No. 19-1378

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Arkansas
Times, LP,

Plaintiff – Appellant,

v.

Mark Waldrip,
et al.,

Defendants – Appellees.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiff Arkansas Times and Defendants Waldrip et al. (the "State") agree about one thing: This case asks the Court to decide whether the First Amendment protects the right to participate in politically-motivated consumer boycotts. Act 710, Ark. Code Ann. § 25-1-503 (the "Act"), requires government contractors to certify that they will not boycott businesses operating in Israel or territories controlled by Israel. The State terminated its advertising relationship with the Arkansas Times after the Arkansas Times refused to sign the anti-boycott certification as a matter of principle.

There have now been four decisions addressing the constitutionality of Israel anti-boycott laws similar to the one at issue here. In three of those cases, courts held that the laws violated the First Amendment and entered preliminary injunctions against their enforcement. *See Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717 (W.D. Tex. 2019), *appeal pending*, No. 19-50384; *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018), *appeal pending*, No. 18-16896; *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018). Rather than defending those laws on appeal, Texas, Arizona, and Kansas amended their laws to exempt the sole proprietors and small businesses who challenged them in court. *See* Sarah Mansur, *Free Speech Rights and the Rise of Anti-BDS Legislation*, Chicago Daily Law Bulletin, Apr. 24, 2019, https://bit.ly/2J3ZnSE. Alone among the courts to

have considered this issue, the district court in this case concluded that boycotts are not entitled to any constitutional protection at all.

The State does not dispute that the district court's reasoning would give the government a blank check to outlaw consumer boycotts on the sole basis of ideological hostility. Indeed, the State does not even attempt to argue that the Act could plausibly satisfy any form of heightened First Amendment scrutiny. Instead, it urges this Court to endorse a dramatic expansion of the government's unchecked power to regulate consumers' political expression. Such a ruling would flout the ideals, and the political practices, on which America was founded. Boycotts of British and Loyalist merchants were essential to the Revolutionary cause, just as boycotts of slave-made goods were essential to the abolitionist cause. Many of this country's Founders, including America's first four presidents and all three authors of the Federalist papers, participated in these boycotts. It is not hard to guess what they would have thought about a law requiring Americans to disavow participation in anti-British boycotts.

The State's position is also contrary to binding precedent. In *NAACP v. Claiborne Hardware Co.*, the Supreme Court held that a consumer boycott of white-owned businesses in Mississippi to protest racial inequality was protected political expression, resting on the "highest rung of the hierarchy of First Amendment values." 458 U.S. 886, 913 (1982). *Claiborne* thus established that the

First Amendment protects politically-motivated consumer boycotts, as this Court recognized in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 197 (8th Cir. 1994). By contrast, the State's primary authority, *Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 47 (2006) (*FAIR*), did not concern a consumer boycott at all and did not revisit *Claiborne*'s protection for such boycotts.

The State does not contest that the Act would be unconstitutional if politically-motivated consumer boycotts were entitled to First Amendment protection. After all, it is black-letter law that the government cannot compel its employees or contractors to disavow participation in constitutionally safeguarded expression or association. But even if this Court holds that the act of boycotting consumer goods and services is not protected, the State cannot compel contractors to disclose their participation or nonparticipation in such boycotts without at least explaining how this disclosure is necessary to vindicate an overriding government interest. Again, the State has refused to provide any such explanation.

Because the Act facially violates the First Amendment, this Court should reverse the district court's order granting the motion to dismiss and denying the motion for preliminary injunction.

ARGUMENT

I. The First Amendment protects politically-motivated consumer boycotts.

The Supreme Court's decision in *Claiborne* governs the outcome of this case. The State attempts to distinguish *Claiborne* by arguing that the decision protects only the right to speak in support of a boycott, not the act of boycotting itself. Alternatively, the State argues that *Claiborne* protects only boycotts that seek to influence state or federal governments. Neither of these conflicting interpretations makes sense of *Claiborne*, which held that a boycott of white-owned businesses was a protected form of expression on public issues. Although the State asserts that *FAIR* instead controls this case, it fails to account for the fact that *FAIR* literally had nothing to say about consumer boycotts or *Claiborne*. It beggars belief to suggest that *FAIR* tacitly denied First Amendment protection to the form of political protest most closely associated with the American Revolution.

