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BUCKEYES AGAINST THE BOYCOTT: WHY OHIO’S LAW OPPOSING BDS IS PROTECTED UNDER THE FIRST AMENDMENT

HANNAH KRAUS*

ABSTRACT

In 2016, Ohio became the fourteenth state to enact legislation denouncing the Boycott, Divestment, and Sanctions movement against Israel. Codified as § 9.76 of the Ohio Revised Code, this legislation prohibits any state agency from contracting with a company that boycotts Israel during the contractual period. While the constitutionality of § 9.76 has not been challenged, anti-BDS statutes passed by other state legislatures have faced First Amendment challenges. This Note argues that § 9.76 of the Ohio Revised Code complies with the First Amendment under the government speech doctrine. In 1991, the Supreme Court applied the government speech doctrine in *Rust v. Sullivan* to uphold a restriction on federal funding, stating that the government does not violate the First Amendment by restricting the recipient of federal funds from supporting a certain viewpoint. Several Supreme Court cases followed and expanded on this holding, further emphasizing that government speech is not subject to First Amendment scrutiny. Despite the constitutionality of § 9.76, this Note proposes that sole proprietors be removed from the legislation’s scope to prevent future litigation costs for Ohio.

CONTENTS

I. INTRODUCTION	160
II. AN OVERVIEW OF THE ISRAELI-PALESTINIAN CONFLICT, THE BDS MOVEMENT, AND ANTI-BOYCOTT LEGISLATION	162
A. <i>The Israeli-Palestinian Conflict: A Basic Primer</i>	162
B. <i>The BDS Movement</i>	164
C. <i>Anti-BDS Legislation</i>	167
D. <i>Ohio’s Anti-BDS Legislation</i>	170

* Hannah Kraus is expected to receive her Juris Doctor from Cleveland-Marshall College of Law in May 2021. She graduated from The Ohio State University in 2018 with a Bachelor of Arts in Psychology and Criminology and a minor in Hebrew. This Note is dedicated to my parents, Edward and Bonnie Kraus, who raised me to be proud of my heritage, always stand up for what I believe in, and inspired me to follow in their footsteps and attend law school. I also wish to extend my sincerest gratitude to everyone who supported and inspired me through the research and writing process, including Professor Doron Kalir and the *Cleveland State Law Review*.

III.	WHY OHIO’S ANTI-BDS LAW IS CONSTITUTIONAL	172
	A. <i>Ohio Revised Code § 9.76 Is Protected as Government Speech</i>	172
	B. <i>Following the Texas Experience, Ohio Should Consider Revising § 9.76 to Exclude Sole Proprietorship</i>	179
IV.	CONCLUSION.....	182

I. INTRODUCTION

In 2019, the Human Rights Watch reported on over ninety countries and territories with human rights violations, Israel being one of them.¹ Yet, of these ninety countries and territories, only Israel is the target of a systematic campaign to “disrupt the economic and financial stability” of the nation.² The Boycott, Divestment, and Sanctions (“BDS”) movement is a widespread Palestinian-led operation calling for a comprehensive boycott of Israel.³ The movement purports to launch a “nonviolent campaign against Israeli abuses against Palestinians.”⁴ However, the BDS movement also aims to methodically isolate Israel, the United States’ closest ally in the Middle East.⁵

Over the past decade, state and federal governments have responded to the rise of the BDS movement by passing resolutions, executive orders and legislation condemning the movement and showing support for Israel.⁶ For example, on July 23,

¹ HUMAN RIGHTS WATCH, WORLD REPORT 304 (2019).

² Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 207–08 (2018) (noting that the BDS movement intends to economically harm both Israel directly and people that are deemed to be affiliated with Israel).

³ *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U. L. REV. 1301, 1311–12 (2018) (describing the BDS movement as a “multi-pronged movement aimed at addressing the decades-long occupation by Israel of Palestinian land”).

⁴ *Israel Praises House Resolution Against BDS Movement*, HAARETZ (July 25, 2019, 8:10 PM), <https://www.haaretz.com/us-news/israel-praises-house-resolution-against-bds-movement-1.7574948> (“Israel says the campaign masks a deeper goal of delegitimizing and even destroying the country.”).

⁵ *U.S. Relations with Israel*, U.S. DEP’T OF STATE (May 14, 2018), <https://www.state.gov/u-s-relations-with-israel/> (“Israel has long been, and remains, America’s most reliable partner in the Middle East. Israel and the United States are bound closely by historic and cultural ties as well as by mutual interests.”).

⁶ See Goldfeder, *supra* note 2, at 211, 216. Goldfeder provides a comprehensive overview of both federal and state governmental approaches to prevent the rise of the BDS movement. For example, Goldfeder discusses the Trade Facilitation and Trade Enforcement Act of 2015 signed into law by Barack Obama. *Id.* at 211. The Act discourages U.S. cooperation with entities that support the BDS movement. *Id.* Goldfeder also examines South Carolina’s 2015 anti-BDS legislation which prevents a public entity from contracting with a business engaged in the

2019, the U.S. House of Representatives overwhelmingly passed House Resolution 246 denouncing the BDS movement as an effort to delegitimize Israel,⁷ and the House emphasized its support for a two-state solution to the ongoing Israeli-Palestinian conflict.⁸ At the state level, twenty-seven states have adopted anti-BDS legislative measures.⁹ On December 19, 2016, Ohio became the fourteenth state to enact such legislation, codified today as § 9.76 of the Ohio Revised Code.¹⁰

Anti-BDS legislation, aimed against a political idea based on its content, understandably raises serious constitutional concerns.¹¹ For example, Congresswoman Rashida Tlaib, a staunch supporter of the BDS movement, referred to House Resolution 246 as “unconstitutional” because it aims, in her mind, to “silence opposition of Israel’s blatantly racist policies that demonize both Palestinians &

boycott of any person or entity in any jurisdiction with whom South Carolina can openly trade with. *Id.* at 216.

⁷ H.R. 246, 116th Cong. (2019).

⁸ See Ashley Killough & Clare Foran, *House Approves Resolution Opposing Israel Boycott Movement in Divisive Vote*, CNN (July 23, 2019, 7:10 PM), <https://www.cnn.com/2019/07/23/politics/house-anti-bds-resolution/index.html> (noting that while progressive Representatives including Rashida Tlaib and Ilhan Omar were opposed to this measure, it received “broad bipartisan support” throughout the House of Representatives).

⁹ ALA. CODE § 41-16-5 (2016), ARIZ. REV. STAT. ANN. §§ 35-393–393.03 (2019), ARK. CODE ANN. §§ 25-1-501–503 (2017), CAL. PUB. CONT. CODE § 2010 (2017), COLO. REV. STAT. § 24-54.8-201 (2016), FLA. STAT. § 215.4725 (2018), GA. CODE ANN. § 50-5-85 (2016), 40 ILL. COMP. STAT. 5/1-110.16 (2018), IND. CODE §§ 5-10.2-11-1–26 (2016), IOWA CODE §§ 12J.1–12J.7 (2016), KAN. STAT. ANN. §§ 75-3740e–40g (2017), KY. REV. STAT. ANN. § 45A.607 (2019), La. Exec. Order No. 2018-15 (May 22, 2018), Md. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017), MICH. COMP. LAWS SERV. § 18.1261 (2017), MINN. STAT. § 3.226 (2017), MISS. CODE ANN. §§ 27-117-1–15 (2019), NEV. REV. STAT. §§ 286.735–286.749 (2017), N.J. REV. STAT. §§ 52:18A-89.13–89.14 (2017), N.Y. Exec. Order No. 157 (June 5, 2016), N.C. GEN. STAT. §§ 147-86.80–86.84 (2017), OHIO REV. CODE ANN. § 9.76 (2017), 62 PA. CONS. STAT. §§ 3601–3606 (2017), 37 R.I. GEN. LAWS §§ 2.6-1–4 (2016), S.C. CODE ANN. § 11-35-5300 (2017), TEX. GOV’T CODE ANN. §§ 2270.001–2270.002 (2017), and Wis. Exec. Order No. 261 (Oct. 27, 2017).

¹⁰ Kristen Mott, *Anti-BDS Bill Passes Senate, Awaits Governor’s Signature*, CLEV. JEWISH NEWS, https://www.clevelandjewishnews.com/news/local_news/anti-bds-bill-passes-senate-awaits-governor-s-signature/article_0381d35a-bd8e-11e6-be09-a7f3b668d2d0.html (last updated Dec. 9, 2016); Jewish Telegraphic Agency & Times of Israel Staff, *Kasich Signs Ohio State Law Banning Boycotts of Israel*, TIMES OF ISR. (Dec. 20, 2016), <https://www.timesofisrael.com/kasich-signs-ohio-state-law-banning-boycotts-of-israel/>.

¹¹ Timothy Cuffman, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. OF TRANSNAT’L L. 115, 119 (2018) (“Prominent critics have condemned the laws for infringing on the First Amendment rights to express political ideas and to participate in political boycotts, which have a storied and successful history of achieving social and political change in the United States.”).

