on file with the *University of the Pacific Law Review*).

91. EUR. MONITORING CTR. ON RACISM & XENOPHOBIA, *MANIFESTATIONS OF ANTISEMITISM IN THE EU 2002–2003* (2004), [https://fra.europa.eu/sites/default/files/fra\\_uploads/184-AS-Main-report.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/184-AS-Main-report.pdf) (on file with the *University of the Pacific Law Review*).

92. *Id.* at 13.

The discontent over the EUMC's report was the catalyst for an intense and urgent effort—among Europeans, Israelis, and Americans, the latter prominently represented by the American Jewish Committee (AJC)—seeking to formulate a definition of antisemitism that addressed Israel-related issues to their satisfaction to be used for the expressly “non-legally binding” purpose of aiding in monitoring and understanding antisemitic trends in Europe. The outcome of this process was a new “working definition of antisemitism”<sup>93</sup> (WDA), drafted by AJC antisemitism expert and lawyer Kenneth Stern, with input from other experts (in 2015 Stern published a book documenting the process in detail).<sup>94</sup> Most importantly for the controversy that was to come, the WDA included, “Examples of the ways in which antisemitism manifests itself with regard to the State of Israel”—examples that closely resemble the aforementioned “3 D’s” of Natan Sharansky’s “new antisemitism.”<sup>95</sup>

From the outset, Palestinians and supporters of Palestinian rights criticized the WDA for its Israel-related examples, which they correctly perceived as weapons that would be used to attack and delegitimize them. In particular, two “examples” stood out: “Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor” and “Applying double standards by requiring of it [Israel] a behavior not expected or demanded of any other democratic nation.”<sup>96</sup> As noted earlier, versions of both of these arguments had already been weaponized to attack the BDS movement and its supporters. Another example, “Drawing comparisons of contemporary Israeli policy to that of the Nazis,” stood out as well, given that Israel politicians frequently invoke the Nazis when criticizing the Palestinians, and given that Israelis and pro-Israel advocates regularly use Nazi terminology and comparisons when attacking left-wing Jews.<sup>97</sup>

It was clear from the outset that, regardless of the definition’s drafters’ intent, defenders of Israel would instrumentalize these examples to deem antisemitic almost any expression of Palestinians’ lived experience of loss and exile, and almost any meaningful criticism or protest of Israel or Zionism. And defenders of Israel did just that, claiming these examples validated their two main lines of attack against BDS (i.e., that the BDS movement is antisemitic because (a) by advocating for the Palestinian right of return, it allegedly seeks to deny Jews the right to self-determination in a Jewish state of Israel, and (b) it focuses exclusively on criticizing Israel).

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93. Dina Porat & Kenneth Stern, *Defining Antisemitism*, TEL AVIV UNIV. (2012), <https://archive.ph/20121218121748/http://www.tau.ac.il/Anti-Semitism/asw2003-4/porat.htm#selection-1598.0-1598.1> (on file with the *University of the Pacific Law Review*).

94. See generally KENNETH MARCUS, *THE DEFINITION OF ANTISEMITISM* (2015).

95. Porat & Stern, *supra* note 84.

96. *Id.*

97. Eric Levitz, *Trump Picks Lawyer Who Says Liberal Jews Are Worse Than Nazi Collaborators as Israel Ambassador*, INTELLIGENCER (Dec. 16, 2016), <https://nymag.com/intelligencer/2016/12/trumps-israel-ambassador-likens-left-wing-jews-to-kaapos.html> (on file with the *University of the Pacific Law Review*).

In 2005, the EUMC adopted Stern’s definition, with minor tweaks, and disseminated it widely.<sup>98</sup> From that point it was promoted by the government of Israel, the OSCE, and pro-Israel organizations in the U.S. and Europe, and even the U.S. Department of State, which formally adopted the WDA in 2010 (leading many people in the U.S. to refer to it as the “State Department Definition of Antisemitism”).<sup>99</sup>

On May 26, 2016,<sup>100</sup> the International Holocaust Remembrance Alliance (IHRA), an organization whose avowed mission<sup>101</sup> is to unite “governments and experts to strengthen, advance and promote Holocaust education, research and remembrance and to uphold the commitments to the 2000 Stockholm Declaration,” adopted the WDA, with minor tweaks, and with the usual proviso that the definition is “non-legally binding.” Since then, the WDA has come to be known as the “IHRA definition of antisemitism” or more familiarly “the IHRA definition” or simply “IHRA” (some people still call it the State Department definition).<sup>102</sup>

The IHRA’s adoption of the WDA marked the opening of a full court press by the Israeli government, pro-Israel organizations, and allied governments, seeking to build the case that the IHRA definition was a global, non-controversial, entirely consensus definition of antisemitism, and that anyone who disagreed with it was naive, ignorant, or an antisemite. Central to this effort was the objective of achieving the widespread embrace of the IHRA definition, as a matter of policy, and the adoption and enforcement of this ostensibly “non-legally binding” definition of antisemitism, as a matter of law.

### B. IHRA on Campus

Even before the WDA became the IHRA definition, there were numerous cases of student government officials and student activist groups targeting Israel-critical free speech on college campuses.<sup>103</sup> These cases were grounded in a novel legal argument, based in the WDA, asserting that identification with and support for Israel are intrinsic to Jewish identity, and therefore are protected characteristics under civil rights and anti-discrimination laws. Based on this framing, defenders

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98. AM. JEWISH COMM., THE WORKING DEFINITION OF ANTI-SEMITISM 2 (2021), <https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Submissions/JBI-Annex1.pdf> (on file with the *University of the Pacific Law Review*).

99. *Defining Anti-Semitism*, U.S. DEP’T OF STATE (June 8, 2010), <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm> (on file with the *University of the Pacific Law Review*).

100. *What Is Anti-Semitism?*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> (last visited Mar. 30, 2023) (on file with the *University of the Pacific Law Review*).

101. *About Us*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/about-us> (last visited Mar. 30, 2023) (on file with the *University of the Pacific Law Review*).

