No. 19-1378

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Arkansas Times, LP,

Plaintiff – Appellant,

v.

Mark Waldrip, et al.,

Defendants – Appellees.

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

APPELLANT'S OPENING BRIEF

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Dated: April 8, 2019

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case concerns a First Amendment challenge to Ark. Code Ann. § 25-1-503 (the "Act"), which requires government contractors to certify that they are not participating in boycotts of Israel or Israel-controlled territories. Plaintiff Arkansas Times LP, a newspaper publisher, has lost numerous government advertising contracts because it refuses to sign the anti-boycott certification. The district court denied the Arkansas Times' preliminary injunction motion and dismissed the case, holding that the act of boycotting is not protected by the First Amendment.

To the contrary, this country was founded on a boycott of British goods, and boycotts have been a fundamental part of American political discourse ever since. The U.S. Supreme Court has unanimously held that political boycotts are protected under the First Amendment, this Court has agreed, and two federal courts have enjoined laws strikingly similar to the one at issue here. If the district court's decision is upheld, government officials of all political stripes will have a free hand to suppress disfavored boycotts based on nothing more than ideological hostility. The absence of any plausible justification for the Act, apart from the desire to suppress disfavored viewpoints and compel support for the government's message, demonstrates the danger of the district court's approach.

This Court should reverse. The Arkansas Times respectfully requests 30 minutes of oral argument per side.

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CORPORATE DISCLOSURE STATEMENT

Appellant Arkansas Times LP ("Arkansas Times") does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock. *See* Fed. R. App. P. 26.1(a); Eighth Circuit Rule 26.1A.

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STATEMENT OF THE ISSUE ON APPEAL

1. Did the district court err in holding that Ark. Code Ann. § 25-1-503 does not violate the First Amendment, where the Act requires government contractors to certify that they are not participating, and will not participate, in boycotts of Israel or Israeli-controlled territories?

Apposite Constitutional Provisions:

- U.S. Const. amends. I & XIV

Apposite Cases:

- *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)
- *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191 (8th Cir 1994)
- *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018)
- *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018)

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JURISDICTIONAL STATEMENT

The district court entered an order denying Plaintiff's motion for preliminary injunction and granting Defendants' motion to dismiss, and rendered judgment for Defendants, on January 23, 2019. Addendum ("ADD") 1–18. Plaintiff filed a timely notice of appeal on February 21, 2019. ADD 19. The district court asserted jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a).

STATEMENT OF THE CASE

The Act

In 2017, the Arkansas General Assembly passed Act 710 (the "Act"), which *inter alia* requires government contractors to certify that they are not participating, and will not participate, in boycotts of Israel or Israeli-controlled territories. The Act became effective August 3, 2017.

The anti-boycott section of the Act provides in relevant part:

> **(a) Except as provided under subsection (b) of this section, a public entity shall not:**
>
> > **(1) Enter into a contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written certification that the person or company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel; or**
> >
> > **(2) Engage in boycotts of Israel.**
>
> **(b) This section does not apply to:**

> **(1) A company that fails to meet the requirements under subdivision (a)(1) of this section but offers to provide the goods or services for at least twenty percent (20%) less than the lowest certifying business; or**
>
> **(2) Contracts with a total potential value of less than one thousand dollars ($1,000).**

Ark. Code Ann. § 25-1-503.

The Act defines "boycott Israel" and "boycott of Israel" to mean:

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

Id. § 25-1-502(1)(A)(i).

The Act's legislative findings state in relevant part:

> **(5) Israel in particular is known for its dynamic and innovative approach in many business sectors, and therefore a company's decision to discriminate against Israel, Israeli entities, or entities that do business with or in Israel, is an unsound business practice, making the company an unduly risky contracting partner or vehicle for investment; and**
>
> **(6) Arkansas seeks to act to implement the United States Congress's announced policy of "examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of state assets from companies that support or promote actions to boycott, divest from, or sanction Israel".**

Id. § 25-1-501(5),(6).

The Facts

Plaintiff Arkansas Times LP ("Arkansas Times") is an Arkansas limited liability partnership. It publishes the *Arkansas Times*, a newspaper of general circulation in Arkansas, as well as other special interest publications. Joint Appendix ("JA") 18. The CEO and a principal of Arkansas Times is Alan Leveritt. JA 19. He is also the publisher of the Arkansas Times. *Id.* For many years, the Arkansas Times has regularly contracted with Pulaski Technical College ("Pulaski Tech") to run Pulaski Tech's paid advertisements in its newspaper and other publications. JA 18.

Pulaski Tech became part of the University of Arkansas system on February 1, 2017. JA 9. The University of Arkansas Board of Trustees ("UABT") is the governing body of all components of the University of Arkansas System and has the authority to enter into, delegate, or direct others to enter into contracts for goods or services on behalf of the University of Arkansas and all the colleges in its system. *Id*. After February 1, 2017, the Arkansas Times contracted with UABT to run advertisements for Pulaski Tech. JA 18.

In October 2018, the Arkansas Times and the UABT were preparing to enter into new contracts for Pulaski Tech's advertising in the newspaper. *Id*. For the first time, Pulaski Tech's Director of Purchasing and Inventory, acting on behalf of the UABT, informed Mr. Leveritt that he would have to sign a certification stating that

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the Arkansas Times is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel. JA 19. The UABT informed Mr. Leveritt that absent this certification, it would refuse to contract with the Arkansas Times for any additional advertising. *Id*. Mr. Leveritt, as CEO of the Arkansas Times, declined to sign the certification. *Id*. The Arkansas Times refuses to enter into an advertising contract with UABT that is conditioned on the unconstitutional suppression and compulsion of protected speech under the First Amendment. *Id.* The Arkansas Times is unwilling to accept a 20% reduction in payment by UABT for its advertising services. *Id*.[1]

The Arkansas Times is ready, willing, and able to enter into new or renewed advertising contracts for the College, but refuses to sign the required anti-boycott certification. JA 19. The UABT has refused to enter into numerous advertising contracts with the Arkansas Times, each of which would have been for an amount in excess of $1,000, because the Arkansas Times refuses to sign the anti-boycott certification. *Id*. In view of its long contractual history with Pulaski Tech, the

[1] The district court erroneously inferred that the Arkansas Times "has previously complied with the law's certification provision on dozens of occasions, as it entered into many contracts with [the College] after Act 710 went into effect." ADD 3. In fact, UABT had not asked Arkansas Times to sign the certification as part of those contracts; UABT first presented the Arkansas Times with the anti-boycott certification in October 2018. Docket Entry ("DE") 20 at 2.

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Arkansas Times reasonably expected that it would be awarded additional advertising contracts in the future. *Id.*[2]

The Arkansas Times' refusal to sign the anti-boycott certification means that it will not receive new contracts for Pulaski Tech advertisements as long as the Act remains in force. JA 19. The refusal of the Arkansas Times to sign the anti-boycott certification has no bearing on its ability or effectiveness in publishing advertisements for Pulaski Tech. JA 20. In addition to the violation of its First Amendment rights, the Arkansas Times has sustained substantial monetary damages, which are not recoverable in a court of law and which will continue into the future if the certification requirement is not invalidated. *Id.*

The Case

On December 11, 2018, the Arkansas Times brought this lawsuit against the UABT members in their official capacities and filed a motion for preliminary injunction. The Arkansas Times argued that the Act's certification requirement violates the First Amendment, both facially and as applied, because it unconstitutionally compels speech, unconstitutionally restricts participation in political boycotts, and unconstitutionally targets protected expression based on its

[2] In 2016, the Arkansas Times entered into 22 separate contracts with Pulaski Tech in amounts over $1,000 for Pulaski Tech ads; in 2017, Plaintiff executed 36 such contracts with UABT; in 2018, Plaintiff and UABT executed 25 such contracts before UABT first demanded that the Arkansas Times sign the anti-boycott pledge. JA 20.

subject matter and viewpoint. DE 3. Defendants opposed the motion for preliminary injunction, DE 14, and filed a motion to dismiss for failure to state a claim, DE 15, arguing that the Arkansas Times lacks standing to challenge the Act's restriction on speech and that boycotts are not protected under the First Amendment.

