No. ________

IN THE

Supreme Court of the United States

ARKANSAS TIMES LP,

Petitioner,

—v.—

MARK WALDRIP, AS TRUSTEE OF THE UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state law requiring government contractors to certify that they are not participating in, and will not participate in, boycotts of Israel or Israel-controlled territories consistent with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and the First Amendment's central prohibition against content and viewpoint discrimination?

PARTIES TO THE PROCEEDING

Petitioner in this Court (Plaintiff-Appellant below) is Arkansas Times LP. Respondents in this Court (Defendants-Appellees below) are Mark Waldrip, John Goodson, Kelly Eichler, David Pryor, Stephen Broughton, C.C. Gibson, Tommy Boyer, and Steve Cox, all in their official capacities as Trustees of the University of Arkansas Board of Trustees.

RULE 29.6 DISCLOSURE STATEMENT

Arkansas Times LP has no parent corporation and no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

United States Court of Appeals (Eighth Circuit):

Arkansas Times LP v. Waldrip, No. 19-1378 (June 22, 2022) (en banc opinion)

Arkansas Times LP v. Waldrip, No. 19-1378 (Feb. 12, 2021) (initial panel opinion)

United States District Court (E.D. Ark.):

Arkansas Times LP v. Waldrip, No. 4:18-CV-00194 (Jan. 23, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Arkansas Times LP respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit below.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Eighth Circuit is reported at 37 F.4th 1386 and reproduced at Pet.App.1a–21a. The panel opinion is reported at 988 F.3d 453 and reproduced at Pet.App.22a–49a. The opinion of the United States District Court for the Eastern District of Arkansas is reported at 362 F. Supp. 3d 617 and reproduced at Pet.App.50a–66a.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2022. Pet.App.2a. By an order dated August 31, 2022, this Court extended the time within which to file any petition for a writ of certiorari due on September 20, 2022, by thirty days, to October 20, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances."

Ark. Code Ann. § 25-1-501 *et seq.*

The full text of Ark. Code Ann. § 25-1-501 *et seq.* is reproduced at Pet.App.102a–109a.

STATEMENT OF THE CASE

I. Statutory Background

In 2017, the Arkansas General Assembly passed Act 710 (the "Act"), Ark. Code Ann. § 25-1-501 *et seq*. (West 2017), which requires government contractors to certify that they are not participating, and will not participate, in boycotts of Israel. The Act became effective on August 3, 2017.

The Act provides in relevant part:

> (a) Except as provided under subsection (b) of this section, a public entity shall not:
>
> (1) Enter into a contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel;

. . .

> (b) This section does not apply to:
>
> (1) A company that fails to meet the requirements under subdivision (a)(1) of this section but offers to provide the goods or services for at least twenty percent (20%) less than the lowest certifying business; or

(2) Contracts with a total potential value of less than one thousand dollars ($1,000).

Ark. Code Ann. § 25-1-503 (Pet.App.105a–106a).

The Act defines "boycott Israel" and "boycott of Israel" to mean: "[E]ngaging in refusals to deal, terminating business activities or other actions that are intended to limit commercial relations with Israel, persons or entities that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner." *Id.* § 25-1-502(1)(A)(i) (Pet.App.103a–104a).

II. Factual Background

Petitioner Arkansas Times LP ("Arkansas Times") is an Arkansas limited partnership. Pet.App.91a.[1] It publishes the *Arkansas Times*, a newspaper of general circulation in Arkansas, as well as other special-interest publications. Pet.App.95a Alan Leveritt is the CEO and a principal of Arkansas Times, and publisher of the namesake newspaper. *Id.* For many years, the Arkansas Times has regularly contracted with Pulaski Technical College ("Pulaski Tech") to run Pulaski Tech's paid advertisements in its newspaper and other publications. *Id.*

Respondents are members of the University of Arkansas Board of Trustees ("UABT"). Pet.App.91a–92a. Pulaski Tech became part of the University of Arkansas system on February 1, 2017. Pet.App.91a. The UABT is the governing body of all components of

[1] Given the case's procedural posture, the well-pleaded factual allegations of Petitioner's complaint are taken as true.

the University of Arkansas System and has the authority to enter into, delegate, or direct others to enter into contracts for goods or services on behalf of the University of Arkansas and all the colleges in its system. *Id.* After February 1, 2017, the Arkansas Times contracted with UABT to run advertisements for Pulaski Tech. Pet.App.95a.

In October 2018, the Arkansas Times and the UABT were preparing to enter into new contracts for Pulaski Tech's advertising in the newspaper. *Id.* Pulaski Tech's Director of Purchasing and Inventory, acting on behalf of the UABT, informed Mr. Leveritt that he would have to sign a certification stating that the Arkansas Times is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel. Pet.App.95a–96a. The UABT informed Mr. Leveritt that absent this certification, it would refuse to contract with the Arkansas Times for any additional advertising. Pet.App.96a. Mr. Leveritt, as CEO of the Arkansas Times, declined to sign the certification. *Id.* The Arkansas Times refuses to enter into an advertising contract with UABT that is conditioned on the unconstitutional suppression and compulsion of protected speech under the First Amendment. *Id.* The Arkansas Times is unwilling to accept a 20% reduction in payment by UABT for its advertising services. Pet.App.97a.

The Arkansas Times is willing and able to enter into new or renewed advertising contracts for the College, but refuses to sign the required anti-boycott certification. Pet.App.96a. The UABT has refused to enter into numerous advertising contracts with the Arkansas Times, each of which would have been for an amount in excess of $1,000, because the Arkansas Times refuses to sign the anti-boycott certification.

Pet.App.97a. In view of its long contractual history with Pulaski Tech, the Arkansas Times reasonably expected that it would be awarded additional advertising contracts in the future. *Id.*

The Arkansas Times' refusal to sign the anti-boycott certification means that it will not receive new contracts for Pulaski Tech advertisements as long as the Act remains in force. Pet.App.96a. The refusal of the Arkansas Times to sign the anti-boycott certification has no bearing on its ability or effectiveness in publishing advertisements for Pulaski Tech. *Id.*

III. Proceedings Below

A. The District Court Decision

On December 11, 2018, the Arkansas Times brought this lawsuit for declaratory and injunctive relief and sought a preliminary injunction. Pet.App.89a. The Arkansas Times argued that the Act's certification requirement violates the First Amendment, both facially and as applied, because it restricts participation in political boycotts, targets protected expression on the basis of its subject matter and viewpoint, and compels speech. Pet.App.97a–99a.

The district court denied the Arkansas Times' motion for preliminary injunction and dismissed the suit. Pet.App.50a–66a. The court held that the Arkansas Times has standing to challenge the Act because it has lost contracts as a result of its refusal to comply with the Act's certification requirement. Pet.App.55a–57a. But the court concluded that the Act does not violate the First Amendment. Construing the Act to regulate only a contractor's "purchasing activities with respect to Israel," the court held that

the refusal to purchase goods or services as part of a boycott is not protected by the First Amendment. Pet.App.59a–61a. In the alternative, the court stated that, even if *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), established First Amendment protection for boycotts, such protection is limited to boycotts vindicating a domestic statutory or constitutional interest. Pet.App.62a–65a.

B. The Panel Decision

A divided panel of the Eighth Circuit reversed. Pet.App.22a–49a. The panel held that the statute's definition of "boycott of Israel"—"engaging in refusals to deal, terminating business activities or other actions that are intended to limit commercial relations with Israel," Ark. Code Ann. § 25-1-502(1)(A)(i)—encompasses pure speech and association that supports or promotes a boycott of Israel. Pet.App.40a–41a. The panel concluded that, because the Act requires contractors to disavow participation in these indisputably protected First Amendment activities, it impermissibly regulates private speech outside the scope of government-funded work. Pet.App.42a. Dissenting, Judge Kobes argued that the statutory phrase "other actions" should be construed to apply only to "commercial activities" that reduce the contractor's "business interactions with Israel in a discriminatory way," and that the Act should be upheld on this ground. Pet.App.43a.

C. The En Banc Decision

The Eighth Circuit granted en banc rehearing. On June 22, 2022, the en banc court affirmed the district court's order denying the Arkansas Times'

motion for a preliminary injunction and dismissing the case. Pet.App.1a–21a.

The court of appeals stated that "[t]he basic dispute in this case is whether 'boycotting Israel' only covers unexpressive commercial conduct, or whether it also prohibits protected expressive conduct." Pet.App.5a. It contrasted this Court's decisions in *Claiborne Hardware*, which reversed a state tort judgment against participants in an NAACP-organized consumer boycott in Port Gibson, Mississippi, and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), which upheld a law requiring educational institutions that receive federal funds to afford military recruiters access to their campuses on equal terms with other recruiters. Pet.App.5a–7a.

According to the Eighth Circuit, "*Claiborne* only discussed protecting expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott." Pet.App.7a–8a. It therefore deemed *Claiborne Hardware* inapplicable to boycott participation, and held that direct participation in a boycott is not protected by the First Amendment—even where, as here, the state has singled out boycotts on a specific topic, and expressing a specific viewpoint, for prohibition. *Id.*

The court reasoned that under *FAIR*, a person's conduct is protected by the First Amendment only if "a neutral observer would *understand* that they're expressing an idea," regardless of whether they "*intended* to express an idea." Pet.App.7a. The court concluded that the conscientious refusals at the heart of a boycott are not constitutionally protected, because a reasonable observer would not infer any expression

from an individual's refusal to purchase consumer goods or services as part of a boycott campaign, absent explanatory speech. Pet.App.7a, 11a.

The court proceeded to address whether the Act prohibits solely "non-expressive commercial decisions," or whether it also restricts "protected boycott-related activity." Pet.App.8a. Disagreeing with the panel, it concluded that the statute's "other actions" provision, like its provisions prohibiting "engaging in refusals to deal" and "terminating business activities," "relate[s] solely to commercial activities." Pet.App.10a. It held that "[b]ecause those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment." Pet.App.11a. The fact that the Act singles out boycotts against Israel on the basis of their content and viewpoint did not alter the court's assessment.[2]

Dissenting, Judge Kelly argued that the Act's "other actions" provision unconstitutionally restricts expressive activity. She explained that "[a]n examination of the Act as a whole reveals that the legislature intended to prohibit commercial and expressive behavior," and that "the Act implicates the First Amendment rights of speech, association, and petition recognized to be constitutionally protected boycott activity." Pet.App.14a–15a (citing *Claiborne Hardware*, 458 U.S. at 911–12; *Jordahl v. Brnovich*,

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[2] The court also held that the Act's certification requirement did not raise compelled speech concerns, because "[a] factual disclosure of this kind, aimed at verifying compliance with unexpressive conduct-based regulations, is not the kind of compelled speech prohibited by the First Amendment." Pet.App.12a.

336 F. Supp. 3d 1016, 1041–43 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018)). She also noted that the Act's sixth codified legislative finding expresses the legislature's intent "to avoid contracting with anyone who supports or promotes [prohibited boycott] activity." Pet.App.16a–17a & n.6. Having determined that the Act "encompasses more than 'purely commercial, non-expressive conduct,'" Pet.App.18a, Judge Kelly concluded that it unconstitutionally prohibits the Arkansas Times from engaging in expressive activity "outside the scope of the contractual relationship 'on its own time and dime,'" Pet.App.20a (quoting *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.* (*AOSI*), 570 U.S. 205, 218 (2013)).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari for three reasons. *First*, this Court's intervention is necessary to correct the en banc Eighth Circuit's radical departure from *Claiborne Hardware*—one of this Court's "most significant" First Amendment precedents, *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000) (Scalia, J., dissenting from denial of certiorari)—as well as the lower court's disregard for the long line of precedent presumptively prohibiting content and viewpoint discrimination. *Claiborne Hardware* characterized the NAACP-led boycott in that case as a "constitutionally protected assembl[y]," as well a form of "expression on public issues." 458 U.S. at 888, 913. It has long stood for the principle that states cannot suppress politically motivated consumer boycotts. By contrast, the majority below erroneously concluded that *Claiborne Hardware* merely protects

speech and association accompanying a boycott, rather than the boycott itself.

This rule gives policymakers free rein to selectively penalize boycotts that express disfavored messages, as Arkansas did here. Because the law at issue here targets political boycotts on the basis of their anti-Israel content and viewpoint, it is more constitutionally suspect than the generally applicable tort addressed in *Claiborne Hardware*. Permitting a state to single out specific boycott campaigns for suppression contravenes the well-established principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Chi. Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

Second, the opinion below creates judicial uncertainty. Numerous federal district courts have applied *Claiborne Hardware* to hold that anti-boycott laws like the one at issue here violate the First Amendment. In each of those cases, however, the legislatures subsequently amended the challenged statutes to exempt the plaintiffs and moot the cases before the appellate courts could address the merits. The Eighth Circuit's opinion directly conflicts with these authorities. Awaiting further percolation would not bring this issue into any sharper focus, and risks substantial chilling of First Amendment protected activity in the meantime.

Finally, this case addresses a question of national importance, as Respondents themselves recognized in their petition for en banc rehearing. Pet.App.72a. Dozens of states have enacted copycat laws requiring government contractors to certify that they are not participating in boycotts of Israel or

Israel-controlled territories. And states are now introducing and enacting bills targeting a variety of politically motivated consumer boycotts, including those directed at energy companies, firearms manufacturers, mining, timber, agriculture interests, and other groups favored by state legislators. Without this Court's guidance, anti-boycott legislation will continue to proliferate under a cloud of constitutional uncertainty.

I. The opinion below, upholding a content- and viewpoint-based restriction on a politically motivated consumer boycott, conflicts directly with this Court's decision in *Claiborne Hardware*, as well as a legion of precedents requiring content neutrality.

A consumer boycott is, at its heart, a collective decision to shun particular product or service "to show displeasure with the manufacturer, seller, or provider." *Boycott*, Black's Law Dictionary (11th ed. 2019). It is an exercise of core First Amendment rights of assembly, association, and expression. It is also an enduring form of collective protest dating to the nation's founding. In *Claiborne Hardware*, this Court held that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott." 458 U.S. at 914. When a state singles out particular boycotts for special penalties, as Arkansas has done here, it not only infringes the right to boycott—it also transgresses the First Amendment's core prohibition on content and viewpoint discrimination.

Yet the Eighth Circuit held below that "the purchasing decisions at the heart of a boycott" enjoy

no First Amendment protection at all. Pet.App.7a–8a, 11a. Under its rationale, states would be free to outlaw participation in disfavored boycott campaigns—whether targeted at companies that support Israel, Saudi Arabia, Planned Parenthood, or the National Rifle Association. This rule—allowing states to pick and choose which acts of political expression and association to prohibit depending on whether government officials favor or disfavor the messages expressed—is impossible to reconcile with *Claiborne Hardware* or this Court's many decisions requiring content neutrality.

The opinion below erroneously held that "*Claiborne* only discussed protecting expressive activities *accompanying* a boycott." Pet.App.7a–8a. The Eighth Circuit therefore ignored *Claiborne Hardware* and instead applied *FAIR*, holding that the collective purchasing decisions at the heart of a politically motivated consumer boycott can be regulated because the meaning of any individual purchasing decision is not evident to observers absent explanatory speech. But *FAIR,* which concerned a law requiring educational institutions that receive federal funding to provide equal access to military recruiters, does not even purport to deny First Amendment protection to protest marches, sit-ins, or consumer boycotts—all historically significant forms of mass protest that require context, including explanatory speech, to be legible to nonparticipants.

Absent banners, placards, and chants, a parade is just a group of people walking together; sitting at a lunch counter or in some other public place has no obvious significance without an explanation. But a content- and viewpoint-discriminatory law requiring government contractors to certify that they will not

participate in marches or sit-ins on specific topics would plainly violate the First Amendment. As this Court recognized in *Claiborne Hardware*, boycotts—like marches and sit-ins—are protected by the First Amendment even though they require words to explain their significance. When a state singles out boycotts on specific hot-button political issues (like "boycotts of Israel") for special penalties, its actions are plainly targeted at the content of what the boycott communicates. A restriction on boycotts of Israel is therefore properly subject to the same strict scrutiny that would apply were the state to selectively penalize marches or sit-ins protesting Israel. The Eighth Circuit's holding to the contrary conflicts with a long line of this Court's precedents recognizing that content discrimination is presumptively unconstitutional—from *Boos v. Barry*, 485 U.S. 312, 321 (1988), to *Texas v. Johnson*, 491 U.S. 397, 411–12 (1989), to *Reed v. Town of Gilbert,* 376 U.S. 155, 163 (2015).

A. ***Claiborne Hardware*** recognized that the First Amendment protects participation in politically motivated consumer boycotts, not just speech and association supporting a boycott.

In *Claiborne Hardware*, this Court recognized that the First Amendment protects politically motivated consumer boycotts—not merely the speech and association accompanying the boycott, as the court below held. The case concerned an NAACP-led boycott of white-owned businesses in Port Gibson, Mississippi to protest racial segregation and discrimination. 458 U.S. at 889. The boycotters refused to deal with those businesses until the government, the businesses, and society more broadly

met the boycotters' demands. *See id.* at 899–900. The boycott was supported by speeches, public meetings, and nonviolent picketing. *See id.* at 902–04. The boycott effort also included individual instances of violence and threats of violence. *See id.* at 904–06.

Merchants targeted by the boycott sued the boycott organizers and participants, seeking to recover business losses and to enjoin future boycott activity. *Id.* at 889–90. A Mississippi chancellor held that the boycott constituted a tort of malicious interference with business relations, and found that it violated state anti-boycott and antitrust laws. *Id.* at 891–92. On appeal, the Mississippi Supreme Court rejected the statutory claims, but "concluded that the entire boycott was unlawful" under the common-law tort theory because, it asserted, the boycott participants "had *agreed* to use force, violence, and 'threats' to effectuate the boycott." *Id.* at 895.[3]

This Court unanimously reversed. It held that the Port Gibson boycott was a "constitutionally protected assembl[y]," involving a "host of voluntary decisions by free citizens," rather than an "unlawful conspirac[y]." *Id.* at 888. Observing that "[t]he black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect," the Court stated that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Id.* at 907 (quoting *Citizens Against Rent*

[3] Mississippi's anti-boycott statute was eventually declared unconstitutional pursuant to a settlement agreement. *Echols v. Parker*, 909 F.2d 795, 797 (5th Cir. 1990).

Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981)). Through such "collective effort," the Court explained, "individuals can make their views known, when, individually, their voices would be faint or lost." *Id.* at 907–08 (quoting *Citizens Against Rent Control*, 454 U.S. at 294). While acknowledging that "[t]here are . . . some activities, legal if engaged in by one, yet illegal if performed in concert with others," the Court held that participation in the Port Gibson boycott—a collective act of "political expression"—was "not one of them." *Id.* at 908 (quoting *Citizens Against Rent Control*, 454 U.S. at 296).

Analogizing the boycott to a protest march, the Court reasoned that such collective actions implicate "the rights of free speech, free assembly, and freedom to petition for a redress of grievances." *Id.* at 909 (citing *Edwards v. South Carolina*, 327 U.S. 229 (1963)). The Court noted that "[s]peech itself also was used to further the aims of the boycott," including through "public address" and "personal solicitation" urging nonparticipants "to join the common cause," as well as "social pressure and the 'threat' of social ostracism" against holdouts. *Id.* at 909–10. "In sum," the Court concluded, "the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.' Through exercise of these First Amendment rights, [the boycotters] sought to bring about political, social, and economic change." *Id.* at 911 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

"The presence of protected activity, however, [did] not end the relevant constitutional inquiry." *Id.* at 912. Recognizing "the strong governmental interest

in certain forms of economic regulation," the Court held that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." *Id.* at 912 & n.47 (citing *United States v. O'Brien*, 391 U.S. 367, 376–66 (1968)). Thus, the Court stated that the First Amendment does not protect "economic" boycotts—including business entities that "'associate' to suppress competition," "[u]nfair trade practices," and "[s]econdary boycotts and picketing by labor unions"—or boycotts designed "to secure aims that are themselves prohibited by a valid state law." *Id.* at 912, 915 n.49 (citations omitted).

But the Court did "not find a comparable right to prohibit peaceful political activity such as that found in the [Port Gibson] boycott." *Id.* at 913. To the contrary, the Court reaffirmed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (internal quotation marks and citation omitted). And it concluded that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914 & n.48 (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964)).

