# PROTECTING THE RIGHT TO BOYCOTT ISRAEL: A FOREIGN AFFAIRS PREEMPTION APPROACH TO STRIKING DOWN STATE ANTI-BDS LAWS

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Legal challenges against the constitutionality of state anti-Boycott, Divestment, Sanctions (BDS) laws are slowly making their way through United States circuit courts, and, so far, these challenges have rested largely on First Amendment grounds. This Note explores the viability of an alternative approach: challenging the constitutionality of state anti-BDS laws under the doctrine of foreign affairs preemption. Ultimately, this Note concludes that state anti-BDS laws pose a sufficient intrusion into foreign affairs so as to be rendered unconstitutional by the doctrine of foreign affairs preemption. Nonetheless, before pursuing this approach in court, litigators and advocates should consider how the precedent might implicate the goals of human rights activists in the long run, particularly regarding the abilities of state governments themselves to mobilize against foreign countries committing human rights violations.

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* J.D. Candidate 2024, Columbia Law School. This Note is dedicated to the memory of Orli Sheffey z"l, who spent a great deal of her life advocating passionately for the rights of others. Thank you to my parents and sisters for your unwavering love and support. Thank you to all of my professors, and particularly to Prof. David Pozen for your valuable guidance and feedback throughout the Note-writing process. Thank you to my classmates, friends, and community members for showing me the importance and power of collective action. The need to preserve legal avenues to boycott foreign governments is more vital now than ever.

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## INTRODUCTION

On December 11, 2018, the American Civil Liberties Union (ACLU) of Arkansas filed a lawsuit against the state on behalf of a small local newspaper called the *Arkansas Times*.[1] The lawsuit challenged the constitutionality of Arkansas Act 710, which requires private entities who contract with the state government to certify that they will not boycott Israel for the duration of the contract, or else receive a reduction of 20 percent in contractors' fees. Rita Sklar, the executive director of the ACLU of Arkansas, called the law "an unconstitutional tax on free speech,"[2] and Alan Leveritt, the founder and publisher of the *Arkansas Times*, warned that "[t]hese anti-boycott laws, allowing government to use money to punish dissent, will encourage the creation of ever more repressive laws that risk strangling free speech for years to come."[3] In another piece, Leveritt chastised, "Since when do American citizens have to pledge to act in the interest of a foreign power in order to do business with their own government? Since when does the state of Arkansas punish its own taxpayers in an effort to assist a foreign government with its domestic policy?"[4]

Throughout the last decade, at least 37 states have adopted laws punishing boycotts against Israel, most recently in New Hampshire in July 2023.[5] These laws, known as anti-BDS laws, are intended to combat the

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1. Press Release, ACLU of Arkansas Files First Amendment Challenge to Law Targeting Anti-Israel Boycotts, ACLU Ark. (Dec. 11, 2018), https://www.acluarkansas.org/en/press-releases/aclu-arkansas-files-first-amendment-challenge-law-targeting-anti-israel-boycotts (on file with the *Columbia Human Rights Law Review*) [hereinafter ACLU Ark.].

2. ACLU Ark., *supra* note 1.

3. Alan Leveritt, *We're a Small Arkansas Newspaper. Why Is the State Making Us Sign a Pledge About Israel?*, N.Y. TIMES (Nov. 22, 2021), https://www.nytimes.com/2021/11/22/opinion/israel-arkansas-bds-pledge.html (on file with the *Columbia Human Rights Law Review*).

4. Alan Leveritt, *Why Should My Newspaper Pledge Not to Boycott Israel?*, ACLU (Jan. 3, 2019), https://www.aclu.org/news/free-speech/why-should-my-newspaper-pledge-not-boycott-israel [https://perma.cc/TG97-JT6P].

5. *New Hampshire Bans Boycotts of Israel in State Procurement and Investments*, ASSOCIATED PRESS (July 6, 2023), https://apnews.com/article/israel-boycott-ban-new-hampshire-executive-order-0bab36505ec2730f649ac8fa3a804d1b [https://perma.cc/3ACK-KM27] ("The executive order signed by Gov. Chris Sununu makes New Hampshire the 37th state to enact such [anti-BDS] regulations . . . ."); Mike Wagenheim, *New Hampshire Becomes 37th State to Take Action Against Israel Boycotters*, JEWISH NEWS SYNDICATE (July 6, 2023), https://www.jns.org/boycott-divestment-sanctions-bds/new-hampshire/23/7/6/300801/ [https://perma.cc/KQB2-4DAV] ("New Hampshire became the 37th U.S. state to put an anti-BDS action on its books.").

Boycott, Divestment, Sanctions (BDS) movement.[6] The BDS movement was founded in 2005 and "works to end international support for Israel's oppression of Palestinians and pressure Israel to comply with international law."[7] In recent years, state anti-BDS laws have faced a variety of legal challenges, including in federal district courts in Arkansas, Arizona, Georgia, Kansas, Maryland, and Texas.[8] Plaintiffs have primarily brought these challenges on the grounds that state anti-BDS laws violate the First Amendment right to free speech.[9] Four federal district courts have agreed that these laws violate the First Amendment, but all four respective suits were subsequently rendered moot between 2018 and 2021 before they could be appealed.[10]

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6. Elliot Setzer, *Eighth Circuit Upholds Arkansas Anti-BDS Law*, LAWFARE (July 8, 2022), https://www.lawfareblog.com/eighth-circuit-upholds-arkansas-anti-bds-law [https://perma.cc/6Z6U-CJBB] ("The laws are intended to combat the pro-Palestinian boycott, divestment, and sanctions (BDS) movement against Israel, which aims to force Israel to withdraw troops from the West Bank and change its treatment of Palestinians by applying external pressure.").

7. *What is BDS,* BDS, https://bdsmovement.net/ [https://perma.cc/6VTR-Y8TF].

8. *Legal Challenges to Anti-Boycott Laws*, PALESTINE LEGAL (July 10, 2023), https://legislation.palestinelegal.org/legal-challenges-to-anti-boycott-laws/ [https://perma.cc/UF8L-B2BV].

9. *Id.*

10. *Id.* ("However, in each of these cases, the state legislatures changed the laws that were challenged so that they no longer applied to the plaintiffs in order to moot the lawsuits."); Mari Cohen, *The Arkansas Anti-Boycott Case, Explained*, JEWISH CURRENTS (June 28, 2022), https://jewishcurrents.org/the-arkansas-anti-boycott-case-explained [https://perma.cc/3LRH-Z7NT] (noting that the relevant states subsequently amended their laws "so that only contracts worth $100,000 or more with businesses employing more than ten people are affected. The sole proprietors, therefore, were released from the obligation to pledge not to boycott Israel, and their cases became moot before reaching the appellate court"). The Arizona case *Jordahl v. Brnovich* was mooted because "the state legislature amended the [anti-boycott] law to exclude the plaintiff" by excluding "sole proprietors, companies with fewer than 10 employees, and contracts worth less than $100,000." *State Legislation: Arizona*, PALESTINE LEGAL (Jan. 19, 2023), https://legislation.palestinelegal.org/location/arizona/#legislation-sb-1167-2 [https://perma.cc/CC7R-AZTS]; *see also* Jordahl v. Brnovich, 789 F. App'x 589, 591 (9th Cir. 2020), *vacating as moot* 336 F. Supp. 3d 1016 (D. Ariz. 2018). Meanwhile, the Georgia case *Martin v. Wrigley* was mooted because "Georgia legislators passed an amendment so that the law would no longer apply to contracts like Martin's that are below $100,000." *Legal Challenges to Anti-Boycott Laws*, PALESTINE LEGAL (July 10, 2023), https://legislation.palestinelegal.org/legal-challenges-to-anti-boycott-laws/ [https://perma.cc/UF8L-B2BV]; *see also* Martin v. Wrigley, 540 F. Supp. 3d 1220 (N.D. Ga. 2021). The Kansas case *Koontz v. Watson* was mooted because "[t]he state legislature later amended the law to exclude the plaintiff" by removing "individuals, sole proprietors, and contracts worth less than $100,000." *State Legislation: Kansas*, PALESTINE LEGAL (Dec. 16, 2020), https://legislation.palestinelegal.org/location/kansas/#legislation-hb-2482 [https://perma.cc/RT5F-Q92W]; *see also* Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan.

Then, in June 2022, the Eighth Circuit issued its opinion in *Arkansas Times LP v. Waldrip*, the first appellate-level decision addressing the constitutionality of state anti-BDS laws under the First Amendment.[11] The Eighth Circuit upheld the constitutionality of Arkansas Act 710, ruling en banc that commercial boycotts against foreign governments are not eligible for First Amendment protections.[12] Asserting that Arkansas Act 710 only prohibits "purely commercial, non-expressive conduct," the Eighth Circuit concluded that "[b]ecause those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment."[13] Leveritt, the newspaper's founder and publisher reacted, "[W]e consider being banned from doing business with our state government for refusing to sign a pledge not to boycott Israel a ridiculous government overreach that has nothing to do with Arkansas."[14]

On October 20, 2022, the national ACLU filed an appeal with the Supreme Court.[15] Its chief litigator warned that "if the law is allowed to stand it would not only intrude on the [First Amendment] right to protest in support of the Palestinians but also legitimize parallel legislation in some states against certain kinds of boycotts over the climate crisis or in support of gun control."[16] However, the Supreme Court denied the petition for

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2018). Finally, *Pluecker v. Paxton* was mooted because "the Texas legislature amended the law to exclude the plaintiffs" by excluding "sole proprietors, companies with fewer than 10 employees, and contracts worth less than $100,000." *State Legislation: Texas*, PALESTINE LEGAL (March 22, 2023), https://legislation.palestinelegal.org/location/texas/#legislation-hb-793 [https://perma.cc/JT63-PX7P]; *see also* the case into which *Pluecker* was consolidated, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019).

11. Arno Rosenfeld, *Appeals Court Upholds Anti-BDS Law as 'Purely Commercial'*, THE FORWARD (June 22, 2022), https://forward.com/news/507017/appeals-court-upholds-anti-bds-law-as-purely-commercial/ [https://perma.cc/HX9J-4AJM].

12. Ark. Times LP v. Waldrip, 37 F.4th 1386, 1390 (8th Cir. 2022) (en banc) (citing Ark. Code Ann. § 25-1-503(a)(1)).

13. *Id.* at 1394.

14. Max Brantley, *Arkansas Times Loses Challenge of State's Israel Boycott Law*, ARK. TIMES (June 22, 2022), https://arktimes.com/arkansas-blog/2022/06/22/arkansas-times-loses-challenge-of-states-israeli-boycott-law [https://perma.cc/RWC4-UVEL].

15. Petition for Writ of Certiorari, *Ark. Times LP*, 37 F.4th 1386 (8th Cir. 2022), *cert. denied,* 143 S.Ct. 744 (No. 22-379).

16. Chris McGreal, *ACLU Asks Supreme Court to Overturn Arkansas' Anti-Boycott Law Against Israel,* THE GUARDIAN (Oct. 20, 2022), https://www.theguardian.com/us-news/2022/oct/20/aclu-arkansas-anti-boycott-law-israel [https://perma.cc/PYL2-HG8L]. For example, Texas passed a law in 2021 that "prohibits most state agencies, as well as local governments, from contracting with firms that have cut ties with carbon-emitting energy companies."; Mitchell Ferman, *Texas Bans Local, State Government Entities from Doing Business with Firms that "Boycott" Fossil Fuels,* TEX. TRIBUNE (Aug. 24, 2022),

certiorari,[17] leaving the Eighth Circuit decision in place. "The Supreme Court's decision not to hear the Arkansas Times' case means that debates over the government's power to suppress boycotts will continue," the ACLU commented,[18] emphasizing that despite the Eighth Circuit's finding, "[f]ederal courts in Kansas, Arizona, Texas, and Georgia have held that laws penalizing boycotts of Israel violate the First Amendment."[19] Julia Bacha, the director of *Boycott*, a documentary about the fight to combat anti-BDS laws,[20] similarly denounced the decision:

> Over the past five years, federal judges in Arizona, Kansas, Texas and Georgia have all come to the same conclusion: anti-boycott bills are a flagrant violation of the First Amendment and do not belong in a democratic country . . . All of these rulings are still valid and boycotts are still protected across America, with the alarming exception of the states that live under the Eighth Circuit[.][21]

Looking ahead, Bacha continued, "[t]he situation is fluid, given that new anti-boycott bills will continue to be introduced and passed, and we will certainly see new legal challenges to such laws."[22]

The Supreme Court's denial of certiorari means that the legal landscape surrounding state anti-BDS laws will continue to evolve as more lawsuits attacking their constitutionality emerge.[23] As such, the objective of

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https://www.texastribune.org/2022/08/24/texas-boycott-companies-fossil-fuels/ [https://perma.cc/7D4Q-PF7H].

17. *No. 22-379*, SUP. CT. DOCKET FILES, (Feb. 21, 2023) https://www.supremecourt.gov/docket/docketfiles/html/public/22-379.html [https://perma.cc/5WH9-BYMN]; *Supreme Court Will Not Hear Arkansas Times Lawsuit*, ARK. MONEY & POL. (Feb. 22, 2023), https://armoneyandpolitics.com/supreme-court-arkansas-times-lawsuit/ [https://perma.cc/VB6A-C8JE].

18. *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 [https://perma.cc/QRW7-E29E].

19. *Id.*

20. *Boycott*, HUM. RTS. WATCH FILM FESTIVAL, https://ff.hrw.org/film/boycott [https://perma.cc/4EBD-E428].

