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CRIMINALIZING NONVIOLENT DISSENT: NEW YORK'S UNCONSTITUTIONAL REPRESSION OF THE BOYCOTT, DIVESTMENT, SANCTIONS (BDS) MOVEMENT

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I. INTRODUCTION

From the American Revolution to women's suffrage to the civil rights era, popular grassroots campaigns have shaped the United States.[1] Social justice movements have continuously had an integral role in the American political scheme for centuries, and continue to advocate for change via various forms of protest and resistance.[2] One well-known method is the boycott, which is the refusal to purchase certain goods or participate in certain activities to bring about social, political, and economic change.[3]

Currently, a boycott initiative that has gained international coverage is the Boycott, Divestment, and Sanctions (BDS) movement.[4] Since its creation in 2005, BDS has modeled itself after the South African anti-apartheid boycott campaign through nonviolent boycott methods.[5] By utilizing such methods, it seeks to pressure the Israeli government to end its occupation of Palestinian territories and to respect the human rights of the Palestinian people.[6] BDS asks its supporters to boycott Israel academically, culturally, and economically via activism at various levels of society.[7] BDS has had an

1. *See generally* Nick Carbone, *Top 10 American Protest Movements*, TIME (Oct. 12, 2011), http://content.time.com/time/specials/packages/article/0,28804,2096654_2096653_2096692,00.html (listing ten sociopolitical protests from American history, beginning with the Boston Tea Party as the "original American protest" in 1773).

2. *See id.* (mentioning multiple forms of expressing dissent: marches, rallies, and groups dedicated to certain causes).

3. *See* EMILY BEAULIEU, ELECTORAL PROTEST AND DEMOCRACY IN THE DEVELOPING WORLD, 140 (2014) (discussing famous historical boycotts like the civil rights era boycott of public transportation and the refusal of sixty-one countries to join the 1980 Summer Olympics in Moscow).

4. *See What is BDS?*, BDS, https://bdsmovement.net/what-is-bds (last visited Oct. 14, 2016) (noting that BDS is a vibrant and growing global movement).

5. *See id.* (stating that BDS is peacefully pressuring Israel to end the occupation, giving equal rights to Palestinian citizens of Israel, and giving the right of return to Palestinian refugees).

6. *See id.* (listing the BDS campaign's main goals).

7. *See Campaign Areas*, BDS, https://bdsmovement.net/campaigns (last visited

impact on foreign investment in Israel.[8]

Although BDS focuses on the Palestinian cause, its inclusion is not limited to solely Palestinian participants.[9] A variety of public figures and institutions from around the world and from various cultures have spoken out in support of BDS.[10] In response, critics of BDS have called it discriminatory.[11]

As of November 2016, a handful of states have enacted anti-BDS legislation, while in other states such measures are pending or have been defeated.[12] In New York on June 5, 2016, Governor Cuomo surprised his constituents when he signed State of New York Executive Order Number 157 (EO No. 157).[13] EO No. 157 not only orders state agencies and authorities to divest government funds from institutions and companies that support BDS, but requires the New York Office of General Services to publish an online blacklist of these entities.[14] Governor Cuomo signed EO No. 157 after the New York legislature failed for months to pass proposed anti-BDS legislation.[15] Commentators argue that EO No. 157, and similar measures in other states, violate the constitutional right to free speech.[16] This

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Oct. 14, 2016) (showing its activism at the government, student, and trade union levels).

8. *See What is BDS?, supra* note 4 (citing a forty-six percent drop in foreign investment in Israel in 2014).

9. *See What is BDS?, supra* note 4 (declaring BDS's opposition to all racism and discrimination, including anti-Semitism and Islamophobia).

10. *See id.* (including Archbishop Desmond Tutu, Angela Y. Davis, the Presbyterian Church, and Stephen Hawking).

11. *See* Ben Norton, *The New McCarthyism Is Pro-Israel: Legal Groups Slam NY Gov. Andrew Cuomo for Creating "Unconstitutional" Blacklist of BDS Supporters*, SALON (June 6, 2016, 5:45 PM), http://www.salon.com/2016/06/06/the_new_mccarthyism_is_pro_israel_legal_groups_slam_ny_gov_andrew_cuomo_for_creating_unconstitutional_blacklist_of_bds_supporters (calling the protests an "anti-Israel campaign").

12. *See, e.g.*, GA. CODE ANN. § 50-5-85 (West 2016) (prohibiting state contracts for companies engaging in the boycott of Israel); H.B. 476, 131st Gen. Assemb., Reg. Sess. (Ohio 2016) (banning contracts between state agencies and businesses that participate in the BDS movement); S.C. CODE ANN. § 11-35-5300 (2015) (ordering public entities to not contract with businesses that boycott areas with which South Carolina can trade freely).

13. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (explaining that New York and Israel have a special bond).

14. *Id.*

15. *See* Norton, *supra* note 11 (punishing businesses that engage in the boycott to fight for Palestinian rights with EO No. 157).

16. *See id*. (citing organizations like Palestine Legal and the New York Civil Liberties Union, which stated that blacklists based on political views raise serious First Amendment concerns).

comment will not address First Amendment concerns of anti-BDS state measures.[17]

This comment argues that EO No. 157, and similar state measures, are unconstitutional under the Supremacy Clause of the Constitution because such measures are preempted by the federal government's constitutional powers over the issue. To develop this argument, Part II discusses the Supremacy Clause and the related concepts of express and implied preemption.[18] Part III shows that EO No. 157 is unconstitutional under three types of implied preemption: field, foreign affairs, and federal objectives.[19] Part IV recommends that lawmakers revoke such measures.[20] Part V concludes by summarizing the reasons why EO No. 157 is unconstitutional and must be revoked.[21]

II. BACKGROUND

A. The Anatomy of Executive Order No. 157 and its Legislative Precedent

EO No. 157 utilizes broad language to express unequivocal allegiance to the state of Israel.[22] Governor Cuomo's Order declares that New York does not support BDS and will not allow its funds to further the campaign.[23] The Order applies to any agencies and departments under the Governor's authority as well as various other entities for which he chooses the overseeing chairs.[24] In addition to its broad condemnation of BDS as a

17. *See generally Recent Legislation*, 129 HARV. L. REV. 2029, 2031 (2016) (arguing, by looking at Supreme Court precedent, that anti-BDS laws violate the First Amendment).

18. *See infra* Part II (providing background information on the various legal aspects on which this comment relies in Part III).

19. *See infra* Part III (utilizing the legal concepts discussed in part II to prove that EO No. 157 is preempted by pervasive federal interest in the field of foreign affairs and because the boycotts conflict with federal objectives).

20. *See infra* Part IV (explaining that, as a matter of policy, EO No. 157, and bills like it, should be repealed and left to the federal government to determine).

21. *See infra* Part V (reiterating the main points of this comment).

22. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (declaring that New York stands firmly beside Israel, an irreplaceable and historical ally).

23. *See id.* (elaborating that the state's investments will not support any BDS efforts, whether indirectly or directly, and defining the prohibited conduct as any activity intending to pressure the government of Israel to alter its policies).

24. *See id.* (including "all public-benefit corporations, public authorities, boards, and commissions, for which the Governor appoints the Chair, the Chief Executive, or the majority of Board Members, except for the Port Authority of New York and New Jersey").

whole, EO No. 157 requires that the Commissioner of the Office of General Services (Commissioner) create a list of organizations and businesses that publicly engage in BDS activity.[25] The Commissioner must then post the list on the website of the New York Office of General Services.[26] All affected state entities must divest from any entity listed.[27] The blacklist dated May 31, 2017, lists fourteen international companies and institutions.[28]

This measure is not unprecedented; the federal government has passed three primary and relevant measures that delve into BDS and boycotts of other countries.[29] Most recently, President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) into law.[30] The TFTEA affirms the American-Israeli relationship, restates the American policy to combat the Arab League boycott of Israel, and opposes political initiatives that restrict commercial relations with Israel.[31] The TFTEA targets boycotts, divestment, and sanctions of Israeli products, and opposes such actions.[32] It also requires that the President submit an annual report to

25. *See id*. (providing no exceptions to companies and institutions that were eligible to be placed on the list).

26. *See id.* (commanding the Commissioner to provide written notice of intent to list entities that he suspects support BDS, and allowing them to prove that they do not support BDS, directly or indirectly, to avoid placement on the list).

27. *See id.* (forbidding future investments in institutions or companies on the blacklist).

28. *See Institutions or Companies Determined to Participate In Boycott, Divestment, or Sanctions Activity Targeting Israel*, OFFICE OF GENERAL SERVICES (May 31, 2017), https://www.ogs.state.ny.us/eo/157/Docs/EO157_Institutions_Companies_List.pdf (listing international companies such as Danske Bank and KLP Kapitalforvaltning); Conor Skelding, *Cuomo quietly releases Israel-boycott opposition list, perplexing targeted companies*, POLITICO (Dec. 9, 2016, 5:42 AM) (reporting that the first release of the blacklist consisted of thirteen international companies).

29. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 909, 19 U.S.C.A. § 4452 (2016) (alluding repetitively that boycott, divestment, and sanctions of Israel will not be tolerated in international trade); Export Administration Act of 1979 (EAA), 50 U.S.C.A. §§ 4601–4623 (West 1979) (establishing the federal government's power to control restrictive trade practices with other countries); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of 26 U.S.C.) (denying tax benefits to U.S. businesses that participate in boycotting countries).

30. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 4452 (noting that the statute went into effect February 24, 2016).

31. *See id.* § 4452(a)-(f) (stating that over forty-five billion dollars worth of goods and services is traded between the United States and Israel annually).

32. *See id.* § 4452(b)(4)-(7), (c)(1) (stating that BDS violates the nondiscrimination principle of GATT 1994 and a primary goal of U.S. commercial partnerships will be to discourage BDS).

Congress about "politically motivated boycotts of, divestment from, and sanctions against Israel."[33] After President Obama signed the TFTEA, the White House released a statement that the President opposed the provision addressing Israel as it contradicted his policy on Israeli settlements.[34]

The two other laws that address boycotts of Israel are the Export Administration Act (EAA) and the Ribicoff Amendment to the Tax Reform Act of 1976 (Ribicoff Amendment).[35] The EAA requires Americans to report to the Department of Commerce requests they receive to support in any way a prohibited boycott.[36] The Ribicoff Amendment requires people to report their participation in boycotts of other countries to the Internal Revenue Service (IRS).[37] Both of these laws target secondary and tertiary boycotts.[38]

B. The Supremacy Clause and the Interpretation of Field Preemption

The Supremacy Clause defines the relationship between the federal and state governments by making the Constitution and federal laws the supreme laws of the country.[39] The Supremacy Clause establishes the concept of preemption where federal laws nullify state laws if they conflict with federal legislation or one of Congress' constitutionally enumerated powers.[40]

Under the Supremacy Clause, state laws must yield to constitutionally

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33. *See id.* § 4452(d) (requiring the President to submit the report every year starting by February 24, 2016 and then every year after on such activities).

34. *See* Press Release, Office of the Press Sec'y, White House, Statement by the Press Secretary on the Trade Facilitation and Trade Enforcement Act of 2015 (Feb. 11, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/11/statement-press-secretary-trade-facilitation-and-trade-enforcement-act (acknowledging concessions made in the interest of passing the bipartisan legislation).

35. *See* 19 U.S.C.A. § 4452(a)(6)(B)-(C)(noting that the policy of the U.S. has been to oppose boycotts of Israel, citing the EAA and the Ribicoff Amendment).

36. *See* MELISSA REDMILES, INTERNATIONAL BOYCOTT REPORTS, 2003 AND 2004 (2004), https://www.irs.gov/pub/irs-soi/03-04boycott.pdf (disclosing that those who do engage in such activity are subject to criminal or civil penalties).

37. *See id.* (including all business transactions, even if they do not produce revenue).

38. *See id.* (explaining that these laws only apply when a country requires a US business partner to boycott a country or forbids an American person from doing business with others that deal with the boycotted state).

39. *See* U.S. CONST. art. VI, cl. 2; People v. Burlington N. Santa Fe R.R., 209 Cal. App. 4th 1513, 1521 (Cal. Ct. App. 2012) (arguing that the preemption doctrine gives force to the Supremacy Clause).

40. *See Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th at 1521-22 (explaining the three types of preemption recognized by the Supreme Court).

valid federal legislation.[41] The Supreme Court has described several different categories of preemption.[42] The two main categories of preemption are express and implied.[43] The Supreme Court's pattern of analysis for preemption is quite flexible and without rigid requirements.[44] The federal government's intent is the core of every preemption analysis.[45]

Express preemption is the most direct way to prove that Congress regulates a subject because it exists when the federal government expressly states its dominance in a federal law.[46] For example, in *Lorillard Tobacco Co. v. Reilly* the Supreme Court held that a federal law preempted state regulations because Congress expressly declared that states or localities could not impose extra requirements.[47]

In contrast, courts find implied preemption in several circumstances where a regulatory text does not explicitly state its intent to preempt.[48] One is federal objectives preemption, where a state law obstructs congressional goals.[49] Another is field preemption, where it is reasonable to assume that the national government controls an issue.[50] A third circumstance is conflict preemption, which this comment will not address.[51]

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41. NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 155 (2005) (saying that states may not impede the federal government and that federal laws supersede state laws).

42. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 288 (7th ed. 2013) (explaining that express preemption exists when a statute refers to the laws which it precludes, and conflict preemption exists where federal and state laws cannot exist simultaneously).

43. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (elaborating that preemption is compelled regardless of whether Congress explicitly states so or implicitly indicates).

44. *See id.* (stating that the goal of the Court is to decide if the "regulation is consistent with the structure and purpose of the [federal] statute").

45. *See* Medtronic Inc. v. Lohr, 518 U.S. 470, 471 (1996) (stating that preemption cases rely on "a fair understanding of congressional purpose") (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530, n. 27 (1992)).

46. *See generally* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551-52 (2001) (holding that the Federal Cigarette Labeling and Advertising Act expressly preempted the Massachusetts Attorney General's advertising regulations).

47. *See id.* (adding that the preemption applies to state regulations regarding advertising or promotion).

48. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 413-14 (4th ed. 2016) (discussing how the courts found implied preemption).

49. *See id.* (defining federal objectives preemption).

50. *See id.* (sharing that although these categories are presented distinctly, they often overlap and are not mutually exclusive).

51. *See id.* at 431 (informing that conflict preemption arises when someone cannot

Federal objectives preemption arises when a state law interferes with a federal goal or is an obstacle to the full purposes of Congress.[52] This type of preemption arises in various instances, such as when a state law undermines federal uniform standards.[53] The Supreme Court has used drastically different standards in deciding whether to apply a broad or narrow characterization of the federal goal.[54]

On the other hand, field preemption arises when the federal government's interests are so dominant that it totally occupies the scope of a certain field.[55] Congress' interest to dominate a field can be demonstrated by showing the existence of pervasive federal regulatory schemes.[56]

Regardless of whether a state law complies with federal law, Congress may still override state action due to its intent to control a certain field in which it constitutionally has a valid power to regulate.[57] Even budding federal dominance of a field may suffice to preempt state laws.[58] If multiple pieces of federal laws rule on a specific subject, a court will hold that Congress intended to dominate that certain field.[59]

C. The Intersection of Federal Preemption and the Power to Regulate Foreign Affairs

The federal government dominates a variety of fields.[60] One such field is

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comply with both a federal law and a state law).

52. *See id.* at 435, 439 (distinguishing federal objective preemption by way of example (citing Nash v. Florida Indus. Comm'n, 386 U.S. 990 (1967))).

53. *See id.* at 435 (citing Perez v. Campbell, 402 U.S. 637, 652 (1971)).

54. *Compare* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98-102 (1992) (applying federal objectives preemption to many state laws), *with* Pac. Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983) (rejecting the presumption of preemption by applying a narrow federal purpose).

55. *See* STONE, *supra* note 42, at 288 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that federal regulation is so pervasive that it is reasonable to assume that Congress left no room for states to supplement it)).

56. *See* Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (finding that the federal government intended to completely occupy the field of alien registration through its system).

57. *See* Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015) (specifying that through field preemption, Congress intended to control the area even if a law complies with federal standards).

58. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 497 (1988) (clarifying that federal legislation may preempt state action before its effective date).

59. *See id.* at 498 (explaining the standard for determining congressional intent to preempt a field).

60. *See* North Dakota v. United States, 460 U.S. 300, 309 (1983) (recognizing that

the field of foreign affairs.[61] The Constitution contains enumerated provisions that specifically allocate the exclusive power to regulate foreign affairs to the President and Congress.[62] The Supreme Court has held that the federal government inherits all powers over external relations as a direct result of the United States' status as a sovereign nation.[63] Consequently, the federal government possesses all powers necessary to maintain a substantial control over international affairs.[64]

As a result, courts typically hold that state laws are preempted when they encroach on the federal government's power to regulate foreign affairs.[65] This is defined as foreign affairs preemption.[66] In *Hines v. Davidowitz*, for example, the Supreme Court held that the federal government controlled the field of alien registration because it touched upon international relations, and thus preempted a state's immigration regulation.[67] *Hines* established two noteworthy rules: first, that preemption exists where a state law complements federal law, and second, preemption can exist in the absence of express preemptive language in the federal measure.[68]

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protecting birds is a national interest); *see also* Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 839 (1982) (ruling tribal affairs are federally regulated).

61. *See* Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941) (informing that the federal government's power regarding foreign affairs has always required wide-reaching authority).

62. *See* U.S. CONST. art. II, § 2 (delegating to the President the authority to make treaties, which the Senate is authorized to advise and consent, and naming the President as Commander-in-Chief of the Army and Navy); *see also* U.S. CONST. art. I, § 8 (authorizing Congress to raise and support armies and declare war).

63. *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (stating that the federal government's sovereignty powers did not need to be constitutionally granted).