Ethiopians.”¹² However, as this Note demonstrates, such constitutional concerns are misplaced, particularly when it comes to Ohio’s anti-BDS law.¹³

Accordingly, this Note examines § 9.76 of the Ohio Revised Code and demonstrates why it does not violate the First Amendment. Since Ohio’s statute does not attack the political basis of the BDS movement, but only serves to restrict state-funded expenditures, it does not raise any legitimate First Amendment concerns. Section 9.76 is protected speech under the government speech doctrine.

This Note proceeds in four parts. Part II of this Note provides an overview of the BDS movement through the lens of the Israeli-Palestinian conflict. This Part also discusses earlier federal laws designed to combat the original economic boycott against Israel, as well as more recent state governmental efforts to contest the discriminatory nature of the BDS movement. Lastly, this Part provides an introduction to, and analysis of Ohio’s anti-BDS legislative measure. Part III examines the constitutionality of § 9.76. In arguing that § 9.76 does not violate the First Amendment, this section analyzes the government speech doctrine and accompanying Supreme Court cases that upheld restrictions on government-funded speech. This section subsequently recommends a slight change to the current legislative text, in light of recent litigation. In particular, it suggests excluding “sole proprietorship” from the definition of “company” under § 9.76(A)(2). Thus, Ohio could prevent accruing future litigation costs by slightly narrowing the scope of § 9.76. Part IV offers a brief conclusion.

II. AN OVERVIEW OF THE ISRAELI-PALESTINIAN CONFLICT, THE BDS MOVEMENT, AND ANTI-BOYCOTT LEGISLATION

A. *The Israeli-Palestinian Conflict: A Basic Primer*

The Israel-Palestinian conflict is one of the longest running and most complex issues in our recent political history.¹⁴ Many books, academic articles, and news stories have been dedicated to the Israeli-Palestinian conflict.¹⁵ At its most fundamental level, the conflict is a dispute between the Israeli and Palestinian people over a geographical land mass in the Middle East approximately the size of New

¹² Rashida Tlaib (@RashidaTlaib), TWITTER (July 10, 2019, 3:07 PM), https://twitter.com/RashidaTlaib/status/1149032471855554562?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1149032471855554562&ref_url=https%3A%2F%2Fwww.jpost.com%2FIsrael-News%2FRashida-Tlaib-slams-anti-BDS-bill-calls-it-unconstitutional-595380.

¹³ See *infra* Part III.

¹⁴ See Dr. Barry A. Feinstein & Dr. Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT’L L. REV. 1, 2 (2000) (“The conflict between Palestinians and Israelis is one of the most complex of our time.”).

¹⁵ See, e.g., LESLIE TURNBERG, *BEYOND THE BALFOUR DECLARATION: 100 YEARS OF ISRAELI-PALESTINIAN CONFLICT* (2017); Russel Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT’L L. (2005); David M. Halbfinger & Isabel Kershner, *After Intense Fighting in Gaza, Israel and Palestinians Observe Ceasefire*, N.Y. TIMES (May 5, 2019), <https://www.nytimes.com/2019/05/05/world/middleeast/gaza-rockets-israel-palestinians.html>.

Jersey.¹⁶ Both the Israelis and Palestinians have rich history in the land and believe that they each have a “legitimate, exclusive claim” over that piece of land.¹⁷ Prior to the establishment of the State of Israel on May 14, 1948, Great Britain had a Mandate over that land, mostly referred to as Palestine.¹⁸ The British Mandate over Palestine ended on November 29, 1947, when the United Nations General Assembly adopted Resolution 181, a partition plan intending to create both a Jewish state and an Arab state, side by side.¹⁹ While the Jews readily approved the Resolution, the Arab population rejected it, and a wave of violence ensued.²⁰ Through today, this violence is still the conflict’s defining characteristic.²¹

Fast forward seventy-two years, the West Bank and East Jerusalem are at the center of the Israeli-Palestinian conflict today. Known as the “occupied territories,” they have been at the center of peace negotiations.²² “The *occupation* refers to the military control of the Palestinian population of the West Bank and East Jerusalem since the

¹⁶ Ahmed Moor, Opinion, *One State for Palestinians and Israelis*, WASH. POST (Mar. 2, 2012), https://www.washingtonpost.com/opinions/one-state-for-palestinians-and-israelis/2012/03/01/gIQAzOZanR_story.html (“The area of Mandate Palestine – that’s Israel, the West Bank and Gaza – is about the size of New Jersey.”).

¹⁷ Feinstein & Dajani-Daoudi, *supra* note 14, at 3 (noting that both Israelis and Palestinians “have their own perception of history and events, a history and accumulation of events that they feel justify their respective contentions and actions”).

¹⁸ *British Palestine Mandate: History & Overview*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/history-and-overview-of-the-british-palestine-mandate> (last visited Oct. 20, 2019); see also Karen Hurvitz, *Ending the ‘Occupation’ Myth*, TIMES OF ISR.: BLOGS (Feb. 20, 2019, 1:10 PM), <https://blogs.timesofisrael.com/ending-the-occupation-myth/> (providing that the League of Nations recognized “the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country” when Great Britain was given the Mandate over Palestine).

¹⁹ G.A. Res. 181 (II), at 133 (Nov. 29, 1947); *The United Nations Partition Plan of 1947*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/united-nations-general-assembly-resolution-181/> (last visited Feb. 1, 2020).

²⁰ *The United Nations Partition Plan of 1947*, *supra* note 19 (“United Nations General Assembly Resolution 181 was not successful in creating two states; the Arab world strongly rejected it, and fighting between Jews and Arabs began almost immediately after the resolution’s passage.”).

²¹ See, e.g., Sam Sokol & Times of Israel Staff, *Two Explosive Balloons, Apparently Flown from Gaza, Land in Israel*, TIMES OF ISR. (Jan. 28, 2020), <https://www.timesofisrael.com/two-explosive-balloons-apparently-flown-from-gaza-land-in-israel/>; *Israeli Army Launches Fresh Air Raids on Gaza, Targets Hamas*, AL JAZEERA (Nov. 16, 2019), <https://www.aljazeera.com/news/2019/11/israeli-army-launches-fresh-air-raids-gaza-targets-hamas-191116055549476.html>.

²² Oliver Holmes, *US Alters Golan Heights Designation from ‘Israeli-Occupied’ to ‘Israeli-Controlled’*, GUARDIAN (Mar. 13, 2019), <https://www.theguardian.com/us-news/2019/mar/13/us-describes-golan-heights-as-israeli-controlled-not-israeli-occupied> (noting that under the Trump administration, the West Bank, Gaza Strip, and Golan Heights are now referred to as “Israeli-controlled” by the State department instead of the former “Israeli-occupied”).

end of the Six Day war in June 1967.”²³ Israel has faced international backlash for building Israeli settlements in the West Bank, which have only increased under Prime Minister Benjamin Netanyahu and the Trump administration.²⁴ President Trump has even announced the move of the U.S. embassy to Jerusalem, as well as support of annexing the Golan Heights to Israel.²⁵ While there is widespread agreement that continuing to build settlements in the occupied territories will not contribute to a future two-state solution, it is equally apparent that Israel maintains a legitimate security interest in those areas.²⁶ Today, the Israeli-Palestinian conflict is as far from resolution as ever before.

B. The BDS Movement

Established in 2005, the BDS movement is relatively young, but “economic warfare” against Israel has much deeper roots.²⁷ Beginning in 1945, the Arab League, a group of Middle Eastern and African countries, organized a boycott of goods produced by Jews living under the British Mandate in Palestine.²⁸ After the

²³ Ron Kronish, *Why ‘End the Occupation’ Is Not a Good Slogan for Peace*, TIMES OF ISRAEL: BLOGS (Aug. 26, 2019, 9:55 PM), <https://blogs.timesofisrael.com/why-end-the-occupation-is-not-a-good-slogan-for-peace/> (contending that referring to these territories as “occupied territories” is not good for the peace process between Israelis and Palestinians).

²⁴ Dan Williams, *Israel Announces New Homes for Settlers, Palestinians in West Bank Ahead of Kushner Visit*, REUTERS (July 31, 2019), <https://www.reuters.com/article/us-israel-palestinians-westbank/israel-announces-new-homes-for-settlers-palestinians-in-west-bank-ahead-of-kushner-visit-idUSKCN1UQ0SX> (stating that both Palestinian leadership and the European Union condemned the announcement of new settlements while the Trump administration welcomed them).

²⁵ Stephen Farrell & Jeffrey Heller, *U.S. Support for Israeli Settlements Renews Focus on Core Issue in Mideast Conflict*, REUTERS (Nov. 19, 2019), <https://www.reuters.com/article/us-israel-palestinians-usa-settlements/u-s-support-for-israeli-settlements-renews-focus-on-core-issue-in-mideast-conflict-idUSKBN1XT1UE> (noting the U.S. Embassy was moved to Jerusalem in 2018, and in March 2019, President Trump recognized Israel’s annexation of the Golan Heights).

