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No. 19-1378

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS TIMES LP,

Plaintiff-Appellant,

v.

MARK WALDRIP, et al.,

Defendants-Appellees,

On Appeal from an Order of the the United States District Court for the Eastern District of Arkansas, Hon. Brian S. Miller,
Case No. 4:18-CV-00914 BSM

BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE IN SUPPORT OF DEFENDANTS-APPELLEES

Gregory E. Ostfeld
GREENBERG TARUIRG, LLP
77 W. Wacker Dr., Suite 3100
Chicago, Illinois 60601
(312) 456-8400 Telephone
312-456-8435 Facsimile

Counsel for Amicus Curiae
American Jewish Committee

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amicus curiae* American Jewish Committee states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation

June 6, 2019

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for *Amicus Curiae*
American Jewish Committee

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INTERESTS OF *AMICUS CURIAE*

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world. AJC frequently speaks out on issues of public concern, including events in the Middle East, Israeli-Palestinian relations, and anti-Semitism.

In accordance with its mission and values, AJC opposes the use of public funds to support the so-called Boycott, Divestment, and Sanctions ("BDS") movement, which markets itself as a non-violent movement to boycott, divest from, and sanction Israel with the putative goal of getting it to withdraw to its pre-1967 borders, but whose leadership in fact seeks and has actively promoted the elimination of Israel as a Jewish state. AJC has actively sought to rally elected officials to reject the BDS movement. AJC has also supported legislation to ensure that no unit of government is compelled to waste public funds due to a contractor's decision to limit market access in the fulfillment of government contracts

by boycotting Israeli goods or services. To that end, AJC supports Act 710 of 2017 codified at Ark. Code Ann. § 25-1-501 *et seq.* ("Act 710" or the "Act"), which Plaintiff-Appellant Arkansas Times LP ("Plaintiff") seeks to have declared facially unconstitutional and enjoined in its entirety. The United States District Court for the Eastern District of Arkansas (the "District Court") correctly denied Plaintiff's motion for preliminary injunction and dismissed its complaint for failure to state a claim by Order entered January 23, 2019 [Dist. Ct. Dkt. No. 23] (the "Order").

AJC respectfully submits that the State of Arkansas (the "State"), and, by extension, the University of Arkansas Board of Trustees ("UABT"), has a legitimate interest in protecting its commerce with Israel and its access to goods and services supplied by Israeli-connected companies and entities. AJC agrees with the District Court and the State that Act 710 is constitutional, both facially and as applied. This brief focuses primarily on the question of facial constitutionality.

The sweeping breadth of Plaintiff's facial challenge to Act 710's certification requirement, which seeks to enjoin the Act in its totality as applied to any party, would bar application of the Act even under core circumstances where it clearly and unequivocally advances the State's

legitimate interest in uninhibited market access, and even where (as here) no actual or anticipated political boycott is implicated in the Act's enforcement. The State has a legitimate interest in safeguarding its commerce with Israel and its access to Israeli-connected goods or services, and its enforcement of that interest does not contravene the First Amendment. Plaintiff's effort to transform this case into a referendum on whether boycotts are constitutionally protected speech presents a false dilemma. The Act's certification requirement directs nothing more than a factual disclosure; it does not compel State contractors to endorse or engage in speech opposing the BDS movement or BDS activities, does not prevent individuals affiliated with State contractors from participating in boycotts in their personal capacities, and does not prevent contractors from expressing their personal views regarding boycotts or associating with others who share their views. The Act requires certification of a fact, not a viewpoint, idea, or expression.