64. *See* United States v. Belmont, 301 U.S. 324, 331 (1937) (embellishing that in respect to foreign relations, states cannot differentiate from the rest of the country).

65. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 441 (1968) (holding that an Oregon statute regarding alien property rights intruded on the foreign powers doctrine); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 964 (9th Cir. 2010) (subjecting a California statute to a field preemption analysis because it created a global venue for the resolution of Holocaust restitution claims).

66. *See* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012) (informing that foreign affairs preemption encompasses the doctrines of field and conflict preemption).

67. *See* Hines v. Davidowitz, 312 U.S. 52, 64-65 (majority opinion), 72-74 (Stone, J., dissenting) (1941) (holding that federal law broadly preempted a Pennsylvania law regulating alien registration policies, even though it complemented federal regulations).

68. *See id.*; CHEMERINSKY, *supra* note 48, at 424 (stating that field preemption means federal law preempts even complementary state laws).

State laws must yield to federal laws regarding foreign affairs because the latter's interests are so dominant that the federal system must control.[69] *Arizona v. United States* further developed the intersection of field preemption and the foreign affairs doctrine when the Supreme Court found that federal law preempted provisions of an Arizona immigration law.[70] The Court analyzed the federal government's regulatory and legislative history over alien registration requirements to demonstrate Congress' intent to occupy the field of foreign relations matters.[71] A key element was the existence of one national sovereign serving as the main communicative body with other nations.[72] Thus, there was no room for state laws to curtail or complement federal policy.[73]

Furthermore, field preemption applies when state measures touch on foreign affairs policies.[74] In *Crosby v. National Foreign Trade Council*, the Court overruled a Massachusetts law that restricted state agencies from buying goods or services from entities that conducted business with Burma (Myanmar)—the Massachusetts Law.[75] First, the Court found that the state measure conflicted with the President's authority to regulate economic sanctions.[76] Second, it interfered with the manner in which Congress had chosen to exercise economic pressure on Burma.[77] The Massachusetts Law had a wider-reaching scope of punishment than the federal scheme, and affected foreign and domestic companies while the federal law affected only

69. *See* Arizona v. United States, 132 S. Ct. 2492, 2501-02 (2012) (arguing that field preemption must demonstrate the federal intent to preempt state regulation in an area).

70. *See id.* at 2510 (striking invalid certain provisions of the Arizona immigration law).

71. *See id.* at 2501 (establishing that congressional intent to displace state law can be inferred from either analyzing the framework of the regulation or by determining if the federal interest is dominant).

72. *See id.* at 2498 (explaining that the ability of foreign nations to communicate with one national sovereign is fundamental, and that immigration policy can affect "trade, investment, tourism, and diplomatic relations").

73. *See id.* at 2501–02 (reasoning that an Arizona immigration law inflicted additional punishment for undocumented immigrants and clashed with the federal scheme).

74. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (ruling that, under the Supremacy Clause the Massachusetts boycott of Burma presented a threat to national legislative objectives).

75. *See id.* at 366–68 (communicating that the Massachusetts Law had a broad scope with only three exceptions to the forbidden entities).

76. *See id.* at 363–65 (explaining that Congress indicated that it wished the President to have the authority to preempt the field by authorizing him to control the measures).

77. *See id.* at 364 (explaining that Congress' plan was not so broad).

American companies.[78] Third, regardless of what measures Congress chose to enact, the state measure conflicted with the President's authority to represent the United States.[79] The President had to communicate with other countries regarding Burma sanctions, which gave the President the highest authority of the federal government.[80] The Massachusetts Law lessened the President's ability to succeed.[81]

State laws that align with federal foreign policy laws will be preempted because their existence compromises the President's power to speak for the nation.[82] In *Odebrecht Construction, Inc. v. Florida Department of Transportation*, for example, the Eleventh Circuit analyzed a Florida law prohibiting companies that conducted business with Cuba from accessing Florida's public contracting market.[83] The court analyzed Congress' economic policies regarding Cuba and determined that the federal scheme was so pervasive that the Cuba Amendment was unconstitutional.[84] The federal government occupied the entire field of foreign relations, and state measures had no authority in this field.[85]

III. ANALYSIS

A. Courts Should Find New York's EO No. 157 Unconstitutional Under Implied Preemption Analyses Because It Addresses Issues That Congress Has Implied Its Intent to Control

In light of the law discussed above, courts should scrutinize anti-BDS

78. *See id.* (arguing that by penalizing people for actions that Congress explicitly allows, the Massachusetts Law conflicts with federal law).

79. *See id.* at 374, 377, 380, 388 (holding, ultimately, that the President has the authority to adjust economic sanctions against another country, which preempts a state's involvement).

80. *See id.* at 364 (explaining that Congress authorized the President to facilitate discussions between the Burmese regime and the democratic opposition).

81. *See id.* (expressing that the Executive consistently said that the Massachusetts law hindered diplomacy).

82. *See* Odebrecht Const., Inc. v. Florida Dep't of Transp., 715 F.3d 1268, 1285-86, 1290 (11th Cir. 2013) (striking down Florida's Cuba Law, which conflicted with federal laws).

83. *See id.* at 1285 (finding Congress preempted the Florida Law).

84. *See id.* at 1274-78, 1282-83 (stating that the many in-depth pieces of federal legislation economically addressing Cuba demonstrated that the federal scheme was intricate and pervasive).

85. *See id.* at 1272 (explaining that the discrepancies between federal and state law weakened the President's power to adjust sanctions).

measures under the Supremacy Clause.[86] In undertaking such an analysis, one must determine which preemption lenses are most relevant to scrutinize New York's EO No. 157.[87]

1. Courts Are Not Likely to Apply Express Preemption to New York's EO No. 157 Because Congress Has Not Passed a Law that Explicitly Denies States' Power to Legislate BDS

In this case, express preemption is not applicable because no federal law has explicitly stated that it wishes to preempt state-level anti-BDS legislation.[88] If there were a federal anti-BDS statute that explicitly stated its intent to preempt state-level legislation regarding the issue, then an express preemption lens would be applicable.[89] As seen in *Lorillard Tobacco Co. v. Reilly*, a federal law preempts state regulations when Congress expresses that states or localities cannot impose additional requirements.[90] Similarly, if a congressional act existed stating that states or localities could not impose certain policies in regards to BDS, express preemption would be the appropriate lens to analyze New York's EO No. 157.[91]

Here, the only three congressional measures that address boycotts on Israeli products are the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Export Administration Act (EAA), and the Ribicoff Amendment to the Tax Reform Act of 1976 (Ribicoff Amendment).[92]

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86. *See* Crosby, 530 U.S. at 372 (arguing that to determine if Congress has the power to preempt state law, courts should utilize one of the various types of preemption).

87. *See id*. at 372–73 (explaining different types of preemption and then determining under which lens should EO No. 157 fall).

88. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541-42 (2001) (explaining that when a federal statute explicitly states its scope, express preemption applies).

89. *See id.* at 537 (advising that the Federal Cigarette Labeling and Advertising Act contained a preemption clause, which banned states from enacting any provisions that imposed regulations on smoking regarding the advertisement or promotion of cigarettes).

90. *See id.* at 540 (explaining that when a federal statute explicitly states its scope, express preemption applies).

91. *See generally id.* at 537, 547 (arguing that the regulations directly targeting cigarette advertising establish an indirect relationship between the regulations and cigarette advertising).

92. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 909, 19 U.S.C.A. § 4452 (2016) (alluding repeatedly that boycott, divestment, and sanctions of Israel will not be tolerated in international trade); *see also* Export Administration Act of 1979 (EAA), 50 U.S.C.A. §§ 4601–4623 (West 1979) (establishing the federal government's power to control restrictive trade practices with other countries); Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of 26 U.S.C.)

However, none include a statement or any language demonstrating that Congress expressly barred states from regulating this issue.[93] Because there is no such express statement within the three anti-BDS or anti-boycott laws, the court may not find express preemption.[94] That means that an implied preemption lens should apply when analyzing EO No. 157.[95] Thus, the most obvious lenses for analysis are field preemption, foreign affairs preemption, and federal objectives preemption.[96]

2. Under a Field Preemption Lens, Courts Should Rule EO No. 157 Unconstitutional Because Congress Has Indicated It Intends to Preempt the Field

When scrutinizing anti-BDS measures such as New York's EO No. 157, courts should first apply a field preemption lens.[97] As seen in *Arizona v. United States* and *Crosby v. National Foreign Trade Council*, field preemption arises where federal interest is so dominant that a court would naturally assume that the federal system precludes state law.[98] As discussed below, field preemption most certainly exists here.

In *Arizona*, one of the main factors in determining whether Congress had preempted the field of alien registration regulation was the fact that the field touched upon foreign relations.[99] Here, New York's EO No. 157 certainly

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(noting that past laws "contained no tax provisions dealing with international boycotts").

93. *See* 19 U.S.C.A. § 4452 (adopting an international focus); EAA, 50 U.S.C.A. § 4604(a)(1) (focusing on the federal government's powers); Tax Reform Act of 1976 (laying out how to determine if a business is participating in a boycott).