²⁶ Kronish, *supra* note 23 (“Does anyone seriously think that *ending the occupation* without an iron-clad agreement between Israelis and Palestinians to end the conflict will produce anything other than more bloodshed and security challenges, both to Israeli Arab Palestinians who live as citizens alongside Jewish citizens of Israel, and to Palestinians and Israeli Jews who live in the West Bank (what some call *Judea and Samaria*), whose security would be threatened by Islamic militants. . . . Rather than ending the conflict, we would most likely continue to experience more and more violence and counter-violence.”).

²⁷ Alexander B. Traum, *Applied Anti-Semitism: The BDS Movement and the Abuse of Corporate Social Responsibility*, 34 TOURO L. REV. 1025, 1028 (2018) (stating “Israel has been subject to campaigns to punish the state economically” since its creation in 1948).

²⁸ Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 6–8 (2017) (citing the Arab League Boycott Declaration of 1945 which describes Jewish goods produced in the British Mandate of Palestine as “undesirable” to Arab countries) [hereinafter Greendorfer, *Foreign Boycott*].

establishment of Israel in 1948, the Arab League continued its boycott in order to “politically and commercially isolate the State of Israel and its Jewish population, preserve Arab purity and hegemony over the territory of Palestine, and [to] ultimately complement Arab military attempts to destroy Israel as a recognized political state.”²⁹ By the late 1990s, however, the Arab League’s boycott lost much of its momentum when Israeli markets opened to many new regions.³⁰ Still, many Palestinians sought to restore the use of boycotts against Israel in order to isolate the country and delegitimize the occupation.³¹

In 2001, the United Nations held a conference in South Africa against racism, racial discrimination, xenophobia, and related intolerances.³² The Durban Conference, as it was known, quickly deteriorated under the leadership of several non-governmental organizations (“NGOs”) into an organized attack on Israel.³³ From there, a call for action against Israel’s “apartheid regime” and so-called “ethnic cleansing methods” was raised by the NGOs, particularly by reinstating the economic boycott of Israel.³⁴ Four years later, in July 2005, the BDS movement was officially launched.³⁵

The BDS movement originated as one of the Palestinians’ responses to the ongoing Israeli-Palestinian conflict, aimed to encourage boycott, divestment, and sanctions

²⁹ *Id.* at 6. Greendorfer is citing Muhammad Khalil, *The Arab States and the Arab League*, *A Documentary Record*, 2 INT’L AFFS. 161 (1962).

³⁰ Traum, *supra* note 27, at 1028–29 (noting that the loss of momentum of the Arab League boycott can be attributed to pressure by the United States to cease the boycott and the advantageous opportunities that member countries sought to gain by entering into trade agreements with Israel).

³¹ Greendorfer, *Foreign Boycott*, *supra* note 28, at 14 (stating that many nationalistic Palestinian Arabs felt that the Arab League boycott lacked the progress they so desired, which was weakening and isolating Israel and replacing Israel with a Palestinian state).

³² Traum, *supra* note 27, at 1029 (stating the Durban Conference is widely viewed as the “birthplace” of the BDS movement).

³³ *Id.* (arguing that the NGOs transformed the Durban Conference into “an anti-Semitic hate-fest” by launching an “organized campaign of economic warfare against the State of Israel”).

³⁴ *Id.* at 1029–30. The non-governmental groups, including Amnesty International and Human Rights Watch, created The NGO Declaration which declared support for an organized economic campaign against Israel. *Id.* at 1029. The Declaration “called upon the international community to impose a policy of complete and total isolation of Israel as an apartheid state as the case of South Africa” as well as the implementation of mandatory sanctions and complete diplomatic, economic, social, and military disengagement with Israel. *Id.* at 1030.

³⁵ Greendorfer, *Foreign Boycott*, *supra* note 28, at 19–20 (“In July 2005, the NGO Durban Conference’s spirit, if not body, was reanimated by over 100 non-governmental organizations that reasserted the call for a global movement against Israel. The movement that they called for had the same essential goals and means as the NGO Durban Conference’s declaration, and the Arab League Boycott Declaration of 1945 before it: the use of boycotts to isolate and weaken Israel. From this call, the BDS Movement was publicly unveiled.”).

against Israel.³⁶ Over time, however, BDS has become known as a well-orchestrated campaign rooted in bigotry and anti-Semitism to delegitimize Israel for alleged human rights violations against Palestinians.³⁷ Prominent leaders and activists of the BDS movement have consistently denounced the legitimacy of a Jewish state and rejected a two-state solution to the Israeli-Palestinian conflict.³⁸ For example, Omar Barghouti, one of the founders of the BDS movement, has stated, “most definitely we oppose a Jewish state in any part of Palestine. . . . Ending the occupation doesn’t mean anything if it doesn’t mean upending the Jewish state itself.”³⁹

The BDS movement was created as an echo to the boycott movement against South Africa’s apartheid in the last century.⁴⁰ In its current form, BDS stands on three basic principles. First, it promotes the *boycott* of Israeli products, services, sporting events, cultural and academic institutions, and any international companies supporting Israel.⁴¹ Second, the BDS movement endorses *divestment* by “banks, local councils,

³⁶ *What Is BDS?*, BDS FREEDOM JUSTICE EQUALITY, <https://bdsmovement.net/what-is-bds> (last visited Jan. 30, 2020) (“Boycott, Divestment, Sanctions (BDS) is a Palestinian-led movement for freedom, justice and equality. BDS upholds the simple principle that Palestinians are entitled to the same rights as the rest of humanity.”).

³⁷ Talia Kaplan, *Anti-Semitism in US Linked to BDS Movement, New NGO-Backed Report Finds*, FOX NEWS (Dec. 15, 2019), <https://www.foxnews.com/us/anti-semitism-bds-movement-report>; see also *BDS: The Global Campaign to Delegitimize Israel*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/bds-the-global-campaign-to-delegitimize-israel> (last visited Nov. 9, 2019) (“Many of the founding goals of the BDS movement, including denying the Jewish people the universal right of self-determination – along with many of the strategies employed in BDS campaigns are anti-Semitic. Many individuals involved in BDS campaigns are driven by opposition to Israel’s very existence as a Jewish state. Often time, BDS campaigns give rise to tensions in communities – particularly on college campuses – that can result in harassment or intimidation of Jews and Israel supporters, including overt anti-Semitic expression and acts. This dynamic can create an environment in which anti-Semitism can be express [sic] more freely.”).

³⁸ See *BDS: In Their Own Words*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/bds-in-their-own-words> (last visited Feb. 1, 2020). As’ad AbuKhalil, a prominent BDS leader, has stated, “[t]he real aim of BDS is to bring down the state of Israel. . . . That should be stated as an unambiguous goal.” *Id.* Omar Barghouti, another prominent BDS leader, stated, “I am completely and categorically against binationalism because it assumes that there are two nations with equal moral claims to the land.” *Id.* Michael Warschawski, BDS activist, has stated, “[p]eace-or better yet, justice-cannot be achieved without a total decolonization (one can say de-Zionization) of the Israeli state.” *Id.*

³⁹ ANDREW PESSIN & DORON S. BEN-ATAR, *ANTI-ZIONISM ON CAMPUS: THE UNIVERSITY, FREE SPEECH, AND BDS* 10–11 (2018) (contending that the leaders of the BDS movement do not recognize a Jewish state and reject the two-state solution).

⁴⁰ *What is BDS?*, *supra* note 36 (“Inspired by the South African apartheid movement, the Palestinian BDS call urges action to pressure Israel to comply with international law.”).

⁴¹ *Id.* (“Boycotts involve withdrawing support from Israel’s apartheid regime, complicit Israeli sporting, cultural and academic institutions, and from all Israeli and international companies engaged in violations of Palestinian human rights.”); see also Sean F. McMahon, *The Boycott, Divestment, Sanctions Campaign: Contradictions and Challenges*, RACE & CLASS 65, 69 (2014).

churches, pension funds and universities” from Israel and any Israeli or international companies that support Israel.⁴² Third, the *sanctions* portion is designed to pressure governments into taking direct action against Israel, “by banning business with illegal Israeli settlements, ending military trade and free-trade agreements, as well as suspending Israel’s membership in international forums.”⁴³

C. Anti-BDS Legislation

The United States has a significant interest in maintaining a strong relationship with Israel.⁴⁴ As the only democratic nation in the Middle East, Israel shares America’s ideological values and serves as a strategic partner in furthering U.S. foreign policy and providing the United States with critical security and intelligence.⁴⁵ Israel provides the U.S. with “greater capabilities than any other Middle Eastern strategic partner,” and even “arguably plays a greater role in U.S. security than any European nation.”⁴⁶ Thus, in response to the growing concern raised by the BDS movement, the U.S. government began to take action.

