Testimony in Opposition to H.C.R. No. 10
Ohio Senate Transportation, Commerce and Workforce Committee
March 21, 2018

Chairman LaRose, Vice Chair Kunze, Ranking Member Schiavoni and members of the Committee:

I am Eric Resnick. I am from Canton. I am Jewish. I am very proud to be here today in opposition to H.R.C. No. 10, which politely, is about suppressing and punishing behavior that is protected by the First Amendment of the U.S. Constitution-- the right to engage in non-violent protest against a government behaving badly. Hence, despite what you may have heard, H.C.R. No. 10 is neither aligned with the fundamental principles of Judaism, the state of Ohio, nor the United States. However, it is aligned with those who can't defend Israel's behavior on merit, so their solution is to shut down those who want to talk about it, and intimidate those who want to use non-violent protest against it.

Looking at the last paragraph of the resolution, the intent is quite clear: Intimidation; Threats; Abuse of power for the purpose of policing and silencing those on Ohio's college campuses who are speaking and acting against injustice.

That such a measure is even under consideration is an insult to the Constitution you all swore to protect and defend.

H.C.R. No. 10 and H.B. 476 passed by the last general assembly are kissing cousins. While this resolution is more specifically about activity on college campuses, they both seek to abridge Constitutionally Protected speech. Their stated goals are the same and the primary tactic used by both is intimidation.

During testimony against H.B. 476 last session and against this measure when it was in the House committee on November 1, we told you what every rookie law student and most high school graduates know about both – and the three of you on this committee who are lawyers, Members Schiavoni, Dolan, and McColley know full well – that they are both wildly and totally unconstitutional. Only now, it isn't just us. We now have a Court that says so.

On January 30 the United States District Court for the District of Kansas struck that state's mirror equivalent to H.B. 476, and *de facto* this resolution finding:

> *"While the Kansas Law may have been passed by the legislature with flying colors, that showing merely would demonstrate that one state legislature had enacted a statute. Such a showing would not place the Kansas Law on the same level as an amendment to our Constitution—the very first amendment adopted by our founders and one ratified by three fourths of our states... A desire to prevent discrimination against Israeli businesses is an insufficient public interest to overcome the public's interest in protecting a constitutional right."*

In case you were not aware of the Kansas case, *Koontz v. Watson*, or the fact that Boycott Divestment and Sanctions (BDS) is a right guaranteed by the First Amendment, consider this notice. Be advised, too, that as soon as a plaintiff emerges, H.B. 476 will suffer similar fate. Legally, it's a no-brainer, which is why the fact that we are here debating this thing is so outrageous.

I have attached the decision in *Koontz v. Watson* to this testimony as Exhibit 1.

The seminal U.S. Supreme Court case on the constitutionality of boycotts is the 1982 *NAACP v. Claiborne Hardware Co.* It's another of those familiar cases to young law students.

The *Koontz Court* relies on it extensively, as on page 17 where it says:

> *"Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments*... This, the Supreme Court held, is a key tenet of the First Amendment."

But that's not even the money shot. In *Koontz* the money shot, and what you need to be concerned with today, is in footnote 8 on page 18 where the Court says:

> *"In some respects, the issue here is easier than the one in Claiborne... To say it simply, the boycott here does not present any of the complicating facts present in Claiborne."*

And I call your attention to page 19 of *Koontz* where the Court quotes the 2017 opinion *Matal v. Tam* and the 1969 opinion *Street v. New York:*

> *"The Kansas [and Ohio] Law also aims to minimize any discomfort that Israeli businesses may feel from the boycotts. This, too, is an impermissible goal... We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'"*

It doesn't stop there.

On February 28 another suit was filed, this time in the United States District Court in Phoenix, Arizona, and this one is over incidents that happened at a university, against Arizona's "No Boycott of Israel" Law. The Plaintiffs in this one are American Muslims for Palestine and Dr. Hatem Bazian, who is a professor of Islamic Law and Theology at Zaytuna College.

The Defendants are Arizona State University, the Arizona Board of Regents, and Arizona Attorney General Mark Brnovich.

The complaint begins by quoting the 1943 U.S. Supreme Court opinion in *West Virginia State Board of Education v. Barnette:*

> *"The First Amendment protects the rights of all speakers to advocate for all viewpoints on issues of public concern. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."*

I have attached this complaint to my testimony as Exhibit 2.

You will see at paragraph 45 on page 10 where this one launches still another attack on these already unconstitutional laws:

> *"[The Arizona Statute] and the "No Boycott of Israel" clause each constitute viewpoint discrimination, because they only bar speech and expression against Israel, and not speech or expression in favor of Israel or against Palestine."*

H.B. 476 and H.C.R. No. 10 suffer this same "viewpoint discrimination" defect (not that they aren't inherently defective to start with). Simply put, neither activism in favor of Boycott Divestment and

Sanctions (BDS) nor criticism of Israel are antisemitic. But even if they were, they are Constitutionally protected speech, and an act of a state legislature can't change that.

Can any of you who were planning to vote for this look us in the eye and tell us you think it could survive a challenge?

That's the legal argument. There's also a moral argument against these measures that abridges speech, hence linking protest to criminality.

This summer we marked 50 years of Israel's occupation of Gaza, the West Bank, and East Jerusalem. That's the 50 years of occupation Israel admits to. Many of us here more accurately put that figure at two months short of 70 years.

50 years of indefensible military occupation, with the Ethnic Cleansing, Crimes Against Humanity and Apartheid needed to sustain it can do terrible things to pervert otherwise decent people.

American Jews, regardless of political party affiliation, are known to generally support liberal Western values.

Liberal Western values uphold human dignity and basic rights for all, regardless of majority or minority status. Freedom of speech and expression, including politics and religion are critical to liberal Western values.

Perhaps this values system — a point of civic pride for most American Jews — reflects a commitment to Tikun Olam or other rabbinic lessons. Or there is a realization that as a minority, Jews have not fared well in cultures where such a values system is absent.

How is it then, that so many Zionist Jews support anti-free speech instruments of Ohio's state government?

When did American Zionist Jews decide it is necessary to ask you to shut down those questioning human rights abuses?

When did American Zionist Jews decide that freedoms of speech and expression belong only to those who support Israel and its right-wing government?

Understand something, please.

Judaism is a religion. Israel is a sovereign nation governed by its internal politics and international law. Zionism is a political movement that is violent, criminal, and corrupt. The Israel Lobby is the U.S. lobbying arm of Zionism. You heard from them earlier.

Zionism is not Judaism. Real Jews reject Zionism. There is nothing anti-Jewish or Antisemetic about criticizing Israel. Let me say that again; Rejection of Zionism and criticizing Israel's crimes are not anti-Jewish or antisemetic. Intuitively, you know that. You would laugh anyone out of this room who claimed Boycott, Divestment and Sanction action that brought down Apartheid in South Africa was anti-White. And yet, that's exactly the ruse you are being asked to believe and act on.

You are being asked to forget everything you know about what it means to be an American citizen to help protect Zionism's $3.7 billion per year enterprise in this country. It's the conduit through which most American Jew dollars flow, and as such wants to be sacred.

Zionism is Ethnic Cleansing.

The unanimously adopted 1992 U.N. Security Council Resolution 780 defines ethnic cleansing as *"a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."*

Zionism is Apartheid.

The United Nations Economic and Social Commission for Western Asia issued a report on this in September. That report cites the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the Rome Statute of the International Criminal Court, which holds that: *"'The crime of apartheid' means inhumane acts ... committed in the context of an Institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."*

The report unequivocally declared Israel an Apartheid state, and anyone honest enough to see it for what it is must agree.

That's why Zionists want you pass resolutions quashing any speech on this matter. What cannot be defended must never be spoken.

Zionism is also racist.

Jews of color, who come from places other than eastern Europe, called Mizrachi or Sephardic Jews are relegated to second class status in Israel, too.

It is also ironic that people with real records of Antisemitism – anti-Jewish expressions and promotion of policies that would hurt Jews, including Steve Bannon and other members of the altright and white nationalists, and Rev. John Hagee of Christians United for Israel (CUFI) are celebrated Zionists. It's more proof that Zionism is not Judaism.

In order to support Israel's imagined national narrative of endless threat and victimhood, Zionists have attempted to replace the definition of Antisemitism from violence and actions that deny Jews rights, make Jews feel unwelcome or threatened, or worse, to criticism of Israel. This movement came on full steam starting around 2005.

My forthcoming book titled "Zionist of Jew?" goes into this dynamic in great detail, but hopefully you can see the sham you're being asked to support.

It is also crystal clear that Boycott, Divestment and Sanction (BDS) is very effective, which is the other reason you're being asked to try to shut it down.

Make no mistake, college campuses are the front lines of the battles for and against BDS, and the laboratories for those who want to develop tactics to quash BDS.

Money, Power, Privilege, Influence, and years of Organized Presence play out in these fights. AEPi Fraternity, Hillel, the Anti-Defamation League, Zionist Organization of America, the AMCHA Initiative, and other Zionist fronts raise and spend tens of millions of dollars a year to try to keep BDS from being mentioned on college campuses. Think about that a moment; Organizations who want you to think they are about civil rights are actually working to deny others' civil rights!

We all know this game well enough to know that there are political perils for many of you who do not appear to be sufficiently Zionist, especially if you seek statewide office, so let's not pretend otherwise.

