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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.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 4:18-CV-00914 BSM
Hon. Brian S. Miller, District Judge

Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as *Amici Curiae* in Support of Defendants-Appellees

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Interest of *Amici Curiae*[1]

Michael C. Dorf (Cornell Law School), Andrew M. Koppelman (Northwestern University Pritzker School of Law), and Eugene Volokh (UCLA School of Law) have all written extensively about First Amendment law. Their interest in this case is solely in offering an impartial analysis of the relevant First Amendment principles.

All parties have consented to the filing of this brief.

Summary of Argument

Decisions not to buy or sell goods or services are generally not protected by the First Amendment. That is the necessary implication of *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and it is the foundation of the wide range of antidiscrimination laws, public accommodation laws, and common carrier laws throughout the nation.

Thus, for instance:

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

- A limousine driver cannot refuse to serve a same-sex wedding party, even if he describes this as a boycott of same-sex weddings (or part of a nationwide boycott of such weddings by like-minded citizens).
- A store cannot refuse to sell to Catholics, even if it describes this as a boycott of people who provide support for the Catholic Church.
- An employer in a jurisdiction that bans political affiliation discrimination cannot refuse to hire Democrats, even if it describes such discrimination as a boycott.
- An employer that is required to hire employees regardless of union membership cannot refuse to hire union members on the grounds that it is boycotting the union.
- A cab driver who is required to serve all passengers cannot refuse to take people who are visibly carrying Israeli merchandise.

Of course all these people would have every right to speak out against same-sex weddings, Catholicism, the Democratic Party, unions, and Israel. That would be speech, which is indeed protected by the First Amendment.

But as a general matter, a decision not to do business with someone, even when it is politically motivated (and even when it is part of a broader political movement), is not protected by the First Amendment. And though people might have the First Amendment right to discriminate (or boycott) in some unusual circumstances—for instance when they refuse to participate in distributing or creating speech they disapprove of—that is a basis for a narrow as-applied challenge, not a facial one. For this reason, Ark. Code Ann. § 25-1-503 is constitutional.

I. Refusals to deal are generally not protected by the First Amendment

In *Rumsfeld*, the Supreme Court rejected the argument that a law school had a First Amendment right to refuse to allow military recruiters on its property—which is to say, the Court rejected the argument that law schools could engage in a limited boycott of such recruiters.

Such a refusal to allow military recruiters, the Court held, "is not inherently expressive." 547 U.S. at 64. Law schools' "treating military recruiters differently from other recruiters" was "expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 66. "The expressive component of a law school's actions is not created

by the conduct itself but by the speech that accompanies it." *Id.* Because of that, Congress could restrict such discrimination against military recruiters without violating the First Amendment. *Id.*

"[I]f an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes," *id.*, that announcement offers no basis for applying First Amendment scrutiny to the nonpayment of taxes. Likewise, if a university announces that it is expressing disapproval of the military's Don't-Ask-Don't-Tell policy by excluding the military from on-campus recruiting, that announcement offers no basis for applying First Amendment scrutiny to this exclusion. *Id.*

The same applies to boycotts of Israel: An observer who sees a company dealing with a non-Israeli business, and not with an Israeli business, can only perceive a political message when the company accompanies its conduct with speech explaining it. Because of that, Arkansas may restrict such discrimination against Israeli businesses without violating the First Amendment.

This simply reflects a well-established principle: The First Amendment does not generally protect liberty of contract, whether or not one's choices about whom to deal with are political. "Boycott" is just another term for refusal to contract, at least when that is part of some organized movement. There are also "buycotts," which are deliberate choices to contract with particular entities, and which are likewise not protected by the First Amendment.[2] But using such terms to refer to one's commercial choices does not create a First Amendment right to contract, or not to contract. People equally lack a First Amendment right, for instance,

- to illegally refuse to hire lawful permanent residents,[3] even if such a refusal is aimed at sending an anti-immigrant message;
- to illegally hire aliens who lack work authorization, even if such a refusal is aimed at sending a pro-open-borders message;

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[2] *See, e.g.*, Anand Ghiridharadas, *Boycotts Minus the Pain*, N.Y. Times (Oct. 10, 2009), http://www.nytimes.com/2009/10/11/weekinreview/11giridharadas.html ("Political consumption is not new . . . . What is new is that boycotting is surrendering to buycotting, the sending of positive, not just negative, signals; and that it is practiced increasingly by mainstream shoppers, not just die-hard activists.").

[3] Title 8 U.S.C.A. § 1324b(a)(1)(B), (3) bans such discrimination.

- to do business with North Korean entities (if a law forbids that), even if such dealing is aimed at sending what they see as a pro-peace message;
- to refuse to do business with Israeli entities (if a law forbids that), even if such a refusal is aimed at sending a pro-Palestinian-rights message.

