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.

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

APPELLANT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING EN BANC

Brian Hauss
Vera Eidelman
Ben Wizner
ACLU Foundation
Speech, Privacy, and Technology Project
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2500
bhauss@aclu.org

Bettina E. Brownstein
Bettina E. Brownstein Law Firm
904 West Second St., Suite 2
Little Rock, AR 72201
T: (501) 920-1764
bettinabrownstein@gmail.com

John L. Burnett
Lavey & Burnett
904 West Second St., Suite 2
Little Rock, AR 72201
T: (501) 376-2269
jburnett@laveyburnett.com

Attorneys for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Appellant Arkansas Times LP 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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INTRODUCTION

Plaintiff-Appellant Arkansas Times LP brought this lawsuit challenging Arkansas Act 710 of 2017, which requires government contractors to certify that they are not participating in boycotts of Israel. The district court denied Plaintiff's motion for preliminary injunction and dismissed the case. A panel of this Court reversed, narrowly holding that Plaintiff is likely to succeed in demonstrating that the Act violates the First Amendment because the Act's definition of boycotts of Israel—which encompasses unspecified "other actions that are intended to limit commercial relations with Israel"—unconstitutionally prohibits speech and association that supports or promotes participation in a proscribed boycott. The dissent disagreed with the panel's interpretation of the Act.

The petition for en banc rehearing filed by Defendants-Appellees Mark Waldrip et al. (the "State") should be denied because it is not necessary to secure uniformity of decisions or to resolve an issue of exceptional importance. Fed. R. App. P. 35(a). *First*, the asserted conflict between the panel decision and existing precedent is illusory. Contrary to the Petition's assertions, the panel expressly "assum[ed] without deciding" that the Act would *not* violate the First Amendment if it were limited to commercial transactions. Op. 12. Its holding was limited to the indisputably correct conclusion that the Act violates the First Amendment insofar as it restricts pure speech and association. *Second*, although the State alternatively

contests the panel's interpretation of the Act, questions of state statutory interpretation are quotidian matters that do not ordinarily warrant en banc rehearing. *Third*, en banc review would be premature at this preliminary stage of litigation. Proceedings on remand, including a determination regarding the severability of the "other actions" provision, will significantly clarify the issues presented in this case. This Court should reject the State's invitation to preemptively decide issues that were not addressed by the panel.

BACKGROUND

1. In 2017, the Arkansas General Assembly passed Act 710 (the "Act"), Ark. Code Ann. § 25-1-501 *et seq.*, 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 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). It further provides 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 by the Arkansas Development Finance Authority as a type of evidence, among others, that a company is participating in a boycott of Israel." *Id.* § 25-1-502(1)(B).

The Act's legislative findings state, *inter alia*, that:

> 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(6).

2. Plaintiff-Appellant Arkansas Times LP ("Arkansas Times") publishes the *Arkansas Times*, a newspaper of general circulation in Arkansas, as well as other special interest publications. JA 18. For many years, the Arkansas Times has regularly contracted with Pulaski Technical College ("Pulaski Tech"), a part of the

University of Arkansas system, to run Pulaski Tech's paid advertisements in its newspaper and other publications. *Id.* In October 2018, the Arkansas Times and Pulaski Tech were preparing to enter into new contracts for Pulaski Tech's advertising in the newspaper. *Id.* For the first time, Pulaski Tech, acting on behalf of the University of Arkansas Board of Trustees ("UABT"), informed the Arkansas Times that it would have to certify its nonparticipation in boycotts of Israel. JA 19. The Arkansas Times refused and brought this lawsuit against the Members of the UABT in their official capacities. JA 8, 19.