The scope of the relief sought by Plaintiff is therefore substantially overbroad in relation to the narrow circumstances of this case, where a party that by its own admission does not and never has boycotted Israel, has no intention of doing so, and has never advocated doing so,

nonetheless feels constitutionally aggrieved by a requirement to certify the truthful fact that it is not participating in a boycott of Israel. On this slender reed, Plaintiff would bar the State from enforcing the Act's certification requirement in all circumstances, even where well-settled precedent clearly permits the State to defend its legitimate interest in protecting the State's market access to goods and services originating in or connected to Israel. Undue facial restraint of the Act's certification requirement may result in the State being deprived of normal market access to prescription drugs, electronics, construction equipment, and other goods and services used in the State's exercise of its ordinary and legitimate functions. AJC thus respectfully submits this *amicus curiae* brief in support of the State and the District Court's Order, and in opposition to Plaintiff's facial challenge to Act 710.[1]

INTRODUCTION

The State and UABT have a legitimate interest in ensuring that taxpayers' funds are spent responsibly in a free and open market, and

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for AJC certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting this brief; and no person other than the *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief. All parties were timely notified of AJC's intent to file this *amicus* brief. All parties have consented to the filing of this brief.

are not wasted due to the conduct of persons who contract with the State, regardless of the contractors' motives. The State and UABT should not be compelled to expend taxpayer resources inefficiently due to a contractor's personal decision to limit the State's market access to particular goods and services. A contractor's refusal to deal with Israeli-connected companies, goods, or services may result in the State and UABT either lacking access to or paying more for prescription drugs, electronics, construction equipment, and other goods or services used by the State and UABT in the exercise of their essential government functions. In its core application, Act 710 safeguards the State's legitimate interest in ensuring that it has full and unimpeded access to all goods and services available on the market, including those of Israeli origin, in the fulfillment of government contracts.

The Supreme Court has long recognized that the government is not obliged to expend public funds in a manner contrary to its own express interests in deference to a contractor's preferred use of public resources to a different end, regardless of whether that preference is couched as an exercise of personal or political expression. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003). The Arkansas Legislature

enacted the certification requirement of Act 710 in response to persistent efforts by the BDS movement to impede commerce with Israel under the guise of protest against the Israeli government's occupation of Palestinian territories. Ark. Code Ann. § 25-1-501. The Act expresses the State's valid interest in protecting its access to a free and open market, including its commerce with Israel, by ensuring that it is not deprived of access to Israeli goods or services through the actions of State contractors refusing to deal, terminating business activities, or otherwise limiting commercial relations with Israel, or with persons or entities doing business in Israel or in Israeli-controlled territories. Ark. Code Ann. § 25-1-502. The Act's certification requirement only obliges State contractors to provide a written certification that they are not engaged in a boycott of Israel. *See* Ark. Code Ann. § 25-1-503(a).[2]

There is no legal justification to deprive the State of its power to enforce the Act in the core circumstance where a State contractor's refusal to deal with Israel would directly impede the State's legitimate interest in engaging in commerce with Israel and having access to Israeli-

[2] This factual certification requirement is far less restrictive than decades-old federal law prohibiting domestic companies from participating in the Arab League boycott of Israel. *See* 50 U.S.C. § 4607; 15 C.F.R. Part 760.[2] That restriction has withstood constitutional scrutiny. *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 918 (7th Cir. 1984).

sourced or Israeli-connected goods and services. The First Amendment does not oblige the State to subordinate its legitimate interests in unhindered access to goods such as pharmaceuticals, office accessories, heavy equipment, and other products used in ordinary government functions, to an individual State contractor's preference to see public funds allocated in a different manner.

Conversely, enforcing the Act simply requires State contractors to certify a fact—that they are not participating in a boycott of Israel. This factual certification is no different from certifying that the contractor uses a State-mandated procurement process, or that its goods or services meet certain quality or safety standards, or any of dozens of other factual certifications State contractors may be required to make to satisfy the State that its taxpayers' resources are being used responsibly. The certification does not require contractors to express or endorse any particular point of view regarding Israel or the BDS movement, nor does it compel contractors to refrain from criticizing Israel, supporting the BDS movement, associating with others who support the BDS movement, or advocating in favor of a boycott. Every avenue of free speech and expression remains open to every State contractor, so long as it is

factually true that they are not boycotting Israel and thereby depriving the State of market access to Israeli goods and services.

