

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
Case No. 4:18-cv-914-BSM

BRIEF OF *AMICI CURIAE*, AMERICAN FRIENDS SERVICE
COMMITTEE, ISRAEL PALESTINE MISSION NETWORK OF THE
PRESBYTERIAN CHURCH (USA), A JEWISH VOICE FOR PEACE,
INC., US CAMPAIGN FOR PALESTINIAN RIGHTS, US PALESTINIAN
COMMUNITY NETWORK, US CAMPAIGN FOR THE ACADEMIC
AND CULTURAL BOYCOTT OF ISRAEL AND FRIENDS OF SABEEL
NORTH AMERICA, IN SUPPORT OF PLAINTIFF-APPELLANT AND
REVERSAL

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CORPORATE DISCLOSURE STATEMENT

A Jewish Voice for Peace, Inc. has no parent corporations. It has no stock, so therefore no publicly held company owns 10% or more of its stock. The other *amici* joining in this brief are not corporations.

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INTEREST OF AMICI CURIAE¹

Amici are the American Friends Service Committee, the Israel Palestine Mission Network of the Presbyterian Church (USA), A Jewish Voice for Peace, Inc., the US Campaign for Palestinian Human Rights, the U.S. Palestinian Community Network, Friends of Sabeel, and the United States Campaign for the Academic and Cultural Boycott of Israel. Each of the *amici* is a U.S.-based peace, social justice, and/or religious non-governmental organizations. Each is committed to justice, equality and human rights of all people, including Palestinians and Israelis. The *Amici* support the boycott of Israel for the purpose of pressuring Israel to respect the human rights of the Palestinian people and to focus the attention of the American public on the military aid that the United States provides to Israel, which enables and facilitates the continuing occupation of Palestinian lands.

The *Amici* collectively have thousands of members and supporters, in Arkansas and throughout the United States, who participate in the boycott of Israel and who are affiliated with companies² that would be directly affected by the enforcement of A.C.A. § 25-1-501 et seq., ("Act 710") the statute at

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one, except counsel for *Amici*, has authored this brief in whole or in part or contributed money toward the preparation of this brief. All parties have consented to the filing of this brief.

² Under Act 710, "Company" includes sole proprietorships. A.C.A. §25-1-502(2).

issue in this case. They have organized or supported scores of different boycott campaigns for Palestinian human rights.

Each of the *Amici* came to support the boycott movement on the basis of its own political, religious and moral principles, in order to challenge and express disapproval of the Israeli government's discriminatory policies, which are enabled and supported by \$38 billion in U.S. military aid each year. All of the *Amici* seek to communicate to the Court that support for the boycott movement is a measure to combat the systematic discriminatory practices of the Israeli government that deny Palestinians justice and equality under the law. Accordingly, the proposed *Amici* have “. . . a unique perspective [and] specific information that can assist the Court beyond what the parties can provide.” Voices for Choices v. Ill. Bell Tel. Co., 339 F. 3d 542, 545 (7th Cir. 2003)(Posner, J., in chambers). The proposed *Amici* seek to appear in support of Plaintiff-Appellant Arkansas Times L.P., and in support of reversal of the order of the District Court made on January 23, 2019.

INTRODUCTION

By order dated January 23, 2019, the District Court denied the motion of plaintiff-appellant Arkansas Times, L.P. for a preliminary injunction against the enforcement of Act 710 and dismissed the action for failure to state a claim. The District Court recognized that "[c]ertification requirements for obtaining government benefits including employment or contracts . . . may . . . violate the constitution if they require an applicant to endorse or espouse a particular message." The District Court held, however, that political boycotts are not protected by the First Amendment to the United States Constitution. In particular, the District Court concluded that even if there is constitutional protection for boycotts, it "does not include political boycotts directed toward foreign governments concerning issues that do not bear on any domestic legal interest." [Add citation]

Appellant has argued persuasively that the Constitutional protection announced by the Supreme Court in N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982) is not so limited. But even if it were, the issues around Israel and Palestine bear directly on domestic legal interests in the United States. Israel is the largest cumulative recipient of United States foreign assistance since World War II. As of April 2018, the United States had

provided Israel \$134.7 billion (non-inflation-adjusted) in military assistance. Under the terms of a Memorandum of Understanding covering fiscal years 2019-2028, the United States has pledged to provide \$3.8 billion in military aid annually.³

American aid to Israel goes way beyond protecting Israel's security needs within its internationally recognized borders. U.S. assistance include support for policies in militarily occupied territories that violate well-established legal and ethical standards of international behavior. The legitimacy of the ongoing Israeli government occupation of Palestinian land and the right of Palestinian self-determination are among the world's most pressing and contested issues. In recent years an increasing number of individuals and organizations inside the United States have engaged in various forms of expressive conduct to register objection to Israeli State practices and to call attention to them as an issue of central domestic concern. The policies of the United States and the military aid provided by the United States enable the continuance of these practices; raising awareness of this connection promotes the robust public debate that the First Amendment is intended to foster.

