NO. 19-1378

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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ARKANSAS TIMES, LP,
Plaintiff-Appellant,

v.

MARK WALDRIP, et al.,
Defendants-Appellees,

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

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# AMICUS CURIAE BRIEF OF PROFESSOR LAWRENCE GLICKMAN IN SUPPORT OF PLAINTIFF-APPELLANT ARKANSAS TIMES

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## INTEREST OF AMICUS[1]

Professor Lawrence B. Glickman is the Stephen and Evalyn Milman Professor of American Studies in the Department of History at Cornell University. Professor Glickman has authored or co-authored four books, including *A Living Wage: American Workers and the Making of Consumer Society* (1999), *Consumer Society in American History: A Reader* (1999), *Buying Power: A History of Consumer Activism in America* (2009), and *The "Cultural Turn" in U.S. History* (2012). *Buying Power* focuses on the historical use of boycotts to effect change. As a scholar intimately familiar with this history—and one who does not participate in or support boycotts of Israel—Professor Glickman is in a unique position to aid this Court.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one, except counsel for Amici, has authored this brief in whole or in part or contributed money toward the preparation of this brief.

## I. INTRODUCTION

"A tradition as persistent as the American nation itself," boycotts and consumer activism have played a critical role in shaping the nation. Lawrence B. Glickman, *Buying Power: A History of Consumer Activism in America* 2 (2009). The State of Arkansas undermined that role when it enacted Ark. Code Ann. § 25-1-503, a statute that would require public contractors to certify that they are not engaging in and will not engage in a "boycott of Israel" during the pendency of their contracts. By holding that First Amendment rights "do[] not include political boycotts directed towards foreign governments concerning issues that do not bear on any domestic legal interest," *Ark. Times LP v. Waldrip*, No. 4:18-CV-00914 BSM, 2019 WL 580669, at *7 (E.D. Ark. Jan. 23, 2019), the district court erred in ignoring the rich American tradition of using boycotts to voice political opinion against domestic and foreign adversaries, on social and moral topics. This Court should therefore reverse the ruling.

## II. DISCUSSION

Boycotts have played a crucial role in American political engagement. In boycotts during the American Revolution, Civil War era, the Great Depression, and the civil rights movement, consumer activists have viewed and used the consumption of goods in an "inherently political" way. Glickman, *Buying Power* at 5. In keeping with that tradition, Appellant Arkansas Times (the "Times") seeks to

exercise its First Amendment rights to boycott as a means of "bring[ing] about political, social, and economic change." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982). Because Arkansas's statute expressly and impermissibly conditions eligibility for government contracts on an agreement not to engage in boycotts, this Court should reverse the district court and hold the statute invalid.

### A. Boycotts Are an Indispensable Part of the American Tradition of Expression and Association

Beginning even before the Revolution, Americans have used boycotts to exert social and commercial pressure, domestically and abroad, as a means of forcing social and political change. *See* Glickman, *Buying Power* at 54–56. Boycotts "highlight the social implications of relations usually hidden from the public, especially in the form of exploitative employment relationships, from slavery in the nineteenth century to sweatshops in the twenty-first." *Id.* at 9. So even when a boycott's aim of pressuring someone or something fails or underwhelms, consumer activists still often help "to publicize, popularize, and politicize causes." *Id.* at 18.

Closely related, boycotts have given voice to previously disenfranchised communities because "consumer activism has been far more open to participants than that other measure of democratic citizenship, voting, which excluded slaves and, later, under Jim Crow, most African Americans and, until 1920, most women." *Id.* at 25. In fact, "consumption was a central mode of political engagement for ordinary people long before other forms of politics . . . became

available to them." *Id.* at 36. Moreover, boycotts allow individuals to expand their own community and reach "as a potentially robust political actor, whose power extend[s] as far as the factories, distributors, and stores[.]" *Id.* at 5. *See also N.A.A.C.P. v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."). Activities and politics related to "consumption brought the household into the public sphere (both near and far) and the public sphere into the home." Glickman, *Buying Power* at 13. Just like early Americans, citizens today are reminded daily in their pantry, at the grocery store, and on social media that their "circle of responsibility" extends well beyond their local communities. *See id.* at 2.

