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Mark Goldfeder
National Jewish Advocacy Center

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Mark Goldfeder*

I. INTRODUCTION

A lie can travel halfway around the world while the truth is putting on its shoes.
— ironically, not Mark Twain

The recent Eighth Circuit ruling in *Arkansas Times LP v. Waldrip*[1], the lawsuit revolving around an Arkansas anti-discrimination bill, has led to a lot of (at best) confusion or (at worst) purposeful obfuscation by people unwilling or unable to differentiate between procedural issues and the constitutional merits of a case.[2] In other words, reports of the bill's death have been very much exaggerated.[3]

Despite the fact that the court's narrow ruling did not even strike down the bill in Arkansas, let alone set a precedent for other similar bills, there are those who are concerned that the *Arkansas Times* decision somehow calls into question legislative action in

* Dr. Mark Goldfeder, Esq. is the Director of the National Jewish Advocacy Center, a Member of the United States Holocaust Memorial Council, counsel for Hillels of Georgia, and a contributor at the MirYam Institute. He also served as the founding Editor of the Cambridge University Press Series on Law and Judaism. The author wishes to thank Danielle Park, Miles Terry, Marc Greendorfer, and Gadi Dotz for their reviews and assistance, and a special thanks to Sasha Volokh for his ever-helpful critiques.

1. 988 F.3d 453 (8th Cir. 2021), *reh'g en banc granted, opinion vacated* (8th Cir. June 10, 2021) (No. 19-01378).

2. *See e.g.*, Elliot Setzer, *Eighth Circuit Strikes Down Arkansas's Anti-BDS Law*, LAWFARE (Mar. 1, 2021), [https://perma.cc/36TX-HAAU] (falsely claiming that the Eighth Circuit struck down the bill, when in fact all it did was remand the case for further proceedings).

3. *See* Sean Savage, *Advocates See Federal Court Decision on Arkansas Anti-BDS Law 'Disappointment,' Not Setback*, JEWISH NEWS SYNDICATE (Feb. 16, 2021), [https://perma.cc/C8BW-CSWP].

other states across the country.[4] In order to separate fact from fiction and clarify the constitutional concerns that are still very relevant in a case that is still very much alive, this Article will recap what has already actually happened and why, explain what is still being decided, and then forecast what is likely to happen in the future of this case.

II. BACKGROUND

"In 2017, Arkansas enacted Arkansas Act 710, titled 'An Act to Prohibit Public Entities from Contracting with and Investing in Companies That Boycott Israel; and for Other Purposes.'"[5] Under this law, state entities are prohibited from contracting on ordinary terms with companies that boycott the State of Israel.[6]

The majority of states in the United States of America (thirty as of the date of this writing) have adopted similar bills, and the motivation behind them was the rise of the antisemitic Boycott, Divestment, and Sanctions ("BDS") Movement, which "operates as a coordinated, sophisticated effort to disrupt the economic and financial stability of the state of Israel,"[7] persons conducting business in and with Israel,[8] and individuals that the movement deems to be too closely affiliated with Israel in some way.[9]

It is the longstanding policy of the United States to oppose discriminatory boycotts against Israel; ever since President Carter

4. *See e.g.*, Aaron Terr, *Eighth Circuit: Arkansas Anti-BDS Law Violates First Amendment*, FIRE: NEWSDESK (Feb. 18, 2021), [https://perma.cc/AW27-6UWM].

5. *Ark. Times LP*, 988 F.3d at 458; *see also* ARK. CODE ANN. § 25-1-503 (2017).

6. § 25-1-503(a).

7. *See* OMAR BARGHOUTI, BDS: BOYCOTT, DIVESTMENT, SANCTIONS: THE GLOBAL STRUGGLE FOR PALESTINIAN RIGHTS 223 (2011); *see also* Bob Unruh, *Hate-Israel Movement Flames Out as Investments Rise*, WORLD NOT DAILY (June 4, 2016), [https://perma.cc/4N26-TXQX].

8. GHADA AGEEL, APARTHEID IN PALESTINE: HARD LAWS AND HARDER EXPERIENCES 100 (Joanne Muzak ed., 2016).

9. As long as those people do not also make useful things that the boycotters want, like Covid-19 vaccines. Marcy Oster, *BDS Founder: Israel-Invented Virus Vaccine Would Be OK for Boycotters to Use*, TIMES ISR. (Apr. 7, 2020), [https://perma.cc/3U9V-PPBN]; *see also* Karl Vick, *This Is Why It's Hard to Boycott Israel*, TIME (June 5, 2015), [https://perma.cc/D94K-KJAR] (discussing how the Israel-boycott-movement began with a targeted boycott of items produced on the West Bank, but the BDS movement has expanded to a boycott of all things produced in Israel); *Boycott Israel Products*, BOYCOTT ISR. TODAY (Sept. 8, 2014), [https://perma.cc/39N3-R7WD] (advocating for a boycott of Israeli and Jewish products that support Israel directly or indirectly no matter where produced).

signed the anti-boycott amendments to the Export Administration Act in 1977,[10] every single Congress and administration has affirmed it.[11] All that Arkansas Act 710 and the rest of the so-called anti-BDS bills really do is implement that federal policy by saying that if you want a particular state to do business with you, you need to abide by that state's policies (reflective of federal policies) related to sound and fair business practices. This includes a requirement to abide by the state's anti-discrimination rules.

In theory this should not be controversial. "The Supreme Court has consistently found that state and federal anti-discrimination laws that relate to race, religion, color, and national origin do not violate the highest level of First Amendment protections."[12] States "all have a compelling interest in preventing invidious discrimination," and they are free to implement "that compelling interest by imposing conduct-based

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10. *Statement by President Carter upon the Signing of Anti-Boycott Legislation*, ISR. MINISTRY OF FOREIGN AFFS., [https://perma.cc/2PDQ-DD2X] (last visited Oct. 21, 2017) [hereinafter *President Carter Anti-Boycott Signing Statement*].

11. *See* Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 47–48 (2017) ("Though the EAA Anti-Boycott Law has statutorily lapsed by its own terms pursuant to its sunset provision, as the Congressional Research Service Report states, 'its provisions are continued under the authorization granted to the President in the National Emergencies Act and the International Economic Emergency Powers Act, most recently under Executive Order 13222 signed August 17, 2001.'") (quoting MARTIN A. WEISS, CONG. RSCH. SERV., RL33961, ARAB LEAGUE BOYCOTT OF ISRAEL 6 n.18 (2017)). President Carter's signing statement itself was quite telling:

> For many months I have spoken strongly on the need for legislation to outlaw secondary and tertiary boycotts and discrimination against American businessmen on religious or national grounds . . . . My concern about foreign boycotts stemmed, of course, from our special relationship with Israel, as well as from the economic, military and security needs of both our countries. But the issue also goes to the very heart of free trade among all nations . . . . The bill seeks instead to end the divisive effects on American life of foreign boycott [sic] aimed at Jewish members of our society. If we allow such a precedent to become established, we open the door to similar action against any ethnic, religious, or racial group in America.

President Carter Anti-Boycott Signing Statement, *supra* note 10.

12. Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 61 & n.135 (2018) (first citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); then citing Holder v. Humanitarian L. Project, 561 U.S. 1, 39 (2015); and then citing Christian Legal Soc'y v. Martinez, 561 U.S. 661, 697-98 (2010)).

regulations on government contractors."[13] In fact, liberal organizations like the American Civil Liberties Union ("ACLU") have been publicly supportive of this idea on a regular basis and in a variety of contexts.[14] The only difference here appears to be the relative popularity of the targets of the discriminatory action that the government is seeking to protect against. In this case (as applied), more often than not the people being discriminated against are Jewish people and those who support the Jewish state.[15] "Act 710's text makes clear the Arkansas General Assembly's antidiscrimination goals. As [the legislature] found, boycotts of Israel, which are 'discriminatory decisions,' are rooted in animus towards 'the Jewish people.'"[16]

13. Brief of States of Arizona & Florida et al. as Amici Curiae Supporting Petitioner, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2526871, at *1.

14. *See e.g.*, Heather L. Weaver & Daniel Mach, *A New String of State Bills Could Give Religious Organizations Blanket Immunity from Any Wrongdoing*, ACLU: NEWS & COMMENT. (Mar. 20, 2021), [https://perma.cc/2J63-563P] (arguing that states should be free to decide whom they contract with, otherwise the law could "make the government an accomplice to discrimination. For example, the bills could prohibit the State from denying State contracts, licenses, and certifications, as well as tax exemptions based on religious organizations' exercise of their faiths. Under these provisions, the State could be required to give government contracts to groups like the KKK, which claim to be religiously based, or organizations that claim a religious right to discriminate against certain social-services beneficiaries.").

