No. 19-1378

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS TIMES, L.P.,
Plaintiff-Appellant,

v.

MARK WALDRIP, *et al.*,
Defendants-Appellees.

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

Defendants-Appellees' Brief

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Arkansas Times, LP, has never boycotted Israel, does not intend to boycott Israel, and has never even advocated boycotting Israel. Yet it brought this lawsuit arguing that an Arkansas law requiring government contractors to certify that they are not boycotting Israel violates the First Amendment. It did so only after spending more than a year unsuccessfully trolling for a plaintiff to bring that lawsuit.

Like similar provisions in 26 other States, Arkansas's law simply prohibits agencies and political subdivisions from contracting with entities that—in their commercial relationships—discriminate against entities that do business in Israel. It does not regulate anyone's speech or expressive conduct. Contractors remain free to criticize Israel, denounce Arkansas's law, and even advocate boycotting. Instead, the challenged provision only affects a contractor's decision not to purchase goods from certain entities. Those facts—as the district court correctly recognized—made this case materially identical to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), and required dismissal. That decision should be affirmed.

Because clear Supreme Court precedent mandates affirmance, Defendants-Appellees Mark Waldrip et al. believe that no more than fifteen minutes of oral argument per side is warranted.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Executive Orders

Other Authorities

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331. On January 23, 2019, the district court denied Arkansas Times's motion for a preliminary injunction and dismissed its complaint for failure to state a claim upon which relief may be granted.

On February 21, 2019, Arkansas Times timely filed an appeal of that order. JA109. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 1292(a).

STATEMENT OF THE ISSUE PRESENTED

Did the district court correctly conclude that Arkansas Times's complaint that requiring it to truthfully certify that it is not currently boycotting Israel—and does not intend to boycott Israel for the duration of a state contract—failed to state a claim upon which relief may be granted?

Apposite Authority: *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

STATEMENT OF THE CASE

A. Statutory Framework

Like over half the States in the Nation, Arkansas has taken aim at the problem of discrimination against Israel. An Arkansas law enacted in 2017 (referred to in this litigation as "Act 710") bars the State and its political subdivisions from contracting on ordinary terms with companies that discriminate by boycotting Israel. Act 710 also bars them, through their asset managers, from investing in any direct holdings of such companies. *See* Act 710, 91st General Assembly, 2017 Reg. Sess., Ark. Acts vol. 1, at 3627 (enacting Ark. Code Ann. 25-1-501 to -504). Describing the details of Act 710, the district court noted, "Dozens of states have passed similar statutes." ADD2. More precisely, 27 States including Arkansas have provisions like Act 710.[1]

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[1] *See* Ala. Code 41-16-5 (prohibiting public contracting at regular prices with companies that boycott any nation, including Israel, that is a member of the World Trade Organization or with which the United States has free-trade agreements); Ariz. Rev. Stat. 35-393.01 (prohibiting public contracting with companies that boycott Israel); Cal. Pub. Cont. Code sec. 2010 (prohibiting public contracting with companies that fail to certify that "any policy that they have against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, is not used to discriminate in violation of [state civil rights laws]"); Colo. Rev. Stat. 24-54.8-202 (prohibiting state employee retirement fund investment in companies that have "economic prohibitions against Israel"); Fla. Stat. 215.4725 (prohibiting state investment in companies that boycott Israel); Fla. Stat. 287.135(2)(a) (prohibiting public contracting with companies that boycott Israel); Ga. Code Ann. 50-5-85 (same); 40 Ill. Comp. Stat. Ann. 5/1-110.16 (prohibiting state employee retirement fund investment in companies that boycott Israel); Ind. Code 5-10.2-11-16 (same); Iowa Code 12J.2,

Act 710's text makes clear the Arkansas General Assembly's antidiscrimination goals. As Act 710 found, boycotts of Israel, which are "discriminatory decisions," are rooted in animus towards "the Jewish people." Ark. Code Ann. 25-1-501(2)-(3) (noting that discriminatory boycotts of Israel predated even its official declaration of independence). Such discrimination against Israel, which is a "key all[y] and trade partner[] of the United States," "threaten[s] [Israel's] sovereignty and security." *Id.* 25-1-501(1). By fighting boycott-related discrimination against

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12J.4 (same); Iowa Code 12J.2, 12J.6 (prohibiting public contracting with companies that boycott Israel); Kan. Stat. Ann. 75-3740f (same); Exec. Order No. 2018-905 (Ky. Nov. 15, 2018) (same); Exec. Order No. JBE 2018 – 15 (La. May 22, 2018) (same); Exec. Order No. 01.01.2017.25 (Md. Oct. 23, 2017) (same); Mich. Comp. Laws Ann. 18.1261(12) (same); Minn. Stat. Ann. 3.226, 16C.053 (same); 2019 Miss. Laws H.B. 761 (same); Nev. Rev. Stat. Ann. 333.338 (same); Nev. Rev. Stat. Ann. 355.345 (prohibiting state investment in companies that boycott Israel); N.J. Stat. Ann. 52:18A-89.14 (same); Exec. Order No. 157 (N.Y. June 5, 2016) (same); N.C. Gen. Stat. Ann. 147-86.81 (same); N.C. Gen. Stat. Ann. 147-86.82 (prohibiting public contracting with companies that boycott Israel); Ohio Rev. Code Ann. 9.76 (prohibiting public contracting with companies that boycott any nation, including Israel, that is a member of the World Trade Organization or with which the United States has free trade agreements); 62 Pa. Cons. Stat. Ann. 3602, 3604 (prohibiting public contracting with companies that boycott nations with which Pennsylvania is not prohibited by federal law from trading with, and declaring that the purpose of this enactment is "stand[ing] with Israel"); R.I. Gen. Laws 37-2.6-3 (prohibiting public contracting on ordinary terms with companies that boycott nations with which the state can enjoy open trade); S.C. Code Ann. 11-35-5300 (same); Tex. Gov't Code Ann. 808.051-.057 (prohibiting state investment in companies that boycott Israel); Tex. Gov't Code Ann. 2270.002 (prohibiting public contracting with companies that boycott Israel); Exec. Order No. 261 (Wis. Oct. 27, 2017) (same).

Israel, Act 710 furthers "the public policy of the United States . . . to oppose boycotts against" and to promote "cooperation with Israel." *Id.* 25-1-501(4); *see id.* 25-1-501(6) ("seek[ing] to act to implement the United States Congress's announced policy").