The history of American boycotts demonstrates how consumer activism has shaped the nation. For example:

- **American Revolution (1760s–1770s):** Colonists and merchants created associations to boycott British and Loyalist goods, helping define and connect the emerging nation. *Id.* at 312–13. *See also infra*, at Section I.B.1.
- **Abolition Movement (1820s–1860s):** Anti-slavery and "free produce" advocates boycotted slave-made southern goods, pressuring white southern agriculturalists. *Id. See also infra*, at Section I.B.2.
- **Labor Era (1870s–1900s):** Consumers and laborers banded together to form unions, attacking industrial-era employers with widely publicized but locally based boycotts. *Id.*

- **Progressive Era (1890s–1920s):** National Consumer League women and southern African Americans participated in boycotts and "muckraking" of southern businesses and government services that supported Jim Crow laws and disenfranchised minorities. *Id.*

- **Silk Boycott (1937–1940):** Antifascist protesters, the League of Women Shoppers, and the American Student Union boycotted Chinese and Japanese silk, substituting other fabric at fashion shows and reviving the Revolutionary concept of virtuous aestheticism. *Id.* at 6, 314–15.

- **Consumer Movement (1939–1950s):** Labor organizers and organizations such as the Consumer Union sought to promote social change and equality through product testing, such as the sort published in *Consumers Reports*, and boycotts; however, the House Committee on Un-American Activities railed against them and their activity as covertly communist while lauding the free market and consumption. *Id.* at 213–15, 314–15.

- **Civil Rights Movement (1950s–1960s):** African Americans and civil rights advocates boycotted segregated businesses and services "in a coordinated attack upon the newly enshrined system of legal segregation[.]" *Id.* at 167–71. *See also supra*, at Section I.B.3.

While many more examples exist, these defining American consumer activist movements "staked a claim wherever the broad categories of consumption and citizenship, long their defining concerns, intersect." *Id.* at 27. And "[w]hatever the particularities of their specific political engagements," American citizens have recognized the political power inextricably "bound with the use of aggregate purchasing power to promote justice." *Id.* at 5.

### B. Boycotts Have Played a Key Role in Shaping American History

### 1. The American Revolution: Founding of the Nation and the Boycott

"Although consumer activism was conceived earlier and matured later, its nascent modern form emerged in the crucial moment of colonial and Revolutionary America." *Id.* at 34. In fact, "[c]alls for American versions of British products began almost as soon as the imperial crisis started in 1763 and intensified over the next decade." *Id.* at 56. But following implementation of the oppressive Stamp Act of 1765, American colonial merchants, clergy, newspaper publishers, and lawyers rallied together against the injustices of the British Parliament and Crown. Claude H. Van Tyne, *The Causes of the War of Independence: Being the First Volume of A History of the Founding of the American Republic* 158–65 (1922) (noting that "[i]t was one of the most serious errors of the British Government to arouse the American lawyers"). Within days, many colonies and merchant associations voted to boycott British goods, *id.* at 164, and "from the 1760s onward, consumer politics became critical to the independence struggle," Glickman, *Buying Power* at 2. Even "the American Founders . . . made consumer tactics central to their patriotic cause." *Id.* at 31. *See also* John Adams, *Instructions of the Town of Braintree to Their Representative Ebenezer Thayer,* Charles F. Adams ed., 3 *The Works of John Adams* 465, 467 (1851) (urging boycotts and noncompliance with the Stamp Act of 1765).

On the night of December 23, 1773, in what became the most famous act of colonial rebellion and consumer activism, disguised American colonialists dumped vast stores of British tea into the Boston Harbor. Glickman, *Buying Power* at 39. Shortly after this "Boston Tea Party," the First Continental Congress organized the Continental Association for implementing a trade boycott with Britain.[2] *See id.* at 37–39. "[T]he goals of nonimportation associations were twofold: first, to weaken the British economy and therefore to force a change in the king's and Parliament's imperial policy; and second, to organize, publicize, and systematize the types of symbolic politics that had taken place in local communities throughout the early modern era." *Id.* at 44. Ultimately, the "London merchants felt the pinch" of these boycotts, Van Tyne, *The Causes of the War of Independence* at 164, and the Parliament repealed the Stamp Act. But by 1767, the unpopular Townshend Acts took effect, imposing new taxes on colonists that once again spurred them to boycott. *See* John Rowe, *Diary 5* 718 (Mar. 4, 1768) (recounting Boston committee's resolution to boycott).[3] Ultimately, Britain inadvertently accomplished one of the most important goals of the Revolution: giving an

[2] As part of the boycott of British and West Indies goods, the Association mandated that a committee "in every county, city, and town" be chosen to represent their constituents and enforce the Articles of the Agreement. Journals of the Continental Congress, 1774–1789, Articles of the Association, 79 (Oct. 20, 1774).

