The First Amendment and Refusals to Deal

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Anti-BDS laws, which bar government contractors from boycotting Israel, are generally constitutional—for the same reason that anti-discrimination laws are generally constitutional: Refusals to deal are, outside some narrow situations, generally unprotected by the First Amendment.

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Many of the arguments here are similar to those set forth in *Arkansas Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (en banc); they were, however, written before that decision was handed down, and indeed were made in our amicus brief in that case.

I. INTRODUCTION

Decisions not to buy or sell goods or services are generally not protected by the First Amendment. That is the necessary implication of *Rumsfeld v. Forum for Academic & Institutional Rights*,[1] and it is the foundation of the wide range of anti-discrimination laws, public accommodation laws, and common carrier laws throughout the nation.

Thus, for instance:

- A limousine driver has no First Amendment right to refuse to serve a same-sex wedding party, even if he describes this as a boycott of same-sex weddings (or part of a nationwide boycott of such weddings by like-minded citizens).
- A store has no First Amendment right to refuse to sell to Catholics, even if it describes this as a boycott of people who provide support for the Catholic Church.
- An employer in a jurisdiction that bans political affiliation discrimination[2] has no First Amendment right to refuse to hire Democrats, even if it describes such discrimination as a boycott.
- An employer that is required to hire employees regardless of union membership has no First Amendment right to refuse to hire union members on the grounds that it is boycotting the union.
- A cab driver who is required to serve all passengers has no First Amendment right to refuse to take people who are visibly carrying Israeli merchandise.

Of course, all these people would have every right to speak out against same-sex weddings, Catholicism, the Democratic Party, unions, and Israel. That would be speech, which is indeed protected by the First Amendment. For this reason, when phrases such as "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations" appear in various anti-BDS statutes,[3] courts should read them as covering only commercial conduct such as that listed in the preceding phrases ("refusing to deal with" and "terminating business activities with"), and not extending to advocacy.

But as a general matter, a decision not to do business with someone, even when it is politically motivated (and even when it is part of a broader political movement), is not protected by the First Amendment.[4] And though people might have the First Amendment right to discriminate (or boycott) in some unusual circumstances—for instance when they refuse to participate in distributing or

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1. Rumsfeld v. Forum for Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006).

2. *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. OF L. & POL. 295 (2012).

3. *See, e.g.*, TEX. GOV'T CODE ANN. § 808.001(1) (West 2022).

4. Nothing in this argument turns on whether BDS discriminates against Jews; but BDS does involve deliberately discriminatory refusals to deal against companies that are owned by Israelis or operate in Israel, and a state may ban such discrimination just like it may ban discrimination based on religion, national origin, ethnicity, and other such factors. *See infra* Part II.D.

creating speech they disapprove of—that is a basis for a narrow as-applied challenge, not a facial one.

For this reason, properly crafted anti-BDS statutes—the subjects of this symposium, and of recent debates about boycotts more broadly—are constitutional, as are contracts based on such provisions. And, of course, the logic of this would apply to a wide range of statutes that forbid (or mandate) various kinds of boycotts or other refusals to deal.[5]

II. REFUSALS TO DEAL GENERALLY

A. Rumsfeld v. FAIR

In *Rumsfeld*, the Supreme Court rejected the argument that a law school had a First Amendment right to refuse to allow military recruiters on its property—which is to say, the Court rejected the argument that law schools could engage in a limited boycott of such recruiters. Such a refusal to allow military recruiters, the Court held, "is not inherently expressive."[6] Law schools' "treating military recruiters differently from other recruiters" was "expressive only because the law schools accompanied their conduct with speech explaining it."[7] "The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it."[8] Because of that, Congress could restrict such discrimination against military recruiters without violating the First Amendment.[9]

"[I]f an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes," that announcement offers no basis for applying First Amendment scrutiny to the nonpayment of taxes.[10] Likewise, if a university announces that it is expressing disapproval of the military's Don't-Ask-Don't-Tell policy by excluding the military from on-campus recruiting, that announcement offers no basis for applying First Amendment scrutiny to this exclusion.[11]

What the universities wanted to do in *Rumsfeld*—"restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military"[12]—was quite similar to boycotts of Israel: it consisted of refusing to deal with certain people or entities (the military and its

5. This article focuses on the Court's First Amendment doctrine; for more on history, see generally Josh Halpern & Lavi Ben Dor, *Boycotts: A First Amendment History* (Harv. Pub. L. Working Paper, Paper No. 23-01, Dec. 15, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4305186 (on file with the *University of the Pacific Law Review*).

