

No. 22-379

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IN THE  
**Supreme Court of the United States**

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ARKANSAS TIMES LP,  
*Petitioner,*

v.

MARK WALDRIP, as Trustee of the University of  
Arkansas Board of Trustees, et al.,  
*Respondents.*

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

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**BRIEF OF AMICI CURIAE T'RUAH, J STREET,  
AMERICANS FOR PEACE NOW, AND  
PARTNERS FOR PROGRESSIVE ISRAEL IN  
SUPPORT OF PETITIONER**

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**TABLE OF CONTENTS**

	Page
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT.....	5
I. FROM THE AMERICAN REVOLUTION TO THE PRESENT, AMERICANS HAVE INVOKED THEIR RIGHT TO BOYCOTT to EXPRESS DISAGREEMENT WITH GOVERNMENT POLICIES.....	5
A.    The Boycott in Early America.....	5
B.    Americans Boycott Nazi Germany.....	8
C.    Civil Rights Boycotts .....	11
1. <i>Montgomery Bus Boycott</i> .....	12
2. <i>Divestment from South Africa</i> .....	13
3. <i>Claiborne County Boycott</i> .....	14
II. THE DECISION BELOW JEOPARDIZES THE RIGHTS OF JEWS AND NON-JEWS ALIKE. .....	15
A.    Boycotting is a Jewish Tradition as Well as an American One.....	15
B.    The Decision Below Ignores the Past and Threatens the Present of American, and Jewish, Boycotts .....	18

C.	The Claim that Political Speech is Motivated by Antisemitism Is Not Itself Grounds for Bringing it Beyond First Amendment Protection.....	21
D.	A Robust First Amendment Protects the Jewish Community and Other Minority Groups .....	25
	CONCLUSION .....	27

## TABLE OF AUTHORITIES

	Page(s)
 <b>CASES</b>	
<i>Ark. Times LP v. Waldrip as Tr. of Univ. of Ark. Bd. of Trs., 37 F.4th 1386 (8th Cir. 2022)</i> .....	18
<i>Gayle v. Browder, 352 U.S. 903 (1956)</i> .....	12
<i>NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964)</i> .....	13, 19
<i>NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)</i> .....	14, 15, 23
 <b>STATUTES</b>	
Ala. Code § 41-16-5(a)(1).....	20
Ark. Code § 25-17-101 .....	25
Ky. Rev. Stat. § 41.480.....	21
Ky. Rev. Stat. § 45A.607 .....	20
Ohio Rev. Code § 9.76 (B) .....	20
S.C. Code § 11-35-5300(A) .....	20
Tex. Gov. Code § 808.001(1).....	19
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Wyo. Stat. § 13-10-302 .....	21

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Position of the American Jewish Committee  
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Br. of Amici Curiae States of Arizona et al., <i>Ark. Times v. Waldrip</i> , No. 19-1378 (8th Cir.), 2021 WL 1499712.....	24
Br. of Amicus Curiae American Jewish Congress, <i>NAACP v. Claiborne Hardware Co.</i> , No. 81-202, 1981 WL 390216 (1981).....	18
Br. of Amicus Curiae Shurat Hadin-Israel Law Center, <i>Ark. Times v. Waldrip</i> , No. 19- 1378 (8th Cir.), 2019 WL 2526775 .....	21
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Marjorie N. Feld, <i>Nations Divided: American Jews and the Struggle over Apartheid</i> (2014).....	16
Monroe Friedman, <i>Consumer Boycotts: Effecting Change Through the Marketplace and Media</i> (1999).....	15
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Moshe Gottlieb, <i>In the Shadow of War: The American Anti-Nazi Boycott Movement in 1939–1941</i> , 62 <i>Am. Jewish Hist. Q.</i> 146 (1972).....	10
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## INTEREST OF AMICI CURIAE

Jewish tradition reflects a commitment to freedom of expression. Amici T'ruah: The Rabbinic Call for Human Rights, J Street, Americans for Peace Now (APN), and Partners for Progressive Israel represent large swaths of the American Jewish community who may personally oppose the global Boycott, Divestment, Sanctions (“BDS”) movement but who recognize the fundamental right to freedom of speech.<sup>1</sup>

T'ruah 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 2,300 Jewish clergy across North America and 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. While T'ruah does not reject out of hand the strategic, targeted use of boycott and

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<sup>1</sup> Counsel for amici curiae authored this brief in its entirety, and no party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of proposed amici's intent to file this brief and consented to its filing.

divestment in justice campaigns, T'ruah does not affiliate with the BDS movement.