Indeed, Congress has long emphasized the importance of preventing discrimination against Israel. *See* 50 U.S.C. 4607 (1979), *reenacted*, 50 U.S.C. 4841 (2018); *see also Briggs & Statton Corp. v. Baldridge*, 728 F.2d 915 (7th Cir. 1984). For instance, the Senate recently passed a bill that would give States more latitude to fight such discrimination. *See* Combating BDS Act of 2019, S. 1, 101st Cong. sec. 402 (2019) (providing that federal law does not preempt state and local laws that prohibit public contracts with entities that knowingly boycott Israel). And other countries have similarly followed suit, with the German parliament recently condemning Israel boycotts and declaring that the "movement's 'Don't Buy!' stickers on Israeli products inevitably awake associations with the Nazi slogan 'Don't Buy from Jews!'" The Associated Press, *German parliament denounces Israel boycott movement*, May 17, 2019, https://www.apnews.com/570dd84c53cf472aaf2661517acd77f2; *see* Der BDS-Bewegung entschlossen entgegentreten – Antisemitismus bekämpfen, Deutscher Bundestag [BT] 19/10191 (2019), https://dipbt.bundestag.de/doc/btd/19/101/1910191.pdf (German-language version of Bundestag resolution).

To ensure Arkansas taxpayers do not fund such discriminatory movements, Act 710 imposes restrictions that generally prevents State "public entit[ies]" or any "political subdivision of the state" from doing business with entities that "boycott Israel." Ark. Code Ann. 25-1-502(1), (5); see *id.* 25-1-503 – 504. Act 710 defines a "boycott of Israel" as "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*." Ark. Code Ann. 25-1-502(1)(A)(i) (emphasis added). And consistent with its limited goal of ensuring that Arkansas taxpayers do not fund discriminatory conduct, that Act does not prohibit anyone from criticizing Israel, condemning Act 710, or even advocating boycotting. Ark. Code Ann. 25-1-503-504.

Rather, Act 710 merely imposes two commercial contracting restrictions. *First*, Act 710 prohibits public entities from directly investing in a company that boycotts Israel. Ark Code Ann. 25-1-504. The investment prohibition is not at issue in this lawsuit.

Second, Act 710 prohibits a public entity from "contracting with entities that boycott Israel" except in narrow circumstances. Ark. Code Ann. 25-1-503. To make that prohibition effective, Act 710 requires contracts with the State to include "a written certification that the [contracting] person or company is not currently

engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." Ark. Code Ann. 25-1-503(a)(1). That provision, however, does not apply to "[c]ontracts with a total potential value of less than one thousand dollars" or where a contractor agrees "to provide the goods or services for at least twenty percent (20%) less than the lowest certifying business." Ark. Code Ann. 25-1-503(b).

Act 710 took effect on August 1, 2017. *See* Ark. Op. Att'y Gen. 2017-052, 2017 WL 2324208, at *1 (May 22, 2017). Between that date and the filing of this lawsuit sixteen months later, no contractor challenged Act 710's prohibition on public entities' contracting with companies engaged in discriminatory boycotts of Israel.

B. Factual Background

Arkansas Times LP is an alternative media company that publishes a weekly alternative newspaper, the *Arkansas Times*, JA9 ¶ 3, and runs an affiliated website, that hosts, among other entities, a blog entitled "Arkansas Blog." Arkansas Times (accessed May 29, 2019), https://arktimes.com/history-of-arkansas-times. That blog describes itself as "Arkansas's first online political blog" and "the scourge of reactionary right-wingers." *History*, Arkansas Times (accessed May 29, 2019), https://arktimes.com/history-of-arkansas-times. Arkansas Times has also never boycotted Israel, does not allege that it intends to boycott Israel, and has never advocated for boycotting Israel. *E.g.*, JA13 ¶ 22. Yet it now challenges Act 710.

Sixteen months after Act 710 took effect, Arkansas Times suddenly decided to seek an order preliminarily enjoining it. In October 2018, Arkansas Times was negotiating advertising contracts with the University of Arkansas – Pulaski Technical College (known as "Pulaski Tech"). JA12 ¶ 21. Consistent with Act 710's provisions, Pulaski Tech requested that Arkansas Times make the following certification:

> [T]he Contractor agrees and certifies that they do not currently boycott Israel, and will not boycott Israel during any time in which they are entering into, or while in contract, with the University of Arkansas - Pulaski Technical College. If at any time after signing this certification the contractor decides to engage in a boycott of Israel, they must notify the University of Arkansas – Pulaski Technical College in writing.

JA79; *see* JA18-19 ¶ 4 (declaration of Alan Leveritt) (explaining Pulaski Tech's request for certification of compliance with Act 710). Alan Leveritt, Arkansas Times's CEO, refused to make the necessary certification. JA19 ¶ 5.

By the time of Leveritt's refusal on behalf of Arkansas Times, it and Pulaski Tech had already executed twenty-five contracts in 2018 alone, following the thirty-six they had executed in 2017. JA12 ¶ 20. Arkansas Times incorrectly suggests that it and Pulaski Tech executed each of these sixty-one contracts before Act 710's effective date. *See id.* (alleging that these contracts were "executed . . . prior to the requirement of the boycott pledge"). But as Arkansas Times correctly notes elsewhere, Act 710 took effect in August 2017. JA10 ¶ 15. Notwithstanding that

Act 710 governed *dozens* of Arkansas Times's prior contracts with Pulaski Tech, in October 2018 Arkansas Times balked at certifying that it would not boycott Israel for the duration of the short-term advertising contracts it was then negotiating. JA13 ¶ 23.

Leading up to Arkansas Times's refusal to comply with Act 710, it ran a series of "articles that [we]re critical of the Act" and its certification requirement. JA13 ¶ 22. These articles demonstrate that Arkansas Times knew of the certification requirement even before deciding not to comply with it. Indeed, they suggest that Arkansas Times refused to comply for the very purpose of ginning up this lawsuit. These articles, which Arkansas Times published on its Arkansas Blog, urged a "willing plaintiff" to challenge Act 710 and retain Arkansas Times's current counsel for the lawsuit. JA86; *see id.* ("Care to join a push for free speech? The ACLU of Arkansas can help."); *see also* JA84 ("A lawsuit similar to the one filed in Kansas should be possible in Arkansas. . . . All that's needed is a plaintiff being forced to sign such a contract who'd like to object."); JA85 (sharing "PSA" from ACLU of Arkansas that the ACLU of Arkansas "welcome[d] anyone contracting with the state or local government . . . to get in touch with us"). After failing to rustle up some other plaintiff—perhaps a plaintiff actually intending to boycott Israel—Arkansas Times decided to challenge Act 710 itself.

By Arkansas Times's own allegations and statements, it would be a true statement to certify that it does not boycott Israel. It alleged below that it "does not currently engage in a boycott of Israel or Israel-occupied territories." JA13 ¶ 22. And it continues to concede as much here. *See* Appellant's Br. at 39 ("Even contractors who do not participate in boycotts of Israel, such as the Arkansas Times, stand to lose their government contracts if they [accurately certify that they do not boycott Israel]."). In fact, Arkansas Times posted on its website—the day it filed this lawsuit—that it has "*never* participated in a boycott of Israel or editorialized in support of one." A3 (quoting Lindsey Millar, *Arkansas Times challenges law that requires state contractors to pledge not to boycott Israel in federal court*, Arkansas Times: Arkansas Blog (Dec. 11, 2018), https://www.arktimes.com (emphasis added)). Around that same time, Leveritt authored a post on the ACLU's website, in which he admitted that "[i]t had never occurred to us [*i.e.*, anyone at Arkansas Times] to boycott anyone." JA88; *see* JA89 ("We're focused on Arkansas at the Arkansas Times and have never editorially advocated for a boycott of Israel."). The only Israel-boycott-related activity Arkansas Times alleges it has ever engaged in is criticizing *Act 710 itself* in the blog posts cited above—an activity which it does not even attempt to suggest falls within Act 710's definition of boycotting Israel. *See* JA13 ¶ 22.

