No. 19-1378

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Arkansas Times LP

Plaintiff-Appellant,

v.

Mark Waldrip, et al.

Defendant-Appellee.

Appeal from the U.S. District Court for the Eastern District of Arkansas in *Arkansas Times LP v. Mark Waldrip, et al.*, No. 4:18-cv-00914-BSM

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 15 MEDIA ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENTS

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

American Society of News Editors is a private, non-stock corporation that has no parent.

The Associated Press Media Editors has no parent corporation and does not issue any stock.

Association of Alternative Newsmedia has no parent corporation and does not issue any stock.

The Media Institute is a 501(c)(3) non-stock corporation with no parent corporation.

Media of Nebraska, Inc. does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The National Coalition Against Censorship is a non-profit organization incorporated in New York with no parent corporation or stock.

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Nebraska Broadcasters Association does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The North Dakota Newspaper Association is a voluntary nonprofit association. It has no stock and no parent corporation.

Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Reporters Without Borders is a nonprofit association with no parent corporation.

Society of Professional Journalists is a non-stock corporation with no parent company

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, The Media Institute, Media of Nebraska, National Coalition Against Censorship, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, Nebraska Broadcasters Association, North Dakota Newspaper Association, Radio Television Digital News Association, Reporters Without Borders, and Society of Professional Journalists.[1]

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. A supplemental statement of identity and interest of *amici* is included below as Appendix A.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.

Amici file this brief in support of Plaintiff-Appellant Arkansas Times LP (the "Arkansas Times" or the "Times"). As advocates for the news media, *amici* have a strong interest in protecting the editorial independence of the press from undue political influence. The law at issue in this case, Ark. Code Ann. § 25-1-503(a)(1) ("the Act"), requires all entities contracting with the Arkansas government to certify that they will not engage in a boycott of Israel. An entity that does not want to so certify must either forego contracting with the state altogether or must agree to offer the relevant goods or services for at least twenty percent less than the lowest certifying business.

As applied to a member of the news media such as the Times, the law places an outlet in an impossible position. A newspaper certifies, and thus could be seen as taking a position on a fraught matter of great public interest, which it has covered or may one day wish to cover. Or a newspaper refuses to certify and foregoes the contract (or takes a steep discount on its rates), which could also be seen as taking an editorial position on the issue. *Amici* have an abiding interest in ensuring that the state not use economic regulations to interfere with the actual or perceived editorial independence of the press. This Act does so.

SOURCE OF AUTHORITY TO FILE

Amici have moved for leave to file this brief in the accompanying motion pursuant to Federal Rule of Appellate Procedure 29(a)(3).

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Arkansas Times, an alternative newsweekly based in Little Rock, challenges the constitutionality of Arkansas Act 710, codified at Ark. Code. Ann §§ 25-1-501 to 504, which took effect in August 2017. Order at 1, Arkansas Times LP v. Mark Waldrip, No. 4:18-cv-00914 (BSM) (E.D. Ark. Jan. 23, 2019), ECF No. 23. The Act prohibits public entities in the state from engaging in a boycott of Israel, or from contracting with any provider unless the provider signs a certification that it is not participating and will not, for the duration of the contract, participate in a boycott of Israel. *Id.* at 1-2. The Act defines a boycott of Israel as "engaging in refusals to deal, terminating business activities, *or other actions* that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner." Ark. Code Ann. § 25-1-502(1)(A)(i) (emphasis added).

An entity that does not sign a written certification may still contract with the state but must first offer the relevant goods or services at a price at least twenty percent lower than the lowest certifying business. Ark. Code Ann. § 25-1-503(b)(1). The law does not apply to contracts with a potential value of less than $1,000. Ark. Code Ann. § 25-1-503(b)(2). Prior to its passage, State Representative Jim Dotson, a Republican from Bentonville and the primary House sponsor of the legislation, stated that the law was introduced not in response to any

particular incident in Arkansas, but was a deliberate effort to combat the "Boycott, Divestment, Sanctions" or "BDS" movement. John Lovett, *New Arkansas Legislation Takes Aim at Boycotting Israel*, Associated Press, June 25, 2018, https://perma.cc/A9WV-VA3Z.

