

No. 19-1378
In The
United States Court of Appeals
For The Eighth Circuit

ARKANSAS TIMES L.P.,
Plaintiff- Appellant

v.

MARK WALDRIP, et. al.,
Defendants- Appellees

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

**BRIEF OF *AMICI CURIAE* AGUDATH ISRAEL OF AMERICA, THE
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
AND STANDWITHUS IN SUPPORT OF DEFENDANTS-APPELLEES**

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following disclosures:

Agudath Israel of America is a nonprofit corporation that has not issued stock and has no parent corporation.

The Union of Orthodox Jewish Congregations of America is a nonprofit corporation that has not issued stock and has no parent corporation.

Israel Emergency Alliance, doing business as StandWithUs (hereinafter, “StandWithUs”), is a California nonprofit corporation. It is not a subsidiary or affiliate of any other corporation. No other corporation owns 10% or more of its stock.

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Identity, Interest, and Authority to File of Amici Curiae

This amicus brief in support of Defendants-Appellees highlights the dangerously anti-Semitic nature of the conduct that the Arkansas Legislature (the “Legislature”) acted to combat by enacting the statute at issue.

Agudath Israel of America (“Agudath Israel”) is a grassroots Orthodox Jewish organization founded in 1922, with constituents and affiliated chapters in Arkansas and throughout the United States. In its early years, Agudath Israel helped rescue Jews during the Holocaust. Thereafter, it helped lead the Orthodox Jewish community’s renaissance in America. It has long sought to protect the religious liberties of Orthodox Jews and to fight anti-Semitism. Agudath Israel regularly advocates for the continued security and well-being of the Jewish people in the United States and Israel.

The Union of Orthodox Jewish Congregations of America (the “Orthodox Union”) is the largest Orthodox Jewish umbrella organization in the United States. Founded in 1898, the Orthodox Union operates and sponsors a wide array of religious, educational and cultural services and programs to its constituent communities. The Orthodox Union represents the interests of nearly 1,000 congregations in the United States. Through its Orthodox Union Advocacy Center, the organization frequently participates—primarily via amicus curiae briefs—in court cases that implicate the values and interests of the American Jewish

community. The case at bar is such a case, for this court's ruling will impact for good or for ill the life of American Jews.

StandWithUs is an international, non-profit Israel education organization founded in 2001. Its staff and volunteers are inspired by their love for Israel, their belief that education is the road to peace, and their commitment to stand up for Israel and the Jewish people when they are publicly attacked or misrepresented. StandWithUs is dedicated to educating people of all ages about Israel and combating the extremism and anti-Semitism that often distort Israel-related issues. While providing positive education to millions, StandWithUs also vigorously challenges discriminatory boycotts and other campaigns of hate.

Counsel for both Defendants-Appellees and Plaintiff-Appellant consent to filing of this brief.

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 Amici Curiae, their members, and their counsel contributed money intended to fund preparing or submitting this brief.

Introduction

This brief's purpose is to demonstrate that the boycotts organized by the Boycott, Divestment and Sanctions (BDS) movement are anti-Semitic, and therefore that the State of Arkansas (the "State") has a compelling interest in combatting them. The State has the power to address invidious discrimination through restrictions on conduct. *E.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Arkansas Code Annotated § 25-1-503 et. seq. (the "Act") falls squarely within that power.

Argument

A. First Amendment Rights Give Way to the State's Compelling Interest in Eradicating Discriminatory Conduct.

Rights protected by the First Amendment are not absolute. They must at times yield to compelling state interests, including a state's interest in eliminating discrimination. *E.g.*, *Jaycees*, 468 U.S. at 623 (a state's compelling interest in eradicating gender discrimination permitted it to require a club to admit women as full members; “[t]he right to associate for expressive purposes is not . . . absolute”); *Bd. of Dirs. of Rotary Int’l. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding infringement of freedom of association was “justified because it serves the State’s compelling interest in eliminating discrimination against women”).

This limitation flows from the fact that the Constitution “places no value on discrimination” *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *Norwood v. Harrision*, 413 U.S. 455, 469 (1973). “[W]hile [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.” *Id.* at 161 (quoting *Norwood*, 413 U.S. at 470).

As this brief details below, the BDS boycotts that the Act combats are discriminatory and perpetuate age-old anti-Semitism. Accordingly, even if the Act

implicates the First Amendment, it is justified by the State's well-recognized compelling interest in eradicating discrimination.

B. The BDS Movement, Which Spearheads the Boycotts Targeted by the Act, Is Anti-Semitic.

Plaintiff-Appellant and its Amici object to any action by the State to limit boycotts against Israel. Many such boycotts are inspired by BDS. *See* Appellant's Opening Brief at 6–7; *see also* Brief of Amici Curiae the Center for Constitutional Rights and Palestine Legal at 3. While masked as criticism of Israel, BDS's true character is evidenced by the hateful anti-Semitic tropes, images, and chants it employs; the harassment in which its members engage; and the demonization, delegitimization, and double standards it applies. These aspects of BDS make clear that it seeks to promote invidious discrimination on the basis of religion and nationality, which the Act properly opposes.