³ United States foreign aid to Israel, Congressional Research Service, April 10, 2018, <https://fas.org/sgp/crs/mideast/RL33222.pdf>.

For centuries, boycotts have been effective mechanisms for political protest; the Boston Tea Party, the Montgomery Bus Boycott, and the movement to divest from South African businesses, for example, all sought and contributed to desired social change. Boycott and divestment campaigns for Palestinian human rights are no different. In aiming to change the state practices of Israel, boycott campaigns engage in an activity that lies at the heart of the First Amendment in a democracy—people who share common views banding together in expressive activity to achieve a common end.

ARGUMENT

The Identity of the Proposed *Amici*

The breadth of support for the boycott movement can be seen from the identity of the *Amici*:

The American Friends Service Committee (AFSC) is a non-profit Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. Through offices in sixteen countries around the world and in 37 cities around the United States, AFSC implements programs to realize peace with justice. Founded in 1917, AFSC has worked in Israel, the West Bank, and Gaza since 1949 and currently maintains offices in Jerusalem and Gaza.

Quakers and AFSC have a long history of engagement in economic activism including support for boycotts, divestment and sanctions. Quakers pioneered the use of boycotts when they helped lead the “Free Produce Movement”, which boycotted goods produced using slave labor during the 1800s. In more recent history, AFSC has supported and led a variety of boycott and divestment campaigns linked to civil rights, anti-apartheid, farm worker, immigration, and prison rights struggles.

AFSC sees these actions as appeals to conscience, actions that seek to raise awareness in those engaged or complicit in harmful practices of the impact of their actions. Economic activism keeps people accountable to their values and when rightly ordered serves to affirm our common humanity while effectively pushing change forward. AFSC’s work in Israel and the Occupied Palestinian Territory is also complemented by advocacy work conducted in the U.S., which aims to change U.S policy and impact U.S. public opinion as part of an effort to realize a just and lasting peace in Israel and Palestine. This advocacy work includes support for various boycott and divestment campaigns organized in response to the call made by Palestinian civil society in 2005 for boycott, divestment, and sanctions (BDS) to pressure Israel to comply with international law and respect Palestinian rights. AFSC supports economic action to target companies or institutions

that are complicit in human rights violations, violations of international law, or that otherwise support Israel's military occupation.

The Israel Palestine Mission Network of the Presbyterian Church (USA) (IPMN) is an ardent supporter of the BDS Movement (Boycott, Divestment, Sanctions) in order to end Israel's violations of Palestinian human rights. The Presbyterian Church has a history of economic actions as public witness, dating back to the 1960s with boycotts of corporations profiting from injustice, as well as economic actions aimed at dismantling the apartheid regime in South Africa. In the case of Palestine, IPMN has been called by churches in the cradle of our faith to stand in solidarity with the people of Palestine by supporting them through nonviolent economic actions. BDS is nonviolent action that moves the church toward not profiting from Israeli human rights violations and connects its theology with the stewardship of its assets.

Jewish Voice for Peace (JVP) is a national grassroots organization inspired by Jewish tradition to work for the equality and freedom of all people in Israel/Palestine. JVP currently has over 16,000 dues-paying members, over 250,000 supporters, and over 70 chapters, in Arizona and around the country, making it one of the largest and fastest growing Jewish organizations in the country. Jewish Voice for Peace endorsed the call for

Boycott, Divestment and Sanctions (BDS) in 2015. The BDS movement is the most promising non-violent tactic to express international solidarity with Palestinian people. As a Jewish organization, JVP is especially sensitive to concerns about anti-Semitism, but in years of working with the Boycott National Committee (BNC), which directs the BDS movement, JVP has seen a commitment to fighting bigotry in all its forms, including anti-Semitism. BDS is an educational tool that enables people to understand conditions on the ground in Israel and Palestine and the role played by United States military aid in perpetuating those conditions.

