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06/06/2019			MOTION interested party, The American Center for Law and Justice (ACLJ) , for leave to file amicus curiae brief on behalf of Defendant/Appellees. w/service 06/06/2019. [4795219] [19–1378] (ELW)
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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS TIMES LP,
Plaintiff-Appellant,

v.

MARK WALDRIP, ET AL.,
Defendant-Appellees.

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

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE
AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF
APPELLEES**

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Counsel for *Amicus Curiae*, the American Center for Law and Justice (ACLJ), respectfully move this Court for leave to file the accompanying *amicus curiae* brief in support of Defendant-Appellees pursuant to Federal Rule of Appellate Procedure 29(a)(2)–(3).

Counsel for Defendant-Appellees consents to the filing of the proposed *amicus* brief. The undersigned counsel for *Amicus Curiae* attempted to reach counsel for Plaintiff-Appellant but was unsuccessful.

A motion for leave to file an *amicus* brief “must be accompanied by the proposed brief and state: (A) the movant’s interest; and (B) the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3). *Amicus Curiae*’s proposed brief is attached as an exhibit to this motion.

Amicus Curiae, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued numerous cases before the Supreme Court of the United States and have participated as *Amicus Curiae* in a number of significant cases involving the Free Speech Clause of the First Amendment. *Amicus Curiae* has dedicated significant time and effort to defending and protecting Americans’ First Amendment freedoms. The ACLJ’s commitment to the integrity of the United States Constitution and Bill of Rights compels it to support the State of Arkansas in its

efforts to avoid becoming complicit in the global Boycott, Divestment and Sanctions (BDS) Movement. *Amicus Curiae*'s brief will aid the Court's disposition of this appeal because *Amicus Curiae*'s brief addresses issues directly before this Court for decision; and the brief elaborates on certain important points that are not detailed in Defendant-Appellees' brief.

For these reasons, *Amicus Curiae* respectfully requests leave to file the accompanying brief in support of Defendant-Appellees.

Dated: June 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2019, I electronically filed the foregoing Motion for Leave to File Brief of *Amicus Curiae* American Center for Law and Justice, along with the proposed Brief, 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.

Dated: June 6, 2019

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued numerous cases before the Supreme Court of the United States and have participated as *Amicus Curiae* in a number of significant cases involving the Free Speech Clause of the First Amendment.

Amicus has dedicated time and effort to defending and protecting Americans' First Amendment freedoms. The ACLJ's commitment to the integrity of the United States Constitution and Bill of Rights compels it to support the State of Arkansas in its efforts to avoid becoming complicit in the global Boycott, Divestment and Sanctions (BDS) Movement.

While *Amicus Curiae* has restrained the scope of this brief to the specific issue of government speech, this is not to take away from *Amicus Curiae*'s concern and opposition to the racially discriminatory impact of the BDS movement and many of its proponents. Further, the goals of the BDS movement itself do not qualify as protected speech, a point that *Amicus Curiae* has made elsewhere.¹

¹ Portions of this brief draw from work previously authored by *Amicus Curiae*. Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 213 (2018).

FACTUAL BACKGROUND

The BDS Movement operates as a coordinated, sophisticated effort to disrupt the economy of the State of Israel, with the ultimate goal of destroying the sovereign nation altogether.² It uses the threat of withdrawing financial support in an effort to coerce companies or other entities to cease or refuse to engage in business relations with Israel, its nationals, and its residents.³ Moreover, it often intentionally targets for discrimination people who are Jewish or who do business with persons who are Jewish.⁴

² See Rachel Avraham, *Goal of the BDS Movement: Delegitimize Israel*, UNITED WITH ISR. (July 10, 2013), <https://unitedwithisrael.org/the-real-goal-of-the-bds-movement-is-israels-delegitimization/>; Dr. Harold Brackman, *Boycott Divestment Sanctions (BDS) Against Israel: An Anti-Semitic, Anti-Peace Poison Pill*, SIMON WIESENTHAL CTR. (Mar. 2013), http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/REPORT_313.PDF.

³ Ziva Dahl, *Birds of a Feather? The Link Between BDS and Hamas*, OBSERVER (Apr. 22, 2016, 4:00 PM), <http://observer.com/2016/04/birds-of-a-feather-the-link-between-bds-and-hamas/>.