For many years, the Arkansas Times has contracted with the University of Arkansas-Pulaski Technical College ("Pulaski Tech") to publish advertisements for the college. Order at 2. In each of the years 2016, 2017, and 2018, the Times has entered into 20 to 30 contracts annually with a value of more than $1,000 with Pulaski Tech. *Id.* In October 2018, as the Times and Pulaski Tech were negotiating a new contract, the school mentioned the certification requirement for the first time. *Id.* at 3. The Times, which has editorialized against the Act, but has never taken a position on Israeli boycotts per se, refused to sign a certification. The Times said that it was not offered the discount option and has subsequently confirmed that a twenty percent cut in its advertising rates would have been unacceptable in any case. *Id.* Consequently, the Times and Pulaski Tech do not now have an advertising contract and it is unlikely one will be signed while the Act imposes the certification or discount obligation.

The Arkansas Times challenged the Act, arguing that the law compels the Times to engage in speech on political issues on which it might otherwise have remained silent. Br. in Supp. of Mot. for Prelim. Inj. and Declaratory Relief at 7,

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Arkansas Times LP v. Waldrip, 4:18-cv-914 (BSM) (E.D. Ark. filed Dec. 11, 2018), ECF No. 3. The court below denied Plaintiff-Appellant's motion for a preliminary injunction and dismissed the case. The Times appealed.

Amici write on a narrow but crucial question of both law and public policy. The Act sets up a Catch-22 for a news outlet striving to maintain neutrality and objectivity with respect to public controversies that it covers or may cover. The Act requires the Times to either sign the certification, which a reasonable reader of the Times could construe as support for Israel or Israeli policies, or to forego the contract altogether (or accept a steep discount on fees), which a Times reader could reasonably take as opposition to Israel or Israeli policies. In either case, the government has used economic regulation to do what it could not come close to attempting directly—interfering with the editorial independence of a member of the news media.

Accordingly, *amici* raise two related points. First, *amici* elaborate on the importance of editorial independence, both actual and perceived, to the news media. Second, *amici* highlight the danger of states using economic regulations to interfere with the editorial independence of the press. Such a danger is compounded where, as here, a law itself effectively forces a news organization to stake a claim on a specific public controversy.

ARGUMENT

I. Editorial independence is a sacrosanct First Amendment value.

The Times and the other amici in this case focus on the district court's finding that the Times is unlikely to succeed on the merits because a boycott of Israel as defined in the Act "is neither speech nor expressive conduct." Order at 16. *Amici* here do not opine on the nature of the boycott, nor its constitutional status. *Amici* do, however, write to emphasize that the effect of this measure, as applied to *members of the news media*, interferes with the actual or perceived editorial independence of a news outlet. It does so in three ways.

One, in contrast to the finding of the district court, the plain terms of the Act could be read, and *will* be read by many outlets, to cover editorials, op-eds, or critical news coverage of Israeli policies, as well as advertising in the Times in support of an Israeli boycott. Such interference with a news outlet's editorial judgment is inconsistent with the Supreme Court's holding in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and its progeny, which have long proscribed any state interference with what a newspaper chooses to publish or not publish. This interference would be constitutionally unacceptable *even if* the district court were correct that the Act prohibits only commercial activities in service of a boycott, such as running a pro-boycott advertisement. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) (upholding the application of human

rights ordinance to prohibit sex-designated classified job postings, but expressly protecting advertisements or editorial content *commenting* on the ordinance).

Further, the law creates a set of impossible options for a news outlet that might wish to remain neutral on the issues of Israel, Israeli policies, or the BDS movement. The news outlet may sign the certification, and therefore be perceived as pro-Israel or anti-BDS. The outlet could refuse to sign the certification and agree to a steep discount on its fees, which could be perceived as anti-Israel or pro-BDS. Or the news outlet could forego state advertising completely and also be seen as anti-Israel or pro-BDS.

