No. 19-01378

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
Case No. 4:18-cv-914
Honorable Brian S. Miller, District Judge

BRIEF OF AMICI CURIAE COUNCIL ON AMERICAN-ISLAMIC RELATIONS AND BAHIA AMAWI IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

CAIR Foundation, Inc. (d/b/a "Council on American-Islamic Relations" or "CAIR") is a 501(c)(3) not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock. Bahia Amawi is an individual.

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STATEMENT OF INTEREST[1]

Founded in 1994, the Council on American-Islamic Relations ("CAIR") has a mission to enhance understanding of Islam, protect civil rights, promote justice, and empower American Muslims. A significant component of CAIR's work is supporting the free speech rights of Muslims throughout the United States, including those who protest Israel's illegal occupation of East Jerusalem, the West Bank, and the Gaza Strip. Since 2018, CAIR lawyers have filed First Amendment lawsuits in Arizona, Maryland, and Texas challenging state laws targeted at suppressing the peaceful Boycott, Divestment, and Sanctions movement.

Bahia Amawi is the plaintiff in CAIR's Texas litigation. Amawi is a speech language pathologist of Palestinian origin who is fluent in English and Arabic. For the last nine years Amawi has contracted with Pflugerville Independent School District to conduct speech therapy and early childhood evaluations, including for Arabic-speaking children. In September 2018, Pflugerville informed Amawi, based on Texas's anti-BDS law, that in order to continue working she must sign a contract

[1] All parties have consented to the filing of this *amicus* brief. No party or its counsel has contributed to the funding or preparation of this brief.

addendum and certify that she (1) does not currently boycott Israel and (2) will not boycott Israel during the term of the contract. Amawi refused to sign this "No Boycott of Israel" clause. She has been unable to conduct speech assessments for Texas schoolchildren ever since. Preliminary injunction proceedings in Amawi's Texas case remain pending. *See Amawi v. Pflugerville Independent School District*, No. 1:18-cv-01091 (W.D. Tex.).

ARGUMENT

Political speech and political consumer boycotts are fully protected by the First Amendment. Arkansas, along with two dozen other states, seeks to stifle protected speech in support of Palestine. In so doing, these states are harming their own citizens. In Bahia Amawi's case, Texas has prioritized its abstract support of Israel over the educational needs of its own Arabic-speaking schoolchildren. The utter lack of relationship between the terms of individual government contracts and the international political debate surrounding Israel and Palestine showcases the First Amendment harms. Arkansas's law is even more egregious than other states because it permits contractors' political

speech against Israel, but only if the speaker agrees to pay a 20 percent penalty.

In evaluating the Arkansas anti-BDS Act, the District Court made three fundamental legal errors. First, the District Court failed to apply controlling Supreme Court precedent regarding political boycotts. Second, the District Court failed to evaluate the actual conduct targeted by the Arkansas anti-BDS Act, which demonstrates that Arkansas espouses no economic interest in Israeli commerce, only a political viewpoint-based one. And third, the District Court failed to acknowledge that a "No Boycott of Israel" certification requirement unconstitutionally compels speech itself. As Bahia Amawi's experience in Texas showcases, anti-BDS laws like Arkansas's are wildly overbroad and wreak serious harm on protected First Amendment activity.

I. THE FIRST AMENDMENT PROTECTS POLITICAL BOYCOTTS

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), controls this appeal. Yet the District Court rejected *Claiborne* as binding. *Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d 617, 2019 WL 580669 at *6 (E.D. Ark. 2019). The District Court held that because the act of *not* purchasing something is not "inherently expressive," political boycotts

are unprotected by the First Amendment. *Id.* at *5–7. The District Court's rejection of *Claiborne* was error.

In *Claiborne*, a group of black activists in Mississippi voted to boycott white merchants in opposition to those businesses' racist practices. 458 U.S. at 889, 907. The activists then monitored their community's patronage of the stores, picketing the storefronts and urging black neighbors to shop elsewhere. *Id.* at 894, 907.