Of course, boycotts usually involve speech—people urging others to join the boycott or organizing in groups that promote the boycott—as well as conduct. Like other advocacy, advocacy of boycotts is generally constitutionally protected: *NAACP v. Claiborne Hardware Co.* made that clear, in noting that "peaceful picketing," "marches," "urg[ing others] to join the common cause," "support[ing the boycott] by speeches," "threats of social ostracism," and gathering and publishing the names of those who refuse to join were all "safeguarded by the First Amendment." 458 U.S. 886, 907, 909, 910, 933 (1982).

But *Claiborne Hardware* had no occasion to decide whether a person's not dealing with someone based on that someone's race was itself protected by the First Amendment, because it was clear that Mississippi law

did not prohibit such private choices not to deal. Under Mississippi law, whites could generally refuse to deal with blacks, and blacks could refuse to deal with whites. Nor was the boycott banned by general prohibitions on "concerted refusal to deal," "secondary boycotts," or "restraint[s] of trade." *Id.* at 891 n.7, 894, 915.

Indeed, *Claiborne Hardware* expressly reserved the question whether a boycott "designed to secure aims that are themselves prohibited by a valid state law" is constitutionally protected. *Id.* at 915 n.49. It follows that the question whether a boycott that involved refusals to deal that were themselves prohibited by a valid state law—a law that targeted conduct rather than speech—was also not resolved by *Claiborne Hardware*. And in *Rumsfeld*, the Court did resolve the issue: a boycott by universities of military recruiters could be outlawed outright, 547 U.S. at 60, and certainly could be penalized by withdrawal of government funds as well, *id.*

The holding of *Claiborne* is thus consistent with the principle set forth just six years before in *Runyon v. McCrary*: Though people and institutions have a right to advocate for discrimination—to "promote the belief

that racial segregation is desirable"—"it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle." 427 U.S. 160, 176 (1976). Likewise, though people have a right to urge a boycott of white-owned stores, as in *Claiborne*, it does not follow that the practice of refusing to deal with an entity based on the owners' race (whether black or white) is also protected by the same principle. And though people have an indubitable right to urge a boycott of Israeli companies,[4] it does not follow that the practice of refusing to deal with such companies based on the owners' nationality is also protected by the same principle.

We see the same in *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982), where union members engaged in a purely politically motivated boycott of cargoes shipped from the USSR

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[4] We agree with the District Court, A 9, that, properly interpreted, the Arkansas statute does not ban such speech; "other actions that are intended to limit commercial relations with Israel," Ark. Code Ann. § 25-1-502(1)(A)(i) refers to commercial conduct such as that listed in the preceding phrases ("refusals to deal" and "terminating business activities"), not to advocacy.

(engaged in as a protest of the invasion of Afghanistan). The Court noted that even outright speech—secondary picketing—in support of refusals to deal might sometimes be properly restricted notwithstanding the First Amendment (a controversial position, but one the Court had settled on in earlier cases). *Id.* at 226. And, the Court noted, if even picketing supporting a boycott could be restricted, "[i]t would seem even clearer that conduct designed not to communicate but to coerce" (there, a refusal to unload ships) "merits still less consideration under the First Amendment." *Id.* Of course, the refusal to unload ships was obviously a part of a broader plan designed to communicate. But the refusal to deal was itself not treated as communication entitled to First Amendment protection.

The Court also added that, "There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others." *Id.* That too fits perfectly with the Arkansas law in this case, which leaves opponents of Israel with many ways to express their opposition to Israel without engaging in discriminatory refusals to deal with Israeli companies.

To be sure, *FTC v. Superior Court Trial Lawyers Ass'n*, while holding that the First Amendment did not protect "a group of lawyers [who] agreed not to represent indigent criminal defendants . . . until the . . . government increased the lawyers' compensation," 493 U.S. 411, 414 (1990), distinguished *Claiborne* on the grounds that the lawyers' boycott was primarily economically motivated while the *Claiborne* boycott was political. And there is language in *Claiborne* suggesting (but not holding) that a political boycott, such as "an organized refusal to ride on [city] buses," might be constitutionally protected. 458 U.S. at 914 & n.48; it is thus possible to read *Claiborne* as saying that boycotts are inherently expressive.

But the far better reading of that case, and the one most consistent with the other precedents, is that *many but not all elements* of political boycotts are expressive. The *Claiborne* Court says that the political "boycott clearly involved constitutionally protected activity," 458 U.S. at 911, and then identifies those elements as "speech, assembly, association, and petition," *id.*, notably not including commercial dealing or nondealing in the list. The Court in *Superior Court Trial Lawyers Ass'n* likewise did not

hold that the refusal to deal would itself be protected had it been politically motivated. And in *Rumsfeld*, the Court expressly rejected any such position.