On January 23, 2019, the district court issued an order denying the Arkansas Times' motion for preliminary injunction and dismissing the case with prejudice. The court held that the Arkansas Times has standing to challenge the Act, on both compelled speech and speech restriction grounds, because it has lost contracts as a result of its refusal to comply with the Act's certification requirement. ADD 5–7.

Turning to the merits, the court held that the Act does not violate the First Amendment. First, the court interpreted the Act to apply only to a contractor's "purchasing activities with respect to Israel." ADD 9. Although the Act defines a boycott of Israel to include both a refusal to deal and "other actions that are intended to limit commercial relations with Israel," Ark. Code Ann. § 25-1-502(1)(A)(i), the court construed the phrase "other actions" to exclude "criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech." ADD 9. The court held that, to prevail on either its compelled speech or speech restriction theory, the Arkansas Times must demonstrate that the act of boycotting—i.e.,

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refusing to purchase goods or services from boycotted entities—is protected under the First Amendment. *Id.*

The court concluded that the First Amendment does not protect boycotts, because boycotts are "neither speech nor inherently expressive conduct." *Id.* Citing the Supreme Court's decision in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 66 (2006), the district court held that boycotts are not inherently expressive conduct, because they require explanatory speech to communicate their message. ADD 10–12.

The district court distinguished the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), holding that *Claiborne* applied First Amendment protection to "meetings, speeches, and non-violent picketing" in support of a boycott, but not the boycott itself. ADD 12–13. In the alternative, the court stated that, even if *Claiborne* provides some First Amendment protection to boycotts, such protection is limited to boycotts vindicating a domestic statutory or constitutional interest. ADD 15–16. The court concluded that, to the extent *Claiborne* establishes a First Amendment right to boycott at all, it "does not include political boycotts directed towards foreign governments concerning issues that do not bear on any domestic legal interest." ADD 14.

The court accordingly held that the Arkansas Times is unlikely to succeed under either of its First Amendment theories, denied the motion for preliminary

injunction, and granted Defendants' motion to dismiss with prejudice. ADD 16. Because the court concluded that boycotts are entirely unprotected by the First Amendment, it did not adjudicate whether the Act is supported by any legitimate government interest unrelated to the suppression of disfavored expression.

SUMMARY OF THE ARGUMENT

I. The district court erred in holding that the First Amendment does not apply to boycotts of Israel.

The question presented by this case is straightforward, but its implications are far-reaching: May the government constitutionally penalize participation in a disfavored political boycott?

The answer to that question is controlled by *Claiborne Hardware*. There, the Supreme Court barred state courts from imposing liability for participation in a politically-motivated consumer boycott, holding that the First Amendment protects such boycotts as a form of "expression on public issues." 458 U.S. at 913. In *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 197 (8th Cir 1994), this Court recognized that such boycotts are "constitutionally safeguarded." And two federal district courts have applied *Claiborne Hardware* to block anti-boycott certification laws strikingly similar to the one at issue here. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018).

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Disregarding these authorities, the district court held that boycotts do not receive any protection under the First Amendment, because they are not inherently expressive. The district court relied on the Supreme Court's decision in *FAIR*, a case that does not mention the word "boycott" or include any citation to *Claiborne*. Under the district court's reasoning, government officials could criminalize participation in disfavored boycotts of every political stripe—including boycotts of companies that support Planned Parenthood on one hand, or the National Rifle Association on the other—without even having to provide a viewpoint-neutral justification.[3] This result squarely contradicts *Claiborne*'s holding that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically-motivated boycott." 458 U.S. at 914.

The district court alternatively held that any constitutional protection *Claiborne* provides for boycotts is limited to boycotts that seek to vindicate a domestic statutory or constitutional interest. This reasoning violates the cardinal principle that "constitutional protection" for expression on matters of public concern "does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (citation omitted). It also ignores the Supreme Court's holding that

[3] *See* Tamar Lewin, *Anti-Abortion Group Urges Boycott of Planned Parenthood Donors*, N.Y. Times, Aug. 8, 1990, at A13; Tiffany Hsu, *Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate*, N.Y. Times, Feb. 28, 2018, at A12.

expression targeted at foreign governments is core political expression entitled to the protection of the First Amendment. *Boos v. Barry*, 485 U.S. 312, 316 (1988).

There is no reason to treat boycotts differently than the pickets at issue in *Boos*, and in fact there is good reason to treat them the same: Many boycotts that have played a significant role in this country's public discourse—such as the boycott of apartheid South Africa—have not sought to vindicate domestic legal rights. If this Court holds that such boycotts do not enjoy any constitutional protection, government officials across the political spectrum will have a blank check to protect their political allies, suppress dissent, and distort public debate by outlawing disfavored boycotts.

This case presents a clear warning of what may be in store if the district court's order is upheld. The Act at issue here facially penalizes boycotts based on their subject matter and viewpoint, and Defendants have conspicuously failed to identify any government interest unrelated to the suppression of disfavored expression that could plausibly justify a law requiring contractors to certify that they are not boycotting Israel. But because the district court concluded that political boycotts do not deserve any constitutional protection, it did not apply even intermediate judicial scrutiny.

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II. The Act imposes an unconstitutional condition on government contracts.

Any application of judicial scrutiny proves fatal, because the Act violates the First Amendment in at least two ways. First, it unconstitutionally compels contractors to disavow participation in boycotts of Israel. It is black-letter law that the government cannot condition employment or government contracts on a certification disavowing participation in protected political expression or association, *Cole v. Richardson*, 405 U.S. 676, 680 (1972), including political boycotts. But even if the act of boycotting is not entitled to constitutional protection, the compelled certification unconstitutionally compels speech. The government cannot force the disclosure of even factual information for the purpose of suppressing a message the government opposes or promoting a message the government supports. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573, 579 (1995).

Second, the Act unconstitutionally restricts contractors from participating in protected boycotts, and the certification also chills contractors from participating in boycott-related expression and association. When the government imposes a prospective restriction on the expression of public employees or government contractors, the restriction is subject to exacting scrutiny and the government must demonstrate that the recited harms are genuine and that the restriction will alleviate

them in a direct and material way. *United States v. Nat'l Treasury Emps. Union* ("*NTEU*"), 513 U.S. 454, 468 (1995).

Defendants have not even attempted to make the necessary showing here. Only one of their briefs in the district court, a reply brief supporting their motion to dismiss, even references the government interests supporting the Act. That brief includes a single sentence stating that the Act "furthers Arkansas's interests in trade policy and in avoiding dealing with contractors who engage in unsound business practices." DE 22-1 at 8. There is no evidence in the record that boycotts of Israel posed a problem for Arkansas trade or that contractors participating in such boycotts are less reliable than average. If Arkansas were genuinely concerned with these issues, it would have passed comprehensive measures to address them.

Instead, the Act restricts only boycotts of Israel, while allowing boycotts of all other foreign countries. The Act's exclusive focus on boycotts of Israel leads ineluctably to the conclusion that its sole purpose is to suppress disfavored expression. Moreover, the Act's exemption allowing contractors to forgo the certification requirement entirely if they are willing to accept a contract price more than 20% below the lowest qualifying bid, Ark. Code Ann. § 25-1-503(b)(1), fatally undermines any justification Defendants might offer. *See NTEU*, 513 U.S. at 468; *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994). If the Act truly served

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important or compelling government interests, the government would not be willing to sacrifice those interests for a discount on its contracts.

