No. 22-379

IN THE

Supreme Court of the United States

ARKANSAS TIMES LP,
Petitioner,

v.

MARK WALDRIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Is an Arkansas law requiring government contractors to agree not to discriminate based on national origin when buying and selling goods consistent with *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), and historical regulation of non-expressive conduct, or does it violate the free speech rights of an entity that is not discriminating now and has no plans to discriminate in the future?

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INTRODUCTION

Economic conduct isn't expression, and explaining that it had a political motivation doesn't make it expression. That's why States can, and often do, ban refusals to do business solely because of an individual's race, national origin, religious affiliation, or other status—even if they're accompanied by speech. And this Court has affirmed those bans time and time again.

The Arkansas law at issue here squarely fits that mold. Arkansas does not want to partner with companies that discriminate based on national origin, so it requires government contractors to certify that they don't refuse to deal with Israelis or people who do business with them. That requirement regulates only that economic conduct; it doesn't prohibit contractors from saying anything.

Arkansas Times, a free weekly publication that occasionally runs advertisements for state colleges, says the law violates the First Amendment. On its own, that's an odd claim: Arkansas's law does not target speech. But it's an even odder claim for Arkansas Times to make because it does *not* itself refuse to deal with Israel and the required certification wouldn't require it to do anything differently.

Arkansas Times bases its argument on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which it misreads to hold that certain politically motivated refusals to deal are protected expression. But *Claiborne* merely confirmed that black Americans seeking to end racial discrimination maintained their rights to speak, petition, and assemble; it did not create a right to economically discriminate whenever the discriminator has a political motive. (Indeed, no judge below adopted Arkansas Times's strained reading of *Claiborne*.) To

the contrary, this Court has reiterated, most recently in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), that ordinary, non-expressive conduct doesn't suddenly become protected expression merely because it has a political motivation or is accompanied by speech explaining that motivation. Because the Eighth Circuit correctly reached that conclusion, this Court's review is not warranted.

STATEMENT

1. Economic discrimination against Israel has a dark history. Mere months after Hitler came to power, Nazi stormtroopers plastered signs across Jewish establishments instructing Germans, "Don't Buy from Jews." U.S. Holocaust Museum, *Boycott of Jewish Businesses*.[1] At the end of World War II, with Jewish Holocaust survivors migrating to Palestine, the Arab League encouraged all Arabs to "refuse to deal in, distribute, or consume Zionist products"—a boycott that continues today. Josh Halpern & Lavi M. Ben Dor, *Boycotts: A First Amendment History* 31 (Harv. Pub. Law Working Paper No. 23-01, 2022) (internal quotation marks omitted).[2] And as the German parliament observed in 2019, the current anti-Israel boycott "movement's 'Don't Buy!' stickers on Israeli products inevitably awake[n] associations with the Nazi slogan" and other past discrimination. The

[1] https://encyclopedia.ushmm.org/content/en/article/boycott-of-jewish-businesses (last visited Jan. 14, 2023).

[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4305186.

Associated Press, *German Parliament Denounces Israel Boycott Movement* (May 17, 2019).[3]

Troubled by the anti-Semitism underpinning refusals to deal with Israeli companies, Congress long ago directed the President to "issue regulations prohibiting any United States person" from "knowingly agreeing to . . . comply with, further, or support any boycott" against "a country which is friendly to the United States." 50 U.S.C. 4842(a)(1). And starting in the 1970s, dozens of States enacted similar measures targeting these discriminatory refusals to deal. *See* Halpern & Ben Dor, *Boycotts*, at 35-36, 38-39 (describing the range of measures). *Contra* Pet. 35 (dating the first laws targeting anti-Israel boycotts to 2015). Some of those statutes ban the discriminatory conduct outright. Halpern & Ben Dor, *Boycotts*, at 35-36. Others are more targeted: more than half of the States currently require government contractors to certify that they are not boycotting Israelis and people who do business with them. *Id.* at 38-39; Pet. 35.

