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 an Order of the United States District Court
for the Eastern District of Arkansas (Hon. Brian S. Miller)
Case No. 4:18-CV-00914 BSM

BRIEF OF T'RUAH AND J STREET AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Jonathan L. Backer
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, DC 20001
Telephone: (202) 662-9042
jb2845@georgetown.edu
mbm7@georgetown.edu

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(4)(A) of the Federal Rules of Appellate Procedure, amici curiae state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

April 15, 2019

/s/ Jonathan L. Backer
Jonathan L. Backer

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

Jewish tradition reflects a strong commitment to freedom of thought and expression. T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism, together with members of the Jewish community, to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah represents more than 2,000 Jewish clergy across North America, along with thousands of Jewish lay people and activists. Grounded in Torah and Jewish historical experience and guided by the Universal Declaration of Human Rights, T'ruah calls upon Jews to assert Jewish values by raising their voices and taking concrete steps to protect and expand human rights in North America, Israel, and the occupied Palestinian territories. T'ruah believes that a just and secure future for Israelis and Palestinians will best be achieved by a negotiated resolution to the Israeli-Palestinian conflict that results in both peoples living peacefully side by side, each within their own sovereign states. While T'ruah does not reject out of hand the strategic, targeted use of boycott and divestment in justice campaigns, T'ruah does not affiliate with the Global Boycott, Divestment, Sanctions ("Global BDS") movement out of concern that its lack of distinction between Israel proper and the occupied Palestinian territories points to a potential rejection of Israel's right to exist, a right recognized by the United Nations and other international bodies, and because of concern about anti-Semitism among some BDS activists. At the same

time, T'ruah opposes efforts to stifle or penalize participation in the Global BDS movement, as such censorship is contrary to Jewish values and the First Amendment. T'ruah believes that the Jewish community is strengthened by vigorous debate on issues that are vital to the well-being of Israel and the worldwide Jewish community. Free speech—including the right to boycott and the right to speech with which we vehemently disagree—constitutes an essential component of democracy, a basic human right, and a fundamental value of Judaism. Jewish tradition teaches this in Talmud, where the rabbis frequently use colorful language to repudiate each others' opinions, while leaving even rejected opinions in the text for later study. T'ruah also believes that boycotts and other forms of economic pressure are a protected and legitimate form of protest, and one in which the Jewish community has participated—for example, in support of the rights of farmworkers, against German-made goods during and following the Nazi era, and against Pepsi when it abided by Arab States' boycott of Israel.

J Street organizes and mobilizes pro-Israel, pro-peace Americans who want Israel to be secure, democratic, and the national home of the Jewish people. Working in American politics and the Jewish community, J Street advocates for policies that advance shared U.S. and Israeli interests as well as Jewish and democratic values, leading to a two-state solution to the Israeli-Palestinian conflict. Strong and vibrant debate has characterized the Jewish tradition for millennia, and the same openness

should govern discourse about Israel today. Those who believe that there is one acceptable view on Israel—theirs—should not be allowed to impose constraints on what constitutes acceptable speech in the Jewish community or in the broader marketplace of ideas. J Street believes that censorship of those who question American or Israeli policy puts the intellectual integrity and future of the Jewish community at risk and threatens to further calcify opinions about the Israeli-Palestinian conflict, making more remote the realization of a just and secure future for both Israelis and Palestinians.[1]

INTRODUCTION

In 2005, a coalition of Palestinian civil-society organizations called on "people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel . . . until Israel meets its obligation to recognize the Palestinian people's inalienable right to self-determination," thus sparking the Global BDS movement. *Palestinian Civil Society Call for BDS*, BDSMovement.net (July 9, 2005), https://perma.cc/ZV73-82HZ. The Global BDS movement blurs the

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made any monetary contribution intended to fund this brief's preparation or submission. All parties were timely notified of proposed amici's intent to file this amicus brief. Appellant has consented to the filing of the brief. Appellees have declined to consent unless provided an opportunity to review the brief first. Proposed amici thus have filed a motion seeking leave to file the amicus brief.

distinction between "Israel proper"—the territory that Israel possessed prior to the 1967 Arab-Israeli War—and Israeli settlements on the land that it conquered in that war and has since occupied by targeting the movement's boycotts at the entirety of the economy and people of Israel and its settlements rather than at companies that specifically help to perpetuate Israel's presence in the West Bank and the Gaza Strip. Some leaders of the Global BDS movement have trafficked in anti-Semitic ideas and rhetoric and have questioned the right of the Jewish people to self-determination. Because of those and other troubling aspects of the Global BDS movement, amici do not support or participate in its initiatives.