III. A facial preliminary injunction is warranted.

The Arkansas Times is therefore likely to succeed in demonstrating that the Act violates the First Amendment. The other preliminary injunction factors also support relief. The Arkansas Times is suffering irreparable harm because it is being forced to choose between its First Amendment rights and essential advertising revenue, and because its damages are not recoverable at law. Further, both the balance of equities and the public interest support injunctive relief against a law that violates First Amendment rights. Finally, because the Act is facially unconstitutional, Defendants should be enjoined from enforcing it in all of their government contracts.

STANDARD OF REVIEW

This Court reviews "a district court's grant of a motion to dismiss for failure to state a claim de novo, taking all facts alleged in the complaint as true." *Sparkman Learning Ctr. v. Ark. Dep't of Human Servs.*, 775 F.3d 993, 997 (8th Cir. 2014) (citation and internal quotation marks omitted). The denial of a preliminary injunction is reviewed for abuse of discretion. A district court abuses its decision if its decision is based on an erroneous legal premise. The district court's legal conclusions are reviewed *de novo*. *Id.*

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In determining whether to grant a preliminary injunction, district courts must consider the following four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Id.* (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

"Because the district court denied [the] motion for a preliminary injunction and granted [the] motion to dismiss using the same legal reasoning and case law," this Court may "address the issues together" on *de novo* review. *Id.* at 998.

ARGUMENT

I. The district court erred in holding that the First Amendment does not apply to boycotts of Israel.

The district court held that the Act does not violate the First Amendment, because boycotts of foreign countries do not enjoy any constitutional protection. The district court's holding is impossible to reconcile with the Supreme Court's decision in *Claiborne Hardware*, which held political boycotts are a form of expression on public issues, and this Court's decision applying *Claiborne* in *Beverly Hills Foodland*, which recognized that politically-motivated consumer boycotts are "constitutionally safeguarded" under *Claiborne*. If upheld, the district court's rationale would give the government a free hand to penalize participation in disfavored boycotts. This case demonstrates the dangers inherent in that approach,

since the Act facially targets boycotts of Israel based on their subject matter and viewpoint. If the government is allowed to penalize participation in disfavored boycotts without satisfying even intermediate scrutiny, government officials will inevitably abuse these powers to support their political allies and suppress dissent.

A. The First Amendment protects political boycotts, including boycotts of Israel.

Because *Claiborne* controls the disposition of this case, the Supreme Court's decision merits careful consideration. *Claiborne* concerned a boycott of white-owned businesses in Port Gibson, Mississippi to protest ongoing racial segregation and inequality. 458 U.S. at 889. The boycott consisted of a concerted refusal to deal with those businesses until the government, those businesses, and society more broadly met the boycotters' demands, and it was supported by speeches, public meetings, and nonviolent picketing. *Id.* at 915. In addition, there were individual instances of violence and threats of violence. *Id.* at 920–21, 933.

Merchants targeted by the boycott sued the boycott participants, seeking to recover business losses caused by the boycott and to enjoin future boycott activity. *Id.* at 889. The Mississippi chancellor held that the entire boycott was unlawful under the common law tort of malicious interference with business relations, the state law prohibiting secondary boycotts, and the state antitrust statute. *Id.* at 891–

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92.[4] On appeal, the Mississippi Supreme Court dispensed with the latter two theories on statutory grounds, but nevertheless "concluded that the entire boycott was unlawful" under the common law tort theory because the boycott had been effectuated through threats and violence. *See id.* at 894–95.[5]

The U.S. Supreme Court unanimously reversed. In the first section of its legal analysis, the Court established that the First Amendment protects the right to participate in political boycotts. Describing the boycott as "a host of voluntary decisions by free citizens," *id.* at 889, the Court observed that "[t]he black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect," *id.* at 907. As the Court recognized, this "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," allowing people to "make their views known" through "collective effort . . . when, individually, their voices would be faint or lost." *Id.* at 907–08 (quoting *Citizens Against Rent Control Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981)). Although there are "some activities,

[4] Although the Supreme Court noted that "many" of the boycotted businesses in *Claiborne* were owned by civic leaders, it did not overturn the chancellor's finding that the boycott was a secondary boycott. *Id.* at 890 n.3, 891–92 & n.8.

[5] Mississippi's anti-boycott statute was eventually declared unconstitutional pursuant to a settlement agreement. *Echols v. Parker*, 909 F.2d 795, 797 (5th Cir. 1990).

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legal if engaged in by one, yet illegal if performed in concert with others," the Court declared, "political expression is not one of them." *Id.* at 908 (quoting *Citizens Against Rent Control*, 454 U.S. at 296).

The Court went on to describe how other elements of the boycott—such as "peaceful picketing" against boycotted businesses, marches, and demonstrations—"also involved activities ordinarily safeguarded by the First Amendment." *Id.* at 909. "Speech itself also was used to further the aims of the boycott," including through "public address" and "personal solicitation" urging nonparticipants "to join the common cause," as well as "social pressure and the 'threat' of social ostracism" against holdouts. *Id.* at 909–10. "In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly association, and petition, 'though not identical, are inseparable.' Through exercise of these First Amendment rights, [the boycotters] sought to bring about political, social, and economic change." *Id.* at 911 (citation omitted).

"The presence of protected activity, however, [did] not end the relevant constitutional inquiry." *Id.* at 912. Recognizing "the strong governmental interest in certain forms of economic regulation," the Court held that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." *Id.* at 912 & n.47 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)). These instances include: business

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entities "'associat[ing]' to suppress competition"; "unfair trade practices"; "[s]econdary boycotts and picketing by labor unions"; and boycotts designed "to secure aims that are themselves prohibited by a valid state law." *Id.* at 912, 915 n.9 (citations omitted).

While acknowledging that "[s]tates have broad power to regulate economic activity," the Court expressly did "not find a comparable right to prohibit peaceful political activity such as that found in the [Mississippi] boycott." *Id.* at 913. To the contrary, the Court "recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Characterizing "[s]peech concerning public affairs" as more than just "self-expression," but even "the essence of self-government," the Court reaffirmed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (citations and internal quotation marks omitted). The Court concluded by holding that that "the nonviolent elements of [the boycotters'] activities are entitled to the protection of the First Amendment." *Id.* at 915. It thus rejected the Mississippi chancellor's "view that voluntary participation in the boycott was a sufficient basis on which to impose liability." *Id.* at 921.

The second part of *Claiborne*'s analysis focused on the Mississippi Supreme Court's decision. "The Mississippi Supreme Court did not sustain the chancellor's

imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott," but "[t]he fact that such activity is constitutionally protected . . . impose[d] a special obligation on [the] Court to examine critically the basis on which liability was imposed." *Id.* at 915. The Mississippi Supreme Court had held that, because the boycott was partly effectuated through threats and violence, the boycott participants "were liable for all damages 'resulting from the boycott,'" including even "all businesses losses [that] were not proximately caused by the violence and threats of violence found to be present." *Id.* at 921 (citations omitted).

The U.S. Supreme Court rejected this approach as well. It held that, even if the boycott included some elements or threats of violence, a "careful limitation on damages liability" had to be imposed to accommodate "the important First Amendment interests at issue[.]" *Id.* at 918. Although the Court acknowledged that "the State legitimately may impose damages for the consequences of violent conduct," it held that Mississippi could "not award compensation for the consequences of nonviolent, protected activity," including in particular the boycott participants' collective decision to withhold "their patronage from the white establishment of Claiborne County." *Id*.

