THE GUN INDUSTRY AND THE NEW ANTI-BOYCOTT LAWS

Dru Stevenson[*]

Abstract

Anti-boycott laws are an emerging trend in our legal system, especially in state legislatures. In the last seven years, more than half the states have adopted laws that sanction, in various ways, firms that boycott the nation of Israel. Even more recently, several states have adopted laws that discourage corporations—especially financial institutions—from adopting environment, social, and governance reform policies. In 2021, Texas and Wyoming adopted sweeping laws that punish banks that do not lend to weapons manufacturers and gun dealers after some of the nation's largest financial institutions had announced plans to stop lending to the firearm industry. A Texas law requires all government contractors to certify in their contracts that they do not discriminate against the gun industry, thereby debarring financial institutions and other companies from state or municipal contracts if they boycott or divest from the protected industry. Similar laws are pending in other states and in Congress. This is the first law review article to explore, in depth, the anti-boycott laws designed to protect the firearms industry from de-banking and important exceptions or potential legal loopholes in these laws. This Article also discusses the economic impact of such laws as well as their legality, especially in terms of corporate rights to free speech.

* Wayne Fischer Research Professor, South Texas College of Law Houston (STCL). I would like to thank the STCL administration for its support for this research, the STCL faculty for helpful comments when I presented this research, and the scholars and lawyers who gathered for a workshop at the Duke Law School Center for Firearms Law in March 2022. Professor Marsha Griggs and Congressional Research Service Attorney Andreas Kuersten provided invaluable feedback on an earlier version of this project. I am also thankful for the diligent proofreading and suggested revisions of my research assistant, Wafa Damashkiah.

INTRODUCTION

Some investors are conscientious. Either they do not want to provide financial support to enterprises that they find morally reprehensible—such as weapons manufacturers, gun dealers, or the fossil fuel industry—or they at least prefer to shift their investments toward enterprises that promote public health and welfare. For others, such scruples in investing may seem silly—if for no other reason than they seem unlikely to make any difference. Nevertheless, when there are enough conscientious investors, taken together, they can wield influence over some financial institutions that want to accommodate them. One sign that conscientious investing or boycotts are making a difference

is when the target of the boycott or the shunning turns to the political arena for relief.

A law that punishes banks if they choose not to lend to the gun industry came into effect in Texas in 2021.[1] The enforcement mechanism of this law is through state contracts—Texas SB 19 forbids state government divisions, as well as municipalities, from contracting with any companies, including financial institutions (e.g., for underwriting state or municipal bond issues) if the companies "discriminate" against firearm or ammunition manufacturers.[2] All government contractors in the state must certify, as a condition in their contract, that they do not "discriminate" against firearms manufacturers or dealers.[3] A companion enactment (SB 13), passed in the same session, imposes similar restrictions for financial institutions that boycott or divest from the fossil fuel industry.[4]

Around the same time,[5] the Wyoming legislature passed HB 0236, which also punishes banks that "discriminate" against gun manufacturers or dealers.[6] Rather than cutting those banks off from municipal bond work in the state, this statute creates a cause of action for those claiming to be victims of such discrimination (that is, gun dealers denied a loan based on their line of work) for which they can seek treble damages.[7]

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1. 2021 Tex. Gen. Laws 1069–71 (codified at TEX. GOV'T CODE ANN. §§ 2274.001 to .003 (West 2021)); Dru Stevenson, *Guns and Banks: New Laws & Policies*, DUKE CTR. FOR FIREARMS L. (Apr. 7, 2022), https://firearmslaw.duke.edu/2022/04/guns-and-banks-new-laws-policies [https://perma.cc/VF8Q-2AVD].

2. *See* TEX. GOV'T CODE ANN. §§ 2274.001 to .003 (West 2021); *see also* Stephen Gandel, *The Texas Law That Has Banks Saying They Don't 'Discriminate' Against Guns*, N.Y. TIMES (May 28, 2022, 8:00 AM), https://www.nytimes.com/2022/05/28/business/dealbook/texas-banks-gun-law.html [https://perma.cc/CV3A-65E2] (describing a law firm's response to the Texas law).

3. *See* Letter from Leslie Brock, Assistant Att'y General, Tex., to Frederic A. Weber, Norton Rose Fulbright (Aug. 23, 2021), https://aboutblaw.com/ZmN [https://perma.cc/S9NY-WXPJ]; Gandel, *supra* note 2.

4. 2021 Tex. Gen. Laws 1064–69 (codified at TEX. GOV'T CODE ANN. §§ 809.001–102, 2274.001 to .003 (West 2021)).

5. *See Governor Gordon Signs Firearms Industry Non-discrimination Act*, ROCKET MINER (Apr. 9, 2021), https://www.wyomingnews.com/rocketminer/news/state/governor-gordon-signs-firearms-industry-non-discrimination-act/article_60ad8b1f-4aa2-5da7-b920-117bddccc60f.html [https://perma.cc/5NL3-M398].

6. 2021 Wyo. Sess. Laws 454–56 (codified at WYO. STAT. ANN. §§ 13-10-301 to -303 (2024)).

7. *Id.*

These laws are part of an emerging trend.[8] Other Republican-controlled states may soon follow suit; some Republican lawmakers have already introduced such bills.[9] In 2022, bills to protect the gun industry from "discrimination" (or boycotts or divestment) by the financial sector also passed one state legislative chamber on the first attempt—but died in the other—in Louisiana,[10] Missouri,[11] and South Dakota.[12] Ohio's version of the bill is still pending in its legislature as of the time of this writing,[13] and a reintroduced bill is currently pending in Louisiana.[14] A bill similar to the Texas law passed the Arizona House[15] but then stalled—for this year, at least—in its Senate.[16] The same series of events unfolded in Oklahoma—the

8. *See* Karen Pierog, *More State Lawmakers Target Muni Underwriters' Firearm Policies*, THE BOND BUYER (Mar. 14, 2022, 1:23 PM), https://www.bondbuyer.com/news/more-state-lawmakers-target-muni-underwriters-firearm-policies [https://perma.cc/7PQA-45H9].

9. *See* Amanda Albright & Danielle Moran, *Law That Shut Goldman, JPMorgan Out of Texas Munis Is Spreading*, BLOOMBERG L. (Feb. 10, 2022, 7:00 AM), https://www.bloomberglaw.com/bloomberglawnews/banking-law/XD91JALG000000?bna_news_filter=banking-law#jcite [https://perma.cc/Z38G-NC6A]. According to the Giffords Law Center, "Arizona, Indiana, Kansas, Kentucky, Missouri, New Hampshire, and West Virginia have similar bills pending." Allison Anderman, *Giffords Law Center Gun Law Trendwatch: March 1, 2022: A Roundup and Analysis of the Latest State Firearm Legislation*, GIFFORDS L. CTR. (Mar. 1, 2022), https://giffords.org/lawcenter/trendwatch/giffords-law-center-gun-law-trendwatch-march-1-2022/ [https://perma.cc/68Z8-ZPEK].

10. H. 978, 2022 Leg., Reg. Sess. (La. 2022) (dying in chamber while waiting on the Senate vote as of June 5, 2022); *see also* Victor Skinner, *Louisiana House Passes Bill That Could Ban Agencies from Contracting with Anti-gun Companies*, THE CTR. SQUARE (May 11, 2022), https://www.thecentersquare.com/louisiana/louisiana-house-passes-bill-that-could-ban-agencies-from-contracting-with-anti-gun-companies/article_24513cc6-d16d-11ec-bc13-3f28729df680.html [https://perma.cc/39LF-VFQJ] (describing the Louisiana legislation's status in the state legislature).

11. S. 1048, 101st Gen. Assemb., Reg. Sess. (Mo. 2022) (dying in chamber after passing in the Senate Insurance & Banking Committee on April 12, 2022).

12. S. 182, 2022 Leg., 97th Sess. (S.D. 2022) (dying in chamber after being deferred to the 41st Legislative Day on February 15, 2022, and no update has been offered since).

13. H. 297, 134th Gen. Assemb., 2021–22 Reg. Sess. (Ohio 2021) (pending in the Government Oversight Committee since May 12, 2021).

14. *See* S. 978, 2024 Leg., Reg. Sess. (La. 2024).

15. H. 2473, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

16. *See* Howard Fischer, *Bill Supported by Arizona Gun Lobby Fails to Get Vote in Senate Panel*, TUSCON.COM (June 24, 2023), https://tucson.com/news/local/govt-and-politics/bill-supported-by-arizona-gun-lobby-fails-to-get-vote-in-senate-panel/article_0a895996-ab01-11ec-99db-43f4b25ad5ea.html [https://perma.cc/3567-JRVW] (explaining that the bill was killed in committee, at least for now); Associated Press, *Arizona House Bill Hits Banks That Refuse Gun Firm Business*, U.S. NEWS (Feb. 18,

Oklahoma House passed a bill similar to the Texas law, but the bill did not garner enough support to pass the Oklahoma Senate.[17] State lawmakers introduced similar bills in the 2021–2022 session in Kansas,[18] Kentucky,[19] Indiana,[20] and West Virginia,[21] but they withered in committee. The first round of these bills appeared in legislatures in the 2015–2016 session in Alabama,[22] Georgia,[23] Kansas,[24] and Tennessee;[25] the advocates for the legislation are tenacious. All of these are

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2022), https://www.usnews.com/news/best-states/arizona/articles/2022-02-18/arizona house-bill-hits-banks-that-refuse-gun-firm-business [https://perma.cc/Z8AA-ET36]; Howard Fischer, *Gun Lobby Suffers Setback in Anti-Discrimination Effort*, DAILY INDEP. (Mar. 23, 2022), https://yourvalley.net/stories/gun-lobby-suffers-setback-in-anti-discrimination-effort,293497 [https://perma.cc/B8V9-D744]; Dan Zimmerman, *Arizona House Passes Bill Banning State From Contracting With Firms That Discriminate Against Gun Industry Firms*, THE TRUTH ABOUT GUNS (Feb. 24, 2022), https://www.thetruthaboutguns.com/arizona-house-passes-bill-banning-state-from-contracting-with-firms-that-discriminate-against-gun-industry-firms/ [https://perma.cc/6UZ8-4YUV] (showing that the House passed the bill); Laurie Roberts, *Republican Lawmakers Think 'Vulnerable' Gunmakers Need Protection*, ARIZ. REPUBLIC (Apr. 1, 2022), https://www.azcentral.com/story/opinion/op-ed/laurie roberts/2022/04/01/republican-lawmakers-would-rather-protect-vulnerable-gun-industry/7238452001/ [https://perma.cc/E9HS-RA6N] (providing an op-ed criticizing the proposed legislation).

17. *See* H. 3144, 58th Leg., 2022 Reg. Sess. (Okla. 2022) (died in chamber); Brent Skarky, *Oklahoma Lawmakers Weigh in On Gun Control Amid Texas Tragedy*, OKLA. NEWS 4 (May 25, 2022), https://kfor.com/news/oklahoma-legislature/ oklahoma-lawmakers-weigh-in-on-gun-control-amid-texas-tragedy/ [https://perma.cc/5C42-E6SN] ("[OK HB 3144] has cleared the House. It's sitting on the Senate side right now, but Senate leadership [explains] that no more policy bills will be heard this session. So, it's very likely dead this year."); Kim Jarrett, *Bills Would Ban Companies That Boycott Firearms, Fossil Fuel Industries from State Contracts*, THE CTR. SQUARE (May 2, 2022), https://www.thecentersquare.com/oklahoma/bills-would-ban-companies-that-boycott-firearms-fossil-fuel-industries-from-state-contracts/article_9775 eedc-ca46-11ec-9a59-7fda5ba9f2fe.html [https://perma.cc/9KHS-Q5AQ] (describing the Oklahoma bill).

18. *See* S. 482, 2021–22 Leg. Sess. (Ka. 2022) (died in committee).

19. *See* H. 123, 2022 Reg. Sess. (Ky. 2022) (died in committee).

20. *See* H. 1409, 122nd Gen. Assemb., 2nd Reg. Sess. (Ind. 2022) (died in committee).

21. *See* S. 268, 85th Leg., 2021 Reg. Sess. (W. Va. 2021) (died in committee).

22. H. 327, 2015 Reg. Sess. (Ala. 2015) (died in committee).

23. S. 282, 153rd Gen. Assemb., 2015–16 Reg. Sess. (Ga. 2015) (passing the Senate but dying in the House).

24. H. 2311, 2015–16 Leg. Sess. (Kan. 2015) (died in committee); Associated Press, *Kansas Bill Aims to Ban Discrimination Against Gun Dealers*, THE TOPEKA CAP. J. (Jan. 26, 2016), https://www.cjonline.com/story/news/politics/state/2016/01/26/kansas-bill-aims-ban-discrimination-against-gun-dealers/16603143007/ [https://perma.cc/4NMM-XMRJ].

25. H. 561, 110th Gen. Assemb., 2017–18 Reg. Sess. (Tenn. 2017) (stalled in committee).

designed to punish private-sector entities that avoid financial entanglements with gun manufacturers or dealers. This rash of similar bills is no coincidence; the gun industry has promoted a standardized-text bill, called the Firearms Industry Nondiscrimination (FIND) Act,[26] for legislators to use without having to draft a new bill from scratch.

The same policy approach is also occurring through executive branch actions, even apart from legislation. For example, before SB 19 passed the Texas legislature, Louisiana, via its State Treasurer and relevant committees, excluded JP Morgan from a major municipal bond contract due to its anti–gun industry policy.[27] The Texas legislative hearings about SB 19 included discussion about this activity in Louisiana.[28]

These legal protections for the firearms industry are part of a larger trend of anti-boycott laws, which in turn are a reaction against a large and growing movement in the private sector toward corporate social consciousness and responsibility[29]—including environmentally friendly investing or lending practices, and, sometimes, divestment from or boycotts of the nation of Israel.[30] Media coverage of the Texas gun statute connected it with the banks' public announcements of the prior

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26. *See Firearms Industry Nondiscrimination (FIND) Act*, CONG. SPORTSMEN'S FOUND., https://congressionalsportsmen.org/policy/firearms-industry-nondiscrimination-act-find-act/ [https://perma.cc/JR6D-E9NA] (describing its generic bill and its progress in various states).

27. *See* Amanda Albright & Danielle Moran, *JPMorgan Removed From Louisiana Muni Deal After Gun Scrutiny*, BLOOMBERG L. (Nov. 18, 2021), https://news.bloomberglaw.com/banking-law/jpmorgan-removed-from-louisiana-muni-deal-after-gun-scrutiny [https://perma.cc/5FJB-2V6S].

28. *See* Melinda Deslatte, *Louisiana Bars Banking Giant From Bond Deal Over Gun Policy*, U.S. NEWS (Nov. 18, 2021), https://www.usnews.com/news/best-states/louisiana/articles/2021-11-18/louisiana-bars-banking-giant-from-bond-deal-over-gun-policy [https://perma.cc/V76D-N5V3].

29. *See* Pete Schroeder, *How Republican-Led States Are Targeting Wall Street With 'Anti-Woke' Laws*, REUTERS (July 6, 2022), https://www.reuters.com/world/us/how-republican-led-states-are-targeting-wall-street-with-anti-woke-laws-2022-07-06/ [https://perma.cc/MLT7-GCX3].

30. *See infra* Section I.B. Although I have found it to be incomplete, one useful website that tracks anti-boycott legislation is JustVision. *See Press Coverage*, JUSTVISION, www.justvision.org/press/highlights [https://perma.cc/N9CS-G73R]. It tracks anti-boycott laws protecting the gun industry, anti–Environment, Social, and Governance (ESG) laws (ESG is an investor-driven movement focused mostly on corporate activities that impact climate change), and anti–Boycott, Divestment, and Sanctions (BDS) laws (BDS is a movement that involves boycotts of Israel). At the time of this Article's writing, thirty-three states have anti-BDS statutes that prohibit government contracts for individuals or entities that boycott, divest from, or sanction Israel. *See infra* Section I.B.

two years.[31] Additionally, the Texas laws are the latest additions to the body of state and federal statutory laws that privilege or protect the rights of gun owners and the gun industry on top of whatever constitutional protections apply under the Second Amendment.

This Article focuses on the Texas statute because it has garnered the most media attention, will serve as the template for other state legislatures in the future, and has already been tracked by economists regarding its implementation and the resulting costs for taxpayers.[32] At the same time, it is clear from the foregoing that this legislative trend is a national phenomenon, not confined to Texas. The Texas law provides a springboard from which this Article discusses the legal and policy implications of such laws, with its primary focus on the firearms industry and secondary focus on the related (and larger) trend with the environment, social, and governance (ESG) movement and the reactionary anti-ESG statutes. The Texas law overlaps with, and reacts against, various federal regulatory actions and bills proposed in Congress, so the discussion that follows addresses the activity on the federal level as well. While there is no case law yet about SB 19 or its counterparts in other states, there is a body of court decisions about the analogous anti-Boycott, Divestment, and Sanctions

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31. *See* Gandel, *supra* note 2 ("Four years ago, JPMorgan Chase joined some of the nation's largest banks in publicly distancing itself from the firearm industry after a mass shooting in Parkland, [Florida], left 17 people dead.").

32. *See generally* Daniel G. Garrett & Ivan T. Ivanov, *Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies* (Mar. 11, 2024) (unpublished manuscript) (on file with author). Here is the conclusion from their abstract: "We find that municipal bond issuers with previous reliance on the exiting underwriters are more likely to negotiate pricing and incur higher borrowing costs after the implementation of the laws. Among remaining competitive sales, issuers face significantly fewer bidding underwriters and higher bid variance, consistent with a decline in underwriter competition. Additionally, underpricing increases among issuers most reliant on the targeted banks and bonds are placed through a larger number of smaller trades. Overall, our estimates imply Texas entities will pay an additional $303–$532 million in interest on the $32 billion in borrowing during the first eight months following the Texas laws." *Id.* at 1; *see also* Amanda Albright & Danielle Moran, *Texas' Recent Gun Law Costing State Taxpayers Millions*, BLOOMBERG (June 13, 2022), https://dentonrc.com/texas-recent-gun-law-costing-state-taxpayers-millions/article_ce6c3139-47f1-5f0f-9454-c7d880a5f952.html [https://perma.cc/TYM3-QHJ7] ("The state's municipal borrowers have been hit with as much as $532 million of extra debt costs because of a new GOP law that's led some banks to step back from Texas' bond market. That's the conclusion of a new paper by Daniel Garrett, a University of Pennsylvania professor, and Ivan Ivanov, a principal economist at the Federal Reserve.").

(BDS) statutes,[33] which have been around longer and have faced some First Amendment challenges.[34] The Eighth Circuit recently upheld Arkansas's anti-BDS statute,[35] going against the nascent emerging consensus in other courts, so it is important to discuss these cases and whether they would apply to the anti-boycott laws that protect the gun industry—there are important differences but also obvious similarities. This Article contends that anti-boycott laws run counter to our legal history and traditions, because boycotts by consumers or investors have played a vital role in United States history; boycotts are "[a] tradition as persistent as the American nation itself."[36]

It is worth noting at the outset that a few states have gone in the opposite direction regarding the gun industry. Some state pension funds have adopted policies,[37] sometimes via state treasurers or advisory boards,[38] to divest state pensions from the firearm industry. This also occurs sometimes on the municipal level, such as in Philadelphia.[39] Again, these boycott,

33. *See generally* Arkansas Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (forcing government contractors in Arkansas to include in their contract a certification that they are not engaging in and will not participate in a "boycott of Israel" during the term of the contract); A & R Eng'g & Testing, Inc. v. City of Houston, 582 F. Supp. 3d 415 (S.D. Tex. 2022) (imposing the same obligations on government contractors in Texas).

34. *See, e.g.*, A & R Eng'g & Testing, Inc., 582 F. Supp. 3d at 438 (enjoining enforcement of the statute against the plaintiff challenging it), *rev'd sub nom.* A & R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685 (5th Cir. 2023); Ali v. Hogan, 26 F.4th 587, 591 (4th Cir. 2022) (denying relief for lack of standing); Martin v. Wrigley, 540 F. Supp. 3d 1220, 1227-31 (N.D. Ga. 2021), *aff'd sub nom.* Martin v. Bd. of Regents, No. 22-12827, 2023 WL 4131443 (11th Cir. June 22, 2023); Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 730 (W.D. Tex. 2019), *vacated sub nom.* Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018), *rev'd as moot* Jordahl v. Brnovich, 789 Fed. App'x 589, 591 (9th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1012 (D. Kan. 2018).