For decades, the federal government has passed several laws discouraging the participation in any boycott against Israel. For example, in the 1970s, Congress enacted two laws preventing U.S. citizens who participate in economic boycotts against certain countries from receiving tax benefits.⁴⁷ The first was the Ribicoff

⁴² *What Is BDS?*, *supra* note 36 (urging these institutions to withdraw investments from Israel and any Israeli or international company that helps “sustain Israeli apartheid.”).

⁴³ *Id.* (contending that the sanctions portion of their campaign will motivate governments to “fulfill their legal obligations to end Israeli apartheid”).

⁴⁴ See Remarks at the International Convention Center in Jerusalem, 1 PUB. PAPERS 220 (Mar. 21, 2013) (“Together, we share a commitment to security for our citizens and the stability of the Middle East and North Africa. Together, we share a focus on advancing economic growth around the globe, and strengthening the middle class within our own countries. Together, we share a stake in the success of democracy. But the source of our friendship extends beyond mere interests, just as it has transcended political parties and individual leaders.”); *see also* Remarks at the Welcoming Ceremony for Prime Minister Menachem Begin of Israel, Remarks at the International Convention Center in Jerusalem, 1 PUB. PAPERS 220 (Sept. 9, 1981) (“Israel and America may be thousands of miles apart, but we are philosophical neighbors sharing a strong commitment to democracy and the rule of law. What we hold in common are the bonds of trust and friendship, qualities that in our eyes make Israel a great nation. . . . In partnership, we’re determined to defend liberty and safeguard the security of our citizens.”).

⁴⁵ Seth Cropsey & Harry Harlem, *The U.S. Alliance with Israel Cannot be Sacrificed to Ideological Purity*, NAT’L REV. (Oct. 7, 2019), <https://www.nationalreview.com/2019/10/us-israel-alliance-cannot-be-sacrificed-to-ideological-purity/> (contending that the partnership between the U.S. and Israel has improved U.S. defense technology, provides the U.S. with invaluable intelligence, and gives the U.S. exclusive access to Israeli military technology).

⁴⁶ *Id.* (stating that although the U.S. benefits immensely from its European alliances, “one must note the outsized role that Israel plays in American security compared with Europe’s erstwhile great powers”).

⁴⁷ See OFFICE OF ANTIBOYCOTT COMPLIANCE, BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/enforcement/oac> (last visited Feb. 1, 2020) (providing

Amendment to the Tax Reform Act of 1976.⁴⁸ The Ribicoff Amendment denied otherwise available tax benefits to businesses that participated in the boycott of countries unsanctioned by the U.S.⁴⁹ Subsequently, President Carter signed the Anti-Boycott provision of the Export Administration Act in 1977, serving a similar function to the Ribicoff Amendment enacted one year prior.⁵⁰ Though neither law explicitly mentioned Israel, their fundamental purpose was to combat the discriminatory nature of the Arab League boycott against Israel.⁵¹ Following his signing of the Anti-Boycott provision, President Carter stated that his “concern about foreign boycotts stemmed, of course, from our special relationship with Israel, as well as from the economic, military, and security needs of both our countries.”⁵²

During the Obama administration, Congress passed the Trade Facilitation and Trade Enforcement Act of 2015.⁵³ This time, the Act was much more explicit; it contained a provision requiring “non-cooperation with entities that participate in the Boycott, Divestment and Sanctions movement against Israel, and reporting on such

information on the Ribicoff Amendment to the Tax Reform Act and the Export Administration Act).

⁴⁸ Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE-NOVO 112, 123 (2016) (stating the Ribicoff Amendment “was enacted to counter anti-Israel boycotts and penalizes those who participate in such unsanctioned boycotts with the denial of otherwise available tax benefits”) [hereinafter Greendorfer, *Inapplicability of First Amendment*].

⁴⁹ See 26 U.S.C. § 999(b)(1) (2019) (“If the person or a member of a controlled group (within the meaning of section 993(a)(3)) which includes the person participates in or cooperates with an international boycott in the taxable year, all operations of the taxpayer or such group in that country and in any other country which requires participation in or cooperation with the boycott as a condition of doing business within that country, or with the government, a company, or a national of that country, shall be treated as operations in connection with which such participation or cooperation occurred, except to the extent that the person can clearly demonstrate that a particular operation is a clearly separate and identifiable operation in connection with which there was no participation in or cooperation with an international boycott.”).

⁵⁰ 50 U.S.C. § 2407 (2019); see also Goldfeder, *supra* note 2, at 210–11 (noting that every single U.S. President, Congress, and administration since President Carter has signed the anti-boycott amendments to the Export Administration Act, thus affirming their support to weaken the boycott of Israel).

⁵¹ Greendorfer, *Inapplicability of First Amendment*, *supra* note 48, at 124–25 (“Throughout congressional hearings on the anti-boycott provisions of the Export Administration Act, numerous legislators and experts testified to the racist and discriminatory origins and intentions of boycotts targeting Israel . . .”).

⁵² Goldfeder, *supra* note 2, at 211 (noting that every U.S. President since the establishment of Israel in 1948, including President Carter, has expressed unwavering support of Israel).

⁵³ Trade Facilitation and Trade Enforcement Act, 19 U.S.C. § 4452 (2016). The Act requires the President to submit to Congress “a report on politically motivated boycotts of, divestment from, and sanctions against Israel.” 19 U.S.C. § 4452(d)(1).

entities.”⁵⁴ Nevada Senator Harry Reid stated that politically-motivated commercial actions against Israel “run counter to longstanding U.S. policy opposing politically-motivated boycotts of, divestment from, or sanctions against Israel and it is incumbent upon the United States to use every diplomatic tool to stop our trading partners from imposing such misguided actions.”⁵⁵ At the federal level, the United States has firmly recognized a substantial interest in protecting Israel from a systematic economic boycott that may result in targeting Israel’s economy and isolating its people.

More recently, state governments joined the trend. One goal of these measures is to prevent state funds from inadvertently supporting the boycott of Israel.⁵⁶ In June 2015, South Carolina became the first state to pass an anti-BDS bill into law, followed very closely by Illinois.⁵⁷ By the end of 2019, over half of U.S. states have taken legal measures aiming to combat the boycott movement against Israel; twenty-three state legislatures have passed laws, while four governors have signed executive orders.⁵⁸ The laws’ text vary slightly from state to state, but they reflect a unified message that

⁵⁴ *Obama Signs Bill Defending Israel From Boycott, Says It Won’t Apply to West Bank Settlements*, HAARETZ (Feb. 25, 2016), <https://www.haaretz.com/israel-news/obama-signs-bill-defending-israel-from-boycott-1.5409529>. The article further quotes Barack Obama’s statement after signing the Act, “I have directed my administration to strongly oppose boycotts, divestment campaigns and sanctions targeting the State of Israel.” *Id.*

⁵⁵ Michael Wilner, *Democrats, Republicans Rebuke White House for Stance on Israel Boycotts*, JERUSALEM POST, (Feb. 26, 2016), <https://www.jpost.com/Breaking-News/Democrats-Republicans-rebuke-White-House-for-stance-on-Israel-boycotts-446225>. Senator Reid was joined by his colleagues Chuck Shumer of New York, Ron Wyden of Oregon, Ben Cardin of Maryland, Michael Bennet of Colorado and Richard Blumenthal of Connecticut in this statement. *Id.*

⁵⁶ Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 34 (2018) (explaining how states “have been working to ensure that state funds and resources are not used to promote or support those who foster” the BDS movement) [hereinafter Greendorfer, *Boycotting the Boycotters*].

⁵⁷ See Michael Wilner, *South Carolina Becomes First US State to Take Action Against Anti-Israel Boycotts*, JERUSALEM POST (June 5, 2015), <https://www.jpost.com/Diaspora/South-Carolina-becomes-first-US-state-to-take-action-against-anti-Israel-boycotts-405120>; see also S.C. CODE ANN. § 11-35-5300 (2017) (stating in relevant part, “[a] public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article”); 40 ILL. COMP. STAT. 5/1-110.16 (2018) (stating in relevant part, “[b]y April 1, 2016, the Illinois Investment Policy Board shall make its best efforts to identify all Iran-restricted companies, Sudan-restricted companies, and companies that boycott Israel and assemble those identified companies into a list of restricted companies, to be distributed to each retirement system”).

⁵⁸ See sources cited *supra* note 9.

the states will not tolerate the attempt to singularly target Israel by means of economic boycott.⁵⁹

Anti-BDS laws enacted by states have been criticized by opponents as a violation of the First Amendment.⁶⁰ However, as Part III demonstrates, these arguments lack merit. First, it is important to understand fully what these so-called “anti-BDS” laws actually entail. Contrary to popular belief, these laws do *not* restrict any publication, statement, or rally supporting the BDS movement. Such laws would unquestionably violate the First Amendment guarantees of freedom of speech and assembly.

