No. 18-16896

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.,
Plaintiff-Appellees,

v.

THE STATE OF ARIZONA and MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,
Defendant-Appellants,

and

JIM DRISCOLL, COCONINO COUNTY SHERIFF,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 3:17-cv-08623

BRIEF OF *AMICUS CURIAE* ZACHOR LEGAL INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS

MARC A. GREENDORFER
Counsel of Record for Amicus Curiae
Zachor Legal Institute
3919 U.S. Highway 84
Red Level, Alabama 36474
(650) 279-9690

Dated: November 13, 2018

I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the undersigned counsel for amicus makes the following disclosures:

Zachor Legal Institute is a non-profit charitable organization under Section 501(c)(3) of the Internal Revenue Code. Zachor Legal Institute does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

II. STATEMENT OF INTEREST OF *AMICUS CURIAE* ZACHOR LEGAL INSTITUTE

Amicus curiae Zachor Legal Institute ("Zachor") is a non-profit legal foundation that focuses on constitutional and rights advocacy and scholarship with the goal of eliminating prejudice and discrimination.[1] In particular, Zachor has published legal analyses of boycotts and the First Amendment with an emphasis on the status of federal and state laws that limit boycott activity. Zachor has also undertaken original research and published works on the origin and operations of the so-called Boycott Divestment and Sanction movement ("BDS" or the "BDS Movement"). A number of states, federal agencies and advocacy organizations have relied either directly or indirectly on the scholarly works of Zachor in considering the legal status of laws limiting BDS activity.

As a leading legal think-tank with expertise in both the history of boycott activity under the Constitution and the nature of the boycott movement at issue in this case, Zachor is uniquely situated to provide this court with important

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party other than amicus made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties, through their respective attorneys, have consented to the filing of this brief.

background on relevant caselaw cited by the district court as well as a full and factual history of the BDS Movement.

The arguments that follow summarize legal analyses in Zachor's founder's recently published law review articles: Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 ("*Cardozo Article*"); Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1 (2017) ("*RWU Article*"); and Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout is Fair Play under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29 (2018) ("*Campbell Article*"). The last two articles were the lead articles in the respective law review volumes.

III. ARGUMENTS AND AUTHORITIES

a. SUMMARY OF ARGUMENT

In granting the Plaintiffs' motion for a preliminary injunction against the enforcement of the provisions of Arizona House Bill 2617, A.R.S. § 35-393.01 ("HB 2617") the district court made at least three material mistakes. First, in erroneously comparing the nature of the promoter of the Plaintiffs' boycott, the so-called "BDS Movement" and its affiliates, including Jewish Voice for Peace, to American civil rights-era activists, rather than to hate groups and proxies for groups designated as foreign terror organizations by the United States government

that actually lead the BDS Movement, the district court whitewashed the discriminatory nature of the subject boycotts and their ties to designated foreign terror groups and, thus, applied the wrong standard of review. Second, the district court dismissed without properly considering, in one case, and fundamentally misinterpreting, in another case, controlling Supreme Court caselaw on the First Amendment as it relates to boycott activity. Third, by failing to grant leave for amici to file briefs at the district court proceeding, the district court abused its discretion and failed to obtain important information from those with particularly relevant backgrounds and expertise.

i. THE BOYCOTTS SUBJECT TO REGULATION ARE DISCRIMINATORY AND FOSTERED BY AFFILIATES OF DESIGNATED TERROR ORGANIZATIONS

The impetus for the enactment of HB 2617 was the rise of the BDS Movement and its discriminatory campaign against Israel and Jews generally. Arizona, and the other 23 states that have enacted laws similar to HB 2617, had ample reason to deem BDS activity discriminatory. Under the most charitable version of its history, the BDS Movement is the child of the longstanding Arab League boycott of Israel, the toxic anti-Semitism of Iran and radical elements of the Arab world.[2] Former Congressman Tom Lantos, the founder of the

[2] Unless otherwise cited, the contents of this Section (a) have been derived from the *Campbell Article*, a law review article authored by the founder of *amicus*. All citations to support the statements made in this Section are in the *Campbell Article* at 45-54.