Such a certification requirement runs counter to the *Tornillo* line of cases and, even under the more permissive commercial speech doctrine, would violate the First Amendment by either failing to directly advance a substantial government interest or being tailored appropriately to advance a substantial government interest. *See, e.g.*, *El Dia, Inc. v. Puerto Rico Department of Consumer Affairs*, 413 F.3d 110, 118 (1st Cir. 2005).

Second, the threat of pretextual or selective enforcement of the law could lead to the kind of chill or self-censorship that the Supreme Court has repeatedly said could render similar laws infirm. For instance, the state of Arkansas could find that an editorial or news article by a certifying newspaper constitutes "other actions that are intended to limit commercial relations with Israel" but forebear

from enforcement action with respect to another, more favored news outlet. This concern goes to whether the statute is void-for-vagueness, an issue that has been briefed by the Times and other *amici*, but *amici* note that vagueness doctrine, in the First Amendment context, is driven by an underlying concern that unclear laws can directly or indirectly suppress speech on public affairs.

Finally, third, it is well established that the cancellation of state advertising contracts in direct retaliation for the editorial decisions of a newspaper violates the free speech rights of the news outlet. *El Dia, Inc. v. Rossello*, 20 F. Supp. 2d 296, 303-05 (D.P.R. 1998) (collecting cases), *aff'd*, 165 F.3d 106 (1st Cir. 1999). We do not know whether there was any direct retaliation in this case, but the First Amendment retaliation cases are nonetheless animated by the same concern present here: that the state can improperly use economic levers to interfere with the editorial independence of the press.

A. A plain reading of the statute encompasses editorializing in support of an Israeli boycott or running pro-BDS advertisements.

The Act defines a boycott of Israel to include "other actions that are intended to limit commercial relations with Israel." Ark. Code Ann. § 25-1-502(1)(A)(i). Relying on canons of statutory interpretation, including *esjudem generis* and the doctrine of constitutional avoidance, the district court found that "other actions" do

not encompass "criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech," and is limited to other "commercial conduct." Order at 9.

The plain meaning of a statute, however, trumps any other doctrine of statutory construction. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (explaining that statutory interpretation "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end'" if the statute's language is plain (citing *United States. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989))); *see also Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."). The Act states that, "A company's statement that it is participating in boycotts of Israel, or that it has taken the boycott action at the request, in compliance with, or in furtherance of calls for a boycott of Israel" can be considered as a type of evidence "among others" that the company is participating in a boycott. Ark. Code Ann. § 25-1-502(1)(A)(ii). A reasonable news outlet could interpret that to include an editorial, op-ed, or news article, either expressing common cause with a boycott of Israel or even harshly criticizing Israel. And an advertisement in support of BDS or another Israeli boycott would almost certainly qualify. There's no question that

a newspaper would consider the purchase and sale of an advertisement "commercial conduct."

Accordingly, the Act would indirectly accomplish what it clearly would be barred from doing directly—preventing the Times from editorializing in support of a boycott of Israel, or running advertisements supporting a boycott of Israel. It also bears emphasis that a certifying news outlet would be entirely free to publish editorials, op-eds, articles, or advertisements *opposing* a boycott of Israel.

The statute here, as applied to members of the news media, thus directly influences what a paper may or may not publish and implicates the same concerns as the "right of reply" statute overturned in *Tornillo*. There, a 1913 law mandated that were a newspaper to criticize a candidate for nomination or election, it had to provide, free of charge, the candidate the right to reply in print in the newspaper, in as conspicuous a spot as the original criticism. 418 U.S. at 244. The Court recognized that any interference with "editorial control and judgment" acted as both the compulsion of speech and its censorship, similar to the statute here. Either the Times certifies, and therefore takes an institutional position against an Israel boycott, or it foregoes government contracts (or drops its prices) and stands in support. "It has yet to be demonstrated how governmental regulation of [editorial control and judgment] can be exercised consistent with First Amendment guarantees of a free press . . . ." *Id.* at 258.