The US Campaign for Palestinian Rights (USCPR) is a coalition of more than 300 organizations nationwide, working together for freedom, justice, and equality for the Palestinian people. USCPR opposes all forms of racism and oppression, including anti-Semitism. USCPR began its first boycott for Palestinian rights in 2002 confronting Caterpillar Incorporated for selling the armored D9 bulldozers that the Israeli government has used in the illegal demolition of Palestinian families' homes.

Over the years, USCPR has helped lead boycotts against SodaStream, G4S, Veolia, Airbnb, and Ahava, all of which have ended or moved toward ending their harmful practices against Palestinians. USCPR is inspired by

the role of boycotts in the Civil Rights Movement and the anti-Apartheid movement in nonviolently achieving positive change.

USCPR engages in the boycott for Palestinian rights for ethical and strategic reasons. Ethically, it is the responsibility of all people of conscience not to actively participate in the oppression of another people, economically or otherwise. Strategically, the boycott movement is the single most effective tactic to advocate for Palestinian rights in the United States. The boycott educates people on the connections between their actions and the lives of others, and empowers people to take nonviolent action in line with their values. The power of those collective actions is to take the profit out of Israel's discriminatory practices, incentivizing a different, more just way forward.

The United States Campaign for the Academic and Cultural Boycott of Israel (USACBI) was formed in 2009 in response to the call by Palestinian civil society for boycott, divestment and sanctions against Israel. USACBI is an independent, volunteer non-profit organization comprised primarily of academics but also cultural workers. USACBI supports the Palestinian BDS movement which seeks to uphold international human rights, and focuses its work primarily on academic boycott campaigns to end cooperation with Israeli universities, which collaborate with the Israeli state

in enacting policies that repress and subjugate Palestinians. Israeli universities have been complicit in theft of Palestinian land; they generate research, especially military research, used against Palestinians living under occupation; and they engage in systemic discrimination by Israeli universities against Palestinians in Israel.

USACBI also supports the academic and cultural boycott of Israel because Palestinian faculty and students do not have academic or political freedom due to Israeli restrictions on their research, mobility, work and study, and because Israel uses cultural programming to whitewash its racist policies and violations of international law. To date, close to 2000 individuals and more than a dozen national academic organizations have endorsed USACBI's call for the academic and cultural boycott of Israel.

The U.S. Palestinian Community Network (USPCN) was founded in 2006 as a national, member-based institution with the mission to re-establish Palestinian and Arab community organizing in the U.S., to help win the Right of Return, an end to Israeli occupation and colonization, and equality for the Palestinian people. USPCN came to the decision to support BDS in conversations with partners and allies in the Palestinian and Palestine solidarity communities in the U.S.; and then brought the discussion

to its National Coordinating Committee, whose members came to consensus that BDS was a strong tactic to utilize in the United States.

USPCN supports BDS because boycott is a non-violent strategy that has traditionally been used in this country and throughout the world as an important organizing tool to win justice for oppressed communities like those in Palestine. and because BDS is a carefully developed mechanism that has the full support of all the most important non-governmental organizations, political parties and movements in Palestine itself.

Friends of Sabeel North America (FOSNA) fully supports the call for BDS as a Palestinian-initiated global, grassroots movement for Palestinian rights. As people of faith, members of FOSNA recognize that justice demands them to stand with the vulnerable, the silenced, and the oppressed. Sabeel's founder, Reverend Naim Ateek, was one of the signers of the 2009 Kairos Palestine document, a call from the churches of Palestine for divestment and boycott of Israel as "tools of nonviolence for justice, peace, and security for all." As an organization amplifying Sabeel's efforts, FOSNA, too, has adopted the call for BDS. Boycotts, divestment, and sanctions were effective methods used to target apartheid in South Africa, racial discrimination in the United States, and British colonial rule in India. Building on this history, the BDS movement leverages grassroots power

against Israeli settler-colonialism, apartheid, and military occupation. FOSNA is active in educating church communities on Palestine, mobilizing them to launch boycott campaigns, and organizing denominations to divest from companies complicit in Israel's occupation.