21. ARK. MONEY & POL., *supra* note 17.

22. *Id.*

23. As recently as July 2023, the Fifth Circuit issued a decision in *A&R Engineering & Testing, Inc. v. Scott,* which involved a challenge to the constitutionality of a Texas state anti-BDS law. A&R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685, 687 (5th Cir. 2023). However, the Fifth Circuit declined to rule on the issue of constitutionality, rather reversing and remanding due to the plaintiffs' lack of standing. *Id*. at 690 ("The economic harm and lost opportunity are traceable to the City. . . . But it's unclear how A&R can trace its economic injury to the [defendant] Attorney General."). As a result, the Fifth Circuit ordered that the injunction against the Texas anti-BDS statute be lifted. *Id.* at 691. Notably, though, if the Texas Attorney General later takes "the jurisdictionally requisite enforcement actions" to

this Note is to discuss the viability of an alternative legal argument that plaintiffs have yet to raise in these matters. This Note argues that even if courts find that state anti-BDS laws do not violate the First Amendment, such laws are nonetheless unconstitutional because they impede upon an area of foreign policy controlled by the federal government.[24] Specifically, this Note will argue that state laws prohibiting government contractors from boycotting Israel unconstitutionally violates the doctrine of foreign affairs preemption. For regardless of the degree to which state regulation aligns with federal foreign policy goals, "[c]ourts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs."[25]

Part I of this Note will describe the doctrinal foundations of foreign affairs preemption and the legal scholarship debating its legitimacy. Part II will investigate the applicability of the foreign affairs preemption doctrine to state-level anti-BDS laws and argue that such laws are unconstitutional. Finally, Part III will explain that while raising a foreign policy preemption argument may be effective with regards to the narrow objective of striking down state anti-BDS laws, litigators should first consider the long-term implications of pursuing such an argument in court—namely, the detriment to the broader goals of scholars and activists who wish to strengthen the abilities of state governments to mobilize against foreign countries committing human rights violations.

## I) BACKGROUND

Part I will provide a basic introduction to the relevant legal frameworks affecting whether state anti-BDS laws violate the foreign affairs preemption doctrine. First, Section I.A will give an overview of the development of the foreign affairs preemption doctrine, highlighting the key cases defining that doctrine and the legal scholarship debating its validity. Then, Section I.B will give an overview of anti-BDS laws, highlighting their legislative history and key statutory provisions. Finally, Section I.C will give an overview of the landscape of enacted and proposed federal legislation pertaining to boycotts against foreign countries.

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implement Texas' state anti-BDS law, the plaintiffs may refile. *Id.* So it remains possible that the Fifth Circuit will address the constitutionality of state anti-BDS laws down the line.

24. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 440–41 (6th ed. 2019) ("Even if there is not express preemption, the Supreme Court has ruled that it will find implied preemption if there is a clear congressional intent that federal law should exclusively occupy a field. . . . The federal government has exclusive authority in dealing with foreign nations, and therefore state regulations in this area are preempted.").

25. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1072 (9th Cir. 2012).

### A) Foreign Affairs Preemption Doctrine

Article VI of the U.S. Constitution provides that state laws are preempted if they conflict with federal laws or one of Congress' constitutionally enumerated powers.[26] In interpreting this article, the Supreme Court has held that "[s]tates are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance,"[27] and that matters of foreign policy in particular are uniquely reserved for the federal government.[28] Over time, the Supreme Court has evolved these principles of preemption into a foreign affairs preemption doctrine, which holds that even in the absence of

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26. U.S. CONST. art. VI, cl. 2; *see also* Gibbons v. Ogden, 22 U.S. 1 (1824) (holding that constitutional congressional regulation of interstate commerce preempts conflicting state regulation); Arizona v. United States, 567 U.S. 387, 399 (2012) (explaining that Congress has the power to preempt state law by enacting a statute with an express preemption provision, and even in the absence of such a provision, state laws are preempted when they conflict with federal law); Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Preemption Again*, SCOTUSBLOG (March 11, 2013), https://www.scotusblog.com/2013/03/scotus-for-law-students-sponsored-by-bloomberg-law-preemption-again [https://perma.cc/ER69-TKWF] (explaining that preemption via a statutorily enacted express preemption provision is known as express preemption, and preemption via a conflict with federal law is known as conflict preemption).

27. *Arizona*, 567 U.S. at 388. The Court further elaborated that the intent to displace state law "can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* at 399 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) ("[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."). This constitutes the notion of field preemption, which occurs "when Congress, without expressly declaring that state laws are preempted, nevertheless legislates in a way that is so comprehensive as to occupy the entire field of an issue." Wermiel, *supra* note 26.

28. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (noting that "the federal power over external affairs in origin and essential character different from that over internal affairs" and that "participation in the exercise of the power is significantly limited" because "[i]n this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation."); *see* United States v. Belmont, 301 U.S. 324 (1937) and United States v. Pink, 315 U.S. 203 (1942) (further emphasizing the preclusion of states from matters of foreign policy); *see also* CHEMERINSKY, *supra* note 24, at 449 (noting that field preemption typically occurs in areas where "the federal government traditionally has played a unique role[]," and that, "[f]or example, the Supreme Court has found field preemption with regard to foreign policy and immigration based on the federal government's preeminent and exclusive role in these areas.").

an established federal law or policy, state laws may be preempted when they encroach on the federal government's power to regulate foreign affairs.[29]

The foreign affairs preemption doctrine was most "quintessential[ly]"[30] established in *Zschernig v. Miller*, a 1968 Supreme Court case addressing the constitutionality of an Oregon statute that provided escheat for all property that would otherwise be inherited by a nonresident noncitizen.[31] The statute carved out certain exceptions[32] that effectively rendered the statute detrimental only to noncitizens from Communist countries, producing the question of whether the statute improperly intruded into federal domain.[33] Holding that the Oregon statute was preempted, the Court reasoned:

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. But those

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29. *State Laws Affecting Foreign Relations - Dormant Federal Power and Preemption*, JUSTIA, https://law.justia.com/constitution/us/article-2/24-state-laws-affecting-foreign-relations.html [https://perma.cc/53N3-FLCX]. ("If the foreign relations power is truly an exclusive federal power, with no role for the states … the Supreme Court has held, … that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy."); Joseph B. Crace Jr., *GARA-Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 210 (2004) ("Courts preempting on the basis of dormant foreign affairs preemption … argu[e] that the Constitution reveals an overriding intent to entrust all matters of foreign affairs to the federal government… whether the federal government has legislated on the issue is irrelevant."); Jack Goldsmith, *Statutory Affairs Preemption*, 2000 S. CT. REV. 175, 203 (2000) ("The justification for this [foreign affairs preemption] doctrine is that certain state foreign relations activities concern 'matters which the Constitution entrusts solely to the federal government.'") (internal citations omitted).

30. Crace, *supra* note 29, at 211.

31. Zschernig v. Miller, 389 U.S. 429, 430 (1968).

32. The statute did not require escheat in cases where the nonresident noncitizen claims real or personal property if these three requirements are satisfied: "(1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.'" *Id.* at 430–31 (citing Ore. Rev. Stat. § 111.070 (1957)).

33. *Zschernig*, 389 U.S. at 437–38 ("As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.").

> regulations must give way if they impair the effective exercise of the Nation's foreign policy.[34]

The Court then explained that although the Oregon statute did not expressly conflict with any federal law or foreign policy goal, the statute nonetheless "ha[d] a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[35] The Court concluded, "The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy."[36] This case established a foreign policy preemption doctrine that relies on the concept of field preemption (as opposed to conflict preemption), according to which "federal law preempts state law where Congress has manifested an intention that the federal government occupy an entire field of regulation."[37]

In the few decades following *Zschernig*, the foreign affairs preemption doctrine remained largely untouched by the Supreme Court. Then, in 2000, the Supreme Court decided *Crosby v. National Foreign Trade Council*. This case addressed the constitutionality of a Massachusetts statute that barred state entities from buying goods or services from certain companies that engaged in business with Burma,[38] as specified on a "restricted purchase list" maintained by the State Secretary of Administration and Finance.[39] Three months after the enactment of the

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34. *Id.* at 440–41.

35. *Id.* at 441.

36. *Id.*

37. JAY SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER, at 17 (2019), https://crsreports.congress.gov/product/pdf/R/R45825/1 (on file with the Columbia Human Rights Law Review) (further noting that "federal law may reflect such an intent through a scheme of federal regulation that is 'so pervasive as to make reasonable the inference that Congress left no room for States to supplement it,' or where federal law concerns 'a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'" (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). Field preemption contrasts with conflict preemption, by which "federal law impliedly preempts state law when it is impossible for regulated parties to comply with both sets of laws," or when 'state laws that pose an obstacle to the "full purposes and objectives' of Congress." *Id.* at 23–24 (citing Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

38. While "Burma" and "Myanmar" may each refer to this state, this Note will use "Burma" for the sake of clarity because that is the name used in the Massachusetts statute at hand. For more information on the state's naming convention, *see, e.g.,* Kim Tong-Hyung & Hyung-Jim Kim, *Myanmar, Burma and Why the Different Names Matter,* ASSOCIATED PRESS (Feb. 3, 2021), https://apnews.com/article/myanmar-burma-different-names-explained-8af64e33cf89c565b074eec9cbe22b72 [https://perma.cc/YF57-D2DL].

39. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366–68 (2000); MASS. GEN. LAWS ch. 7, §§ 7:22G–7:22 M (1997) ("An Act Regulating State Contracts with Companies

Massachusetts statute, in September 1996, Congress passed a federal statute that imposed various sanctions on Burma and directed the President to develop a comprehensive strategy to improve human rights practices in Burma.[40] Eight months after that, in May 1997, President Clinton issued an executive order certifying that the Government of Burma had "committed large-scale repression of the democratic opposition in Burma," constituting "an unusual and extraordinary threat to the national security and foreign policy of the United States."[41]

In April 1998, the National Foreign Trade Council (NFTC), 34 of whose members were on the Massachusetts restricted purchase list, brought suit against the Massachusetts Secretary of Administration and Finance and argued that the state's Burma Act unconstitutionally impeded upon the federal government's authority to regulate foreign affairs.[42] The First Circuit, citing *Zschernig,* found in favor of NFTC, and the Supreme Court unanimously upheld the First Circuit's decision.[43] Deciding that "Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma," the Court held that the federal statute effectively "placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit."[44] This discretion, the Court argued, is incompatible with and weakened by state action such as the Massachusetts Burma Act that, "if enforced, blunt[s] the consequences of discretionary Presidential action."[45]

Importantly, the fact that the policy goals of the Massachusetts Burma Act aligned with federal policy was irrelevant to the Court in assessing the scope of foreign affairs preemption. The State tried to argue this point, noting, as the Court described the State's theory, that "there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions."[46] However, the Court concluded that "[t]he fact of a common end hardly neutralizes conflicting means" and "the fact that some companies may be able to comply with both

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Doing Business with or in Burma (Myanmar)."). MASS. GEN. LAWS ch. 7, § 40 F 1/2 (1997) (repealed 2012).

40. *Crosby*, 530 U.S. at 368–69.

41. *Id.* at 370 (citing Exec. Order No. 13047, 3 CFR § 202 (1997 Comp.)).

42. *Id.* at 371.

43. *Id.* at 371, 373.

44. *Id.* at 376 (citing Justice Jackson's observation that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

45. *Id.* at 377.

46. *Id.* at 379.

sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."[47]

Scholars have debated the degree to which *Crosby* actually upholds the foreign affairs doctrine expressed in *Zschernig*, given that *Crosby* involved a purported conflict with federal legislation—relying on conflict, rather than field, preemption[48]—whereas *Zschernig,* relying on field preemption, addressed the constitutionality of state legislation affecting foreign affairs in the face of federal silence.[49] The degree to which *Crosby* upheld *Zschernig* was somewhat resolved a couple of years later in *American Insurance Association v. Garamendi*,[50] though that decision itself also produced some confusion.[51] The statute at issue in *Garamendi* was California's Holocaust Victim Insurance Relief Act of 1999, which, in order to "ensure the rapid resolution" of unpaid insurance claims to survivors of the Holocaust, required any insurer doing business in California to disclose information about policies sold in Europe between 1920 and 1945.[52] The federal government challenged the constitutionality of the California statute following concern that the statute would undermine the effectiveness of similar efforts being brought forth by the International Commission on Holocaust Era Insurance Claims (ICHEIC), of which the United States was part.[53]

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47. *Id.* at 380.

48. *See supra* note 37 and accompanying text for explanations of field and conflict preemption.

49. *See, e.g.*, Alexandria Strauss, *Supremacy of the Supremacy Clause: A* Garamendi*-Based Framework for Assessing State Law that Intersects with U.S. Foreign Policy*, 83 FORDHAM L. REV. 417, 431 (2014) ("Many believed that the Supreme Court had granted certiorari [in *Crosby*] to clarify the *Zschernig* confusion [after *Barclays Bank*, which addressed state legislation levying taxes on multinational corporations]. However, the Supreme Court declined to address the dormant foreign affairs issue, ruling instead that the state statute was invalid on conflict preemption grounds."); Goldsmith, *supra* note 29, at 221 ("It remains possible, of course, that the Court in *Crosby* was engaging in 1960s [*Zschernig*]-style judicial foreign relations effects analysis, and masking this analysis by tying it to the statute itself. Even if this were true—and I think there is no basis in the opinion for such a conclusion—it remains significant that the Court believes that the judicial foreign relations effects test is sufficiently illegitimate that it requires masking."); *but see* Carlos Manuel Vazquez, *W(h)ither Zschernig*, 46 VILL. L. REV. 1259, 1262, 1272 (2001) (arguing that "there is less of a difference than may at first appear between a holding based on the dormant foreign affairs doctrine and one based on an obstacle preemption," and "*Crosby* itself comes very close to reaffirming the doctrine. Indeed, I exaggerate only slightly when I say that *Crosby* is a dormant foreign affairs case in disguise").

50. American Ins. Assn. v. Garamendi, 539 U.S. 396 (2003).

51. *See infra* pages 191–193.

52. *Garamendi*, 539 U.S. at 411.