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. Vibrant debate has characterized the Jewish tradition for millennia. The same openness should govern discourse about Israel today. J Street opposes the global BDS movement, and at the same time opposes penalizing those who exercise their right to engage in boycott activity.

APN's mission is to educate and advocate with U.S. policymakers, political leaders and the Jewish community around supporting and adopting policies that will lead to comprehensive, durable, Israeli–Palestinian and Israeli–Arab peace. APN is the sister organization of Shalom Achshav, Israel's preeminent peace movement.

Partners for Progressive Israel supports Israelis working to ensure civil rights, equality, social justice, and a durable and just peace between Israel and its neighbors.

Amici believe that the Jewish community is strengthened by vigorous debate on issues that are vital to the wellbeing 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 other's opinions, while leaving even rejected opinions in the text for later study. Those who believe that there is one acceptable view on Israel should not be allowed to impose constraints on what constitutes permitted speech in the Jewish community or the broader marketplace of ideas. 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 Israelis and Palestinians.

### **SUMMARY OF ARGUMENT**

From the founding to the present, Americans have engaged in politically motivated boycotts. And for just as long, Americans have viewed their participation in these boycotts as expressive acts, part of their rights as Americans.

Boycotts have been a powerful tool for historically marginalized groups, including the Jewish community, to protest against injustice. Thus, for example, when Adolf Hitler assumed power in Germany and began his campaign to exterminate the Jews, the American Jewish community organized a boycott of Nazi-made products. Anti-Nazi boycott leaders drew inspiration from the founding era and

invoked their constitutional rights as Americans. Boycotters across other eras similarly invoked their constitutional rights to protest slavery, apartheid, and racial injustice.

With scant analysis of this Court's precedents and no acknowledgment of this history, the court of appeals deemed boycotts beyond First Amendment protection. Under this view, the mass boycotts of Nazi Germany were matters of legislative grace rather than constitutional right. The boycotts of the civil rights movement would have been unprotected by the Constitution. Governments would be free to choose which political views they favor and which they do not.

Carving out exceptions to the First Amendment's protections imperils the Jewish community. Some Jews support the BDS movement, while others oppose it. The choices about which political movements to support are ones that should be subject to debate and persuasion, not government coercion. If it is allowed to stand, the court of appeals' decision will weaken the First Amendment freedoms on which all Americans, including American Jews, depend. Thus, amici urge this Court to review and reverse the dangerous precedent set below.

## ARGUMENT

### I. FROM THE AMERICAN REVOLUTION TO THE PRESENT, AMERICANS HAVE INVOKED THEIR RIGHT TO BOYCOTT TO EXPRESS DISAGREEMENT WITH GOVERNMENT POLICIES.

#### A. The Boycott in Early America

America was founded with a boycott. In the decade leading up to the Declaration of Independence, colonists used non-importation agreements to boycott British goods in a powerful expression of their anger at British taxation laws. Colonial leaders secured commitments from merchants and consumers not to import or purchase listed products from Britain.

In Virginia, for example, signatories to the 1769 Nonimportation Resolutions promised to boycott a long list of products from Britain “unless the [challenged] Acts of Parliament are repealed.” *Virginia Nonimportation Resolutions (May 17, 1769)*, Founders Online, National Archives, <https://perma.cc/HY75-QCRN>. Inspired by similar agreements in the northern colonies, George Mason drafted and George Washington introduced the agreement, which many Virginia leaders, including Thomas Jefferson, signed.

Nonimportation agreements spread throughout the colonies. *See, e.g.*, Glenn Curtis Smith, *An Era of Non-Importation Associations, 1768-73*, 20 *Wm. & Mary Q.* 84, 93 (1940). Richard Henry Lee, another signatory to the Virginia resolutions, celebrated the effort: “The flame of liberty burns bright and clear ...