Like the federal government and most of our sister States, Arkansas seeks to eliminate economic discrimination against Israelis and the people who do business with them. Arkansas agrees that refusing to do business with Israel and Israelis solely because they are Israeli is an "unsound business practice" grounded in "national origin" discrimination. Ark. Code Ann. 25-1-501(3), (5). To prevent that discriminatory conduct from being put on the taxpayers' dime, it has joined the majority of States limiting government contracting with boycotters by enacting Act 710. *Id.* 25-1-503(a).

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[3] https://apnews.com/article/race-and-ethnicity-boycotts-middle-east-israel-europe-570dd84c53cf472aaf2661517acd77f2.

Act 710 does not prohibit anyone from criticizing Israel, condemning the Act itself, or even advocating boycotting. Rather, it merely prohibits public entities from contracting with entities that boycott Israel except in narrow circumstances. *Id.* 25-1-503. To make that prohibition effective, Act 710 requires contracts with the State to include "a written certification" that the contracting company "is not currently engaged in . . . a boycott of Israel." *Id.* 25-1-503(a)(1). Consistent with its goal of stamping out economic discrimination, Act 710 narrowly defines "[b]oycott[ing] Israel" as "engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel . . . in a discriminatory manner." *Id.* 25-1-502(1)(A)(i).

2. Arkansas Times is a free publication that hasn't boycotted, doesn't intend to boycott, and hasn't advocated for boycotting Israelis and the people who do business with them. Pet. App. 52a-53a, 96a. Indeed, for more than a year after Act 710 went into effect, it entered advertising contracts with a state-run college, notwithstanding the certification requirement. Pet. App. 52a.

But in late 2018, as it was negotiating a new set of contracts with the college, Arkansas Times reversed course. Over the previous several months, it had run articles criticizing Act 710 and urging a plaintiff to challenge it. Pet. App. 74a, 96a. Yet after failing to rustle up some other plaintiff—perhaps a plaintiff actually intending to boycott Israel—Arkansas Times decided to challenge the Act itself. So rather than sign a new certification, Arkansas Times refused, became ineligible for a new contract, and sued. Pet. App. 95a-96a.

3. Arkansas moved to dismiss both on standing and on the merits. The district court concluded that

Arkansas Times had standing to sue even though it had never boycotted because it had suffered an injury when it lost the advertising contract. But it also held that Arkansas Times had "not demonstrated that a boycott of Israel, as defined by Act 710, [was] protected by the First Amendment." Pet. App. 57a.

Arkansas Times based its First Amendment claims on a strained reading of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), suggesting that that case "create[d] an unfettered black-letter right to engage in political boycotts." Pet. App. 62a (discussing *Claiborne*, 458 U.S. at 907-08). But that case "did not hold that individual purchasing decisions," divorced from speech, "were protected by the First Amendment"—or indeed, address purchasing decisions at all. Pet. App. 62a-63a.

Instead, the district court found this Court's opinion in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), more on-point. Pet. App. 60a. That case held that law schools' boycotting of military recruiting on their campuses was not protected by the First Amendment because it was not "inherently expressive." *FAIR*, 547 U.S. at 66. As *FAIR* explained, that boycott sent a message only if "the law schools accompanied their conduct with speech explaining it." *Id.* But accompanying speech could not transform unexpressive conduct into something protected by the First Amendment. *Id.*

The district court explained that the same was true of the conduct prohibited by Act 710. Pet. App. 60a. The Act does not target "criticism of [itself] or Israel, calls to boycott Israel, or other types of speech." Pet. App. 58a. It narrowly focuses on "commercial conduct," *id.*—specifically, "refusals to deal," termination of "business activities," and "other actions . . . intended to limit commercial relations," Ark. Code Ann. 25-1-

502(1)(A)(i), that were "similar to the listed items," Pet. App. 58a. But "refusal[s] to deal" or other "commercial purchasing decisions" do not inherently "communicate ideas." Pet. App. 59a. Indeed, "absent any explanatory speech, an external observer would [never] notice that a contractor" was boycotting Israel. Pet. App. 60a. So as with the boycott in *FAIR*, the conduct regulated by Act 710 was neither inherently expressive nor protected. Pet. App. 61a.