94. *See* R.F. v. Abbott Labs., 745 A.2d 1174, 1186 (N.J. 2000) (explaining that implied preemption may arise when there is no express preemption).

95. *See id.* (stating that the two types of implied preemption are field and conflict preemption).

96. *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (ruling that immigration involved foreign affairs and preempted state measures); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 376 (2000) (alluding that the foreign affairs doctrine involves global economic policies); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (applying federal objectives preemption to a large number of state laws).

97. *See* Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) (arguing that Arizona's law was held as valid, then other states could make similar statutes which would ruin Congress' powers and existing regulations); *Crosby*, 530 U.S. at 375 (2000) (stating that the President must control the field of economic foreign policy).

98. *See Arizona*, 132 S. Ct. at 2501 (noting that federal interest can be found by looking at laws that Congress has enacted); *Crosby*, 530 U.S. at 373 (highlighting how federal interest is dominant).

99. *See Arizona*, 132 S. Ct. at 2506 (demonstrating how foreign affairs falls squarely within the purview of the federal government).

touches upon foreign relations because it deals with policies concerning Israel.[100] In *Arizona*, the Supreme Court established that field preemption will have such a wide scope that simply touching upon foreign affairs means that a state law will be preempted.[101] Whether the state law complemented the federal laws was completely irrelevant.[102] Here, even though New York's EO No. 157 might seem complementary to the federal law, it too must be preempted because it touches upon the incredibly sensitive field of foreign affairs by addressing the boycott of a foreign nation.[103]

The fact that the federal government has not enacted an express preemptive provision regarding BDS does not provide permissive authority for states to establish such measures by executive order or other measures.[104] The foreign affairs and field preemption doctrines require no such express preemption language.[105] Congress' posture merely indicates that these robust implied preemption doctrines are so settled that courts will apply them without explicit or detailed instructions from Congress.[106] Courts will refer to the federal government's constitutional authority over foreign affairs matters generally.[107] By applying that rule here, it means that that the New York governor may not interpret the lack of a specific domestic anti-BDS federal law as agreeable silence on the issue.[108]

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100. *See id.* at 2506 (finding that Arizona's immigration statute affected U.S. relations with foreign nations); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (affirming New York's support of Israel and rejection of BDS).

101. *See Arizona*, 132 S. Ct. at 2510 (elaborating that immigration is such a powerful subject that it shapes the destiny of the country).

102. *See id.* at 2501-02 (arguing that the complete scheme of alien registration touches upon foreign affairs which means that complementary and curtailing state measures are preempted).

103. *See id.* (explaining that the federal scheme was complete and did not allow for states to touch upon the subject).

104. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (recognizing that preemption does not rely on express provisions alone, and that Congress' silence on a certain issue does not mean endorsement but can be interpreted ambiguously).

105. *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 964 (9th Cir. 2010) (subjecting a California statute to a field preemption analysis because its law created a global venue for the resolution of Holocaust restitution claims, even though no specifically relevant law was in place).

106. *See id.* at 964 (reasoning that courts consistently invalidate state laws which attempt to regulate an area of traditional state competence, but do touch upon foreign affairs).

107. *See id.* at 963–64 (reiterating that a state violates the Constitution by establishing its own foreign policy).

108. *See id.* (stating that foreign affairs field preemption may arise even when there

Additionally, the Congressional purpose for the federal government is to occupy the field of economic policies with Israel.[109] The Supreme Court reasoned in *Hines* that the nature of the country's government is to represent the entire nation as one people, and therefore the field of foreign relations has no room for state or local impediment.[110] Through the TFTEA, Congress and the President addressed a plethora of important trade issues, such as intellectual property rights, anti-dumping, and the currency exchange rate.[111] Congress purposefully included a provision regarding boycotts, divestment, and sanctions to Israeli products.[112] Consequently, only the President and the executive branch have the power to regulate this area.[113] Therefore, the New York's governor lacks authority to sign EO No. 157 because Congress delegated the field of foreign relations to the President.[114]

Because tEO No. 157 touches an issue related with Israel, the Order is inconsistent under the Supremacy Clause. As the Supreme Court clarified in *Arizona v. United States*, state policies on matters even slightly related to foreign relations easily run afoul of the Supremacy Clause because they potentially conflict with the Executive's foreign affairs powers.[115] As noted in *Arizona*, state immigration policies were invalid because they could affect "trade, investment, tourism, and diplomatic relations for the entire Nation," as well as the treatment of American citizens abroad.[116] State anti-BDS

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is no treaty or federal statute in place).

109. *See* Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996) (stating that "the purpose of Congress is the ultimate touch-stone" in all preemption cases (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963))).

110. *See* Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (arguing that the Constitution makes clear that Congress controls the field of international relations in general as it represents the interests of all American cities, counties, states, and people).

111. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 909, 19 U.S.C.A. §§ 4452, 4341, 4401, 4421 (2016) (exemplifying the vast subjects that the statute covered).

112. 19 U.S.C.A. § 4452(a)-(f) (discouraging boycotts of Israel by Bahrain, Oman, and Saudi Arabia).

113. *See Hines*, 312 U.S. at 65-66 (reasoning that when regulations are so blended with the responsibilities of the national government, and when a state attempts to act on the same issue, the act of Congress dominates).

114. *See id.* at 67-68 (stating that international relations is a field largely dominated by Congress).

115. *See* Arizona v. United States, 132 S. Ct. 2492, 2501-02 (2012) (reasoning that immigration policies are interlinked with foreign affairs interests of the federal government because when a law touches on foreign affairs, states cannot curtail, complement, or add to federal law).

116. *See id.* at 2498 (adding that such a law would alter the perception of aliens in this country who seek the protection of the law).

measures like New York's EO No. 157 have the potential to influence issues of trade, investment, tourism, and foreign relations for the entire country.[117] State anti-BDS measures affect such issues because they demand divestment from any and all entities whom they identify as BDS supporters.[118] Anti-BDS Policies are similar to the law discussed in *Arizona* because both affect national interests by advocating one side of a foreign affairs issue, regardless of the United States' position, while punishing citizens with the other view.[119] When the topic at hand affects the broader sphere of foreign affairs, states cannot restrain, accompany federal law, or staple on further regulations.[120]

Even if a state anti-BDS law is arguably complementary to the federal government's policies, such as taking a similar stance to the TFTEA provisions, a state may not impose its own punishments in a federally dominated field.[121] In *Arizona*, the Court rejected the state's argument that one of the provisions of its controversial immigration law had the same goal and substantive standards as federal law.[122] The Supreme Court held that field preemption does not allow the states to become involved in fields that the federal government has occupied in any fashion.[123] Similarly, EO No. 157 inflicts punishment upon American persons, and thus upsets the sensitive framework which Congress wishes to control through the TFTEA, EAA, and Ribicoff Amendment.[124]

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117. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (declaring that New York rejects BDS and boycott tactics that threaten allies and trade partners).

118. *See id.* (utilizing vague language so that the list may include any institution or company that practices BDS).

119. *See* Arizona v. United States, 132 S. Ct. 2492, 2506-07 (2012) (asserting that removal decisions touch upon federal foreign relations powers and require analysis of political and economic circumstances); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 363-64 (2000) (stating that the President has the right to adjust economic sanctions against another country and preempts a state's involvement).

120. *See Arizona,* 132 S. Ct. at 2502 (utilizing an example of a previous ruling that Pennsylvania could not have its own alien registration regulations because the issue itself breached the field of foreign affairs where the federal government had its own complete scheme regarding alien registration).

121. *See id.* (citing *California v. Zook,* 336 U.S. 725, 730–31 (1949) (stating that even if States make violations of federal law a crime, they cannot do so in federally dominated areas); *In re Loney,* 134 U.S. 372, 375–76 (1890) (ruling that states could not have their unique punishment for perjury in federal courts)).

122. *See Arizona*, 132 S. Ct. at 2502 (informing that field preemption precludes any state regulation even if it is similar to federal standards).

123. *See id.* (arguing that allowing states to inflict their own punishments for federal offenses would contradict the careful framework that Congress had enacted).

124. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (providing that entities

Regarding local issues that may delve into foreign affairs, states may only enact relevant laws if their effects are negligible upon international relations.[125] Here, EO No. 157 utilizes explicit language to define the state's relationship with the state of Israel.[126] However, the United States Government has been hugely involved in the Middle Eastern peace process for years.[127] Measures like EO No. 157 punish nonprofits, NGOs, awareness groups, churches, and other international advocates of BDS, which ultimately affects the perception of the United States as an actor within the peace process.[128] This punishment could have serious consequences for the United States Executive branch at international tables.[129] As seen in *Crosby*, unilateral state actions like the Massachusetts Burma Law and New York's EO No. 157 complicate international coalition building to promote democracy and human rights.[130]

Field preemption of foreign affairs arises even when there is no treaty or federal statute present.[131] This rule applies to the New York EO No. 157, because there is no congressional measure addressing BDS itself, or BDS activities domestically.[132] State lines dissolve when interactions with foreign

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cannot receive New York State funding); *see also Arizona*, 132 S. Ct. at 2502 (holding that Arizona may not create its own immigration laws when such laws exist at the federal level).

