PETITION FOR A WRIT OF CERTIORARI

Questions Presented

- Whether the President's Order is *ultra vires* the federal procurement statutes.
- Whether the President's Order violates the Religious Freedom Restoration Act (42 U.S. Code §§ 2000bb *et seq.*) or the First Amendment by prohibiting public support and advocacy of anti-Zionism by Haredi federal contractors.
- Whether the restrictions on government contracts conditioned on speech and expressive conduct violate the First Amendment.
- Whether the President's Order effects a *de facto* debarment from public contracts in violation of the procedural due process protected by the Fifth Amendment.

Introduction

On September 17, 2021, President Adithyansoccer issued Executive Order 13995, which purports to combat the Boycott, Divestment, Sanctions (BDS) movement, a loose civil society coalition which advocates for a variety of measures aimed at pressuring Israel to establish a separate Palestinian state in the occupied Palestinian territories.

The Order expresses its strong opprobrium of the BDS movement and casts it as anti-Zionist and antisemitic. The Order then proceeds to prohibit federal departments from renewing contracts with entities supporting the BDS movement and directs each federal department to establish a so-called "Anti-Hatred Committee" to maintain blacklists of current and prospective contractors which (1) boycott Israeli or Jewish goods, (2) make contributions to the Palestinian BDS National Committee ("BDS Committee"), (3) take part in, join, or support the Palestinian Campaign for the Academic and Cultural Boycott of Israel ("Palestinian Boycott Campaign"), (4) make public statements delegitimizing or denying the right to exist of the Israeli state, or (5) make statements which breach the International Holocaust Remembrance Alliance's Working Definition of Antisemitism ("IHRA Definition"), available at https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism.

Petitioner alleges that the President's Order is *ultra vires* his executive authority over public procurements, violates the Religious Freedom Restoration Act, and contravenes the First and Fifth Amendments to the U.S. Constitution.

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PART I: *ULTRA VIRES* ENACTMENT

1. The President cites no statutory authority for his Order, which lacks a sufficiently close nexus to federal contracting priorities.

All lawful exercise of presidential power must derive from either his constitutional authority or a valid delegation of authority by the Congress. *See generally*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Lincoln v. Gunnz*, 101 M.S.Ct. 114 (2020); *In re Executive Order 23*, 101 M.S.Ct. 117 (2020); *Fremont v. NinjjaDragon*, 21-01 M.S.Ct. 1 (2021). Accordingly, it is well-established that the President may not "impose conditions [on spending] without statutory authorization." *Fremont*, *supra*, at 8. By analogy, the President should not be able to impose random, entirely unrelated conditions on procurement programs authorized and mandated by the Congress without a congressional delegation of authority to do so.

The sole statute which generally authorizes presidential management of the procurement process is the Federal Property and Administrative Services Act of 1947 (FPASA), incorporated at 40 U.S. Code §§ 101 *et seq.*, which provides at section 205(a) that the President may "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of this Act." 40 U.S. Code § 486. The longstanding interpretation of this provision by the federal courts has been to the effect that a "sufficiently close nexus" must exist between the FPASA's values of economy and efficiency and the President's Section 205 order. *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979) (en banc). Because "[t]he procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power," this nexus will usually be found when justified in terms of savings to the Government. *Id.* at 793-4.

"[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947). Because the President never invokes any language related to either efficiency or economy in promulgating his Order, review of his Order's rationale must be limited only to those grounds invoked by the Order itself: combating anti-semitism and protecting the U.S.-Israel relationship. Neither of these grounds have anything to do with economy or efficiency, and it would be difficult—even contrived—to come up with any rationale where these social and foreign policy goals have a substantial nexus to the permissible statutory aims of FPASA. *See*, *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170-1 (4th Cir. 1981) (lack of findings or "direct connection to federal procurement" defeats sufficiency of nexus under FPASA).

Thus, the lack of a sufficiently close nexus under FPASA, as interpreted by the *AFL-CIO v. Kahn* line of cases, support a finding of *ultra vires*.

