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	 Amicus, Zachor Legal Inst. brief	2	
	 CovLtrAmBrFiled	46	

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 THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN
DIVISION
Case No. 4:18-CV-00914 BSM

**BRIEF OF *AMICUS CURIAE* ZACHOR LEGAL INSTITUTE IN
SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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Dated: June 5, 2019

CORPORATE DISCLOSURE STATEMENT

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Table of Contents

CORPORATE DISCLOSURE STATEMENT.....i

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

ZACHOR LEGAL INSTITUTE 1

II. ARGUMENTS AND AUTHORITIES 2

A. SUMMARY OF ARGUMENT.....2

**B. ARGUMENT: THE BOYCOTTS SUBJECT TO ACT 710 ARE
DISCRIMINATORY AND FOSTERED BY AFFILIATES OF
DESIGNATED TERROR ORGANIZATIONS 3**

I. ANTI-ZIONISM IS ANTI-SEMITISM 4

**II. BDS IS THE MOST RECENT ITERATION OF ANTI-JEWISH
RADICALISM9**

III. BDS IS THE SUCCESSOR TO THE ARAB LEAGUE BOYCOTT.. 14

**IV. DESIGNATED TERROR ORGANIZATIONS CREATED AND
MANAGE BDS 23**

III. CONCLUSION..... 30

Table of Authorities

Constitutional Provisions

U.S. CONST. amend. I 1

Statutes

18 U.S.C. § 2339B..... 24

18 U.S.C. §§ 1961-1968 24

50 U.S.C. § 4607. 12

Act 710..... passim

ARK. CODE ANN. § 25-1-501(6)..... 19

Other Authorities

AARON J. SARNA, *BOYCOTT AND BLACKLIST: A HISTORY OF ARAB*

ECONOMIC WARFARE AGAINST ISRAEL 5 (1986)..... 10

ANTI-DEFAMATION LEAGUE, *ANTI-SEMITIC INCIDENTS SURGED*

NEARLY 60% IN 2017, ACCORDING TO NEW ADL REPORT (Feb. 27,

2018)..... 16

BDS Spurs Anti-Semitism on Campuses, Says Brandeis Study,

THE TIMES OF ISRAEL (Nov. 2, 2016)9

Ben Cohen, *Left, Right and Center Parties in German Parliament Unite to Oppose Antisemitic BDS Campaign*, THE ALGEMEINER (May 16, 2019) 17

Benny Morris & Dror Ze’evi, *When Turkey Destroyed its Christians*, WALL ST. J. (May 18, 2019)..... 21

Br. for Plaintiff-Appellant at 46, *Arkansas Times, LP v. Mark Waldrip, et al.*, (April 9, 2019) (No. 19-1378)..... 18

Catie Edmundson & Sheryl Gay Stolberg, *House Democrats Brace for Another Anti-Semitism Showdown*, N.Y. TIMES (April 3, 2019) 15

Dan Diker & Adam Shay, *The PACBI Deception: Palestinian Academic & Cultural Boycott of Israel (PACBI) Unmasked, Terror Links and Political Warfare Masquerading as Human Rights*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (2019)..... 26

Daniel Schwammenthal, *‘Anti-Zionism’ Threatens Europe’s Jews*, WALL ST. J. (Dec. 12, 2018) 17

DOJ RICO Prosecution Request 14, 24, 26

Edy Cohen, *How the Mufti of Jerusalem Created the Permanent Problem of Palestinian Violence*, THE TOWER MAGAZINE (Nov. 2015)..... 11

Eliana Rudee, *Sixth BDS National Conference Sheds Light on Movement’s Intentions and Terrorist Affiliates*, JEWISH NEWS SERVICE (April 25, 2019)..... 14, 26

Extension of the Export Administration Act: Hearings and Markup Before the H. Comm. on Int’l Relations, 95th Cong. 389 (1977) .13

Foreign Investment and Arab Boycott Legislation: Hearing on S. 69 and S. 92 Before the S. Subcomm. on Int’l Fin. of the S. Comm. on Banking, Hous. and Urban Affairs, 95th Cong. 446–47 (1977)..... 13

Gabriel San Ramon, *Pro-Palestine Group Sanctioned by UCI for ‘Disrupting’ Israeli Soldier Panel*, OC WEEKLY (Sept. 1, 2017) ..29

Germany Votes to Define BDS as Antisemitic, MIDDLE EAST MONITOR (May 17, 2019)..... 17

Gil Atzmon, et al., *Abraham's Children in the Genome Era: Major Jewish Diaspora Populations Comprise Distinct Genetic Clusters*

with Shared Middle Eastern Ancestry, AM. J. OF HUM. GENETICS
(June 2010) 6

GIL FEILER, FROM BOYCOTT TO ECONOMIC COOPERATION: THE
POLITICAL ECONOMY OF THE ARAB BOYCOTT OF ISRAEL 9, 21-27
(1998)..... 9, 11

Governors United against BDS..... 30

GRASSROOTS PALESTINIAN ANTI-APARTHEID CAMPAIGN, TOWARDS A
GLOBAL MOVEMENT: A FRAMEWORK FOR TODAY’S ANTI-APARTHEID
ACTIVISM 160 (June 2007)..... 5, 20

Jake Wallis Simons, *British Jews in Fear After Pro-Palestine
Group Supported by Corbyn Forces Jewish Shops to Close with
‘Campaign of Intimidation’*, THE DAILY MAIL (May 31, 2019) 16

James Esseks, *In Masterpiece, the Bakery Wins the Battle but
Loses the War*, ACLU BLOG (June 4, 2018) 4

Jim Hoft, *Word to Obama: Daniel Pearl Was Not Beheaded
Because He Was A Journalist, He Was Beheaded Because He Was
An American and A Jew*, BREITBART (May 18, 2010) 8

Jonathan S. Tobin, *Don't Blame the Surge in European Anti-Semitism on the Populists*, NATIONAL REVIEW (May 29, 2019)... 17

Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY L. REV. 837 (2007) 8

Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018). 2, 14, 18, 19

Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1 (2017)..... 2, 20, 21

Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 2, 3

Matthew Dalton, *Anti-Semitic Acts 'Spreading Like a Poison' in France*, WALL ST. J., Feb. 19, 2019 16

NGO MONITOR report dated June 13, 2018 titled *Jewish Voice for Peace (JVP)* 23

Patrick Wintour, *Persecution of Christians ‘Coming Close to Genocide’ in Middle East*, THE GUARDIAN (May 2, 2019)..... 21

Peter Hasson, *Inside the Ties Between Anti-Israel BDS Groups and Palestinian Terror Orgs.*, THE DAILY CALLER NEWS FOUNDATION (May 18, 2019)..... 15

Quds News Editorial Board, *National and Islamic Forces Call for Support of the “Boycott Movement” BDS*, QUDS NEWS (March 11, 2019)..... 25

Robert Wistrich, *Anti-Zionism and Anti-Semitism*, 16 JEWISH POL. STUD. REV. 3-4 (Fall 2004) 7

Ron Machol, *Thwarting “Terrorists in Suits” in the Israel Boycott*, WASH. TIMES (May 21, 2019) 24

Sean Savage, *The Literal Case Against BDS*, THE JEWISH PRESS (May 6, 2019) 15

STATE OF ISRAEL MINISTRY OF STRATEGIC AFFAIRS AND PUBLIC DIPLOMACY, *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations* (Feb. 2019).... 24, 26

Stephanie Butnick, *Northeastern Bans Pro-Palestine Student Group*, TABLET MAGAZINE (March 13, 2014) 29

THE PALESTINIAN NATIONAL CHARTER, RESOLUTIONS OF THE PALESTINE NATIONAL COUNCIL, Art. 20 (July 1968)..... 5, 6

U.S. DEPARTMENT OF STATE, OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM, DEFINING ANTI-SEMITISM..... 7

WALTER LAQUEUR, A HISTORY OF ZIONISM: FROM THE FRENCH REVOLUTION TO THE ESTABLISHMENT OF THE STATE OF ISRAEL 3-39 (2003)..... 9

Yitzhak Santis, *Jewish Voice for Peace Whitewashes Anti-Semitism in the Anti-Israel Movement*, JEWISH NEWS SERVICE (March 3, 2015). 23

YONA A. SCHIFMILLER, NGO MONITOR, BDS ON AMERICAN CAMPUSES: SJP AND ITS NGO NETWORK 7 (2015) 23

YOTAV ELIACH, JUDAISM, ZIONISM AND THE LAND OF ISRAEL 5 (2018) 6, 9, 11

I. STATEMENT OF INTEREST OF *AMICUS CURIAE* ZACHOR LEGAL INSTITUTE

Amicus curiae Zachor Legal Institute (“Zachor”) is a non-profit legal foundation focusing on constitutional and rights advocacy with the goal of eliminating prejudice and discrimination.¹ Zachor has published legal analyses of the First Amendment with an emphasis on the status of federal and state laws that limit boycott activity. Zachor has also undertaken original research and published works on the origin and operations of the so-called Boycott Divestment and Sanction movement (“BDS” or the “BDS Movement”). A number of states, federal agencies and advocacy organizations have relied either directly or indirectly on the scholarly works of Zachor in considering the legal status of laws limiting BDS activity.

As a leading legal think-tank with expertise in both the history of boycott activity under the Constitution and the nature of the boycott

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties, through their respective attorneys, have consented to the filing of this brief.

movement at issue in this case, Zachor is uniquely situated to provide this court with important background on relevant caselaw cited by the district court as well as a full and factual history of the BDS Movement.

The arguments to support the district court's analysis of relevant caselaw on the First Amendment are contained in Zachor's founder's recently published law review articles and will not be repeated in this brief: Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 ("Cardozo Article"); Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1 (2017) ("RWU Article"); and Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018) ("Campbell Article"). The last two articles were the lead articles in the respective law review volumes.

II. ARGUMENTS AND AUTHORITIES

A. SUMMARY OF ARGUMENT

In granting Defendants'-Appellees' motion to dismiss Plaintiff's-Appellant's complaint against the enforcement of the provisions of

Arkansas Act 710 (“Act 710”), the district court properly analyzed relevant First Amendment caselaw and follows the arguments of *amicus* in the *Cardozo Article*. Of equal importance, though, is the purpose for which Arkansas enacted Act 710, something that the district court did not discuss in detail, but this Court should consider.

The boycott campaign that Act 710 was enacted to confront, the BDS Movement, is blatant racial and national origin discrimination that seeks to disenfranchise Jews of their right to self-determination. BDS was founded and is managed by, *inter alia*, groups designated as foreign terror organizations by the United States government. As with other laws that are directed at protecting states from being entangled in discrimination and/or preventing taxpayer funds from being used to provide financial support to organizations backed by terrorism, Act 710 is a proper exercise of the state’s powers and does not violate applicable constitutional protections.

B. ARGUMENT: THE BOYCOTTS SUBJECT TO ACT 710 ARE DISCRIMINATORY AND FOSTERED BY AFFILIATES OF DESIGNATED TERROR ORGANIZATIONS

“Instead, [the Supreme Court’s] decision affirms again and again that our nation’s laws against discrimination are essential to

maintaining America’s open society and that states can pass and enforce those laws....”²

This statement on the constitutionality of state anti-discrimination laws, such as Act 710, was made by counsel for Plaintiff-Appellant one year ago in another case defending a state anti-discrimination law at the Supreme Court. Since that time, nothing has changed as a matter of law.

Counsel for Plaintiff-Appellant has attempted to distinguish Act 710 from all other state anti-discrimination laws by claiming that boycotts targeting the only Jewish state in existence somehow aren’t discriminatory, yet this argument is not only contrary to the clear and repeated statements of those who founded and manage the boycott movement, it also denies thousands of years of history.