Indeed, much of the reasoning in *Superior Court Trial Lawyers Ass'n* is squarely on point here. "Every concerted refusal to do business with a potential customer or supplier has an expressive component," the Court noted. *Id.* at 431. Yet that does not itself make refusals to deal constitutionally protected. *Id.* at 430. Nor does the publicity generated by the boycott: "[T]o the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters' ideas. But this level of expression is not an element of the boycott. Publicity may be generated by any other activity that is sufficiently newsworthy." *Id.* at 431.

The same applies to the boycotting behavior to which Arkansas law applies: The concerted refusal to do business with Israeli companies may have a political motivation, may help spread political ideas, and may even be understood as political by people who are told about the boycotters' motivations. But this does not make such speech protected.

And to the extent that *Superior Court Trial Lawyers Ass'n* might have been seen as implying a different result for purely un-self-interested boycotts, *Rumsfeld* rebuts any such reading. "[A] group's effort to use market power to coerce the government through economic means may subject the participants to antitrust liability," even Justice Brennan's *Superior Court Trial Lawyers Ass'n* dissent acknowledged, *id.* at 438 (Brennan, J., dissenting). A university's effort to use control over its property to coerce the government into changing its policies may subject the university to the loss of funds. *Rumsfeld*, 457 U.S. at 60. Likewise, an effort to use economic power to coerce a foreign government through economic means may subject the participants to loss of state government contracts.

Of course, different laws banning refusals to deal operate differently:

1. Some categorically require people to do business with all eligible people or organizations—common carrier obligations, such as those imposed on taxicabs, are one example.[5]

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[5] *See, e.g.*, *Princeton Taxi Owners' Ass'n v. Mayor & Council of Borough of Princeton*, 362 A.2d 42 (N.J. Super. Ct. App. Div. 1976).

2. Some ban discrimination based on a particular trait that has been the basis of massive and often debilitating discrimination, such as race.

3. Some ban discrimination for much less pressing reasons, for instance bans on discrimination based on marital status, "personal appearance," "matriculation," "political affiliation," "source of income," or "place of residence or business."[6]

4. Some ban discrimination only against particular groups or organizations, such as bans on discrimination against military recruiters, Israeli companies, military members,[7] or permanent resident aliens.[8] While such selectivity might in rare situations violate the Equal Protection Clause (for instance, if a law banned discrimination against Hispanics but not against Asians), it does not violate the First Amendment.

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[6] *See, e.g.*, D.C. Code § 2-1402.31.

[7] *See, e.g.*, 38 U.S.C.A. § 4311; N.Y. Work Comp. § 125-a; La. Rev. Stat. § 23:331.

[8] 8 U.S.C.A. § 1324b(a)(1)(B), (3).

5. Some categorically ban discrimination, and some ban discrimination only in government funding.[9]

But these laws all have an important feature in common: They ban refusal to deal, which is to say the conduct of not doing business with some person or organization, rather than banning speech. Because of this, none of them is generally viewed as subject to heightened scrutiny: Antidiscrimination laws, for instance, are constitutional precisely because they do not inherently burden First Amendment rights, not because they burden First Amendment rights but pass strict scrutiny. (Indeed, many applications of antidiscrimination laws might well not pass strict scrutiny; consider, for instance, the bans on public accommodation discrimination based on marital status or political affiliation.)

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[9] For examples of the latter, See, *e.g.*, the Solomon Amendment, upheld in *Rumsfeld*; Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000d to 2000d-4a; Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681-1688; Equal Employment Opportunity, Exec. Order No. 11246 (Sept. 24, 1965); and the Vietnam-Era Veterans Readjustment Assistance Act, 38 U.S.C.A. § 4212, as implemented by 41 C.F.R. § 60-300.5.

When the Court concluded that, "There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union," *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *Runyon*, 427 U.S. 160; and *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)), it did so because such discrimination is simply not treated as symbolic expression for First Amendment purposes—not because bans on such discrimination pass heightened scrutiny. The same applies to discriminating in the selection of those with whom one enters into other business arrangements.