By imposing liability on the boycott participants, the Mississippi Supreme Court had impermissibly exerted state power "to compensate [the boycotted businesses] for the direct consequences of nonviolent, constitutionally protected

activity." *Id.* at 923. The U.S. Supreme Court accordingly reversed, holding that the claims against the rank-and-file boycott participants and store watchers could not proceed, while allowing that those who engaged in violence or threats of violence could be held liable for that conduct. *Id.* at 926.[6]

In *Beverly Hills Foodland*, this Court recognized that *Claiborne* extends First Amendment protection to consumer boycotts on public issues. *Foodland* concerned a union-organized "campaign publicly challenging [a grocery store's] policies, including its non-union status, wages paid to employees and the prices charged," as well as the store's "treatment of its black employees." 39 F.3d at 193. "Protests took the form of picketing, mass distribution of handbills and billboards calling for a consumer boycott of Foodland." *Id.*

Affirming the district court's dismissal of Foodland's libel and tortious interference claims, this Court stated that "peaceful pamphleteering is a form of communication protected by the First Amendment." *Id.* at 197. "Additionally," this Court held that "the prime directive in the Union campaign, a boycott of Foodland, is similarly constitutionally safeguarded. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (holding that a state tortious interference claim by targeted businesses

[6] By the same token, the Court held that liability could not be imposed against NAACP Field Secretary and activist Charles Evers "for his presence at NAACP meetings *or his active participation in the boycott itself*." *Id.* (emphasis added). The Court further held that Evers' speeches in support of the boycott were also protected under the First Amendment. *Id.* at 926–29.

could not be maintained against participants and organizers of a consumer boycott).” *Id.* (parallel citation omitted).

Federal district courts in Kansas and Arizona have applied *Claiborne* to block anti-boycott certification laws strikingly similar to the one at issue here. As those courts recognized, the boycotts of Israel regulated by the Act, and similar laws in other states, are “protected for the same reason as the boycotters’ conduct in *Claiborne* was protected.” *Koontz*, 283 F. Supp. 3d at 1022. Those who participate in these boycotts “have ‘banded together’ to express, collectively, their dissatisfaction with Israel and to influence governmental action.” *Id.* Anti-boycott certification laws like the one at issue here “unquestionably burden[]” this protected form of political expression, as well as “the rights of assembly and association that Americans . . . use ‘to bring about political, social, and economic change.’” *Jordahl*, 336 F. Supp. 3d at 1043 (quoting *Claiborne*, 458 U.S. at 911). “Under *Claiborne*, this conduct is deserving of First Amendment protection.” *Id.*

B. The district court erroneously held that boycotts of Israel are not entitled to any protection under the First Amendment.

Rejecting the clear language of *Claiborne*, as well as the straightforward application of that case set forth in *Beverly Hills Foodland*, *Koontz*, and *Jordahl*, the district court provided two alternative grounds for holding that boycotts of Israel are not constitutionally safeguarded: First, the court held that boycotts do not enjoy any protection under the First Amendment, because the act of boycotting is

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not inherently expressive. ADD 10–13. Second, the court held that if the First Amendment protects boycotts at all, such protection extends only to boycotts vindicating a domestic statutory or constitutional interest. ADD 14. Neither holding withstands scrutiny.

1. The First Amendment protects participation in a political boycott.

First, the district court opined that boycotts are not protected under the First Amendment, because they are neither "purely speech" nor "inherently expressive" conduct. ADD 10. To support this conclusion, the district court relied *FAIR*, despite the fact that the only other two courts to have considered this issue both found *FAIR* inapplicable. *Jordahl*, 336 F. Supp. 3d at 1042; *Koontz*, 283 F. Supp. 3d at 1023–24.

FAIR rejected a First Amendment challenge to the Solomon Amendment, which allows the Department of Defense to deny federal funds to law schools that deny military recruiters equal access to on campus recruiting. 547 U.S. at 55. The law schools argued that the Solomon Amendment unconstitutionally conditioned government funds on the forfeiture of their First Amendment rights, but the Supreme Court concluded that it was unnecessary to consider the unconstitutional conditions doctrine, "[b]ecause the First Amendment would not prevent Congress from *directly* imposing the Solomon Amendment's access requirement." *Id.* at 60 (emphasis added). In other words, the Court held that the government may

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constitutionally require all law schools, even those that do not receive federal funds, to provide equal access to military recruiters.

The Court reasoned that the government may regulate conduct without triggering heightened First Amendment scrutiny so long as the conduct itself is not inherently expressive. *Id.* at 65–66. Although the law schools sought to express "their disagreement with the military by treating military recruiters differently from other recruiters," the Court observed that "the point of requiring military interviews to be conducted on the undergraduate campus [i.e., outside the law school campus] is not 'overwhelmingly apparent,'" and would presumably go unnoticed absent some explanation from the law schools about what they were doing and why they were doing it. *Id.* at 66.

The Supreme Court found the need for such "explanatory speech" to articulate the law schools' message to be "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under *O'Brien*." *Id.* (citing *O'Brien*, 391 U.S. at 376). The Court pointed out that, if explanatory speech were sufficient to make any sort of conduct inherently expressive under *O'Brien*, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* "For instance," the Court posited, "if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, [courts] would have to apply *O'Brien* to determine whether

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the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result." *Id.*

Applying *FAIR* in this case, the district court held that political boycotts are not inherently expressive, because "[i]t is highly unlikely that, absent any explanatory speech, an external observer would ever notice that a contractor is engaging in a primary or secondary boycott of Israel." ADD 11. The court distinguished *Claiborne* on the ground that it "did not 'address purchasing decisions or other non-expressive conduct,'" but rather applied First Amendment protection only to the "meetings, speeches, and non-violent picketing" supporting the boycott. ADD 13. The court therefore concluded that refusals to deal—the defining element of any boycott—are not protected under the First Amendment. *Id.*

The district court misinterpreted both *Claiborne* and *FAIR*. As described above, *Claiborne*'s core holding is that boycotters cannot be penalized for their "voluntary" and "active" participation in a political boycott. *See* 458 U.S. at 926; *see also id.* at 915, 921. The Court explicitly held that Mississippi did not have a right "to prohibit peaceful political activity such as that found in the boycott." *Id.* at 913. And the Court further described the boycott participants' decision to "with[o]ld their patronage from the white establishment of Claiborne County" as "nonviolent, protected activity." *Id.* at 918. As this Court recognized in *Beverly Hills Foodland*, *Claiborne* established that politically-motivated consumer

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boycotts are "constitutionally safeguarded." 39 F.3d at 197. That is because such boycotts are inherently expressive. *See Claiborne*, 458 U.S. at 912–13 & n.47 (quoting *O'Brien*, 391 U.S. at 367–77).[7]

The district court's reflexive application of *FAIR* also proves too much. If the act of boycotting were unexpressive conduct not entitled to any constitutional protection, as the district court maintained, then States would have authority to outlaw participation in disfavored boycotts with impunity. *See FAIR*, 547 U.S. at 60. Absent any First Amendment scrutiny, government actors would have free rein to prohibit boycotts against their political friends and allies, whether that is Planned Parenthood or the National Rifle Association, Nike or Wal-Mart, France or the United Kingdom. Indeed, under the district court's rationale, Mississippi could have outlawed the collective refusal to deal at the heart of the *Claiborne* boycott. Such a result contradicts both common sense and *Claiborne*'s express holding that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott . . . ." 458 U.S. at 914.

[7] If *Claiborne* did not establish protection for political boycotts, the Supreme Court would have had no reason to clarify that the First Amendment does not protect boycotts organized to suppress business competition or secondary boycotts by labor unions. *See id.* at 912. The Court's careful delineation of these exceptions makes sense only against the backdrop of *Claiborne*'s general rule protecting participation in political boycotts.

Although *FAIR* established a strong presumption that conduct cannot become inherently expressive simply through the addition of explanatory speech, it did not abrogate constitutional protection for well-defined forms of collective protest, like boycotting, that are already "deeply embedded in the American political process." *Id.* at 907. To take another example, marching in a parade is simply walking down the street if one refuses to consider either the banners and slogans or the other marchers. Yet it is well-established that parades are "a form of expression, not just motion." *Hurley*, 515 U.S. at 568. "The protected expression that inheres in a parade is not limited to its banners and songs," but extends to the parade itself as a longstanding and ubiquitous form of collective expression. *Id*. at 569 (collecting cases).