I. ANTI-ZIONISM IS ANTI-SEMITISM

To sanitize a boycott whose goal is to eliminate the right of Jewish self-determination in the historic home of the Jewish people and

² James Esseks, *In Masterpiece, the Bakery Wins the Battle but Loses the War*, ACLU BLOG (June 4, 2018), <https://www.aclu.org/blog/lgbt-rights/lgbt-nondiscrimination-protections/masterpiece-bakery-wins-battle-loses-war>.

ethnically cleanse an entire geographical region, promoters of BDS resort to the discredited position that there is a distinction between anti-Zionism and anti-Semitism.³ There is, in fact, no substantive difference between the two.

Zionism is the movement advancing the right of the Jewish people, a distinct nation with a history that stretches over three millennia, to self-determination in their historic homeland of Israel. Zionism is both a political and religious movement that represents the intersection of the Jewish religion with the Jewish nation. While BDS supporters falsely claim that there is only a Jewish religion and not a

³ The BDS Movement was established pursuant to a document titled GRASSROOTS PALESTINIAN ANTI-APARTHEID CAMPAIGN, TOWARDS A GLOBAL MOVEMENT: A FRAMEWORK FOR TODAY'S ANTI-APARTHEID ACTIVISM 160 (June 2007), <https://bdsmovement.net/files/bds%20report%20small.pdf> [hereinafter, BDS Charter]. The BDS Charter tracks the language of the organizing document of the Palestine Liberation Organization: "Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own...." THE PALESTINIAN NATIONAL CHARTER, RESOLUTIONS OF THE PALESTINE NATIONAL COUNCIL, Art. 20 (July 1968) [hereinafter, PLO Charter]. It must be noted that while the BDS Charter is careful to avoid disclosing the genocidal aims of the BDS movement, the PLO Charter is not, stating "...Israel is the instrument of the Zionist movement...the liberation of Palestine will destroy the Zionist and imperialist presence...." PLO Charter at Art. 22.

Jewish nation, a claim that is empirically at odds with the scientific fact that there is a distinct Jewish genetic identity⁴, scholars have explained that the Jewish bible, an indisputably religious text, "...is the basis for a constitution for running a Jewish State [and contains] a) criminal law, b) property law, c) liability law, d) business law, e) family law, f) rules regarding social welfare, g) governance and h) military law...[t]hey are laws meant to be kept by a society that runs its own state, laws for a Jewish republic."⁵ A British Prime Minister expanded upon this in 1931, over a decade before the re-establishment of the Jewish homeland, stating that "...Jews surely have a special claim on [Israel]. They are the only people who have made a success of it during the past

⁴ *Id.* Claims made by BDS supporters and other anti-Semitic groups that Jews constitute a religion but not a distinct people are not only a form of history denial, they are contradicted by scientific research that unequivocally demonstrates a unique Jewish DNA profile. See Gil Atzmon, et al., *Abraham's Children in the Genome Era: Major Jewish Diaspora Populations Comprise Distinct Genetic Clusters with Shared Middle Eastern Ancestry*, AM. J. OF HUM. GENETICS (June 2010), [https://www.cell.com/ajhg/fulltext/S0002-9297\(10\)00246-6](https://www.cell.com/ajhg/fulltext/S0002-9297(10)00246-6) ("**Jews originated as a national and religious group in the Middle East during the second millennium BCE and have maintained continuous genetic, cultural, and religious traditions since that time, despite a series of Diasporas**") (emphasis added).

⁵ YOTAV ELIACH, JUDAISM, ZIONISM AND THE LAND OF ISRAEL 5 (2018).

3,000 years. They are the only people who have made its name immortal and as a race, they have no other home. **This was their first, this has been their only home; they have no other home.**⁶

While there are minor semantic distinctions between those who oppose Zionism and those who are anti-Semitic, the United States government defines anti-Semitism as animus towards Jews and uses the specific example of “[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.”⁷ Under this globally-accepted definition, BDS is *prima facie* anti-Semitic. Indeed, the world’s foremost authority on anti-Semitism has found that anti-Zionism has effectively merged with anti-Semitism.⁸ It would be impossible, as a matter of history and theology,

⁶ *Id.* at 168 (emphasis added).

⁷ The United States Department of State defines anti-Semitism as: “... a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” U.S. DEPARTMENT OF STATE, OFFICE OF INTERNATIONAL RELIGIOUS FREEDOM, DEFINING ANTI-SEMITISM, <https://www.state.gov/defining-anti-semitism/>.

⁸ Robert Wistrich, *Anti-Zionism and Anti-Semitism*, 16 JEWISH POL. STUD. REV. 3-4 (Fall 2004). *See, also*, Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15

to do as BDS proponents suggest and separate Judaism from Zionism and the miracle of the re-establishment of a sovereign Jewish state in the land of Israel.⁹

The charter of the BDS Movement explicitly and repeatedly declares BDS to be an anti-Zionist movement and BDS adherents proudly proclaim that they seek the destruction of Zionism. This type of eliminationist rhetoric often results in violence.¹⁰ Due in large part to

WM. & MARY L. REV. 837 (2007) (demonstrating that under federal law, anti-Zionism is a form of racial and national origin discrimination).

⁹ Israel's first Prime Minister, David Ben-Gurion, famously stated "[i]n Israel, in order to be a realist, you must believe in miracles" in reference to the re-establishment of the Jewish homeland.

¹⁰ The BDS Charter refers to Zionism over 50 times, always in a derogatory manner. BDS proponents are among the most active groups seeking to normalize anti-Zionism, a message that was used to justify the murder of Daniel Pearl. Immediately prior to being beheaded by his Islamist captors, Daniel Pearl stated "I am a Jewish American...on my father's side the family is Zionist." Pearl's captors then slit his throat and beheaded him. Jim Hoft, *Word to Obama: Daniel Pearl Was Not Beheaded Because He Was A Journalist, He Was Beheaded Because He Was An American and A Jew*, BREITBART (May 18, 2010), <https://www.breitbart.com/politics/2010/05/18/word-to-obama-daniel-pearl-was-not-beheaded-because-he-was-a-journalist-he-was-beheaded-because-he-was-an-american-and-a-jew/>.

