ZACHOR LEGAL INSTITUTE

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International Longshore and Warehouse Union, Local 10
Melvin Mackay, President
400 North Point Street
San Francisco, CA 94133
fax: 415.441.0610

May 16, 2021

Via Facsimile

Dear Mr. Mackay:

On behalf of Zachor Legal Institute, the undersigned respectfully asks International Longshore and Warehouse Union ("**ILWU**") Local 10 ("**Local 10**") to be aware that a coalition of hate groups that is controlled by organizations that the United States and other countries have designated as foreign terror organizations is planning to induce members of Local 10 to engage in an unlawful secondary boycott during the week of May 17, 2021 (the "**Proposed Boycott**").

Background of Zachor Legal Institute

Zachor Legal Institute has been active in legal issues relating to civil liberties and the Constitution and has an active United States Supreme Court practice. The founder of Zachor Legal Institute is the author of a number of legal papers analyzing constitutional issues with an emphasis on anti-discrimination laws and the First Amendment. Relevant for the purposes of this letter are the founder's paper "The BDS Movement: That Which We Call A Foreign Boycott, By Any Other Name, Is Still Illegal" (the "**RWU Paper**", published in the Roger Williams Law Review and available for download at https://docs.rwu.edu/rwu_LR/vol22/iss1/2/). The RWU Paper was inspired by an unlawful secondary boycott by Local 10 in 2014 targeting Israeli owned vessels at the Port of Oakland (the "**2014 Boycott**") and has been widely cited by attorneys general across the United States, federal courts and legal scholars.

Background of the Proposed Boycott

The Proposed Boycott, like the 2014 Boycott, is being promoted by a foreign organization that is part of a coalition that founded the governing body of the so-called "Boycott, Divest and Sanction" Movement ("**BDS Movement**"). Among the other members of this coalition are the designated terror groups Hamas, Popular Front for the Liberation of Palestine,

Palestine Islamic Jihad, Popular Front for the Liberation of Palestine-General Command and Palestinian Liberation Front.[1]

While some supporters whitewash the BDS Movement's genocidal aims and its ultimate objective of ethnically cleansing Jews from their historic homeland in Israel, even those on opposite ends of the political spectrum in the United States from current President Biden to former Secretary of State Pompeo and 2020 Presidential candidate Andrew Yang, agree that the BDS Movement is a racist hate group[2] and a front for terror groups.[3]

Furthermore, in a recent decision (the "**UAW BDS Decision**") by the International Executive Board of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("**UAW**"), one of the country's largest labor unions, the union found that the BDS Movement "espouses discrimination and vilification" of union members and a local union's support of BDS was found to "[i]ntrude upon [the union's constitution] by subverting the Union in collective bargaining...[and] would have a far reaching economic impact on UAW and other union members."[4]

The words of the UAW speak volumes about the true nature of BDS and the impact of BDS support:

> *...the local union's BDS Resolution inherently targets ... Israeli and/or Jewish members…this call to action by the local union, in association with the BDS Resolution, is in disregard of the rights of ... members of the UAW. Moreover, this type of activity is suggestive of* ***discriminatory labeling and a disparagement of these members****.*

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[1] Dan Diker and Adam Shay, JERUSALEM CENTER FOR PUBLIC AFFAIRS, "The PACBI Deception Unmasked: Terror Links and Political Warfare Masquerading as Human Rights" (2019), available at https://jcpa.org/pdf/PACBI_unmasked_web.pdf.

[2] *See, e.g.*, President Biden's description of BDS as anti-Semitic, "Biden Draws Ire of Palestinian Activists for Shunning BDS Efforts, ALJAZEERA.COM (May 21, 2020), available at https://www.aljazeera.com/news/2020/5/21/biden-draws-ire-of-palestinian-activists-for-shunning-bds-efforts (Biden said the movement "singles out Israel – home to millions of Jews – and too often veers into anti-Semitism, while letting Palestinians off the hook for their choices.'"); *see also*, then-Secretary of State Mike Pompeo's 2020 description of BDS as anti-Semitic, United States Department of State press statement titled "Identifying Organizations Engaged in Anti-Semitic BDS Activities", November 19, 2020, available at https://www.state.gov/identifying-organizations-engaged-in-anti-semitic-bds-activities/ *and* 2020 Democratic presidential candidate and current New York City mayoral candidate Andrew Yang's op-ed deeming BDS to be anti-Semitic, Forward.com (January 22, 2021), available at https://forward.com/opinion/462603/andrew-yang-mayoral-race-new-york-city-jewish-community/ ("Not only is BDS rooted in antisemitic thought and history, hearkening back to fascist boycotts of Jewish businesses, it's also a direct shot at New York City's economy.")