6. 547 U.S. at 64.

7. *Id.* at 66.

8. *Id.*

9. *Id.* at 67–68.

10. *Id.*

11. *Id.*

12. 547 U.S. at 52.

recruiters) "because they object to the[people's or entities'] polic[ies]."[13] Indeed, FAIR characterized the universities' actions as "a limited sort of boycott of any institution that discriminates."[14] The *Rumsfeld* Court rejected this claimed First Amendment right.

The same applies to boycotts of Israel or any other country: An observer who sees a company dealing with a non-Israeli business, and not with an Israeli business, can only perceive a political message when the company accompanies its conduct with speech explaining it.[15]

This lack of constitutional protection simply reflects a well-established principle: the First Amendment does not generally protect liberty of contract, whether or not one's choices about whom to deal with are political. "Boycott" is just another term for refusing to contract, at least when that is part of some organized movement. There are also "buycotts," which are deliberate choices to contract with particular entities, and which are likewise not protected by the First Amendment, regardless of whether the contracting decision has a political motivation. Using such terms to refer to one's commercial choices does not create a First Amendment right to contract, or not to contract. People equally lack a First Amendment right, for instance,

- to illegally refuse to hire lawful permanent residents, even if such a refusal is aimed at sending an anti-immigrant message;
- to illegally hire aliens who lack work authorization, even if such hiring is aimed at sending a pro-open-borders message;
- to do business with North Korean entities (if a law forbids that), even if such dealing is aimed at sending what they see as a pro-peace message;
- to refuse to do business with Israeli entities (if a law forbids that), even if such a refusal is aimed at sending a pro-Palestinian-rights message.

B. NAACP v. Claiborne Hardware Co.

Of course, boycotts are usually accompanied by speech—people urging others to join the boycott or organizing in groups that promote the boycott. Like other advocacy, advocacy of boycotts is generally constitutionally protected: *NAACP v. Claiborne Hardware Co.* made that clear, in noting that "peaceful picketing," "marches," "urg[ing others] to join the common cause," "support[ing the boycott] by speeches," "threats of social ostracism," and gathering and publishing the

13. *Id.*

14. Brief for Respondents, Rumsfeld v. FAIR, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347175, at *29; *see also* Brief for Ass'n of Am. L. Schools as Amicus Curiae in Support of Respondents, Rumsfeld v. FAIR, 547 U.S. 47 (No. 04-1152), 2005 WL 2347173, at *28 ("AALS and its members have chosen to convey their message of tolerance and equality through a policy prohibiting discriminatory recruiting—in the time-honored tradition of 'nonviolent, politically motivated boycott designed to force governmental and economic change.'" (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982))).

15. *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1392 (8th Cir. 2022) (en banc).

names of those who refuse to join were all "safeguarded by the First Amendment."[16]

But *Claiborne Hardware* had no occasion to decide whether a person's not dealing with someone based on that someone's race was itself protected by the First Amendment, because it was clear that Mississippi law did not prohibit such private choices not to deal.[17] Under Mississippi law, whites could generally refuse to deal with blacks, and blacks could refuse to deal with whites. Nor was the boycott banned by general prohibitions on "concerted refusal to deal," "secondary boycotts," or "restraint[s] of trade."[18]

Indeed, *Claiborne Hardware* expressly reserved the question whether a boycott "designed to secure aims that are themselves prohibited by a valid state law" is constitutionally protected.[19] It follows that the question whether a boycott that involved refusals to deal that were themselves prohibited by a valid state law—a law that targeted conduct rather than speech—was also not resolved by *Claiborne Hardware*. And in *Rumsfeld*, the Court did resolve the issue: a boycott by universities of military recruiters could be outlawed outright, and certainly could be penalized by withdrawal of government funds as well.[20]

