

Zachor Legal Institute Urges En Banc Review of Eighth Circuit Decision on Anti-Discrimination Law

A divided panel of the Eighth Circuit struck down an anti-discrimination law on narrow grounds, putting all other anti-discrimination laws in jeopardy.

BOZEMAN, MONTANA, UNITED STATES, February 12, 2021 /EINPresswire.com/ -- Press Release – For Immediate Release



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[Zachor Legal Institute](#) Urges Eighth Circuit En Banc Review for Arkansas Anti-Discrimination Law.

Among Zachor Legal Institute's areas of focus is confronting discriminatory boycotts that have been promoted by a group known as the Boycott, Divest and Sanction ("BDS") movement. The BDS movement has deep and extensive ties to designated foreign terrorist organizations, including Hamas and the Popular Front for the Liberation of Palestine and has infiltrated a number of organizations to spread a discriminatory agenda aimed at Jews and companies that do business with and in Israel. The ultimate goal of BDS is to disenfranchise Jews, the indigenous people of the land of Israel, and ethnically cleanse Israel. BDS activity has now been embraced by far left extremists as well as white supremacist groups, united in their promotion of anti-Semitism.

On February 12, 2021, a divided three judge panel of the Eighth Circuit Court of Appeals issued an opinion reversing a denial of a preliminary injunction sought by opponents of an Arkansas law restricting when the state can do business with those engaging in discriminatory boycotts (19-1378 Arkansas Times LP v. Mark Waldrip, et al.)

The lower court properly found that the Arkansas law, Act 710, a narrowly tailored and common

sense law designed to ensure that the state did not fund anti-Semitic boycotts while not affecting the right of individuals to speak on the topic, complied with the First Amendment. Two of the three judges on the Eighth Circuit panel misinterpreted the text of Act 710 to find that it was vague while the third judge found the text to not only be specific, but also argued that the lower court's decision should have been upheld.

The lower court engaged in a reasoned analysis of existing First Amendment caselaw on boycott activity and found that the case relied upon by BDS activists, *NAACP v. Claiborne Hardware Co.*, did not protect the types of boycotts promoted by BDS and subject to Act 710, which are secondary boycotts relating to foreign conflicts.

As Zachor has pointed out in its scholarship and court briefs, Claiborne is limited to protest activity that relates to the 14th Amendment rights of those engaging in the boycotts, such as African Americans protesting local officials who promoted a pattern of race based discrimination. Act 710 does not touch upon the right of individuals to protest in support of their 14th Amendment rights. Instead, it simply prevents the state from becoming entangled in foreign disputes.

The case that controls the type of boycotts regulated by Act 710, as the lower court confirmed in denying the request to enjoin the enforcement of Act 710, is *International Longshoremen's Ass'n v. Allied International*. In *International Longshoremen's*, U.S. workers who opposed the Soviet Union's actions in Afghanistan engaged in a secondary boycott against the Soviet Union and the Supreme Court found that their boycott activity was not protected by the First Amendment.

BDS boycotts are precisely analogous to the boycotts in *International Longshoremen's*, as those engaging in BDS activity in the United States are engaging in a secondary boycott targeting a foreign nation, with no Fourteenth Amendment rights of the boycotters implicated. The Eighth Circuit never reached the question of secondary boycott activity unrelated to the rights of those boycotting, even though this was the core First Amendment question in the case. Instead, the court found three words in Act 710 used to define discriminatory boycotts subject to the law to be vague and on that basis, reversed the lower court.

Zachor submitted an amicus brief in this Eighth Circuit case and will continue to support the state of Arkansas, and more than half of all other U.S. states, as they confront the spread of anti-Semitism promoted by BDS. If the Eighth Circuit's decision stands, all state antidiscrimination laws will be in jeopardy. We urge an En Banc review by the Eighth Circuit.

About Zachor Legal Institute: Zachor Legal Institute, a 501(c)(3) non-profit organization, uses the law to defend against anti-Semitism and delegitimization of Israel, with a focus on opposing BDS. To learn more, please visit www.zachorlegal.org.

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