The Supreme Court in *Claiborne* recognized that non-violent boycotts constitute "form[s] of speech or conduct that [are] ordinarily entitled to protection under the First and Fourteenth Amendments." 458 U.S. at 907, 915. The Supreme Court held that a State's "broad power to regulate economic activity" simply does not extend to "prohibit[ing] peaceful political activity such as that found in [a] boycott" which expresses concern on critical public issues and showcases a desire for self-government. *Id.* at 913. Such activity "rest[s] on the highest rung of the hierarchy of First Amendment values." *Id.* (internal citation omitted).

The Supreme Court's decision was not ambiguous: *Claiborne* unanimously held that each "elemen[t] of the boycott is a form of speech or conduct" entitled to protection under the First Amendment. *Id.* at 907.

"The black citizens … in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect." *Id.*

The District Court attempted to distinguish speech in support of a boycott, which *Claiborne* explicitly protects, from the physical or economic act of boycotting itself. *See Arkansas Times*, 2019 WL 580669 at *6. But *Claiborne* did not make this distinction. *Claiborne* declared that the "boycott clearly involved constitutionally protected activity," and its speech elements, "though not identical, are inseparable" from physical and economic conduct. *Id.* at 911 (quoting in part *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *Claiborne* would have had no reason to clarify that "[s]econdary boycotts and picketing by labor unions may be prohibited," *id.* at 912, as could "a boycott organized for economic ends," *id.* at 915 (quoting *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)), if it were not holding that the First Amendment protects consumer participation in a boycott for political reasons.

As two other federal district courts have concluded, "The conduct [an anti-BDS law] aims to regulate is inherently expressive." *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018) (citing *Claiborne*, 458

U.S. at 907–08). "*Claiborne* stands for the proposition that collective boycotting activities undertaken to achieve social, political or economic ends is conduct that is protected by the First Amendment." *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1041 (D. Ariz. 2018). "The type of collective action targeted by [anti-BDS acts] specifically implicates the rights of assembly and association that Americans … use to bring about political, social, and economic change." *Id.* at 1043 (citing *Claiborne*, 458 U.S. at 911).

Bahia Amawi is a Muslim of Palestinian origin who has seen first-hand Israeli maltreatment of Palestinians in the occupied territories. Due to her experiences, Amawi checks labels while shopping and refuses to buy Israeli products. She considers her refusal to economically support Israel to be an expression of political protesting that imposes peaceful pressure on the Israeli government to end oppressive policies against Palestinians. For those protected acts of consumer protest, Amawi is now unemployed. Even more seriously, Texas public schoolchildren are not receiving the bilingual speech assessments and services Amawi is uniquely qualified to provide.

The District Court erred in rejecting *Claiborne* and should be reversed.

II. EXAMINATION OF THE ACTIONS THE ARKANSAS ANTI-BDS ACT TARGETS DEMONSTRATES ITS UNCONSTITUTIONALITY

The Arkansas anti-BDS Act, like other states' anti-BDS acts, presents the opposite situation from *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)**Error! Bookmark not defined.** because it is squarely aimed at speech, not conduct. The District Court thus erred in relying on *FAIR*. *See Arkansas Times*, 2019 WL 580669 at *5–6.

Crucial to the *FAIR* decision was the Supreme Court's limiting of the holding to narrowly-defined conduct: law schools must provide physical access for military recruiters. 547 U.S. at 60. Once law schools supply that access, "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything." *Id*. The Supreme Court acknowledged that law schools remain free to engage in other protest activities, including distributing dissenting bulletins and picketing outside the military recruiters' doors. *Id*. By limiting the question presented to a binary yes-or-no regarding physical access, the

Supreme Court averted any legal dissection of the schools' speech or viewpoints on LGBT discrimination in the military.

The District Court erred by primarily relying on *FAIR* to conclude that the Arkansas anti-BDS Act targets economic conduct, and not political speech. The difference is clear because the State of Arkansas does not purport, as a general matter, to care about individual or business decisions to *not* purchase from Israel. Unlike the Solomon Amendment, which requires campus access for military recruiters, there is no affirmative legal requirement that Arkansas contractors *must* purchase Israeli goods or services. Nor has Arkansas created an office of Israeli-purchase compliance tasked with auditing all contractors' kitchen or technology procurements. Rather, the structure of the anti-BDS Act reveals that Arkansas only cares about someone *not* purchasing goods from Israel *if* that decision is made by a government contractor, *and if* that contractor is avoiding Israeli purchases for a political reason, *and if* those contractors refuse to pay a 20% political penalty. *See* Ark. Code § 25-1-503. Unlike *FAIR*, Arkansas is not asking a binary question like: "Do you purchase goods from Israel? Yes or No." Instead, Arkansas is asking, "If you are a contractor who has ever not purchased a good related