[3] https://www.masshist.org/revolution/doc-viewer.php?item_id=432&mode=transcript&img_step=2&pid=2#page2.

identity and sense of community to the colonists. Glickman, *Buying Power* at 11 ("The nonimportation, nonconsumption movements of the Revolutionary era, for example, helped invent American identity, in large measure by attenuating the colonists' sense of Britishness.").

Methods of political consumer activism varied during this time, with nonimportation and boycott agreements "signed by colonists all along the Eastern seaboard[.]" Glickman, *Buying Power* at 38. Women made homespun clothes, mourning dress was simplified, and sage, sassafras, and balm replaced British tea. *Id.* at 56. *See also* Van Tyne, *The Causes of the War of Independence* at 163. As for men, bands of patriotic merchants and the Sons of Liberty strictly enforced the agreements, *id.* at 164, with "[c]olonists who supported British imperial measures, from the Stamp Act to the Intolerable Act, routinely fac[ing] the wrath of their neighbors," Glickman, *Buying Power* at 36. This "'strikingly original' form of politics invented by the Revolutionaries," T.H. Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence* 19 (2004), thus set the stage and standard for future boycotts' use of foreign and domestic pressure, extension of one's individual reach, aggregation of a community's purchasing power, and enfranchisement of minorities.

"Although initially led by merchants, . . . [b]y the 1770s, ordinary Americans had claimed a new and powerful role for themselves as members of the

public, as signers of petitions, and as participants in the consumer politics of the nonimportation, nonconsumption movement." *Id.* at 44. "These people formed a group by virtue of shared consumer practices and also through shared information about their actions via placard, sandwich board, petition, or newspaper." *Id.* at 52. Americans "came to believe that their new political practices were not dependent on proximity," *id.* at 59–60, and that they could wield this newly found political power to effect change globally. So while "the Revolutionary era marked 'the beginning of a more organized, general and nonphysical form of collective action—the boycott,'" *id.* at 59 (quoting Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* 40–41 (1st ed. 1994)), Americans were far from done using boycotts to effect domestic and international change.

### 2. The Civil War: Buy Free for the Sake of the Slave

Beginning in the 1820s and through the antebellum period, consumer activists used boycotts for new reasons and in new ways. Glickman, *Buying Power* at 61. Instead of merchants targeting a business or nation for only political reasons, now merchants and citizens also withheld "pecuniary support from a business, product, or nation deemed *immoral*." *Id.* at 66. Believing just a boycott of slave-made goods was an "insufficient response to the evil of slavery," the "free produce" movement encouraged consumers to buy products made by "free labor" (non-slave workers). *Id.* at 69. Led by Quakers and some abolitionists who

believed that "[i]f there were no consumers of slave-produce there would be no slaves," *id.* at 73, "shopping [during this period] was politics by other means, enabling the activist to put theoretical beliefs into practice," *id.* at 77. In that way, this "engine for moral change" highlighted the injustices of slavery and plight of black slaves. *Id.* at 78.

Boycotts to effect moral change, in which "free produce campaigners sought to humanize the people and the forces that brought goods into their shopping cart," *id.* at 78–79, not only expanded upon the early colonial boycotts but also helped set the modern boycott template. Now, instead of seeking to pressure and "pinch" a foreign market, the focus also turned to compelling and weakening part of the domestic market—southern slaveholders.[4] But one's local neighbors did not get a pass either, for those who did not support the boycotts were now "involved in the guilt" of slavery. *Id.* at 68. "[N]eutrality or even tacit support for the cause was no longer an option." *Id.* An individual's reach was also further expanded during this period, with "market, communication, and transportation revolutions [making] it possible for 'immense and widely separated multitudes' to unite and act effectively

