No. 19-1378

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS TIMES LP,

Plaintiff/Appellant,

v.

MARK WALDRIP, in his official capacity as Commissioner, Tennessee Department of Transportation, ET AL,

Defendants/Appellees.

On appeal from the United States District Court for the Eastern District of Arkansas
No. 4:18-cv-00914-BSM

Brief of *Amici Curiae* Institute for Free Speech and Foundation for Individual Rights in Education

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DISCLOSURE STATEMENT

Counsel for *amici curiae* certify that the Institute for Free Speech and the Foundation for Individual Rights in Education are nonprofit corporations, have no parent companies, subsidiaries, or affiliates, and that no publicly held company owns more than 10 percent of their stock.

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INTEREST OF AMICI

Founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission, the Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights to speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to the regulation of core political activity. It also files *amicus* briefs in cases affecting First Amendment rights.

The Foundation for Individual Rights in Education is a non-profit, non-partisan education and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE has defended constitutional liberties on behalf of students and faculty at our nation's colleges and universities and participated as *amicus curiae* in many cases, including matters where a statutory mandate will impact the First Amendment rights of campus constituencies.

Amici curiae confirm that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

Counsel for all parties have consented to participation by the Institute and FIRE as *amici curiae*.

INTRODUCTION

The statute before this Court doubtless arose from good intentions: a desire to protect Israel and ensure that an evil like the Shoah, or Holocaust, "never arise again."[1] But prohibiting boycotts of Israel is counterproductive. Such viewpoint-based restrictions could just as easily be used against Israel, or any other target disfavored by a state or local government. And chilling expression only exacerbates the "thoughtlessness [that] can wreak more havoc than all the evil instincts taken together."[2]

Freedom of expression—including expression one believes mistaken—and freedom of association are necessary if societies, including our own, are to avoid the mistakes of the past. This case involves a crucial subset of the right to speech and association: the ability of individuals to engage in the mutual, expressive economic activity of a political boycott.

This right has been specifically recognized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and its progeny. In deciding that the boycott in that case

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[1] "We must make sure that from now until the end of days all humankind stares this evil in the face...and only then can we be sure it will never arise again." President Ronald Reagan, speech at the cornerstone-laying ceremony (October 5, 1988), United States Holocaust Memorial Museum, *Frequently Asked Research Questions*, https://www.ushmm.org/collections/ask-a-research-question/frequently-asked-questions (alteration in original).

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 288 (Revised ed. 1994).

was protected, the Court did not do what the district court did here. It did not simply ask whether a boycott involved expressive activity—every effective boycott does. Rather, the Court examined the source, context, and nature of the boycott as a whole to determine whether it was a protected political boycott or an unprotected, purely commercial effort. Only that test properly protects the association and speech rights implicated in political boycotts. And, under that test, Arkansas's law violates the First Amendment.

ARGUMENT

A. The District Court failed to examine the refusal to associate in context.

Spurred by the Civil Rights struggles of the 1960s, the Supreme Court rooted the First Amendment protection of political boycotts in the "inseparable" rights "of speech, assembly, association, and petition." *Id*. at 911 (internal quotation marks omitted); *see also id*. at 930 and n.75 (noting repeated cases protecting the NAACP's associational rights). While the parties have focused on the expressive aspects of the boycott, the associational implications of the district court's decision are no less critical. And by failing to examine the spending decision in the context of the overall boycott, the district court failed to give the boycott at issue the First Amendment protection to which it is entitled.

1. The First Amendment's protections of boycotts lie at the nexus of speech, assembly, petition, and association.

Boycotts are composed of numerous speech and conduct "elements . . . that [are] ordinarily entitled to protection under the First and Fourteenth Amendments." *Id*. at 907. But a boycott is more than the sum of its parts, and so is the First Amendment protection accorded to it. Boycotts are especially protected because they involve a practice "deeply embedded in the American political process": individuals "banding together" to "make their views known" "by collective effort . . . when, individually, their voices would be faint or lost." *Id*. at 907-08 (internal quotation marks omitted).[3]

Indeed, the Supreme Court has repeatedly taught that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id*. at 908 (quoting *NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Accordingly, in the political boycott cases and elsewhere, the Court has "emphasiz[ed] 'the importance of freedom of association in

[3] Indeed, the Supreme Court quoted Alexis de Tocqueville on the importance of associations to society itself, not just to our political freedoms: "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." *Claiborne Hardware*, 458 U.S. at 933 n.80 (quoting 1 Alexis de Tocqueville, *Democracy in America* 203 (P. Bradley ed. 1954)).

guaranteeing the right of people to make their voices heard on public issues.'" *Id*. at 908 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 295 (1981)).