BDS, anti-Semitic violence is epidemic.¹¹

II. BDS IS THE MOST RECENT ITERATION OF ANTI-JEWISH RADICALISM

Before there was a modern state of Israel, there were organized campaigns to boycott, marginalize and intimidate Jews from participation in commercial, academic and cultural matters.¹² These campaigns trace back over 2,000 years to the time of the Jewish exile from their historic homeland of Israel.¹³ After expelling Jews from their homeland, the Romans imposed oppressive laws to limit Jewish cultural and economic life. The economic and cultural marginalization of Jews continued with the spread of Islamic rule, where Jews were treated as second class citizens and subject to taxes for their faith, into 15th

¹¹ *BDS Spurs Anti-Semitism on Campuses, Says Brandeis Study*, THE TIMES OF ISRAEL (Nov. 2, 2016), <https://www.timesofisrael.com/bds-spurs-anti-semitism-on-campus-says-brandeis-study/>.

¹² *See, e.g.*, GIL FEILER, FROM BOYCOTT TO ECONOMIC COOPERATION: THE POLITICAL ECONOMY OF THE ARAB BOYCOTT OF ISRAEL 9, 21-27 (1998) (“[t]he original purpose of the Arab States when they declared the boycott in December 1945—two and a half years before the State of Israel was proclaimed—was to prevent its emergence as a state. Later the boycott was one of the means used to try and destroy the Jewish State....”).

¹³ *See* Eliach, *supra* note 5, at 50-84, and WALTER LAQUEUR, A HISTORY OF ZIONISM: FROM THE FRENCH REVOLUTION TO THE ESTABLISHMENT OF THE STATE OF ISRAEL 3-39 (2003), as support for the statements made in this paragraph.

century persecution in Spain and Cologne (modern Germany) to the 17th century Russian Empire pogroms, where thousands of Jews were murdered and many other Jews were forced, at the risk of death, to flee to other countries.

While Jews in the Russian Empire were being attacked in pogroms, a similar campaign by Arabs against Jews began in modern Israel in the 1920s. By the end of the 1920s, the Arab boycott of Jewish businesses in the land of Israel had begun, accompanied by organized massacres of Jews.¹⁴

As the Russian pogroms ebbed and Arab boycotts and attacks on Jews in the land of Israel were in full swing, the rise of the Nazi party led to the increased persecution of Jews, including boycotts of Jewish businesses, and, ultimately, the Holocaust and the extermination of millions of Jews.

On the eve of Germany's defeat and as a compliment to the Nazi genocide campaign against Jews, a pan-Arab organization known as the

¹⁴ AARON J. SARNA, *BOYCOTT AND BLACKLIST: A HISTORY OF ARAB ECONOMIC WARFARE AGAINST ISRAEL* 5 (1986) (“...Arab hostility grew more extreme and was marked by plundering of Jewish property, massacres of Jews, and open warfare.”).

League of Arab States implemented its own campaign to boycott Jewish businesses and prevent the modern state of Israel from being formed.¹⁵ The Arab League focused its attacks on Zionists and stipulated that its campaign was intended to “...make the boycott of Zionist goods a creed of the Arab nations.”¹⁶ It was no mistake that the Arab League used the term “Zionist” to refer to all Jewish presence in what was then called Palestine and is now the state of Israel. The use of this term meant that all Jews were their target.¹⁷

Tellingly, like those behind pogroms and the Holocaust, the Arab League focused on the claim that Zionists were a foreign invader that had to be economically, politically and culturally marginalized to

¹⁵ Edy Cohen, *How the Mufti of Jerusalem Created the Permanent Problem of Palestinian Violence*, THE TOWER MAGAZINE (Nov. 2015), <http://www.thetower.org/article/how-the-mufti-of-jerusalem-created-the-permanent-problem-of-palestinian-violence/> (“[the Grand Mufti] was also a fervent anti-Semite, the most important Nazi collaborator in the Arab world, and a political activist who worked tirelessly for the ethnic cleansing and physical destruction of the Jews in Palestine and in the Middle East as a whole.”).

¹⁶ Feiler, *supra* note 12, at 25.

¹⁷ Eliach, *supra* note 5, at 314 (“The Arab League used the word Jewish and Zionist interchangeably, being honest in its definition of whom and what was hated....In fact, it was only during the 1980s when the Arab world realized that if it separated its hatred of Jews from its hatred of Zionism it would be able to gain a much broader appeal in the west.”).

prevent them from reclaiming their homeland. When the modern state of Israel became a reality in 1948, the Arab world rejected the United Nations' plan to create an independent Palestinian Arab state that would exist side-by-side with the Palestinian Jewish state of Israel and broadened its boycott to ban all commercial and financial interactions with Israel. The Arab League also implemented a formal boycott apparatus that still exists today. The goal of the Arab League boycott was, and remains, the elimination of the Jewish state of Israel.

As the Arab League boycott peaked in the 1970s with crippling effects on the United States economy, American politicians realized that the Arab League boycott was not only harming American financial and commercial interests, it was also an unconscionable global campaign to spread anti-Semitic discrimination in the United States.

In response, the United States government enacted a federal law that prohibited participation in the Arab League's boycott of Israel.¹⁸

It is illustrative to consider the Senate hearings leading to the adoption of the federal anti-boycott law to see how similar that law is,

¹⁸ 50 U.S.C. § 4607.

in what it seeks to address, to Act 710. Then-Senator Adlai Stevenson described the boycott of Israel as

“[intruding on] American sovereignty. It interferes with basic human rights and religious freedom. It impedes free competition in the marketplace and systematically enlists American citizens against their will in a war with Israel. It excludes other Americans from economic opportunities. Such behavior cannot be tolerated.”¹⁹

In testimony before the House of Representatives at hearings on the federal anti-boycott law, the largest American union accurately described the true nature of boycotts against Israel as

“...attempts to impose upon the American people practices of racial and religious bigotry which violate American belief and law, and to make American firms the agents of hostile acts against a friendly nation. This constitutes a repugnant intrusion into American domestic life, and an unacceptable effort to coerce American foreign policy.”²⁰

These statements parallel the legislative findings of Act 710.