While Plaintiff and its *amici* supporters seek to posture this appeal as a test case on the question of whether all political boycotts are constitutionally protected speech under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), that question is not before this Court. Indeed, it is notable that two years after passage of the Act, no party engaged in or even contemplating an actual boycott of Israel has come forward to challenge its constitutionality. Quite the contrary, Plaintiff concedes it is not engaged in a boycott of Israel, has never done so, has no intention of doing so in the future, and does not advocate a boycott of Israel or support the BDS movement. Plaintiff simply opposes certifying a fact it acknowledges to be true. Under these circumstances—where the Act is plainly constitutional in its core application and Plaintiff itself does not even claim interference with any existing or anticipated boycott, Plaintiff's putative facial challenge is overreaching and inapposite. Entry of facial declaratory and injunctive relief against the Act's certification requirement is therefore unwarranted.

For these reasons, the District Court's Order is correctly decided and should be affirmed.

ARGUMENT

I. The Core Application of the Act to State Contractors Who Seek to Impair the State's Commerce with Israel Is Unquestionably Valid

The unusual posture of Plaintiff's claim—where Plaintiff seeks relief not because it desires to engage in a boycott of Israel but because it operates a newspaper and objects to the certification requirement on grounds of personal belief—cannot overshadow the legitimate sweep of the Act's certification requirement as applied to its core function. It is clear the State may lawfully impose appropriate limits to protect the State's commerce with Israel and to avoid having public funds wasted due to a contractor's personal decision to deprive the State of market access to Israeli-connected goods and services. This valid application of the Act precludes Plaintiff's facial challenge to its constitutionality.

The list of companies targeted by the BDS movement includes more than three dozen major consumer and industrial companies, including Teva Pharmaceuticals, Caterpillar, and Hewlett Packard. *See* www.bdslist.org/full-list (last visited June 2, 2019). It is readily apparent

how a contractor's boycott directed to these companies could directly implicate the State's valid interests. Consider the following examples:

- A hospital contracting with the State to provide medical services to State employees engages in a boycott of Israel, and refuses to purchase any prescription drugs manufactured by Israeli pharmaceutical manufacturer Teva Pharmaceutical or its affiliates. Instead, the hospital sources less effective and/or more expensive medications from other pharmaceutical companies, with the State's employees bearing the health consequences and its taxpayers bearing the added financial costs. The State has legitimate interests in ordinary access to the pharmaceutical market and in not subsidizing the hospital's boycott.
- A procurement company contracting with the State to supply office equipment engages in a boycott of Israel, and refuses to source office equipment from Hewlett Packard, instead purchasing other brands at a higher price and/or with less desirable features from other companies. The State has legitimate interests in ordinary access to the office equipment

market and in not expending taxpayer funds to subsidize the procurement contractor's boycott.

- A construction company contracting with the State boycotts Caterpillar and refuses to purchase or use any equipment manufactured by Caterpillar though it would be the most suitable and cost-efficient equipment for the job. The State has legitimate interests in ordinary access to the heavy equipment market and in the proper expenditure of taxpayer funds on public construction projects.

In each example, there is a direct relationship between the Act's certification requirement and the contractors' duties, and failure to enforce the certification requirement imposes a direct detriment and cost on the operations of the State. Because application of the Act in these core circumstances is clearly valid under long-settled Supreme Court precedent, Plaintiff's facial challenge cannot proceed.

A. A Facial Challenge Cannot Lie Against the Act Unless It Is Unconstitutional in Every Application.

Federal courts exercise judicial review with great caution, particularly in the context of purported facial challenges. The Supreme Court has explained facial challenges "are disfavored for several

reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). First, "[c]laims of facial invalidity often rest on speculation" and "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). Second, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring) (internal citation omitted)). Third, facial challenges "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

For these reason, "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Id.* at 450 (quoting *United States v. Salerno*, 481 U.S. 739,

745 (1987)).[3] A facial challenge "must fail where the statute has a 'plainly legitimate sweep.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-740 (1997) (Stevens, J., concurring in judgments)). "Exercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Id.* (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). Refraining from "premature" decisions on facial challenges is thus "a proper exercise of judicial restraint." *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 755 (8th Cir. 2018). *See also Brakebill v. Jaeger*, 905 F.3d 553, 558 (8th Cir. 2018) (noting that facial challenges are "disfavored").