53. *Id.*

Alluding to the "degree of pressure" argument from *Crosby*,[54] the Court held that the California law was preempted because "HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require, employs 'a different, state system of economic pressure,' and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it."[55] The Court further noted that "California seeks to use an iron fist where the President has consistently chosen kid gloves," and that "the evidence here is 'more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives.'"[56] As to the status of the dormant foreign affairs preemption doctrine, the majority proposed a balancing test based on the traditional police powers held by the state, deciding that "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[57]

Taken together, *Zschernig*, *Crosby*, and *Garamendi* lay the basic framework for the Court's interpretation and application of the foreign affairs preemption doctrine, but these cases still leave questions unanswered. In 2007, an Illinois district court discussed some of these gaps in a suit filed by NFTC against the enforcement of the Illinois Sudan Act, which imposed a variety of restrictions on investments in Sudan-connected entities as part of an attempt to pressure Sudan to end human rights violations in Darfur.[58] Referencing *Garamendi*'s iron fist versus kid gloves metaphor,[59] the district court held, while analogizing to *Crosby*, that the Illinois Sudan Act was preempted because it impeded on federal foreign policy.[60] Then, the court addressed the imprecise definition of the foreign policy preemption doctrine that the Supreme Court had developed. The Illinois district court critiqued:

> [T]hough both *Zschernig* and *Garamendi* presume a broad role of the national government in foreign affairs, they do not delineate with clarity what role, if any, the states retain.

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54. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 380 (2000).

55. *Garamendi*, 539 U.S. at 423–24 (citations omitted).

56. *Id.* at 427 (quoting *Crosby*, 530 U.S. at 386).

57. *Id.* at 429.

58. Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 733 (N.D. Ill. 2007).

59. *Id.* at 744 ("Though it may be a stretch to say that the Act uses an iron fist where the national Sudan policy uses kid gloves, it is not a stretch to say that the state has chosen a more heavy-handed approach than the national government.").

60. *Giannoulias*, 523 F. Supp. 2d. at 741 ("Federal Sudan policy, like the Burma policy, provides the president with flexibility to effect 'carrot and stick' diplomacy," whereas the Illinois Sudan Act does not allow for such flexibility.").

> Nor do these cases clearly establish a test to apply to a state or local law to determine whether it interferes with the national government's foreign affairs powers.[61]

And while the Illinois district court found it clear that there must be "some tangible effect or the risk of such an effect" on the national government's conduct of foreign affairs in order for a state law to be preempted,[62] the precise degree of required interference was unclear.[63] Ultimately, the court could only confidently assert that the Illinois Sudan Act was unconstitutional because it "would have an impact on the national government's ability to deal with Sudan that is at least equal to or greater than the impact of the state laws in *Zschernig* and *Garamendi*."[64]

The Illinois district court in *National Foreign Trade Council v. Giannoulias* is not alone in remarking upon the murkiness of the foreign affairs preemption doctrine. Although the cases described above generally demonstrate that Supreme Court jurisprudence supports the use of foreign

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61. *Id.* at 744.

62. *Id.*

63. In an attempt to pin down the required degree of interference, the Illinois district court speculated, "Zschernig and Garamendi would not appear to prohibit a state or local government from issuing a resolution condemning the actions of a foreign government, even if the national government had made no such declaration or did not support such a view. In such a case, although the United States would not be speaking with 'one voice,' the absence of actual hindrance to the national government's conduct of foreign policy would appear to preserve the state or local enactment." *Id.* at 744 (citation omitted). However, even this may be a controversial inference, as demonstrated by *Movsesian v. Victoria Versicherung AG*, a Ninth Circuit case from 2012. *Movsesian* arose out of a dispute over Section 354.4 of the California Code of Civil Procedure, which gave California courts jurisdiction over certain insurance claims brought by "Armenian Genocide victim[s]" arising out of policies issued or in effect between 1875-1923 and extended the statute of limitations for such claims. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1070 (9th Cir. 2012). This policy had a greater impact than mere condemnation of the actions of a foreign government, as it "establishe[d] a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for 'Armenian Genocide victim[s]' by subjecting foreign insurance companies to lawsuits in California." *Id.* at 1076. Yet in its decision, the Ninth Circuit made a point to emphasize that "[t]he statute expresses a distinct political point of view on a specific matter of foreign policy" by "impos[ing] the politically charged label of 'genocide' on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and express[ing] sympathy for 'Armenian Genocide victim[s].'" *Id.* The court further belabored the potential impact of using the term "genocide," noting that "Turkey expresses great concern over the issue, which continues to be a hotly contested matter of foreign policy around the world" and citing various sources indicating the controversiality of using the word "genocide" with regards to Turkey's actions. *Id.* at 1077. The Ninth Circuit thus concluded that the California statute was preempted because it sent a "political message" and intruded on "federal government's exclusive power to conduct and regulate foreign affairs." *Id.* at 1077.

64. *Giannoulias*, 523 F. Supp. 2d. at 745.

affairs preemption even absent a direct conflict with federal law, the doctrine is not entirely clear,[65] nor is it without controversy among legal scholars.[66] Scholars who oppose the dormant foreign affairs preemption doctrine frequently argue that it is senseless for courts to strike down state laws affecting foreign affairs when the federal government has expressed no opposition—and at times even friendliness—towards the state action at hand.[67]

For example, shortly after *Crosby* was decided, legal scholar and U.S. foreign relations expert Sarah Cleveland argued that "[w]hile the Constitution largely excludes states from participating in foreign relations, historic and contemporary practice has left some play for state action in this

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65. *See, e.g.*, the preceding discussion regarding *Giannoulias*; Goldsmith, *supra* note 29, at 178 (noting, with regards to statutory foreign affairs preemption cases, that "[t]he Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear. And the decisional outcomes are difficult to cohere. Only in passing does this article try to figure out what (if anything) is going on, behind the doctrines, in the preemption cases"); Celeste Boeri Pozo, *Foreign Affairs Power Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 VAL. U. L. REV. 591, 591 (2007) ("Exactly how much latitude states have to affect foreign affairs is a question of great contention and one on which the Supreme Court has been remarkably elusive.").

66. *See, e.g.*, Vazquez, *supra* note 49, at 1259 ("Both the soundness and the scope of the *Zschernig* doctrine have long been a matter of considerable debate. In recent years, however, the idea that some state laws are invalid because they interfere with the federal government's unexercised power to conduct foreign relations has come under intensified academic attack."); Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2140 (2017) (citing MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 135–37 (2016)) ("For Glennon and Sloan, both *Zschernig* and *Garamendi* were wrongly decided. Glennon and Sloane argue that in such cases the courts should abstain from constricting state action that bears upon foreign affairs.").

67. *See, e.g.*, Galbraith, *supra* note 66, at 2155 ("The fact that the federal government frequently encourages or pressures state and local governments to act in ways that affect foreign affairs strongly undermines claims that these actors have no business in the foreign affairs space."); Sarah H. Cleveland, *Crosby and the One-Voice Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 975 (2001) (arguing that the one-voice doctrine is a myth with "little support in the constitutional framework . . . and even less in the actual practice of government," given that Congress and the President have frequently "tolerated, deferred to or even encouraged state and local measures impacting on foreign affairs"). Cleveland noted that "state and local governments have entered agreements [with foreign countries] without congressional consent on local matters such as police cooperation, border control, and road construction," and "[m]ayors of larger U.S. cities often lead international missions to pursue economic, social, cultural, and other objectives." *Id.* at 994. For example, "[s]tate and local governments have opened trade offices and established sister-city relationships with foreign municipalities" and used those "sister-community ties to pursue specific human rights objectives," the legality of which agreements have been "rarely challenged by the national government." *Id.* at 994–95.

area,"[68] and "[t]he national political branches frequently have tolerated state and local boycott activities."[69] Cleveland pointed to the fact that in the 1970s, "Congress allowed measures targeting the Arab League boycott of Israel to stand until Congress itself adopted federal legislation barring U.S. entities from participating in the boycott," and only later did Congress expressly preempt the existing state legislation.[70] Congress also "declined to preempt the state and local rules targeting apartheid in South Africa for the two decades that they conflicted with national policy,"[71] and "[b]y the time Congress finally adopted the Comprehensive Anti-Apartheid Act of 1986, as many as 140 states, counties, and localities had adopted divestment or procurement laws targeting South Africa."[72]

In light of this history, and the fact that the federal government "had numerous [untaken] opportunities to expressly preempt or otherwise eliminate the conflict posed by the Massachusetts law,"[73] Cleveland argued that the Court in *Crosby* should have "recognize[d] the de facto lenience that Congress and the Executive have bestowed on states in general . . . to adopt legislation such as the [Massachusetts] Burma law."[74] In failing to recognize this lenience, the Court's decision reached "far beyond the Framers' primary concern of ensuring that the national government had *authority* to prevent states from interfering in the foreign affairs area."[75] Scholars like Cleveland believe that the Court overreached in developing the doctrine of foreign affairs preemption, stripping away more power from state governments than the Constitution intended.

That being said, the objective of this Note is not to assess the political legitimacy of the foreign affairs preemption doctrine, nor to provide a comprehensive overview of the varying scholarly positions on the limitations of the doctrine. Rather, this Note aims to consider the potential applicability of using the foreign affairs preemption doctrine, as it stands, to render state anti-BDS laws unconstitutional. Nonetheless, given the debate described in the preceding paragraphs, a foreign affairs preemption argument against state anti-BDS laws will be considerably more persuasive to those who doubt the doctrine's legal validity with explicit evidence that: (1) state anti-BDS

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68. Cleveland, *supra* note 67, at 989.
69. *Id.* at 1001.
70. *Id.* (citing the Export Administration Act of 1979, 50 U.S.C. app. § 2407(c) (1998), which provided that federal anti-Arab boycott rules "preempt any law, rule or regulation" passed by states on the matter).
71. *Id.*
72. *Id.* at 995.
73. *Id.* at 1012.
74. *Id.*
75. *Id.*

laws conflict with federal law, (2) state anti-BDS laws undermine federal policy goals, or (3) the federal government does not want states legislating on this matter. Whether this evidence exists will be further discussed in Part II.

### B) State Anti-BDS Statutes

Throughout the last decade, at least 37 states have adopted laws prohibiting and/or punishing various forms of engagement with boycotts against Israel.[76] The sponsors and drafters of these statutes have typically justified anti-BDS laws by asserting state-level positions on foreign affairs, claiming that boycotting Israel runs counter to state policy.[77] For example, Arkansas State Representative Jim Dotson, a drafter and cosponsor of Arkansas Act 710, described the legislation as a reaction to the BDS movement[78] and stated that the bill "shows we're not going to support any entity that is trying to cause detriment to the state of Israel."[79] Texas Governor Greg Abbott, while signing Texas' anti-BDS statute, similarly stated that "[a]nti-Israel policies are anti-Texas policies, and we will not tolerate such actions against an important ally."[80] New York former Governor Andrew Cuomo, while signing a New York anti-BDS executive order, warned that "[i]f you boycott against Israel, New York will boycott you."[81]

Most anti-boycott laws fall under one or both of the following categories: contract-focused laws, which prohibit state governments from contracting with private entities that engage in commercial boycotts against

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76. ASSOC. PRESS, *supra* note 5; Wagenheim, *supra* note 5.

77. Other justifications have included, for example, Arkansas State Senator Bart Hester's statement that he introduced Arkansas Act 710 because "[t]here is [sic] going to be certain things that happen in Israel before Christ returns. There will be famines and disease and war. And the Jewish people are going to go back to their homeland. At that point Jesus Christ will come back to the earth. Anybody, Jewish or not Jewish, that doesn't accept Christ, in my opinion, will end up going to Hell." *Act 710 of 2017*, ENCYCLOPEDIA OF ARK. (Mar. 28, 2023), https://encyclopediaofarkansas.net/entries/act-710-of-2017-14203/ [https://perma.cc/TG83-BMNY].

78. Elliot Setzer, *Eighth Circuit Upholds Arkansas Anti-BDS Law*, LAWFARE (July 8, 2022), https://www.lawfaremedia.org/article/eighth-circuit-upholds-arkansas-anti-bds-law [https://perma.cc/6Z6U-CJBB].

79. John Lovett, *New Arkansas Legislation Takes Aim at Boycotting Israel*, ASSOCIATED PRESS (June 25, 2018), https://apnews.com/article/fd8b92cbb9454a33a2a484b28c831dd5 [https://perma.cc/PUT3-FBQF].

80. *Anti-Israel Policies are Anti-Texas Policies*, OFFICE OF THE TEX. GOV. (May 2, 2017), https://gov.texas.gov/news/post/anti-israel-policies-are-anti-texas-policies [https://perma.cc/5Q4W-8RTA].

81. Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, THE NEW YORKER (June 16, 2016), https://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott [https://perma.cc/58JR-RV9D].

Israel, and investment-focused laws, which prohibit state governments from investing in companies that engage in commercial boycotts against Israel.[82] While some state laws only target boycotts against Israel proper, at least seventeen state laws have targeted boycotts against both Israel and Israeli settlements, and "[s]ome states whose laws do not explicitly apply to settlements have also penalized companies that cut settlement ties."[83]

For example, finding, among other things, that "[b]oycotts and related tactics have become a tool of economic warfare that threaten the sovereignty and security of key allies and trade partners of the United States,"[84] "[t]he State of Israel is the most prominent target of such boycott activity,"[85] and "[i]t is the public policy of the United States, as enshrined in several federal acts, to oppose boycotts against Israel,"[86] Arkansas Act 710 prohibits the Arkansas government from:

> Enter[ing] into a contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel.[87]

The Act also prohibits the Arkansas government from engaging in "direct investments in companies that boycott Israel."[88] Similarly, Texas' anti-BDS law provides that "[a] governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract."[89] While the specific language within state anti-BDS laws may vary from state to state, they all have "the same target: boycotts for Palestinian rights." [90]

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82. JIM ZANOTTI ET AL., CONG. RSCH. SERV., R44281, ISRAEL AND THE BOYCOTT, DIVESTMENT, AND SANCTIONS (BDS) MOVEMENT 10–11 (June 9, 2017), https://sgp.fas.org/crs/mideast/R44281.pdf [https://perma.cc/UW2J-WZ52].

83. *US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019), https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses [https://perma.cc/8N63-Q8XK].