A. *Claiborne* upheld the right to boycott, not just the right to speak in support of a boycott.

All boycott litigation leads back to *Claiborne Hardware*. In that case, the Supreme Court 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 & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988) (citing *Claiborne*, 458 U.S. at 914–15).

Claiborne concerned a lawsuit by twelve businesses against more than a hundred people who participated in a boycott of white-owned businesses to protest segregation and inequality. 458 U.S. at 889. The Mississippi trial court concluded that the concerted refusal to patronize white businesses as part of a secondary boycott was a sufficient basis on which to impose liability. *Id.* at 891–92 & nn.9, 10. The Mississippi Supreme Court rejected that theory of liability, but nonetheless "concluded that the entire boycott was unlawful" on the theory that the "petitioners had *agreed* to use force, violence, and 'threats' to effectuate the boycott." *Id.* at 895. The U.S. Supreme Court thus confronted the question whether the "concerted action" at issue in the Mississippi boycott was an "unlawful conspirac[y]" or a "constitutionally protected assembl[y]" involving a "host of voluntary decisions by free citizens." *Id.* at 888.

The Supreme Court held it was the latter. As the Court put it, "[t]he black citizens named as defendants 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.* at 907. Their protest took the form of a consumer boycott—a practice "deeply embedded in the American political process," which allows people to collectively "make their views known, when, individually, their

voices would be faint or lost." *Id.* at 907–08 (internal quotation marks omitted) (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981)). While the Court acknowledged the government's "broad power to regulate economic activity," it did "not find a comparable right to prohibit peaceful political activity such as that found in the [Mississippi] boycott." *Id.* at 913. To the contrary, the Court characterized the boycott as a form of "expression on public issues," which "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* (citation omitted).

The State argues that *Claiborne* did not consider "whether boycotts are protected by the First Amendment," because the "Mississippi state courts ultimately rejected any attempt to impose liability for the totally voluntary and nonviolent withholding of patronage." Ans. Br. at 25 (citation and internal quotation marks omitted). To be sure, "[t]he Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott." *Claiborne*, 458 U.S. at 915. The U.S. Supreme Court's determination "that such activity is constitutionally protected, however, impose[d] a special obligation on [it] to examine critically the basis on which liability was imposed." *Id.*

The Mississippi Supreme Court ruled that the *entire* boycott was an unlawful conspiracy because the boycott was enforced through threats and violence. *Id.* at

895. The U.S. Supreme Court held that this extension of damages liability to the whole boycott violated the First Amendment:

> [A] careful limitation on damages liability . . . is . . . applicable . . . to the important First Amendment interests in this case. Petitioners *withheld their 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. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences *of nonviolent, protected activity*.

Id. at 918 (emphases added) (citation omitted). Applying this principle to the facts at hand, *Claiborne* held that the Mississippi Supreme Court's decision—which found the boycott participants "liable for all damages 'resulting from the boycott,'" regardless of whether the damages were traceable to individual threats or acts of violence used to effectuate the boycott, *id.* at 921—unconstitutionally "compensate[d] [the plaintiff businesses] for the direct consequences of nonviolent, constitutionally protected activity." *Id.* at 923.

The State argues that *Claiborne* does not include "any holding, dictum, or even suggestion that the act of refusing to *buy* from white merchants itself was protected by the First Amendment." Ans. Br. at 26. In fact, the Arkansas Times identified numerous such examples in its Opening Brief, all of which the State ignores. For instance, the Supreme Court referred to "nonviolent, politically motivated boycott[s]" generally, and petitioners' decision to "with[hold] their patronage" specifically, as constitutionally "protected activity." *Claiborne*, 458

U.S. at 915, 918. And the Court concluded that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott." *Id.* at 914. The State offers no response to these points. The Supreme Court also described the "narrowly defined instances" in which the government could regulate certain kinds of boycotts, such as secondary labor union boycotts and anticompetitive boycotts. *Id.* at 912. This careful exegesis would have been entirely redundant if the Court had concluded that boycotts are not entitled to any constitutional protection. Again, the State fails to explain the discrepancy between its position and the Supreme Court's opinion.