Rather, state “anti-BDS” laws are divided into two main groups. First, the majority of laws prohibit state-funded agencies from *contracting with* corporations that boycott any jurisdiction that the State may openly trade with, including Israel.⁶¹ Second, some states have adopted laws that prohibit state-funded agencies from *investing in* companies that boycott Israel.⁶² Both categories of law apply only to state-funded agencies and do not affect private citizens. Thus, individuals residing in any one of the twenty-seven states with anti-BDS laws, much like all other U.S. citizens, are still free to support the boycott of Israel if they so choose.⁶³

D. Ohio's Anti-BDS Legislation

On December 19, 2016, Ohio Governor John Kasich signed House Bill 476 into law, making Ohio the fourteenth state to specifically target the BDS movement

⁵⁹ Liz Essley Whyte, *One Way to Silence Israel Boycotts? Get Lawmakers to Pass Anti-BDS Bills*, USA TODAY (May 1, 2019), <https://www.usatoday.com/story/news/investigations/2019/05/01/statehouse-model-bills-bds-protest-bans/3575083002/> (“These new laws and executive orders were crafted by activists, then copied from one state to the next and adopted with virtually identical language. Most require tens of thousands of state contractors to pledge not to boycott Israel or lose their government funding. Other efforts require state pension boards to divest from companies that boycott Israel.”).

⁶⁰ See, e.g., Lindsey Lewton, *A New Loyalty Oath: New York's Targeted Ban on State Funds for Palestinian Boycott Supporters*, 42 N.Y.U. REV. L. & SOC. CHANGE 649 (2019); *Boycotting a Boycott*, *supra* note 3; Cuffman, *supra* note 11.

⁶¹ E.g., MINN. STAT. § 3.226 (2017) (stating in relevant part, “[t]he legislature may not enter into a contract with a vendor that engages in discrimination against Israel, or against persons or entities doing business in Israel, when making decisions related to the operation of the vendor's business”); see also Greendorfer, *Boycotting the Boycotters*, *supra* note 56, at 34 (describing the “No Contract Laws” adopted by the majority of states with anti-BDS laws).

⁶² E.g., N.J. REV. STAT. §§ 52:18A-89.13–89.14 (2017) (stating in relevant part, “no assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury, or its successor, shall be invested in any company that boycotts the goods, products, or businesses of Israel, boycotts those doing business with Israel, or boycotts companies operating in Israel or Israeli-controlled territory”); see also Greendorfer, *Boycotting the Boycotters*, *supra* note 56, at 35–36 (describing the “Divestiture Laws” adopted by a minority of states” with anti-BDS laws).

⁶³ Greendorfer, *Boycotting the Boycotters*, *supra* note 56, at 35–36 (noting that both categories of anti-BDS laws do not prevent private citizens from engaging in any type of boycott activity).

through legislation.⁶⁴ Representative Kirk Schuring, the primary sponsor of House Bill 476, explained that Ohio's connection to the State of Israel "generates more than \$200 million of economic benefit for Ohio each year," adding that this new law "provides more opportunities for Ohio to continue its strong alliance with Israel, as well as bolster our economy here at home."⁶⁵ Section 9.76 of the Ohio Revised Code fits into the "contracting" category of state anti-BDS laws, with definitions that outline the narrow scope of the law followed by a very clear and concise "no contract" provision. Section 9.76 provides:

A. As used in this section:

1. "Boycott" means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with persons or entities in a discriminatory manner. "Boycott" does not include:
 - a. Boycotts to which 50 U.S.C. 4607(c) applies;⁶⁶
 - b. A decision based on business or economic reasons, or the specific conduct of a targeted person or entity;
 - c. A boycott against a public entity of a foreign state when the boycott is applied in a nondiscriminatory manner; and
 - d. Conduct necessary to comply with applicable law in the business's home jurisdiction.
2. "Company" means a sole proprietorship, partnership, corporation, national association, societe anonyme, limited liability company, limited partnership, limited liability partnership, joint venture, or other business organization, including their subsidiaries and affiliates, that operates to earn a profit.
3. "Israel" means Israel or Israeli-controlled territories.
4. "Jurisdiction with whom this state can enjoy open trade" means any world trade organization member and any jurisdiction with which the United States has free trade or other agreements aimed at ensuring open and nondiscriminatory trade relations.

⁶⁴ Jewish Telegraphic Agency & Times of Israel Staff, *supra* note 10 ("The legislation, which prohibits the state from contracting with companies that engage in boycotts of Israel, including firms located outside the state, and also requires companies to explicitly state in contracts that they are not boycotting or divesting, was signed Monday. It makes Ohio the 14th state to enact such a law.").

⁶⁵ *Id.*; see also Kristen Mott, *Ohio 14th State to Pass Anti-BDS Bill*, CLEV. JEWISH NEWS, https://www.clevelandjewishnews.com/news/local_news/ohio-th-state-to-pass-anti-bds-bill/article_259af2d6-c6ef-11e6-a16e-1347713d9c56.html (last updated Dec. 20, 2016). Cliff Rosenberger, Speaker of the House at the time House Bill 476 was signed into law, noted that "Israel is not only America's No. 1 ally in the Middle East, but it is also an important economic partner with Ohio. This legislation signifies and strengthens that partnership by standing in solidarity with Israel which in turn benefits our economy here at home." *Id.*

⁶⁶ 50 U.S.C. § 4607(c) was repealed on August 13, 2018, but the reference to it has not been removed from Ohio's statute.

5. “State agency” means an organized body, office, agency, institution, or other entity established by the laws of the state for the exercise of a function of state government.
- B. A state agency may not enter into or renew a contract with a company for the acquisition or provision of supplies, equipment, or services, or for construction services, unless the contract declares that the company is not boycotting any jurisdiction with whom this state can enjoy open trade, including Israel, and will not do so during the contract period.⁶⁷

To reiterate the statutory text, Ohio prohibits any state agency, including any entity established by Ohio law or for a state governmental function, from entering into or renewing a contract with any company boycotting Israel during the contractual period. Under this statute, corporations may publicly *support* the BDS movement, but any contract they sign must attest to the fact that they do not, and will not, actually boycott Israel. Naturally, the law does not apply to Ohio’s individual citizens, who may boycott Israel with impunity. Section 9.76 merely serves to prevent state funds from contributing to a boycott that the State of Ohio has no interest in supporting.⁶⁸

III. WHY OHIO’S ANTI-BDS LAW IS CONSTITUTIONAL

A. Ohio Revised Code § 9.76 Is Protected as Government Speech

The First Amendment of the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁶⁹ One of the major issues raised by the First Amendment is its application to government speech. According to the government speech doctrine, a government may “promote government policies, or advance particular ideas, without subjecting the government’s speech to First Amendment scrutiny.”⁷⁰ In other words, when the government “speaks,” it does not *regulate* speech, and therefore it does not violate the First Amendment. That, in essence, is the government speech doctrine.

In 1991, the Supreme Court used the government speech doctrine to uphold a restriction on federal funding. In *Rust v. Sullivan*, recipients of Title X funding under

⁶⁷ OHIO REV. CODE ANN. § 9.76 (2017).

⁶⁸ See *Testimony in Support of Amended House Bill 476: Hearing Before the S. Comm. on Gov’t Oversight and Reform*, 131st Gen. Assembly (Ohio 2016) (statement of Eric D. Fingerhut, Pres. and CEO, Hillel Int’l) at 2. Fingerhut argues that the BDS movement would have a detrimental impact on the state of Ohio’s economy. *Id.* At the time this statement was written, there were “over 40 Israeli companies in Ohio and dozens of research and commercialization partnerships between [Ohio] and Israel.” *Id.* Fingerhut also notes that the BDS movement has harmful effects on college campuses throughout Ohio. *Id.* There is a strong correlation between anti-Semitism on campus and the presence of the BDS movement; 95% of schools with a BDS presence had at least one anti-Semitic incident. *Id.* at 2–3.

⁶⁹ U.S. CONST. amend. I.

⁷⁰ Alyssa Graham, *The Government Speech Doctrine and Its Effects on the Democratic Process*, 44 SUFFOLK L. REV. 703, 703–04 (2011); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”).

the Public Health Service Act were prohibited from engaging in abortion-related activities.⁷¹ The Act authorizes the Secretary of Health and Human Services to make grants and enter into contracts with private entities to assist in family planning projects, but § 1008 of the Act prohibits federal funds from being used for programs related to abortion.⁷² This condition under § 1008 was challenged by various recipients of Title X funds and doctors who supervise Title X funds as a violation of their First Amendment rights.⁷³ The *Rust* Court upheld the restriction on Title X funding, holding that:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.⁷⁴

The Court further upheld the constitutionality of the federal funding restrictions because Title X recipients were only prohibited from engaging in abortion-related activities within the scope of their employment and the Title X funded project.⁷⁵ The employees working on projects funded by Title X had the absolute freedom to pursue abortion-related activities as private individuals outside of their work on the federally funded project.⁷⁶ Thus, the Supreme Court both recognized and applied the government speech doctrine as full protection against First Amendment scrutiny.