Moreover, reviewing courts have invalidated presidential directives as exceeding the intelligible principle of the statute's delegation when the Congress has considered, but failed to pass, legislation doing what the President has ordered by executive fiat. *See generally*, *Youngstown*, *supra*, at 637-9 (Douglas, J., concurring) (Congress' failure to grant President general emergency seizure authority while concurrently enacting narrower seizure statutes supports *ultra vires* finding). The current situation is closely analogous to *Youngstown*'s legislative history: while the Congress has imposed narrow restrictions on compelled participation in boycotts *organized* by foreign states, *see*, Anti-Boycott Act of 2018, 50 U.S. Code § 4842, it has emphatically never adopted—and indeed, rejected—a general policy of prohibiting boycotts of foreign states.[1] This careful, narrow legislative design in the same field that the President's Order occupies instead indicates a clearly implied congressional intent against the sort of sweeping anti-boycott legislation that the President has promulgated by diktat. In other words, had Congress wanted to impose a more general policy against boycotts, it would have done so in 2018 when it legislated on the topic; instead, it chose to keep in place the narrow policy first established in the 1977 amendments to the Export Administration Act.

Accordingly, the President's Order is *ultra vires* his statutory and constitutional authority, an abuse of discretion, and should be deemed null and void. *See generally*, U.S. Const., art. II, § 3, cl. 2 ("The President [...] shall take Care that the Laws be faithfully executed").

PART II: VIOLATION OF FREE EXERCISE

2. The President's order substantially burdens Haredi religious exercise and cannot survive strict scrutiny.

The Religious Freedom Restoration Act (RFRA) provides *inter alia* that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" except if it is able to meet the exacting standard of strict scrutiny. 42 U.S. Code § 2000bb-1. The Free Exercise Clause of the First Amendment likewise only permits regulations on religiously motivated action "when such regulations are necessary to a compelling state interest, are narrowly tailored to achieve the purpose, and use the least restrictive means of achieving the purpose." *Carey v. Dixie Inn*, 101 M.S.Ct. 112 (2020).

Because strict scrutiny under RFRA and under the First Amendment "require us to apply the same test [...] in any event," *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 921 (Cal. 1996), this Court should find an infringement of the Constitution if it finds a violation of RFRA, per *Dixie Inn*.

Under the applicable test, "a plaintiff must establish, by a preponderance of the evidence, three threshold requirements to state a *prima facie* free exercise claim. The

[1] In 2018, the 115th Congress considered and did not proceed with H.R. 1697, the Israel Anti-Boycott Act, a bill that would have outlawed boycotts of Israel. As recently as July 2021, the 118th Congress considered but did not pass S.3, the Israel Support and Anti-Hatred Contracts Act, which is almost identical to the President's Order, and, indeed, was written by the President.

governmental action must (1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which is sincerely held by the plaintiff." *U.S. v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). If this threshold is met, "the burden shifts to the government to demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner." *Id*.

Sincere religious belief—Many Haredi Jews, notably those affiliated with the Neturei Karta organization, maintain a sincere religious belief in anti-Zionism. Followers of this organization, and other members of the Haredi community, believe that a Jewish state in the Holy Land may only be established upon the arrival of the Messiah, and that, by consequence, the State of Israel is sinful and illegitimate in the eyes of their divine creator. *See*, Aviezer Ravitzy, *Munkacs and Jerusalem: Ultra-Orthodox Opposition to Zionism and Agudaism*, *in* Zionism and Religion 67 (Shmuel Almog, Jehuda Reinharz, & Anita Shapira eds. 1998). There is no doubt that, though only representative of the creed of a small minority of the broader Jewish community, this is a genuinely held religious belief, as evidenced by decades of consistent proclamations and religious activism on the issue by followers of the Naturei Karta and similar groups. *Cf. Love v. Reed*, 216 F.3d 682, 688 (8th Cir. 2000) ("His beliefs may not fit squarely with the orthodoxy of Judaism [but] 'the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect'."), quoting *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981).