The State alternatively tries to skirt the plain meaning of *Claiborne* by asserting that the respondents' supplemental brief "established that none of the defendants had been held liable for mere boycott participation." Ans. Br. at 25 & n.4. That statement appears nowhere in the opinion. And even the supplemental brief on which the State relies argued that if the Supreme Court did not find that the boycott participants "endorsed the violent and coercive tactics by which the boycott was conducted, then the Court will be faced with the question of the constitutionality of the trial court judgment *holding petitioners liable on the basis of their participation in a concerted refusal to deal*." Resps.' Suppl. Br., *NAACP v. Claiborne Hardware Co.*, 1982 WL 608673, at *17–18 (emphasis added). The respondents thus consistently maintained that the boycott participants could be

held liable on the basis of their collective refusal to deal. The Supreme Court rejected that argument, holding that liability could not be imposed for "active participation in the boycott itself." *Claiborne*, 458 U.S. at 926.[1]

The State's obfuscations cannot change the plain meaning of *Claiborne*, which was immediately hailed as a ringing affirmation of the right to boycott. *See* Leonard Orland, Op-Ed, *Protection for Boycotts*, N.Y. Times, July 31, 1982, https://nyti.ms/31ydXKC. In subsequent decisions addressing concerted refusals to deal, the Supreme Court held that *Claiborne Hardware* established First Amendment protection for political boycotts, but not "economic boycotts"—a distinction that would be entirely unnecessary if *Claiborne* did not protect boycotts at all. *See* Amicus Br. of Inst. for Free Speech and Found. for Indiv. Rights in Educ. at 5–9; *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426–28 (1990) (defining an economic boycott as "a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market'" (quoting *Allied Tube*, 486 U.S. at 508)).

[1] Had the Court instead agreed with respondents, it would have had to address whether the organization of the boycott and the speech supporting it amounted to conspiracy, incitement, or speech otherwise integral to unlawful conduct. *See Claiborne*, 458 U.S. at 913 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *NLRB v. Retail Stores Emps.*, 447 U.S. 607 (1980)); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982). The Court did not need to address these issues, because it held that the boycott itself was protected. *See* Amicus Br. of Thirteen First Amendment Scholars at 6–7.

Indeed, even opinions on which the State relies recognize that the *Claiborne* boycott was a constitutionally protected form of political expression. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("A group boycott or refusal to deal for political purposes may be speech, *NAACP v. Claiborne Hardware Co.*, 458 U.S., 886, 912–15 (1982), though a similar boycott for purposes of maintaining a cartel is not." (parallel citation omitted)); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 298 (2d Cir. 1992) (stating that "in contrast to the boycott in *Claiborne Hardware*, the instant conduct was not political speech").

This Court too has recognized that *Claiborne* protects politically-motivated consumer boycotts. In *Beverly Hills Foodland*, the Court rejected a tortious interference claim filed by a grocery store against a labor union "based on the Union's picketing and boycotting activities." 39 F.3d at 194. The Court held that the union's pamphlets promoting the union boycott were protected expression *and* that "the prime directive in the Union campaign, a boycott of Foodland, is similarly constitutionally safeguarded." *Id.* at 197. The Court cited *Claiborne* for the proposition that "a state tortious interference claim by targeted businesses could not be maintained against participants and organizers of a consumer boycott." *Id.*

Unable to distinguish *Beverly Hills Foodland*, the State argues that its application of *Claiborne* is dicta. Ans. Br. at 28. But the State is wrong. If the

Court had concluded that the Foodland boycott was an unlawful interference with business relations, it would have been forced to determine whether picketing and pamphleteering urging consumers to join the boycott constituted incitement or speech integral to tortious conduct. *See Retail Store Emps.*, 447 U.S. at 616. As in *Claiborne*, the Court did not need to conduct such an analysis because it held that the "prime directive" of the speech was itself constitutionally protected. *Beverly Hills Foodland*'s application of *Claiborne* is therefore binding.