84. ARK. CODE ANN. § 25-1-501(1) (2019).

85. *Id.* § 25-1-501(2).

86. *Id.* at § 25-1-501(4).

87. *Id.* at § 25-1-503(1).

88. *Id.* at § 25-1-504.

89. TEX. GOV'T CODE ANN. § 2271.002(b) (West 2019).

90. *Types of Legislation*, PALESTINE LEGAL, https://legislation.palestinelegal.org/types-of-legislation/#anti-boycott [https://perma.cc/V7EF-ASNQ].

### C) Federal Anti-Boycott Legislation

In order to determine whether state anti-BDS laws are preempted by federal law, one must understand the relevant federal legislation that may pose a conflict. The key pieces of enacted federal legislation affecting boycotts against Israel are: the Export Control Reform Act, which houses the Anti-Boycott Act of 2018; the Trade Facilitation and Enforcement Act; and the Ribicoff Amendment.[91] Additionally, the Combating BDS Act and the Israel Anti-Boycott Act constitute federal bills affecting boycotts that were proposed but never enacted.[92] Although these bills are not potential sources of conflict because they have not been passed into law, they nonetheless shed interesting light on how Congress evaluates the validity of state anti-BDS laws. This initial Section provides a brief summary of each law, while Part II of this Note will consider in greater depth the debated implications of these laws in applying the foreign affairs preemption doctrine.

#### 1) Enacted: The Export Control Reform Act

The Export Control Reform Act, which passed in 2018, provides legislative authority for the President to implement export controls over dual-use products, i.e., goods and technologies that may be used for both civilian and military purposes.[93] Subchapter II of the Act houses the Anti-Boycott Act of 2018, which, among other provisions, prohibits Americans from taking various actions "with intent to comply with, further, or support any boycott fostered or imposed by any foreign country, against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation."[94] The Anti-Boycott Act of 2018 also contains a preemption provision, stating that its provisions:

> [P]reempt any law … or regulation of any … State[s] or the District of Columbia . . . [that] pertains to participation in… the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign

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91. The Export Control Reform Act, 50 U.S.C. §§ 4801 – 4852; The Trade Facilitation and Trade Enforcement Act, 19 U.S.C. §§ 4301–4454; The Ribicoff Amendment to the 1976 Tax Reform Act, 26 U.S.C. § 999.

92. *See infra* notes 105 and 110.

93. IAN F. FERGUSSON & PAUL K. KERR, CONG. RSCH. SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE 2 (Jan. 28, 2020), https://sgp.fas.org/crs/natsec/R41916.pdf [https://perma.cc/ZTP3-EASN]. The Export Control Reform Act repealed and replaced the Export Administration Act of 1979.

94. 50 U.S.C. § 4842(a)(1).

> countries against other countries friendly to the United States.[95]

2) Enacted: The Trade Facilitation and Enforcement Act

The Trade Facilitation and Enforcement Act, signed by President Obama in 2015, addressed boycotts against Israel in Section 909, titled "United States-Israel Trade and Commercial Enhancement."[96] Section 909 affirms that Congress "supports the strengthening of economic cooperation between the United States and Israel and recognizes the tremendous strategic, economic, and technological value of cooperation with Israel,"[97] and that Congress "supports efforts to bring together the United States, Israel, the Palestinian territories, and others in enhanced commerce."[98]

Then, specifically to the point of boycotts, Section 909 notes that Congress "opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel."[99] Section 909 then further emphasizes that one of the principal negotiating objectives of the United States for trade agreements with foreign countries is "[t]o seek the elimination of state-sponsored unsanctioned foreign boycotts of Israel . . . by prospective trading partners."[100] Finally, Section 909 requires the President to submit to Congress an annual report on "politically motivated boycotts of, divestment from, and sanctions against Israel,"[101] with information regarding boycotts in both Israel and "Israeli-controlled territories."[102]

3) Enacted: Ribicoff Amendment

The Ribicoff Amendment to the Tax Reform Act of 1976 requires taxpayers to report operations in, with, or related to boycotting countries,[103] and penalizes those who participate in unsanctioned boycotts, as delineated on a list issued annually by the U.S. Department of Treasury.[104] The Ribicoff

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95. 50 U.S.C. § 4842(b)(c).
96. 19 U.S.C. § 4452 (2016).
97. *Id.* § 4452(b)(1).
98. *Id.* § 4452(b)(3).
99. *Id.* § 4452(b)(4).
100. *Id.* § 4452(c)(1)(C).
101. *Id.* § 4452(d)(1).
102. *Id.* § 4452(d)(2)(A), (C), (D).
103. 26 U.S.C. § 999 (2005).
104. Melissa Redmiles, *International Boycott Reports, 2003 and 2004*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-soi/03-04boycott.pdf [https://perma.cc

Amendment was enacted specifically in response to the Arab League Boycott of Israel and foreign attempts to require U.S. taxpayers to participate in boycotting Israel.[105]

4) Introduced: The Combating BDS Act

The Combating BDS Act, introduced by U.S. Senator Marco Rubio in 2017, provides "for nonpreemption of measures by State and local governments to divest from entities that engage in commerce-related or investment-related boycott, divestment, or sanctions activities targeting Israel, and for other purposes."[106] Specifically, under the bill, states may divest their assets from, and are prohibited from investing state assets into or contracting with, an entity that "knowingly engages in a commerce-related or investment-related boycott, divestment, or sanctions activity targeting Israel."[107] Furthermore, and most relevantly, any state measure consistent with those requirements "is not preempted by any Federal law."[108] The bill defines "boycott, divestment, or sanctions activity targeting Israel" as "any activity that is intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel or persons doing business in Israel or in Israeli-controlled territories for purposes of coercing political action by, or imposing policy positions on, the Government of Israel."[109]

5) Introduced: The Israel Anti-Boycott Act

The Israel Anti-Boycott Act, originally introduced by U.S. Senator Benjamin Cardin in 2017, "amend[s] the Export Administration Act of 1979 to include in the prohibitions on boycotts against allies of the United States boycotts fostered by international governmental organizations against Israel."[110] In other words, this Act expands the Export Administration Act of 1979 such that it prohibits not only boycotts fostered by foreign governments, but also by organizations such as the United Nations. In fact, the bill was proposed in reaction to a session of the United Nations Human Rights Council (UNHRC) where "the UNHRC targeted Israel with a

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/EN6W-LPH2]; Kathryn A. Green, *International Boycott Reports, 1999 and 2000*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-soi/00boycot.pdf [https://perma.cc/4Q7E-KC9U].

105. Green, *supra* note 104.
106. Combating BDS Act of 2017, S. 170, 115th Cong. (2017).
107. S. 170, 115th Cong. § (2)(a)–(b) (2017).
108. S. 170, 115th Cong. § (2)(d) (2017).
109. S. 170, 115th Cong. § (2)(h)(2) (2017).
110. Israel Anti-Boycott Act, S. 720, 115th Cong. (2017).

commercial boycott" by "calling for the establishment of a database, such as a 'blacklist,' of companies" that conduct business with Israel.[111]

Several years after its original introduction, in March 2022, the Israel Anti-Boycott Act was reintroduced into the U.S. House of Representatives by Representative Lee Zeldin.[112] The reintroduced bill was revised to confirm its applicability to the Export Control Reform Act of 2018, which, as discussed in Section I.C.1, replaced the Export Administration Act of 1979.[113] The reintroduced Israel Anti-Boycott Act also added an additional section to prohibit "[f]urnishing information to a foreign country or international governmental organization in response to efforts by a foreign country or international governmental organization to collect information" to support the boycott, such as whether any person has any sort of business relationship with the country being boycotted.[114]

In light of this legislation, both enacted and proposed, Part II of this Note will address the potential applicability of the foreign affairs preemption doctrine to the constitutionality of state anti-BDS statutes. Indeed, as this Note proceeds to consider how these statutes relate to federal foreign policy and law, Part II will analyze and interpret in greater depth the contested implications of the aforementioned legislation.

## II) ASSESSING THE CONSTITUTIONALITY OF STATE ANTI-BOYCOTT LEGISLATION

By prohibiting state governments from (1) contracting with certain private companies that boycott Israel and/or (2) investing in certain companies that boycott Israel, state anti-BDS laws clearly engage with foreign affairs. The next step is to determine whether such engagement is preempted by the foreign affairs doctrine.

Sections II.A–C will discuss whether the various interpretations of the foreign affairs preemption doctrine indicate that federal anti-boycott activity preempts state anti-boycott legislation. These Sections will apply the field preemption approach used in *Zschernig* (which supports the preemption of state anti-BDS laws), the conflict preemption approach used

111. S. 720, 115th Cong. § (2)(3) (2017).

112. *Rep. Zeldin Introduces "Israel Anti-Boycott Act" to Combat BDS Movement, Anti-Israel Boycotts*, CHRISTIAN COALITION OF AMERICA (2022), https://cc.org/rep-zeldin-introduces-israel-anti-boycott-act-to-combat-bds-movement-anti-israel-boycotts/ [https://perma.cc/9ZGW-6CYU].

113. A Bill to Impose Additional Prohibitions Relating to Foreign Boycotts Under the Export Control Reform Act of 2018, and for Other Purposes, H.R. 6940, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/6940/text?r=1&s=1 [https://perma.cc/G8ZB-THEY].

114. *Id.* § (3)(b)(1)(A)(ii).

in *Crosby* (which undermines the preemption of state anti-BDS laws), and, perhaps most dispositively, the *Garamendi* approach towards assessing the degree to which state anti-boycott legislation actually impacts the federal government's ability to regulate foreign affairs and resolve contested issues of foreign policy. While defining the federal government's official foreign policy towards Israel is debated and complicated, as is the question of whether the federal government would want state anti-boycott laws to be enforced, the answers to these queries are generally irrelevant when considering the case law defining the foreign policy preemption doctrine.[115] Rather, the focus is whether the state laws materially intrude on a field occupied by the federal government,[116] and here, under the *Garamendi* analysis, state anti-BDS laws are preempted.

### A) State Foreign Policy and *Zschernig*'s Field Preemption

Taken in isolation, the foreign affairs field preemption approach expressed in *Zschernig* supports the proposition that anti-BDS laws are preempted by federal activity. In *Zschernig*, the Court held that the Oregon probate law in question "affect[ed] international relations in a persistent and subtle way"[117] by penalizing citizens of communist countries, effectively espousing an official position on Oregon's relations with foreign entities. The Court concluded that though there was no specific federal law upon which the Oregon law purportedly intruded, the statute "ha[d] a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[118] The Court also concluded that states should not be permitted to pass legislation for the purposes of "establish[ing] [their] own foreign policy."[119]

Analogously, anti-BDS laws penalize companies who wish to boycott Israel, meaning that the laws inherently espouse an official position on the state's relationship with a foreign country. If prohibiting citizens of communist countries from benefitting from state escheat laws was deemed sufficiently intrusive into the realm of foreign affairs so as to be preempted—even though the state law itself did not explicitly name that as its intent—then surely, laws affecting state citizens' boycotts of Israel are sufficiently intrusive to be preempted, given that the language of state anti-BDS laws explicitly articulates their connection to foreign policy.

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115. For a discussion of these questions, see *infra* Section II.B.
116. *See supra* Section I.A.
117. Zschernig v. Miller, 389 U.S. 429, 440–41 (1968).
118. *Id.* at 441.
119. *Id.*

### B) Express Delegation and Conflict Preemption Under *Crosby*

However, the analysis grows more complicated when assessing state anti-BDS laws in light of the later *Crosby* decision, which relies on conflict preemption and leaves uncertain the question as to how widely the field preemption analysis in *Zschernig* extends. As discussed throughout Section I.A, *Crosby* involved a Massachusetts statute that barred the Massachusetts government from purchasing goods or services from certain companies engaged in business with Burma.[120] Following the passage of this Massachusetts statute, Congress separately passed a federal statute imposing sanctions on Burma and directing the President to take action to improve human rights practices in Burma.[121] The National Foreign Trade Council (NFTC) sued, arguing that the state Burma Act unconstitutionally violated the foreign affairs preemption doctrine. The Supreme Court ruled in NFTC's favor[122] on account of the fact that Congress passed the federal Act specifically to designate the power to sanction Burma to the President.[123] The Supreme Court stated that even if the Massachusetts Burma Act furthered the same goals as the federal Act, "the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."[124]

Like the Massachusetts Burma Act, state anti-BDS laws regulate how state entities may interact with companies that engage in business with a foreign country. The Massachusetts Burma Act was preempted in part because federal legislation created a clear conflict with state legislation by delegating the power to sanction Burma to the Executive. However, no such delegation to the Executive can be found in federal legislation affecting anti-Israel boycotts. As such, state anti-BDS laws do not provide the same level of conflict preemption found in *Crosby*, undermining the degree to which *Crosby* can be applied to state anti-BDS laws.[125]

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120. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366–68 (2000); *see supra* Section I.A.

121. *Crosby*, 530 U.S. at 368–69.

122. *Id.* at 371, 373.

123. *Id.* at 376.

124. *Id.* at 380.

