

No. 22-379

IN THE
Supreme Court of the United States

ARKANSAS TIMES, LP,

Petitioner,

v.

MARK WALDRIP, ET AL.,

Respondents.

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

**BRIEF OF FIRST AMENDMENT SCHOLARS
AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER**

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INTEREST OF AMICI¹

Amici, listed below, are nine 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. *Amici* submit this brief to explain the First Amendment's application to political boycotts by consumers and to the speech associated with such boycotts.

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SUMMARY OF ARGUMENT

From the Boston Tea Party to the Montgomery bus boycott, to the campaign for divestment from apartheid South Africa, boycotts have played a central role in this nation's history. Americans have used boycotts across a range of issues to express their shared convictions and to force social and political change. The Eighth Circuit's decision undermines this rich tradition of protest. By adopting a flawed interpretation of this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Eighth Circuit has eviscerated that decision's core holding that politically motivated consumer boycotts are covered by the First Amendment. The Court should grant review to correct the Eighth Circuit's error.

Whether political boycotts fall within the First Amendment's protection is a matter of exceptional importance. Since the nation's founding, Americans have used boycotts as a form of collective action to express their opinions and challenge the prevailing social and political order. By coordinating purchasing decisions, often at significant personal hardship, Americans have amplified their views, when otherwise their voices might have been lost or ignored. And they have conveyed an intensity of commitment and moral conviction not easily communicated by mere words. The Eighth Circuit's decision undermines this vitally important form of political expression.

The Eighth Circuit's decision also conflicts with this Court's justly celebrated decision in *Claiborne*

Hardware. In *Claiborne Hardware*, the Supreme Court recognized the expressive character of political boycotts by consumers, and it held unconstitutional a damages award against the NAACP for its role in organizing such a boycott of white merchants in Claiborne County. The Eighth Circuit erred in holding that *Claiborne Hardware* has no application to Arkansas’ law. Contrary to the Eighth Circuit’s decision, *Claiborne Hardware* clearly held that the First Amendment covers political boycotts by consumers, not merely the speech associated with those boycotts. And Arkansas’ law burdens such boycotts by requiring state contractors to certify that they will not boycott Israel, or companies that do business there, for the duration of their contracts. *See* Ark. Code Ann. § 25-1-502 (2022); *id.* § 25-1-503. The Act warrants, but did not receive, First Amendment scrutiny.

This Court should therefore grant the petition for a writ of certiorari.

ARGUMENT

I. Whether political boycotts by consumers are covered by the First Amendment is a matter of exceptional importance to the American public.

Political boycotts have been a “principal means of political communication since the birth of the Republic.” *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 447 (1990) (Brennan, J., concurring in part and dissenting in part). Colonists boycotted British goods during the American Revolution to

protest the unpopular Stamp and Townshend Acts. See Lawrence B. Glickman, *Buying Power: A History of Consumer Activism in America* 312–13 (2009). From the 1820s to the 1860s, Quakers and abolitionists boycotted slave-made goods to protest slavery and put pressure on Southern slaveholders. *Id.* And in the 1950s and 60s, Black Americans boycotted segregated businesses and services to challenge institutionalized racial segregation. *Id.* at 166–73. In 1955, for example, Black residents of Montgomery, Alabama organized a boycott of city buses to protest segregated seating—a thirteen-month campaign that culminated in a Supreme Court decision affirming that the city’s policy of racial segregation was unconstitutional. See *Gayle v. Browder*, 352 U.S. 903 (1956).

As this Court has recognized, the use of boycotts to influence powerful actors and demand social and political change is “deeply embedded in the American political process.” *Claiborne Hardware*, 458 U.S. at 907 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)). Individuals engage in consumer boycotts as a form of collective action—a means of joining with others who share their views to pursue common goals. *Id.* By coordinating their purchasing decisions, individuals can “make their views known, when, individually, their voices would be faint or lost.” *Id.* at 907–08 (quoting *Citizens Against Rent Control*, 454 U.S. at 294).

In this respect, purchasing decisions function like campaign contributions, which similarly involve elements of both expression and association.