Nevertheless, in an October 2018 contract with Pulaski Tech, Arkansas Times refused to certify that it was not currently boycotting Israel and would not boycott Israel for the duration of the short-term contract. Although such a certification would, by its own admission, have been accurate, Leveritt took the litigation "position" that boycotting Israel is protected speech and that "it is unacceptable for [Arkansas Times] to enter into an advertising contract . . . that is conditioned on the unconstitutional suppression of protected speech." JA13 ¶ 23. Arkansas Times also refused to avoid the certification requirement by selling its advertising to Pulaski Tech at a twenty percent discount. JA14 ¶ 28.

C. Procedural Background

Having manufactured standing to challenge Act 710 by refusing to certify the truth, Arkansas Times sued the Trustees of the University of Arkansas System, which includes Pulaski Tech. Arkansas Times sought a declaratory judgment that Act 710's contracting provisions violate the First Amendment and an injunction barring the Trustees from contractors to certify that they will not boycott Israel for the duration of their contracts. JA16. Arkansas Times moved for a preliminary injunction, and the Trustees moved to dismiss. *See* ADD1.

After ruling that Arkansas Times's lost contracts with Pulaski Tech gave it standing to bring its claims, *see* ADD7, the district court denied Arkansas Times's motion for a preliminary injunction and dismissed the lawsuit. ADD17. It did so

because, as the district court explained, Arkansas Times has "not demonstrated that a boycott of Israel, as defined by Act 710, is protected by the First Amendment." ADD7-8.

To start, as the district court noted, Act 710 does not restrain "speech" in the sense relevant to the First Amendment. ADD10. Rather, it only concerns "a contractor's purchasing activities with respect to Israel," and those activities are not "purely speech." ADD9-10. Indeed, "a refusal to deal, or particular commercial purchasing decisions, do not communicate ideas through words or other expressive media." ADD10. Moreover, employing "[f]amiliar canons of statutory interpretation," the district court explained that while Act 710's definition of boycotts included the phrase "other actions," that language plainly does not bar contractors from criticizing "Act 710 or Israel, calls to boycott Israel, or other types of speech." ADD9 (discussing Ark. Code Ann. 25-1-502(1)(A)(i)).

With that backdrop in mind, the district court then explained that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), required it to dismiss Arkansas Times's complaint. *See* ADD9-12. *FAIR* involved an association of law schools that chose to boycott military recruiters. In response, Congress passed a law denying certain federal funds to law schools participating in the boycott. ADD10. As the district court noted, a unanimous Supreme Court made short work of the law schools' arguments, explaining that boycotts are not

"inherently expressive" conduct subject to First Amendment protection. ADD10. To the contrary, such "actions 'were expressive *only* because the law schools accompanied their conduct with speech explaining it.'" ADD10 (quoting *FAIR*, 547 U.S. at 66).

The same is true here. Indeed, as the district court explained, whether boycotting military recruiters or Israel, "the decision to engage in a primary or secondary boycott of [either] is 'expressive only if it is accompanied by explanatory speech.'" ADD11 (quoting *Jordahl v. Brnovich*, Case No. 18-16896, Doc. 26 at 5 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting from denial of stay pending appeal)). Without speech explaining a boycott of Israel, "the motivations behind a contractor's private purchasing decisions are entirely unknown to the public." ADD11. Few "external observer[s] would ever notice that a contractor is engaging in a primary or secondary boycott of Israel." ADD11. "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." ADD11.

Moreover, as with the absence of on-campus military recruiters in *FAIR*, the district court explained that a boycott of Israeli goods will only manifest itself in "the *absence* of certain goods from a contractor's office." ADD11. Yet as the district court noted, few people—perhaps no one at all—would both notice *the ab-*

sence of Israeli goods *and* take that absence to "mean that the contractor is engaged in a boycott of Israel." ADD11. Rather, if at some hypothetical point in the future Arkansas Times chose to begin boycotting Israel, it "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." ADD11. Otherwise, much like the unexplained absence of on-campus recruiters in *FAIR* whom an observer might think were interviewing off campus due to space constraints, an observer would simply chalk Arkansas Times's purchasing decisions up to "its commercial, as opposed to its political, preferences." ADD11.

Consequently, under *FAIR*, a boycott of Israel is not inherently expressive and not protected by the First Amendment, and the district court correctly held that Arkansas Times's claim failed as a matter of law. *See* ADD11-12. The district court then properly denied Arkansas Times's motion for a preliminary injunction and dismissed the case. *See* ADD16-17.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss for failure to state a claim de novo. *See Kelly v. City of Omaha*, 813 F.3d 1070, 1075 (8th Cir. 2016).

It reviews the denial of a motion for a preliminary injunction for abuse of discretion. *See Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013). If a district court's denial of a preliminary injunction rests solely on a mistaken legal premise regarding likelihood of success, this Court will remand to the district court for it to weigh the remaining preliminary-injunctive-relief factors in the first instance. *See Home Instead, Inc. v. Florance*, 721 F.3d 494, 500 (8th Cir. 2013).

SUMMARY OF THE ARGUMENT

The First Amendment does not guarantee Arkansas Times the right to boycott Israel. The U.S. Supreme Court's decision in *FAIR* requires that conclusion. There the Court expounded its rule that the First Amendment protects only speech or inherently expressive conduct. Arkansas Times makes no attempt to portray boycotts of Israel as speech. So unless such boycotts are inherently expressive, the First Amendment does not protect them.

FAIR makes clear that boycotts of Israel are not inherently expressive conduct. There, after a group of law schools boycotted the U.S. military by banning its recruiters from their campuses, Congress denied federal funding to those schools. Rejecting the schools' First Amendment challenge to that denial of funding, the Court held that the military boycott was not inherently expressive. Unless a law school explained that it was boycotting the U.S. military, someone observing the absence of military recruiters on campus would be unable to ascertain the reason for that absence. The same reasoning applies to Israel boycotts. Unless a government contractor explained that it was boycotting Israel, someone observing the absence of Israeli goods among the contractor's property would be unaware of the boycott. Indeed, *FAIR*'s reasoning applies even more clearly here. Unlike there, where military recruiters would be conspicuously absent on campus, with a boycott

of Israel, an observer is unlikely to even notice the absence of Israeli goods unless a contractor announces its boycott.

Because the expressiveness of a decision not to purchase Israeli goods depends upon accompanying explanatory speech, boycotting Israel is not inherently expressive conduct. As a result, boycotts of Israel are not protected by the First Amendment and Act 710's requirements do not violate the First Amendment. Therefore, as the district court correctly concluded, dismissal was required.