Thanks in large part to the effectiveness of the federal anti-boycott law, by the 1990s the Arab League boycott had been weakened

¹⁹ *Foreign Investment and Arab Boycott Legislation: Hearing on S. 69 and S. 92 Before the S. Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous. and Urban Affairs, 95th Cong. 446–47 (1977).*

²⁰ *Extension of the Export Administration Act: Hearings and Markup Before the H. Comm. on Int'l Relations, 95th Cong. 389 (1977).*

to the point that it was no longer a prominent element of the Arab world's war against Israel.

III. BDS IS THE SUCCESSOR TO THE ARAB LEAGUE BOYCOTT

This remained the case until the early 2000s. After a series of international conferences whose agendas had been hijacked by anti-Semitic state and non-state actors (including Iran), a new call for a global boycott of Israel was issued. This boycott campaign was led by those who believed the Arab League had abandoned its goal of destroying Israel and needed to be supplanted by a new generation of leaders who sought to use modern activism to implement radical opposition to Israel and reenergize the movement to replace the Jewish State of Israel with a Palestinian Arab state.

By 2007, the Arab League's boycott had been effectively replaced by the BDS Movement.²¹

²¹ For a discussion of the prominent role occupied by designated foreign terror organizations in the founding and continued operation of the BDS Movement, see the *Campbell Article* at 48-54 and the *DOJ RICO Prosecution Request*, *infra* note 36. See, also, Eliana Rudee, *Sixth BDS National Conference Sheds Light on Movement's Intentions and Terrorist Affiliates*, JEWISH NEWS SERVICE (April 25, 2019),

Initially, the BDS movement did not have a significant presence in the United States outside of radical groups that had little influence on public opinion or policy. Recently though, as the influence of the “social justice” movement has grown, proponents of BDS have mainstreamed their movement to the point that many university campuses publicly support BDS and a number of new Democratic party members of Congress openly repeat the anti-Semitic tropes of the BDS Movement.²²

Concurrent with the spread of BDS in the United States, there has been a significant rise in anti-Semitism. A recent report on anti-Semitic incidents shows that they have spiked from a low of 751

<https://www.jns.org/sixth-bds-national-conference-sheds-light-on-movements-intentions-and-terrorist-affiliates/>, Peter Hasson, *Inside the Ties Between Anti-Israel BDS Groups and Palestinian Terror Orgs.*, THE DAILY CALLER NEWS FOUNDATION (May 18, 2019), <https://dailycaller.com/2019/05/08/anti-israel-bds-palestinian-terrorist-pflp-hamas/> and Sean Savage, *The Literal Case Against BDS*, THE JEWISH PRESS (May 6, 2019), <https://www.jewishpress.com/indepth/opinions/the-literal-case-against-bds/2019/05/06/> (“[e]vidence suggests that the BDS movement has extensive ties to Palestinian terrorist organizations. By using the “social justice” movement as a veritable human shield for anti-Israel ideology and activism, terror groups are now succeeding in a type of reputational and commercial warfare against Israel.”).

²² Catie Edmundson & Sheryl Gay Stolberg, *House Democrats Brace for Another Anti-Semitism Showdown*, N.Y. TIMES (April 3, 2019) at A16).

incidents in 2013 to nearly 2,000 in 2017.²³ It is no coincidence that the spread of a movement that demonizes Jews has had the same effect in the United States that similar campaigns have had over the prior 2,000 years. While not all of the increase in anti-Semitism is directly attributable to BDS, when there are loud, persistent voices on campuses, at public events and even in government spreading anti-Semitic BDS bigotry, it is no surprise to see a concomitant increase in anti-Semitic events.

If any country knows the risk of the institutionalized demonization of Jews, it's Germany and in May 2019, the German

²³ ANTI-DEFAMATION LEAGUE, ANTI-SEMITIC INCIDENTS SURGED NEARLY 60% IN 2017, ACCORDING TO NEW ADL REPORT (Feb. 27, 2018) https://www.adl.org/news/press-releases/anti-semitic-incidents-surged-nearly-60-in-2017-according-to-new-adl-report?fbclid=IwAR0UMk9g7BLYp8GjHrorGaImNByKD9qgOPcKhNDQ9B72rkza8H_U6rc_h38. See, also, Matthew Dalton, *Anti-Semitic Acts 'Spreading Like a Poison' in France*, WALL ST. J., Feb. 19, 2019 at A9 (documenting attacks on Jews, accusing them of being “dirty Zionist shit” and noting that these attacks “...have tended to rise and fall with tensions in the Israeli-Palestinian conflict.”) and Jake Wallis Simons, *British Jews in Fear After Pro-Palestine Group Supported by Corbyn Forces Jewish Shops to Close with 'Campaign of Intimidation'*, THE DAILY MAIL (May 31, 2019), <https://www.dailymail.co.uk/news/article-7087929/Pro-Palestine-group-supported-Corbyn-forces-Jewish-shops-close.html>.

parliament adopted a bipartisan motion declaring BDS to be anti-Semitic, equating BDS calls for boycotts of Jews with similar calls from the Nazi party during World War II and defunding BDS activity in Germany.²⁴ Europe, where BDS has become entrenched, is realizing the risks of BDS' anti-Semitism and the European Union's Justice and Home Affairs Council recently unanimously approved a declaration against anti-Semitism, focusing explicitly on the denial of Israel's right to exist that is championed by BDS adherents.²⁵

²⁴ Regierungsentwurf, DEUTSCHER BUNDESTAG: DRUCKSACHE 19/10191 (May 15, 2019), <https://dip21.bundestag.de/dip21/btd/19/101/1910191.pdf> (Ger.). *See, also*, Ben Cohen, *Left, Right and Center Parties in German Parliament Unite to Oppose Antisemitic BDS Campaign*, THE ALGEMEINER (May 16, 2019) and *Germany Votes to Define BDS as Antisemitic*, MIDDLE EAST MONITOR (May 17, 2019) (“the arguments, patterns and methods of the BDS movement are anti-Semitic”). **As evidence of this, the motion argued that BDS’ “don’t buy” stickers – which aim to identify products of Israeli origin so consumers can refrain from purchasing them – “arouse associations [with] the Nazi slogan ‘Don’t buy from Jews’” and are “reminiscent of the most horrific phase in German history”** (emphasis added). The same tactics are used by BDS activists in the United States.