Two of you on this committee, Chairman LaRose and Member Manning, were treated to free trips to Israel last year by the Zionist Jewish Federations of North America and Israel Leadership Institute of North America.

Those trips are "Hasbara," which is Hebrew for "explaining" or propaganda.

They showed you what they wanted you to see, and like all good promoters, they subtly, or not so, co-opted your support.

But they didn't take you to Hebron, where the Apartheid is everywhere, and Jews and non-Jews are not even allowed on the same roads.

They didn't take you to the illegal colonies/settlements in the Occupied West Bank, or let you see where the illegal Jewish settlers stole property above the Palestinian markets. You didn't see the nets above the markets to catch the trash the lawless Jews dump on the rightful owners of the land.

They didn't take you to Bil'in, also in the Occupied West Bank, where every Friday the Israeli Military sprays peaceful and unarmed protesters of the Apartheid Wall with internationally banned rubber coated bullets and chemicals. You can see it for yourself in the documentary *Five Broken Cameras*, though.

You did not see the indignity and humiliation of Palestinians enduring checkpoints, military seizures of their homes and property or night raids that terrorize Palestinian children.

They didn't show you Gaza, where the Israeli military blockade has created what is known as the world's largest outdoor prison.

Israel controls everything and everyone that goes in and out of Gaza, including food and electricity. Gaza only gets a few hours of electricity a day, also meaning that water is not treated and has become scarce, and people die in hospitals that do not have sufficient fuel to power generators.

They didn't show you Israeli prisons where Palestinian children as young as age 12 are tortured, kept in solitary confinement, and held without charges, sometimes for years. There are currently around 800 such children. Since 2000, around 8,000 children have been imprisoned by Israel. This sad reality of Zionism is well documented by every human rights organization that has ever looked at it.

And your patrons certainly did not volunteer the fact that Israel is the only nation on Earth that tries these children in military tribunals!

I am an unapologetic anti-Zionist, and BDS supporter because Israel has become worse than the pogroms my ancestors escaped in Europe.

I am deeply ashamed and appalled by what those sick Zionists are doing, period, and also that they are hijacking Judaism and giving all of us a bad name.

Because they cannot defend Israel's reprehensible behavior they want you to see to it that it isn't discussed, especially on college campuses.

Nothing delegitimizes Israel more than Israel's own behavior. So, of course, they blame BDS activists instead of looking at themselves. Israel is always the victim, after all!

Finally, American Jews only started opposing BDS as a tactic when Israel became a target.

They were all about BDS when the targets were places like South Africa.

Attached to this testimony as Exhibit 3 is a copy of the BDS resolution adopted in 1987 by the Central Conference of American Rabbis – the Reform Jewish Movement. Other resolutions are online, but I exhibit this one because of its completeness, and its moral clarity.

It calls for the U.S. government to ban South African imports, to boycott firms that do business in South Africa, to reduce the level of diplomatic recognition of South Africa, and for congregations to support those South Africans engaged in non-violent resistance of Apartheid. In other words, a full-throated endorsement and urgent call to BDS!

This hypocrisy is what more than 50 years of military occupation and Zionism has done to proponents of this resolution.

Ohio needs elected officials with thoughtful courage.

This resolution is really a test for you, as your vote will stand as a testament to your character and fitness.

We can't offer you political largess or junkets. We can't promise you support, or limit your opposition if you seek statewide office.

All we can do is implore you to be on the right side of history, the right side of the U.S. Constitution, and the right side of humanity.

This vote is not about those of us who came here today. It's about **you,** and what kind of person – what kind of public servant you want to be. We're listening and watching.

I will gladly answer questions.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ESTHER KOONTZ,

Plaintiff,

v.

RANDALL D. WATSON, in his official capacity as Kansas Commissioner of Education,

Defendant.

Case No. 17-4099-DDC-KGS

MEMORANDUM AND ORDER

In this lawsuit, plaintiff Esther Koontz seeks injunctive and declaratory relief under 42 U.S.C. § 1983. She asks the court to enjoin enforcement of a Kansas law requiring all persons who enter into a contract with the State of Kansas to certify that they are not engaged in a boycott of Israel. Ms. Koontz claims that this law violates both the First Amendment and the Fourteenth Amendment's Equal Protection Clause. This matter comes before the court on Ms. Koontz's Motion for Preliminary Injunction (Doc. 3). The parties have briefed the issue fully and presented oral argument on it.

Judging the constitutionality of democratically enacted laws is among "the gravest and most delicate" enterprises a federal court ever undertakes. *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring). But just as surely, following precedent is a core component of the rule of law. When the Supreme Court or our Circuit has established a clear rule of law, our court must follow it. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). As this Order explains, the Supreme Court has held that the First

Amendment protects the right to participate in a boycott like the one punished by the Kansas law. The court thus grants plaintiff's motion and imposes the preliminary injunction specified at the end of this Order.

I. Facts

House Bill 2409

In June 2017, Kansas enacted House Bill 2409 ("the Kansas Law"). This law requires all state contractors to certify that they are not engaged in a boycott of Israel. Kan. Stat. Ann. § 75-3740f(a). The Kansas Law defines a "boycott" as:

> [E]ngaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with persons or entities doing business in Israel or in territories controlled by Israel, if those actions are taken either: (1) In compliance with or adherence to calls for a boycott of Israel other than those boycotts to which 50 U.S.C. § 4607(c)[1] applies; or (2) in a manner that discriminates on the basis of nationality, national origin or religion, and that is not based on a valid business reason . . . .

Id. § 75-3740e(a). The Kansas Law also allows the Secretary of Administration for the State of Kansas to waive this requirement "if the secretary determines that compliance is not practicable." *Id.* § 75-3740f(c). The Kansas Law took effect on July 1, 2017. 2017 Kan. Sess. Laws 1126.

Multiple legislators made statements during debate about the Kansas Law that its purpose was to stop people from antagonizing Israel. And multiple private individuals testified to the same effect. Several individuals emphasized the need to oppose "Boycott, Divestment, Sanctions" campaigns, which protest the Israeli government's treatment of Palestinians in the occupied Palestinian territories and Israel by applying economic pressure to Israel. During a

[1] This federal provision preempts state law from contradicting a federal statute prohibiting certain types of boycotts. *See* 50 U.S.C. § 4607(a)(1). Plaintiff does not assert that the Kansas Law conflicts with the federal provision.

committee hearing about the bill[2] that became the Kansas Law, the Director of Marketing and Research for the Kansas Department of Commerce testified that Israel and Kansas are substantial trading partners. The Department of Commerce calculated that in 2016, Kansas exported $56 million worth of commodities to Israel while importing $83 million from Israel. The Kansas Law's fiscal note asserted that the Kansas Law would not affect the Kansas state government fiscally.

Plaintiff's Boycott of Israel

In May 2017, plaintiff Esther Koontz began boycotting Israeli businesses. She first became motivated to boycott Israel in 2016 when she saw a presentation about conditions in Israel and Palestine. And on July 6, 2017, Mennonite Church USA passed a resolution calling on Mennonites to take steps to redress the injustice and violence that both Palestinians and Israelis have experienced. Ms. Koontz is a member of a Mennonite Church organization. Specifically, this organization's resolution called on Mennonites to boycott products associated with Israel's occupation of Palestine. As a consequence, plaintiff decided she would not buy any products or services from Israeli companies or from any company who operates in Israeli-occupied Palestine.

Plaintiff's Efforts to Contract with Kansas

Plaintiff is a curriculum coach at a public school in Wichita, Kansas. As part of her regular duties, she supports her school's curriculum and teaches teachers how to implement it. Before she began working in this position, plaintiff taught math in the Wichita public schools. During the 2016-17 academic year, the Kansas State Department of Education ("KSDE") selected plaintiff to participate as a teacher trainer in KSDE's Math and Science Partnership program. In this program, KSDE contracts with professional educators to provide coaching and

[2] House Bill 2409

training to public school math and science teachers throughout Kansas. Plaintiff wants to participate in the program, both to enhance her career and earn extra spending money. Plaintiff would have earned an extra $600 per day (plus travel expenses) for each training she gives.

On May 31, 2017, plaintiff successfully completed the requisite training to serve as trainer for the program. Shortly afterward, the program director for the Math and Science Partnership, Melissa Fast, began sending plaintiff travel requests asking her to lead training programs for other teachers. Plaintiff said she was willing to conduct three of the trainings that Ms. Fast initially offered her. In the future, plaintiff asserts, she would like to do as many training sessions as she can.

On July 10, 2017, the program director asked Ms. Koontz to sign a certification confirming that she was not participating in a boycott of Israel, as the Kansas Law requires. Initially, plaintiff did not respond because she wanted to consider her options. On August 9, 2017, plaintiff emailed the program director and told her that she had decided to refuse to sign the certification. The program director responded that Kansas could not pay plaintiff as a contractor unless she signed the certification.

Despite plaintiff's eligibility and interest in participating in the Math and Science Partnership program, the KSDE declined to contract with plaintiff because she would not sign the certification. But in this case, defendant Randall D. Watson[3] submitted an affidavit from the Secretary of Administration, Sarah Shipman. It asserts that Secretary Shipman would have waived the certification requirement if plaintiff had asked her to do so. It is undisputed that plaintiff did not apply for the waiver authorized by Kan. Stat. Ann. § 75-3740f(c).