⁷¹ *Rust v. Sullivan*, 500 U.S. 173, 178 (1991) (“In 1970, Congress enacted Title X of the Public Health Service Act (Act), 84 Stat. 1506, as amended, 42 U. S. C. §§ 300 to 300a-6, which provides federal funding for family-planning services. . . . Section 1008 of the Act, however, provides that ‘none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.’”).

⁷² *Id.* at 178–79. The purpose of such restriction was to ensure that Title X funds were only used for “preventative family planning services, population research, infertility services, and other related medical, informational, and educational activities.” *Id.*

⁷³ *Id.* at 181. In addition to their First Amendment claim, petitioners also contended that § 1008 violated their Fifth Amendment rights. *Id.*

⁷⁴ *Id.* at 193; *see also* *Maher v. Roe*, 432 U.S. 464, 475 (1977) (“There is a basic difference between direct state interference with a protected activity and the state encouragement of an alternative activity consonant with legislative policy.”).

⁷⁵ *Rust*, 500 U.S. at 198–99 (reasoning that Congress had not denied Title X recipients the right to engage in abortion-related activities by requiring them do so separately from the activity that is receiving the federal funding).

⁷⁶ *Id.* (“The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project’s activities, do not in any way restrict the activities of those persons acting as private individuals. The employee’s freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.”).

Applying the government speech doctrine to § 9.76 is straight forward. *Rust* provides that the government does not violate the First Amendment by restricting the recipient of federal funds from using those funds to support a particular viewpoint.⁷⁷ This is precisely what § 9.76 is doing by its text, purpose, and policy considerations. Ohio is prohibiting companies from receiving state funds, via contracts with state agencies, if they boycott any jurisdiction that Ohio may openly trade with, including Israel.⁷⁸ By implementing this prohibition, Ohio is taking a preventative measure to ensure that state funds are not being used by companies to contribute to the boycott of Israel. Just as the Secretary in *Rust* was permitted to fund family planning to the exclusion of abortion, Ohio should be permitted to continue funding contracts with Israel to the exclusion of inadvertently funding the BDS movement.⁷⁹

In determining that § 1008 of the Public Health Service Act did not violate the First Amendment, the Court in *Rust* emphasized that recipients of Title X funding were not forced to give up abortion-related speech as private individuals.⁸⁰ The regulation simply required recipients to engage in any abortion-related activities separately from the activity receiving the Title X funding, so there exists no impermissible limitation on the recipients' First Amendment rights.⁸¹ This is a situation where "Congress has merely refused to fund [abortion-related activities] out

⁷⁷ *Id.* at 194 ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.").

⁷⁸ OHIO REV. CODE ANN. § 9.76 (2017).

⁷⁹ See *Rust*, 500 U.S. at 193; see also *Maher*, 432 U.S. at 475 (noting that there exists a fundamental difference "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."). Here, Ohio is encouraging the continued economic support of Israel by prohibiting state agencies from entering into or renewing contracts with companies that boycott Israel. Supporting Israel is consistent with Ohio's policies and interests, as Ohio businesses do "hundreds of millions of dollars in trade with Israel and Israeli companies each year." Robert Wang, *Schuring Seeks to Protect Israel from Boycotts*, TIMES REP., <https://www.timesreporter.com/article/20160519/news/160529954?template=ampart> (last updated May 20, 2016). As mentioned by the court in *Maher*, this is profoundly different from Ohio directly interfering with a company's right to boycott. Under § 9.76 of the Ohio Revised Code, companies still retain the freedom to boycott Israel or any other jurisdiction that Ohio can openly trade with; if companies choose to exercise this right, they will just be precluded from contracting with state agencies.

⁸⁰ *Rust*, 500 U.S. at 196 ("The regulations govern the scope of the Title X *project's* activities, and leave the *grantee* unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion-related advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.").

⁸¹ *Id.* at 198 (stating that Congress has not denied Title X grantees to engage in abortion-related activity, but rather requires any engagement in abortion-related activity to be done separately from the activity receiving federal funds).

of the public fisc.”⁸² That part of the *Rust* analysis applies to Ohio Revised Code § 9.76 as well. Ohio does not discriminate against viewpoints on boycotting Israel, just as Congress had not discriminated against viewpoints on abortion.⁸³ Ohio merely refuses to allow state funds to promote the boycott of Israel, just as Congress refused to allow federal funds to promote abortion as an option for family planning.

Furthermore, Ohio enacted § 9.76 with the purpose of preventing state agencies from contracting with *companies* that boycott Israel.⁸⁴ Section 9.76 does not restrict the employees of those companies in their capacities as private individuals from participating in the boycott of Israel.⁸⁵ A more complicated issue arises when a sole proprietor, which is included in the definition of “company” under § 9.76(A)(2), chooses to boycott Israel and therefore cannot contract with state agencies.⁸⁶ This Note addresses this issue shortly.⁸⁷ Apart from this narrow circumstance, it is clear that § 9.76 falls well within the protection of the government speech doctrine.⁸⁸

Following *Rust*, the Supreme Court expanded the government speech doctrine to include government authority to control federal funds.⁸⁹ In *National Endowment for the Arts v. Finley*, the Supreme Court upheld § 954(d)(1) of the National Foundation on the Arts and Humanities Act, which requires the Chairperson of the National

⁸² *Id.* (noting that this refusal to fund abortion-related activities is simply there to maintain “a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program”).

⁸³ *Id.* at 193. *See supra* note 77 and accompanying text.

⁸⁴ *See* OHIO REV. CODE ANN. § 9.76(B) (2017) (“A state agency may not enter into or renew a contract with a company . . . unless the contract declares that the company is not boycotting any jurisdiction with whom this state can enjoy open trade, including Israel, and will not do so during the contract period.”).

⁸⁵ *Id.* The text of the statute plainly states that state agencies may not “enter into or renew a contract with a company” that boycotts Israel. *Id.* There is nothing in the text of the statute relating to individual, private citizens of Ohio. *Id.*

⁸⁶ OHIO REV. CODE ANN. § 9.76(A)(2) (“‘Company’ means a sole proprietorship, partnership, corporation, national association, societe anonyme, limited liability company, limited partnership, limited liability partnership, joint venture, or other business organization, including their subsidiaries and affiliates, that operates to earn a profit.”).

⁸⁷ *See infra* Part III.B for a full discussion of this issue.

⁸⁸ *See supra* text accompanying notes 76–86 for the straightforward application of the government speech doctrine to § 9.76 of the Ohio Revised Code.

⁸⁹ *See, e.g., Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 220 (2000) (holding that viewpoint-based funding decisions can be upheld in cases where the government is the speaker); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 893 (1995) (holding that “when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee”). Ohio prohibiting state agencies from contracting with companies that boycott Israel is a “legitimate and appropriate” step to ensure that state funds are not “distorted” by companies and used to support the boycott of Israel.

Endowment for the Arts to consider general standards of decency and respect when granting federal funds.⁹⁰ The Court noted that the First Amendment had not been violated because “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake.”⁹¹ Additionally, the Court cited *Rust* and emphasized that it is permissible under the First Amendment for the government to selectively fund one activity to the exclusion of another.⁹²

To reiterate, § 9.76 fits neatly within this framework. Here, too, the State is permitted under the First Amendment to fund one activity to the exclusion of another. In *Rust*, the Secretary of Health and Human Services was permitted to use government funds toward family planning to the exclusion of funding any abortion-related activities.⁹³ In *Finley*, the Chairperson of the National Endowment for the Arts was permitted to use government funds to make grants for art projects that fit within the general standards of decency and respect to the exclusion of funding anything that did not satisfy these standards.⁹⁴ The Supreme Court concluded that neither of these situations posed any violation to the First Amendment because the government is permitted to fund one program without being obligated to fund an alternative program.⁹⁵ Thus, Ohio is permitted under the First Amendment to exclude the use of *state funds* from supporting the boycott of Israel by prohibiting *state agencies* from contracting with companies that support the boycott.

Finally, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment as a permissible limitation on government-funded speech.⁹⁶ The Solomon Amendment provides that in order for an institution of higher education to maintain its federal funding, the institution must provide military recruiters with equal access to its campus and students as it does for

⁹⁰ Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 572–76 (1998) (holding that taking standards of decency and respect into consideration when granting federal funds was not discriminating on the basis of viewpoint).

⁹¹ *Id.* at 587–88 (stating that “Congress has wide latitude to set spending priorities” as long as other constitutionally-protected rights are not violated).

⁹² *Id.* at 588 (emphasizing that the government is permitted to “selectively fund” one program without funding an alternative program that deals with the issue differently).

⁹³ *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (“The Secretary’s regulations are a permissible construction of Title X” and do not violate the First Amendment).

⁹⁴ *Finley*, 524 U.S. at 576. *See supra* note 90 and accompanying text.

⁹⁵ *Rust*, 500 U.S. at 193. *See supra* note 79 and accompanying text.

