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Appeal No. 19-1378

IN THE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARKANSAS TIMES, LP,
Plaintiff-Appellant.

v.

MARK WALDRIP, et al., in their official capacities as Trustees of the University of Arkansas Board of Trustees,
Defendants-Appellees.

On Appeal from the United States District Court, Eastern District of Arkansas
No. 4:18-cv-914-BSM

BRIEF OF AMICUS CURIAE SHURAT HADIN-ISRAEL LAW CENTER IN SUPPORT OF DEFENDANTS-APPELLEES

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a) (4)(A), and Eighth Circuit Local Rule 26.1A, the undersigned counsel for *amicus* makes the following disclosure:

Shurat HaDin – Israel Law Center is an Israeli nonprofit corporation that has not issued stock and has no parent corporation. No other corporation owns 10% or more of its stock.

STATEMENT OF INTEREST

Shurat HaDin-Israel Law Center ("SHD") respectfully submits this *amicus* brief in support of Defendants-Appellees. This brief will explain the background of the Boycott, Divestment and Sanctions ("BDS") movement, and how its iniquitous discriminatory conduct targeting Jews, Israelis, and those affiliated with Israel is not protected under settled First Amendment jurisprudence. Counsel for both Plaintiffs-Appellants and Defendants-Appellees consent to filing of this brief.

SHD is a not-for-profit human rights law organization organized under Israeli law and dedicated to protecting Israel and the rights of Jews worldwide by assisting victims of terrorism, fighting boycotts, and challenging those who seek to delegitimize Israel. SHD has spearheaded the fight against discriminatory conduct by the BDS movement and assisted in the representation of numerous terror victims in cases brought against state-sponsors of terror, as well as financial institutions and others who have given material support to terrorism. These cases have led to judgments exceeding $1 billion, freezing of over $600 million in terrorist assets, and securing over $120 million in recoveries to victims and their families. SHD's efforts to fight BDS include: blocking hostile blockade-running flotillas from infiltrating Gaza; pressuring academic institutions not to condone anti-Semitism on campus; countering boycotts against Israeli companies and

academics; suing to revoke the tax exempt status of organizations that promote boycotts against Israel; and assisting terror victims to bring suit under anti-terrorism statutes, torture victim-protection conventions, civil-rights laws, consumer fraud statutes, state and federal education laws, and whistleblower statutes.

Recently, SHD assisted twelve Jewish-American families to bring suit in federal district court in Delaware alleging that Airbnb's policy of boycotting Jewish-owned properties in Israel's Judea and Samaria regions violated the Fair Housing Act of 1968 (42 U.S.C. § 3601, et seq.). *Silber v. Airbnb, Inc*. (1:18-cv-01884) (D. Del.). As a result of that litigation, on April 9, 2019 Airbnb reversed its policy and now permits all homeowners in Judea and Samaria, regardless of their religion, race or nation origin, to list their houses for rent on its web platform.

The BDS movement perpetuates a long history of boycotts that have exclusively singled out Jews and Israel. Yet, Plaintiff and *amici* would have this Court afford "constitutional" protection to BDS' religious and nationality-based discrimination and sanction the economic and cultural destruction of the Jews, Israel, and anyone who dares do business with them. BDS' abhorrent conduct would be loudly condemned were it directed towards women, African-Americans, or other minorities. It cannot be countenanced simply because BDS disguises

itself as political opposition worthy of "free speech" protection under the First Amendment.

Statement under Rule 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than Amicus SHD, its members, and its counsel contributed money intended to fund preparing or submitting this brief.

ARGUMENT

I. INTRODUCTION

Invidious discriminatory conduct targeting Jews, Israel, and any party doing business with them is not protected speech. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976). The State of Arkansas has a legitimate and compelling interest in ensuring taxpayers do not fund discriminatory behavior or underwrite political views of parties that contract with the state. Moreover, it is constitutionally permissible to condition contracts upon adherence to lawful conditions. Further, plaintiff's potential boycott of Israel is simply not protected as "inherently expressive" conduct. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983). These fundamental principles, well-settled in First Amendment jurisprudence, are dispositive of this case.