35. *See* Arkansas Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

36. LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 2 (2009).

37. *See* Marc Lifsher, *Biggest U.S. Pension Fund Sells Gun Manufacturer Stocks*, GOVERNING (Feb. 20, 2013), https://www.governing.com/archive/mct-calpers-sells-gun-manufacturer-stocks.html [https://perma.cc/54A6-QTT5].

38. *See* Danny Hakim, *California Treasurer Urges State Pension Funds To Drop Gun Sellers*, N.Y. TIMES (Oct. 6, 2017) https://www.nytimes.com/2017/10/06/business/california-gun-retailers.html [https://perma.cc/X46C-9V4X].

39. *See* Michael Katz, *Pittsburgh Mayor Asks Pension to Divest Guns, Fossil Fuels, Private Prisons*, CHIEF INV. OFFICER (June 13, 2019), https://www.ai-cio.com/news/pittsburgh-mayor-asks-pension-divest-guns-fossil-fuels-private-prisons/ [https://perma.cc/W4K4-EYYY].

divestment, and abstention policies are part of a larger trend that includes ESG policies by large pension funds and some banks. Connecticut, for example, has taken a step beyond what other states have done. In 2018, its State Treasurer announced a policy of more rigorous pension fund divestment from the firearms industry (the Connecticut Treasurer has some oversight of municipal pensions as well as pensions on the state level),[40] and it now requires banks to disclose ties with the gun industry to get contracts (i.e., loans or lines of credit for cities or state agencies as well as bond work).[41] The Connecticut Treasurer's Office weighs a financial institution's gun policy as one factor, among many, when approving public contracts for banking and financial services.[42] Connecticut appears to be the first state to adopt such measures.[43] The Treasurer's announcement of this policy connected the policy with potential civil liability for gun manufacturers:

> From an investment perspective, civilian gun manufacturers face significant legal and reputational risks that have an impact on company profitability and long-term shareholder value. Often a volatile investment, these securities present unnecessary financial and business risks associated with the products manufactured. *The U.S. Supreme Court's decision to allow the families of Sandy Hook*

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40. *See* Ryan Lindsay & Vanessa De La Torre, *Treasurer Introduces Plan For Connecticut To Divest From Gun Industry*, CONN. PUB. RADIO (Dec. 3, 2019), https://portal.ct.gov/-/media/OTT/Newsroom/News/News-Articles/010720Articles/PR120319CTPublicRadioTreasurer-Introduces-Plan-For-Connecticut-To-Divest-From-G.pdf [https://perma.cc/LT4T-S4U2].

41. *See* Press Release, Conn. State Treasurer, Shawn T. Wooden, Treasurer Wooden Announces Historic Gun Policy For Investments & Financial Business (Dec. 3, 2019) [hereinafter Wooden Press Release], https://portal.ct.gov/-/media/OTT/Press-Room/Press-Releases/2019/PR120319ResponsibleGunPolicy.pdf [https://perma.cc/C7KZ-3K5T]; *see also Connecticut to Stop Investing Pension Money in Gun Manufacturers*, CBS NEWS: MONEYWATCH (Dec. 3, 2019), https://www.cbsnews.com/news/connecticut-pension-fund-to-divest-30-million-from-gun-companies/ [https://perma.cc/Q53S-A4QT]; Daniela Altimari, *Connecticut to Divest $30M in Gun Stocks In Effort To Shape Gun Control Debate*, HARTFORD COURANT (Dec. 3, 2019), https://www.courant.com/politics/hc-pol-shawn-wooden-guns-20191203-g4w3xtmt7vafrm47k3wqbdnycq-story.html [https://perma.cc/WV32-PJW9].

42. Wooden Press Release, *supra* note 41.

43. *See* Press Release, State of Conn. Treasurer's Off., Responsible Gun Policy: Top 10 Frequently Asked Questions at 1 (Dec. 2019), https://portal.ct.gov/-/media/OTT/Press-Room/Press-Releases/2019/PR120219Ct_OTT_ResponsibleGunPolicy_FAQs.PDF [https://perma.cc/S3YH-NWN4].

> *victims to proceed with their claims against Remington Arms underscores these risks*. . . . As State Treasurer, the costs and risks of gun violence are a matter of significant financial concern, and the business of guns is becoming an increasingly risky proposition.[44]

The Connecticut Treasurer teamed up with Rhode Island's Treasurer in December 2021 and filed a shareholder proposal with Mastercard asking the board to stop processing sales transactions for "ghost guns"—home-assembly gun kits.[45] Likewise, former U.S. Secretary of Labor Robert Reich has called on states to respond to the Texas law by passing the opposite type of enactments: "Lawmakers in progressive states like California (whose bond market is even larger than Texas') should immediately enact legislation that bars the state from dealing with any firm that finances the gun industry."[46]

While some of these state legislative initiatives—on each side—are mostly political theater, their greatest impact is on the municipal bond market.[47] The municipal bond market is a $4-trillion industry[48] in the United States, and underwriting

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44. *See id.* (emphasis added).

45. *See* Press Release, Off. of Gen. Treasurer Seth Magaziner, Treasurer Magaziner Presses Mastercard to Restrict Sales of Untraceable Firearms Known as "Ghost Guns" (Dec. 29, 2021), https://www.ri.gov/press/view/42767 [https://perma.cc/WW94-49MX].

46. Robert B. Reich, *Big Banks Should Choose Social Responsibility*, REFLECTOR (June 8, 2022), https://www.reflector.com/opinion/editorial_columnists/robert-b-reich-big-banks-should-choose-social-responsibility/article_2ef584ea-5f87-5b37-b263-7ba4a1546c80.html [https://perma.cc/T9MQ-NYCZ]. Note that Reich is also skeptical about the sincerity of the banks' public announcements on ESG and gun industry divestment or boycotts: "The lesson here is twofold. First, pay no attention to assertions by big banks or any other large corporations about their 'social responsibilities' to their communities. When social responsibility requires sacrificing profits, it magically disappears—even when it entails financing gunmakers." *Id.*

47. *See generally* Charlotte W. Rhodes, *Living In A Material World: Defining "Materiality" in the Municipal Bond Market and Rule 15c2-12*, 72 WASH. & LEE L. REV. 1989 (2015) (providing an introductory background on municipal bonds and their legal status); Lisa Anne Hamilton, *Canary in the Coal Mine: Can the Campaign for Mandatory Climate Risk Disclosure Withstand the Municipal Bond Market's Resistance to Regulatory Reform?,* 36 WM. MITCHELL L. REV. 1014 (2010) (explaining Congress's deference to state and local governments regarding municipal bonds).

48. *See* Securities Industry and Financial Markets Association, *US Municipal Bonds Statistics*, SIFMA (Mar. 6, 2024), https://www.sifma.org/resources/research/us-municipal-bonds-statistics/ [https://perma.cc/V2WF-AP9W]; Heita Miki, *Live and Let Die: Peeling Back on Municipal Bond Regulation After the 2008 Financial Crisis*, 2016 COLUM. BUS. L. REV. 252, 259–60.

bond issues is very lucrative for financial institutions.[49] In Texas alone, "Three of the state's top five underwriters in the first half of 2021—JPMorgan, Citi, and Bank of America—accounted for $6.4 billion of deals."[50] Municipal bond issues are also extremely lucrative for law firms that do the underlying legal work, which prompted the American Bar Association (ABA) to adopt Model Rule 7.6[51] as part of the Model Rules of Professional Conduct, prohibiting firms from making campaign contributions to state or municipal officials to obtain contracts related to bond work.[52] In the 1990s, the chair of the Securities and Exchange Commission (SEC) requested that the ABA do something to end these commonplace "pay-to-play" scenarios.[53]

During legislative debates about Texas SB 19, opponents raised concerns that excluding several of the largest banks from the Texas bond market would end up hurting municipalities in the state, making it more difficult or more expensive for them to find a bank to handle their future bond issues; the first economics study so far confirms this fear.[54] Though, the long-term effects of such exclusion do depend partly on how competitive the bond market is (a highly competitive market will see minimal price increases even with the exclusion of several banks).[55]

The impact on underwriting costs for municipalities will depend on how many banks are able to certify compliance with

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49. Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money In Politics*, 12 CONN. PUB. INT. L.J. 361, 372 (2013) ("The market for underwriting municipal bonds is competitive with large commissions at stake for the investment bank that wins the contract. These large commissions, the highest of which are earned in negotiated deals, can create perverse incentives to engage in pay-to-play abuses.").

50. Richard Williamson, *Texas Gun Law Has Big Banks Backing Away from Texas Bond Deals*, THE BOND BUYER (Oct. 5, 2021), https://www.bondbuyer.com/news/texas-gun-law-has-big-banks-backing-away-from-texas-bond-deals [https://perma.cc/PMS7-S8RT].

51. MODEL RULES OF PRO. CONDUCT r. 7.6 (AM. BAR ASS'N, 1999).

52. *See generally* Brian C. Buescher, *ABA Model Rule 7.6: The ABA Pleases the SEC, But Does Not Solve Pay to Play*, 14 GEO. J. LEGAL ETHICS 139 (2000) (explaining the new "'for the purpose'" wording in Model Rule 7.6).

53. *See id.* at 144; *see also* SEC, PAY-TO-PLAY AND THE INVESTMENT ADVISORY PROFESSION, GUIDANCE DOCUMENT (May 15, 2000), https://www.sec.gov/rules/other/f4-433/tittswo2.htm [https://perma.cc/6BRB-WVCC].

54. *See generally* Garrett & Ivanov, *supra* note 32, at 1 ("[U]nderwriter distribution network access or capacity constraints have a major impact on borrowing costs.").

55. However, if excluding these banks *does* result in price increases for Texas bond work, it would suggest that these firms have been enjoying monopoly or oligopoly rates up to now, which is a separate, but important, concern.

the Texas law, even if the banks announced various gun-industry boycotts in recent years. Though news outlets reported that the big banks were backing away from the Texas bond market in the wake of SB 19,[56] Citi was awarded a Texas bond contract[57] just a few months after SB 19 passed[58]—it was able to certify its compliance with the Texas law despite its prior announcements about cutting ties with the gun industry.[59] After Citi, many more banks rushed to certify their compliance with the law.[60] Even if the Texas law does not produce higher bank rates for bond issuance in the long term, the process of certifying compliance means additional work for the banks' lawyers[61] and for bond rating agencies.[62]

The impact of the bank bans will also depend on cross-affiliate application of the law—the Texas statute, for example, is unclear on this point. Large, national banks, such as Citi and Bank of America, have dozens of subsidiaries and affiliates that are separate legal entities operating under different charters—some specialized regionally and some specialized by the type of banking services they offer (think consumer savings accounts and home mortgages versus commercial loans or bond issues).[63]

Apart from how these laws affect underwriting costs (and therefore hurt taxpayers), there remains the pressing issues of

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56. *See* Williamson, *supra* note 50.

57. *See* Amanda Albright & Danielle Moran, *Citi Returns to Texas Muni Market After GOP Sought Ouster*, BLOOMBERG L. (Dec. 14, 2021), https://news.bloomberglaw.com/banking-law/citigroup-returns-to-texas-muni-market-after-gop-sought-ouster [https://perma.cc/YF2U-CNX8].

58. *See* Danielle Moran & Amanda Albright, *Citi Underwrites First Texas Muni Deal Since Gun Law Spat*, BLOOMBERG L. (Nov. 17, 2021), https://news.bloomberglaw.com/securities-law/citi-underwrites-first-texas-muni-deal-since-gun-law-spat [https://perma.cc/W8J3-YAPW].

59. *See* Amanda Albright, *Citigroup Ready to Restart Its Texas Underwriting After Certifying It Meets Gun Law Restrictions*, DALLAS MORNING NEWS (Nov. 9, 2021), https://www.dallasnews.com/business/banking/2021/11/09/citigroup-ready-to-restart-its-texas-underwriting-after-certifying-it-meets-gun-law-restrictions/ [https://perma.cc/MY28-E3PG].

60. Michael Kaplan & Graham Kates, *Dozens of Banks Told Texas Attorney General They Don't "Discriminate" Against Firearms Companies*, CBS NEWS (June 3, 2022), https://www.cbsnews.com/news/guns-texas-law-banks-dont-discriminate-firearms-companies/ [https://perma.cc/6KHZ-899S].

61. *See supra* notes 51–53 and accompanying text.

62. *See Texas Senate Bill 19: A Clash of Stakeholder Interests*, INSIDER ENGAGE (Oct. 28 2021), https://www.insiderengage.com/article/298vj5hh476qxio3i835s/kbra-esg-knowledge-hub/texas-senate-bill-19-a-clash-of-stakeholder-interests [https://perma.cc/FWC3-FARN].

63. *See Commercial Banking Structure*, VAULT, https://vault.com/industries/commercial-banking/structure [https://perma.cc/X68C-9W33].

the gun industry, the sickening escalation of gun violence in our society, and the morality of supporting these merchants of death financially. Many investors, as a matter of conscience, do not want to support gun manufacturers and retailers, and they will shift their resources to financial institutions that are free from this taint. At the same time, many voters want their elected officials to protect the gun industry. While this Article is partly descriptive, my modest normative proposal is a compromise, along the lines of what the Connecticut Secretary of State has done—rather than completely debar banks or other companies based on their boycott policies, states should announce that such boycotts (or investments/buycotts) will be one factor considered, in addition to a dollar comparison of the bids, when granting state contracts. To facilitate this consideration, states would simply require disclosure of the bidder's financial ties to the gun industry (or the fossil fuel industry), and states that want to bolster the gun industry can show favoritism to banks that support it. Conversely, without a complete bar, conscientious institutions would still win contracts by being the lowest bidder—offering the government unit enough savings to offset any policy concerns. If the conscientious banks are correct that avoiding the gun industry is better for business—either because of liability-related losses or reputational risks—then those banks will be able to afford underpricing competitors who have no scruples in their lending practices.

The discussion below proceeds as follows: Part I situates the gun industry boycotts and ESG-related divestments within the larger context of consumer and commercial boycotts. It attempts to draw insight from the history (and academic study) of consumer boycotts but also highlights ways in which the socially conscious actions of big financial institutions represent a new and necessary phenomenon in the world of boycotts and social change. Part II provides nuts-and-bolts statutory analysis of Texas SB 19—its basic provisions, its impact so far, and a bit of its legislative history. Part III focuses on the constitutionality of anti-boycott laws, based on comparisons with the analogous anti-BDS laws. The first such case has just reached the Supreme Court as a petition for certiorari from a 2022 en banc decision by the Eighth Circuit upholding Arkansas's anti-BDS statute; the Court denied cert.[64] Part III

64. Arkansas Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

also argues that corporate boycotts should receive the same free speech protections as consumer boycotts and other commercial speech.

I. BOYCOTTS & THE GUN INDUSTRY

The type of "boycott" prohibited by SB 13 and SB 19 (under the moniker "discrimination" in the latter) is a type of commercial ostracism or shunning that has received far less academic study than consumer boycotts. Consumer boycotts are commonplace in modern times. In his academic treatise on the subject, Professor Monroe Friedman defined "consumer boycott" as "an attempt by one or more parties to achieve certain objectives by urging individual consumers to refrain from making selective purchases in the marketplace."[65] That does not align with the statutory definition of "boycott" in the companion statute that protects the energy industry, SB 13:

> Sec. 809.001. DEFINITIONS. In this chapter:
>
> (1) "Boycott energy company" means, without an ordinary business purpose, 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 with a company because the company:
>
> (A) engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or
>
> (B) does business with a company described by Paragraph (A)[66]

The type of activity contemplated in these statutes—which for sake of convenience I have called "anti-boycott" laws—does not fit neatly into traditional definitions. The statutes partly encompass what Friedman and others would call a "secondary boycott"[67] (subsection B above is clearly a type of secondary boycott) or a "surrogate boycott,"[68] but here there is no

65. MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 4 (1999).

66. S. 19, 87th Leg., Reg. Sess. (Tex. 2021).

67. *See* FRIEDMAN, *supra* note 65, at 15.

68. *See id.* at 14.

contemplated consumer activity or urging of others to participate in the boycott. Further, the core activity prohibited by these statutes is a refusal to trade with the target directly rather than indirectly (such as refusing to trade with the target's commercial suppliers or retailers). It is a bit more like what Friedman and others call a "corporate campaign,"[69] because it involves cutting off the flow of commercial loans or lines of credit by financial institutions to the fossil fuel industry. It is possible, of course, that the boycotting and/or discriminating actions of these financial institutions is due to consumer boycotts or threats of boycotts, in which case the scenario *would* fall under Friedman's categories of secondary boycotts and corporate campaigns. The statutes themselves, however, do not mention consumer pressures—or any other cause, for that matter—but focus entirely on the commercial shunning activity and whether it was deliberate (done because of the target's industry), not merely a coincidence or the result of other financial risk concerns.

A. *Boycotts—Some Background*

It is helpful to situate the bank boycotters targeted by these statutes within the larger context and history of boycotts. As one would expect, several factors contribute to the success or failure of a regular consumer boycott, such as the publicity surrounding the boycott,[70] whether consumers have easy substitutes for the boycotted goods or services,[71] the timing of the announcement and the duration of the boycott,[72] the choice of the target,[73] and the feasibility of the organizers' demands.[74] All these factors affect the number of consumers who participate in the boycott, which translates into how much financial pressure and reputational damage the target will experience. Essentially, "The larger the adverse impact on the target of the drop in sales due to the boycott, the more likely the target will yield to the demands of the boycotters."[75] The choice

69. *See id.* at 50–54; *see also* Lawrence Mishel, *Strengths and Limits of Non-Workplace Strategies*, 1 LAB. RSCH. REV. 69, 69–75 (1985), https://ecommons.cornell.edu/server/api/core/bitstreams/30e9347b-71f9-4f49-9f90-7c755e462372/content [https://perma.cc/5FM5-F29Z] (describing corporate campaigns as a non-workplace alternate strategy, separate from a workers' strike, in the labor union context).

70. *See* FRIEDMAN, *supra* note 65, at 24–26.

71. *See id.* at 27–28.

72. *See id.*

73. *See id.* at 28.

74. *See id.* at 26.

75. *Id.* at 29.

of target matters as well—a more image-conscious company will yield more quickly to the threat of negative publicity or reputational damage.[76] Conversely, a target with the capacity to launch an effective counteraction to the boycott (either triggering a buycott[77] by supporters or effectively debunking the boycotters' accusations) is less likely to yield to pressure from boycotters.[78]

Commercial boycotts, however, do not necessarily depend on the same factors as consumer boycotts—for example, information problems (publicizing the boycott effectively)[79] are not as complex when there are a handful of trade partners involved, such as suppliers or commercial lenders, as opposed to the general public or a large customer base. Commercial or trade-partner boycotts are more likely to depend on each side's ability to substitute alternates in the marketplace—alternate suppliers, lenders, borrowers, and so forth—or to weather the storm and survive the losses incurred. Monopolist or monopsonist firms have maximum leverage to make extracontractual demands on the firms that depend on them, that is, to demand of their trade partners changes in their internal policies or practices unrelated to the price, quality, or quantity of goods and services provided. Oligopolist or oligopsonist firms (such as national commercial banks or airlines) have substantial leverage as well—more than in a truly competitive market with low entry barriers. Consumer boycotts can attempt to harness the greater power of commercial boycotts by staging a secondary boycott (boycotting a company to pressure it to boycott one of its commercial trade partners) or a corporate campaign (appealing to companies to boycott a targeted trade partner, perhaps for the benefit of good publicity). The difficulty with commercial boycotts, of course, is convincing managers or directors to undertake a boycott for reasons other than simply maximizing their own profits—a subject to which I return below.

Historically, secondary consumer boycotts (consumers using boycotts to pressure other companies, such as retailers or

76. *See id.* at 25.

77. Buycotts consist of consumers (or financial institutions) proactively seeking out (or offering especially favorable terms to) particular, favored companies. *See* Cindy D. Kam & Maggie Deichert, *Boycotting, Buycotting, and the Psychology of Political Consumerism*, 82 J. POL. 72, 72 (2020). This "intentional buying" looks to support companies engaging in some type of social or political act that the buyer wishes to support. *See id.*

78. FRIEDMAN, *supra* note 65, at 26.

79. *See id.* at 24–26.

suppliers, to stop doing business with the offending company) have often been phenomenally effective, as with the Knights of Labor boycotts in the 1880s (which eventually provoked an intense legal backlash).[80] Similarly, there is at least one celebrated example of a corporate campaign strategy being highly effective—the campaign led by Ray Rogers against the J.P. Stevens Company in the early 1980s.[81]

It was unclear at first the difference that the banks' announcements about shunning the gun industry would make. According to the gun industry's lobbyists, it made a substantial difference.[82] However, the emerging backlash from conservative legislators and other state officials (treasurers, governors, etc.)—which comes at the state's financial expense—seems to indicate that the banks' actions had serious consequences.[83] There is also an obvious element of political theater involved in all this, but that is not in itself meaningless—one of the main ways boycotts and corporate campaigns have "worked" historically was by attracting attention to or building public awareness of the issues at stake, so the performative politics surrounding the boycotts and the boycott bans can themselves have a long-term impact.