4. Arkansas Times appealed, and a divided Eighth Circuit panel reversed. But the panel majority didn't adopt Arkansas Times's reading of *Claiborne*. Pet. App. 34a (acknowledging that "not necessarily all[] elements of a boycott are protected by the First Amendment"). Instead, it rewrote Act 710 to cover more than just commercial conduct. Pet. App. 34a-42a. The Act's reference to "other actions . . . intended to limit commercial relations" wasn't—as the text would suggest—simply a catchall for unenumerated commercial conduct. Pet. App. 36a-41a (construing Ark. Code Ann. 25-1-502(1)(A)(i)). Rather, the majority decided, that reference targeted speech, such as "post[ing] anti-Israel signs, donat[ing] to causes that promote a boycott of Israel, encourag[ing] others to boycott Israel, or even publicly criticiz[ing] the Act." Pet. App. 36a. Prohibiting that speech, it held, implicated the First Amendment. Pet. App. 41a-42a. In dissent, Judge Kobes took issue with the majority's "effort to stretch the term 'other actions.'" Pet. App. 48a.

5. Arkansas sought en banc review, and the en banc court held 9-1 that Judge Kobes had the better reading of Act 710. Pet. App. 8a-11a (explaining that Arkansas courts would likely read "other actions" to cover only conduct, not speech). In doing so, that court adopted

the district court's reading of precedent: *Claiborne* had "only discussed protecting expressive activities *accompanying* a boycott." Pet. App. 7a-8a. And *FAIR* confirmed that a "*non-expressive*" refusal to deal "was unprotected." Pet. App. 7a. Dissenting, Judge Kelly reiterated the panel's statutory analysis, but she did not take issue with the en banc court's reading of *Claiborne*. *See* Pet. App. 19a (noting that *Claiborne* addressed "speech and other protected, boycott-associated activities").

REASONS FOR DENYING THE PETITION

I. The Eighth Circuit correctly interpreted this Court's precedents.

Arkansas Times grounds its request for certiorari on an alleged conflict with a single 40-year-old decision of this Court. But the Eighth Circuit got it right: *Claiborne* does not recognize an unfettered right to conduct "politically motivated consumer boycotts." Pet. 14. Instead, it recognizes only that expression that often accompanies boycotting—such as speaking, petitioning, and picketing—is protected by the First Amendment. And even if some of *Claiborne*'s language could be ripped out of context to suggest that politically motivated refusals to deal are protected in their entirety, *Claiborne* is neither the first nor the last word on the constitutional status of boycotting. History and other precedents confirm that non-expressive refusals to deal are not protected—even if those economic decisions are politically motivated and accompanied by speech explaining those motivations.

A. Governments have historically regulated refusals to deal.

Boycotting has existed since before the Founding—but it has never been treated as speech. The Founders "did not conceive of the boycott as a matter of conscience, presumptively immune from coercion or state influence." Halpern & Ben Dor, *Boycotts*, at 9. In fact, the First Continental Congress *mandated* a boycott of British goods, and those who refused to join were punished. *Id.* at 10-11. Early Congresses enacted similar policies and "never appear[] to have entertained the possibility that mandatory boycotts might somehow intrude on the freedom of speech or association, because the decision of whom to deal with was *never* conceptualized as a right of free expression." *Id.* at 14. By the Gilded Age, courts routinely held union boycotters liable for causing economic harm to their target and occasionally enjoined boycotts altogether. *Id.* at 17-23. And some of those anti-boycotting rules were eventually codified. *See, e.g.*, 29 U.S.C. 158(b)(4).

Neither legislatures nor courts drew a line between political and economic boycotts: many compelled or prohibited boycotts were politically motivated. *See, e.g.*, Halpern & Ben Dor, *Boycotts*, at 10 (mandated boycott against "enemies of the American liberty" (internal quotation marks omitted)); *id.* at 21-23 (injunction against anti-Chinese boycott protesting immigration). Correctly so. "The First Amendment does not generally protect liberty of contract, whether or not one's choices about whom to deal with are political." *Amici Curiae* Br. of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh, *Arkansas Times LP v. Waldrip*, 2019 WL 2488957, at *5 (8th Cir. June 5, 2019) ("Professors' *Amicus* Br."). Anti-discrimination laws illustrate this point nicely. A

State certainly cannot prohibit people from criticizing the Catholic Church, the Democratic Party, or labor unions. *Id.* at *2. Yet States can—and frequently do—require businesses to sell regardless of religious belief, political affiliation, or union membership without running afoul of the First Amendment.[4] *Id.* at *2-3. "Boycott" is just another label for these proscribable refusals to deal. *Id.* at *5.