²⁵ Daniel Schwammenthal, *‘Anti-Zionism’ Threatens Europe’s Jews*, WALL ST. J. (Dec. 12, 2018) at A17. *See, also*, Jonathan S. Tobin, *Don’t Blame the Surge in European Anti-Semitism on the Populists*, NATIONAL REVIEW (May 29, 2019), <https://www.nationalreview.com/2019/05/anti-semitism-europe-muslim-immigrants/> (“Muslim expressions of hatred for Israel and Jews are now indistinguishable from the anti-Semitic

Act 710 was not enacted to silence protest against the policies of Israel, and Act 710 does nothing to prevent such expression. Rather, Act 710 has a narrow focus of allowing Arkansas the freedom as a market participant, to choose not to do business with those who engage in discriminatory campaigns while not suppressing such discriminatory conduct.²⁶ California, for example, prohibits state expenditures for travel to states that have policies and laws that California considers discriminatory, a practice with a long history in American states and one that would be at risk if the Plaintiff's-Appellant's position is given legal effect.²⁷ Contrary to what Plaintiff-Appellant asserts in its opening brief,²⁸ the State of Arkansas has an eminently persuasive governmental interest in distancing itself, and taxpayer funds, from a

invective of many Europeans. This has created a bizarre alliance among Muslims, leftist academics, and other elites who aim to delegitimize Israel, Zionism, and Jews.”).

²⁶ See the *Campbell Article* at 37-42 for a discussion of the constitutionality of a state acting as a market participant to express its disapproval of certain policies or actions of private parties.

²⁷ CA. ATT'Y GEN. PRESS RELEASE, *California Will Restrict State-Funded and State-Sponsored Travel to South Carolina*, April, 2, 2019, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-california-will-restrict-state-funded-and-state-0>.

²⁸ Br. for Plaintiff-Appellant at 46, *Arkansas Times, LP v. Mark Waldrip, et al.*, (April 9, 2019) (No. 19-1378).

discriminatory campaign that has deep organizational ties to groups that the United States government has designated as foreign terror organizations.

Arkansas, and the dozens of other states that have enacted laws similar to Act 710, had ample reason to deem BDS activity discriminatory. Under the most charitable version of its history, the BDS Movement is the child of the longstanding Arab League boycott of Israel, the toxic anti-Semitism of Iran and radical elements of the Arab world.²⁹ Act 710 clearly sets out this historical background in its Legislative Findings and explains that the purpose of the law is to vet companies that comply with “unsanctioned boycotts, divestment from, or sanctions against Israel” (i.e., BDS).³⁰ Former Congressman Tom Lantos, the founder of the Congressional Human Rights Caucus, was present at the conference that led to the creation of the BDS Movement and described it as “an anti-American, anti-Israeli circus” at which there were “transparent attempt[s] to de-legitimize the moral argument for Israel’s existence as a haven for Jews.”

²⁹ Unless otherwise cited, the contents of this section have been derived from the *Campbell Article* at 45-54.

³⁰ ARK. CODE ANN. § 25-1-501(6).

The goal of the BDS Movement is not, as those who support it assert, to promote civil rights. Rather, it is a companion to anti-Semitic violence. The founding document of the BDS Movement does not mince words when it comes to this goal: “The Palestine struggle cannot be so simply defined as violent or non-violent; it brings together a variety of strategies in its path of resistance to advance national goals.”³¹

Far from rejecting terrorism against Jews, BDS doubles down on it. The BDS Charter affirms that BDS is a movement to disenfranchise Jews, stating “...opposition to Zionism [the right of Jews to have a homeland] as an ideology forms the major impetus for the struggle”³² and admitting that the boycott movement exists “...as a means to cripple the Zionist movement within Palestine and, immediately after 1948, **to bring about Israel’s demise.**”³³

The motto of the BDS Movement, “from the river to the sea, all of Palestine shall be free,” is a phrase that is regularly repeated at BDS events. This phrase refers to purging all Jews from the Jordan River to the Mediterranean Sea, originates with the designated foreign terror

³¹ BDS CHARTER at 11. *See, also*, the RWU Article at 19-33.

³² BDS Charter at 13.

³³ BDS Charter at 18 (emphasis added).

groups that lead BDS and illustrates that the goal of BDS is the elimination of the Jewish state of Israel. The BDS motto makes it clear that BDS is a movement that seeks no compromise, no peace, and no coexistence with Israel. This is not the language of a civil rights movement.³⁴

Omar Barghouti, the co-founder of the BDS Movement, has made public statements that the goal of BDS is to realize a “one-state” solution that “end[s] Israel’s existence” and reiterates the position of BDS as “[d]efinitely, most definitely we oppose a Jewish state in any part of Palestine. No Palestinian, rational Palestinian, not a sell-out Palestinian, will ever accept a Jewish state in Palestine.” The BDS Movement openly and repeatedly rejects the right of Israel to exist as

³⁴ The Arab League’s goal in boycotting Israel was to preserve Arab hegemony in the Middle East. *See the RWU Article* at 5-10. Unfortunately, such xenophobia has not been an isolated incident in the Middle East. *See, e.g.,* Benny Morris & Dror Ze’evi, *When Turkey Destroyed its Christians*, WALL ST. J. (May 18, 2019) at C4 (“Turkey’s Armenian, Greek and Assyrian (or Syriac) communities disappeared as a result of a staggered campaign of genocide beginning in 1894, perpetrated against them by their Muslim neighbors.”). *See, also,* Patrick Wintour, *Persecution of Christians ‘Coming Close to Genocide’ in Middle East*, THE GUARDIAN (May 2, 2019), <https://www.theguardian.com/world/2019/may/02/persecution-driving-christians-out-of-middle-east-report>.

an independent state, and even prominent critics of Israel, such as Norman Finkelstein, concede that the goal of the BDS Movement is the destruction of Israel:

“[BDS promoters] don’t want Israel. They think they’re being very clever. They call it their three tiers We want the end of the occupation, we want the right of return, and we want equal rights for Arabs in Israel. And they think they are very clever, because they know the result of implementing all three is what? What’s the result? You know and I know what’s the result: there’s no Israel.”