102. *Id.*

103. For a detailed review of cases of the IHRA definition being used to attack students and professors, see Letter from Palestine Legal & Ctr. For Const. Rts. To A.B.A. 9–18 (Jan. 30, 2023), [https://vtjp.org/2023.01.20\\_Pal+Legal+++CCR+Letter+to+ABA\\_final.pdf](https://vtjp.org/2023.01.20_Pal+Legal+++CCR+Letter+to+ABA_final.pdf) (on file with the *University of the Pacific Law Review*).

of Israel insisted that the mere assertion by a Jewish student that they perceived Palestine/Israel-related statements, signs, movies, books, guest speakers, or anything else on campus as an attack on their Jewish identity is sufficient grounds for a formal complaint under Title VI of the Civil Rights Act.

To his credit, from the earliest sign of efforts in the U.S. to use the WDA to police campus free speech, lead drafter Kenneth Stern was (and remains) outspoken in protest. For example, in 2011, Stern co-wrote an open letter with the head of the American Association of University Professors in the context of allegations of antisemitism-related violations of Title VI regulations at the University of California at Berkeley, the University of California at Santa Cruz, and Rutgers, based on claimants invoking of the WDA. Stern and his co-author warned:

It is entirely proper for university administrators, scholars and students to reference the ‘working definition’ in identifying definite or possible instances of antisemitism on campus. It is a perversion of the definition to use it, as some are doing, in an attempt to censor what a professor, student, or speaker can say. Because a statement might be ‘countable’ by data collectors under the ‘working definition’ does not therefore mean that Title VI is violated. To assert this not only contravenes the definition’s purpose (it was not drafted to label anyone an antisemite or to limit campus speech), it also harms the battle against antisemitism.<sup>104</sup>

At the same time, as the threat to political free speech and academia posed by the IHRA definition began to come into focus, opposition to the IHRA definition also began ramping up. For example, legal expert Eugene Volokh, a self-described supporter of Israel, published an op-ed in the *Washington Post*, in which he observed:

What is the right view and what is the wrong view of the conflict in the Middle East should be a matter for academics and students to debate, without the university condemning one side as bigots — which... sends a strong message to untenured faculty members, graduate students and others that they had better not say certain things. (Of course, actual discrimination against Jewish students should indeed be spoken out against, and physical attacks, vandalism and disruption of events should be forbidden; but that doesn’t require the adoption of the State Department definition.)<sup>105</sup>

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104. Cary Nelson and Kenneth Stern Pen Open Letter on Campus Antisemitism, AM. ASS’N OF UNIV. PROFESSORS (Apr. 20, 2011), <https://www.aaup.org/news/cary-nelson-and-kenneth-stern-pen-open-letter-campus-antisemitism> (on file with the *University of the Pacific Law Review*).

105. Eugene Volokh, *The University of California, ‘Microaggressions,’ and Supposedly Anti-Semitic Criticism of Israel*, WASH. POST (Aug. 31, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/the-university-of-california-microaggressions-and-supposedly-anti-semitic-criticism-of-israel> (on file with the *University of the Pacific Law Review*).



Kenneth Stern likewise remained an outspoken voice of protest against the use of the IHRA definition to suppress free speech. He wrote:

Some in the Jewish community say that academic freedom is important, but not as important as opposing antisemitism. Thus they have advocated universities adopt the Department of State Definition of Antisemitism, to help identify what political speech should be considered bigoted (a de facto speech code based on a definition never intended for campus use); encouraged spying on faculty; and presuming that a faculty member's politics somehow renders them incapable of evaluating students' work based on merits, rather than political position. On top of all this, they have brought and threatened lawsuits complaining about political speech. **Essentially, the pro-Israel community is perceived to be saying it can't win the debate on the merits, but instead has to try and shut down the other side.**<sup>106</sup>

### C. The IHRA in Federal Law & Policy

In parallel to these efforts to see the widespread adoption of IHRA, this period was the beginning of an effort to get this “non-legally binding” definition enacted into law. In 2016, legislators introduced a piece of legislation entitled the “Anti-Semitism Awareness Act” (ASAA) in both houses of Congress.<sup>107</sup> While the bill's name suggests its purpose is to raise general awareness about antisemitism, the sole objective of this legislation is in fact to graft the IHRA definition, including its list of problematic examples, onto Title VI of the Civil Rights Act, in order to shut down criticism of Israel on campuses. Writing about the ASAA, Professor Barry Trachtenberg<sup>108</sup> noted that “[s]ince they are losing the battle over student opinion on a fair playing field of public debate on college campuses, supporters of the Anti-Semitism Awareness Act are trying to demolish the entire field and stop any debate from occurring at all.”

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106. Kenneth Stern, *Should a Major University System Have a Particular Definition of Anti-Semitism?*, JEWISH J. (June 22, 2015), <https://jewishjournal.com/commentary/opinion/175207> (on file with the *University of the Pacific Law Review*). In response to Stern's criticisms, backers of the adoption/enforcement of the IHRA definition have sought to downplay his role in conceptualizing and drafting the text, see Bayla Zohn, *Who Wrote the IHRA Working Definition of Anti-Semitism?*, BRANDEIS CTR., <https://brandeiscenter.com/who-wrote-the-ihra-working-definition-of-anti-semitism> (last visited Mar. 30, 2023) (on file with the *University of the Pacific Law Review*). For Stern's response, see Kenneth S. Stern, *We Disagree About the Working Definition. That's OK. Here's What's Not.*, TIMES OF ISR. (Feb. 10, 2021), <https://blogs.timesofisrael.com/we-disagree-about-the-working-definition-thats-ok-heres-whats-not> (on file with the *University of the Pacific Law Review*) (emphasis added).

107. Anti-Semitism Awareness Act of 2016, H.R. 6421, 114th Cong. (2016); Anti-Semitism Awareness Act of 2016, S. 10, 114th Cong. (2016).

108. Barry Trachtenberg, *Congress's Anti-Semitism Awareness Act Doesn't Protect Jews—It Protects Israel*, FORWARD (July 3, 2018), <https://forward.com/opinion/404591/the-anti-semitism-awareness-act-wouldnt-protect-jews-it-would-protect> (on file with the *University of the Pacific Law Review*).