1. BDS's Explicit Goal Is to End Israel's Existence as a Jewish State.

Anti-Semitism has plagued the world for over 2,000 years.¹ Hostility against the Jewish people dates back to ancient Babylonia, where, after the Babylonian destruction of the first Jewish Temple in Jerusalem, Jews were

¹ *Anti-Semitism*, HISTORY (last updated May 28, 2019), <https://www.history.com/topics/holocaust/anti-semitism>.

persecuted for their rejection of the social norms and customs of their conquerors.²

After the subsequent Roman destruction of the reconstituted ancient Jewish state and destruction of the Second Jewish Temple in Jerusalem, anti-Semitism spread over the millennia, resulting in horrific violence against Jews in the Crusades, the Spanish Inquisition, incidents provoked by “blood libels,” countless pogroms, and the Holocaust.³

Boycotts against Jews and Jewish-owned businesses are embedded in this history. In 1922, Arab leaders in the Palestine Mandate launched a boycott against

² *Id.*

³ *See id.*; Edward A. Ryan, *Spanish Inquisition*, Encyclopedia Britannica, <https://www.britannica.com/topic/Spanish-Inquisition> (last visited June 5, 2019). Jews in medieval Europe were denied basic civil liberties, forced to live in ghettos, prohibited from owning land and, in some instances, forced to differentiate themselves from society by wearing a yellow star or similar article of clothing identifying them as Jews. *Id.* Beginning in 1933, until the end of World War II, the Nazis brutally slaughtered six million Jews. *What was the Holocaust? Overview - How Vast was the Crime*, Yad Vashem, <https://www.yadvashem.org/holocaust/about.html> (last visited June 5, 2019). The United States has not been immune to anti-Semitism. Until the mid-20th century, Jews were refused entry to country clubs, were unable to obtain jobs at prestigious firms, and were unable to buy homes in certain neighborhoods. *See* Jennie Rothenberg Gritz, *The Jews in America*, *The Atlantic* (Sept. 2007), <https://www.theatlantic.com/magazine/archive/2007/09/the-jews-in-america/306273/>; *The Jew and the Club*, *The Atlantic* (Oct. 1924), <https://www.theatlantic.com/magazine/archive/1924/10/the-jew-and-the-club/306258/>.

Jews.⁴ In 1933, the Nazi regime in Germany boycotted Jewish-owned stores and businesses in an attempt to isolate and exclude Jews from all civic life.⁵ In 1945, before the creation of the Jewish state, the Arab League Council called for a boycott of all Jewish and Zionist products.⁶ In 1947 and 1948, Jews (not just Zionists) in Algeria, Iraq, Libya, Egypt, Morocco, Syria and Yemen were persecuted, subjected to government-instigated anti-Jewish riots, and deprived of their belongings.⁷ Between 1948 and 1972, approximately 820,000 Jewish refugees fled these Arab countries, many with little but the clothing on their backs, and 586,000 of them resettled in Israel.⁸

⁴ See *Unmasking BDS: Radical Roots, Extremist Ends*, Jerusalem Center for Public Affairs: Israeli Security, Regional Diplomacy, and International Law, <http://jcpa.org/unmasking-bds/> (last visited June 5, 2019).

⁵ *Boycott of Jewish Businesses*, United States Holocaust Memorial Museum: Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005678> (last visited June 5, 2019).

⁶ Mitchell Bard, *Arab League Boycott: Background and Overview*, Jewish Virtual Library (updated Feb. 2017), <http://www.jewishvirtuallibrary.org/background-and-overview-of-the-arab-boycott-of-israel>.

⁷ *Fact Sheet: Jewish Refugees from Arab Countries*, Jewish Virtual Library, <https://www.jewishvirtuallibrary.org/jewish-refugees-from-arab-countries> (last visited June 5, 2019).

⁸ *Id.*

BDS follows in the footsteps of historical anti-Jewish boycotts and persecutions—only now, instead of seeking to harm a diffuse group of Jews or Jewish-owned businesses, it seeks to eradicate *the entire Jewish state*, i.e., Israel.

BDS co-founder Omar Barghouti has been explicit about this goal, stating that BDS “oppose[s] a Jewish State in any part of Palestine.”⁹ In this context, Palestine refers to the entire area that is now Israel, not specific disputed regions such as the West Bank and Gaza. Other BDS leaders have likewise confirmed that BDS’s goal is to eliminate the State of Israel, urging that “to bring down the state of Israel . . . should be stated as an unambiguous goal” of the BDS movement.¹⁰ And the call to erase Israel from the map is frequently heard at BDS programs. Members of the organization spearheading many of the BDS activities in the United States, Students for Justice in Palestine (“SJP”), routinely chant at BDS rallies: “from the [Jordan] river to the [Mediterranean] sea, Palestine will be free.”¹¹ Unlike other movements that have used boycotts to effectuate social or

⁹ John Y. Jones, *Omar Barghouti – Strategies for Change*, Vimeo (Sept. 2013), <https://vimeo.com/75201955> at 5:54 (last visited June 4, 2019).

¹⁰ As’ad AbuKhalil, *Critique of Norman Finkelstein on BDS*, Alakhbar English (Feb. 17, 2012), <https://web.archive.org/web/20180310054351/http://english.alakhbar.com:80/node/4289>.