[3] Randall Watson is the Kansas Commissioner of Education and the Chief Administrative Officer of the KSDE. He is charged with enforcing compliance with the Kansas Law for all KSDE independent contractors.

II. Ripeness

Before the court can reach the merits of plaintiff's motion, it must decide whether her claim is ripe for judicial review. *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1114 (10th Cir. 2008). This ripeness requirement is a component of justiciability. "In order for a claim to be justiciable under Article III [of the Constitution], it must present a live controversy, ripe for determination, advanced in a 'clean-cut and concrete form.'" *Id.* at 1116 (quoting *Renne v. Geary*, 501 U.S. 312, 322 (1991)).[4]

Typically, federal courts "apply a two-factor test to determine whether an issue is ripe." *Id.* These factors evaluate the fitness of "the issue for judicial resolution and the hardship to the parties of withholding judicial consideration." *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir. 1990). But when the claim presents a First Amendment facial challenge, the "ripeness analysis is 'relaxed somewhat' . . . because an unconstitutional law may chill free speech." *Stout*, 519 F.3d at 1116 (quoting *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995)).

The ripeness factors considered in a facial First Amendment challenge case are: "(1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review."

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[4] In a broader sense, the ripeness requirement implicates a federal court's subject matter jurisdiction under Article III's case and controversy clause. *Acorn v. City of Tulsa, Okla.*, 835 F.2d 735, 738 (10th Cir. 1987). When a defendant challenges a claim's ripeness, it is, in effect, a challenge to the court's subject matter jurisdiction. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498–99 (10th Cir. 1995).

Typically, the federal courts view such a challenge as a motion under Fed. R. Civ. P. 12(b)(1). *Id.* at 1499. Here, defendant has not challenged the court's subject matter jurisdiction. Instead, he claims that plaintiff likely will not succeed on the merits because her claim is not ripe. Doc. 11 at 8. But because a claim's ripeness affects the court's subject matter jurisdiction, the court must consider it before deciding any substantive matter. *See Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093 (10th Cir. 2004) ("Before we reach the merits of appellant's claims, we must examine whether the issues raised in this case are ripe for review.").

Richardson, 64 F.3d at 1500. Because these factors are not ones that apply themselves in a self-evident fashion, the next three subsections discuss them at some length.

A. "Hardship to the Parties by Withholding Review"

This first factor requires the court to "ask whether the [Kansas Law] create[s] a 'direct and immediate dilemma for the parties.'" *Stout*, 519 F.3d at 1117 (quoting *Richardson*, 64 F.3d at 1500). *Stout* illustrates how to apply this factor. There, two candidates for popularly elected judicial office challenged two provisions in the Kansas Code of Judicial Conduct. *Id.* at 1111. The provisions prohibited candidates for judicial office from making certain pledges and personally soliciting support for their campaigns. *Id.* Two candidates sued, presenting both a facial and as applied challenge asserting that these restrictions infringed their First Amendment rights of political expression. *Id.* Our court concluded that the claims were ripe and found that plaintiffs likely would succeed on the merits. *Id.* It thus entered a preliminary injunction forbidding enforcement of the provisions. *Id.*

On appeal, *Stout*'s defendants again challenged the ripeness of plaintiffs' claims. *Id.* at 1115–16. They argued that no one had initiated a disciplinary action against the judicial candidates for violating the restrictions and so, "plaintiffs' fears of prosecution are illusory." *Id.* at 1117. The Circuit rejected defendants' argument, reasoning: "So long as the [provisions] remain in effect in their current form, the state is free to initiate such action against candidates [for judicial office]." *Id.* at 1118 (citing *Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987) (explaining that when fear of sanction "is not imaginary or wholly speculative, a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute") (internal citation and quotation omitted)).

The Kansas Law challenged in the current case puts plaintiff in a different posture than the plaintiffs in *Richardson* and *Stout*. Ms. Koontz's boycott of Israel does not expose her to fear of prosecution (as in *Richardson*, 64 F.3d at 1501) or professional discipline (as in *Stout*, 519 F.3d at 1118). Instead, the Kansas Law simply disqualifies plaintiff from eligibility for reaping the benefits of a contract with the State of Kansas that she otherwise would have received, *i.e.*, a contract compensating plaintiff for serving as a trainer for the Math and Science Partnership. But the court concludes that this difference is immaterial. The challenged Kansas Law still imposes a hardship on plaintiff and, potentially, others subject to its disqualifying provision. As long as the Kansas Law "remains in effect in [its] current form, the state is free" to use it to disqualify other contractual aspirants. *Stout*, 519 F.3d at 1118. As in *Stout*, this presents the requisite hardship for purposes of the ripeness analysis.

B. Potential "Chilling Effect of the Challenged Law on First Amendment Liberties"

The second factor of the relaxed ripeness test requires the court to assess "the chilling effect the challenged law may have on First Amendment liberties." *Id.* at 1116 (citing *Richardson*, 64 F.3d at 1499–1500). In its cases applying this factor, the Circuit has expressed an important corollary to it. When the challenged statute is unconstitutionally vague, that vagueness "greatly militates in favor of finding an otherwise premature controversy to be ripe." *Id.* at 1118 (citing *Richardson*, 64 F.3d at 1503). Indeed, the Circuit has observed that a plaintiff "should not have to risk prosecution, under a statute whose scope is unclear, before [her] challenge to the constitutionality of that statute is ripe." *Richardson*, 64 F.3d at 1503.

This corollary, then, frames the threshold question under this second factor: Is the Kansas Law challenged here vague? In one sense, it is not. It imposes a bright line rule. All prospective contractors must certify to Kansas that they are not boycotting Israel. *See* Kan. Stat.

Ann § 75-3704f(a). If they don't so certify, they can't contract with the state. But a second aspect of the Kansas Law injects a significant degree of uncertainty. This provision authorizes the Kansas Secretary of Administration to waive the Kansas Law's certification requirement "if the secretary determines that compliance is not *practicable*." *Id.* § 75-3704f(c) (emphasis added).

When is compliance "not practicable?" The Kansas Law does not say. Indeed, it provides no guidance about the meaning intended for this important term. Defendant's Opposition to plaintiff's injunction motion (Doc. 11) is mum on the subject as well. It never mentions the issue at all. But at oral argument, defense counsel described the standard applied to date by Kansas's Secretary of Administration. The Secretary has received, defense counsel represented, a few requests to waive the certification requirement. Some requests were submitted by putative contractors who asserted that they just didn't "want to fill out another government form and deal with the state government to be a contractor." Counsel argued that the Secretary reasonably had determined it was "practicable" for these stubborn applicants to comply with the Kansas Law's certification requirement. Counsel contrasted this kind of contractor with Ms. Koontz. He explained that the plaintiff is "a member of a church, a church [where] there's a religious belief that would oppose doing business with Israel." So, defense counsel asserted, the Secretary of Administration "would grant the waiver when presented with evidence; [but] not [grant a waiver to a contractor who] just [said,] 'I don't want to do it.'"

The court is not yet prepared to decide the constitutional sufficiency of such a malleable, uncertain definition for a term so central to the Kansas Law and to the ripeness analysis of plaintiff's claim. But the court has sufficient information to decide that "the arguable vagueness of [the Kansas Law] greatly militates in favor of a finding of ripeness." *Stout*, 519 F.3d at 1118.

A potential contractor "should not have to risk [exclusion], under a statute whose scope is unclear, before [her] challenge to the constitutionality of that statute [becomes] ripe." *Richardson*, 64 F.3d at 1503. As in *Richardson* and *Stout*, this "potential vagueness" may increase the hardship to plaintiff and others, and the generalized chilling effect on speech. *Id.* The court thus concludes that this second factor also favors a finding that plaintiff's claim is ripe for adjudication.

C. Fitness of the Controversy for Judicial Review

The third and final factor of the relaxed ripeness test considers whether the controversy presented by plaintiff's claim is one fit for judicial review. *Stout*, 519 F.3d at 1116. Our Circuit explained that this factor focuses on "whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed." *Richardson*, 64 F.3d at 1499. Also, the Circuit has held, a "[F]irst [A]mendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *ACORN v. City of Tulsa, Okla.*, 835 F.2d 735, 740 (10th Cir. 1987); *accord Awad v. Ziriax*, 670 F.3d 1111, 1124–25 (10th Cir. 2012). And even when a case presents an as applied challenge, it is fit for judicial review if "the facts of the case are relatively uncontested." *Stout*, 519 F.3d at 1118.

Here, Ms. Koontz presents a facial challenge to the Kansas Law under the First Amendment. This brings it within the holding in *ACORN* and *Awad*. And even if one construed the case's claims as ones presenting only an as applied challenge—which the court does not—the facts controlling that analysis are not disputed materially.

D. *ACORN v. Tulsa*

While sections A, B, and C complete the analysis required by the three-part relaxed ripeness test, the court devotes a fourth section to the ripeness discussion in *ACORN v. Tulsa.*

835 F.2d 735. It does so because the Circuit's discussion there is particularly informative about the correct analysis here.

