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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

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

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PLAINTIFF–APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state that they are natural persons and are therefore not required to file a corporate disclosure statement.

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INTERESTS OF AMICI CURIAE[1]

Amici, listed below, are thirteen First Amendment scholars who have taught courses in constitutional law or the First Amendment, published articles and books on these topics, and dedicated significant attention to the study of First Amendment protections. Based on their experience, *amici* seek to explain the First Amendment's application to political boycotts by consumers.

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[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that (1) this brief was authored entirely by *amici* and their counsel and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) apart from *amici* and their counsel, no other person contributed money to the preparation or submission of this brief. All parties have consented to the filing of this brief.

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INTRODUCTION

This appeal turns on a narrow, but significant, dispute about the scope of the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that landmark case, the Supreme Court recognized that political boycotts by consumers are inherently expressive. On that basis, the Court held that the First Amendment protected the NAACP and its members from liability for organizing and participating in a political boycott of white merchants in Claiborne County, Mississippi.

The State of Arkansas has enacted a law that burdens peaceful political boycotts of Israel, by requiring state contractors to certify that they will not boycott Israel or companies who do business in Israel for the duration of their contracts. *See* Ark. Code Ann. § 25-1-502; *id.* § 25-1-503. The law allows contractors to forgo this requirement if they are willing to accept a contract price at least twenty percent less than the lowest certifying business. *Id.* § 25-1-503(b)(1).

The primary question on appeal is whether Arkansas's anti-boycott law is subject to First Amendment scrutiny under *Claiborne*. *Amici* write respectfully to explain that the district court erred in holding that the First Amendment has no application to this case. *Claiborne* clearly held that political boycotts by consumers are covered by the First Amendment. As explained below, the district court's

holdings to the contrary are without merit, and the judgment of the district court should therefore be reversed.

ARGUMENT

I. Arkansas's anti-boycott law is subject to First Amendment scrutiny.

The primary question before this Court is whether Arkansas's anti-boycott law is subject to First Amendment scrutiny. The district court held that it is not, reasoning that the First Amendment covers only the speech associated with political boycotts, but not political boycotts themselves. In the alternative, the district court reasoned that the First Amendment covers only political boycotts intended to vindicate a "domestic legal interest." Respectfully, the district court erred. In *Claiborne*, the Supreme Court squarely held that the First Amendment covers political boycotts by consumers, not just the speech associated with those boycotts, and that it covers all such boycotts, so long as they are peaceful.

A. *Claiborne* established that political boycotts by consumers are covered by the First Amendment.

Government restrictions on political boycotts by consumers are subject to First Amendment scrutiny. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982); *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990). In *Claiborne*, the Supreme Court reviewed a civil judgment against the NAACP for its role in organizing a boycott of white merchants in Claiborne County, Mississippi. *See Claiborne*, 458 U.S. at 889. The boycott's "acknowledged purpose was to secure

compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice," *id.* at 907, in part by causing "the [boycotted] merchants [to] sustain economic injury as a result of their campaign," *id.* at 914. In response, a group of white merchants sued the NAACP and many of the boycott's participants to recover business losses caused by the boycott and to enjoin future boycotting efforts. *Id*. at 889.

The Supreme Court rejected the merchants' claims, holding, in relevant part, that the "nonviolent elements of [the boycott] [we]re entitled to the protection of the First Amendment." *Id.* at 915. The Court's analysis proceeded in two steps. At the first step of its analysis, the Court addressed "whether [the boycott was] protected in any respect by the Federal Constitution." *Id.* at 907. To that end, the Court analyzed the "many forms" that the boycott took, beginning with the boycott itself—that is, the collective refusal to patronize white merchants in Claiborne County. *Id.* Recognizing the historical pedigree of boycotts as a form of collective action, the Court explained that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Id.* (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)). The Court went on to explain, in detail, how the boycott was also "supported by speeches and nonviolent picketing." *Id*.; *see also id.* at 909–12. Following a thorough discussion of "each element" of the NAACP's

boycott, the Court concluded that the boycott was an exercise of the "inseparable" First Amendment rights of "speech, assembly, and petition." *Id.* at 911–12 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

After establishing First Amendment coverage, the Court proceeded to the second step of its analysis, by weighing the State's economic interests in regulation against the boycotters' interests in exercising their First Amendment right to boycott. Siding with the boycotters, the Court held that, although "States have broad power to regulate economic activity," they "do not [have] a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. The Court explained that "peaceful political activity" like the NAACP's boycott differed, for purposes of the First Amendment, from economic activity designed to "destroy legitimate competition." *Id.* at 914. Accordingly, the Court held that the "nonviolent elements of [the boycott] [we]re entitled to the protection of the First Amendment." *Id.* at 915.