With these principles in mind, the Court held that a "careful limitation on damages liability" at tort had to be imposed to accommodate "the important First Amendment interests at issue" in the Port Gibson boycott. *Id.* at 918. As the Court explained:

> Petitioners *withheld their patronage* from the white establishment of Claiborne

> County to challenge a political and economic system that had denied them basic rights of dignity and equality . . . . While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of *nonviolent protected activity*.

Id. at 918 (emphases added). The Court accordingly repudiated the Mississippi chancellor's "view that voluntary participation in the boycott was a sufficient basis on which to impose liability." *Id.* at 921 (approving the Mississippi Supreme Court's rejection of this theory).

This Court also held that it had "a special obligation . . . to examine critically the basis on which liability was imposed" by the Mississippi Supreme Court, because "a nonviolent, politically motivated boycott. . . . is constitutionally protected." *Id.* at 915. The Court rejected the Mississippi Supreme Court's conclusion that the use of violence or threats rendered the entire boycott unlawful, reasoning that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920. Such guilt by association "would present 'a real danger that legitimate political expression or association would be impaired.'" *Id.* at 919 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). Rather, "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Id.* at 920. Because the chancellor's findings did not establish that the rank-and-file boycott participants "authorized, ratified, or even discussed" the use of threats or violence to

enforce the boycott, the First Amendment precluded liability for these petitioners. *Id.* at 924.

The Court also faulted the Mississippi Supreme Court for failing to distinguish between damages resulting from unlawful threats or violence, on the one hand, and the business losses incurred as a result of peaceful boycott participation, on the other. Observing that many "business losses were not proximately caused by the violence and threats of violence found to be present" in the boycott, the Court held that the Mississippi Supreme Court's decision impermissibly sought "to compensate [the boycotted businesses] for the *direct consequences* of nonviolent, constitutionally protected activity"—that is, the boycott itself. *Id.* at 922–23 (emphasis added). The Court accordingly dismissed the claims against the rank-and-file boycott participants and store watchers, while allowing that those who engaged in violence or threats of violence—the only elements of the boycott that were not constitutionally protected—could be held liable for that conduct. *Id.* at 926. It also held that liability could not be imposed against NAACP Field Secretary and activist Charles Evers "for . . . his active participation in the boycott itself." *Id.*[4]

In short, *Claiborne Hardware* held that politically motivated consumer boycotts, like protest marches, are protected by the First Amendment—so much so that the First Amendment prohibited even

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[4] The Court went on to hold that Evers and the NAACP could not be held liable for Evers' speeches urging compliance with the boycott, and rhetorically threatening to "break [the] damn neck" of anyone who broke the boycott, because his speeches did not incite violence, and there was no evidence that either Evers or the NAACP authorized, directed, or ratified unlawful conduct. *See Claiborne Hardware*, 458 U.S. at 927–32.

the application of general tort liability on those who participated in the Port Gibson boycott. The Court's unanimous holding was not (as the Eighth Circuit reasoned) limited to those who spoke in support of the boycott, but extended to all boycott participants who did not engage in violence or threats.

B. This Court's subsequent decision in *FTC v. Superior Court Trial Lawyers Association* confirms that *Claiborne Hardware* protects boycott participation.

This Court's subsequent decision in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), reaffirms *Claiborne Hardware*'s central holding. There, the FTC charged defense lawyers who boycotted Criminal Justice Act assignments until they received increased compensation with engaging in an "unfair method of competition" in violation of the Federal Trade Commission Act. *Id.* at 418–20.

The defense lawyers argued that their boycott was protected under *Claiborne Hardware*, but the Court explained that the *Claiborne Hardware* boycott "differ[ed] in a decisive respect. Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves." *Id.* at 426. By contrast, the defense lawyers' "immediate objective was to increase the price that they would be paid for their services." *Id.* at 427. The Court concluded that "[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself." *Id.* at 427 & n.11 (citing *Claiborne Hardware*, 458 U.S. at 914–15).

Superior Court Trial Lawyers Association thus reaffirmed *Claiborne Hardware*'s fundamental

distinction between "economic boycotts," which are subject to rational government regulation, and "'peaceful, political activity such as that found in the [Mississippi] boycott,'" which is "entitled to constitutional protection." *Id.* at 428 & n.12 (alteration in original) (quoting *Claiborne Hardware*, 458 U.S. at 912); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("A group boycott or refusal to deal for political purposes may be speech, *NAACP v. Claiborne Hardware Co.*, 458 U.S., 886, 912–15 (1982), though a similar boycott for purposes of maintaining a cartel is not." (parallel citation omitted)).

This distinction would have been irrelevant if *Claiborne Hardware* had not established that the First Amendment protects participation in political boycotts. All parties in *Superior Court Trial Lawyers Association* agreed that the First Amendment protects speech in support of a boycott, regardless of whether the boycott itself is "political" or "economic" in nature.[5] The distinction between "political" and "economic" boycotts mattered only because the Court was asked to determine whether *Claiborne Hardware*'s protection for direct boycott participation applied to the defense lawyers' boycott. The Court concluded

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[5] The Court stated that "[i]t is, of course clear that the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation—like similar activities in *Claiborne Hardware*—were activities that were fully protected by the First Amendment. But nothing in the FTC's order would curtail such activities." *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 426. Rather, the FTC's order prohibited "a concerted refusal by CJA lawyers to accept any further assignment until they receive an increase in their compensation." *Id.*

that, although "political" boycotts deserve special First Amendment protection under *Claiborne Hardware*, "economic" boycotts do not.

C. *Claiborne Hardware*'s recognition of First Amendment protection for political boycotts accords with history and tradition.

Claiborne Hardware's unanimous recognition that political boycotts are protected by the First Amendment is consistent with this nation's history and tradition. Politically motivated consumer boycotts have been a distinctive form of collective association and expression since the Founding. Indeed, the Revolution itself was galvanized by a series of consumer boycotts—then known as nonimportation and nonconsumption agreements—protesting British policies. *See, e.g.*, Matthew Porterfield, *State & Local Policy Initiatives in Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 28–29 (1999). Although critics "contended that the nonimportation associations were unlawful even when their activities were entirely peaceable," American leaders insisted "that 'every body of English freemen' possessed an 'undeniable constitutional right' to boycott 'if they think it necessary for their preservation.'" James Gray Pope, *Republican Moments: The Role of Direct Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 333 (1990) (quoting Letter from Christopher Gadsden to Peter Timothy (Oct. 26, 1769), in *The Letters of Freeman, Etc.: Essays on the Nonimportation*

Movement in South Carolina 57, 67 (W. Drayton ed. 1771) (R. Weir ed. 1977)).[6]

As tensions mounted, Parliament passed the Massachusetts Government Act of 1774, which chastised the colonists over the nonimportation and nonconsumption associations; Parliament alleged that the Americans were "abusing their authorization 'to assemble together' by treating 'upon matters of the most general concern' (meaning telling Parliament how to run the Empire) and passing 'many dangerous and unwarrantable resolves.'" *Id.* at 330 (quoting Massachusetts Government Act, 14 Geo. 3, ch. 45, § 7 (Eng. 1774)). The Continental Congress responded by declaring the right of the people "peaceably to assemble, consider of their grievances, and petition the king." *Id.* (quoting Declaration of Rights, 14 October 1774, *Journal of the Proceedings of the First Congress Held at Philadelphia Sept. 5, 1774*, at 62 (1774)). Those words laid the groundwork for the First Amendment. Thus, "the legal justifications for" the colonial boycotts of British goods "were intimately

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[6] John Dickinson—a prominent Founder and Framer, known as the "Penman of the Revolution" for his influential *Letters from a Pennsylvania Farmer*, similarly argued that, "[i]f respectful petitions were ignored . . . 'then that kind of opposition becomes justifiable, which can be made without breaking the laws, or disturbing the public peace,' namely 'withholding from Great-Britain, all the advantages she has been used to receive from us.'" *Id.* at 331 (quoting J. Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* 31–35 (1903)). Another patriot, John Mackenzie, asserted that "the [nonimportation] 'association assumes no other right' than the individual right to withhold patronage." *Id.* at 332 n.199 (quoting Letter by a Member of the General Committee (John Mackenzie) (Sept. 28, 1769), in *Letters of Freeman* 33, 38).

bound up with the development of the right of the people peaceably to assemble." *Id.* at 329.

Politically motivated consumer boycotts have been ubiquitous ever since. In the period between the Revolutionary and Civil Wars, opponents of slavery boycotted merchants who sold slave-made goods. *See* A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* 140, 142 (1978). In the late 1930s, Antifascist protesters, the League of Women Shoppers, and the American Student Union boycotted Japanese silk to protest Japan's military aggression against China. *See* Lawrence B. Glickman, *Buying Power: A History of Consumer Activism in America* 225–26, 314–15 (2009). During the Civil Rights Movement, Black citizens galvanized public opposition to Jim Crow laws by boycotting segregated businesses and government services. *See id.* at 266–67. And in the 1980s, Americans expressed their opposition to apartheid by boycotting goods and services made in South Africa. *See* Robin Toner, *Shell Oil Boycott Urged; Pretoria Policy at Issue*, N.Y. Times, Jan. 10, 1986, at A7. In recent years, Americans of all political stripes have participated in consumer boycotts—from boycotts of companies that support Planned Parenthood to boycotts of companies that support the National Rifle Association. *See* Tamar Lewin, *Anti-Abortion Group Urges Boycott of Planned Parenthood Donors*, N.Y. Times, Aug. 8, 1990, at A13; Tiffany Hsu, *Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate*, N.Y. Times, Feb. 28, 2018, at A12. These acts of collective protest are an enduring part of the fabric of American public discourse.

D. The opinion below directly conflicts with *Claiborne Hardware.*

The opinion below conflicts with *Claiborne Hardware*, as well as the history and tradition recounted above. The court of appeals sought to minimize and distinguish *Claiborne Hardware* by claiming that this Court "stopped short of declaring that a 'boycott' itself—that is, the refusal to purchase from a business—is protected by the First Amendment." Pet.App.7a. The court asserted that "*Claiborne* only discussed protecting expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott." Pet.App.7a–8a.

That reading flouts *Claiborne Hardware*'s express holding that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott," 458 U.S. at 914, as well as its extension of relief to all nonviolent participants in the boycott, not merely to those who spoke while boycotting. By exempting politically motivated consumer boycotts from First Amendment protection entirely, the opinion below gives states a blank check to selectively penalize boycotts that express disfavored messages—precisely what Arkansas did here. And it contradicts *Claiborne Hardware*'s holding that allowing the business owners to recover business losses resulting from the boycott would impermissibly "compensate [the boycotted businesses] for the direct consequences of nonviolent, constitutionally protected activity." *Id.* at 923.

The Eighth Circuit suggested that *Claiborne Hardware*'s references to the "elements of the [Port

Gibson] boycott" and the "peaceful political activity . . . found *in the boycott*" implied a distinction between unprotected boycott participation and protected speech supporting the boycott. Pet.App.6a, 7a (emphasis added by the Eighth Circuit). While it is true that *Claiborne Hardware* distinguished between constitutionally protected and unprotected elements of the Port Gibson boycott, that distinction turned on the difference between nonviolent participation (protected) and violence or threats of violence (unprotected). *See* 458 U.S. at 918 ("While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity."). Nowhere in *Claiborne Hardware* did the Court even suggest a constitutional distinction between the *speech* accompanying the Port Gibson boycott and the boycotters' collective refusal to patronize the boycotted stores. The Eighth Circuit simply ignored this Court's many statements establishing that the collective decision to withhold patronage, the defining element of any politically motivated consumer boycott, is protected under the First Amendment.

E. The opinion below erroneously applies *FAIR*'s symbolic conduct test to an exercise of the constitutional right to assembly.

Against this implausibly narrow reading of *Claiborne Hardware*, the opinion below juxtaposes a dangerously broad reading of this Court's decision in *FAIR*—one that would deprive boycotts of any First Amendment protection and open the door to content and viewpoint discrimination against boycotts that express disfavored messages.

FAIR rejected law schools' First Amendment challenge to the Solomon Amendment, which requires educational institutions that receive federal funds to allow military recruiters equal access to on-campus recruiting. 547 U.S. at 55. The Court reasoned that the government may regulate conduct that is not inherently expressive, such as affording equal access to recruiters, without triggering heightened First Amendment scrutiny. *Id.* at 65–66. Although the law schools' conduct was politically motivated—they sought to express disapproval of the military's exclusion of gay and lesbian servicemembers by denying military recruiters access to their facilities—the Court observed that "the point of requiring military interviews to be conducted on the undergraduate campus [i.e., outside the law school campus] is not 'overwhelmingly apparent,'" and would presumably go unnoticed absent some explanation from the law schools about what they were doing and why they were doing it. *Id.* at 66.

The Court found the need for such "explanatory speech" to articulate the law schools' message to be "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under *O'Brien*." *Id.* (citing *O'Brien*, 391 U.S. at 376). If explanatory speech were sufficient to make any conduct inherently expressive under *O'Brien*, the Court remarked, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* "For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, [courts] would have to apply *O'Brien* to determine whether the Tax Code violates the First

Amendment. Neither *O'Brien* nor its progeny supports such stuff." *Id.*

The Eighth Circuit reasoned that a politically motivated consumer boycott is similarly not protected, "[b]ecause those commercial decisions are invisible to observers unless explained." Pet.App.11a. Under this logic, protest activity receives First Amendment protection *only if* it satisfies *FAIR*'s test for determining whether conduct is inherently symbolic. But protest marches, sit-ins, consumer boycotts, and other historically significant forms of collective protest are protected regardless of *O'Brien*. *See Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 428–29 (separately analyzing whether the *Claiborne Hardware* or *O'Brien* doctrines applied to the defense lawyers' boycott). As this Court recognized in *Claiborne Hardware*, such collective actions are "protected by the rights of free speech, free assembly, and freedom to petition for redress of grievances." 458 U.S. at 909 (citing *Edwards*, 327 U.S. 229). They do not rely solely on *O'Brien*'s protection for individual symbolic conduct.

Under the Eighth Circuit's reasoning, however, courts must parse the individual elements of collective actions to determine whether each component in isolation is inherently expressive. As discussed above, walking and sitting in restaurants are not inherently expressive activities, but that has never justified denying them First Amendment protection. It is well-established that protest marches and parades are "a form of expression, not just motion." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995); *see also Edwards*, 327 U.S. at 235–36 (describing a protest march as an exercise of First and Fourteenth Amendment rights "in their most pristine

and classic form"). "The protected expression that inheres in a parade is not limited to the banners and songs," but extends to the parade itself as a longstanding and widely recognized form of collective expression. *Hurley*, 515 U.S. at 568 (collecting cases).

Like marches, boycotts derive their expressive power from people's "collective effort" to "make their views known when, individually, their voices would be faint or lost." *Claiborne Hardware*, 458 U.S. at 907–08 (quoting *Citizens Against Rent Control*, 454 U.S. at 295). Like marches, boycotts are routinely accompanied by other expressive activities—including picketing, petitioning, and editorializing—that translate the message of collective action into articulable demands. *See id.* at 907. And, like marches, boycotts are "deeply embedded in the American political process." *Id.* at 907 (quoting *Citizens Against Rent Control*, 454 U.S. at 294). Although an individual's decision not to purchase a particular product or service may not be inherently expressive in isolation, such decisions acquire expressive force when performed collectively in the context of a politically motivated consumer boycott. That is what this Court meant when it said in *Claiborne Hardware* that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." 458 U.S. at 908–09 (citation omitted).

Accordingly, just as the government's authority to regulate the use of the streets and sidewalks does not entail the power to arbitrarily—much less discriminatorily—suppress a protest march, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969), "[t]he right of the States to regulate economic activity could not justify a complete

prohibition against a nonviolent, politically motivated boycott," *Claiborne Hardware*, 458 U.S. at 914. By holding that an act of collective expression does not warrant any First Amendment protection, the Eighth Circuit's decision conflicts not only with *Claiborne Hardware*, but with a long line of decisions protecting marches, sit-ins, and other forms of collective protest against invidious government interference.

F. The opinion below gives states a blank check to selectively penalize boycotts that express disfavored messages, as Arkansas did here, and thereby conflicts with the First Amendment's requirement of content neutrality.

The decision below also conflicts with the central principle of this Court's First Amendment jurisprudence: the requirement of content neutrality. *See Reed*, 576 U.S. at 163. For that reason, this is an even easier First Amendment case than *Claiborne Hardware*. There, this Court unanimously held that the First Amendment limits the application of the common-law tort of interference with business relations—a content-neutral law of general applicability—to politically motivated consumer boycotts. Here, the law is neither neutral nor generally applicable, but expressly directed at boycotts of a single country, with no plausible justification other than legislative hostility to the message expressed by such boycotts. It is as if Alabama had responded to the Montgomery bus boycott by enacting a law that exclusively prohibited boycotts of municipal buses. *Cf. Flowers*, 377 U.S. at 307 (describing as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might,

without more, in some circumstances violate a valid state law").

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95 (holding that an ordinance restricting "non-labor" picketing was content based); *see also Johnson*, 491 U.S. at 412 (holding that Texas' flag-desecration statute was unconstitutionally content based as applied to flag burning in political protest); *Boos*, 485 U.S. at 321 (holding that a law restricting picketing in front of foreign embassies was content based because its application "depend[ed] entirely on whether [the protesters'] picket signs are critical of the foreign government"). Arkansas' law is content and viewpoint based. It penalizes boycotts of businesses operating in Israel or Israel-controlled territories, but spares boycotts targeting any other country or entity, including "reverse boycotts" targeting companies that boycott Israel or that otherwise refuse to do business in Israel or Israeli-controlled territories.[7] It therefore restricts boycotts on the basis of both their subject matter (Israel) and viewpoint (protest of Israel).

Content- and viewpoint-based regulations are presumptively invalid and must satisfy the most exacting scrutiny. *Reed*, 576 U.S. at 163. But having concluded that the First Amendment does not protect boycott participation, the Eighth Circuit declined even to consider whether the Act is tailored to a substantial government interest. If the Eighth Circuit's opinion

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[7] *See, e.g.*, Roz Rothstein & Roberta Seid, *Boycott the Boycotters*, Jewish Journal (Sept. 15, 2010), https://jewishjournal.com/opinion/82996/.

stands, government officials will be free to single out boycotts that express disfavored messages for special penalties, as Arkansas did here. As such, the decision conflicts with *Mosley*, *Boos*, *Johnson*, *Reed*, and a host of other cases requiring that content- and viewpoint-based laws satisfy strict scrutiny.

II. The opinion below conflicts with numerous federal district court decisions from other circuits addressing substantially similar laws.

While there are no other circuit court opinions reviewing laws penalizing boycotts of Israel, the opinion below stands in stark contrast to numerous federal district court decisions enjoining copycat laws.

In *Koontz v. Watson*, a substitute math teacher who heeds the Mennonite Church's call to boycott products associated with Israel's occupation of Palestine, was barred from participating in Kansas' Math and Science Partnership Program because she would not sign the anti-boycott certification. 283 F. Supp. 3d at 1014. The U.S. District Court for the District of Kansas preliminarily enjoined the law, holding that "[t]he conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in *Claiborne* was protected," and that the law impermissibly sought "to undermine the message of those participating in a boycott of Israel." *Id.* at 1022. The case was voluntarily dismissed after Kansas amended its law to exempt sole proprietors and small businesses. *See* Agreed Order of Dismissal, *Koontz v. Watson*, Case No. 5:17-cv-4099-DDC-KGS (D. Kan. Jun. 29, 2018), ECF No. 33; H.B. 2482, 2018 Legis. Sess. (Kan. 2018).

In *Jordahl v. Brnovich*, an attorney moved by the Evangelical Lutheran Church in America's call to boycott products from Israeli settlements in the West Bank, was unable to renew contracts to provide legal representation to incarcerated people in Arizona, because he refused to sign the anti-boycott certification. 336 F. Supp. 3d at 1028–29. The U.S. District Court for the District of Arizona issued a preliminary injunction against the law, holding that "[t]he type of collective action targeted by the Act specifically implicates the rights of assembly and association that Americans and Arizonans use 'to bring about political, social, and economic change.'" *Id.* at 1043. (quoting *Claiborne Hardware*, 458 U.S. at 911)). Again, the case became moot on appeal after Arizona amended the law to exempt sole proprietors and small businesses. *See Jordahl*, 789 F. App'x 589 (9th Cir. 2020).