B. Months before *Claiborne*, *International Longshoremen* confirmed that States can regulate political refusals to deal.

Just a few months before deciding *Claiborne*, this Court reiterated that fundamental principle. In *International Longshoremen's Association v. Allied International*, it unanimously held that a statutory prohibition on secondary boycotts—boycotts intended to pressure the target into ceasing business with a third party—could permissibly apply to a politically motivated boycott. 456 U.S. 212, 214 (1982).

Properly understanding *Claiborne* requires starting with *International Longshoremen* (though Arkansas Times completely ignores that case). Indeed, as the district court aptly noted, *International Longshoremen* presented "largely the same" issues as this case, "[i]f one simply substitutes the words 'labor union,' 'Soviet,' 'U.S.S.R.,' and 'Afghanistan' with 'newspaper,' Israeli,' 'Israel,' and 'West Bank.'" Pet. App. 64a. There, a union refused to unload Russian cargoes in protest of the Soviet invasion of Afghanistan. 456 U.S. at 214. That boycott was indisputably political, designed to

[4] Anti-discrimination statutes that compel speech, rather than target non-expressive, economic conduct, raise different concerns not present here. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

change Soviet policy. Still, the Court held that it was not protected by the First Amendment because it was not "conduct designed . . . to communicate." *Id.* at 226.

Claiborne didn't overrule *Longshoremen*. To the contrary, it cites *Longshoremen* for the proposition that secondary boycotts may be banned. *See Claiborne*, 458 U.S. at 912. So whatever *Claiborne* stands for, it can't be that a refusal to deal is protected if it's politically motivated.

C. *Claiborne* did not hold that refusals to deal are protected.

Indeed, *Claiborne* never had an occasion to decide whether a refusal to deal is protected by the First Amendment. That case arose in Civil-Rights-Era Mississippi, where state law (unfortunately) allowed whites and blacks to refuse to deal with each other on racial grounds. 458 U.S. at 899. In 1965, the Claiborne County NAACP chapter petitioned public officials to desegregate public schools and facilities, to include black citizens in juries, and to otherwise afford black citizens their constitutional rights. *Id.* When that petition did not receive a favorable response, the NAACP voted to boycott white businesses. *Id.* at 900. To support the boycott, black citizens spoke and picketed. *Id.* at 907.

White merchants sued the NAACP and over a hundred black citizens involved in the boycott to stop the boycott and recoup business losses. *Id.* at 889. The Mississippi state courts ultimately rejected any attempt to impose liability for the "totally voluntary and nonviolent withholding of patronage." *Id.* at 894; *see also id.* at 915 ("The Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent,

politically motivated boycott."). Instead, the courts imposed liability on the theory that a handful of boycotters "had agreed to use force, violence, and 'threats'" to effectuate the boycott. *Id.* at 895 (emphasis omitted). The courts counted social ostracism as a proscribable threat. *Id.* at 894. And they assumed that many boycotters—who did not themselves commit violence—were nevertheless complicit merely because they had attended weekly NAACP strategy meetings. *Id.* at 924-25. Thus, the question before the Court was not whether refusing to deal was protected but rather whether violence by some could justify imposing liability on others who merely exercised their right to freely associate. *See* Respondents' Supplemental Br., *NAACP v. Claiborne Hardware Co.*, 1982 WL 608673, at *18 (noting that "this is not the case" to decide whether "boycotts are constitutionally protected activity").