¹¹ *E.g.*, *Rutgers SJP Chanting “From the River to the Sea, Palestine will be Free,”* YouTube (Nov. 12, 2014), https://www.youtube.com/watch?v=ShWMwqHpO_I (last visited June 3, 2019).

political change (e.g., boycotts of British goods and boycotts of apartheid South Africa), BDS seeks to use boycotts to eliminate an entire country. Israel, as a democracy, cannot, and should not, be beyond criticism. But criticism of a country's policies is one thing; actively pursuing destruction of that country is quite another.

Although BDS sometimes conceals its anti-Jewish animus behind an “anti-Israel” façade, BDS advocates’ heavy reliance on anti-Semitic tropes, images and chants reveals the true nature of BDS.¹² BDS supporters spread dehumanizing cartoons portraying Israelis as malicious octopuses and apply age-old anti-Semitic slurs about Jewish greed to Israelis. They also perpetuate modern-day forms of the medieval blood libel that accused Jews of poisoning wells and using the blood of Christian children to bake matzah.¹³ A BDS co-founder peddles the ugly calumny

¹² See, e.g., *Hate Spaces: The Politics of Intolerance on Campus (Trailer)*, YouTube (Nov. 23, 2016), <https://www.youtube.com/watch?v=IvxYazOSEys> (last visited June 4, 2019).

¹³ See *Blood Libel: A False, Incendiary Claim Against Jews*, ADL, <https://www.adl.org/education/resources/glossary-terms/blood-libel> (last visited June 5, 2019); Adam Levick, *Anti-Semitic Cartoons on Progressive Blogs*, Jerusalem Center for Public Affairs (Sept. 2, 2010), <http://jcpa.org/article/anti-semitic-cartoons-on-progressive-blogs/>; Petra Marquardt-Bigman, *Rutgers Prof Insists Her Updated Version of the Blood Libel is Not Anti-Semitic*, The Tower (March 20, 2016, 7:34 PM), <http://www.thetower.org/3117-rutgers-prof-insists-her-updated-version-of-the-blood-libel-is-not-anti-semitic/>.

that Israel engages in “medical experimentation” on Palestinian women,¹⁴ and a leader of two organizations that are instrumental to the BDS movement (Students for Justice in Palestine and American Muslims for Palestine) spreads falsehoods about Israelis and Jews stealing organs.¹⁵

An amicus brief filed *in support* of Plaintiff-Appellant makes this very point: T’ruah and J Street disavow any affiliation “with the [Global BDS] movement” because “[s]ome of the leaders of the Global BDS movement have trafficked in anti-Semitic ideas and rhetoric and have questioned the right of the Jewish people to self-determination,” and because the movement’s targeting of Israel proper in addition to disputed territories, “points to a potential rejection of Israel’s right to exist.” Brief of T’Ruah and J Street as Amici Curiae in Support of Plaintiff-Appellant at 1, 4.

¹⁴ *Omar Barghouti @ USC 1.12.2012*, YouTube (January 19, 2012), <https://www.youtube.com/watch?v=gYwPyc4t7U0> (last visited June 4, 2019).

¹⁵ Tikva: Students for Israel, Facebook (December 4, 2017), <https://www.facebook.com/tikvah.berkeley/posts/1718193621544633> (last visited June 4, 2019); see Yair Rosenberg, *Co-Founder of Students for Justice in Palestine Shares Insanely Anti-Semitic Memes, Offers World’s Least Convincing Apology*, Tablet (Nov. 28, 2017), <http://www.tabletmag.com/scroll/250354/co-founder-of-students-for-justice-in-palestine-shares-insanely-anti-semitic-memes-offers-worlds-least-convincing-apology> (the meme displayed a stereotypical Jewish caricature with the caption “MOM LOOK! I IS CHOSEN! I CAN NOW KILL, RAPE, SMUGGLE ORGANS & STEAL THE LAND OF PALESTINIANS *YAY* ASHKE-NAZI”).

Anti-Semitic slander has historically had deadly consequences for Jewish communities.¹⁶ And, consistent with that history, the anti-Semitic smears spouted by BDS are accompanied by physical attacks on Jews in Israel and elsewhere.¹⁷ Anti-Semitic incidents have skyrocketed in the United States and globally in recent years.¹⁸ Assaults against American Jews more than doubled from 2017 to 2018,

¹⁶ See *supra* note 3.

¹⁷ Erik Kirschbaum, *Germans march against anti-Semitism after Berlin attack on Israeli wearing a yarmulke*, L.A. Times (Apr. 25, 2018), <http://www.latimes.com/world/europe/la-fg-germany-berlin-yarmulke-20180425-story.html>; James McAuley, *How the Pittsburgh shooting compares to attacks on Jews in Europe, where anti-Semitism has been growing*, Washington Post (Oct. 28, 2018), https://www.washingtonpost.com/world/2018/10/28/how-pittsburgh-shooting-compares-attacks-jews-europe-where-anti-semitism-has-been-growing/?noredirect=on&utm_term=.8784d233c4ca; New York Times Editorial Board, *A Rising Tide of Anti-Semitism*, NY Times (April 30, 2019), <https://www.nytimes.com/2019/04/30/opinion/cartoon-nytimes.html> (“By publishing a bigoted cartoon, The Times ignored the lessons of history, including its own.”).