In *Amawi v. Pflugerville Independent School District*, numerous individuals were told that they had to certify that they would not boycott Israel to contract with the government. 373 F. Supp. 3d 717, 731–35 (W.D. Tex. 2019), *vacated as moot sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020). The U.S. District Court for the Western District of Texas issued a preliminary injunction, holding that "boycotts are 'deeply embedded in the American political process'—so embedded not because 'refusing to buy things' is of paramount importance, but because in boycotts, the 'elements of speech, assembly, association, and petition . . . 'are inseparable' and are magnified by the 'banding together' of individuals []to 'make their voices heard.'" *Id.* at 744 (omission in original) (quoting *Claiborne Hardware*, 458 U.S. at 907, 911). The court also held that the law imposed a content-

based restriction on expression "because it single[d] out speech about Israel, not any other country," and that it imposed a viewpoint-based restriction because it targeted boycotts critical of Israel. *Id.* at 748. Here, too, the case became moot on appeal after Texas amended the law to exclude sole proprietors and small businesses. *Amawi*, 956 F.3d at 821.

And in *Martin v. Wrigley*, a journalist was forced to cancel her keynote address at a public university conference after she refused to sign the anti-boycott certification. 540 F. Supp. 3d 1220, 1223–24 (N.D. Ga. 2021), *appeal docketed*, No. 22-12827 (11th Cir. Aug. 19, 2022). The U.S. District Court for the Northern District of Georgia denied the state's motion to dismiss, holding that the law "prohibit[ed] inherently expressive conduct protected by the First Amendment, burden[ed] Martin's right to free speech, and [was] not narrowly tailored to further a substantial state interest." *Id.* at 1231. The court also held that the law was content discriminatory because its application was "premised entirely upon the motive behind the contractor's decision" not to buy products or services from companies operating in Israel or Israel-controlled territories. *Id.* at 1230. Here, as well, Georgia amended the law to exclude sole proprietors and small businesses, and the case was dismissed for mootness. *See* Order, *Martin v. Wrigley*, No. 1:20-cv-596 (MHC) (N.D. Ga. Jul. 20, 2022), ECF No. 76.

The opinion below—holding that the First Amendment does not provide any protection to politically motivated consumer boycotts, even when they are singled out by the state on the basis of their content and viewpoint—cannot be reconciled with these decisions. Further percolation is unnecessary to address the validity of a content- and viewpoint-based

regulation penalizing disfavored political boycotts. Without this Court's guidance, these widespread laws will continue to chill political assembly and expression on an issue of significant public concern. There is no reason to reserve that guidance for another day.

III. The opinion below will have far-reaching consequences on an issue of exceptional importance.

As Respondents themselves recognized in their petition for en banc rehearing, "this case . . . presents a question of profound importance both for courts throughout [the Eighth Circuit] and nationally." Pet.App.72a. From the Revolutionary Era boycotts of British goods to the Montgomery bus boycott to the boycott of apartheid South Africa, boycotts have always been a prominent feature in American politics. For more than three decades after *Claiborne Hardware*, neither the states nor the federal government sought to suppress politically motivated consumer boycotts.

All that changed in 2015 when South Carolina enacted this country's first law penalizing boycotts of Israel. *See Recent Legislation*, 129 Harv. L. Rev. 2029 (2016). Now, twenty-eight states have similar laws requiring contractors to certify that they do not participate in proscribed boycotts of Israel.[8]

Numerous state legislatures have introduced, and some have enacted, bills that would extend this tactic to other disfavored boycotts. These laws and bills require government contractors to certify that they are not participating in boycotts of energy

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[8] Palestine Legal, *Statistics* (last updated Aug. 12, 2022), https://legislation.palestinelegal.org/#statistics.

companies, Ky. Rev. Stat. § 41.480 (West 2022), firearms manufacturers, Tex. Code Ann. § 2274 (West 2021), and other industries or interests selected for legislative favor, *see* H.B. 737, 66th Legis., 2nd Reg. Sess. (Idaho 2022) (requiring government contractor to certify that they do not boycott mining, energy production, agriculture, or commercial timber companies). The Eighth Circuit's clearly erroneous decision invites still further efforts along these lines, and will chill protected First Amendment activity by all who fear litigation, liability, or the loss of a government contract.

This dramatic increase in legislative activity calls out for this Court's intervention to make clear that the First Amendment prohibits states from singling out particular politically motivated consumer boycotts for punishment. Otherwise, public confusion will erode settled expectations about what the First Amendment protects, silencing many while empowering policymakers to suppress political boycotts that express disfavored messages. This tacit abrogation of *Claiborne Hardware* would deal a serious blow to the First Amendment freedoms of expression, assembly, and petition that Americans have always exercised to make their voices heard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the U.S. Court of Appeal for the Eighth Circuit should be granted.

Respectfully submitted,

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OCTOBER 20, 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 19-1378

Arkansas Times LP,

Plaintiff - Appellant,

v.

Mark Waldrip, in his official capacity as Trustee of the University of Arkansas Board of Trustees; John Goodson, in his official capacity as Trustee of the University of Arkansas Board of Trustees; Kelly Eichler, in her official capacity as Trustee of the University of Arkansas Board of Trustees; David Pryor, in his official capacity as Trustee of the University of Arkansas Board of Trustees; Stephen Broughton, in his official capacity as Trustee of the University of Arkansas Board of Trustees; C C Gibson, in his official capacity as Trustee of the University of Arkansas Board of Trustees; Tommy Boyer, in his official capacity as Trustee of the University of Arkansas Board of Trustees; Steve Cox, in his official capacity as Trustee of the University of Arkansas Board of Trustees,

Defendants - Appellees,

First Amendment Scholars; Council on American Islamic Relations; American Friends Service Committee; Israel Palestine Mission Network of the Presbyterian Church; A Jewish Voice for Pease Inc.; U.S. Campaign for Palestinian Rights; U.S.

Palestinian Community Network; U.S. Campaign for the Academic and Cultural Boycott of Israel; Friends of Sabeel North America; Institute for Free Speech; Foundation for Individual Rights in Education; Palestine Legal; The Center for Constitutional Rights; Bahia Amawi National Lawyers Guild; Project South; J Street; Truah: The Rabbinic Call for Human Rights; 15 Media Organizations; Reporters Committee for Freedom of the Press; Lawrence Glickman

Amici on Behalf of Appellant(s)

Michael C. Dorf; Eugene Volokh; Zachor Legal Institute; Andrew Koppelman; Shurat Hadin-Israel Law Center; American Jewish Committee; Christians United for Israel; Israeli-American Coalition for Action; The Israel Project; Agudath Israel of America; The Union of Orthodox Jewish Congregations of America; Standwithus; State of Arizona; State of Florida; State of Georgia; State of Indiana; State of Missouri; State of Ohio; State of Texas; State of Utah; State of West Virginia; The Louis D. Brandeis Center Inc.; The American Center of Law and Justice; State of Idaho; State of Kansas; State of Kentucky; State of Montana; State of Oklahoma; State of South Carolina; State of South Dakota; Eleven Constitutional and Business Law Professors

Amici on Behalf of Appellee(s)

Appeal from United States District Court for the Eastern District of Arkansas - Little Rock

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Submitted: September 21, 2021
Filed: June 22, 2022

Before SMITH, Chief Judge, LOKEN, GRUENDER, BENTON, SHEPHERD, KELLY, ERICKSON, GRASZ, STRAS, and KOBES, Circuit Judges, En Banc

KOBES, Circuit Judge

In 2017, Arkansas passed a law requiring public contracts to include a certification that the contractor will not "boycott" Israel. Arkansas Times sued, arguing that the law violates the First Amendment. The district court[1] dismissed the action. Sitting en banc, we conclude that the certification requirement does not violate the First Amendment and affirm.

I.

Arkansas Act 710 prohibits state entities from contracting with private companies unless the contract includes a certification that the company "is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." Ark. Code Ann. § 25-1-503(a)(1). The statute defines "boycott of Israel" as "engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner." Ark. Code Ann. § 25-1-502(1)(A)(i). The Act exempts contracts if a company provides goods or services for at least 20% less than the lowest certifying

[1] The Honorable Brian S. Miller, United States District Judge for the Eastern District of Arkansas.

business, or if the contract has a total potential value of less than $1,000. Ark. Code. Ann. § 25-1-503(b).

Arkansas Times, a newspaper, contracts with University of Arkansas-Pulaski Technical College. It sued for a preliminary injunction, arguing that the certification violates the First Amendment in two ways: (1) by placing an unconstitutional condition on the award of government contracts; and (2) by compelling speech. The district court dismissed the suit, holding that economic boycotts do not implicate the First Amendment because they are neither speech nor expressive conduct.

A divided panel of this court reversed, holding that the certification requirement was unconstitutional. The panel interpreted the language prohibiting "other actions intended to limit commercial relations with Israel" to include protected speech. We granted rehearing en banc.

II.

We review the grant of a motion to dismiss *de novo* and accept the complaint's factual allegations as true, granting all reasonable inferences to the non-moving party. *Park Irmat Drug Corp. v. Express Scripts Holding Co.*, 911 F.3d 505, 512 (8th Cir. 2018). We review the denial of a preliminary injunction for abuse of discretion. *Phyllis Schlafly Revocable Tr. v. Cori*, 924 F.3d 1004, 1009 (8th Cir. 2019).

A.

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech . . . [is] secured to all persons

by the Fourteenth Amendment against abridgment by a state."). This includes nonverbal conduct that is intended to be, and likely to be understood as, expressing a particularized message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

These constitutional protections don't just prevent outright prohibitions on speech; they also prohibit the government from imposing unconstitutional conditions that chill or deter speech. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The government imposes an unconstitutional condition when it requires someone to give up a constitutional right in exchange for a government benefit. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). This includes making government benefits contingent on endorsing a particular message or agreeing not to engage in protected speech. *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 309 (2012) ("The government may not . . . compel the endorsement of ideas that it approves."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

The basic dispute in this case is whether "boycotting Israel" only covers unexpressive commercial conduct, or whether it also prohibits protected expressive conduct. Arkansas Times points us to *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which held that expressive conduct accompanying a boycott is protected by the First Amendment. The State, on the other hand, argues that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006) controls. There, the Supreme Court held that First Amendment

protection does not extend to non-expressive conduct intended to convey a political message.

Claiborne involved a boycott of white business owners organized by the N.A.A.C.P. 458 U.S. at 889. The participants refused to purchase anything from white-owned businesses and encouraged support for the boycott with speeches, marches, and picketing. *Id.* at 902–03. But some participants took it further, committing acts of violence against those who opposed the boycott. *Id.* at 903–06. White business owners sued to recover physical and economic losses caused by the boycott and enjoin future boycotts. *Id.* at 889. So the question before the Court was whether the activities in support of the boycott, both peaceful and violent, were protected. *Id.* at 907. The Court first noted that the boycott "took many forms," including speeches, picketing, marches, and pamphleteering. *Id.* at 907, 909–11. It then held that the boycott "clearly involved constitutionally protected activity" and that "[e]ach of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 911, 907. The Court held that the violence and threats that accompanied the boycott were "beyond the pale of constitutional protection." *Id.* at 933. So *Claiborne* instructs us to examine the *elements* of a boycott to determine which activities are constitutionally protected.

FAIR, on the other hand, dealt with a different issue—whether the First Amendment protects non-expressive conduct. 547 U.S. at 65–66. In *FAIR*, several law schools banned military recruiters on campus in protest of the military's "don't ask, don't tell" policy. *Id.* at 51. Congress then passed the Solomon Amendment, which conditioned some federal

funding on allowing military recruiters on campus. *Id.* at 52. The law schools sued, arguing that this limited their speech by prohibiting expressive conduct—i.e., banning military recruitment on campus. *Id.* at 54. The Court disagreed, holding that the law schools' refusal to allow military recruiters did not implicate the First Amendment because such a refusal was "not inherently expressive." *Id.* at 66. The Court made clear that the question wasn't whether someone *intended* to express an idea, but whether a neutral observer would *understand* that they're expressing an idea. *Id.* In that case, an observer would have no way of knowing the law school was expressing disapproval of the military without accompanying explanatory speech. *Id.* An observer could assume that the law school's interview rooms were full, or that the recruiters preferred to interview off-campus. *Id.* But the Court made clear that only the schools' *non-expressive* conduct was unprotected. *Id.* at 60. The law schools were still free to express their disapproval of "don't ask, don't tell" in other ways, such as posting signs and organizing student protests. *Id.*

Arkansas Times argues that Act 710 runs afoul of *Claiborne*, which it suggests held that boycotts are protected under the First Amendment. But the Court stopped short of declaring that a "boycott" itself—that is, the refusal to purchase from a business—is protected by the First Amendment. Instead, it acknowledged that "States have broad power to regulate economic activity," but held that this power does not allow for a prohibition on "peaceful political activity such as that found *in the boycott* in this case." 458 U.S. at 913 (emphasis added). Contrary to Arkansas Times's argument, *Claiborne* only discussed protecting expressive activities *accompanying* a

boycott, rather than the purchasing decisions at the heart of a boycott.

So this case turns on what Act 710 bans: protected boycott-related activity, or non-expressive commercial decisions? To answer that, we look to the text of the statute.

B.

We review questions of statutory interpretation *de novo*. *Robinett v. Shelby Cnty. Healthcare Corp.*, 895 F.3d 582, 588 (8th Cir. 2018). When interpreting a state statute that has not been addressed by that state's highest court, "it is our responsibility to predict, as best we can, how that court would decide the issue." *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994). In doing so, we apply the state's rules of statutory construction. *See In re Dittmaier*, 806 F.3d 987, 989 (8th Cir. 2015).

Act 710 prohibits public entities from contracting with companies unless they certify that they won't boycott Israel. Ark. Code Ann. § 25-1-503(a)(1). It defines "boycott of Israel" as (1) "engaging in refusals to deal"; (2) "terminating business activities"; or (3) taking "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories," "in a discriminatory manner." Ark. Code. Ann. § 25-1-502(1)(A)(I).

The third category is in dispute. Arkansas Times argues that the catch-all "other actions" language includes constitutionally protected activity that is intended to limit commercial relations with Israel. This interpretation implicates protected speech, such as picketing outside a business that has commercial

relations with Israel. The State, on the other hand, argues that the statute only prohibits non- expressive commercial decisions, which are not protected under the First Amendment. Arkansas's standard rules of statutory interpretation support the State's reading.

Arkansas law directs us to examine the Act in its entirety and interpret it according to legislative intent. *See Ark. Tobacco Control Bd. v. Santa Fe Nat. Tobacco Co.*, 199 S.W.3d 656, 659 (Ark. 2004) ("The basic rule of statutory construction to which all interpretive guides must yield is to give effect to the intent of the Legislature."). In doing so, we must look at the language, legislative history, and subject matter involved. *Id.*

When considering the constitutionality of a statute, Arkansas's "first and most important rule of statutory interpretation is that a statute is presumed constitutional and all doubts are resolved in favor of constitutionality." *Booker v. State*, 984 S.W.2d 16, 21 (Ark. 1998). The party challenging a statute has the burden of showing that the statute infringes on a constitutional right. *Id.* Because Arkansas Times's interpretation would make the statute unconstitutional, this canon weighs heavily in favor of the State's interpretation.

Other tools of statutory interpretation also support the State's reading. Under *ejusdem generis*, "when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Edwards v. Campbell*, 370 S.W.3d 250, 253 (Ark. 2010) (citation omitted). For example, a statute authorizing a school "to employ and pay

> teachers, janitors, and other employes of the schools" would authorize the school board to hire a principal, but not a lawyer. ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 201 (2012) (cleaned up). This principle applies here. The more specific phrases before the "other actions" provision—"engaging in refusals to deal" and "terminating business activities"—relate solely to commercial activities. It follows that the more general phrase, "other actions," does too.

To the extent that there's any remaining ambiguity, the Act's legislative intent resolves it in favor of the State's interpretation. The legislature's motive for passing Act 710 was primarily economic. It repeatedly expressed concern for the commercial viability of companies that refuse to do business with Israel and the effect this could have on the state's finances. *See* Ark. Code Ann. § 25-1-501. For example, § 25-1-501(3) points out that companies that "make discriminatory decisions on the basis of national origin . . . impair [their] commercial soundness." And § 25-1-501(5) says these companies are "unduly risky contracting partner[s] or vehicle[s] for investment" because they don't have access to Israeli innovations.[2]

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[2] We acknowledge that one of the Act's six legislative findings suggests a broader purpose. Ark. Code. Ann. § 25-1-501(6) states that Arkansas seeks to "implement the United States Congress's announced policy of . . . support[ing] the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel." (quoting H.R. 825, 114th Cong. (2015)). But this language is borrowed from Congress. And even if it supports Arkansas Times's interpretation, it is outweighed by the other findings, which evidence a purely economic purpose. *See* § 25-1-501(1), (3)–(5). On balance, the legislative findings, read in light of the

These findings suggest a purely commercial purpose for the statute and weigh strongly in favor of upholding the statute.

Under Arkansas's canons of statutory interpretation, we think the Arkansas Supreme Court would read Act 710 as prohibiting purely commercial, non-expressive conduct. It does not ban Arkansas Times from publicly criticizing Israel, or even protesting the statute itself. It only prohibits economic decisions that discriminate against Israel. Because those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment.

III.

Arkansas Times also argues that the statute unconstitutionally compels speech by requiring it to include a certification that the company will not "boycott" Israel for the duration of the contract. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The compelled speech doctrine prohibits the government from making someone disseminate a political or ideological message. *See id.* at 713 (holding that a state cannot require a citizen to display the state motto, "Live Free or Die," on their license plate); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional a law requiring students to salute the flag every day).

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statute, evidence a legislative intent to regulate *commercial* conduct, not political speech.

"Compelled statements of fact . . . like compelled statements of opinion, are subject to First Amendment scrutiny." *FAIR*, 547 U.S. at 62. But the certification requirement here is markedly different from other compelled speech cases. Although it requires contractors to agree to a contract provision they would otherwise not include, it does not require them to publicly endorse or disseminate a message. Instead, the certification targets the noncommunicative aspect of the contractors' conduct—unexpressive commercial choices. The "speech" aspect—signing the certification—is incidental to the regulation of conduct. *See id.* at 62 ("There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse. The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct.").

We are not aware of any cases where a court has held that a certification requirement concerning unprotected, nondiscriminatory conduct is unconstitutionally compelled speech. A factual disclosure of this kind, aimed at verifying compliance with unexpressive conduct-based regulations, is not the kind of compelled speech prohibited by the First Amendment.

IV.

The judgment of the district court is affirmed.

KELLY, Circuit Judge, dissenting.

At issue in this case is the meaning of the third prong of the statutory definition of "boycott of Israel"[3]: "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories," "in a discriminatory manner." Ark. Code Ann. § 25-1-502(1)(A)(i). As the court tacitly acknowledges, this provision of the statute is ambiguous. See Simpson v. Cavalry SPV I, LLC, 440 S.W.3d 335, 338 (Ark. 2014) ("A statute is considered ambiguous if it is open to more than one construction."). The State argues that the phrase "other actions" is limited to commercial conduct, which it describes as non-expressive and not protected by the First Amendment. But the State's narrow reading of the definition of "boycott of Israel" is not the only reasonable interpretation. Actions "intended to limit commercial relations with Israel" could encompass a much broader array of conduct than only commercial conduct, at least some of which would be protected by the First Amendment. One could imagine a company posting anti-Israel signs, donating to causes that promote a boycott of Israel, encouraging others to boycott Israel, or even publicly criticizing the Act with the intent to "limit commercial relations with Israel" as a general matter. And any of that conduct would arguably fall within the prohibition.

To resolve this ambiguity, we should interpret the statute according to legislative intent by looking at the Act in its entirety. Under Arkansas law, "[t]he basic rule of statutory construction to which all other

[3] "Boycott Israel" has the same definition under the Act as "boycott of Israel."

interpretive guides must yield is to give effect to the intent of the legislature." Thomas v. State, 864 S.W.2d 835, 836 (Ark. 1993). "Where the language of a statute is plain and unambiguous, [the] court determines legislative intent from the ordinary meaning of the language used." Simpson, 440 S.W.3d at 337. "When a statute is ambiguous, [we] must interpret it according to legislative intent and our review becomes an examination of the whole act." Id. at 338. We "review[] the act in its entirety" and "reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part." Id. And our task includes consideration of "the legislative history, the language, and the subject matter involved." Id.