Here, Plaintiff's facial challenge to the Act fails because it not only has a plainly legitimate sweep, but the valid application of the Act goes to the very core of the Legislature's reason for enacting it—to preserve

[3] There is a limited exception to this rule for First Amendment "overbreadth doctrine" challenges, where "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep[.]" *Havlak v. Vill. of Twin Oaks (In re Josephine Havlak Photographer, Inc.)*, 864 F.3d 905, 912 (8th Cir. 2017) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal citations omitted)). As discussed in § II, *infra*, Plaintiff's circumstances represent the exception, not the rule, and there is no basis in the record to conclude that a "substantial number" of the Act's applications are unconstitutional in relation to its core sweep of legitimate application to safeguard the State's commerce with Israel.

the State's commerce with Israel and access to a free and open market in carrying out legitimate government functions.

B. The Act Is Constitutionally Valid in Its Core Application.

The State is constitutionally authorized to defend its legitimate interest in the responsible expenditure of public funds, including its interest in access to all commerce, goods, and services. The First Amendment does not include a right of public contractors to divert, dilute, or squander public funds merely because the contractor prefers they be spent differently, regardless of whether the contractor's preference is couched as protected political expression. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Am. Library Ass'n*, 539 U.S. at 212 (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (internal citation omitted)). "Within broad limits, 'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 211 (quoting *Rust*, 500 U.S. at 194). In *Rust*, for example, Congress appropriated federal funding for family planning services and prohibited the use of such funds in programs that provided abortion counseling. 500 U.S. at 178. The Supreme Court upheld the

restriction, finding that it did not compel the recipients to relinquish their constitutional right to engage in abortion counseling, but only insisted on public funds being spent "for the purposes for which they were authorized." 500 U.S. at 196.

Similarly, in *American Library Association*, the Court affirmed that Congress could impose a restriction on its Internet assistance programs to public libraries and require libraries to install filtering software on Internet-accessible computers that blocks images constituting obscenity or child pornography and that prevents minors from obtaining access to harmful material. 539 U.S. at 212. The Court held that the restriction "simply reflects Congress' decision not to subsidize" libraries choosing not to install such software, while leaving the libraries "free to do so without federal assistance." *Id.* And in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court upheld a restriction limiting tax exemption status to nonprofit organizations that do not engage in substantial lobbying activities, and rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Id.* at 546 (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959)); *see also id.* at 549 ("[A] legislature's

decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.").

These holdings establish as a "general matter" that "if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds," and "[t]his remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 570 U.S. 205, 214 (2013). The limitation on this general rule is that a funding condition may not be used specifically to impose an "unconstitutional burden on First Amendment rights." *Id.* The "relevant distinction," the Court had held, "is between conditions that define the limits of the government spending program" and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214-15.

The application of the Act's certification requirement to safeguard the State's commerce with Israel and to ensure the State retains market access to Israeli-connected goods like pharmaceuticals, electronics, and heavy equipment is plainly a condition that limits State spending programs, not a condition that leverages funding to regulate speech. Indeed, protecting commerce and the State's market access defines the

Act's core function. In adopting Act 710, the Legislature declared the State's interest in combatting the use of boycotts as a tool of "economic warfare" against "key allies and trade partners," recognized Israel as the "most prominent target" of such boycotts, found the refusal to deal with Israel impaired the "commercial soundness" of the companies engaged in the boycotts, and identified companies engaged in such boycotts as "an unduly risky contracting partner." Ark. Code Ann. § 25-1-501.

These findings identify legitimate State interests in preserving the State's commerce with Israel and access to Israeli goods, and ensuring the State is not contracting with unduly risky partners. When application of the Act's certification requirement is viewed in light of these declared State interests, there is no question a State contractor who refuses to participate in commerce with Israel, regardless of motive, could readily and materially impact the State's legitimate interests. Indeed, even those First Amendment scholars supporting a challenge to Arizona's similar certification requirement acknowledged that such a requirement would pass constitutional muster to the extent it "regulated solely the manner in which its contractors performed their state contracts," while arguing against applications of the certification requirement that lack a

"relationship to the state contract." *See* Brief of *Amicus Curiae* First Amendment Scholars in Support of Plaintiffs-Appellees [Dkt. No. 72], pp. 19-20, *Jordahl v. Arizona*, No. 18-16896 (9th Cir. filed Jan. 24, 2019).