Due to strong opposition from antisemitism experts,<sup>109</sup> the ACLU,<sup>110</sup> other free speech groups,<sup>111</sup> academic groups,<sup>112</sup> civil society organizations,<sup>113</sup> legal organizations,<sup>114</sup> and grassroots organizers and activists, the 2016 version of the ASAA failed to pass, and the versions introduced in 2018<sup>115</sup> and 2019<sup>116</sup> suffered the same fate. In 2021 and 2022,<sup>117</sup> backers of the IHRA definition tried another approach—enacting the IHRA definition into law by attaching its language to a broader piece of legislation targeting the UN relief organization that serves Palestinian refugees. That, too, has failed to move (so far).

On December 11, 2019, in an atmosphere in the U.S. of surging right-wing antisemitism associated with supporters of then-President Donald Trump, Trump issued his executive order<sup>118</sup> on antisemitism, rendering the battle over the ASAA moot. Like the ASAA, Trump's executive order, while framed as a policy dealing with antisemitism in general, is focused exclusively on enforcing the IHRA definition—including its problematic examples—on U.S. campuses. And lest

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109. E.g., Letter from Barry Trachtenberg, Assoc. Professor, Wake Forest Univ., to H. Comm. on the Judiciary (Nov. 7, 2017), <https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-TrachtenbergB-20171107.pdf>; Letter from Kenneth Stern, Dir., Justus & Karin Rosenberg Found., to H. Comm. on the Judiciary (Nov. 7, 2017), <https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-SternK-20171107.pdf> (on file with the *University of the Pacific Law Review*); *Hearing on Examining Anti-Semitism on College Campuses Before the H. Comm. on the Judiciary*, 115th Cong. 11, 20 (Nov. 7, 2017) (statements of Dr. Barry Trachtenberg, Dir., Jewish Stud. Program, Wake Forest Univ. & Kenneth Stern, Exec. Dir., Justus & Karin Rosenberg Found.).

110. Letter from Christopher Anders, Deputy Dir., Am. C.L. Union, & Manar Waheed, Legis. & Advoc. Couns., Am. C.L. Union, to U.S. Senators & Representatives (June 4, 2018), <https://www.aclu.org/letter/anti-semitism-awareness-act-2018> (on file with the *University of the Pacific Law Review*).

111. Will Creeley, *New Federal Anti-Semitism Act, Same First Amendment Problem*, FIRE (May 29, 2018), <https://www.thefire.org/new-federal-anti-semitism-act-same-first-amendment-problem> (on file with the *University of the Pacific Law Review*).

112. Letter from Judith E. Tucker, President, Middle E. Stud. Ass'n, & Amy W. Newhall, Exec. Dir., Middle E. Stud. Ass'n, to Chuck Grassley, Chair, S. Comm. on the Judiciary, et al. (June 4, 2018), <https://mesana.org/advocacy/committee-on-academic-freedom/2018/06/04/concerns-regarding-the-anti-semitism-awareness-act-of-2018> (on file with the *University of the Pacific Law Review*); Cary Nelson, *What's Wrong with the Anti-Semitism Awareness Act*, INSIDE HIGHER ED (June 12, 2018), <https://www.insidehighered.com/views/2018/06/12/criticism-anti-semitism-awareness-act-opinion> (on file with the *University of the Pacific Law Review*).

113. Letter from Dima Khalidi, Dir., Palestine Legal et al., to Hon. Bob Goodlatte & John Coyers, Jr. (Dec. 5, 2016), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/584eca8ee6f2e17fd89fa3ca/1481558672194/AntiSemitism+Awareness+Act+Opposition+Letter+final.pdf> (on file with the *University of the Pacific Law Review*).

114. *Lawmakers Reinroduce Federal Bill Aimed at Censoring Palestine Advocacy on Campuses*, PALESTINE LEGAL (May 24, 2018), <https://palestinelegal.org/news/lawmakers-reintroduce-asaa> (on file with the *University of the Pacific Law Review*).

115. Anti-Semitism Awareness Act of 2018, H.R. 5924, 115th Cong. (2018); Anti-Semitism Awareness Act of 2018, S. 2940, 115th Cong. (2018).

116. Anti-Semitism Awareness Act of 2019, H.R. 4009, 116th Cong. (2019); Anti-Semitism Awareness Act of 2019, S. 852, 116th Cong. (2019).

117. UNRWA Accountability and Transparency Act, H.R. 4721, 117th Cong. (2021); UNRWA Accountability and Transparency Act, S. 3467, 117th Cong. (2022).

118. Joshua Leifer, *The Real Target of Trump's Executive Order*, JEWISH CURRENTS (Dec. 12, 2019), <https://jewishcurrents.org/the-real-target-of-trumps-executive-order> (on file with the *University of the Pacific Law Review*).

anyone think this was a partisan act by Trump, it is worth noting that four days before Trump issued his executive order, Ted Deutch, a Democrat from Florida who at the time was the top Democrat on the House Foreign Affairs Committee’s Middle East Subcommittee, published an op-ed<sup>119</sup> in an Israeli newspaper calling for the U.S. to adopt the IHRA definition to “lay the groundwork for a whole-of-government strategy to combat anti-Semitism.”<sup>120</sup> Likewise, while since taking office President Biden has canceled a number of Trump’s controversial executive orders, the executive order on antisemitism is not among them.

On May 25, 2023, the Biden Administration released the first-ever *U.S. National Strategy To Counter Antisemitism* (“the Strategy”)—a whole-of-government and “whole-of-society” plan to raise awareness of antisemitism and its threat to American democracy, protect Jewish communities, reverse the normalization of antisemitism, and build cross-community solidarity.<sup>121</sup> The release of this plan came on the heels of months of consultations by the Biden Administration, accompanied by intensive public and private lobbying by forces focused on making sure the strategy would include a full and exclusive embrace of the IHRA definition of antisemitism, and by forces making the case against such an outcome.<sup>122</sup>

In the end, the Strategy—the wording of which was reportedly subjected to the kind of intensive wordsmithing process appropriate to a document that would be parsed under a microscope—represents a clear defeat for the pro-IHRA crowd. It mentions the IHRA definition once, observing that it is a definition “which the United States has embraced.”<sup>123</sup> This past tense, passive voice observation

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119. Ted Deutch, *The US Should Adopt the IHRA Definition of Anti-Semitism*, TIMES OF ISR. (Dec. 7, 2019), <https://blogs.timesofisrael.com/the-us-should-adopt-the-ihra-definition-of-anti-semitism> (on file with the *University of the Pacific Law Review*).