The court acknowledges that we should construe the Act in light of legislative intent. Yet it begins not with an analysis of the text but with a presumption of constitutionality, a canon it says "weighs heavily" in the State's favor. The Supreme Court of Arkansas "will construe a statute with a limiting interpretation to preserve the constitutionality of the statute." Ark. Hearing Instrument Dispenser Bd. v. Vance, 197 S.W.3d 495, 499 (Ark. 2004). However, it will only do so "provided that such a construction does not contravene the intent of the legislature." Id.; see also Booker v. State, 984 S.W.2d 16, 21 (Ark. 1998) ("[I]t must be remembered that all other interpretative guides must give effect to the intent of the legislature." (citing Thomas, 864 S.W.2d at 836)). In my view, it is incorrect under Arkansas principles of statutory interpretation to apply this canon *before* conducting a close reading of the Act as a whole to determine the legislative intent.

An examination of the Act as a whole reveals that the legislature intended to prohibit commercial and

expressive behavior. Section 502(1)(B) permits the State to consider specified "type[s] of evidence" to determine whether "a company is participating in a boycott of Israel." This evidence includes the company's own "statement that it is participating in boycotts of Israel." And evidence that a government contractor "has taken the boycott action"[4] "at the request, in compliance with, or in furtherance of calls for a boycott of Israel"—that is, in association with others—can be considered to enforce the Act. Thus, at a minimum, the State can consider a company's speech and association with others to determine whether that company is participating in a "boycott of Israel." And the State may refuse to enter into a contract with the company on that basis, thereby limiting what a company may say or do in support of such a boycott.[5] In this way, the Act implicates the First Amendment rights of speech, assembly, association, and petition recognized to be constitutionally protected boycott activity. See N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 911–12 (1982); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1041–43 (D. Ariz. 2018), vacated as moot, 789 F. App'x 589 (9th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018).

That the term "other actions" captures constitutionally protected activity is further supported by the Act's codified legislative findings.

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[4] The Act does not define "boycott action."

[5] In contrast, "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything." Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 60 (2006).

Such findings establish the intent of the legislature for purposes of interpreting state statutes. See, e.g., McDaniel v. Spencer, 457 S.W.3d 641, 650 (Ark. 2015) (treating the "legislative- findings portion of the [a]ct" as indicative of the issue that the "General Assembly was concerned" about when it enacted the statute); Gallas v. Alexander, 263 S.W.3d 494, 509 (Ark. 2007) (holding that a "review of the [a]ct reveals that the General Assembly clearly and specifically set forth its findings and purpose for the [a]ct" in a section titled "Legislative findings," and relying on those findings to determine the legislature's "clear intent"); Manning v. State, 956 S.W.2d 184, 186 (Ark. 1997) ("The General Assembly declares its intent and purposes of the [a]ct in [a section] entitled, 'General legislative findings, declarations, and intent.'"); Ark. Charcoal Co. v. Ark. Pub. Serv. Comm'n, 773 S.W.2d 427, 429 (Ark. 1989) (relying on the "broad policy objectives articulated by the General Assembly in its legislative findings" to determine the purposes of the statute). In this Act, it is true some of the legislative findings codified at § 25-1-501 mention only economic concerns. But the sixth codified legislative finding specifically states that Arkansas seeks to implement the policy of "examining a company's *promotion* or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts." Ark. Code Ann. § 25-1-501(6) (emphasis added). It further states that Arkansas "supports the divestment of state assets from companies that *support or promote* actions to boycott, divest from, or sanction Israel." Id. (emphasis added). The court's decision to "balance" the legislative findings and determine that the sixth is "outweighed by the other findings" reads out one of the legislature's explicit purposes in enacting the statute. By the

express terms of the Act, Arkansas seeks not only to avoid contracting with companies that refuse to do business with Israel. It also seeks to avoid contracting with anyone who supports or promotes such activity.[6]

Nor does the plain language of the certification at issue in this case limit its reach to commercial conduct. The legislature did not include a form certification, so the State drafted its own version for

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[6] I also note that the Act uses the singular word "boycott" throughout the legislative findings. While "boycott of Israel" and "boycott Israel" are defined in the Act, the word "boycott" is not. Compare Ark. Code Ann. § 25-1-501(1) ("[b]oycotts and related tactics"), id. § 25-1-501(2) ("boycott activity"), and id. § 25-1-501(6) ("unsanctioned boycotts"), with id. § 25-1-502(1)(a)(i) (defining "boycott Israel" and "boycott of Israel"). Under Arkansas law, "[i]n the absence of a statutory definition for a term, we resort to the plain meaning of a term." State v. Jernigan, 385 S.W.3d 776, 781 (Ark. 2011). According to dictionaries from the time the Act was enacted, the plain meaning of "boycott" includes an inherent element of expression. See, e.g., *Boycott*, Oxford English Dictionary (3d ed. 2008) ("To withdraw from commercial or social interaction with (a group, nation, person, etc.) as a protest or punishment; to refuse to handle or buy (goods), or refuse to participate in (an event, meeting, etc.), as a protest."); *Boycott*, Merriam-Webster Dictionary (11th ed. 2003) ("to engage in a concerted refusal to have dealings with (a person, a store, an organization, etc.) usually to express disapproval or to force acceptance of certain conditions"); *Boycott*, Cambridge Advanced Learner's Dictionary (4th ed. 2013) ("to refuse to buy a product or take part in an activity as a way of expressing strong disapproval"); *Boycott*, American Heritage Dictionary (5th ed. 2011) ("To abstain from or act together in abstaining from using, buying, dealing with, or participating in as an expression of protest or disfavor or as a means of coercion."). These definitions guide my reading of the legislative findings and suggest that the Act's intent was to restrict both economic refusals to deal *and* a government contractor's ability to support or promote boycotts of Israel through its speech.

Arkansas Times to sign, agreeing and certifying that, as a contractor, it will not engage in a "boycott of Israel" for the duration of its contract. See Appendix A. But the certification does not define or even cite to the statutory definition of "boycott of Israel." Rather, a contractor is left to determine on its own what activity is or is not prohibited. And relying on the ordinary meaning of "boycott," see supra note 4, a contractor could readily conclude that it was prohibited from both refusing to engage commercially with Israel *and* supporting or promoting a boycott of Israel or Israeli goods. At a minimum, it seems highly unlikely that a lay-contractor unfamiliar with this lawsuit would give the phrase "boycott of Israel" the same limited definition the State now urges and the court accepts. Instead, any contractor who does not want to risk violating the terms of its contract might very well refrain even from activity that is constitutionally protected.

Considering the Act as a whole—as Arkansas principles of statutory interpretation instruct—it is my view that the term "other actions" in the definition of "boycott Israel" and "boycott of Israel" encompasses more than "purely commercial, non-expressive conduct." The court's reliance on the interpretative canon of *ejusdem generis* does not convince me otherwise. Under Arkansas law, this tool of statutory construction applies only where "there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires." McKinney v. Robbins, 892 S.W.2d 502, 503 (Ark. 1995). Arkansas law counsels that canons of construction like *ejusdem generis* "are only aids to judicial interpretation, and they will not be applied . . . *to defeat legislative intent and purpose*." Seiz Co. v.

Ark. State Highway & Transp. Dep't, 324 S.W.3d 336, 342 (Ark. 2009) (emphasis in original). In my view, the Act as a whole reflects the legislature's intent to include more than purely commercial conduct in its definition of "boycott of Israel," and the canon of *ejusdem generis* cannot be used to defeat that intent.

The Act requires government contractors, as a condition of contracting with Arkansas, to agree not to engage in economic refusals to deal with Israel or to support or promote boycotts of Israel. Because the Act restricts government contractors' ability to participate in speech and other protected, boycott-associated activities recognized by the Supreme Court in Claiborne, see 458 U.S. at 915, it imposes a condition on government contractors that implicates their First Amendment rights.

Of course, determining that the Act's condition for contracting with Arkansas implicates the First Amendment would not end the analysis because not all such conditions are unconstitutional. See, e.g., Rust v. Sullivan, 500 U.S. 173, 198 (1991). A funding condition unconstitutionally burdens First Amendment rights where it "seek[s] to leverage funding to regulate speech outside the contours of the program itself." Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc. (AOSI), 570 U.S. 205, 214–15 (2013); see also FCC v. League of Women Voters of Cal., 468 U.S. 364, 399–401 (1984). Supporting or promoting boycotts of Israel is constitutionally protected under Claiborne, yet the Act requires government contractors to abstain from such constitutionally protected activity. Without any explanation of how this condition seeks to "define the limits of [the State's] spending program," it can be viewed only as seeking to "leverage funding to regulate speech

outside the contours of the program itself." AOSI, 570 U.S. at 214–15. Thus, I would conclude that the Act prohibits the contractor from engaging in boycott activity outside the scope of the contractual relationship "on its own time and dime." Id. at 218. Such a restriction violates the First Amendment.[7]

I respectfully dissent.

[7] Because I would find that the Act violates the First Amendment, I would not reach the question of whether the certification in this case constitutes compelled speech. I disagree with the court that the Act covers only unexpressive commercial choices, so I disagree that the certification requires only a "factual disclosure" intended to "verify[] compliance with unexpressive conduct-based regulations."

APPENDIX A

RESTRICTION OF BOYCOTT OF ISRAEL CERTIFICATION

Pursuant to Arkansas Code Annotated §25-1-503, a public entity **shall not** enter into a contract valued at $1,000 or greater with a company unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel.

By signing below, the Contractor agrees and certifies that they do not currently boycott Israel, and will not boycott Israel during any time in which they are entering into, or while in contract, with the University of Arkansas - Pulaski Technical College. If at any time after signing this certification the contractor decides to engage in a boycott of Israel, they must notify the University of Arkansas – Pulaski Technical College in writing.

If the Contractor currently boycotts Israel, or engages in the boycott of Israel while in contract with the University of Arkansas – Pulaski Technical College, see Arkansas Code Annotated §25-1-503.

Description of product or service	
Contractor name	

Contractor Signature: ______________________ Date: ____________
Signature must be hand written, in ink

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 19-1378

ARKANSAS TIMES LP,

Plaintiff - Appellant,

v.

MARK WALDRIP, in his official capacity as Trustee of the University of Arkansas Board of Trustees; JOHN GOODSON, in his official capacity as Trustee of the University of Arkansas Board of Trustees; KELLY EICHLER, in her official capacity as Trustee of the University of Arkansas Board of Trustees; DAVID PRYOR, in his official capacity Trustee of the University of Arkansas Board of Trustees; STEPHEN BROUGHTON, in his official capacity Trustee of the University of Arkansas; C C Gibson, in his official capacity as Trustee of the University of Arkansas Board of Trustees; TOMMY BOYER, in his official capacity as Trustee of the University of Arkansas Board of Trustees; STEVE COX, in his official capacity as Trustee of the University Arkansas Board of Trustees,

Defendants - Appellees

First Amendment Scholars; Council on American Islamic Relations; American Friends Service Committee; Israel Palestine Mission Network of the Palestinian Church; A Jewish Voice for Peace Inc.; U.S. Campaign for Palestinian Rights; U.S.

Palestinian Community Network; U.S. Campaign for the Academic and Cultural Boycott of Israel; Friends of Sabeel North America; Institute for Free Speech; Foundation for Individual Rights in Education; Palestine Legal; The Center for Constitutional Rights; Bahia Amawi; National Lawyers Guild; Project South; J Street; T'ruah: The Rabbinic Call for Human Rights; 15 Media Organizations; Reporters Committee for the Freedom of the Press; Lawrence Glickman

Amici on Behalf of Appellant(s)

Michael C. Dorf; Eugene Volokh; Zachor Legal Institute; Andrew Koppelman; Shurat Hadin-Israel Law Center; American Jewish Committee; Christians United for Israel; Israel-American Coalition for Action; The Israel Project; Agudath Israel of America; The Union of Orthodox Jewish Congregations of America; Standwithus; State of Arizona; State of Florida; State of Georgia; State of Indiana; State of Missouri; State of Ohio; State of Texas; State of Utah; State of West Virginia; The Louis D. Brandeis Center Inc.; The American Center of Law and Justice

Amici on Behalf of Appellee(s)

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS – LITTLE ROCK

Submitted: January 15, 2020
Filed: February 12, 2021

Before KELLY, MELLOY, and KOBES, Circuit Judges

KELLY, Circuit Judge,

Arkansas Times LP (Arkansas Times) sued various members of the University of Arkansas Board of Trustees (UABT) in their official capacities as trustees (collectively, the Defendants) concerning Arkansas Act 710 of 2017 (the Act). Arkansas Times sought a preliminary injunction enjoining enforcement of the Act, alleging that it violates the First and Fourteenth Amendments. The Defendants, represented by the Arkansas Attorney General's Office (the State), moved to dismiss the case. The district court denied Arkansas Times's motion for a preliminary injunction and dismissed the case. Arkansas Times appeals.

I.

In 2017, Arkansas enacted Arkansas Act 710, titled "An Act to Prohibit Public Entities from Contracting with and Investing in Companies That Boycott Israel; and for Other Purposes." The Act provides, in pertinent part:

> (a) Except as provided under subsection (b) of this section, a public entity shall not:
>
> > (1) Enter into contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written

certification[1] that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel; or

(2) Engage in boycotts of Israel.

(b) This section does not apply to:

(1) A company that fails to meet the requirements under subdivision (a)(1) of this section but offers to provide the goods or services for at least (20%) less than the lowest certifying business; or

(2) Contracts with a total potential value of less than one thousand dollars ($1,000).

Ark. Code Ann. § 25-1-503 (2017).

The Act defines "boycott of Israel" and outlines evidence that may be considered to determine whether a company is engaging in a boycott of Israel:

> (1)(A)(I) "Boycott of Israel" and "boycott of Israel" means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in

[1] The Act does not provide a form certification or additional guidance as to what specific language, if any, a written certification must contain. Arkansas Times was required to sign a form prepared by the Defendants titled, "RESTRICTION OF BOYCOTT OF ISRAEL CERTIFICATION." See Appendix A.

Israeli-controlled territories, in a discriminatory manner.[2]

[. . .]

(B) A company's statement that it is participating in boycotts of Israel, or that it has taken the boycott action at the request, in compliance with, or in furtherance of calls for a boycott of Israel, can be considered by the Arkansas Development Finance Authority as a type of evidence, among others, that a company is participating in a boycott of Israel.

Id. § 25-1-502(1). Finally, for our present purposes, the Act includes codified legislative findings. Id. § 25-1-501.[3]

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[2] The Act does not define the term "in a discriminatory manner."

[3] The Act enumerates the following legislative findings:

(1) Boycotts and related tactics have become tools of economic warfare that threaten the sovereignty and security of key allies and trade partners of the United States;

(2) The State of Israel is the most prominent target of such boycott activity, which began with but has not been limited to the Arab League boycott adopted in 1945, even before Israel's declaration of independence and the reestablished national state of the Jewish people;

(3) Companies that refuse to deal with United States trade partners such as Israel, or entities that do business with or in such countries, make discriminatory decisions on the basis of

Arkansas Times operates a weekly newspaper, the Arkansas Times, as well as other publications. For many years, Arkansas Times contracted with Pulaski Technical College (Pulaski Tech), located in North Little Rock, Arkansas, to run paid advertisements for the college in Arkansas Times's publications. The college became part of the public University of Arkansas System in 2017, at which point Arkansas Times began to work with UABT, which had the authority to enter into contracts for goods or services on Pulaski Tech's behalf, to continue running paid

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national origin that impair those companies' commercial soundness;

(4) It is the public policy of the United States, as enshrined in several federal acts, to oppose boycotts against Israel, and the United States Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness;

(5) Israel in particular is known for its dynamic and innovative approach in many business sectors, and therefore a company's decision to discriminate against Israel, Israeli entities, or entities that do business with or in Israel, is an unsound business practice, making the company an unduly risky contracting partner or vehicle for investment; and

(6) Arkansas seeks to act to implement the United States Congress's announced policy of "examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel."

Id. § 25-1-501.

advertisements for the college. Arkansas Times and UABT contracted to run advertisements for Pulaski Tech through September 2018.

In October 2018, as the parties were preparing to enter into a new advertising contract for Pulaski Tech, UABT asked Arkansas Times to sign a written certification as required under the Act. Pursuant to the certification, Arkansas Times was to "agree and certify[y] that they do not currently boycott Israel, and will not boycott Israel during any time in which they are entering into, or while in contract, with [Pulaski Tech]." See Appendix A. Arkansas Times refused to sign, and as a result the parties did not renew their advertising contract. Arkansas Times then brought the present suit seeking injunctive and declaratory relief, on the grounds that the Act violates the First and Fourteenth Amendments. The district court denied Arkansas Times's motion for a preliminary injunction and granted the Defendants' motion to dismiss. The district court concluded that a boycott of Israel, as defined by the Act, is "neither speech nor inherently expressive conduct" and is thus not entitled to First Amendment protection. Arkansas Times appealed.

II.

We review de novo the district court's decision to grant a motion to dismiss, considering as true all facts alleged in the complaint and drawing all reasonable inferences in favor of the plaintiff. Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist., 813 F.3d 1124, 1129 (8th Cir. 2016). We review the denial of a preliminary

injunction for an abuse of discretion.[4] Wilson v. City of Bel-Nor, 924 F.3d 995, 999 (8th Cir. 2019).

A.

The First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I; see Gitlow v. New York, 268 U.S. 652, 666 (1925) (noting "freedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States"). Under the unconstitutional conditions doctrine, "the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr, 518 U.S. 668, 681 (1996) (cleaned up) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)). The doctrine "[r]ecogniz[es] that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental efforts that fall short of a direct prohibition against the exercise of

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[4] To resolve a motion for preliminary injunction, the district court must consider (1) the threat of irreparable harm to the movant, (2) the balance between the harm and the injury that granting the injunction would inflict on other interested parties, (3) the probability that the movant will succeed on the merits, and (4) whether the injunction is in the public interest. Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1098 (8th Cir. 2013) (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). Regarding the third factor, a movant challenging a state statute must show it is "likely to prevail on the merits." Id. (quoting Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 731–33 & n.4 (8th Cir. 2008) (en banc)).

First Amendment rights." Id. As a result, the government cannot, through funding conditions, indirectly impair the freedom of speech "which if directly attempted would be unconstitutional." Speiser v. Randall, 357 U.S. 513, 518 (1958); see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR), 547 U.S. 47, 59–60 (2006).

Arkansas Times argues[5] that the Act imposes an unconstitutional condition "by prohibiting government contractors from participating in politically-motivated consumer boycotts [of Israel]." The State does not contest that the Act imposes a condition on Arkansas Times as a government contractor. See Umbehr, 518 U.S. at 677 (applying unconstitutional conditions doctrine to independent government contractors who derive a financial benefit from contracting with the government). But it argues that the condition is permissible because boycotts of Israel, as defined by the Act, are not "inherently expressive" conduct subject to First Amendment protection.

In its challenge to the Act, Arkansas Times relies heavily on the Supreme Court's ruling in N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982). In that case, the Court considered a boycott by Black citizens of White merchants in two Mississippi counties. Id. at 888. Boycott participants purchased goods and services exclusively from Black-owned stores but also used speeches, nonviolent picketing, and pamphleting to put economic pressure on White-owned businesses. Id. at 900–01, 907–09. The boycott's "acknowledged purpose was to secure

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[5] Given our ruling, we do not address Arkansas Times's other arguments on appeal.

compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice," in part by causing "the [boycotted] merchants [to] sustain economic injury as a result of their campaign." Id. at 907, 914. Several of the merchants filed suit to recover losses caused by the boycott and to enjoin future boycott activity. Id. at 889.

The Supreme Court rejected the merchants' claims and held, in relevant part, that the "nonviolent elements of [the boycott we]re entitled to the protection of the First Amendment." Id. at 915. These nonviolent elements included "speech, assembly, association, and petition," through which the boycotters "sought to change a social order." Id. at 911–12. The boycotters' goal was to influence governmental action, and it was foreseeable that the boycott would cause merchants economic harm. Even so, the Court held that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change." Id. at 914; see Beverly Hills Foodland, Inc. v. United Food & Comm. Workers Union, Local 655, 39 F.3d 191, 197 (8th Cir. 1994). Arkansas Times asserts that a boycott of Israel is necessarily politically motivated and that any effort to restrict a government contractor's ability to participate in such a boycott is, as a result, an unconstitutional condition.