To be sure, the statement in *Claiborne Hardware* that "[p]etitioners withheld their patronage from the white establishment of Claiborne County," was followed by the statement that, "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered."[21]

But the focus of this discussion in *Claiborne Hardware* was on requiring that a tort verdict, allegedly based on violent actions, was indeed based solely on violent actions; the only "unlawful conduct" at issue in the case was violent conduct, because discriminatory purchasing decisions were not unlawful in 1960s Mississippi. The *Claiborne Hardware* Court did not purport to hold that race-based "with[holding of] patronage" is constitutionally protected—and, of course, antidiscrimination law routinely and constitutionally forbids withholding business relations based on race, religion, sexual orientation, national origin, and more.

Nor can such normal antidiscrimination laws be distinguished from other boycotts on the grounds that they bar discrimination in selling goods and services rather than in buying goods and services. There is no real economic difference between a purchase and a sale (or, for that matter, barter): Both involve economic transactions that trade something for something else.

There is likewise no First Amendment difference between discrimination in buying and selling. An employer's decision to discriminate in hiring is not protected by the First Amendment, for instance, even though the employer is a

16. 458 U.S. 886, 907, 909, 910, 933 (1982).

17. *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1392 (8th Cir. 2022) (en banc).

18. 458 U.S. at 891 n.7, 894, 915.

19. *Id.* at 915 n.49.

20. 547 U.S. at 60.

21. 458 U.S. at 918.

"consumer" of labor, paying money for labor the way that consumers pay money for other services. There may be good policy reasons not to apply antidiscrimination laws to certain transactions (such as a person's decisions whether to buy goods and nonlabor services). But they are not First Amendment reasons.

C. The Court's Other Cases

The holding of *Claiborne* is thus consistent with the principle set forth just six years before in *Runyon v. McCrary*: Though people and institutions have a right to advocate for discrimination—to "promote the belief that racial segregation is desirable"—"it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."[22] Likewise, though people have a right to urge a boycott of white-owned stores, as in *Claiborne*, it does not follow that the practice of refusing to deal with an entity based on the owners' race (whether black or white) is also protected by the same principle. And though people have an indubitable right to urge a boycott of Israeli companies, it does not follow that the practice of refusing to deal with such companies based on the owners' nationality is also protected by the same principle.

We see the same in *International Longshoremen's Ass'n v. Allied International, Inc.*,[23] where union members engaged in a purely politically motivated boycott of cargoes shipped from the USSR (engaged in as a protest of the invasion of Afghanistan). The Court noted that even expression—secondary picketing—in support of refusals to deal might sometimes be properly restricted notwithstanding the First Amendment (a controversial position, but one the Court had settled on in earlier cases).[24] And, the Court noted, if even picketing supporting a boycott could be restricted, "[i]t would seem even clearer that conduct designed not to communicate but to coerce" (there, a refusal to unload ships) "merits still less consideration under the First Amendment."[25] Of course, the refusal to unload ships was obviously part of a broader plan that included communication. But the refusal to deal itself was not treated as communication entitled to First Amendment protection.

The Court also added, "There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others."[26] That too fits with anti-BDS laws, which leave opponents of Israel with many ways to express their opposition to Israel without engaging in discriminatory refusals to deal with Israeli companies.

To be sure, *FTC v. Superior Court Trial Lawyers Ass'n*, while holding that the First Amendment did not protect "a group of lawyers [who] agreed not to represent

22. 427 U.S. 160, 176 (1976).
23. 456 U.S. 214–15 (1982).
24. *Id.* at 226.
25. *Id.*
26. *Id.*

indigent criminal defendants . . . until the . . . government increased the lawyers' compensation,"[27] distinguished *Claiborne* on the grounds that the lawyers' boycott was primarily economically motivated—while the *Claiborne* boycott was political. And there is language in *Claiborne* suggesting (but not holding) that a political boycott, such as "an organized refusal to ride on [city] buses," might be constitutionally protected;[28] it is thus possible to read *Claiborne* as saying that boycotts are inherently expressive.