FAIR plainly did not overrule *Hurley* or deprive parades of First Amendment protection. Neither did it overrule *Claiborne* or deny First Amendment protection to politically-motivated consumer boycotts, which have a long historical pedigree as a distinct form of collective protest.[8]

[8] The Court's constitutional analysis in *FAIR* was also explicitly predicated on its recognition that "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." 547 U.S. at 58 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). There is no similar authority at issue here, and therefore no cause for judicial deference.

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2. The First Amendment protects political expression directed to foreign governments.

The district court alternatively held that "[e]ven if *Claiborne* stands for the proposition that the act of refusing to deal enjoys First Amendment protection, such a right is limited in scope," and applies only to "boycotts to vindicate particular statutory or constitutional interests." ADD 14. The court accordingly concluded that the First Amendment does not apply to "political boycotts directed towards foreign governments concerning issues that do not bear on any domestic legal interest." *Id.*

The district court's reading would effectively limit *Claiborne* to its particular facts, ADD 15, leaving almost all political boycotts entirely unprotected. The consequences of this approach are hard to overstate. Boycotts of foreign countries and private businesses have played a fundamental role in American politics since the Founding. In the 1790s, American Quakers and other abolitionists boycotted sugar produced by Caribbean slave plantations.[9] In the late 1930's, Americans boycotted Japanese silk to protest Japan's invasion of China.[10] And in the latter half of the 20th Century, Americans boycotted companies that operated in

[9] Calvin Schermerhorn, *How Abolitionists Fought—and Lost—the Battle with America's Sweet Tooth*, What It Means to be American, Mar. 10, 2017, https://bit.ly/2I3CC3j.

[10] *Downtown Pickets Urge Silk Boycott; Women Wearing Cotton, Lisle & Rayon Hose Join in Commodity Exchange Plea*, N.Y. Times Oct. 28, 1937, at 9, https://nyti.ms/2YV8k7S.

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South Africa to protest apartheid.[11] In recent years, Americans have boycotted France to protest its opposition to the Iraq War,[12] companies owned by the Trump family to protest the President,[13] and Nike to protest its support for Colin Kaepernick.[14] If such boycotts are invisible to the First Amendment because they do not primarily seek to vindicate domestic legal rights, then States will have free rein to criminalize boycotts based purely on hostility to the boycotters' message or beliefs.

Nothing in either *Claiborne* or *Beverly Hills Foodland* remotely implies that the First Amendment's reach is so limited. To the contrary, *Claiborne* characterized "peaceful political activity such as that found in the boycott in [that] case" as a form "expression on public issues" and "[s]peech concerning public affairs," and reiterated the "profound national commitment to the principle that debate on public issues should be uninhibited robust, and wide-open." *Claiborne*, 458 U.S. at 913 (internal quotation marks omitted) (quoting *Garrison v. Louisiana*,

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[11] Robin Toner, *Shell Oil Boycott Urged; Pretoria Policy at Issue*, N.Y. Times, Jan. 10, 1986, at A7.

[12] Robert J. McCartney, *U.S. Boycott Being Felt, French Say*, Wash. Post, Apr. 16, 2003, https://wapo.st/2IknfCM.

[13] Rachel Abrams, *The Anti-Trump Activist Taking on Retailers*, N.Y. Times, Feb. 26, 2017, at BU1.

[14] Jacey Fortin & Matthew Haag, *After Colin Kaepernick's Nike Deal, Some Salute Swoosh, Others Boycott It*, N.Y. Times, Sept. 5, 2018, at B10.

379 U.S. 64, 74–75 (1964); *New York Times*, 376 U.S. at 270). Because political boycotts are a form of expression or expressive conduct about public issues, their "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times*, 376 U.S. at 271 (citation omitted).

The First Amendment does not distinguish between expression seeking to vindicate "domestic legal interests" and other forms of political expression. In *Boos v. Barry*, for instance, the Supreme Court struck down a municipal ordinance prohibiting protestors from picketing with signs "tending to bring a foreign government into public odium or public disrepute" within 500 feet of any foreign government building. 485 U.S. at 316. The plaintiffs in the case were protestors who wanted to stand outside the Soviet Union's embassy holding signs that read "RELEASE SAKHAROV" and "SOLIDARITY," and outside the Nicaraguan embassy holding signs that read "STOP THE KILLING." *Id.* at 315.

The Court held that the picketing prohibition "operate[d] at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech." *Id.* at 318. Citing its decision in *Claiborne* among other precedents, the Court stated that it had "consistently commented on the central importance of protecting speech on public issues." *Id.* (citations omitted). Because the ordinance

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was "a *content-based* restriction on *political speech*," the Court held that it "must be subjected to the most exacting scrutiny." *Id.* at 321 (emphasis in original).

The same principle applies here. Just as pickets protesting foreign governments' policies are entitled to the same constitutional protection as pickets protesting domestic government policies, boycotts protesting foreign governments' policies are entitled to the same constitutional protection as boycotts protesting domestic issues.

3. The other cases cited by the district court are inapposite.

The district court cited two other Supreme Court decisions to shore up its conclusion that *Claiborne* is essentially limited to its facts. First, the court relied on *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). ADD 14. But far from supporting the district court's reasoning, *Superior Court Trial Lawyers* undermines it. There, a group of defense lawyers engaged in a concerted refusal to accept Criminal Justice Act assignments until they received increased compensation. 493 U.S. at 414–18. After the boycott succeeded, the Federal Trade Commission brought an enforcement action, determined that the boycott was an "unfair method of competition" in violation of the Federal Trade Commission Act, and entered an order restraining the defense lawyer association and its officers from initiating similar boycotts in the future. *Id.* at 418–20.

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The Supreme Court held that the defense lawyers' boycott was not protected under *Claiborne*. The Court stated that "[i]t is, of course, clear that the association's efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation—like similar activities in *Claiborne Hardware*—were activities that were fully protected by the First Amendment." *Id.* at 426. But "nothing in the FTC's order would curtail such activities." *Id.* Rather, the FTC's order prohibited "a concerted refusal by CJA lawyers to accept any further assignments until they receive an increase in their compensation." *Id.*

The question before the Supreme Court was whether this concerted refusal to deal was protected under the First Amendment. The defense lawyers argued that their boycott was protected for the same reasons as the *Claiborne Hardware* boycott, but the Supreme Court explained that the *Claiborne Hardware* boycott "differ[ed] in a decisive respect. Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves." *Id.* By contrast, the defense lawyers' "immediate objective was to increase the price that they would be paid for their services." *Id.* at 427. The Court concluded that "[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself." *Id.* at 427 & n.11 (citing *Claiborne*, 458 U.S. at 914–15). If *Claiborne* did not protect the act of boycotting—i.e., a concerted refusal to

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deal—there would have been no need to distinguish the *Claiborne* boycott from the boycott at issue in *Superior Court Trial Lawyers*.

Further, *Superior Court Trial Lawyers* reaffirmed *Claiborne*'s fundamental distinction between "economic boycotts" subject to reasonable government regulation—including unfair trade practices, boycotts to suppress competition, and secondary boycotts by labor unions—and "'peaceful, political activity such as that found in the [Mississippi] boycott,'" which is "entitled to constitutional protection." *Id.* at 428 & n.12 (alteration in original) (quoting *Claiborne*, 458 U.S. at 912). This distinction does not turn on whether the boycott participants are seeking to vindicate particular legal rights, but rather whether they are advancing their own economic self-interest as opposed to expressing a position on a matter of public concern.

Second, the district court relied on the Supreme Court's decision in *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982). In that case, a labor union ordered its members to refuse to handle any cargo arriving from or destined for the Soviet Union, to protest the Soviet Union's invasion of Afghanistan. *Id.* at 214–15. This union action resulted in the "obstruct[ion of] commerce up and down the east and gulf coasts." *Id.* at 219. The Court held that a labor union's refusal to serve ships carrying Russian cargo constituted an illegal secondary boycott under the National Labor Relations Act. *Id.* at 222–26.