120. *Id.* In February 2022 Deutch announced that he would be leaving Congress later in the year to become the head of the American Jewish Committee, the pro-Israel organization that played the key role in the birth of the IHRA definition, and which actively supports both anti-BDS legislation and legislation enacting the IHRA definition into law. Even after the announcement, Deutch remained in Congress and remained the chair of HFAC’s Middle East Subcommittee until he formally resigned in October 2022. See Alex Rogers, *Ted Deutch to Resign from Congress to Lead American Jewish Committee*, CNN (Feb. 28, 2022), <https://www.cnn.com/2022/02/28/politics/ted-deutch-retiring-congressman-florida/index.html> (on file with the *University of the Pacific Law Review*); Renzo Downey, *Ted Deutch Resigns from Congress to Join the American Jewish Committee*, FLA. POL. (Oct. 1, 2022), <https://floridapolitics.com/archives/560564-ted-deutch-resigns-from-congress-to-join-the-american-jewish-committee> (on file with the *University of the Pacific Law Review*).

121. See WHITE HOUSE, THE U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM (2023); WHITE HOUSE BRIEFING ROOM, *Fact Sheet: Biden-Harris Administration Releases First-Ever U.S. National Strategy to Counter Antisemitism*, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/25/fact-sheet-biden-harris-administration-releases-first-ever-u-s-national-strategy-to-counter-antisemitism/> (last visited July 5, 2023) (on file with the *University of the Pacific Law Review*).

122. Jonathan Guyer, *The High-Stakes Debate Over How the US Defines “Antisemitism”*, VOX (MAY 25, 2023), <https://www.vox.com/world-politics/2023/5/25/23733396/internal-jewish-debate-definition-antisemitism-ihra-israel-zionism> (on file with the *University of the Pacific Law Review*); Mari Cohen, *National Plan Reflects the Debate Over Antisemitism*, JEWISHCURRENTS (June 1, 2023), <https://jewishcurrents.org/national-plan-reflects-the-debate-over-antisemitism> (on file with the *University of the Pacific Law Review*).

123. WHITE HOUSE, THE U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM (2023).

accurately describes U.S. policy prior to the release of the Strategy (the State Department's adoption of the IHRA definition, which has nothing to do with domestic policy, and Trump's 2019 EO applying the IHRA solely to the Department of Education) but in no way suggests any U.S. embrace beyond that. Moreover, this weak reference to the IHRA definition comes only after the Biden plan articulates its own definition of antisemitism, which bears no resemblance to the IHRA definition or its examples. It also comes through framing that reduces the IHRA definition to merely one of "several definitions of antisemitism" that all "serve as valuable tools to raise awareness and increasing understanding of antisemitism."<sup>124</sup> The plan goes so far as to explicitly name one of the competing definitions, known as the Nexus Document.<sup>125</sup> The plan in no way suggests that IHRA is a better definition than other definitions, instead describing it only as the most "prominent"—a description that is both unquestionably true, thanks to millions of dollars that have been spent over the past decade for the express purpose of giving it prominence, and implies no value judgment or preference in its favor.

As of this writing, it is too soon to say what, if anything, the text of the Biden plan will mean in practice. It is too soon to determine how it will affect ongoing efforts in the U.S., the United Nations, and around the world, to achieve universal embrace and widespread enforcement of the IHRA definition and its conflating of criticism of Israel/Zionism with antisemitism. Predictably, many hardline pro-IHRA groups and individuals denounced the Strategy for its failure to embrace IHRA wholeheartedly and exclusively. What is clear is that the most prominent pro-IHRA forces, including Deborah Lipstadt, the State Department's Special Envoy to Monitor & Combat Antisemitism (whose role, as confirmed by Congress, includes no role vis-à-vis domestic U.S. policy), are actively misrepresenting the text of the Strategy.<sup>126</sup> These IHRA supporters are proceeding as if it did unequivocally endorse the IHRA definition, and working to put enforcement of the IHRA definition at the core of the Strategy's implementation.<sup>127</sup> Perhaps best summing up this approach is the response to the strategy of Natan Sharansky, who tweeted on May 29, 2023:

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124. *Id.*

125. *The Nexus Document, ISRAEL & ANTISEMITISM*, <https://israelandantisemitism.com/the-nexus-document/> (last visited July 5, 2023) (on file with the *University of the Pacific Law Review*).

126. WHITE HOUSE BRIEFING ROOM, *What They Are Saying: Bipartisan Members of Congress, State and Local Leaders, Faith-Based Organizations, and Advocates Applaud Release of White House National Strategy to Counter Antisemitism*, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/26/what-they-are-saying-bipartisan-state-and-local-leaders-faith-based-organizations-and-advocates-applaud-release-of-white-house-national-strategy-to-counter-antisemitism/> (last visited July 5, 2023) (on file with the *University of the Pacific Law Review*); Anti-Defamation League, *Fighting Hate From Home: Inside the White House Strategy to Counter Antisemitism*, YOUTUBE (June 2, 2023) <https://youtu.be/rYA8rt24551?t=1594> (starting at around 26:34, Deborah Lipstadt speaks on this definition) (on file with the *University of the Pacific Law Review*).

127. *See Officer of the Special Envoy to Monitor and Combat Antisemitism*, U.S. DEP'T STATE, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-of-the-special-envoy-to-monitor-and-combat-antisemitism/> (last visited July 5, 2023) (on file with the *University of the Pacific Law Review*).