15. *See* David Bernstein, *The ACLU's Shameful Role in Promoting Antisemitism*, REASON (Mar. 11, 2019), [https://perma.cc/6P26-79TX] (noting how, when it comes to the BDS movement, the ACLU is surprisingly willing to engage in some light antisemitism, including the use of classic antisemitic tropes, like calling the anti-discrimination provisions "loyalty oath[s]" to the State of Israel). In his words:

> This is complete nonsense. Contractors certifying that their businesses don't boycott Israel-related entities is no more a "loyalty oath" to Israel than certifying that they don't refuse to deal with black or gay or women-owned business, or or [sic] that they will deal only with unionized businesses, is a "loyalty oath" to blacks, gays, women, or unions. Contractors who sign anti-boycott certifications are free to boycott Israel and related entities in their personal lives, and they and their businesses are free to donate to anti-Israel candidates and causes, and even to publicly advocate for BDS.

Id.

16. Brief of Defendants-Appellees, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2407954, at *2; *see also* ARK. CODE ANN. § 25-1-501(2)-(3) (2017) (noting that discriminatory boycotts of Israel predated even its official declaration of independence). Other states have been even more explicit on the subject. *See, e.g.*, Greendorfer, *supra* note 12, at 46 (citing Act of Sept. 24, 2016, §§ 1(f), (j), 2016 Cal. Stat. 4023, 4025 (West 2016) (codified at CAL. PUB. CONT. CODE § 2010 historical and statutory notes)).

To be clear, while it is not the case that all BDS supporters are antisemitic, the movement itself is demonstrably so, and that is the relevant fact for a constitutional analysis.[17] The BDS campaign "is predicated on the claim that Israel is nothing more than a colonial and racist initiative undertaken by Jews and explicitly states that the State of Israel is a racist, illegitimate entity that should not exist."[18] Its leaders openly and repeatedly deny the Jewish people's right to self-determination and call for the destruction of their homeland.[19] Per the internationally recognized International Holocaust Remembrance Alliance ("IHRA") definition of antisemitism, that alone is unacceptable antisemitism,[20] but it is *also* true that the nonprofit umbrella group for U.S.-based BDS organizations funnels money to terrorist organizations that specialize in killing Jews and that call for Jewish genocide;[21] that more than thirty[22] of the BDS National Committee's leaders are *actual* violent terrorists;[23] and that the

17. Greendorfer, *supra* note 12, at 33.

18. Marc A. Greendorfer, *Discrimination as a Business Policy: The Misuse and Abuse of Corporate Social Responsibility Programs*, 8 AM. U. BUS. L. REV. 307, 358 (2020) (citing GRASSROOTS PALESTINIAN ANTI-APARTHEID WALL CAMPAIGN, TOWARDS A GLOBAL MOVEMENT: A FRAMEWORK FOR TODAY'S ANTI-APARTHEID ACTIVISM, (2007), [https://perma.cc/TCT5-LQNV] [hereinafter TOWARDS A GLOBAL MOVEMENT]). In relation to the colonialist claim, Greendorfer also notes the fact that this is a complete inversion of history: Jews are the indigenous people of the land and are simply reclaiming their historic homeland and asserting their inherent right to self-determination. Greendorfer, *supra* note 11, at 5, 85.

19. *See, e.g.*, Ali Abunimah, *Finkelstein, BDS and the Destruction of Israel*, AL JAZEERA (Feb. 28, 2012), [https://perma.cc/TX4R-8AA4] (quoting an interview with Norman Finkelstein); Rachel Avraham, *Goal of the BDS Movement: Delegitimize Israel*, UNITED WITH ISR. (July 10, 2013), [https://perma.cc/M4HY-L4UP]; HAROLD BRACKMAN, SIMON WIESENTHAL CTR., BOYCOTT DIVESTMENT SANCTIONS (BDS) AGAINST ISRAEL: AN ANTI-SEMITIC, ANTI-PEACE POISON PILL 1-3 (2013).

20. *See* Ahmed Shaheed, *Elimination of All Forms of Religious Intolerance*, ¶¶ 18, 50, U.N. Doc. A/74/358 (Sept. 20, 2019) (noting with concern the claim "that the objectives, activities and effects of the Boycott, Divestment and Sanctions movement are fundamentally antisemitic" under the IHRA's internationally accepted standard definition of antisemitism).

21. Armin Rosen & Liel Leibovitz, *BDS Umbrella Group Linked to Palestinian Terrorist Organizations*, TABLET (June 1, 2018), [https://perma.cc/P3WK-8H52].

22. *Terrorists in Suits: The Ties Between NGOs Promoting BDS and Terrorist Organizations*, STATE OF ISR. (Feb. 2019), [https://perma.cc/Z4U7-D6PW] (detailing exposed information of more than thirty individuals who are BDS leaders and have personal involvement in actual terrorism).

23. Emily Jones, *'Terrorists in Suits': Senior Leaders of Anti-Israel BDS Groups Tied to Palestinian Terror*, CBN NEWS (Feb. 4, 2019), [https://perma.cc/9QNN-TMA6].

antisemitism some BDS activists spout[24] often breaks through the "non-violent" veil,[25] leading to people, including innocent Jewish (not Israeli) American citizens getting hurt.[26] Our government is, of course, aware of these connections; in 2016 for example, Congress heard testimony from former United States Department of the Treasury counterterrorism analyst Dr. Jonathan Schanzer that: "[i]n the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign."[27]

This is also not in any way a partisan issue: both the Republican and Democratic parties have consistently denounced BDS in their platforms.[28] Nor is it only a federal issue; in 2017, the governors of *all fifty* states signed onto a statement affirming

24. Jeremy Bauer-Wolf, *After Threat of Violence, Calls to Fire RA*, INSIDE HIGHER ED (Aug. 1, 2018), [https://perma.cc/6L42-F2VG] (stating that a college student who was associated with a student organization which supports BDS sought to physically fight Zionists on campus).

25. Rachel Frommer, *British Jewish Leaders Outraged by London University Anti-Israel Protest Which Required Police Intervention*, ALGEMEINER (Oct. 28, 2016, 4:37 PM), [https://perma.cc/JNH2-T3UD].

26. DAN DIKER & JAMIE BERK, JERUSALEM CTR. FOR PUB. AFFS., STUDENTS FOR JUSTICE IN PALESTINE UNMASKED: TERROR LINKS, VIOLENCE, BIGOTRY, AND INTIMIDATION ON US CAMPUSES 5, 28 (2018), [https://perma.cc/6NYS-TSLK].

27. *Israel Imperiled: Threats to the Jewish State: Joint Hearing Before the Subcomm. on Terrorism, Nonproliferation, & Trade & the Subcomm. on the Middle E. & N. Afr. of the H. Comm. on Foreign Affs.*, 114th Cong. 23 (2016) (statement of Dr. Jonathan Schanzer, Vice President of Rsch., Found. for Def. of Democracies); *see also Israel, the Palestinians, & the United Nations: Challenges for the New Admin.: Joint Hearing Before the Subcomm. on the Middle E. & N. Afr. and the Subcomm. on Afr., Glob. Health, Glob. Hum. Rts., & Int'l Orgs. of the H. Comm. on Foreign Affs.*, 115th Cong. 42-43 (2017) (statement of Dr. Johnathon Schanzer, Vice President of Rsch., Found. For Def. of Democracies):

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

28. *See, e.g.*, *Republican Platform 2016*, GOP (2016), [https://perma.cc/U9AE-DNKA]; *2016 Democratic Party Platform*, AM. PRESIDENCY PROJECT (2016), [https://perma.cc/S6Z8-Q6YE]; *2020 Democratic Party Platform*, DEMOCRATIC NAT'L CONVENTION (August 18, 2020), [https://perma.cc/S7VL-MB9S].

their opposition to BDS, noting that "[t]he goals of the BDS movement are antithetical to our values and the values of our respective states[,]" and reiterating that BDS's "single-minded focus on the Jewish State raises serious questions about its motivations and intentions."[29]

And so, it is not surprising that, in response to the BDS movement, a majority of states have enacted their own "anti-BDS bills,"[30] which mirror the federal anti-boycott provisions and seek to prevent American citizens and businesses from being forced to take sides in a foreign conflict, and to take part in actions (such as national origin discrimination) which are repugnant to American values and traditions.[31]

Just so that there is no confusion: none of the state "anti-BDS" laws ban or punish speech that is critical of Israel; none of the state laws target advocacy for Palestinian rights; and none of the state laws stop anyone or any business from boycotting Israel. The laws simply say that if you *do* choose to boycott Israel in a discriminatory manner, the State can choose not to do business with you.

Again, there should be nothing controversial with a state simply choosing how to spend its dollars.[32] Government

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29. *Governors United Against BDS*, AM. JEWISH COMM., [https://perma.cc/M9MX-98QY] (last visited Oct. 1, 2021).