In a terse paragraph at the end of the decision, the Court determined that the NLRA's prohibition on secondary boycotts did "not infringe upon the First Amendment rights of the [union] and its members." *Id.* at 226. After noting that the NLRA constitutionally prohibits secondary picketing by labor unions, the Court held that the same principle applies even more forcefully to the NLRA's prohibition against coercive secondary boycotts by labor unions. *Id.* & n.26 (citing *O'Brien*, 391 U.S. at 376). The Court explained that "the labor laws reflect a careful balancing of interests," *id*., such as preventing "heavy burden[s] on neutral employers" and the "widening of industrial strife," *id.* at 223.

The Court echoed this sentiment just a few months later, in *Claiborne*. There, it held that although the government generally cannot prohibit political boycotts, economic regulations that incidentally restrict political activity "may be justified in certain narrowly defined circumstances." 458 U.S. at 912. Listing these circumstances, the Court stated that "[s]econdary boycotts and picketing *by labor unions* may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" *Id*. at 912 (emphasis added) (citing, *inter alia*, *Longshoremen*).[15]

[15] Notably, *Claiborne* did not include "boycotts of foreign countries" or "boycotts that do not concern domestic legal rights"—the types of boycotts deemed entirely

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If *Longshoremen* controlled outside the labor context, that would suggest there is no First Amendment right to picket, since *Longshoremen* recognized that the NLRA also validly proscribes secondary picketing by labor unions. *See* 456 U.S. at 226. That result is plainly untenable. *See, e.g.*, *Boos*, 485 U.S. at 318; *Snyder v. Phelps*, 562 U.S. 443 (2011). But despite acknowledging that *Longshoremen* "was decided against the broader context of federal labor law," the district court opined that the decision "held that there is no unqualified right to boycott or a constitutional right to refuse to deal, or perhaps no First Amendment interest in boycotting at all." ADD 15.

The district court reasoned that *Claiborne* "created a narrow exception to [the *Longshoremen*] rule based on particular facts that are not present here." *Id.* But if *Claiborne* genuinely represented an exception to *Longshoremen*'s rule, and not the other way around, one would have expected the Court to address *Longshoremen* at length in *Claiborne*. Instead, the Court merely cited *Longshoremen* among a list of "narrowly defined" instances in which governmental regulation of a boycott may be justified. Similarly, if *Longshoremen* established a general rule that boycotts are not protected, one would have expected the Supreme Court to address that rule in *Superior Court Trial Layers*. Instead, the

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unprotected by the district court—among the list of "narrowly defined circumstances" under which the government may regulate a boycott. *See id.*

Court discussed *Claiborne*. There is simply no basis for concluding that *Longshoremen* applies outside the context of secondary boycotts by labor unions.

Thus, the district court erred in holding that the First Amendment does not apply to the boycotts of Israel regulated by the Act.

C. The Act regulates political boycotts based on their subject matter and viewpoint.

Because the district court concluded that political boycotts do not receive any protection under the First Amendment, it did not attempt to analyze whether the Act suppresses protected expression based on its subject matter or viewpoint. "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted). Content- and viewpoint-based regulations are presumptively invalid and must satisfy the most exacting scrutiny. *See e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Boos*, 485 U.S. at 321.

The Act is plainly content and viewpoint based. It regulates boycotts based on their subject matter (Israel) and viewpoint (protest of Israel). It penalizes boycotts against Israel or businesses operating in Israel or Israeli-controlled territories, but spares boycotts targeting any other country or entity, including "reverse boycotts" targeting companies that boycott Israel or that otherwise refuse

to do business in Israel or Israeli-controlled territories.[16] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (holding that an ordinance restricting "non-labor" picketing was content based).

That is precisely what the Act does. Indeed, any application of judicial scrutiny would quickly reveal that the Act is not supported by *any* legitimate governmental interests unrelated to the suppression of disfavored expression. But neither Defendants nor the district court made any significant attempt to identify a legitimate governmental interest that could plausibly sustain the Act. This abdication of judicial review highlights the dangers of upholding the district court's approach. If boycotts are entirely unprotected, then federal, state, and local government officials will have a free hand to outlaw participation in disfavored boycotts, based solely on political and ideological hostility, without judicial oversight. Such a permissive rule would allow government officials to distort public debate according to their interests, whims, and prejudices.

[16] *See, e.g.*, Roz Rothstein & Roberta Seid, *Boycott the Boycotters*, Jewish Journal, Sept. 15, 2010, https://jewishjournal.com/opinion/82996/.

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II. The Act imposes an unconstitutional condition on government contracts.

The "modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674–75 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The Act violates the unconstitutional conditions doctrine in two ways: (1) it compels expression by requiring government contractors to disavow participation in boycotts of Israel; (2) it restricts expression and association by prohibiting contractors from participating in such boycotts. These First Amendment harms are analyzed separately. *See Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018). Whichever analysis this Court applies, the Act cannot survive because Defendants have failed to identify a plausible justification for the Act unrelated to the suppression of expression.

A. The Act unconstitutionally compels contractors to disavow current and future participation in boycotts of Israel.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Thus, the Supreme Court has "held time and again that freedom of speech

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'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2463 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

During the McCarthy era, government entities throughout the United States required public employees to certify that they were not members of the Communist party or engaged in "subversive" political activities. In decisions striking down several of these measures, the Supreme Court established that public "[e]mployment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection." *Cole*, 405 U.S. at 680. "Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities." *Id.* (citations omitted). The same rules apply to government contractors. *Umbehr*, 518 U.S. at 677 (1996). The Act violates this basic command. It requires contractors to certify that they are not participating in boycotts of Israel, even though *Claiborne* and *Beverly Hills Foodland* establish that such boycotts are constitutionally protected.

The Act not only punishes government contractors who participate in boycotts of Israel, it affirmatively requires contractors to declare their nonparticipation in such boycotts. Even contractors who do not participate in boycotts of Israel, such as the Arkansas Times, stand to lose their government contracts if they refuse to toe the State's line. Requiring the Arkansas Times to

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declare its non-participation in boycotts of Israel is "akin to forcing plaintiff to accommodate [Arkansas'] message of support for Israel." *Koontz*, 283 F. Supp. 3d at 1024. This is impermissible. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Hurley*, 515 U.S. at 579.

Indeed, even if boycotts of Israel were not entitled to constitutional protection, the Act's certification requirement would still be unconstitutional. The "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 573. "Just as compelled silence will extinguish the individual's right of expression, compelled speech will vitiate the individual's decision either to express a perspective by means of silence, or to remain humbly absent from the arena." *Burns v. Martuscello*, 890 F.3d 77, 84 (2d Cir. 2018). To be sure, "[t]here is no right to refrain from speaking when 'essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court.'" *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (citation omitted). But the government must be able to identify at least some reasonable justification for the compelled disclosure of information. *See Robinson v. Reed*, 566 F.2d 911, 913 (5th Cir. 1978) (per curiam) (observing that compelled

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disclosure about a plaintiff's personal life unrelated to her public employment would not withstand constitutional scrutiny). As discussed below, Defendants have failed to articulate any such justification here.

B. The Act unconstitutionally restricts contractors' expression as citizens on matters of public concern.

Restrictions on speech by public employees and government contractors are analyzed pursuant to the framework established in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and its progeny. *See Umbehr*, 518 U.S. at 677 (holding that the *Pickering* framework also applies to government contractors). Under *Pickering*, government regulation of public employees is proper only if "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568.

Where, as here, the government proactively deters a "broad category of expression," the First Amendment harms are even graver. *NTEU*, 513 U.S. at 467. In such contexts, rather than engage in "a post hoc analysis of one [contractor's] speech and its impact on that [contractor's] public responsibilities," the Court weighs the impact of the ban on "the interests of both potential audiences and a vast group of present and future [contractors] in a broad range of present and future expression" against the restricted expression's "necessary impact on the actual

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operation of the Government." *Id.* at 467–68 (citations and internal quotation marks omitted).