Despite amici's concerns about aspects of the Global BDS movement, amici recognize that consumer boycotts—even those with which amici disagree—are forms of collective action that powerfully communicate political messages. Indeed, consumer boycotts played a critical role in the founding of the United States, the dismantlement of Jim Crow, and the struggle against apartheid in South Africa. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1000 (1989) (noting that the Montgomery Bus Boycott led to *Gayle v. Browder*, 352 U.S. 903 (1956), which "effectively overruled *Plessy v. Ferguson*"); Cecile Counts, *Divestment Was Just One Weapon in the Battle Against Apartheid*, N.Y. Times (Jan. 27, 2013), https://perma.cc/PWK3-BE6Q; *Virginia Nonimportation Resolutions, 22 June 1770*,

Nat'l Archives: Founders Online, https://perma.cc/ES2G-XANY (last visited Apr. 6, 2019) (calling for colonial boycott of British and European goods). Consumer boycotts also have been used by the American Jewish community as a tool of self-defense. In the wake of Adolph Hitler's rise to power, Jewish groups organized a boycott of German goods. *Rabbi Wise Breaks Silence on Boycott; Calls It Duty of All Self-Respecting Jews*, Jewish Telegraphic Agency (Aug. 15, 1933), https://perma.cc/MD4D-33Y4 (quoting Rabbi Stephen S. Wise as saying, "As long as Germany declares the Jews to be an inferior race, poisoning and persecuting them, decent, self-respecting Jews cannot deal with Germany in any way, buy or sell or maintain any manner of commerce with Germany or travel on German Boats"). By referencing the aforementioned examples of consumer boycotts, amici in no way mean to equate those boycotts' motivations or targets to those of the Global BDS movement. The point is, rather, that those who oppose the Global BDS movement cannot censor its activities without exposing other activism with which they agree to similar suppression.

Given this history and amici's strong commitment to freedom of thought and expression, amici reject the choice of many lawmakers to express their disagreement with the Global BDS movement's positions and tactics by enacting laws that penalize companies and individuals for participating in boycotts against Israel. To date, 27 states, including Arkansas, have adopted laws designed to discourage and

penalize boycotts against Israel. *Anti-Semitism: State Anti-BDS Legislation*, Jewish Virtual Library, https://perma.cc/RXR7-YKAM (last visited Apr. 4, 2019); Ark. Code §§ 25-1-501 to -504. And the U.S. Senate has passed a bill that, if signed into law, would encourage other states to adopt similar anti-BDS legislation. Combatting BDS Act of 2019, S. 1, 116th Cong. §§ 401–08 (as passed by Senate, Feb. 5, 2019).

Several of these anti-BDS laws have been challenged, with two courts holding that the laws violate the First Amendment's guarantees of freedom of speech and assembly. In this case, the district court held that Arkansas's anti-BDS law, known as Act 710, passes constitutional muster because consumer boycotts are neither speech nor expressive conduct. *Arkansas Times LP v. Waldrip*, — F. Supp. 3d. —, No. 4:18-CV-00914 BSM, 2019 WL 580669, at *5 (E.D. Ark. Jan. 23, 2019). The district court's ruling is at odds with two other courts' opinions that have enjoined the enforcement of similar laws. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1040 (D. Ariz. 2018), *appeal docketed* No. 18-16896 (9th Cir. Oct. 3, 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018). Moreover, longstanding Supreme Court precedent establishes that consumer boycotts are entitled to First Amendment protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

Amici oppose Act 710 and other laws like it because they penalize individuals for expressing their views about the Israeli-Palestinian conflict. Instead of

encouraging or even simply permitting constructive dialogue about this important issue, laws like Act 710 drive people into ideological corners, making the possibility of political progress on the conflict more remote. Congress and state legislatures are free to express their institutional opposition to the Global BDS movement through resolutions or hearings on the subject, but the First Amendment does not permit governments to use fiscal policy to pick winners and losers among those expressing themselves in policy debates.