Congressional Human Rights Caucus, was present at the conference that led to the creation of the BDS Movement and described it as "an anti-American, anti-Israeli circus" at which there were "transparent attempt[s] to de-legitimize the moral argument for Israel's existence as a haven for Jews."

The goal of the BDS Movement is not, as the district court and Plaintiffs assert, to promote civil rights. Rather, the BDS Movement was created to complement Arab state military action to destroy Israel as a Jewish state. Omar Barghouti, the co-founder of the BDS Movement, has made public statements that describe the goal of BDS as to realize a "one-state" solution that "end[s] Israel's existence." The BDS Movement openly and repeatedly rejects the right of Israel to exist as an independent state, and even prominent critics of Israel, such as Norman Finkelstein, concede that the goal of the BDS Movement is the destruction of Israel:

> "[BDS promoters] don't want Israel. They think they're being very clever. They call it their three tiers . . . . We want the end of the occupation, we want the right of return, and we want equal rights for Arabs in Israel. And they think they are very clever, because they know the result of implementing all three is what? What's the result? You know and I know what's the result: there's no Israel."

Middle East peace advocates also have disputed the claim that BDS is a rights movement and have criticized the discriminatory aims of movement.

Scholars for Peace in the Middle East noted ties between the BDS Movement and Hamas and concluded that

> "[a] careful look at the BDS movement and its methodology shows not legitimate criticism but a movement that is racist and anti-Semitic. . . .Overall, the BDS campaign is contrary to the search for peace, since it represents a form of misguided economic warfare. It is directly in opposition to decades of agreements between Israeli and Arab Palestinians, in which both sides pledged to negotiate a peaceful settlement and a commitment to a two state solution."

The BDS Movement was not only founded with the discriminatory goal of eliminating the State of Israel as a state with a Jewish character, it has been promoted and supported by individuals and groups committed to the spread of hate and named as designated terror organizations by the United States. Recently, *amicus* submitted a letter to the United States Department of Justice outlining the ties between BDS affiliates and groups designated as foreign terror organizations (the "DOJ RICO Prosecution Request").[3] In requesting a Department of Justice investigation, *amicus* established the framework for federal prosecution of BDS groups, including the one supported by Plaintiffs, under 18 U.S.C. §§ 1961-1968 (the Racketeer Influenced and Corrupt Organizations statute, "RICO") based on a

[3] A copy of this letter is available at the website of *amicus* at www.zachorlegal.org/press-releases/ under the heading "Legal Filings". In the *Campbell Article* at 111-123, *amicus* has also set out the legal basis of prosecuting BDS groups under RICO with other predicate crimes, including violations of 18 U.S.C. § 1951 (the Hobbs Act).

predicate crime of providing material support to designated terror organizations in violation of 18 U.S.C. § 2339B. In the DOJ RICO Prosecution Request, *amicus* outlined the structure the BDS National Committee ("BNC"), the governing body of the BDS Movement, and documented that a founding (and current) member of the BNC is the Council of National and Islamic Forces in Palestine, a coalition of prominent Palestinian terror organizations that includes five currently designated foreign terror organizations: Hamas, Popular Front for the Liberation of Palestine ("PFLP"), Popular Front for the Liberation of Palestine-General Command, Palestinian Islamic Jihad, and Palestinian Liberation Front.

This constitutes a direct connection and control relationship between terror organizations and the governing body of BDS.

While the BDS Movement claims to be a grass roots organization, there is considerable evidence showing that it, and BDS activity, is a continuation of the Arab League's anti-Israel boycott apparatus. Furthermore, in addition to the five designated foreign terror organizations that are coalition members of the BNC, the government of Iran and backers of several other foreign designated terror organizations are associated with the formation and continuing operations of the BDS Movement and BDS activity carried out by other organizations.

Moreover, recent testimony before Congress demonstrated that supporters of Hamas are now in leadership positions of BDS:

> "[i]n the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign."

