**Summary and Outcome**

A US District Court in Arkansas dismissed a motion for a preliminary injunction.

The Arkansas Times challenged the constitutionality of Act 710 which required companies doing business with state entities to certify that they are not, and will not engage in boycott activities against Israel.

**Facts**

The Arkansas Times is a weekly newspaper which published over 83 paid advertisements for the University of Arkansas-Pulaski Technical College (Pulaski Tech) between 2016 and 2018 on a contract basis. In October 2018, in advance of signing a new advertising contract with the Arkansas Times, Pulaski Tech asked the newspaper to provide certification in compliance with Art 710 that it was not, and would not, engage in boycott activities against Israel. Although the paper had provided such certification numerous times in the past, Alan Leveritt, the Times’ publisher and chief executive officer refused on the grounds that it would violate the paper’s First Amendment rights. The editorial board had been critical of the Act in the past, but there was no indication that the Times had any intention to engage in any such boycott. The Times’ further refused to offer the required twenty percent discount to avoid compliance with the Act. Hence, the parties ceased doing business together.

The Arkansas Times challenged the constitutionality of the Act claiming it violates the First and Fourteenth Amendments and the paper requested a preliminary injunction to prohibit the enforcement of the certification requirement pending judicial review.

[Act 710](http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act710.pdf) (Act) is an Arkansas State statute which prohibits “public entities from contracting with and investing in companies that boycott Israel.” The Act states that boycotts “threaten the sovereignty and security” of US allies and defines a boycott 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.” The Act seeks to support trade and cooperation with Israel as Congress has seemed it deemed it to “materially benefit” U.S. businesses and their competiveness. Companies who refuse or fail to provide the relevant certification may still contract with State Entities if they offer at least a twenty percent discount for the goods or services provided. The Act is similar to statutes already passed in numerous states and with a federal law which prohibits US citizens from “support[ing] any boycott fostered or imposed by a foreign country against a [friendly] country.” 50 U.S.C. § 4607(a)(1) (1979)

**Decision Direction**

The Court began by recognizing that a preliminary injunction is an extraordinary remedy which requires parties to prove that “(1) it will suffer irreparable harm if the injunction is denied; (2) the harm to the movant, if the injunction is denied, outweighs the harm to the non-movant if the injunction is granted; (3) there is a likelihood of success on the merits; and (4) an injunction is in the public’s interest. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981); Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987).”

Next, in order to demonstrate injury in fact in First Amendment cases the plaintiff must either prove either that undertaking a particular action prohibited by a statute would result in some unjustified penalty (Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 794 (8th Cir. 2016)) or that the statute has had a chilling effect on protected speech. (Care Comm. v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011))

The Times argued that the Act compelled speech pertaining to “political beliefs, association and expression,” and that it unjustifiably restricted protected speech and activities relating to boycotts.

The Court found that the Times had standing to bring the case since it had clearly suffered “injury in fact” due to the “concrete and quantifiable” financial loss from its refusal to comply with the certification provision. However, the Court also found that Times failed to prove that the boycotting of services was protected under the First Amendment, a finding which it acknowledged “diverged” from recent decisions handed down from federal district courts in Arizona ([*Mikkel Jordahl v. Mark Brnovich*](https://globalfreedomofexpression.columbia.edu/cases/mikkel-jordahl-v-mark-brnovich/)336 F. Supp. 3d at 1016) and Kansas ([Koontz v. Watson](https://globalfreedomofexpression.columbia.edu/cases/koontz-v-watson/) 283 F. Supp. 3d 1007, 1021–22 (D. Kan. 2018)).

The Court then turned to a discussion of the applicable First Amendment standards. The First Amendment “protects political association as well as political expression” (Buckley v. Valeo, 424 U.S. 1, 15 (1976)) and it prohibits the government from “from dictating what we see or read or speak or hear.” (Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002))

The Court clarified that certification requirements usually do not raise constitutional questions unless they seek to restrict protected speech, association or activities, or alternately, compel speech. In the case of Act 710, the certification provision only “concerns a contractor’s purchasing activities with respect to Israel,” and does not restrict criticism of Israel or even calls to boycott Israel. In light of the definition of a boycott under Act 710, the Court determined that purchasing decisions are “neither speech nor inherently expressive conduct.” As per the ruling in *Jordhal,* purchasing decisions, in and of themselves, do not communicate ideas. Such decisions only become expressive when they are “accompanied” by speech explaining the purpose of the boycott which would make the political motivations clear to the public. (Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (“FAIR”), 547 U.S. 47, 66 (2006)) Relying on Supreme Court precedent in FAIR, the Court further clarified that conduct cannot be “transformed” into “inherently expressive conduct” when it is accompanied by explanatory speech after the fact or even if it is part of a larger social movement.

 ~~Relying on Supreme Court precedent in FAIR, the court further clarified that explanatory speech made after the action or when the actions are part of a larger social movement, are not necessarily sufficient to transform the conduct in to “inherently expressive conduct.”~~  Therefore, Court concluded that the First Amendment did not protect the Times’ refusal to comply with the certification requirement.

The Court then rejected the Times’ argument that the Supreme Court precedent in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) protected “an unfettered” right to participate in politically motivated boycotts. Rather the court explained that in Claiborne, the boycott comprised a range of protected activities including meetings, speeches and non-violent pickets, as well as purchasing decisions. It noted that Claiborne did not find that “individual purchasing decisions were protected by the First Amendment.” (see also Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655, 39 F.3d 191 (8th Cir. 1994)) Under Act 710, the Times is free to criticize Israel’s policies, engage in protests or organize meetings in support of a boycott, without state interference.

The facts under Claiborne were also significantly different from the present case. Claiborne concerned a “primary boycott of white owned businesses…by civil rights activists in order to protest racial discrimination.” In effect, the boycott was being conducted by persons “whose constitutional rights were being infringed upon and against those who were infringing upon those rights. (FTC v. Superior Court Trial Lawyers Association 493 U.S. at 426–27) Whereas, Act 710 concerns political boycotts against a foreign government relating to issues of no “domestic legal interest.” The Court again relied on Supreme Court precedent in International Longshoremen’s Association (Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc., 456 U.S. 212, 226 (1982) ) to underscore that there is no “unqualified right to boycott,” or “First Amendment interest in boycotting at all,” and that Claiborne must be seen as establishing a “narrow exception to this rule based on particular facts that are not present here.” (page 15)

Therefore, the Court denied the Times’ request for a preliminary injunction and dismissed the Times’ claim finding “that a boycott of Israel, as defined by Act 710, is not speech, inherently expressive activity, or subject to independent constitutional protection under Claiborne.”