But the better reading of that case, and the one most consistent with the other precedents, is that many but not all elements of political boycotts are expressive. The *Claiborne* Court said that the political "boycott clearly involved constitutionally protected activity," and then identifies those elements as "speech, assembly, association, and petition," notably not including commercial dealing or non-dealing in the list.[29] The Court in *Superior Court Trial Lawyers Ass'n* likewise did not hold that the refusal to deal would itself be protected had it been politically motivated. And in *Rumsfeld*, the Court expressly rejected any such position.

Indeed, much of the reasoning in *Superior Court Trial Lawyers Ass'n* is squarely on point here. "Every concerted refusal to do business with a potential customer or supplier has an expressive component," the Court noted.[30] Yet that does not itself make refusals to deal constitutionally protected speech.[31] Nor does the publicity generated by the boycott: "[T]o the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters' ideas. But this level of expression is not an element of the boycott. Publicity may be generated by any other activity that is sufficiently newsworthy."[32]

The same applies to the boycotting behavior to which anti-BDS laws apply: the concerted refusal to do business with Israeli companies may have a political motivation, may help spread political ideas, and may even be understood as political by people who are told about the boycotters' motivations. But this does not mean that such refusal to deal is protected by the First Amendment.

And to the extent that *Superior Court Trial Lawyers Ass'n* might have been seen as implying a different result for purely un-self-interested boycotts, *Rumsfeld* rebuts any such reading. "[A] group's effort to use market power to coerce the government through economic means may subject the participants to antitrust liability," even Justice Brennan's *Superior Court Trial Lawyers Ass'n* dissent acknowledged.[33] A university's effort to use control over its property to coerce the government into changing its policies may subject the university to the loss of funds.[34] Likewise, an effort to use economic power to coerce a foreign government

27. 493 U.S. 411, 414 (1990).

28. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 & n.48 (1982).

29. *Id.* at 911.

30. 493 U.S. 411 at 431.

31. *See id.* at 430.

32. *Id.* at 431.

33. *Id.* at 438 (Brennan, J., dissenting).

34. Rumsfeld v. FAIR, 547 U.S. 47, 60 (2006).

through economic means may subject the participants to loss of state government contracts.

D. Restrictions on Refusals to Deal, Broad and Narrow

Of course, different laws banning refusals to deal operate differently:

- Some categorically require people to do business with all eligible people or organizations—common carrier obligations, such as those imposed on taxicabs, are one example.
- Some ban discrimination based on a particular trait that has been the basis of massive and often debilitating discrimination, such as race.
- Some ban discrimination for less pressing reasons, for instance bans on discrimination based on marital status, "personal appearance," "matriculation," "political affiliation,"[35] "source of income," or "place of residence or business."
- Some ban discrimination only against particular groups or organizations, such as bans on discrimination against military recruiters, Israeli companies, military members,[36] permanent resident aliens,[37] the blind and severely visually impaired,[38] or people age 40 and over.[39] While such selectivity might in rare situations violate the Equal Protection Clause (for instance, if a law banned discrimination against Hispanics but not against Asians), it does not violate the First Amendment.
- Some categorically ban discrimination and some ban discrimination only in government funding.

But these laws all have an important feature in common: they ban refusal to deal, which is to say the conduct of not doing business with some person or organization, rather than banning speech. Because of this, none of them is generally viewed as subject to heightened scrutiny. Antidiscrimination laws, for instance, are constitutional precisely because they do not inherently burden First Amendment rights—not because they burden First Amendment rights but pass strict scrutiny. (Indeed, many applications of antidiscrimination laws might well not pass strict scrutiny; consider, for instance, the bans on public accommodation discrimination based on marital status or political affiliation.[40])

When the Court concluded that, "There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union,"[41] it did so because such discrimination is simply not treated as symbolic

35. *See, e.g.*, Volokh, *supra* note 2; Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 NYU J. L. & LIBERTY 709 (2021).

36. Uniformed Services Employment and Re-Employment Rights Act, 38 U.S.C. § 4311.

37. 8 U.S.C. § 1324b(a)(1)(B), (3).

38. 20 U.S.C. § 1684 (part of Title IX, and a companion to the anti-sex-discrimination rules in Title IX).