In subsequent testimony before Congress, additional information was provided regarding funding and strategic ties between the BDS Movement and the Palestine Liberation Organization, one of the oldest and most notorious terror organizations. That testimony demonstrated that the PLO's treasury is likely the key source of BDS Movement funding and that the PLO coordinates BDS activity worldwide. The key element of the Congressional testimony is contained in this excerpt:

> "[The Palestinian National Fund] reportedly pays the salaries of the [PLO's] members, as well as students, who received tens of millions of dollars in support of BDS activities each year. . . . PLO operatives in Washington, DC are reportedly involved in coordinating the activities of Palestinian students in the U.S. who receive funds from the PLO to engage in BDS activism. This, of course, suggests that the BDS movement is not a grassroots activist movement, but rather one that is heavily influenced by PLO-sponsored persons."

In the United States, the BDS Movement is an ideological umbrella under which several affiliated groups operate. Among those are Students for Justice in Palestine ("SJP"), the Muslim Students' Association ("MSA") and Jewish Voice for Peace ("JVP"), a BDS organization of which Plaintiff Mikkel Jordahl is a member.

SJP is a university-based group, co-founded by American Muslims for Palestine ("AMP") chairman Hatem Bazian and former PFLP member Senan Shaqdeh. Much of SJP leadership is interconnected with AMP, AMP provides significant levels of support for MSA and AMP has extensive ties with former backers and officials of the now-defunct Holy Land Foundation for Relief and Development, an entity controlled by individuals who were convicted of providing material support to Hamas. In addition to Hatem Bazian, the leadership of AMP includes a number of high-profile extremists with ties to Hamas and other terrorist organizations.

MSA was founded by the Muslim Brotherhood in 1963 and a significant part of its primary focus is the promotion of BDS on university campuses. After conducting a thorough investigation, the New York Police Department issued a report that deemed BDS Movement affiliate MSA an "incubator" for radical Islamist activity.

In a 2015 Washington Times op-ed, journalist David Horowitz described MSA and SJP as the two leading campus organizations promoting BDS activity in the United States.

The BDS organization with which Plaintiffs most closely associate, JVP, is used by BDS organizations such as AMP, MSA and SJP as a strawman organization to defend against allegations that BDS is an anti-Semitic movement.

While JVP has a nominally Jewish makeup, it actively promotes BDS, advocates for the elimination of Israel, aligns almost exclusively with radical Islamist and Marxist organizations and partners with groups that rabidly support designated foreign terror organizations including Hamas and Hezbollah and encouraged terror attacks against Israeli civilians.[4] JVP recently invited convicted terrorist and PFLP member, Rasmea Odeh, to speak at a conference,[5] has featured BDS Movement co-founder Omar Barghouti at events attacking Israel and in 2017, JVP was a co-sponsor of a program that brought American BDS activists to the Palestinian territories for meetings with leaders and representatives of designated foreign terror organizations including the PFLP. As further evidence of the interlocks between JVP and BDS, two members of the advisory board of JVP's "Deadly Exchange" campaign (Omar Barghouti and Garik Ruiz) are also BNC officials.[6]

[4] Yitzhak Santis, *Jewish Voice for Peace whitewashes anti-Semitism in the anti-Israel movement*, JEWISH NEWS SERVICE (March 3, 2015). *See, also*, YONA A. SCHIFMILLER, NGO MONITOR, BDS ON AMERICAN CAMPUSES: SJP AND ITS NGO NETWORK 1 (2015) (describing the connections between SJP, AMP and JVP) and NGO MONITOR report dated June 13, 2018 titled *Jewish Voice for Peace (JVP)* at https://www.ngo-monitor.org/ngos/jewish_voice_for_peace_jvp_/ (providing an overview of the funding, BDS activities and pro-terror positions of JVP) (last visited Nov. 13, 2018).

[5] Danielle Ziri, *Jewish Voice for Peace to Host Terrorist at Panel*, JERUSALEM POST (Feb. 27, 2017).

[6] JEWISH VOICE FOR PEACE, https://deadlyexchange.org/campaign-advisory-team-members/ (last visited Nov. 13, 2018).