[3] In 2018, Zachor Legal Institute finalized a study investigating the ties between certain designated foreign terror organizations, including the PFLP, and groups operating on university campuses. That study resulted in a report that was sent to the United States Department of Justice, recommending an investigation into the presence of terror groups on U.S. campuses under the federal material support to terror statute, 18 U.S. Code § 2339A. A copy of the letter can be downloaded at https://zachorlegal.org/wp-content/uploads/2018/11/Final-DOJ-Letter.pdf?189db0&189db0. *See, also*, the RWU Paper.

[4] Decision of the International Executive Board of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America in the appeal of Stephen Brumbaugh, Member UAW Local Union 2865 vs. UAW Local Union 2865, Region 5, dated December 15, 2015 at pages 115-122 (a copy of this document is on file with Zachor Legal Institute and is available upon request).

Similarly, the local union's [BDS resolution engages in] ***biased targeting of Israeli/Jewish UAW members****….*

…we find that the provisions of the BDS Resolution, despite semantical claims to the contrary by the local union, can easily be construed as ***academic and cultural discrimination against union members on the basis of their national origin and religion****…*

…notwithstanding the denotation and connotation of words, it is our unanimous belief that the notion of ***BDS, credibly espouses discrimination and vilification*** *against Israelis and UAW members who are of Jewish lineage….Thus, the local union's platform is apparent in its unfavorable stance against the State of Israel, Israelis, and, invariably, Jewish union members.*[5]

On this basis, the UAW found that BDS support violates the UAW's International Constitution's prohibition on discrimination based on race, ethnicity, religion and national origin.

The 2014 Boycott

In 2014, following the outbreak of hostilities between the State of Israel and the designated terrorist group Hamas in the Gaza Strip, a BDS Movement affiliate, going under the name "Block the Boat Movement", called for a coordinated campaign to prevent the ship Zim Piraeus (owned, in part, by Israelis) from docking at the Port of Oakland for unloading.

News reports from that time, such as one report on the SFGate website[6], indicated that the ILWU claimed to not take a position on the political situation that had been raised as a straw man for purposes of the boycott of Israel by the individuals and groups taking action at the Port of Oakland.

However, social media reports by the groups involved in the protests claimed otherwise, stating "[w]e blocked the boat AGAIN! ILWU workers not called to unload ZIM ship. Thank you to the ILWU for standing in solidarity and on the side of justice. Palestine 6 - Zionist ZIM 0. Turn the ship around!"[7]

These groups also stated that they "…built on ILWU's history and successfully blocked the Israeli Zim ship from being unloaded at the Port of Oakland — the first time in US history an Israeli ship was blocked"[8] also acknowledged that it is part of the BDS Movement.

Furthermore, ILWU Local 10 member Clarence Thomas had stated

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[5] UAW Appeal at 117-119 (emphasis added).
[6] http://www.sfgate.com/default/article/Bid-to-block-Israeli-ship-continues-in-Oakland-5696666.php
[7] Post on 8/19/14 by the "Block the Boat" Facebook organization https://www.facebook.com/events/1447374682195857/
[8] *Id*.

…organizing at the ports in solidarity with Palestinians is essential given that Israel has foreclosed on any opportunity for Palestinians to engage in international trade through its ports. 'As a longshoreman, I know how critical international trade is to the economy,' he said. 'I think it is an appropriate action against those who have prevented the self-determination of the Palestinian people and to show solidarity with the people of Gaza.'[9]

The statements of the BDS Movement affiliates and ILWU Local 10 members were clearly at odds with the public statements of the ILWU's Port of Oakland spokeswoman. The actions of the ILWU in refusing to unload the Zim Piraeus and the statements of ILWU Local 10 members strongly indicated that there was tacit coordination between ILWU Local 10 and BDS Movement affiliates.

Legal Issues with Local 10's Participation in the Proposed Boycott

Under Section 8(b)(4) ("**Section 8(b)(4)**") of the National Labor Relations Act (the "**Act**"), a labor organization shall be deemed to have engaged in an unfair labor practice if two conditions are met: (i) a labor organization must induce or encourage an employee to strike or take other actions that are designed to interfere with another party's business operations with the objective of (ii) forcing any person to suspend business activities with another person.