In an era characterized by interconnectivity and extreme political polarization, the largest financial institutions play a crucial role in social reforms. There were almost 50,000 deaths from firearms in the United States in 2021[84]—a record high. With Congress mired in partisan gridlock, it seems unlikely that federal legislative reforms will address the gun-violence epidemic, at least in the immediate future. Solutions will have

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80. *See id.* at 35–38.

81. *See id.* at 53–54.

82. *See* Katanga Johnson, *U.S. Gun Lobby Takes Aim at 'Gun-Hating' Banks Citi, BofA*, REUTERS (May 18, 2018), https://www.reuters.com/article/idUSL2N1SL1YP/ [https://perma.cc/YQ8R-J76K].

83. *See* Albright & Moran, *supra* note 27.

84. *See* Press Release, A Devastating Toll: 2021 CDC Data Shows Record Number of Gun Deaths, Makes Clear the Need for Continued Action to Address Gun Violence in America, GIFFORDS L. CTR. (July 14, 2022), https://giffords.org/press-release/2022/07/2021-cdc-data-shows-record-number-of-gun-deaths/ [https://perma.cc/4APN-UV52]; John Gramlich, *What the Data Says about Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/2K6F-FC96]; *New Report Highlights U.S. 2020 Gun-Related Deaths: Highest Number Ever Recorded by CDC, Gun Homicides Increase by More Than One-Third*, JOHNS HOPKINS (Apr. 28, 2022), https://publichealth.jhu.edu/2022/new-report-highlights-us-2020-gun-related-deaths-highest-number-ever-recorded-by-cdc-gun-homicides-increase-by-more-than-one-third [https://perma.cc/KX4S-B3RU].

to come from the private sector, through private boycotts, shunning, divestment, and social stigma. The largest financial institutions can play a key role here—by not bankrolling the firearms industry and gun retailers, they can provide a partial offset to the ever-expanding legal privileges protecting the manufacturers and merchants of deadly weapons for civilians. Bank managers and risk analysts have a moral duty to do so; otherwise, they are complicit in the mass shootings, rampant revenge killings, and suicides that they help finance. Commercial boycotts, internal corporate campaigns (by activist shareholders), and divestment are the only viable options to reform an industry that has an extremely loyal and supportive customer base such as the gun industry.

A commercial boycott is a form of economic abstention that involves organizations refusing to do business with a particular company or industry to pressure them to change their practices or policies. By contrast, consumer boycotts typically involve individuals refusing to purchase a particular product or products to pressure the company or companies that produce or sell them to change their policies or practices.[85] In both cases, the goal is to use the power of the consumer or business to exert pressure on a company or companies to change behavior. The key difference between the two types of boycotts is who is participating in the boycott. In a commercial boycott, it is businesses that are refusing to do business with the targeted company, while consumer boycotts occur when individual consumers refuse to purchase targeted products.

Another important difference between consumer and commercial boycotts is the scale of the economic impact that they can have. Because consumer boycotts rely on individual consumers choosing not to buy certain goods or services, they can be difficult to organize and sustain, and these natural restraints often limit their economic impact. Commercial boycotts, by contrast, can involve large numbers of businesses and organizations, and the collective action of these groups can have a substantial economic impact. However, while it is possible to organize consumer boycotts informally, through word of mouth or social media, commercial boycotts require a high level of coordination and planning among the participating businesses or organizations. Overall, though, both consumer and commercial boycotts are forms of protest that aim to exert

85. *Consumer Boycott*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095634204 [https://perma.cc/W652-ZT6Q].

economic pressure on companies or industries to change their policies or practices.

Professors Oliver Hart and Luigi Zingales recently argued that the traditional model of shareholder value maximization (SVM) was problematic from the start and is becoming progressively outdated, especially as shareholders demonstrate increasing engagement on social and environmental concerns.[86] Their proposed solution is for the traditional model to give way to shareholder welfare maximization (SWM), allowing owners of corporate shares to prioritize other types of utility or goals over simple profits or dividends.[87] Hart and Zingales make a compelling argument in debunking the "Friedman rule"—that is, debunking the argument that corporations should maximize profits and dividends, ignoring shareholders' ideological, charitable, or altruistic goals, and, instead, allowing the shareholders themselves to donate those (presumably higher) dividends to the charities of their choice.[88] Although, even the traditional model of shareholder maximization could allow, in theory, for managers to prioritize socially conscious goals, such as reducing gun violence or being more climate-friendly, over straight profit goals if enough prospective investors prefer to invest in socially conscious corporations. When more investors demonstrate even a slight preference for such companies, demand increases for those shares, and the share prices go up. This is, of course, a reiteration of the perennial profits-versus-share-price question: even if investors recognize that polluters or gun companies might maximize earnings by ignoring the externalities of their business activities, the investors might expect the share price to increase if they foresee a continuing increase in the number of shareholders who share their investment preferences. Under this view, future profits or future earnings do not correlate with future share price as much as future investor preferences (demand for certain stocks) do. If demand for specific stocks is a cultural phenomenon, not merely a representation of profitability, then the traditional rule of maximizing shareholder value will give priority to cultural trajectory over figures on the balance sheet.

There is, of course, an alternate argument—common in the ESG literature, and occasionally brought up in gun industry matters—that businesses with heavy externalities in terms of

86. *See* Oliver Hart & Luigi Zingales, *The New Corporate Governance*, 1 U. CHI. BUS. L. REV. 195, 195 (2022).

87. *See id.* at 207–16.

88. *See id.* at 201–04.

climate change or gun violence will also face increasing exposure to tort liability, regulatory constraints or scrutiny, and reputational loss (social stigma) that manifests as consumer boycotts or shunning by other trade partners, such as vendors, distributors, and retailers.[89] Liability risks (whether through private lawsuits or regulatory crackdowns), consumer boycotts, and commercial ostracism can reduce profits, and mere uncertainty about the likelihood of these potential losses can impact current share price, reflecting expected future earnings. To the extent that this is true, even a profit-maximization rule or model would provide a justification for socially conscious investment preferences. Some (most?) sophisticated investors will hold the view that egregious externalities in business activities will *inevitably* generate an eventual backlash and be reinternalized; thus, businesses with egregious externalities would have higher short-term profits offset by losses in the long term.

It is worth noting that the alternative argument—that egregious externalities are a risky way to pursue profits—is not mutually exclusive with the primary argument. It is plausible that both are simultaneously true: the fossil fuel industry and the gun industry might experience both a steady decrease in popularity with investors for reasons unrelated to earnings and looming potential losses (or at least uncertainty about the potential for such losses) through legal liability, consumer boycotts, and commercial ostracism; the potential losses could merely compound the trending preferences of investors.

B. *The Mirror Image of Boycotts: The Gun Industry and Activist Shareholders*

One force driving the movement to boycott and divest from the gun industry comes from investors and activist shareholders. Within the ESG movement, weapons manufacturers often fall under the "S" (social) stratum,[90] and

89. *See, e.g.*, Patrick Luff, *Regulating Firearms Through Litigation*, 46 CONN. L. REV. 1581, 1585–86 (2014).

90. *See* Paul Brest et al., *How Investors Can (and Can't) Create Social Value*, 44 J. CORP. L. 205, 213 (2018) ("Thus, socially responsible investing also includes divesting from, or not investing in, companies whose outputs (e.g., alcohol, tobacco, firearms, or gambling) or business practices (poor treatment of employees or environmental degradation) conflict with the investor's values."); *see also* Damien Fruchart et al., *Firearms—Investor Responses amid Political Inaction*, HARV. L. SCH. F. CORP. GOVERNANCE (Sept. 9, 2019), https://corpgov.law.harvard.edu/2019/09/09/

they have since the pioneers of the movement boycotted weapons manufacturers during the Vietnam War[91] and many municipalities passed divestment ordinances for makers of nuclear-weapons components in the 1980s.[92] Socially responsible investing funds, which originally were mostly for faith-based groups, eschewed "sin stocks," such as firms producing or purveying alcohol, tobacco, firearms, or gambling.[93] As noted above, several pension funds and other large institutional investors eschew the firearms industry.[94] Individual and institutional investors alike are driving the ESG movement forward, putting pressure on large financial institutions to conform.[95] For example, after the gun massacre

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firearms-investor-responses-amid-political-inaction/ [https://perma.cc/JS7W-25FQ] ("An analysis of [Institutional Shareholder Services, Inc.] ESG data identifies [fifty-nine] companies across major indices in developed and emerging markets involved in the manufacture or sale of civilian firearms or ammunition. An additional [twenty-two] companies undertake business activities that risk association with these markets.").

91. *See* American Home Products Corp., SEC No-Action Letter, 1977 WL 14099, at 3 (Mar. 10, 1977); Robert G. Eccles & Jill E. Fisch, *The Politics of Values-Based Investing*, HARV. L. SCH. F. CORP. GOVERNANCE (Sept. 7, 2022), https://corpgov.law.harvard.edu/2022/09/07/the-politics-of-values-based-investing/ [https://perma.cc/MFW4-WJ28] (noting that the modern era of socially responsible investing began formally "with the launch of the Pax World Fund (which still exists) in 1971 . . . by two 'United Methodist ministers—Luther Tyson and Jack Corbett—looking to avoid investing church dollars in companies contributing to the Vietnam War'").

92. *See, e.g.*, Patrick J. Borchers & Paul F. Dauer, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components*, 40 HASTINGS L.J. 87, 88–89 (1988) (discussing the trend occurring at the time).

93. *See* Eccles & Fisch, *supra* note 91.

94. *See, e.g.*, William W. Clayton, *How Public Pension Plans Have Shaped Private Equity*, 81 MD. L. REV. 840, 858 n.86 (2022) (discussing restrictions on public pension plans that prevent the plans from investing in the gun industry); David H. Webber, *Rethinking "Political" Considerations In Investment*, 46 DEL. J. CORP. L. 3, 16 (2021) (describing the California State Teachers Retirement System's decision to divest from the gun industry after 2012); *see also* Kent Greenfield, *The Rise of the Working Class Shareholder: An Application, An Extension, and A Challenge*, 99 B.U. L. REV. 303, 309 (2019) (responding to Webber about the CalSTR divestment program); Matt Wirz, *More Institutional Investors Say No to Tobacco, Weapons*, WALL ST. J. (Nov. 23, 2018, 8:00 AM), https://www.wsj.com/articles/more-institutional-investors-say-no-to-tobacco-weapons-1542978000 [https://perma.cc/Z7UZ-C2U9].

95. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 384–85 (2020) ("Over the past decade, trustees have come under increasing pressure to consider environmental, social, and governance (ESG) factors

at Marjory Stoneman Douglas High School in Parkland, Florida, in 2018, "BlackRock, the largest shareholder in the three largest U.S. firearms manufacturers, urged firearms manufacturers to assess their business strategies concerning distribution of their products and not[ed] that it might vote against directors of companies who did not respond appropriately."[96] At the same time, Blackrock "announced that it intended to offer an index product that excluded firearms manufacturers."[97]

The activist-investor movement, a mirror image of the divestment movement, consists of groups of activists that buy enough shares of a target company to force votes on resolutions at shareholder meetings. Some groups of activist investors are faith-based. *Time Magazine* reported in September 2022 about a recently formed consortium of fourteen religion-affiliated shareholders, the Northwest Coalition for Responsible Investment (NCRI), which had been buying shares in Smith & Wesson to force adoption of new violence-prevention policies.[98] The NCRI is an offshoot of the longstanding Interfaith Coalition for Corporate Responsibility (ICCR), a mix of faith-based and ethics-based investors who together have about $4 trillion in managed assets and who force corporations to change policies and practices.[99] This latter group, older and more established, has long exerted its leverage to force positive change at large corporations.[100]

At the September 2022 shareholder meeting of Smith & Wesson, the NCRI investors engineered a vote on a proposal that would have required the company to adopt a lengthy human rights policy that included a company policy that studied how its business practices affect the rights of individuals.[101]

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in their investment decisions, for example, by divesting from fossil fuel, tobacco, or firearms companies, or otherwise accounting for environmental or social costs in making investment decisions.").

96. Brest et al., *supra* note 90, at 226.

97. *Id.*

98. *See* Belinda Luscombe, *Why a Group of Nuns Has Been Buying Up Firearm Shares*, TIME (Sept. 10, 2022), https://time.com/6211631/nuns-activists-gun-control-smith-wesson [https://perma.cc/CB4G-JQAZ].

99. *See id.*

100. *See id.*

101. *See* Arnie Alpert, *Activist Shareholders for Smith & Wesson Embrace the Long View in Struggle to Curb Gun Violence*, WAGING NONVIOLENCE (Sept. 16, 2022), https://wagingnonviolence.org/2022/09/smith-wesson-activist-shareholders-embrace-long-view-struggle-end-gun-violence/ [https://perma.cc/CU6Z-V4DE].

The proponents argue that this policy was within the ambit of shareholder concerns—reputational risks (the growing social stigma associated with manufacturers of assault rifles used in mass shootings) and potential liability from lawsuits, especially after the case involving the Sandy Hook parents.[102] Smith & Wesson's managers and directors, unsurprisingly, decried this as an attempt to force an anti-gun agenda over the best interests (i.e., profit concerns) of the shareholders as a group.[103] The Chief Executive Officer (CEO) angrily claimed on social media that this was a conspiracy of the government and lobbyists to shift blame for rising crime rates onto the company.[104] The proposal ultimately failed to garner support from a majority of the shareholders, but the group who supported it has vowed to fight on.[105] The group actually succeeded in getting a shareholder proposal for a gun safety report passed in 2018, but the company produced only a token effort in response.[106] Each year thereafter, the group has proposed a human rights policy, losing but garnering more votes each time.[107] Smith & Wesson, and Sturm Ruger, the only two publicly traded firearm manufacturers in the United States, have been targets of faith-based activist shareholders.[108]

Three months before Smith & Wesson's September 2022 meeting, a similar spectacle unfolded at Sturm Ruger's annual shareholder meeting,[109] but, there, a majority of the company's shareholders voted in favor of a resolution that the company would produce a human rights impact report.[110] This occurred despite management's opposition.[111] The resolution that passed stated that "[t]he inherent lethality of firearms exposes all gun makers to elevated human rights risks" and that the company did not have adequate protocols or business methods to mitigate lethal misuse of its products.[112] Surprisingly, two-

102. *See* Luscombe, *supra* note 98.
103. *See id.*
104. *See id.*
105. *See* Alpert, *supra* note 101.
106. *See* Luscombe, *supra* note 98.
107. *See id.*
108. *See* Alpert, *supra* note 101.
109. *See* Ross Kerber, *Investors Call for Human Rights Report at Gunmaker Sturm Ruger*, REUTERS (June 1, 2022), https://www.reuters.com/business/sustainable-business/investors-call-human-rights-report-gunmaker-sturm-ruger-2022-06-01 [https://perma.cc/79FD-Q5MP].
110. *See id.*
111. *See id.*
112. *See id.*

thirds of the company's shares voted in favor of the resolution.[113] The company's CEO attributed the passage of the resolution to support from large institutional shareholders (e.g., investment funds or pension funds).[114]

Another group of faith-based activist investors in this space is the American Friends Service Committee (AFSC), a Quaker group, which runs the Action Center for Corporate Accountability (formerly the Economic Activism program).[115] Quakers have been exerting influence against warfare and slavery through boycotts, divestment, and market disruption since the Founding era.[116] For the AFSC, shareholder resolutions serve multiple purposes, even if they do not pass—"The resolutions are used as a way to get some public attention, a way to get your message across to the board and main shareholders that will see the resolution on the proxy [or the official notice of the corporation's annual meeting]."[117] Federal securities regulations require managers to respond publicly to the proposed resolutions, but, to avoid such publicity, corporate managers often meet to negotiate with the group that filed the proposed resolutions and sometimes agree to make some of the desired policy changes in exchange for the resolution being withdrawn.[118] For example, in 2018, after managers were pressured through proposed resolutions into meeting with faith-based activist investors, Dick's Sporting Goods ceased all sales of assault rifles.[119] The AFSC Economic Activism project not only employs shareholder proposals but also organizes

113. *See* Alpert, *supra* note 101.

114. *See* Kerber, *supra* note 109.

115. *See, e.g.*, *Action Center for Corporate Accountability*, AM. FRIENDS SERV. COMM. [hereinafter *Action Center*], https://afsc.org/programs/action-center-corporate-accountability [https://perma.cc/9MQZ-M342]

116. *See, e.g.*, Eccles & Fisch, *supra* note 91 (noting that socially responsible investing "can be traced back some 200 years to the Quakers"); Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 CARDOZO L. REV. 1455, 1475 (2016) ("Quaker abolitionists promoted the buying of slavery-free cotton and fruit . . . ."); *see also* Dru Stevenson, *William Rotch and the Second Amendment*, 100 DET. MERCY L. REV. 413, 415–16 (2023) (detailing the exploits of Founding-era commercial magnate William Rotch, co-owner of the ships attacked in the Boston Tea party, who rankled other public figures in the era—John Hancock, John Adams, Thomas Jefferson, and others—with his antiwar activism). Rotch famously sank a boatload of bayonets off the coast of Nantucket at the outbreak of the Revolutionary War. *Id.* at 430.

117. Alpert, *supra* note 101.

118. *See id.* (citing an example of the AFSC achieving its goals on the Microsoft's human rights compliance through such a negotiation).

119. *See id.*

consumer boycotts through its website.[120] The AFSC, and Quakers more generally, "have a long history of engagement in economic activism including support for boycotts, divestment and sanctions."[121] Quaker reformers were pioneers in the "Free Produce Movement," a nineteenth-century movement among abolitionists to boycott the products of slave labor.[122] In the twentieth and twenty-first centuries, AFSC led or participated in many divestment campaigns to end apartheid in South Africa; promote the civil rights movement; and protect the rights of prisoners, farm workers, and immigrants.[123]

At the Smith & Wesson shareholder meeting that occurred in September 2022, a leader of the shareholder activist group was able to give a brief address to the shareholders present at the meeting.[124] After explaining how firearms were the leading cause of childhood fatalities in the United States, she declared:

> We believe that these developments reinforce the seriousness of the risks created by Smith & Wesson's failure to systematically assess or even track the adverse impacts of its products. A human rights policy would demonstrate to stakeholders that Smith & Wesson is not callous to harm resulting from the misuse of its products and to legislators that it is willing to collaborate in the development of solutions to mitigate those harms.[125]

When it came time to vote, the proposal garnered support from forty-two percent of the shares represented—not enough support to win but enough support for the group to continue fighting.[126]

The Episcopal Church of North America has also been involved in pressuring Smith & Wesson to adopt more socially responsible policies.[127] Previously, the Episcopal Church

120. *See Action Center*, *supra* note 115.

121. Brief for American Friends Service Committee et al. as Amici Curiae Supporting Plaintiff-Appellant at 11, Ark. Times, LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378).

122. *See id.*

123. *See id.*

124. *See* Alpert, *supra* note 101.

125. *See id.*

126. *See id.*

127. *See id.*; *see* David Paulsen, *Episcopal Church Presses Gun Manufacturer to Study Lethality*, THE CHRISTIAN CENTURY (June 29, 2022), https://www.christiancentury.org/article/news/episcopal-church-presses-gun-manufacturer-study-lethality

attempted to sway the behavior of corporate leaders by refusing to buy stock (boycott or divestment) of targeted industries, such as private prison companies or the tobacco industry.[128] Frustration over the results prompted the adoption of a more direct approach: "Starting in November 2018, the Episcopal Church's finance office began purchasing shares in three publicly traded companies: Ruger; American Outdoor Brands, which owns Smith & Wesson; and Olin Corporation, owner of Winchester Ammunition."[129] Eligibility to submit shareholder proposals requires only $2,000-worth of stock in a given company.[130] Along with the groups already mentioned, the Episcopal Church was partly behind the successful shareholder activist proposal in June 2022 that forced Sturm Ruger to undertake a serious corporate study of the lethality of the company's products and to report its findings to shareholders in published form.[131]

The Episcopal Church's Executive Council channels its shareholder activism through its Committee on Corporate Social Responsibility, currently led by an Episcopal bishop in western Massachusetts.[132] After its 2018 announcement, the Church bought shares in Sturm Ruger, American Outdoor Brands, and Olin Corporation.[133] The bishop leading this endeavor for the Episcopal Church subscribes to a momentum-building strategy: "[E]ven if you don't get up to 50% [of the vote], leadership takes notice."[134] He references a published one-page document known as the Mosbacher-Bennett Principles for Investors in the Gun Industry, which was developed by the anti–gun violence group Do Not Stand Idly By.[135] The Mosbacher-Bennett Principles outline a strategy of

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[https://perma.cc/PW2R-LYRT]; Jim Kinney, *Massachusetts Episcopal Diocese Buys Shares in Smith & Wesson Parent To Influence Gun Debat*e, MASS LIVE NEWS (Jan. 2, 2019), https://www.masslive.com/business/2018/12/massachusetts-episcopal-diocese-buys-shares-in-smith-wesson-parent-to-influence-gun-debate.html [https://perma.cc/NK86-98BM].