39. Age Discrimination in Employment Act, 29 U.S.C. § 631. When it was first enacted, the ADEA applied only to 40-to-65-year-olds. Pub. L. 90-202, sec. 12 (1967).

40. *See* Volokh, *supra* note 35.

41. Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (citing Norwood v. Harrison, 413 U.S. 455, 470

expression for First Amendment purposes—not because bans on such discrimination pass heightened scrutiny. The same applies to discriminating in the selection of those with whom one enters into other business arrangements.

Of course, anti-BDS statutes may well have been motivated not just by purely economic considerations, but also by legislators' desires to send a message that a certain basis for refusing to deal is improper. But there too this statute is similar to many of the other laws mentioned above: Those laws also aim to send a message about equality and fairness. The important point is that they send a message by banning conduct—refusal to do business—not by targeting constitutionally protected speech; the same is true of the anti-BDS statute.

E. Legislative Motivation

To be sure, the anti-BDS laws are motivated by their authors' viewpoints—hostility to boycotts of Israel, and usually support for Israel. The authors may also seek to use the laws to send a public message of support for Israel (in addition to their more direct practical effects). But of course that's true of a vast range of laws, especially antidiscrimination laws. Each such law is motivated by the authors' opposition to a particular kind of refusal to deal, and usually support for the groups that the law seeks to protect. The authors may also seek to use the laws to send a public message of support for those groups. More broadly, most laws are the result of their authors' viewpoints on the underlying subject, are often the result of broader ideological movements, and are aimed at sending a message. None of that makes the laws unconstitutional.

F. There Is No Exception for Consumer Boycotts

Some have argued that anti-BDS laws are different because they target "consumer boycotts."[42] But there's no First Amendment distinction between consumers, producers, employers, and others, including when it comes to discriminatory refusals to deal. Indeed, from an economic perspective, an employer is just a consumer of labor, and a big business that refuses to buy from a company because of its owners' race (in violation of 42 U.S.C. § 1981) is a consumer of that company's products.

Now as a policy matter it might make sense for antidiscrimination and antiboycott laws to treat individuals differently from businesses and other organizations. With the possible exception of 42 U.S.C. § 1981, which courts have interpreted as a blanket ban on race discrimination in contracting, most antidiscrimination laws bar discrimination by, for instance, employers, educational institutions, and places of public accommodation, and not by prospective

(1973); Runyon v. McCrary, 427 U.S. 160 (1976); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93–94 (1945)).

42. *Cf., e.g.*, Brief of Amici Curiae First Amendment Scholars in Support of Plaintiffs-Appellees at 10–11, Jordahl v. Brnovich, 789 F. App'x 589 (9th Cir. 2020) (No. 18-16896), 2019 WL 359687, *10.

employees, students, or customers. But that has to do with concerns about individual choice, not with any First Amendment rights.

And, of course, many anti-BDS laws deliberately focus on businesses, not on individuals who happen to be deciding which stores to shop at in their private lives.[43] Those businesses are only "consumers" in the economic sense, a sense in which they are again no different from employers that are "consumers" of labor. For the reasons given above, they have no First Amendment rights to refuse to deal in their business activities.

III. REFUSALS TO DEAL AS TO FIRST-AMENDMENT-PROTECTED ACTIVITY

To be sure, some refusal to deal may indeed be protected by the First Amendment, when the underlying transaction itself involves First-Amendment-protected activity. For instance:

- A church's refusal to hire someone as clergy may be categorically protected by the Free Exercise Clause, even if it violates an antidiscrimination statute.[44]
- A filmmaker's decision to cast actors from a particular group in a particular role may be categorically protected by the Free Speech Clause.[45]
- A beauty pageant's decision to allow contestants from a particular group may be categorically protected by the freedom of expressive association.[46]
- A newspaper's decision not to continue employing reporters who engage in political activity may be categorically protected by the Free Press Clause, even in those states where employers generally may not dismiss employees for their political activity.[47]
- A web site designer's decision not to create web sites for same-sex weddings—or, for instance, Scientology events—is protected by the compelled speech doctrine, even if it would otherwise violate a ban on sexual orientation discrimination or religious discrimination in a public accommodation.[48]
- A nonprofit organization's decision not to contract with spokespeople whose publicly known sexual orientation or religion would undermine the organization's ability to spread its message may be categorically protected by the Free Speech Clause.[49]

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43. *See, e.g.*, TEX. GOV'T CODE ANN. § 2271.002 (West 2022) (applying the anti-BDS requirements only to government contractors "with 10 or more full-time employees").

44. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

45. *See* Claybrooks v. Am. Broad. Co., Inc., 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012); *see also* Green v. Miss United States of America LLC, 52 F.4th 773 (9th Cir. 2022) (same as to beauty pageants).

46. Green v. Miss United States of America, LLC, 52 F.4th 773, 776 (9th Cir. 2022).

47. *See* Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1133 (Wash. 1997).

48. *See* 303 Creative LLC v. Elenis, 600 U.S. __ (2023).

49. *See* Dale v. Boy Scouts of Am., 530 U.S. 640, 644 (2000) (so holding as to volunteers).

Indeed, newspapers may well have the right to refuse to, for instance, publish op-eds by Israeli citizens or political advertisements submitted by Israeli companies.[50]

But these special cases simply reflect the reality that a wide range of laws that regulate conduct, that are constitutional on their face, may sometimes require First Amendment exceptions as applied. The remedy in such situations is to grant as-applied exceptions from the laws, not to invalidate them on their face. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real [for the law to be facially invalidated], but substantial as well, judged in relation to the statute's plainly legitimate sweep."[51] If the overbreadth is not substantial, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[52]

Hosanna-Tabor, after all, did not facially invalidate the Americans with Disabilities Act, even though some applications of the Act violate the First Amendment. The same is true for *Claybrooks* as to Title VII and *Dale* as to New Jersey's ban on discrimination in places of public accommodation. Similarly, *Claiborne Hardware* did not facially invalidate the tort of interference with business relations, but just held that it could not be applied to constitutionally protected speech. The Sherman Act is likewise generally constitutional; it just may not be applied to anticompetitive conduct that takes the form of lobbying or non-frivolous litigation.[53]

IV. REQUIRED CERTIFICATION OF COMPLIANCE

Nor is there a First Amendment problem with requiring contractors to certify that they comply with anti-discrimination laws or anti-boycott laws. If a government required contractors to certify that they do not discriminate in employment based on, say, race, religion, sex, sexual orientation, or marital status, that requirement would not be facially unconstitutional. Indeed, the Court upheld a similar requirement under Title IX as to recipients of federal funds in *Grove City College v. Bell*.[54]

And that is true even though some contractors may in rare situations have a First Amendment right to so discriminate. The Catholic Church, for instance, could sign this certification with a reservation noting that it discriminates based on sex, marital status, and religion in choice of clergy. If the government then chose to

50. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

51. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

52. *Id.* at 615–16.

53. Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144–45 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 659–61, 670 (1965); FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (noting that, though the *Noerr* Court was purporting just to interpret the Sherman Act, it was doing so "in the light of the First Amendment[]").

54. 465 U.S. 555, 575 (1984), *superseded in part by statute as to other matters*, Pub. L. 100-259, § 3(a) (1988). Though *Grove City College* interpreted Title IX as banning discrimination only in the particular program that was being aided with federal funds, Title IX was later expanded to bar discrimination by any part of the benefited institution. Pub. L. 100-259, § 3(a) (1988), *codified at* 20 U.S.C. § 1687.

disqualify the Church from a contract because of that reservation, the Church would likely have a strong as-applied challenge. But because the certification requirement would not be substantially overbroad, the as-applied challenge would be the only one available. And the same applies to anti-BDS laws.[55]

V. RESTRICTIONS ON "OTHERWISE TAKING ANY ACTION THAT IS INTENDED TO PENALIZE, INFLICT ECONOMIC HARM ON, OR LIMIT COMMERCIAL RELATIONS"

Many anti-BDS statutes define "[b]oycott[ing] Israel" as "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory," though excluding "an action made for ordinary business purposes."[56] Under the canons of *ejusdem generis* and constitutional avoidance, the "otherwise taking any action" language should be read to refer to economic decisions akin to "refusing to deal with" or "terminating business activities with"—for instance, charging higher prices, imposing additional contractual conditions, or refusing to deal with entities that deal with third-party entities that do business in Israel.[57]

The "otherwise taking any action" language should thus not be understood as covering mere advocacy of boycotts or other constitutionally protected speech. But if a court disagrees and thinks that "otherwise taking any action" can only be interpreted in a way that covers a substantial amount of constitutionally protected speech, then this clause should simply be severed, with the "refusing to deal with" and "terminating business activities with" language remaining in effect.