To @POTUS and the @WhiteHouse, thank you for your prioritization of the fight against rising antisemitism! Your groundbreaking [sic] new national strategy presented last week will help foster the broad united front needed to combat this societal scourge effectively in the U.S. Your embrace of @theIHRAWorking Definition is critically important, and it must be given an exclusive role in the plan's implementation, as it is the only definition that covers my 'three Ds' of modern-day antisemitism—delegitimization, demonization, and double standards.<sup>128</sup>

That said, the position of U.S. groups and individuals who oppose the IHRA definition, and those who might in the future find the IHRA definition weaponized against them, has arguably been strengthened significantly, including with respect to cases that might in the future become the subject of litigation. Prior to the release of the Strategy, it could be argued that the IHRA definition of antisemitism, while officially embraced only by the State Department and Trump's limited-use EO, was the only definition of antisemitism that had any formal U.S. government recognition. With the release of the Strategy, those who reject the IHRA definition of antisemitism can now point to the "several definitions" that the Strategy explicitly and implicitly legitimizes, and perhaps more powerfully, to the Biden Administration's own definition of antisemitism.<sup>129</sup>

#### D. The IHRA in State Legislatures

While so far Congress has not passed any law adopting or enforcing the IHRA definition, backers of that definition have had better results in state legislatures, building on their success promoting anti-BDS laws. South Carolina passed laws enacting the IHRA definition<sup>130</sup> in 2018 and Florida did the same<sup>131</sup> in 2019; in 2022 Arizona and Iowa grafted the IHRA definition onto its hate crime laws,<sup>132</sup> and Tennessee legislated it into the educational system.<sup>133</sup>

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128. Natan Sharansky (@natan\_sharansky), TWITTER, (May 29, 2023, 9:15 AM), [https://twitter.com/natan\\_sharansky/status/1663217491294801922](https://twitter.com/natan_sharansky/status/1663217491294801922) (on file with the *University of the Pacific Law Review*).

129. WHITE HOUSE, THE U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM (2023).

130. Andrew Brown & Seanna Adcox, *Antisemitism and 'Sanctuary Cities' Bill Inserted into South Carolina State Budget*, POST & COURIER (Apr. 12, 2018), [https://www.postandcourier.com/news/antisemitism-and-sanctuary-cities-bill-inserted-into-south-carolina-state/article\\_0bc622c0-3e87-11e8-99e3-df93acd6be75.html](https://www.postandcourier.com/news/antisemitism-and-sanctuary-cities-bill-inserted-into-south-carolina-state/article_0bc622c0-3e87-11e8-99e3-df93acd6be75.html) (on file with the *University of the Pacific Law Review*).

131. H.B. 741, 2019 Leg., Reg. Sess. (Fla. 2019).

132. Lara Friedman, *States Are Moving to Class Criticisms of Israel as Antisemitism*, JEWISH CURRENTS (Feb. 20, 2022), <https://jewishcurrents.org/states-are-moving-to-class-criticism-of-israel-as-antisemitism> (on file with the *University of the Pacific Law Review*); H.B. 2675, 2022 Leg., Reg. Sess. (Ariz. 2022); H.F. 2220, 2022 Leg., Reg. Sess. (Iowa 2022).

133. H.B. 2673, 2022 Leg., Reg. Sess. (Tenn. 2022).

With respect to the forces behind IHRA legislation in states, there is a great deal of on-the-record, public information. For example, emails dating to August 2019,<sup>134</sup> released via a Freedom of Information Act request, reveal the direct engagement of the Israeli-American Coalition for Action's Executive Director Joseph Sabag<sup>135</sup> (previously mentioned in relation to his work promoting anti-BDS bills) with state legislators on IHRA-focused legislation. In the emails, which reference a meeting at a gathering of the American Legislative Exchange Council,<sup>136</sup> a Florida legislator, Randy Fine, crow's to other state legislators about Florida's new antisemitism law:

[T]he bill does two things: 1) takes the State Department definition of anti-Semitism and makes it the Florida definition of anti-Semitism and 2) requires that all antisemitism in our K-20 education system (whether acts by students, administrators or faculty, policies and procedures, club organizations, etc.) be treated identically as how racism is treated. In other words, they duplicate their policies for racism and simply swap out the word anti-Semitism. Students for Justice in Palestine is now treated the same way as the Ku Klux Klan – as they should be.<sup>137</sup>

Fine goes on to say: "Joe Sabag at the Israeli-American Coalition for Action was instrumental in providing outside support as I pushed the bill and I would highly recommend anyone considering such an effort speak with him."<sup>138</sup> In an immediate reply-all message, Sabag responds:

As we saw in FL and South Carolina, this bill requires a lot of resourcing in order to achieve a clean passage. My legal team has now taken Randy's bill and refined it into a model that can be brought elsewhere. **I urge you to please contact me or Rep. Alan Clemmons [a then-South Carolina legislator and then-head of ALEC] and take advantage of our policy support if you are considering filing a bill.** We are here to serve.<sup>139</sup>

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134. Email from Randy Fine, Fla. State Representative, to Joseph Sabag, Fla. State Representative (Aug. 18, 2019), <https://www.documentcloud.org/documents/6455535-Anti-Semitism-Bill-Discussed-at-ALEC-Emails.html> (on file with the *University of the Pacific Law Review*).

135. *About, ISR.-AM. COAL. FOR ACTION*, <https://iacforaction.org/about> (on file with the *University of the Pacific Law Review*).

136. ALEC also supports anti-BDS laws, see Press Release, Am. Leg. Exch. Council, ALEC Legislators Sign Letter to Reiterate Commitment to Free Market Against Discriminatory Policies (Dec. 13, 2018), <https://alec.org/press-release/alec-legislators-sign-letter-to-reiterate-commitment-to-free-market-and-against-discriminatory-policies> (on file with the *University of the Pacific Law Review*).

137. Email from Randy Fine, Fla. State Representative, to Joseph Sabag, Fla. State Representative (Aug. 18, 2019), <https://www.documentcloud.org/documents/6455535-Anti-Semitism-Bill-Discussed-at-ALEC-Emails.html> (on file with the *University of the Pacific Law Review*).