¹⁸ See, e.g., Madeline Roache, *Surge in Anti-Semitic Attacks Has Caused a ‘Sense of Emergency’ Among Jews Worldwide, New Report Says*, Time (May 2, 2019), <https://time.com/5580312/kantor-center-anti-semitism-report/> (“More Jews were killed in anti-Semitic violence around the world in 2018 than during any other year in decades[.]”); *German Jews warned not to wear kippas after rise in anti-Semitism*, BBC News (May 26, 2019), <https://www.bbc.com/news/world-europe-48411735> (“1,646 hate crimes against Jews were committed [in Germany] in 2018 - an increase of 10% on the previous year.”); Angelique Chrisafis, *‘Spreading like poison’: flurry of antisemitic acts alarms France*, The Guardian (February 12, 2019), <https://www.theguardian.com/world/2019/feb/12/french-police-investigate-antisemitic-attacks-in-paris-simone-veil> (“The [French] government announced a 74% rise in the number of anti-Semitic incidents last year.”).

including cold-blooded murders of worshipers at synagogues in Pittsburgh and Poway.¹⁹

BDS also has sparked an increase in anti-Semitism against Jewish college students on campuses. BDS activity on campuses correlates with high levels of hostility towards Jewish students.²⁰ In the wake of BDS campaigns, Jewish students have been harassed with anti-Semitic slurs and discrimination.²¹

¹⁹ *Anti-Semitic Incidents Remained at Near-Historic Levels in 2018; Assaults Against Jews More Than Doubled*, ADL, <https://www.adl.org/news/press-releases/anti-semitic-incidents-remained-at-near-historic-levels-in-2018-assaults> (last visited June 5, 2019) (“ADL’s annual Audit of Anti-Semitic incidents recorded a total of 1,879 attacks against Jews and Jewish institutions across the country in 2018, the third-highest year on record since ADL started tracking such data in the 1970s.”); Cambell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. Times (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

²⁰ See Saxe et al., *Antisemitism and the College Campus: Perceptions and Realities*, Brandeis Cohen Center for Modern Jewish Studies (Jul. 2015), <https://www.jewishvirtuallibrary.org/jsource/anti-semitism/antisemcampus2015.pdf>; Saxe et al., *Hotspots of Antisemitism and Anti-Israel Sentiment on US Campuses*, Brandeis Cohen Center for Modern Jewish Studies (Oct. 2016), <https://www.brandeis.edu/ssri/pdfs/campusstudies/AntisemitismCampuses102016.pdf>.

²¹ See, e.g., Anthony Berteaux, *In the safe spaces on campus, no Jews allowed*, Wash. Post (Sept. 15, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/15/in-the-safe-spaces-on-campus-no-jews-allowed/?utm_term=.d533bdbace71; Jennifer Medina, *Student Coalition at Stanford Confronts Allegations of Anti-Semitism*, N.Y. Times (Apr. 14, 2015), <http://www.nytimes.com/2015/04/15/us/student-coalition-at-stanford-confronts-allegations-of-anti-semitism.html>; Margaux Gundzik, *Letter to the Editor: A*

For example, at the University of California, Davis, a Jewish fraternity house was vandalized with a swastika after a BDS resolution passed in the student senate.²² During a BDS campaign at San Diego State University, numerous racist posts appeared on social media platforms targeting Jewish students.²³ At UCLA, after a successful BDS resolution passed the student government, pro-BDS senators tried to deny a Jewish student her position on the student government judicial board on the grounds of her Jewish identity.²⁴

Hollow Victory for the Jewish Community, The Bottom Line (Apr. 17, 2015), <https://thebottomline.as.ucsb.edu/2015/04/letter-to-the-editor-a-hollow-victory-for-the-jewish-community>; William Newton, *CC Rejects Williams Initiative for Israel*, Williams Record (May 1, 2019), <https://williamsrecord.com/2019/05/cc-rejects-williams-initiative-for-israel/> (the College Council at Williams College voted against recognizing Williams Initiative for Israel as an official registered student organization).

²² Maria Akhter, *Swastikas spray painted on AEPi fraternity house*, The California Aggie (Jan. 31, 2015) <https://theaggie.org/2015/01/31/swastikas-spraypainted-on-aepi-fraternity-house/>.

²³ Anthony Berteaux, *Anti-Semitic posts divest from social progress*, The Daily Aztec (Apr. 14, 2015), <http://thedailyaztec.com/66142/opinion/anti-semitic-posts-divest-from-social-progress/>.

²⁴ Adam Nagourney, *In U.C.L.A. Debate Over Jewish Student, Echoes on Campus of Old Biases*, N.Y. Times (Mar. 5, 2015), http://www.nytimes.com/2015/03/06/us/debate-on-a-jewish-student-at-ucla.html?_r=0. On at least four college campuses across Iowa, anti-Semitic fliers were circulated blaming Jews for the sexual assault allegations against Supreme Court Justice Brett Kavanaugh. *Fliers Blaming Jews for Kavanaugh Assault Allegations Target Iowa Organizations*, Jewish Telegraphic Agency (Oct. 11, 2018, 7:30 AM), <https://www.jta.org/2018/10/11/united-states/iowa-organizations-target-anti-semitic-fliers>. Numerous instances of anti-Semitism have been reported

2. **As World Leaders Have Recognized, BDS's Mission of Eradicating the World's Only Jewish State Is Anti-Semitic.**