ARGUMENT

I. THE FIRST AMENDMENT IS A CRUCIAL SAFEGUARD FOR MINORITY GROUPS AND VIEWPOINTS.

As the Supreme Court famously stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That bedrock First Amendment principle applies with full force to debate over the Israeli-Palestinian conflict, which has been a source of debate and friction in U.S. foreign policy since even before Israel achieved independence in 1948. Act 710 is a brazen attempt to penalize companies and individuals for engaging in collective action to express their opposition to Israel's government and its policies and is, in turn, a violation of the First Amendment's protection of free expression. Even though amici do not support the Global BDS movement, historical experience and tradition teach that Jews must speak out against government censorship like Act 710.

In a 1790 letter to the Hebrew Congregation in Newport, Rhode Island, President George Washington wrote that "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, Nat'l Archives: Founders Online, https://perma.cc/XM7V-SLTX (last visited Apr. 5, 2019). That promise of freedom of religion drew many Jewish immigrants to the shores of the United States. But, for American Jews and other minorities, America has not always lived up to that promise. During two dark chapters of American history—the First Red Scare (1917–20) and the McCarthy Era (late 1940s through 50s)—fears of Communism fueled government censorship and repression. And, as two examples show, Jews were among the victims of those epochs' injustices.

As the First Red Scare took hold, Congress enacted the Espionage Act of 1917, which, among other things, gave the Postmaster General the power to crack down on supposedly subversive publications. Pub. L. No. 65-24, tit. XII, 40 Stat. 217, 230–31. Using that authority, Postmaster General Albert S. Burleson threatened to revoke the *Jewish Daily Forward*'s second-class postage rates in response to the outlet's publication of articles expressing opposition America's involvement in World War I. Mike Wallace, *Greater Gotham: A History of New York City from 1898 to 1919*, at 991 (2017); 2 Zosa Szajkowski, *Jews, Wars, and Communism: The Impact of the 1919-20 Red Scare on American Jewish Life* 30

(1974). Louis Marshall, a prominent lawyer and one of the founders of the American Jewish Committee—a group founded in 1906 to secure civil and religious rights for Jews—successfully interceded on behalf of the *Forward* to preserve the newspaper's mail privileges, but at a heavy price. Irving Howe, *World of Our Fathers* 539–40 (NYU Press 2005) (1976); Moses Rischin, *The Early Attitude of the American Jewish Committee to Zionism (1906–1922)*, 49 Publications of the Am. Jewish Hist. Soc'y 188, 196 (1960). Abraham Cahan, the newspaper's editor, pledged to cease publication of pacifist articles, and Marshall promised Burleson that he would act as a "private censor" and identify any *Forward* articles that "could be considered as contrary to the public interests." Letter from Louis Marshall to Postmaster General A. S. Burleson (Jan. 5, 1918), *reprinted in* 2 *Louis Marshall: Champion of Liberty* 975 (Charles Reznikoff ed., 1957). The *Forward* kept its doors open, but only by succumbing to the government's wartime censorship.

During the McCarthy Era, congressional committees including the infamous House Un-American Activities Committee (HUAC) and Senator Joseph McCarthy's Permanent Subcommittee on Investigations delved into individuals' private associations in an attempt to uncover supposed Communist affiliations. Fear of those investigations prompted Americans to engage in widespread private and self-censorship to avoid being branded as Communist sympathizers. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the*

Problem of the Weakest Link, 155 U. Pa. L. Rev. 11, 42–46 (2006). One target of those largely unchecked investigations was a Jewish woman named Anna Rosenberg, whom Secretary of Defense George C. Marshall nominated in 1950 to be Assistant Secretary of Defense. After receiving a unanimous confirmation vote in the Senate Committee on Armed Forces, rumors began circulating that Rosenberg had associated with or been a member of the Communist Party in the 1930s. Aviva Weingarten, *Jewish Organisations' Response to Communism and to Senator McCarthy* 112 (2008). Openly anti-Semitic supporters of Senator McCarthy—Gerald L.K. Smith, Wesley Swift, and Benjamin Freedman—lobbied Congress in an attempt to defeat Rosenberg's nomination. *Id.* at 113. Freedman obtained files from HUAC showing that someone named Anna Rosenberg belonged to a Communist literary society in the 1930s. *Id.* He also engineered unreliable testimony by a witness who claimed to have known Rosenberg when she had supposedly been active in Communist circles. *Id.* at 113–15.