The BDS Movement is anything but a civil rights organization and is more properly characterized as a proxy for the foreign terror organizations that control it and that promote Plaintiffs' discriminatory boycott activity.

ii. THE DISTRICT COURT MISCONSTRUED FIRST AMENDMENT PRECEDENT

The district court's First Amendment analysis rests in large part on its misinterpretation of *NAACP. V. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In order to discern the scope of *Claiborne*, it is important to understand the background of the boycotts in that case, as that court's opinion was clearly fact specific. The boycotters in *Claiborne* were African-Americans whose constitutional rights were being infringed by local government actors, most of whom were also business owners in the local communities. The infringement of rights was a continuation of a long pattern of discrimination in violation of Reconstruction-era constitutional amendments. In response to the deprivation of their own rights, the boycotters in *Claiborne* employed a primary boycott directly against those responsible for the unlawful deprivation.

The core of the district court's First Amendment analysis in the current case is based on a misreading and distortion of *Claiborne*. The district court impermissibly expanded *Claiborne*'s holding to provide absolute First Amendment protection for all "…collective boycotting activities undertaken to achieve social, political or economic ends."

This restatement of *Claiborne*'s holding utterly ignores the critical fact that the boycotters in that case were acting to protest a "…social structure that had **denied them rights** to equal treatment and respect." *Claiborne* at 907 (emphasis added). Had the district court limited its summary of *Claiborne*'s holding to activities undertaken to vindicate the rights of the boycotters (that is, a primary boycott), it would have been accurate.

The text quoted below, from *Claiborne* at note 49, directly contradicts the district court's expansion of *Claiborne*'s scope:

> "[w]e need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law."

Put simply, the Supreme Court stated that its decision did not necessarily apply to laws restricting boycott activity when the boycotts had any of the following characteristics: (i) boycotts in furtherance of anticompetitive behavior; (ii) secondary boycotts; and (iii) boycotts that are the subject of otherwise valid state laws. The district court ignored this critical, explanatory three-part test in *Claiborne* and instead arrived at a statement of the case that is nowhere to be found in the Supreme Court's opinion and, in fact, is in opposition to what that opinion did say.

The district court also inappropriately and summarily distinguished a case, *International Longshoremen's Association, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), that was decided in the same term as *Claiborne* and relied upon the exceptions enumerated in *Claiborne* that are directly applicable to the current case. The boycott in *Longshoremen's*, unlike the boycott activity in *Claiborne*, was nearly identical in substance to the types of boycotts at issue in the current case: secondary boycotts related to a foreign conflict where no constitutional rights of the boycotters are at issue. And in *Longshoremen's*, the Supreme Court upheld the application of a narrowly tailored statute (the prohibition on secondary boycotts at 29 U.S.C. § 158(b)(4)) prohibiting secondary boycott activity directed at a political issue.

Since the Supreme Court was considering *Claiborne* at the time it was also considering *Longshoremen's*, and the opinions for the two cases were published less than three months apart in the same term, the two cases must therefore be read together, rather than sequentially as the district court did. *Claiborne* was argued before the Supreme Court on March 3, 1982 and *Longshoremen's* wasn't decided until April 20, 1982. The district court treats *Claiborne* as limiting *Longshoremen's* when, if the two cases are read in the actual context of the Supreme Court writing the *Longshoremen's* opinion after hearing arguments in *Claiborne*, the proper reading would be to see *Longshoremen's* as illustrating one

of the three exceptions that were then enumerated in *Claiborne*. *See* the *Cardozo Article* at 117-119. Thus, *Longshoremen's* can't be limited as an isolated decision based on the nuances of the National Labor Relations Act; rather, it is a decision that formed the basis for two of the three exceptions noted in *Claiborne.* Contrary to the district court's interpretation of how *Claiborne* was meant to outline nearly unlimited contours for First Amendment boycott jurisprudence, *Claiborne* and *Longshoremen's*, read together, show that a wide range of boycott activity is not subject to the heightened protections that domestic civil rights boycotts receive.