McCutcheon v. FEC, 572 U.S. 185, 203 (2014) (plurality). By making campaign contributions, this Court has recognized, “like-minded persons [can] pool their resources in furtherance of common political goals” and “aggregate large sums of money to promote effective advocacy.” *Buckley v. Valeo*, 424 U.S. 1, 22 (1976). Boycotts operate in a similar, albeit inverse, manner. By organizing to *withhold* consumer dollars, individuals can powerfully express their opposition to conduct they find objectionable. This ability to combine purchasing power makes boycotts an indispensable tool of “poorly financed causes,” *Martin v. Struthers*, 319 U.S. 141, 146 (1943), which otherwise lack the resources needed to obtain access to more established forms of communication, like newspapers, television, and radio.

Another reason boycotts are so effective as a form of political expression is “the emotional message” they convey. *Trial Lawyers*, 493 U.S. at 450 (Brennan, J., concurring in part and dissenting in part). Those who participate in boycotts often do so at significant personal hardship. As one of the many Black residents involved in the *Claiborne Hardware* boycott explained, “Unlike voter registration, which was a one-time act, the boycott relied on a daily commitment, making it fundamental to the lives of most blacks.” Emilye Crosby, *A Little Taste of Freedom: The Black Freedom Struggle in Claiborne County, Mississippi* 130 (2005). For example, boycotters were forced to “deal with the inconvenience of shopping further from home,” and “the more fundamental problems of finding transportation and securing credit.” *Id.* at 135. By

making these daily sacrifices, however, the boycotters were able to “communicate [a] dedication and righteousness more eloquently than words ever could.” *Trial Lawyers*, 493 U.S. at 450 (Brennan, J., concurring in part and dissenting in part). This quality—an ability to convey an intensity of conviction that simple words cannot—makes boycotts an especially powerful form of political communication.

Little wonder, then, that political boycotts continue to play a central role in the political process. In recent years, consumers across the political spectrum have used boycotts to voice their shared opinions and press their demands. Consumers have boycotted Disney for its opposition to Florida’s so-called “Don’t Say Gay” bill, Dick’s Sporting Goods for its efforts to restrict gun sales, Pepsi Co. for donating money to the Texas GOP after a state abortion ban took effect, Starbucks for offering to pay the travel expenses of employees seeking abortions, and Russian exports to protest Russia’s invasion of Ukraine. Chris Taylor, *Boycott Nation: How Americans are Boycotting Companies Now*, Reuters (Jun. 29, 2022), <https://perma.cc/7J9N-8DZ2>; David Gelles, *The C.E.O. Taking On The Gun Lobby*, N.Y. Times (Oct. 25, 2019), <https://perma.cc/4TU9-4WEB>; Julie Zauzmer Weil, *Does Opposing Abortion Mean You Should Boycott Starbucks? Some Advocates Say Yes.*, Wash. Post (Jan. 23, 2020), <https://perma.cc/54UC-RAXZ>; Ewan Palmer, *Boycott Pepsi Calls Grow Over Alleged Donation to Texas GOP After Abortion Ban*, Newsweek (Jan. 25, 2022), <https://perma.cc/4B9B-EMP7>.

The Eighth Circuit's decision jeopardizes the right of Americans to engage in this vital and wide-ranging politically expressive activity. By holding that politically motivated consumer boycotts lie outside the First Amendment's protection, the decision empowers States to restrict any boycott with which they disagree. For example, States could pass laws requiring state contractors to affirm that they will not engage in boycotts supportive of abortion access or gun rights. They could even forbid such boycott activity outright. This would give States a powerful weapon to silence disfavored viewpoints and distort public debate. Investing government with this power plainly offends the First Amendment.

II. The Eighth Circuit's decision conflicts with *Claiborne Hardware*, which established that political boycotts by consumers are covered by the First Amendment.

Arkansas's law burdens politically motivated consumer boycotts by requiring state contractors to certify that they will not boycott Israel, or companies that do business there, for the duration of their contracts. Ark. Code Ann. § 25-1-502; *id.* § 25-1-503. The question presented by the Petition is whether political boycotts by consumers are covered by the First Amendment. The Eighth Circuit, sitting en banc, held that they are not, reasoning that the First Amendment covers only the speech associated with political boycotts, but not political boycotts themselves. The Eighth Circuit's decision conflicts with this Court's precedent. In *Claiborne Hardware*,

the Supreme Court squarely held that the First Amendment covers political boycotts by consumers, not just the speech associated with those boycotts.

A. *Claiborne Hardware* held that the First Amendment covers political boycotts, in addition to the speech associated with those boycotts.