Middle East peace advocates also have disputed the claim that BDS is a rights movement and have criticized the discriminatory aims of BDS. Scholars for Peace in the Middle East noted ties between the BDS Movement and Hamas and concluded that

“[a] careful look at the BDS movement and its methodology shows not legitimate criticism but a movement that is racist and anti-Semitic. . . . Overall, the BDS campaign is contrary to the search for peace, since it represents a form of misguided economic warfare. It is directly in opposition to decades of agreements between Israeli and Arab Palestinians, in which both sides pledged to negotiate a peaceful settlement and a commitment to a two-state solution.”

IV. DESIGNATED TERROR ORGANIZATIONS CREATED AND MANAGE BDS

The BDS Movement was not only founded with the discriminatory goal of eliminating the State of Israel, it has been promoted and supported by individuals and groups committed to the spread of hate and named as designated terror organizations by the United States.³⁵

³⁵ The fact that there are some Jewish supporters of BDS, including some *amici* supporting Plaintiff-Appellant in this case, does not sterilize the discriminatory, terror-backed goals of the movement. Throughout history there has been fringe Jewish support for those who seek to do harm to the Jewish people. This can be documented as far back as the Roman occupation of the land of Israel, where the commander of Jewish forces in the Galilee, Josephus Flavius, *né* Yosef ben Matityahu, betrayed the Jewish people and surrendered his forces to join the enemy, to the minor religious sects of Neturei Karta and Satmar, who believe that a Jewish state can only be established upon messianic revelation, to Jewish “kapo” concentration camp prisoners, who provided assistance to the Nazi genocide of Jews, to the modern analog of these groups, such as Jewish Voice for Peace, who advocates on behalf of the those who seek the destruction of the modern State of Israel and goes as far as organizing meetings between BDS members and designated terror organizations. Yitzhak Santis, *Jewish Voice for Peace Whitewashes Anti-Semitism in the Anti-Israel Movement*, JEWISH NEWS SERVICE (March 3, 2015). *See, also*, YONA A. SCHIFMILLER, NGO MONITOR, BDS ON AMERICAN CAMPUSES: SJP AND ITS NGO NETWORK 1 (2015) (describing the connections among BDS groups on campuses) and NGO MONITOR report dated June 13, 2018 titled *Jewish Voice for Peace (JVP)* at https://www.ngo-monitor.org/ngos/jewish_voice_for_peace_jvp/ (providing an overview of the funding, BDS activities and pro-terror positions of JVP).

Recently, *amicus* submitted a letter to the Department of Justice outlining the ties between BDS affiliates and groups designated as foreign terror organizations (the “DOJ RICO Prosecution Request”)³⁶ and established the framework for federal prosecution of BDS groups under 18 U.S.C. §§ 1961-1968 (the Racketeer Influenced and Corrupt Organizations statute, “RICO”) based on a predicate crime of providing material support to designated terror organizations in violation of 18 U.S.C. § 2339B.

The DOJ RICO Prosecution Request outlines the structure of the BDS National Committee (“BNC”), the governing body of the BDS Movement, and documents that a founding (and current) member of the BNC is the Council of National and Islamic Forces in Palestine

³⁶ A copy of this letter is available at the website of *amicus* at www.zachorlegal.org/press-releases/ under the heading “Legal Filings”. *See, also*, STATE OF ISRAEL MINISTRY OF STRATEGIC AFFAIRS AND PUBLIC DIPLOMACY, *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations* (Feb. 2019), https://www.gov.il/BlobFolder/generalpage/terrorists_in_suits/en/De-Legitimization%20Brochure.pdf [hereinafter, BDS AND TERROR REPORT] and Ron Machol, *Thwarting “Terrorists in Suits” in the Israel Boycott*, WASH. TIMES (May 21, 2019), <https://www.washingtontimes.com/news/2019/may/21/thwarting-terrorists-in-suits-in-the-israel-boycot/>.

(“PNIF”), a coalition of prominent Palestinian terror organizations that includes five currently designated foreign terror organizations: Hamas, Popular Front for the Liberation of Palestine (“PFLP”), Popular Front for the Liberation of Palestine-General Command, Palestinian Islamic Jihad (“PIJ”), and Palestinian Liberation Front (“PLF”).

This constitutes a direct connection and control relationship between terror organizations and BDS and justifies the State of Arkansas’ desire to ensure it is not providing support, directly or indirectly, to foreign terror organizations.

Earlier this year the BNC held its leadership conference to establish the 2019-2020 strategic plan for BDS. Through the PNIF, terror groups including Hamas, PFLP and PIJ urged participation in BDS and explicitly stated that the BDS Movement is the Palestinian national strategy against Israel.³⁷ Officials of the five designated terror organizations led the BDS leadership conference, including PLF Secretary General Dr. Wasel Abu Yosef, Khitam Saafin, a PFLP leader

³⁷ Quds News Editorial Board, *National and Islamic Forces Call for Support of the “Boycott Movement” BDS*, QUDS NEWS (March 11, 2019), <https://qudsn.co/post/165826>.

and BNC secretariat member and PFLP official Abu Marsel Karaja.³⁸ A 2019 report based on a review of online sources as well as court records and indictments in terrorism cases found that the ties between BDS leadership and terror groups are extensive, a sample of which is shown in the chart below.³⁹

³⁸ Rudee, *supra* note 21.