128. *See* Kinney, *supra* note 127.

129. *See* Paulsen, *supra* note 127.

130. *See id.*

131. *See id.*

132. *See* David Paulsen, *Episcopal Church as Shareholder Takes Initial Steps Toward Direct Advocacy with Gun Manufacturers*, EPISCOPAL NEWS SERV. (July 25, 2019), https://www.episcopalnewsservice.org/2019/07/25/episcopal-church-as-shareholder-takes-initial-steps-toward-direct-advocacy-with-gun-manufacturers [https://perma.cc/EVG6-LHBC].

133. *See id.*

134. *See id.*

135. *See id.*

pressuring companies in the gun industry to take measures to ensure more responsible firearm purchases, better gun safety features, and a reduction in the gray market for used guns.[136]

Additionally, the Massachusetts Episcopal diocese, in collaboration with others, has called for the adoption of smart gun technology, for universal background checks for gun purchases, and for Smith & Wesson to desist from manufacturing any weapons that Massachusetts state law prohibits.[137] Nationally, the Episcopal Church holds an investment portfolio valued at around $400 million.[138]

One 2015 shareholder proposal, submitted by Walmart shareholders, turned into protracted litigation.[139] The proposal called for an amendment to a board committee charter to review and adopt policies about the retailer selling products such as firearms.[140] Trinity Church was the shareholder proponent of the proposal.[141] The litigation went to the Third Circuit, which held that the proposal fell under Walmart's "ordinary business operations" because "product selection is the foundation of retail management."[142] The Court, therefore, allowed the company to exclude the proposal from its shareholder meeting.[143] Walmart has, however, adapted its policies on firearms products several times in recent years.[144] In 2015, Walmart ceased the sale of assault weapons, and, after the shooting at Marjory Stoneman Douglas High School in 2018, Walmart raised its minimum age to buy a gun from eighteen to twenty-one.[145]

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136. *See* METRO AIF: DO NOT STAND IDLY BY, MOSBACHER-BENNETT PRINCIPLES FOR INVESTORS IN THE GUN INDUSTRY, http://donotstandidlyby.org/wp-content/uploads/2018/05/Mosbacher-Bennett-Principles-for-Gun-Industry-Investors.pdf [https://perma.cc/RQ6M-GXUC] (detailing the principles for gun manufacturers and gun retailers).

137. *See* Kinney, *supra* note 127.

138. *See id.*

139. *See* Courteney Keatinge, *Investor Pressure on Firearms Manufacturers*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 18, 2018), https://corpgov.law.harvard.edu/2018/03/18/investor-pressure-on-firearms-manufacturers [https://perma.cc/77KB-TRWM].

140. *See id.*

141. *See id.*

142. Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323, 346 (3d Cir. 2015).

143. *See id.* at 351.

144. *See* Fruchart et al., *supra* note 90.

145. *See id.*

Shareholder activism highlights the dilemma created for companies—and activists—by the new anti-boycott laws.[146] Sometimes corporate leaders boycotting the gun industry are merely responding to intense pressure from a substantial portion of their shareholders (e.g., the forty-two percent of Smith & Wesson shareholders who supported Item 5 in September 2022),[147] and in other cases, they are bound by resolutions the shareholders—that is, the company's owners—adopted. While the shareholder activism recounted here involves publicly traded companies, it is unknown whether, or how much, similar activity is occurring in the private equity sphere, which does not attract the same news coverage. Though, Professor William Clayton wrote recently that "[p]rivate equity's biggest backers are public pension plans,"[148] and, though private equity funds seem to lag behind registered investment funds or publicly traded companies in socially conscious investment, "some of the largest public plans in the United States have also expressed a strong commitment to ESG principles in private equity funds."[149] The anti-boycott laws indirectly have a chilling effect on shareholder activist movements as well—potentially rendering such efforts futile wherever the statutory prohibitions affect the profits of the company (such as with companies at least partly dependent on government contracts for their survival). The shareholder activist stories also highlight the blurry line between commercial boycotts (as opposed to consumer boycotts) and investor buycotts because commercial boycotts often result from a "buycott" of a company's shares by concerned investors.

Unsurprisingly, these and similar religious groups also encourage and participate in boycotts to achieve similar social reform goals and in litigation to challenge anti-boycott laws. For example, the plaintiff in *Koontz v. Watson*,[150] a legal

146. *See* Cydney Posner, *State Legislation Targets Company Policies on ESG*, HARV. L. SCHOOL F. CORP. GOVERNANCE (Sept. 8, 2022), https://corpgov.law.harvard.edu/2022/09/08/state-legislation-targets-company-policies-on-esg/ [https://perma.cc/L2FQ-NFUS] ("And many of these actions are aimed, not just at expressed political positions, but rather at environmental and social measures that companies may view as strictly responsive to investor or employee concerns, shareholder proposals, current or anticipated governmental regulation, identified business risks or even business opportunities.").

147. *See* Alpert, *supra* note 101.

148. Clayton, *supra* note 94, at 842.

149. *Id.* at 863.

150. 283 F. Supp. 3d 1007 (D. Kan. 2018).

challenge to the Kansas anti-BDS statute,[151] was a Mennonite teacher trainer whose participation in the boycott of Israel (over its treatment of Palestinian citizens) rendered her ineligible for teaching assignments in the state.[152] The court explained that "[O]n July 6, 2017, Mennonite Church USA passed a resolution calling on Mennonites to take steps to redress the injustice and violence that both Palestinians and Israelis have experienced. . . . Specifically, this organization's resolution called on Mennonites to boycott products associated with Israel's occupation of Palestine."[153] The court ruled in the boycotter's favor and granted a preliminary injunction against the State of Kansas, holding that the boycotter was likely to succeed on the merits of her First Amendment claim.[154] In so holding, the court recognized that "[M]embers of the Mennonite Church, and others ha[d] 'banded together' to express, collectively, their dissatisfaction with Israel and to influence governmental action."[155] The boycotters wanted to raise awareness to "the injustice and violence they perceive[d], as experienced both by Palestinians and Israeli citizens," and they wanted "to amplify their voices to influence change."[156]

Similarly, *Jordahl v. Brnovich*,[157] another successful challenge to a state anti-BDS law, involved plaintiffs (an attorney and a law firm that provided legal services to inmates on a state contract) who participated in the Peace Not Walls campaign of the Evangelical Lutheran Church in America.[158] The district court opinion noted that the Church encourages its members "to invest in Palestinian products to build their economy and to utilize selective purchasing to avoid buying products made in illegal Israeli settlements built on Palestinian

151. *See id.* at 1012.

152. *See id.* at 1014; *see also* Lindsey Lawton, *A New Loyalty Oath: New York's Targeted Ban on State Funds for Palestinian Boycott Supporters*, 42 N.Y.U. REV. L. & SOC. CHANGE 649, 663 (2019) (noting that *Koontz* "was brought on behalf of a teacher trainer and member of the Mennonite Church whose BDS activity made her ineligible for state teaching assignments under a Kansas state statute requiring contractors to self-certify they are not involved in a boycott of Israel"); Timothy Cuffman, Note, *The State Power to Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT'L L. 115, 161 (2018) (describing the decision in *Koontz* and the Mennonite-inspired boycott that led to the litigation).

153. *Koontz*, 283 F. Supp. 3d at 1013.

154. *See id.* at 1027.

155. *Id.* at 1022.

156. *Id.*

157. 336 F. Supp. 3d 1016 (D. Ariz. 2018) (holding that the anti-boycott law violated the First Amendment), *vacated*, 789 F. App'x 589 (9th Cir. 2020).

158. *See id.* at 1028.

land."[159] The court also noted the plaintiffs' association with a second religious activist group, the Jewish Voice for Peace, which also encourages the boycott of Israel to protest its occupation of Palestinian territory.[160]

In regards to shareholder proposals related to socially responsible investing, the number of shareholder proposals under Rule 14a-8[161] has been steadily increasing in the last decade or so.[162] The number of such proposals at companies on the S&P Composite 1500 List in 2023 broke all previous records.[163] The objective of such proposals has shifted recently from focusing on internal governance concerns to ESG-related topics, which now comprise the majority of proposals.[164] After many years of being an unimpressive fraction of proposals, "in the 2018 proxy season, the two most common shareholder proposal topics related to social (202 proposals) and environmental (139 proposals, including 72 on climate change). Companies are increasingly expected to integrate relevant sustainability and ESG matters into strategic and operational planning and communicate on these subjects effectively."[165]

Federal regulators have played a part in this shift. After the Securities and Exchange Commission (SEC) released its Staff Legal Bulletin No. 14L, which signaled a change in policy favoring shareholders, corporate managers had a more difficult time persuading the SEC to allow them to refuse to bring specific shareholder proposals to a vote.[166] The result was that most proposals did, in fact, reach a vote in the shareholder meeting, though the percentage that won at the vote declined.[167] Further, "A small group of prolific proponents

159. *Id.* at 1028–29.

160. *See id.* at 1029.

161. 17 C.F.R. § 240.14a-8 (2019).

162. *See* June Hu et al., *2022 Proxy Season Review: Rule 14a-8 Shareholder Proposals*, HARV. L. SCH. F. CORP. GOVERNANCE (Aug. 25, 2022), https://corpgov.law.harvard.edu/2022/08/25/2022-proxy-season-review-rule-14a-8-shareholder-proposals/ [https://perma.cc/4PWJ-JDMN].

163. Melissa Sawyer et al., *2023 Proxy Season Review: Rule 14a-8 Shareholder Proposals*, HARV. L. SCH. F. CORP. GOVERNANCE (Aug. 28, 2023), https://corpgov.law.harvard.edu/2023/08/28/2023-proxy-season-review-rule-14a-8-shareholder-proposals/ [https://perma.cc/L7MM-QVRM].

164. *See* Hu et al., *supra* note 162; *see also* Dionysia Katelouzou, *The Rhetoric of Activist Shareholder Stewards*, 18 N.Y.U. J.L. & BUS. 665, 758 (2022) ("Shareholder climate activism is on the rise and, as expected, activists stewards do not remain idle.").

165. Gregory E. Ostling, *U.S. Activism*, 33 INT'L L. PRACTICUM 73, 77 (2020).

166. *See* Hu et al., *supra* note 162.

167. *See id.*

continued to drive submissions to U.S. S&P Composite 1500 companies. . . . [In fact,] the top 10 proponents [continued to] account[] for over 60% of proposals submitted."[168]

Some prominent scholars had been calling for legal reforms to allow for more shareholder power even before the last financial crisis,[169] and the current trends may reflect the impact of such calls. The financial crises of 2002 and 2010 prompted significant legislative responses (for example, the Sarbanes-Oxley and Dodd-Frank Acts), which in turn prompted amendments to the Shareholder Proposal Rule, or Rule 14a-8.[170] Some even claim that "The passive index investing revolution and the demand for bespoke . . . ESG . . . investment products [were] the most monumental changes to shape the investor landscape for many years."[171] In fact, the largest asset managers, which are some of the main shareholders of the companies that contribute the most to greenhouse gas emissions, have been the target of concerted pressure by investors to adopt socially responsible practices.[172] In a recent article, Professor Virginia Harper Ho made a compelling case that firms and portfolios perform better in the long term if both financial and nonfinancial risks are taken into account.[173] This can drive firm and portfolio performance while advancing market transparency and stability. Shareholder and investor activism related to such risks—including reputational risk—

168. *See id. See generally* Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569 (2021) (discussing the rise and power of "corporate gadflies," which are individual shareholders wielding disproportionate power to reset corporate policies).

169. *See generally* Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) (proposing reforms to allow shareholders to initiate and adopt rules-of-the-game decisions to change a company's charter or state of incorporation). For more recent advocacy of shareholder power, see generally Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647 (2016) (arguing that activism around non-financial risk may promote decisions that ultimately impact profitability and fundamental firm financial performance).

170. *See generally* Courtney Luster, *A Proposal to End Proposals*, 47 SEC. REG. L. J. 135 (2019) (describing the history and calling for the abolition of shareholder proposals). For a similar critique offering an alternative solution, see Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135, 2138 (2022) (arguing that corporate compliance offers the most realistic path forward).

171. Anna Christie, *The Agency Costs of Sustainable Capitalism*, 55 U.C. DAVIS L. REV. 875, 875 (2021).

172. *See id.* at 875–76.

173. *See generally* Ho, *supra* note 169 (making a case for companies and portfolio managers to account for both financial and non-financial information in decision-making).

fosters better alignment "of investor interests with long-term firm value and core regulatory goals."[174] Such corporate accountability to investors also boosts firm stability and corporate transparency.[175]

Now, "Some activist hedge funds are beginning to invoke ESG-related themes in their investments to try to appeal to certain institutional investors"; for example, JANA Partners has begun "fundraising efforts for a new 'social impact' fund"[176] to support initiatives such as in the alliance of JANA Partners with CalSTRS on proposals to force Apple to provide more disclosures regarding parental controls and tools for supervising children's use of connected devices.[177] Shareholder activism has been achieving results—these are not merely symbolic or performative stunts.[178] Sometimes the activists win a majority of shareholder votes, and, in other cases, they are able to negotiate with boards of directors to agree to make desired changes in exchange for the withdrawal of their proposal before the shareholder meeting.[179] Large asset managers, going against the board's wishes, sometimes lend support to the proposals brought by individual activists; in 2017 such institutional support forced five large energy companies to adopt climate resolutions.[180] Even though proposals that pass are not necessarily legally binding on the managers of a company, they make a difference, because boards want to avoid negative publicity, consumer boycotts, and replacement of board members.[181]

II. STATUTORY ANALYSIS OF TEXAS SB 13 & SB 19 (2021)

This Part is primarily descriptive—for readers interested in the specific provisions or mechanics of the new Texas anti-boycott laws, which are likely to serve as a model for other states with Republican-controlled legislatures. Readers more

174. *See id.* at 647.
175. *See id.* at 653.
176. Ostling, *supra* note 165, at 77.
177. *See id.*
178. *See* Kuo & Means, *supra* note 170, at 2178.
179. *See id.* at 2178–79.
180. *See id.* at 2179.
181. *See id.* For more recent discussion of shareholder proposals related to ESG issues, see generally Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453 (2021) (favoring more disclosures and more shareholder power).

interested in the constitutionality of the laws may want to skim or skip this Part and move on to the discussion that follows.[182]

As mentioned in the Introduction, the Texas legislature enacted the two main anti-boycott statutes together in September 2021, along with SB 4, a less important third anti-boycott law that requires sports teams receiving government contracts to play the national anthem at every public game.[183] SB 13 and SB 19 are virtually identical in some of their provisions, but there are a few important differences. For example, SB 13 (the anti-ESG law) requires state pension funds and similar investment funds (such as the entity that collects and distributes the state's Interest on Lawyers' Trust Accounts (IOLTA) funds) to divest from financial institutions that boycott the fossil fuel industry,[184] but SB 19 (the gun industry law) does not have a divestment section.[185] Both statutes, though, bar government contracts that do not have contractual certifications of compliance with the statutes.[186]

Section A of this Article discusses the firearms-related enactment, but, before proceeding, it is necessary to mention a confusing numbering error that occurred in the codification process for these statutes.

The legislative history for SB 19 contains a surprising feature; rather than the law being a reaction to announcements by the nation's largest banks that they were backing away from the gun industry, the firearms industry and the bill's sponsors explained that the bill was a reaction to a much less recent Obama-era initiative called Operation Choke Point,[187] which involved a few regulatory agencies and a unit at the Department of Justice.[188] A companion article to this piece

182. *See infra* Part III.

183. *See* S. 4, 87th Leg., Reg. Sess. (Tex. 2021).

184. *Id.*; S. 13.

185. S. 13, 87th Leg., Reg. Sess. (Tex. 2021).

186. S. 19, 87th Leg., Reg. Sess. (Tex. 2021).

187. *See, e.g.*, *Hearing on S. B. 550 Before the S. Comm. on State Affs.*, 2021 Leg., 87th Sess. (Tex. 2021) (testimony of Darren LaSorte, Director of Government Relations, State Affairs for the National Shooting Sports Association) (testifying at minute 38:30 in the video, which has not been transcribed); C.S.S. 19, 87th Sess., at 1 (Tex. 2021); S. 19, 87th Leg., Reg. Sess. TEX. H.J. 2926, 2953 (2021).

188. *See* Robert T. Luttrell, III, *Operation Choke Point*, 68 CONSUMER FIN. L.Q. REP. 36, 37 (2014) (explaining that "Operation Choke Point" is a joint operation between the Department of Justice and the Consumer Financial Protection Bureau to put Internet "payday" lenders out of business by "choking off their access to the electronic payments system" and that this denies the lenders the ability to collect their loans); Jim Lardner, *The Odd Crusade Against 'Operation Choke Point'*, U.S.

debunks this view of Operation Choke Point, which has taken on mythic status for the firearms industry and which comes up whenever these anti-boycott laws are proposed.[189]

A. *Texas SB 19—"An Act Relating to Prohibited Contracts with Companies that Discriminate Against the Firearm or Ammunition Industries"*

1. A Few Crucial Definitions

Like most modern statutes, SB 19 starts with a definition section.[190] The definitions of "firearms," "ammunition," and so forth are straightforward and very inclusive, but that is not surprising. The definition of "company," however, is quite broad:

> "Company" means a for-profit organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or associations that exists to make a profit. The term does not include a sole proprietorship.[191]

Note that even though the legislative history suggests this was targeted at financial institutions, it would, in theory, apply to *any* government contractors with more than ten full-time employees for contracts worth $100,000 or more.[192]

The most important definition is for the prohibited activity itself, for which the legislature uses the verb "discriminate." Note what the definition includes and does not include:

> (3) "Discriminate against a firearm entity or firearm trade association":
>
> (A) means, with respect to the entity or

NEWS (July 2, 2014, 3:30 PM), https://www.usnews.com/opinion/economic-intelligence/2014/07/02/some-in-congress-object-to-justice-departments-operation-choke-point [https://perma.cc/T8KF-P6UK]; *see also* Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After The Global Financial Crisis*, 107 GEO. L.J. 813, 835–40 (2019) (writing a detailed description of the history).

189. *See generally* Dru Stevenson, *Operation Choke Point: Myths and Reality*, 75 ADMIN. L. REV. 317 (2023).

190. *See* TEX. GOV'T CODE ANN. § 2274.001 (West 2021).

191. *Id.*

192. *See* § 2274.002(a).

association, to:

(i) refuse to engage in the trade of any goods or services with the entity or association based solely on its status as a firearm entity or firearm trade association;

(ii) refrain from continuing an existing business relationship with the entity or association based solely on its status as a firearm entity or firearm trade association; or

(iii) terminate an existing business relationship with the entity or association based solely on its status as a firearm entity or firearm trade association; and

(B) does not include:

(i) the established policies of a merchant, retail seller, or platform that restrict or prohibit the listing or selling of ammunition, firearms, or firearm accessories; and

(ii) a company's refusal to engage in the trade of any goods or services, decision to refrain from continuing an existing business relationship, or decision to terminate an existing business relationship:

(aa) to comply with federal, state, or local law, policy, or regulations or a directive by a regulatory agency; or

(bb) for any traditional business reason that is specific to the customer or potential customer and not based solely on an entity's or association's status as a firearm entity or firearm trade association.[193]

The exclusions in (B)(i) apply to retailers such as Dick's Sporting Goods that simply do not sell guns—meaning, for example, that a local high school sports team could procure some of its athletic equipment from a local Dick's, even though the retail chain has announced it will not sell firearms. Similarly, (B)(i) exempts from the statute any online platforms

193. § 2274.001.

such as Craigslist and Facebook that do not allow gun advertisements.