[4] Undoubtedly inspired by British abolitionists, American abolitionist protesters were also aware of the global dimensions of the sale of slave-made cotton and sugar and organized global boycotts of the latter, beginning in the 1790s. *See generally* Glickman, *Buying Power* at 93. And during the Silk Boycotts of the late 1930s, although boycotters "believed that their actions served to weaken [Japan's] ability to make war," opponents pointed out that "the most significant victims in the causal web of this boycott were the American workers who converted Japanese silk into full-fashioned hosiery." *Id.* at 25–26.

on behalf of causes they held dear." *Id.* at 67 (quoting William Ellery Channing, *Remarks on the character and writings of Fenelon* 4 (2d ed. 1830)). And while white abolitionist use of boycotts died down during the decade before the Civil War, the free produce movement did not die. Glickman, *Buying Power* at 85. Instead, the movement's center of gravity shifted to the community of black abolitionists surrounding Frederick Douglass. *Id.* Like the newly politicized women of the Revolution, the African American boycotters of the mid-1800s exercised the political power of the pocketbook in a time when other means of participation were denied to them. *See id.* at 25, 36.

Following the high-water mark of the movement—with the 1838 formation of the American Free Produce Association, *id.* at 74—critics railed against the boycotts as "impractical and inconvenient, claiming that it was futile for consumers to try to separate themselves from slavery since the slave system interpenetrated every aspect of American life and, indeed, the world economy," *id.* at 83. But by "[a]dopting and . . . transforming the rhetoric and tactics established during the nonimportation campaigns of the 1770s and the sugar boycotts of the 1790s, free produce activists laid the template of modern consumer activism" with respect to the morality of products and humanity of their producers. *Id.* at 72. While free produce activism ultimately failed, "[i]n defining consumers as representative citizens, it laid the groundwork for the political culture of modern

America." *Id.* at 86. It also directly inspired the union and civil rights movements of the late nineteenth and early twentieth centuries, where the idea of taking a "community of producers and consumers and . . . turn[ing] them into freed people and emancipators" became promoting the "union label" and preventing "wage slavery." *See id.* at 86, 88.

### 3. The Civil Rights Movement: *N.A.A.C.P. v. Claiborne* and Boycotting Jim Crow

The emancipation of slaves and the end of the Civil War did little to end the disenfranchisement of African Americans or their use of consumer activism to highlight and fight injustice in the coming years. "[A]s racial segregation was [now] mandated by state legislatures and city councils and as streetcars typically operated as public utilities, African American boycotts during the Jim Crow era took on the state more directly than had their immediate predecessors." *Id.* at 163. Thus, "[a]t a time of great repression—evidenced by lynchings and other forms of extralegal violence and disfranchisement—and general disrespect by whites, the streetcar boycotts required considerable courage and represented a significant challenge to white economic, social, and political prerogatives." *Id.* at 164. "[O]rganized by African Americans in more than twenty-five Southern cities" and 12 segregated states (including the District of Columbia), "[t]hese anti-Jim Crow boycotts added a new element to the arsenal of consumer activists by challenging public or quasi-public institutions." *Id.* at 163.

Like labor union and antebellum boycotters of the past, civil rights boycotters emphasized the responsiveness of the "pocket nerve" and used the power of pressure, extended reach, and association to effect change. *Id.* at 166 (quoting John Mitchell, *"Jim-Crow" Street-Cars*, Richmond Planet, April 9, 1904). Emphasizing "the force of their collective consuming efforts, a power that would be compounded with the citywide support of black commuters," *id.* at 167, "[t]he boycotters held special contempt for their fellow African Americans who rode the streetcars and punished them with community sanctions," *id.* at 169. These boycotts also highlighted racial issues nationally, connecting communities across state lines. But unlike the Revolutionary boycotts led by merchants or the free produce boycotts led by white abolitionists, the civil rights boycotts were founded from the least enfranchised parts of society. *See id.* at 174. By challenging national concepts of identity and discrimination, the African American boycotters were able to start the wheels of desegregation in motion. *See id.* at 166 ("[T]he Montgomery bus boycott of 1955-1956 marked as much the culmination of a long tradition of Jim Crow streetcar protests as it did the start of the modern Civil Rights movement").