3. 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 boycotts are "neither speech nor inherently expressive conduct," and that they are therefore unprotected under the First Amendment. Addendum ("ADD") at 9. The court acknowledged that speech and association supporting a boycott *are* constitutionally protected, *Id.* at 12–13, but it held that the Act does not prohibit these activities. *Id.* at 9. Applying the *ejusdem generis* and constitutional avoidance canons of statutory construction, the court held that the term "other actions" in the Act's definition of "boycott of Israel"—"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)—means "commercial conduct similar to the listed items." ADD 9. The court accordingly held that the Act

does not prohibit "criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech." *Id.*

4. The panel disagreed with the district court's construction of the ambiguous statutory term "other actions," which could plausibly prohibit "post[ing] anti-Israel signs, donat[ing] to causes that promote a boycott of Israel, encourag[ing] others to boycott Israel, or even publicly criticiz[ing] the Act," if done "with the intent to 'limit commercial relations with Israel' as a general matter." Op. 12–13. The panel noted that, under Arkansas law, courts construing ambiguous statutory provisions must "consider the entire Act and use appropriate tools of statutory construction to interpret the statute consistent with its legislative intent." *Id.* at 13 (citing *Simpson v. Cavalry SPV I, LLC*, 440 S.W.3d 335, 338 (Ark. 2014); *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 776 (8th Cir. 2010)). Looking at the Act as a whole, the panel identified a number of features all supporting the conclusion that the Act prohibits speech and association supporting the proscribed boycotts.

First, the panel looked to the "type[s] of evidence" that the Act permits the State to consider in determining whether "a company is participating in a boycott of Israel." Op. 14 (quoting Ark. Code Ann. § 25-1-502(1)(B)). "This evidence includes the company's own 'statement that it is participating in boycotts of Israel,'" as well as "evidence that a government contractor 'has taken the boycott action,'" a term

that is itself undefined, "in association with others (*i.e.*, 'at the request, in compliance with, or in furtherance of calls for a boycott of Israel')." *Id.* at 14 & n.9 (footnote omitted) (quoting Ark. § 25-1-502(1)(B)). The panel accordingly concluded that, "[a]t a minimum, . . . a company's speech and association with others may be considered to determine whether the company is participating in a 'boycott of Israel,' and the State may refuse to enter into a contract with the company on that basis, thereby limiting what a company may say or do in support of such a boycott." *Id.* at 14 (footnote omitted).

Second, the panel held that "the Act's codified legislative findings" lends "further support[]" to the conclusion "[t]hat the term 'other actions' captures constitutionally protected activity." *Id*. at 14 (citing *Ark. Charcoal Co. v. Ark. Pub. Serv. Comm'n*, 773 S.W.2d 427, 429 (Ark. 1989); *Manning v. State*, 956 S.W.2d 184, 186 (Ark. 1997)). As the panel noted, those findings provide that Arkansas seeks to implement the 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 that Arkansas "supports the divestment of state assets from companies that *support or promote* actions to boycott, divest from, or sanction Israel." *Id*. at 15 (quoting Ark. Code Ann. § 25-1-501(6)). "Thus," the panel concluded, "Arkansas seeks not only to avoid contracting

with companies that refuse to do business with Israel. It also seeks to avoid contracting with anyone who supports or promotes such activity." *Id.*

Third, the panel observed that "[t]he facts of this case do nothing to detract from [its] reading of the term 'other actions.'" *Id.* at 16. Because "[t]he Act does not include a form certification . . . the Defendants drafted their own certification for Arkansas Times to sign." *Id.* At this stage of the proceedings, that is "the only certification form in the record." *Id.* It "makes no effort to provide the Act's definition of 'boycott of Israel,' leaving it to the contractor to determine what activity is prohibited." *Id.*; *see* JA 79. The court stated that a contractor signing a certification "[r]elying on the ordinary meaning of 'boycott,' . . . could readily conclude that it was prohibited from both refusing to economically engage with Israel and supporting or promoting a boycott of Israel or Israeli-goods," and "would likely refrain even from activity that is constitutionally protected." Op. 16.