125. This Note posits that the main material difference between the Massachusetts Burma Act and state anti-BDS laws lies in the latter's lack of explicit conflict preemption. Some might argue that yet another material difference lies in the fact that whereas the Massachusetts Burma Act prohibited state entities from contracting with companies that *choose* to engage in business with Burma, state anti-BDS laws prohibit state entities from contracting with companies that *refuse* to engage in business with Israel. *See* Marc Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause*

Moreover, although the federally enacted Anti-Boycott Act of 2018 provides some explicit preemption language from Congress, that language does not directly implicate state anti-BDS laws. Specifically, the Anti-Boycott Act of 2018, housed within the Export Control Reform Act,[126] states that its provisions "preempt any law. . . [which] pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts *fostered or imposed by*

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*and the Unconstitutional Conditions Doctrine,* 40 CAMPBELL L. REV. 29, 43 (2018) (claiming that "while State Anti-Boycott Laws do not violate the Commerce Clause, a state law that imposed sanctions on Israel . . . would unquestionably fail on numerous grounds."). Greendorfer argued that state or local laws restricting boycotts of commerce with Israel are uniquely constitutional under the Market Participant Doctrine (MPD), *Id.*, which provides that "the state does not violate the dormant Commerce Clause by favoring its own citizens and companies when it buys or sells goods or services"— in other words, when the state is participating in rather than regulating the market. David S. Bogen, *The Market Participant Doctrine and the Clear Statement Rule*, 29 SEATTLE U. L. REV. 543, 543 (2006); *see also* Greendorfer, *supra,* at 38 (claiming that "when a state is acting in its proprietary capacity to spend or invest state funds in a manner that comports with the economic or ideological sentiments of its citizens, such action does not violate the Commerce Clause"). However, Greendorfer's argument is unsound, and the difference between pro-boycott and anti-boycott legislation is not material when evaluating constitutionality under the doctrine of foreign affairs preemption. First, the MPD was developed with respect to commerce *within* the United States, and every case that Greendorfer cited in support of applying the Market Participant Doctrine to state anti-boycott legislation involved domestic interstate Commerce Clause conflicts. Greendorfer, *supra,* at 38–40 (citing Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), in which the Court applied the exception to a Maryland statute that required different title documentation from out-of-state automobile scrap processors than in-state processors as part of an environmental clean-up effort); *see also* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (in which the Court applied the exception to a South Dakota statute that prioritized in-state customers of a state cement plant above out-of-state customers in response to a regional cement shortage); White v. Mass. Council of Construction Employers, Inc., 460 U.S. 204 (1983) (in which the Court applied the exception to a Massachusetts order requiring all construction projects funded at least partially by city funds to be performed by a work force consisting of at least half residents of Boston); *see also* Bogen, *supra,* at 543–44 (describing *Hughes, Reeves,* and *White* as forming the foundation of the MPD). Moreover, in *Crosby*, the state of Massachusetts actually attempted to use the MPD argument to support the legality of the Massachusetts Burma Act, and the Supreme Court dismissed the argument. *Crosby*, 530 U.S. at 373 n.7 ("We add that we have already rejected the argument that a State's 'statutory scheme . . . escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power'. . ."). Second, even if the Market Participation Doctrine applies to foreign affairs (which it clearly does not), Greendorfer posited no argument for why state anti-boycott laws—which he claimed have "absolutely no regulatory effect on commerce" other than to "disqualify certain parties from doing business with a state when the state acts on its own account"—should qualify for the MPD exception, but state boycott laws should not. Greendorfer, *supra,* at 41.

126. *See* Section I.C.1 for a more detailed explanation of this Act.

*foreign countries* against other countries friendly to the United States."[127] This provision does not directly preempt state anti-BDS laws, as the provision pertains to state laws affecting boycotts "fostered or imposed by foreign countries," such as the Arab League Boycott of Israel[128]—not boycotts fostered or imposed by movements like BDS.

At the same time, the fact that the Anti-Boycott Act of 2018 preempts only state laws affecting boycotts fostered by the governments of foreign countries does not suggest *sub silentio* that the federal government *approves* of state laws affecting boycotts fostered by civil society movements like BDS. Rather, the federal government may have preferred to exclude any mention of the BDS movement from its legislation altogether, due to the same First Amendment concern that opponents to state anti-BDS laws are currently raising in court.[129] Indeed, in response to the question of whether federal anti-boycott legislation might be extended to the BDS movement generally, Martin Weiss, the author of a Congressional Research Service report on the Arab League Boycott of Israel, wrote:

> Extending existing U.S. antiboycott measures to incorporate the BDS movement raises several challenges. To the extent

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127. 50 U.S.C. § 4842(c) (emphasis added).

128. The Arab League Boycott of Israel was established in 1948 following the creation of the state of Israel. MARTIN A. WEISS, CONG. RSCH. SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 1 (2017). The boycott requires citizens of member States of the Arab League to boycott (1) Israeli goods and services (the primary boycott), (2) any global entity that does business with Israel (the secondary boycott), and (3) any global entity that deals with global entities that do business with Israel (the tertiary boycott). *Id.* at 2. Not all member States of the Arab League participate in the boycott. Egypt, the Palestinian Authority, and Jordan have formally revoked their participation in the boycott, and Algeria, Morocco, and Tunisia do not enforce the boycott. *Id.* at 3. The United Arab Emirates revoked its participation in the boycott in August 2020 following the announcement of a normalization agreement with Israel, as have Morocco, Sudan, and Bahrain in recent years. Kerry B. Contini et al., *The UAE-Israel Abraham Accords – UAE Boycott of Israel Repealed But No Change in US Antiboycott Laws*, BAKER MCKENZIE SANCTIONS & EXPORT CONTROLS UPDATE (Sept. 21, 2020), https://sanctionsnews.bakermckenzie.com/the-uae-israel-abraham-accords-uae-boycott-of-israel-repealed-but-no-change-in-us-antiboycott-laws/ [https://perma.cc/A2Y3-CGKY]; *US to strengthen penalties for joining Arab League's Israel boycott*, MIDDLE EAST EYE (Oct. 7, 2020), https://www.middleeasteye.net/news/us-strengthens-penalties-companies-engaging-arab-leagues-israel-boycott [https://perma.cc/RE9X-SRM2]. The United States government "officially opposes the boycott and works to end its enforcement" through, for example, the anti-boycott laws that were included in the Export Administration Act of 1979 and continue to be enforced through the Export Control Reform Act of 2018 (which replaced the Export Administration Act of 1979) and which houses the Anti-Boycott Act of 2018 (*see infra* Section I.C.1). WEISS, *supra,* at 5–6. These anti-boycott laws have been perceived as an effective measure of quelling the Arab League Boycott of Israel, and "[t]he Arab League has acknowledged that U.S. pressure has affected its ability to maintain the boycott." *Id.* at 2.

129. *See supra* Introduction.

> a U.S. organization may participate in the BDS movement, it would not appear to violate existing federal antiboycott legislation, which targets organizations' participation in *foreign boycotts*. Foreign states do not directly participate in the BDS movement, and the movement does not have a secondary tier targeting companies that do business in or with Israel. It appears, rather, to essentially be an informal grouping of civil society organizations—originating among Palestinians but subsequently expanding into other countries—making common cause rather than exercising economic pressure on companies to participate.[130]

If the United States tried to extend its anti-boycott legislation to prohibit participation in the BDS movement, Weiss continued, such legislation would likely be subject to First Amendment challenges,[131] given the ways in which it would infringe upon the well-established rights of citizens and U.S. entities to participate in boycotts.[132] Therefore, the fact that the Anti-Boycott Act of 2018 exclusively preempts state laws affecting boycotts led by foreign governments may be chalked up to a desire to exclude BDS from the legislation altogether, rather than a desire to establish that state laws are affecting boycotts led by the BDS movement non-preempted. In any case, this uncertainty only serves to demonstrate that the federal government's legislative position is undefined as to whether state anti-BDS laws should be permitted.

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130. WEISS, *supra* note 128, at 8 (emphasis added). In an FAQ released by Palestine Legal following the enactment of the 2015 Trade Promotion Authority Bill, another trade act with anti-boycott provisions, Palestine Legal similarly asserted that the anti-boycott provisions will not affect the rights of Americans to advocate for or participate in BDS, as "[a]ny effort to restrict, prohibit or chill BDS activities in the US would raise serious First Amendment concerns. The US Supreme Court has clearly stated that peaceful political boycotts are protected First Amendment speech, assembly and associational activities." *How Does the Trade Promotion Authority (TPA) Law Affect BDS?*, PALESTINE LEGAL (July 1, 2015), https://palestinelegal.org/news/2015/7/1/how-does-the-trade-promotion-authority-tpa-law-affect-bds [https://perma.cc/U3E7-6YYX].

131. WEISS, *supra* note 128, at 8 ("U.S. legislation similar to the 2011 Israeli 'Anti-Boycott Law,' which instituted civil penalties for Israeli citizens who organize or publically endorse boycotts against Israel, would probably be vulnerable to challenge on free speech (First Amendment) grounds.").

132. This is a right upon which state anti-boycott laws also do not attempt to infringe. As discussed *supra* in Section I.B, these laws only affect whether the state government can contract with individuals and companies participating in these boycotts, not whether these individuals and companies can participate in the boycotts at all. The federal anti-boycott acts, on the other hand, fully prohibit participation in boycotts of Israel fostered or promoted by foreign entities.

The Combating BDS Act, which explicitly provides for the non-preemption of state anti-BDS laws and likewise never passed,[133] adds another layer to the murkiness of the federal government's position on whether states should be permitted to pass anti-BDS laws. On the one hand, by proposing to provide for the non-preemption of state anti-BDS laws, the introduction of the Combating BDS Act could suggest that without an explicit non-preemption clause, state anti-BDS laws are preempted—and that since the Act never passed, the majority of congressional representatives must not have wanted state anti-BDS laws to receive federal protection. On the other hand, this is quite speculative, as no legislator specifically remarked upon the foreign affairs preemption concerns that the Combating BDS Act explicitly and centrally addresses. Rather, nearly all comments, from legislators and advocates on both sides of the debate, related to First Amendment concerns. For example, in a *New York Times* article, Marco Rubio, a co-sponsor of the bill,[134] addressed what he described as "false claims made by anti-Israel activists and others that the bill violates Americans' First Amendment rights."[135] Claiming that there are no such First Amendment rights as asserted by these activists, Rubio reframed this as a discrimination issue, stating:

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133. COMBATING BDS ACT OF 2017, S. 170, 115th Cong. (2017). The Act provides "for nonpreemption of measures by State and local governments to divest from entities that engage in commerce-related or investment-related boycott, divestment, or sanctions activities targeting Israel, and for other purposes." *Id.* Specifically, the proposed Act permits States to divest their assets from, prohibit investment of their assets into, and/or restrict the State from contracting with entities that "knowingly engage[] in a commerce-related or investment-related boycott, divestment, or sanctions activity targeting Israel," as long as the State complies with certain requirements pertaining to notice, timing, opportunity for comment, and avoidance of erroneous targeting. *Id.* at § 2(a)(1)-170(2)(b). Any State measure consistent with those requirements "is not preempted by any Federal law." *Id.* at § 2(d). The proposed Act defines "boycott, divestment, or sanctions activity targeting Israel" as "any activity that is intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel or persons doing business *in Israel or in Israeli-controlled territories* for purposes of coercing political action by, or imposing policy positions on, the Government of Israel." *Id.* at § 2(h)(2) (emphasis added).

134. Joe Manchin, Rubio's co-sponsor, has not said much beyond stating that "[t]he bipartisan *Combating BDS Act* is a step towards ensuring individual states have the right to pass laws that prevent business transactions with the anti-Israeli BDS movement." Press Release, Marco Rubio: US Sen. for Fla., Rubio, Manchin Reintroduce Legislation to Combat Anti-Israel BDS Campaign (June 21, 2021), https://www.rubio.senate.gov/rubio-manchin-reintroduce-legislation-to-combat-anti-israel-bds-campaign/. [https://perma.cc/SP9X-GYJV].

135. Marco Rubio, *The Truth About B.D.S. and the Lies About My Bill*, N.Y. TIMES (Feb. 5, 2019), https://www.nytimes.com/2019/02/05/opinion/marco-rubio-bds-israel.html (on file with the *Columbia Human Rights Law Review*).

> While the First Amendment protects the right of individuals to free speech, it does not protect the right of entities to engage in discriminatory conduct. Moreover, state governments have the right to set contracting and investment policies, including policies that exclude companies engaged in discriminatory commercial- or investment-related conduct targeting Israel.[136]

Opponents of the Combating BDS Act likewise focused on the First Amendment concerns.[137] It is surprising, indeed, that even though the main focus of the Combating BDS Act is the "nonpreemption of measures by state and local governments,"[138] non-preemption was not addressed by the bill's sponsors, advocates, and opponents.[139] As a result, it is difficult to tell whether the bill's sponsors—or anyone else, for that matter—believed that the bill was *necessary*, rather than just a safeguard, for ensuring that state anti-BDS laws did not violate the foreign affairs preemption doctrine.

In conclusion, the Anti-Boycott Act of 2018 does not provide the kind of explicit conflict preemption found in *Crosby*, in which the Court struck down the Massachusetts Burma Act in part because the legislature explicitly delegated the authority to sanction Burma to the President. Additionally, although the Combating BDS Act (1) prompts interesting debate about the federal government's stance on the question and (2) constitutes an example of a piece of legislation that would have resolved the issue had it passed, that debate does not resolve the question of whether state anti-BDS laws sufficiently conflict with federal legislation under *Crosby.* As such, we cannot

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136. *Id.*

137. *See, e.g.*, *ACLU Letter Opposing S.1 (Combating BDS Act)*, ACLU (Jan. 28, 2019), //www.aclu.org/letter/aclu-letter-opposing-s-1-combating-bds-act [https://perma.cc/5ZGF-VR8Dhttps ] (discussing the First Amendment extensively but not addressing preemption by federal law once); Press Release, Bernie Sanders, U.S. Sen. for Vt., Sanders Statement on Anti-BDS Bill (Jan. 28, 2019), https://www.sanders.senate.gov/press-releases/sanders-statement-on-anti-bds-bill-2/ [https://perma.cc/B9X7-3WQR] (asserting that "[w]hile I do not support the BDS movement, we must defend every American's constitutional right to engage in political activity. It is clear to me that this bill would violate Americans' First Amendment rights"); *see also* Nathaniel Sobel, *Breaking Down the Combating BDS Act of 2019 and First Amendment Challenges to State Anti-BDS Laws*, LAWFARE (Mar. 19, 2019), https://www.lawfaremedia.org/article/breaking-down-combating-bds-act-2019-and-first-amendment-challenges-state-anti-bds-laws [https://perma.cc/2DCC-G8WS] (remarking "[w]hile the Combating BDS Act appears primarily intended to address preemption and perhaps due process challenges to state and local anti-BDS laws, plaintiffs' legal challenges have thus far centered on the First Amendment").