As described above, each of the *Amici* is an organization that has concluded, through its own process, that the boycott movement is the most effective non-violent means to pressure Israel to respect Palestinian human rights. The *Amici*, and others who endorse the boycott movement, have done so independently of each other and at different times. They have no ties to any government. All of the *Amici* share a commitment to nondiscrimination, equality, and to combatting all forms of racism including anti-Semitism. *Amici* hold a deep and abiding commitment to the integrity and moral force of international human rights law and have raised their voices to defend Palestinian human rights in the face of and despite strong opposition from Israeli and U.S. institutions. Like the anti-apartheid movement in South Africa and the Civil Rights movement in the United States, the boycott movement to support Palestinian rights is born of “. . . determination to remedy past injustices, and a host of voluntary decisions by free citizens . . .” N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 888 (1982).

The Genesis of Act 710

Supporters of the government of Israel have spent millions of dollars on lobbying efforts, to encourage state and municipal governments in the United States to enact provisions like Act 710, requiring persons who seek to contract with state entities to promise they will not engage in activity that is constitutionally protected.⁴ Anti-boycott legislation like Act 710 is one of many tools used to stop criticism of Israel's treatment of Palestinians, as such criticism increasingly filters into the mainstream.

The requirement of certification of non-participation in a boycott to promote Palestinian rights is part of a coordinated and well-funded effort⁵ to stifle the Palestinian viewpoint. In the past four years alone, twenty-six states have adopted laws that target advocacy for Palestinian rights, especially boycotts. This remarkably broad and fast legislative activity is a direct result of the immense and heavily funded lobbying campaign to limit discussion of Israel's policies.

⁴ Nathan Thrall, BDS: how a controversial non-violent movement has transformed the Israeli-Palestinian Debate, The Guardian, August 14, 2018 [<https://www.theguardian.com/news/2018/aug/14/bds-boycott-divestment-sanctions-movement-transformed-israeli-palestinian-debate>].

⁵ Israeli Government OKs \$72 million anti-BDS project, Jewish Telegraphic Agency, December 29, 2017 [<https://www.jta.org/2017/12/29/news-opinion/israel-middle-east/israeli-government-oks-72-million-anti-bds-project>].

Act 710 defines boycott as a refusal to deal with persons or entities doing business “in Israel or in Israeli-controlled territories” (A.C.A. § 25-1-502 (1)(A)(i) (emphasis supplied). The occupation of the “Israeli-controlled territories” including the West Bank is illegal under international law, and Arkansas has effectively expressed its support for that violation of international law by means of this expansive definition.

The public policy of the United States as enshrined in the Export Administration Act has been to forestall "attempts by foreign governments to 'embroil American citizens in their battles with others by forcing them to participate in [boycotts]'" Briggs & Stratton Corp. v. Baldrige, 539 F.Supp. 1307, 1319 (E.D. Wis. 1982), *affd.* 728 F.2d 915 (7th Cir. 1984). By contrast, Act 710, far from protecting American citizens against having to take sides, requires those who would contract with the State to publicly espouse the position of the State against boycotts. Arkansas is thus taking a partisan position on this issue of public importance and is seeking to penalize those who disagree with the position taken by the State. Allowing the State to determine what positions are acceptable in this dispute about an issue of public importance is antithetical to the First Amendment: “This is either viewpoint discrimination against the opinion that Israel mistreats Palestinians or subject matter discrimination on the topic of Israel. Both are

impermissible goals under the First Amendment.” Koontz v. Watson, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018).

The Purpose of the boycott movement

The purpose of the boycott movement is to pressure Israel to stop its oppression of Palestinians, which has been going on for more than seventy years. The Palestinian people, who are indigenous to what is today Israel and the Occupied Palestinian Territory, including East Jerusalem, were driven by Israeli forces from their land and homes and were not allowed to return. In the West Bank, they have been disenfranchised, subjected to Israeli military occupation and Israeli military rule with no voice in the government that restricts their daily movement. Israel continues to dispossess them of their land in order to build Jewish-only settlements that are illegal under international law. In Gaza, they are trapped by a blockade from land, sea and air, deliberately kept with inadequate food, fuel or materials to repair the destruction caused by repeated Israeli bombardments that have destroyed the infrastructure, killed thousands, and are rendering the besieged and densely populated area unlivable. The World Bank has reported a rapid collapse in humanitarian conditions in Gaza, including access to medical treatment, electricity, and clean water. 52 percent of the

labor force is unemployed, including 67 percent unemployment among youth.⁶.