B. *Claiborne* is not limited to boycotts vindicating domestic legal rights.

The State alternatively argues that *Claiborne* extended First Amendment protection to the Mississippi boycott under the Petition Clause, and that boycotts of Israel are therefore unprotected because they "do not seek to influence federal or state government." Ans. Br. at 29. It is well established, however, that First Amendment rights share a common source and serve a common purpose. "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (citations omitted) (quoted in part in *Claiborne*, 458 U.S. at 911). That is because debate on matters of public concern—regardless whether it is addressed to a federal or state

governmental entity—is "the essence of self-government." *Claiborne*, 458 U.S. at 913 (citation omitted).

Claiborne reflects this synoptic understanding of the First Amendment. The Mississippi boycott was "a massive and prolonged effort to change the social, political, and economic structure of a local environment." *Id.* at 933. Undoubtedly, "a major purpose of the boycott in [*Claiborne*] was to influence governmental action," *id.* at 914, but the Court nowhere suggested that the boycott's protection derived solely from the Petition Clause. Instead, the Court recognized the boycott as a form of "expression on public issues," and reiterated our country's "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 913 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because politically-motivated consumer boycotts are political expression, they are protected even when they seek to influence non-governmental entities, such as the grocery store in *Beverly Hills Foodland*, or foreign governments. *See Boos v. Barry*, 485 U.S. 312, 318 (1988) (holding that protests directed at foreign governments are "classically political speech" at "the core of the First Amendment").[2]

[2] To borrow another example: In response to Nike's announcement that it would not sell sneakers featuring the Betsy Ross flag, Senator Ted Cruz recently tweeted: "I respect Free Speech and I'm exerting mine: until @Nike ends its contempt for [patriotic] values, I WILL NO LONGER PURCHASE NIKE PRODUCTS.

The State does not address these issues. Instead, it cites snippets from various decisions describing the *Claiborne* boycott as an attempt to "vindicat[e] rights of equality and freedom lying at the heart of the Constitution." Ans. Br. at 30 (quoting *Allied Tube*, 486 U.S. at 508). But the State does not identify any case—other than the district court's decision here—holding that *Claiborne*'s protection for boycotts is limited to such narrow circumstances. The only case the State cites for that proposition, *Jews for Jesus*, does not stand for it. There, the Second Circuit held that the First Amendment did not protect a privately communicated threat to boycott a resort unless it violated federal and state public accommodation laws by denying service to Jews for Jesus. The court reasoned that, whereas the *Claiborne* boycott was "political speech" on a matter of public concern, the boycott threat in *Jews for Jesus* was a "series of private communications" designed to coerce unlawful activity "in the context of a private dispute." 968 F.2d at 297–98. The same cannot be said about public boycotts protesting the policies of a foreign government on one of today's most hotly contested political issues. *See Boos*, 485 U.S. at 318.

The State also relies on *International Longshoremen's Association v. Allied International, Inc.*, which held that the National Labor Relations Act's prohibition

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#WalkAwayFromNike RT if you agree." Ted Cruz (@TedCruz), Twitter (July 2, 2019, 12:41 PM), https://bit.ly/30b1v1F.

on secondary boycotts by labor unions does not violate the First Amendment. 456 U.S. 212, 218 (1982). Unlike *Claiborne*, *Longshoremen* did not concern a politically-motivated boycott of consumer goods and services. Rather, the International Longshoremen's Association ordered its members to refuse service to ships carrying Russian cargoes, causing havoc in commercial shipping throughout the country. *Id.* at 214. The Supreme Court held that this refusal of service was an illegal boycott under the National Labor Relations Act and rejected the union's First Amendment defense, holding that "[t]he labor laws reflect a careful balancing of interests." *Id.* at 226. As *Claiborne* itself acknowledged several months later, "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" 458 U.S. at 912 (citing *inter alia Longshoremen*, 456 U.S. at 222–23 & n.20). The State, on the other hand, denies that there is any First Amendment interest at stake here. Under its theory, there is no constitutional constraint on the government's power to outlaw disfavored boycotts.