A law review article by National Labor Relations Board ("**NLRB**") attorney Richard A. Bock (the "**Bock Article**") succinctly reiterated the two components of a Section 8(b)(4) violation: "first, engaging in a strike or other form of work stoppage; and second, inducing or encouraging certain individuals to do the same thing. Indeed, to **refuse to use, manufacture, process, transport, handle or work, is effectively to strike.**"[10]

In other words, a strike is not simply a work stoppage in the traditional sense; rather, a refusal to use certain items from a targeted producer is also a strike for purposes of Section 8(b)(4). The Bock Article also helpfully defines the activity that is prohibited by Section 8(b)(4) (often referred to as a "secondary boycott or strike"): "…a combination to influence *A* by exerting economic or social pressure against persons with whom *A* deals. It has been put more succinctly as 'a combination to harm one person by coercing others to harm him'".[11] This becomes important in determining whether the Proposed Boycott is a prohibited secondary strike.

Some commentators and even the NLRB have incorrectly asserted that the test to determine whether a labor organization's statements violate Section 8(b)(4) is if statements by a labor organization or its agents can reasonably be understood by the employees as a signal or

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[9] http://electronicintifada.net/blogs/charlotte-silver/activists-declare-first-victory-israeli-ship-delays-docking-oakland 8/16/14.

[10] Richard A. Bock, S*econdary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 917 (2005) (emphasis added).

[11] *Id*. at 907.

request to engage in a work stoppage against their own employer.[12] As an initial matter, it should be noted that Section 8(b)(4) does not include the limiting language, either explicitly or implicitly, that a labor organization must be advocating that employees act "against their own employer" for there to be a violation of Section 8(b)(4).

The text of Section 8(b)(4) and Supreme Court decisions demonstrate that no such limitation was ever intended. Indeed, in discussing the legislative intent of the prohibition on secondary boycotts contained in Section 8(b)(4), the Supreme Court found that Congress intended to prohibit both direct calls for secondary boycotts as well as indirect calls that nonetheless had the effect of causing the desired secondary boycott.[13] Indeed, the NLRB, in Los Angeles Building & Construction Trades Council, 215 NLRB 288, 290 (1974) at note 3, explicitly notes the Supreme Court's description of the legislative intent of the prohibitions in Section 8(b)(4): "[Section 8(b)(4) preserves] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of **shielding unoffending employers and others from pressures in controversies not their own.**"[14]

Thus, it is manifestly contrary to the text and intent of Section 8(b)(4) to limit its application to situations where union members are only engaging in actions against their own employers. Rather, so long as such action is directed at disrupting the commercial activity of "unoffending employers and others" in an attempt to drag them into "controversies not their own", the actions are violative of Section 8(b)(4). If BDS is anything with regard to the Proposed Boycott (as well as the 2014 Boycott), it is an attempt by a labor organization to coerce member-employees to harm employers who are not the subjects of legitimate, lawful labor action by the union against a primary employer.

Furthermore, the Memo's conclusion that "[a]ctivity intended only to educate consumers, secondary employers, or secondary employees, and even prompt them to action-so long as the action is not a cessation of work by the secondary employees-is lawful" at page 5 is an incorrect statement of law. While such activity may not necessarily violate Section 8(b)(4)(i)(B) of the Act (a conclusion that I only refer to *arguendo*), it may violate other provisions of the Act, including, but not limited to Section 8(a)(3) (as discussed later in this letter), and such activity violates other applicable state and federal laws, including the anti-boycott provisions of the Export Administration Act (as discussed in the next section of this letter) and federal and state anti-discrimination laws.

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[12] See, e.g., Advice Memorandum issued on December 21, 2015 with regard to the United Electrical, Radio, and Machine Workers of America (Various Employers) Case 06-CC-162236 (the "**Memo**") at 5.

[13] *International Brotherhood of Electrical Workers, et al., v. N.L.R.B.*, 341 U.S. 694 at 702-704 (1951) ("There is no legislative history to justify an interpretation that Congress, by those terms, has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." …To exempt peaceful picketing from the reach of § 8(b)(4) would be to open the door to the customary means of enlisting the support of employees to bring economic pressure to bear on their employer. The Board quickly recognized that to do so would be destructive of the purpose of § 8(b)(4)(A). It said 'To find that peaceful picketing was not thereby proscribed would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective which it forbade to be accomplished directly.'")

[14] *Citing* to *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 at 692 (1951) (emphasis added).

The Bock Article, citing relevant Supreme Court caselaw, describes prohibited secondary boycott activity as follows: "Where a union either induces employees of a neutral party, or threatens the neutral, no other evidence of secondary object is necessary. Indeed, enmeshing the neutral party through the proscribed conduct is precisely that which [the Act] prohibits."[15] In sum, the Proposed Boycott clearly includes a call for a strike (by the plain language of Section 8(b)(4) and as the same is described in the Bock Article) against a neutral party unconnected to any primary labor action and, thus, will constitute a secondary boycott in violation of Section 8(b)(4).