Rosenberg eventually secured Senate confirmation, in part because Jewish leaders rallied to her defense. Stuart Svonkin, *Jews Against Prejudice* 121 (1997). For Jewish organizations, the attacks on Rosenberg exposed how anti-Semites could capitalize on anti-Communist hysteria to tarnish Jews' reputations. An Anti-Defamation League (ADL) publication described Rosenberg as "a latter-day Dreyfus," invoking the name of the Alsatian French military officer of Jewish

descent who was convicted on trumped-up espionage charges. *Id*. at 120 (quoting 7 ADL Bulletin, Dec. 1950, at 5). And the ADL's national director, Benjamin Epstein, warned that all Jews were "targets" of the Rosenberg affair because "[t]he goal was to keep Jews out of Washington and out of public office; to label them as unreliable citizens, as second grade citizens, as traitors." *Id.* (quoting 8 ADL Bulletin, Jan. 1951, at 2).

Since the end of the McCarthy Era, First Amendment case law has matured to offer more robust protections against the types of injustices that the *Forward* and Anna Rosenberg faced. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Supreme Court struck down a law similar to the one wielded against the *Forward* that allowed the Postmaster General to detain mail from abroad deemed "communist political propaganda" and release it only upon request by the intended recipient. *Id.* at 306–07. And in *Watkins v. United States*, 354 U.S. 178 (1957), the Court overturned a criminal contempt conviction of a man who refused to divulge to HUAC the names of people who had once associated with the Communist Party, stating that the First Amendment denies Congress "a general power to expose where the predominant result can only be an invasion of the private rights of individuals." *Id.* at 200. As Jewish organizations, amici are mindful that carving out exceptions to the First Amendment's protections imperils the Jewish community. "If American Jews have attained an unprecedented measure of security and success in America,

one major reason is the majestic sweep of the Constitution and the Bill of Rights." Albert Vorspan & David Saperstein, *Tough Choices: Jewish Perspectives on Social Justice* 40 (1992); *see also* Aryeh Neier, *Defending My Enemy* 7 (1979) ("It is dangerous to let the Nazis have their say. But it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other and to the world for succor. . . . When the time comes for Jews to speak, to publish, and to march in behalf of their own safety, [states] and the United States must not be allowed to interfere."). Anti-BDS laws like Act 710 are troubling echoes of the past and cannot be squared with the First Amendment and the jurisprudence that has emerged construing its protections.

II. ACT 710 AND ITS ANALOGUES VIOLATE THE FIRST AMENDMENT.

Under Act 710, any company or person who contracts with Arkansas must sign a pledge to refrain from participating in a "boycott of Israel" for the duration of the contract. Ark. Code § 25-1-503(a)(1).[2] In addition, the Act requires all public entities in Arkansas—including universities—to divest themselves of any investments that they have in companies that "boycott Israel." *Id.* § 25-1-504. "Boycott Israel" and "boycott of Israel" are defined as:

[2] Companies need not make an anti-boycott pledge if their bid is at least 20 percent below the next lowest bidder or if the contract has potential value of less than $1,000. Ark. Code § 25-1-503(b).

> engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner.

Id. § 25-1-502(1)(A)(i). Although the statute does not specify what distinguishes discriminatory and nondiscriminatory withholding of business, it states that a company's participation in a boycott of Israel can be inferred from a "statement that [the company] is participating in boycotts of Israel, or that it has taken the boycott action at the request, in compliance with, or in furtherance of calls for a boycott of Israel." *Id.* § 25-1-502(1)(B).

A. Consumer Boycotts Are Protected by the First Amendment.

The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I. First Amendment safeguards "do[] not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), but also protect conduct "inten[ded] to convey a particularized message" that is likely to "be understood by those who view[] it," *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). The district court held that Act 710 is valid under the First Amendment because "a boycott is not purely speech" and is not "inherently expressive." *Arkansas Times*, 2019 WL 580669, at *5. This holding cannot be reconciled with the Supreme Court's case law establishing that politically motivated boycotts like those discouraged by Act 710 are entitled to First Amendment protection.