30. Some of which are modeled in spirit after the 1977 amendments to the Export Administration Act. *See, e.g.*, Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 [hereinafter EAA of 1977]; *Impact of the Boycott, Divestment, & Sanctions Movement: Hearing Before the Subcomm. On Nat'l Sec. of the H. Comm. on Oversight and Gov't Reform*, 114th Cong. (2015) (statement of Eugene Kontorovich); Ribicoff Amendment to the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended at 26 U.S.C. § 999); *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR., [https://perma.cc/H9HJ-NWNS] (last visited Nov. 25, 2021).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a(a)).

32. This is usually not a disputed point, and it applies in a variety of areas. For example, there is a market participant exception to the Commerce Clause that allows a state to make commercial purchasing decisions to comport with the interests of the state, even if that decision may otherwise appear to be partisan in some way. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 437-39 (1980). While Act 710 is not a Commerce Clause case, the market participant exception certainly reinforces the idea that states are not always prohibited from acting in their own interests when it comes to commercial relations. If this were not the case, then states like California would not be allowed to do what they do when acting as a market participant for state-sponsored travel by state employees, i.e., prohibiting travel to states or localities that have policies or laws that California's legislators find to be discriminatory, such as states that refuse to fully support LGBTQ activism. *See* Rebecca Beitsch, *Supposedly*

spending (especially with accompanying legislative findings) in this context is government speech, and "as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf."[33] 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."[34] In the case of Arkansas Act 710 and all similar statutes, the government does not even seek to fund a controversial program, it merely seeks *not* to fund a program that discriminates.[35] While people remain free to engage in hateful actions, that does not make them less hateful, nor does it mean that the State must agree to subsidize those actions.[36] "To argue otherwise would be to suggest that [a] state is constitutionally obligated to support the BDS [M]ovement, which is not only irrational but also has no basis in law."[37]

In addition to protecting citizens from coercion and protecting the government from involving itself in discriminatory

Symbolic, State Travel Bans Have Real Bite, PEW (Aug. 15, 2017), [https://perma.cc/C34V-8GE6] (detailing the negative economic impact imposed on some states by six other states, including California, by utilizing the market participant exception to further their interests). Of course, in that case the ACLU (which filed against Act 710 here) openly *supported* the choice that California made not to engage with those whom they consider to be acting in a discriminatory fashion. *See* Carma Hassan, *California Adds 4 States to Travel Ban for Laws It Says Discriminate against LGBTQ Community*, CABLE NEWS NETWORK (June 23, 2017, 5:50 PM), [https://perma.cc/KZL5-E6FH].

33. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015); *see also* Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (holding that a city's decision to reject, or accept, certain monuments is a form of government speech).

34. *Walker*, 576 U.S. at 208 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

35. *See* Mark Goldfeder, S*top Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 219 (2018).

36. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) ("[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but *it has never been accorded affirmative constitutional protections*.") (emphasis added) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)); N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 13 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); Ark. Times LP v. Waldrip, 988 F.3d 453, 467 (8th Cir. 2021).

37. Andrew Cuomo, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), [https://perma.cc/727P-CW9X].

practices, anti-BDS bills also protect the economic interests of the United States, which could be detrimentally impacted by efforts to disrupt the economic stability of a close ally,[38] as well the interests of each of the individual states themselves. Arkansas, for example, does almost $43,000,000 a year worth of trade with Israel,[39] and has longstanding binational foundation grants that it shares with Israel in the areas of Agricultural Research and Development; Science and Technology; and Industrial Research and Development.[40] And so aside from the fact that supporting BDS is morally wrong, supporting those who would boycott Israel is also a bad *business* decision for the United States of America, and leading politicians of both major political parties have consistently affirmed this.[41]

As it relates to this point, on February 24, 2016, President Barack Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 into law.[42] The Act promotes United States–Israel relations by discouraging cooperation with entities that participate in boycott, divestment, and sanctions movements against Israel, and requires regular reporting on such entities.[43] As the President explained, in no uncertain terms, "I have directed my administration to strongly oppose boycotts, divestment campaigns, and sanctions targeting the State of Israel."[44] Several provisions in the Act bear repeating—for example, the "[s]tatements of policy," say that Congress:

> (1) supports the strengthening of economic cooperation between the United States and Israel and *recognizes the tremendous strategic, economic, and technological value of cooperation with Israel*;
>
> . . . .

38. Michael Eisenstadt & David Pollock, *Friends with Benefits: Why the U.S.-Israeli Alliance Is Good for America*, WASH. INST. (Nov. 7, 2012), [https://perma.cc/7NV4-JKB5].

39. *State-to-State Cooperation: Arkansas and Israel*, JEWISH VIRTUAL LIBR., [https://perma.cc/DJT9-6CSE] (last visited Mar. 20, 2021).

40. *Id.*

41. *See* Goldfeder, *supra* note 35, at 210–12.

42. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 127 (codified as amended at 19 U.S.C. §§ 4301-4456 (2016)).

43. 19 U.S.C. § 4452(a)-(b), (d).

44. Statement on Signing the Trade Facilitation and Trade Enforcement Act of 2015, 2016 DAILY COMP. PRES. DOC. 98 (Feb. 24, 2016).

> (4) opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel[.][45]

Based on these and other similar (and consistent) Congressional findings over the decades,[46] the Arkansas legislature found in the passing of Act 710 that:

> (4) It is the public policy of the United States, as enshrined in several federal acts, to oppose boycotts against Israel, and *. . . Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness*;
>
> (5) Israel in particular is known for its dynamic and innovative approach in many business sectors, and *therefore 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*; and
>
> (6) Arkansas seeks to act to implement Congress's announced policy of "examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel."[47]

For the purposes of the statute, the term "boycott of Israel" means:

> [E]ngaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, *in a discriminatory manner*.[48]

45. 19 U.S.C. § 4452(b)(1), (b)(4) (emphasis added).

46. *See e.g.*, EAA of 1977, *supra* note 30; *President Carter Anti-Boycott Signing Statement*, *supra* note 10.

47. ARK. CODE ANN. § 25-1-501 (2017) (emphasis added).

48. § 25-1-502(1)(A)(i) (emphasis added). Note that a decision not to engage in business with Israel for non-discriminatory reasons is perfectly fine.

Operationally, the Act requires entities who wish to do business with the State of Arkansas to sign a certification stating that they are not currently boycotting Israel as defined by the Act, and do not intend to boycott Israel for the duration of the contract.[49] It is worth reiterating that the law only applies to discriminatory boycotts, and non-discriminatory boycotts are not subject to the certification requirement.[50] If a party was, for example, boycotting all Middle East countries, or all companies that work with militaries, or all companies that provide tech for security forces, without regard to the country of origin, that would not be a discriminatory boycott under the Act. A party could sign the certification and if ever asked, simply show that the boycott was not discriminatory. Regardless, even if a company is not willing to sign such a statement, it can *still* do business with the State if its price comes in at 20% less than the lowest certifying business,[51] an amount the legislature has deemed enough to make up for the greater inherent risk involved in doing business with a company that makes *political* rather than economically *sound* business decisions.

III. THE LAWSUIT

The Arkansas Times is a free weekly newspaper that has never actually boycotted Israel. Nevertheless, in October 2018, the paper decided to file a test case against Act 710, challenging it on the grounds that it conditioned State contracts "on the unconstitutional suppression . . . of protected speech[,]"[52] and seeking injunctive and declaratory relief, based on alleged violations of the First and Fourteenth Amendments. It argued "that the law impermissibly compels speech regarding contractors' political beliefs, association, and expression[,]" and that it imposes an unconstitutional condition on funding by impermissibly restricting "state contractors from engaging in protected First Amendment activities, including boycott

49. § 25-1-503(a)(1).

50. § 25-1-502(1)(A)(i).

51. § 25-1-503(b)(1).

52. Brief for Petitioner-Appellant at 5, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378).

participation and boycott-related speech, without a legitimate justification."[53]

It was especially surprising and disheartening that liberal groups like the ACLU, which filed on behalf of the Arkansas Times, came out in support of the plaintiffs and argued *against* the general rule that commercial decisions to buy or not to buy are *not* protected by the First Amendment.[54] It is surprising because, as noted above, they are arguing against *literally* the very same rule that they have championed publicly and consistently in other contexts when it better suited their ideological leanings.[55] For example, upon rereading certain passages in the brief that the ACLU filed in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[56] it is hard to find a better word to describe its position here in the Arkansas case than hypocritical:

> The Bakery is not the first business to claim a First Amendment right to violate an antidiscrimination law . . . . This Court has never accepted that premise, and has, instead, affirmed repeatedly the government's ability to prohibit discriminatory conduct over the freedom of expression, association, and religion objections of entities ranging from law firms[;] . . . to private schools, and universities; to membership organizations open to the public; to restaurants, *and newspapers*. . . . "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[57]

53. Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617, 621 (E.D. Ark. 2019) *rev'd and remanded*, 988 F.3d 453 (8th Cir. 2021).