Responding to BDS' relentless discriminatory efforts to impede commerce with Israel under the pretense of "protesting Israeli government policy,"

Arkansas' legislature[1] enacted Ark. Code § 25-1-503, introducing a "[p]rohibition on contracting with entities that boycott Israel." It found that companies that boycott Israel make unsound discriminatory business decisions based on national origin. Ark. Code §§ 25-1-501(1)-(3). To combat such discrimination, the statute requires recipients of government contracts to certify that "the person or company is not currently engaged in, and agrees … not to engage in, a boycott of Israel. . . ." Ark. Code Ann. § 25-1-503(a) (1).

Arkansas' certification requirement no more infringes upon Plaintiff's right of expression or association than do a myriad of federal, state, and local statutes that regularly condition government contracts to combat discrimination.

II. BDS SEEKS THE DESTRUCTION OF THE JEWISH STATE.

Contrary to plaintiff's portrayal of BDS as a universal civil rights movement, BDS perpetuates a long history of boycotts targeting Jews.

Undoubtedly, the Constitution protects one's right to criticize Israel and to espouse hate speech. Framing this issue as one of traditional First Amendment concerns, however, ignores the historic relationship between BDS and anti-

[1] Twenty-six other states have enacted similar legislation. See https://www.wsj.com/articles/state-efforts-to-quell-israel-boycott-movement-raise-free-speech-objections-11557943165

Semitism, the settled distinction between speech and action, and the broad latitude federal and state governments have to prevent discrimination, in this case, invidious nationality-based discrimination against Jews, Jewish-owned businesses, and any party affiliated with Israel. Arkansas cannot be required to fund BDS' conduct any more than it could would be if BDS directed its boycott to any other protected class.

Boycotts against Jews and Jewish-owned businesses have an extensive and malicious history.[2] They originated long before the establishment of Israel or any instance of "settlement" or "occupation," which BDS claims justifies its "vendetta" against Israel and Jews. At the 1922 Fifth Arab Congress in Nablus, Arab leaders declared a boycott of Jewish businesses in the British Mandate for Palestine.[3] Participants at the 1937 Pan-Arab Conference in Syria approved a resolution and boycott against Jews, deeming it a "patriotic duty." *Id*.

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[2] Gil Feiler, *From Boycott to Economic Cooperation: The Political Economy of the Arab Boycott of Israel* (Routledge, 1998); see also Jewish Political Studies Review, Jerusalem Center for Public Affairs, 2003: http://www.jcpa.org/phas/phas-gersten-f03.htm citing Dan S. Chill, *The Arab Boycott of Israel: Economic Aggression and World Reaction* (New York: Praeger Publishers, 1976), p 1.

[3] http://www.jcpa.org/phas/phas-gersten-f03.htm.

In 1945, the newly formed Arab League Council, using the terms "Zionist" and "Jewish" interchangeably, declared all Jewish goods undesirable, and called for Arab countries to boycott all Zionist products. *Id*. After Israel was founded in 1948, the Arab League in 1949 established the Central Boycott Office to isolate the Jewish state from the international community and to coordinate further Arab boycotts against any party tied to Israel. *Id.* This boycott prompted the passage of federal and state anti-boycott legislation, cementing U.S. policy against international boycotts solely targeting Israel.[4] Nevertheless, the Arab League Boycott still exists in various forms.

In Germany, the Nazis implemented the first nationwide planned action against Jews by targeting Jewish businesses in April 1933.[5]

The current BDS movement, which Arkansas seeks to combat with its certification requirement, picked up the mantle of the earlier boycotts and adopted the anti-Israel boycott agenda from the 2001 United Nations Conference Against Racism, in particular, its NGO Forum held in Durban, South Africa. The late Congressman Tom Lantos, a Holocaust labor-camp survivor, described the forum

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[4] Congressional Research Service, Arab League Boycott of Israel (April 19, 2006), http://www.fas.org/sgp/crs/mideast/RS22424.pdf.