International law holds that all people have a right to self-determination.²⁵

Accordingly, the United States Department of State has defined anti-Semitism to include attempts to delegitimize Israel through “[d]enying the Jewish people their right to self-determination, and denying Israel the right to exist.”²⁶ This definition

at the University of Minnesota, including student defacement of university property with the depiction of swastikas. Emily Tate, *Anti-Semitic Incidents at U of Minnesota*, Insider Higher Ed (Feb. 21, 2017), <https://www.insidehighered.com/quicktakes/2017/02/21/anti-semitic-incidents-u-minnesota>. Earlier this year, a widely-circulated social media post featured Minnesota high school students giving a Nazi salute and holding a sign making references to Hitler and Nazis. Karla Hult, *Minnetonka School Leaders Promise More Holocaust Education after Anti-Semitic Post*, Kare 11 (Jan. 18, 2019, 6:39 PM), <https://www.kare11.com/article/news/minnetonka-school-leaders-promise-more-holocaust-education-after-anti-semitic-post/89-d4c35504-f0ca-46e7-a836-2adfb31c5a74>. See also Danielle Drake-Flam & Olivia Szymanski, *Students Against Israeli Apartheid Protest Hen Mazzig Talk*, Student Life (Nov. 1, 2018), <http://www.studlife.com/news/2018/11/01/students-against-israeli-apartheid-protest-hen-mazzig-talk/> (Members of the Students Against Israeli Apartheid at Washington University in Missouri chanted and protested at an on-campus speech by Hen Mazzig, a young Israeli speaker and activist, only 48 hours after the Pittsburgh mass shooting at the Tree of Life Synagogue.).

²⁵ Charter of the United Nations, <https://www.un.org/en/charter-united-nations/index.html> (last visited June 5, 2019).

²⁶ *Defining Anti-Semitism*, U.S. Dep’t of State (June 8, 2010), <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm>.

mirrors the one adopted by the International Holocaust Remembrance Alliance (IHRA), an organization with 31 member countries.²⁷

BDS is anti-Semitic under this definition. And world leaders have agreed. President Barack Obama recognized both that BDS's agenda would end Israel's existence as a Jewish state and the unacceptability of that outcome, stating: "that's not an option."²⁸ German Chancellor Angela Merkel's Christian Democratic Union has observed that BDS *is* anti-Semitism: "Who today under the flag of the BDS movement calls to boycott Israeli goods and services speaks the same language in which people were called to not buy from Jews. That is nothing other than coarse anti-Semitism."²⁹ The German parliament recently approved a resolution denouncing BDS as anti-Semitic, noting (among other things) that "[t]he BDS movement's 'Don't Buy' stickers on Israel products inevitably awake

²⁷ See *Working Definition of Antisemitism*, International Holocaust Remembrance Alliance, <https://www.holocaustremembrance.com/node/196> (last visited June 5, 2019). The IHRA's working definition of anti-Semitism has been adopted by Austria, Bulgaria, Germany, Romania, the United Kingdom, and the European Union Parliament. *What is Antisemitism?*, Campaign Against Antisemitism, <https://antisemitism.uk/definition/> (last visited June 5, 2019).

²⁸ *Obama: Opposes 'Right of Return' Inside Israel*, YouTube (May 2, 2008), <https://www.youtube.com/watch?v=Xatt3DmTXHo> (last visited June 5, 2019).

²⁹ *ADL Praises Germany's Largest Party for Clear Linkage Between BDS and Anti-Semitism*, ADL, <https://www.adl.org/news/press-releases/adl-praises-germanys-largest-party-for-clear-linkage-between-bds-and-anti> (last visited June 5, 2019).

associations with the Nazi slogan ‘Don’t Buy from Jews!’”³⁰ Several German state intelligence agencies have likewise concluded that the BDS movement is anti-Semitic, and that calls to boycott Israel “betray[] significant parallels to the anti-Jewish agitation of the National Socialists [i.e., Nazis].”³¹

These leaders have rightly recognized that attempting to destroy the world’s only Jewish state is fundamentally anti-Semitic. By targeting Israel—and by expressly advocating for the elimination of the world’s only Jewish state and home to a plurality of the world’s Jews—BDS is targeting Jews and Judaism.³²

3. BDS’s Anti-Semitic Motive is Evident from Its Focus on Israel Despite Widely-Recognized Egregious Human Rights Violations by Other State Actors.

³⁰ *German Parliament denounces Israel boycott movement*, Associated Press (May 17, 2019), <https://www.apnews.com/570dd84c53cf472aaf2661517acd77f2>.

³¹ *Third German Intelligence Agency Finds Anti-Israel Boycott Campaign to be Anti-Semitic*, The Tower Magazine (Aug. 29, 2018, 11:42 AM), <http://www.thetower.org/6603-third-german-intelligence-agency-finds-anti-israel-boycott-campaign-to-be-anti-semitic/>; Benjamin Weinthal, *German Intelligence Agency Deems BDS Antisemitic*, The Jerusalem Post (May 31, 2018), <https://www.jpost.com/BDS-THREAT/German-intelligence-agency-deems-BDS-group-antisemitic-558816>.

³² The connection between Jews and the land of Israel dates back thousands of years. Jewish liturgy repeatedly underscores the intimate relationship between Jews and Israel. *See, e.g., Liturgical References to Zion*, 1–4 (2015), <https://israeled.org/wp-content/uploads/2019/05/Liturgical-References-to-Zion.pdf>. And Jerusalem is the holiest site in Judaism (last visited June 5, 2019); Rachel Avraham, *The 5 Holiest Places in the Jewish Faith*, Jerusalem Online (Jan. 24, 2017), <http://www.jerusalemonline.com/culture-and-lifestyle/the-5-holiest-places-in-judaism-26166>.