⁹⁶ *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 70 (2006) (“Because Congress could require law schools to provide equal access to military recruiters without violating the schools’ freedoms of speech or association, the Court of Appeals erred in holding that the Solomon Amendment likely violates the First Amendment. We therefore reverse the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.”).

nonmilitary recruiters.⁹⁷ In determining that there was no First Amendment violation, the Court emphasized that the Solomon Amendment did not compel speech by institutions, but rather served to regulate conduct as a condition for receiving federal funds.⁹⁸

Just like the Solomon Amendment, § 9.76 in no way compels the speech of companies. By enacting this statute, Ohio is *not* requiring companies who openly support the BDS movement to stop their support and alter their beliefs. Section 9.76 simply serves to notify companies that Ohio refuses to permit state funds from contributing to the boycott of Israel by prohibiting state agencies from contracting with companies that participate in the BDS movement.⁹⁹ Section 9.76 certainly does not compel companies to express support of Israel or to condemn the BDS movement. By enacting § 9.76, Ohio is refusing to be affiliated with the boycott of Israel, which is fully permissible under the government speech doctrine and does not violate the freedom of speech of any individual Ohio citizen.¹⁰⁰

The Supreme Court has held some government-funded speech unconstitutional, but these cases are easily distinguishable from the issue here. For example, in *Legal Services Corp. v. Velazquez*, the Supreme Court refused to extend the government speech doctrine to a statutory provision prohibiting federal funds distributed by the Legal Services Corporation (“LSC”) from being used for legal representation involving an effort to reform welfare laws.¹⁰¹ The Court held this restriction violated the First Amendment because an attorney funded by the LSC speaks on behalf of his

⁹⁷ *Id.* at 55 (noting that the Solomon Amendment requires the law school to offer military recruiters equal access to the campus and its students as it offers to nonmilitary recruiters in order to receive federal funding).

⁹⁸ *Id.* at 61–62 (discussing some of the leading precedent on First Amendment rights, which establishes that the government may not compel speech). *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943) (holding that a state law requiring children to recite the Pledge of Allegiance and salute the flag at school was unconstitutional under the First Amendment); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (holding that a New Hampshire law compelling drivers to display the state motto on their license plates violated their freedom of speech).

⁹⁹ *See Goldfeder, supra* note 2, at 220–21 (stating that South Carolina’s anti-BDS law “merely expresses the state’s position on the issue, explains how and where it will spend public funds within its jurisdiction, and notifies the public as to its actions.”).

¹⁰⁰ *See Regan v. Tax’n with Representation*, 461 U.S. 540, 541 (1983) (holding that Congress was permitted under the First Amendment to prohibit tax-exempt organizations from substantial lobbying). The Court noted that “Congress has merely refused to pay for the lobbying out of public moneys. This Court has never held that Congress must grant a benefit such as [Taxation with Representation] claims here to a person who wishes to exercise a constitutional right.” *Id.* at 545; *see also Cammarano v. United States*, 358 U.S. 498, 513 (1959) (upholding a Treasury Regulation denying business expenses deductions for lobbying activities). Both of these cases further demonstrate that the government is permitted under the Constitution to use federal funds for one activity that bears “a rational relation to a legitimate governmental purpose” at the exclusion of another. *Regan*, 461 U.S. at 547.

¹⁰¹ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536 (2001) (holding that the restriction prohibiting legal representation if such representation involves amending or challenging welfare laws violates the First Amendment).

or her client, not the government, therefore constituting private speech.¹⁰² Additionally, the Court reasoned that upholding the statutory provision would force attorneys funded by the LSC to potentially ignore serious questions of law, which would hinder the courts' ability to properly exercise its judicial power.¹⁰³

In *Agency for International Development v. Alliance for Open Society International, Inc.*, the Supreme Court also declined to apply the government speech doctrine.¹⁰⁴ The statutory provision at issue prohibited Congress from funding non-governmental organizations under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that do not have a policy explicitly opposing prostitution and sex trafficking.¹⁰⁵ The Supreme Court concluded that the condition imposed by the statutory provision, explicitly opposing prostitution and sex trafficking, violated the First Amendment because it cannot be "confined within the scope of the Government program."¹⁰⁶ The Court distinguished the statutory provision from that in *Rust*, where the regulations only governed recipients of Title X funds within the scope of their employment.¹⁰⁷

Velazquez and *Agency for International Development*, although important to mention, are inapplicable here. The Supreme Court in *Velazquez* refused to apply the government speech doctrine because the attorneys funded by the LSC spoke on behalf of their private clients, not the government.¹⁰⁸ Unlike the *Velazquez* prohibition that restricted speech on behalf of private citizens, § 9.76 only restricts speech on behalf of the State of Ohio. Companies in Ohio are permitted to boycott Israel, they simply cannot do so if they choose to contract with state agencies.¹⁰⁹ Section 9.76 does not

¹⁰² *Id.* at 542 (stating that "an LSC-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client").

¹⁰³ *Id.* at 545 (refusing to apply the government speech doctrine because "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power").

¹⁰⁴ *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (holding that the statutory provision at issue "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program" therefore violating the First Amendment).

¹⁰⁵ *Id.* at 208 (noting recipients of federal funding must agree in their award documents that they oppose prostitution).

¹⁰⁶ *Id.* at 221 (contending that the condition imposed by the statutory provision crosses the line beyond merely defining the federal program).

¹⁰⁷ *Id.* at 217–18 ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'").

¹⁰⁸ *Velazquez*, 531 U.S. at 542. See *supra* note 102 and accompanying text.

¹⁰⁹ OHIO REV. CODE ANN. § 9.76(B) (2017).

pose any restrictions on private companies *unless* Ohio agencies and funds are involved. Therefore, companies are only restricted when they contract with agencies that represent Ohio. This is strictly government speech, as opposed to the situation in *Velazquez* where attorneys' speech on behalf of their private clients was impermissibly limited.¹¹⁰

Furthermore, § 9.76 differs greatly from the statutory provision at issue in *Agency for International Development* because the prohibition against boycotting Israel only applies to the company itself, not its employees as private individuals. This was not the case in *Agency for International Development* because that prohibition went "beyond defining the limits of the federally funded program to defining the recipient."¹¹¹ However, under § 9.76, the prohibition has no limiting impact on the speech or expression of individuals outside of their work with their company. Ohio is not "defining the recipient" because employees are free to do as they please as private individuals outside of their work with a company that contracts with a state agency. Similarly, the prohibition under § 9.76 only applies during the contract period, therefore remaining within the limits of the contract with state agencies.¹¹² Companies in Ohio are wholly free to boycott Israel, they just may not do so *while* contracting with a state agency. Based on this analysis, the Supreme Court's decision in *Agency* does not apply here.

B. Following the Texas Experience, Ohio Should Consider Revising § 9.76 to Exclude Sole Proprietorship

As mentioned above, § 9.76(B) currently provides that:

A state agency may not enter into or renew a contract with a company for the acquisition or provision of supplies, equipment, or services, or for construction services, unless the contract declares that the company is not boycotting any jurisdiction with whom this state can enjoy open trade, including Israel, and will not do so during the contract period.¹¹³

The word "company" is defined in § 9.76(A)(2) as "a *sole proprietorship*, partnership, corporation, national association, societe anonyme, limited liability company, limited partnership, limited liability partnership, joint venture, or other business organization, including their subsidiaries and affiliates, that operates to earn a profit."¹¹⁴ Thus, a state agency in Ohio is prohibited from renewing or entering into a contract with any sole proprietorship, partnership, corporation, national association, societe anonyme, limited liability company, limited partnership, limited liability partnership, joint venture, or other business organization, including their subsidiaries and affiliates, that operates to earn a profit and engage in the boycott of Israel.

¹¹⁰ *Velazquez*, 531 U.S. at 542. See *supra* note 102 and accompanying text.

¹¹¹ *Agency*, 570 U.S. at 218. See *supra* notes 104–07 and accompanying text.

¹¹² OHIO REV. CODE ANN. § 9.76(B) (2017). The statutory text explicitly specifies that a company contracting with a state agency cannot boycott Israel only *during* the contract period. *Id.*

¹¹³ *Id.*

¹¹⁴ OHIO REV. CODE ANN. § 9.76(A)(2) (emphasis added).

Black's Law Dictionary defines a sole proprietorship as "[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity."¹¹⁵ In a sole proprietorship, "one person owns all the business's assets, owns all of the profits derived from its operations, and has unilateral management authority. The legal identity of the business and the owner, in other words, are the same."¹¹⁶

Because the individual owner and the business are considered one single entity in a sole proprietorship, it may be difficult to § 9.76 as it currently stands without the State facing potential exposure. Although § 9.76 does not violate the First Amendment, removing sole proprietorship from its scope further protects the State from constitutional challenges and reduces future litigation costs. While there is currently very little caselaw challenging state anti-BDS laws, this proposal is influenced by Texas, which was forced to change its anti-BDS law after recently losing a First Amendment challenge.¹¹⁷

In *Amawi v. Pflugerville Independent School District*, the District Court for the Western District of Texas found that Texas's anti-BDS law was likely unconstitutional under the First Amendment.¹¹⁸ The five plaintiffs, all sole proprietors, alleged that Texas Government Code § 2272.002 violated their First Amendment rights by restricting their speech.¹¹⁹ Four of the five plaintiffs were active participants of the BDS movement who refused to sign contracts with public institutions, thereby foregoing profits, because the contracts contained "No Boycott of Israel" clauses.¹²⁰ One of the plaintiffs contended that he was no longer active in the BDS movement only because he was forced to sign a "No Boycott of Israel" provision in order to avoid

¹¹⁵ *Sole Proprietorship*, BLACK'S LAW DICTIONARY (2019).