Of direct relevance to this case is *Claiborne Hardware*, in which the Supreme Court held that consumer boycotts are political expression protected by the First Amendment. 458 U.S. at 907. *Claiborne Hardware* grew out of a boycott launched in 1966 by black citizens of Port Gibson, Mississippi, against white-owned businesses as a vehicle for demanding racial equality and integration. *Id.* at 889. The boycott had a significant impact, prompting the targeted companies to file suit in state court where they obtained tort damages for lost earnings based on a claim of malicious interference with business. *Id.* at 891–94. Holding that "each . . . element[] of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments," the Supreme Court reversed the judgment against the boycott participants. *Id.* at 907, 934. Those protected elements included the boycott itself, which was "supported by speeches and nonviolent picketing" and calls by participants for others to join the cause. *Id.* at 907.

Through a strained reading of *Claiborne Hardware*, the district court parsed the elements of a boycott, concluding that the "meetings, speeches, and non-violent picketing" are entitled to First Amendment protection, but not the "individual purchasing decisions" that those aspects of a boycott support. *Arkansas Times*, 2019

WL 580669, at *6–7.[3] But in *Claiborne Hardware*, it was boycott participants' refusal to solicit white-owned businesses—not their speeches, meetings, and picketing—that proximately caused the businesses to lose earnings. If, as the district court concluded, only the meetings, speeches, and picketing that supported the boycott had received First Amendment protection from the *Claiborne Hardware* Court, then the boycott participants still could have been held liable for interfering with business relations through their coordinated effort to withhold their business from the targeted companies.[4] *Claiborne Hardware*'s holding would make little

[3] As a fallback, the district court also reasoned that "[e]ven if *Claiborne* stands for the proposition that the act of refusing to deal enjoys First Amendment protection, such a right is limited in scope . . . to nonviolent, primary political boycotts to vindicate particular statutory or constitutional interests," and does not extend to boycotts targeted at another country's alleged human rights violations. *Id.* at *6. But the First Amendment does not favor expression concerning particular political topics. So long as speech or expressive conduct concerns something of "public concern," it is entitled to First Amendment protection. *See Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (holding that the Westboro Baptist Church's military-funeral pickets expressing anti-gay animus address something of "public import" even if they "fall short of refined social or political commentary" and are therefore protected by the First Amendment). The public import of the Israeli-Palestinian conflict is beyond dispute, and expressive conduct concerning it does not receive lesser First Amendment protection just because it might not address "statutory or constitutional interests."

[4] A cause of action exists under Mississippi law for malicious injury to business where "[1] one engages in some act [2] with a malicious intent to interfere and injure the business of another, and [3] injury does in fact result." *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 48 (Miss. 1998) (quoting *Cenac v. Murry*, 609 So. 2d. 1257, 1271 (Miss. 1992)).

sense unless—contrary to the district court's rendering—political boycotts themselves are protected by the First Amendment.

The First Amendment's applicability to consumer boycotts themselves—and not just the speech and conduct that support them—is confirmed by *FTC v. Superior Court Trial Lawyers Association (SCTLA)*, 493 U.S. 411 (1990). That case concerned a coordinated effort by trial lawyers to refuse to represent indigent criminal defendants in protest of the District of Columbia's compensation rates for such representation. *Id.* at 414. The Federal Trade Commission (FTC) determined that the lawyers' boycott amounted to an unfair trade practice and issued a cease-and-desist order. *Id.* at 419–20. That order applied only to the lawyers' "concerted refusal . . . to accept any further assignments" and not to their "efforts to publicize the boycott, to explain the merits of [their] cause, and to lobby District officials to enact favorable legislation." *Id.* at 426. Thus, *SCTLA* presented the Court with an unambiguous question of whether consumer boycotts, isolated from any accompanying expressive activity, are protected by the First Amendment.

The Supreme Court answered that question in the affirmative: "Every concerted refusal to do business with a potential customer or supplier has an expressive component." *Id.* at 431. The Court nevertheless upheld the FTC's order, not because the boycott was nonexpressive, but because it sought only "to economically advantage the participants." *Id.* at 428. That is, the boycott,

expressive as it was, nonetheless constituted an antitrust violation. In turn, because the boycott's objectives were purely economic, the Court held that it could be subject to antitrust law without offending First Amendment principles. *Id.* at 427; *see also* Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 Duke L.J. 1037, 1066–67 (2010) ("[A]ny speech interests inherent in the conduct at issue [in *SCTLA*] are trumped not only by the government's substantive interest in antitrust regulation but also by the government's 'administrative efficiency interests in antitrust regulation.'" (quoting *SCTLA*, 493 U.S. at 430)). Plainly, companies and individuals who boycott Israel are motivated by political convictions, not economic self-interest. Accordingly, the government interests that justified the FTC's order in *SCTLA* do not underlie Act 710.