[5] See http://jcpa.org/unmasking-bds; https://encyclopedia.ushmm.org/content/en/article/boycott-of-jewish-businesses.

as the most sickening display of anti-Semitism he had witnessed since the Holocaust.[6] Anti-Israel groups organized anti-Semitic rallies and distributed anti-Semitic flyers. One flyer depicted Hitler asking, "What if I had won?" The answer, "There would be no Israel. . . ." *Id*. The anti-Semitic nature of the event prompted the United States to walk out.[7]

Since Durban, BDS has become a pervasive worldwide movement, spawning such groups as the US Cultural and Academic Boycott of Israel, Students for Justice in Palestine, and Jewish Voice for Peace.[8] All supposedly advance Palestinian "justice" by undertaking initiatives to isolate, demonize, and destroy Jews and Israeli civil society, expressing no remorse when chanting renditions of Hamas' battle cry: "Free Palestine from the [Jordan] river to the [Mediterranean] sea."[9] Despite championing itself as a boycott targeting Israel's

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[6] The Durban Debacle: An Insider's View of the UN World Conference Against Racism, https://dl.tufts.edu/pdfviewer/r207v073p/tx31qt958

[7] U.S., Israel Walk out of U.N. Conference, http://archive.adl.org/durban/durban_090401d.html.

[8] NGO FORUM AT DURBAN CONFERENCE 2001, http://www.ngo-monitor.org/article/ngo_forum_at_durban_conference_; http://pacbi.org; http://www.usacbi.org; http://jcpa.org/students-justice-palestine-unmasked/; https://jewishvoiceforpeace.org/jvp-supports-the-bds-movement/.

[9] Hamas https://www.youtube.com/watch?v=dGmnG-BLCjk

"apartheid regime," BDS in reality, boycotts all Israeli and Jewish academic, cultural, and economic life.[10]

In keeping with its true mission, the mainstream BDS movement openly courts convicted terrorists and members and former members of designated terrorist organizations that advocate for Israel's destruction as leaders and speakers. One such organization responsible for scores of terrorist attacks in Israel is the Popular Front for the Liberation of Palestine ("PFLP"), a designated terrorist organization in the United States, European Union, Canada and Israel.[11]

Instead of disavowing PFLP's influence, BDS has empowered it.[12] Often invited to speak at BDS events is "top billed speaker" Rasmea Odeh. *Id.* Odeh has a criminal record for her terrorism and membership in the PFLP, including convictions for murdering two, one of whom was a U.S. citizen, and injuring nine.[13] In 2017, the United States stripped Odeh of her citizenship, deporting her

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[10] *See* https://www.ngo-monitor.org/key-issues/bds/about/#whatisbds.

[11] *See* https://www.bbc.com/news/world-middle-east-30099510.

[12] *See* https://bdsmovement.net/news/jewish-voice-heart-boycott-israel-movement.

[13] *See* https://4il.org.il/exclusive-msa-report-proves-human-rights-ngo-leaders-in-the-service-of-designated-terror-organizations/; *see also* "Terrorists-in-Suits" (a recent study disclosing the ties between the BDS movement and designated terrorist organizations at https://4il.org.il/wp-content/uploads/2019/02/MSA-Terrorists-In-Suits-English-1.pdf

for not disclosing her participation in the bombings.[14] Yet, despite Odeh's blatant disregard for human rights, Jewish Voice for Peace and Students for Justice in Palestine, two of the most widely regarded BDS organizations, have idolized her and presented her with "honorary awards." *See id*.

JVP's branch in Germany, Jewish Voice For Just Peace in the Middle East ("EJJP"), followed suit by inviting Odeh to speak in Berlin in March 2019.[15] Despite event organizers casting Odeh as a staunch human rights advocate, the Administrative Court of Berlin affirmed the cancellation of Odeh's visa deeming her a "threat to Germany.[16]

PFLP members also head organizations championing BDS. Al-Haq, a boycott promoting organization based in Ramallah, classifies itself as a human rights NGO. Yet its General Director Shawan Jabarin was convicted for recruiting

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[14] https://www.ice.gov/news/releases/convicted-terrorist-stripped-citizenship-ordered-deported-failing-disclose-ties-deadly

[15] https://www.timesofisrael.com/convicted-palestinian-terrorist-invited-to-speak-at-bds-event-in-berlin/; https://www.jpost.com/Diaspora/Rasmea-Odeh-vows-to-continue-struggle-against-Israel-after-expulsion-from-US-485926; https://www.jpost.com/Opinion /Students-for-Justice-in-Palestine-unmasked-507291; https://www.timesofisrael.com/jewish-voice-for-peace-to-host-convicted-terrorist-at-confab/