ARGUMENT

I. Boycotting Israel is not protected by the First Amendment.

There is no First Amendment right to boycott Israel. Consequently, as the district court correctly concluded, Arkansas Times's complaint failed to state a claim upon which relief may be granted.

Dismissal is warranted where even "accepting all [the complaint's] allegations as true, it appears that the plaintiff can prove no set of facts that would entitle him to relief." *Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003); *accord Botten v. Shorma*, 440 F.3d 979, 980 (8th Cir. 2006). Applying that standard, the district court correctly dismissed the complaint because Arkansas Times's claim that Act 710 violates the First Amendment by conditioning contracting on refraining from boycotting Israel and a truthful certification that an entity is not boycotting Israel are not cognizable. To the contrary, such boycotts are neither

speech nor expression. Thus, Act 710 does not prohibit *speech*, conditionally or otherwise, and what it "compels" is merely a truthful certification of compliance with a benign state contracting requirement.

A. *FAIR* compels the conclusion that boycotts of Israel are not protected by the First Amendment.

As the district court correctly held, the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), compels the conclusion that boycotting Israel is not protected by the First Amendment. *See* ADD11 ("*FAIR* is controlling.") (citing *Jordahl v. Brnovich*, Case No. 18-16896, Doc. 26 at 5 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting from denial of stay pending appeal) ("*FAIR* controls this case."")). *FAIR* held that conduct that only becomes expressive once its significance is explained by speech—such as the ordinarily unnoticed and unexpressive act of *not* buying goods from certain vendors—is not itself protected speech or expression. Arkansas Times's various attempts to distinguish *FAIR* either suppose an illogical consumer-boycotting carve-out from its general rule or otherwise run afoul of the Supreme Court's "rule of thumb for reading our decisions . . . that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016).

The First Amendment only protects speech or "conduct that is inherently expressive." *FAIR*, 547 U.S. at 66. Arkansas Times does not suggest, nor could it,

that boycotting Israel itself—apart from whatever speech boycotters may use to describe, explain, or justify their boycotting—is speech.[2] It only claims that "such boycotts are inherently expressive" conduct. Appellant's Br. at 26; *see also id.* at 15 ("[P]olitical boycotts are a form of expression . . . ."). Yet it is far from apparent that *not* purchasing a country's goods is even conduct. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (Roberts, C.J.) (the choice *not* to purchase a product is not "activity," but "inactivity," or "doing nothing"). But whether or not declining to purchase is conduct, *FAIR* unambiguously holds that boycotts are not inherently expressive.

In *FAIR*, a coalition of "law schools 'expressed' their disagreement" with the military's "Don't Ask, Don't Tell" policy by denying military recruiters access to their campuses, forcing them to conduct interviews elsewhere. *FAIR*, 547 U.S. at 66. In its Supreme Court brief, that coalition aptly described their refusal to deal with the military on terms accorded to other recruiters as a "sort of boycott," and they argued for First Amendment protection in those terms. Brief for the Respondents, *FAIR*, 2005 WL 2347175, at *29 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). Congress responded to this "sort of boycott" by enacting the Solomon Amendment, which denied federal funding to institutions

[2] Arkansas Times also does not claim that its status as an alternative weekly newspaper publisher and blog host is relevant to this case.

that discriminated against military recruiters. *See FAIR*, 547 U.S. at 51. The coalition of law schools challenged that law on the grounds that it violated the First Amendment by indirectly regulating their supposedly expressive conduct of boycotting military recruiters. *See id.* at 65-66.

Reviewing the Solomon Amendment, the Court unanimously held it need not address the unconstitutional-conditions doctrine because the First Amendment would not prohibit a direct ban of anti-military-recruiter discrimination. *See id.* at 59-60. After rejecting the law schools' argument that the Solomon Amendment compelled them to speak on military recruiters' behalf or accommodate those recruiters' speech, the Court held that the Solomon Amendment also did not restrict law schools' speech because their boycott was "not inherently expressive." *Id.* at 61-66. The Court explained that excluding military recruiters from law school campuses and requiring them to conduct interviews at off-campus locations was "expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 66. "An observer who s[aw] military recruiters interviewing away from the law school" would have "no way of knowing" why absent the law school's explanation. *Id.* And "explanatory speech," the Court held, did not transform the law schools' inexpressive conduct into protected expression. *Id.* Indeed, "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking

about it." *Id*. "For instance," the Court observed, if that were true—so long as it was accompanied by speech—even the act of "refusing to pay [one's] income taxes" would be transformed into a protected expressive act of protest. *Id.*

That same reasoning applies with even greater force here. As the district court explained, "[l]ike the law schools' decision to prevent military recruiters from coming to campus, the decision to engage in a . . . boycott of Israel is 'expressive only if it is accompanied by explanatory speech." ADD11 (internal quotation marks omitted). That is true because unlike the "sort of boycott" in *FAIR*—which was at least readily noticeable to an "observer" who saw only military recruiters interviewing at off-campus locations, *FAIR*, 547 U.S. at 66—a contractor's *non*-purchase of Israeli goods is all but invisible absent explanatory speech. Few people know which goods are manufactured in Israel. Fewer still keep track of which goods are manufactured by companies that do business there. And absent a contractor's vocally calling attention to it, even fewer people will notice the *absence* of Israel-affiliated companies' goods or services from a contractor's offices or operations. Indeed, even if one were *looking* for evidence of a boycott of Israel, the process of inventorying all the goods a contractor buys (which an outside observer would not generally do or be able to do) and sorting out whether each of those

products' manufacturers does business in Israel would be monumental. Thus, absent explanatory speech, it would be all but impossible to tell that a contractor has refrained from purchasing Israel-affiliated goods.

Moreover, even in the surpassingly unlikely event that an uninformed observer did notice such non-purchases, he or she would be left to guess, as in *FAIR*, about what motivated it. *See FAIR*, 547 U.S. at 66 (exclusion of military recruiters was not expressive because an observer who noticed it would not know whether the recruiters were interviewing off-campus by choice, had been excluded, or the school had simply run out of interview space). Such a purchasing pattern could be chalked up to coincidence, a commercial preference for the goods the contractor did buy, a preference for American goods, or any number of other explanations that have nothing to do with boycotting Israel. Absent an explanation on the contractor's part, the views underlying such purchasing patterns are unknowable. *See Jordahl v. Brnovich*, No 18-16896, Doc. 26 at 5 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting from denial of stay pending appeal) ("Until Jordahl explains that he is engaged in a boycott [of Israel], his private purchasing decisions do not communicate his opinions to the public."). As a result, under *FAIR*, that activity is not inherently expressive. Rather, as *FAIR* makes clear, if conduct needs to be explained to take on expressive meaning, it was never expressive to begin with and it is not protected by the First Amendment.