54. *Arkansas Times LP v. Waldrip*, ACLU, [https://perma.cc/5LF3-D68B] (May 9, 2019).

55. This is not entirely surprising. *See* Wendy Kaminer, *The ACLU Retreats From Free Expression*, WALL ST. J. (June 20, 2018), [https://perma.cc/N2EM-6FCH] (noting the ACLU's 2018 guidelines assertion that case selection should involve an assessment of whether it will advance the goals of those "whose views are contrary to our values . . . [i]n selecting speech cases to defend, the ACLU will . . . balance the 'impact of the proposed speech and the impact of its suppression'").

56. Brief for Respondents Charlie Craig and David Mullins at 14-15, Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

57. *Id*. (internal citations omitted) (emphasis added). *But see* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945); Runyon v. McCrary, 427 U.S. 160, 176 (1976), Bob Jones Univ. v. United States, 461 U.S. 574, 603-04 (1983); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987);

The ACLU was also clear that this was in fact the *general* rule for all commercial activity and all kinds of discrimination, and was not somehow case specific:

> While the particular facts of this case involve a bakery refusing to sell a cake for the wedding reception of a same-sex couple, the implications of the . . . arguments are not limited to sexual orientation discrimination or weddings . . . [a]nd, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," a wide range of businesses could claim a First Amendment exemption from generally applicable regulations of commercial conduct. . . . To recognize either of the Bakery's asserted First Amendment objections would run counter to the basic principle, reflected in over a century of public accommodation laws, that all people, regardless of status, should be able to receive equal service in American commercial life.
>
> . . . .
>
> The State's prohibition against discrimination in the sale of goods and services to the public is a regulation of commercial conduct that affects expression only incidentally . . . [b]usinesses, the court has held, have "no constitutional right . . . to discriminate."[58]

As several prominent amicus curiae in this case have already pointed out, this idea is in fact "the foundation of the wide range of antidiscrimination laws, public accommodation laws, and common carrier laws throughout the nation."[59]

It is unclear why the ACLU would change its position in this case. Charitably, perhaps it is because it is not aware that the BDS movement is *actually* antisemitic, and so it thinks that states do not have a compelling interest in combatting it with anti-discrimination laws. Unfortunately, as evidenced by the statements of the movement's leaders, and its founding

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Newman v. Piggie Park Enters., 390 U.S. 400, 402-03 n.5 (1968) (per curiam); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 389 (1973).

58. Brief for Respondents, *supra* note 56, at 2-15.

59. Brief of Profs. Michael C. Dorf et. al. as Amici Curiae in Support of Defendants-Appellees at 1, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2488957.

documents, that line of thinking is both wrong on its face and wrong as applied.

BDS leaders often use classic antisemitic tropes to make their arguments "including, but not limited to, false accusations of Jewish conspiracies; blood libels; portraying Jews (. . . not just *Israelis* but caricatures of religious *Jews*) as Satanic, demonic, and evil (at times even using actual Nazi propaganda), accusing Jews of dual loyalty, and engaging in Holocaust denial and Holocaust inversion."[60] In terms of its practical effect, the BDS movement discriminates against Jewish people in an absurdly clear and disproportionate manner: 95% of American Jews support the State of Israel[61] which is the definition of Zionism that BDS targets. A movement that discriminates against 95% of a group based on its members' shared ethnic beliefs is discriminatory toward that group, and a state has the right not to subsidize or further that movement's discriminatory goals.

But even if the BDS movement *was not* generally antisemitic, that would *also* be irrelevant for the purposes of this statute and for the proper disposition of this case. The statutes in question, including the Arkansas statute, do not target BDS supporters, or even the BDS movement as a whole;[62] by definition the law in question (and BDS laws and anti-discrimination laws generally) only affect *discriminatory conduct* in commercial activity, i.e., when the action taken is based on race, color, religion, gender, or national origin.[63] In this case, the Act does not affect decisions not to deal with Israel that are based on economic reasons, or the specific conduct of a person or firm. The only way we could *possibly* know that a company's buying decisions were based on discriminatory reasons and not economic

60. *See* Mark Goldfeder, *The Danger of Defining Your Own Terms: Responding to the Harvard Law Review on Antidiscrimination Law and the Movement for Palestinian Rights*, 3.2 J. CONTEMP. ANTISEMITISM 141, 143 (2020). It should also be obvious that saying Jews are not a people while calling for the destruction of the world's lone Jewish state, along with the ethnic cleansing and/or the genocidal extermination of its millions of Jewish inhabitants, is *also* antisemitic.

61. Frank Newport, *American Jews, Politics and Israel*, GALLUP (Aug. 27, 2019), [https://perma.cc/74VQ-2AWZ].

62. It is also worth highlighting that while *the BDS movement* is antisemitic, that is not a criticism of general Palestinian rights work and advocacy. *See* Goldfeder, *supra* note 60, at 141, 143.

63. *See* ARK. CODE ANN. § 25-1-501(3) (2017).

ones would be if it told us, in *accompanying* speech, that it was taking this action *in order to discriminate*. Certainly, we should all be able to agree that *when* BDS, by admission, involves non-expressive discriminatory conduct, it can and should be regulated by anti-discrimination law.[64]

Now to be fair, the truth is that a casual observer (not the lawyers at the ACLU) *might* be excused for some confusion in this case because of the use of the term "boycott" in the statute. The term "boycott" could, in some contexts, refer to the kinds of boycott activities that *are* protected by the First Amendment. The fact is though that *none* of the state laws in question, including Arkansas Act 710, regulate that kind of expressive boycott activity, and indeed they could not legally do so.

As the Supreme Court ruled in *NAACP v. Claiborne Hardware Co.*,[65] a case about a primary boycott of white-owned businesses to protest racial discrimination in Mississippi,[66] "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[67] No one involved in the Arkansas case (or with any of the state anti-BDS bills for that matter) in any way disagrees with that principle.

The boycott in *Claiborne* involved a range of First Amendment protected activities, including speeches, picketing, the sending of telegrams and the publication of lists, etc.[68] "Crucially, *Claiborne* did not 'address purchasing decisions or

64. The argument that an individual's refusal to deal, or his purchasing decisions, when taken in connection with a larger social movement, do become inherently expressive is also unpersuasive. "Such an argument is foreclosed by *FAIR*, as individual law schools were effectively boycotting military recruiters as part of a larger protest against the Don't Ask, Don't Tell policy." Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617, 624 (E.D. Ark. 2019); *see* Rumsfeld v. F. for Acad. & Inst. Rights, Inc. (''FAIR''), 547 U.S. 47, 66 (2006).

65. 458 U.S. 886 (1982).

66. *Id.* at 889. A boycott by those whose constitutional rights were being infringed upon and against those who were infringing upon those rights, as opposed to a secondary political boycott directed towards foreign governments against longstanding U.S. policy. *See* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 218-19 (1982).

67. *Claiborne Hardware Co.*, 458 U.S. at 914.

68. *See id*. at 889, 902, 907.

other non-expressive conduct.'"[69] As former Solicitor General Paul Clement has explained, what *Claiborne* did was affirm that those elements of a boycott that *do* involve protected First Amendment activity do not *lose* that protection simply because they are accompanied by elements that are *not* expressive.[70] But "[a]t no point did the Court suggest that the mere act of refusing to deal—accompanied by no protected conduct like speech or picketing—constitutes 'inherently expressive' conduct" entitled to First Amendment protection.[71]

The Court in *Claiborne* also did not address whether the First Amendment would protect a refusal to deal with someone that is forbidden under state anti-discrimination law because at the time there *were* no laws in Mississippi that prohibited racial discrimination. "Nor was the boycott banned by general prohibitions on 'concerted refusal to deal,' 'secondary boycotts,' or 'restraint[s] of trade[]' . . . . Indeed, *Claiborne Hardware* expressly reserved the question whether a boycott 'designed to secure aims that are themselves prohibited by a valid state law' is constitutionally protected."[72]

That question was left open by *Claiborne* but conclusively resolved by the Supreme Court in *Rumsfeld v. FAIR*: to the extent that such a boycott involves *non-expressive activity*, that activity is *not* protected.[73]

69. *Ark. Times LP*, 362 F. Supp. 3d at 625 (quoting Jordahl v. Brnovich, Case No. 18-16896, Dkt. No. 26 slip op. at 5 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting)).

70. Brief for Amicus Curiae Christians United for Israel in Support of Defendant-Appellees' Petition for Rehearing En Banc at 7, Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2021 WL 1603995.