138. S. 170(2).

139. ACLU, *supra* note 137; Sanders, *supra* note 137; Sobel, *supra* note 137.

convincingly rely on a theory of conflict preemption to bolster the foreign affairs preemption argument for striking down state anti-BDS laws.

However, conflict preemption was only one of several factors that the Court used to render the Massachusetts Burma Act unconstitutional. Thus, given that state anti-BDS laws appear to lie somewhere in between the broad field preemption applied in *Zschernig* and the express conflict preemption applied in *Crosby*—and given that Supreme Court doctrine inconsistently applies where on that spectrum the doctrine of foreign affairs preemption lies—the next Section will address the impact of state anti-BDS laws on the federal government's ability to regulate foreign affairs with one voice. This element of the doctrine of foreign affairs preemption was established by both *Zschernig* and *Crosby*, and was subsequently significantly developed in *Garamendi*. Ultimately, the next Section will demonstrate that by applying a different degree of pressure than the federal government in terms of its regulation of the U.S.-Israel relationship, state anti-BDS laws undermine the federal government's ability to speak on foreign affairs with one voice, violating the doctrine of foreign affairs preemption by taking a stance on a contested area of foreign policy.

### C) *Garamendi* and the Impact of State Anti-BDS Laws on the Federal Regulation of Foreign Affairs

After laying out the conflicts between the state and federal acts affecting sanctions against Burma, the *Crosby* Court asserted that even if the Massachusetts Burma Act furthered the same goals as the federal Act, "the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."[140] This rationale stemmed from *Zschernig* and was further developed in *Garamendi*,[141] in which the Court found that California's Holocaust Victim Insurance Relief Act (HVIRA) was preempted because it conflicted with the United States' participation in the International Commission on Holocaust Era Insurance Claims (ICHEIC) by employing "a different, state system of economic pressure."[142] Indeed, similar to the "degree of pressure"[143] argument posed by *Crosby*, the Court in *Garamendi* found that the HVIRA was preempted because "California seeks to use an iron fist where the President

140. Crosby v. National Foreign Trade Council, 530 U.S. 363, 380 (2000).

141. *See supra* Section I.A for a discussion of *Zschernig* and *Garamendi*.

142. American Ins. Assn. v. Garamendi, 539 U.S. 396, 423–24 (2003) (citations omitted).

143. *Crosby*, 530 U.S. at 380.

has consistently chosen kid gloves," impeding upon the President's diplomatic objectives through the ICHEIC.[144]

In an attempt to clarify how one might assess a state intrusion into the federal government's control over foreign affairs, the Court in *Garamendi* proposed a balancing test based on the areas of "traditional competence" held by states.[145] The Court decided that in applying this test, "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[146] Some have interpreted the *Garamendi* balancing test as indicating that "in the absence of conflicting federal action, dormant foreign affairs preemption is possible if the state's action affects foreign affairs *without addressing a 'traditional state responsibility.'*"[147] Similarly, scholars have argued that "[t]he only situation where *Garamendi* allows for foreign affairs preemption in the absence of a conflict is when the state acts beyond its constitutionally delegated police power *and* the state action has more than an incidental or indirect effect on foreign relations."[148]

However, scholars have also noted the difficulty of judging what "traditional" state practice actually constitutes, given that "[n]umerous powers that are viewed as traditional areas of state authority have the potential to impact foreign relations."[149] Moreover, *Zschernig*, the origin of the foreign affairs preemption doctrine and the case on which *Garamendi* relies,[150] involved a statute affecting escheat, a domain that the *Zschernig* Court itself acknowledged is traditionally regulated by the states.[151] Yet the *Zschernig* Court still struck down the Oregon statute on foreign affairs preemption grounds: "The several States, of course, have traditionally

144. *Garamendi*, 539 U.S. at 399.

145. *Id.* at 420 (citations omitted).

146. *Id.* (citing, among other things, Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 768–69 (1945), which found that under the Dormant Commerce Clause, "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved," and LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 2nd ed. (1972), which suggested "balanc[ing] the state's interest in a regulation against the impact on U. S. foreign relations").

147. Crace, *supra* note 29, at 223.

148. Strauss, *supra* note 49, at 456.

149. Cleveland, *supra* note 67, at 991.

150. American Ins. Assn. v. Garamendi, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) ("The Court's analysis draws substantially on *Zschernig v. Miller*.").

151. Zschernig v. Miller, 389 U.S. 429, 440 (1968).

regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy."[152]

Given these inconsistencies, it is not entirely clear how the *Garamendi* test should be applied. Noting this confusion, the Illinois District Court in *Giannoulias* concluded that the only surefire way to apply the balancing test and determine whether the foreign affairs preemption doctrine has been violated is to see if the state statute at hand "would have an impact on the national government's ability to deal with [the given issue of foreign policy] that is at least equal to or greater than the impact of the state laws in *Zschernig* and *Garamendi*."[153]

So, what, precisely, is the impact that state anti-BDS laws might have on the national government's ability to manage its position on the Israeli-Palestinian conflict? First, whereas the federal government only discourages boycotts against Israel led by foreign countries, state anti-BDS laws discourage all boycotts against Israel, thus applying a different degree of pressure in terms of their allyship with Israel. Second, many state anti-BDS laws conflate Israel and Israeli-controlled territories, thus taking a stance on a highly controversial issue of foreign policy that the federal government has not resolved.

#### 1) BDS v. Boycotts Led by Foreign Governments

First, anti-boycott provisions in federal legislation exclusively apply to participation in boycotts promoted or fostered by foreign governments,[154] whereas state anti-BDS laws attempt to penalize participation in *any* boycott against Israel, including civil society boycotts like BDS. In doing so, state anti-BDS laws apply a different degree of pressure than federal legislation with

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152. *Id*.

153. Nat'l Foreign Trade Council, Inc. v. Giannoulias, 523 F. Supp. 2d 731, 745 (N.D. Ill. 2007). It seems worth noting that Justice Ginsburg, who dissented in *Garamendi* and argued that HVIRA should not have been struck down, likely would argue that state anti-BDS laws pose a much greater intrusion into the realm of foreign policy than HVIRA and are a much better candidate for the foreign affairs preemption analysis: "The notion of 'dormant foreign affairs preemption' with which *Zschernig* is associated resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involves "sitting in judgment" on them.' The HVIRA entails no such state action or policy." (citations omitted). *Garamendi*, 539 U.S. at 439–40 (Ginsburg, J., dissenting); *see also* Crace, *supra* note 29, at 220–21 (summarizing Ginsburg's dissent). Although state anti-BDS laws express support for rather than criticism of a foreign government, the symmetry argument discussed in Section II.B.1 should apply, and in any case, state anti-BDS laws certainly take "a position on a contemporary foreign government." *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting).

154. *See supra* notes 127–31 and accompanying text.

regard to regulating boycotts against Israel. Moreover, in 2018, Congress had the opportunity to expand federal legislation prohibiting participation in boycotts led by foreign countries to include boycotts against Israel led by non-governmental organizations—but Congress declined to do so. Indeed, the proposed Israel Anti-Boycott Act[155] —distinct from the Anti-Boycott Act of 2018, which is housed in the Export Control Reform Act[156]—would have expanded the anti-boycott provisions in the Export Administration Act to include boycotts led by non-governmental organizations and international organizations like the United Nations.[157] However, the Act never passed, and it faced substantial criticism from legislators and policy advocates for violating the First Amendment.[158] Therefore, given that no law like the Israel Anti-Boycott Act ever passed, state anti-BDS laws take a much more hardline stance than the federal government on the permissibility of engaging in boycotts against Israel, thus putting a different degree of pressure on Israel and violating foreign affairs preemption.

2) Israel v. Occupied Palestinian Territories

Second, state anti-BDS laws impact the national government's ability to manage its position on the Israeli-Palestinian conflict because many state anti-BDS laws, including Arkansas Act 710 and Texas Government Code § 2271.002, jointly and equivalently address Israel and Israeli-occupied territories.[159]

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155. *See supra* Section I.C.5 for an overview of the Israel Anti-Boycott Act.

156. *See supra* Section I.C.1 for an overview of the Anti-Boycott Act of 2018 (housed within the Export Control Reform Act).

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

158. *See, e.g.*, Press Release, Bernie Sanders, U.S. Sen. for Vt., Sanders, Feinstein Oppose Inclusion of Israel Anti-Boycott Act in Appropriations Bill (Dec. 19, 2018), https://www.sanders.senate.gov/press-releases/sanders-feinstein-oppose-inclusion-of-israel-anti-boycott-act-in-appropriations-bill/ [https://perma.cc/B3SL-MDSS] (stating commitment to the "constitutional oath to defend the right of every American to express their views peacefully without fear of or actual punishment by the government . . . . As the ACLU has repeatedly stated in its opposition to S. 720, this bill would violate Americans' First Amendment rights"); *US Senator Withdraws Sponsorship of an Israel Anti-Boycott Bill*, WAFA NEWS AGENCY (Aug. 3, 2017), https://english.wafa.ps/page.aspx?id=HtS6VBa91565300871aHtS6VB [https://perma.cc/3NLR-WBLF] (describing Kirsten Gillibrand's withdrawal of sponsorship from the bill "following pressure from constituents who repeatedly questioned her support for the bill . . . . Residents were concerned about threats the bill could cause to the civil liberties of Americans . . . .").

159. Arkansas Act 710, for instance, defines "boycott of Israel" as "engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner." Ark. Code Ann. § 25-1-502(1)(A)(i) (2020). Similarly, Texas' anti-BDS statute, which is at issue in *A & R*

The official U.S. position on conflating Israel with Israeli-controlled territories has shifted over the last decades. The United States' position on the matter has often been imprecisely defined, likely intentionally, so as "to avoid the possibility that Israel would face international sanctions"[160] while also avoiding express approval of the settlements. As an article from the Council on Foreign Relations summarized the history of U.S. policy toward Israeli settlements over time,

> A 1978 State Department legal opinion stated that [Israeli] settlements in occupied territory are not admissible under international law, yet President Ronald Reagan stated in a 1981 interview that the settlements were "ill-advised" but "not illegal." George H.W. Bush was the first president to link the amount of aid that Israel would receive to its settlement building, deducting the cost of settlement construction from U.S. loan guarantees. However, Clinton later allowed exemptions for settlement construction in East Jerusalem and for "natural growth." In 2004, George W. Bush wrote a letter to Israeli Prime Minister Ariel Sharon recognizing that the "new realities," or settlements, would make it impossible for Israel to revert to pre-1967 borders in any peace agreement. . . .While the Obama administration took actions to shield Israel from political movements that sought to penalize Israeli businesses operating in the West Bank, it also delivered a rebuke of Israel's settlements by abstaining from a UN Security Council vote declaring the settlements illegal.[161]

Then, the Trump Administration "pivoted to a view of [Israeli] settlements that was markedly pro-Israel,"[162] with U.S. Secretary of State Mike Pompeo stating in 2019 that "civilian settlements in the West Bank are 'not, per se, inconsistent with international law,' and not an obstacle to the peace process."[163] The Biden Administration has yet to officially comment on

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*Engineering and Testing, Inc. v. Paxton*, defines "boycott Israel" as "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes." Tex. Gov't Code § 2271.001(1) (2022) (using the definition in Tex. Gov't Code § 808.001(1) (2017)).

160. Kali Robinson, *What Is U.S. Policy on the Israeli-Palestinian Conflict?* COUNCIL ON FOREIGN RELS. (July 12, 2023), https://www.cfr.org/backgrounder/what-us-policy-israeli-palestinian-conflict#chapter-title-0-1 [https://perma.cc/8DBL-ECK9].

161. *Id.*

162. *Id.*

163. *Id.*; *see also* Jonathan Guyer, *Biden Says He Wants a Two-State Solution. Why Is He Silent on Israeli Settlements?,* VOX (July 14, 2022),

the legality of settlements in general,[164] and reporters have struggled to get Biden Administration officials to state their position on the matter,[165] even though the Biden Administration has repeatedly condemned specific attempts to expand settlements beyond current boundaries.[166]

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https://www.vox.com/23207299/israel-palestine-settlements-chart-two-state-biden-visit [https://perma.cc/T5LZ-7N2M] (comparing Trump's recognition of "settlements in the West Bank as not violating international law" to the Obama Administration's "partial freeze of settlements a cornerstone of a policy that it had hoped would lead to the relaunch of Israeli-Palestinian negotiations over the two-state solution").

164. *See* Nahal Toosi & Joseph Gedeon, *An Unsettled Matter in Biden's Middle East*, POLITICO (June 13, 2022), https://www.politico.com/newsletters/national-security-daily/2022/06/13/an-unsettled-matter-in-bidens-middle-east-00039222 [https://perma.cc/Y9YM-PDYV]; Guyer, *supra* note 163 (pointing to specific instances in which the Biden Administration has refused to clarify its stance on the general legality of Israeli settlements); Michael Crowley, *Biden Found Even Modest Israel-Palestine Peace Steps Impossible,* N.Y. TIMES (Nov. 1, 2023), https://www.nytimes.com/2023/11/01/us/politics/biden-israel-palestinians-peace.html (on file with the *Columbia Human Rights Law Review*) ("[Many Palestinians also hoped that the United States under Mr. Biden would reinstate a State Department legal opinion declaring Israeli settlements in the West Bank to be illegal," but he has not). That said, the Biden Administration has expressed concern about announcements that Israel will be expanding settlements, without speaking to the legality of settlements in general. Antony Blinken, *Israeli Settlement and Outpost Legalization Announcement,* U.S. DEP'T OF STATE (Feb. 13, 2023), https://www.state.gov/israeli-settlement-and-outpost-legalization-announcement/ [https://perma.cc/L6R7-2LCJ] ("We are deeply troubled by Israel's decision yesterday to advance reportedly nearly 10,000 settlement units and to begin a process to retroactively legalize nine outposts in the West Bank that were previously illegal under Israeli law."); Matthew Miller, *Settlements in the West Bank* (May 21, 2023), https://www.state.gov/settlements-in-the-west-bank/ [https://perma.cc/2CY4-DPDZ] ("We are deeply troubled by the Israeli government's order that allows its citizens to establish a permanent presence in the Homesh outpost in the northern West Bank . . . Advancing Israeli settlements in the West Bank is an obstacle to the achievement of a two-state solution.").