This acknowledgment that there is a constitutionally permissible core application of the certification requirement to the performance of State contracts confirms Plaintiff's facial challenge is overbroad, in that it reaches permissible applications of the Act and prevents the State from enforcing its legitimate interest in preserving its commerce with Israel. If anything, the Act's certification requirement imposes far fewer limitations than the federal government's longstanding prohibition on domestic participation in the Arab League's boycott of Israel, which passed constitutional muster more than three decades ago. *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 918 (7th Cir. 1984). When the State's valid interests are coupled with its well-recognized authority to impose funding restrictions and to refuse the needless waste of public funds, the justification for a facial challenge dissolves. *See Alliance for Open Society*, 570 U.S. at 214; *Am. Library Ass'n*, 539 U.S. at 211-12; *Rust*, 500 U.S. at 193-94; *Regan*, 461 U.S. at 546. Plaintiff has failed to

offer any rationale for its facial challenge sufficient to overcome the Act's legitimate core purpose.

II. Plaintiff's Allegations and Circumstances Do Not Support a Facial Challenge to the Act

Plaintiff's inability to allege a cognizable facial challenge to the Act is all the more clear when considered against Plaintiff's exceptional circumstances. Though Plaintiff attempts to posture this appeal as a referendum on whether all political boycotts are constitutionally protected expression, that is a false trail. Plaintiff itself is not engaged in such a boycott, nor has it identified any State contractor who is. Plaintiff's entire facial challenge is thus built on the shaky foundation that it opposes certifying a fact that it already admits to be true—its non-participation in a boycott of Israel. While it is possible some hypothetical contractor could claim at some unspecified date in the future that the Act forces it to choose between participating in a *bona fide* political boycott or giving up a State contract, that is not the dilemma Plaintiff faces, nor has Plaintiff identified any other State contractor facing such a choice. Having failed to raise the question even on its own behalf, or on behalf of a substantial number of other State contractors, Plaintiff cannot make it the basis for a facial challenge.

The parties and their *amici* dedicate considerable time and attention to the District Court's consideration of *Claiborne Hardware*'s reach, and whether it is limited to expressive conduct in support of a political boycott or protects the political boycott itself as its own mode of expressive activity. *See* A 12-16. Plaintiff argues that *Claiborne Hardware* protects boycotts as an "expression on public issues." 458 U.S. at 913. Plaintiff further seeks to draw support from several district court decisions applying *Claiborne Hardware* to enjoin enforcement of other states' certification laws. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018); *see also Amawi v. Pflugerville Indep. Sch. Dist.*, No. 1:18-cv-1091-RP, 2019 U.S. Dist. LEXIS 70208 (W.D. Tex. Apr. 25, 2019). The State responds that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*"), limits the expressive element of a boycott to speeches accompanying and explaining the boycott.

The entire debate, however, is directed to a superfluous question insofar as this case is concerned. Neither the active nor expressive elements of a political boycott are at issue here. By its own admission, Plaintiff has never boycotted Israel, participated in a boycott of Israel,

expressed an intention to boycott, or editorialized in favor of boycotting Israel. *See* JA13 ¶ 22; JA88-89. Thus, whether by act or expression, the Act does not regulate Plaintiff's participation in or expression in favor of any existing or anticipated boycott. Nor has any other State contractor come forward to claim that its participation in or expression in support of an actual or anticipated boycott has been impeded by the Act.

On the record before this Court, therefore, the question is not the expressive status of a political boycott (since no such boycott is at issue here), but simply whether the First Amendment protects Plaintiff's putative right to express its principled disagreement with the Act by refusing to certify a ***fact*** it admits is true—that it is not boycotting Israel. Plaintiff is not faced with the choice of abandoning a boycott to keep its government contract, as it neither has participated in nor intends to participate in such a boycott. It need only certify the true fact that it is not boycotting Israel. This presents a much simpler constitutional question, and one *FAIR* answers directly: A "compelled statement of fact[]" that is "plainly incidental to the [law's] regulation of conduct" and does not contain any government-mandated message that the recipient of funds "must endorse" is a "far cry from the compelled speech" that the

Supreme Court has previously found to be unconstitutional. *FAIR*, 547 U.S. at 61-62 (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)).