In *ACORN*, the plaintiffs brought a facial First Amendment challenge to an ordinance adopted by the City of Tulsa, Oklahoma. *Id.* at 738. The challenged ordinance prohibited public gatherings in public parks and also forbade posting signs in parks without approval by the Tulsa Park and Recreation Board. *Id.* at 736. Plaintiffs had made plans to protest in one of Tulsa's city parks but various city officials told them that only the Park and Recreation Board could approve their planned protest. *Id.* at 737–38. Plaintiffs never asked that board for permission to protest in the park and, instead, conducted their protest gathering on private property. *Id.* at 738. Afterward, plaintiffs sued the city, alleging that the ordinance violated the First Amendment on its face. *Id.* Their suit sought to recover damages for past harm and also asked to enjoin future enforcement of the ordinance. *Id.*

The district court held plaintiffs' challenge was not ripe for judicial review because the plaintiffs never had asked the Park and Recreation Board for permission to protest in the park. *Id.* The Tenth Circuit disagreed. It held that a request seeking the board's permission to protest in the park was not a prerequisite to filing suit. *Id.* at 739. It emphasized, "'applying for and being denied a license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law.'" *Id.* (quoting *ACORN v. Golden*, 744 F.2d 739, 744 (10th Cir. 1984)). *ACORN* also noted that Tulsa's ordinance was chilling plaintiffs' speech rights because the city could prosecute them for conduct that violated the ordinance. And the suit presented a clearly framed legal issue: whether the ordinance was unconstitutional, regardless of how Tulsa enforced it. *Id.* Reasoning that the case presented a strictly legal question and the ordinance

could cause an irretrievable loss of speech rights, the Circuit held the case was ripe for review. *Id.* It thus reversed the district court's ripeness determination.

Defendant's ripeness argument here contradicts *ACORN*. He argues that plaintiff's challenge to the Kansas Law is not ripe because she never asked the Secretary of Administration to waive the certification requirement. He also supplies evidence—an affidavit from the Secretary of Administration—asserting that the Secretary would have granted the waiver if plaintiff only had asked. But *ACORN* squarely held that "applying for and being denied a license or exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law." *Id.* Plaintiff's challenge presents a facial challenge to the Kansas Law and so, *ACORN*'s holding excuses plaintiff from applying for an exemption.[5]

E. Conclusion: Plaintiff's Claim is Ripe for Judicial Review

The court concludes that Ms. Koontz's First Amendment challenge to the Kansas Law is ripe for judicial review under the relaxed ripeness test applied to facial challenges under the First Amendment. It thus rejects defendant's arguments to the contrary.

III. Mootness

Defendant's memorandum opposing plaintiff's injunction motion also references mootness.[6] While it is not clear, it appears that he referenced mootness merely as an adjunct to his ripeness defense. *See* Doc. 11 at 10–11 (arguing that had plaintiff requested a waiver under

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[5] Defendant primarily relies on *Levin v. South Carolina Department of Health & Human Services*, 12-CV-0007, 2015 WL 1186370 (D.S.C. Mar. 16, 2015), for his ripeness argument. But it is of no consequence here. The plaintiff in *Levin* presented no First Amendment challenges—facial, as applied, or otherwise. So, as one would expect, *Levin* applied the two-part test generally applied to assess ripeness. *See id.* at *9 (considering "(1) fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration"); *see also Yeutter*, 911 F.2d at 1415 (summarizing the two-part ripeness test typically applied). *Levin* did not apply or even mention the relaxed ripeness test applied in First Amendment cases like this one.

[6] Even if defendant does not present a mootness challenge, the court has a duty to assure itself that a case is not moot because, like ripeness, mootness is a jurisdictional prerequisite that the court must determine before proceeding. *Jordan v. Sosa*, 654 F.3d 1012, 1023 (10th Cir. 2011) ("The mootness doctrine provides that although there may be an actual and justiciable controversy at the time the litigation is commenced, once that controversy ceases to exist, the federal court must dismiss the action for want of jurisdiction." (internal quotation omitted)).

the Kansas Law, the Secretary of Administration would have granted it and thus mooted the entire dispute).

The mootness doctrine is "grounded in the requirement that any case or dispute that is presented to a federal court be definite, concrete and amenable to specific relief." *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) (emphasis omitted). These requirements derive from Article III's case or controversy clause, which requires that "'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)).

While it is not entirely clear, it seems that defendant may have intended to invoke the voluntary cessation doctrine. Under it, a defendant cannot moot a case by voluntary ceasing the allegedly wrongful conduct if the defendant could engage in the conduct again after a court would dismiss a case challenging it. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

Here, the affidavit from the Secretary of Administration asserts that she would have granted plaintiff a waiver of the certification requirement. But dismissing the case because defendant gave a waiver to plaintiff still would permit defendant to deny a waiver to others, or revoke a waiver given to plaintiff after the court dismisses her suit. These actions would prevent the court from reviewing the constitutionality of the Kansas Law, which is what the voluntary cessation doctrine aims to prevent. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("We have recognized, however, that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop

when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." (internal citation omitted)).

Here, defendant never asserts that he permanently will abandon enforcement of the Kansas Law's certification requirement. Given this, the dispute presented by plaintiff's Complaint presents a "definite, concrete and amenable to specific relief" claim. *Jordan*, 654 F.3d at 1024. The claim is not moot.

IV. The Preliminary Injunction Analysis

Having concluded that Ms. Koontz's challenge to the Kansas Law presents a claim that is ripe but not moot, the court now turns to the merits of the pending motion. This motion seeks a preliminary injunction pending a final judgment in the case. Specifically, plaintiff asks for an order that temporarily enjoins defendant from enforcing the requirement established in Kan. Stat. Ann. § 75-3740f—or any other like Kansas law, policy, or practice—that state contractors must declare they are not boycotting Israel. The court begins its analysis of this request for relief with an overview of the requisite showing. It then applies that standard to the request made by plaintiff's motion.

A. The Showing a Party Must Make to Deserve a Preliminary Injunction

Federal Rule of Civil Procedure 65(a) authorizes district courts to issue preliminary injunctions. The relief afforded under this rule has a limited purpose—a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The Tenth Circuit has specified the following standard for district courts to follow when deciding whether to issue a preliminary injunction:

> "To obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will

> suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in the moving party's favor; and (4) the preliminary injunction is in the public interest."

Verlo v. Martinez, 820 F.3d 1113, 1126 (10th Cir. 2016) (quoting *Republican Party of N.M. v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013)). The court has discretion to decide whether to grant a preliminary injunction. *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (citations omitted). "[The Tenth Circuit] reviews a district court's grant of a preliminary injunction for abuse of discretion." *Verlo*, 820 F.3d at 1124 (internal quotation omitted). "'A district court abuses its discretion when it commits an error of law or makes clearly erroneous factual findings.'" *Id.* (quoting *Moser*, 747 F.3d at 822).

A preliminary injunction is an extraordinary remedy. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). So, the right to such relief must be "clear and unequivocal." *Petrella v. Brownback*, 787 F.3d 1242, 1256 (10th Cir. 2015) (quoting *Beltronics, USA, Inc.*, 562 F.3d at 1070). "In general, 'a preliminary injunction . . . is the exception rather than the rule.'" *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007) (quoting *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984)).

The parties here agree about some things. For example, they agree about the facts. They also agree that plaintiff must make the four showings required by *Verlo v. Martinez*, among other cases. But predictably, they disagree sharply about how the court should apply those four requirements.

For one, defendant argues that a preliminary injunction here would alter the status quo—not preserve it—thus increasing plaintiff's burden. Specifically, defendant contends, when a district court considers a preliminary injunction that would alter the status quo, the court must "closely scrutinize[] [the movant's request] to assure that the exigencies of the case support the

granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc). While it is unclear whether the requested injunction would alter the status quo in the way the cases apply this term of art, the court need not resolve that question to decide the motion. As the following analysis explains, the court concludes that plaintiff meets even the heavier burden that defendant advocates. The court thus assumes, without deciding, that the requested preliminary injunction would alter the status quo. It thus "closely scrutinizes" Ms. Koontz's request for a preliminary injunction.

1. Is plaintiff likely to succeed on the merits of her claim?

Plaintiff asserts that by enforcing the Kansas Law, defendant is violating 42 U.S.C. § 1983. A defendant is liable under § 1983 if he deprives a person of a constitutional right under color of state law. 42 U.S.C. § 1983. Neither party contests that defendant is acting under color of state law. But the parties contest whether defendant has deprived plaintiff of a constitutional right.

Plaintiff asserts a variety of legal theories that show defendant is depriving plaintiff of a constitutional right. *See* Doc. 4 at 10–23. But the court concludes it must address just one of them to decide the current motion.

Under the First Amendment,[7] states cannot retaliate or impose conditions on an independent contractor "'on a basis that infringes his constitutionally protected freedom of speech.'" *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (alteration omitted). To determine whether a state is infringing on an independent contractor's rights under the First Amendment,

[7] The First Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014) (citations omitted).

courts use the same guidelines developed in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968), and its progeny. *Umbehr*, 518 U.S. at 678.