Substantial burden—"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, *supra*, at *717-18*. The benefit in this case is clear: the opportunity to receive a government contract. *Cf. O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 716-17 (1996) (government contract cannot be conditioned on exercise of First Amendment rights). The substantial burden is also clear: by barring public statements "delegitimizing" the State of Israel, the President's Order compels adherents of a sincere religious belief in anti-Zionism not to exercise their ability to engage in public religious expression of their creed. Because the President's order plainly applies to all speakers "that have found to" have been made such statements in the past, that "are deemed to support" anti-Zionism in the present, and that "may potentially enter contracts" in the future, *Exec. Order 13995*, at II(2), III(2), III(3), it forecloses upon every avenue in space and time for religiously anti-Zionist government contractors to spread word of their religious belief. This is entirely impermissible under RFRA. *Weir v. Nix*, 114 F.3d 817 (8th Cir. 1997) (existence of alternatives determines whether burden is substantial), *accord*, *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995).

Because the President's Order substantially burdens the exercise of many Haredi Jews' sincere religious beliefs in anti-Zionism, the regulation is presumptively unconstitutional and strict scrutiny applies.

Strict scrutiny factors—To satisfy strict scrutiny, government action which substantially burdens religious exercise must (1) further a compelling state interest, (2) narrowly tailor to achieve the purpose, and (3) use the least restrictive means available to do so. *Dixie Inn*, *supra*. The President cites two interests in his Order: combating antisemitism and protecting the "bond with the State of Israel." Assuming, *arguendo*, that protecting the fee-fees of a foreign state is even a compelling reason to limit free exercise of religion to begin with, the Order fails strict scrutiny because it is underinclusive and overbroad.

- It is underinclusive because (1) antisemitic statements and membership in antisemitic organizations that do not focus on Israel (e.g. the Ku Klux Klan, the Proud Boys) are not restricted by the Order, (2) the Order does not prohibit membership in organizations with similar goals to the BDS Committee or the Palestinian Boycott Campaign (e.g. the UK Labour Party, the American Studies Association, or Brown University), (3) federal contractors are free under the Order to advocate for the rupture of most or all diplomatic relations between the U.S. and Israel or even for war against Israel, which is antithetical to protecting U.S.-Israel relations, and (4) insofar as the Order attempts to further anti-discrimination, it fails to penalize any form of racial, religious or national-origin discrimination targeted at any group except Jews and Israelis.
- It is overbroad because it covers large swaths of protected, non-antisemitic religious expression in the private sphere, even *by devout Jews*, that have no measurable impact on U.S.-Israel relations.[2]

Consequently, the Order violates the Religious Freedom Restoration Act, and per *Dixie Inn*, the First Amendment to the U.S. Constitution.

PART III: VIOLATION OF THE FIRST AMENDMENT

3. The President's order enacts content-based discrimination and fails strict scrutiny as an overbroad, unconstitutional condition.

It is well-settled law that the government cannot condition contracts on the basis of speech with no direct connection to contract performance without falling afoul of the First Amendment. *Elrod v. Burns*, 427 U.S. 347 (1976). Flowing from this principle is the simple doctrine that the government may not "produce a result which it could not command directly" by limiting benefits, such as public contracts, on the basis of constitutionally protected speech. *City of Northlake*, 518 U.S. at 717. Because the Congress could ban none of the things prohibited by the President's Order, and because they do not pertain in any way to direct issues of contract performance, the conditions are unconstitutional.

[2] Indeed, the anti-Zionist Haredi groups in question—incredibly—have a substantial presence *in the State of Israel*. The Government cannot show an adverse effect on U.S.-Israel relations from anti-Zionist advocacy by Haredi groups in the United States when these same groups do the exact same thing *in Israel itself*.