C. *FAIR* did not overrule *Claiborne*.

The State juxtaposes its implausibly narrow parsing of *Claiborne* with an implausibly broad reading of *FAIR*. *FAIR* concerned a First Amendment challenge

to the Solomon Amendment, which authorizes the federal government to deny funding to law schools that do not provide military recruiters equal access to on-campus recruiting. 547 U.S. at 55. The Supreme Court held that the act of refusing equal access to military recruiters is not inherently expressive conduct warranting First Amendment protection. *Id.* at 66. Observing that the off-campus interview policy would not usually express any message without an explanation from the law schools, the Court reasoned that the need for such "explanatory speech" to articulate the law schools' message was "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under *O'Brien*." *Id.* (referencing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).[3]

Taking *FAIR*'s "strong evidence" guideline for a categorical rule, the State argues that boycotts can never be expressive because most observers would not be able to ascertain the political views behind an individual boycott participant's purchasing decision without some explanatory speech. Ans. Br. at 19–20. The State misunderstands the whole point of a consumer boycott, which is that it enables people to *collectively* "make their views known, when, individually, their voices would be faint or lost." *Claiborne*, 458 U.S. at 907–08 (quoting *Citizens Against Rent Control*, 454 U.S. at 294). Boycotts, like parades and other forms of

[3] "The *Claiborne Hardware* doctrine," on the other hand, "itself rests in part upon *O'Brien,*" because politically-motivated consumer boycotts are inherently expressive. *Superior Court Trial Lawyers*, 493 U.S. at 431; *see also Claiborne*, 458 U.S. at 912 & n.47 (citing *O'Brien*).

collective expression, must be viewed in the aggregate to be understood. Considering a single boycott participant's consumer choices in isolation makes as little sense as focusing on a single parade marcher's walk down the block. *See* Amicus Br. of T'ruah and J Street at 21–22. Properly considered, consumer boycotts are obviously expressive. *Consumer Boycott*, Black's Law Dictionary (11th ed. 2019) ("A boycott by consumers of products or services to show displeasure with the manufacturer, seller, or provider."). Their expressive potential derives from the powerful message sent by a concerted refusal to purchase the boycotted goods.

"Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). Consumer boycotts have played a uniquely expressive role in American politics since the Revolution, which was galvanized by a series of consumer boycotts—then known as non-importation and non-consumption agreements—protesting British policies. *See* Amicus Br. of Prof. Lawrence Glickman at 6–9. American colonists boycotted British goods to protest the Stamp and Townshend Acts in the 1760s. They boycotted again to protest the Tea Act of 1773, famously dumping British tea into Boston Harbor. When Parliament attempted to bring the colonies to heel by passing the Intolerable Acts, the unofficial Continental Congress called for a broad boycott of British goods. The boycotts were promoted and supported by George

Washington, Samuel Adams, Thomas Jefferson, James Madison, Benjamin Franklin, John Adams, John Hancock, and Patrick Henry, among others. Arthur Meier Schlesinger, *The Colonial Merchants and the American Revolution, 1763–1776* 114, 118, 136, 220, 362–64, 415, 416, 419 (1918); Ralph Ketcham, *James Madison: A Biography* 61, 63 (1971). Christopher Gadsden, a prominent leader of the boycott movement and creator of the famous Gadsden flag, wrote in a 1775 letter to Peter Timothy that the colonists had "an undeniable constitutional right" to boycott. *The Letters of Freeman, Etc.: Essays on the Nonimportation Movement in South Carolina* 67 (William Henry Drayton ed. 1977).