Other Legal and Policy Issues

a. Section 8(a)(3) of the Act

When it was enacted, the Act constituted a legislative expansion of previously unenumerated (and unprotected) rights. The Act was meant to further the nation's desire to safeguard workers from rampant and unchecked labor abuses while stimulating commerce and fairness. Today, the Act continues to protect workers' rights, yet it would be absurd and, indeed, perverted, for a labor organization to use the protections of the Act to violate other laws, obstruct commerce, usurp federal policy and infringe upon the rights of others by spreading a foreign, discriminatory boycott.

Under Section 8(a)(3) of the Act, it is an unfair labor practice for any employer to engage in discriminatory acts as part of employment or membership in the labor organization and it is a violation of Section 8(b)(2) of the Act for any labor organization to cause an employer to engage in discrimination prohibited under Section 8(a)(3) or to engage in such discrimination on its own part.

As noted above, the UAW BDS Decision concluded that support of BDS Movement activity, such as the Proposed Boycott, "espouses discrimination and vilification" of union members and a local union's support of BDS was found to "[i]ntrude upon [the union's constitution] by subverting the Union in collective bargaining...[and] would have a far reaching economic impact on UAW and other union members."[16]

The UAW also found BDS support by a local union to subvert union collective bargaining efforts in that the sanctions and boycott activity had the effect of binding the parent union to either breach or refuse to enter into contracts based on a third party's relationship to Israel. This not only violated the UAW's constitution, it violates the intent of the Act, which is to foster collective bargaining and to expand opportunities for labor organization members.

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[15] Bock Article at 937.

[16] Decision of the International Executive Board of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America in the appeal of Stephen Brumbaugh, Member UAW Local Union 2865 vs. UAW Local Union 2865, Region 5, dated December 15, 2015 (the "**UAW Appeal**") at pages 115-122 (a copy of this document is on file with Zachor Legal Institute and is available upon request).

It has been demonstrated that BDS is a movement based on discrimination. The support of BDS by any union is, as the UAW found, a discriminatory act against employees and union members on the basis of national origin and religion. Just as a labor organization adopting a resolution to support the Ku Klux Klan would be seen as engaging in anti-African American discrimination, or one adopting a resolution to support the Westoboro Baptist Church would be seen as engaging in anti-LGBTQ discrimination, a labor organization supporting BDS must be seen as engaging in anti-Jewish and anti-Israeli discrimination.

As such, any labor organization support of BDS violates Section 8(b)(2) of the Act.

b. Constitutional Issues

Finding that labor organization support for BDS constitutes an unfair labor practice under the Act would in no way conflict with DeBartolo Corp. v. Gulf Coast Trades Counc., 485 U.S. 568(1988). In *DeBartolo*, the Supreme Court set forth guidance on interpreting provisions of the Act in light of the Constitution's First Amendment protections:

> *Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.*

The first issue under *DeBartolo* is whether BDS support by labor organizations is protected by the First Amendment. This issue was resolved in, International Longshoremen's Association, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982), where the Supreme Court found that union boycotts impeding United States commerce that are political protests intended to punish foreign nations for their offshore conduct may be limited by the government.[17]

Turning to the second prong of *DeBartolo*, as noted earlier in this letter, the Supreme Court found the intent of Congress in enacting Section 8(b)(4) of the Act to be the preservation of "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of **shielding unoffending employers and others from pressures in controversies not their own.**"[18]

The objectives of BDS are simply not related to any primary labor issues that arise between employees and employers. BDS is a political issue and the goal of BDS is to embroil American consumers, employers and employees in a foreign dispute, with a further goal of encouraging discriminatory acts against Americans of Jewish and Israeli descent. These are precisely the types of abusive labor activities that Congress sought to prevent when it drafted the

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[17] For a more detailed legal discussion of the status of BDS under the First Amendment and the Longshoremen's case, *see* Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112.