To answer that question, the Court did not discuss the constitutional status of refusals to deal but rather homed in on "elements of the boycott" that prior precedent had already determined were "entitled to protection under the First and Fourteenth Amendments." *Claiborne*, 458 U.S. at 907. The Court stressed that under settled First Amendment principles, boycotters, like others, enjoy the right to associate and peaceably assemble, picket, argue in favor of a boycott, encourage others to boycott, and socially ostracize boycott violators by broadcasting their identities. *Id.* at 908-10. And it ultimately held that Mississippi could not impose liability on those who engaged in this "constitutionally protected" conduct simply because other members of the group "committed acts of violence." *Id.* at 915, 920. "[T]he right of free speech [could not] be denied by drawing from a trivial rough incident . . . the conclusion that otherwise peaceful picketing ha[d] the taint of force." *Id.* at 924 (quoting

Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941)). By contrast, the Court never even hinted that the act of refusing to *buy* from white merchants was itself protected, in dicta or otherwise.

To suggest a different reading of *Claiborne*, Arkansas Times must distort the opinion. Arkansas Times suggests that *Claiborne* "[a]nalogiz[ed] the boycott to a protest march" and "reasoned that such collective actions implicate [constitutional rights]." Pet. 16 (discussing 458 U.S. at 909-10). But that portion of the opinion does not draw a comparison between boycotting and marching or exposit the free speech rights of collective actions. Instead, it explains that the boycott included certain "*elements*," such as picketing and protesting, that are themselves "safeguarded by the First Amendment['s]" protections for "free assembly" and "petition." 458 U.S. at 909 (emphasis added).

Next, Arkansas Times gerrymanders the text to quote *Claiborne* as saying that "a nonviolent, politically motivated boycott . . . . is constitutionally protected." Pet. 18 (quoting 458 U.S. at 915). Actually, that portion of the opinion recounts that Mississippi did not impose liability "on a theory that state law prohibited a nonviolent, politically motivated boycott" but suggests that the Court must still "examine critically the basis on which liability was imposed" because "much of petitioners' conduct was constitutionally protected." 458 U.S. at 915-16. In other words, the Court simply reiterated (and answered) the question presented: whether violent conduct could taint protected conduct, such as speaking or picketing.

Finally, Arkansas Times quotes a portion of the opinion noting that "[t]he right of the States to regulate economic activity [cannot] justify a complete prohibition against a nonviolent, politically motivated

boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." Pet. 17 (quoting 458 U.S. at 914) (first alteration in original). But in light of *International Longshoremen*, that quote cannot be read to hold that a refusal to deal is protected simply because it has political motivations. Rather, it merely reiterates *Claiborne*'s holding that a State cannot prohibit or impose liability on the protected speech, assembly, and petitioning accompanying the refusal to deal. Indeed, that quote comes near the end of a section explaining that States cannot outright "prohibit" the "constitutionally protected activity" like "speech, assembly, association, and petition" accompanying a boycott, though they can regulate the underlying economic conduct. *See id.* at 911-14.

Besides, reading that quote out of context to hold that the *Claiborne* boycott was protected in its entirety wouldn't help Arkansas Times. At most, such a reading might suggest that boycotts petitioning the government to redress denials of constitutional rights are fully protected. *Cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) (noting that the *Claiborne* boycott was "motivated . . . by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution" and holding that a boycott motivated by dissimilar aims was unprotected). But a refusal to deal motivated by national-origin animus certainly isn't designed to secure civil rights. Indeed, *Claiborne* itself suggested that its holding would not protect such discriminatory refusals to deal: the opinion noted that it was not "presented with a boycott designed to secure aims that are . . . prohibited by a valid state law" and approvingly cited a case affirming a State's authority to prohibit picketing that encouraged racial discrimination. *Claiborne*, 458 U.S.

at 915 n.49 (citing *Hughes v. Superior Ct.*, 339 U.S. 490 (1950)).