Like the federal statute at issue in *Longshoremen's*, HB 2617 is the type of law that is designed to secure valid aims: in this case, one that ensures the State of Arizona does not use taxpayer funds to enter into contracts with parties engaging in discriminatory boycotts of protected classes. State anti-discrimination laws have a long history of being held to be valid exercises of state power.

Further, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) demonstrate that *Claiborne* does not provide the all-encompassing First Amendment protection for economic and political boycotts that the district court found. In *FTC*, the Supreme Court explained *Claiborne* by noting that "[o]nly after recognizing the well-settled validity of prohibitions against various economic boycotts did we conclude in *Claiborne* that 'peaceful, political activity such as that

found in the [Mississippi] boycott' is entitled to constitutional protection." *FTC* at 428. First, the *FTC* court explicitly stated that is settled law that prohibitions on "various economic boycotts" are permissible. Second, the *FTC* court noted that in the particular case of *Claiborne*, the boycott was protected speech based on its facts: i.e., the boycott in *Claiborne* was a primary boycott by those whose constitutional rights were being infringed against those who were infringing the rights. This clearly shows that contrary to the district court's conclusion, *Claiborne*'s protections are fact specific.

In the current case, Plaintiffs' civil rights are not being infringed by either Israel or companies doing business with Israel and its boycotts are of a secondary or tertiary nature. In *Claiborne* as well as *FTC*, the boycotts were of a primary nature.

Furthermore, when examined substantively, Plaintiffs' boycotts should be seen as economic, not political, in nature, and thus don't benefit from the limited protections of *Claiborne*. As Scholars for Peace in the Middle East noted, BDS activity is best characterized as a form of "economic warfare"[7] rather than political speech.

[7] *Israel's War with Hamas Reinvigorates BDS Movement*, SCHOLARS FOR PEACE IN THE MIDDLE EAST (Sept. 11, 2014). The State of Iowa also described BDS as a form of economic warfare when it adopted its version of HB 2617. IOWA CODE § 12J.1 (2017).

Indeed, the court in *FTC* labeled the boycott activity in that case as non-political speech and noted that the boycotters could resort to many other means to communicate their political agenda and the boycott activity itself wasn't the type of conduct that deserved First Amendment protection. *FTC* at 431-432. As in *FTC*, Plaintiffs in the current case retain robust and varied means of expressive activity, including actual speech, rather than expressive economic conduct, to communicate their opinions of Israel.

Similarly, in *Allied Tube*, the court explicitly described the boycott in *Claiborne* as one where the boycotters were acting against those who infringed the boycotters' constitutional rights:

> "In that case, we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice."

Allied Tube at 508. The district court conflated *Claiborne*'s call for domestic justice with the BDS Movement, a foreign call to economic warfare against a foreign sovereign based on acts that occur entirely offshore. Indeed, the boycott that the Plaintiffs adhere to is a continuation and repackaging of the longstanding Arab League boycott of Israel, which was described as "…economic war…" and "…no longer a direct and primary boycott of Israel [but rather] a transnational assault on fundamental American freedoms and longstanding precepts of unimpeded international commerce". *RWU Article* at 79-80 (citing Congressional

testimony from hearings that led to the enactment of the federal anti-boycott law prohibiting participation in the Arab League boycott).

Allied Tube and *FTC* reiterate that the *Claiborne* court specifically tied First Amendment protections for boycott activity to the effect that the underlying boycott would have on the demand for protection of Fourteenth Amendment rights of those engaging in the boycotts. As the *Claiborne* court noted, the boycotters in that case "sought to vindicate the rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself." *Claiborne* at 914. This passage from the *Claiborne* opinion is central to that court's ruling. The *Claiborne* court was deciding a case that determined how Americans could protest against local action that deprived them of their constitutional right to freedom.

Whatever one may think of the conflict between the State of Israel and Palestinian Arabs, it is not an issue governed by the Fourteenth Amendment or any other provision of the United States Constitution; the rights of the parties involved are outside the scope and reach of Constitution. Thus, BDS boycott activity in the United States is not covered by the protections afforded under *Claiborne*.