[18] *Citing* to *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 at 692 (1951) (emphasis added). *See, also, International Brotherhood of Electrical Workers,* (finding that Congress did not intend to for the Act to protect strikes that had an unlawful object).

unfair labor practice elements of the Act. Congress certainly did not intend for the Act to support discriminatory foreign boycotts bereft of any connection to American labor relations.

c. BDS Support Violates a Number of Federal and State Laws

In *International Brotherhood of Electrical Workers*, the Supreme Court found that Congress did not want to "induce or encourage a strike for an unlawful object" when it created the Act. BDS support is not only a violation of the unfair labor practice provisions of the Act, it is a violation of a number of federal and state laws. It cannot be the policy of the National Labor Relations Board to interpret the Act in a way that would encourage labor organizations or employees to engage in activities that are unlawful as well as violative of strong public policy interests (in preventing discrimination).

Opposition to discriminatory foreign boycotts has been established American policy and law for decades. In the 1970s, President Jimmy Carter signed into law amendments to the Export Administration Act (the "EAA Act") to combat the pernicious Arab League boycott of Israel. This boycott had widespread, damaging effects on American consumers and employees and, as President Carter explained in his signing statement, the boycott was nothing less than institutionalized discrimination against Americans of Jewish and Israeli background.[19]

The anti-boycott provisions of the EAA Act are very broad and prohibit any domestic support for foreign boycotts unless the foreign boycott is sanctioned by the United States government. Whether one sees BDS as an alter ego of the Arab League or an entirely new foreign boycott apparatus, support for BDS activities in the United States violates the EAA Act. In addition, over 30 states have adopted anti-boycott laws focusing on BDS and Local 10's support of BDS would result in significant penalties, including the loss of contracts with state agencies.

The EAA Act is not the only federal law that prohibits BDS support; a provision of the tax code, known as the Ribicoff Amendment, also subjects supporters of anti-Israel boycotts to penalties.[20] The United States is also a signatory to the World Trade Organization's Agreement on Government Procurement, which prohibits discrimination on the basis of national origin in government procurement. The BDS movement's activities clearly discriminate on the basis of national origin, as the activities are directed at parties who originate from Israel, making labor organization support for BDS a potential violation of this international agreement. BDS support also violates federal anti-trust laws.[21]

Finally, since designated foreign terrorist organizations were among those who created BDS, support for BDS violates federal anti-terrorism statutes[22] and can result in RICO

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[19] *See* the RWU Paper.
[20] *See* BUREAU OF INDUSTRY AND SECURITY, UNITED STATES DEPARTMENT OF COMMERCE, OFFICE OF ANTIBOYCOTT COMPLIANCE at http://www.bis.doc.gov/index.php/enforcement/oac for an overview of the Ribicoff Amendment (as well as the EAA Act) and enforcement thereof;
[21] *See* the RWU Paper.
[22] *Id.*

prosecution under material support for terror and Hobbs Act predicates. Any labor organization that takes part in BDS support thus could be exposed to civil and criminal RICO prosecution.[23] Union support for BDS would thus conflict with the Supreme Court's holding on the Congressional purpose of the Act (preventing the inducement of strikes for unlawful objects) in *International Brotherhood of Electrical Workers*.

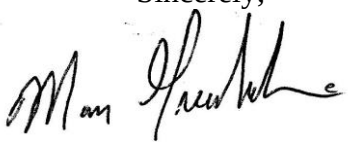
Conclusion

As was the case in *Longshoremen's*, if a boycott against a foreign nation is to be the policy of the United States, or any American individual or organization, such decision is to be made by the federal government, not labor organizations. Indeed, the Proposed Boycott is identical in substance to the secondary labor boycott that was the subject of the Supreme Court's decision in *International Longshoremen's*: a union engaging in a secondary boycott of a foreign company to protest a foreign conflict that was unrelated to the labor activities of the union. The Supreme Court clearly found that secondary boycotts such as the Proposed Boycott violate Section 8(b)(4) and are not protected speech under the First Amendment.

In the 2014 Boycott, Local 10 claimed that it was not participating in the BDS boycott of the Zim Piraeus; rather, Local 10 claimed that the BDS activists who were at the port and the police presence that resulted from that activity constituted a threat to the safety of union workers, and thus no union workers were available to unload the ship's cargo. This was clearly a pretextual claim that was exposed by the statements of Local 10's own members, who openly supported BDS and the illegal secondary boycott against Israeli-owned ships.

Whatever else is happening in the conflict between Israel and Palestinian Arabs, it is not a domestic labor matter and if Local 10 participates in the Proposed Boycott, either directly or through red herrings like claims that the planned protests by BDS activists and the resulting police presence will result in a threat to the safety of union members, we will review the actions taken and file a complaint with the NLRB for violations of Section 8(b)(4) and other relevant provisions of the Act and will consider all other legal remedies available under state and federal laws.

Sincerely,



Marc Greendorfer
President
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[23] *Id*. at 207.