The *Pickering* test requires plaintiff to show, first, that the First Amendment protects the conduct that she claims led to the state denying a benefit. *Id.* at 675. If the plaintiff succeeds on this showing, the government can justify its decision by showing that "legitimate countervailing government interests are sufficiently strong" to justify its encroachment. *Id.* Under the *Pickering* test, when a law has a widespread effect and the potential to chill speech before it happens, the government must show the speech's "'necessary impact on the actual operation'" of the government outweighs the interests of the speakers and their audiences. *United States v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 468 (1995) (quoting *Pickering*, 391 U.S. at 571) (holding that a governmental ban on employees receiving academic honorary degrees was unconstitutional). To make this showing, the government must establish a real harm that the law will alleviate directly. *Id.* at 475.

Plaintiff here has met her initial burden. The First Amendment protects the right to participate in a boycott as the Supreme Court held explicitly in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

In *Claiborne*, defendants—supporters of civil rights—organized a boycott of all white merchants after city and county officials had refused defendants' demands for racial equality. *Id.* at 899–900. Plaintiffs—a group of white merchants—sued in Mississippi state court seeking to recover damages they had lost because of the boycott. *Id.* at 889. After an eight-month trial, the judge imposed liability on the boycotters under three distinct conspiracy theories. *Id.* at 890–91. All three sounded in state law. *Id.* at 891. The state trial court also rejected the boycotters'

argument that the First Amendment prohibited the court from imposing liability on them based on their boycott. *Id.* at 891–92. The Mississippi Supreme Court affirmed the trial court's imposition of liability and again rejected the defendants' argument that the First Amendment protected them from liability. *Id.* at 895.

The Supreme Court granted certiorari and reversed the Mississippi Supreme Court. *Id.* at 912. The Court emphasized, "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. While states broadly can regulate boycotts that aim to suppress competition or target companies involved with labor disputes, *id.* at 912, their regulatory power over boycotts is limited when the boycott's main purpose is to influence governmental action, *id.* at 914.

The Supreme Court explained that the boycott at issue in *Claiborne* included many elements. *Id.* at 907. Participants met with other likeminded individuals to organize and discuss the boycott. *Id.* They supported the boycott with speeches, nonviolent picketing, and encouragement to others to join their cause. *Id.* And all this was done to bring about change in society and government. *Id.* After reviewing the components of the *Claiborne* boycott, the Court noted:

> Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments. The black citizens . . . banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect.

Id. (footnote omitted). This, the Supreme Court held, is a key tenet of the First Amendment. *Id.* at 908.

The same analysis applies to the Kansas Law. The conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in *Claiborne* was protected. Ms.

Koontz, other members of the Mennonite Church, and others have "banded together" to express, collectively, their dissatisfaction with Israel and to influence governmental action. Namely, its organizers have banded together to express collectively their dissatisfaction with the injustice and violence they perceive, as experienced both by Palestinians and Israeli citizens. She and others participating in this boycott of Israel seek to amplify their voices to influence change, as did the boycotters in *Claiborne*. The court concludes that plaintiff has carried her burden on the current motion to establish that she and others are engaged in protected activity.[8]

Ms. Koontz's satisfaction of her initial burden shifts the burden to defendant. *Umbehr*, 518 U.S. at 675. He must show that Kansas has a strong, legitimate interest in enforcing the Kansas Law. *Id.* Defendant fails to meet his burden.

When evaluating whether a law serves a compelling governmental purpose, a court must inquire into the circumstances of the law's enactment. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1132 (10th Cir. 2012). The Kansas Law's legislative history reveals that its goal is to undermine the message of those participating in a boycott of Israel. This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are impermissible goals under the First Amendment. *See Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment

[8] In some respects, the issue here is easier than the one in *Claiborne*. In that case, some of the boycotters had exerted discipline against persons who refused to join their boycott. *Id.* at 903–04. Some of this discipline directed illegal, violent conduct at persons who refused to join the boycott, *i.e.*, shots fired at a house, a brick thrown through a car's windshield, and some whiskey being stolen. *Id.* at 904–05. As the Court emphasized, "The First Amendment does not protect violence." *Id.* at 916 (citing *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglass, J., concurring) ("Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy."). But violent, illegal, conduct by some boycotters did not strip other, legal conduct of its protected characteristic. *Id.* at 908 ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."). Here, no one contends that Ms. Koontz or her fellow boycotters have done anything illegal or violent. To say it simply, the boycott here does not present any of the complicating facts present in *Claiborne*.

means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

The Kansas Law also aims to minimize any discomfort that Israeli businesses may feel from the boycotts. This, too, is an impermissible goal. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))).

But even if one assumed that Kansas had passed the law to achieve constitutionally permissible goals that would not change the outcome here. It is still unconstitutional because it is not narrowly tailored to achieve those permissive goals. If Kansas had passed its law to regulate boycotts intended to suppress economic competition coming from Israel—a goal that *Claiborne* permits[9]—the Kansas Law is overinclusive. It is overinclusive because it also bans political boycotts, which is impermissible. *See Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). Likewise, if the Kansas Law's goal is to promote trade relations with Israel—also a permissible goal—the Kansas Law is underinclusive because it only regulates boycotts but does not regulate other conduct that affects trade.

The authority the Kansas Law grants the Secretary of Administration to waive the certification requirement also undermines any rationale offered by defendant. As the Supreme Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), "Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52.

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[9] *See* 458 U.S. at 912 ("The right of business entities to 'associate' to suppress competition may be curtailed [by states].").

The defendant's written Opposition to plaintiff's injunction motion never argued the constitutionality of the Kansas Law. At the hearing on the motion, the court asked defense counsel to address this omission. He did. When asked whether there was an argument to be made that the Kansas Law is indeed constitutional, defense counsel said there was. He cited *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

In *Rumsfeld*, the Congress had enacted a law requiring a law school, to be eligible for federal funding, to "offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." *Id.* at 55. Arguing that the law violated the First Amendment, a group of law schools sued. *Id.* at 51. They argued that the law made them choose between receiving federal funding and allowing the military to recruit on campus. *Id.* at 53. According to the law schools, this amounted to the law compelling the schools to speak a certain message, in violation of the First Amendment. *Id.*

The Supreme Court disagreed. *Id.* at 60. The law schools argued that the law forced them to speak by "send[ing] e-mails or post[ing] notices on bulletin boards on an employer's behalf." *Id.* at 61. But the Supreme Court concluded that this speech was incidental to the law's regulation of conduct. *Id.* at 62. And the government can regulate conduct under the First Amendment so long as the conduct is not inherently expressive. *Id.* at 65–66. Conduct is inherently expressive when someone understands that the conduct is expressing an idea without any spoken or written explanation. *Id.* at 66 (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding that the First Amendment protects a person's right to burn the flag because a person understands this conduct expressed disdain of an idea)). The Court concluded that the law schools' refusal to allow military recruiters to recruit on campus was not expressive of an idea.

Id. It reasoned that people could understand that the schools were expressing an idea only if the schools explicitly explained why the military recruiters were off-campus. *Id.* at 66.

The Supreme Court also concluded that the law did not force the law schools to host or accommodate the military's message. *Id.* at 64. The Court noted that in some circumstances, the Court had struck down laws that forced private parties to accommodate a message they opposed. *Id.* at 63. But the Supreme Court explained that in every one of those cases, the "speaker's own message was affected by the speech it was forced to accommodate." *Id.* For instance, a law requiring parade organizers to include a certain group altered the parade organizer's speech because "'every participating [group] affects the message conveyed by the parade's private organizers . . . .'" *Id.* (internal bracket omitted) (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 572–73 (1995)). In contrast to parades, hosting employment interviews and holding recruiting receptions lacked an expressive quality. *Id.* at 64.

The Kansas Law here is different than the requirement at issue in *Rumsfeld*. The conduct the Kansas Law aims to regulate is inherently expressive. *See Claiborne*, 458 U.S. at 907–08. It is easy enough to associate plaintiff's conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians. And boycotts—like parades—have an expressive quality. *Id.* Forcing plaintiff to disown her boycott is akin to forcing plaintiff to accommodate Kansas's message of support for Israel. Because the Kansas Law regulates inherently expressive conduct and forces plaintiff to accommodate Kansas's message, it is unlike the law at issue in *Rumsfeld*. The court thus finds defendant's reliance on *Rumsfeld* misplaced.

In sum, the court holds that plaintiff is likely to succeed on the merits. This is so even if—as defendant contends—a preliminary injunction would alter the status quo. The court has

"closely scrutinized [plaintiff's] request" and concludes "that the exigencies of the case support granting" this extraordinary remedy. *O Centro Espirita*, 389 F.3d at 975.

2. Will plaintiff suffer irreparable harm if the court does not grant an injunction?

Next, plaintiff must establish that she will sustain irreparable harm absent a preliminary injunction. *Verlo*, 820 F.3d at 1126. To show irreparable harm, plaintiff must show that her injury is certain, great, and not "merely serious or substantial." *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008). Economic loss "usually does not, in and of itself, constitute irreparable harm." *Id.* (internal quotation and citation omitted).