[16] https://www.juedische-stimme.de/2019/03/26/juedische-stimme-demands-the-right-of-free-speech-for-rasmea-odeh-in-berlin/

and arranging training for PFLP members. The Israeli Supreme Court banned his travel, ruling he "acted some of the time as the CEO of a human rights organization, and at other times as an activist in a terror organization which has not shied away from murder and attempted murder…nothing to do with rights."[17]

Addameer, another Palestinian BDS-affiliated organization and supposed civil and human-rights NGO, is actually a PFLP "affiliate." Addameer's chairperson and co-founder, Abdul-Latif Ghaith, was banned by Israel from travelling internationally due to his PFLP membership; Khalida Jarrar, Addameer's former vice-chairperson, is a senior PFLP official convicted for inciting violence to kidnap Israeli soldiers and for her PFLP membership.[18] Likewise, founder and director of the Palestinian Center for Human Rights and PFLP operative, Raji Souranihas provided legal advice to Hamas, a terrorist organization that shares the PFLP's vision of destroying Israel.[19]

BDS co-founder Omar Barghouti confirmed that the true nature of BDS is to "oppose a Jewish State in any part of Palestine." *See* https://vimeo.com/75201955 at 5:54. Other BDS leaders have also confirmed BDS's goal to

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[17] https://www.ngo-monitor.org/ngos/al_haq/

[18] https://www.ngo-monitor.org/ngos/addameer/

[19] https://4il.org.il/exclusive-msa-report-proves-human-rights-ngo-leaders-in-the-service-of-designated-terror-organizations/.

eliminate Israel, urging that "bring[ing] down the state of Israel" "should be stated as an unambiguous goal" of BDS.[20]

The anti-Semitic nature defining the BDS movement is open and notorious. Politicians and global leaders have deemed BDS anti-Semitic for subjecting the only Jewish state to unfair scrutiny. Recently, Germany's parliament passed legislation classifying BDS as "anti-Semitic."[21] France's prime minister, Emmanuel Macron,[22] Spain's prior prime minister, Jose Maria Aznar,[23] Britain's foreign minister, Jeremy Hunt,[24] as well as Canada's prime minister, Justin Trudeau,[25] have likewise classified BDS as anti-Semitic. Further, high-profile recent American politicians have out rightly opposed BDS, with Senator Ted Cruz

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[20] https://4il.org.il/wp-content/uploads/2019/02/MSA-Terrorists-In-Suits-English-1.pdf

[21] https://www.nytimes.com/2019/05/17/world/europe/germany-bds-anti-semitic.html

[22] https://www.jpost.com/International/Macron-expected-to-support-two-state-solution-says-BDS-is-antisemitic-490710

[23] https://www.jpost.com/Middle-East/BDS-movement-seeks-to-empty-Israel-of-Jews-former-Spanish-PM-says-406608

[24] http://www.israelnationalnews.com/News/News.aspx/263512

[25] https://www.timesofisrael.com/trudeau-blasts-bds-movement-as-anti-semitic/

deeming it anti-Semitic,[26] and Hillary Clinton denouncing how BDS uniquely "isolate[s] the State of Israel."[27] Regardless of political allegiance, a strong consensus amongst world leaders confirms that BDS is anti-Semitic. BDS' malicious and hostile boycotts targeting all facets of Jewish life and existence in Israel is the very definition of invidious discrimination. Arkansas has a legitimate and compelling interest in regulating it.

III. DISCRIMINATORY SPEECH IS NOT CONSTITUTIONALLY PROTECTED AND THE STATE MAY CONDITION ITS CONTRACTS UPON ADHERENCE TO LAWFUL CONDITIONS.