The word "solely" throughout the definition is significant, though it is unclear how broadly the Attorney General or the courts would interpret it. On its face, it would seemingly make the statute inapplicable to companies that boycott ("discriminate against") gun dealers or manufacturers *partly* due to their status as such. Companies consider numerous factors in choosing business partners—price, reputation, long-term viability, geography, and even personal friendships or familial ties between officers or directors—so, in theory, a company could still consider involvement in the gun industry one factor among others without triggering the statute. For instance, a bank bidding for a contract to underwrite a municipal bond issue could argue that it does not discriminate *solely* on the basis of association with the firearms industry but that it merely considers that association as one of many factors in its lending and investing practices. Although, one could anticipate the counterargument—that if this factor affected the decision to eschew the company as a "but-for" factor, then, in some sense, it is the "sole factor."

Subsection (B)(ii)(aa) anticipates (invites?) federal or state prohibitions that might compel a financial institution to stop funding a type of gun company, just like national banks have claimed that federal regulations prevent them from providing banking services to state-legalized marijuana dispensaries. So, for example, the Office of the Comptroller of Currency could functionally nullify Texas SB 19 by promulgating a regulation that restricted national banks' ability to lend to gun dealers or manufacturers. This could take the form of a ban or a requirement that, before lending to gun dealers, banks must require substantial documentation of anti–money laundering procedures in their business practices. The prior[194] federal regulatory ban on bump stocks would seem to have applied here as well; although companies are not forbidden by law from lending to bump stock manufacturers or sellers, they could reasonably argue that this clause excuses them for refusing to lend to borrowers who make or sell illegal devices.

194. Although the regulatory ban on bump stocks was recently struck down by the Supreme Court, *see* Cargill v. Garland, 602 U.S. 406, 410 (2024), Congress could resurrect the ban. *See id.* at 429 (Alito, J., concurring). A Congressional ban on bump stocks would certainly have the same impact on companies looking to stop lending to bump stock manufacturers or sellers.

It is unclear if compliance with a state regulation such as Connecticut's would satisfy the "state regulation" provision. One could imagine a stronger state legal obstacle—such as the bank's home state (its state of incorporation or its business headquarters) enacting a law that forbids chartered financial institutions from lending to businesses that make or sell semi-automatic rifles or that sell them to customers younger than twenty-one years old.

Subsection (B)(ii)(bb) covers traditional financial risk issues not based *solely* on the company's status as a gun company. For example, if a bank has any additional financial-risk reasons to shun a gun manufacturer or seller—such as the realistic threat of lawsuits—or reasons to believe that a dealer may have his federal license revoked, it would still be in compliance with the statute.

2. SB 19's Operative Provision

The prohibition on discrimination against gun manufacturers and dealers is implemented through debarment from all government contracts (state or local). The mechanics of the debarment takes the form of a required provision in any government contract—a contractual "verification" (certification) that the contractor does not discriminate as described in the statute. Though the statute does not mention a requirement for banks to file a statewide certification of compliance with the Comptroller or Attorney General, many banks have been doing so, and the Attorney General has requested or demanded this from some banks.[195] The statute itself contemplates the same implementation mechanism that is in the anti-BDS statute—a "no discrimination" certification provision within the contract with the state entity.[196] Note that there is no private cause of action here—the sanction against the banks takes the form of required contract terms.[197]

Section 2274.002(c) provides a few important exceptions to SB 19.[198] The law does not apply if the government entity did not receive *any* bids from companies that can verify compliance.[199] This is an important loophole, because some requests for proposals or bids by government entities receive

195. *See, e.g.*, Letter from Ken Paxton, Att'y Gen. of Tex., to All Bond Counsel (Sept. 22, 2021) (on file with Author).

196. *See* TEX. GOV'T ANN. CODE § 2274.002(b) (West 2021).

197. *See id.*

198. *See* § 2274.002(c).

199. *See id.*

only two or three bids (especially for very large contracts). Because it is possible that only the big, banned banks would bid on certain contracts, this loophole means that the best bidder would still be eligible for the contract. And if many more banks join the largest national banks in boycotting the gun industry—even in minor ways—this loophole could essentially circumvent the anti-boycott law, as the situation contemplated under section 2274.002(c) could become the norm, rather than the exception. More banks could make this choice due to pressures from customers, shareholders, or even leading firms in the industry.

Section 2274.002(c) also does not apply to "contracts with a sole-source provider."[200] This is unlikely to affect financial institutions, but it could affect contractors who provide unique services or equipment (basically, monopolists in their industries). Section 2274.003 contains an exception:

> (a) A contract entered into in connection with or relating to the issuance, sale, or delivery of notes under Subchapter H, Chapter 404, or the administration of matters related to the notes, including the investment of note proceeds, is exempt from this chapter if, in the comptroller's sole discretion, the comptroller determines that compliance with Section 2274.002 is likely to prevent:
>
> (1) an issuance, sale, or delivery that is sufficient to address the general revenue cash flow shortfall forecast; or
>
> (2) the administration of matters related to the notes.[201]

This is a technical exception to prevent municipal budget shortfalls—for scenarios where a bond is issued to address cash-flow or revenue problems, rather than for a capital project (which seems more common). Still, this exception could provide a strategic workaround for some municipalities that exhaust their regular budgets on capital expenses.

B. *Texas SB 13—The Anti-ESG Law*

The anti-ESG statute, SB 13, is a bit more complex because it includes a mandatory divestment provision that applies to

200. *Id.*
201. *See* § 2274.003(a).

state investment funds (such as state pension funds or the pool of undistributed IOLTA funds). The additional substantive provisions meant that different sections would be codified in different Titles of the Texas Government Code. The divestment provisions in section 1 are codified in Title 8, Subtitle A of the Texas Government Code[202]—this section requires divestment from ESG-friendly financial institutions.[203] Section 2 of SB 13 debars companies from government contracts in the state if they boycott energy companies.[204]

With the passage of SB 13 in 2021, "Texas became the first state to enact legislation prohibiting state agencies from investing funds in financial companies that boycott the fossil fuel industry."[205] After that, several states, including Kentucky,[206] Oklahoma,[207] Tennessee,[208] and West Virginia,[209] followed Texas's lead with their own anti-boycott statutes targeted at banks.[210] Idaho enacted a law that prohibits state entities from basing contract or investment decisions on consideration of ESG factors in violation of normal prudent investor rules.[211] A few other state legislatures introduced, but failed to pass, anti-boycott laws that protected the energy industry; these were legislatures in Louisiana,[212] Indiana,[213] Minnesota,[214] and South Carolina.[215] Florida's governor has called for an anti-ESG policy in that state as well.[216]

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202. *See* TEX. GOV'T CODE ANN. § 809.001-006 (West 2021*)*; § 809.051-056; § 809.101-102.

203. *See* TEX. GOV'T CODE ANN. § 809.053-054 (West 2021).

204. *See* § 809 (West 2024).

205. *ESG and State Law in 2022: Conflicts and Trends*, THOMSON REUTERS PRACTICAL L. (Sept. 9, 2022), https://1.next.westlaw.com/Document/Ida0cc91d077d11ed9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=(sc.Default) [https://perma.cc/6R2L-CNZJ].

206. *See* KY. REV. STAT. ANN. §§ 41.470 to .480 (West 2022).

207. *See* H. 2034, 2022 Leg., Reg. Sess. (Okla. 2022).

208. *See* S. 2649, 112th Gen. Assemb., 2021–22 Reg. Sess. (Tenn. 2022).

209. W. VA. CODE ANN. § 12-1C-1–1C-7 (West 2022). Note that the West Virginia law differs somewhat from its Texas counterpart in that it does not require divestment by state funds but rather authorizes the state Treasurer to debar offending institutions from state contracts.

210. *See ESG and State Law in 2022: Conflicts and Trends*, *supra* note 205.

211. *See* IDAHO CODE ANN. § 67-2345 (West 2022).

212. *See* H. 25, 2022 Leg., Reg. Sess. (La. 2022).

213. *See* H. 1224, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

214. *See* S.F. 4441, 92d Leg. (Minn. 2022).

215. *See* H. 4996, 124th Sess., Gen. Assemb. (S.C. 2022).

216. *See* Sean T. O'Neill, *Florida Becomes Latest State to Propose Anti-ESG Legislation*, JD SUPRA (Aug. 22, 2022), https://www.jdsupra.com/legalnews/florida-becomes-latest-state-to-propose-1700590 [https://perma.cc/78D6-TMXD].

1. Texas SB 13—Important Definitions

Though it is unclear why the laws use different terms (except for the political rhetoric that might associate gun ownership with an individual or group's identity), SB 13's definition of "boycott" echoes SB 19's definition of "discriminate":

> Sec. 809.001. DEFINITIONS. In this chapter:
>
> (1) "Boycott energy company" means, without an ordinary business purpose, 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 with a company because the company:
>
> (A) engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or
>
> (B) does business with a company described by Paragraph (A).[217]

The definition of "boycott" also identifies—very broadly—forbidden energy-industry targets. Subsection A of the term's definition includes exploration companies, refineries, pipeline companies, and fossil fuel power plants. Note that subsection B specifically contemplates secondary boycotts, that is, a commercial lender boycotting other companies (say, suppliers, distributors, or other contractors) to punish them for engaging in business with an energy company. "Company" under SB 13 has the same definition as in SB 19, which is discussed above.[218] It is a little unclear how the SB 13 definition of "boycott" would apply to a mirror-image "buycott" of companies in the renewable energy sector.

2. Operative Provisions Regarding Divestment

Section 1's operative provisions, codified in Title 8 of the Texas Government Code at sections 809.051–.057, require state funds (e.g., employee pension funds, the pool of IOLTA funds yet to be distributed through grants, and so forth) to divest from

217. S. 13, 87th Leg., Reg. Sess. (Tex. 2021).

218. *See supra* note 191 and accompanying text (quoting the relevant section of Texas SB 19).

financial companies[219] that boycott the energy industry.[220] The State Comptroller is to create and maintain a blacklist of financial companies that boycott the fossil fuel industry; that duty includes providing companies with an opportunity to provide written verification that the company "does not boycott energy companies."[221] Government entities are to notify the Comptroller within thirty days of a company being added to the blacklist if the entity has holdings that in that company that need to be divested.[222] The blacklisted company then receives advance notice of the intended divestment and has 90 days to amend its behavior before the government entity proceeds with divestment,[223] which occurs in phases—50% of holdings are divested by the 180th day after the company receives notice and the remaining holdings are divested by the 360th day.[224]

Unlike SB 19, the anti-ESG statute contains an express exclusion for any private cause of action under the Act against state entities or state actors.[225] Presumably, this was a necessary addition due to the divestment provisions—it prevents beneficiaries from suing their state pension fund managers over, for example, lower returns or delays in the divestment process (which takes more than a year to complete even without delays).

There are some important exceptions to the divestment requirements, such as the confusingly ambiguous provision regarding fiduciary duties:

> A state governmental entity is not subject to a requirement of this chapter if the state governmental entity determines that the

219. The definition section of the statute defines "Financial company" as "a publicly traded financial services, banking, or investment company." S. 13, 87th Leg., 2nd Spec. Sess. § 809.001(4) (Tex. 2021) (codified at TEX. GOV'T CODE ANN. § 809.001(4) (West2021)).

220. *See* §§ 809.051–.057 (codified at TEX. GOV'T CODE ANN. §§ 809.051–.057 (West 2021)).

221. TEX. GOV'T CODE ANN. § 809.051(a)(2) (West 2021). *See Divestment Statute Lists*, COMPTROLLER.TEXAS.GOV, https://comptroller.texas.gov/purchasing/publications/divestment.php [https://perma.cc/25JV-R29V]; *Texas Comptroller Glenn Hegar Announces List of Financial Companies that Boycott Energy Companies*, COMPTROLLER.TEXAS.GOV (Aug. 24, 2022), https://comptroller.texas.gov/about/media-center/news/20220824-texas-comptroller-glenn-hegar-announces-list-of-financial-companies-that-boycott-energy-companies-1661267815099 [https://perma.cc/7B9Q-Q94D].

222. TEX. GOV'T CODE ANN. § 809.052 (West 2021).

223. § 809.053.

224. § 809.054.

225. § 809.004.

> requirement would be inconsistent with its fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets, including the duty of care established under Section 67, Article XVI, Texas Constitution.[226]

Other provisions provide similar exceptions for avoiding losses.[227] If the provisions are interpreted very broadly, it would be possible to argue that non-divestment is still an option if the returns from the boycotting banks are substantially higher than what the returns would be if those same funds were invested elsewhere. Advocates of ESG investing claim that it will, in fact, yield higher returns in the long run, because fossil fuel companies will inevitably face increasing regulation and potential liability related to damage from climate change; additionally, the reputational risks of investing in fossil fuel companies are likely to increase, rather than decrease, over time.[228]

Another important caveat, though not a true exception, is the provision that allows good-faith reliance on a company's responses about its boycotting activities: "The comptroller and a state governmental entity may rely on a financial company's response to a notice or communication made under this chapter without conducting any further investigation, research, or inquiry."[229] This certainly streamlines the decision process for government officials or employees when making decisions about investments and divestments, thereby reducing transaction costs for both the government entity and the financial companies under review. It also operates as a safe harbor provision, shielding the government actor from repercussions in cases of mistakes. Of course, the provision also introduces some room for error and misunderstanding.

SB 13 entrusts enforcement of the divestment requirements to the state Attorney General.[230] Each state investment fund must file annual reports about its compliance with or activities

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226. § 809.005.

227. *See, e.g.*, § 809.056 (invoking this exception—which more expressly addresses avoided losses for a fund—requires that the entity invoking the exception must first notify the state Comptroller, the state Attorney General, and the leaders of each house in the state legislature).

228. *See Exponential Expectations for ESG*, PWC (2022), https://www.pwc.com/gx/en/financial-services/assets/pdf/pwc-awm-revolution-2022.pdf [https://perma.cc/XR74-9TKC].

229. TEX. GOV'T CODE ANN. § 809.006 (West 2021).

230. *See* § 809.102.

under this Act.[231] An early example of Attorney General–enforcement (investigation) under the statute occurred in September 2022 when the Texas Office of the Attorney General announced it was joining a multistate investigation into the use of ESG ratings by S&P Global Inc.[232] The Texas Attorney General's Consumer Protection Division sent a Civil Investigative Demand to S&P Global requesting documents related to the investigation under state consumer fraud and deceptive trade practices laws.[233] It requested documents related to the use of ESG credit factors in analyzing U.S. public finance entities; information on ESG credit indicator report cards for U.S. states; details on the inclusion of specific events and risk factors in the climate models used for ESG scoring; how the company ensures its ESG scoring systems are not influenced by sales, marketing, or authoritarian governments; and any communication that the company has had with foreign and domestic government agencies regarding the implementation of ESG programs and products.[234]

3. Operative Provisions Regarding Government Contracts

Section 2 of SB 13 amended, or added to, Title 10 of the Texas Government Code.[235] Section 2274.002 prohibits companies that boycott the fossil fuel industry from obtaining government contracts; in fact, all contracts must include an anti-boycott certification:

> (b) Except as provided by Subsection (c), a governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it:
>
> (1) does not boycott energy companies; and

231. *See* § 809.101.

232. *See* Press Release, Ken Paxton, Texas Att'y Gen., Paxton Launches Investigation into S&P Global's Use of ESG Factors in Credit Ratings, Potentially Violating Consumer Protection Laws (Sept. 28, 2022), https://www.texasattorneygeneral.gov/news/releases/paxton-launches-investigation-sp-globals-use-esg-factors-credit-ratings-potentially-violating [https://perma.cc/VZ4E-X7DQ].

233. *See id.* (explaining that the consumer laws alleged to be violated are found at TEX. BUS. & COM. CODE ANN. §§ 17.41 to .63 (West 2023)).

234. *See* Civ. Investigative Demand Letter from James Holian, Texas Assistant Att'y Gen., to S&P Global, Inc. (Sept. 22, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/SP%20-%20CID%2009.22.22.pdf [https://perma.cc/BC7K-FZ8J].

235. *See* S. 13 § 2, 87th Leg., 2nd Spec. Sess. (Tex. 2021).

> (2) will not boycott energy companies during the term of the contract.[236]

This exception parallels the debarment provisions in SB 19 related to "discrimination" against the gun industry. The exception, however, has narrower phrasing than its counterpart in the gun statute; the anti-ESG debarment does not apply to a government entity that "determines the requirements of Subsection (b) are inconsistent with the governmental entity's constitutional or statutory duties related to the issuance, incurrence, or management of debt obligations or the deposit, custody, management, borrowing, or investment of funds."[237]

C. *Assessing the Impact of SB 13 & SB 19*

Even though the two anti-boycott statutes have some distinct provisions (mostly pertaining to the divestment requirements under SB 13) and address boycotts of different industries, they operate together in practice. Municipalities and other government entities seeking underwriters for bond issues have asked for certifications of both statutes together, and the certifications themselves have addressed both statutes at once.[238]

According to a 2022 empirical study by Professor Daniel Garrett and Economist Ivan Ivanov, SB 13 and SB 19 led to the exit of four or five of the largest municipal bond underwriters from the state.[239] The study estimated that, overall, Texas entities would pay an additional $300 million to $500 million in interest on the $31.8 billion in borrowing during the first eight months after the enactment of the Texas laws due to the reduced competition in the bond market and the exit of the largest firms, which were able to offer better rates (because of better national networks of bond purchasers, better economies of scale, etc.).[240] The study's predictions seem to have proven true. Municipalities that were most dependent on the banned banks for bond underwriting have had higher borrowing costs due to the new laws.[241] Issuers have faced significantly fewer bidding underwriters and higher bid variance due to the decline

236. TEX. GOV'T CODE ANN. § 2274.002(c) (West 2021).

237. § 2276.002(c).

238. Certifications of compliance for SB 13 and SB 19 are publicly available at https://www.mactexas.com/Document/HB89Letter [https://perma.cc/7VFU-5TPY].

239. *See* Garrett & Ivanov, *supra* note 32, at 1.

240. *See id.* at 2.

241. *See id.* at 31.

in underwriter competition.[242] Bonds are now being placed with investors through a larger number of smaller trades (exiting national banks could be big buyers of bonds).[243]

In addition to generating higher costs for bond issues, the laws have also generated a great deal of confusion. For example, a few months after SB 19 passed, CitiGroup filed a certificate of compliance but did not alter its policies about guns; it secured several contracts because of its certified compliance.[244] In January 2022, the National Shooting Sports Foundation (NSSF) (a trade association for gun companies) filed formal complaints disputing CitiGroup's certification of compliance and alleging that CitiGroup is still "discriminating" because of its boycott of bump stock sellers, among others.[245] Attorney General Ken Paxton's Office says CitiGroup's status is still under review.[246] On September 16, 2022, Anna, a small town in north Texas, declined CitiGroup's winning bid on a $100-million bond issue based on SB 19 concerns; it went with the runner-up (Baird) instead, costing the city $277,334 over twenty-five years.[247]

III. THE CONSTITUTIONALITY OF ANTI-BOYCOTT LAWS

As of the writing of this Article, no litigation challenges have arisen yet against the 2021 Texas anti-boycott laws. The most plausible grounds for such challenges would be the First Amendment (free speech) rights of the banks or other companies targeted by the statutes. There has been litigation and developing case law, however, about some analogous state laws—the anti-BDS statutes that most states have enacted in the last decade. "BDS" is an acronym for a movement to boycott,

242. *See id.*

243. *See id.* at 4.

244. *See* Moran & Albright, *supra* note 58.

245. *See NSSF Hails Texas Attorney General's Stand Against 'Woke' Banking Discrimination*, NSSF (Jan. 19, 2023), https://www.nssf.org/articles/nssf-hails-texas-attorney-generals-stand-against-woke-banking-discrimination/ [https://perma.cc/5KN4-HKT4].

246. *See* Danielle Moran, *Texas Attorney General to Rule on Citigroup's Underwriting Status by Next Month*, BLOOMBERG (Dec. 13, 2022, 8:43 PM), https://www.bloomberg.com/news/articles/2022-12-14/texas-attorney-general-to-rule-on-citigroup-s-underwriting-status-by-next-month?embedded-checkout=true [https://perma.cc/6WTR-BFD6].