Every prohibition contained in the President's Order implicates either speech or expressive conduct[3] and is subject to strict scrutiny when predicated on content-based discrimination:

- The prohibition on making public statements "delegitimizing" or "denying [the] right to exist" of Israel or "support[ing]" the Palestinian Boycott Campaign is a plain viewpoint-based limitation on political speech for reasons which are too obvious to require a supporting authority.
- The entire IHRA Definition as incorporated by the President's Order is a viewpoint-based limitation on protected speech because each and every example provided within is pure speech. There is, of course, a constitutional right to deny the Holocaust, to criticize Israel using any standard, to vilify the Jewish people, and so on, however offensive any decent member of society may find such speech. *See generally*, *Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (First Amendment protects speech even when speaker is a racist douchebag).
- The prohibition on "making discriminatory statements against Jewish individuals" is a content-based restriction on constitutionally protected hate speech.[4] *R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992).
- The prohibition on membership in the Palestinian Campaign, which includes a U.S.-based domestic affiliate, is a viewpoint-based restriction on the freedom of association, which is subsumed under the constitutional conception of the freedom of speech. *NAACP v. Alabama*, 357 U.S. 449 (1958).
- The prohibition on monetary donations to the BDS Committee is a viewpoint-based restriction on political donations, a form of protected speech. *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).
- The prohibition on participation in any boycott of Israeli- or Jewish-made goods, which applies even when not sponsored by a foreign state or organization, is a viewpoint-based restriction on the inherently expressive activity of political boycott. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Each and every activity restricted by the President's Order targets expressive speech or activity on the basis of its pro-Palestinian, anti-Israeli, or anti-Jewish message. By "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" as it does here, the Government engages in an "egregious form of content discrimination," *Rosenberger v. Regents and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); therefore, strict scrutiny applies.

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[3] The President admits as much. *See*, *Exec. Order 13995*, pream. (explaining that the Order is animated by the fact that "many businesses in the United States *express support* for the Boycott, Divestment, and Sanctions movement") (emphasis added).

[4] Petitioner disputes some of the IHRA Definition's characterizations of hate speech, but concedes the point for the purpose of First Amendment analysis because it is irrelevant, as hate speech is no less entitled to constitutional protection. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

As discussed in Part II of this petition, *supra*, neither government interest proffered by the President in the Order is narrowly tailored or constitutes the least restrictive means of achieving the objective. Moreover, to the extent that the President cites the "rhetoric" or "discriminatory statements" of anti-Israeli groups or their offensive statements directed at Jews as a compelling interest, *Exec. Order 13995*, *supra*, the Court should reject these out of hand because the government has no interest whatsoever in preventing speech expressing offensive or hateful ideas. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (government has no legitimate interest in preventing 'demeaning messages' from reaching 'underrepresented groups' or in 'preventing speech expressing ideas that offend').

Finally, in the free speech context, an added fatal deficiency exists: the President's Order is hopelessly overbroad.

Overbreadth facially invalidates a regulation under the First Amendment when "a substantial number of its applications are unconstitutional." *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 449 (2008). Overbreadth should be "substantial, not only in an absolute sense, but also relative to its plainly legitimate sweep." *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

This standard is clearly met in the instant case because almost all activity identified by the Order is constitutionally protected and whatever 'legitimate sweep' the regulation possesses,[5] if any, is dwarfed by the scope of the unconstitutional censorship in both an absolute and relative sense. Like the ban on animal cruelty videos in *U.S. v. Stevens*, 559 U.S. 460 (2010), the President's Order here has "alarming breadth" and does not qualify its sweeping prohibition with any language or implication suggestive of limiting its application to certain criminal activities outside the protection of the First Amendment. 559 U.S. at 474. Indeed, the Order explicitly, by its own language, targets "all such support" for BDS, applies to "any [...] contracts", and blacklists "any entity" that commits any act listed in section III of the Order—which, as discussed above, includes a vast plethora of constitutionally protected expressive activities.

4. Alternatively, it creates a chilling effect against protected First Amendment speech.

[5] The 'legitimate sweep' of the Order extends, at the very most, perhaps to a few antisemitic fighting words or public statements that cause a breach of the peace. Neither of these considerations, however, can save a regulation from overbreadth. *See*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (breach of the peace statute covering protected speech is overbroad); *City of Saint Paul*, *supra* (statute covering both fighting words and protected hate speech is overbroad).