125. *See* Zschernig v. Miller, 389 U.S. 429, 441 (1968) (holding that an Oregon statute regarding alien property rights was an unconstitutional intrusion into the foreign powers doctrine granted to the Executive branch and Congress).

126. *See* tit. 9, § 8.157 (asserting that New York has a historically special relationship with Israel).

127. *See generally* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081, 2087-88 (2016) (noting that Jerusalem is a sensitive topic, and that even within the federal government's powers over foreign affairs, recognition is a power of the President alone).

128. *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (discussing that mistreatment of aliens in the United States could lead to retaliatory treatment of Americans abroad).

129. *See Zivotofsky,* 135 S. Ct. at 2082 (mentioning that protests were ignited in the Gaza Strip and elsewhere in response to Congress' Act allowing Americans to list Jerusalem, Israel, on passports).

130. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 383-85 (2000) (discussing that high-level discussions between the United States and European Union focused not on helping Burma, but on what to do about the Massachusetts law).

131. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003) (ruling that although no federal regulation existed, a California law involved foreign affairs powers and was invalid).

132. *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 965 (9th Cir. 2010) (subjecting a California statute to field preemption analysis because its law actually created a global venue for the resolution of Holocaust restitution claims,

nations are involved.[133] Similarly, although there is no anti-BDS treaty or national statute criminalizing BDS in the domestic context, New York's anti-BDS EO No. 157 is still preempted under the foreign affairs power of the government.[134]

3. Within the Scope of the Foreign Affairs Doctrine, EO No. 157 is Preempted Because It Touches upon a Foreign Affairs Issue

New York's EO No. 157 is illegitimate under the foreign affairs doctrine field preemption doctrine.[135] The foreign affairs doctrine triggers the federal preemption of that entire field, and EO No. 157 should be analyzed under the relevant precedential framework.[136] In *Hines v. Davidowitz*, the Supreme Court held that state powers affecting foreign affairs are "restricted to the narrowest of limits" because it is a field which Congress prevalently and consistently oversees.[137]

Furthermore, the Supreme Court has indicated that the ability to lift and impose economic policies is essential to the President's exclusive foreign affairs powers.[138] In *Crosby v. National Foreign Trade Council*, the Supreme Court established that only the President had the authority to lift or impose economic sanctions in the interest of national security.[139] The

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even though no specifically relevant law was in place).

133. *See* United States v. Belmont, 301 U.S. 324, 331 (1937) (embellishing that in respect to foreign relations, "the state of New York does not exist" – it cannot be differentiated from the rest of the country in this regard).

134. *See Von Saher*, 592 F.3d at 964 (holding that the Supreme Court can invalidate laws which violate the federal power to conduct foreign affairs despite the absence of conflict with federal regulations or policies).

135. *See Am. Ins. Ass'n*, 539 U.S. at 423 (insinuating that the President's authority requires flexibility in economic diplomacy, and state laws infringing upon this field compromise his ability); *see* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (stating Israel is an important ally for the nation as a whole and New York shares a special bond with it).

136. *See* Hines v. Davidowitz, 312 U.S. 52, 62, 67 (1941) (articulating that generally in the field of foreign affairs, federal power reigns supreme); *see also* tit. 9, § 8.157 (punishing those who boycott Israel and thus creating a preference for Israel as a matter of foreign policy).

137. *See Hines*, 312 U.S. at 67-68 (emphasizing that government power regarding international relations has always been broad).

138. *See Crosby,* 530 U.S. at 377 (2000) (arguing that a Massachusetts law imposing economic sanctions on Burma lessens the President's ability to impose economic and diplomatic pressure on Burma).

139. *See id.* (reasoning that due to national security concerns, the President requires the flexibility to respond to change in diplomatic relations by altering sanctions without obstacles).

President carries this authority to achieve political results, and the broad scope of this authority shows how important it is for Congress to attain those results.[140] In important respects, *Crosby* is identical to New York's EO No. 157 and the surrounding facts.[141] Both situations involve state measures that sought to restrict state agencies from doing business with companies supporting a particular foreign nation.[142] The statute mandated the creation and maintenance of a list of such entities, and EO No. 157 also requires the creation and maintenance of a list of entities that support BDS.[143] Therefore, both thus undermine the President's authority to represent the United States on foreign affairs matters.[144] In these situations, field and foreign powers preemption is clear.

The Supreme Court has ruled that when an issue involves foreign countries communicating their concerns to the United States, it is essential that they communicate with one national sovereign and not fifty separate states.[145] New York's EO No. 157 creates a disjointed communication between the United States and the world because it establishes an inconsistency that would repel potential trade partners that participate in BDS but not the Arab League boycott of Israel.[146] Under the current standard, such a business would have to interact separately with the federal government and the New York government because of EO No. 157's contradicting stipulations.[147] Although New York's EO No. 157 does not discriminate on its face against

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140. See *id.* (highlighting the importance of the President's powers as well as Congress' need for them).

141. *See id.* at 366 (ruling unconstitutional a Massachusetts law which restricted its agencies from conducting business with companies that supported Burma); *see also* tit. 9, § 8.157 (preventing its agencies from conducting business with companies that participate in BDS).

142. *See Crosby,* 530 U.S. at 366 (advising that the Burma law limits state agencies from working with entities doing business with Burma).

143. *See id.* at 367-68 (explaining that the statute widely defined "doing business with Burma", with three exceptions to the ban).

144. *See id.* at 374 (punishing companies that work with Burma, and stating that the Massachusetts law diminishes the President's capabilities as a diplomat); *see also* tit. 9, § 8.157 (prohibiting support of Palestinians by refusing to allow government agencies to have contracts with businesses that support BDS,).

145. *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (referring to a country's concerns over the status, safety, and security of its nationals and the country's wish to confer with the American government about those concerns).

146. *See Crosby*, 530 U.S. at 376 (distinguishing the Massachusetts law because it penalized things that the federal law allowed).

147. *See id.* at 364 (clarifying that the Massachusetts law punished persons and actions that Congress has explicitly excluded from sanctions).

foreign companies, it could hinder the "one voice" of the President by requiring an entity to negotiate with the President and New York Governor.[148] State laws do not and cannot have the authority to dismantle the unified voice that the President needs to present to the rest of the world.[149]

When a state involves itself with international economic boycott policies, it effectively undermines the federal authority in adjusting its economic pressures, and pursuing multilateral strategies with foreign countries.[150] An inconsistency between state and federal policies regarding BDS threatens the power of the President to utilize economic incentives and sanctions to achieve national goals.[151] If the United States Government desires to punish BDS participants or to even adopt certain tactics to pressure Israel into altering its human rights policies, laws like New York's EO No. 157 would undermine their calibration of force.[152]

Courts have held that it is essential for the President to represent a unified nation regarding foreign affairs policies.[153] In *Odebrecht*, the Court of Appeals for the Eleventh Circuit analyzed a state law similar to New York's EO No. 157.[154] Both laws punished entities which practiced certain economic policies.[155] The *Odebrecht* court noted that the law punished those who did business with Cuba; and in New York, the law punishes those who refuse to purchase certain products benefiting Israel.[156] The law conflicted

148. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 67 (1st Cir. 1999) (referencing Massachusetts's Burma law which both discriminated against foreign commerce and curtailed the federal government's "one voice" in foreign affairs).

149. *See Crosby*, 530 U.S. at 381 (stating that such state laws compromise the ability of the President to present one voice).

150. *See id.* at 382 (reminding that discrepancies between state and federal sanctions complicate discussions between countries).

151. *See id.* at 381 (reasoning that the President's maximum authority to influence other countries rests on his access to the national economy without random exception).

152. *See* Odebrecht Constr., Inc. v. Sec'y, Florida Dep't of Transp., 715 F.3d 1268, 1283 (11th Cir. 2013) (implying that by imposing its own sanctions, Massachusetts lessened Congress' calibration of force).

153. *See id.* at 1272 (holding that the federal government's foreign affairs powers preempted a Florida statute which prohibited the state from granting public contracts to companies with business relations with Cuba).

154. *See id.* (explaining that Florida banned agencies from giving public contracts to companies that worked with Cuba); N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (forbidding state agencies from investing in companies that support BDS).

155. *See Odebrecht,* 715 F.3d at 1272 (preventing companies that have relations with Cuba from bidding on Florida public contracts); tit. 9, § 8.157 (prohibiting state funding for companies which support BDS).