71. *Id.*

72. Brief in Support of Defendants-Appellees, *supra* note 59, at 7 (quoting *Claiborne Hardware Co.*, 458 U.S. at 891 n.7, 894, 915). "The holding of *Claiborne* is thus consistent with the principle set forth just six years before in *Runyon v. McCrary*: Though people and institutions have a right to advocate for discrimination . . . 'it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.'" *Id.* at 7-8 (quoting Runyon v. McCrary, 427 U.S. 160, 176 (1976)).

73. 547 U.S. 47, 65-66 (2006). *Rumsfeld* involved law schools engaged in a boycott of military recruiters to protest the military's then-extant "Don't Ask Don't Tell" policy. *See id.* at 52. The Court held that such conduct was "not inherently expressive" because the actions "were expressive *only* because the law schools accompanied their conduct with speech explaining it." *Id.* at 66; *Ark. Times LP*, 362 F. Supp. 3d at 623. Otherwise, no one would know for sure why the recruiters were not there. *Rumsfeld*, 547 U.S. at 66.

In addition, the BDS movement is fairly open[74] about the fact that, as opposed to the primary boycott activity in *Claiborne*, for the most part, BDS activities take the form of secondary and tertiary boycotts.[75] A primary boycott is generally one in which the boycotter is acting against the entity that it has a grievance with; a secondary boycott is one in which the party boycotting an entity has a goal of affecting a third party, rather than the boycotted entity. A tertiary boycott is one in which the goal is to affect a fourth party, who supports the third party supporting the boycotted entity.[76] BDS activists say that their issue is with the State of Israel, but the bulk of their targets are not the government of Israel, but rather companies doing business in or with Israel (a secondary boycott) and the people that support them (a tertiary boycott). Unlike in *Claiborne*, "[t]he BDS supporters are not trying to protect their own constitutional rights[]" from those who are oppressing them; "they are trying to use commerce to inflict harm on a foreign nation[.]"[77] "In both *Claiborne* and *International Longshoremen's Association*,[78] the Supreme Court explicitly stated that secondary boycotts are not accorded the same types of protections under the First Amendment as primary boycotts."[79] In fact, the Court in *Longshoremen* actually upheld a law regulating boycott activity directed at a matter covered by U.S. foreign policy, "conclud[ing] that boycotts that impede United States commerce and are political protests intended to punish foreign nations for their offshore conduct *may* [in fact] be limited by the government."[80]

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74. *See, e.g.*, TOWARDS A GLOBAL MOVEMENT, *supra* note 18.

75. *See* Goldfeder, *supra* note 35, at 223-31.

76. *See generally* Presentation by the Office of Antiboycott Compliance in the Bureau of Industry and Security in the U.S Department of Commerce, [https://perma.cc/EA7Y-Q6CK].

77. Goldfeder, *supra* note 35, at 224.

78. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917 (1982); Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 216-17 (1982).

79. *See* Greendorfer, *supra* note 12, at 58 (first citing *Claiborne*, 458 U.S. at 912 ("Secondary boycotts and picketing by labor unions may be prohibited . . . ."); then citing *Longshoremen*, 456 U.S. at 226-27 n.123 ("holding that a law prohibiting secondary boycotts did not violate the First Amendment and stating, '[i]t would seem even clearer that conduct designed not to communicate, but to coerce, merits still less consideration under the First Amendment.'")).

80. Goldfeder, *supra* note 35, at 229 (emphasis added) (citing *Longshoremen*, 456 U.S. at 221).

Of course, BDS activists like to conflate protected and unprotected activities,[81] which is exactly why the state had to clarify that the mere use of the term boycott "to refer to one's commercial choices does not create a First Amendment right to contract, or not to contract."[82] The clear distinction between expressive and non-expressive "boycott" activity is *precisely* why the legislature in Arkansas defined the term "boycott" in the statute to *only* refer to a company's non-expressive commercial choices.[83] Contractors with the State remain absolutely free to engage in any and all *expressive* boycott activity against Israel. The Arkansas Times may, for example, "send representatives to meetings, speeches, and picketing events in opposition to Israel's

81. Indeed, the ACLU relied extensively on a cherrypicked recitation of *Claiborne* in briefing this case. *See generally* Appellant's Opening Brief, Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617 (E.D. Ark. 2019) (No. 19-1378), 2019 WL 1756930; Appellant's Reply Brief, Ark. Times LP v. Waldrip, 362 F. Supp. 3d 617 (E.D. Ark. 2019) (No. 19-1378), 2019 WL 3208596.

82. Brief in Support of Defendants-Appellees, *supra* note 59, at 5, 7. For instance, "[a] limousine driver cannot refuse to serve a same-sex wedding party, even if he describes this as a boycott of same-sex weddings (or part of a nationwide boycott of such weddings by like-minded citizens)." *Id.* at 2. By that very same token, it should be obvious that:

> A cab driver who is required to serve all passengers cannot refuse to take people who are visibly carrying Israeli merchandise. Of course all these people would have every right to speak out against same-sex weddings . . . and Israel. That would be speech, which is indeed protected by the First Amendment. But as a general matter, a decision not to do business with someone, even when it is politically motivated (and even when it is part of a broader political movement), is not protected by the First Amendment. And though people might have the First Amendment right to discriminate (or boycott) in some unusual circumstances—for instance when they refuse to participate in distributing or creating speech they disapprove of—that is a basis for a narrow as-applied challenge, not a facial one.

Id. at 2-3.

83. To the extent that anyone really does believe that such a boycott is expressive, then the reverse should also be true, and the State of Arkansas's decision not to do business with those who engage in discrimination should be considered government speech, not a regulation of private speech. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009). "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." ERWIN CHEMERINSKY, THE FIRST AMENDMENT 49 (Wolters Kluwer 2019). 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)).

policies . . . call upon others to boycott Israel, write in support of such boycotts, and engage in picketing and pamphleteering to that effect[]" and the State can say nothing about it.[84] This does not mean, however, that the newspaper's *non*-expressive commercial decisions are *also* protected by the First Amendment.[85]

And so, it was not surprising when the district court—based on the well-established rule that particular commercial purchasing decisions do *not* themselves communicate ideas[86]—rejected the Plaintiff's shallow surface comparison of the "boycott" activities proscribed in Act 710 to the activities in *Claiborne* and denied the Plaintiff's motion for a preliminary injunction, while granting the Defendants' motion to dismiss.[87]

The court correctly concluded that a boycott of Israel, *as defined by the Act*,[88] commercial actions undertaken in a discriminatory way, is "neither speech nor inherently expressive conduct[]" and is thus not entitled to First Amendment protection.[89] Such actions are only expressive when the conduct is accompanied by speech that explains it.[90] As the court noted:

> Very few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the *absence* of certain goods from a contractor's office mean that the contractor is engaged in a boycott of Israel. Instead, an observer would simply believe that the types of products located at the contractor's office reflect its commercial, as opposed to its political, preferences. In most, if not all cases, a contractor would have to explain to an observer that it is engaging in a boycott for the observer to have any idea that a boycott is taking place. And under *FAIR*, the fact that such conduct *may* be subsequently explained by speech does not mean that this

84. *Ark. Times LP*, 362 F. Supp. 3d at 625.

85. *Id.*

86. *See id.* at 624.

87. See Ark. Times LP v. Waldrip, 988 F.3d 453, 458 (8th Cir. 2021).

88. I.e., a refusal to deal or a company's purchasing decisions. *Ark. Times LP*, 362 F. Supp. 3d at 623.

89. *Id.*; *see* Pickup v. Brown, 740 F.3d 1208, 1225 (9th Cir. 2014) (quoting Rumsfeld v. F. for Acad. & Inst. Rights, Inc. ("*FAIR II*"), 547 U.S. 47, 66 (2006)) ("The Supreme Court has made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive.'").

90. *See FAIR II*, 547 U.S. at 66.

> conduct is, or can be, transformed into inherently expressive conduct. ("The fact that . . . explanatory speech is necessary is strong evidence that . . . conduct . . . is not so inherently expressive that it warrants protection.").[91]

Arkansas Times appealed, and in February 2021, the Eighth Circuit issued an opinion reversing the decision and remanding the case back to the district court for further findings.[92]

IV. A NARROW (AND VERY STRANGE) APPELLATE DECISION

This is where the purposeful misreporting comes in, with BDS activists falsely claiming that the anti-BDS law in Arkansas had been struck down as unconstitutional.[93] Here is what actually happened in the Eight Circuit's extremely narrow opinion reversing the district court's decision to *immediately* dismiss the case.

First and foremost, the court *accepted* the fairly obvious principle that commercial buying decisions are not inherently expressive.[94] Far from being an adverse ruling, that understanding alone *confirms* the constitutionality of anti-BDS laws across the country.