The State counters by citing to the Supreme Court's decision in FAIR. In FAIR, several law schools refused to allow military recruiters on campus in protest of the military's "don't ask, don't tell" policy, which excluded openly gay and lesbian persons from serving in the military. 547 U.S. at 66; see Telescope Media Grp. v. Lucero, 936 F.3d 740, 758 (8th Cir.

2019). The Court concluded that the law schools' refusal was not protected by the First Amendment because it was not inherently expressive conduct. The Court explained that "[t]he expressive component of a law school's actions is created not by the conduct but by the speech that accompanies it." FAIR, 547 U.S. at 66. Instead, the actions of the law schools would be expressive only if they combined their conduct with speech that explained it. Without the accompanying speech, no one would understand why they refused to allow military recruiters on campus.

The State says this case is indistinguishable from FAIR because a decision not to purchase Israeli goods, like the decision to bar military recruiters from campus, is "all but invisible absent explanatory speech." According to the State, "a boycott of Israel is [simply] not expressive conduct," and as such is not entitled to First Amendment protection. But the comparison is not an exact fit because FAIR did not concern a boycott. In FAIR, the Supreme Court addressed the Solomon Amendment, which gave universities "a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds." Id. at 58. The Court thus focused narrowly on the law schools' conduct in relation to military recruiters and never characterized it more broadly as a "boycott."[6] Here, we are faced with a statute that expressly concerns and prohibits "boycotts." See Ark. Code Ann. § 25-1-1501 et seq. (the terms "boycott Israel," "boycotts of Israel," and simply "boycott").

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[6] Indeed, the word "boycott" is never used in the opinion. See generally FAIR, 547 U.S. 47.

And the Supreme Court has reiterated since Claiborne that at least some elements of a boycott are entitled to First Amendment protection. Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411 (1990). In Trial Lawyers, a group of Criminal Justice Act (CJA) lawyers refused to accept any further assignments to represent indigent defendants until they received an increase in compensation. Id. at 426. The Federal Trade Commission (FTC) concluded that the lawyers' "coercive, concerted refusal to deal" was an illegal boycott under the antitrust laws. The FTC then entered a cease-and-desist order "to prohibit the respondents from initiating another boycott . . . whenever they become dissatisfied with the results or pace of the city's legislative process." Id. at 419–20.

In response to the CJA lawyers' argument that their conduct was constitutionally protected, the Court said it was "clear that the [lawyers'] efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials . . . were fully protected by the First Amendment." Id. at 426. The closer question was whether the FTC could prohibit their concerted refusal to accept further CJA assignments. Id. Distinguishing this boycott from the one in Claiborne, the Court held that because "the undenied objective of their boycott was an economic advantage for those who agreed to participate," the lawyers' conduct was not constitutionally protected. Id. In contrast to the politically-motivated boycott in Claiborne, through which Black Mississippians sought "equal respect and equal treatment to which they were constitutionally entitled," the CJA lawyers' "immediate objective was to increase the price that they would be paid for their services." Id. at 426–27. Thus, the Court concluded, to the extent the lawyers

refused to accept case assignments until they received a raise in their hourly rate, they had engaged in an "economic boycott" that was not afforded First Amendment protection. Id. (citing Claiborne, 548 U.S. at 914–15).

With this background, we understand that at least some—but not necessarily all—elements of a boycott are protected by the First Amendment. Thus, we must determine what the Act prohibits. Does it prohibit solely commercial activity that lacks any expressive or political value? Or does it also prohibit those elements of a boycott, such as speech and association, that we know enjoy First Amendment protection? We must answer these questions before we can determine whether the Act imposes an unconstitutional condition on companies seeking to contract with the State of Arkansas. We turn, then, to the Act itself.

B.

We review questions of statutory interpretation de novo, Am. Growers Ins. Co. v. Fed. Crop Ins. Corp., 532 F.3d 797, 803 (8th Cir. 2008), and we are bound by a state's rules of statutory interpretation when reviewing a statute of that state. See, e.g., Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 972 (8th Cir. 2009) (applying North Dakota statutory interpretation principles to North Dakota law). Under Arkansas law, "[t]he basic rule of statutory construction is to give effect to the intent of the legislature." Simpson v. Cavalry SPV I, LLC, 440 S.W.3d 335, 337 (Ark. 2014). "Where the language of a statute is plain and unambiguous, [the] court determines the legislative intent from the ordinary meaning of the language used." Id. We are to

"construe[] the statute so that no word is left void, superfluous, or insignificant," giving "meaning and effect to every word in the statute, if possible." Id. at 338. "If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, it is unnecessary to resort to the rules of statutory interpretation." Id.

Under Arkansas law "[a] statute is considered ambiguous if it is open to more than one construction." Id. "When a statute is ambiguous, [we] must interpret it according to legislative intent and [our] review becomes an examination of the whole act." Id. We "review[] the act in its entirety," and "will reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part." Id. When necessary, we also "must look at the legislative history, the language, and the subject matter involved." Id.

We begin with section 503(a)(1) of the Act. This section states that "a public entity shall not" enter into a contract with a company unless that company "is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." Ark. Code Ann. § 25-1-503(a)(1). The Act then defines "boycott of Israel" to mean[7] (1) "engaging in refusals to deal"; (2) "terminating business activities"; or (3) "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories," "in a discriminatory manner." Id. § 25-1-502(1)(A)(i). Neither party seriously disputes that the first two terms in the definition of a "boycott of Israel" are

[7] "Boycott Israel" has the same definition under the Act as "boycott of Israel."

limited to economic or commercial activities. Assuming without deciding that the Act would not run afoul of the First Amendment if it were limited to purely economic activity, our focus is on whether the term "other actions" includes activity that is constitutionally protected.

The phrase "other actions" is not defined in the Act, but it is limited by language that follows it: other actions "that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories." The State urges us to conclude that the phrase "other actions" is limited to commercial conduct, which it asserts is non-expressive and not protected by the First Amendment. But the State's narrow reading of the definition of "boycott of Israel" is not the only reasonable interpretation. Actions "intended to limit commercial relations with Israel" could encompass a much broader array of conduct than only commercial conduct, at least some of which would be protected by the First Amendment. We are not convinced, from a plain reading of the text, that the Act necessarily allows a company to post anti-Israel signs, donate to causes that promote a boycott of Israel, encourage others to boycott Israel, or even publicly criticize the Act. If a company took any of these actions with the intent to "limit commercial relations with Israel" as a general matter, that conduct would arguably fall within the prohibition.

Because the definition of "boycott Israel" is open to more than one plausible construction, it is ambiguous. To resolve this ambiguity, we consider the entire Act and use appropriate tools of statutory construction to interpret the statute consistent with its legislative intent. See Simpson, 440 S.W.3d at 338;

Curtis Lumber Co. v. La. Pac. Corp., 618 F.3d 762, 776 (8th Cir. 2010). We recognize that the district court employed *ejusdem generis*, a canon of construction that counsels "when general words follow specific words in a statutory enumeration the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words," to understand the meaning of the phrase "other actions." Hanley v. Ark. State Claims Comm'n, 970 S.W.2d 198, 201 (Ark. 1998). Applied to the Act, this canon suggests that the term "other actions" should be read narrowly to include only conduct similar in kind to the terms that precede it: "refusals to deal" and "terminating business activities." Under this reading, "other actions" would refer only to commercial activity (or inactivity) akin to not economically engaging with Israel. Notably, the State has not provided any example of the type of conduct that, under their interpretation of the Act, would fall in the "other actions" category.

But we must look to the Act as a whole to resolve the ambiguity in its meaning.[8] See Simpson, 440

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[8] The dissent suggests that we "retreat[] from [a] straight-forward analysis" by using additional tools of statutory interpretation rather than relying on *ejusdem generis* alone. But as noted above, Arkansas law requires us to review the whole Act to resolve statutory ambiguity, giving "meaning and effect to every word in the statute," and we decline to restrict our analysis when multiple tools of statutory interpretation aid our understanding. Indeed, Arkansas law counsels that canons of construction like *ejusdem generis* "are only aids to judicial interpretation, and they will not be applied when there is no ambiguity, *to defeat legislative intent and purpose*, to make general words meaningless, *or to reach a conclusion inconsistent with other rules of construction*." Seiz Co. v. Ark. State Highway

S.W.3d at 338 (explaining that, under Arkansas law, we look to the statute as a whole to interpret it according to the legislative intent). When we do, we see that it permits the State to consider specified "type[s] of evidence" to determine whether "a company is participating in a boycott of Israel." This evidence includes the company's own "statement that it is participating in boycotts of Israel." Additionally, evidence that a government contractor "has taken the boycott action"[9] in association with others (*i.e.*, "at the request, in compliance with, or in furtherance of calls for a boycott of Israel") can be considered to enforce the Act. At a minimum, therefore, a company's speech and association with others may be considered to determine whether the company is participating in a "boycott of Israel," and the State may refuse to enter into a contract with the company on that basis, thereby limiting what a company may say or do in support of such a boycott.[10] In this way, the Act implicates the First Amendment rights of speech, assembly, association, and petition recognized to be constitutionally protected boycott activity. See Claiborne, 458 U.S. at 911–12; Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1041–43 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018).

& Transp. Dep't, 324 S.W.3d 336, 342 (Ark. 2009) (second emphasis added).

[9] The Act does not define "boycott action."

[10] In contrast, "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything." FAIR, 547 U.S. at 60.

That the term "other actions" captures constitutionally protected activity is further supported by the Act's codified legislative findings. Cf. Ark. Charcoal Co. v. Ark. Pub. Serv. Comm'n, 773 S.W.2d 427, 429 (Ark. 1989) (relying on statute's general legislative findings to determine the General Assembly's intent and purposes for enacting it); Manning v. State, 956 S.W.2d 184, 186 (Ark. 1997) (same). Those findings state that Arkansas seeks to implement the policy of "examining a company's *promotion* or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts." Ark. Code Ann. § 25-1-501(6) (emphasis added). The findings further state that Arkansas "supports the divestment of state assets from companies that *support or promote* actions to boycott, divest from, or sanction Israel." Id. (emphasis added). Thus, Arkansas seeks not only to avoid contracting with companies that refuse to do business with Israel. It also seeks to avoid contracting with anyone who supports or promotes such activity.[11]

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[11] We also note that the Act uses the singular word "boycott" throughout the legislative findings. While "boycott of Israel" and "boycott Israel" are defined in the Act, the word "boycott" is not. Compare id. § 25-1-501(1) ("[b]oycotts and related tactics"), id. § 25-1-501(2) ("boycott activity"), id. § 25-1-501(6) ("unsanctioned boycotts"), with id. § 25-1-502(1)(a)(i) (defining "boycott Israel" and "boycott of Israel"). Under Arkansas law, "[i]n the absence of a statutory definition for a term, we resort to the plain meaning of a term." State v. Jernigan, 385 S.W.3d 776, 781 (Ark. 2011). According to dictionaries from the time the Act was enacted, the plain meaning of "boycott" involves an inherent element of expression. See, e.g., *Boycott*, Oxford English Dictionary (3d ed. 2008) ("To withdraw from commercial or social interaction with (a group, nation, person, etc.) as a protest or punishment; to refuse to

Finally, the facts of this case do nothing to detract from our reading of the term "other actions." The Act does not include a form certification, see supra note 1, so the Defendants drafted their own certification for Arkansas Times to sign. See Appendix A. According to the only certification form in the record, a contractor must agree and certify that it will not engage in a "boycott of Israel" for the duration of the contract. Yet the certification makes No effort to provide the Act's definition of "boycott of Israel," leaving it to the contractor to determine what activity is prohibited. Relying on the ordinary meaning of "boycott," see supra note 11, a contractor could readily conclude that it was prohibited from both refusing to economically engage with Israel *and* supporting or promoting a boycott of Israel or Israeli-goods. A contractor that does not want to risk violating the terms of its contract would likely refrain even from activity that is constitutionally protected.

Considering the Act as a whole, we conclude that the term "other actions" in the definition of "boycott

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handle or buy (goods), or refuse to participate in (an event, meeting, etc.), as a protest."); *Boycott*, Merriam-Webster Dictionary (11th ed. 2003) ("to engage in a concerted refusal to have dealings with (a person, a store, an organization, etc.) usually to express disapproval or to force acceptance of certain conditions"); *Boycott*, Cambridge Advanced Learner's Dictionary (4th ed. 2013) ("to refuse to buy a product or take part in an activity as a way of expressing strong disapproval"); *Boycott*, American Heritage Dictionary (5th ed. 2011) ("To abstain from or act together in abstaining from using, buying, dealing with, or participating in as an expression of protest or disfavor or as a means of coercion."). These definitions guide our reading of the legislative findings and suggest that the Act's intent was to restrict economic refusals to deal as well as a government contractor's ability to support or promote boycotts of Israel through its speech.

Israel" and "boycott of Israel" encompasses more than "commercial conduct" similar to refusing to deal or terminating business activities. Instead, the Act requires government contractors, as a condition of contracting with Arkansas, not to engage in economic refusals to deal with Israel *and* to limit their support and promotion of boycotts of Israel.[12] As such, the Act

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[12] The district court relied upon the doctrine of constitutional avoidance to conclude that "other actions" referred to purely commercial conduct. Constitutional avoidance is the "bedrock principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court] is to adopt the latter" out of respect for the legislature, assumed to legislate "in the light of constitutional limitations." Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec., 738 F.3d 885, 892–93 (8th Cir. 2013). But "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." Saxton v. Fed. Housing Finance Agency, 901 F.3d 954, 959 (8th Cir. 2018) (quoting Clark v. Martinez, 543 U.S. 371, 381 (2005)). When considering the whole Act, as Arkansas law requires, there is but one permissible interpretation—that the Act restricts speech in addition to economic refusals to deal with Israel.

To the extent the dissent suggests that the constitutional avoidance principle requires us to adopt the State's interpretation of the Act, we respectfully disagree. Although we begin by presuming a challenged statute is constitutional, we assess whether that statute truly is so by employing principles of statutory interpretation and "all other interpretative guides [to] give effect to the intent of the legislature." Booker v. State, 984 S.W.2d 16, 21 (Ark. 1998); see also Ark. Hearing Instrument Dispenser Bd. v. Vance, 197 S.W.3d 495, 499 (Ark. 2004) ("If we can construe a statute as constitutional, we will do so provided that such a construction does not contravene the intent of the legislature."). Having done this, we reach the conclusion that the

restricts government contractors' ability to participate in speech and other protected, boycott-associated activities recognized by the Supreme Court in Claiborne. See 458 U.S. at 915. Therefore, the Act imposes a condition on government contractors that implicates their First Amendment rights.

C.

Determining that the Act's condition for contracting with Arkansas implicates the First Amendment does not end our analysis because not all such conditions are unconstitutional. See e.g., Rust v. Sullivan, 500 U.S. 173, 198 (1991). A funding condition unconstitutionally burdens First Amendment rights where it "seek[s] to leverage funding to regulate speech outside the contours of the program itself." Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc. (AOSI), 570 U.S. 205, 214 (2013); see FCC v. League of Women Voters of Cal., 468 U.S. 364, 399–401 (1984). In response, the State asserts that because "boycotting Israel is not protected by the First Amendment," the certification is simply a truthful statement that "provide[s] the government with information." But this generalization is inconsistent with both the law and the text of the Act. Supporting or promoting boycotts of Israel is constitutionally protected under Claiborne, yet the Act requires government contractors to abstain from such constitutionally protected activity. Without any explanation of how this condition seeks to "define the limits of [the State's] spending program," it can be viewed only as seeking to "leverage funding to

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Act implicates the First Amendment rights of would-be government contractors.

regulate speech outside the contours of the program itself." AOSI, 570 U.S. at 214–15. Thus, the Act prohibits the contractor from engaging in boycott activity outside the scope of the contractual relationship "on its own time and dime." Id. at 218. Such a restriction violates the First Amendment.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

KOBES, Circuit Judge, dissenting.

Arkansas prohibits public entities from contracting with companies that boycott Israel by (1) "engaging in refusals to deal"; (2) "terminating business activities"; or (3) taking "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories," "in a discriminatory manner." Ark. Code Ann. §§ 25-1-503(a)(1), 25-1-502(1)(A)(I). The majority finds that "other actions" broadly bans constitutionally protected activities. I respectfully disagree. The provision is a catch-all for commercial activities that do not fit the first two categories, but have the same purpose—to reduce the company's business interactions with Israel in a discriminatory way. I think that is clear. To the extent it is ambiguous, I would apply a constitutionally-permissible interpretation and uphold the statute.

Under the canon of *ejusdem generis*, "when general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Edwards v. Campbell*, 370 S.W.3d 250, 253 (Ark. 2010). The principle squarely applies here. The

specific phrases before the "other actions" provision—"engaging in refusals to deal" and "terminating business activities"—relate solely to commercial activities. It follows that the more general phrase, "other actions," does too.

The majority retreats from this straightforward analysis because "the State has not provided any example of the type of conduct that, under [its] interpretation of the Act, would fall in the 'other actions' category." Maj. Op. 13. But consider the following: a company begins charging overly-inflated shipping prices for products shipped to Israel to reduce commercial relationships with the country. While this is not a refusal to deal or a termination of business activities, it is another "action . . . intended to limit commercial relations with Israel." Ark. Code Ann. § 25-1-502(1)(A)(I).

By not applying *ejusdem generis,* the court is left with an unnecessarily ambiguous clause and so turns to the entire Act, which it claims yields "but one permissible interpretation." Maj. Op. 16, n.2. Each argument in support of this "one permissible interpretation" is unpersuasive.[13]

The majority first argues that the statute regulates speech because it allows speech in support of boycotts and association with boycotters to be used

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[13] The majority criticizes use of *ejusdem generis* because the doctrine cannot be used to defeat ordinary tools of statutory construction. But its tools are (1) considering the types of evidence permitted to prove intent; (2) reading a policy statement overbroadly and inconsistently with other statements of legislative purpose; and (3) saying that the executive's enforcement of the statute makes it difficult for people to know what conduct is proscribed. I do not view any of these as ordinary tools of statutory construction.

as evidence of participation in prohibited boycotts. But "[t]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). Here, a company only engages in a boycott of Israel if its "other actions are *intended* to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories." Ark. Code Ann. § 25-1-502(1)(A)(I) (emphasis added). The better (and constitutionally permissible) understanding of the permitted use of speech here is that it may establish the element of intent. The prohibited *conduct* is still commercial.

Next, the court says that the Act's legislative findings show that "other actions" encompasses protected activity. To get there, the majority says that by stating a broader policy and desire to limit the State's commercial interactions with those who, among other things, support or promote actions to boycott Israel, the Arkansas Legislature must have taken unconstitutional steps to accomplish these goals. But states have a broad mandate to enact legislation evincing the policy choices of their citizens. We may only hold states back in achieving those goals when they do so by unconstitutional means. Nothing in the text of the operative provision itself suggests overreach (regulation of protected speech) by the Arkansas Legislature, and we should not impute an unconstitutional meaning to a statute that is benign on its face.

This interpretation of the Act's purpose is also inconsistent when considered with the other legislative findings. The findings express concern for the commercial viability of companies that refuse to

do business with Israel and the commercial effect this may have on the state's finances. For example, Section 25-1-501(3) notes that companies that "make discriminatory decisions on the basis of national origin [] impair . . . [their] commercial soundness." Section 25-1-501(5) observes that companies that discriminate against businesses in Israel are "unduly risky contracting partner[s] or vehicle[s] for investment" because they do not have access to innovation coming from the country. These statements suggest a purely commercial purpose for the statute, and if we consider legislative findings in our analysis, they weigh strongly in favor of upholding the statute.