156. *See Odebrecht,* 715 F.3d at 1272 (including all subsidiaries, parent companies,

with the federal scheme regarding economic pressure to Cuba by punishing conduct that Congress had overtly excluded from sanctions.[157] Here, the anti-BDS laws clash with the federal scheme regarding economic pressure and diplomacy; the national government loses its power to economically pressure Israel and Palestine to adhere to certain policies when state laws like New York's exist.[158]

The President's power to influence other nations relies upon on his ability to negotiate access to the American economy without interference by inconsistent state policies.[159] The President's ability to influence is part of the executive's overall interest to play a productive role in the Middle East peace process, especially the relations between Israel and Palestine.[160] The Court argued in *Crosby* that state acts addressing sanctions have the capacity to affect relations with foreign nations.[161] Such state measures also affected the ability to create alliances through diplomatic actions, which would best promote human rights and democracy with specific nations.[162] Similarly, state measures like New York's EO No. 157 have the potential to upset American relations with allies of Palestine, as well as to hinder the ability of the Executive branch to pressure both Israel and Palestine to adhere to international law and human rights norms as steps towards achieving peace.[163] Such measures could distract at the negotiation table where conversations with the United States become not about how to achieve peace,

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or affiliates); tit. 9, § 8.157 (lacking limits to the list).

157. *See Odebrecht*, 715 F.3d at 1283 (referencing the Trading with the Enemy Act which penalized violating the federal sanctions against Cuba).

158. *See id.* at 1272 (arguing that the Cuba Amendment directly conflicted with the "extensive and highly calibrated federal regime of sanctions against Cuba promulgated by the legislative and executive branches over almost fifty years").

159. *See id.* at 1284-85 (recalling Congress' grant of considerable power to adjust sanctions).

160. *See id.* (stating that exceptions which alter the President's ability to exhibit one voice behalf of the economy weaken the President's ability to work with the nation at issue frustrate hopes of reaching solutions).

161. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 384 (2000) (providing the example of how the Massachusetts Burma Law has the potential to affect American discussions with the European Union, where high-level discussions revolved around "not on what to do about Burma, but on what to do about the Massachusetts Burma Law").

162. *See id.* (explaining that the Massachusetts law was a distraction at high-level government meetings).

163. *See id.* at 376 (pointing out that the Executive's authority regarding foreign affairs is not only to make political statements but to receive political results, and the entirety of such power shows the importance of it so there cannot be congressional intent to compromise it via deference to states).

but what to do about anti-BDS measures in states such as New York and others.[164] Based upon the views of the Supreme Court in *Crosby*, courts must scrutinize EO No. 157 by the same standard and strike it down.[165]

Congress and the Executive branch have shown through various pieces of legislation that they intend to occupy the field of economic policies regarding Israel and its neighbors.[166] These actions are constitutionally legitimate pursuant to Congress and the President's enumerated foreign affairs powers.[167] The TFTEA, EAA, and Ribicoff Amendment, are all legitimate because they pertain to international trade issues which is a power belonging to Congress.[168]

The New York EO No. 157 is preempted under the foreign policy doctrine because it would likely limit the President's ability to lift or impose economic policies.[169] Although the New York EO No. 157 differs from *Crosby* because it punishes American citizens for boycotting Israel rather that imposing extra sanctions, *Crosby* squarely addresses what powers states have to control domestic policies regarding international boycotts, and plainly rules that states cannot control domestic policies about international boycotts.[170]

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164. *See id.* at 384 (informing that discussions became not about Burma but what to do with state laws regarding it).

165. *See id.* at 388 (holding that the Massachusetts law conflicted with the President's power to limit sanctions).

166. *See* Trade Facilitation and Trade Enforcement Act of 2015 § 909, 19 U.S.C.A. § 4452(a)(5) (2016) (reaffirming the United States-Israel trade relationship); *see also* The Export Administration Act (EAA), Pub. L. No. 96-72 § 8(a) (1979) (requiring US persons to report when they help a forbidden boycott); *see also* Tax Reform Act of 1976, Pub. L. No. 99-514, 100 Stat. 2085, Title X, Part VI § 999 (a)-(b) (1976) (requiring U.S. businesses to report operations related to boycotting countries to the IRS).

167. *See Crosby*, 530 U.S. at 381 (2000) (reaffirming that the President has the constitutional power to make treaties and appoint public officials).

168. *See* U.S. CONST. art. I § 8 (establishing the Commerce Clause, which allows Congress to regulate commerce with foreign countries); *see also* 19 U.S.C.A. § 4452 (2016) (alluding repetitively that boycott, divestment, and sanctions of Israel will not be tolerated in international trade); *see also* Pub. L. No. 96-72 93 Stat. 503, 521 (1979) (discouraging US persons from supporting forbidden boycotts); Pub. L. No. 99-514, 100 Stat. 2085 (1976) (requiring U.S. taxpayers to report business or commercial activities alongside or related to boycotting countries).

169. *See Crosby*, 530 U.S. at 376 (arguing that the Massachusetts law inconsistently imposes economic pressure against Burma).

170. *Compare id.* at 366 (stating that the issue at hand is the constitutionality of a Massachusetts law restricting its agencies from purchasing goods from or conducting business with the country of Burma), *with* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (restricting New York agencies from conducting business with companies listed

New York's EO No. 157 attempts to give the state of New York the power to control domestic policies regarding international boycotts.[171] A state measure addressing an issue as sensitive as foreign economic sanctions gives the President less diplomatic leverage as a consequence.[172] Like *Crosby*, where Massachusetts forbade state agencies from purchasing from any company or person identified on a list of those doing business with Burma, New York's EO No. 157 forbids state agencies from investing in entities which support BDS.[173] To allow the state government to punish those who support BDS represses advocates of Palestinian human rights and poses an incredible threat to the constitutional foreign affairs powers of the President.[174]

State policies addressing international economic sanctions contradict the federal scheme to control that field.[175] The Court of Appeals in *Odebrecht* utilized as evidence many pieces of legislation regarding economic sanctions and humanitarian relief regarding Cuba as evidence of congressional intent to control the field.[176] It ruled that passing many pieces of relevant legislation clearly indicated that there was congressional intent to pervasively regulate the subject.[177] Similarly to the set of laws mentioned in *Odebrecht* that control American economic policies concerning Cuba, the TFTEA, EAA, and Ribicoff Amendment all regulate economic policies pertaining to Israel and the boycott of Israel and indicate that Congress

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on the Commissioner's list).

171. *See Crosby,* 530 U.S. 363, 380 (2000) (saying that the Massachusetts Burma law conflicts with the President's power to provide the world with a comprehensive strategy regarding Burma); *see also* tit. 9, § 8.157 (setting out a policy which represses the right to boycott Israeli products).

172. *See Crosby*, 530 U.S. at 377 (comparing the President's diplomatic powers to bargaining chips).

173. *See id.* at 367 (informing that the law exempted certain entities that were in Burma); *see also* tit. 9, § 8.157 (mandating that the Commissioner lists BDS-supporting companies and institutions without exemption).

174. *See Crosby*, 530 U.S. at 373-74 (noting that the Massachusetts law which attempted to control policy regarding international boycotts hindered the President's effective voice and his ability to facilitate dialogue between conflicting parties).

175. *See id.* at 380-81 (stating that the President has the authority to speak on behalf of the nation regarding economic policies affecting the U.S.-Burman relations); *see also* Odebrecht Constr., Inc. v. Sec'y, Florida Dep't of Transp., 715 F.3d 1268, 1272 (11th Cir. 2013) (ruling that a Florida law weakened the President's ability to speak on economic sanctions of Cuba).

176. *See Odebrecht,* 715 F.3d at 1275-77 (discussing in detail the history of presidential and congressional regulations of American economic policies with Cuba).

177. *See id.* (insinuating that the federal government enacted a pervasive scheme through many statutes, executive orders, and regulations).

wishes to dominate the subject pervasively.[178] Economic sanctions have the power to persuade and pressure foreign nations to follow certain policies.[179] As such, policies that touch upon such sensitive international issues like Cuba, Israel, and Palestine are regulated solely by the federal government.[180]

Punishing organizations and companies that are international in nature (via the required public blacklist) also falls under the foreign relations doctrine.[181] In *Odebrecht*, Florida's Cuba Amendment required companies to prove that they did not do business with Cuba; if they falsified the information, they were penalized.[182] Foreign nations, such as Canada and Brazil, as well as several member parties of the World Trade Organization (WTO), complained about Florida's Cuba Amendment and its punishment.[183] New York's EO No. 157 is similar to Florida's Cuba Amendment in that it inflicts broader punishments than the federal scheme does: no federal laws mandate a publicly available list of BDS supporters.[184]

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178. *See* Tax Reform Act of 1976, Pub. L. No. 99-514, 100 Stat. 2085 (1976) (setting policies deterring or punishing participation with an international boycott); *see also* The Export Administration Act (EAA), Pub. L. No. 96-72 93 Stat. 503, 521 (1979) (prohibiting the boycott of allied nations and establishing punishment for those who participate in such boycotts); *see also* 19 U.S.C.A. § 4452 (addressing BDS in the international context).

179. *See Odebrecht*, 715 F.3d at 1275 (stating that economic policies pertaining to Cuba are complex).

180. *See id.* (insinuating that economic sanctions are so sensitive and impactful on foreign relations that they must be regulated by the federal government).

181. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (requiring the Commissioner to list any institutions and companies that partake in BDS); *Odebrecht*, 715 F.3d at 1279 (explaining that the broad preliminary list included 238 companies that Florida invested in, such as "major airlines, banks, . . . and oil companies"); *see also* "Institutions or Companies Determined to Participate in Boycott, Divestment, or Sanctions Activity Targeting Israel," Office of General Services (May 31, 2017), https://www.ogs.state.ny.us/eo/157/Docs/EO157_Institutions_Companies_List.pdf (listing international companies such as Betsah SA and FreedomCall UK).

182. *See Odebrecht*, 715 F.3d at 1279 (discussing Florida's Cuba Amendment which was enforced through a public bidding process that penalized companies that did business in Cuba).

183. *See id.* at 1279-80 (informing that a WTO meeting took place as the European Union sought information about the law; additional examples of concerned countries include Norway, Singapore, and Switzerland).

184. *Compare* United States-Israel trade and commercial enhancement § 909, 19 U.S.C.A. § 4452 (2016)(d)(1) (requiring the President to annually submit a report to Congress regarding politically motivated boycotts of, divestment from, and sanctions against Israel), *and* The Export Administration Act (EAA), Pub. L. No. 96-72, 93 Stat. 503, 522 (1979) (requiring US persons to report requests to participate in prohibited boycotts every quarter to the Commerce Department), *and* Tax Reform Act of 1976, Pub.

New York's EO No. 157 evidently imposes greater punishments than any federal law and, like in *Odebrecht*, is preempted.[185]

With the support of Congress, only the President may possess the power to regulate the national response to the boycott of Israel as well as to determine the extent of our economic and political relations with Israel.[186] The President's power to determine the nation's economic policies and to use them as diplomatic leverage is the peak of presidential political power.[187] Congress would not go to various legislative lengths to empower the President and address boycotts of Israel if it wished to compromise that power by allowing states to inflict tougher punishments on such boycotters.[188]

The seemingly small discrepancies between state regulations and the existing federal laws regarding economic policies pertaining to boycotts of or solidarity with Israel have the potential to create tremendous reverberations.[189] In *Crosby*, the Supreme Court noted that the Massachusetts Burma Law, although somewhat consistent with subsequent federal legislation, created a quagmire of negative responses from other nations.[190] The backlash went so far as to include a warning from European Union officials that the law "could have a damaging effect on bilateral EU-US relations."[191] The Act not only ignited international trade dispute

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L. No. 99-514, 100 Stat. 2085 (1976) (requiring U.S. taxpayers and businesses to report business or commercial activities alongside or related to boycotting countries to the IRS), *with* N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016) (requiring the Commissioner to list pro-BDS businesses and publish them on a website and to punish all entities that participate in the BDS Movement).

185. *See Odebrecht*, 715 F.3d at 1281 (stating that the Cuba Amendment conflicted with federal law in various ways, and had a wider scope of punishment than the federal scheme, which permitted certain acts that Florida punished).

186. *See id.* at 1285 (pointing out that the President's power over foreign relations is his most substantial power, and he alone can speak for the nation).

187. *See id.* (claiming that the Cuba Amendment is at odds with federal law because the President is at the zenith of his Congress-given power, which grants him the discretion to direct national economic policies toward Cuba).

188. *See id.* at 1286 (pointing out that state legislation has the potential to hinder presidential discretionary powers in relation to foreign affairs and create enclaves that the President cannot access).

189. *See id.* (informing that Florida's Cuba Amendment received international protests); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 367-68 (2000) (explaining that state economic laws like the Massachusetts Burma Law not only affect the American relationship with Burma, but with other countries).

190. *See Crosby*, 530 U.S. at 382 (noting that a number of allies and trading partners formally filed protests with the federal government regarding the Act).

191. *See id.* at 383 (sharing that the European Union not only gave this warning but

proceedings within the WTO, but unnecessarily complicated diplomatic relations with other nations.[192] Here, New York's EO No. 157 has the capability of igniting similar reactions.[193] New York's anti-BDS EO No. 157, like the Massachusetts Burma Law, has the potential to not only punish companies or organizations that partake in BDS, but to damage US relations with foreign nations.[194] Like in *Crosby*, New York's EO No. 157 could open the United States to lawsuits in the WTO because it plausibly affects international trade.[195] Additionally, it would punish foreign allies that conduct business with such companies or organizations, which would damage diplomatic relations.[196]

4. Under a Federal Objectives Lens, EO No. 157 is Again Unconstitutional Because It Impedes Federal Objectives

When a state law stands as an obstacle to a federal goal, or undermines the purposes of an act, federal objectives preemption applies.[197] The federal government has indicated that its objective is to punish boycotts in divestment from, and sanctions of Israel in a purely international context, and New York's EO No. 157 stands as an obstacle to its achievement of that goal.[198] The most recent example was President Barack Obama signing into

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pursued proceedings beside Japan in the WTO).

192. *See id.* (arguing that the responses of foreign governments and the Executive serve as evidence of the Act's frustration of federal objectives).

193. *See id.* at 383-84 (referencing the Assistant Secretary of State Larson who said that the Act hindered coalition-building with allies intended to pressure Burma to promote human rights and democracy)

194. *See id.* at 383 (sharing that the European Union partook in proceedings beside Japan in the WTO against the United States).

195. *See id.*, 530 U.S. 363, 383 (noting that several foreign nations brought suit against the US under the WTO Dispute Settlement Process because Florida's law restricted international trade).

196. *See id.* at 370 (identifying the respondent as National Foreign Trade Council, a nonprofit corporation that represented companies involved with foreign commerce, thirty-four of whom were named on Massachusetts' restricted purchase list).

197. *See id.* at 373-74 (reasoning that the Massachusetts Burma law impeded the objectives of federal law and undermined the intentions of Congress to give the President flexible authority with economic policies).

198. *Compare* United States-Israel trade and commercial enhancement § 909, 19 U.S.C.A. § 4452(b)(7) (2016) (establishing the nation's stance toward BDS actions at international trade tables), *and* The Export Administration Act (EAA), Pub. L. No. 96-72, 93 Stat. 503, 523 (1979) (requiring US persons to report requests to participate in prohibited international boycotts), *and* Tax Reform Act of 1976, Pub. L. No. 99-514, 100 Stat. 2085 (1976) (requiring U.S. taxpayers and businesses to report business or commercial activities alongside or related to boycotting countries), *with* N.Y. COMP.

law the Trade Facilitation and Trade Enforcement Act of 2015.[199] That Act contained specific provisions addressing American-Israeli trade relations and commercial enhancement policies.[200] Congress intended to address this subject even though the Act does not explicitly mention BDS, unlike the NY measure.[201] Consequently, the federal act preempts NY from passing this ordinance.[202] Thus, just as in *Crosby*, Congress has spoken on U.S. policy with regard to boycotts in the region and the states may not regulate in this area.[203]

Congress has furthered its objective to establish a careful standard regarding international boycotts with not only one, but two federal laws addressing international boycotts.[204] These statutes are The Export Administration Act of 1979[205] and The Ribicoff Amendment to the Tax Reform Act of 1976.[206] These two laws regulate U.S. persons who comply with a foreign nation's policies to boycott another country.[207] Both of these federal statutes do not mention BDS as it did not exist in the 1970s, but the

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CODES R. & REGS. tit. 9, § 8.157 (2016) (requiring the Commissioner to list pro-BDS businesses in New York and for agencies to divest from them).

199. *See* United States-Israel Trade and Commercial Enhancement § 909, 19 U.S.C.A. § 4452 (2016) (announcing the American government's opposition to boycott, divestment, and sanction tactics).

200. *See id.* (establishing its opposition to boycotts of Israel and requiring the President submit a report to Congress on "politically motivated boycotts of, divestment from, and sanctions against Israel").

201. *See id.* (stating that "boycott of, divestment from, and sanctions against Israel" will not be tolerated within the context of international trade).

202. *See id.* § 909(d) (affirming that the US-Israel alliance is strategically important, and listing various ways through which the United States has and will combat forms of boycott, divestment, and sanctions targeting Israel).

203. *See id.*; Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 376 (2000) (specifying that international economic policies fall under the foreign affairs doctrine).

204. *See* Arizona v. United States, 132 S. Ct. 2492, 2505 (2011) (demonstrating that Arizona's law frustrated federal objectives because it would interfere with Congress' careful balance).

205. *See* The Export Administration Act (EAA), Pub. L. No. 96-72, 93 Stat. 503, 504 § 8(a) (1979) (establishing the federal government's power to control restrictive trade practices with other countries).

206. *See* Tax Reform Act of 1976, Pub. L. No. 99-514, 100 Stat. 2085 Title X, Part VI § 999 (a)(1)(A)-(B) (1976) (requiring U.S. taxpayers and businesses to report activities alongside boycotting countries to the IRS).