138. *Id.*

139. *Id.*

Shortly thereafter, Sabag published an op-ed in which, referencing the passage of the bills in Florida and South Carolina, he made clear the objective behind both the legislation and, at least in his view, the IHRA definition itself:

As the primary legal expert who helped develop such legislation, I believe the matter ought to be clarified so that the public can appreciate this important effort to combat hate and bigotry . . . . The codified definition has been adopted by branches of the U.S. government and over thirty other countries **because it makes it possible to identify when anti-Israel expressions are systematically used as a means of conveying anti-Jewish intent . . . .**<sup>140</sup>

And speaking on a recent webinar about anti-BDS laws and what comes next, Sabag said:

[T]he next step naturally is going to be to begin regulating anti-Semitism as it manifests as criminal or unlawful discriminatory conduct...The importance of IHRA is that it helps to expose national origin-driven antisemitism which we would say is much more of the contemporary style as opposed to religious based antisemitism which is more of the classic style...**the codification of the IHRA definition is one of the extreme priorities of the Jewish community in the next couple of years** and making certain that state investigators who have to investigate crime or unlawful discriminatory conduct have an accurate definition that doesn't allow the other side to dissimulate and to suggest that they were merely protesting Israel's policies where we know they were simply using pretexts in order to target Jewish victims on a particular basis.<sup>141</sup>

While Sabag has no basis to claim to speak for all Jewish Americans or even for a large percentage of Jewish Americans, developments at the outset of 2023 bear out his view that the codification of the IHRA definition is indeed a top priority for pro-Israel. During the first half of 2023, two more states—Arkansas and Virginia—passed legislation adopting and enforcing the IHRA definition, and similar legislation was introduced in 5 other states.<sup>142</sup>

Finally, it bears mentioning that Sabag is by no means alone in working to pass IHRA legislation in U.S. states. As I wrote in 2020, “There exists today a veritable cottage industry of organizations dedicating significant efforts to promoting the

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140. Joseph Sabag, *SABAG: Promoting Anti-Semitism by Perverting the Freedom of Speech*, DAILY WIRE (Oct. 23, 2019), <https://www.dailywire.com/news/sabag-promoting-anti-semitism-by-perverting-the-freedom-of-speech> (on file with the *University of the Pacific Law Review*) (emphasis added).

141. Middle East Forum, *Fighting BDS, One American State at a Time with Joseph Sabag*, YOUTUBE (July 22, 2022), [https://youtu.be/fNf9q24xN\\_k](https://youtu.be/fNf9q24xN_k) (on file with the *University of the Pacific Law Review*) (emphasis added).

142. *Anti-Free Speech/Faux “Fighting Anti-Semitism” Bills State & Federal (2017–2023)*, FOUND. FOR MIDDLE E. PEACE (Jan. 31, 2023), <https://fmep.org/wp/wp-content/uploads/Faux-Anti-Semitism-bills-Federal-State-2017.pdf> (on file with the *University of the Pacific Law Review*).

IHRA definition as a legally-mandated litmus test, designed to delegitimize if not criminalize criticism and activism on Israel, and especially boycotts.”<sup>143</sup> These include the Anti-Defamation League,<sup>144</sup> the American Jewish Committee,<sup>145</sup> the Lawfare Project,<sup>146</sup> the Tikvah Fund,<sup>147</sup> the Brandeis Center,<sup>148</sup> the Zachor Legal Institute,<sup>149</sup> B’nai B’rith,<sup>150</sup> the aforementioned Israeli-American Coalition for Action and Kohelet Policy Forum,<sup>151</sup> and a long list of smaller organizations (as seen in the list of groups endorsing Zachor Legal’s 2019 report, ‘*The New Antisemites*’: *New Report Uncovers the Dangerous Connection Between BDS and Antisemitism*).<sup>152</sup>

#### *E. Controversial, Non-consensus, and Not-Widely Adopted*

At the core of efforts to legislate and enforce the IHRA definition is the assertion that it reflects a broad consensus, is non-controversial, and already nearly universally recognized. None of these assertions hold up to scrutiny. The IHRA definition is not, by any standard, a consensus or non-controversial document.<sup>153</sup> As observed in a letter sent by civil society groups in January 2023

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143. Lara Friedman, *States are Moving to Class Criticism of Israel as Antisemitism*, JEWISH CURRENTS (Feb. 20, 2020), <https://jewishcurrents.org/states-are-moving-to-class-criticism-of-israel-as-antisemitism> (on file with the *University of the Pacific Law Review*).

144. *About the IHRA Working Definition of Antisemitism*, ANTI-DEFAMATION LEAGUE (Feb. 19, 2021), <https://www.adl.org/resources/backgrounders/about-ihra-working-definition-antisemitism> (on file with the *University of the Pacific Law Review*).

145. *AJC Policy: IHRA Working Definition of Antisemitism*, AM. JEWISH COMM., <https://www.ajc.org/policy/IHRA> (on file with the *University of the Pacific Law Review*).

146. *Help Us End Jew Hatred at UC Merced!*, LAWFARE PROJECT (Jan. 13, 2021), <https://www.thelawfareproject.org/releases/2021/1/13/help-us-end-jew-hatred-at-uc-merced> (on file with the *University of the Pacific Law Review*).

147. Kenneth Marcus, *Podcast: Kenneth Marcus on How the IHRA Definition of Anti-Semitism Helps the Government Protect Civil Rights*, TIKVAH FUND (July 30, 2021), <https://tikvahfund.org/library/podcast-kenneth-marcus-on-how-the-ihra-definition-of-anti-semitism-helps-the-government-protect-civil-rights> (on file with the *University of the Pacific Law Review*).

148. Toby Irenstein, *Adopting the IHRA Definition to Combat Anti-Semitism: In Government, on Campus, and Beyond*, BRANDEIS CTR. (Mar. 30, 2023), <https://brandeiscenter.com/adopting-the-ihra-definition-to-combat-anti-semitism-in-government-on-campus-and-in-general> (on file with the *University of the Pacific Law Review*).

149. Ron Machol, *Zachor Legal Institute Advocates for Social Media Companies to Rid Their Platforms of Antisemitism*, EIN PRESSWIRE (June 4, 2020), [https://www.einnews.com/pr\\_news/518525134/zachor-legal-institute-advocates-for-social-media-companies-to-rid-their-platforms-of-antisemitism](https://www.einnews.com/pr_news/518525134/zachor-legal-institute-advocates-for-social-media-companies-to-rid-their-platforms-of-antisemitism) (on file with the *University of the Pacific Law Review*).