Recognizing that, Arkansas Times unconvincingly attempts to sidestep *FAIR*. In particular, Arkansas Times claims that, in contrast to run-of-the-mill boycotts, what it calls "politically-motivated consumer boycotts" are inherently expressive and entitled to protection. Appellant's Br. at 25-26. It argues that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), recognizes such a subset of boycotts and that *FAIR* did not overrule that approach. Appellant's Br. at 27. But as explained in greater detail below, *Claiborne Hardware* does not hold that boycotts themselves—as opposed to the speech accompanying them—are inherently expressive. *See infra* at 23-31. To the contrary, *FAIR* forecloses any such strained reading of *Claiborne Hardware*, since if that case had held boycotts are inherently expressive, *FAIR* could not have been decided as it was without overruling *Claiborne Hardware*.

Arkansas Times alternatively suggests that *FAIR* cannot really mean what it says because it would permit viewpoint-discriminatory regulation and would supposedly "deprive parades of First Amendment protection." Appellant's Br. at 26, 27. On its face, that argument conflicts with the principle that Supreme Court opinions mean what they say. *Mathis*, 136 S. Ct. at 2254. Yet even aside from that, both arguments fail on their own terms.

To start, contrary to Arkansas Times's claim, the First Amendment does not preclude States from targeting non-expressive conduct merely because they may

not bar the expression of the ideas the motivated that conduct. For instance, while States may not prohibit hate *speech*, they may impose additional penalties where a defendant is motivated by hate. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Similarly, while the First Amendment does not permit States to prohibit people from arguing that certain groups make better employees, States are certainly entitled to bar racial or gender employment discrimination. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). And most relevant here, while the First Amendment does not permit States to prohibit anti-Semitic speech, it "does not guarantee a right to choose . . . customers, *suppliers, or those with whom one engages in simple commercial transactions*, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added).[3]

Equally unpersuasive is Arkansas Times's other argument that a straightforward reading of *FAIR* would deprive parades of First Amendment protections and conflict with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). That is true, says Arkansas Times, because parades too are

[3] A different rule logically applies to the sale of products that are themselves works of expression. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1741-47 (2018) (Thomas, J., concurring in part and concurring in the judgment). For example, a law forbidding discrimination in sale of goods or services on the basis of a purchaser's political affiliation, though constitutional in most applications, could obviously not be applied constitutionally to a speechwriter or a ghostwriter of memoirs.

inexpressive without explanatory speech; in fact, it claims, "marching in a parade is simply walking down the street if one refuses to consider either the banners and slogans or the other marchers." Appellant's Br. at 27. But that is like saying that paintings lack protection because a canvas is inexpressive if one refuses to consider the paint. There simply are no parades without banners, slogans, or other marchers. *See* Merriam-Webster Online Dictionary, *parade*, https://www.merriam-webster.com/dictionary/parade (defining "parade" as a "procession" or a "lengthy array or succession"). By contrast, anyone can engage in a boycott without publicly broadcasting it.

Moreover, as *Hurley* explains, parades and marches are inherently symbolic—even if banners or songs clarify what they are about. *See* 515 U.S. at 569 ("The protected expression that inheres in a parade is not limited to its banners and songs . . . [because] a narrow, succinctly articulable message is not a condition of constitutional protection[.]"). The same cannot be said of a lack of purchases. Indeed—in stark contrast to a parade or march—the mere fact that someone's purchases do not include goods from Israel-affiliated companies is not expressive of anything until the purchaser explains that he or she is engaged in a boycott and why. Therefore, this Court should reject Arkansas's Times attempts to recast *FAIR* and affirm the district court's conclusion that *FAIR* compels dismissal of Arkansas Times's complaint.

B. *Claiborne* did not hold that consumer boycotts are protected by the First Amendment.

At bottom, Arkansas Times grounds its entire argument on the mistaken assertion that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), holds that consumer boycotts are protected by the First Amendment. But *Claiborne Hardware* held no such thing. Rather, all that *Claiborne Hardware* held—and all that was at issue in that case—is that speech, assembly, association, and picketing in *favor* of a boycott are protected by the First Amendment.

1. *Claiborne Hardware* is about boycott-supportive speech, not boycotting.

Claiborne Hardware involved a boycott "designed to force governmental . . . change and effectuate rights guaranteed by the Constitution itself." *Claiborne Hardware*, 458 U.S. at 914. In 1965, at the height of the civil-rights movement, Charles Evers, the brother of the slain civil-rights hero Medgar Evers, organized a chapter of the NAACP in Claiborne County, Mississippi. *See id.* at 898. That chapter petitioned public officials to desegregate public schools and facilities, to include black citizens in juries, and to otherwise afford black citizens their constitutional rights. *See id.* at 899. That petition did not meet with a favorable response, and the local NAACP consequently voted to boycott white business. *See id.* at 900. White merchants responded by suing the NAACP and over a hundred black citizens involved in the boycott in state court. *See id.* at 889-90, 897-98.

The Mississippi state courts ultimately rejected any attempt to impose liability for the "totally voluntary and nonviolent withholding of patronage." *Id.* at 894. Nevertheless, the Mississippi state courts held the defendants liable on the theory that they "had *agreed* to use force, violence, and 'threats' to effectuate the boycott." *Id.* at 895 (emphasis in original). What exactly that meant was not entirely clear from the record, but supplemental briefing—that the Court credited and relied on—established that none of the defendants had been held liable for mere boycott participation. *See id.* at 895-98 (different groups of defendants had been held liable for participating in boycott-planning meetings, being "boycott 'enforcer[s],'" or personally engaging in violence).[4] Thus, the issue before the Supreme Court was not—as Arkansas Times superficially claims—whether boycotts are protected by the First Amendment.

Instead, as the district court correctly recognized, *Claiborne Hardware* was about whether each of "the various elements of the boycott, which consisted of meetings, speech, and non-violent picketing" were protected. ADD13. In fact, far from asking whether the decision not to purchase goods is protected by the First Amendment, *Claiborne Hardware* began by noting that "[t]he boycott of white

[4] Seven of the hundred-plus defendants were held liable for reasons that were entirely unclear. 458 U.S. at 898. Even these seven did not participate in the boycott, so not a single one of the hundred-plus defendants before the Court was held liable for boycott participation itself. *See* Respondents' Supplemental Brief, *NAACP v. Claiborne Hardware Co.*, 1982 WL 608673, at *16-18.

merchants at issue in this case took many forms." 458 U.S. at 907. For instance, it "was launched at a meeting . . . attended by several hundred persons," was "supported by speeches and nonviolent picketing," and involved efforts to persuade "others to join in." *Id.* The Court then held that "[e]ach of *these elements* of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* (emphasis added). Indeed, the Court stressed that under settled First Amendment principles, boycotters—like others—enjoy the right to associate and peaceably assemble, picket, argue in favor of a boycott, solicit and encourage others to boycott, and socially ostracize boycott violators by broadcasting their identities. *Id.* at 908-10; *see also id.* at 911 ("In sum, the boycott clearly *involved* constitutionally protected activity"—namely, the "elements of speech, assembly, association, and petition" that accompanied the boycott itself (emphasis added)); *id.* at 933 ("The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award.").