Americans, from one end of the Continent to the other, appear too wise, too brave, and much too honest, to be either talked, terrified, or bribed from the assertion of just, equitable, and long possessed rights.” Letter from Richard Henry Lee to Arthur Lee (May 19, 1769), in *The Letters of Richard Henry Lee Vol. 1: 1762-1778*, at 34 (James Curtis Ballagh ed., 1911), <https://perma.cc/B7WD-CAKS>.

By the time the First Continental Congress met, boycotting British goods was a familiar mode of discourse. One of the Congress’s first acts was adopting a colony-wide boycott of various British goods. Resolution of September 22, 1774, U.S. Continental Congress, Charles Thomson & Continental Congress Broadside Collection, Library of Congress, <https://perma.cc/P3V2-WAJL>; Extracts from the Votes and Proceedings, Oct. 20, 1774, U.S. Continental Congress, Peyton Randolph & Continental Congress Broadside Collection, Library of Congress, <https://perma.cc/6UUH-HD44>.

Thus, the founding generation understood the boycott as a political and expressive act. Indeed, this collective action to express political grievance helped forge a distinctive *American* political identity separate from that of individual colonies. See, e.g., Lucius S. Landreth, *A Hundred and Ten Years of the Constitution*, 38 Am. L. Registry 417, 423 (1899). The boycott was a highly effective form of mass political mobilization, and a uniquely American one at that: “[T]he American Revolution was the first large-scale political movement in recorded history to organize itself around the relation of ordinary people to manufactured consumer goods.” T.H. Breen, *The*

*Marketplace of Revolution: How Consumer Politics Shaped American Independence*, at XVIII (2005).

“The founding generation not only viewed nonimportation boycotts as legal, but also as the exercise of an ‘undeniable constitutional right’ under both English and colonial law.” Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 *Stan. J. Int’l L.* 1, 30 (1999) (citations omitted). “Those who founded our nation and ratified our Constitution believed their boycott activities against the British were lawful, and would be shocked by the notion that the Bill of Rights did not safeguard the type of assembly and petition for redress of grievances they had used themselves.” Note, *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 *Rutgers U.L. Rev.* 1301, 1311 (2018).

In the decades following the Constitution’s ratification, Americans again turned to the boycott to express their disapproval, this time of slavery. A prominent abolitionist, Benjamin Franklin had long spoken out in favor of purchasing products tied to paid labor rather than slavery. He became president of the nation’s first abolition society, which adopted a boycott of slave-made products at its 1797 convention. Julie L. Holcomb, *Moral Commerce: Quakers and the Transatlantic Boycott of the Slave Labor Economy* 65 (2016); Edward Raymond Turner, *The First Abolition Society in the United States*, 36 *Pa. Mag. Hist. & Biography* 92, 95, 103-104 (1912). Abolitionists continued to organize abstention from products tainted by slavery as part of their protest against the

institution. *See generally* Carol Faulkner, *The Root of the Evil: Free Produce and Radical Antislavery, 1820-1860*, 27 *J. Early Republic* 377 (2007).

Just as during the country's founding, participants again understood their boycott as a political and expressive act. *See* Lawrence B. Glickman, *Buying Power: A History of Consumer Activism in America* 62 (2009). And the boycott provided a mode of expression that was particularly empowering for those Americans, such as women, who were otherwise excluded from political power. Angelina Grimké of the Philadelphia Female Anti-Slavery Society argued that a woman must "do all that she can by her voice, and her pen, and her purse, and the influence of her example" to abolish slavery, a position ratified by the Anti-Slavery Convention of American Women. *See* Ira V. Brown, "Am I Not a Woman and a Sister?" *The Anti-Slavery Convention of American Women, 1837-1839*, 50 *Pa. Hist.: J. Mid-Atl. Stud.* 1, 5-6 (1983).

These early boycotts established boycotting as an expressive and political act and set the tone for American protests in the generations that followed.