³⁹ See the BDS and Terror report, *supra* note 36 for a full list of ties between BDS leadership and terror affiliation, including descriptions of the various BDS groups such as Samidoun, Al-Haq and Addameer. See, also, the DOJ RICO Prosecution Request, *supra* note 36, for additional details on these ties as well as Dan Diker & Adam Shay, *The PACBI Deception: Palestinian Academic & Cultural Boycott of Israel (PACBI) Unmasked, Terror Links and Political Warfare Masquerading as Human Rights*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (2019), http://jcpa.org/pdf/PACBI_unmasked_web.pdf.

<u>Name of Individual</u>	<u>Terror Affiliations</u>	<u>BDS Affiliations</u>
Mustapha Awad	PFLP, Hezbollah	Samidoun
Leila Khaled	PFLP	Multiple
Mohammed Khatib	PFLP	Samidoun
Salah Khawjah	PFLP	BNC/PNIF
Khalida Jarrar	PFLP	Addameer
Shawan Jabarin	PFLP	Al-Haq
Salah Hammouri	PFLP	Addameer
Jamil Mazhar	PFLP	PNIF
Abd al-Rahim Malu	PFLP	PNIF
Mahmoud Abu Tah	PFLP	PNIF
Said Siyam	Hamas	PNIF
Ismail Radwan	Hamas	PNIF
Iyad Abu Fannouneh	Hamas	PNIF
Abdallah Yassin Fuqaha	Hamas	PNIF
Khlaed al-Batsh	PIJ	PNIF
Khader Habib	PIJ	PNIF
Tareq Qa'adan	PIJ	PNIF
Ahmad al-Uri	PIJ	PNIF
Khaled Barakat	PFLP	Samidoun
Abdullatif Ghaith	PFLP	Addameer
Ayman Nasser	PFLP	Addameer
Yaqoub Oude	PFLP	Addameer

While the BDS Movement claims to be a grass roots organization, the BDS Charter confesses this is not the case: “[BDS is] not a new phenomenon, but operated in one form or another for many decades only to subside during the 1990s.”⁴⁰

⁴⁰ BDS Charter at 13.

Recent testimony before Congress demonstrated that supporters of Iran-affiliated Hamas are now in leadership positions of BDS:

“[i]n the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign.”

In subsequent testimony before Congress, additional information was provided regarding funding and strategic ties between the BDS Movement and the Palestine Liberation Organization, one of the oldest and most notorious terror organizations. That testimony demonstrated that the PLO’s treasury is likely the key source of BDS Movement funding and that the PLO coordinates BDS activity worldwide. The key element of the Congressional testimony is contained in this excerpt:

“[The Palestinian National Fund] reportedly pays the salaries of the [PLO’s] members, as well as students, who received tens of millions of dollars in support of BDS activities each year. . . . PLO operatives in Washington, DC are reportedly involved in coordinating the activities of Palestinian students in the U.S. who receive funds from the PLO to engage in BDS activism. This, of course, suggests that the BDS movement is not a grassroots activist movement, but rather one that is heavily influenced by PLO-sponsored persons.”

One of the most heinous accomplishments of BDS has been to inject anti-Semitism on college campuses, preventing Jewish professors,

academics and scholars from adding to campus diversity and creating hostile environments for students, primarily Jewish, who support Zionism.

There is no more valid exercise of state action than to protect minority groups in education from mob-fueled movements that seek to legitimize ethnic cleansing and spread bigotry.⁴¹ The BDS Movement is anything but a civil rights organization and is more properly characterized as a proxy for the foreign terror organizations that control it and that are the eminence grise promoting discriminatory boycott activity that is the threat addressed by Act 710.⁴²

⁴¹ BDS groups have been censured for their discriminatory activities on a number of university campuses. *See, e.g.,* Gabriel San Ramon, *Pro-Palestine Group Sanctioned by UCI for ‘Disrupting’ Israeli Soldier Panel*, OC WEEKLY (Sept. 1, 2017), <https://ocweekly.com/uci-students-for-justice-in-palestine-sanctioned-again-8389976/> and Stephanie Butnick, *Northeastern Bans Pro-Palestine Student Group*, TABLET MAGAZINE (March 13, 2014), <https://www.tabletmag.com/scroll/166022/northeastern-bans-pro-palestine-student-group>.

⁴² The District Court noted in its order that Plaintiff-Appellant challenged Act 710 on theoretical grounds and had no intention of participating in BDS activity. The State of Arkansas enacted Act 710 to disentangle the state from BDS and the terror groups supported by BDS and the constitutionality of the law must be reviewed based on the state’s purpose in adopting these measures.

III. CONCLUSION

Act 710 is a common sense, narrowly tailored anti-discrimination measure, the type of law that counsel for Plaintiff-Appellant described as being essential and constitutional last year. The BDS Movement was founded by a consortium of hate groups, led by designated foreign terror organizations, whose goal is the denial of the right of Jewish self-determination. BDS supporters allege they are opposing apartheid, but in reality they are advocating their own form of apartheid and a return to policies of ghettoization, where Jews are stripped of the right of self-determination as the final step to create one more Arab state that would be, using the Nazi term, “Judenrein” (cleansed of Jews).

The governors of all fifty U.S. states recently signed a statement affirming opposition to BDS, stating that BDS’s “single-minded focus on the Jewish State raises serious questions about its motivations and intentions.” *Governors United against BDS*, <https://www.ajc.org/governors>. This, combined with recent European positions declaring BDS to be discrimination, demonstrates that there is universal acknowledgement of the threats of BDS in line with Act 710

and these facts should be recognized when undertaking a legal analysis of rights associated with BDS Movement activity.

Accordingly, *amicus* respectfully requests that this Court affirm the district court's order in its entirety.

DATED, this 5th day of June 2019

By: s/ Marc A. Greendorfer

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2019, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Marc A. Greendorfer

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June 05, 2019

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

Dear Counsel:

The amicus curiae brief of the Zachor Legal Institute 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.

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Michael E. Gans
Clerk of Court

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46 of 47

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