BDS's anti-Semitic motive is also evident from its focus. Anti-Semitism is the only plausible explanation for the fact that BDS ignores widely-recognized, egregious human rights violations and oppression by multiple countries imperiling vulnerable groups the world over and seeks to isolate and besiege just one tiny target: Israel, a liberal democracy and the world's only Jewish state.

An otherwise lawful action constitutes illegal discrimination if it has a disproportionate effect on a minority group and cannot be explained by the justifications offered. In a Title VII discrimination case, for example, a plaintiff can demonstrate that an employer's stated reason for an adverse employment decision is "pretext" by pointing to "[i]nstances of disparate treatment." *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994). If an employer purports to have fired an African-American employee because of a disciplinary infraction, the employee can prevail on a Title VII claim by proving that the employer enforces the disciplinary policy in a "discriminatory" manner. *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 875 (8th Cir. 2010). As the Supreme Court has explained, an employer "may justifiably refuse to rehire one who was engaged in" reckless behavior, "*but only if this criterion is applied alike to members of all races.*" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (emphasis added); *see also Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 990–91 (8th Cir. 1984) (holding evidence sufficient to demonstrate discrimination where a black worker

was fired for excessive absenteeism, because “several white workers with absentee records equal to, or worse than, his were still employed at the time of his termination”).

Similarly, “gross statistical disparit[y]” in enforcing a policy is “prima facie proof of a pattern or practice of discrimination.” *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977); *see also Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 479 (8th Cir. 1984) (“Gross statistical disparities alone may, in a proper case, prove a pattern or practice of discrimination.”). That is, even if a particular policy is “facially neutral,” “proof of [the policy’s] disproportionate impact on an identifiable group” alone can demonstrate that “invidious or discriminatory purpose underlies the policy.” *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (emphasis added); *see also Burgis v. N.Y.C. Dep’t of Sanitation*, 798 F.3d 63, 69 (2d Cir. 2015) (noting that in some cases, “statistics alone may be sufficient” to demonstrate that “defendants acted with discriminatory intent”).

BDS exemplifies such discrimination. Despite its supposed concerns about human rights, BDS singles out the world’s only Jewish state (a liberal democracy) as an alleged violator of human rights (a position Amici wholeheartedly reject) while ignoring widely-recognized glaring human rights abuses worldwide in other

countries. Country reports for 2018 published by the U.S. State Department,³³ Human Rights Watch’s World Report 2019,³⁴ and Freedom House’s Freedom in the World 2019³⁵ all detail serious human rights abuses in scores of countries not targeted by BDS. China, Russia, Saudi Arabia, Egypt, and Turkey are prime examples of such human rights offenders—the populations of which exceed by orders of magnitude the combined populations of Israel, the West Bank, and Gaza. The “disparate treatment” and “gross statistical disparities” between BDS’s treatment of the Jewish state and these other countries clearly indicates an illegitimate form of discrimination that Arkansas is within its rights to combat.

The State Department’s 2018 report on China pointed to the government’s role in arbitrary or unlawful killings, forced disappearances, and torture as well as “severe restrictions of religious freedom” and “significant restrictions on freedom of movement.”³⁶ Moreover, in 2018, Chinese authorities reportedly “arbitrarily

³³ See generally *2018 Country Reports on Human Rights Practices*, U.S. Dep’t of State (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/>.

³⁴ See generally *World Report 2019*, Human Rights Watch (Jan. 17, 2019), <https://www.hrw.org/world-report/2019>.

³⁵ See generally *Democracy in Retreat: Freedom in the World 2019*, Freedom House (Feb. 4, 2019), <https://freedomhouse.org/report/freedom-world/freedom-world-2019>.

³⁶ *2018 Country Reports on Human Rights Practices: China (includes Tibet, Hong Kong, and Macau) – China*, U.S. Dep’t of State (Mar. 13, 2019),

detained 800,000 to possibly more than two million Uighurs, ethnic Kazakhs, and other Muslims in internment camps designed to erase religious and ethnic identities.”³⁷

As to abuses by Russia, the State Department’s 2018 report listed, *inter alia*, extrajudicial killings, enforced disappearances and pervasive torture, severe suppression of freedom of association and expression, severe restrictions on religious freedom, and decriminalization of domestic abuse.³⁸ The State Department noted that Russia’s “occupation and purported ‘annexation’” of Ukraine’s Crimea Peninsula continued to affect the human rights situation there “significantly and negatively.”³⁹

According to the State Department’s 2018 report, Saudi Arabia was guilty of “unlawful killings; executions for nonviolent offenses; forced renditions; forced

<https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/china-includes-tibet-hong-kong-and-macau-china/>.

³⁷ *Id.*; see also Arch Puddington, *Beijing’s Persecution of the Uighurs is a Modern Take on an Old Theme*, Freedom House (May 8, 2019), <https://freedomhouse.org/blog/beijing-s-persecution-uighurs-modern-take-old-theme>.

³⁸ *2018 Country Reports on Human Rights Practices: Russia*, U.S. Dep’t of State (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/russia/>.