FAIR makes clear, in short, that "fact-based disclosure requirements … implicate the First Amendment only if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make." *Beeman v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1099-1100 (9th Cir. 2011), *rehearing en banc granted*, 661 F.3d 1199 (9th Cir. 2011), *question certified*, 682 F.3d 779 (9th Cir. 2012), *vacated on other grounds*, 741 F.3d 29 (9th Cir. 2014). Here, Plaintiff is required to endorse no viewpoint or message with which it disagrees. It can advocate against the Act, advocate against Israel, speak or editorialize for or against a boycott, speak or editorialize for or against withdrawal to pre-1967 borders, or deliver any other viewpoint, content, or message it wishes with respect to the Act, the BDS movement, or Israel. As applied to Plaintiff, the Act's certification requirement compels nothing more than the certification of a truthful fact-based disclosure. Plaintiff has identified no other State

contractor differently situated with respect to the effect of the Act's certification requirement, and no party has come forward to allege that the Act has forced it to choose between a political boycott and its contract.

These circumstances distinguish this case from the Arizona, Kansas, and Texas cases Plaintiff cites, as in all those cases the plaintiffs asserted an impediment to their participation in ongoing boycotts of Israel. *See Amawi*, 2019 U.S. Dist. LEXIS 70208 at *4 ("Plaintiffs in this case are all participants or supporters of the 'BDS' movement."); *Jordahl*, 336 F. Supp. 3d at 1028 ("Mr. Jordahl personally participates in a boycott of consumer goods and services offered by businesses supporting Israel's occupation of the Palestinian territories."); *Koontz*, 283 F. Supp. 3d at 1013 ("In May 2017, plaintiff Esther Koontz began boycotting Israeli businesses.").[4] In each case, therefore, there was at least a party claiming it had to choose between participating in a political boycott or its government contract. No such contractor has come forward with respect to the Arkansas statute.

[4] AJC believes the Arizona, Kansas, and Texas cases were wrongly decided, and has filed or plans to file *amicus* briefs in the appeals of several of these cases to present its views to the various Courts of Appeal deciding each case. Irrespective of AJC's disagreement with those rulings, however, the plaintiffs in those cases are in a different posture than Plaintiff here.

Here, with no actual or anticipated boycott in sight, the District Court held Plaintiff had standing based not on the infringement of its alleged expressive right to engage in or advocate for a political boycott, when neither was the case, but rather on its loss of a government contract after refusing to comply with the Act's certification provision. *See* A 5-7. That does not support a facial constitutional challenge. Essentially, Plaintiff is asking this Court to undertake analysis of a facial challenge based on nothing more than the asserted right of a hypothetical, but presently non-existent, State contractor to boycott Israel.

Plaintiff cannot mount a facial constitutional challenge by asserting a First Amendment right to boycott, where Plaintiff itself does not seek to exercise that right and has identified no other State contractor in a different position. Though Plaintiff insists a facial preliminary injunction "would serve the public interest by upholding the First Amendment and preventing the enforcement of unconstitutional laws" (Pl. Br. at 54), that circular reasoning does not answer the Supreme Court's concerns regarding the imprudence of facial challenges. *See* § I.A, *supra*. Facial challenges brought under the First Amendment are equally disfavored for their tendency to "rest on speculation" and to risk "premature

interpretation" of statutes. *Havlak v. Vill. of Twin Oaks (In re Josephine Havlak Photographer, Inc.)*, 864 F.3d 905, 912 (8th Cir. 2017) (quoting *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 685 (8th Cir. 2012)).

First Amendment jurisprudence does recognize an "overbreadth doctrine" permitting invalidation of a law as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* But it is "inappropriate to entertain a facial overbreadth challenge when the plaintiff fails to adduce any evidence that third parties will be affected in any manner differently from herself." *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal citations omitted)). To entertain a facial challenge pursuant to the overbreadth doctrine, therefore, "[t]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt." *Id.* (quoting *Jacobsen v. Howard*, 109 F.3d 1268, 1274 (8th Cir. 1997) (internal citation omitted)). *See also Minn. Majority v. Mansky*, 708 F.3d 1051, 1056 (8th Cir. 2013) (requiring the overbreadth of the alleged restraint of speech to be "both 'real' and 'substantial' in relation to its 'plainly legitimate sweep'" (internal citation omitted)).