1. *It Is Constitutionally Permissible to Condition State and Federal Contracts to Ensure Compliance With Certain Requirements*

Plaintiff's claim challenges well-settled Supreme Court authority. As the State of Arkansas has done here, states and the federal governments may condition contracts and grants to ensure the recipient's compliance with conditions. Courts have regularly upheld such terms against First Amendment challenges. *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 575 (1984)

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[26] https://www.cruz.senate.gov/?p=press_release&id=4395

[27] https://www.ngo-monitor.org/key-issues/bds/bds-condemnation-by-world-leaders/

(rejecting university's First Amendment challenge to requirement that recipient of federal tuition assistance certify the university does not discriminate based on sex); *Cutter v. Wilkinson*, 544 U.S. 709, 732-33 (2005) (noting "while Congress' condition stands, the States subject themselves to that condition by voluntarily accepting federal funds," and thus upholding against a First Amendment challenge condition that States receiving federal funds for prison programs must comply with federal statute protecting free exercise of religion); *see also Lyng v. Int'l Union, United Automobile, Aerospace, & Agricultural Implement Workers of America*, 485 U.S. 360,362, 369 (1988) (First Amendment challenge to a law that made households ineligible for food stamps while "any member of the household [was] on strike" was rejected because "it d[id] not require [plaintiffs] to participate in political activities or support political views with which they disagree. It merely decline[d] to extend additional food stamp assistance to striking individuals. . . .").

United States v. American Library Association, Inc., 539 U.S. 194 (2003) is instructive. There, the Court disagreed that a requirement for library funding that libraries must install content-filtering software on public computers violated the First Amendment. *Id*. at 212. The Court wrote, "assuming . . . that public libraries have First Amendment rights[,] [the statute] does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their

patrons with unfiltered Internet access." *Id.* Instead, the statute "simply reflects Congress' decision not to subsidize their doing so." *Id.* That is the case here.

Plaintiff also challenges the state's certification requirements on First Amendment grounds. However, this Court has held that certification requirements, like those present here, are not "compulsion to disseminate a particular political . . . message" but rather, mandate them "only to provide the government with information" about whether they meet government contracting requirements. *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995). The Court was clear: requirements "to provide the government with information" do not implicate compelled-speech concerns. *Id.*

Plaintiff is free to refuse to certify its compliance. It does so, however, knowing that just as any other contractor that is non-compliant with a state law, it will be ineligible to contract with and receive funds from the state. This does not infringe upon any of plaintiff's First Amendment rights. It is fundamental First Amendment jurisprudence that "[a] refusal to fund protected activity . . . cannot be equated with the imposition of a 'penalty' . . . ." *American Library Association, Inc.*, 539 U.S. at 212. It is also well settled that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." Id; *see Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (same). *See also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983) ("[t]his Court

has never held that the Court must grant a benefit . . . to a person who wishes to exercise a constitutional right.").

2. *The State Has a Compelling Interest in Discouraging Invidious Discrimination Based on Nationality, Religion and National Origin*

The above principles apply more so when the state imposes restrictions on conduct to address obvious invidious discrimination. *See e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (state's compelling interest in eradicating gender discrimination permitted it to require a club to fully admit women members; "[t]he right to associate for expressive purposes is not absolute"). "The Constitution places no value on discrimination" and discriminatory conduct is not protected speech. *Runyon v. McCrary,* 427 U.S. 160, 176 (1976).

Titles VI and VII of the Civil Rights Act of 1964—42 U.S.C. §§ 2000D, *et. seq.*, and 42 U.S.C. § 2000e-2(a)(1), respectively apply to Pulaski Tech, a State organization with which plaintiff seeks to contract. Both statutes prohibit discrimination, often requiring employers to certify compliance with the law. Title VII makes it unlawful for employers (with more than 15 employees) "to fail or refuse to hire or to discharge any individual, or…discriminate…with respect to…compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). *See, e.g., EEOC v. Abercrombie & Fitch Stores,* 135 S. Ct. 2028 (2015)

(holding employer cannot make an applicant's religious practice a factor in employment decisions). Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000D, *et. seq.*, likewise, prohibits discrimination based on race, color, and national origin in programs receiving federal financial assistance.