It might also be argued that participation in boycotts under the direction or order of a foreign state is not constitutionally protected. This does not save the Order from overbreadth because the Order also bans boycotts motivated by individual conscience independent of any group and since BDS is only the loose label for a "global, decentralized" movement not led by any state or organization. Palestinian BDS National Committee, *Statement on Affiliation with the BDS Movement and the Use of the BDS Acronym* (Jan. 2019), at https://bdsmovement.net/news/statement-affiliation-bds-movement-and-use-bds-acronym.

Even if the Court holds that the President's Order is not facially an unconstitutional condition that flunks strict scrutiny, it should still invalidate the regulation as a chilling effect on the First Amendment rights to speech and association since "[g]overnment speech is not protected to the extent it creates a chilling effect based on the content of speech or viewpoint expressed by a speaker." *Nat'l Rifle Ass'n v. Lincoln*, 101 M.S.Ct. 116 (2020), at part II-B.

Indeed, the Court will find the instant case to be very closely analogous to the Supreme Court of Fremont's decision in *In re San Francisco Res. No. 190841*, 15 West. 1 (Fre. 2020), which *NRA v. Lincoln* positively cites and whose approach this Court ultimately adopted. In that case, the San Francisco Board of Supervisors adopted a non-binding resolution condemning the National Rifle Association (NRA) as a domestic terrorist organization and declaring the intent of the city and county to limit public contracts with firms that do business with the NRA. The Supreme Court of Fremont held the resolution unconstitutional, despite its non-binding nature, because it is "likely to chill a person of reasonable firmness from wanting to associate with the NRA, [and] demonstrates a malicious desire to punish and coerce, rather than simply a desire to express an opinion or viewpoint." 15 West. at 5.

As previously discussed, the regulations in the President's Order clearly discriminate on the basis of content and viewpoint. They are also *per se* coercive: like the NRA's designation as terroristic, pro-Palestine groups such as the BDS Committee and the Palestinian Boycott Campaign are singled out for attack as "antisemitic", "anti-Zionist" and Nazi-like, all government-imposed labels which attempt to chill their expression through vilification and injury to reputation. *Cf. Lincoln* at part II-B ("the very act of declaring the NRA a domestic terrorist organization" is evidence of coercion).

If anything, the conduct in the instant case is even more egregious because it involves actual adverse consequences as opposed to abstract threatened ones. Like companies that do business with the NRA, persons with financial or membership ties to various anti-Israel movements are threatened with real and imminent economic repercussions for their protected political viewpoints, which serve the twin unconstitutional goals of chilling the free association of individuals with these movements and the free speech of the movements themselves. Here, unlike the San Francisco board, the President makes no attempt even to disguise his malicious purpose that goes far beyond simple government speech, since the Order explicitly spells out that its purpose is to "cease [all] support" for anti-Israel causes emanating from the United States. *Exec. Order 13995* at § 1(3).

Consequently, as the President's Order "goes beyond expressing a viewpoint and "instead attempts to coerce or threaten other viewpoints," it creates an unconstitutional chilling effect and should be struck down. *Lincoln*, at part IV.

5. At the very minimum, it fails the *Pickering* test for public employee speech.

Although the Order violates the First Amendment for many more egregious and patent reasons, it even violates free speech rights at their narrowest: in their application to government personnel. Under the relevant standard, restrictions on employee speech are impermissible when "the interests of the [employee], as a citizen, in commenting upon matters of public concern" outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968).

For the purposes of employee speech analysis, contractors to the government are analogous to government employees and protected from retaliation for expression of personal political views. *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996); *City of Northlake*, 518 U.S. 712.

Although the government has a strong interest in regulating "daily professional activities" and "statements [made] pursuant to [...] official duties," *Garcetti v. Ceballos*, 547 U.S. 410, 421-2 (2006), its interest is highly attenuated and cannot defeat the protections of the First Amendment when the employee "[speaks] as a citizen addressing matters of public concern," *id.* at 410, in a manner which does not hinder "maintaining either discipline by immediate superiors or harmony among coworkers." *Pickering*, 391 U.S. at 570.

This standard is flagrantly breached in the instant case.

The President's Order, as a blanket ban on anti-Israel advocacy that makes no distinction between official and private speech and that has no relation whatsoever to federal contractors' official duties, is not a legitimate regulation of employee conduct, since speech "with individuals or entities outside of [an employee's] chain of command [is] unlikely to be pursuant to the employee's official duties." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074 (9th Cir. 2013) (en banc).