Ms. Koontz asserts that the analysis is simple. She is correct. The Supreme Court squarely has decided this point. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)). *Elrod* demonstrates this principle's vitality. In *Elrod*, the Republican Sheriff of Cook County, Illinois was replaced by a Democrat. *Id.* at 350. The new Sheriff discharged plaintiffs, all Republicans and non-civil service employees of the Sheriff's office and thus unprotected from arbitrary discharge. *Id.* at 351. This conformed to a long-standing practice where a newly installed Sheriff typically required such employees to join the new Sheriff's political party or face dismissal. *Id.* Plaintiffs challenged their dismissal—or, for one plaintiff, his looming dismissal—in federal court. They claimed that it encroached on freedoms protected by the First Amendment. *Id.* For relief, they sought a preliminary injunction. *Id.*

The district court declined to issue a preliminary injunction, reasoning that loss of employment did not constitute irreparable harm. *Id.* at 373. Such loss, if later proved to be unconstitutional, could be compensated with back pay, which would be an adequate remedy. *Id.*

The Seventh Circuit disagreed, and directed the district court to issue the injunction. *Id.* The Supreme Court affirmed the Circuit's decision. *Id.* The Court explained, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* The Court held that the plaintiffs lost those freedoms when the defendant fired them because of their political beliefs. *Id.* at 374.

Defendant here makes a similar argument to the one discredited in *Elrod*. He argues that Ms. Koontz will not sustain irreparable harm if the Kansas Law's certification requirement is left in place while the case is adjudicated on the merits. Defendant says that plaintiff can present evidence about the number of training sessions she would have conducted. And since each session fetches a payment of $600, simple math will permit a damage award to make her whole—assuming the court concludes that defendant has disenfranchised her constitutional rights.

While this argument has a pragmatic appeal, it is not one the First Amendment will abide. As referenced above, the Supreme Court already has decided the question. *See id.* at 373. This is so because "[t]he timeliness of political speech is particularly important . . . . '[It] enable[s] every citizen at any time to bring the government and any person in authority to the bar of public opinion . . . ." *Id.* at 373 n.29 (internal quotation and brackets omitted) (quoting *Wood v. Georgia*, 370 U.S. 375, 392 (1962) (further citation omitted)).

Nor will the pragmatic appeal of defendant's argument withstand closer scrutiny. Ms. Koontz has sued defendant in his official capacity. Doc. 1 ¶ 7. The Eleventh Amendment forbids recovery of damages in federal court suits against state officials sued in their official capacity. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (holding a movant for preliminary injunction would sustain irreparable harm because sovereign

immunity would bar damage recovery). Our Circuit long has recognized that an award of money damages that the plaintiff cannot recover "for reasons such as sovereign immunity constitutes irreparable injury." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (collecting cases).

Defendant also argues that plaintiff's harm is not imminent because she already has refused to sign the certification. And, defendant argues, any future trainings plaintiff might give are speculative. To support his argument, defendant cites *Pinson v. Pacheco*, 397 F. App'x 488 (10th Cir. 2010), and *Schrier v. University of Colorado*, 427 F.3d 1253 (10th Cir. 2005). But his faith in those cases is misplaced. They are materially different.

In *Pinson*, the Tenth Circuit held that a movant for a preliminary injunction had failed to show irreparable harm. *Id.* at 492. The movant claimed that he would sustain irreparable harm because federal prison officials had refused to honor his request not to be housed in the same institution as prisoners "'who pose a known, specific risk of harm toward [p]laintiff.'" *Id.* (quoting the motion for preliminary injunction). Because plaintiff produced no specific evidence of any threats towards him in the institution where the officials placed him, *Pinson* held simply that the harm alleged by plaintiff was speculative. *Id.*

In *Schrier*, the district court denied plaintiff's preliminary injunction motion. 427 F.3d at 1267. The injunction he sought, if granted, would have required defendant to reinstate plaintiff in his former job after defendant had terminated plaintiff's employment, allegedly because of plaintiff's speech. *Id.* The Tenth Circuit affirmed the district court's decision not to grant the injunction, in part, because plaintiff had failed to show irreparable harm. *Id.* The Tenth Circuit concluded that the harms already had occurred and the injunction could not cure them. *Id.* And

also, plaintiff failed to show that defendant's action violated his First Amendment rights. *Id.* at 1266. The harm thus was not imminent. *Id.* at 1267.

Here, defendant's argument focuses on the wrong harm. Plaintiff's harm stems not from her decision to refuse to sign the certification, but rather from the plainly unconstitutional choice the Kansas Law forces plaintiff to make: She either can contract with the state or she can support a boycott of Israel. Her harm is ongoing because the Kansas Law is currently chilling plaintiff's and other putative state contractors' speech rights.

In short, the court finds that Ms. Koontz has shown that she will sustain irreparable harm unless the court enjoins defendant from enforcing the Kansas Law's certification requirement. She thus has shouldered her burden on the second element of the injunction standard.

3. Does plaintiff's irreparable harm outweigh any harm defendant will sustain if the court grants the preliminary injunction?

Plaintiff next argues that her irreparable harm outweighs any harm defendant would bear if the court issued a preliminary injunction. Plaintiff asserts that defendant "does not have an interest in enforcing a law that is likely constitutionally infirm." *See Edmondson*, 594 F.3d at 771. Plaintiff also argues that a preliminary injunction against the Kansas Law would maintain the status quo because the Kansas Law is sufficiently new that any harm to the State of Kansas and defendant is minimal. On the other hand, plaintiff argues that she and other state contractors will suffer great harm because defendant is depriving them of a constitutional right.

Defendant argues that plaintiff has not shown any imminent or threatened injury and an injunction will harm Kansas and defendant greatly. Defendant notes that in 2016, Kansas exported more than $56 million worth of goods to Israel and imported more than $83 million worth of goods. Defendant fears that enjoining the Kansas Law will cause Israeli companies to refuse to do business in Kansas, or with Kansas companies, and thus harm the Kansas economy.

Defendant's argument is not persuasive. Defendant adduced no evidence that Israeli companies will refuse to do business in or with the State of Kansas unless its ban against Israeli boycotts is enforced. And defendant has not forwarded any evidence that Kansas commerce has increased because of, or in anticipation of, the boycott ban. If such evidence existed, one would expect the defense to have access to it and have presented it. It didn't.

After balancing the relative harms imposed by a preliminary injunction, the court finds that the continuing harm to plaintiff's First Amendment rights—and those of persons similarly situated—outweighs defendant's speculative suggestion that an injunction will harm him, the State of Kansas, or Kansas merchants. Ms. Koontz has carried her burden on this third part of the injunction test.

4. Is the requested injunction adverse to the public harm?

The fourth and final touchstone of the preliminary injunction standard requires the injunction's proponent to show that it will not be adverse to the public interest. Plaintiff argues that a preliminary injunction will serve the public interest because it will protect constitutional rights. *See Edmunson*, 594 F.3d at 771 ("'[T]he public interest will [certainly] be served by enjoining the enforcement of the invalid provisions of state law.'" (quoting *Bank One, Utah v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999))).

Defendant argues that an injunction will not serve the public interest because Israel is an important trade partner, as explained above. Defendant also argues that it is in the public interest to enforce a law that prevents Kansans from discriminating against foreign companies doing business in Kansas. Last, defendant argues that enforcing the Kansas Law is in the public interest because the Kansas Law passed the Kansas House 99 to 13 and the Kansas Senate 36 to 3.

Here, the court already has concluded that it is highly likely that the Kansas Law is invalid and thus enjoining it will protect a constitutional right. *See supra*, Part IV.A.1. Defendant has failed to produce evidence that an injunction will affect Kansas's relationship with Israeli companies. While the Kansas Law may have been passed by the legislature with flying colors, that showing merely would demonstrate that one state legislature had enacted a statute. Such a showing would not place the Kansas Law on the same level as an amendment to our Constitution—the very first amendment adopted by our founders and one ratified by three fourths of our states. *See* U.S. Const. art. V. A desire to prevent discrimination against Israeli businesses is an insufficient public interest to overcome the public's interest in protecting a constitutional right. The court finds that an injunction will serve the public interest.

V. Conclusion

For reasons explained above, the court grants plaintiff's Motion for Preliminary Injunction (Doc. 3).

IT IS THEREFORE ORDERED THAT plaintiff's Motion for Preliminary Injunction (Doc. 3) is granted. Defendant is preliminarily enjoined from enforcing Kan. Stat. Ann. § 75-3740f and any other Kansas statute, law, policy, or practice that requires independent contractors to declare that they are not participating in a boycott of Israel. Pending further order from this court, the court enjoins defendant from requiring any independent contractor to sign a certification that they are not participating in a boycott of Israel as a condition of contracting with the State of Kansas.

IT IS FURTHER ORDERED THAT the parties must meet and confer to discuss a proposed schedule for the remainder of this case. Counsel for the parties are directed to contact the chambers of United States Magistrate Judge K. Gary Sebelius to request a Scheduling

Conference to govern the remainder of the case. Counsel may either call his chambers at 785-338-5480 or email ksd_sebelius_chambers@ksd.uscourts.gov.

IT IS SO ORDERED.

Dated this 30th day of January, 2018, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

EXHIBIT 2

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

AMERICAN MUSLIMS FOR PALESTINE and **DR. HATEM BAZIAN** Plaintiffs, vs. **ARIZONA STATE UNIVERSITY; ARIZONA BOARD OF REGENTS**; and **MARK BRNOVICH**, in his official capacity as Attorney General of Arizona Defendants.	Case No. **COMPLAINT AND JURY DEMAND**

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INTRODUCTION

1. The First Amendment protects the rights of all speakers to advocate for all viewpoints on issues of public concern. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

2. The conflict between Israel and Palestine is a longstanding issue of considerable public concern, both in the United States and internationally, to which politicians, professionals, and the press dedicate considerable energy and resources.