Finally, the majority argues that the facts of the present case "do nothing to detract from [its] reading of the term 'other actions.'" Maj. Op. 15. Even if this were true, the facts similarly do not support the majority's reading. The majority argues that the certification fails to notify the contractor of what conduct is prohibited. I disagree. The certification references the statute, *see* Appendix A, and anyone interested in finding out what conduct is barred can read the definition in Section 502. Even if the majority were correct, vagueness arguments like this are only colorable under the due process clauses, and Arkansas Times did not plead that claim.[14]

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[14] "[I]mprecise laws can be attacked on their face under two different doctrines." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). While a statute may be challenged on First Amendment grounds where "impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep,'" *id.* (citation omitted), the majority does not levy that attack here. Instead, its argument more closely resembles a Fifth or Fourteenth Amendment Due Process claim

Even if I am wrong and the statute is susceptible to the majority's interpretation, we have two options: (1) use the entire Act to raise constitutional questions about "other actions"; or (2) read "other actions" consistent with *ejusdem generis* and uphold the statute. In Arkansas, "[t]he first and most important rule of statutory interpretation is that a statute is presumed constitutional and all doubts are resolved in favor of constitutionality." *Booker v. State*, 984 S.W.2d 16, 21 (Ark. 1998). To honor this principle, "[i]f it is possible to construe a statute as constitutional, we must do so." *Reinert v. State*, 71 S.W.3d 52, 54 (Ark. 2002); *see also McLane S., Inc. v. Davis*, 233 S.W.3d 674, 677 (Ark. 2006) ("All statutes are presumed constitutional, and if it is possible to construe a statute so as to pass constitutional muster, this court will do so."). That is plainly possible here, and I would "construe [the] statute with a limiting interpretation to preserve [its] constitutionality." *Arkansas Hearing Instrument Dispenser Bd. v. Vance*, 197 S.W.3d 495, 499 (Ark. 2004).[15]

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that the statute is "impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.*

[15] The majority's initial finding of ambiguity alone may be fatal to its argument. The majority suggests that constitutional avoidance is a canon of last resort, but that is premised on federal principles of statutory interpretation, and "we are bound by a state's rules of statutory interpretation when reviewing a statute of that state." Maj. Op. 11 (citation omitted). *Booker* suggests Arkansas prioritizes constitutional avoidance more than federal courts. 984 S.W.2d at 21. In any case, even if constitutional avoidance is a canon of last resort—it applies here.

The court's effort to stretch the term "other actions" is unavailing. The easiest and most natural reading of the statute is constrained: "other actions" is similar to the purely commercial terms preceding and modifying it. I would interpret it accordingly and affirm the district court. I respectfully dissent.

APPENDIX A

RESTRICTION OF BOYCOTT OF ISRAEL CERTIFICATION

Pursuant to Arkansas Code Annotated §25-1-503, a public entity **shall not** enter into a contract valued at $1,000 or greater with a company unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel.

By signing below, the Contractor agrees and certifies that they do not currently boycott Israel, and will not boycott Israel during any time in which they are entering into, or while in contract, with the University of Arkansas - Pulaski Technical College. If at any time after signing this certification the contractor decides to engage in a boycott of Israel, they must notify the University of Arkansas – Pulaski Technical College in writing.

If the Contractor currently boycotts Israel, or engages in the boycott of Israel while in contract with the University of Arkansas – Pulaski Technical College, see Arkansas Code Annotated §25-1-503.

Description of product or service	
Contractor name	

Contractor Signature: ______________________________ Date: ______________
Signature must be hand written, in ink

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

Case No. 4:18-CV-00914 BSM

ARKANSAS TIMES LP,

Plaintiffs

v.

MARK WALDRIP, et al.,

Defendants.

January 23, 2019

ORDER

I routinely instruct jurors to follow my instructions on the law, even if they thought the law was different or think it should be different. This case presents an occasion in which I must follow the same principle, which is that I have a duty to follow the law even though, before researching the issue, I thought the law required a different outcome than the one ultimately reached.

Plaintiff Arkansas Times LP's motion for a preliminary injunction [Doc. No. 2] is denied, and defendants' motion to dismiss [Doc. No. 15] is granted. Defendants' motion for leave to file a reply brief [Doc. No. 22] is denied as moot.

I. BACKGROUND

The Arkansas Times challenges the constitutionality of Act 710, a state statute requiring that companies doing business with state entities certify that they are not boycotting Israel. The relevant facts are as follows:

Act 710 prohibits state entities from entering into contracts with companies for goods or services unless those companies certify in writing that they are not currently engaged in, nor will they engage in for the duration of their contract, a "boycott of Israel." Ark. Code Ann. § 25-1-503(a). It defines a "boycott of Israel" to mean:

> [E]ngaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner.

Id. § 25-1-502(1)(A)(i). If a company fails to provide this written certification, it may still contract with a state entity—but it must first offer to provide its goods or services for at least a twenty percent discount. *Id.* § 25-1-503(b)(1). The law does not apply to contracts with a potential value of less than $1,000. *Id.* § 25-1-503(b)(2).

This law is not the only one of its kind. Dozens of states have passed similar statutes. *See* Br. Opp. Pl. Mot. Prelim. Inj. at 2 n.1, Doc. No. 14. There is a somewhat similar federal law authorizing the "President [to] issue regulations prohibiting any United States person . . . from . . . support[ing] any boycott fostered or imposed by a foreign country against a [friendly] country." 50 U.S.C. § 4607(a)(1)

(1979); *see also* Anti-Boycott Act of 2018, Pub. L. No. 115-232, §§ 1771–74.

The Arkansas Times is a weekly newspaper in Arkansas. Its publisher and chief executive officer is Alan Leveritt. For many years, the Times has contracted with Pulaski Technical College, now the University of Arkansas–Pulaski Technical College ("Pulaski Tech"), to publish advertisements for the college. In 2016, the Times entered into twenty-two advertising contracts with Pulaski Tech for amounts over $1,000; in 2017, it entered into thirty-six such contracts. In 2018, the Times entered into twenty-five such contracts before October.

In October 2018, the Arkansas Times and Pulaski Tech were preparing to enter into a new advertising contract. Pulaski Tech, consistent with Act 710's certification requirements, informed Leveritt that he would have to certify that the Times is not currently engaging in, nor would for the duration of the contract engage in, a boycott of Israel. Leveritt declined to do so, citing the Times's First Amendment rights. Specifically, the Times takes the position that it should not have to choose between doing business with the state and its right to freedom of expression. Leveritt also asserts that while he was not afforded an opportunity to decline certification and to offer a twenty percent reduction in price, such a discount is unacceptable.

The Times has previously complied with the law's certification provision on dozens of occasions, as it entered into many advertising contracts with Pulaski Tech after Act 710 went into effect. Further, while the paper's editorial board has been critical of Act 710, it appears that the Times has never engaged in, nor ever

written in support of, a boycott of Israel. *See* Lindsey Millar, *Arkansas Times challenges law that requires state contractors to pledge not to boycott Israel in federal court*, Arkansas Times: Arkansas Blog (Dec. 11, 2018) ("The Times has never participated in a boycott of Israel or editorialized in support of one."). Nothing indicates the Times will engage in such a boycott.

Because of the Times's refusal to certify, the parties did not execute a contract in October 2018, and there are no existing contracts between them. It is also very unlikely that there will be any future advertising contracts between the Times and Pulaski Tech because of this certification requirement.

The Arkansas Times brings this lawsuit asserting that Act 710 violates the First and Fourteenth Amendments. It seeks a preliminary injunction prohibiting the defendants from enforcing the law's certification provision while this suit is pending. Defendants oppose the motion and have moved to dismiss.

II. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008). Whether to grant such relief is within the sound discretion of the district court. *See Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006). A party seeking a preliminary injunction must prove that: (1) it will suffer irreparable harm if the injunction is denied; (2) the harm to the movant, if the injunction is denied, outweighs the harm to the non-movant if the injunction is granted; (3) there is a likelihood of success on the merits; and (4) an injunction is in the public's interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*,

640 F.2d 109, 113 (8th Cir. 1981); *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

Generally, a "fair chance" of prevailing on the merits is required to grant a preliminary injunction. *Planned Parenthood of Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 730–31 (8th Cir. 2008). "Where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, however, the moving party must make a more rigorous showing that it is likely to prevail on the merits." *Planned Parenthood of Arkansas & E. Oklahoma v. Jegley*, 864 F.3d 953, 957–58 (8th Cir. 2017) (quotations omitted). This heightened standard "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Rounds*, 530 F.3d at 732 (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)).

III. DISCUSSION

The Arkansas Times presents two arguments challenging the constitutionality of Act 710's certification requirement. First, it asserts that the law impermissibly compels speech regarding contractors' political beliefs, association, and expression. Second, it asserts that the law impermissibly restricts state contractors from engaging in protected First Amendment activities, including boycott participation and boycott-related speech, without a legitimate justification. Defendants dispute both of these arguments and assert that the Times lacks standing to bring its boycott-restriction claim.

While the Times has standing to bring both of its claims, a preliminary injunction is denied because the Arkansas Times has failed to show that a boycott of Israel, as defined by Act 710, is protected by the First Amendment.

A. *Standing*

The Arkansas Times has standing to bring its boycott-restriction claim because it suffered an injury in fact when it lost a government contract after refusing to comply with Act 710's certification provision. It does not have to allege that it intends to boycott Israel or that it would have boycotted Israel but for Act 710.

Federal courts may hear only "cases" and "controversies." U.S. Const. art. III, § 2, cl.1. "[T]here is no case or controversy unless the party initiating the [lawsuit] has standing to sue." *Owner-Operator Indep. Drivers Ass'n, Inc. v. United States Dep't of Transp.*, 831 F.3d 961, 966 (8th Cir. 2016). To establish that it has standing to bring this lawsuit, the Arkansas Times must show that it suffered an "injury in fact." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "Injury-in-fact means an actual or imminent invasion of a concrete and particularized legally protected interest." *Kinder v. Geithner*, 695 F.3d 772, 776 (8th Cir. 2012).

There are two common ways of demonstrating an injury in fact in First Amendment cases. *See Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016). First, a plaintiff may allege "an intention to engage in a course of conduct . . . proscribed by a statute" such that the plaintiff risks prosecution or some other penalty, including the loss of a government contract. *Id.* (internal quotation

marks omitted) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Second, it may allege self-censorship. *Id.*; *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (noting that to show self-censorship, a plaintiff "needs . . . to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute.").

Critically, these two methods are used in cases in which plaintiffs are challenging the constitutionality of a law *before* facing prosecution or otherwise suffering from the adverse consequences of noncompliance. *See 281 Care Comm.*, 638 F.3d at 627; *Zanders v. Swanson*, 573 F.3d 591, 593–94 (8th Cir. 2009). *See also Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003).

The Times, however, has *already* sustained an injury from Act 710, and its standing to bring the boycott-restriction claim does not derive from a risk of future injury. It lost its contract with Pulaski Tech, and therefore suffered a concrete and quantifiable economic loss, because it refused to comply with Act 710's certification provision. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1033 (D. Ariz. 2018) (noting that the resulting financial harm from plaintiff's failure to certify under a similar Arizona statute is an independent basis for standing) (citing *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)).

This is sufficient to confer standing upon the Times to bring its boycott-restriction claim. *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591–92 (8th Cir. 2009) ("Article III generally requires injury to the plaintiff's personal legal interests, but that does

not mean that a plaintiff with Article III standing may only assert his own rights or redress his own injuries.") (internal citation omitted); Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 13B Fed. Prac. & Proc. § 3531.16, at 362–63 (3d ed. 2008).

B. *Likelihood of Success on the Merits*

The Times is unlikely to prevail on the merits of its First Amendment claims because it has not demonstrated that a boycott of Israel, as defined by Act 710, is protected by the First Amendment. This finding diverges from decisions recently reached by two other federal district courts. *Jordahl*, 336 F. Supp. 3d at 1016; *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018).

1. Applicable First Amendment Standards and "Boycotts of Israel"

The First Amendment, made applicable to the states by virtue of the Fourteenth Amendment's Due Process Clause, forbids the government "from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002). It "protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Certification requirements for obtaining government benefits, including employment or contracts, that merely elicit information about an applicant generally do not run afoul of the First Amendment. *See United States v. Sindel*, 53 F.3d 874,

878 (8th Cir. 1995). They become constitutionally problematic, however, when they require that an applicant certify that it "will not engage . . . in protected speech activities" or "associational activities within constitutional protection." *Cole v. Richardson*, 405 U.S. 676, 680 (1972). They may also violate the Constitution if they require an applicant to endorse or espouse a particular message. *See id.*; *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 217–18 (2013) (holding that the government could not require organizations to adopt a policy opposing prostitution in order to receive government funds).

Act 710 requires contractors to certify that they will not refuse to deal with Israel or with companies that do business with Israel. A boycott of Israel, as defined by Act 710, concerns a contractor's purchasing activities with respect to Israel. While the statute also defines a boycott to include "other actions that are intended to limit commercial relations with Israel," Ark. Code Ann. § 25-1-502(1)(A)(i), this restriction does not include criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech. Familiar canons of statutory interpretation, such as constitutional avoidance and *edjusdem generis*, counsel in favor of interpreting "other actions" to mean commercial conduct similar to the listed items. *See Bakalekos v. Furlow*, 410 S.W.3d 564, 571 (Ark. 2011); *Edwards v. Campbell*, 370 S.W.3d 250, 253 (Ark. 2010).

To prevail under either of its theories, the Times must demonstrate that a refusal to deal, or its purchasing decisions, fall under the First Amendment, which protects speech and inherently expressive conduct. *See Pickup v. Brown*, 740 F.3d

1208, 1225 (9th Cir. 2014) ("The Supreme Court has made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive.'") (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 66 (2006)).

2. A Boycott is Neither Speech Nor Inherently Expressive Conduct

A boycott of Israel, as defined by Act 710, is neither speech nor inherently expressive conduct.

First, a boycott is not purely speech because, after putting aside any accompanying explanatory speech, a refusal to deal, or particular commercial purchasing decisions, do not communicate ideas through words or other expressive media. *See Jordahl*, 336 F. Supp. 3d at 1042 ("[T]he decision not to buy a particular brand of printer to show support for a political position, may not be deserving of First Amendment protections on the grounds that such action is typically only expressive when explanatory speech accompanies it."); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) (explaining different types of expressive media).

Second, such conduct is not "inherently expressive." *FAIR*, 547 U.S. at 66. In *FAIR*, an association of law schools restricted military recruiting on campuses to express their opposition to the military's then-existing "Don't Ask, Don't Tell" policy. *Id.* at 51. Congress responded to this restriction by passing the Solomon Amendment, which denied federal funding to law schools unless they allowed military recruiters to have equal access to campuses. *Id.* The law schools asserted that the law violated the First Amendment, *id.*, but a unanimous Supreme

Court rejected the challenge, holding that such conduct was "not inherently expressive" because the actions "were expressive *only* because the law schools accompanied their conduct with speech explaining it." *Id.* at 66 (emphasis added).

Specifically, "[a]n observer who s[aw] military recruiters interviewing away from the law school" would have "no way of knowing" why recruiters were interviewing off-campus absent any explanatory speech. *Id.* Further, explanatory speech describing the purpose of the military restriction did not transform the law school's unexpressive conduct into expressive conduct. *Id.* "[I]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

FAIR is controlling. *See Jordahl v. Brnovich,* Case No. 18-16896, Dkt. No. 26, slip op. at 5 (9th Cir. Oct. 31, 2018) (order denying stay of preliminary injunction) (Ikuta, J., dissenting). Like the law schools' decision to prevent military recruiters from coming to campus, the decision to engage in a primary or secondary boycott of Israel is "expressive only if it is accompanied by explanatory speech." *Id.* Until then, the motivations behind a contractor's private purchasing decisions are entirely unknown to the public.

It is highly unlikely that, absent any explanatory speech, an external observer would ever notice that a contractor is engaging in a primary or secondary boycott of Israel. Very few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the

absence of certain goods from a contractor's office mean that the contractor is engaged in a boycott of Israel. *See id.*; *c.f. FAIR*, 547 U.S. at 66.

Instead, an observer would simply believe that the types of products located at the contractor's office reflect its commercial, as opposed to its political, preferences. In most, if not all cases, a contractor would have to explain to an observer that it is engaging in a boycott for the observer to have any idea that a boycott is taking place. And under *FAIR*, the fact that such conduct *may* be subsequently explained by speech does not mean that this conduct is, or can be, transformed into inherently expressive conduct. 547 U.S. at 66 ("The fact that . . . explanatory speech is necessary is strong evidence that . . . conduct . . . is not so inherently expressive that it warrants protection."); *see also Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) ("It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment.").

The Arkansas Times's argument that an individual's refusal to deal, or his purchasing decisions, when taken in connection with a larger social movement, become inherently expressive is well-taken but ultimately unpersuasive. Such an argument is foreclosed by *FAIR*, as individual law schools were effectively boycotting military recruiters as part of a larger protest against the Don't Ask, Don't Tell policy.

For these reasons, the First Amendment does not protect the Arkansas Times's purchasing decisions or refusal to deal with Israel.

3. No Unqualified Constitutional Right to Boycott

The Times's argument that the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) creates an unfettered, black-letter right to engage in political boycotts is unpersuasive.

Claiborne concerned a primary boycott of white-owned businesses in Port Gibson, Mississippi by civil rights activists in order to protest racial discrimination. 458 U.S. at 899–900. The boycotters' constitutional rights were being violated by local government officials, many of whom also owned the businesses being boycotted. *Id.* The Supreme Court observed that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914.

Crucially, *Claiborne* did not "address purchasing decisions or other non-expressive conduct." *Jordahl*, Case No. 18-16896, Dkt. No. 26 slip op. at 5 (9th Cir. Oct. 31, 2018) (order denying stay of preliminary injunction) (Ikuta, J., dissenting); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426–27 (1990). Rather, the Court arrived at its decision only after carefully inspecting the various elements of the boycott, which consisted of meetings, speeches, and non-violent picketing. *Claiborne*, 458 U.S. at 907–08. It concluded that "[e]ach of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* The Court, however, did not hold that individual purchasing

decisions were protected by the First Amendment. *See id.*

Similarly, under *Claiborne*, the Times may write and send representatives to meetings, speeches, and picketing events in opposition to Israel's policies, free from any state interference. It may even call upon others to boycott Israel, write in support of such boycotts, and engage in picketing and pamphleteering to that effect. This does not mean, however, that its decision to refuse to deal, or to refrain from purchasing certain goods, is protected by the First Amendment.

Even if *Claiborne* stands for the proposition that the act of refusing to deal enjoys First Amendment protection, such a right is limited in scope. The Court emphasized that the boycotters in *Claiborne* "sought to vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself." *Id.* at 914. Consequently, *Claiborne* applies to nonviolent, primary political boycotts to vindicate particular statutory or constitutional interests. 458 U.S. at 914; *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988). *But see Jordahl*, 336 F. Supp. 3d at 1041. This understanding was reiterated in *FTC v. Superior Court Trial Lawyers Association*, where the Court explained that its decision in *Claiborne* was based on its particular facts—namely, a primary boycott by those whose constitutional rights were being infringed upon and against those who were infringing upon those rights. 493 U.S. at 426–27.

This, however, does not include political boycotts directed towards foreign governments concerning issues that do not bear on any domestic legal interest. In *International Longshoremen's Association*, a case

that was decided just months before *Claiborne*, the Court held that a labor union's secondary boycott of Soviet goods to protest the U.S.S.R.'s invasion of Afghanistan was not protected by the First Amendment. 456 U.S. at 212. Although the union's boycott was clearly motivated by political interests, *see id.* at 223–26, the Court unanimously held that a prohibition of such a boycott did "not infringe upon the First Amendment rights of the [union] and its members." *Id.* at 226. If one simply substitutes the words "labor union," "Soviet," "U.S.S.R.," and "Afghanistan" with "newspaper," "Israeli," "Israel," and "West Bank," then it becomes clear that *International Longshoremen's Association* is largely the same case as the Times's.

While *International Longshoremen's Association* was decided against the broader context of federal labor law, the Court held that there is no unqualified right to boycott or a constitutional right to refuse to deal, or perhaps no First Amendment interest in boycotting at all. *See id.* It appears that *Claiborne*, which immediately followed *International Longshoremen's Association*, created a narrow exception to this rule based on particular facts that are not present here.

The Eighth Circuit has reaffirmed these aspects of *Claiborne* and *International Longshoremen's Association*. *See Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191 (8th Cir. 1994). In *Beverly Hills*, a union's distribution of handbills to promote a consumer boycott of a grocery store was protected by the First Amendment and a complete defense to the store's claim of tortious interference. *Id.* at 196–97. Applying *Claiborne*, the Eighth Circuit noted that peaceful

pamphleteering was independently protected by the First Amendment. *Id.* It did not hold, however, that refusals to deal or commercial purchasing decisions are protected by the First Amendment. Further, if *Beverly Hills* does stand for such a proposition, it appears, like *Claiborne*, limited to the fact that the union was promoting the boycott to vindicate a statutory or constitutional interest—namely, to protest the grocery store's discriminatory treatment of black workers. In contrast, the purpose of the union's boycott in *International Longshoremen's Association* was not to vindicate any such statutory or constitutional interest.