Perhaps because the Arkansas Times is not actually boycotting Israel, and the court felt the need to find an interpretation of the Act that could even possibly apply to it such that it would have a potential claim, the majority opinion chose to focus on one phrase in the definition of boycott that (according to the court) could reasonably be misconstrued as applying to actually expressive conduct. Again, the Act defines "boycott of Israel" to mean:

(1) "engaging in refusals to deal";

91. *Ark. Times LP*, 362 F. Supp. 3d at 624. The Court also noted in *Longshoremen* that "[i]t would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982).

92. *Ark. Times LP*, 988 F.3d at 458, 467.

93. *Federal Court Rules Arkansas Anti-Boycott Law Violates First Amendment*, PALESTINE LEGAL (Feb. 18, 2021), [https://perma.cc/XH7N-PD5A].

94. *Ark. Times LP*, 988 F.3d at 460.

> (2) "terminating business activities"; or
>
> (3) "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner."[95]

The State has consistently insisted that, like the activities described in subsections (1) and (2), the phrase "other actions" in subsection (3) is clearly also limited to similar non-expressive commercial conduct and indeed has reiterated many times that any and all contractors are in fact free to express their feelings about Israel *in any way that they want*, including but not limited to criticizing Israel, lobbying against Act 710 itself, and even advocating for boycotts.[96] In fact, in this very case, the Arkansas Times itself had done those things, and the State had no problem with it.[97] The court, however, felt that because that phrase "is open to more than one plausible construction," it was still too ambiguous.[98]

The court did note that the district court had used the appropriate canon of *ejusdem generis* to understand the meaning of the phrase "other actions" in the statute.[99] *Ejusdem generis* is the principle of statutory construction which says that "when general words follow specific words in a statutory enumeration the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[100] Applied to the Act, the term "other actions" should obviously be read to include only conduct similar in kind to the terms that precede it: "refusals to deal" and "terminating business activities," i.e. non-expressive commercial activity. But then, in a truly mystifying manner, the court decided *not* to follow the correct canon of construction and instead to "look to the statute as a whole to interpret it according to the legislative intent[]."[101]

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95. ARK. CODE ANN. § 25-1-502(1)(A)(i) (2017).

96. Defendants-Appellees' Brief at 4, *Ark. Times LP*, 988 F.3d 453 (No. 19-1378).

97. *Id.* at 8.

98. *Ark. Times LP*, 988 F.3d at 464.

99. *Id.*

100. Hanley v. Ark. State Claims Comm'n, 333 Ark. 159, 167, 970 S.W.2d 198, 201 (1998).

101. *Ark. Times LP*, 988 F.3d at 464-65 (citing Simpson v. Cavalry SPV I, LLC, 2014 Ark. 363, at 3, 440 S.W.3d 335, 338).

Incredibly, this reference to legislative intent was offered as a reason for the court to disagree with the district court's reading, *despite* the fact that the legislative intent in passing the bill, confirmed repeatedly by the legislature's own representatives, was *clearly* (and *demonstrably*, based on their relationship with the Plaintiff-Appellees *in this very case*) for that section to be read exclusively in the way that the district court did, i.e., as applying only to non-expressive commercial conduct.

The only justification that the court seemed to give for the decision to ignore both the text and the readily apparent legislative intent was to note that "the State has not provided any example of the type of conduct that, under their interpretation of the Act, would fall in the 'other actions' category[,]"[102] as if to say that the concern about other discriminatory non-expressive commercial conduct could not really be the reason for subsection (3) and to imply that the State's position was just apologetics. This is a logically flawed and lazy argument.

First, the legislature does not have to specify every single behavior that could be referenced, so long as it sufficiently delineates the type of behavior being prohibited. In this instance, the type of behavior being referred to is clearly, contextually, discriminatory non-expressive commercial conduct.

Second, there are *numerous* behaviors that fit into that category, i.e., cases where a party is discriminating in commercial decision making against Israel or Israelis while not *technically* refusing to deal or terminating business relations, and it was these actions that the Arkansas Legislature clearly meant to cover.

Some easy examples of the kind of constitutionally unprotected activity that the "other actions" clause covers could include, but are not limited to, a refusal to give equal commercial access/opportunities to an Israeli person or group (like the access that was denied in the *FAIR* case that the court discusses at length).[103] That action is broader than a simple refusal to deal but, if done for discriminatory reasons, would also fall under subsection (3). Likewise, another type of behavior in that category of "other actions" that are discriminatory non-expressive

102. *Id.* at 464.

103. *See generally* Rumsfeld v. F. for Acad. & Inst. Rts., 547 U.S. 47 (2006).

commercial decisions would be the classic BDS tactic of a *conditional* refusal to deal, i.e., a scenario in which a company discriminatorily says that it *will* do business with Israelis but only if the Israeli group or individual (as opposed to every other group or individual it is willing to do business with) first meets a set of conditions.[104] Or, as the dissent points out, "consider the following: a company begins charging overly-inflated shipping prices for products shipped to Israel to reduce commercial relationships with the country. While this is not a refusal to deal or a termination of business activities, it is another 'action . . . intended to limit commercial relations with Israel.'"[105]

Finally, and seeing as the court was ostensibly looking for legislative intent this whole time, perhaps most convincingly, the Arkansas General Assembly's very purposeful choice of language actually points directly to the type of behavior it intended to cover with the statute. Anti-boycott laws[106] and anti-discrimination laws[107] are "not the only federal law[s] implicated by the BDS Movement[.]"[108] As the 1976 House Boycott Report and the accompanying Department of Justice analysis[109] concluded, anti-Israel boycotts that affect U.S. businesses also violate anti-trust laws.[110] In fact, the phrase that the Arkansas

104. *See, e.g.*, Todd Gitlin & Nissim Calderon, *A Counterproductive Call to Boycott Israel's Universities*, NEW REPUBLIC (Oct. 10, 2010), [https://perma.cc/5QPZ-TEHP]. A prime and well publicized example of this process, which also belied the movement's underlying antisemitism, was the BDS movement's 2015 attempted boycotting of Jewish-American (non-Israeli) reggae star Matthew Paul Miller. The singer, also known as "Matisyahu," was scheduled to perform at the Spanish Rototom Sunsplash Festival in August 2015, but when the BDS movement got wind of his performance, its members pressured the festival to demand that Matisyahu, the only Jewish artist invited, issue a statement in support of Palestinian statehood as a condition for the opportunity to perform. That condition was not placed on any other artist at the festival. *See* Donna Rachel Edmunds, *Jewish Rapper Matisyahu Banned by Israel Boycotters . . . Except He's Not Israeli*, BREITBART (Aug. 17, 2015), [https://perma.cc/8PFJ-7RV4].

105. *Ark. Times LP*, 988 F.3d at 468 (Kobes, J., dissenting).

106. *See, e.g.*, EAA of 1977, *supra* note 30.

107. *See, e.g.*, Title VI, 42 U.S.C. § 2000d (1964).

108. Greendorfer, *supra* note 11, at 97.

109. Written by the late Justice Antonin Scalia, at the time an Assistant Attorney General at the Department of Justice. *See Arab Boycott: Hearings on H.R. 5246, H.R. 12383 and H.R. 11488 Before the Subcomm. on Monopolies & Com. L. of the Comm. on the Judiciary*, 94th Cong. 68-74 (1975) (statement of Antonin Scalia, Assistant Attorney General, Department of Justice).

110. Greendorfer, *supra* note 11, at 97.

Legislature used in subsection (1) of Act 710, a "refusal to deal," comes *directly* from the anti-trust caselaw.[111] In passing the Sherman Antitrust Act:[112]

> What the government was most concerned with was a scenario where, due to pressure from the Arab League, one United States entity would refuse to deal with another entity that was being targeted by the Arab League for having relations with Israel. Such a refusal to deal would not only have damaging effects on United States commerce and competition, it would, in essence, be a private usurpation of the federal government's exclusive authority to regulate commerce. In the House Legal Analysis, [later-to-be] Justice Scalia cited to *Fashion Originators Guild of America v. F.T.C* [] in support of his argument that such boycotts are *prima facie* illegal. . . . In the same way, the BDS Movement's activities put the regulation of commerce into private, indeed hostile, foreign hands.[113]

That concern over a secondary/tertiary refusal to deal that is at the heart of the Sherman Antitrust Act is a perfect description of yet another type of "other actions" that are discriminatory but non-expressive commercial activity. Seen in this light, the most obvious reading of the statute is that the Arkansas General Assembly *intended* and indeed *incorporated* all of the regular and contextually appropriate anti-trust meanings of "refusal to deal," including other related non-expressive coercive business actions undertaken with the same discriminatory intent. Again, the legislative findings state that:

> (4) It is the public policy of the United States, as enshrined in *several federal acts*, to oppose boycotts against Israel, and . . . Congress has concluded as a matter of national trade policy that cooperation with Israel materially benefits United States companies and improves American competitiveness.[114]

111. *See e.g.*, Kathryn A. Kusske, *Refusal to Deal as a Per Se Violation of the Sherman Act: Russell Stover Attacks the Colgate Doctrine*, 33 AM. U. L. REV. 463, 463-64 (1984); *see also* Kenneth Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1, 1-2 (2002) for an overview of Sherman Act principles, especially as they relate to group boycotts.

112. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7.

113. Greendorfer, *supra* note 11, at 99-100.

114. ARK. CODE ANN. § 25-1-501(4) (2017) (emphasis added).

In the definition section, subsection (1), the legislature referenced a classic refusal to deal as an example of the kind of behavior that would obviously fall under the statute.[115] Then it clarified in subsection (3), for those who may not be familiar with this area of law, that, consistent with the legal and historical usage of the term "refusal to deal" *in this very context*, if a party were to take "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel"—for example, if they were to make business decisions designed to force or coerce *another* party to refuse to deal with the target of a boycott (i.e. a secondary or tertiary boycott), even while never engaging in the actual boycott themselves, that too would be the kind of discriminatory commercial action that (aside from the federal concerns) would be (a) problematic under Act 710, and (b) not entitled to First Amendment protection.[116] Outsourcing discrimination does not make it better,[117] and the Arkansas Legislature had every right to include that concern, decades old in the context of anti-Israel boycotts, in its deliberate considerations.

Regardless, the divided Eighth Circuit panel felt that the legislature had not been clear *enough* about its intent to limit the statute to non-expressive activity.[118] While it is not uncommon for courts to find a statute void for vagueness, in this instance it really looks like the court set out to find the statute vague for voidness.[119] Then, incredibly, instead of being content with merely casting the language as ambiguous, the court offered as "proof" of the legislatures' real intent the fact that the statute:

> [P]ermits the State to consider specified "type[s] of evidence" to determine whether "a company is participating

115. § 25-1-502(1)(A)(i).

116. *See generally* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915 (7th Cir. 1984).

117. *See generally* Greendorfer, *supra* note 11; *see* Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112, 113 (2016).

118. Ark. Times LP v. Waldrip, 988 F.3d 453, 464-65 (8th Cir. 2021).

119. *See generally* Philip B. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970); *see id.* at 667 n.178 ("A keen analysis of the partisan use of the void-for-vagueness doctrine may be found in Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L REV. 67, 75-85, 98-115 (1960).").

> in a boycott of Israel." This evidence includes the company's own "statement that it is participating in boycotts of Israel." Additionally, evidence that a government contractor "has taken the boycott action" in association with others . . . can be considered to enforce the Act. At a minimum, therefore, a company's speech and association with others may be considered to determine whether the company is participating in a "boycott of Israel," and the State may refuse to enter into a contract with the company on that basis, thereby limiting what a company may say or do in support of such a boycott. In this way, the Act implicates the First Amendment rights of speech, assembly, association, and petition recognized to be constitutionally protected boycott activity.[120]

The only problem with that reading, as the dissent forcefully points out, is that this very line of reasoning was *firmly* rejected by a unanimous Supreme Court:

> The First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent.[121]
>
> . . . .
>
> Here, a company only engages in a boycott of Israel if its "other actions are *intended* to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories." The better (and constitutionally permissible) understanding of the permitted use of speech here is that it may establish the element of intent. The prohibited *conduct* is still commercial.[122]

The majority's fierce determination to find *some* reading of the statute that *could* be problematic, while ignoring clear language and precedent, is truly bizarre. The text, history, and application of the law make it clear that the legislature only ever intended to do exactly what the statute says, i.e., regulate discriminatory non-expressive commercial activity. Even in this very case, the Arkansas Times itself *actually* did publish multiple articles critical of the Act, and the State was *still* more than willing to do business with it so long as the paper would certify that its

120. *Ark. Times LP*, 988 F.3d at 465.

121. Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993).

122. *Ark. Times LP*, 988 F.3d at 468 (Kobes, J., dissenting) (quoting ARK. CODE ANN. § 25-1-502(1)(A)(I) (2017)).

non-expressive commercial activity was in fact non-discriminatory.[123] The court's refusal to acknowledge even the *possibility* that the legislature intended to legislate within constitutional bounds, hidden away in footnote 12 of the opinion, is nothing short of remarkable:

> The district court relied upon the doctrine of constitutional avoidance to conclude that "other actions" referred to purely commercial conduct. Constitutional avoidance is the "bedrock principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court] is to adopt the latter" out of respect for the legislature, assumed to legislate "in the light of constitutional limitations." But "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." When considering the whole Act, as Arkansas law requires, there is *but one permissible interpretation*—that the Act restricts speech in addition to economic refusals to deal with Israel.[124]

That line, which is at the crux of this *entire* decision, is astounding. Not only *is* there clearly, demonstrably, explicitly, another permissible interpretation—all of the evidence actually suggests that this other interpretation is the correct one! Again, as the dissent explains in no uncertain terms:

> In Arkansas, "[t]he first and most important rule of statutory interpretation is that a statute is presumed constitutional and all doubts are resolved in favor of constitutionality." To honor this principle, "[i]f it is possible to construe a statute as constitutional, we must do so." ("All statutes are presumed constitutional, and if it is possible to construe a statute so as to pass constitutional muster, this court will do so."). That is plainly possible here, and I would "construe

123. *Id.* at 460, 470.

124. *Id.* at 466 n.12 (emphasis added) (first quoting Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec., 738 F.3d 885, 892-93 (8th Cir. 2013); and then quoting Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 959 (8th Cir. 2018)).

> [the] statute with a limiting interpretation to preserve [its] constitutionality."[125]

Still not done, in yet another effort to find a problem with the statute's application, the majority continued its dubious reading of the facts by claiming that "the certification makes no effort to provide the Act's definition of 'boycott of Israel,' leaving it to the contractor to determine what activity is prohibited."[126] As an aside, it is hard to even know what to respond to that patently false statement, because the certification form itself is literally *attached to the opinion* as an appendix, and it very plainly *begins* with the words: "Pursuant to Arkansas Code Annotated § 25-1-503[.]"[127]

Regardless, having observed that a contractor could perhaps *misread* the statute as applying to protected speech, the court next considered whether the Act imposed a restriction outside of the program itself, because even if it did implicate speech, the State would be justified in regulating speech that fell within the contours of the contractual relationship.[128] Of course, looking at and reading it objectively, Act 710 is clearly designed to "define the limits of the State's spending program," by making sure that the State only does business with people making sound business decisions.[129] But having concluded that the law could be misread as applying to protected speech as well, the court circularly found that the condition therefore "seek[s] to 'leverage funding to regulate speech outside the contours of the program itself.'"[130]

In a final twist of omission, even supposing arguendo that the wording in that subsection of the Act did impose on protected First Amendment activity, the court declined to consider the traditional balancing test used in unconstitutional conditions cases. That test, first established in *Pickering v. Board of*

125. *Id.* at 469 (Kobes, J., dissenting) (first quoting Booker v. State, 335 Ark. 316, 325, 984 S.W.2d 16, 21 (1998); then quoting Reinert v. State, 348 Ark. 1, 4, 71 S.W.3d 52, 52 (2002); and then quoting Ark. Hearing Instrument Dispenser Bd. v. Vance, 359 Ark. 325, 331, 197 S.W.3d 495, 499 (2004)).

126. *Id.* at 466.

127. *Ark. Times LP*, 988 F.3d at 470.

128. *Id.* at 467.

129. *Id.* (alterations in original) (quotation omitted).

130. *Id.* (quotation omitted).

Education,[131] and later clarified in *Connick v. Myers*,[132] balances the public employee or contractor's speech rights to comment on matters of public concern against the government's interest in operational efficiency.[133] As the Supreme Court has noted:

> In striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."[134]

As applied to Arkansas Act 710, the test would clearly favor upholding an anti-discrimination bill that also has strong business efficiency considerations (because it targets a friendly trade partner and those who support it in a way that the State considers risky)[135] against the secondary and tertiary boycotting of a foreign nation, which is not even necessarily related to a "matter of public concern,"[136] and the conducting of which the Arkansas public

131. 391 U.S. 563, 568 (1968).

132. 461 U.S. 138, 154 (1983). While *Pickering* dealt with public employees, for our purposes *Board of County Commissioners v. Umbehr* and *O'Hare Truck Service, Inc.* expanded *Pickering* to the private sector. *See Pickering*, 391 U.S. at 569; Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 700 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 721 (1996).

133. *See generally* Joseph O. Oluwole, *The* Pickering *Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008).

134. *Umbehr*, 518 U.S. at 676 (quoting Waters v. Churchill, 511 U.S. 661, 673, 675 (1994)); Greendorfer, *supra* note 12, at 65–66.

135. For example, a contractor might use a less efficient or more costly means of fulfilling its contractual duties to the government because it wished to avoid using an Israeli firm or product. *Umbehr*, 518 U.S. at 674.