⁴ *Concern Mounts Over BDS Moves Against Kosher Food Products in Miami*, KOSHER TODAY (June 29, 2016), <http://www.koshertoday.com/breaking-news-concern-mounts-bds-moves-kosher-food-products-miami/>; see Daniel Greenfield, *Racist BDS Activists Try to Put Pig's Head in Kosher Food, Put it in Halal Instead*, FRONT PAGE MAG. (Oct. 24, 2014), <http://www.frontpagemag.com/point/243757/racist-bds-activists-try-put-pigs-head-kosher-food-daniel-greenfield>; *Student Voices: What Students are Saying About Antisocialism on Their Campuses*, AMCHA INITIATIVE, <http://www.amchainitiative.org/student-voices-being-jewish-on-campus> (last visited Oct. 21, 2017); Scott Jaschik, *2 Events Unsettle Jewish Students at Brown*, INSIDE HIGHER EDUC. (Mar. 21, 2016), <https://www.insidehighered.com/news/2016/03/21/two-events-unsettle-jewish-students-brown-university>; Kemberlee Kaye, *Dozens of Groups Support Plea for*

In response to this, many state governments have taken a stance against the BDS movement by passing legislation that requires these governments to only engage in contracts with business partners who do not support the BDS movement.⁵ In 2017, the State of Arkansas passed such a law, joining many other states.⁶ The law prohibits the State from contracting with companies that boycott Israel and prohibits public investment in companies that boycott Israel.

The State of Arkansas does a tremendous amount of business with Israel; in 2017 Arkansas exported goods to Israel that totaled over \$32 million.⁷ This was a 15% increase over the previous year.⁸ Simply put, it makes bad business sense for the State to contract with suppliers and others who are actively engaged in an economic boycott of one of Arkansas' largest business partners.⁹

Following the effective date of Act 710, codified at Ark. Code Ann. § 25-1-503, *The Arkansas Times* (“*The Times*”) challenged the constitutionality of the law.

Help from Vassar Jewish Students, LEGAL INSURRECTION (May 12, 2016, 1:00 PM), <http://legalinsurrection.com/2016/05/dozens-of-groups-support-plea-for-help-from-vassar-jewish-students>; Ben Cohen, *Analysis: Hindered by New Anti-Discrimination Laws, BDS May Increasingly Target U.S. Jews*, TOWER (Feb. 7, 2016, 10:33AM), <http://www.thetower.org/2921-analysis-hindered-by-new-anti-discrimination-laws-bds-may-increasingly-target-u-s-jews>.

⁵Jewish Virtual Library, *Anti-Semitism: State Anti-BDS Legislation* (June 6, 2019), <https://www.jewishvirtuallibrary.org/anti-bds-legislation>.

⁶ Ark. Code Ann. § 25-1-503.

⁷ Jewish Virtual Library, *State-to-State Cooperation: Arkansas and Israel* (June 6, 2019), <https://www.jewishvirtuallibrary.org/arkansas-israel-cooperation>.

⁸ *Id.*

⁹ *Id.*

The *Times* regularly contracts with the University of Arkansas—Pulaski Technical College (“Pulaski Tech”) to provide advertising on behalf of the college. The publisher and CEO of *The Times*, Alan Leveritt, initially brought this action after being denied those contracts when he refused to certify that *The Times* did not engage in BDS.

The Times asserted that § 25-1-503 violated the First and Fourteenth Amendments and sought a preliminary injunction to prohibit the State from enforcing the certification requirement while the suit was pending. At the district level, the State’s Motion to Dismiss was granted and the preliminary injunction denied. *The Times* appealed.

ARGUMENT

I. THE ARKANSAS STATE LAW DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT CONSTITUTES PERMISSIBLE GOVERNMENT SPEECH AND DOES NOT UNCONSTITUTIONALLY COMPEL PRIVATE SPEECH.

The statute, § 25-1-503, is a clear example of constitutional government speech occurring in the context of a governmental spending program (*i.e.*, commercial contracting for goods and services) within which the State of Arkansas has determined which agendas and viewpoints it will and will not support as a commercial operator. The government is not required to remain viewpoint-neutral in such circumstances. Instead, it is permitted to take or not take a position of its

own. In this case, the State of Arkansas has merely chosen not to fund, through commercial contracts, companies that participate in activity at odds with the State's own commercial policies and interests — the boycott of Israel, its businesses and its people.

To the extent that private speech is even implicated here, the Statute has no unconstitutional chilling effect, nor does it unconstitutionally compel private speech, as no one is compelled to contract with the State in the first instance. Further, any private individual, acting in a personal capacity and according to a personal choice, may boycott the State of Israel and may engage in related speech of his or her choosing. He or she just cannot do so while expecting that their customer — the State of Arkansas, a trade ally of the State of Israel — continue to contract with that individual or their business.