Here, the Act regulates political boycotts that fall squarely within the coverage of *Claiborne*. The Act applies to boycotts of Israel that are nonviolent, that are politically motivated, and that involve individual consumers who have "banded together and collectively expressed their dissatisfaction," *id.* at 907, with the policies of Israel and the policies of the United States toward Israel. Like the NAACP's boycott in *Claiborne*, the "acknowledged purpose [of many of these boycotts] [i]s

to secure compliance by both civic and business leaders with a lengthy list of demands for equality." *Id*. And like the NAACP's boycott, these boycotts encompass many "inseparable" elements. *Id*. at 911 (quoting *Thomas*, 323 U.S. at 530). For these reasons, the Act's regulation of political boycotts by consumers triggers First Amendment scrutiny under *Claiborne*.

B. Contrary to the district court's ruling, *Claiborne* held that the First Amendment covers political boycotts in addition to the speech associated with those boycotts.

The district court interpreted *Claiborne* as holding that the First Amendment covered only the speech associated with the NAACP's boycott, but not the boycott itself. That interpretation of *Claiborne* is incorrect.

Claiborne, itself, was clear on this point. As explained above, the Court analyzed the NAACP's boycott and each of its associated elements at length, beginning with the collective refusal to patronize white merchants. *See id*. at 906–15. And it held that "[e]ach of these elements," *id.* at 907, was protected by the First Amendment. The Court could have described the reach of its opinion very differently. It could have explained that only the *speech* associated with the NAACP's boycott enjoyed First Amendment protection. Instead, it held that the NAACP's activities were an exercise of the "inseparable" rights "of speech, assembly, association, and petition," *id.* at 911 (internal quotation marks omitted),

and, ultimately, that the NAACP's nonviolent activities were "entitled to the protection of the First Amendment," *id*. at 915.

If the Supreme Court had intended to apply the First Amendment as narrowly as suggested by the district court, the Court's analysis would have proceeded differently. Specifically, if the Court had held that only the boycotters' *speech* was protected by the First Amendment, it would have been necessary for the Court to determine whether the boycotters' purportedly unprotected purchasing decisions nonetheless justified the judgment of liability against them. The Court did not conduct that analysis, because its holding reached all of the nonviolent activity encompassed by the NAACP's boycott and associated expression.

The district court's interpretation of *Claiborne* is also impossible to square with the Court's earlier decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). According to the district court, *Claiborne* addressed only the constitutionality of penalizing the *speech* associated with the NAACP's boycott. Were that so, the Supreme Court would have dispensed with the case summarily under *Brandenburg*, which addresses whether speech that incites unlawful activity may be punished. Under *Brandenburg*, the question in *Claiborne* would have been whether the *speech* associated with the NAACP's boycott had incited an unlawful boycott. The *Claiborne* Court did not address that question, however, because it held that the boycott itself was constitutionally protected, and thus the boycott could not have

been the foundation for a charge of incitement. This, of course, is why *Claiborne* is recognized as one of the Supreme Court's seminal First Amendment decisions and not as a mere application of *Brandenburg*.