165. Toosi & Gedeon, *supra* note 164 ("Toosi has been privately and publicly asking Biden administration figures to lay out their official position on the legality of Israel's settlement construction. . . . At best, we've been handed irrelevant talking points."). *See also* Guyer, *supra* note 163 ("[I]t appears…[the Biden administration has] made a political judgment not to quibble over settlements. So you get comments like this from State Department spokesperson Jalina Porter — 'Israel's program of expanding settlements…damages the prospect for a two-state solution' — but no American leverage or influence to back up the criticism.").

166. *See, e.g.*, Raf Sanchez, *U.S. Issues Rare Rebuke of Israel in a Sign of Growing Frustration with its Far-Right Government*, ABC NEWS (Mar. 22, 2023), https://www.nbcnews.com/news/world/us-rebuke-israel-west-bank-settlements-frustration-biden-palestinians-rcna76047 [https://perma.cc/8BPR-3ZTN] ("The United States has issued a rare diplomatic rebuke to Israel, in a sign of the Biden administration's growing frustration over moves by the country's far-right government to entrench control. . . Deputy Secretary of State Wendy Sherman protested changes to Israeli law that would allow new settlement building.").

Language in state legislation conflating Israel and Israeli-controlled territories thus intrudes into the debate on this contested issue, and while federal legislation has engaged in this conflation as well,[167] this legislation has not been without controversy. For example, when signing the Trade Facilitation and Trade Enforcement Act of 2015, former President Barack Obama expressed concern that "[c]ertain provisions of this Act, by conflating Israel and 'Israeli-controlled territories,' are contrary to longstanding bipartisan United States policy, including with regard to the treatment of settlements."[168] In response, six Democratic senators issued a statement saying that Obama "mischaracterized" the bill's language, that lumping Israel and Israeli-controlled territories together does not make a "[U.S.] policy statement about Israeli settlements," and that the administration should "implement these provisions as enacted and intended."[169]

At the time of the signing, U.S.-Israel relations reporter Ron Kampeas described Obama's statement as "the latest salvo in an intensifying battle over whether the United States should differentiate between economic activity in West Bank settlements and Israel proper," noting that "[p]roponents of eliminating the distinction say there is little difference

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167. Trade Facilitation and Trade Enforcement Act, 19 U.S.C. § 4452(d)(2)(A), (C), (D) (requiring a report that describes "establishment of barriers to trade . . . against United States persons operating or doing business in Israel, with Israeli entities, or in Israeli-controlled territories," "specific steps being taken by the United States to prevent investigations or prosecutions . . . solely on the basis of such persons doing business with Israel, with Israeli entities, or in Israeli controlled territories," and "[d]ecisions by foreign persons . . . that limit or prohibit economic relations with Israel or persons doing business in Israel or in any territory controlled by Israel").

168. Press Release, Signing Statement for H.R. 644, Obama White House (Feb. 24, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/signing-statement-hr-644 [https://perma.cc/UDT7-5EH4].

169. Eric Cortellessa, *Democratic Senators: Obama 'Mischaracterized' Trade Bill Over Settlements*, TIMES OF ISRAEL (Feb. 26, 2016), https://www.timesofisrael.com/democratic-senators-obama-mischaracterized-trade-bill-over-settlements/ [https://perma.cc/ESQ3-E7HX]; *see also Top Senate Dems Hit Obama's Objection to Anti-BDS Provisions on Settlements*, JEWISH INSIDER (Mar. 1, 2016), https://jewishinsider.com/2016/03/top-senate-dems-hit-obamas-objection-to-anti-bds-provisions-on-settlements/ [https://perma.cc/9AC6-SMSA]. On the other side of the debate, JStreet, a pro-Israel organization that advocates for a two-state solution to the Israeli-Palestinian conflict, responded to Obama's statement with a petition urging people to tell their legislators to support Obama's stance. The petition asserted that "recent Congressional attempts to conflate Israel and the occupied territories subvert longstanding, bipartisan US policy on Israeli settlements," and that legislators should "oppose or amend legislation that upends America's longstanding opposition to Israeli settlements that are undermining the democratic future of Israel and chances for resolving the Israeli-Palestinian conflict." *Stand with President Obama*, JSTREET, https://act.jstreet.org/sign/stand-with-president-obama-on-settlements? [https://perma.cc/MZ58-7PXX].

between Israel and the West Bank when it comes to countering BDS, while others contend that lumping in settlements undercuts the wider effort to counter the boycott movement."[170] Referencing the link between this controversy and state anti-BDS laws, Kampeas continued, "The argument is already playing out in 22 state legislatures that are considering anti-BDS bills — some of which explicitly protect businesses operating in the settlements, while others extend protections only to Israel proper."[171] Another newspaper article warned that the Trade Facilitation and Trade Enforcement Act's conflation of Israel and Israeli-controlled territories could "mark a change in 50 years of U.S. policy on the Israeli-Palestinian conflict," as even though Obama promised that his administration "will not apply the part of the bill tied to the protection of West Bank settlements," future administrations would not be forced to exercise that restraint.[172] While the Trump Administration asserted perhaps more decisively than ever before that the settlements are "not, per se, inconsistent with international law,"[173] the Biden Administration's stance is difficult to infer, given that although the Biden Administration has reversed some of the Trump Administration's Israeli foreign policy moves, others have been left in place.[174]

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170. 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 [https://perma.cc/87MD-7FPQ].

171. *Id.* This debate "also cropped up in January [2016] in the controversy over the reissuing of customs regulations requiring goods produced in the West Bank to be labeled as such," which led some legislators to propose a bill opposing those regulations and permitting settlement goods to be labeled the same as Israeli goods. *Id.* In response, the government affairs director for Americans for Peace Now said that "the effort to extend protections to settlement products is an effort to undercut longstanding U.S. policy," and that such an "historic shift in U.S. policy" would "have devastating consequences for the possibility of any peaceful solution to the Israeli-Palestinian conflict." *Id.*

172. Lena Odgaard, *New Trade Law Could Reverse 50 Years of U.S. Economic Policy Regarding Occupied Palestinian Territories,* FREE SPEECH RADIO NEWS (Mar. 10, 2016), http://fsrn.org/2016/03/new-trade-law-could-reverse-50-years-of-u-s-economic-policy-regarding-occupied-palestinian-territories/ [https://perma.cc/QJ9B-DKJM].

173. Robinson, *supra* note 160; *see also* Guyer, *supra* note 163 (noting that "in 2019, President Donald Trump ruptured four decades of US policy by recognizing settlements in the West Bank as not violating international law"); Toosi & Gedeon, *supra* note 164 (emphasizing the Trump Administration's deviation from the United States's historical position in endorsing the settlements' legality).

174. Toosi & Gedeon, *supra* note 164 (noting that on the one hand, "Biden didn't even try to reverse Trump's decision to recognize Jerusalem as the Israeli capital. He still hasn't fulfilled a promise to reopen the U.S. Consulate in Jerusalem, the diplomatic mission that dealt with the Palestinians which Trump closed," while on the other hand, "the Biden administration has restored much of the funding to the Palestinian people that Trump had essentially zeroed out. It has taken some steps to upgrade its ties to Palestinians…It also

Beyond these statements from executive officials, the delicate nature of U.S. foreign policy towards Israel and the need to reserve its control to the federal government was underscored by the Supreme Court in *Zivotofsky v. Kerry.*[175] This case concerned the Foreign Relations Authorization Act, Fiscal Year 2003.[176] Section 214 of the Act, titled "United States Policy with Respect to Jerusalem as the Capital of Israel," provided that Americans born in Jerusalem may elect to have "Israel" listed as the place of birth on their passports.[177] When Zivotofsky, a Jerusalem-born U.S. citizen, requested that "Jerusalem, Israel" be recorded as his place of birth on his passport, the State Department refused, in accordance with the Foreign Affairs Manual which cited longstanding U.S. policy of not taking a position on the political status of Jerusalem.[178] The Court found in favor of the State Department, deciding that only the President has the power to recognize a "foreign state and its territorial bounds,"[179] and as such, congressional attempts to do so "not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations."[180]

Importantly, in explaining its basis for the decision in *Zivotofsky*, the Court emphasized how "delicate" and "sensitive" the political standing of Jerusalem is.[181] The Court further noted that "in contrast to a consistent policy of formal recognition of Israel, neither President Truman nor any later United States President [at the time of this 2015 decision] has issued an official statement or declaration acknowledging any country's sovereignty over Jerusalem," instead maintaining that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned."[182] In other words, both the Court and numerous presidents feared that an Executive statement on the status of Jerusalem could jeopardize peace efforts, let alone a statement by an act of Congress. Of course, the United States' stance on Jerusalem has changed since *Zivotofsky*, with former

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was a key player in defusing last year's battle between Israel and Palestinian militants in the Gaza Strip").

175. Zivotofsky v. Kerry, 576 U.S. 1 (2015).

176. *Id.* at 7.

177. *Id.*

178. *Id.* at 7–8 ("Because the United States does not recognize any country as having sovereignty over Jerusalem, the FAM instructs employees to record the place of birth for citizens born there as 'Jerusalem.'").

179. *Id.* at 28.

180. *Id.* at 30.

181. *Id.* at 5–6 ("Jerusalem's political standing has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed it is one of the most delicate issues in current international affairs.").

182. *Id.* at 6 (citations omitted).

President Trump controversially recognizing Jerusalem as the capital of Israel in 2017.[183] However, the reasoning in *Zivotofsky* nonetheless easily analogizes to the legality of Israeli settlements, on which a clear U.S. position has yet to be expressed. By *Zivotofsky's* logic, given how cautiously U.S. presidential administrations have proceeded when definitively expressing a position on the legality of Israeli-controlled territories, Congress should not be intruding into this realm by conflating such territories with Israel proper.

As this Section demonstrates, the question of the conflation of Israel and Israeli-controlled territories is far from resolved with regards to U.S. foreign policy, and the debate continues. Therefore, the fact that state anti-BDS laws include this conflation impedes a "hotly contested"[184] issue of foreign policy, inhibiting the national government's ability to speak with one voice on the Israeli-Palestinian conflict and intruding on the "federal government's exclusive power to conduct and regulate foreign affairs."[185] For these reasons, state anti-BDS laws violate the doctrine of foreign affairs preemption.

## III) STRATEGY AND POLICY CONCERNS

The Eighth Circuit opinion in *Arkansas Times LP v. Waldrip* marked the first appellate-level decision upholding the constitutionality of state anti-

183. Mark Lander, *Trump Recognizes Jerusalem as Israel's Capital and Orders U.S. Embassy to Move*, N.Y. TIMES (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/world/middleeast/trump-jerusalem-israel-capital.html (on file with the *Columbia Human Rights Law Review*) ("President Trump on Wednesday formally recognized Jerusalem as the capital of Israel, reversing nearly seven decades of American foreign policy and setting in motion a plan to move the United States Embassy from Tel Aviv to the fiercely contested Holy City.") In 2022, President Biden affirmed this decision. *Readout of President Biden's Meeting with President Abbas of the Palestinian Authority,* THE WHITE HOUSE (July 15, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/15/readout-of-president-bidens-meeting-with-president-abbas-of-the-palestinian-authority/ [https://perma.cc/L5W5-N3UF] ("President Biden reiterated the U.S. position that Jerusalem is the capital of Israel.").

184. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1077 (9th Cir. 2012); *see supra* note 63 for a lengthier description of this case in which the Ninth Circuit found preempted a California statute that sought "to provide redress for 'Armenian Genocide victim[s]' by subjecting foreign insurance companies to lawsuits in California." *Movsesian*, 670 F.2d at 1076. The Ninth Circuit emphasized that "[t]he statute expresses a distinct political point of view on a specific matter of foreign policy" by "impos[ing] the politically charged label of 'genocide' on the actions of the Ottoman Empire," which was problematic because at the time, the descriptor "Armenian genocide" was a "hotly contested matter of foreign policy around the world." *Id.* at 1076–77.

185. *Movsesian*, 670 F.2d at 1077.

BDS laws.[186] Considered alongside with the Supreme Court's subsequent denial of the petition for certiorari,[187] this outcome shows that the debate over the constitutionality of state anti-BDS laws has reached a heightened level of significance and uncertainty in the United States. The argument that these statutes are unconstitutional on First Amendment grounds is highly compelling,[188] as are the moral reasons for wanting to boycott Israel or, at the very least, the Israeli settlements.[189] Nonetheless, the First Amendment

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186. Rosenfeld, *supra* note 12.