More importantly, criticism of Israel—however offensive—is a quintessential example of speech on a matter of public concern. *See generally*, *Bond v. Floyd*, 385 U.S. 116, 134-5 (1966) (racial undertones of statement by expelled legislator did not remove comment from First Amendment protection); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (university could not stigmatize professor for expressing racist theories outside the classroom). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up). By this standard, there can be no dispute that commentary upon the U.S.-Israel relationship, the State of Israel, and the Israel-Palestine conflict are subjects of general and news interest of political and social concern to the community. *See*, *Plai Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1048 (D. Ariz. 2018) ("actions taken by Israel in relation to Palestine are matters of much political and public debate"); *Desai v. Hersh*, 719 F. Supp. 670, 674 (N.D. Ill. 1989) (commentary upon conduct of United States foreign policy is "unquestionably" matter of public concern).

The balance between the *Pickering* factors lends itself to an inescapable conclusion: that the unlimited breadth of the President's Order is an unconstitutional abridgement of federal contractors' right to free speech as public employees.

PART IV: VIOLATION OF THE FIFTH AMENDMENT

6. The order violates procedural due process because it directs the government to unilaterally blacklist contractors without adequate notice or a meaningful hearing.

It has long been recognized by the federal courts that a corporation has a Fifth Amendment liberty interest in not being unfairly excluded from bidding on public contracts and may not be deprived of this interest except by due process of law. *Old Dominion Dairy Prod., Inc. v. Sec'y of Def*., 631 F.2d 953, 961-63 (D.C. Cir. 1980); *Trifax Corp. v. D.C.*, 314 F.3d 641, 643 (D.C. Cir. 2003); *Related Indus., Inc. v. U.S.*, 2 Cl. Ct. 517, 525 (1983). Consequently, a company may not be subjected to *de facto* debarment ("blacklisting") from public contracting without adequate notice and a meaningful hearing. *Phillips v. Mabus*, 894 F. Supp. 2d 71, 81 (D.D.C. 2012).

Here, every company which engages in activities or speech prohibited by the President's Order clearly suffers a *de facto* debarment, as "an agency's statement that it will not award the contractor future contracts" suffices to establish debarment. *CRC Marine Serv., Inc. v. U.S.*, 41 Fed.Cl. 66, 84 (1998). The Order expressly states as much. *See*, *Exec. Order 13995* at § IV ("The [Secretaries] are hereby ordered *not to enter into contracts with or accept tenders* from any entity that has been deemed by the respective Anti-Hatred Committees of their Departments to be supportive of the BDS Movement") (emphasis added).

Because the Order (1) fails to give contractors adequate notice by retroactively considering past advocacy of anti-Israel causes, (2) does not provide for a meaningful hearing before the Anti-Hatred Committees to contest the charges, and (3) does not create an administrative remedy or judicial review process,[6] it is an unconstitutional deprivation of federal contractors' constitutional interest in liberty without due process.

Conclusion

Combating antisemitism is a laudable goal, but no goal—however admirable—can invade the protected bastion of our constitutional liberty. As Justice Black warned in his prescient dissent in *Beauharnais v. Illinois* of another attempt to censor allegedly discriminatory speech a half century ago, "[t]he motives behind the [law] may have been to do good [but] the same can be said about most laws making opinions punishable as crimes." 343 U.S. at 274 (Black, J., dissenting).

The Constitution protects the rights of a free people to speak their conscience and hold personal political opinions free from state intervention—no matter how misguided or

[6] *See*, *Hellenic Am. Neighborhood Action Comm. v. City of New York*, 101 F.3d 877 (2d Cir. 1996) (whether an adequate postdeprivation remedy exists is determinative of the viability of a *de facto* debarment claim under Due Process Clause).

offensive the President deems their position. Nothing in our constitutional framework permits the President to unilaterally act as the high censor of political speech or as the chief constable of the thought police.

The petition should be granted.

Respectfully submitted,

Hurricane