Having concluded that the Act prohibits contractors from engaging in speech and association in support of a proscribed boycott, the panel held that it violates blackletter First Amendment doctrine. As the panel explained, "a funding condition unconstitutionally burdens First Amendment rights where it 'seeks to leverage funding to regulate speech outside the contours of the program itself.'" *Id.* at 17 (cleaned up) (quoting *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc. (AOSI)*, 570 U.S. 205, 214 (2013)). "Without any explanation" of how the Act's restriction

on speech and association supporting boycotts of Israel "seek[s] to 'define the limits of [the State's] spending program,' it can be viewed only as seeking to 'leverage funding to regulate speech outside the contours of the program itself.'" *Id.* at 18 (citation omitted). In other words, the panel held that Plaintiff is likely to succeed in demonstrating that the Act violates the First Amendment because it "prohibits the contractor from engaging in boycott activity outside the scope of the contractual relationship 'on its own time and dime.'" *Id.* (citation omitted). The panel accordingly reversed and remanded for further proceedings. *Id.*

Dissenting, Judge Kobes wrote that he would have applied the *ejusdem generis* canon to interpret the term "other actions" to apply "solely to commercial activities," as the State argued. Dissent 19. In response, the panel pointed out that, under Arkansas law, canons of statutory construction like *ejusdem generis* apply only where the statute is *ultimately* ambiguous, and that they cannot be applied "*to defeat legislative intent and purpose*, to make general words meaningless, *or to reach a conclusion inconsistent with other rules of construction*." Op. 13–14 n.8 (quoting *Seiz Co. v. Ark. State Highway & Transp. Dep't*, 324 S.W.3d 336, 342 (Ark. 2009)); *see also id.* at 16–17 n.12 (same with respect to constitutional avoidance).

Judge Kobes disputed whether the sources relied on by the panel support its conclusion that the statutory term "other actions" refers to speech and association supporting a boycott of Israel. He asserted that the evidentiary provision is relevant

only to establishing proscribed intent; that the Act's legislative findings should not affect the interpretation of its substantive provision, and several of the Act's legislative findings evince a constitutionally permissible objective; and that the certification form's reference to the Act provides sufficient notice for contractors to look up the statute itself. Dissent 19–21. He concluded that the Court should construe any ambiguity inherent in the term "other actions" in favor of the statute's constitutionality. *Id.* at 21–22.

ARGUMENT

I. The Panel's Decision Does Not Conflict with Eighth Circuit or Supreme Court Precedent.

Tilting at windmills, the State predicates its petition for en banc rehearing on a mischaracterization of the panel's decision. According to the State, the panel "held that while an individual refusal to deal might not be protected, a refusal accompanied by 'the company's own statement that it is participating in boycotts of Israel' and evidence that it is done 'in association with others' is protected." Pet. 6 (quoting Op. 14). Not so. The panel summed up its review of the Supreme Court's decisions in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), and *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006), with the conclusion "that at least some—but not necessarily all—elements of a boycott are protected by the First Amendment." Op. 10. "Assuming without deciding that the Act would not run afoul

of the First Amendment if it were limited to purely economic activity," the panel did not address whether the first two parts of the tripartite statutory definition of "boycott of Israel," prohibiting "refusals to deal" and "terminating business activities," violate the First Amendment. *Id.* at 12.

Instead, the panel's "focus [wa]s on whether the term 'other actions' includes activity that is constitutionally protected," such as "post[ing] anti-Israel signs, donat[ing] to causes that promote a boycott of Israel, encourag[ing] others to boycott Israel, or even publicly criticiz[ing] the Act." *Id.* at 12–13. Rejecting the State's argument that the term "is limited to commercial conduct," *id.* at 12, the panel concluded that "the Act requires government contractors, as a condition of contracting with Arkansas, not to engage in economic refusals to deal with Israel *and* to limit their support and promotion of boycotts of Israel." *Id.* at 16. Succinctly stated, the panel held that the Act violates the First Amendment, because "[s]upporting or promoting boycotts of Israel *is* constitutionally protected under *Claiborne*, yet the Act requires government contractors to abstain from such constitutionally protected activity." *Id.* at 18. *See also* Eugene Volokh, *The Eighth Circuit's Narrow Decision About the Arkansas BDS Statute*, The Volokh Conspiracy (Feb. 14, 2021), https://bit.ly/3boFpB1.

This narrow holding was sufficient to justify reversal of the district court's decision dismissing the case and denying Plaintiff's motion for preliminary

injunction. The panel did not reach—and, at this stage of the litigation, did not need to reach—the question whether refusals to deal and the termination of business activities are imbued with First Amendment protection when they are undertaken in association with others. *See* Op. 7 n.5, 12. The narrowness of the panel's decision is underscored by the dissent. Judge Kobes argued that he would have interpreted the phrase "other actions" to mean "commercial activities that do not fit the first two categories, but have the same purpose—to reduce the company's business interactions with Israel in a discriminatory way," and would have upheld the statute in its entirety under that interpretation. Dissent 18. He nowhere disputed the panel's application of First Amendment law to the construed statute, nor did he suggest that the panel applied First Amendment protection to commercial activities.

