No. 19-01378

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS TIMES LP,
Plaintiff-Appellant,
v.
MARK WALDRIP, *et al.*,
Defendants-Appellees.

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

BRIEF OF ELEVEN CONSTITUTIONAL AND BUSINESS LAW PROFESSORS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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STATEMENT OF IDENTIFICATION OF *AMICI CURIAE*[1]

Amici are law professors who have studied and written on the First Amendment, antidiscrimination laws, and the legal aspects of Israel-focused boycotts. They have a professional interest in the integrity of First Amendment principles and the neutral application of anti-discrimination laws. *Amici* are:[2]

David Bernstein is University Professor and Executive Director of the Liberty and Law Center, Antonin Scalia Law School, George Mason University. He has written extensively about the interaction of antidiscrimination laws and the First Amendment, including a book, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003).

Richard A. Epstein is the inaugural Laurence A. Tisch Professor of Law, New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and senior lecturer, University of Chicago. Professor Epstein has written extensively on issues of antitrust, antidiscrimination, constitutional, and criminal law.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4)(e).

[2] Affiliations are for identification purposes only.

Jesse M. Fried is the Dane Professor of Law at Harvard Law School, where he teaches courses on the federal and state regulation of businesses.

Tonja Jacobi is the Stanford Clinton Sr. and Zylpha Kilbride Clinton Research Professor of Law at Northwestern University Pritzker School of Law. Specializing in constitutional law and judicial politics, she has published over 40 articles in peer reviewed journals and law reviews.

Eugene Kontorovich is Professor of Law and Director of the Center for International Law in the Middle East, Antonin Scalia Law School, George Mason University. Previously, he was a Professor of Law at Northwestern University. He has written over 30 articles on subjects including constitutional law, international law, and legal issues arising from the Arab-Israeli conflict. He has written extensively about First Amendment issues, as well as anti-boycott laws, about which he has also testified before Congress and state legislatures.

Julian Ku is the Faculty Director of International Programs and Maurice A. Deane Distinguished Professor of Constitutional Law at the Maurice A. Deane School of Law at Hofstra University.

Jeremy A. Rabkin is a Professor of Law at the Antonin Scalia Law School, George Mason University, where he teaches a variety of public law subject. Before joining the faculty in June 2007, he was, for over two decades, a professor in the Department of Government at Cornell University.

Maimon Schwarzschild is a Professor of Law at the University of San Diego. He has written extensively on free speech issues, including the entry on "Civil Rights and Free Speech" in the *Routledge Encyclopedia of American Civil Liberties*.

Steven Davidoff Solomon is Professor of Law and Faculty Director, Berkeley Center for Law and Business, University of California, Berkeley School of Law.

Alexander Tsesis is a professor and the Raymond & Mary Simon Chair in Constitutional Law at Loyola University School of Law. He is also a series editor for the Cambridge University Press Studies on Civil Rights and Civil Liberties and a series editor for the Oxford University Press' Theoretical Perspectives in Law. He has published various books and articles about the Constitution and free speech.

Louise Weinberg is holder of the Bates Chair and Professor of Law at the University of Texas School of Law. She has written extensively about civil rights laws. Professor Weinberg is a member of the American Law Institute, and serves as an invited Adviser to the ALI Restatement (Third) of Conflict of Laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since 2015, thirty-two states have adopted measures preventing state agencies from certain kinds of commercial relationships that enagege in

discriminatory boycotts of the State of Israel.[3] In 2017, Arkansas enacted Act 710 prohibiting state entities from contracting with companies that boycott Israel. In 2019, Arkansas' Eastern District Court dismissed Arkansas Times' challenge, holding that a state can regulate discriminatory non-expressive commercial behavior. In February 2021, a divided Eighth Circuit panel reversed that decision, remanding it to the district court.

That appellate panel's decision ignored clear canons of statutory construction and the well-established presumption of constitutionality. It also referred selectively to legislative findings, aggressively interpreting them as evidence of unconstitutional intent, while ignoring the bill's text. Finally, the Court conflated the (permissible) evidentiary use of speech to prove a substantive violation with the (impermissible) regulation of that speech itself.

Amici are law professors well-versed in anti-BDS laws, including ones with identical "actions" language. None among us think that this language can be read as applying outside the commercial context, and there is no prior precedent to think otherwise. The panel majority's reading entirely contradicts statutory interpretation and canons of construction as *amici* understand them, as well as the interpretation given to these statutes by the 15 other states using identical "actions" language.

[3] Such laws typically bar either government contracting with such companies, state pension fund investment in them, or both.