Under the *ejusdem generis* canon, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[58] Consider, for instance, the Federal Arbitration Act's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[59] That could be read, if one is interpreting the words "any other" in the abstract, as covering "all [employment] contracts within the Congress' commerce power,"[60] or at least any workers engaged more directly in foreign or interstate commerce, such as workers at hotels, people who do telephone sales, and the like. But the Supreme Court instead applied

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55. *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1394 (8th Cir. 2022) (en banc) ("[T]he certification [requirement] targets the noncommunicative aspect of the contractors' conduct—unexpressive commercial choices. The 'speech' aspect—signing the certification—is incidental to the regulation of conduct." (citing Rumsfeld v. FAIR, 547 U.S. 47, 62 (2006))).

56. TEX. GOV'T CODE ANN. § 808.001(1) (West 2022).

57. *See generally* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1392–94 (8th Cir. 2022) (en banc).

58. Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (citation omitted); see also Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012).

59. 9 U.S.C. § 1.

60. *Circuit City*, 532 U.S. at 115.

ejusdem generis to read "any other class of workers" as covering only employment contracts of transportation workers, by analogy to the preceding terms ("seamen" and "railroad employees"):

> The wording of [the statute] calls for the application of the maxim *ejusdem generis* . . . . Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent [as a catch-all covering all employees engaged in interstate or foreign commerce writ large] fails to produce these results.[61]

Likewise, consider *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, which interpreted a statute protecting Social Security benefits from "execution, levy, attachment, garnishment, or other legal process."[62] The Court reasoned:

> [T]he case boils down to whether the department's manner of gaining control of the federal funds involves "other legal process," as the statute uses that term. . . . [I]n the abstract the department does use legal process as the avenue to reimbursement: by a federal legal process the Commissioner appoints the department a representative payee, and by a state legal process the department makes claims against the accounts kept by the state treasurer.
>
> The statute, however, uses the term "other legal process" far more restrictively, for under the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Thus, "other legal process" should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism . . . .[63]

"Otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations" in § 808.001, then, should not be read "in the abstract" as simply referring to anything that is intended to indirectly harm (for instance, through praise of a boycott). Rather, it should be read as applying to economic actions that are "similar in nature" to "refusing to deal with, terminating business activities with."

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61. *Id.* at 109, 114–15.

62. 537 U.S. 371, 375 (2003).

63. *Id.* at 383–85 (citations omitted, paragraph break added).

And this is especially so because of the canon of constitutional avoidance. "[S]tatutes should be interpreted to avoid constitutional doubts."[64] *Ejusdem generis* here offers a sensible way of accomplishing that result.[65]

VI. CONCLUSION

Banning discrimination against Israel and Israeli companies—whether in general, or just for government contractors—is a controversial policy. Perhaps it is unwise, especially when applied to small service providers. Perhaps people should be generally free to choose whom they will do business with, unless such choice risks creating a truly pressing social problem.

But such decisions are a matter for the political process, not for courts. So long as a law leaves people free to say what they want, it may generally restrict people's decisions about whom to do business with—which are generally regulable conduct, not constitutionally protected speech.

64. Clark v. Martinez, 543 U.S. 371, 379 (2005).

65. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 579, 588 (1988) (reading statute narrowly to avoid covering likely constitutionally protected speech, even when the government had characterized that speech as "an attempt to inflict economic harm" (cleaned up)); *cf.* Jones v. Jones, 2015 UT 84, ¶ 40 ("Under the *ejusdem generis* canon of construction, and in light of the doctrine of constitutional avoidance, we give a limiting construction to this provision."); Binkowski v. State, 322 N.J. Super. 359, 383–84 (App. Div. 1999) (likewise).