D. *Superior Court Trial Lawyers & FAIR* reiterate that refusals to deal are non-expressive and unprotected.

1. This Court's later decisions reiterate that refusals to deal, unlike accompanying speech, are non-expressive and unprotected. In *FTC v. Superior Court Trial Lawyers Association*, this Court held 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). "[M]uch of the reasoning" in that case is "squarely on point here." Professors' *Amicus* Br., 2019 WL 2488957, at *11. The Court explained that any refusal to deal has an "expressive component": the boycotters must talk amongst themselves, inform their target of their goals, and gin up public support. *Superior Court Trial Lawyers*, 493 U.S. at 431. And some of that activity may be protected. *Id.* at 426 (confirming that "efforts to publicize the boycott, to explain the merits of its cause, and to lobby District officials" were protected). Still, that accompanying speech doesn't transform the otherwise unexpressive, underlying refusal to deal into protected expression. *Id.* at 430-31.

Arkansas Times tries to draw a different lesson from *Superior Court Trial Lawyers*. Rather than reaffirm that decisions not to deal are unprotected, it says, that case distinguishes between unprotected economic boycotts and protected political activity. Pet. 20-21. To be sure, *Superior Court Trial Lawyers* did distinguish *Claiborne* on the grounds that the *Claiborne* boycotters sought to vindicate their constitutional rights, while the trial lawyers sought to "profit

financially." 493 U.S. at 427 (internal quotation marks omitted); *see also* Professors' *Amicus* Br., 2019 WL 2488957, at *10. But that opinion acknowledged that the boycotting lawyers had a political motivation too: they "sought to vindicate the Sixth Amendment rights of indigent defendants." 493 U.S. at 427 n.11. Yet that political motivation didn't protect the lawyers' refusal to deal any more than it would have protected any other attempt "to circumvent antitrust law." *Id.* Far from drawing a line between political and economic boycotts then, *Superior Court Trial Lawyers*—at most—might suggest in dicta a carveout for civil rights boycotts. But it leaves all others unprotected, whether politically or economically motivated.

Besides, *Superior Court Trial Lawyers* draws another, perhaps more instructive, distinction between its facts and *Claiborne*'s: unlike the Mississippi courts' decisions, "nothing in the FTC's order would curtail [protected] activities," such as publicizing the boycott or petitioning local officials. *Id.* at 426. If anything, that distinction bolsters the Eighth Circuit's reading of *Claiborne* as focused on the accompanying protected activity, not the underlying refusal to deal.

2. And *FAIR* reiterates that the relevant line is between protected speech and refusals to deal, not political or economic motivation. For no one could possibly dispute that the boycott in *FAIR* had a political aim, yet this Court held that *FAIR*'s boycott was unprotected.

In *FAIR*, a coalition of law schools denied military recruiters access to their campuses in protest of the military's "Don't Ask, Don't Tell" policy. 547 U.S. at 66. Congress responded by enacting the Solomon Amendment, which denied federal funding to institutions that discriminated against military recruiters.

Id. at 51. So the law schools sued, claiming that the law violated the First Amendment by indirectly regulating their supposedly expressive conduct of boycotting. *Id.* at 65-66.

This Court disagreed. The Court explained that the schools' refusal to deal with recruiters was not protected by the First Amendment because it was not "inherently expressive." *Id.* at 66. "An observer who [saw] military recruiters interviewing away from the law school" would not know why unless "the law schools accompanied their [boycott] with speech explaining it." *Id.* And the necessity of such "explanatory speech" confirmed that the boycott was "not so inherently expressive" as to "warrant[] protection." *Id.* Nor could the accompanying speech transform the refusal to deal into protected expression. *Id.* Otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.*

Arkansas Times tries to sidestep *FAIR* by treating its holding as entirely separate from the issue in *Claiborne*. *FAIR*, it says, decided that the law schools' actions were not symbolic under *United States v. O'Brien*, 391 U.S. 367 (1968), but it did not undermine the separate protection for politically motivated "collective actions" like boycotts provided by *Claiborne*. Pet. 28. But that cannot be true. The law schools protesting "Don't Ask, Don't Tell" "associat[ed]" to collectively "express[] their opposition" to a federal policy. 547 U.S. at 52. Indeed, they described their collective refusal to deal as a "sort of boycott" and argued that it was protected by *Claiborne*. *See* Respondents' Br., *FAIR*, 2005 WL 2347175, at *29 (citing *Claiborne*). Had *Claiborne* truly held that boycotts are protected in their entirety, *FAIR* could not have been decided as it was without overruling that case.