Moreover, BDS boycott activity such as that which the Plaintiffs engage in is not a primary boycott activity but is, instead of a secondary nature similar to that of *Longshoremen's*. *Claiborne* was a classic example of a primary boycott – the boycotters refusing to do business with those who are in control of the subject

matter of the grievance. Secondary or tertiary boycotts, on the other hand, are ones where the boycotters put pressure on persons or entities in order to affect a third party. *See* the *RWU Article* at 82-83 and 100-101 for an analysis showing that secondary and tertiary boycotts have far fewer legal protections than primary boycotts.

Examples of secondary and tertiary boycotts are those employed by the Arab League (and BDS) against Israel. In the Arab League boycott, in addition to refusing to do business with Israel, Arab countries refused to do business with anyone or any company that did business with Israel. This is exactly how Plaintiffs' BDS boycott activity works. *Claiborne* not only doesn't cover Plaintiffs' secondary boycott activity, *Claiborne* explicitly noted that laws regulating secondary and tertiary boycotts are exceptions not covered by *Claiborne* and *Longshoremen's* was decided precisely on one such exception. In fact, existing federal law prohibits secondary and tertiary participation in the Arab League boycott (without regard to whether the boycott participants are members of labor unions) and that law has been upheld in the face of First Amendment challenges. When Congress debated that law it drew clear distinctions between primary boycotts, which are protected conduct, and secondary/tertiary boycotts, which are not afforded such protections. *See* the *RWU Article* at 82-84.

Plaintiffs also make the conclusory statement that BDS boycott activity is political speech protected under *Claiborne* but that conclusion is baseless. As *FTC* noted and *Longshoremen's* found, not all boycott activity is protected political speech, especially when other more effective means of communication remain available. BDS boycotts, including Plaintiffs', should not be viewed as political speech. Rather, they are economic boycotts that are often, though never inextricably, linked to the political positions being advocated by adherents vis-á-vis U.S. foreign policy. While some boycotts, such as those in *Claiborne*, are expressive conduct that cannot be separated from the underlying protected political speech, Plaintiffs' boycotts can be separated from the associated political speech.

The conduct in Plaintiffs' boycotts is also entirely unrelated to the purported political message of Plaintiffs. That is, Plaintiffs claim that their speech is meant to protest the policies of the government of Israel, yet their boycott activity is directed almost exclusively against third parties, including a number of American companies, that have no control over the actions of the Israeli government. When Congress enacted the federal prohibition against participation in boycotts of Israel in 50 U.S.C. § 4607 (the "Federal Anti-Boycott Law"), it did so in large part to

prevent American commerce, consumers and companies from being drawn into foreign conflicts,[8] something Plaintiffs now want to promote.

It is illustrative to look back to the Senate hearings leading to the adoption of the Federal Anti-Boycott Law to see how similar it is, in what it seeks to address, to HB 2617. Senator Adlai Stevenson described the boycott of Israel as

> "[intruding on] American sovereignty. It interferes with basic human rights and religious freedom. It impedes free competition in the marketplace and systematically enlists American citizens against their will in a war with Israel. It excludes other Americans from economic opportunities. Such behavior cannot be tolerated."[9]

In testimony before the House of Representatives at hearings on the Federal Anti-Boycott law, the executive council of the largest American union federation, the American Federation of Labor and Congress of Industrial Organization, accurately described the true nature of boycotts against Israel as

> "…attempts to impose upon the American people practices of racial and religious bigotry which violate American belief and law, and to make American firms the agents of hostile acts against a friendly nation. This constitutes a repugnant intrusion into American domestic life, and an unacceptable effort to coerce American foreign policy. The American people will not tolerate this dictation. The Executive Council [of the AFL-CIO] believes that the imposition of this boycott on Americans, American

[8] *See* the *RWU Article* at 76-80 (chronicling the legislative intent of the Export Administration Act's anti-boycott provisions, with a focus on the desire of Congress to insulate American commerce from the Arab-Israeli conflict).