In the decades following the Revolutionary War, American abolitionists wielded the boycott as a means of protesting slavery and advocating manumission. John Jay and Alexander Hamilton served as founder and first secretary, respectively, of the New York Society for Promoting the Manumission of Slaves. A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* 140, 142 (1978). The Society, which was inaugurated in 1785, organized consumer boycotts against New York merchants who sold goods produced by slaves and against newspaper owners who advertised for the purchase and sale of slaves in their papers. The Society itself belonged to a larger "free produce" movement, which was conceived of and popularized by British Quakers in the decades following the Revolutionary War. *See* Glickman

Amicus Br. at 9–12; Higginbotham at 142.William Fox, a radical British abolitionist, published a pamphlet in 1791 advocating a transatlantic boycott of slave-produced rum and sugar. William Fox, *An Address to the People of Great Britain on the Utility of Refraining from the use of West India Sugar and Rum* (1791). The pamphlet's circulation surpassed Thomas Paine's *Rights of Man* and helped foment support for abolitionist boycotts throughout Quaker communities, women's groups, and the general public. Julie Holcomb, *Moral Commerce: Quakers and the Transatlantic Boycott of the Slave Labor Economy* 43 (2016).

Claiborne put the seal of First Amendment protection on this longstanding constitutional tradition, holding that politically-motivated consumer boycotts are a form of expression on public issues. 458 U.S. at 913. The State argues that "*FAIR* forecloses any such strained reading of *Claiborne Hardware*, since if that case had held boycotts are inherently expressive, *FAIR* could not have been decided as it was without overruling *Claiborne Hardware*." Ans. Br. at 21. But *FAIR* did not concern a consumer boycott and did not even mention the word "boycott." *Amawi*, 373 F. Supp. 3d at 743. There is thus no reason to believe the Supreme Court intended the guideline it laid down in *FAIR* to deny First Amendment protection to

consumer boycotts. That is because *FAIR* was never intended to apply to such boycotts.[4]

Even if this Court concludes that the reasoning in *FAIR* is in tension with *Claiborne*'s core holding, it must apply *Claiborne*. If a Supreme Court decision "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). Because *Claiborne* is the only Supreme Court case that directly applies to politically-motivated consumer boycotts, it controls the outcome here.

II. The Act imposes an unconstitutional condition on government contracts.

A. The State does not dispute that the Act must fall if this Court holds that boycotts are protected.

As the Arkansas Times argued in its Opening Brief, the Act imposes an unconstitutional condition on government contracts for two independent reasons. First, the Act unconstitutionally compels contractors to disavow participation in boycotts of Israel. Second, it is unconstitutionally overbroad because it restricts protected expression and association by prohibiting government contractors from

[4] Although the State's law professor *amici* argue that the First Amendment does not protect politically-motivated refusals to deal, their cited authorities largely concern discrimination in employment or access to public accommodations. *See* Amicus Br. of Profs. Michael C. Dorf, Andrew M. Koppelman & Eugene Volokh. None of these authorities address consumers' decision to "with[o]ld their patronage" from boycotted businesses. *Claiborne*, 458 U.S. at 918.

participating in politically-motivated consumer boycotts. Op. Br. at 38–44. These constitutional violations are compounded by the fact that the Act targets particular boycott campaigns on the basis of their subject matter (Israel) and viewpoint (protest of Israel). *Id.* at 36–37. The Arkansas Times also demonstrated that the Act cannot satisfy any form of heightened First Amendment scrutiny. *Id.* at 47–51.