Alternatively, Arkansas Times suggests that reading *FAIR* to mean what it says would unleash a parade of horribles. Pet. 28. If courts must "parse the individual elements" of boycotts, that would risk stripping other "collective actions" such as "protest marches and parades" of protection and conflict with well-established First Amendment principles. *Id.*

But Arkansas Times misses the point. True, boycotts, like parades and protests, may be intended to express a message. But *FAIR* made clear that that's not what triggers First Amendment protection; the proper inquiry is whether "a neutral observer would *understand* that [participants were] expressing an idea," as the Eighth Circuit explained. Pet. App. 7a (discussing 547 U.S. at 66). And on that score, boycotts and parades are less alike than Arkansas Times cares to admit. "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point," not simply walking "from here to there." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995). *Contra* Pet. 13 (disaggregating parades into "walking," "banners, placards, and chants"). And that "inherent expressiveness . . . explains [this Court's] cases." *Hurley*, 515 U.S. at 568.

By contrast, as *FAIR* notes, anyone can boycott—refuse to deal—without publicly broadcasting it: the mere fact that someone's purchases do not include goods from Israel-affiliated companies does not express anything unless the purchaser explains that it is engaged in a boycott and why. In fact, "[i]t is highly unlikely . . . absent any explanatory speech" that "an external observer" would even notice that a purchaser failed to buy Israeli goods. Pet. App. 60a. If someone owns an Epson printer, an observer would not

necessarily assume he was boycotting HP. *Cf.* BDS, *Resist Israel's Apartheid: Boycott HP Companies* (Aug. 31, 2020).[5] Similarly, an observer might presume that someone doesn't own a SodaStream machine because of the cost or because she doesn't like soda, not because she's boycotting Israel. *Cf.* BDS, *"SodaStream Is Still Subject to Boycott"* (Aug. 22, 2018).[6]

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The best reading of precedent is that speech accompanying a boycott is protected, but the non-expressive refusal to deal is not. *Claiborne* could not have held that all politically motivated refusals to deal are protected without silently overruling *International Longshoremen*. And if it had, that broad reading could not have survived *FAIR*. Far from conflicting with these precedents, the Eighth Circuit's reading is the only way to make sense of them. Thus, the original panel and the lone en banc dissenter (who wrote the original panel opinion) rewrote the Act to rule for Arkansas Times, rather than adopt its reading of *Claiborne*.

And under the Eighth Circuit's (correct) reading, Act 710 is plainly constitutional. It does not hinder expressive conduct such as criticizing Israel. Pet. App. 11a. Instead, it targets "refusals to deal," Ark. Code Ann. 25-1-502(1)(A)(i)—economic decisions that would be "invisible to observers" unless announced and explained. Pet. App. 11a. So it does not implicate *Claiborne*, which focused on the protected speech accompanying economic decisions, but rather fits squarely within *FAIR*. *Id.* at 6a-8a. And because that analysis

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[5] https://bdsmovement.net/news/resist-israels-apartheid-boycott-hp-companies.

[6] https://bdsmovement.net/news/%E2%80%9Csodastream-still-subject-boycott%E2%80%9D.

comports with, rather than contradicts, this Court's precedents, there is no need for this Court's review.[7]

II. This case presents a poor opportunity to review the question presented.

A. This case is particularly ill-suited for review: unlike other potential plaintiffs, Arkansas Times is not boycotting Israel, let alone speaking, petitioning, or associating with others to do so. That makes this case an awkward vehicle to reconsider the relationship between economic decisions and protected speech; this Court would be consigned to deal with hypotheticals, not concrete facts. *Cf. California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (reaffirming that courts do not write "opinion[s] advising what the law would be upon a hypothetical state of facts" (internal quotation marks omitted)).