By contrast, entirely absent from the Court's analysis was any holding, dictum, or even suggestion that the act of refusing to *buy* from white merchants itself was protected by the First Amendment. Arkansas Times does not point to any such statement in the opinion. Instead, at best, it merely suggests that the Court's statement that the boycott "involved" speech proves its case. Appellant's Br. at 18 (quoting *Claiborne Hardware*, 458 U.S. at 911); *accord id.* at 25. But that hardly

establishes that everything associated with the boycott—like refusing to buy from certain providers—is itself protected speech or assembly. And Arkansas Times does not point to any statement suggesting, let alone holding, that declining to buy from certain providers is itself protected.

That district court's straightforward reading of *Claiborne Hardware* is also entirely consistent with *FAIR*. Collectively, those cases establish a clear rule that while boycotting itself is not protected by the First Amendment, advocacy for boycotting—just like advocacy for other sorts of non-expressive conduct—is protected. And applying that test here, as the district court correctly concluded, the challenged statute does not prohibit advocacy, but merely prohibits state contractors from engaging in the act of boycotting Israel itself. *See, e.g.*, ADD9, 13-14; *see also* Ark. Code Ann. 25-1-502(1)(A)(i), 25-1-503(a). In fact, as the district court observed, consistent with *Claiborne Hardware*, under Act 710, "[Arkansas] Times may write and send representatives to meetings, speeches, and picketing events in opposition to Israel's policies, free from any state interference" and "may even call upon others to boycott Israel, write in support of such boycotts, and engage in picketing and pamphleteering to that effect." ADD13.

To avoid that conclusion, Arkansas Times resorts to claiming that this Court previously interpreted *Claiborne Hardware* to protect consumer boycotts on "public issues" in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers*

Union, Local 655, 39 F.3d 191 (8th Cir. 1994). Appellant's Br. at 21. That case holds no such thing. In *Beverly Hills*, a grocery store sued a union for picketing and calling for shoppers to boycott it. *See* 39 F.3d at 193. The store argued that the union was liable for defamation and tortious interference because the union and its representatives had allegedly made defamatory statements on picket signs, in handbills, and elsewhere. *See id.* at 193-94. Thus, as was ultimately true of the *Claiborne Hardware* defendants, the union faced liability not for boycotting, but speech. Unsurprisingly, this Court had little trouble affirming dismissal of those claims on the grounds that "the activity of peaceful pamphleteering is a form of communication protected by the First Amendment." *Id.* at 197.

Ignoring that holding, Arkansas Times instead focuses on a single passing remark that "[a]dditionally, the prime directive in the Union campaign, a boycott of Foodland, is similarly constitutionally safeguarded," *id.*, and argues this Court has already concluded that *Claiborne Hardware* holds boycotts themselves are protected by the First Amendment. *See* Appellant's Br. at 25-26. Yet that fleeting remark cannot possibly bear the weight that Arkansas Times gives it since pamphleteering is protected speech *regardless* of whether the pamphlets advocate something that is itself "constitutionally safeguarded," even under this Court's own analysis. *See Beverly Hills Foodland*, 39 F.3d at 197 (pamphlets were protected regardless of whether they were "intended to exercise a coercive impact"). Indeed,

had the union distributed pamphlets encouraging shoppers to buy American-made goods, or to tip underpaid baggers, that too would have been protected, even though purchasing American-made goods or tipping baggers is not speech. Moreover, even if the "additionally" language on which Arkansas Times relies were a holding, it would not survive *FAIR*. *See supra* at 17-29. Therefore, as the district court concluded, *Claiborne Hardware* does not establish a constitutional right to boycott and Arkansas Times's claim fails as a matter of law.

2. Even if *Claiborne Hardware* could be read to suggest boycotts enjoy some degree of First Amendment protection, that protection would be exceedingly limited and not apply here.

Claiborne Hardware does not hold that purchasing decisions are protected by the First Amendment, and as the district court correctly concluded, that should be the end of this case. But even if *Claiborne Hardware* could be read to suggest "that the act of refusing to deal enjoys First Amendment protection, such a right is limited in scope" and would not apply here. ADD14. That is true because—even under the most strained of readings—*Claiborne Hardware* would, at most, suggest that the boycott at issue there enjoyed some degree of protection under the Petitions Clause. And that clause is not implicated here because boycotts of Israel do not seek to influence federal or state government.

As noted, *Claiborne Hardware* does not contain a single statement suggesting that boycotts themselves are speech or inherently expressive conduct subject to

the First Amendment's Speech Clause. Rather, at the maximum, the language cited by Arkansas Times might be stretched to suggest the *Claiborne Hardware* boycott was protected under the Petitions Clause because it sought "to influence governmental action" and "vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself." *Claiborne Hardware*, 458 U.S. at 914; *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) (noting that *Claiborne Hardware* boycott was "motivated . . . by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution" and holding that boycotts motivated by dissimilar aims are unprotected); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 298 (2d Cir. 1992) (boycotts that are not "designed to secure governmental action to vindicate legitimate rights" are not protected by *Claiborne Hardware*). Moreover, as the district court recognized, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), underscores that any protection that might have been afforded the *Claiborne Hardware* boycott itself "was based on [the] particular facts" of that case—"namely, a primary boycott by those whose constitutional rights were being infringed upon and against those who were infringing upon those rights." ADD14 (citing *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426-27). Thus, as relevant here, to the extent boycotting itself enjoys any protection, the protection is limited to boycotts that petition the government to redress denials of constitutional rights.

By contrast, those interests would not apply where a boycott does not concern such rights. For instance, *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982), unanimously held that a union's "boycott" of Soviet goods "to protest the Russian investigation of Afghanistan" and influence Soviet policy was not protected by the First Amendment. *Id.* at 214; *see id.* at 226-27. Applying those principles here, the result is the same since—like the union in *Longshoremen's*—an anti-Israel boycotter's goal is "to coerce" a foreign power to alter policies that the boycotters find objectionable, not to vindicate constitutional rights. *Id.* at 227; *see* Palestinian BDS National Committee, *What is BDS?*, https://bdsmovement.net/what-is-bds (explaining that the Boycott, Divestment, Sanctions (BDS) movement "urges action to pressure Israel"). Indeed, as the district court aptly put it, "If one simply substitutes the words 'labor union,' 'Soviet,' 'U.S.S.R.,' and 'Afghanistan' with 'newspaper,' 'Israeli,' 'Israel,' and 'West Bank,' then it becomes clear that *International Longshoremen's Association* is largely the same case as [this one]." ADD15. And while Arkansas Times attempts to avoid that commonsense conclusion by claiming that non-union boycotters have greater rights, *see* Appellant's Br. at 35, labor unions enjoy the same First Amendment liberties that others do. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down ban of independent political expenditures by corporations and unions that was defended on theory that unions had lesser First Amendment

rights). Therefore, even under a maximalist reading of *Claiborne Hardware*, Arkansas Times's claim fails as a matter of law and the district court's judgement should be affirmed.