³⁹ *Id.*

disappearances; and torture of prisoners and detainees by government agents.”⁴⁰

Per Human Rights Watch, Saudi “[a]uthorities systematically discriminate against women and religious minorities.”⁴¹

The State Department’s 2018 report on Egypt states that “[h]uman rights issues included unlawful or arbitrary killings . . . ; forced disappearances; torture; [and] arbitrary detention. . . .”⁴² The State Department also cited arbitrary arrest and prosecution of minorities, and “forced or compulsory child labor.”⁴³

Finally, the State Department’s 2018 discussion of Human Rights violations by Turkey mentions reports of arbitrary killing, forced disappearances, torture, arbitrary arrest and detention of tens of thousands of people, criminal prosecution

⁴⁰ *2018 Country Reports on Human Rights Practices: Saudi Arabia*, U.S. Dep’t of State (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/saudi-arabia/>.

⁴¹ *Saudi Arabia*, Human Rights Watch, <https://www.hrw.org/middle-east/n-africa/saudi-arabia> (last visited June 4, 2019).

⁴² *2018 Country Reports on Human Rights Practices: Egypt*, U.S. Dep’t of State (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/egypt/>.

⁴³ *Id.*

of government critics, severe restrictions on freedoms of assembly, association and movement, as well as violence against minorities.⁴⁴

These reports amply demonstrate that China, Russia, Saudi Arabia, Egypt, and Turkey engage in widespread human rights violations. Yet BDS is notably silent about the grave human rights abuses occurring in these countries and elsewhere around the globe. In this context, BDS's obsession with the tiny country of Israel, a country the size of the State of New Jersey, is difficult to understand if viewed in isolation. But viewed against the background of historical and current anti-Semitism, and in light of the openly anti-Semitic views espoused by BDS movement leaders, the most plausible explanation for the BDS movement's obsessive application of a double standard toward Israel is anti-Jewish animus.⁴⁵ The Arkansas Legislature made a valid policy judgment that boycotts of Israel are anti-Semitic discrimination, and Arkansas' compelling interest in preventing this discrimination justifies any resulting incidental burden on the First Amendment privileges that Plaintiff-Appellant and its Amici assert. *See* Ark. Code Ann. § 25-

⁴⁴ *2018 Country Reports on Human Rights Practices: Turkey*, U.S. Dep't of State (Mar. 13, 2019), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/turkey/>.

⁴⁵ *See Defining Anti-Semitism*, U.S. Dep't of State (June 8, 2010), <https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm> (providing the following examples as ways in which anti-Semitism manifests itself with regard to Israel: "Applying double standards [for Israel] by requiring of it a behavior not expected or demanded of any other democratic nation" and "organizations focusing on Israel only for peace or human rights investigations").

1-502(1)(A)(i); *see also id.* § 25-1-501(3) (noting that a company that “refuse[s] to deal” with Israel is making a “discriminatory decision[.]”).

C. The Involvement of Some Jews in the BDS Movement Does Not Render the Movement Non-Discriminatory.

The fact that some of Plaintiff-Appellant’s amici are Jewish organizations cannot whitewash BDS’s anti-Semitic animus. As noted above, *supra* page 10, some such organizations who support Plaintiff-Appellant have acknowledged the BDS movement’s anti-Semitism, though they weigh the competing considerations here differently than the undersigned and have a different view of the outcome in the court below.

In any event, as this Court has recognized, invidious discrimination is impermissible regardless of who engages in the discriminatory conduct. Specifically, this Court has rejected an argument that counsel’s improper questioning of a witness about her Jewish religion must not have been anti-Semitic because counsel was also Jewish:

Silbergleit’s religious beliefs have absolutely no relevance in this lawsuit. The bank’s counsel cannot escape responsibility for these questions and comments by claiming that he would not attempt to elicit anti-Semitism from the jury because he himself is a Jew.

Silbergleit v. First Interstate Bank of Fargo, N.A., 37 F.3d 394, 398 (8th Cir. 1994).

As in *Silbergleit*, the fact that some Jews support BDS does not mean the movement is not anti-Semitic. Indeed, some of BDS's Jewish supporters want to isolate Israel *because of* its Jewish character. For example, one of the Jewish leaders of the boycotts has written that it bothers her to fly on Israel's national airline, El Al, because she cannot countenance seeing Jews in security positions:

Getting through security in London brought back the same feelings I'd had on my first visit to Israel twelve years before. There is something about the sight of young Jewish people in these military, police, and security positions that repulses me. It makes me feel afraid, not secure. In fact, I realize perhaps again, that ***Jewish authority, Jewish police, Jews in uniforms, Jewish governments, all these things bothered me.***⁴⁶

Remove the words Israeli and Jews and replace them with Latinos or Muslims, and the discrimination is clear. The author is asserting that a particular national, ethnic, or religious group should not be performing certain jobs that are open to other national, ethnic, or religious groups. The fact that the author is a Jew does not make her position any less racist, nor can it justify discriminatory boycotts against Israelis or those who choose to do business with Israelis.

More generally, a claim by the discriminating party that it has ideological or benign motives does not defeat a conclusion of discriminatory conduct when the actual treatment is discriminatory. Certainly a legislature can conclude that such

⁴⁶ Sarah Schulman, *Israel/Palestine and the Queer International* 67 (Duke Univ. Press 2012) (emphasis added).

conduct is discriminatory despite denials by the actors. And that is what the Legislature did here in passing the Act.