to Israel, do you certify that this non-purchase was *not* for a political boycott reason? If it was politically-motivated, are you willing to incur a 20% monetary penalty in order to continue standing on your political principles?" *See* Ark. Code §§ 25-1-502, 503. Because the state's regulation of economic action depends entirely on a contractor's political viewpoints, the Arkansas anti-BDS Act is aimed directly at speech.

The District Court *correctly* reasoned that most forms of boycott activity and economic conduct involving Israel can only be distinguished by speech. The District Court noted, for example, that it was "highly unlikely" that an outside observer would be able to discern from an "absence of certain goods from a contractor's office" that the contractor was engaged in a boycott in the absence of speech. *Arkansas Times*, 2019 WL 580669 at *5 (relying on *FAIR*, 547 U.S. at 66. But this analysis is best read as a concession of First Amendment defeat, not a path to Attorney General victory. It is precisely because identical economic conduct is indistinguishable to an outside observer that the Arkansas anti-BDS Act deems it necessary to require a "No Boycott of Israel" pledge and inquire into external corporate "statement[s] that it is participating in boycotts of Israel." Ark. Code §§ 25-1-502(1)(B), 503.

Identical economic conduct is prohibited only when contractors accompany it with speech Arkansas dislikes. This is unconstitutional. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (invalidating ordinance where "The restrictions … that apply to any given sign thus depend entirely on the communicative content of the sign.").

Stated differently, *FAIR* and the Arkansas anti-BDS Act are distinct due to the posture in which their terms are invoked. In *FAIR*, private law schools invoked their political principles defensively: they attempted to use the First Amendment as a way to claim an exemption from a mandate that campuses must permit access to military recruiters on equal terms as other recruiters. 547 U.S. at 60. By contrast, under the Arkansas anti-BDS Act, the State evaluates private contractors' political principles offensively: Arkansas has no buy-from-Israel-mandate, so the State instead requires speech certifications that contractors do not boycott Israel. Speech certifications are required because auditing signed statements is easy; auditing the absence of economic transactions plus the motivations for that absence is hard. In the absence of a certification, the State imposes affirmative financial

penalties because the refusal necessarily reveals that a contractor engages in disfavored political activity.

Amawi's case is illustrative. She enjoys performing speech assessments for the Pflugerville Independent School District, and her boycott of Israeli products does not adversely impact her work. Recognizing that, Pflugerville has even conditionally stipulated to offering Amawi her job back if the Texas federal court issues a preliminary injunction against the law. *See Amawi,* 1:18-cv-01091, Dkt. 18. Amawi's political opinions and economic actions related to Israel and Palestine would never have affected her job *except for* the fact that Texas mandated public inquiry into them as a condition of contracting. The First Amendment problems with anti-BDS laws are due to states' affirmative certification demands aimed at political support of Israel, not plaintiffs' defensive requests for free speech exemptions from generally-applicable mandates.

Notably, *FAIR* does not refer to the law schools' actions as a "boycott" anywhere in the opinion. Instead, the Supreme Court states that the conduct involved was simply "treating military recruiters differently from other recruiters." 57 U.S. at 66. *FAIR* neither cites to

nor mentions *Claiborne* or other "boycott" cases. When the Supreme Court overrules, abrogates, or distinguishes prior decisions, it does so expressly. The Supreme Court's unanimous, narrowly-focused decision in *FAIR* cannot be read to have upset decades of prior boycott caselaw covertly and without dissent. *See Koontz*, 283 F. Supp. 3d at 1023 ("boycotts—like parades—have an expressive quality") (citing *Claiborne*). The District Court's failure to parse the nuances of *FAIR's* speech and conduct balance caused it to overread *FAIR* as abrogating *Claiborne*. *See Koontz*, 283 F. Supp. 3d at 1023-204; *Jordahl*, 336 F. Supp. 3d at 1042-43 (relying on *Claiborne* and distinguishing *FAIR*). This was error and should be reversed.