Instead of addressing these arguments, the State has doubled down on its position that there is no such thing as a right to boycott. The State does not contest that the Act restricts participation in politically-motivated consumer boycotts on the basis of their subject matter and viewpoint. Nor does it argue that the Act could satisfy any form of heightened scrutiny, let alone the strict scrutiny applied to content-based restrictions on expression. Indeed, the State does not even assert that the Act could somehow satisfy the unconstitutional conditions doctrine. The State's theory of the case therefore requires this Court to endorse the startlingly broad proposition that politically-motivated consumer boycotts are not expressive at all. Such a position would have grave implications for the "poorly financed causes of little people," *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943), who routinely use consumer boycotts to make their voices heard on any number of public issues. Op. Br. at 26, 28–29. The State's resort to such brinksmanship can

be explained only by its tacit recognition that the Act cannot survive any form of heightened scrutiny.[5]

B. Even if boycotts are not protected, the Act unconstitutionally compels speech.

Even if this Court were to conclude that there is no First Amendment right to boycott, the Act would still violate the First Amendment's prohibition against compelled speech. The State argues that compelled disclosure of factual information implicates the First Amendment only if it requires the speakers to "alter their speech to include other [government-mandated] content." Ans. Br. at 35. But the First Amendment protects both the right to tailor speech to a particular message *and* the right to "remain humbly absent from the arena" entirely, *Burns v. Martuscello*, 890 F.3d 77, 84 (2d Cir. 2018), as the Arkansas Times wishes to

[5] The State breezily suggested in its reply brief below that the Act "furthers Arkansas's interests in trade policy and in avoiding dealing with contractors who engage in unsound business practices." District Court Docket Entry ("DE") 22-1 at 8. Switching horses midstream, the State now alludes to governmental interests in supporting "the public policy of the United States . . . to oppose boycotts against" Israel, and also to "ensur[e] that Arkansas taxpayers do not fund discriminatory conduct." Ans. Br. at 3–4. Regardless, the State neglects to argue that the Act is both necessary to advance an overriding government interest and narrowly tailored to that interest. It has therefore waived any attempt to carry its burden of justification, which requires the government to justify restrictions on contractor expression with argument based on record evidence, not just the recitation of legislative findings. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475–77 (1995).

remain absent from the debate over boycotts of Israel. The Act is an unconstitutional attempt to conscript the Arkansas Times into that debate.

To be sure, "[t]here is no right to refrain from speaking when essential operations of government may require it for the preservation of an orderly society." *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (citation and internal quotation marks omitted). The implied corollary is that the government cannot compel speech, including factual statements that a speaker would rather avoid, without at least providing a good reason. In *Associated Builders & Contractors of Southeast Texas v. Rung*, for instance, the U.S. District Court for the Eastern District of Texas enjoined federal regulations requiring government contractors to disclose any alleged violations of federal labor and employment laws. Civil Action No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. 2016). Although there is no First Amendment right to violate labor and employment laws, the court held that these compelled disclosures violated the First Amendment because the government failed to demonstrate they were tailored to the government's procurement interests. *Id.* at *8–11 (citing *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014), *adhered to on reh'g*, 800 F.3d 518 (D.C. Cir. 2015)). At a minimum, the Act suffers from the exact same flaw.[6]

[6] The State relies on *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc). *Rounds*, however,

III. A facial preliminary injunction is warranted.

The Act is currently forcing an unconstitutional choice on the Arkansas Times and other government contractors throughout the state: either sign the Israel anti-boycott form or forfeit your livelihood. A facial preliminary injunction is necessary to prevent this ongoing violation of First Amendment rights.

The State contends that this Court should not resolve whether a preliminary injunction is warranted in the first instance, but should instead remand the case to the district court to evaluate the other preliminary injunction factors. Although that may be this Court's usual practice, it is manifestly unnecessary in this case. "In a First Amendment case . . . the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007) (citation omitted).

> It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' If [a plaintiff] can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation. Likewise, the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights. The balance of equities, too, generally favors the constitutionally-protected freedom of expression.

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upheld a law requiring physicians to disclose information about abortion, based on the state's interest in ensuring that patients are able to provide informed consent. *Id.* at 734 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)). The decision does not remotely suggest that compelled factual statements never raise First Amendment concerns.

Id. at 484–85 (citations omitted). Thus, if this Court concludes that the Arkansas Times is likely to succeed on the merits of its First Amendment claim, the record not only supports but compels the issuance of a preliminary injunction. *See id.* at 488 (holding that plaintiff was likely to succeed on the merits of her First Amendment claim, and reversing the district court's adverse determination on irreparable harm, balance of equities, and public interest). The State's arguments to the contrary are easily dispatched.