¹¹⁶ THERESA A. GABALDON & CHRISTOPHER L. SAGERS, BUSINESS ORGANIZATIONS 34 (1st ed. 2016) (noting that a sole proprietorship is simply formed when a person begins selling a product or service).

¹¹⁷ Elizabeth Byrne, *Texas Narrows Law Barring Contractors from Boycotting Israel*, TEX. TRIB. (May 9, 2019), <https://www.texastribune.org/2019/05/09/Texas-anti-boycott-israel-law-greg-abbott-hb793>; see also Jewish Telegraphic Agency & Times of Israel Staff, *Lawsuit Dismissed over Kansas Anti-BDS Law; State to Pay Plaintiff's Legal Fees*, TIMES OF ISR. (July 1, 2018), <https://www.timesofisrael.com/lawsuit-dismissed-over-kansas-anti-bds-law-state-to-pay-plaintiffs-legal-fees> (describing how Kansas also amended their anti-BDS statute to exclude individuals and sole proprietorships from its scope).

¹¹⁸ *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 757–59 (W.D. Tex. 2019) (finding that the plaintiff's will likely succeed on their claim that Texas's anti-BDS law violates their First Amendment rights).

¹¹⁹ *Id.* at 730–31 (stating that the issue here is whether Texas could prohibit boycotting Israel as a condition of public employment).

¹²⁰ *Id.* at 732–35. Bahia Amawi, a speech pathologist, refused to renew her contract with Pflugerville Independent School District where she was required to certify that she would not boycott Israel during her employment term. *Id.* at 732. John Pluecker, a freelance writer, artist, interpreter, and translator, refused to sign a contract with the University of Houston because he would not get paid unless he certified that he did not participate in the boycott of Israel. *Id.* at 732–33. Zachary Abdelhadi and Obinna Dennar, both students, refused to judge debates at local public-school districts because the contracts required them to certify that they do not boycott Israel in order to get paid. *Id.* at 733.

losing his job.¹²¹ The District Court ultimately concluded that the plaintiffs were likely to succeed on the merits of their claim because § 2272.002 violates free speech rights under the First Amendment.¹²²

In response to the *Amawi* decision, the Texas legislature narrowed the scope of Texas's anti-BDS statute because it had "some unintended consequences."¹²³ Texas Government Code § 2272.002 provides that "a governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract."¹²⁴ Prior to the amendment of the statute, the term "company" under § 2270.001 included a for-profit sole proprietorship, similar to Ohio Revised Code § 9.76(A)(2).¹²⁵ However, following *Amawi*, § 2272.002 is now more limited, only applying to companies, not individuals, and not applying to companies with fewer than ten full-time employees.¹²⁶

Marc Greendorfer, founder of the Zachor Legal Institute, stated that although he believed Texas's anti-BDS law was constitutional prior to the amendment, "there is still room for legal improvement to erase any gray areas."¹²⁷ This is precisely why this Note proposes that Ohio should amend § 9.76 to remove a sole proprietorship from the scope of the statute. Although § 9.76 is permissible government speech and does not currently violate the First Amendment, sole proprietorships certainly create a gray area. Because the individual and the business of a sole proprietor are seen as one single

¹²¹ *Id.* at 734–35. George Hale, a radio reporter licensed with Texas A&M University-Commerce, hesitantly signed the contract with a no-boycott provision so he could keep his job. *Id.*

¹²² *Id.* at 757–58 (concluding that § 2272.002 is a content and viewpoint-based restriction on protected speech, imposes unconstitutional conditions on public employment, compels speech for an impermissible purpose, and is void for vagueness).

¹²³ Sean Savage, *Texas Approves Measure to Tweak Law That Bars Government from Contracting with Businesses Supporting BDS*, SUN SENTINEL (Apr. 16, 2019), <https://www.sun-sentinel.com/florida-jewish-journal/fl-jj-texas-approves-measure-tweak-law-bars-government-contract-businesses-bds-20190424-story.html> (reporting on the recent amendment to Texas's anti-BDS law following unsuccessful litigation for the state).

¹²⁴ TEX. GOV'T CODE ANN. § 2270.002 (2017).

¹²⁵ TEX. GOV'T CODE ANN. § 2270.001 (2019). Currently, the word "company" under § 2270.001 has the same meaning as § 808.001, "except that the term does not include a sole proprietorship." Section 808.001 defines company as "a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit."

¹²⁶ Savage, *supra* note 123 (stating that the Texas law as amended does not include "individuals and smaller companies, such as those with fewer than 10 full-time employees or valued under \$100,000").

¹²⁷ *Id.* Goldfeder is also quoted stating that he believes the purpose of anti-BDS laws is to address an institutional issue, "rather than individual, adoption of BDS-type discrimination against Israel and Jews." *Id.*

entity, any participation in the BDS movement by the individual may also be seen as participation by the business.¹²⁸

Therefore, unlike any other type of “company” under § 9.76(A)(2), a sole proprietor would currently be required to stop any boycott activity as a private individual in order to contract with state agencies. This is contrary to one of the central reasons the Supreme Court in *Rust* gave for upholding § 1008 of the Public Health Service Act under the government speech doctrine.¹²⁹ The Supreme Court emphasized that there was no First Amendment violation because the Title X grantees were still free to participate in abortion-related activities as private individuals outside the scope of their employment.¹³⁰ Thus, § 1008 did not present any restrictions on the freedom of speech of private individuals. This is not necessarily the case for sole proprietors under § 9.76. Unlike Title X grantees, a sole proprietor does not have the absolute freedom to support the boycott of Israel if he or she wants to contract with an Ohio agency. Because a sole proprietor, as a private individual, may be limited under § 9.76 from boycotting Israel, a First Amendment concern may arise.

To avoid this issue, Ohio should follow Texas’s lead and amend § 9.76 to exclude a sole proprietorship from the definition of “company” under § 9.76(A)(2). This precautionary step will help safeguard Ohio from incurring future litigation costs and ensure that § 9.76 fully complies with First Amendment law.

IV. CONCLUSION

Ohio has full authority under the First Amendment to prohibit state agencies from contracting with companies that boycott Israel. The Supreme Court has repeatedly authorized the government to promote certain policies or particular viewpoints without violating the First Amendment under the government speech doctrine.¹³¹ This doctrine permits the government to promote certain policies and particular viewpoints “without subjecting the government’s speech to First Amendment scrutiny.”¹³²

This Note also suggests a minor amendment to § 9.76. Ohio should amend the definition of “company” within the meaning of the statute by removing a sole proprietorship. This proposal mirrors a recent amendment to Texas’s anti-BDS statute after the State lost a First Amendment challenge.¹³³ Due to the nature of a sole

¹²⁸ See *supra* notes 115–16 and accompanying text for more information on a sole proprietorship.

¹²⁹ *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). See *supra* notes 80–82 and accompanying text for a discussion on the Supreme Court’s reasoning in *Rust*.

¹³⁰ *Rust*, 500 U.S. at 196.

¹³¹ See *supra* Part III.A. for a discussion of the government speech doctrine.

¹³² *Graham*, *supra* note 70, at 703–04; see also *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“when the State is the speaker, it may make content-based choices”).

¹³³ *Byrne*, *supra* note 117 (“Two weeks after a federal judge blocked the enforcement of a state law that prohibits government agencies in Texas from doing business with contractors who are boycotting Israel, Gov. Greg Abbott signed a bill this week narrowing the controversial law to exclude individual contractors.”).

proprietorship, a gray area may exist where a sole proprietor boycotts Israel. Because the individual and the company of a sole proprietorship are a single legal entity, any speech by the individual, as a private citizen, can be viewed as speech by the company as well.¹³⁴ Therefore, § 9.76 may impermissibly limit a sole proprietor's ability to boycott Israel as a private individual if he or she wishes to contract with a state agency. Ohio can easily resolve this potential issue by the minor revision proposed in this Note.

Notwithstanding this proposed modification, § 9.76 is well within the scope of the First Amendment. Under Ohio Revised Code § 9.76, Ohio is simply advancing its important economic relationship with Israel by preventing state agencies from contracting with companies that boycott Israel. Section 9.76 in no way prohibits the boycott of Israel by private individual citizens and therefore enjoys full First Amendment protection.

¹³⁴ See *Sole Proprietorship*, *supra* note 115, for the legal definition of a sole proprietorship.