[9] *Foreign Investment and Arab Boycott Legislation: Hearing on S. 69 and S. 92 Before the S. Subcomm. on Int'l Fin. of the S. Comm. on Banking, Hous. and Urban Affairs, 95th Cong. 446–47 (1977).*

owned business, or on any transactions occurring on American territory must end now."[10]

The BDS Movement boycott, as the successor to the Arab League boycott of Israel, must be described in the same terms: an attempt to use American consumers and commerce as a weapon in a bigoted foreign attack on a friendly nation.

One can further analogize BDS Movement supporters to the activists in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In that case, a group sought to assist designated foreign terror organizations in developing advocacy and legal strategies to support the terror organizations' activities. The assistance was, on its face, entirely non-violent. Nonetheless, the Supreme Court found that federal law prohibiting the provision of advisory support and engaging in activism favorable to foreign terror organizations did not violate the constitutional rights of the activists, even if the support was intended to be used only for purportedly humanitarian activities of the foreign organization. While HB 2617 was not explicitly implemented as an anti-terror law, its anti-discrimination prohibitions are aimed at the activities of those providing support for domestic affiliates of terror organizations (whether they are aware of the connection or not). Like the ironically named Humanitarian Law Project that was established to provide support to terror

[10] *Extension of the Export Administration Act: Hearings and Markup Before the H. Comm. on Int'l Relations, 95th Cong. 389 (1977).*

organizations, the organization whose boycott program Plaintiffs promote, Jewish Voice for Peace, was established to provide support to foreign groups that are controlled by designated terror organizations. While intent would matter if Plaintiffs were being prosecuted for criminal activity, Plaintiffs' purported lack of intent to provide support to terror organizations doesn't turn the State of Arizona's lawful exercise of its right to choose who it does business with into a First Amendment violation. As with the federal law at issue in *Humanitarian Law Project*, HB 2617 affects conduct that is not protected by the First Amendment.

Had the Plaintiffs been engaging in a boycott of companies that were denying Plaintiffs their constitutionally protected rights, *Claiborne* would certainly control this case. That is not what is happening here. Instead, like *Longshoremen's*, this is a case of a secondary boycott against parties unrelated to the Plaintiffs' grievance regarding a foreign conflict entirely unrelated to the infringement of any of Plaintiffs' constitutional rights, and the law at issue is a valid state anti-discrimination law. By *Claiborne's* own terms, laws regulating secondary boycotts and laws that are otherwise within a state's authority, such as anti-discrimination laws, are not subject to the broad First Amendment protections that the district court provided.[11]

[11] Even a Harvard Law Review note that was otherwise critical of another state's anti-boycott law acknowledged that with regard to new contracts with a state "…it is less certain that the anti-BDS law is unconstitutional…." *Recent Legislation*, 129 HARV. L. REV. 2029, 2036 (2016). The

iii. THE DISTRICT COURT'S DENIAL OF AMICI'S MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS WAS AN ABUSE OF DISCRETION

Including *amicus*, six parties sought leave to file *amicus* briefs in the district court proceedings, all of which were denied. Federal district courts possess the inherent authority to accept amicus briefs. *In re Bayshore Ford Truck Sales, Inc.*, *471 F.3d 1233, 1249 n.34 (11th Cir. 2006)* ("[D]istrict courts possess the inherent authority to appoint 'friends of the court' to assist in their proceedings."); *Hoptowit v. Ray, 682 F.2d 1237, 1260 (2d Cir. 1982); United States ex rel. Gudur v. Deloitte Consulting Llp, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007)* ("The extent to which the court permits or denies amicus briefing lies solely within the court's discretion."). "No statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an amicus brief, . . . and in the absence of controlling authority, district courts commonly refer to [Federal Rule of Appellate Procedure] 29 for guidance." *Gudur*, 512 F. Supp. 2d at 927. "Factors relevant to the determination of whether amicus briefing should be allowed include whether the proffered information is 'timely and useful' or otherwise necessary to the administration of justice." *Id*. Amici's role is to assist the court "in cases of general public interest by making suggestions to the court, by providing supplementary

---

Campbell Article at 53-58 rebuts many of the arguments regarding *Claiborne* and the unconstitutional conditions doctrine in the Harvard Law Review note. This shows that even among scholars there is debate as to the scope of *Claiborne* in the context of BDS activity, which, at a minimum, should have precluded the district court from granting the preliminary injunction.

assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *N.A.A.C.P. v. Town of Harrison, 940 F.2d 792, 808 (3d Cir. 1991)*.