First, the State contends that the Arkansas Times is not suffering irreparable harm to its First Amendment rights because it does not intend to boycott Israel, and therefore "has not been prevented from speaking." Ans. Br. at 39. But the Act pressures the Arkansas Times to speak against its will. The application of financial pressure to compel speech poses just as much of a threat to First Amendment freedoms as the application of financial pressure to restrict it.

Elrod v. Burns is directly on point. There, several police officers were fired, and at least one police officer was threatened with termination, "because they did not support and were not members of the Democratic Party." 427 U.S. 347, 351 (1976). The Supreme Court held that the pressuring of employees to support the favored political party violated the First Amendment and imposed irreparable harm. Here, the Act continues to pressure the Arkansas Times to toe the State's ideological line by rendering it ineligible for state contracts as long as it refuses to

sign the anti-boycott form. If the Arkansas Times succumbs to that pressure while this case remains pending, the injury to its First Amendment rights would be irreparable. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71–72 (2d Cir. 1996).[7]

Even if lost advertising revenues were the only consideration at issue here, the State's Eleventh Amendment immunity would still require a finding of irreparable harm. *Baker Elec. Co-op, Inc. v. Cheske*, 28 F.3d 1466, 1472–73 (8th Cir. 1994); *see also, e.g.*, *Temple Univ v. White*, 941 F.2d 201, 214–15 (3d Cir. 1991). The State asserts that the Arkansas Times could recover its lost revenue in administrative proceedings before the Arkansas Claims Commission. Ans. Br. at 39. The State's "argument, however, simply misses the mark; in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available federal legal remedies." *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (citing *Petroleum Expl., Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 217 & n.8 (1938)).

[7] The threat that financial pressures may force the Arkansas Times to sign the certification against its will distinguishes this case from *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C. Cir. 1991), on which the State relies. In that case, the D.C. Circuit held that the record did not demonstrate a real risk that the plaintiffs' loss of honoraria would cause them to "cease speaking or writing before the district court resolve[d] their constitutional challenges." *Id.* at 1255. The same cannot be said about the annual loss of tens of thousands of dollars of advertising revenue, which poses an existential threat to a small business like the Arkansas Times.

Second, the State argues that the balance of equities and the public interest weigh against preliminary relief because the State has an interest in the enforcement of its laws. The State undoubtedly has a legitimate interest in the enforcement of its statutes. But those interests must yield to the enforcement of the First Amendment, a higher law enacted by We the People. *See Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc). By the same token, "the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (per curiam).[8]

Finally, the State insists that any preliminary relief should be limited to the Arkansas Times because this case is not a class action. But it is well-established that courts confronting facial claims may craft relief that "reach[es] beyond the particular circumstances of [the] plaintiffs." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Both the Supreme Court and this Court have not hesitated to block the enforcement of laws that violate constitutional rights. *See, e.g.*, *Ashcroft v. ACLU*,

[8] The State also argues that a preliminary injunction would not restore the status quo, erroneously asserting that the Arkansas Times was "required to comply with Act 710 for sixteen months before it even filed its complaint." Ans. Br. at 43. But the Act does not directly require contractors to do anything. It requires public entities to insert the Israel anti-boycott certification into their contracts. Ark. Code Ann. § 25-1-503. The Arkansas Times was not asked to sign the certification until October 2018. DE 20 at 2 n.1. It refused and filed this lawsuit shortly thereafter.

542 U.S. 656, 665 (2004), *affirming ACLU v. Reno*, 31 F. Supp. 2d 473, 498–99 (E.D. Pa. 1999); *Minn. Citizens Concerned for Life, Inc.*, 692 F.3d at 877. This case is no different.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting the State's motion to dismiss and denying the Arkansas Times' motion for preliminary injunction.

Respectfully submitted,

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I hereby certify that on July 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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