III. A NO BOYCOTT OF ISRAEL CERTIFICATION REQUIREMENT UNCONSTITUTIONALLY COMPELS SPEECH

The government is constitutionally prohibited from requiring contractors to pledge allegiance to its preferred policies. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220–21 (2013). The Supreme Court has long recognized that the First Amendment forbids a mandatory pledge of allegiance even to the United States. *See West Virginia v. Barnette*, 319 U.S. 624, 642 (1943). The same principle applies

with even greater force to Arkansas's "No Boycott of Israel" clause, which amounts to a loyalty oath to a foreign nation. *Id.* State governments cannot condition employment "on an oath that one has not engaged, or will not engage, in protected speech activities." *Cole v. Richardson*, 405 U.S. 676, 680 (1972) (collecting cases).

The District Court held that Arkansas's certification requirement did not violate the First Amendment because it was simply "elicit[ing] information" that the individual would comply with the law. *Arkansas Times*, 2019 WL 580669 at *4 (relying on *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995); *Cole v. Richardson*, 405 U.S. 676, 680 (1972)). The District Court then concluded that no certification requirement implicates the First Amendment unless the underlying certification conduct (the boycott) is itself constitutionally protected speech. *Arkansas Times*, 2019 WL 580669 at *4. As detailed in Section I above, protesting Israel through economic avoidance *is* constitutionally protected.

Moreover, under *Sindel's* own reasoning, the Arkansas "No Boycott of Israel" certification requires an individual to "disseminate" a political position on Israel "with which [s]he disagrees." 53 F.3d at 878 (explaining what type of certification would violate the First Amendment). Nor is

Arkansas merely requiring a certification that the contractor will comply with existing law. *Cole*'s certification dealt with avoiding treason, a serious crime. *Cole*, 405 U.S. at 678. By contrast, the certification Arkansas requires forbids one specific type of activity – boycotting Israel – which is not otherwise unlawful. As detailed in Section II above, Arkansas does not care about whether it's contractors or residents purchase from Israel or not, unless the avoidance is for political reasons. "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (striking down New Hampshire requirement that license places must display the "Live Free or Die" state motto).

By imposing a mandatory signature requirement (or alternative 20% financial penalty), the Arkansas anti-BDS Act compels the very conduct-adjacent speech that *FAIR* acknowledged would implicate the First Amendment. *FAIR*, 547 U.S. at 66; *see also Jordahl*, 336 F. Supp. 3d at 1042 (requiring a "promise to refrain from engaging in certain actions that are taken in response to larger calls to action that the state

opposes" is "infringing on the very kind of expressive conduct at issue in *Claiborne*").

The error in the District Court's reasoning is evident by applying its holding to the facts of *Claiborne* itself. Under the District Court's reasoning, the NAACP would also have had no right to engage in the physical act of "picketing," despite *Claiborne* and other Supreme Court cases recognizing that politically-motivated action as First Amendment protected conduct. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 318–19 (1988). Furthermore under its reasoning, the NAACP would have been free to advocate for a boycott of white merchants, but had no right to physically refuse to visit their stores or economically refuse to purchase their merchandise. *See Arkansas Times*, 2019 WL 580669 at *5–6. Once boycotting conduct was prohibited, under the District Court's logic, Mississippi could have further required the NAACP to certify it would not boycott racially discriminatory businesses. *See id.* Since any result blocking NAACP activism must be wrong due to its clear contradiction with *Claiborne*, the District Court's opinion must be reversed.

CONCLUSION

The Court should reverse the opinion of the District Court and conclude that the Arkansas anti-BDS Act violates the First Amendment.

Dated: April 15, 2019

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As required by Fed. Rul. App. P. 32(a)(7)(B) the brief, excluding exempted portions, contains 2841 words.

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Dated: April 15, 2019 *<u>/s/ Lena Masri</u>*

CERTIFICATE OF SERVICE

This is to certify that on April 15, 2019, a true and correct copy of the foregoing Brief of Amici Curiae was electronically mailed to all counsel of record through this Court's CM/ECF system, including:

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