150. B’NAI B’RITH INT’L, *THE WORKING DEFINITION OF ANTISEMITISM* (2022), [https://www.bnaibrith.org/wp-content/uploads/2022/06/ihra\\_working\\_definition\\_policy\\_paper.pdf](https://www.bnaibrith.org/wp-content/uploads/2022/06/ihra_working_definition_policy_paper.pdf) (on file with the *University of the Pacific Law Review*).

151. *Hearing on Confronting the Rise in Anti-Semitic Domestic Terrorism before the H. Subcomm. on Intel. and Counterterrorism of the Comm. on Homeland Sec.*, 116th Cong. 38 (2020) (statement of Prof. Eugene Kontovrich, Antonin Scalia L. Sch.).

152. “*The New Antisemities*”: *New Report Uncovers the Dangerous Connection Between BDS and Antisemitism*, STOP ANTISEMITISM (Dec. 16, 2019), <https://www.stopantisemitism.org/new-anti-semites-report> (on file with the *University of the Pacific Law Review*).

153. Lara Friedman, *Challenging the IHRA Definition of Antisemitism*, FOUND. FOR MIDDLE E. PEACE, <https://finep.org/wp/wp-content/uploads/Challenging-the-IHRA-Definition-of-Antisemitism.pdf> (last updated



to the American Bar Association,<sup>154</sup> in the context of pressure for it to include the IHRA definition (including its examples) in a resolution on antisemitism it was considering:

The IHRA definition has been challenged, vigorously, by hundreds of antisemitism experts, rabbis, and scholars of Jewish studies, Jewish history, and the Holocaust, by Palestinians who have borne the brunt of its application, as well as by experts on fighting racism and free speech. These experts—who include Kenneth Stern, the original lead drafter of the definition—have published hundreds of reports and articles articulating their concerns and objections. They have given speeches at countless think tanks, universities, synagogues, and international forums. They have presented testimony before Congress, and even before the ABA in connection with this resolution. Concern about either the misuse of, and/or the plain text of, the IHRA definition among Jewish scholars is so acute that it has given rise (so far) to two mainstream, independent projects aimed at developing alternative definitions.<sup>155</sup>

Similarly, the IHRA definition has not been universally or even nearly universally accepted, as its backers claim.<sup>156</sup> Minimal scrutiny of the backers' own numbers make this clear. For example, of the 1,116 entities that they boast have adopted the IHRA definition as of December 2022, according to their own data this includes just thirty-nine countries out of a total of 193 UN member states—

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Apr. 23, 2023) (on file with the *University of the Pacific Law Review*).

154. Letter from ACLU, et al., to A.B.A. (Jan. 18, 2023), <https://www.aclu.org/letter/letter-co-sponsors-proposed-american-bar-association-resolution-514-antisemitism> (on file with the *University of the Pacific Law Review*).

155. JERUSALEM DECLARATION ON ANTISEMITISM, <https://jerusalemdeclaration.org> (last visited Apr. 2, 2022) (on file with the *University of the Pacific Law Review*); NEXUS, THE NEXUS DOCUMENT (2023), <https://israelandantisemitism.com/the-nexus-document> (on file with the *University of the Pacific Law Review*). The AJC weighed in with the ABA, arguing that, “Critics of that Definition have wildly mischaracterized its intent and impact . . . .” Letter from Marc L. Stern, Chief Legal Officer, Am. Jewish Comm., to Deborah Enix-Ross, Esq., President, A.B.A. (Feb. 1, 2023), <https://fmep.org/wp/wp-content/uploads/AJC-letter-re-IHRA-to-DER.pdf> (on file with the *University of the Pacific Law Review*). The ADL likewise weighed in insisting that, “The IHRA definition does not undermine free speech or prohibit criticism of Israel.” Letter from Steven M. Freeman, Vice President, Anti-Defamation League, to Deborah Enix-Ross, Esq., President, A.B.A. (Feb. 1, 2023), <https://www.adl.org/sites/default/files/pdfs/2023-02/ADL-letter-to-ABA-re-Antisemitism-Resolution.pdf> (on file with the *University of the Pacific Law Review*). The Brandeis Center, which is actively involved in IHRA-based cases against universities, weighed in with a letter to selected ABA delegates alleging, “. . . [Y]ou have received letters promoting specious arguments opposing the IHRA working definition of anti-Semitism (“the IHRA Definition”)) . . . . “The Definition is no more “controversial” than any other civil rights law, and the speech charges are wildly inaccurate.” Letter from L. Rachel Lerman, General Counsel, & Denise Katz-Prober, Dir. Of Legal Initiatives, Brandeis Ctr. (Feb. 3, 2023), <https://fmep.org/wp/wp-content/uploads/Brandeis-Center-letter-to-selected-ABA-delegates.pdf> (on file with the *University of the Pacific Law Review*). On February 6, 2023, the ABA voted to adopt an antisemitism resolution that does not include the IHRA definition.

156. COMBAT ANTISEMITISM MOVEMENT & CTR. FOR THE STUDY OF CONTEMP. EUR. JEWRY AT TEL AVIV UNIV., THE IHRA WORKING DEFINITION OF ANTISEMITISM 2022 ADOPTIONS & ENDORSEMENTS REPORT (2023), [https://combatantisemitism.org/wp-content/uploads/2023/01/2022-IHRA-WDA-Adoption-\\_Endorsement-Report\\_CAM.pdf](https://combatantisemitism.org/wp-content/uploads/2023/01/2022-IHRA-WDA-Adoption-_Endorsement-Report_CAM.pdf) (on file with the *University of the Pacific Law Review*).