The Export Administration Act of 1979 (EAA) deemed boycotts of Israel as discriminatory and racist, creating criminal liability for those engaged in prohibited boycotts. 50 U.S.C. §4607. The Act passed constitutional scrutiny and its enforcement went unchallenged. *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984). To this day, the U.S. Department of Commerce Bureau of Industry and Security, Office of Antiboycott Compliance administers and enforces the Antiboycott laws under the EAA.[28]

Plaintiff cannot champion social justice while simultaneously asking this Court to sanction "its right" to discriminate. Unlike plaintiff's proposed conduct, which ignores settled anti-discrimination statutes and precedent, the Arkansas statute here is entirely consistent with federal law. Plaintiff seeks private profit by

[28] The authority of export regulations was continued by executive order with Presidents Reagan and Clinton each reauthorizing all EAA export regulations deeming it a national emergency. President Trump continued export control authority under the EAA on August 8, 2018. See https://www.whitehouse.gov/briefings-statements/text-notice-president-speaker-house-representatives-president-senate/

running advertisements for Pulaski Tech, a part of the University of Arkansas system, subject to both Titles VI & VII. *See* Plaintiff's opening brief at 4. Pulaski Tech acknowledges that "[t]he federal government mandates that institutions of higher learning that receive federal funds must disclose certain information about the institution to enrolled students, prospective students, and members of the community."[29]Pulaski Tech further expounds that "the University of Arkansas - Pulaski Technical College is committed to promoting diversity, nondiscrimination and equal opportunity compliance in all college programs, facilities and activities in regard to . . . Title VI of the Civil Rights Act of 1964 . . . which prohibits discrimination on the basis of race, color, and national origin."[30]

Arkansas' statute does nothing more than federal law does in regulating discrimination. If Arkansas were to condition contracts to ensure contractors do not boycott or discriminate against African Americans or women in order to comply with Title VI and VII, without question this would withstand a First Amendment challenge. The same result should apply when the State conditions its contracts upon a certification that the proposed contractor does not discriminate against or boycott Jews, Israelis, and their supporters. The Act

[29] https://www.uaptc.edu/consumer-information

[30] https://www.uaptc.edu/human-resources/non-discrimination-and-equal-opportunity-provisions

combats BDS boycotts that are discriminatory, just as boycotts against products produced by other protected classes would be.

As demonstrated, the modern BDS movement stems from historic boycotts against Jews, and continues to demonize, delegitimize, and destroy the only Jewish state.[31]

With just over six million individuals, Israel hosts the world's largest concentration of Jews. Out of 195 countries, Israel is the only expressly Jewish and Jewish majority state (80%) in the world.[32] BDS exclusively targets Israel and its supporters. No other organized world-wide boycott movement solely targets a single country.

The present Arkansas law also reflects that boycotts against Israel disproportionately impact Jews, while having anti-Semitic motives.[33] *See also Sinai v. New England Tel. & Tel. Co.*, 3 F.3d 471, 474 (1st Cir. 1993) ("That Israel is a Jewish state, albeit not composed exclusively of Jews, is well-established."). The First Amendment does not leave the State powerless to address such anti-

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[31] See n. 1, supra; *see also* https://www.israeliamerican.org/national-headquarters/media/bigotry-discrimination-anti-semitism.

[32] http://knesset.gov.il/constitution/ConstMJewishState.html

[33] *See, e.g.*, Greendorfer, Marc A., The BDS Movement: That Which We Call A Foreign Boycott, by Any Other Name, Is Still Illegal, 22 Roger Williams U. L. Rev. 1, 29, 37 (2017).

Semitism. BDS is discriminatory in its goals and effect. Ignoring countries actually engaged in egregious behavior, the movement isolates Israel, the only Jewish State, as uniquely evil among all other nations. Further, BDS does not merely target any individual Israeli policy or regime. Rather, it rejects Jewish self-determination outright. Cofounder Omar Barghouti opposes a Jewish State "in any part of Palestine," which BDS believes encompasses all of Israel. *See* https://vimeo.com/75201955 at 5:54. Most significantly, as discussed below, BDS is not confined to expressive speech, but relies primarily upon discriminatory conduct, such as boycotts, which the laws challenged here seek to contain.

In passing the present Act, the Arkansas legislature expressly stated its goal—to combat the discrimination underlying the boycott of Israel. Its legislative findings included the following:

> Companies that refuse to deal with [US] trade partners such as Israel…make discriminatory decisions on the basis of national origin that impair those companies' commercial soundness…a company's decision to discriminate against Israel, Israeli entities, or entities that do business with or in Israel, is an unsound business practice, making the company an unduly risky contracting partner or vehicle for investment….