The Supreme Court's later decision in *Trial Lawyers* confirms this reading of *Claiborne*. In *Trial Lawyers*, the Federal Trade Commission issued a cease-and-desist order against an association of lawyers who refused to represent indigent defendants until they received an increase in fees. 493 U.S. at 414–20. In considering the association's First Amendment defense, the Court first made clear that the case did not concern the *speech* associated with the lawyers' refusal. *Id.* at 426 ("[N]othing in the FTC's order would curtail such activities . . . ."). Instead, it concerned solely the lawyers' "concerted refusal . . . to accept any further assignments." *Id.*

The lawyers argued that their concerted refusal was analogous to the boycott in *Claiborne*, but the Supreme Court held that the NAACP's boycott "differ[ed] in a decisive respect." *Id*. Whereas the *Claiborne* boycott sought political gains, the *Trial Lawyers* boycott sought economic ones. As the Court explained, "[t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves." *Id.* They did not "stand to profit financially from a lessening of competition in the boycotted market." *Id.* at 427 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 508 (1988)). In *Trial Lawyers*, however,

the "clear objective" of the association was "to economically advantage the participants" by securing increased compensation. *Id*. at 428. The Court reasoned that "[s]uch an *economic* boycott [was] well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself," and, therefore, subject to regulation. *Id.* at 427 (emphasis added); *see also Claiborne*, 458 U.S. at 914–15.

The Court's analysis in *Trial Lawyers* reflects its recognition that *Claiborne*'s protection extended to the NAACP's boycott, and not just to the speech associated with that boycott. What distinguished the boycott in *Trial Lawyers* was its economic, rather than political, purpose.

C. *FAIR* and the other cases relied upon by the district court do not disturb *Claiborne*'s coverage of political boycotts.

None of the other cases relied upon by the district court disturbs *Claiborne*'s central holding that political boycotts by consumers are covered by the First Amendment. *See Ark. Times LP v. Waldrip*, No. 18 Civ. 914, 2019 WL 580669, at *5–7 (E.D. Ark. Jan. 23, 2019).

The district court relied principally on the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), but *FAIR* is inapposite. First, nothing in *FAIR* calls into question *Claiborne*'s central holding. *FAIR* does not cite *Claiborne*, much less explicitly overturn it. And it is not credible to suggest the Court upended a signature civil rights ruling without so much as an acknowledgement. *Cf. Shalala v. Ill. Council on Long Term Care,*

Inc., 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

Second, *FAIR* is not a consumer boycott case. In *FAIR*, an association of law schools brought a First Amendment challenge against a law that withheld federal funding from educational institutions that denied military recruiters access to their campuses. *FAIR*, 547 U.S. at 51. The Court upheld the law, concluding that it did not regulate conduct that was "inherently expressive" for the purposes of the First Amendment. *Id*. at 66. Because *FAIR* did not involve collective action with any recognized historical pedigree, the Court asked whether an "observer" would understand the law schools' exclusion of military recruiters as expressive. *Id.* The Court concluded that an observer would not, because the purpose of the exclusion, which had the effect of "requiring military interviews to be conducted [off] campus," would not be "overwhelmingly apparent." *Id.* (internal quotation marks omitted).

By contrast, the key holding of *Claiborne* is that political boycotts by consumers *are* inherently expressive. In the same way that "[p]arades are . . . a form of expression, not just motion," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 568 (1995), consumer boycotts, *Claiborne* established, are not just purchasing decisions. As with parades, the expressive quality of a consumer boycott inheres in its "inseparable" synthesis of assembly, petition, and speech. *See Claiborne*, 458 U.S. at 911 ("Through exercise of these First Amendment rights,

petitioners sought to bring about political, social, and economic change."). And also as with parades, consumer boycotts are "deeply embedded in the American political process." *Id.* at 907 (internal quotation marks omitted). It is no surprise, then, that the *FAIR* Court neither invoked nor disturbed *Claiborne*. *FAIR* simply did not concern the kind of collective action at issue in *Claiborne*.

Third, *FAIR*'s analysis is inapplicable here because, as the Court observed in that case, "judicial deference is at its apogee when Congress legislates under its authority to raise and support armies." *FAIR*, 547 U.S. at 58 (internal quotation marks and alterations omitted). In the Court's view, Congress's decision to withhold funds from law schools for excluding military recruiters deserved such deference. *Id.* But, here, the Act has nothing to do with military affairs. Accordingly, an important foundation of *FAIR* is absent.