This court recognized the distinction between political and economic boycotts in *Missouri v. National Organization for Women, Inc. (NOW)*, 620 F.2d 1301 (8th Cir. 1980). That case grew out of a convention boycott launched by NOW against states, including Missouri, that had not voted to ratify the Equal Rights Amendment (ERA). *Id.* at 1302. Missouri sued NOW, arguing that the convention boycott violated antitrust laws and amounted to tortious interference with business relations. *Id.* 1302, 1316. Emphasizing that the ERA "is a social or political piece of legislation" and not economic in its orientation, the court held that neither antitrust nor tort law prohibit "using a boycott in a non-competitive political arena for the

purpose of influencing legislation." *Id.* at 1311, 1315; *see also id.* at 1316, 1319. The court so held because construing antitrust or tort law to bar NOW's boycott would amount to "an infringement upon the people's right to petition the government" and would therefore have "constitutional ramifications." *Id.* at 1310, 1319.[5]

In upholding Act 710, the district court also improperly relied on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), for the proposition that consumer boycotts are not entitled to First Amendment protection because they are "expressive only if . . . accompanied by explanatory speech." *Arkansas Times*, 2019 WL 580669, at *5 (citations and internal quotation marks omitted). *FAIR* upheld a federal law known as the Solomon Amendment that withholds contracts and grants to universities that bar ROTC or military recruiters from campus. 547 U.S. at 70. Unlike Act 710, however, the Solomon Amendment is facially neutral: it denies contracts to universities that close their gates to ROTC or military recruiters for any reason, political or apolitical. 10 U.S.C. § 983

[5] Although distinct, the rights enshrined in the First Amendment (speech, press, assembly, and petition) are "cognate rights." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "[T]he rights of speech and petition share substantial common ground," and "both . . . advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of grievance." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). Plaintiffs "who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment." *Id.* at 382.

(withholding grants and contracts to universities that have "a policy or practice . . . that either prohibits, or in effect prevents" the establishment of an ROTC unit or campus access to military recruiters). Because of the Solomon Amendment's neutral terms, a university might be denied a federal contract for turning away ROTC or military recruiters based on the apolitical judgment that the school's curriculum better prepares students for civilian rather than military life. Accordingly, the Court held that a university's decision to bar the military from campus is expressive only when "accompanied . . . with speech" that explains the decision. *FAIR*, 547 U.S. at 66.

Unlike the Solomon Amendment, however, Act 710 is not facially neutral. It withholds contracts only from companies that "engag[e] in refusals to deal, terminat[e] business activities" or otherwise "limit commercial relations with Israel" "*in a discriminatory manner*." Ark. Code § 25-1-502(1)(A)(i)(emphasis added). Without that critical qualification, Act 710 would bear a closer resemblance to the Solomon Amendment but would lead to absurd results. A neutral version of Act 710 would simply (if outlandishly) require state contractors to do business in Israel, denying contracts to companies that lack business there for completely apolitical reasons. For example, a small Arkansas company that does business only domestically might be unable to obtain a state contract under a neutral version of Act 710. The absurdity of such an alternative policy underscores that Act 710 is no

evenhanded measure to promote business with Israel but, rather, a policy intended to penalize expressive activism concerning the Israeli-Palestinian conflict.

Moreover, the Act specifically authorizes the Arkansas Development and Finance Authority to consider, in determining whether a company is boycotting Israel, whether the company has made a "statement that it is participating in boycotts of Israel, or that it has taken the boycott action at the request, in compliance with, or in furtherance of calls for a boycott of Israel." *Id.* § 25-1-502(1)(B). This provision specifically authorizes state agencies to make contracting decisions based on the content of speech that accompanies boycott activities. That aspect of Act 710 is wholly unlike the Solomon Amendment, which prohibited only the conduct of restricting campus access to ROTC or military recruiters, without regard to any accompanying expressive activity by the universities. *See* 10 U.S.C. § 983. Because of the salient differences between the Solomon Amendment and Act 710, the district court erred in relying on *FAIR* to uphold the Arkansas law.