For these reasons, *Claiborne* does not hold that individual purchasing decisions are constitutionally protected, nor does it create an unqualified right to engage in political boycotts. In the years following *Claiborne*, it does not appear that the Supreme Court or any court of appeals has extended *Claiborne* in such a manner. *See, e.g.*, *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426; *Allied Tube & Conduit Corp.*, 486 U.S. at 492; *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 297 (2d Cir. 1992).

4. <u>Conclusion</u>

The Arkansas Times is unlikely to succeed on either of its theories because, as discussed above, a boycott of Israel, as defined by Act 710, is not speech, inherently expressive activity, or subject to independent constitutional protection under *Claiborne*.

IV. MOTION TO DISMISS

Because engaging in a boycott of Israel, as defined by Act 710, is neither speech nor inherently expressive conduct, it is not protected by the First Amendment. Accordingly, the Arkansas Times has failed to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Defendants' motion to dismiss [Doc. No. 15] is therefore granted.

V. CONCLUSION

For the foregoing reasons, the Arkansas Times's motion for a preliminary injunction [Doc. No. 2] is denied, and defendants' motion to dismiss [Doc. No. 15] is granted. Defendants' motion for leave to file a reply brief [Doc. No. 22] is denied as moot. This case is dismissed with prejudice.

IT IS SO ORDERED this 23rd day of January 2019.

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 19-1378

ARKANSAS TIMES LP,

Plaintiff-Appellant,

v.

MARK WALDRIP, in his Official Capacity as Trustee of the University of Arkansas Board of Trustees; ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

No. 4:18-CV-00914 BSM (Hon. Brian S. Miller)

DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

Respectfully submitted,

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RULE 35(b)(1) STATEMENT

Nearly two-thirds of the States prohibit their business partners from boycotting Israel. Their laws—including the Arkansas law at issue here and four others in this circuit—reflect a national consensus that taxpayers shouldn't do business with those who discriminate against a crucial American ally. The majority's decision places all those laws in jeopardy, and this case therefore presents a question of profound importance both for courts throughout this circuit and nationally. That alone warrants en banc review.

Two additional reasons further underscore why such review is necessary. *First*, the majority's boycott analysis—particularly its conclusion that refusals to deal "in association with others" (Op. 14) are protected by the First Amendment— conflicts with *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*). Indeed, as the district court held below, that case decides this one. Yet the majority didn't even attempt to distinguish *FAIR*; it simply deemed it inapplicable.

Second, in a rush to shore up—and distract from—its flawed boycott analysis, the majority undermined hornbook principles of statutory construction. Its decision disregarded basic canons of statutory construction used to interpret state laws throughout this circuit in favor of a sweeping inquiry designed to manufacture constitutional difficulties. If allowed to stand, this will complicate adjudication and render this Court an outlier.

BACKGROUND

1. Like laws across the country, the Arkansas provision at issue here, Act 710, seeks to eliminate economic discrimination against the Jewish State. *See generally* Act 710, 2017 Ark. Acts 3627 (Mar. 27, 2017); *see also* 50 U.S.C. 4841-4842, *prior version*, Pub. L. No. 96-72, 93 Stat. 503 (1979).[1] Such discrimination has a dark history, with the German parliament observing in 2019 that the anti-Israel boycott "movement's 'Don't Buy!' stickers on Israeli products inevitably awake associations with the Nazi slogan 'Don't Buy from Jews!'"[2]

Act 710 is designed to ensure taxpayers don't fund such discriminatory con- duct. It does so by generally barring "public entit[ies]" and "political subdivision[s]" from doing business with entities that "boycott Israel." Ark. Code Ann. 25-1-502(1), (5); *see id.* 25-1-503, -504. Consistent with its underlying goal of stamping out economic discrimination, Act 710 narrowly defines a "boycott" as "engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner." *Id.* 25-1-502(1)(A)(i). And to make that statute effective, Act 710 requires public

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[1] Since the panel-stage briefing, the number of States with similar laws has increased to 32. *See* Appellee's Br. 1 n.1; Palestine Legal, *State Legislation* (updated Mar. 25, 2021), https://bit.ly/31nevUF.

[2] The Associated Press, *German parliament denounces Israel boycott movement*, (May 17, 2019), http://bit.ly/2Qw1DJX; *see* Deutscher Bundestag: Drucksachen [BT] 19/10191, https://bit.ly/394ILI9 (German-language resolution).

contracts to include "a written certification that the [contractor] is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." *Id.* 25-1-503(a)(1).

Thus, as relevant here, Act 710 narrowly regulates commercial conduct and only prohibits contractors from refusing to deal based solely on national origin. Indeed, consistent with Act 710's plain text, Arkansas has *never* argued that it restricts a contractor's ability to criticize Israel or argue for national-origin discrimination. *See* Oral Argument at 17:40 (counsel for Arkansas offering this interpretation); Appellees' Br. i ("Contractors remain free to . . . advocate boycotting."); ADD9 (statute doesn't reach "calls to boycott Israel").

2. Plaintiff-Appellant Arkansas Times is an alternative media company that hasn't boycotted, doesn't intend to boycott, and hasn't advocated boycotting Israel. *See* JA88-90; ADD3; Appellant's Br. 39. Yet it sued to argue that requiring it—as an entity that occasionally runs advertisements for public institutions—to certify that it won't discriminate violates the First Amendment. JA12-13. In fact, it only brought this lawsuit after spending months unsuccessfully trolling for another plaintiff, *see* JA80-86, and after it had been subject to Act 710 for more than a year, *see* JA10-13, 18-19.

3. Arkansas moved to dismiss the complaint for failure to state a claim. *See* ADD1. Concluding Arkansas Times hadn't shown "a boycott of Israel, as defined by Act 710, is protected by the First Amendment," the district court granted Arkansas's motion. ADD7-8.

The district court began by explaining that Act 710 doesn't restrain "speech." It only restricts *conduct*, because "a refusal to deal, or particular commercial purchasing decisions, do not communicate ideas through words or other expressive media." ADD10. And it explained that Act 710's "other actions" language didn't suggest the contrary. Rather, *ejusdem generis* required reading that phrase in light of the enumerated items, "refusals to deal" and "terminating busi- ness activities." *Id.* So read, the district court continued, Act 710 only covered "commercial conduct"—namely, "a contractor's purchasing activities." ADD9. And in any event, that court added, another "[f]amiliar canon[]," constitutional avoidance, reinforced that reading. *Id.*

The district court then correctly concluded that *FAIR* required dismissing Arkansas Times's complaint. *See* ADD9-12. That case involved an association of law schools that collectively decided to bar military recruiters from their campuses to protest the military's "Don't Ask, Don't Tell" policy. *See FAIR*, 547 U.S. at 51. In response to that "sort of boycott," Respondents' Br., *FAIR*, No. 04-1152, 2005 WL 2347175, at *29, Congress barred participating schools from receiving federal funds. The law schools claimed that violated the First Amendment. 547 U.S. at 52-55. But as the district court explained, a unanimous Supreme Court made short work of that argument, holding boycotts are not "inherently expressive conduct" subject to First Amendment protection. ADD10. To the contrary, such "actions 'were expressive *only* because the law schools accompanied their conduct with speech explaining it.'" *Id.* (quoting *FAIR*, 547 U.S. at 66).

The same is true here, reasoned the district court. Whether boycotting military recruiters or Israel, "the decision to engage in a primary or secondary boycott of [either] is 'expressive only if it is accompanied by explanatory speech.'" ADD11 (quoting *Jordahl v. Brnovich*, No. 18-16896 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting from stay denial), ECF No. 26 at 5). Thus, if Arkansas Times decided to boycott, it "would have to explain to an observer that it is engaging in a boycott for the observer to have any idea that a boycott is taking place." *Id.* Otherwise, even someone happening to notice the absence of Israeli goods would assume it arose from "commercial, as opposed to political, preferences." *Id.* As in *FAIR*, that means the conduct regulated by Act 710 isn't inherently expressive or protected. *See* ADD16-17.

4. A sharply divided panel disagreed. Over Judge Kobes's dissent, Judges Kelly and Melloy rejected both the district court's boycott and statutory analyses, rewriting First Amendment precedent and Arkansas's statute.

The majority began with the First Amendment, quickly scuttling *FAIR*. To do that, the majority simply rejected that case's application here on the grounds that—even though the law schools called their collective association a boycott—"*FAIR* did not concern a boycott." Op. 9. Having rejected *FAIR*, the majority then declared that it did not need to decide whether Arkansas's law would "run afoul of the First Amendment if it were limited to purely economic activity." Op. 12.

Instead, the majority held that while an individual refusal to deal might not be protected, a refusal accompanied by "the company's own statement

that it is participating in boycotts of Israel" and evidence that it is done "in association with others" is protected. Op. 14 (internal quotation marks omitted). As support, it cited two out-of-circuit district court decisions misreading *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and holding that refusals to deal "in response to larger calls to action" are protected. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020); *see Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018) (decisive question is whether plaintiff "banded together" with others to oppose Israel).

It further argued that its distinction of *FAIR* was supported by supposed differences between protected "politically-motivated" and presumably unprotected economically-motivated boycotts. Op. 10-11 (asking whether *collective* refusal "lacks any expressive or political value"). And having concluded that *FAIR* was inapposite, it didn't have to deal with the inconvenient fact that *FAIR* too involved a politically-motivated, associative refusal to deal. 547 U.S. at 52.

Yet the majority wasn't content to stop there. Instead, recognizing that its argument rested on a weak foundation, it attempted to shore up that foundation by rewriting Arkansas law in a way that would make the protected and unprotected activity appear related. To accomplish that, the majority declared that Act 710's "other actions" language wasn't—as the text would suggest—simply a catchall for unenumerated commercial conduct. *See* Op. 12-13. Rather, the majority decided it must be a vast prohibition on the kind of protected activity that the majority had concluded accompanies calls for collective action. Op. 14-16. And it argued its reading

was appropriate because—despite a wealth of contrary authority—it believed Arkansas courts would not apply *ejusdem generis* whenever other "appropriate tools of statutory construction" might tease out a potentially problematic meaning. *See* Op. 13. Then, having upended First Amendment and statutory-construction principles, the majority reversed the district court's decision.

Judge Kobes dissented and argued that the panel should have upheld Arkansas's law on the grounds that, properly interpreted, the statute didn't present constitutional problems. Op. 22. In particular, he focused on the majority's refusal to apply a "straight-forward analysis" under *ejusdem generis*. Op. 19. And he stressed that even if that failure were defensible, the majority should have followed the "first and most important rule of statutory interpretation"—that "all doubts are resolved in favor of constitutionality"—and interpreted Act 710 as limited to commercial activity to avoid the majority's constitutional concerns. *Id.* at 21 (quoting *Booker v. State*, 984 S.W.2d 16, 21 (Ark. 1998)).

ARGUMENT

I. The Majority's Boycott Analysis Conflicts with Supreme Court Precedent.

To strike down Arkansas's law prohibiting discrimination against Israeli businesses, the majority ignored basic First Amendment principles. Under established principles, refusals to deal aren't inherently expressive and entitled to First Amendment protection. Indeed, absent explanatory speech, a decision not to buy certain goods isn't normally understood as communicative—let alone as

an expression of opposition to Israel. That should have decided this case.

Yet the majority reached the opposite conclusion and placed the laws of 32 States and national policy in jeopardy. On the majority's view, the question isn't whether the prohibited conduct is expressive, but whether that conduct is "in association with others." Op. 14. If it is, then, according to the majority, the conduct is entitled to First Amendment protection. That gets the First Amendment analysis entirely wrong, undermines the well-established distinction between expression and conduct, and threatens any number of state and federal laws that regulate unexpressive conduct. En banc rehearing is necessary to avoid that result.

A. Applying established First Amendment principles, this is a straightforward case. There's no First Amendment right to boycott Israel, and the district court's order dismissing the complaint should be affirmed.

"*FAIR* controls this case." *Jordahl*, *supra*, Doc. 26 at 5 (Ikuta, J., dissenting). Under *FAIR*, conduct that only becomes expressive once its significance is explained—like *not* buying something—isn't entitled to First Amendment protection. Rather, the First Amendment only protects speech or "conduct that is inherently expressive." *FAIR*, 547 U.S. at 66.

The law-school coalition in *FAIR* forced recruiters off-campus because of their disagreement with military policy. *Id.* And contrary to the majority's claim that "*FAIR* did not concern a boycott," Op. 9, the law schools described their collective refusal to deal as a "sort of boycott" and argued that, as such, it was protected expression, Respondents' Br., *FAIR*, 2005

WL 2347175, at *29 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). When Congress responded by barring schools that received federal funds from discriminating against military recruiters, the law schools challenged that bar on the grounds that it regulated their supposedly expressive conduct of boycotting military recruiters. *See FAIR*, 547 U.S. at 63, 65-66.

The Supreme Court unanimously rejected that argument and held their boycott was "not inherently expressive." *Id.* at 66. Excluding recruiters and requiring them to interview elsewhere was "expressive only because the law schools accompanied their conduct with speech explaining it." *Id*. Absent an explanation, "[a]n observer who s[aw] military recruiters interviewing away from the law school" would have "no way of knowing" why. *Id.* And "explanatory speech" didn't transform the schools' collective, unexpressive conduct into protected expression. *Id.* Indeed, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

Under that holding, Arkansas Times's claim likewise fails. "Like the law schools' decision to" bar recruiters, "the decision to engage in a . . . boycott of Israel is 'expressive only if it is accompanied by explanatory speech.'" ADD11 (quoting *Jordahl*, *supra*, Doc. 26 at 5 (Ikuta, J., dissenting)). Certainly, unless a contractor calls attention to the absence of Israel-affiliated companies' goods and explains it, that absence would go both unnoticed and unexplained. *See FAIR*, 547 U.S. at 66; *Jordahl*, *supra*, Doc. 26 at 5 (Ikuta, J., dissenting) (noting "decision not to purchase" goods "is expressive only if it is

accompanied by explanatory speech"). And as *FAIR* holds, if conduct needs to be explained to be expressive, it was never expressive enough to begin with and isn't protected. Thus, to resolve this case, the majority need only to apply *FAIR*.

B. Yet the majority rejected a straightforward application of *FAIR* on the dubious ground that—whatever the law schools said—"*FAIR* did not concern a boycott." Instead, the majority held Act 710 unconstitutional on the theory that reacting to calls for political action or boycotting "in association with others" is protected. Op. 14. (citing *Jordahl*, 336 F. Supp. 3d at 1042; *Koontz*, 283 F. Supp. 3d at 1022); *see also* Op. 11 (question is whether refusal, in context, "lacks any expressive or political value"). That approach conflicts with precedent and—if it stands—would transform a broad array of unexpressive conduct into protected expression.

1. Contrary to the majority's reasoning, the First Amendment doesn't protect conduct just because it's "in response to larger calls to action." *See Jordahl*, 336 F. Supp. 3d at 1042. Nor does a statement that a company "is participating in boycotts of Israel" or evidence that it's acting "in association with others" trans- form otherwise unexpressive conduct into protected expression. Op. 14 (internal quotation marks omitted). Indeed, *FAIR* involved a refusal to deal by an *incorporated* "*association* of law schools" created for the purpose of coordinating boycotting activities, 547 U.S. at 52 (emphasis added), and the Supreme Court still had no trouble concluding their boycott wasn't protected, *see id.* at 68-70. By contrast, the "association with others" the majority thought protected the boycott here merely amounts to boycotting in response to third parties' "calls for a

boycott." Op. 14. If that sort of "association with others" transforms a boycott into First Amendment activity, then every boycott would be protected—a bizarre result for a category of unexpressive inaction.

Unable to square its associative-boycott rule with the facts or reasoning of *FAIR*, the majority vaguely suggested *Claiborne* supported its approach. But *Claiborne* offers the majority no support either. Instead, *Claiborne* only and unremarkably held that the meetings, speeches, nonviolent picketing, and efforts to persuade that accompanied the boycott in that case were "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." 458 U.S. at 907. Indeed, far from holding—as the majority did here—that boycotting in response to boycott-advocacy is protected association, *Claiborne* only held that the "speech, assembly, association, and petition" that *accompanied* the boycott there were "constitutionally protected activity." *Id.* at 911 (emphasis added). That's unsurprising since *Claiborne* was all about whether that tradition- ally protected activity somehow lost its protection simply because it accompanied unexpressive conduct—not whether boycotting became protected by accompanying protected activity. *See id.* at 908-11.

The threshold question in *Claiborne*, therefore, is the same as in *FAIR*: whether the activity in question is either speech or expressive conduct, not whether it's called a boycott or done in association with others. *See FAIR*, 547 U.S. at 59- 60, 65; *Claiborne*, 458 U.S. at 907. And that makes sense. A contrary rule would mean that virtually any activity—even "refusing to pay [one's] income taxes," *FAIR*, 547 U.S. at 66—

would be protected so long as it was done "in association with others," Op. 14.[3]

2. While that alone warrants further review, the majority's analysis also rests on a flawed distinction between "politically-motivated" and economically- motivated boycotts. Op. 10. Citing *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), it found the former were entitled to greater protection than the latter, and it suggested Arkansas's law targeted the former. *See* Op. 8, 11. But *FAIR* makes clear the majority has misread *Trial Lawyers*. For no one could possibly dispute that the boycott in *FAIR* had a political aim, yet *FAIR*'s boycott was unprotected. *See FAIR*, 547 U.S. at 52 (schools sought to change "the policy Congress has adopted with respect to homosexuals in the military").

Nor for that matter can the majority's reading of *Trial Lawyers* be squared with *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982). That earlier case—which the majority doesn't even bother to cite— found no protection for a union's boycott of "handling cargoes arriving from or destined for the Soviet Union" for the expressly political purpose of "protest[ing] the Russian invasion of Afghanistan." *Id.* at 214, 226. Indeed, as the district court put it below, "simply substitut[ing] the words

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[3] Contrary to the majority's suggestion, Op. 9, this creates no tension with this Court's recognition that the First Amendment applies when a State "seeks to regulate speech itself as a public accommodation," *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 758 (8th Cir. 2019); *see Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring in part and concurring in the judgment) (distinguishing *FAIR* when "government" has "force[d] speakers to alter their *own* message").

'labor union,' 'Soviet,' 'U.S.S.R.,' and 'Afghanistan' with 'newspaper,' 'Israeli,' 'Israel,' and 'West Bank'" makes clear that *Longshoremen* "is largely the same case as" this one. ADD15.

The majority's distinction therefore lacks support, and this Court should grant rehearing to hold that "an effort to use economic power to coerce a foreign government through economic means may subject the participants to loss of state government contracts." *Amici Curiae* Br. of Profs. Michael Dorf, Andrew Koppelman, and Eugene Volokh (June 5, 2019), Entry ID: 4794442, ECF p.17.

II. The Majority's Opinion Undermines Basic Principles of Statutory Construction

Recognizing that it couldn't square its boycott analysis with *FAIR*, the majority attempted to bolster that analysis by construing Arkansas law in a way that lumped speech, association, and unexpressive conduct together. But the majority's approach to statutory interpretation violates bedrock principles of statutory construction and, if it stands, would have serious implications for the interpretation of state laws throughout this circuit.

Act 710 "prohibits public entities from contracting with companies that boycott Israel by (1) 'engaging in refusals to deal'; (2) 'terminating business activities'; or (3) taking 'other actions that are intended to limit commercial relations with Israel' . . . 'in a discriminatory manner.'" Dissent 18 (quoting Ark. Code Ann. 25-1-502(1)(A)(i), -503(a)(1)). Under a "straight-forward analysis," *ejusdem generis* requires interpreting the "other actions" provision to apply "solely to commercial activities." Dissent 19.

That's how Arkansas courts would have interpreted it. For they regularly apply *ejusdem generis* to similar phrases. *See, e.g.*, *Edwards v. Campbell*, 370 S.W.3d 250, 253 (Ark. 2010) (applying *ejusdem generis* to "embezzlement of public money, bribery, forgery or other infamous crime"). And this Court has interpreted similar phrases in Arkansas law "to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Universal Coops., Inc. v. AAC Flying Serv., Inc.*, 710 F.3d 790, 795 (8th Cir. 2013) (quoting *Hanley v. Ark. State Claims Comm'n*, 970 S.W.2d 198, 201 (Ark. 1998)).