meaning eighty percent of the world’s governments have not adopted or endorsed IHRA.<sup>157</sup> Similarly, the backers state that the IHRA definition has been adopted by 464 “non-federal government entities”—that is, fewer than one percent of the tens if not hundreds of thousands of such entities worldwide.<sup>158</sup> They boast that the IHRA definition has been adopted by thirty U.S. states but, as laid out in detail above, as of this writing only seven states have adopted it by law; all other endorsements are in the form of non-binding resolutions or proclamations.<sup>159</sup> They crow that eighty six U.S. municipal governments have adopted the IHRA definition—representing (per the last census<sup>160</sup>) less than .5% of all municipal governments in the U.S.<sup>161</sup> They likewise brag that the IHRA definition has been adopted by 339 institutions of higher education worldwide, representing around one percent of the more than 25,000 institutions of higher education worldwide.<sup>162</sup> Finally, they brag that 274 “NGOs, corporations, religious organizations, student clubs, political parties, and other groups worldwide” have adopted the IHRA definition, out of the hundreds of thousands (if not millions) of organizations worldwide that fall into this grab bag category—i.e., a number IHRA adopters so small it is statistically insignificant.<sup>163</sup>

#### IV. CONCLUSION

As the foregoing analysis demonstrates, the effort to pass U.S. laws targeting boycotts of Israel and settlements, and the effort to pass U.S. laws enforcing the IHRA definition of antisemitism, are two related elements of a still evolving new approach to pro-Israel advocacy. This approach began as a tactic designed to prevent and punish both the BDS movement and any act of boycotting either Israel or settlements to protest Israel’s treatment of Palestinians. As that tactic proved successful, it evolved into a broader strategy designed to capitalize on concerns over surging antisemitism—as classically defined to mean threats, incitement, discrimination, and violence against Jews—to promote a redefinition of the very concept of antisemitism. According to that re-definition, virtually any meaningful criticism of Israel or expression of support for Palestinian rights, from BDS to pro-Israel student activism, to international human rights organizations charging Israel

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157. *Id.* at 5.

158. *Id.*

159. *Id.*

160. *Local Government in the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Local\\_government\\_in\\_the\\_United\\_States#Municipal\\_governments](https://en.wikipedia.org/wiki/Local_government_in_the_United_States#Municipal_governments) (last updated Jan. 18, 2023) (on file with the *University of the Pacific Law Review*).

161. COMBAT ANTISEMITISM MOVEMENT & CTR. FOR THE STUDY OF CONTEMP. EUR. JEWRY AT TEL AVIV UNIV., *supra* note 138, at 5.

162. *Id.* at 6; Imed Bouchrika, *60 University Statistics: 2023 Data, Trends & Predictions*, RESEARCH.COM (Dec. 20, 2022), <https://research.com/universities-colleges/university-statistics> (on file with the *University of the Pacific Law Review*).

163. COMBAT ANTISEMITISM MOVEMENT & CTR. FOR THE STUDY OF CONTEMP. EUR. JEWRY AT TEL AVIV UNIV., *supra* at note 138, at 6.



antisemitism today comes from—surprise!—Palestinians and supporters of Palestinian rights. This finding might seem counterintuitive to people who spend time online, particularly since Elon Musk’s takeover of Twitter has led to an increase in posts and users that openly embrace Nazism, traffic in well-worn anti-Jewish tropes, and promote all manner of newly-fashioned, anti-Jewish conspiracy theories.<sup>173</sup> But this finding was, in fact, inevitable—made so by the Ministry of Diaspora Affairs’ choice to employ the IHRA definition as its standard of analysis. As the saying goes: to a hammer, everything looks like a nail; similarly, if you are using the IHRA definition of antisemitism to judge online content, virtually every expression of online support for Palestinian rights, or criticism of Israeli policies, or assertion of the legitimacy of anti-Zionism—and there is plenty of all of those online—will look to you like antisemitism.<sup>174</sup>

For advocates of the IHRA definition, this report—like the anti-BDS laws and pro-IHRA laws, the resulting lawsuits and legal complaints, and the growing chilling effect that have produced—represents, in short, mission accomplished. That mission, however, has been accomplished at a high cost—in the form of an ever-expanding body of laws that assault and erode Americans’ free speech and right to protest, not just in support of the rights of Palestinians, but, increasingly, over any entrenched political and economic interests that legislatures might be lobbied or pressured to protect. Consequently, this mission—which prioritizes defending Israel over defending Jews—has diverted energy and focus away from fighting growing antisemitism and has legitimized attacks against both Palestinians and Jewish supporters of Palestinian rights.<sup>175</sup>

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JERUSALEM POST (Jan. 29, 2023), <https://www.jpost.com/diaspora/antisemitism/article-729989> (on file with the *University of the Pacific Law Review*).

173. See, e.g., Zvika Klein, *Twitter Sees Surge in Gen-Z Neo-Nazi Antisemitism Since Musk Takeover*, JERUSALEM POST (Feb. 8, 2023), <https://www.jpost.com/international/article-730951> (on file with the *University of the Pacific Law Review*).

174. In November 2022, 189 pro-Israel NGOs sent a letter to Elon Musk urging him to adopt the IHRA definition. Letter to Elon R. Musk, *supra* note 152. The letter includes a list of 50 alleged antisemitic tweets as examples of the problem. Of these, nearly half (24) are tweets that have nothing to do with threats against or tropes about Jews. Rather, these tweets are on the list for violating the IHRA examples related to criticism of Israel. These include, for example, a tweet reading, “Boris Johnson wants to outlaw #BDS & ban our basic human right to boycott apartheid israel: he doesn’t get it; it’s a grassroots movement” Sarah Wilkinson (@swilkinsonbc), TWITTER (Jan. 18, 2020), <https://twitter.com/Annlawr76875381/status/1218676507675185152> (on file with the *University of the Pacific Law Review*). This was listed for violating IHRA example #7 – “Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.” See Porat & Stern, *supra* note 84. Another listed tweet that allegedly violates the same example reads, “I love how people are like ‘from the river to see means kick all Jews out!’ No, it means Palestine will be liberated. Sorry, we aren’t Zionist and don’t only think in terms of ethnically cleansing people. It means all will be free, in one, decolonized, liberated state for all.” @Remroum, TWITTER (May 19, 2021), <https://twitter.com/Remroum/status/1395163332462661632> (on file with the *University of the Pacific Law Review*).

175. Peter Beinart, *Antisemitic Zionists Aren’t A Contradiction in Terms*, JEWISHCURRENTS (Jan. 10, 2023), <https://jewishcurrents.org/antisemitic-zionists-arent-a-contradiction-in-terms> (on file with the *University of the Pacific Law Review*).