The sweep of the statute also highlights the lack of tailoring even were this just a matter of commercial speech, which *amici* do not believe it is. *See El Dia, Inc.*, 413 F.3d at 118 (finding bond requirement for non-residents seeking to advertise in Puerto Rico not narrowly tailored to advance government's asserted interest). "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In *El Dia*, the court refused to countenance "conclusory assertions" that non-resident advertisers posed greater enforcement risks than resident advertisers. 413 F.3d at 115. Similarly, here, Arkansas has failed to make any showing that enforcing a specific anti-Israel-boycott contracting restriction—particularly against the press—would address a cognizable harm in that state. Arkansas already has antitrust laws governing various anti-competitive practices, Ark. Code Ann. §§ 4-75-301 to 320, and, as noted, the primary House sponsor stated publicly that the legislation was not intended to cure any particular competitive harm in Arkansas itself.

Additionally, the unconstitutional conditions doctrine, particularly with respect to the press, mandates special care in this case. Though not limited to members of the news media, unconstitutional conditions—where a valuable government benefit is conditioned on the beneficiary forswearing a constitutional

right—are particularly harmful with respect to the press. In *Federal Communications Commission v. League of Women Voters*, for instance, the Supreme Court invalidated a provision of the Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 365, as amended by Pub. L. No. 97-35, 95 Stat. 730, forbidding any noncommercial educational broadcaster receiving a public broadcasting grant from "editorializing." 468 U.S. 364, 366 (1984). In doing so, even while acknowledging that the broadcast media may be subject to content regulation that would be impermissible with respect to print or other media, the Court prominently noted that the restriction "is specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection." *Id.* at 381. The Court explained at length:

> The editorial has traditionally played precisely this role by informing and arousing the public, and by criticizing and cajoling those who hold government office in order to help launch new solutions to the problems of the time. Preserving the free expression of editorial opinion, therefore, is part and parcel of "a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open."

Id. at 382 (quoting *N. Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). This theme recurs repeatedly in cases involving government regulation of private editorial content. In *Mills v. Alabama*, for instance, the Court wrote, "Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of

our Constitution thoughtfully and deliberately selected to improve our society and keep it free." 384 U.S. 214, 219 (1966) (holding Alabama Corrupt Practices Act imposing criminal penalties for election day editorials on ballot issues violated First Amendment).

In sum, all of the First Amendment doctrines implicated by this case—right to reply statutes, compelled speech, unconstitutional conditions and even commercial speech doctrine as applied to newspaper advertising—would invalidate a law that even remotely threatens to interfere with the editorial independence of a member of the news media. The danger with respect to the Act here is far from remote.

B. As applied to the press, the mere possibility of chill or self-censorship posed by the Act is enough to violate the First Amendment.

Even if the restriction here excluded editorial content—which a reasonable observer could conclude this does not—the law unconstitutionally chills media organizations from engaging in protected speech. Prospective restrictions on speech look to whether the ban "chills potential speech before it happens." *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995). Prospective bans on speech impose stricter standards of statutory vagueness, as any vagueness requires a person to "act at [their] peril here," harming the free

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dissemination of ideas. *Cramp v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 368 U.S. 278, 287 (1961).

When those who are regulated are unclear what conduct will lead to government sanctions, they are required to "steer far wider of the unlawful zone," and distance themselves from any conduct that *may* appear unlawful. *See Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). The Supreme Court has consistently struck down these unclear bans on speech. *See id.* (striking down statute that required Washington state employees to swear to promote respect for the United States and not become a member of a "subversive organization" as unconstitutionally vague and chilling speech); *Cramp*, 368 U.S. at 287 (striking down statute that required employees to swear that they never "knowingly lent their aid, support, advice, counsel, or influence to the Communist Party" as unconstitutionally vague).