Of course, the Arkansas anti-BDS statute may well have been motivated not just by purely economic considerations, but also by the Legislature's desire to send a message that a certain basis for refusing to deal is improper. But that too is a similarity between this statute and many of the other laws mentioned above: Those laws also aim to send a message

about equality and fairness. The important point is that they send a message by banning conduct—refusal to do business—not by targeting constitutionally protected speech; the same is true of the anti-BDS statute.[10]

II. Some refusals to deal may indeed be protected by the First Amendment, but those are rare exceptions that call for as-applied exemptions from the statute

To be sure, some refusal to deal may indeed be protected by the First Amendment, when the underlying transaction itself involves First-Amendment-protected activity. For instance:

- A church's refusal to hire someone as clergy may be categorically protected by the Free Exercise Clause, even if it violates an antidiscrimination statute. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

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[10] If the statute's purpose were to suppress speech because of its content, that might make it unconstitutional as well. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015). But there is no basis in this record to conclude this: The law appears to be aimed at the conduct of refusals to deal with Israel and Israeli companies, and not at any message expressed by that conduct—indeed, it applies even to people's silent refusals to deal that are unknown to anyone else and thus cannot convey any message.

- A filmmaker's decision to cast actors from a particular group in a particular role may be categorically protected by the Free Speech Clause. *See Claybrooks v. ABC*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012).
- A newspaper's decision not to continue employing reporters who engage in political activity may be categorically protected by the Free Press Clause, even in those states where employers generally may not dismiss employees for their political activity. *See Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1133 (Wash. 1997).
- A photographer's decision not to photograph same-sex weddings—or, for instance, Scientology events—might possibly be protected by the compelled speech doctrine, even if it would otherwise violate a ban on sexual orientation discrimination or religious discrimination in a public accommodation, though the signatories of this brief disagree with each other on that score. *But see Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (rejecting such a claim).

- A nonprofit organization's decision not to contract with spokespeople whose publicly known sexual orientation or religion would undermine the organization's ability to spread its message may be categorically protected by the Free Speech Clause. *See Dale v. Boy Scouts of Am.*, 530 U.S. 640 (2000) (so holding as to volunteers).
- Indeed, the Arkansas Times may well have the right to refuse to, for instance, publish op-eds by Israeli citizens or political advertisements submitted by Israeli companies, *see Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974)—though the Arkansas Times has apparently not made any such narrow claim having to do with its First Amendment right to exercise editorial control.

But this simply reflects the reality that a wide range of laws that regulate conduct, and that are constitutional on their face, may sometimes require First Amendment exceptions as applied. The remedy in such situations is to grant as-applied exceptions from the laws, not to invalidate them on their face. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real [for the

law to be struck down on its face], but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). If the overbreadth is not substantial, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16.

Hosanna-Tabor, after all, did not facially invalidate the Americans with Disabilities Act, even though some applications of the Act violate the First Amendment. The same is true for *Claybrooks* as to Title VII, and *Dale* as to New Jersey's ban on discrimination in places of public accommodation. Similarly, *Claiborne Hardware* did not facially invalidate the tort of interference with business relations, but just held that it could not be applied to constitutionally protected speech. The Sherman Act is likewise generally constitutional, but may not be applied to anticompetitive conduct that takes the form of lobbying or nonfrivolous litigation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144-45 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 659-61, 670 (1965); *Superior Court Trial Lawyers*

Ass'n, 493 U.S. at 424 (noting that, though the *Noerr* Court was purporting just to interpret the Sherman Act, it was doing so "in the light of the First Amendment[]").

Similarly, if a government required contractors to pledge that they do not discriminate in employment based on, say, race, religion, sex, sexual orientation, or marital status, that requirement would not be facially unconstitutional—even though some contractors may in rare situations have a First Amendment right to so discriminate (for instance, in choice of clergy). If the Catholic Church, for instance, was otherwise eligible for the contract, it could sign this pledge with a reservation noting that it of course discriminates based on sex, marital status, and religion in choice of clergy. If the government then chose to disqualify the Church because of that reservation, the Church would likely have a strong as-applied challenge. (Indeed, in certain circumstances, the Church could get a declaratory judgment affirming its rights on this score.) But because the pledge would not be substantially overbroad, the as-applied challenge would be the only one available.

Conclusion

Banning discrimination against Israel and Israeli companies—whether in general, or just for government contractors—is a controversial policy. Perhaps it is unwise, especially when applied to small service providers. Perhaps people should be generally free to choose whom they will do business with, unless such choice risks creating a truly pressing social problem.

But such decisions are a matter for the political process, not for courts. So long as a law leaves people free to say what they want, it may generally restrict people's decisions about whom to do business with—which are generally regulable conduct, not constitutionally protected speech.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae*
June 5, 2019

Certificate of Compliance with Rule 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,757 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Statement Mandated by Circuit Rule 28A(H)

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s/ Eugene Volokh

Attorney for *Amici Curiae*

Certificate of Service

I certify that on June 5, 2019, I electronically filed and served this Brief using the Eighth Circuit CM/ECF system; all participants in the case are registered CM/ECF users.

s/ Eugene Volokh

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

Dear Counsel:

The amicus curiae brief of Prof. Dorf, Koppelman and Volokh 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.

Michael E. Gans
Clerk of Court

JMM

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