D. The Legislature Believed that the Act Was Necessary to Combat BDS's Anti-Semitism.

Plaintiff-Appellant argues that “any application of judicial scrutiny would quickly reveal that the Act is not supported by *any* legitimate governmental interests unrelated to the suppression of disfavored expression.” Appellant’s Opening Brief at 37 (emphasis added). Not so. The legislative findings and statements in support of the Act explain that the Act was based on the State’s desire to confront and condemn invidious discrimination against Israel, Israelis, and Jews.

The legislative findings expressly state that the “State of Israel is the most prominent target of such boycott activity, which began with but has not been limited to the Arab League Boycott adopted in 1945, *even before Israel’s declaration of independence as the reestablished national state of the Jewish people.*” Ark. Code Ann. § 25-1-501 (emphasis added). In so finding, the Legislature recognized the BDS movement for what it is—a discriminatory movement that is not based on legitimate policy concerns but rather anti-Jewish animus that pre-dates Israel becoming a state in 1949 and the Six Day War in 1967, which left Israel in control of the West Bank and Gaza. The legislative findings supporting the Act further state that “[c]ompanies that refuse to deal

with . . . Israel . . . make *discriminatory decisions* on the basis of national origin that impair those companies' commercial soundness" *Id.* (emphasis added). That statement highlights the fact that a central purpose of the Act is to combat the invidious discrimination reflected in anti-Israel boycotts.

As shown above, the Legislature was absolutely correct in this assessment. In passing the Act, Arkansas joined the federal government and 26 other states which have enacted similar measures to combat discriminatory conduct against Israel and Jews and send a clear unequivocal message in support of the Jewish people. While anyone is free to share the abhorrent beliefs underlying the BDS movement, the Legislature acted constitutionally in discouraging economic discrimination based upon those beliefs.

Moreover, the Legislature acted consistently with the best of American traditions. The United States was founded on the ideals of civil liberty and freedom from oppression and discrimination. In a letter to the Hebrew Congregation of Newport, George Washington wrote that the United States has a "[g]overnment . . . which gives to bigotry no sanction, to persecution no assistance" ⁴⁷ The Legislature, in passing the Act, aspired to Washington's lofty ideal by contesting the economic discrimination practiced by the bigotry-contaminated

⁴⁷ George Washington, *Letter to the Hebrew Congregation at Newport* (August 21, 1790), <http://teachingamericanhistory.org/library/document/letter-to-the-hebrew-congregation-at-newport/> (last visited June 4, 2019).

BDS movement—bigotry which revives old, evil stereotypes of Jews, and uses them to inspire the infliction of economic harm.

E. The Act Is Narrowly Tailored to Target a Specific Harm, Anti-Semitism.

Plaintiff-Appellant argues that the asserted government interest of furthering “Arkansas’s interests in trade policy and in avoiding dealing with contractors who engage in unsound business practices” does not justify the Act and that the Act is both underinclusive and overinclusive. Appellant’s Opening Brief at 48.

However, Plaintiff-Appellant ignores the Act’s express legislative intent of preventing “discriminatory” behavior toward Israel and its citizens. *See* Ark. Code Ann. § 25-1-501. Since BDS’s focus is Israel, the Act is narrowly tailored to address boycotts of Israel alone. By requiring those contracting with the State of Arkansas to agree not to engage in boycotts of Israel and by preventing the State itself from investing in any company that actively boycotts Israel, the State is squarely addressing BDS’s anti-Semitic conduct which is fixated on Israel and Jews.

By the same token, the Act is not improperly underinclusive. To be sure, “[a] State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,

578 (1993). Legislation is said to be underinclusive “when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*.” *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015) (citing *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989)) (holding that a restriction prohibiting a judicial candidate from personally soliciting campaign funds was not underinclusive or overinclusive and was narrowly tailored to address the government’s interest in preventing the appearance of impropriety). The fact that the Act does not impact other instances of discrimination does not in any way “raise ‘doubts about whether the government is in fact pursuing the interest that it invokes’” or “reveal that [the Act] does not actually advance a compelling interest.” *Id.* at 1668, 1670 (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992)) (“Even under strict scrutiny, ‘[t]he First Amendment does not require States to regulate for problems that do not exist’” and “a state need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns.”).

The Legislature rightfully chose to attack a problem that it saw as compelling. As described in detail above, the Legislature had every reason to be concerned about the dangerous implications of BDS’s anti-Jewish animus.⁴⁸

⁴⁸ See *supra* note 19.

Conclusion

Invidious discrimination “cause[s] unique evils that the government has a compelling interest to prevent.” *Jaycees*, 468 U.S. at 628. The BDS-led boycott movement is motivated by and designed to advance discrimination against Jews, Israelis, and Israel itself. The State’s compelling interest in combatting that invidious discrimination overcomes any incidental effect that Act may have on boycotters’ rights of expression and free association. The Act is in harmony with the ideal of a government “which gives to bigotry no sanction, to persecution no assistance”⁴⁹ The judgment should be affirmed.

⁴⁹ Washington, *supra* note 47.

June 6, 2019

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Statement Mandated by Circuit Rule 28A(H)

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I hereby certify that on June 6, 2019, I electronically filed and served this Brief using the Eighth Circuit CM/ECF system; all participants in the case are registered CM/ECF users.

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