No. 19-50384

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BAHIA AMAWI, ET AL.,

Plaintiffs/Appellees,

v.

PFLUGERVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants/Appellants.

On appeal from the United States District Court
for the Western District of Texas, Austin Division
Consolidated Nos. 1:18-cv-1091-RP; 1:18-cv-1100-RP

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

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December 6, 2019

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 AMICUS

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 ("FIRE") 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.

INTRODUCTION[1]

The Texas statute[2] 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[es] again."[3] But prohibiting boycotts of Israel is counterproductive, as such viewpoint-based restrictions could just as easily be used against Israel, or any other target disfavored by a state or local government. Chilling expression only exacerbates the "thoughtlessness [that] can wreak more havoc than all the evil instincts taken together."[4] Indeed, the prohibition on viewpoint discrimination has caused the Court to ensure that all substantive and procedural protections be given even to speech and expressive activities most would find morally odious. *See*, *e.g.*,

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[1] *Amici* filed a substantially similar brief in another BDS case currently pending before the Eighth Circuit Court of Appeals, as that case similarly implicated First Amendment principles at the core of *amici's* mission and interests. *See* Brief of *Amici Curiae* Institute for Free Speech and Foundation for Individual Rights in Education in *Arkansas Times LP v. Mark Waldrip* et al., Case No. 19-1378 (8th Cir., pending).

[2] Tex. Gov. Code § 2270.001 *et seq*. (hereinafter "H.B. 89").

[3] "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).

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

Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (ordering procedural safeguards any time government-imposed restraints on speech and assembly rights are at issue).

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 is specifically recognized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and its progeny. In deciding that the boycott in that case was constitutionally protected, the Court did what the district court did here. It simply asked whether a boycott involved expressive activity. Further, in *Claiborne* 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, Texas's H.B. 89 violates the First Amendment.

ARGUMENT

A. The District Court correctly examined the right to associate.

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." *Claiborne*, 458 U.S. at 911 (internal quotation marks omitted); *see also id*. at 930 and n.75 (noting repeated cases protecting the NAACP's associational rights). One need only consider the Birmingham bus boycotts to recognized how important boycotts are to political rights of speech, assembly and association.

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 examining the spending decisions in the context of the overall boycott, the district court gave the boycotts at issue the First Amendment protection to which they are entitled. *Amici* here also write to foreground the association aspect of boycott cases to emphasize that in boycott cases speech and association rights are necessarily implicated and proper analysis of those interests must recognize this fact.

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

The district court here correctly concluded that the boycotts at issue in this case are protected speech. *Amawi* et al. *v. Pflugerville Indep. Sch. Dist.* et al., 1:18-cv-1091 (W.D. Tex. 2019) Dkt. 82 (hereinafter "Slip Op.") at 26-27. *Amici* here

agree with the district court's analysis of the speech elements, but the Court should also recognize that other First Amendment principles are implicated in boycott cases such as this. 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).[5]

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

[5] The Supreme Court quoted 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.[6] No such exception applies here as the district court properly concluded.

[6] The district court correctly refrained from relying on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). Slip Op. at 25-26. *FAIR* is not one of the boycott cases descending from *Claiborne Hardware*, nor does *FAIR* even cite to *Claiborne*. 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,

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

As the district court correctly noted, a boycott's First Amendment protection does not merely hinge on whether a court finds that the boycott features an expressive component. Slip Op. at 26-27. Its approach recognizes 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.

In *Claiborne Hardware* and subsequent boycott cases, the Court required a holistic approach to distinguish between protected political boycotts and non-protected 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)).

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431 (1990) (noting that the boycott line of cases already incorporates *O'Brien* and requires a separate analysis).

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 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").[7]

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. H.B.89 is directed at boycotts, and, as

[7] The district court here also correctly rejected the applicability of *International Longshoremen's Ass'n v. Allied International*, 456 U.S. 212 (1982). Slip Op. at 27-28. 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.

noted above, the "hallmark of every effective boycott" is an "expressive component." 493 U.S. at 431. Rather, the question is whether H.B. 89 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. In this respect, the district court correctly found that *Claiborne* and not *FAIR* governed the First Amendment analysis in this case. Slip Op. at 23-24.

The district court correctly discerned that the context of the activity here is that of a political boycott. *Id*. at 23-26. 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, as the district court recognized. Slip Op. at 27. Texas did not direct its law at economic boycotts—boycotts intended "to lessen competition or to reap economic benefits" for the participants. *Allied Tube*, 486 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 correctly deduced that "Plaintiffs' boycotts are protected speech" and related associational activity. Slip Op. at 26-29. 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 Texas's H.B. 89 squarely place them among the political boycotts protected by the First Amendment and the district court correctly found H.B. 89 facially invalid.

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 Texas are not necessarily associated in a formal manner. But formal association is not a prerequisite to protecting their 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 affirm the district court's decision and hold that Texas's H.B. 89 is unconstitutional.

Respectfully submitted,

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Dated: December 6, 2019

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), 2,687 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.

Dated: December 6, 2019

/s/ Parker Douglas
Parker Douglas

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2019 I electronically filed the foregoing with the Clerk of this Court using the CM/ECF system. Service of such filing will be accomplished by the CM/ECF system upon all participants in this action.

DATED this 6th day of December 2019.

/s/ Parker Douglas
Parker Douglas