Thus, the starting point of the Supreme Court's analysis in *Claiborne Hardware*, and of any court in a boycott case, is "[t]he fact that [a nonviolent, politically motivated boycott] is constitutionally protected." *Id*. at 915. The question is whether the boycott at issue is a political one, or whether it involves the "narrowly defined instances"—such as suppressing competition or engaging in unfair trade practices—under which "incidental" restrictions on the freedoms underlying boycotts may be permitted. *Id*. at 912.[4]

[4] The district court erred in relying on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). It is not one of the boycott cases descending from *Claiborne Hardware*, nor does *FAIR* even cite to it. Indeed, there was no boycott at issue in *FAIR*: The schools did not cut off all relations—related and unrelated to the changes they wanted—with the federal government, but instead demanded changes in the military's hiring policies as a condition of allowing recruiters on campus. *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 801-02 (1993) (distinguishing boycotts from cartelization); *Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 70 (1st Cir. 2005) (same); *Slagle v. ITT Hartford*, 102 F.3d 494, 498-99 (11th Cir. 1996) (same); *Delta Life & Annuity Co. v. Freeman Fin. Servs. Corp.*, No. 93-16999, 1995 U.S. App. LEXIS 14897, at *10 (9th Cir. June 15, 1995) (unpublished) (same). Because it was not a boycott case, the *FAIR* Court had to determine whether there was expressive conduct and thus whether to apply the test from *United States v. O'Brien*, 391 U.S. 367 (1968). *Cf. Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 431 (1990) (noting that the boycott line of cases already incorporates *O'Brien* and requires a separate analysis).

2. Courts must examine the source, context, and nature of anticompetitive activity to determine if it is a protected political boycott.

Contrary to the district court, a boycott's First Amendment protection does not hinge on whether a court finds that the boycott features an expressive component. Such an approach ignores that "an expressive component . . . is the hallmark of every effective boycott." *Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 431 (1990). Whether the boycott may be restricted or not must therefore depend on other factors. Furthermore, such an approach fails to consider a boycott's protected associative aspect altogether.

Rather, in *Claiborne Hardware* and subsequent boycott cases, the Court required a holistic approach to distinguish between protected political boycotts and nonprotected boycotts—boycotts where the participants are "in competition with the" subjects of the boycott or where "the boycott arose from parochial economic interests." *Claiborne Hardware*, 458 U.S. at 915; *see also id*. at 912 (permitting restrictions on cartels organized "to suppress competition," "[u]nfair trade practices," and "[s]econdary boycotts . . . by labor unions"); *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. at 426-27 (permitting restrictions on boycotts intended to further one's own "economic advantage" or "destroy legitimate competition" (internal quotation marks omitted)).

The holistic test for discerning protected political boycotts requires that a court examine "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 499 (1988); *see also id*. at 504 (noting that whether a boycott is subject to immunity "depends . . . on its impact . . . context and nature"); *id*. at 505-06 (noting that "the context and nature of petitioner's activity" distinguish between "commercial activity" and "political activity" that should not be regulated); *id*. at 507 n.10 ("caution[ing]" that, because of the difficulty in drawing "precise lines," decisions "depend[] on the context and nature of the activity").

The anticompetitive activity in *Allied Tube*, for example, was not a protected political boycott, even though it ultimately influenced government action. Allied Tube packed a meeting of the National Fire Protection Association with supporters who would vote for a standard excluding a competing product. The case was not completely commercial, however, because state and local governments frequently adopted the association's standards for building codes. The case demonstrated the need for a holistic analysis because "[t]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious." *Id*. at 501-02.

While it was true that the association's activity ultimately influenced legislative action, the Supreme Court held that was "not dispositive." *Id*. at 504.

Rather, the Court looked to the context and nature of the anticompetitive action. Regarding the former, the purpose of the boycott was to influence an association vote, not to influence the general public to secure "legislation or executive action." *Id*. at 499; *see also id.* at 506 (contrasting activity in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), which took "place in the open political arena"). Furthermore, the defendant's actions were motivated by its own "personal financial interests," not its desire to secure or protect some right. *Id*. at 502; *id*. at 509 (noting "economically interested party"); *id*. at 508-09 (contrasting with "aim of vindicating rights" in *Claiborne Hardware*). Thus, in both context and nature, the activity was not a protected boycott.

A holistic analysis also distinguishes *Superior Court Trial Lawyers Ass'n*. That case involved a boycott by court-appointed attorneys who represented indigent defendants in about 85% of cases in the District of Columbia. 493 U.S. at 414-15. A group of lawyers who regularly accepted the assignments, and who made most of their income from those assignments, voted to strike until the city increased the fees paid for appointments. *Id*. at 416.