It is beyond dispute that *Claiborne*, at the very least, protects speech and association supporting a boycott. The district court, the panel majority, and the dissent all agree on this point. *See* ADD 13, Op. 12, Dissent 18. Indeed, the State itself acknowledged as much in its appellate briefing, writing: "[*Claiborne*] stressed that under settled First Amendment principles, boycotters—like others—enjoy the right to associate and peaceably assemble, picket, argue in favor of a boycott, solicit and encourage others to boycott, and socially ostracize boycott violators by broadcasting their identities." Appellees' Br. 26. Even now, the State does not deny that speech and association supporting a boycott is constitutionally protected under

the First Amendment, nor does it contest the panel's straightforward application of the unconstitutional-conditions doctrine. Its petition for en banc rehearing rests on a contrived conflict with a fictional holding.

II. En Banc Rehearing Is Not an Appropriate Process for Relitigating the Panel's Application of Arkansas Law to Construe the Act.

The State argues, in the alternative, that en banc rehearing is necessary to address the panel's interpretation of the Act, asserting that the panel's decision "violates bedrock principles of statutory construction and, if it stands, would have serious implications for the interpretation of state laws throughout this circuit." Pet. 15. On the contrary, this Court's application of Arkansas law to construe an Arkansas statute does not even have precedential value in Arkansas. *Cf. AIG Centennial Ins. Co. v. Fraley-Landers*, 450 F.3d 761, 767–68 (8th Cir. 2006) ("Although our circuit has never specifically determined the binding effect of a state law determination by a prior panel, other circuits defer to prior panel decisions absent a 'subsequent state court decision or statutory amendment that makes [the prior federal opinion] clearly wrong.'" (alteration in original) (quoting *Broussard v. Southern Pac. Transp. Co.*, 665 F.2d 1387, 1389 (5th Cir.1982) (en banc))); *Roeder v. United States*, 432 S.W.3d 627, 635 n.8 (Ark. 2014) ("A federal court decision construing an Arkansas statute is not binding authority on this court; however, the decision is persuasive authority.").

The State's disagreement with the panel's application of Arkansas principles of statutory construction to the discrete provision of the Act at issue here does not warrant the exceptional and resource-intensive procedure of en banc rehearing. *See* 8th Cir. I.O.P IV(D). As other circuits have noted, en banc rehearing is generally *not* warranted to address alleged errors in the determination of state law or in the application of correct precedent to the circumstances of a particular case. *See* 6th Cir. I.O.P. 35(a); 11th Cir. R. 35-3. *See also Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1343–44 (D.C. Cir. 1981) (Robinson, J., dissenting) ("[W]e no longer have either the responsibility or the prerogative to fashion the common law of the District of Columbia, or to act en banc to maintain its uniformity. . . . Against this background, I cannot conceive of anything less appropriate for en banc consideration than a matter of purely local law.").

In any event, the State has failed to demonstrate that the panel incorrectly applied Arkansas principles of statutory interpretation in construing the Act. According to the State, the panel should have applied the *ejusdem generis* canon to hold that the term "other actions" applies solely to commercial activities. Pet. 16. The State asserts that, under Arkansas law, *ejusdem generis* and other canons of construction give way only to "the elemental canon of construction that no word is to be treated as unmeaning." *Id.* (quoting *Wallis v. State*, 16 S.W. 821, 822 (Ark. 1891)). This is incorrect. As the panel recognized, the Arkansas Supreme Court has

held that the "canons of statutory construction . . . will not be applied when there is no ambiguity, *to defeat legislative intent and purpose,* to make general words meaningless, *or to reach a conclusion inconsistent with other rules of construction*." Op. 13–14 n.8 (quoting *Seiz Co.*, 324 S.W.3d at 342)).