207. *See* Pub. L. No. 96-72, 93 Stat. 503, 504 § 8(a) (1979) (punishing those who participate in forbidden boycotts at the request of other nations); Pub. L. No. 99-514, 100 Stat. 2085 Title X, Part VI § 999 (a)(1)(A)-(B) (1976) (mandating U.S. taxpayers and businesses to report activities to the IRS).

statutes apply to the Arab League boycott of Israel.[208] Thus, the federal government has acted to control the boycott policies regarding Israel, in addition to the extent of record-keeping of those who do boycott it.[209] New York may not act in this same sphere.[210]

Conflicts between the objectives of state and federal laws regarding punishments for certain activity further emphasizes the existence of federal objectives preemption, especially where there is a possibility of impediment of national policies.[211] As highlighted in *Crosby*, conflict in technique, despite symmetry in goals, has the potential to be as disruptive to the federal scheme as an actual conflict in policy.[212] In applying this to New York's EO No. 157, the government has already established its goals regarding BDS: to address it solely in an international context.[213]

Even if an entity is able to comply with the federal and state regulations, the ends do not justify the conflicting means.[214] As a result, a company or organization that previously complied with the aforementioned federal laws pertaining to boycotts of Israel and BDS would face inconsistent regulations.[215] As such, New York EO No. 157 conflicts with the federal power to impose whatever degree of punishment it deems necessary upon

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208. *See* MELISSA REDMILES, INTERNATIONAL BOYCOTT REPORTS, 2003 AND 2004 at 168 (2004), https://www.irs.gov/pub/irs-soi/03-04boycott.pdf (informing that Congress responded to the Arab League boycott of Israel by passing legislation to discourage domestic support).

209. *See* Arizona v. United States, 132 S. Ct. 2492, 2505 (2011) (ruling that a section of the law actually impeded federal objectives because it involved a conflict in the enforcement method).

210. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 77 (1st Cir. 1999) (insinuating that acceptable state regulation would be a domestic issue).

211. *See Arizona*, 132 S. Ct. at 2503 (reinforcing that the conflicts between the Arizona law and the federal scheme indicated that federal objectives preemption existed).

212. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 (2000) (arguing that a common end does not justify conflicting means).

213. *See* United States-Israel trade and commercial enhancement § 909, 19 U.S.C.A. § 4452(b) (2016) (alluding repetitively that boycott, divestment, and sanctions of Israel will not be tolerated in international trade); The Export Administration Act (EAA), Pub. L. No. 96-72 (1979) (establishing the federal government's power to control restrictive trade practices with other countries); Tax Reform Act of 1976, Pub. L. No. 99-514, 100 Stat. 2085 (1976) (requiring U.S. taxpayers and businesses to report business or commercial activities alongside or related to boycotting countries to the IRS).

214. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379-80 (2000) (arguing that although Massachusetts had the same intentions as the federal government, conflict will occur when two separate schemes are implemented upon the same activity).

215. *See id.* (noting the confusion of the inconsistent regulations).

those who participate in BDS or boycotts of Israeli products.[216]

IV. POLICY RECOMMENDATION

BDS is gaining traction, and reactionary measures have appeared not only in the United States, but across the world.[217] As a matter of policy, it is important for the national government to present a unified, clear, and unbiased voice when addressing BDS and its goal to pressure Israel into compliance with international standards for human rights.[218] States have no place in punishing human rights activism by presenting varied measures, which are clearly preempted under the Supremacy Clause of the United States Constitution.[219] Anti-BDS measures are inherently flawed in multiple aspects, and should not be in effect.[220]

Measures such as New York's EO No. 157 establish, above anything else, bad policy.[221] For example, the previously discussed Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) essentially legitimizes Israeli settlements, which is contrary to the history of U.S. policy, as well as international policies.[222] Despite the fact that international law states that

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216. *See id.* at 380 (insinuating that separate remedies for the same activity and the degree of pressure Congress wishes to employ on other nations are interlinked).

217. *See* Ron Kampeas, *Anti-BDS Bill Would Make It Crime To Boycott West Bank Settlements*, FORWARD (Nov. 16, 2016), http://forward.com/news/breaking-news/354592/anti-bds-bill-would-make-it-crime-to-boycott-west-bank-settlements/ (explaining that the TFTEA was sparked as a response to a United Nations Human Rights Council database listing companies that do business with Israeli settlements).

218. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 67 (1st Cir. 1999) (referencing Massachusetts's Burma law, which both discriminated against foreign commerce, and curtailed the federal government's "one voice" in foreign affairs).

219. *See supra* Part III (arguing that under different types of preemption, federal law invalidates New York's EO No. 157).

220. *See What to know about anti-BDS legislation*, PALESTINE LEGAL (Aug. 16, 2016), http://palestinelegal.org/news/2016/6/3/what-to-know-about-anti-bds-legislation (pointing out anti-BDS laws affect institutions like the Presbyterian church, which could lose funding for social programs).

221. *See id.* (informing that the lists of BDS supporters are McCarthyite in nature and unclear in implementation in its discussion of N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (2016)).

222. *Compare* 19 U.S.C.A. § 4452(f)(1) (extending its protections to territories controlled by Israel, which translates to Israeli settlements in the West Bank and Golan Heights), *with* S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979) (criticizing Israeli settlements as unlawful obstacles to a just and lasting peace in the region), *and* Press Release, Office of the Press Sec'y, White House, Statement by the Press Sec'y on the Trade Facilitation and Trade Enf't Act of 2015 (Feb. 11, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/11/statement-press-

settlements are illegal, the trade act's verbiage implicitly attacks European measures which restrict business with Israeli settlements.[223] Unreasonable stipulations such as these create a one-sided diplomatic approach, which even the President himself has expressed dissatisfaction with.[224] U.S. persons must be allowed to engage in BDS without hindrance; the State Department itself has recognized the right to boycott Israel as protected under the right to free speech.[225] Consequently, state politicians must veto pending and future proposed anti-BDS measures.

The BDS campaign is similar to the boycott against South African apartheid in the 1990s.[226] Comparable to the latter's protest of unequal treatment and discriminatory laws, BDS expresses a discontent with the Israeli treatment toward the Palestinian people.[227] Despite the United States' history of politically motivated boycotts, present-day politicians repeatedly target and attempt to silence BDS.[228] This is not the first time that Americans have participated in politically-motivated boycotts, and it will not be the last.[229] To create and publish a list of people based only upon their political views, and punish them for having such views, is simply McCarthyite in

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secretary-trade-facilitation-and-trade-enforcement-act (refusing to support the language in the TFTEA that legitimizes Israeli settlements).

223. *See generally* COMMISSION INTERPRETATIVE NOTICE ON INDICATION OF ORIGIN OF GOODS FROM THE TERRITORIES OCCUPIED BY ISRAEL SINCE JUNE 1967, EUROPEAN COMMISSION 1-4 (2015), https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf (informing that in conformity with international law, the EU refuses to recognize Israel's occupation of the Palestinian territories since 1967, and that labels must reflect that goods from settlements are not made in Israel but made in those illegal settlements).

224. *See How does the Trade Promotion Authority (TPA) Affect BDS?*, PALESTINE LEGAL (July 9, 2016), http://palestinelegal.org/news/2015/7/1/how-does-the-trade-promotion-authority-tpa-law-affect-bds (referencing a State Department statement that said the U.S. government does not support settlements and never has).

225. *See* Mark C. Toner, Daily Press Briefing, Bureau of Public Affairs: Office of Press Relations, U.S. Dep't of State (Nov. 7, 2016), http://www.state.gov/r/pa/prs/dpb/2016/11/264175.htm#MIDDLEEASTPEACE (transcribing the Spokesman's statement that although the government disagrees with BDS, it also believes in protecting a citizen's right to freedom of expression).

226. *See* What is BDS?, *supra* note 4 (declaring the campaign's inspiration to be the South Africa anti-apartheid campaign).

227. *See id.* (quoting Archbishop Desmond Tutu who compared the two movements).

228. *See New York State wants to blacklist you*, PALESTINE LEGAL (Jan. 26, 2016), http://palestinelegal.org/news/2016/1/26/new-york-state-wants-to-blacklist-you (noting that at least twenty-two anti-BDS bills were introduced in 2015).

229. *See id.* (referencing the Montgomery bus boycott, the California grape boycott, and the South African anti-apartheid movement).

nature.[230]

V. CONCLUSION

Courts have yet to review the legitimacy of anti-BDS legislation. If that day comes, analysis under the Supremacy Clause would indicate that such repression is unconstitutional.[231] The Supremacy Clause allows federal law to preempt EO No. 157 punishing BDS activists.[232] Courts will quickly realize that three implied preemption lenses arise when analyzing New York's EO No. 157 and similar measures: federal objectives, field, and foreign affairs.[233] As such, New York's EO No. 157 and similar state measures should be revoked.

230. *See id.* (reminding that the McCarthy era punished certain political views by blacklisting individuals with those views).

231. *See supra* Part III (arguing that federal law, under implied preemption lenses, preempts New York's EO No. 157).

232. *See supra* Part III (analyzing the federal scheme which preempts New York's EO No. 157).

233. *See supra* Part II (explaining the applicable types of preemption).