The Supreme Court rejected the application of *O'Brien* to determine whether the boycott contained expressive conduct and was thus protected. Such a test was useless because "the hallmark of every effective boycott," even those initiated for unprotected reasons, is an "expressive component." *Id*. at 431 (noting that the

boycott cases may have "exhaust[ed] *O'Brien's* application"). Rather, the Court turned to the source, context, and nature analysis. As in *Allied Tube*, the activity there was a "[h]orizontal conspirac[y] . . . to exact higher prices or other economic advantages." *Id*. at 425. That is, although the attorneys wanted higher fees to maintain a high caliber of defense counsel, "their immediate objective was to increase the price that they would be paid for their services." *Id*. at 427. It was, therefore, not a protected political boycott.

Furthermore, the boycott's nature was one of a "price-fixing agreement[]" that "almost produced a crisis in the administration of criminal justice in the District," contrary to "the clear course of [the Supreme Court's] antitrust jurisprudence." *Id*. at 435-36; *see also id*. at 436 n.19 (noting that "horizontal price-fixing arrangement[s]" fall outside of the group boycott cases because of the "price-fixing component").[5]

[5] Another case the district court relied on—*International Longshoremen's Ass'n v. Allied International*, 456 U.S. 212 (1982)—is excluded from consideration by the nature and context analysis. That case involved a union boycott, and the Supreme Court has repeatedly held that secondary boycotts by labor unions, regardless of their purpose, are not protected by the First Amendment. *Id*. at 226; *Claiborne Hardware*, 458 U.S. at 912; *see also* Arkansas Times Opening Br. at 33-36.

3. The boycott here is protected under the source, context, and nature test.

Here, as in *Superior Court Trial Lawyers Association*, the question is not whether there is an expressive component. Arkansas's law is directed at boycotts, and, as noted above, the "hallmark of every effective boycott" is an "expressive component." 493 U.S. at 431. Rather, the question is whether Arkansas's law is directed at boycotts whose source, context, and nature demonstrate that they are protected political boycotts or whether it is directed only to that limited subset of boycotts that are not protected.

The context of the activity here is that of a political boycott. Unlike *Allied Tube*, the "activity at issue" here is taking place in "the open political arena." 486 U.S. at 506. And, in that open political arena, the goal is to secure "legislation or executive action" by "persuad[ing] an independent decisionmaker"—here the Israeli government—to adopt certain policies. *Id*. at 499, 507.

Furthermore, the nature of the activity here is that of a political boycott. Arkansas did not direct its law at economic boycotts—boycotts intended "to lessen competition or to reap economic benefits" for the participants. *Id.* at 508 (contrasting with *Claiborne Hardware*). Rather, the state directed its law to boycotts whose participants believe they are "vindicating rights," *id*. at 508, and furthering the "[e]quality and freedom [that] are preconditions of the free market," *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. at 427.

Thus, the district court erred in breaking down the boycott component by component to see whether each one would individually "fall under the First Amendment." *Ark. Times Lp v. Waldrip*, No. 4:18-CV-00914 BSM, 2019 U.S. Dist. LEXIS 27147, at *10-11 (E.D. Ark. Jan. 23, 2019).[6] As noted above, a boycott is more than the sum of its parts, and its nature and context as a whole must be examined to determine if it is a protected political boycott. The nature and context of the boycotts prohibited by Arkansas squarely place them among the political boycotts protected by the First Amendment.

CONCLUSION

"[T]he First Amendment bars subtle as well as obvious devices by which political association might be stifled." *Claiborne Hardware*, 458 U.S. at 932. Those participating in the boycotts restricted by Arkansas are not necessarily associated in a formal manner. But formal association is not a prerequisite to protecting their

[6] Furthermore, the district court's decision to diminish First Amendment protections merely because they involve decisions about money—a "refusal to deal" or "purchasing decisions," 2019 U.S. Dist. LEXIS 27147, at *10-11, 14—runs counter to the Supreme Court's decisions since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). There, the government attempted to argue that government regulation was subject to lesser scrutiny when it involved decisions about money. It argued that, in such circumstances, the restrictions were regulations of "conduct, not speech." 424 U.S. at 16. The Supreme Court rejected this justification, stating that it had "never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non speech element or to reduce the exacting scrutiny required by the First Amendment." *Id*.

associational rights—those who merely donated in *NAACP v. Alabama* or who participated in the boycott in *Claiborne Hardware* were not necessarily members of the NAACP either. Nevertheless, those participating in the restricted boycotts are allied in a meaningful way, in a way that amplifies their voices.

For the reasons above, this Court should hold that Arkansas's law is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32 (a)(7)(B)(i) as it contains, exclusive of those provisions exempted by Fed. R. App. P. 32(f), 2,532 words. It also complies with the typeface and style requirements of Fed R. App. P. 32(a)(5) and 32(a)(6), because this document has been prepared using a proportionally spaced typeface in Microsoft Word 2016 in Times New Roman, 14-point font.

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Dated: April 15, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of this Court using the CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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