In *Claiborne Hardware*, this Court reviewed a civil judgment against the NAACP for its role in organizing a boycott of white merchants in Claiborne County, Mississippi. *See Claiborne Hardware*, 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. They relied on three separate conspiracy theories, including two statutory theories and the common law tort theory of malicious interference with business. *Id.* at 894.

The Court rejected the merchants’ claims, holding, in relevant part, that the “nonviolent elements of [the defendants’] activities [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 defendants’] activities

[we]re protected in any respect by the Federal Constitution.” *Id.* at 907. To that end, the Court analyzed the “many forms” of First Amendment activity the defendants had engaged in, 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*, 454 U.S. at 294). 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 “[e]ach of the[] elements” of the defendants’ activities, the Court concluded that the boycott was an exercise of the “inseparable” First Amendment rights of “speech, assembly, and petition.” *Id.* at 907, 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. *See id.* at 912–15. 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” found in the NAACP’s boycott differed, for purposes of the First Amendment, from

economic activity designed to “destroy legitimate competition.” *Id.* at 913–14. Accordingly, the Court held that the nonviolent elements of the defendants’ activities—including the boycott—were entitled to the protection of the First Amendment. *Id.* at 915.

Arkansas’s law regulates political boycotts that fall squarely within *Claiborne Hardware*’s coverage. The Act applies to boycotts of Israel that are nonviolent, that are politically motivated, and that involve 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 Hardware*, 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 the “established,” but also “inseparable,” elements of “speech, assembly, association, and petition.” *Id.* at 911 (quoting *Thomas*, 323 U.S. at 530). It follows that Arkansas’s law should draw First Amendment scrutiny under *Claiborne Hardware*.

The Eighth Circuit, sitting en banc, interpreted *Claiborne Hardware* as holding that the First Amendment covers only the speech associated with boycotts, and not boycotts themselves. *Ark. Times LP v. Waldrip as Tr. of Univ. of Ark. Bd. of Trs.*, 37 F.4th 1386, 1392 (8th Cir. 2022). That interpretation is incorrect.

Claiborne Hardware 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* 458 U.S. 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, and, ultimately, that the NAACP's nonviolent activities were “entitled to the protection of the First Amendment,” *id.* at 915.²

Moreover, if the Court had intended to apply the First Amendment as narrowly as the Eighth Circuit suggested, the Court would have had to consider whether the boycotters' purportedly unprotected purchasing decisions justified the judgment of liability against them. After all, the court below held that “the entire boycott was unlawful,” *id.* at 895, on a theory of malicious interference with business, *id.* at 894, and it affirmed the award of all damages “resulting from the boycott” on this basis, *id.* at 921. The Court did not conduct that analysis, however,

² In doing so, the Court cited its decision in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964), which described as “doubtful” the “assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law.” *Claiborne Hardware*, 458 U.S. at 915 n.48.

because its holding reached all of the nonviolent activity encompassed by the boycott, not just the speech associated with it. *See id.* at 923 (finding that the award of all business losses sustained during the boycott impermissibly compensated businesses for “the direct consequences of nonviolent, constitutionally protected activity”).

The Eighth Circuit’s interpretation of *Claiborne Hardware* is also impossible to square with this Court’s earlier decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). If *Claiborne Hardware* had concerned only the speech *associated* with the NAACP’s boycott, the Court would have dispensed with the case summarily under *Brandenburg*. Under *Brandenburg*, the question in *Claiborne Hardware* would have been whether the speech associated with the NAACP’s boycott had incited an unlawful boycott. The Court did not address that question, however, because it held that the boycott itself was constitutionally protected, and thus that the boycott could not have been the foundation for a charge of incitement. This, of course, is why *Claiborne Hardware* is recognized as one of the Supreme Court’s seminal First Amendment decisions and not as a mere application of *Brandenburg*.³

³ This reading of *Claiborne Hardware* does not undermine this Court’s longstanding recognition that public accommodations laws do not ordinarily violate the First Amendment. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984). To begin, the First Amendment’s protection of consumer boycotts does not imply similar protection for other refusals to deal, which lack the historical pedigree of consumer boycotts as a form of political expression. *See Claiborne*