En banc review is essential because the panel's reading threatens the integrity of those 15 other state anti-BDS laws, including 3 in the 8th Circuit, and also call into question federal anti-boycott laws, which use similar language. *See*, for e.g., John S. McCain National Defense Authorization Act, Pub. L. 115-232 §§ 1741-1781, 132 Stat. 1636, 2208-38 (2018) (including the Anti-Boycott Act of 2018, 50 U.S.C. § 4842). In addition, a variety of other anti-discrimination laws across the country use speech as evidence of discriminatory practices. The panel's conflation of evidentiary use of speech with impermissible regulation can be used to attack the constitutionality of bedrock civil rights laws.

We therefore ask that the panel review the appellate decision *en banc*.

ARGUMENT

I. THE APPELLATE COURT CLEARLY ERRED IN ITS READING OF THE STATUTE

Longstanding United States-policy opposes discriminatory boycotts against Israel.[4] Arkansas Act 710, consistent with this policy, requires those wishing to do business with the state to abide by its anti-discrimination rules.

[4] See for example, statement by President Carter Upon the Signing of Anti-Boycott Legislation, ISRAEL MINISTRY OF FOREIGN AFF., http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook3/Pages/5%20Statement%20by%20President%20Carter%20upon%20the%20signing%20o.aspx

"The Supreme Court has consistently found that state and federal anti-discrimination laws [relating] to race, religion, color, and national origin do not violate the highest level of First Amendment protections."[5] States have a compelling interest in preventing invidious discrimination," and may implement "that compelling interest by imposing conduct-based regulations on government contractors."[6]

"Boycott" could, in some contexts, refer to kinds of activities protected by the First Amendment. As confirmed in *NAACP v. Claiborne Hardware Co.*,[7] "[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."[8] All parties here agree with that principle.

The boycott in *Claiborne* involved various First Amendment protected activities: speeches, picketing, sending telegrams and publishing

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[5] Marc A. Greendorfer, Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine, 40 Campbell L. Rev. 29, 69 (2018) *citing to e.g.*, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2015); and *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697-98 (2010) among others.

[6] Brief for *Arkansas Times LP v. Waldrip* as Amici Curiae Supporting Petitioner, 988 F.3d 453 (8th Cir. 2021) (No. 19-1378), 2019 WL 2526871.

[7] 458 U.S. 886 (1982).

[8] *Id.* at 914.

lists. *Claiborne* did not "address purchasing decisions or other non-expressive conduct."[9] Not did it address whether the First Amendment protects a refusal to deal with someone who violates state anti-discrimination laws, because, when *Claiborne* was delivered, no laws in Mississippi prohibited racial discrimination. That question, unaddressed by *Claiborne,* was answered in *Rumsfeld v. FAIR.*[10] Non-expressive boycott activities are *not* protected.[11]

That is why Act 710 clearly defines 'boycott' to *only* refer to a company's non-expressive commercial choices. Specifically, the Act defines, "'Boycott Israel' and 'boycott of Israel' means engaging 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."[12]

The district court correctly concluded that a boycott of Israel, *as defined by the Act*, i.e. discriminatory commercial *actions*, are "neither speech nor inherently

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[9] *Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d 617, 625 (E.D. Ark. 2019), *rev'd & remanded*, 988 F.3d 453 (8th Cir. 2021).

[10] 547 U.S. 47 (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.

[11] See Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, & Will Be Again*, Arkansas Law Review Vol. 74 (forthcoming). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817895

[12] Ark. Code Ann. § 25-1-502.

expressive conduct" warranting First Amendment protection.[13] Such actions are only expressive when the conduct is accompanied by explanatory speech.[14] The appellate panel, however, focused on subsection 3, reading it in a way that no other state or court ever has.

A. The Panel Majority Ignored A Basic Principle of Statutory Construction Requiring Adoption of a Plausible and Constitutional Reading of a Challenged Provision

Like the activities described in subsections (1) and (2), the phrase "other actions" in subsection (3) is clearly limited to non-expressive commercial conduct. The Court, however, felt that because that phrase could entail "more than one plausible construction," it was too ambiguous, and could theoretically apply to protected expressive activity.[15]

But the well-established rule, based on the presumption of constitutionality, is that constitutional questions should be avoided whenever possible. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827). *See also Fletcher v. Peck*, 10 U.S. (6 Cr.) 87, 128 (1810); Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 531 (1871). Having found Section 710 capable of multiple meanings, the appellate panel ignored the district court's correct interpretation, refusing to acknowledge

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[13] *Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d 617, 623 (E.D. Ark. 2019), *rev'd and remanded*, 988 F.3d 453 (8th Cir. 2021)).
[14] *See FAIR*, 547 U.S. at 66, 126 S.Ct. 1297.
[15] *Arkansas Times LP v. Waldrip*, 988 F.3d 453, 464 (8th Cir. 2021).