Ark. Code Ann. § 25-1-501.

The legislative history behind Arkansas' law parallels that behind federal "congressional hearings on the anti-boycott provisions of the Export Administration Act, [during which] numerous legislators and experts testified to

the racist and discriminatory origins and intentions of boycotts targeting Israel."[34] Ultimately, the Act's conditions for contracting with the State fall within settled jurisprudence upholding similar requirements in First Amendment challenges, especially where the state's intent was to combat (and certainly not to subsidize) discrimination. *See Grove City College*, 465 U.S. at 575; *U.S. Jaycees*, 468 U.S. at 623. Plaintiff's expansive view of non-expressive conduct and the First Amendment contradicts the settled principles discussed above and challenges the constitutionality of numerous federal, state, and municipal laws that are conditioned upon compliance with conditions that advance legitimate state interests. It should be rejected.

IV. THE CHALLENGED STATE LAW DOES NOT INFRINGE UPON PROTECTED FIRST AMENDMENT SPEECH.

Not only is Arkansas constitutionally permitted to protect its citizens' by not funding discriminatory conduct, the present Arkansas law does not even regulate plaintiff's actual speech. Under the Act, plaintiff can criticize any policy of the Israeli government, can boycott Israel, and can solicit others to follow suit.

[34] Marc A. Greendorfer, The Inapplicability of First Amendment Protections to BDS Movement Boycotts, 2016 CARDOZO L. REV. DE NOVO 112, 124-25.

In fact, plaintiff has—freely, openly and without penalty—editorialized against the Arkansas law it challenges here.[35]

The only thing plaintiff cannot do, is boycott Israel and contract with the State. It is well-established that First Amendment protection does not apply to conduct that is not "inherently expressive." *FAIR*, 547 U.S. 47, 66 (2006). The district court correctly concluded that **"**a boycott of Israel, [as defined by the Act] is neither speech nor inherently expressive conduct." Addendum at 9. *FAIR applies* here, and the district court correctly held that plaintiff's claim does not warrant traditional First Amendment protection.

In *FAIR*, several law schools restricted military recruiting on campuses, thereby protesting the military's then-existing "Don't Ask, Don't Tell" policy. *FAIR*, 547 U.S. at 51. Congress responded, passing the Solomon Amendment, which denied funding to law schools until they granted military recruiters equal access to campuses. *Id*. The law schools proclaimed it a First Amendment violation, which a unanimous Supreme Court subsequently rejected, holding that such conduct was "not inherently expressive" because the actions "were

[35] www.wrmea.org/2019-march-april/why-should-my-newspaper-pledge-not-to-boycott-israel.html.

expressive only because the law schools accompanied their conduct with speech explaining it." *Id*. at 66.

Specifically, the *FAIR* Court noted that "[a]n observer who s[aw] military recruiters interviewing away from the law school" would not have known why recruiters had to interview off-campus absent any explanatory speech clarifying that explanatory speech describing the purpose of the military restriction did not transform the law school's conduct into expressive conduct. *See* 547 U.S. at 66. "[I]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id*. Thus, the *FAIR* Court concluded that the prohibition regulated "conduct, not speech" given that "[i]t affects what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id*. at 60.

FAIR is controlling here. Like the law schools' boycott of military recruiters, boycotting Israel is "expressive only if…accompanied by explanatory speech." *See* 547 U.S. at 60. Until then, any message a boycotter wishes to convey is unknown to the public. Absent explanatory speech, an external observer would never notice a contractor's boycott of Israel. The absence of Israeli products manufactured in Israel or by companies dealing with Israel in plaintiff's offices would not readily be recognized as the result of plaintiff's boycott of Israel without further narrative. This especially applies here where plaintiff does not

boycott Israel. Regular observers would believe that the types of products at the contractor's office reflected its commercial, rather than its political preferences. A contractor such as plaintiff would have to explain its participation in a boycott to an observer for them to know a boycott is occurring.

Under *FAIR*, plaintiff's conduct may be subsequently explained by speech, but that does not mean that this conduct constitutes inherently expressive conduct. *FAIR*, 547 U.S. at 66 ("The fact that . . . explanatory speech is necessary is strong evidence that . . . conduct . . . is not so inherently expressive that it warrants protection"). The consumer's decision not to buy a particular product does not deserve First Amendment protection. Such action is only expressive when accompanied by explanatory speech.