The government carries a heavier burden in this context because, "[u]nlike an adverse action taken in response to actual speech," a prospective restriction "chills potential speech before it happens." *Id.* at 468. To satisfy the First Amendment in this context, the government "must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Id at 475 (omission in original) (citation omitted). The test applied therefore "more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Janus*, 138 S. Ct. at 2472. Heightened scrutiny is especially appropriate where, as here, the government regulation is content and viewpoint based. *See Sanjour v. EPA*, 56 F.3d 85, 96–97 (D.C. Cir. 1995) (en banc).

The first prong of the *Pickering* analysis involves two inquiries: (1) whether the challenged restriction applies to an employee's or contractor's expression "as a citizen" (i.e., outside the scope of their official job duties); and (2) whether the challenged restriction applies to speech on matters of public concern. *Lindsey v. City of Orrick*, 491 F.3d 892, 897 (8th Cir. 2007). In this case, the Act extends well beyond a contractor's official government duties. It applies to any company that

has a contract to provide "services, supplies, information technology or construction" to a public entity in Arkansas. Ark. Code Ann. § 25-1-503(a)(1). And it requires all such contractors to certify that they will not participate in boycotts of Israel, regardless of whether the boycott has anything to do with the contractor's government work. *Id.*

"The scope of 'official duties' that are encompassed by the number and diversity of companies contracting with the State vary dramatically and the plain language of the Certification Requirement does not limit its scope to prohibit actions taken in furtherance of those duties." *Jordahl*, 336 F. Supp. 3d at 1047. Because the Act expressly prohibits participation in boycotts of Israel, it "clearly aims to suppress expressive conduct that may be 'directed to community groups, to city and state legislators, to state and federal officials, and even to family members and friends,'" none of whom are likely to be involved in the contractor's work for the government. *Id.* (quoting *Moonin v. Tice*, 868 F.3d 853, 863 (9th Cir. 2017)).

The Act also "unquestionably touches on matters of public concern." *Id.* "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (internal quotation marks omitted); *see, e.g.*, *Hemminghaus v. Missouri*, 756 F.3d

1100, 1111–12 (8th Cir. 2014) (blog posts about a nanny's child abuse constituted speech on a matter of public concern). Applying this broad standard, the boycotts restricted by the Act obviously implicate a matter of public concern, since the Israel-Palestine conflict is a "matter[] of much political and public debate." *Jordahl*, 336 F. Supp. 3d at 1048.

Additionally, "unlike an adverse action" taken in response to speech that has already occurred, a prospective restraint necessarily chills a wide variety of expression "before it happens." *NTEU*, 513 U.S. at 468. Although the district court concluded that the Act applies only to the act of refusing to purchase a boycotted product—and therefore does not prohibit picketing in support of a boycott, calling for a boycott, or associating with organizations that actively promote BDS—contractors are unlikely to draw such a fine distinction. The boycott certification form states that "the 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," but nowhere defines what constitutes a "boycott of Israel." ADD 21. *See Moonin*, 868 F.3d at 861 n.5 (the "focus in the prospective restraint context is on the chilling effect of the employer's policy on employee speech," which is "determined by the language of the policy—what an employee reading the policy would think the policy requires.").

If contractors were to take it upon themselves to read the Act's definitional section, they would find that the Act prohibits "engaging in refusals to deal, terminating business activities, *or other actions* that are intended to limit commercial relations with Israel." Ark. Code Ann. § 25-1-502(1)(A)(i). This broadly phrased definition does little to mitigate the chilling effect of the certification. The potential reach of the catchall phrase "other actions" is wide, because boycott actions take "many forms," *Claiborne*, 458 U.S. at 907. In *Claiborne*, the Mississippi courts imposed liability for actions such as "management of the boycott," speech made in support of the boycott, and association with boycott organizers, *id.* at 897 (internal quotation marks omitted). Here, the Act purports to "examin[e] a company's *promotion or compliance* with unsanctioned boycotts . . . against Israel[.]" Ark. Code Ann. § 25-1-501(6) (emphasis added). "Promotion" of an "unsanctioned boycott" would certainly seem to include activities like calling for a boycott or picketing in support of a boycott, both of which are undoubtedly actions "intended to limit economic relations" with boycotted entities.

The district court was persuaded by Defendants' argument that the phrase "other actions" applies only to economic conduct, not speech or association promoting a boycott. But the federal district court's construction of state law is neither authoritative, *Kotval v. Gridley*, 698 F.2d 344, 348 (8th Cir. 1983), nor

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persuasive in light of the Act's explicit legislative findings. In any event, contractors who sign an anti-boycott certification will steer far clear of any such expression because of "[t]he susceptibility of the statutory language to require forswearing of an undefined variety of 'guiltless knowing behavior.'" *Baggett v. Bullitt*, 377 U.S. 360, 368 (1964).

This pervasive chilling effect is the unique vice of laws compelling disavowal of activities touching on areas of First Amendment concern. "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Id.* at 372; *see also Cole*, 405 U.S. at 681 ("Concern for vagueness in the oath cases has been especially great because uncertainty as to an oath's meaning may deter individuals from engaging in constitutionally protected activity conceivably within the scope of the oath."). Thus, even if this Court agrees that the Act does not prohibit speech or association promoting a boycott, the Act's inevitable chilling effect on such freedoms necessarily weighs in the *Pickering* balance against Defendants. *See Harman v. City of New York*, 140 F.3d 111, 120 (2d Cir. 1998) (taking into account, as part of the *Pickering/NTEU* analysis, the fact that preclearance requirement for public employees wishing to speak to the media "may have a

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broad inhibiting effect on all employees, even those who might ultimately receive permission to speak").

C. The asserted governmental interests do not justify the Act.

"[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it . . . must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *NTEU*, 513 U.S. at 475 (citation and internal quotation marks omitted). In *NTEU*, the Supreme Court invalidated a ban on federal employees receiving honoraria for public speeches, despite acknowledging the government's "undeniably powerful" interest in preventing the appearance corruption, because "the Government cite[d] no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16." *Id.* at 471–72.

NTEU also concluded that the government's asserted interest in preventing the appearance of corruption was fatally undermined by exemptions in the text of the statute and its implementing regulations that effectively allowed honoraria for unexpressive activities. The Court held that the statute's focus on "expressive activity for special regulation heightens the government's burden of justification," and determined that the honoraria ban's various exemptions "diminish[ed] the credibility of the Government's rationale." *Id.* at 475 (citing *City of Ladue*, 512

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U.S. at 52). Taken together, "[t]hese anomalies in the text of the statute and [its implementing] regulations" reinforced the Court's conclusion that whatever "speculative benefits" the honoraria ban provided were "not sufficient to justify [its] crudely crafted burden on [employees'] freedom to engage in expressive activities." *Id.* at 477.

The same problem presents itself here. Neither the district court nor Defendants made any serious attempt to identify a legitimate government interest that could sustain the Act against heightened scrutiny under *NTEU*, or even the more lenient *O'Brien* standard.[17] The most Defendants could muster, in a reply brief supporting their motion to dismiss, was a single sentence stating that the Act "furthers Arkansas's interests in trade policy and in avoiding dealing with contractors who engage in unsound business practices." DE 22-1 at 8. Defendants did not even attempt to explain, let alone substantiate, their contention that requiring all contractors to disavow participation in boycotts of Israel meaningfully furthers either interest.

[17] In *O'Brien*, the Supreme Court held that a government regulation of inherently expressive conduct satisfies First Amendment scrutiny "if it furthers an important or substantial governmental interest" that is "unrelated to the suppression of free expression," and "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. *O'Brien* scrutiny is ultimately inappropriate in this case because the Act is "*directed* at the communicative nature of conduct," and therefore must "be justified by the substantial showing of need that the First Amendment requires" for laws directed at speech itself. *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (emphasis in original) (citation and internal quotation marks omitted).