The district court's reliance on *Longshoremen's* is likewise misplaced. *See Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982). Decided unanimously less than two months after *Longshoremen's*, *Claiborne* made clear that cases like *Longshoremen's* establish only that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined circumstances." *Claiborne*, 458 U.S. at 912. For example, as the Court explained, "[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." *Id*. (internal quotation marks omitted) (citing *Longshoremen's*, 456 U.S. at 222–23 & n.20). But *Claiborne* refused to extend *Longshoremen's* logic to "peaceful political" boycotts. *Id*. at 913. Under *Claiborne*, peaceful political boycotts by consumers receive First Amendment protection even if, under *Longshoremen's*, economic boycotts do not.[2]

Accordingly, none of the cases the district court relied upon disturbs *Claiborne*'s holding that political boycotts by consumers are covered by the First Amendment.

D. The district court's alternative holding that *Claiborne* covers only political boycotts intended to vindicate a "domestic legal interest" is also wrong.

The district court's alternative holding—that *Claiborne* does not reach "political boycotts directed towards foreign governments concerning issues that do not bear on any domestic legal interest"—is also wrong. *Ark. Times*, 2019 WL 580669, at *7.

Quite simply, the district court mistook the Supreme Court's *description* of the boycott in *Claiborne* for a *prescription* of the reach of the First Amendment. In

[2] The district court also cited this Court's decision in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191 (8th Cir. 1994), but that decision appropriately recognized *Claiborne*'s protection of the "participants *and* organizers of a consumer boycott," *id.* at 197 (emphasis added).

Claiborne, the Supreme Court noted that the NAACP's boycott "sought to vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself." *Claiborne*, 458 U.S. at 914. But nothing in the Court's opinion suggests that its constitutional holding turned on that description. The key consideration for the Court was not that the boycotters had a "domestic legal interest," *Ark. Times*, 2019 WL 580669, at *7, but, rather, that they had engaged in "peaceful political" activity, *Claiborne*, 458 U.S. at 913–14. That fact was critical because it differentiated the "peaceful political" boycott in *Claiborne*, *id*. at 913, from "a boycott organized for economic ends," *id*. at 915 (quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 303 (1979)).

The district court's alternative account of *Claiborne* is also indefensible as a matter of broader First Amendment jurisprudence. As a general matter, the First Amendment covers speech without regard to its content or expressive aim. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 444–45 (1963) ("For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."). And yet the district court's alternative holding would violate that principle, by extending the First Amendment's coverage to boycotts seeking to vindicate a "domestic legal interest," but not to boycotts seeking to vindicate a foreign or non-legal interest. There is no

precedent for that artificial constraint on the First Amendment's reach, and it is impossible to understand why the Court in *Claiborne* would have imposed it.

The district court's alternative account is also irreconcilable with the historical pedigree that the *Claiborne* Court invoked of "persons sharing common views banding together to achieve a common end." *Claiborne*, 458 U.S. at 907 (quoting *Citizens Against Rent Control*, 454 U.S. at 294). Political boycotts in this country have taken myriad forms, often directed at foreign regimes or at securing non-legal interests. The appellants document a sample of those boycotts, including the abolitionists' 1790s boycott of sugar produced by Caribbean slave plantations, the boycott of Japanese silk to protest Japan's invasion of China, the boycott of companies operating in South Africa to protest apartheid, and the more recent boycotts of Nike for supporting Colin Kaepernick and of companies owned by President Trump's family for the actions of the President. *See* Appellant's Br. 28–29. The district court's interpretation would exclude these boycotts from *Claiborne*'s reach for no discernible, let alone compelling, reason.

The *Claiborne* Court could not have intended such a result.

CONCLUSION

The Act regulates the type of "peaceful political" boycotts that *Claiborne* held implicate "inseparable" First Amendment rights. *Claiborne* is, therefore, on all fours here. *Amici* respectfully urge the Court to reverse the judgment below.

Dated: April 15, 2019

Respectfully submitted,

/s/ Ramya Krishnan

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,353 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: April 15, 2019

/s/ Ramya Krishnan
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CERTIFICATE OF SERVICE

I, Ramya Krishnan, certify that on April 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 15, 2019

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April 15, 2019

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RE: 19-1378 Arkansas Times LP v. Mark Waldrip, et al

Dear Counsel:

The amicus curiae brief of the First Amendment Scholars has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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