Plaintiff's allegations fall well short of satisfying the stringent requirements for a facial First Amendment challenge. Plaintiff has not shown that a substantial number of the Act's applications are unconstitutional judged in relation to its plainly legitimate sweep. Indeed, Plaintiff has identified no contractor and no set of circumstances, apart from Plaintiff's own unusual circumstances of refusing to comply with the Act's certification requirement despite not participating in any boycott of Israel, in which application of the certification requirement would be unconstitutional. Plaintiff certainly has made no showing that the Act's certification requirement imposes the same alleged harm or has the same operational consequences with respect to all State contractors. Plaintiff also has made no showing of a realistic danger that the Act's certification requirement will significantly compromise the recognized First Amendment protections of any contractors not before the Court. Plaintiff's personal opposition to the Act's certification requirement thus supplies no basis for this Court to undertake a facial analysis of the Act in its entirety, much less to enjoin the Act's legitimate core functions for the sake of the alleged boycott rights of a hypothetical State contractor.

CONCLUSION

Plaintiff's facial challenge improperly seeks to impose blanket declaratory and preliminary injunctive relief that is neither supported nor necessary under the circumstances of this case. Plaintiff improperly seeks to bar all applications of the Act's certification requirement, even those plainly supported by the State's legitimate interests in preserving its own access to the market and maintaining its commerce with Israel. Plaintiff has failed to satisfy the stringent requirements even to assert such a facial challenge, much less secure the broad declaratory and injunctive relief sought. For these reasons, Plaintiff's facial challenge to the Act should be rejected.

Dated: June 6, 2019

Respectfully submitted,

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
GREENBERG TARUIRG, LLP
77 W. Wacker Dr., Suite 3100
Chicago, Illinois 60601
(312) 456-8400 Telephone
312-456-8435 Facsimile

Counsel for *Amicus Curiae*
American Jewish Committee

CERTIFICATE OF COMPLIANCE

I, Gregory E. Ostfeld, hereby certify that the foregoing Brief of *Amicus Curiae* American Jewish Committee in Support of Defendants-Appellees complies with type-volume limits because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, the brief contains 5,480 words, and is proportionately spaced using Century 14-point typeface.

June 6, 2019

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for *Amicus Curiae*
American Jewish Committee

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2019, I electronically filed the foregoing Brief of *Amicus Curiae* American Jewish Committee in Support of Defendants-Appellees with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which will send notice of such filing to all registered CM/ECF participants.

June 6, 2019

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for *Amicus Curiae*
American Jewish Committee

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

June 06, 2019

Mr. Gregory Edward Ostfeld
GREENBERG & TRAURIG
Suite 3100
77 W. Wacker Drive
Chicago, IL 60601-0000

RE: 19-1378 Arkansas Times LP v. Mark Waldrip, et al

Dear Counsel:

The amicus curiae brief of the American Jewish Committee has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

JMM

Enclosure(s)

cc: Mr. Alexander Abdo
Mr. Jonathan Backer
Mr. Nicholas Jacob Bronni
Mr. Bruce David Brown
Ms. Bettina E. Brownstein
Mr. John Lindsay Burnett
Mr. Michael A. Cantrell
Mr. Allen J. Dickerson
Ms. Ambika K. Doran
Ms. Vera Eidelman
Mr. Jethro Eisenstein
Mr. Marc Arthur Greendorfer

Mr. Brian Matthew Hauss
Ms. KaTina Hodge-Guest
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Mr. Gabriel Rottman
Mr. Radhika Sainath
Mr. Matthew Strugar
Mr. Robert J. Tolchin
Ms. Katie Townsend
Ms. Caitlin Vogus
Mr. Eugene Volokh
Mr. Vincent M. Wagner
Mr. Benjamin Wizner
Mr. Owen Dennis Yeates

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