247. Danielle Moran & Amanda Albright, *Gun Law Compliance Leads Anna to Reject Citigroup as Underwriter of $100 Million in Bonds*, DALLAS MORNING NEWS (Sept. 16, 2022), https://www.dallasnews.com/business/banking/2022/09/16/gun-law-compliance-leads-anna-to-reject-citigroup-as-underwriter-of-100-million-in-bonds/ [https://perma.cc/KEZ2-K3X9].

divest from, and sanction the government of Israel for its treatment of Palestinians;[248] the state laws take various forms, but many debar from state contracts any companies that boycott Israel. Challenges to anti-BDS laws have proceeded on First Amendment grounds, but the results have varied. Additionally, while the commercial boycotts targeted by SB 13 and SB 19 are not secondary boycotts and are not related to labor unions, longstanding federal laws, which courts have upheld, prohibit secondary boycotts in the labor context, meaning that some commercial boycotts can be prohibited.

A. *Challenges to the Anti-BDS Laws*

The first case appealed to the Supreme Court was the Eighth Circuit's June 2022 en banc decision in *Arkansas Times LP v. Waldrip*.[249] This decision upheld Arkansas's anti-BDS statute, which is similar not only to Texas's anti-BDS statute but also to Texas's newer anti-boycott laws, SB 13 and SB 19.[250] Although, while anti-BDS laws are analogous to SB 13 (and anti-ESG laws in other states) and SB 19, they are also distinguishable from them. While the Supreme Court denied certiorari to *Arkansas Times* without explanation, the denial allows other circuit courts to weigh in on such statutes. In the future, if the Court were to hold that anti-BDS statutes are unconstitutional due to their infringement on free speech rights of corporations, the holding would also apply to SB 13 and SB 19, rendering them unconstitutional as well. Conversely, a holding that boycotts or divestments by corporations are not forms of speech or expression, and therefore not protected by the First Amendment, would doom free speech challenges to SB 13 and SB 19. There is a possible middle ground: the Supreme Court could uphold state anti-BDS statutes specifically because the targeted activity (boycotting Israel) involves delicate issues of United States foreign policy and some federal laws prohibiting certain types of boycotts of Israel.[251] Upholding the

248. Whizy Kim, *The Boycott Movement Against Israel, Explained*, VOX (Oct. 28, 2023, 7:00 AM), https://www.vox.com/world-politics/23935054/boycott-movement-palestine-against-israel-bds [https://perma.cc/V9JQ-P3YX].

249. 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

250. *Id.* at 1392–94. Compare *id.* at 1390, *with* S. 13, 87th Leg. Reg. Sess. (Tex. 2021, and S. 19, 87th Leg. Reg. Sess. (Tex. 2021).

251. *See, e.g.*, Sara J. Watkins, *State Anti-BDS Laws Counteracting the BDS Movement . . . and the Constitution*, 56 DUQ. L. REV. 199, 201–02 (2018) (arguing that anti-BDS laws interfere with the federal government's exclusive power to conduct

anti-BDS statutes on these latter grounds, which is plausible, would leave open the possibility of challenging the other anti-boycott statutes on First Amendment grounds. As discussed in this Part, the Supreme Court's holdings on boycotts in the last forty years have sent mixed signals about how the First Amendment applies to companies that refuse to do business with (1) the government of Israel, (2) the fossil fuel industry, and (3) the gun industry. Legal commentators writing about anti-BDS laws have taken directly opposing positions on the applicability of First Amendment protections in this area.[252] The American Civil Liberties Union filed a petition for certiorari with the Supreme Court in the *Arkansas Times* case, but the Court denied the petition.[253]

The Eighth Circuit's decision is not binding in Texas (which is in the Fifth Circuit). Federal courts in Texas have, however, considered two challenges to the state's anti-BDS statute, and have held it to be unconstitutional—but the applicability of the holdings to other anti-boycott laws is complicated. The first case

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foreign policy and that they raise dormant Foreign Commerce Clause issues but that they are unlikely to be preempted by federal law); Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, and Will Be Again*, 74 ARK. L. REV. 607, 615 (2022).

252. *See generally* Goldfeder, *supra* note 251 (discussing the confusion that has arisen as a result of *Arkansas Time LP v. Waldrip*); Patrick Keogh, *Confusion in the Marketplace: Anti-BDS Laws and Free Speech Principles*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 609 (2021) (arguing the anti-BDS laws are unconstitutional); Debbie Kaminer & David Rosenberg, *How the Conflict Between Anti-Boycott Legislation and the Expressive Rights of Business Endangers Civil Rights and Antidiscrimination Laws*, 55 U. RICH. L. REV. 827 (2021) (arguing the anti-BDS laws should be upheld); Hannah Kraus, Note, *Buckeyes Against the Boycott: Why Ohio's Law Opposing BDS Is Protected Under the First Amendment*, 69 CLEV. ST. L. REV. 159 (2020) (arguing anti-BDS statutes comply with the First Amendment); Note, *Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360 (2020) [hereinafter *Wielding Antidiscrimination Law*] (arguing that BDS does not constitute legally cognizable discrimination); Cuffman, *supra* note 152, at 116 ("Ultimately, many of the anti-BDS laws likely run afoul of the First Amendment by imposing unconstitutional conditions on government contractors and/or beneficiaries of public funding, though courts should take account of the full range of legal issues in disposing of suits challenging anti-BDS laws."); Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U.L. REV. 1 (2017) (arguing that many BDS activities are unlawful); Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 (arguing that the First Amendment does not apply to boycotts of Israel); *South Carolina Disqualifies Companies Supporting BDS From Receiving State Contracts: S.C. Code Ann. § 11-35-5300 (2015)*, 129 HARV. L. REV. 2029 (2016) [hereinafter *South Carolina Disqualifies*] (concluding that anti-BDS laws are "likely unconstitutional").

253. *Arkansas Times LP*, 143 S. Ct. at 774.

was *Amawi v. Pflugerville Independent School District*,[254] in which a district court held that the Texas anti-BDS statute[255] violated free speech rights.[256] This was a consolidated action of lawsuits by several sole proprietors[257] who worked as contractors in various capacities for public schools and universities in Texas,[258] and "[f]our of the five plaintiffs were active participants of the BDS movement who refused to sign contracts with public institutions, thereby foregoing profits, because the contracts contained 'No Boycott of Israel' clauses."[259] After the district court decided the case, the legislature amended the statute so that it applied only to corporations and not to individuals;[260] by the time the case reached the Fifth Circuit, it was moot.[261] The Texas law now provides that "a governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it (1) does not boycott Israel . . . and (2) will not boycott Israel during the term of the contract."[262] A number of other states similarly amended their statutes to fend off legal challenges[263] —an individual's right to boycott is easier to tie to free expression than a corporation's decisions to avoid certain trade partners.

That distinction alone was not enough in the second Texas case, *A & R Engineering and Testing, Inc. v. City of Houston*,[264] which involved a firm that conducted engineering services for the City of Houston on a contractual basis.[265] The court held (in a matter of first impression) that the anti-BDS law violated the corporation's First Amendment free speech rights and it granted a preliminary injunction—pertaining only to the plaintiff corporation—that prohibited the state or the city from

254. 373 F. Supp. 3d 717, 757–59 (W.D. Tex. 2019), *vacated*, 956 F.3d 816 (5th Cir. 2020).

255. H. 89, 85th Leg., Reg. Sess. (Tex. 2017) (codified at TEX. GOV'T CODE ANN. § 2271.002 (West 2021)).

256. *See Amawi*, 373 F. Supp. 3d at 757–59.

257. *See id.* at 729–31.

258. *See id.* at 731–35.

259. *See* Kraus, *supra* note 252, at 180–81.

260. *See* H. 793, 86th Leg., Reg. Sess. (Tex. 2019).

261. *See* Amawi v. Paxton, 956 F.3d 816, 820–21 (5th Cir. 2020).

262. TEX. GOV'T CODE ANN. § 2271.002 (West 2021), *invalidated by* A & R Eng'g & Testing, Inc. v. Scott, 582 F. Supp. 3d 415 (S.D. Tex. 2022).

263. *See* Cuffman, *supra* note 152, at 133.

264. 582 F. Supp. 3d 415 (S.D. Tex. 2022), *rev'd sub nom.* A & R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685 (5th Cir. 2023).

265. *A & R Eng'g & Testing*, 72 F.4th at 688.

including an anti-BDS certification clause in its contract with the plaintiff corporation.[266]

The district court in *A & R Engineering* acknowledged the complexity and lack of judicial consensus on the First Amendment issue for corporate boycotts, and for the anti-BDS statute in particular:

> This fact pattern concerns a legal question that is surprisingly perplexing, though not uncommon. This lawsuit is one of many filed nationwide seeking to set aside pieces of legislation passed in various states known as "Anti-BDS laws," which preclude a person or entity receiving government funds from boycotting Israel. More than a few courts have addressed this issue, and their decisions have not been necessarily uniform. . . . This issue has confounded more than a few judges, and there seems to be no consensus.[267]

The court then noted the widely divergent opinions between the district court and the various members of the Eighth Circuit panel in the *Arkansas Times* case, observing that "[t]he differing results are indicative of how a seemingly simple fact pattern can encompass any number of complex legal issues—enough issues to puzzle even the most erudite professor of constitutional law."[268] While the court concluded that "mere refusal to engage in a commercial/economic relationship with Israel or entities doing business in Israel is not 'inherently expressive' and therefore does not find shelter under the protections of the First Amendment,"[269] the statute had a residual clause in its definition section that went far beyond the idea of refusing to engage in commercial transactions—it included "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations" with the nation of Israel.[270] The statute, therefore, "not only prohibits Plaintiff from refusing to deal with Israel or terminating business relationships with Israel, but that it also prohibits Plaintiff from doing *anything* that is intended to

266. *See A & R Eng'g & Testing*, 582 F. Supp. 3d at 437–38. Note that the court also had to address issues of standing and ripeness. *See id.* at 425–29.

267. *Id.* at 421–22.

268. *Id.* at 422.

269. *Id.* at 431.

270. *Id.*

economically harm Israel,"[271] which the court held to be unconstitutional.[272]

The state also argued that it should have freedom of contract and freedom of expression—a reciprocal right to boycott the boycotters.[273] The court acknowledged this as true in theory[274] but found that an incidental contractor's boycott does not interfere with or undermine Texas's ability to exercise free speech and freedom of contract in its support of Israel.[275] There was no evidence that the contractor's boycott would reflect on Texas, which had fostered commercial ties with Israel and publicly declared its support for Israel.[276] The Attorney General of Texas appealed the decision to the Fifth Circuit, where the decision was subsequently reversed for lack of standing.[277]

The *A & R Engineering* case is significant in that the court held that an anti-boycott statute could infringe on the First Amendment rights of a corporation (because most of the challenges so far have involved individuals), but at the same time the court found that corporate boycotts themselves are not protected "speech."[278] Though this case is applicable to the other anti-boycott statutes (SB 13 & 19), the "residual clause" that was the lynchpin of the court's infringement finding is absent from those statutes. However, the boycotts of the fossil fuel and gun industries by the large national banks have been extremely public—when the banks announce their ESG commitments, they have to undertake the boycotts in order to honor their commitments to social-conscious investors. Banks and other large corporations make public ESG disclosures and seek ESG scores from various ESG-ratings companies. The SEC has promulgated a regulation that would require public disclosures about investments in the fossil fuel industry.[279] So, the court's concern in *A & R Engineering* that "no one would know of [the Plaintiff's] boycott, absent additional speech"[280] would not apply to commercial boycotts that are evident in a

271. *Id.* at 432.
272. *A & R Eng'g & Testing*, 72 F.4th at 691.
273. *See A & R Eng'g & Testing*, 582 F. Supp. 3d at 434–35.
274. *See id.* at 433–34.
275. *See id.* at 437.
276. *See id.* at 434–35.
277. *See id.*
278. *See id.* at 429–32.
279. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 28, 2024) (to be codified at 17 C.F.R. 210, 229, 230, 232, 239, and 249).
280. *A & R Eng'g & Testing*, 582 F. Supp. 3d at 431.

company's public disclosures and press releases to its shareholders and potential investors. Although, the court's discussion of the state's dubious right to boycott the boycotters—to have freedom of contract and the freedom to express disapproval of the BDS movement (by debarring certain contractors)—was compelling and would undermine a similar argument by the state in support of other anti-boycott statutes. The state and its hundreds of municipalities have far too many contracts with vendors for various goods and services—most of which are not obvious to the public—to effectively send a message by banning individual contactors here and there. And the state can make its positions clear through much more public means: declarations, trade agreements, subsidies, and so forth. Commercial boycotts matter to socially conscious or value-driven investors, but there is no state counterpart to this phenomenon. Moreover, in regards to the gun industry, the National Rifle Association (NRA) and NSSF have claimed—publicly and for many years—that they are the targets of a boycott by many financial institutions.[281] The boycott is very public and well-known to

281. *See*, *e.g.*, *Florida Shooting: Firms Abandon NRA Amid Consumer Boycott*, BBC (Feb. 24, 2018), https://www.bbc.com/news/business-43173753 [https://perma.cc/F7FC-T3ZN] (discussing the growing number of companies boycotting the NRA, including First National Bank of Omaha). Related to the NRA's claim of facing boycotts, the Supreme Court's recent decision in *N.R.A. v. Vullo*, 144 S. Ct. 1316 (2024) could have bearing on some state anti-ESG actions. In that case, the National Rifle Association (NRA) sued a New York state official (Maria Vullo) for allegedly using her position of authority to pressure various insurers and financial institutions to sever ties with the NRA after the mass shooting in Parkland, Florida. *See id.* at 1323–24. A unanimous Supreme Court found that Vullo had violated the NRA's First Amendment rights by coercing regulated parties under her purview into shunning the NRA to punish the organization for its central role in promoting private arms proliferation in the United States. *Id.* at 1332. In one sense, this is a mirror image of what states like Texas have done in punishing financial institutions that shun (or announce their intention to shun) the firearms industry, which also seems like corporate expressive activity. But, there are important distinctions—the *Vullo* case was an appeal from a circuit court's order dismissing the claim, and it is not clear that the NRA will have sufficient evidence to win at trial. Moreover, the Vullo decision centered around the alleged overreaching of an individual state official, especially a private settlement meeting with a large insurer in which she offered to overlook several of their unrelated regulatory violations if they would permanently drop the NRA as a client. *See id.* at 1329. The Supreme Court may treat legislation, which is my primary focus here, as categorically different from the actions of a single maverick bureaucrat, at least for purposes of First Amendment analysis. The Ninth Circuit has already distinguished the *Vullo* case on exactly this basis in upholding legislation that restricted gun show sales on state property or county fairgrounds. *B*

interested parties, even if each individual rejection of a loan application is not in the public eye.

B. *Anti-BDS Laws as Early Examples of Anti-Boycott Laws*

Since 2015, there has been "a flurry of anti-BDS legislative activity."[282] Approximately thirty states have some type of anti-BDS law as of the time of this writing.[283] Some laws, such as those in Colorado, Illinois, and Indiana, require divestment of the state's pension funds from companies that boycott Israel.[284] Others, such as the laws in Arkansas, South Carolina, and Texas, bar corporations that boycott Israel from any government contracts in the state.[285] Florida and Arizona have laws that combine divestment and debarment from contracts,[286] as do a few other states.[287] These anti-BDS laws garner broad bipartisan support, as evidenced by the mix of red states and blue states that have enacted them.[288] In 2017, all fifty state governors signed a statement declaring their opposition to BDS.[289] The state anti-BDS laws do not prohibit or sanction advocacy for Palestinian rights or speech criticizing Israel nor do they attempt to prohibit boycotts of Israel per se.[290]

There have been similar efforts in Congress, though none have been successful so far, "harkening back to 1970s legislation opposing the Arab League's boycott of Israel."[291] The Israel Anti-Boycott Act (IABA), proposed in 2017, would have imposed criminal penalties for participating in anti-Israel boycotts sponsored by international governmental

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& L Productions, Inc. v. Newsom, No. 23-55431, 2024 WL 2927734 *6 n.16 (9th Cir. June 11, 2024).

282. *See South Carolina Disqualifies*, *supra* note 252, at 2031.

283. *See* Goldfeder, *supra* note 251, at 608. The BDS movement "operates as a coordinated, sophisticated effort to disrupt the economic and financial stability of the state of Israel." *Id.* Some sources suggest that up to [thirty-eight] states currently have anti-BDS laws. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/AQ2W-XTA5].

284. *See South Carolina Disqualifies*, *supra* note 252, at 2031.

285. *See id.* at 2029.

286. *See id.* at 2031.

287. *See* Cuffman, *supra* note 152, at 129–30.

288. *See Wielding Antidiscrimination Law*, *supra* note 252, at 1363.

289. *See* Goldfeder, *supra* note 251, at 612.

290. *See id.* at 613.

291. *Wielding Antidiscrimination Law*, *supra* note 252, at 1364 (citing the 1976 Ribicoff Amendment to the Tax Reform Act and the 1977 amendments to the Export Administration Act as examples of 1970s activity).

organizations.[292] In 2019, the Combatting BDS Act, which would have expressly permitted states to adopt anti-BDS laws without fear of federal preemption, passed the Senate but not the House.[293] That same year, the House passed a resolution condemning the BDS movement.[294]

C. *The* Claiborne Hardware–FAIR *Conundrum*

Two Supreme Court cases from the late twentieth century frame the academic and judicial discussions about First Amendment protection for boycotts. Those challenging anti-boycott statutes invariably invoke *NAACP v. Claiborne Hardware*,[295] in which the Court found that boycotting to protest racial discrimination or segregation was protected expression or speech under the First Amendment. States and commentators defending the anti-boycott statutes cite the more recent *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*"),[296] in which the Court held law schools were not engaged in protected speech or expression when they excluded military recruiters from their campuses. Of course, both of these cases are distinguishable in some ways from the modern anti-boycott statutes and the companies—especially the financial institutions—targeted by them. When applied to anti-BDS statutes, "*Claiborne* would cut towards the constitutional protection of BDS activities,"[297] and the same would be true for the other anti-boycott statutes under consideration here.

Of course, the application of the First Amendment to anti-boycott laws is far from straightforward.[298] Those "who consider anti-BDS laws unconstitutional cite *NAACP v. Claiborne* . . . for the proposition that the First Amendment protects nonviolent, politically motivated consumer boycotts."[299] Even to the extent that an anti-boycott statute prohibits boycotting (whether boycotting Israel, the gun industry, or the fossil fuel industry) based on the *reason* or *motivation* behind it, such a statute

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292. *Id.* (citing Israel Anti-Boycott Act, S. 720, 115th Cong. (2017)).

293. *See* Strengthening America's Security in the Middle East Act of 2019, H.R. 336, 116th Cong. (2019).

294. *See* H.R. Res. 246, 116th Cong. (2019); *see also Wielding Antidiscrimination Law*, *supra* note 252, at 1364.

295. 458 U.S. 886, 932 (1982) (stating that boycott activity that was not itself violent was constitutionally protected).

296. 547 U.S. 47, 68 (2006).

297. *See* Keogh, *supra* note 252, at 611.

298. *See* Cuffman, *supra* note 152, at 136.

299. *See Wielding Antidiscrimination Law*, *supra* note 252, at 1368.

essentially singles out politically motivated abstinence from trade, and, regardless of a court's definition of "speech," the First Amendment limits the government's ability to prohibit conduct based on what it communicates or reveals.[300]

However, "*FAIR* is typically deployed as a counter to the argument that boycotting is expressive activity afforded First Amendment shielding at all."[301] Writers who defend the constitutionality of anti-boycott laws cite *FAIR* to argue that boycotting (as it occurs with BDS) does not come under the protection of the First Amendment, because boycotts are non-expressive conduct—merely not doing business with certain parties—and such conduct requires additional explanation in order to be expressive.[302] As such, the question is now "whether to expand the protection of boycotts per *Claiborne* or instead to reduce boycotting activity to simple decision-making regarding non-purchases."[303] Proponents of anti-boycott legislation contend that *Claiborne* protects statements or expressions in support of boycotts (e.g., writing op-eds, posting signs, passing out flyers, or joining marches or public protests), but that it does not protect the act (or intentional omission) of boycotting itself.[304] A defender of anti-boycott laws is likely to argue that *Claiborne* invalidated a law that prohibited boycotts by individuals and that the newer anti-boycott laws discussed in this Article apply only to businesses that engage in boycotts.[305] After all, the Court in *Claiborne* expressly stated that "[t]he right of business entities to 'associate' to suppress competition may be curtailed"[306] (though it also clarified in a footnote that it was *not* deciding the constitutionality of an anti-boycott statute "narrowly tailored" to apply to "anticompetitive conduct" or secondary boycotts).[307] Nevertheless, narrowing the scope of *Claiborne* is only part of it; supporters of anti-boycott laws rely mostly on the *FAIR* case, interpreting it to mean that

300. *See id.* at 1368–69.

301. *See* Keogh, *supra* note 252, at 611.