3. In 2016, the State of Arizona chose to categorically take Israel's side in this international conflict by adopting Ariz. Rev. Stat. § 35-393. This Act bars the State of Arizona from entering into government contracts with companies or persons who engage in or advocate for economic boycotts of Israel.

4. On February 22, 2018 the Muslim Students Association of Arizona State University invited American Muslims for Palestine and Dr. Hatem Bazian to speak at an April 3, 2018 educational event regarding Palestinian perspectives on Middle East conflict, including the Boycott, Divestment and Sanctions Movement. Because of the Act, however, Arizona State University's standard outside speaker contract was amended in 2016 to contain a "No Boycott of Israel" clause. American Muslims for Palestine and Dr. Hatem Bazian cannot agree to that clause. They are therefore barred from presenting at the April 3, 2018 campus event solely because they engage in and advocate for economic boycotts of Israel as a means to promote Palestinians' human rights.

5. Arizona's ban on contracting with any boycotter of Israel constitutes viewpoint discrimination that chills constitutionally-protected political advocacy on behalf of Palestine. This Court should enjoin enforcement of Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause under the First Amendment, thereby permitting Plaintiffs to participate in the Muslim Students Association's event on April 3, 2018.

PARTIES

6. Plaintiff AJP Educational Foundation, Inc., doing business as American Muslims for Palestine, is a 501(c)(3) non-profit organization committed to educating the American public about Palestine's rich heritage while advocating for Palestinian justice. American Muslims for Palestine is headquartered in Bridgeview, Illinois with offices in Washington, D.C. and seven state chapters.

7. Plaintiff Dr. Hatem Bazian is a Professor of Islamic Law and Theology at Zaytuna College, which he cofounded as the first accredited Muslim liberal arts college in the United States. Separately, Dr. Bazian serves as a lecturer and adjunct professor at the University of California, Berkeley, where he earned his Ph.D. Dr. Bazian founded and chairs American Muslims for Palestine. He is also a cofounder of Students for Justice in Palestine. Dr. Bazian is an internationally renowned expert on Islamophobia and a leader of the Boycott, Divestment, and Sanctions ("BDS") movement in America.

8. Defendant Arizona State University ("ASU") is a public university within the Arizona University System, with its flagship campus located in Tempe, Arizona.

9. Defendant Arizona Board of Regents is the governing public body for the Arizona University System, including Arizona State University. The Arizona Board of Regent's principal place of business is located at 2020 N. Central Ave., Suite 230 in Phoenix, Arizona.

10. Defendant Mark Brnovich is the Attorney General of Arizona. The Attorney General's principal office is located at 2005 N. Central Ave in Phoenix, AZ. He is responsible for enforcing and defending the constitutionality of Arizona law. Defendant Brnovich is sued in his official capacity, only.

JURISDICTION & VENUE

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this action arises under federal law, namely the First and Fourteenth Amendments to the U.S. Constitution.

12. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

13. This Court has personal jurisdiction over the Defendants because they reside in this district.

14. A substantial part of the events or omissions giving rise to the claims alleged in this Complaint occurred in this Judicial District. Venue therefore lies in the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1391(b)(2).

FACTUAL BACKGROUND

The Israel – Palestine Conflict is a Fraught Issue of International Importance

15. The relationship between Israel and Palestine is one of the most significant international political conflicts of the modern era. One of the core disputes

within that conflict concerns Israel's continuing occupation and settlement of Palestinian territories, including the West Bank and Golan Heights.

16. On December 23, 2016, the United Nations Security Council unanimously (with the United States abstaining) adopted Resolution 2334. The Resolution condemned Israeli settlements in the Occupied Palestinian Territories, and reaffirmed that continuing settlements "constitute[e] a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace." The Resolution additionally condemned Israeli violence and human rights abuses against Palestinians.

17. A robust international movement seeks to impose economic pressure on Israel to cease its settlement activity in Palestinian Territory. Calling itself "Boycott, Divestment, and Sanctions" or "BDS," the movement seeks the peaceful end of Israeli discrimination against and maltreatment of Palestinians. The BDS movement specifically encourages economic divestment from institutions that are not in compliance with established international law related to the Israeli occupation of Palestine.

18. The United States has historically discouraged Israeli settlements as "inconsistent with international law." Overall, however, U.S. policy strongly supports Israel, and the U.S. and Israel enjoy close political and economic relationships. These friendly relations have tended to soften or mute the United States' criticism of Israeli settlements. The United States abstained from Resolution 2334 due to its political support of Israel, and previously vetoed a similar U.N. Resolution in February 2011.

19. The merits of all perspectives in the Israel-Palestinian conflict and the U.S.'s respective political positions are robustly and publicly debated by leading

politicians, academics, universities, non-profit organizations, businesses, and media organizations in the United States and around the world.

Arizona Passes Anti-Boycott, Divestment, and Sanctions Legislation

20. Because the prevailing political sentiment in the United States favors Israel, many U.S. states, private organizations, and public officials view the Palestinian-led Boycott, Divestment, and Sanctions movement as a threat to U.S.-Israel economic relations and Israel's sovereignty.

21. This political climate has, in recent years, prompted local and state legislatures to consider more than a hundred bills and resolutions aimed at hindering the Boycott, Divestment, and Sanctions movement. At least twenty-four states have enacted legislation.

22. Arizona is one state to enact anti-Boycott, Divestment, and Sanctions measures. On March 17, 2016, Arizona enacted HB 2617, codified at Ariz. Rev. Stat. § 35-393 *et. seq*. In support of the Act, the legislature found that "Boycotts 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." The Legislature then specifically identified Israel as a subject of threatening boycotts. "The state of Israel is the most prominent target of such boycott activity, beginning with the Arab League Boycott adopted in 1945, even before Israel's declaration of independence as the reestablished national state of the Jewish people."

23. The Legislature concluded that "a company's decision to discriminate against Israel, Israeli entities or entities that do business with Israel or in Israel is an unsound business practice making the company an unduly risky contracting partner or vehicle for investment."

24. Based on these findings, Arizona law now prohibits all public entities from contracting with any company that boycotts Israel, or any person who may induce others to boycott Israel.

25. Specifically, Ariz. Rev. Stat. § 35-393.01 provides:

A. A public entity may not enter 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 company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel.

B. A public entity may not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person or company to boycott Israel.

26. The Act defines "boycott" to include "engaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with Israel." Ariz. Rev. Stat. § 35-393.

27. To comply with this statutory provision, Arizona agencies and public entities including state universities have started including language in their boilerplate contracts which bars boycotts of Israel.

Muslim Students Association Invites Pro-Palestine Speakers to Campus Event

28. The Muslim Students Association at Arizona State University seeks to engage in interfaith and intellectual dialogue. To that end, it regularly hosts events on campus, including inviting guest speakers. Recent events include: (a) a presentation on the "History of Islam in America" by Ustadh Ubaydullah Evans from the American Learning Institute for Muslims; (b) a panel discussion on

"Contemporary Perception of Islam" with Imraan Siddiqi, the Executive Director of CAIR-Arizona, Imam Yaser Ali, a local attorney, and Imam Anas Hlyahel, a contributory author to the popular blog Muslim Matters; and (c) a discussion of "Women in Islam: Beyond the Stereotypes" with Amal Fayad, a local counselor and Naeema Zaman, a local academic.

29. The political climate of the Middle East, including all facets of the Israeli – Palestinian conflict, is of particular interest to the Muslim Students Association and its membership. It is also of interest to other professors and students across campus. For example, Arizona State University houses the School of Politics and Global Studies, the School of Historical, Philosophical, and Religious Studies, the Department of Jewish Studies, the Council for Arabic and Islamic Studies, and the Center for the Study of Religion and Conflict – all of which may be interested in a discussion of Israel and Palestine.

30. Arizona State University is committed to academic freedom, and to providing an open venue for student organizations to invite outside speakers and host educational events on a wide variety of subjects, and from a wide variety of viewpoints. Student organizations have broad authority to create events and choose who to invite to speak. Such presentations do not reflect the views of Arizona State University itself, but rather those of the individual speakers. For example, the ASU chapter of Students for Justice in Palestine has repeatedly hosted an "Apartheid Week." For many years, these students set up a large "Mock Apartheid Wall" on the Hayden Lawn filled with art and educational information regarding Palestinian perspectives on Israel's occupation of Palestinian territories, and Israel's relegation of Palestinians to second-class status.

31. On February 22, 2018, the leadership of the Muslim Students Association invited American Muslims for Palestine and the organization's chairman, Dr. Hatem Bazian, to give a guest educational presentation on campus. The presentation will be on the BDS movement and is scheduled for April 3, 2018.

32. The Muslim Students Association has issued many invitations and scheduled many outside speakers in the past, without incident.

33. To host an event, the Arizona Board of Regents and Arizona State University require that student organizations pre-clear the availability of physical facilities, and that the outside speaker sign the university's standard "Speaker/Artist/Performer Agreement."

34. The standard "Speaker/Artist/Performer Agreement" was amended sometime after passage of Ariz. Rev. Stat. § 35-393 in March 2016. Paragraph 20 of the agreement now reads, in full: "No Boycott of Israel. As required by Arizona Revised Statutes § 35-393.01, Entity certifies it is not currently engaged in a boycott of Israel and will not engage in a boycott of Israel during the term of this Contract."