There is no evidence in the record that boycotts of Israel have a significant effect on Arkansas' trade or economic health. Moreover, although trade relations with foreign countries involve a host of economic and financial arrangements, the Act leaves almost all of these arrangements entirely unregulated. Instead, it singles out for special disfavor boycott activity aimed at one country, Israel, by government contractors—no matter how small the economic impact of such activity might be. Tellingly, the Act does not address boycotts targeting Arkansas' more significant trading partners, such as Canada, Mexico, France, China, and the United Kingdom. Office of the U.S. Trade Representative, *Arkansas Trade Facts*, https://ustr.gov/map/state-benefits/ar (last visited Apr. 5, 2019). The Act's exclusive focus on boycotts of Israel undercuts any suggestion that it is seriously meant to promote trade.

The same problem bedevils Defendants' assertion that the Act is meant to avoid "dealing with contractors who engage in unsound business practices." There is no evidence in the record that contractors who participate in boycotts of Israel are less reliable or more likely to engage in unsound business practices affecting their government work. Nor have Defendants explained why other indicators of unsound business practices are entirely unregulated. At the very least, one would expect that contractors who participate in foreign and domestic boycotts—especially boycotts involving Arkansas' largest trade partners—would pose a

similar risk of unsound business practice. But the Act does not penalize such boycotts, or any other form of unsound business practice. "Such '[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011)).

The Act's underinclusiveness is exacerbated by its waiver provision, which authorizes government entities to disregard the Act's certification requirement if the contractor "offers 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)(1). Whatever interest Defendants might assert to justify requiring all manner of government contractors to disavow participation in boycotts of Israel, it cannot be very significant if it can be overcome by a twenty percent discount. *See City of Ladue*, 512 U.S. at 52 ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . . may diminish the credibility of the government's rationale for restricting speech in the first place."); *accord NTEU*, 513 U.S. at 476. The Act's waiver provision thus "undermines any rationale offered" by Defendants to sustain the Act. *Koontz*, 283 F. Supp. 3d at 1023.

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Finally, the Act is overinclusive and substantially overbroad. *See Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. Unit A 1981). Arkansas has plenty of legitimate tools at its disposal to promote trade and ensure the commercial soundness of government contractors, none of which require contractors to certify that they are not participating in boycotts of Israel. For example, the State could invest directly in trade relationships, audit contractors, and even adopt narrowly tailored, content-neutral measures restricting unfair business practices (including boycotts designed to suppress competition). *See Jordahl*, 336 F. Supp. 3d at 1049 (citing *Koontz*, 283 F. Supp. 3d at 1023); *see also Claiborne*, 458 U.S. at 912 (holding that "[t]he right of business entities to 'associate' to suppress competition may be curtailed"). The ready availability of alternative means to advance the government's asserted interests without infringing contractors' First Amendment rights rebuts Defendants' halfhearted attempt to justify the Act.[18]

III. A facial preliminary injunction is warranted.

The other *Dataphase* factors also support the Arkansas Times' request for a preliminary injunction. First, the Arkansas Times is suffering *per se* irreparable

[18] Notably, Defendants have not argued that the Act furthers the governmental interest in preventing discrimination. Presumably, that is because the Act cannot plausibly be characterized as an anti-discrimination measure. Anti-discrimination measures typically prevent discrimination against individuals based on protected characteristics, such as race, ethnicity, and national origin. The Act, on the other hand, prohibits boycotts of any company that operates in Israel or Israeli-controlled territories, regardless of that company's nationality.

harm because it is being forced to choose between its First Amendment rights and access to essential advertising revenue. Second, the balance of equities and the public interest support the enforcement of First Amendment rights. Finally, because the Act is facially unconstitutional, Defendants should be enjoined from enforcing it in all of their government contracts.

A. The Arkansas Times is suffering irreparable harm.

The Arkansas Times is currently suffering irreparable harm as a result of the Act's unconstitutional certification requirement, and will continue to do so until the Act is enjoined. "It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Phelps-Roper v. Nixon*, 509 F.3d 480, 484–85 (8th Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, if a plaintiff "can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation." *Id.* at 485 (citations omitted).

In this case, in particular, the Arkansas Times is experiencing irreparable harm because it is being forced to choose between its conscientious refusal to sign the anti-boycott certification and its ability to enter into government advertising contracts worth tens of thousands of dollars a year. *See Koontz*, 283 F. Supp. 3d at 1026 ("Plaintiff's harm stems not from her decision to refuse to sign the

certification, but rather from the plainly unconstitutional choice the Kansas Law forces plaintiff to make[.]"). Because the Arkansas Times is a small business and a free publication, this significant loss in advertising revenue poses a major threat to its survival. If the Arkansas Times is compelled, as an act of self-preservation, to sign the anti-boycott certification, its First Amendment rights will be irrevocably infringed. *See, e.g.*, *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71–72 (2d Cir. 1996) (holding that compelled speech amounts to irreparable harm).

Even if the Arkansas Times could ultimately recover damages suffered as a result of the unconstitutional choice being imposed, the ongoing infringement of its First Amendment rights would still constitute irreparable harm. *See Elrod*, 427 U.S. at 373. But in this case, the Arkansas Times cannot recover damages at law, because Defendants are subject to sovereign immunity in both federal and state court. *See Bunch v. Univ. of Arkansas Bd. of Trustees*, 863 F.3d 1062, 1067–68 (8th Cir. 2017); *Bd. of Trustees of Univ. of Arkansas v. Andrews*, 535 S.W.3d 616, 619 (Ark. 2018). That immunity cannot be waived, even by the legislature. *Andrews*, 535 S.W.3d at 622. The application of sovereign immunity to bar the Arkansas Times' damages claim also constitutes irreparable harm as a matter of law. *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994); *Chu Drua Cha v. Noot*, 696 F.2d 594, 600 (8th Cir. 1982).

B. The balance of harms and public interest support injunctive relief.

Like the irreparable harm analysis, "the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." *Phelps-Roper*, 509 F.3d at 485 (citations omitted). "The balance of equities, too, generally favors the constitutionally-protected freedom of expression. In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Id.* (citations omitted).

In this case, continued enforcement of the Act will infringe the Arkansas Times' First Amendment rights and cause it to suffer irreparable financial harm. On the other hand, Defendants "will experience little to no hardship by enjoining the enforcement of a law that does nothing to further any economic state interest and infringes on First Amendment protections." *Jordahl*, 336 F. Supp. 3d at 1050. Similarly, the grant of a preliminary injunction would serve the public interest by upholding the First Amendment and preventing the enforcement of unconstitutional laws.

C. Because the Act is facially unconstitutional, Defendants should be enjoined from enforcing it across the board.

Because the Act's certification requirement facially violates the First Amendment, the appropriate remedy is an injunction preventing Defendants from enforcing the requirement with respect to all their government contracts. A court may "reach beyond the particular circumstances of [the] plaintiffs" in granting a preliminary injunction, if the plaintiffs satisfy the standard for a facial challenge. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (granting facial injunctive relief partly because "the ongoing enforcement of the potentially unconstitutional regulations . . . would infringe not only the free expression interests of [plaintiffs], but also the interests of other people subjected to the same restrictions" (citation and internal quotation marks omitted)).

In this case, the Act is facially unconstitutional for several reasons. First, it unconstitutionally compels speech. Second, it imposes content- and viewpoint-based restrictions on protected expression. And finally, it imposes a substantially overbroad restriction on protected expression by government contractors. Facial relief is therefore warranted.

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CONCLUSION

For the foregoing reasons, the district court's order dismissing the case and denying the Arkansas Times' motion for preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I, Brian Hauss, hereby certify that on April 8, 2019, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Brian Hauss
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