even the *possibility* that the legislature intended a constitutional meaning. Thus, the Court ignored its own determination that "there is more than one plausible construction," and announced that "there is *but one permissible interpretation*—that the Act restricts speech in addition to economic refusals to deal with Israel."[16]

This ruling embodies *clear error*, since another permissible interpretation exists, (as the court admitted,) and because the available evidence suggests that this other interpretation is correct![17] As the dissent explains:

> 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." *Booker v. State*. To honor this principle, "[i]f it is possible to construe a statute as constitutional, we must do so." *Reinert v. State*,; *see also McLane S., Inc. v. Davis*... That is plainly possible here, and I would "construe [the] statute with a limiting interpretation to preserve [its] constitutionality." *Arkansas Hearing Instrument Dispenser Bd. v. Vance*.[18]

B. The Panel Majority Ignored The Principle of *Ejusdem Generis*.

The majority also disregarded the appropriate canon of statutory construction, *ejusdem generis*, which notes, "when general words follow specific words in a statutory enumeration the general words are construed to embrace only

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[16] *Id.* at 467.

[17] *See* Goldfeder, *supra* n. 11.

[18] *Id.* at 469.

objects similar in nature to those objects enumerated by the preceding words."[19] "Other actions" should thus include only conduct similar in kind to its preceding terms: "refusals to deal" and "terminating business activities," i.e. non-expressive commercial activity. The "possibility" of this other interpretation is fortified by the fact that *fifteen* other states share exact or similar language in their anti-BDS bills, and all of them read it *precisely* the way that the State of Arkansas, the district court, and the panel's dissent do—as applying *only* to other, similarly non-expressive, commercial activity. See: Ariz. Rev. Stat. Ann. § 35-393(1); Fla. Stat. Ann. § 215.4725(1)(a); Ga. Code Ann. § 50-5-85(a)(1); Kan. Stat. Ann. § 75-3740e(a); La. Stat. Ann. § 39:1602.1(c)(1) Md. Order No. 2017-25 (Oct. 23, 2017); Minn. Stat. Ann. § 16C.053(1)(b); Miss. Code. Ann. § 27-117-3(a); Mo. Ann. Stat. § 34.600(3)(1); Nev. Rev. Stat. Ann. § 333.338(3)(a)(1); Ohio Rev. Code Ann. § 9.76(a)(1); Okla. Stat. Ann. tit. 74, § 582(e)(1); S.B. 143, 1st Reg. Sess. (Ky. 2019); S.D. Order No. 2020-01 (Jan. 14, 2020); Tex. Gov't Code Ann. § 808.001(1).

C. The Panel Ignored the Supreme Court's Clear Holding Permitting The Evidentiary Use of Speech To Prove Motive Or Intent.

In championing its decision to interpret the language idiosyncratically, the majority noted that the statute:

[19] *Hanley v. Ark. State Claims Comm'n*, 333 Ark. 159, 970 S.W.2d 198, 201 (1998).

> permits the State to consider specified "type[s] of evidence" to determine whether "a company is participating in a boycott of Israel." ... In this way, the Act implicates the First Amendment rights of speech, assembly, association, and petition recognized to be constitutionally protected boycott activity.[20]

But as the dissent highlights, this reasoning was *firmly* rejected by a unanimous Supreme Court: "[T]he First Amendment ... does not prohibit the evidentiary use of speech ... to prove motive or intent." *Wisconsin v. Mitchell,* 508 U.S. 476, 489 (1993). 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" (emphasis added). 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.[21]

D. The Panel Majority's Selective Reading of the Act's Legislative History Reveals the Majority's Eagerness to Strike Down the Law.

The majority also cited a cherry-picked version of the legislative findings before conflating the evidentiary use of speech with something impermissible. In fact, the findings clarify that Arkansas only ever intended to regulate non-expressive commercial activity.[22] They explicitly refer to

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[20] *Arkansas Times LP v. Waldrip*, 988 F.3d 453, 465 (8th Cir. 2021).
[21] *Arkansas Times*, 988 F.3d 453 at 468.
[22] See Goldfeder, *supra* n. 11

discriminatory decision making that impairs a company's commercial soundness, and cite United-States policy as enshrined in federal acts to oppose boycotts against Israel. Those federal acts obviously regulate only non-protected commercial activity.

The Court's conclusion that there is "but one permissible" reading of the statute is wrong. Therefore, to reinforce the constitutionality of the laws in fifteen other states, alongside long-standing federal law, this panel should reverse the appellate panel's decision in an *en banc* review.