The Act will chill certifying companies, including news outlets, from making any speech that could *possibly* be interpreted as promoting or complying with the illegal boycott; accordingly, it will interfere with a newsroom's editorial judgment of what it can safely publish. *See Tornillo*, 418 U.S. at 255. Any sort of action "in compliance with, or in furtherance of calls for a boycott of Israel" could lead to statutory liability. *See* Ark. Code Ann. § 25-1-502(1)(B). Certifying companies, such as the Times, could reasonably believe that the Act prohibits publishing any material supporting a boycott of Israel. Accordingly, regardless of

what the state *intended* to regulate, the First Amendment does not allow states to control a newsroom's editorial judgment, even indirectly.

C. It is well-established that the retaliatory withdrawal of advertising from a newspaper violates the First Amendment.

Finally, courts have repeatedly held that state withdrawals from advertising contracts in response to the exercise of a newspaper's editorial discretion may state a claim for unlawful First Amendment retaliation. In the 1999 *El Dia* case, for instance, the First Circuit affirmed that a prominent daily newspaper in Puerto Rico had a clearly established right to be free from retaliatory withdrawals of advertising and denied the state's invocation of qualified immunity. 165 F.3d at 108. Beginning in January 1997, *El Nueva Dia*, a Spanish-language daily owned by El Dia, Inc., published a series of articles critical of the new administration of Governor Pedro Rossello. *Id.* In April 1997, eighteen government agencies, which had routinely contracted to advertise in *El Nueva Dia*, abruptly canceled their contracts. *Id.* El Dia, Inc. sued, alleging First Amendment retaliation under 42 U.S.C. § 1983, and the First Circuit permitted the claim to survive the Rossello administration's assertion of qualified immunity. *Id.* at 108, 110.

Similarly, in *North Mississippi Communications, Inc. v. Jones*, the Fifth Circuit permitted a § 1983 claim to proceed after a Mississippi weekly newspaper presented evidence that the DeSoto County Board of Supervisors switched its general legal advertising to a competing paper in retaliation for news articles and

editorials critical of certain board members. 792 F.2d 1330, 1332-33 (5th Cir. 1986). The case went back to the Fifth Circuit twice, and it affirmed this holding each time. *See* 874 F.2d 1064 (5th Cir. 1989); 951 F.2d 652 (5th Cir. 1992). The Supreme Court cited *North Mississippi Communications* in resolving a circuit split over the extent to which all independent contractors are protected from cancellation of state contracts in retaliation for perceived criticism of the government. *See Bd. of Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 673 (1996).

Finally, earlier in *Frissell v. Rizzo*, the Third Circuit concluded that the retaliatory withdrawal of advertising from a newspaper perceived as critical of the state advertiser is a violation of "settled" First Amendment law. 597 F.2d 840 (3d Cir. 1979). The court dismissed the case on standing grounds because it had been brought by a reader of the newspaper, not the newspaper itself, but said, "[w]e assume, without deciding, that were the [newspaper] to press a suit on its own behalf it could readily establish that its First Amendment rights have been violated." *Id.* at 845.

The factual record here has not been developed enough to determine if the state acted in direct response to any specific article, editorial, op-ed, or advertisement in the Times. Nevertheless, the concern prompting *amici*'s submission today underpins these First Amendment retaliation cases. That is, the

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editorial independence of the press is vulnerable to economic pressures like the withdrawal of advertising.

II. Although the Act is both a content- and viewpoint-based restriction, facially neutral economic regulations can also harm the press.

Amici note as well that even facially neutral economic regulations, which *amici* do not believe the Act is, raise particular sensitivities when they implicate the editorial independence of the press.

For instance, facially neutral laws governing coordinated boycotts and concerted refusals to deal are a sub-species of antitrust regulation, which has a long history of being misused by presidential administrations of both parties to help political allies and harm political enemies. In early 1964, for example, President Lyndon Johnson literally extorted a loyalty pledge from the largest paper in Texas, the *Houston Chronicle*, in exchange for Johnson's intervention to save the merger of the Texas National Bank with Houston's National Bank of Commerce, which was owned by the president of the *Chronicle*. *See* Robert A. Caro, The Passage of Power 523-27 (2012). During the early 1970s, the Nixon administration consciously used the threat of antitrust action against the "Big Three" networks in an attempt to force more favorable coverage. President Nixon and aide Charles Colson were captured on the Nixon tapes in July 1971 discussing how holding the potential for a lawsuit over the heads of network management provided a formidable political "club." *See* Walter Pincus and George Lardner, Jr., *Nixon*