136. *See* D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 258-59 (1990). *See also* Greendorfer, *supra* note 12, at 66-67 ("The typical *Pickering* case involves individuals who are speaking on a matter of local (or, at least, domestic) concern, such as the functioning of school districts, public hospitals, or local law enforcement. Certainly, such speech is valuable and important to the functioning of a robust and healthy democracy. Economic attacks upon companies that do business in a foreign nation to protest that foreign nation's policies, however, have remote and nebulous connections to the interests of a state and its citizens.").

itself finds deeply offensive.[137] The Eighth Circuit, however, did not apply the test.[138]

And so, in conclusion, all that the Eighth Circuit really *did* do was two things:

First, and most importantly, the court restated the obvious; limiting discriminatory non-expressive commercial activity does not violate the First Amendment.

Second, having forced an ambiguous reading onto a subsection of the Act, such that it could potentially be *misapplied* to limit discriminatory *expressive* activity, the court remanded the decision back to the district court for further proceedings consistent with that ruling.[139] It did not strike down the law as unconstitutional. It reversed the granting of the State's motion to dismiss and asked the district court to reconsider whether the Arkansas Times's request for a preliminary injunction, *at least as applied to subsection (3)*, might in fact be appropriate.[140]

V. WHAT HAPPENS NEXT

Despite being remanded to the district court, this was an obvious win for the State of Arkansas, which never *intended* to limit anything but non-expressive commercial activity in the first place. It is important to understand that nothing about the Eighth Circuit's opinion in any way damages the core tenet of anti-BDS

137. *See* Pereira v. Comm'r of Soc. Servs., 733 N.E.2d 112, 121 (2000) (quoting *Connick*, 461 U.S. at 152) (factoring community relations into a *Pickering-Connick* analysis).

138. The test did briefly come up in the 8th Circuit's en banc rehearing of this matter after one judge asked why the government's ability to act as proprietor and choose whom to do business with was not dispositive. The ACLU's rather weak attempt to respond focused on analogizing this case to the *Pickering*, 391 U.S. 563 and *United States v. Treasury Emps.*, 513 U.S. 454 (1995) cases, arguing that when the government is imposing an ex ante restriction on expressive activity (which again it is not doing here, but for argument's sake), it should have to articulate a compelling interest and show how the proposal would help eliminate a real harm. *See generally* Oral Arguments During en banc Rehearing, Ark. Times LP v. Waldrip, No. 19-1378 (8th Cir. argued Sept. 21, 2021), [https://perma.cc/64YN-XLD4] [hereinafter Oral Arguments During en banc Rehearing]. That answer was weak, of course, because even on the ACLU's own terms and understanding, the government of Arkansas has done just that, explaining clearly its desire to eliminate this particular form of discrimination.

139. *Ark. Times LP*, 988 F.3d at 467.

140. *Id.*

legislation, or even the statute at the heart of this case. Indeed, the principle upon which Arkansas Act 710 and similar laws rest has actually been upheld and will be upheld once again: discriminatory commercial purchasing decisions are not protected under the First Amendment.[141] As it relates to this bill, under Arkansas law the provisions of a statute are severable, and so even if subsection (3) *were* to be found invalid, *the rest of the statute is still fully constitutional and fine*.[142]

* * *

After this Article was accepted for publication, Arkansas filed a petition appealing to have this case reheard by the entire Eighth Circuit sitting en banc, which was granted,[143] and the case was reheard shortly before this Article went to print.[144] At the hearing[145] the judges focused on the dueling interpretations of *Claiborne* and *FAIR*, but perhaps the most telling moment came in a short discussion related to the technicalities of the certification form itself.

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141. *See* Aaron Bandler, *Federal Appeals Court Sends Arkansas Anti-BDS Law to Lower Court*, JEWISH J. (Feb. 16, 2021), [https://perma.cc/WKW4-WQ4M] ("[S]tate anti-BDS laws have always been about refusals to deal, not pro-BDS speech, so the decision upheld much more than it rejected. Thus 8th Circuit ruling leaves intact not just the principal part of Arkansas's anti-BDS law, but also provides a strong precedent for the constitutionality of such laws across the country, which quite clearly target pure business conduct, not merely 'supporting' boycotts. Ironically, the plaintiff was not engaged in any kind of Israel boycott—neither a refusal to deal, or even verbal support for it. They just brought it as a test case, obscuring the fact that no one but the 2 8th circuit judges had read 'any actions' that way. While BDS champions will try to spin this as a win, the decision will in fact keep anti-BDS laws on the books across the country.") (quoting Eugene Kontorovich (@EVKontorovich) TWITTER (Feb. 13, 2021, 4:13 PM), [https://perma.cc/9P5W-TBFW]).

142. *See* Eugene Volokh, *The Eighth Circuit's Narrow Decision About the Arkansas BDS Statute*, REASON (Feb. 14, 2021, 1:05 PM), [https://perma.cc/5RWU-LU6] ("Except as otherwise specifically provided in this Code, in the event any title, subtitle, chapter, subchapter, section, subsection, subdivision, paragraph, subparagraph, item, sentence, clause, phrase, or word of this Code is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this Code which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this Code.") (quoting ARK. CODE ANN. § 1-2-117 (2016)).

143. *See generally* Order Granting Petition for en banc Rehearing, Ark. Times LP v. Waldrip, (8th Cir. June 10, 2021) (No. 19-1378), [https://perma.cc/2DE8-JSYN].

144. U.S. CT. APPEALS EIGHT CIR., SEPTEMBER 20-21, 2021 ORAL ARGUMENTS VIA TELECONFERENCE OR VIDEOCONFERENCE 4 (2021), [https://perma.cc/6NHS-2CP7] (case reheard on September 21, 2021).

145. *See generally* Oral Arguments During en banc Rehearing, *supra* note 138.

Judge Kelly, who had written the majority opinion in February, asked Arkansas Solicitor General Nicholas J. Bronni if perhaps by using the term "boycott" (instead of, for example, the term "refusing to purchase"), the State of Arkansas had made the whole matter more complicated, because while the certification does admittedly refer back to the statute and its clear definition, it does not specifically refer to the definition *section* of the statute, and so some lay person might not read the definition and might, therefore, misunderstand what the State actually meant to regulate.[146] Bronni answered that the statute and the form were fairly self-explanatory and conformed to the vernacular understanding of boycott.[147] More importantly, as he explained, Arkansas did not "redefine" the word boycott as Judge Kelly had suggested—*Claiborne* itself made clear that there are protected and non-protected aspects contained within the term boycott, which is why Arkansas used the correct legal term and even took the additional step of clarifying exactly what aspect it was referring to.[148]

While the en banc decision is still forthcoming, for all of the reasons listed above—including the clear rules of statutory construction; the canon of constitutional avoidance; the list of discriminatory, non-expressive "other actions" that subsection (3) does cover, and the clear intent of the legislature not to target expressive actions *as demonstrated in its interactions with this very plaintiff in this very case*—it is more than likely that a majority of judges faithfully applying the law would reverse the Eighth Circuit panel and reinstate the district court's reading and accompanying decision to dismiss.

And even if we were to ignore all of the above, i.e., even if First Amendment protections were to somehow apply to that "ambiguous" clause, or even to anti-BDS laws generally, the

146. *Id.* at 17:20.

147. *Id.* at 17:34.

148. *Id.* at 18:26. In his rebuttal, Brian Hauss, the attorney for the ACLU, picked up on this argument to try and make the claim that even if the people signing it knew what the term boycott meant, the fact that someone else reading their certification might also misunderstand and miss the definition, should be enough to turn the certification form itself, a mere statement of fact, into a compelled ideological expression. *Id.* at 38:48. That argument has no limiting principle and, thankfully, did not appear to gain any traction at all, even from the judges sympathetic to his cause.

court should still uphold the law as constitutional. Under the standard free speech balancing test appropriate in this context, a state is certainly at liberty to decide not to fund a discriminatory movement that is antithetical to American foreign policy and to the state's own interest in the efficient conduct of its business, especially if that discriminatory movement is not clearly directed at public concerns and has the potential to undermine the government's relationship with the community.

At *worst*, based on Judge Kelly's questions, the State will have to go back to the district court for further proceedings pursuant to the Eighth Circuit's original decision and may have to amend subsection (3) of its definition section to further clarify that the words "other actions," like the two subsections before it, are only dealing with non-expressive commercial activity.[149] There is no loss there, however, because that is all Arkansas ever wanted to do all along!

And that is why legislatures in all the other states that have passed anti-BDS bills do not have to be concerned that their laws will be called into question by the Eighth Circuit's ruling in this case. Because despite what they may have heard, Arkansas Act 710 was actually substantially upheld and will be once again.

149. The legislature may even decide to amend the certification form itself, if we take the hypothetical misinformed, lay person argument seriously.