Conversely, there's no precedent for the majority's refusal to apply *ejusdem generis* based on the "legislative intent and purpose." Op. 13 (emphasis and citation omitted). It rests on a misunderstanding of the maxim that *ejusdem generis* be used "to carry out, not to defeat, legislative intent." *Wallis v. State*, 16 S.W. 821, 822 (Ark. 1891). This maxim applies only when *ejusdem generis* would violate "the elemental canon of construction that no word is to be treated as unmeaning." *Id.*; *see, e.g.*, *Compton v. State*, 143 S.W. 897, 900 (Ark. 1911) (rejecting interpretation that "would render the clause meaningless"). Applying *ejusdem generis* here wouldn't violate that canon. *See* Dissent 19 (explaining how "charging overly inflated shipping prices . . . to reduce commercial relationships with [Israel]" would violate other-actions clause, but not be a literal "refusal to deal or a termination").

Interpreted according to *ejusdem generis*, the "other actions" language presents no issue. But that approach did not fit the majority's faulty boycott analysis, and as a result, it rejected that "reasonable interpretation" in favor of a much broader

construction that covered expressive activities that sometimes accompany refusals to deal. Op. 12-13. Yet far from justifying such a radical departure from hornbook principles of statutory construction, the majority simply declared that other "appropriate tools of statutory construction" pointed to a different result. Op. 13. Those other tools, however, amounted to little more than a survey of "the types of evidence permitted to prove intent," an "overbroad[] and inconsistent[]" reading of a legislative "policy statement," and a citation to a confusingly drafted certification. Dissent 19 n.13.

Moreover, even that couldn't possibly justify an interpretation that would raise constitutional problems in the face of an unproblematic "plausible construction." Op. 13. The majority violated "[t]he first and most important rule of statutory interpretation" in Arkansas—that "all doubts are resolved in favor of constitutionality." Dissent 21 (quoting *Booker*, 984 S.W.2d at 21). And this Court has previously applied constitutional-avoidance principles as a matter of federal law, even when interpreting state statutes. *See Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 461-64 (8th Cir. 1999).

Thus, the majority's approach conflicts with—and undermines—basic principles of statutory construction, and if allowed to stand, it will complicate countless cases in this Circuit that involve the interpretation of Arkansas law. Indeed, under the majority's approach, when an issue of Arkansas law arises, courts in this circuit won't be permitted to simply apply straightforward canons of statutory construction. Rather, they'll have to conduct a sweeping inquiry designed to ferret out problems that aren't obvious on the face of the statute. And it's hard

to see how the majority's approach could be cabined to Arkansas cases since most state rules of interpretation rest on similar common-law foundations.

* * *

The majority's decision undermines core First Amendment principles and hornbook rules of statutory interpretation. If it stands, that decision will render this Circuit an outlier in both categories. To prevent that, this Court should grant en banc review, apply well-established constitutional and statutory principles, and affirm the decision below.

CONCLUSION

For these reasons, this petition should be granted.

Respectfully submitted,

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/s/ Nicholas J. Bronni
Nicholas J. Bronni

APPENDIX E

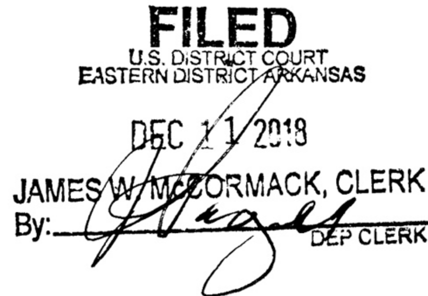
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

Case No. 4:18-CV-00914 BSM

Arkansas Times LP — Plaintiff

v.

Mark Waldrip, John Goodson, Morril Harriman, Kelly Eichler, David Pryor, Stephen Broughton, C.C. Gibson, Sheffield Nelson, Tommy Boyer, and Steve Cox, in their official capacities as Trustees of the University of Arkansas Board of Trustees.



Defendants

This case is assigned to District Judge Miller
and to Magistrate Judge Deere

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This is an action to protect the constitutional rights to engage in political expression and association. Plaintiff Arkansas Times LP sues, pursuant to 28 U.S.C. §§ 2201(a) and 2202, to declare that portion of Act 710 of 2017 codified Ark. Code Ann. §-25-1-503 ("the Act") unconstitutional and, pursuant to 42 U.S.C. § 1983, to enjoin enforcement of the Act. The Act requires those who desire to contract with governmental entities in this state to certify that they currently are not boycotting Israel and will not boycott Israel during the duration of their contract. However, the Act permits a contractor to boycott Israel if the contractor agrees to provide the goods or services for at least a twenty percent (20%) reduction in the contract amount to be paid by the state. The Act's certification requirement violates the First and Fourteenth Amendments of the United States Constitution by requiring contractors, including Plaintiff in this action, to either refrain from boycotting Israel or to agree to a substantial reduction in the contractual amount paid.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this § 1983 action under 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. 1331 and 1343. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202. Venue is proper under 28 U.S.C. 1391 because at least one of the Defendants resides in this judicial district and the events giving rise to this action occurred in this judicial district.

THE PARTIES

3. Plaintiff Arkansas Times LP is an Arkansas limited partnership in good standing, with its principal place of business in Pulaski County, Arkansas. It has contracted many times over many years with Pulaski Technical College to include advertising for Pulaski Technical College ("PTC") in the *Arkansas Times*, a weekly newspaper of general circulation in this state, as well as in other special interest publications published by Arkansas Times LP. Since Pulaski Technical College became part of the University of Arkansas system on February 1, 2017, and was renamed the University of Arkansas Pulaski Technical College ("UAPTC"), these advertising contracts have been with the University of Arkansas Board of Trustees ("UABT").

4. The University of Arkansas Board of Trustees is the governing body of all components of the University of Arkansas System and has the authority to enter into, or delegate to or direct others to enter into, contracts for goods or services on behalf of the University of Arkansas and all colleges in its system.

5. Defendant Mark Waldrip is chair of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Lee County, Arkansas.

6. John Goodson is a vice chair of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Miller County, Arkansas.

7. Morril Harriman is secretary of the University of Arkansas Board of Trustees. He is sued in his official

capacity. He is a resident of Pulaski County, Arkansas.

8. Kelly Eichler is an assistant secretary of the University of Arkansas Board of Trustees. He is sued in his official capacity. She is a resident of Pulaski County, Arkansas.

9. David Pryor is a member of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Pulaski County, Arkansas.

10. Stephen Broughton is a member of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Jefferson County, Arkansas.

11. C.C. Gibson is a member of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Drew County, Arkansas.

12. Sheffield Nelson is a member of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Pulaski County, Arkansas.

13. Tommy Boyer is a member of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Washington County, Arkansas.

14. Steve Cox is a member of the University of Arkansas Board of Trustees. He is sued in his official capacity. He is a resident of Craighead County, Arkansas.

THE ACT

15. In 2017, the Arkansas Legislature passed Act 710, codified as Ark. Code Ann. §§ 25-1-501 to 25-1-504. The Act became effective August 3, 2017.

16. The anti-boycott section of the Act, Ark. Code Ann. § 25-1-503, provides:

> Prohibition on contracting with entities that boycott Israel.
>
> (a) Except as provided under subsection (b) of this section, a public entity shall not:
>
> (1) Enter into contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel; or
>
> (2) Engage in boycotts of Israel.
>
> (b) This section does not apply to:
>
> (1) A company that fails to meet the requirements under subdivision (a)(1) of this section but offers to provide the goods or services for at least (20%) less than the lowest certifying business; or
>
> (2) Contracts with a total potential value of less than one thousand dollars ($1,000).

Ark. Code Ann. § 25-1-503 (2017).

17. The definitions part of the Act provides, in relevant part:

> As used in this subchapter:
>
> (1)(A)(i) "Boycott of Israel" and "boycott of Israel" means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner.
>
> (ii) "Boycott" does not include those boycotts to which 50 U.S.C. § 4607(c) applies.

Ark. Code Ann. § 25-1-502.

18. The Act seeks to suppress participation in political boycott campaigns, particularly Boycott, Divestment, and Sanctions ("BDS") campaigns, which are aimed at Israel and territories where Israel exerts control. These campaigns typically are a protest against the Israeli government's treatment of Palestinians and its occupation of Palestinian territories and are a means of exerting economic pressure on the Israeli government to change its policies vis a vis the Palestinians.

18. The legislative findings to the Act state, inter alia, "Boycotts and related tactics have become a tool of economic warfare that threaten [sic] the sovereignty and security of key allies and trade partners of the United States. The State of Israel is the most prominent target of such boycott activity[.]"

19. In the Arkansas House of Representatives State Agencies and Governmental Affairs Committee meeting on March 20, 2017, Representative Jim Dotson described Senate Bill 518, which was enacted as Act 710, as preventing Arkansas public entities from contracting with companies "which are anti-Israel or have business dealings with enemies of the State of Israel."

THE FACTS

19. Plaintiff operates the *Arkansas Times*, a weekly newspaper of general circulation in this state, and also other special interest publications in Arkansas. The publisher and CEO of the *Arkansas Times* is Alan Leveritt. He is also the CEO and a principal of Arkansas Times LP.

20. For many years, Plaintiff has regularly contracted with PTC and, as of February 1, 2017, with UABT to run advertisements for UAPTC in the *Arkansas Times* as well as in other special interest publications in return for payment for this service. In 2016, Plaintiff executed 22 separate contracts with ~~UABT~~ PTC in amounts over $1,000 each to place ads in its various publications for ~~UA~~PTC; in 2017, Plaintiff executed 36 such contracts with UABT; in 2018, Plaintiff executed 25 such contracts with UABT prior to the requirement of the boycott pledge in issue.

21. In October, 2018, Plaintiff and UAPTC were preparing to enter into new contracts for additional advertising in the *Arkansas Times*. At that time Mr. Leveritt was informed that the UAPTC Director of Purchasing and Inventory, based on the Act, was requiring, as a condition of the contract and on behalf of the Board of Trustees of the University of Arkansas, that Mr. Leveritt, on behalf of the Arkansas Times LP,

in addition to the usual advertising contract documents, sign a certification stating that Plaintiff is not currently engaged in and agrees for the duration of the contract not to engage in a boycott of lsrael. UAPTC informed Mr. Leveritt that absent this certification, UAPTC would refuse to contract with Plaintiff for any additional advertising.

22. Plaintiff does not currently engage in a boycott of Israel or Israeli-controlled territories. Plaintiff has published articles that are critical of the Act and similar anti-boycott laws in other states.

23. It is Mr. Leveritt's position, as CEO of and principal in Arkansas Times LP, that the politically-motivated boycott of Israel, or persons or entities doing business in Israel or Israeli-controlled territories, is speech and expressive activity related to a matter of public concern and is therefore protected by the First Amendment, and that it is unacceptable for Plaintiff to enter into an advertising contract with the University of Arkansas that is conditioned on the unconstitutional suppression of protected speech under the First Amendment. Mr. Leveritt therefore has refused to sign any such certification and accordingly UAPTC has refused to enter into further advertisement contracts with Plaintiff.

24. But for UABT's certification requirement, based on the Act, Plaintiff is ready, willing, and able to enter into new advertising contracts for UAPTC with UABT.

25. Because of the certification requirement, Plaintiff and UABT have no present contract to advertise with UAPTC and no future prospect to do so.

26. Any participation by Plaintiff in a BDS campaign or refusal by Plaintiff to sign the certification have no

bearing on Plaintiff's ability to provide advertising services to UAPTC.

27. But for Plaintiff's refusal to sign the anti-boycott pledge, as of November 28, 2018, UAPTC would have entered into at least two new contracts for advertising in the *Arkansas Times*, each of which would have been for an amount in excess of $1,000, and, based upon its past course of dealing with Plaintiff, as stated in ¶20 of this Complaint, UAPTC would enter into additional such new contracts in the future.

28. Plaintiff is not willing to accept a 20% discount on payment by UAPTC for its advertising services.

29. Because Plaintiff is not able to contract with UABT absent the required anti-boycott certification, Plaintiff has sustained substantial monetary damages, which are not recoverable against UABT in a court of law and which will continue into the future if the certification requirement is not invalidated.

30. By virtue of the denial of its First Amendment rights on account of the unconstitutional requirement of the Act, as well as by its loss of revenue on that same account that cannot be recovered as against UABT, the Plaintiff has suffered and will continue to suffer irreparable harm.

COUNT 1

(Violation of the First and Fourteenth Amendments)

31. Plaintiffs restate and incorporate by reference the allegations of the preceding paragraphs of this complaint.

32. The First Amendment is made applicable to the states through the Fourteenth Amendment.

33. Whether or not someone chooses to boycott Israel, or persons or entities doing business in Israel or Israeli-controlled territories, is politically-motivated speech and expressive activity related to a matter of public concern and therefore protected by the First Amendment.

34. Participation in a boycott, together with others who use BDS tactics, is protected association under the First Amendment.

35. Speech related to participation in this boycott is speech on a matter of public concern. It is therefore protected by the First Amendment.

36. The Act's certification requirement and UABT's implementation of it violate the First Amendment, both facially and as-applied, because the requirement unduly restricts the ability of contractors who wish to contract with government entities in this state to engage in core political expression and expressive activity, including participation in political boycotts.

37. The certification requirement violates the First Amendment, both facially and as applied, because it discriminates against protected expression based on the expression’s content and viewpoint. The requirement prohibits government contractors from boycotting Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, while allowing contractors to participate in other boycotts, including boycotts of other foreign countries and “reverse boycotts” targeting companies and individuals engaged in boycotts of Israel.

38. The certification requirement violates the First Amendment because it is overinclusive and substantially overbroad.

39. The certification requirement violates the First Amendment, both facially and as applied, because it imposes an ideological litmus test and compels speech related to government contractors' protected political beliefs, associations, and expression.

40. The certification requirement violates the First Amendment, both facially and as-applied, because it bars government contractors from receiving government contracts based on their protected political beliefs and associations.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendants, and award the following relief:

(1) Declare that the certification requirement contained in Act 710, Ark. Code Ann. § 20-5-503, violates the First and Fourteenth Amendments to the United States Constitution, both facially and as-applied to Plaintiff;

(2) Preliminarily and permanently enjoin Defendants from requiring those contracting with the University of Arkansas and each of its constituent parts to certify that they are not currently engaged, nor will they engage for the duration of the contract, in a boycott of Israel and from penalizing government contractors based on their participation in political boycotts of Israel.

(3) Alternatively, preliminarily and permanently enjoin Defendants from requiring Plaintiff as a contractor with the University of Arkansas to certify that it is not currently engaged, nor will it engage for the duration of any contract, in a boycott of Israel.

(4) Award Plaintiff its costs and reasonable attorney fees under 28 U.S.C. § 1988; and

(5) Grant Plaintiff such other relief as this Court would deem just and proper.

Respectfully submitted

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* *Pro hac vice* applications to be filed

APPENDIX F

Ark. Code Ann. § 25-1-501 to §25-1-504 provide:

§ 25-1-501. Legislative findings

The General Assembly finds that:

(1) Boycotts and related tactics have become tools of economic warfare that threaten the sovereignty and security of key allies and trade partners of the United States;

(2) The State of Israel is the most prominent target of such boycott activity, which began with but has not been limited to the Arab League boycott adopted in 1945, even before Israel's declaration of independence as the reestablished national state of the Jewish people;

(3) Companies that refuse to deal with United States trade partners such as Israel, or entities that do business with or in such countries, make discriminatory decisions on the basis of national origin that impair those companies' commercial soundness;

(4) It is the public policy of the United States, as enshrined in several federal acts, to oppose boycotts against Israel, and the United States Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States

companies and improves American competitiveness;

(5) Israel in particular is known for its dynamic and innovative approach in many business sectors, and therefore a company's decision to discriminate against Israel, Israeli entities, or entities that do business with or in Israel, is an unsound business practice, making the company an unduly risky contracting partner or vehicle for investment; and

(6) Arkansas seeks to act to implement the United States Congress's announced policy of "examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel".

§ 25-1-502. Definitions

As used in this subchapter:

(1)(A)(i) "Boycott Israel" and "boycott of Israel" means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or

in Israeli-controlled territories, in a discriminatory manner.

(ii) "Boycott" does not include those boycotts to which 50 U.S.C. § 4607(c) applies.

(B) A company's statement that it is participating in boycotts of Israel, or that it has taken the boycott action at the request, in compliance with, or in furtherance of calls for a boycott of Israel, can be considered by the Arkansas Development Finance Authority as a type of evidence, among others, that a company is participating in a boycott of Israel;

(2) "Company" means a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other entity or business association, including all wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates of those entities or business associations;

(3) "Direct holdings" in reference to a company means all publicly traded securities of that company that are held directly by the public entity in an actively managed account or fund in which the public entity owns all shares or interests;

(4) "Indirect holdings" in reference to a company means all securities of that company that are held in an account or fund, such as a mutual fund, managed by one (1) or more persons not employed by the public entity, in which the public entity owns shares or interests together with other investors not subject to the provisions of this subchapter or that are held in an index fund;

(5) "Public entity" means the State of Arkansas, or a political subdivision of the state, including all boards, commissions, agencies, institutions, authorities, and bodies politic and corporate of the state, created by or in accordance with state law or rules, and does include colleges, universities, a statewide public employee retirement system, and institutions in Arkansas as well as units of local and municipal government;

(6) "Restricted companies" means companies that boycott Israel; and

(7) "Retirement system" means a public retirement system in Arkansas.

§ 25-1-503. Prohibition on contracting with entities that boycott Israel

(a) Except as provided under subsection (b) of this section, a public entity shall not:

(1) Enter into a contract with a company to acquire or dispose of services, supplies,

information technology, or construction unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel; or

(2) Engage in boycotts of Israel.

(b) This section does not apply to:

(1) A company that fails to meet the requirements under subdivision (a)(1) of this section but offers to provide the goods or services for at least twenty percent (20%) less than the lowest certifying business; or

(2) Contracts with a total potential value of less than one thousand dollars ($1,000).

§ 25-1-504. Prohibition on direct investments in companies that boycott Israel

(a)(1) A public entity through its asset managers shall identify all companies that boycott Israel and assemble those identified companies into a list of restricted companies to be distributed to each retirement system.

(2) For each company newly identified and added to the list of restricted companies, the public entity through its asset managers shall send a written notice informing the company of its

status and that it may become subject to divestment by the public entity.

(3) If, following the engagement by the public entity through its asset managers with a restricted company, that company ceases activity that designates it as a restricted company and submits a written certification to the public entity that it shall not reengage in such activity for the duration of any investment by the public entity, the company shall be removed from the restricted companies list.

(4) The public entity shall keep and maintain the list of restricted companies and all written certifications from restricted and previously restricted companies.

(b)(1) The public entity shall adhere to the following procedures for companies on the list of restricted companies:

(A) Each public entity shall identify the companies on the list of restricted companies of which the public entity owns direct holdings and indirect holdings;

(B) The public entity shall instruct its investment advisors to sell, redeem, divest, or withdraw all direct holdings of restricted companies from the public entity's assets under management in an orderly and fiduciarily responsible

manner within three (3) months after the appearance of the company on the list of restricted companies; and

(C) Upon request from the Arkansas Development Finance Authority, each public entity shall provide the Arkansas Development Finance Authority with information regarding investments sold, redeemed, divested, or withdrawn in compliance under this section.

(2) The public entity shall not acquire securities of restricted companies as part of direct holdings.

(c)(1) Subsection (b) of this section does not apply to the public entity's indirect holdings or private market funds.

(2) The public entity shall submit letters to the managers of those investment funds identifying restricted companies and requesting that those investment funds consider removing the investments in the restricted companies from the funds.

(d) The costs associated with the divestment activities of the public entity shall be borne by the respective public entity.

(e) With respect to actions taken in compliance with this section, including all good-faith determinations regarding companies as required under this section, any statewide

retirement system and the Arkansas Development Finance Authority are exempt from any conflicting statutory or common law obligations, including any fiduciary duties and any obligations with respect to choice of asset managers, investment funds, or investments for the statewide retirement systems' portfolios.