Plus, without actively boycotting, Arkansas Times may not have standing to press its First Amendment claim. It does not claim that Act 710 puts it to the Hobson's choice of ceasing to boycott or losing revenue. Pet. App. 96a ¶¶ 22-23. It does not even claim that Act 710 covers (let alone chills) the only Israel-boycott-related activity it has chosen to engage in: criticism of the Act itself. *Id.* ¶ 22. (Nor could it: Arkansas Times vehemently criticized the Act while complying with it—with no repercussions.) It simply does not want to certify the truth: that it is not boycotting. Thus, any purported injury flows not from Act 710's boycott suppression but rather from Act 710's compelling

[7] As a backup argument, Arkansas Times suggests that Act 710 conflicts with this Court's decisions prohibiting viewpoint- and content-based restrictions. Pet. 30-32. But because the Act targets unprotected conduct, not speech, content-neutrality rules do not apply.

Arkansas Times to speak the truth. Arkansas Times may not parlay that narrow attack into a broadside on the constitutional status of refusals to deal. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (noting that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established" (internal quotation marks omitted)).

And Arkansas Times does not seek certiorari on the narrower compelled-speech theory. Nor could it. As the Eighth Circuit correctly recognized, the act of certifying here is merely "incidental" to the "regulation of conduct," not anything approaching a "[g]overnment-mandated pledge or motto that [Arkansas Times] must endorse." *FAIR*, 547 U.S. at 62; *see also* Pet. App. 11a-12a.

B. Arkansas Times has a second problem: as it acknowledges, no circuit but the Eighth has yet addressed the merits of anti-Israel-boycott restrictions, let alone split from the Eighth Circuit's reasoning. Pet. 32. Without such a split, there is no need for this Court's review. Instead, this Court should wait to see whether the Fifth or Eleventh Circuits creates a split when deciding analogous challenges. *See A&R Eng'g v. Paxton*, No. 22-20047 (5th Cir.) (suit brought by a Palestinian boycotter and his corporation); *Martin v. Chancellor for the Bd. of Regents*, No. 22-12827 (11th Cir.) (qualified immunity appeal by a boycotting journalist who refused to certify before speaking at an academic conference). If either does, the Court might consider granting certiorari then.

With no circuit split, Arkansas Times instead emphasizes the Eighth Circuit's divergence from a handful of district courts. But far from showing an acute need for this Court's guidance, *see* Pet. 34-35, this "split" only underscores the weakness of Arkansas

Times's petition: this Court will not ordinarily grant certiorari to resolve splits between district courts. *See* Sup. Ct. R. 10 (listing only splits between courts of appeals and state courts of last resort).

And it should not alter that practice here when each of the divergent cases is moot. Pet. 32-34. In every case Arkansas Times identifies, litigation ended when a State amended its boycott restrictions to exclude small businesses or sole proprietors like the plaintiffs. *See Jordhal v. Brnovich*, 789 F. App'x 589, 591 (9th Cir. 2020); *Amawi v. Paxton*, 956 F.3d 816, 821 (5th Cir. 2020); Order, *Martin v. Wrigley*, No. 1:20-cv-596 (MHC) (N.D. Ga. July 20, 2022); Agreed Order of Dismissal, *Koontz v. Watson*, No. 5:17-cv-4099-DDC-KGS (D. Kan. June 29, 2018). With those amendments, it is doubtful litigation over the boycotting statutes will resume: "corporate giants," unlike small, "closely held" businesses, do not generally unite around a set of beliefs. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014). Without ongoing litigation, Arkansas Times's concerns about a widespread chilling of "political assembly and expression" are implausible. Pet. 35.

C. Finally, even if this Court were inclined to revisit the constitutional status of refusals to deal—notwithstanding *FAIR*, the lack of a circuit split, and the absence of actual boycotting—this case may not directly tee up that question. For Act 710 does not directly prohibit anti-Israel boycotts. Rather, it prohibits state entities from *contracting* with anti-Israel boycotters. But Arkansas may impose some conditions on its contracting partners that would be "impermissible" if implemented through direct regulation or prohibition. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998) (discussing

federal conditions on spending). And if this Court were to treat a refusal to deal as protected expression, Arkansas need not subsidize messages with which it disagrees. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015). Consequently, Arkansas Times could not win simply by persuading this Court to adopt its broad reading of *Claiborne*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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