It is alleged that Arkansas's § 25-1-503 certification requirement impermissibly compels speech and impermissibly restricts state contractors from engaging in protected First Amendment activities¹⁰ without a legitimate justification. The statute does neither. This statute only regulates government speech (*i.e.*, in the form of spending and business transactions) and relays the government's decision concerning those companies with which it wishes to conduct business. As Governor Andrew M. Cuomo wrote shortly after he signed Executive Order No. 157 in New

¹⁰ Including boycott participation and boycott-related speech.

York, directing state entities to divest all public funds supporting the Boycotts, Divestment and Sanctions campaign against Israel,

[a]s a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that New York state is constitutionally obligated to support the BDS Movement, which is not only irrational but also has no basis in law.¹¹

Indeed the very opposite is true. The U.S. Supreme Court in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, held that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” 135 S. Ct. 2239, 2246 (2015). Without this ability, the government “would [simply] not work.” *Id.* In fact, the Supreme Court has continually refused “[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.” *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

In *Rust*, the Supreme Court found that regulations prohibiting the use of Title X funds for abortion, and even the pure speech of abortion-related counseling, did not violate any free speech rights held by program recipients. *Rust*, 500 U.S. at 173. As the Court noted, holding a program unconstitutional because the government

¹¹ Andrew Cuomo, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html?utm_term=.17cf47bcda43.

advocates for one viewpoint but not a countervailing one would mean that government funding of efforts to establish democracy abroad would require equal funding for efforts advocating for communism and fascism. *Id.* at 194. Just like in *Rust*, the State here is not denying a benefit to anyone, “but is instead simply insisting that the public funds be spent for the purposes for which they were authorized.” *Id.* at 196. No one is being asked to relinquish any speech rights; rather the terms of the statute merely confirm that the State’s commercial contracting funds are authorized to be spent *only in furtherance of the commercial policies and interests of the State*. Contracting with companies that wish to undermine those interests — unremarkably — is therefore not authorized.

Notably, nothing in the statute affects in any way the boycott activities of any individual who, while operating a company, may simultaneously comply with the statute’s terms *commercially* and at the same time be engaging in anti-Israel boycott activities *personally*. In essence, an individual could boycott Israel in their personal time, and have their company continue to contract with the State, as long as their company does not engage in the boycott. This separation between the individuals and their companies further evidences the fact that the statute, truly, is strictly about business.

From 1996 to the present day, Arkansas has exported more than \$5.8 million USD to Israel.¹² Scientific breakthroughs and cutting-edge technologies are being developed from joint projects with Arkansas researchers and Israeli scientists due to the Binational Science Foundation (BSF). *Id.* The BSF sponsored studies continue to be highly successful in achieving their goals of strengthening the US-Israel partnership through science and “promoting world-class scientific research for the benefit of the two countries and all mankind.” *Id.* Grant recipients in Arkansas from U.S.-Israel binational foundations include the National Center for Toxicological Research University of Arkansas. *Id.*

The relationship between Israel and Arkansas has led to quantifiable financial gains, advances in technology, environmental developments, and any of a number of successful partnership enterprises that make it in the best interest of Arkansas for the parties to maintain a healthy relationship. *It would be absurd to think that the State of Arkansas cannot refrain from doing official commercial business with companies that boycott one of the State’s key trade partners.* Forcing the State to strain this relationship would be asking the government to act against its own interests. No constitutional provision or law requires such an absurd result.

Here, just as in *Walker*, there is no issue of compelled speech whatsoever. To make sure that the commercial interests of the State are *not* infringed, Arkansas asks

¹² *Supra*, n. 6.

that companies that contract with State entities to certify in writing their commitment to *not* engage in the boycott of Israel for the duration of their contract. The government is not requiring individual companies or institutions who engage in BDS activities targeting Israel to alter their beliefs, stop their support for BDS, or change their message in any way. The statute merely expresses the *State's* position on the issue, explains how and where it will spend public contracting funds within its jurisdiction, and notifies the public as to its actions. This action is (or at least should be) unremarkable, and is entirely consistent with the Supreme Court's prior rulings in *Rust* and *Walker*.

CONCLUSION

Because the purpose of the law is a legitimate expression of state and national policy in foreign relations and commerce, *i.e.*, government speech, the First Amendment is not violated here. *Amicus Curiae* urges this Court to recognize as much and decline to accept Plaintiff/Appellant's meritless arguments.

Dated: June 6, 2019

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CERTIFICATES AND STATEMENTS

Certificate of Compliance with FRAP 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,222 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14-point font size, Times New Roman style.

Corporate Disclosure Statement

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *Amicus Curiae* American Center for Law and Justice states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Statement Mandated by Circuit Rule 28A(H)

This brief has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2019, I electronically filed the foregoing Brief of *Amicus Curiae* American Center for Law and Justice 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.

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