Israel has explicitly denominated its Palestinian citizens as second-class citizens, subject to persistent *de facto* and *de jure* discrimination manifested in over fifty Israeli laws codifying discrimination in all areas of life including political participation, access to land, education, infrastructure and criminal procedures.

The international community has failed to protect Palestinians from these Israeli violations of international law, and the United States has provided unconditional aid and support to Israel that enables and facilitates these violations.

In 2005, Palestinian civil society appealed to the international community for help in securing the right to freedom, justice and equality for Palestinians, based on international law. The more than 170 organizations joining in this appeal included labor unions, charitable organizations, political organizations and human rights organizations. They do not take direction from any government.

Inspired by the South African anti-apartheid movement and the Civil Rights movement in the United States, which employed boycotts as a tactic

⁶ Overview: The World Bank in West Bank and Gaza April 1, 2019 [<http://www.worldbank.org/en/country/westbankandgaza/overview>].

to exert pressure for justice, the Palestinian appeal called for boycott, divestment and sanctions (“BDS”) to exert nonviolent pressure on Israel until it complies with international law by meeting three demands:

- Ending its occupation and colonization of all Arab lands and dismantling the Separation Wall.
- Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality.
- Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.

Boycotts for Palestinian rights uphold the simple principle that Palestinians are entitled to the same rights as the rest of humanity. Boycotts for Palestinian rights are used to pressure Israel to comply with international law and universal principles of human rights. As a matter of principle, the BDS movement categorically opposes all forms of racism, including Islamophobia and anti-Semitism. The BDS movement stands for freedom, justice and equality.

The Focus of Boycotts for Palestinian Rights

The boycott campaigns do not target individuals, companies or institutions based on their national origin or religion. They focus, rather, on companies and institutions that are complicit in Israel's oppression of Palestinians irrespective of place of incorporation. In recent years, companies boycotted by *amici* include Hewlett Packard (US), G4S (UK), AirBnb (US), SodaStream (Israel), Caterpillar (US), and Booking.com (US)

BDS campaigns have been successful in opening a dialogue in the United States about corporate social responsibility and corporate accountability that may not otherwise be available to a majority of Americans. The discourse introduced by BDS campaigns makes visible the Palestinian demand for freedom, dignity, respect for human rights and an end to Israeli violations of international law. The predominant discourse, in which the sole focus is Israeli security, does not acknowledge that unconditional U.S. military aid to Israel has enabled the continuing violation of Palestinian rights. A striking feature of BDS campaigns is the support they have garnered within the United States from a broad diversity of religious institutions and leaders, students, academics, human rights activists, cultural leaders, and performers.

The boycott movement has employed many of the same tactics (and their internet-era equivalents) that were used in protesting racial discrimination in Claiborne County, Mississippi in the 1960s, as described by the Supreme Court in N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886 (1982): they have marched, they have engaged in peaceful picketing, they have promoted letter-writing campaigns, twitter campaigns and online petitions. The fact that these efforts are “...intended to exercise a coercive impact on [the companies] does not remove them from the reach of the First Amendment.” N. A. A. C. P. v. Claiborne Hardware Co., *supra*, 458 U.S. at 911.

CONCLUSION

Boycott is a peaceful means of resisting oppression. It is expressive conduct protected by the First Amendment. The Certification Requirement of Act 710 compels those who wish to contract with the State to endorse the position of the State on a disputed issue of public importance. This compulsion of speech hampers the robust debate that the First Amendment protects. For these reasons and those set forth above, *Amici* respectfully request that the decision of the District Court dismissing the action brought

by plaintiff-appellant be reversed and that the preliminary injunction prayed for be granted.

Dated: New York, New York
April 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted from Fed. R. App. P. 32(f), this document contains 3827 words.

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Dated: April 15, 2019

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CERTIFICATE OF SERVICE

I, Jethro M. Eisenstein, hereby certify that I electronically filed the foregoing Brief Of *Amici Curiae*, American Friends Service Committee, Israel Palestine Mission Network Of The Presbyterian Church (USA), A Jewish Voice For Peace, Inc., US Campaign For Palestinian Rights, US Palestinian Community Network, US Campaign For The Academic And Cultural Boycott Of Israel And Friends Of Sabeel North America, In Support of Plaintiff-Appellant And Reversal with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on April 15, 2019, which will send notice of such filing to all registered CM/ECF users.

/s/ Jethro M. Eisenstein

Jethro M. Eisenstein