Similarly, the Supreme Court in *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 226-27 (1982) rejected a union's boycott of Soviet goods, taken to protest the Russian investigation of Afghanistan, finding that by itself the boycott was not protected by the First Amendment. The Court held "conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *Id.* at 226. Likewise, here, any desire by plaintiff to boycott a particular Israeli product does not solely communicate anything. Rather, it simply intends to coerce companies to ostracize Israel.

Ultimately, the commercial decision by a company to not buy a particular product does not deserve traditional First Amendment protection. Such commercial decisions only become expressive when accompanied by explanatory speech. Here, plaintiff's hypothetical conduct is "ineligible for such protection." *See FAIR*, 547 U.S. at 66. To hold otherwise would introduce a broad, unprecedented reading of the First Amendment, whereby anytime someone determines which hummus to purchase, that person may be engaged in protected First Amendment activity which exists only in the consumer's mind. This is not the case.

Plaintiff relies on *NAACP v. Claiborne Hardware Co*., 458 U.S. 886 (1982) to support its claim that its desire to boycott Israel (or not) warrants traditional First Amendment protection. Plaintiff reads *Claiborne* too broadly, turning it on its head. The Court never held, as plaintiff contends, that boycotts alone, absent any other form of expressive speech or conduct, are protected under the First Amendment.

Claiborne concerned a boycott of white-owned businesses in Mississippi by activists protesting racial discrimination present in local businesses. *Claiborne*, 458 U.S. at 899-900. The Supreme Court observed that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a

nonviolent, politically motivated boycott designed to…effectuate rights guaranteed by the Constitution itself." *Id*. at 914.

Specifically, *Claiborne* addressed boycotting intended to defend core rights protected under the Fourteenth Amendment. The Court reached this determination after carefully inspecting the various elements of the boycott, which consisted of meetings, speeches, and non-violent picketing. *Claiborne*, 458 U.S. at 907-08. It concluded that these elements, when considered in the context of an economic boycott designed to defend core rights under the Fourteenth Amendment, constituted protected First Amendment activity. *Id*. at 914.

Here, as under *Claiborne,* plaintiff may write and send representatives to meetings, give speeches, picket against Israel's policies, solicit others to boycott Israel, engage in picketing and pamphleteering, free from any state interference. This does not mean, however, and *Claiborne* does not hold, that any decision plaintiff may make to boycott (or not to boycott) Israel is entitled to First Amendment scrutiny or that plaintiff can contract with the state without making the requisite certifications required of all state-contractors.

Further, the Supreme Court emphasized the context of *Claiborne,* where the boycotters "sought to vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself." *Claiborne*, 458 U.S. at 914. There, the boycotters, who suffered discrimination, sought to redeem their constitutionally

protected civil rights against Jim Crow businesses engaged in segregation. Plaintiff in this case shamelessly dons the cloak of civil rights activists while actually engaging in discrimination and seeking to destroy Israel. Its misappropriation of *Claiborne* must be rejected.

CONCLUSION

BDS is inherently rooted in antisemitism, further perpetuating a long history of anti-Semitic boycotts that have targeted Jews, Israel and anyone daring to affiliate with Israel. It makes little effort to conceal its anti-Semitic motives and anti-Semitic leadership, unashamedly courting high-profile convicted terrorists who have murdered Jewish civilians and seek Israel's demise to spearhead a campaign founded for the sole purpose of destroying the Jewish State.

By mandating contracting parties certify they will not engage in boycotts against Israel, the State of Arkansas by no means stifles the speech of BDS supporters, who can still engage in their discriminatory conduct without repercussion. Rather, through the statute, the State proclaims its right to condition eligibility for its award—a contract—to those who pledge not to discriminate. Such an incentive will inevitably reduce discrimination—a compelling state-interest. For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP P. 32

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately 5,041 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) and 8th Cir. R. 28A(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-Point Times New Roman.

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/s/ Robert J. Tolchin

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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June 06, 2019

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

Dear Counsel:

The amicus curiae brief of the Shurat Hadin-Israel Law Center 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.

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