35. Both American Muslims for Palestine and Dr. Hatem Bazian advocate for boycotts of Israel due to Israel's continuing violations of international law in its treatment of Palestinians. Dr. Hatem Bazian and American Muslims for Palestine intend to use their speaking opportunity at Arizona State University to educate the campus community about the historical context and rationale for the peaceful Palestinian Boycott, Divestment, and Sanctions movement.

36. Neither Dr. Hatem Bazian nor American Muslims for Palestine can or will sign the contract with the "No Boycott of Israel" provision, which is required by state law. As advocates for Palestinian rights and justice, they cannot in good faith

certify or state that they do not boycott Israel, and will not engage in a boycott of Israel.

37. Dr. Hatem Bazian and American Muslims for Palestine would accept the Muslim Students Association's invitation if the "No Boycott of Israel" clause were stricken. They agree to all other contractual terms. The "No Boycott of Israel" provision of the ASU's standard speaker agreement is, to Plaintiffs' knowledge, the only barrier to their participation at the Muslim Student Association's scheduled April 3, 2018 event.

FIRST CAUSE OF ACTION

VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S CONSTITUTION

38. Plaintiffs incorporate all of the above paragraphs as though fully set forth herein.

39. The First Amendment provides: "Congress shall make no law … abridging the freedom of speech, or of the press." U.S. CONST. Amend. I.

40. The First Amendment binds the State of Arizona pursuant to the incorporation doctrine of the Fourteenth Amendment.

41. Political speech on issues of great national and international importance is central to the purposes of the First Amendment. Speech and advocacy related to the Israel – Palestine conflict is core political speech on a matter of public concern entitled to the highest levels of constitutional protection.

42. Economic boycotts for the purposes of bringing about political change are entrenched in American history, beginning with colonial boycotts on British tea. Later, the Civil Rights Movement relied heavily on boycotts to combat racism and

bring about societal change. The Supreme Court has recognized that non-violent boycotts intended to advance civil rights constitute "form[s] of speech or conduct that [are] ordinarily entitled to protection under the First and Fourteenth Amendments." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

43. The First Amendment protects the rights of speakers to call for and participate in economic boycotts as a means of amplifying their message. Joining voices together to participate in and call for political boycotts is protected association under the First Amendment.

44. The Arizona Board of Regents and Arizona State University provide a limited public forum for student organizations and their sponsored educational events. Any "ideologically driven attempts to suppress a particular point of view" within that forum "are presumptively unconstitutional." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995).

45. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause each constitute viewpoint discrimination, because they only bar speech and expression against Israel, and not speech or expression in favor of Israel or against Palestine.

46. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause each constitute content-specific restrictions on speech, because they single out boycotts *of Israel* for disfavored treatment.

47. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause each constitute speaker-specific restrictions on speech, because they single out government contractors who advocate for Palestine and against Israel as specific speakers who warrant disfavored treatment.

48. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause each impose a prior restraint on speech, by requiring speakers to certify in advance that they do not and will not engage in a boycott of Israel.

49. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause each constitute impermissible State attempts to impose conditions on an independent contractor on a basis that infringes constitutionally protected freedom of speech.

50. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause each constitute impermissible State attempts to impose an ideological litmus test or compel speech related to government contractors' political beliefs, associations, and expressions.

51. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause are each substantially overbroad.

52. Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause are each void for vagueness.

53. Both Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause operate to chill the exercise of constitutionally protected speech and associations.

54. The Arizona Attorney General, Arizona Board of Regents, and Arizona State University each lack a compelling or legitimate governmental interest in the enforcement of Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause.

55. Enforcement of Ariz. Rev. Stat. § 35-393 and the "No Boycott of Israel" clause does not constitute the least-restrictive means of fulfilling any state interest.

56. Ariz. Rev. Stat. § 35-393 is facially unconstitutional under the First Amendment and cannot be enforced against anyone by the Arizona Attorney General.

57. Ariz. Rev. Stat. § 35-393, as implemented through the "No Boycott of Israel" clause in the "Speaker/Artist/Performer Agreement" promulgated by the Arizona Board of Regents and Arizona State University, is unconstitutional as applied to Plaintiffs and their plans to present, as Palestinian activist speakers, a campus discussion on the Israel-Palestine conflict with a on April 3, 2018.

58. Absent an injunction, Plaintiffs will suffer irreparable harm because they will be barred by state law and contract from engaging in protected First Amendment speech and association on a matter of public concern. Plaintiffs will be chilled in their discussion of and advocacy for Palestinian rights, and unable to participate in the ASU MSA's April 3, 2018 event.

59. If Defendants are not enjoined from enforcing Ariz. Rev. Stat. § 35-393, and from including the "No Boycott of Israel" clause in state contracts, Plaintiffs and all advocates for Palestine will be effectively prohibited from entering into any agreement with the State of Arizona unless they give up the constitutionally-protected views that are central to their educational and advocacy missions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court enter the following relief:

A. Declare Ariz. Rev. Stat. § 35-393 unconstitutional and unenforceable;

B. Issue judgment in Plaintiffs' favor and against Defendants on all causes of action alleged herein;

C. Grant Plaintiffs a preliminary and permanent injunction striking the "No Boycott of Israel" clause from their contemplated speaker contract with the Arizona Board of Regents and Arizona State University, thereby permitting

them to participate in the Muslim Students Association's planned April 3, 2018 event regarding the BDS movement.

D. Enter a preliminary and permanent injunction against Defendants' inclusion of boycott provisions under Ariz. Rev. Stat. § 35-393 in any state contract, and against Defendant Attorney General's continuing enforcement of Ariz. Rev. Stat. § 35-393.

E. Declare void any "No Boycott of Israel" clause pursuant to Ariz. Rev. Stat. § 35-393 that now exists in any and all contracts between Arizona public entities and private companies or persons.

F. Award Plaintiffs their reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988; and

G. Grant such other and further relief as the Court may deem to be just and proper.

JURY DEMAND

NOW COME Plaintiffs, by and through their undersigned counsel, and hereby demand trial by jury of the above-referenced causes of actions.

Dated this 28th day of February 2018.

CAIR LEGAL DEFENSE FUND

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EXHIBIT 3

Resolution Adopted by the CCAR

South Africa

Adopted by the CCAR at the 98th Annual Convention of the Central Conference of American Rabbis 1987

WHEREAS our prophets and rabbis taught that all human beings are created in the image of God and have an equal claim to equity and justice, and

WHEREAS the Jewish religious tradition and historical experience equate racism with ultimate evil. and

WHEREAS Reform Judaism, throughout its history, has spoken with vigor and clarity against racial segregation and discrimination in the United States and the world, and

WHEREAS South Africa is the only country in the modern world that constitutionally establishes white supremacy and racial oppression, and

WHEREAS apartheid is a system that affronts the most profound values of humanity and democracy and violates the teachings of our religion, and the apartheid regime poses a moral challenge to all who cherish liberty and decency, and

WHEREAS in 1976 the Central Conference of American Rabbis protested against racism and police brutality in South Africa and its dealings with Zimbabwe,

THEREFORE BE IT RESOLVED that the CCAR:

1. Reaffirms its condemnation of apartheid.

2. Calls upon the government of South Africa to release immediately Nelson Mandela and all others imprisoned because of their opposition to apartheid.

3. Calls upon the government of South Africa to enter into negotiations aimed at eliminating apartheid with bona fide representatives of the victims of apartheid.

4. Calls upon the Canadian Parliament and the United States Congress to enact legislation that will ban new business investment and bank loans in South Africa; ban the importation into the United States and Canada of all South African gold coins; ban all sales of U.S. and Canadian equipment with military and police application; ban U.S. and Canadian contributions to South Africa through the International Monetary Fund.

5. Calls upon the governments of the United States and Canada to reduce the level of diplomatic recognition of South Africa.

6. Further calls on the U.S. Congress and the Canadian Parliament, if substantial progress toward the abolition of apartheid does not occur within one year, to enact the following legislation:

divestiture of United States and Canadian assets in South Africa and institution of a trade embargo by the United States and Canada against South Africa.

7. Affirms its fraternal support for the Southern African Union for Progressive Judaism, the Southern African Association of Progressive Rabbis, and the South African Jewish Board of Deputies in their support for fundamental reform of South African life and institutions, their condemnation of violence, and their complete rejection of apartheid.

8. Directs the Executive Board in a manner it deems appropriate and responsible to boycott firms that engage in business in South Africa and have not accepted the Sullivan Principles.

9. Directs the Executive Board to divest the CCAR of all investments in corporations doing business in South Africa.

10. Further recommends that CCAR members urge their congregations and their individual members to cease the purchase of South African gold coins as an immediate, direct, personal and symbolic protest against South Africa's racist and repressive regime.

11. Calls upon the members of the CCAR and their congregations and constituencies to lend moral and substantive support to those in South Africa actually engaged in the non-violent struggle against apartheid:

A. by continuing messages of support and encouragement to individuals such as Beyers Naude, Allan Boesak, Helen Suzmann, Frederick Van Zyl Slabbert, Winnie Mandela, Bishop Desmond Tutu, and others.

B. by establishing a relationship with and contributing to the Legal Resource Center at the University of Wetwatersrand.