Of all civil rights boycotts, however, the one of greatest legal importance was arguably African Americans' 1966 withholding of "patronage from the white establishment of Claiborne County to challenge a political and economic system

that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure." *Claiborne*, 458 U.S. at 918. Denying the merchant-plaintiffs' requested damages, the Supreme Court held that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. Further recognizing that the boycotters "sought to bring about political, social, and economic change" through the exercise of their First Amendment rights, *id.* at 911, the Supreme Court acknowledged the continuing role these consumer activists played in shaping the history of our nation. *See id.* at 907–08 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.") (quoting *Ala. ex rel. Patterson*, 357 U.S. at 460).

### C. Arkansas's Statute Targets the Historical Intersection of Activism and Consumption: Boycotts Intended to Effect Social and Political Change

Viewed through this historical lens, all those who participate in proscribed "boycotts of Israel"—seeking to exercise their fundamental First Amendment right to boycott—sit squarely in the protected seats of their boycotting American

forefathers. In fact, they use many of the exact same methods as the Revolutionary-era American colonists for the exact same reason: to show their political discontent with one nation's policy towards another. Through boycotting companies that support Israel's occupation of the Palestinian territories, for example, they seek to pressure a foreign sovereign (just as the colonists did) to alleviate the plight of a disenfranchised minority (as did abolitionists). Collectively participating in proscribed "boycotts of Israel" also extends the reach and association of individual boycotters, whose political power and expression are undoubtedly and inextricably "bound with the use of aggregate purchasing power to promote justice." Glickman, *Buying Power* at 5. Furthermore, by heeding calls "to invest in Palestinian products . . . and to utilize selective purchasing to avoid buying products made in illegal Israeli settlements," the boycott harkens back to the issues of moral consumption and substitution so prominently displayed during the slave labor boycotts. *See Jordahl v. Brnovic*, 336 F. Supp. 3d 1016, 1028–29 (D. Ariz. 2018) (citation omitted).

While a state "regulation that has an incidental effect on First Amendment freedoms may be justified in certain *narrowly* defined instances," *Claiborne*, 458 U.S. at 912 (emphasis added), "government must ensure that, even when its regulation is not content based, the restriction narrowly 'focuses on the source of the evils the [State] seeks to eliminate.'" *F.T.C. v. Superior Court Trial Lawyers*

*Ass'n*, 493 U.S. 411, 440 (1990) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, and n. 7 (1989)). *See also United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 467 n.11 (1995) (courts use increased scrutiny where the government's "ban deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government's interests"). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U. S. 138, 145 (1983) (internal quotation marks omitted). Because "actions taken by Israel in relation to Palestine are matters of much political and public debate," *Jordahl*, 336 F. Supp. 3d at 1048, this Court should evaluate Arkansas's restrictive statute under the strictest scrutiny.

The statute requires a government contractor like the Times to certify that it "is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." Ark. Code Ann. § 25-1-503(a)(1). Effectively, this statute mandates that the Times and other government contractors (1) at least consider purchasing certain types of goods while (2) giving up their First Amendment rights to speak about not purchasing goods on account of (3) a political debate concerning (4) a matter of public concern. Because Arkansas has not provided an adequate justification for such an infringement, the State's regulation is inconsistent with historically exercised boycotting rights and

impermissible under the First Amendment. Like the activist boycotters of the Civil Rights movement, "[t]he right of the State[] to regulate economic activity c[annot] justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Claiborne*, 458 U.S. at 914.

## III. CONCLUSION

"Over the course of American history, consumer activists have believed that organized consumption or nonconsumption could sustain (or, conversely, weaken) not just a product but a cause, a people, even a nation." Glickman, *Buying Power* at 5. In cases like this, where a boycott takes aim at the policies of a foreign nation to highlight and relieve the suffering of a minority, the "inherently political" nature of such a boycott entitles it to the First Amendment's strongest protection. Because Arkansas's law broadly denies that protection to government contractors, this Court should reverse the district court's ruling and hold § 25-1-503 invalid.

DATED this 15th day of April, 2019.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 29(d). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 4068, not including the caption page, table of contents, table of citations, certificate of service, certificate of compliance, and any addendum containing statutes, rules or regulations required for consideration of the brief.

DATED this 15th day of April, 2019.

DAVIS WRIGHT TREMAINE LLP

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## CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants.

DATED this 15th day of April, 2019.

Attorneys for Amicus Curiae
Lawrence B. Glickman

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