Here, the panel's review of the Act as a whole, *see Simpson*, 440 S.W.3d at 338, including both the Act's evidentiary provision and the codified legislative findings, *see Ark. Charcoal Co.*, 773 S.W.2d at 429, led it to conclude that the legislature unambiguously intended the term "other actions" to encompass speech and association supporting a boycott of Israel. Because the panel concluded that the term "other actions" is not ultimately ambiguous, it had no occasion to apply the *ejusdem generis* canon. While the State may weigh the evidence differently, its dissatisfaction with the panel's conclusion is hardly a matter for en banc rehearing.

The State's resort to the constitutional avoidance canon, Pet. 17–18, fails for the same reason. *See* Op. 16–17 n.12. Like many other jurisdictions, Arkansas applies the canon of constitutional avoidance, but not in circumstances where it contradicts the unambiguous intent of the legislature. *See Ark. Hearing Instrument Dispenser Bd. v. Vance*, 197 S.W.3d 495, 499 (Ark. 2004) ("If we can construe a statute as constitutional, we will do so *provided that such a construction does not contravene the intent of the legislature*." (emphasis added)); *see also Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954, 959 (8th Cir. 2018) ("[T]he canon of constitutional

avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." (quoting *Clark v. Martinez*, 543 U.S. 371, 381 (2005))). *Cf. Sternberg v. Carhart*, 530 U.S. 914, 944 (2000) (federal courts "are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent" (citation and internal quotation marks omitted)).

III. En Banc Rehearing at This Stage of the Litigation Would Be Premature.

The procedural posture of this case also counsels against en banc rehearing. This appeal arises from the district court's order dismissing the case and denying Plaintiff's motion for preliminary injunction. The panel held that Plaintiff has stated a First Amendment claim and that it is likely to succeed in demonstrating that the Act is unconstitutional insofar as it restricts contractors' speech and association in support of a proscribed boycott of Israel. On remand, the State will have the opportunity to argue, *inter alia*, that the Act's "other actions" provision is severable from the other statutory restrictions. *See* Volokh, https://bit.ly/3boFpB1. Further proceedings in the district court will clarify, and may significantly narrow or obviate, other questions presented in this case. Furthermore, a final district court judgment after discovery would provide the surest footing for this Court to address any issues

that remain on appeal. This Court should reject the State's invitation to prematurely address issues that are unnecessary to resolve the present appeal.

CONCLUSION

The panel narrowly held that Plaintiff is likely to succeed in demonstrating that the Act violates the First Amendment insofar as it prohibits contractors from engaging in speech and association supporting a proscribed boycott of Israel. The State has not identified any conflict between that holding and the precedents of this Court or the Supreme Court. En banc rehearing is not warranted to relitigate the panel's (correct) application of Arkansas statutory interpretation principles, particularly given the preliminary posture of this appeal. The Petition should be denied.

Respectfully submitted,

/s/ Brian Hauss
Brian Hauss
Vera Eidelman
Ben Wizner
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
Tel: (212) 549-2500
bhauss@aclu.org

Counsel list continued on next page.

Bettina E. Brownstein
Bettina E. Brownstein Law Firm
904 West Second St., Suite 2
Little Rock, AR 72201
T: (501) 920-1764
bettinabrownstein@gmail.com
On behalf of the Arkansas Civil Liberties Union Foundation, Inc.

John L. Burnett
Lavey & Burnett
904 West Second St.
Little Rock, AR 72201
T: (501) 376-2269
jburnett@laveyburnett.com
On behalf of the Arkansas Civil Liberties Union Foundation, Inc.

Attorneys for Plaintiff-Appellant

Dated: May 24, 2021

CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. 35(e) and the Court's April 12, 2021 Order requesting Plaintiff–Appellant's response to the petition for rehearing en banc because it contains 3,792 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Additionally, this document complies with the requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally-spaced typeface using 14-point Times New Roman.

The response has been scanned for viruses, and no viruses were found.

/s/ Brian Hauss
Brian Hauss

CERTIFICATE OF SERVICE

I, Brian Hauss, hereby certify that on May 24, 2021, I electronically filed the foregoing Appellant's Response to Appellees' Petition for Rehearing En Banc 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
Brian Hauss