Hoped Antitrust Threat Would Sway Network Coverage, Wash. Post, Dec. 1, 1997, https://perma.cc/C42R-HKN8. "We don't give a goddam about the economic gain," Nixon said. *Id.* "Our game here is solely political." *Id.*

These particular sensitivities are evident in the line of Supreme Court cases recognizing the vulnerability of news media organizations to economic pressure. Even subtle regulatory intimidation can impact the exercise of editorial freedom. For instance, in *Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983), the Supreme Court invalidated a state tax on the cost of paper and ink used to print newspapers not because of manifest viewpoint discrimination, but rather because of the mere "potential for abuse" in any law that singles out the media. *Id.* at 591. As Justice O'Connor wrote, the prospect of "burdensome taxes . . . can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585; *see also* Br. of Amicus Curiae the Reporters Comm. for Freedom of the Press in Supp. of Neither Party, 2018 WL 5085005, United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019).

The restraint posed by the Arkansas anti-BDS Act is far from subtle or indirect. By its terms, it would apply to an editorial by the Arkansas Times expressing common cause with an Israeli boycott or to advertisements by boycott supporters or organizers. Even were that not the case, the incidental impact of the

law on the Times's editorial freedom implicates abiding concerns that neutral economic regulation—and in particular antitrust—can be used to stifle critical reporting or extort favorable coverage.

* * *

In sum, to the extent the Act facially prohibits editorializing by news organizations running state-purchased advertisements, it violates the First Amendment. To the extent it places a newspaper in the impossible position of having to certify, and therefore being perceived as opposed to Israeli boycotts, or foreswearing advertising contracts with the state, and therefore being perceived as pro-boycott, it violates the First Amendment. And, to the extent it results in a chill and self-censorship by a member of the news media, it violates the First Amendment. All of these constitutional infirmities are grounds on their own to reverse the district court's dismissal of Plaintiff-Appellant's petition.

Additionally, the editorial independence of the press is fragile and uniquely susceptible to regulatory pressure, particularly with respect to pocket-book commercial controls like antitrust. Such pressure can be overt, as *amici* submit is the case here, or covert, as when facially neutral laws are used pretextually to coerce favorable reporting or stifle negative coverage. The danger of such pressure is particularly acute in this case.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the district court's order granting Defendant-Appellee's motion to dismiss.

Dated: April 15, 2019

Respectfully submitted,

/s/ Bruce D. Brown

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APPENDIX A

STATEMENT OF INTEREST FOR *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

With some 500 members, **American Society of News Editors** ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the

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principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Media of Nebraska, Inc. is a non-profit corporation created to advocate in favor of the interests of Nebraska's print and broadcast news media. Media of Nebraska, Inc. advises the Legislature and the Courts concerning the views and positions of Nebraska's news media regarding issues that impact its members' ability to effectively access and disseminate news to their subscribers, viewers, and others interested in the news.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in opposing viewpoint-based censorship and is joining in this brief to urge the Court to preserve the protections of the First Amendment in government-created online public speech forums. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Missouri.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a

transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

Nebraska Broadcasters Association ("NE-BA") is a trade organization representing the interests of more than 200 television and radio stations licensed to broadcast in Nebraska. NE-BA advocates for and against legislation, provides seminars to educate its members and offers scholarships to students in communication majors.

The North Dakota Newspaper Association is the formal trade organization for the newspaper industry in North Dakota. It represents the 10 daily and 78 nondaily newspapers in North Dakota.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 130 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 15 offices and sections worldwide.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

APPENDIX B

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of *amici curiae* complies with:

1) the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because it contains 5548 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and
2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

/s/ Bruce D. Brown

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Dated: April 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I have filed the foregoing Brief of *Amici Curiae* the Reporters Committee for Freedom of the Press and 15 Media Organizations in Support of Plaintiff-Appellant electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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