II. A FIRST AMENDMENT RIGHT TO DO BUSINESS OR TO REFUSE TO DO BUSINESS WITH PARTICULAR PERSONS WOULD INVALIDATE NUMEROUS FEDERAL AND STATE ANTI-DISCRIMINATION LAWS

The Supreme Court has never held that a state must contract with businesses who refuse to do business with—*i.e.,* discriminate against—particular categories of persons or entities. That is the only effect of Act 710—allowing Arkansas to refuse to do business with parties that improperly discriminate.

Such restrictions are commonplace—federal and state laws bar private businesses from discriminating against other persons and businesses on the basis of race, gender, national origin, sexual identity, sexual preference, and familial status. Perhaps the most similar example to Act 710 is federal legislation dating back to 1979 criminalizing compliance with foreign boycotts of Israel.) John S. McCain

National Defense Authorization Act, Pub. L. 115-232 §§ 1741-1781, 132 Stat. 1636, 2208-38 (2018) (including the Anti-Boycott Act of 2018, 50 U.S.C. § 4842).

Despite vigorous federal enforcement against boycotting companies over the past four decades, no defendants have dared claim what the appellate court claims here, i.e. that the "actions" being regulated should be construed to include expressive activity that cannot be regulated. For example, 19 U.S.C. 4452(b)(4) states that Congress "opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel, such as boycotts of, divestment from, or sanctions against Israel." If the appellate panel's opinion were accurate, federal anti-boycott laws, such as this, would likewise be invalid because the statute does not explicate the term "economic action," despite the clear contextual evidence that this is what the term "actions" refers to.

Many state and local laws prohibit the government from funding or doing business with persons and businesses that discriminate against LGBTQ Americans, regardless of the boycotter's opposition to gay marriage or other actions of LGBTQ Americans.[23] Hence, California refuses state funding or sponsorship of

[23] Laws dealing with sexual orientation and gender identity are particularly relevant because, unlike race or sex discrimination, most states and the federal government do not forbid such discrimination outright—that is, they do not ban it by private parties. However, many states and the federal government nonetheless prohibit government contracting with businesses that engage in refusals to deal on the basis of such factors. The anti-BDS laws follow the same model: not banning the

travel for state employees and contractors to states whose laws on "sexual orientation, gender identity, or gender expression" do not meet California's approval. Cal. Gov't Code § 11139.8(b)(2). Many other states and cities have similar laws.[24]

Moreover, several states and cities have adopted prohibitions in the LGBTQ context directly analogous to Arkansas' law challenged here.[25]

Ironically, the American Civil Liberties Union has vigorously defended these laws. The ACLU acknowledges that in many states it is "legal to fire or refuse to hire someone based on their sexual orientation," but argues that

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refusals to deal outright, but still refusing to indirectly support them with public funds.

[24] *See* Christy Mallory & Brad Sears, Discrimination, Diversity and Development: The Legal and Economic Implications of North Carolina's HB2 at 26-27 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Discrimination-Diversity-and-Development_The-Legal-and-Economic-Implications-of-North-Carolinas-HB2.pdf.

[25] See, for example: *Governor Cuomo Signs Executive Order Banning All State Agencies and Authorities from Doing Business with Companies that Promote or Tolerate Discrimination*, N.Y. STATE, (Feb. 4, 2018), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-banning-all-state-agencies-and-authorities-doing-business.; *San Francisco Is First To Ban City Contracts With Businesses In States With Anti-LGBT Laws*, KPIX5 NEWS (Sept. 27, 2016), https://sanfrancisco.cbslocal.com/2016/09/27/san-francisco-is-first-city-to-ban-city-contracts-with-businesses-in-states-with-anti-lgbt-laws/ (last visited Sept. 5, 2019).

companies that do so "must not be allowed to do so with taxpayer dollars."[26] Only here does the ACLU inexplicably ignore the obvious: if the First Amendment requires states to do business with those who discriminate against people and entities who do business in Israel, it also requires states to do business with those who discriminate against other groups the state wishes to protect.

If the panel majority opinion prevails, all laws limiting state contracting on antidiscrimination or anti-boycott grounds would violate the First Amendment. Like Arkansas' statute, each of these governmental prohibitions targets economic activity; and in all cases, a violator's speech may be used as evidence of a substantive violation.

Respectfully submitted,

/s/ Jerome M. Marcus
JEROME M. MARCUS
MARCUS & MARCUS LLC
P.O. Box 212
Merion Station, PA 19066
Telephone: (610) 664-1184
jmarcus@marcuslaw.us

[26] *See* Eugene Kontorovich, *For the ACLU, Antipathy to Israel Trumps Antidiscrimination,* WALL ST. J. at A17 (Feb. 12, 2019).