The Supreme Court’s later decision in *Trial Lawyers* confirms this reading of *Claiborne Hardware*. 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 there was no question that the speech *associated* with the lawyers’ refusal was protected. *Id.* at 426 (“[N]othing in the FTC’s order would curtail such activities . . .”). Rather, the First Amendment question 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 Hardware*, but this Court held that the NAACP’s

Hardware, 458 U.S. at 907. Second, public accommodations laws do not “target speech,” but instead prohibit “the *act* of discriminating against [protected persons] in the provision of publicly available goods, privileges, and services.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (emphasis added). Third, public accommodations laws are enacted to ensure consumers’ equal access to “the transactions and endeavors that constitute ordinary civic life in society,” *Romer v. Evans*, 517 U.S. 620, 631 (1996), not to squelch expression. Arkansas’s law, by contrast, reflects an intent to silence a particular form of expression (consumer boycotts) based on its message (protest of Israel). It even exempts contractors from the State’s certification requirement entirely if they are willing to accept a contract price more than twenty percent below the lowest qualifying bid, Ark. Code Ann. § 25-1-503(b)(1)—a feature at odds with any genuine interest in fighting discrimination.

boycott “differ[ed] in a decisive respect.” *Id.* Whereas the *Claiborne Hardware* 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 Hardware*, 458 U.S. at 914–15; cf. *Jaycees*, 468 U.S. at 636 (Connor, J., concurring) (“A group boycott or refusal to deal for political purposes may be speech, though a similar boycott for the purposes of maintaining a cartel is not.” (citing *Claiborne Hardware*, 458 U.S. at 912–15)).

The Court’s analysis in *Trial Lawyers* reflects its recognition that *Claiborne Hardware*’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.

B. *FAIR* and *Longshoremen*'s did not disturb *Claiborne Hardware*'s holding that the First Amendment protects political boycotts.

In holding that *Claiborne Hardware* reached only the speech associated with politically motivated consumer boycotts, and not the boycotts themselves, the Eighth Circuit relied principally on this Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006). *Ark. Times*, 37 F.4th at 1392. But that case did not disturb *Claiborne Hardware*'s holding that the First Amendment protects political boycotts by consumers.

In *FAIR*, several law schools banned military recruiters from campus to protest the military's "don't ask, don't tell" policy. *FAIR*, 547 U.S. at 51. In response, Congress passed the Solomon Amendment, which withheld federal funds from institutions of higher education that denied military recruiters access to their campuses. *Id.* at 52. The law schools sued, arguing that the Solomon Amendment violated their First Amendment freedoms of speech and association. *Id.* at 53. This Court rejected that argument, holding that the refusal to allow military recruiters onto campus was not "inherently expressive." *Id.* at 66.

FAIR did not undermine *Claiborne Hardware* for three reasons.

First, *FAIR* did not discuss *Claiborne Hardware*, or even cite it. It is not credible to suggest the Court

jettisoned 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*, the Court upheld a law that regulated educational institutions’ decision to allow recruiters onto campus. 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. *FAIR*, 547 U.S. at 66. 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.* (cleaned up).

By contrast, the key holding of *Claiborne Hardware* 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*, 515 U.S. at 568, consumer boycotts, *Claiborne Hardware* 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 Hardware*, 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. It is no surprise, then, that the *FAIR* Court neither invoked nor disturbed *Claiborne Hardware*’s central holding. *FAIR* simply did not concern the kind of collective action that was at issue in *Claiborne Hardware*.

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 (cleaned up). In the Court’s view, Congress’s decision to withhold funds from law schools for excluding military recruiters deserved such deference. *Id.* Because Arkansas’s law has nothing to do with military affairs, an important foundation of *FAIR* is absent.

In the court below, the State also pointed to *International Longshoremen’s Association v. Allied International, Inc.*, 456 U.S. 212 (1982), but that case is also inapt. Decided unanimously less than three months after *Longshoremen’s*, *Claiborne Hardware* 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 instances.” *Claiborne Hardware*, 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 Hardware* refused to extend *Longshoremen's* logic to “peaceful political” boycotts. *Id.* at 913. Under *Claiborne Hardware*, peaceful political boycotts by consumers receive First Amendment protection even if, under *Longshoremen's*, economic boycotts do not.

Accordingly, neither *FAIR* nor *Longshoremen's* disturbed *Claiborne Hardware's* holding that political boycotts by consumers are covered by the First Amendment.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the Petition and reverse the judgment below.

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