II. Arkansas has not imposed an unconstitutional condition on government contracts or compelled speech in violation of the First Amendment.

Arkansas Times claims Act 710 imposes an unconstitutional condition both by conditioning contracting on refraining from boycotting and by requiring certification. Because, as discussed, a decision not to purchase goods from companies that do business in Israel is not protected by the First Amendment, those arguments fail and the district court's decision should be affirmed.

First, Arkansas Times's claim that Act 710 conditionally restricts expressive conduct fails from the outset because, as discussed, boycotting itself is not protected by the First Amendment. *See supra* at 15-31. Indeed, it goes without saying that as boycotting Israel is not protected by the First Amendment, a State does not violate the First Amendment by conditioning government contracts on an agreement not to engage in such boycotts.

Second, Arkansas Times's alternative suggestion that requiring certification unconstitutionally compels speech fares little better. Contracting certification requirements are generally constitutionally unproblematic. No one would suggest, for example, that a statute requiring contractors to certify that, as a factual matter,

they do not engage in employment discrimination would fall afoul of the compelled-speech doctrine. *See, e.g.*, *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984) (rejecting First Amendment challenge to a requirement that recipients of federal funding certify they did not discriminate on the basis of sex). After all, absent such certification requirements, States would have no way of knowing whether a contractor complied with any number of run-of-the-mill contracting conditions. Instead, as this Court has held, the "First Amendment protection against compelled speech" generally applies "only in the context of governmental compulsion to disseminate a particular political or ideological message." *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995). Hence, as the certification here merely requires contractors "to provide the government with information," *id.*, it does not run afoul of the compelled-speech doctrine.

Faced with that precedent, Arkansas Times falls back on a line of McCarthy-era cases that held that the government cannot condition employment "on an oath that one has not engaged, or will not engage, in protected speech activities" or "associational activities within constitutional protection." *Cole v. Richardson*, 405 U.S. 676, 680 (1972); *see* Appellant's Br. at 39. For example, in a case relied on in *Cole*, the Court held a state bar could not require applicants to disavow membership in the Communist Party. *See Baird v. State Bar of Arizona*, 401 U.S. 1 (1971). Under that rule, States generally may not compel expression of a political

or ideological message, *i.e.*, that one does *not* have certain views or belong to certain political parties.

But where the subject of the certification is not itself protected by the First Amendment—for instance, that an individual has not committed a felony, does not have substantial unpaid tax debts, or is an equal-opportunity hirer—requiring certification poses no First Amendment problem. *See, e.g.*, *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736-37 (8th Cir. 2008) (en banc) (factual certification requirement was unexceptionable under the First Amendment because it did not contain "an ideological message from which [those making the certification] need to disassociate themselves"). The same is true here. Because there is no constitutional right to boycott Israel, requiring truthful certification poses no First Amendment problem. Additionally, given Arkansas Times's representation that it has never boycotted Israel—and has no plans to do so in the future—it is difficult to see how it could ever make such an ideologically based claim. *See supra* at 7-8.

Arkansas Times also alternatively suggests that even if the subject of a contracting certification does not involve protected speech, such certifications still impermissibly compel speech. *See* Appellant's Br. at 40-41. It argues that *Hurley* supports that view, arguing that "[t]he 'general rule' against compelled speech 'applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid.'" *Id.* at 40 (quoting *Hurley*,

515 U.S. at 573). That approach would preposterously suggest that *any* compelled factual disclosure implicates the compelled-speech doctrine. And unsurprisingly, that is not what *Hurley* actually says. Rather, read in full, the cited passage merely states the narrower principle that, when a speaker is engaged in speech, "th[e] general rule, that the *speaker has the right to tailor the speech*, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid." *Hurley*, 515 U.S. at 573 (emphasis added). Moreover, *Hurley*'s citation to two cases that involved provisions requiring parties to alter their speech to include other content underscores that the quoted language does not stand for a much broader proposition. *See id.* (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988)).

Hence, applying what *Hurley* said—and not what Arkansas Times revises it to say—Act 710 does not run afoul of the compelled-speech doctrine because it does not require contractors to interject any statements about Israel boycotting into their speech. To the contrary, Arkansas Times may continue to make the same statements it always has and even call for boycotts without running afoul of Act 710. Accordingly, Arkansas Times's claim fails as a matter of law and the district court's order should be affirmed.

III. This Court should decline Arkansas Times's extraordinary request that it enter a preliminary injunction.

Even in the unlikely event that this Court reversed the district court's well-reasoned dismissal order, it should decline Arkansas Times's extraordinary request that this Court enter a preliminary injunction. In resolving preliminary injunction requests, district courts consider: (1) the threat of irreparable harm; (2) the balance between that harm and the harm from an injunction; (3) the likelihood of success on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). But where an injunction would prevent "implementation of a duly enacted state statute," a movant must first make a "rigorous showing that it is 'likely to prevail on the merits.'" *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (quoting *Rounds*, 530 F.3d at 733).

Applying that standard, the district court denied Arkansas Times' motion for a preliminary injunction because, as a matter of law, Arkansas Times could not succeed on its claims. Consequently, as the district court concluded, Arkansas Times likewise did not make a showing—let along a rigorous one—that it was likely to succeed on the merits and did not need to consider the other *Dataphase* factors. ADD5. Because, as explained above, that conclusion is correct, this Court need go no further to deny Arkansas Times's request for a preliminary injunction. But in the unlikely event this Court were to determine that the district court erred

in dismissing Arkansas Times's claim that boycotting Israel is protected by the First Amendment, it should remand for the district court to determine in the first instance the propriety of preliminary relief.

A. Any balancing of the preliminary-injunction factors should be done by the district court in the first instance.

In the unlikely event that this Court holds that the district court erred in dismissing the complaint, remand would be required to consider Arkansas Times's preliminary injunction request. *See Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (issuance of a preliminary injunction is generally within the "broad discretion" of the district court). Upon remand, the district court would be required to consider whether Arkansas Times had made the required rigorous showing that it is likely to succeed, consider the other fact-based preliminary factors, and determine the appropriate scope of preliminary relief.

That is typically this Court's practice, and Arkansas Times does not explain why this Court should depart from that practice here. For instance, like here, in *Home Instead, Inc. v. Florance*, 721 F.3d 494, 500 (8th Cir. 2013), the district court concluded that the moving party was unlikely to succeed on the merits, denied a requested preliminary injunction, and "did not make any findings of fact concerning the effect of a preliminary injunction on [the parties] or the public." Though this Court concluded that the district court's likelihood-of-success analysis was erroneous, it declined to issue the requested preliminary injunction in the first

instance. *Id.* Instead, this Court held that "'[t]he district court is in the best position to evaluate all of the evidence and weigh the factors to determine whether the injunction should issue[.]'" *Id.* (quoting *Lankford*, 451 F.3d at 513). Indeed, as this Court stressed, it was only aware of one instance where this Court departed from that "more common approach." *See id.* at 499-500 (citing *Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1480-81 (8th Cir. 1995)). And in that case, the district court had at least addressed irreparable harm, and the harm to third parties was clearly minimal. *See Coteau Props. Co.*, 53 F.3d at 1479-80. Here, the district court did not even address irreparable harm, which, as explained below, is at best for Arkansas Times a close question in this case.