302. *See Wielding Antidiscrimination Law*, *supra* note 252, at 1368–69.

303. *See* Keogh, *supra* note 252, at 611.

304. *See Wielding Antidiscrimination Law*, *supra* note 252, at 1368–69.

305. *See South Carolina Disqualifies*, *supra* note 252, at 2032–33.

306. NAACP v. Claiborne Hardware, 458 U.S. 886, 912 (1982).

307. *See id.* at 915 n.49 ("We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law.").

some explanatory speech about the reasons for a boycott "was the magic ingredient for creating speech-like conduct."[308]

Although most federal courts that have ruled on anti-BDS laws have held that the BDS boycotts were constitutionally protected expression (at least before the Eighth Circuit's en banc decision in *Arkansas Times*),[309] some commentators have observed that the perpendicular tracks of reasoning in *Claiborne* and *FAIR* resulted in "two arguments that talk past each other."[310] Eventually, a circuit split will emerge, and the Supreme Court will have to resolve the issue. Upholding an anti-BDS statute (or worse, the anti-ESG statutes or a statute punishing boycotts of weapons manufacturers) will seem disingenuous and egregiously partisan, given the precedent of *Claiborne* and other First Amendment traditions.[311] Now, "In the age of *Citizens United*, laws that burden political speech receive strict scrutiny regardless of whether the speaker is an individual, corporation, or any other business association."[312]

As mentioned above, many anti-BDS statutes punish participants in the BDS movement by debarring them from government contracts; Texas SB 13 and SB 19 do the same. Defenders of anti-boycott statutes lean heavily on this point to distinguish such statutes from the law invalidated in *Claiborne*; they claim that, under anti-boycott statutes, individuals and companies are still free to engage in any boycotts they want but the state does not have to hire them as contractors if they do. As Mark Goldfeder argues:

> Just so that there is no confusion: none of the state "anti-BDS" laws ban or punish speech that is critical of Israel; none of the state laws target advocacy for Palestinian rights; and none of the state laws stop anyone or any business from boycotting Israel. The laws simply say that if you *do* choose to boycott Israel in a discriminatory manner, the State can choose not to do business with you. Again, there should be nothing controversial with a state simply choosing how to spend its dollars.[313]

The argument exists, but it is controversial and legally questionable. In 1996, the Supreme Court held, in *Board of*

308. *See* Keogh, *supra* note 252, at 611.
309. *See Wielding Antidiscrimination Law*, *supra* note 252, at 1369.
310. Keogh, *supra* note 252, at 647.
311. *See id.* at 647–48.
312. *See South Carolina Disqualifies*, *supra* note 252, at 2032.
313. *See* Goldfeder, *supra* note 251, at 613.

County Commissioners v. Umbehr[314] and *O'Hare Truck Service, Inc. v. City of Northlake*,[315] that government entities cannot terminate contracts with independent contractors based on political party affiliation, political beliefs, or political activities. The Court noted that, if anything, there is *less* justification for screening government contractors, as compared to government employees, based on political affiliation or activities because the government's argument for preserving harmony in its workplace and avoiding association with unpopular political speech is stronger in the case of employees.[316]

As observed in a *Harvard Law Review* note in 2016, "The fate of the anti-BDS law is less certain as applied to new bids for government contracts, but it is still likely unconstitutional."[317] In *Umbehr*, the majority acknowledged that it was not reaching the question of First Amendment protections for those who did not already have a contract, e.g., "bidders or applicants for new government contracts who cannot rely on [a pre-existing commercial] relationship."[318] The Court has not revisited this question since 1996.[319] The Third Circuit has held that First Amendment protections do not apply to new bidders,[320] while the Fifth Circuit has held that they do.[321] Appeals from challenges to the Texas anti-boycott statutes would go to the Fifth Circuit; of course, that circuit has lurched in a more conservative direction in the last few years.[322]

The newer anti-boycott statutes—whether targeting the BDS movement, environmentally conscious companies, or companies that avoid any business involvement with weapons manufacturers—most frequently achieve their punitive aims by barring the targeted entities from any government contracts in the state (including those contracts with municipalities, state

314. 518 U.S. 668, 668 (1996).

315. 518 U.S. 712, 715 (1996).

316. *Umbehr*, 518 U.S. at 680.

317. *See South Carolina Disqualifies*, *supra* note 252, at 2035.

318. *Umbehr*, 518 U.S. at 685.

319. *See South Carolina Disqualifies*, *supra* note 252, at 2035.

320. *See* McClintock v. Eichelberger, 169 F.3d 812, 817 (3d Cir. 1999).

321. *See* Oscar Renda Contracting, Inc. v. City of Lubbock, 463 F.3d 378, 380 (5th Cir. 2006).

322. *See, e.g.*, Jarkesy v. SEC, 34 F.4th 446, 449 (5th Cir. 2022), *aff'd on other grounds sub nom.* SEC v. Jarkesy, No. 22-859, 2024 WL 3187811 (U.S. June 27, 2024) (holding that the SEC having administrative law judges decide securities fraud cases violates the nondelegation doctrine).

agencies, or public universities).[323] The Supreme Court cases about the First Amendment rights of independent contractors are directly relevant to the new generation of anti-boycott statutes. Analytically, this makes sense: it is hard to see why the First Amendment would protect an individual in her own capacity but would suddenly not apply to the same individual if she incorporates as a limited liability company or some other corporate form for purposes of liability, taxes, and purchasing insurance. A boycott by an individual operating as an individual is no less expressive than a boycott by the same individual operating as some kind of sole proprietorship or business entity.

When it comes to protecting existing contractors versus new bidders on prospective government contracts, the only theoretical difference between the two options is some kind of reliance interest, which is a strange basis for protecting (or not protecting) a core constitutional right such as free speech. Moreover, statutes like Texas's SB 13 and SB 19 require contractors to pledge, as a contractual condition, that they do not and *will not* boycott the gun industry or the fossil fuel industry at any time during the contract term—the laws do not punish bidders for past boycotting behaviors (which would also be problematic) but for potential boycotting once the contract is operational. This collapses the distinction between existing contractors and new bidders because it compels new bidders to censor their speech while they are contractors.

Application of the First Amendment to boycotts has varied over time, partly due to changes on the Court, partly due to changes in the relevant statutory framework, and partly due to the evolving nature of boycotts.[324] The 1959 amendments to the Taft-Hartley Act[325] expressly prohibited secondary boycotts in the labor union context.[326] For example, in *International Longshoremen's Association, AFL-CIO v. Allied International,*

323. *See*, *e.g.*, Meg Cunningham, *Kansas Uses the Power of the Pocketbook to Prevent Divestment in Israel*, WICHITA BEACON (Oct. 24, 2023), https://wichitabeacon.org/stories/2023/10/24/kansas-anti-bds-israel-contracts/ [https://perma.cc/G9BG-3R27] (explaining that Kansas and at least thirty-six other states have anti-BDS laws that bar state contractors from refusing to do business in Israel or otherwise boycotting or divesting from Israel).

324. *See* Hunter Pearl, *Political Nonexpenditures: "Defunding Boycotts" as Pure Speech*, 45 HARV. J.L. & PUB. POL'Y 703, 706–10 (2022) (chronicling the evolution of First Amendment protections for boycotts).

325. *See* 29 U.S.C. § 158(b)(4)(i)(B).

326. *See* Pearl, *supra* note 324, at 708.

Inc.,[327] the Supreme Court held that a secondary boycott provision was applicable to a dock workers' union that refused to load or unload vessels going to or coming from the Soviet Union in protest of the Soviet Union's invasion of Afghanistan.[328] In making its decision, the Court may have doubted the sincerity of the union's political rationale and instead attributed the boycott to a collective bargaining flex.[329] Commentators have recently criticized the Court's holding in the case.[330] After all, this was the same year the Court decided *Claiborne*.[331]

A major turning point in applying First Amendment protections to corporate speech was *Citizens United v. Federal Election Commission*.[332] There, the Court famously held that corporate expenditures for political campaigns were protected speech.[333] For purposes of analyzing the constitutionality of anti-boycott laws, *Citizens United* settled the antecedent question of whether corporations have First Amendment rights—they do. *Citizens United* involved expenditures, however, so the question remains whether boycotts constitute speech or expression under *Citizens United* and, consequently, the First Amendment.

More recently, in *Janus v. American Federation of State, County, and Municipal Employees*,[334] the Supreme Court held that requiring non-consenting state employees to pay into a union through agency fees violated the employees' First Amendment rights.[335] As one commentator observed, "Just as limiting the amount of money one can spend for political speech is a restriction on speech itself, compelling one to pay money for

327. 456 U.S. 212, 225 (1982).

328. *See id.* at 226.

329. *See* Pearl, *supra* note 324, at 708–09.

330. *See id.* at 709.

331. *See also* Carpenters Loc. 213 v. Ritter's Cafe, 315 U.S. 722, 728 (1942) (upholding a Texas antitrust statute prohibiting secondary labor boycotts). This was one of the first cases to consider the amount of protection to be afforded to a secondary labor boycott. Anti-boycott laws themselves are a secondary boycott by the protective industry and are closer to being a violation of antitrust laws and labor laws than the boycotts they punish. For example, banks are merely individual entities making commercial decisions as a form of speech. By contrast, the anti-boycott statutes result from lobbying by the fossil fuel and gun industries to get another party (the state) to boycott entities that will not support those industries.

332. 558 U.S. 310 (2010).

333. *See id.* at 365–66; for more discussion about applying this holding to commercial boycotts, see Pearl, *supra* note 324, at 716–17.

334. 138 S. Ct. 2448 (2018).

335. *Id.* at 2459–60.

private speech with a political valence infringes on one's right to say—or not to say—whatever one wishes."[336]

The Court's reasoning in *Janus* suggests that the government has a particularly high burden to justify a statute that compels both subsidization and association.[337] As such, if a state cannot force state workers to join a union, then a state should also not be able to require outside contractors (working for the state but not as employees) to certify, as a contractual condition, that they do not participate in certain political boycotts, such as BDS or divestment from weapons manufacturers.

D. *Do Private Contractor Boycotts Constitute Compelled Government Speech?*

Some commentators have argued that invalidating anti-boycott laws would be tantamount to compelled government speech—that providing First Amendment protections to contractors for boycotts necessarily constitutes an endorsement of the contractors' expression by the government entity that is party to the contract.[338] Similarly, in *A & R Engineering*, the district court devoted part of its opinion to the government's right to free speech and to freedom from compelled speech,[339] though it concluded, mostly for practical reasons, that the state's argument was weak on this point.[340] A state has many avenues to make public declarations of its official policies, and it can offset any individual contractor's private boycott by giving state contracts, or even grants, to the target of the contractor's boycott. The public is unlikely to be aware of every private boycott of every individual contractor across a state (especially if this includes the contractors of the municipalities and the university and state hospital systems).

There are also legal problems with the compelled government speech argument. Proponents of this argument often rely on *Rust v. Sullivan*,[341] which upheld a federal regulatory prohibition on abortion counseling in federally

336. *See* Pearl, *supra* note 324, at 718.

337. *See id.*

338. *See* Kraus, *supra* note 252, at 159; Goldfeder, *supra* note 251, at 613–14, 639.

339. *See* A & R Eng'g & Testing v. City of Houston, 582 F. Supp. 3d 415, 433–35, *rev'd sub nom.* A & R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685 (5th Cir. 2023).

340. *See id.* at 435, 437.

341. 500 U.S. 173 (1991).

funded healthcare clinics.[342] However, there are some distinguishable features between restrictions on the activities of federal-grant recipients and on contracts to hire outside contractors to provide goods or services to a government entity (in theory, grant recipient activities are a zero-sum game—time or resources spent on any activity other than the specific operations the grant-maker wanted the grant to fund comes at the expense of those desired operations).

Other relevant cases point in the opposite direction. In *Legal Services Corp. v. Velazquez*,[343] for example, the Supreme Court held unconstitutional a statutory restriction that prevented grant funds from the federal Legal Service Corporation (a quasi-governmental entity) from funding legal advocacy that sought to amend or challenge welfare laws.[344] Similarly, in *Agency for International Development v. Alliance for Open Society International, Inc.*[345] the Court did not apply the government speech doctrine it had invoked in *Rust* because *Rust* involved regulations that applied only to recipients of Title X funds and only when those recipients acted within the scope of their employment.[346] The federal statute at issue in *Alliance for Open Society* conditioned federal grant money given to private entities (mostly nonprofits) to combat HIV/AIDS on the entity expressly opposing the legalization of prostitution.[347] The distinction between these two conditions is subtle, if not purely semantic. The Court held that the provision in *Alliance for Open Society* violated the First Amendment because it compelled speech by the recipients—speech not necessarily within the scope of the grant program itself.[348] In other words, a statute may prohibit the use of federal grant money for particular purposes, such as advocating for the legalization of prostitution, but a statute must not condition grants on pledging allegiance to the federal government's policies on certain issues.[349] Arguably, anti-boycott statutes are more like the scheme in *Alliance for Open Society* than the scheme in *Rust*, because anti-boycott statutes condition the receipt of a contract for payment on the contractor's agreement to refrain

342. *See id.* at 178.

343. 531 U.S. 533 (2001).

344. *See id.* at 537. For one commentator's attempt to distinguish this case from anti-BDS laws, see Kraus, *supra* note 252, at 177–78.

345. 570 U.S. 205, 221 (2013).

346. *See* Kraus, *supra* note 252, at 178.

347. *See* Cuffman, *supra* note 152, at 167.

348. *See id.* at 167–68.

349. *See id.*

from specific expressive conduct.[350] As one commentator put it: "[I]t is difficult to argue that a company's decision to boycott a particular nation is related to its ability to perform a contract for which it bids. Instead, the state is using its economic leverage to discourage protected boycott activity."[351]

Essentially, a single contractor's commercial boycott—alongside thousands or tens of thousands of government contracts in the relevant jurisdiction—is not salient enough to the public and is something the government can thoroughly offset with other public declarations, appropriations, and expenditures to the contrary. State legislatures that enact anti-boycott laws "are not seeking to defend a valued ally from a fearsome, rapidly growing boycott campaign. They are announcing their disdain for a marginal political movement whose goals they strenuously oppose. This motive could not be more antithetical to the core values of the First Amendment."[352]

If the Supreme Court follows its own precedents, it should find that statutes are unconstitutional when they disqualify contractors merely for engaging in politically expressive boycotts, or socially conscious business practices, outside the scope of the contract to provide goods or services to a governmental entity.

Additionally, the compelled-government-speech argument undercuts the argument from proponents of these laws that the boycotts themselves are not speech or expression for First Amendment purposes. If states can avoid contractors who are engaged in a disapproved boycott because the boycott constitutes compelled government speech in the form of an endorsement, then the commercial boycott itself must be a form of expression that implicates the First Amendment. This is the most puzzling or contradictory thing about the district court's opinion in *A & R Engineering*—the court simultaneously concluded that commercial boycotts are *not* speech, and therefore fall outside First Amendment protections, and that they *could* constitute compelled government speech, even though the court concluded the government interest, while valid, was not compelling enough (due to its trivial salience) to outweigh opposing interests under traditional First Amendment balancing tests.[353]

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350. *See id.*

351. *See South Carolina Disqualifies*, *supra* note 252, at 2037.

352. *See id.* at 2038.

353. *See* A & R Eng'g & Testing v. City of Houston, 582 F. Supp. 3d 415, 429–32, 435, *rev'd sub nom.* A & R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685 (5th Cir. 2023).

E. *Prohibiting Discriminatory Practices by Corporations*

Numerous state and federal laws—both statutes and regulations—prohibit various types of discrimination by private employers, such as discrimination based on race, sex, religion, or national origin. There is little doubt that such laws are constitutional because, recently, the Supreme Court not only upheld one but also extended it in *Bostock v. Clayton County*.[354] The question, then, is whether a legislature can frame, at least plausibly, its anti-boycott laws as permissible antidiscrimination laws. Defenders of anti-BDS laws have tried just that[355] based on the close association between Judaism and the nation of Israel (the converse claim, therefore, is that being anti-Israel is indistinguishable from being antisemitic).[356] They claim that they "[d]o not target BDS supporters, or even the BDS movement as a whole . . . [they] only affect *discriminatory conduct* in commercial activity, i.e., when the action taken is based on race, color, religion, gender, or national origin."[357]

Similarly, the Texas state legislature wrote SB 19 to refer to "discrimination" against gun manufacturers and dealers—though, as discussed above, the statute defines "discriminate" as basically any boycott activity or commercial shunning—in an attempt to put the law in the same category as other well-established antidiscrimination laws.[358]

There are numerous problems with these statute structures. For example, even if the legislators behind the anti-BDS statutes intended the laws to combat antisemitic discrimination, there is no evidence that most participants in the BDS boycotts have discriminatory intent against Jewish people generally or that the BDS boycotts have disparately impacted Jewish citizens.[359] Courts require parties alleging unconstitutional discrimination under the Fourteenth Amendment to demonstrate that a state entity or state official acted with discriminatory intent, and private-sector discrimination claims often include a showing of disparate impact.[360] As one commentator observed, "At bottom, anti-BDS

354. 590 U.S. 644, 680–83 (2020).

355. *See* Goldfeder, *supra* note 251, at 609–20.

356. *See, e.g.*, Cuffman, *supra* note 152, at 145–46 (noting that Eugene Kontorovich, a legal scholar who was a drafter of several anti-BDS laws, sees anti-Israel boycotts as a proxy for antisemitism).

357. *See* Goldfeder, *supra* note 251, at 620.

358. *See* TEX. GOV'T CODE ANN. § 2274.001(3) (West 2021).

359. *See Wielding Antidiscrimination Law*, *supra* note 252, at 1372–74, 1378–79.

360. *See id.* at 1372.

laws cannot properly be viewed as combatting discrimination. The claim that BDS constitutes religious and national-origin discrimination fits neither the framework of discriminatory intent nor disparate impact law."[361] While combatting discrimination may be a compelling government interest to justify many antidiscrimination laws, anti-BDS laws are not narrowly tailored to such an interest.[362]

Admittedly, of all the new anti-boycott laws, the anti-BDS laws are the easiest to link to other more longstanding antidiscrimination laws, United States foreign policy,[363] and secondary-boycott prohibitions in the labor and antitrust context. For example, a long series of federal laws and executive orders, beginning in the Carter Administration (with the 1977 amendments to the Export Administration Act) and continuing through subsequent administrations, have placed certain restrictions on boycott activity against Israel. In that sense, state anti-BDS laws reflect federal policies.[364] Of course, this could just as easily cut the other way—the Supreme Court could find that the federal constitutional powers related to foreign policy, treaties, and tariffs and customs create field preemption for state anti-BDS laws because they pertain to relations with foreign governments.

This point of overlap with federal policy, however, is absent with the other anti-boycott laws (such as anti-ESG laws and bans on gun industry divestment).[365] Combatting religious persecution has always been a feature of longstanding antidiscrimination laws, and, though the modern state of Israel is a secular state, for many, it has deep religious significance that seems inseparable from its political status.[366] Additionally, some commentators have argued that "anti-BDS bills also

361. *See id.* at 1381.

362. *See id.*

363. In the 1980s, many municipalities adopted no-contract ordinances to debar companies that made nuclear weapons components; some scholars argued at the time that such boycotts by local governments were subject to field preemption by federal laws about nuclear materials and by federal foreign commerce and national security powers. *See, e.g.*, Patrick J. Borchers & Paul F. Dauer, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components*, 40 HASTINGS L.J. 87, 88–91 (1988).

364. *See* Goldfeder, *supra* note 251, at 608–09.

365. *See, e.g.*, Bruno Bischoff, *Anti-ESG Legislation in the USA: Emerging Risk for Financial Institutions?*, ECO: FACT (Dec. 13, 2022), https://www.ecofact.com/de/blog/anti-esg-legislation-in-the-usa/ [https://perma.cc/U9V9-WZ7B].

366. *See* Goldfeder, *supra* note 251, at 609–10.

protect the economic interests of the United States, which could be detrimentally impacted by efforts to disrupt the economic stability of a close ally,"[367] and that a widespread boycott of an important international trade partner could disrupt friendly trade relations between the two countries. Finally, some defenders of anti-BDS laws claim that the BDS movement relies primarily on secondary or tertiary boycotts, which are expressly prohibited in the labor union context and are different from the boycotts protected in *Claiborne*.[368] All of these arguments are attenuated and easily answerable; this Article maintains that anti-BDS laws are unconstitutional. However, the unconstitutionality of other anti-boycott laws is clearer.