187. ARK. MONEY & POL., *supra* note 17.

188. *See* Petition for a Writ of Certiorari, Arkansas Times LP v. Waldrip (2022) (No. 22-379), 2022 WL 14568612, at 10–11 (citations omitted) (explaining that the Eighth Circuit's decision was a "radical departure from *Claiborne Hardware,*" which was one of the Supreme Court's "'most significant' First Amendment precedents" and which held that "states cannot suppress politically motivated consumer boycotts"); *see also* the host of amici curiae submitted by First Amendment scholars and advocates in support of the Arkansas Times' petition for a writ of certiorari (which was only just filed in October 2022)*, e.g*., Brief of First Amendment Scholars as Amici Curiae in Support of Petitioner, Arkansas Times LP v. Waldrip (2022) (No. 22-379), 2022 WL 17340271; Brief of Amicus Curiae Professor Lawrence Glickman in Support of the Petition for Writ of Certiorari (2022) (No. 22-379), 2022 WL 16558036; Brief of Amici Curiae T'ruah, JStreet, Americans for Peace Now, and Partners for Progressive Israel in Support of Petitioner (2022) (No. 22-379), 2022 WL 17184311; Brief of Amici Curiae, The Forum for Constitutional Rights and the Foundation for Individual Rights and Expression in Support of Petitioner (2022) (No. 22-379), 2022 WL 17340271. These briefs all base their arguments on the First Amendment right to boycott, relying primarily on NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), which held that collective actions like boycotts implicate "the rights of free speech, free assembly, and freedom to petition for a redress of grievances," *Claiborne Hardware*, 458 U.S. at 909 (citations omitted), such that the Eighth Circuit decision upholding Arkansas Act 710 constituted an "implausibly narrow reading of *Claiborne Hardware*," as well as a "radical departure" from Supreme Court precedent protecting the "principle that states cannot suppress politically motivated consumer boycotts." Petition for a Writ of Certiorari, *Arkansas Times LP* (No. 22-379) at 10, 26. None of these briefs mention the question of foreign policy preemption. *See also, e.g.*, *Statement from Palestine Legal on Arkansas Anti-Boycott Ruling*, PALESTINE LEGAL (June 22, 2022), https://palestinelegal.org/news/2022/6/22/statement-from-palestine-legal-on-arkansas-anti-boycott-ruling [https://perma.cc/56LS-KWZ4] ("Boycotts are a powerful tool for seeking justice…Given the proliferation of anti-boycott laws targeting other social justice movements, this decision sets a dangerous precedent for anyone interested in seeking social, political, or economic change.").

189. *See, e.g.*, Press Release, Hum. Rts. Council, Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories: Israel Has Imposed Upon Palestine an Apartheid Reality in a Post-Apartheid World, U.N. Press Release (Mar. 25, 2022), https://www.ohchr.org/en/press-releases/2022/03/special-rapporteur-situation-human-rights-occupied-palestinian-territories [https://perma.cc/TD84-LAF5] ("Applying the accepted three-part test taken from the 1973 United Nations Convention Against Apartheid, and the 1998 Rome Statute of the International Criminal Court, the Special Rapporteur had concluded that the political system of entrenched rule…satisfied the prevailing evidentiary standard for the existence of apartheid" and that "the Israeli

argument did not prevail in the Eighth Circuit, and plaintiffs in any circuit that likewise upholds the constitutionality of state anti-BDS laws on First Amendment grounds will have little chance of successfully appealing to the Supreme Court given the certiorari denial in *Waldrip*. If laws like Arkansas Act 710 continue to be deemed constitutional on First Amendment grounds in circuit courts, Palestinian and human rights activists will continue to face the unjust choice between retaining eligibility for state government contracts and engaging in commercial boycotts to protest a government perpetrating the crime of apartheid.[190] As such, perhaps it is time for litigators to consider a new approach.

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settlements were illegal."); *US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019), https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses [https://perma.cc/78DK-P85C] ("States with anti-boycott laws are effectively telling companies that if you do the right thing and disentangle yourselves from settlement abuses, you can't do business with us. . . States should encourage, not sanction, companies that avoid contributing to rights abuses." (quoting Andrea Prasow, then Deputy U.S. Advocacy Director, Human Rights Watch)). Human Rights Watch noted that "[i]t is impossible to do business in the settlements without contributing to or benefitting from human rights abuse and violations of international humanitarian law," given that "Israeli authorities have facilitated the transfer of more than 600,000 Israeli citizens to the occupied West Bank, including East Jerusalem, in violation of the 1949 Geneva Conventions," and "Israeli settlements are inextricably bound up with serious rights abuses, including forcing Palestinian inhabitants of the occupied territories off land seized for settlers, and restricting their freedom of movement." *Id.* Moreover, the United States gives significant foreign aid to Israel every year, so U.S. residents may feel particularly inclined to participate in BDS efforts in light of Israel's human rights abuses. Kaia Hubbard, *3 Charts That Illustrate Where U.S. Foreign Aid Goes*, U.S. NEWS (May 24, 2021), https://www.usnews.com/news/best-countries/articles/2021-05-24/afghanistan-israel-largest-recipients-of-us-foreign-aid (on file with the *Columbia Human Rights Law Review*) (noting that "Israel has received the most U.S. foreign assistance of any country since World War II, at $243.9 billion, adjusted for inflation, and has been among the countries receiving the most aid every year since 1971" and that "U.S. foreign aid to Israel has largely gone toward military efforts."); *see also* JEREMY SHARP, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL (2020). ("Israel is the largest cumulative recipient of U.S. foreign assistance since World War II."). In recent years, "some Democrats from within the progressive wing of the party have become more vocal about conditioning, repurposing, or even cutting foreign aid to Israel." *Id.*

190. For why Israel's government is perpetrating the crime of apartheid, *see, e.g.,* Hum. Rts. Council, *supra* note 189; *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution,* HUM. RTS. WATCH (2021), https://www.hrw.org/sites/default/files/media_2021/04/israel_palestine0421_web_0.pdf [https://perma.cc/8N42-SC7K] ("Human Rights Watch concludes that the Israeli government has demonstrated an intent to maintain the domination of Jewish Israelis over Palestinians across Israel and the OPT . . . that intent has been coupled with systematic oppression of Palestinians and inhumane acts committed against them. When these three elements occur together, they amount to the crime of apartheid."); *Israel's Apartheid Against Palestinians*, Amnesty Int'l (2022), https://www.amnesty.org/en

But despite the case presented throughout this Note for raising a foreign policy preemption argument, litigators have yet to do so in their challenges to state anti-boycott laws, opting to rely exclusively on the First Amendment argument. Perhaps the reason is that litigators worry about the implications of the precedent that would then be set—and these implications are concerning indeed. First, a ruling outlawing state anti-BDS laws would likely incentivize right-wing pro-Israel lobbying groups to dedicate more time and money pushing for federal-level legislation, potentially leading to the final passage of bills like the Combating BDS Act and the Israel Anti-Boycott Act.[191] Second, a Supreme Court decision striking down anti-BDS laws on foreign policy preemption grounds would affirm and clarify the power of the foreign affairs preemption doctrine, limiting state action on matters of foreign affairs across the board, including, for example, state-led attempts to boycott Israeli apartheid.[192] Indeed, many human rights scholars

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/documents/mde15/5141/2022/en/ [https://perma.cc/GB4L-M4PH] ("The organization has concluded that Israel has perpetrated the international wrong of apartheid.").

191. For indication of this, *see, e.g.*, Amir Tibon, *U.S. Legislators, AIPAC Push Anti-BDS Bill After UN Letter Warns Companies Against Operating in Settlements*, HAARETZ (Sept. 28, 2017), https://www.haaretz.com/us-news/2017-09-28/ty-article/.premium/u-s-legislators-aipac-push-anti-bds-bill-in-light-of-un-blacklist/0000017f-e29c-d7b2-a77f-e39f14d80000 [https://perma.cc/8TTU-DT4U] (describing how the "American Israel Public Affairs Committee (AIPAC), the most prominent pro-Israel organization in the United States, also highlighted the 'Anti-Boycott Act' . . . . AIPAC added that . . . Congress should pass the Israel Anti-Boycott Act at the earliest possible date"); Dalia Hatuqa, *Anti-BDS Bills Expected to Feature Prominently at AIPAC,* AL JAZEERA (Mar. 3, 2018), https://www.aljazeera.com/news/2018/3/3/anti-bds-bills-expected-to-feature-prominently-at-aipac [https://perma.cc/U2TU-89SL] (describing AIPAC's efforts to lobby for the Israel Anti-Boycott Act and the Combating BDS Act); Alex Kane, *Right-Wing Donor Adam Milstein Has Spent Millions of Dollars to Stifle the BDS Movement and Attack Critics of Israeli Policy,* THE INTERCEPT (Mar. 25, 2019), https://theintercept.com/2019/03/25/adam-milstein-israel-bds/ [https://perma.cc/RV3M-6CET] (describing Milstein's efforts to "fund[] groups that have pushed controversial state laws that crack down on BDS supporters" and explaining how, as a result of the "Milstein-backed assault on the BDS movement," many states have passed anti-BDS laws and Senate passed the Combating BDS act. Between 2004 and 2016, the Milsteins "gave at least $4.4 million to groups that . . . harshly attack critics of Israeli policy").

192. Though state-led boycotts against Israel would be difficult to carry out regardless, as such a boycott would likely conflict with general U.S. foreign policy towards Israel. *See* Office of the Spokesperson, *The United States-Israel Relationship*, U.S. DEP'T OF STATE (Mar. 26, 2022), https://www.state.gov/the-united-states-israel-relationship/ [https://perma.cc/RQ5L-4MRA] (noting that "[t]he United States and Israel are strong partners and friends. Americans and Israelis are united by our shared commitment to democracy, economic prosperity, and regional security. Our partnership has never been stronger" and that "[t]he U.S.-Israel economic and commercial relationship is strong, anchored by bilateral trade of close to $50 billion in goods and services annually")

argue that the foreign affairs preemption doctrine should be dismantled, as it precludes states from taking actions against human rights abuses in foreign countries. For example, Sarah Cleveland argued,

> Because the decision in *Crosby* fundamentally misconstrues the dynamic relationship between the states and federal government relating to Burma, the decision preferably should be overruled or abandoned. At the very least, *Crosby* should not be interpreted to allow implied preemption whenever any state law diverges from federal policy, however minimally. . . A preferable reading of *Crosby* would require a federal statute (or an executive order) that directly conflicts with the matter addressed by state legislation.[193]

In that article, Cleveland advocated for a stricter standard of foreign affairs preemption, preferring an express, direct conflict between state and federal legislation before the doctrine is applied. Moreover, from a policy perspective, Cleveland noted the potential for stronger, more meaningful international action when states are allowed to take action supplementing federal foreign policy, concluding that "[t]he Court [in *Crosby*] thus failed to recognize the possibility and the reality that state and local voices do not inherently clash with national policy, but may instead help to promote a richer harmony of action by the United States as a whole."[194]

On the strategic benefits of permitting state action in the realm of foreign policy, European Union scholar Daniel Halberstam likewise found that "[state foreign policy] initiatives may have a positive impact on the national foreign policy making process"[195] and that in fact, "[b]y challenging the absence of federal foreign policy on an issue, state and local actors may raise national awareness of an issue, place issues on the agenda of federal officials or even induce the federal government to take action on behalf of the Nation."[196] Legal scholar Jack Goldsmith addressed the converse, warning

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193. Cleveland, *supra* note 67, at 1013. By requiring a federal statute or executive order that directly conflicts with state legislation, Cleveland's argument seems to even leave room for the possibility of state-led boycotts against Israel, given that the federal anti-boycott statutes, by their most plausible reading, only prohibit participation in boycotts led by foreign countries, not civil society boycotts like BDS. *See supra* notes 130–32 and accompanying text (discussing Martin Weiss's interpretation of these provisions).

194. Cleveland, *supra* note 67, at 1014.

195. Daniel Halberstam*, The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1039–40 (2001).

196. *Id.* at 1040. Note, though, that Halberstam does not argue, like Cleveland, that *Crosby* needs to be overturned in order to recognize these benefits. *Id.* at 1017, 1068 ("This Article will argue that Crosby is consistent with a recognition of the national benefits of state involvement in foreign affairs and the view that States may participate in foreign

that as courts continue to "treat[] customary international law as federal common law" in international human rights cases,[197] the foreign affairs preemption doctrine will increasingly limit opportunities for states to legislate on issues affecting human rights:

> On this view, a state law that is consistent with federal statutes and the federal Constitution would nonetheless be invalid if inconsistent with customary international law. . . . The possibilities for preemption under this rationale range from state juvenile death penalty statutes to state restrictions on welfare benefits to [noncitizens] to state choice-of-law rules. As the scope of customary international law continues to grow (and in the human rights context there is every indication that it will), so too will the areas of state law potentially subject to preemption under a federal common law of foreign relations rationale.[198]

Goldsmith further acknowledged the changing reality that "national governments [no longer] enjoy a monopoly over the conduct of foreign relations" because "subnational units like the U.S. states have joined international organizations, multinational corporations, and other non-national actors in the conduct and regulation of international affairs."[199] As this involvement increases, and states grow more active in developing relationships with foreign entities and international human rights causes, one should "cast[] doubt on the widely held view that the states have no legitimate interest in the regulation of foreign relations."[200]

Altogether, this scholarship presents a strong argument that human rights activists should, if anything, attempt to weaken the foreign affairs preemption doctrine, not attempt to strengthen it for the purposes of procuring a narrow win on state anti-BDS legislation. Otherwise, states will lose the ability to make meaningful contributions to international human rights, which will in fact undermine the scope of the federal government's potential impact on foreign affairs. This argument, along with the likelihood that a win on foreign affairs preemption grounds may only increase rightwing mobilization in support of federal anti-BDS legislation, calls into serious question whether pursuing a foreign affairs preemption argument is wise.

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affairs to the extent these benefits are realized," as *Crosby* only draws the line "when the Nation has spoken to the issues raised and has chosen to exclude the States.").

197. Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1640 (1997).

198. *Id.* at 1641.

199. *Id.* at 1673.

200. *Id.* at 1677.

## CONCLUSION

Legal challenges against the constitutionality of state anti-BDS laws are slowly making their way through United States circuit courts, and so far, these challenges have rested largely on First Amendment grounds. This Note explores the viability of an alternative approach—namely, the prospect of challenging the constitutionality of state anti-BDS laws through the foreign affairs preemption doctrine. The foreign affairs preemption doctrine establishes that states act beyond their authority when they legislate in such a way that tangibly undermines the federal government's ability to manage foreign policy directives and speak to the international community with "one voice." Based on Supreme Court precedent, state anti-BDS laws pose a sufficient intrusion into foreign affairs so as to be preempted by this doctrine. Nonetheless, before pursuing this approach, lawyers and advocates must determine whether the implications of succeeding on these grounds are worth potentially inhibiting the long-term goals of the same human rights activists hoping to strike anti-BDS laws down. Specifically, using the foreign affairs preemption doctrine to render state anti-BDS laws unconstitutional would strengthen precedent that precludes states themselves from mobilizing against foreign governments that are committing human rights atrocities, and the cost of that detriment might not be worth it.