District courts generally welcome the participation of amici where amici help in "…assisting in a case of general public interest, supplementing the efforts of counsel and drawing the court's attention to law that might otherwise escape consideration." *Funbus Systems, Inc. v. State of California Pub. Utilities Comm'n,* 801 F.2d 1120, 1125 (9th Cir. 1986). Supreme Court Justice Samuel Alito, then a judge on the Second Circuit, explained

> [e]ven when a party is very well represented, an amicus may provide important assistance to the court. 'Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.*' Luther T. Munford, When Does the Curiae Need An Amicus?*, 1 J.APP. PRAC. & PROCESS 279 (1999). Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance…. [I]t is preferable to err on the side of granting leave.
> *Neonatology Associates, P.A. v Comm'r IRS*, 293 F.3d 128, 132-133 (3rd Cir. 2002).

The founder of a*micus*, as an expert on the nature of the BDS Movement and the author of numerous published scholarly articles on the constitutional implications of regulations on BDS Movement boycotts, was in a unique position

to inform the district court on matters that the district court needed assistance with in determining whether there were open issues of law that would have militated against the issuance of a preliminary injunction. Because the issues in this case presented novel questions of law and fact, briefs from the other *amici*, especially states with laws similar to HB 2617, would have provided similar beneficial facts and analyses to the district court on important elements that should have been considered prior to granting the preliminary injunction. The district court's denial of leave to file amicus briefs resulted in the district court not being fully informed of the legal and factual issues at stake and constituted an abuse of the court's discretion that "…convey[ed] an unfortunate message about the openness of the court." *Neonatology Assocs*. at 133. *See, also, Taylor v. Soc. Sec. Admin.*, 842 F.2d 232, 233 (9th Cir. 1988) (finding that a district court's failure to properly exercise discretion was, itself, an abuse of discretion).

IV. CONCLUSION

HB 2617 is a common sense, narrowly tailored anti-discrimination measure that affects only a limited universe of secondary and tertiary economic boycotts relating to foreign affairs, completely divorced from the assertion of any constitutional rights asserted by those engaging in the boycotts. The activity subject to the restrictions of HB 2617 is not protected under *Claiborne* and

Plaintiffs retain an effective assortment of expressive conduct and actual speech with which to voice their political beliefs about Israel.

The BDS Movement was founded by a consortium of countries and terror organizations devoted to the destruction of Israel, many of whom have been designated as foreign terror organizations by the United States. The governors of all fifty states recently signed a statement affirming opposition to BDS, stating that BDS's "single-minded focus on the Jewish State raises serious questions about its motivations and intentions." *Governors United against BDS*, https://www.ajc.org/governors. This unified and universal acknowledgement of the nature of BDS should be recognized when undertaking a legal analysis of rights associated with BDS Movement activity.

Accordingly, *amicus* respectfully requests that this court vacate the district court's order.

DATED, this 13th day of November 2018

By: s/ Marc A. Greendorfer

MARC A. GREENDORFER
Counsel of Record for Amicus Curiae
Zachor Legal Institute
3919 U.S. HIGHWAY 84
RED LEVEL, ALABAMA 36474
(650) 279-9690

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-16896

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [5,364] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Marc A. Greendorfer

Date: 11/13/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF AMICUS CURIAE ZACHOR LEGAL INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANTS with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 13, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

November 13, 2018

/s/ Marc A. Greendorfer

MARC A. GREENDORFER
Counsel of Record for Amicus Curiae
ZACHOR LEGAL INSTITUTE