Thus, even if this Court concluded that the district court erred in dismissing Arkansas Times's complaint, it should follow its usual approach and remand for the district court to make fact determinations and weigh the preliminary injunction factors.

B. Arkansas Times is not suffering irreparable harm.

Even were Arkansas Times likely to succeed on its claims, a preliminary injunction would be inappropriate here because it is not suffering irreparable harm. Rather, at most, it has alleged that absent an injunction it has suffered the *reparable* harm of diminished advertising revenues. *See, e.g., Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 300 (8th Cir. 1996) (preliminary injunctive relief is

unavailable where plaintiff has "an adequate remedy at law, namely, the damages and other relief to which she will be entitled if she prevails"). Notwithstanding Arkansas Times's suggestion to the contrary, *see* Appellant's Br. at 53, sovereign immunity does not make its harm irreparable. Even assuming sovereign immunity applied, Arkansas Times could still seek redress for its claimed loss of "contracts worth tens of thousands of dollars a year" (Appellant's Br. at 52) before the Arkansas Claims Commission. Indeed, Arkansas law specifically vests that entity with the power to adjudicate such claims and award appropriate monetary relief. *See* Ark. Code Ann. 19-10-204(b)(2)(A) (giving Claims Commission jurisdiction "over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction"); *Fireman's Ins. Co. v. Ark. State Claims Comm'n*, 784 S.W.2d 771, 774-75 (Ark. 1990) (discussing history of Claims Commission).

Aside from ignoring potential state-law remedies for its supposed harm, Arkansas Times's irreparable-harm argument fails on its own terms. Even were boycotting Israel protected by the First Amendment, having *declined* to agree not to boycott Israel, Arkansas Times could begin boycotting today and do so throughout the pendency of this case. Thus, even on its own theory, Arkansas Times has not been prevented from speaking, but merely faces the prospect of losing advertising dollars during the pendency of this case. *See* Appellant's Br. at 52 (complaining

that Act 710's requirement impaired Arkansas Times's "ability to enter into government advertising contracts worth tens of thousands of dollars a year"). That is not irreparable harm.

To avoid that commonsense conclusion, Arkansas Times invokes *Elrod v. Burns*' oft-quoted admonition that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Appellant's Br. at 52 (internal quotation marks omitted) (quoting 427 U.S. 347, 373 (1973) (plurality opinion)). Yet that case did not hold—as Arkansas Times suggests—that all First Amendment plaintiffs are *automatically* irreparably injured if they can establish a likelihood of success, even if that may be the outcome in the typical case. *Cf. Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc) (noting that upon a showing of a likelihood of success in a First Amendment case, "the other requirements for obtaining a preliminary injunction are *generally* deemed to have been satisfied" (emphasis added)). Rather, *Elrod* held only that a plaintiff suffers irreparable harm if their "First Amendment interests were either threatened or in fact being impaired at the time relief was sought," in the sense that the plaintiff is either (1) being put to a choice that he has *not yet made* of either forgoing speech or suffering a sanction or (2) is self-censoring his speech. *Elrod*, 427 U.S. at 373.

Neither is true here. Instead, Arkansas Times made a different decision and opted not to certify and allegedly lost "government advertising contracts worth tens of thousands of dollars a year." Appellant's Br. at 52. And faced with similar claims, other courts have consistently read *Elrod* to preclude preliminary injunctive relief. *See, e.g.*, *Google, Inc. v. Hood*, 822 F.3d 212, 227-28 (5th Cir. 2016) (First Amendment plaintiffs must show that First Amendment interests are in fact being threatened or impaired at the time relief is sought, and that "invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury"); *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 350 (2d Cir. 2003) ("in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff . . . must demonstrate that the injunction will prevent the feared deprivation of speech rights" and cannot rely on a presumption of irreparable harm).

In *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C. Cir. 1991), for instance, then-Judge Thomas held for the D.C. Circuit that a law forbidding federal employees from receiving honoraria for speeches or articles could not be enjoined on a preliminary basis, because plaintiffs' harms at the relevant time were only monetary. The statute did not prevent government employees from giving speeches, and the plaintiffs did not stop giving them; the only harm plaintiffs could point to is that "if [the court did] not grant them preliminary relief,

they will not be paid for speaking or writing before the district court rules on the merits." *Id.* at 1255-56. That harm, Justice Thomas reasoned, could be remedied at the conclusion of the case, and thus was not irreparable. *See id.* at 1256. As for *Elrod*, Justice Thomas explained that while the challenged statute might violate the First Amendment, it was not presently threatening or impairing plaintiffs' First Amendment interests, as *Elrod* required. That is because the record did not demonstrate that the plaintiffs would "cease speaking or writing before the district court resolve[d] their constitutional challenges." *Id.* at 1255.

The same is true here. Like the plaintiffs in *National Treasury Employees Union*, who could not show irreparable harm from lost honoraria for speeches they continued to make, Arkansas Times cannot show irreparable harm merely from the loss of "government advertising contracts worth tens of thousands of dollars a year." Appellant's Br. at 52. Therefore, even if this Court were to consider the propriety of a preliminary injunction, it should be denied.

C. The other factors weigh against a preliminary injunction.

In contrast to Arkansas Times's lack of irreparable harm, an injunction would irreparably harm Arkansas. "'Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it has suffered a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (alteration omitted) (quoting *New Motor Vehicle Bd.*

of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *accord Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted [legislation] clearly inflicts irreparable harm on the State."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). Hence, the harms of injunctive relief substantially outweigh any harm from denying preliminary relief.

Likewise, the public interest in seeing duly-enacted legislation enforced pending final resolution weighs against preliminary relief. Nor for that matter would a preliminary injunction act to preserve the *status quo* pending resolution since Arkansas Times had been required to comply with Act 710 for sixteen months before it even filed its complaint.

Further, even in the unlikely event that this Court believed preliminary relief might be appropriate, that relief should be limited to Arkansas Times. Absent class certification, Arkansas Times has no standing to seek injunctive relief on non-parties' behalf, and this Court has no power to grant it in their favor. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring). Indeed, even the Circuit on whose dated precedent Arkansas Times relies on in this regard, *see* Appellant's Br. at 55 (citing *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009)), has recently recognized that injunctions extending to non-parties are re-

served for "exceptional cases" in which "such breadth is necessary to give prevailing parties the relief to which they are entitled." *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)). Enjoining Act 710's application to other contractors is not necessary to give Arkansas Times any relief to which it may be entitled.

CONCLUSION

For the foregoing reasons, the District Court's order should be affirmed.

Respectfully submitted,

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately 10,359 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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

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/s/ *Nicholas J. Bronni*

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I hereby certify that on May 30, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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