Thus, the attempt to explain divestment from weapons manufacturers as "discrimination" is even more farcical than anti-BDS laws. Historically, the federal government encouraged and even subsidized weapons manufacturers (especially around major wars); guns have been prevalent in society throughout our history, and the gun-rights lobby is one of the most powerful in the country.[369] Gun manufacturers and dealers currently enjoy statutory immunity to most tort claims under federal law,[370] and federal law has long excluded firearms and ammunition from any consumer product safety regulations or oversight.[371] As firearms-law expert Jake Charles has observed, "[D]espite the frequent claims of vilification and unfair treatment, guns are one of the most protected commodities under American law and gun owners are some of the law's most favored citizens."[372] To classify gun manufacturers and gun dealers as a suspect class, or to claim that they have been the target of historical mistreatment and discrimination, directly contradicts historical reality and trivializes the suffering of racial minorities and other vulnerable groups who have historically been exploited, oppressed, excluded, and enslaved.

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367. *See id.* at 615.

368. *See id.* at 623.

369. KRISTIN A. GOSS, DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA 4–6 (2006); MATTHEW J. LACOMBE, FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE 9 (2021).

370. *See* Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901–03.

371. *See* Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5)(E) (referencing 26 U.S.C. § 4181).

372. *See* Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 583 (2022).

F. *Anti-Boycott Laws and Government Monopsony Power*

There is a power imbalance. A potential investor in A & R Engineering—or even a commercial lender—reviews the company's books and such to decide how profitable the company will be in the future. From the perspective of a potential investor or lender, a company participating in a boycott could be limiting itself from some profitable activity in the future, but it is possible that participation in the boycott builds enough community goodwill to offset any such opportunity costs. The more serious concern for a potential investor or lender is that A & R Engineering will never be able to get government contracts anywhere in the state—the sanction far outweighs the boycott in terms of opportunity costs. The BDS boycott is not symmetrical with the state's boycott in terms of market effects. The government—whether federal, state, or local—can exercise labor monopsony power (or at least oligopsony power) for services it purchases.[373]

Underlying these problematic anti-boycott laws is the fact that the state is either the sole purchaser, or one of the only major purchasers, for many goods and services, such as bond underwriting, which is a monopsony (single buyer) scenario.[374] "Monopsony involves an exercise of market power on the buy side of the market."[375] Such scenarios present a characteristic set of problems; monopsony is the "flip side of monopoly,"[376] a mirror image of the single-seller problem. In the private sector, a classic example of monopsony might be the sole major

373. *See* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 11–15 (2021) (defining and describing labor monopsony power).

374. *See generally id.* (explaining the relationship between anti-boycott laws and the theory of monopsony). *See also* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 41 (Cambridge 2010) (explaining the economic theory of monopsony); ALAN MANNING, MONOPSONY IN MOTION 3, 14 (2003); Debbie Feinstein & Albert Teng, *Buyer Power: Is Monopsony the New Monopoly?*, 33 ANTITRUST 12 (2019); J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353, 358–60. Economist Joan Robinson introduced the term "monopsony" into the lexicon in her 1932 tome *The Economics of Imperfect Competition*; though, in a footnote, "she credits classics scholar B. L. Hallward of Cambridge for the new term, which is derived from the Greek verb *opsonein*, which [Robinson] says means 'to go marketing.'" Robert J. Thornton, *How Joan Robinson and B. L. Hallward Named Monopsony*, 18 J. ECON. PERSP. 257, 257–58 (2004); POSNER, *supra* note 373, at 11.

375. Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402, 403 (2008) (surveying the history of judicial decisions about monopsony in the antitrust enforcement arena).

376. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 164 (4th ed. 2023).

employer in a rural town (such as a remote mining town)[377] where the workers are in a dependent position and the firm can exploit employees by paying low wages. A more familiar suburban or urban example is Wal-Mart, both as a primary employer[378] and as the dominant buyer-retailer of certain goods.[379] A recent high-profile example is the 2021 Supreme Court case *National Collegiate Athletic Association v. Alston*,[380] which addressed the National Collegiate Athletic Association's ability to exploit student athletes.[381] Justice Brett Kavanaugh wrote a concurrence in which he quipped, "[T]o put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition."[382]

Here, however, the point under consideration is government monopsony power, which has bearing on the discussion of anti-boycott laws. Consider the situation with public schools and universities: in some rural municipalities, the school district may be the sole employer for teachers, and primary, secondary, and higher education systems are often the sole employer for certain types of outside contractors or vendors, such as the speech pathologist who became the lead plaintiff in *Amawi*.[383] "Unlike the competitive market, where infinite buyers create a stable demand curve, the government normally purchases defense goods as a monopsonist, a sole buyer, and

377. *See, e.g.*, John A. Litwinski, *Regulation of Labor Market Monopsony*, 22 BERKELEY J. EMP. & LAB. L. 49, 55 (2001) (discussing "circumstances where a 'company town' employer has sufficient labor monopsony power to underpay his workers").

378. *See, e.g.*, Lesley Wexler, *Wal-Mart Matters*, 46 WAKE FOREST L. REV. 95, 95 (2011) (discussing Wal-Mart's share of gender discrimination in employment); Stephanie Wagner, *Big Box Living Wage Ordinances: Upholding Our Constitutive Commitment to a Remunerative Job*, 15 GEO. J. ON POVERTY L. & POL'Y 359, 368–69 (2008) (discussing Wal-Mart's control over wages paid to workers who manufacture their goods); Michael J. Hicks, *Estimating Wal-Mart's Impacts in Maryland: A Test of Identification Strategies and Endogeneity Tests*, 34 E. ECON. J. 56, 56 (2008) (estimating the impact of Wal-Mart on labor markets in Maryland).

379. *See, e.g.*, John B. Kirkwood, *Powerful Buyers And Merger Enforcement*, 92 B.U. L. REV. 1485, 1489–94 (2012) (discussing Wal-Mart's monopsony power); Seth Korman, *International Management of a High Seas Fishery: Political and Property-Rights Solutions and the Atlantic Bluefin*, 51 VA. J. INT'L L. 697, 733–34 (2011) (using Wal-Mart as an analogy to explain the monopsony power of the Japanese government); Wagner, *supra* note 378 (discussing Wal-Mart's control over wages paid to workers who manufacture their goods).

380. 594 U.S. 69 (2021).

381. *See id.* at 80–81.

382. *Id.* at 110–11 (Kavanaugh, J., concurring).

383. *See* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 731–32 (W.D. Tex. 2019), *vacated*, 956 F.3d 816 (5th Cir. 2020).

singlehandedly determines the demand curve."[384] Previous scholarship has addressed the problem of government monopsony in providing court-appointed counsel to indigent defendants[385] and with IOLTA-funded legal services for the poor.[386] Monopsony power also contributes to the suppression of city employee wages, though generous public-employee pensions help offset this effect.[387]

Because it is often the sole purchaser—or at least the dominant purchaser—of goods and services related to governance or the provision of public goods, "the government possesses monopsony power over multiple suppliers in a government market."[388] Where there are multiple suppliers of a service or good, the government as exclusive (or near-exclusive) purchaser has substantial leverage or bargaining power.[389] Labor markets, including those for most government contractors, are very concentrated due to the local or regional government entity's economies of scale and other factors.[390] Whether on the state or local level, a government entity often "determines the total amount of business to be made available to private enterprise, the apportionment of business between contractors and the profits received by contractors."[391] For many types of government contractors, labor markets are very local—most public contracts require physical proximity, which reduces the ability of contractors to switch to another job or contract if a government entity imposes burdensome, or even unreasonable, conditions in the contract.[392]

Pervasive government regulation that often surrounds the types of services provided to the government can further exacerbate the government's monopsony power in many instances.[393] This can include competitive bidding

384. Steven L. Schooner, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 PUB. CONT. L.J. 229, 262 (1986).

385. *See* Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2274 (2014).

386. *See* Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455, 481–85 (2010) (discussing monopsony effects in the context of IOLTA program funding).

387. *See* Richard T. Boylan & Dru Stevenson, *The Impact of District Elections on Municipal Pensions and Investment*, 14 J.L. ECON. & POL'Y 127, 140–42 (2017).

388. Richard McMillan, Jr., *Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopolist*, 51 ANTITRUST L.J. 689, 700 (1982).

389. *See id.* at 700.

390. *See* POSNER, *supra* note 373, at 17.

391. *See* McMillan, *supra* note 388, at 700.

392. *See* POSNER, *supra* note 373, at 19.

393. *See* McMillan, *supra* note 388, at 701–02.

requirements, mandatory procedures for screening for officials' conflicts of interest, government immunity to suit in some cases, and restrictions such as the anti-boycott laws.[394] Some of these features contribute to job differentiation in a way that resembles product differentiation for monopolies in antitrust law, making it harder for workers to switch employers or contracts, or even to compare their opportunities to those elsewhere.[395] "The government's purchases reflect political interests unrelated to consumer preferences."[396] Like monopoly power, monopsony power usually includes the ability of the monopsonist to control prices (that is, wages or contract prices) and to suppress competition.[397]

Overall, "Monopsony, in the abstract, negates everything for which pure competition stands."[398] While economists often discuss how monopsony forces prices in the market (that is, costs for the sole purchaser) down, which in turn results in either lower supply or lower quality,[399] the monopsony power of the government also allows it to restrict the freedom of its suppliers, contractors, or vendors,[400] as in the case of anti-boycott laws such as SB 13 and SB 19.

Governmental monopsonists can create secondary effects that affect and distort markets for other industries,[401] such as firms that supply government contractors with materials or specialized services. Even where a government entity is not the sole procurer of a service, its control of even a substantial portion of any given market can significantly affect the entire industry, including those outside the reach of the state's

394. *See id.*

395. *See* POSNER, *supra* note 373, at 15.

396. Schooner, *supra* note 384, at 263.

397. *See* McMillan, *supra* note 388, at 701.

398. Schooner, *supra* note 384, at 263; *see also* Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1278 n.5 (11th Cir. 2019) ("Even so, the anticompetitive effects of monopsony power are well-documented, both in the context of horizontal cartel agreements and horizontal mergers.").

399. *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 316–18 (1991).

400. *See* David Mcgowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 320 (1994) ("Government agencies that are the principal purchasers of a particular commodity may use their monopsony power to reduce prices below the competitive level, to impose terms and conditions on sellers, or to favor local businesses at the expense of out-of-state companies.").

401. *See* SULLIVAN & GRIMES, *supra* note 376, at 288 (discussing how monopsonies can directly influence other industries).

control.[402] While economists often talk about monopsony as the "mirror image" of monopoly, some recent researchers have suggested that the mirror metaphor is inapt, at least for purposes of antitrust policy, because monopsony effects can be much more severe than monopoly effects.[403] As Professor Eric Posner observes, "[T]here is reason to believe that labor markets are more vulnerable to monopsony than products markets are to monopoly."[404]

This is not to say that exercising monopsony power is always illegal or always triggers antitrust laws.[405] In fact, "A firm that has substantial power on the buy side of the market (i.e., monopsony power) is generally free to bargain aggressively when negotiating the prices it will pay for goods and services."[406] Nevertheless, "[W]hen a firm exercises monopsony power pursuant to a conspiracy, its conduct is subject to more rigorous scrutiny . . . and will be condemned if it imposes an unreasonable restraint of trade."[407] And there are sometimes benefits from government monopsony for public finance, because, theoretically, "a government monopsony should redound to the public's benefit because the government agency, as the sole buyer, should be able to capture the entire surplus value of the contract, thus driving the seller's profits down to its cost of capital."[408]

However, it does not always work out this way. Monopsony makes the government entity a target for private sector lobbying and manipulation: "Once there is only a single buyer, that buyer is subject to concerted efforts from each potential contractor interested in persuading it to adopt a program

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402. *See* Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CALIF. L. REV. 13, 15–16 (1992).

403. *See* Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1514–15 (2013) (arguing that courts should not treat monopsony as the mirror image of monopoly because monopsony power requires less market share and does disproportionate damage); POSNER, *supra* note 373, at 18–19.

404. POSNER, *supra* note 373, at 18.

405. *See id.* at 30–41 (describing the failure of the legal system, especially in the area of antitrust law, to address labor monopsony problems sufficiently); *see also* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1031–32 (2019) (suggesting that antitrust law should be applied more robustly to labor monopsony power resulting from proposed corporate mergers).

406. W. Penn. Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 103 (3d Cir. 2010).

407. *Id.*

408. Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 920 (2010) (reviewing GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009)).

design that only that contractor can fulfill."[409] Suppose, for example, that some relatively small, local financial institutions wanted to secure lucrative bond underwriting contracts, but needed to eliminate the large national banks that have dominant market share, economies-of-scale pricing, and entrenched relationships with municipalities; the solution might be to lobby for a state anti-boycott statute tailored to drive the largest national banks from that state's bond market.

A government monopsony, as the sole or dominant purchaser of certain services or goods, will have an unavoidable impact on prices and contractual restraints on the provider.[410] At the margin, a monopsonist buyer's procurement of each additional unit of a provider's service or good constitutes an increase in demand, which pushes up the price for the next purchase, so "monopsonists tend to constrict the market in order to keep the price as low as possible."[411]

The monopsony power of the government in the contracts at issue in *Arkansas Times*, *A & R Engineering*, and *Amawi* is easy to see—the contractors who were plaintiffs in these cases were dependent on the government contract for their line of work—though the monopsony effects are hard to quantify. There is no consensus among economists about how to measure monopsony power or effects in labor markets.[412] The case with

409. *Id.* at 921. On this point, see also Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 817–18 (2011) (discussing the monopsony explanation for the federal government not using debarment as a sanction for violations of the Foreign Corrupt Practices Act).

410. *See* Stevenson, *supra* note 386, at 482.

411. *Id.*; *see also* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 710 (2007) (explaining the concept of monopsony).

412. *See* Gregor Schubert et al., *Employer Concentration and Outside Options* 2, 31–32 (Jan. 25, 2024) (unpublished manuscript), https://ssrn.com/abstract=3599454 [https://perma.cc/38V5-99DW] (surveying different methods of defining market concentration and proposing a novel approach to measurement); David Card, *Who Set Your Wage?*, 112 AM. ECON. R. 1075, 1085 (2022) (discussing various methods for measuring elasticity in labor markets, which in turn helps measure monopsony power); POSNER, *supra* note 373, at 64–68 (discussing the problem of defining the labor market for purposes of monopsony); Monica Langella & Alan Manning, *The Measure of Monopsony*, 19 J. EUR. ECON. ASS'N 2929, 2932–33 (2021) (explaining the difficulties with measuring monopsony effects in labor markets and proposing alternative models for such measurement); Stevenson, *supra* note 386, at 484 ("The effects of monopsony are notoriously difficult to measure . . . ."). The quantification problem has been a longstanding topic of academic commentary. *See, e.g.*, Charles E. Hyde & Jeffrey M. Perloff, *Can Monopsony Power Be Estimated?*, 76 AM. J. AGRIC. ECON. 1151, 1154–55 (1994) ("Unfortunately, even with an accurate estimate of the

the bond underwriters in Texas is admittedly less clear, especially because Texas municipalities paid far more (up to half a billion dollars) in underwriting costs for bond issues in the first several months after the enactment of SB 13 and SB 19.[413] In the mid-twentieth century, the conventional wisdom among economists was that the bond market had a monopsony problem on the other side—there were very few banks in the business.[414] Conversely, more commentators have observed, "The municipal bond market has undergone dramatic changes over the last [twenty] years. Some of these changes relate to the use and activities of financial intermediaries, including financial advisors and investment banks."[415] The advent of financial advisors in the bond underwriting market, and the increased reliance on them, has helped counteract the monopsony power, at least in certain scenarios.[416] Federal financial reforms have also mitigated the banks' monopsony power and have shifted some of that power to the states.[417]

State and local governments possess significant monopsony power when it comes to hiring vendors and contractors. The government can dictate the terms and conditions of these contracts. This power, while potentially beneficial in negotiating favorable terms and prices, can be susceptible to abuse, unfairly benefitting certain companies or individuals at the expense of others. Misuse of government monopsony power may result in subpar goods and services being provided to the government. Only by addressing this issue can we ensure that the government is acting in the best interests of taxpayers

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gap between the wage and the value of the marginal product of labor, the degree of monopsony power cannot be determined without additional information.").

413. *See supra* note 32 and accompanying text.

414. *See, e.g.*, Richard West, *New Issue Concessions on Municipal Bonds: A Case of Monopsony Pricing*, 38 J. BUS. 135, 135 (1965) ("When the number of competing buyers [i.e., banks] of a commodity becomes small enough, we expect that those who sell a particular quantity will suffer a tangible disadvantage. The analysis . . . suggests quite strongly that some issues of . . . government bonds have paid interest rates above the competitive level because of monopsony in the underwriting and distribution of their securities [by banks].").

415. Martin Luby & Tima Moldogaziev, *An Empirical Examination of the Determinants of Municipal Bond Underwriting Fees*, 34 MUN. FIN. J. 13, 13 (2013).

416. *See id.* at 19.

417. *See* Mikhail Ivonchyk, *The Impact of Dodd–Frank on True Interest Cost of Municipal Bonds: Evidence From California*, PUB. BUDGETING & FIN. 3, 3 (Mar. 2019) ("The results suggest a significant decrease in true interest cost after the reform. The policy effect is more pronounced on negotiated debt. Thus, the federal regulation of municipal financial intermediaries may have helped to improve the average quality of advice in the market and lower the cost of borrowing.").

while respecting the rights of the businesses with whom it contracts.

CONCLUSION

Justice William Brennan, writing his partial dissent in *FTC v. Superior Court Trial Lawyers Association*,[418] remarked on the "venerable tradition of expressive boycotts as an important means of political communication."[419] As he observed, expressive boycotts have been a crucial part of political speech and influence since the Founding era.[420] Since "[T]he colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott and the National Organization for Women's campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our Nation's political discourse."[421] Though the majority in *Superior Court Trial Lawyers Ass'n* had treated the lawyers' boycott as economic rather than political in motivation, Justice Brennan explained that political boycotts should receive the highest level of scrutiny applied to statutory restrictions on free speech.[422] He concluded by reminding his readers that "boycotts have been used by the American colonists to throw off the British yoke and by the oppressed to assert their civil rights. . . . Such groups cannot use established organizational techniques to advance their political interests, and boycotts are often the only effective route available to them."[423]

The anti-boycott statutes pertaining to the gun and fossil fuel industries violate the First Amendment rights of corporations by debarring them from government contracts due to their expressive boycotts or divestment from controversial, and arguably harmful, industries. The monopsony power of the state in most of its relationships with would-be government contractors allows it to put those contractors in a difficult situation of having to choose between conscience and financial survival. Moreover, the anti-boycott laws unfairly penalize companies that are themselves attempting to respond to pressure from the other side in the form of activist shareholder proposals, institutional investor expectations, and threats of consumer boycotts.

418. 493 U.S. 411 (1990).
419. *Id.* at 437 (Brennan, J., concurring in part and dissenting in part).
420. *See id.* at 447.
421. *Id.*
422. *See id.* at 448.
423. *Id.* at 451.

These laws are also bad policy because they suppress competition in the market by removing valuable contractors, resulting in government entities paying more for service contracts. The burden falls disproportionately on cash-strapped municipalities, counties, and school systems that depend on numerous contractors for essential services related to the provision of public goods. Municipalities also depend heavily on bond underwriters to assist in funding infrastructure projects—again, encumbering the provision of public goods. Boycotts and divestment campaigns have played a vital part in the history of our democracy since the founding of the nation, and the laws attempting to squelch or punish politically based or social-reform-based boycotts and divestment run counter to our legal history and traditions.

In conclusion, courts should afford the same First Amendment protections to companies participating in boycotts as they would to individuals who participate in boycotts. Just as individuals have the right to express their political beliefs and opinions through boycotts so too do companies. Boycotts are a powerful tool for bringing about social and political change; restricting the ability of companies to participate in them would significantly undermine their effectiveness. Barring companies from all government contracts is a significant restriction. Companies play an important role in boycott and divestment movements, and courts should ensure that they receive protection under the First Amendment. In the long term, allowing companies to boycott without fear of retribution is crucial for the preservation of free speech and democracy.

Anti-boycott laws are a misguided and harmful form of legislation that infringe upon the First Amendment rights of both individual shareholders and organizations. These laws stifle free speech and the ability to engage in political activism, and they can also serve to benefit special interests, such as the gun industry, while harming the broader public interest. Moreover, the vague and overbroad language used in many of these laws leaves them open to potential abuse and selective enforcement. It is crucial that lawmakers, courts, and the public alike recognize the dangers of these laws and work to repeal them to protect the fundamental freedom of political expression.