B. Boycotts Are a Protected Form of Collective Action.

The district court's analysis of Act 710 also misses the mark by atomizing boycotts—a type of *collective* action—into "*individual* purchasing decisions." *Arkansas Times*, 2019 WL 580669, at *6 (emphasis added). By examining boycotts at the molecular level, the district court underestimates their expressive value.

Boycotts are similar to parades in that the communicative power of both can be detected only by viewing them in the aggregate. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court held that parades are expressive conduct protected by the First Amendment. *Id.* at 568–69. "Parades are . . . a form of expression," the Court stated, "not just motion," because they are comprised of "marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568. Even if an individual marcher also engages in expressive conduct, a parade's "collective point" might not be discernible by focusing on that isolated marcher. Similarly, a boycott's expressive message is not conveyed by a single purchasing decision. By analyzing consumer boycotts through too narrow of a lens, the district court failed to see their expressive power at the collective level—a power recognized by the Supreme Court's boycott jurisprudence.

First Amendment limitations on campaign-finance regulations flow from a similar recognition that group association amplifies expression that might be less powerful by itself. Through campaign contributions, "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) (per curiam). The "value" of campaign contributions "is that by collective effort individuals can make their views known, when, individually, their voices

would be faint or lost." *Citizens Against Rent Control / Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981). Boycotts are, in effect, the mirror image of campaign financing. Instead of pooling their resources to support a candidate or political cause, boycott participants coordinate the withholding of resources that would otherwise flow to and support a company's activities. The communicative power of boycotts is no less impactful because they deny resources to companies that participants oppose rather than giving them to entities that they support.

The impact of anti-BDS laws on collective expression is evident from the stories of the plaintiffs who have come forward to challenge them. Esther Koontz has an individual offer to contract with the Kansas State Department of Education to coach and train public school math and science teachers. *Koontz*, 283 F. Supp. 3d at 1013–14. As a member of the Mennonite Church, which supports the Global BDS movement, she boycotts Israeli products. *Id.* at 1013. Kansas's anti-BDS law has thus forced Koontz to choose between continuing to participate in her Church's boycott and contracting with the Department of Education. *Id.* at 1014. Mikkel Jordahl is an attorney who personally boycotts Israeli products in response to the Evangelical Lutheran Church in America's Peace Not Walls campaign and as a non-Jewish member of Jewish Voice for Peace, which has endorsed the Global BDS movement. *Jordahl*, 336 F. Supp. 3d at 1028–29. Jordahl would like his law firm,

which he alone owns, to participate in the boycott as well, but that would mean losing a contract with a county jail on account of Arizona's anti-BDS law. *Id.*

Koontz and Jordahl are but two examples of individuals whom anti-BDS laws inhibit from joining in collective expressive activity—either by joining individually, as in Koontz's case, or by joining through their companies, as in Jordahl's. Laws that force individuals like Koontz and Jordahl to stand on the sidelines while the groups with which they associate engage in collective action cannot be reconciled with the First Amendment. As Justice Louis Brandeis (who was also a Zionist leader) wrote, "the remedy to be applied" to disfavored speech "is more speech, not enforced silence." *California v. Whitney*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Arkansas is free to express its opposition to boycotts against Israel, but it may not constitutionally penalize those who participate in them.

CONCLUSION

For all of the foregoing reasons, amici respectfully urge this court to reverse the order of the district court.

Dated: April 15, 2019

Respectfully submitted,

/s/ Jonathan L. Backer

Jonathan L. Backer
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, DC 20001
Telephone: (202) 662-9042
jb2845@georgetown.edu
mbm7@georgetown.edu

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, Jonathan L. Backer, hereby certify that the foregoing Brief of T'ruah and J Street as Amici Curiae in Support of Plaintiff-Appellant and Reversal complies with type-volume limits because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, the brief contains 5,571 words, and is proportionately spaced using a roman style typeface of 14-point.

/s/ Jonathan L. Backer
Jonathan L. Backer

Dated: April 15, 2019

CERTIFICATE OF SERVICE

I, Jonathan L. Backer, hereby certify that on April 15, 2019, I electronically filed the foregoing Brief of T'ruah and J Street as Amici Curiae in Support of Plaintiff-Appellant and Reversal with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Jonathan L. Backer
Jonathan L. Backer