### **B. Americans Boycott Nazi Germany**

One hundred years later, Americans drew inspiration from these precedents and launched a widespread boycott of Nazi Germany. Immediately after Hitler took power, American Jewish leaders urged Jews and non-Jews alike to boycott products from Nazi Germany. By 1939, sixty-five percent of Americans, across all faiths and political perspectives, had joined the anti-Nazi boycott. Moshe

R. Gottlieb, *American Anti-Nazi Resistance, 1933-1941: An Historical Analysis* 262 (1982) (hereinafter Gottlieb, *Anti-Nazi Resistance*).

Anti-Nazi boycotters understood their action as connected to American history and the Constitution. As one leader of the anti-Nazi boycott declared, “The [boycott] movement is in the oldest American tradition.” Moshe R. Gottlieb, *The Anti-Nazi Boycott Movement in the United States: An Ideological and Sociological Appreciation*, 35 *Jewish Soc. Stud.* 198, 221 (1973) (quoting American Jewish Congress Bulletin, Jan. 13, 1939, at 1). “Long before the word boycott was used, our forefathers made great sacrifices in enforcing a general embargo against trade with Great Britain.” *Id.* Although a formal, government-enforced embargo would have implicated politics and international relations, boycott organizers urged that critics “cannot effectively attack a private boycott, or deny the constitutional right of Americans to buy where and what they choose.” Gottlieb, *Anti-Nazi Resistance*, at 300 (citing Records of the Joint Boycott Council, Anti-Nazi Week folder (1938)).

Leaders viewed the boycott as the most effective means for ordinary Americans to protest Nazi policy.<sup>2</sup>

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<sup>2</sup> Nazi reactions suggest this was correct. Nazi propagandist Joseph Goebbels complained that the boycott forced the Nazi regime’s campaign against Jews to halt briefly, writing that the regime could “undertake[] nothing more against the Jews ... since further boycotts, foreign exchange difficulties and other troubles are thereby threatened.” Moshe Gottlieb, *In the Shadow* (cont’d)

Samuel Untermyer, a boycott leader, emphasized that the boycott extended to people from all faiths, who participated as part of “their right to full expression of grievances against Nazi Germany.” *Boycott Fight to Finish, Wise Insists at Geneva*, Jewish Daily Bulletin, Aug. 22, 1934, at 1, <https://perma.cc/S3PV-E6R7>. “The answer of liberal and humane America to the war of extermination now decreed by the madman[] now in control of Germany, will express itself in an intensification and extension of the boycott.” *\$500,000 Sought for Nazi Boycott*, N.Y. Times, Sept. 11, 1933, at 8 (quoting Untermyer). Rabbi Stephen Wise wrote that the boycott “recorded civilization’s protest against Nazi Germany.” Stephen Samuel Wise, *Challenging Years* 261 (1949). Boycott Committee Chair Joseph Tenenbaum praised the “the moral expression of condemnation of Hitlerism, as exemplified in the boycott.” *AJC Calls for Vigilantes Body to Aid Boycott*, Jewish Daily Bulletin, June 22, 1934, at 2, <https://perma.cc/2EU2-NRSZ>.

Nazis, meanwhile, lamented the American right to boycott. Hitler found it “unbearable” that “it should be possible in some countries for some ideological reason or other to let loose a wild boycott of agitation against other countries and their goods.” Gottlieb, *Shadow of War*, at 161. And Nazi sympathizers in the United States argued unsuccessfully that the boycott

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*of War: The American Anti-Nazi Boycott Movement in 1939–1941*, 62 Am. Jewish Hist. Q. 146, 160 (1972) (hereinafter Gottlieb, *Shadow of War*) (quoting N.Y. Sun, Feb 28, 1935).

should be illegal. *See Justice Department Denies Aiding Nazis*, N.Y. Times, June 2, 1934, at 9.

Instead, U.S. leaders praised the boycott as a way to renounce Hitlerism. Justice Brandeis wrote: “[Hitler’s] weakness because of the absence of a market [due to the boycott] is Jewry’s and the world’s hope.” Wise, *supra*, at 239-40 (quoting private letter). Former Deputy Attorney General and World War I General John V. Clinnin declared, “It is proper for all liberty loving humanitarians in all countries of the world to show resentment against Hitlerism.... Our only means of showing resentment is the boycott, an economic lesson to be brought home to the German government.” *Boycott Only Weapon to Fight Nazi Intolerance, General Clinnin Declares*, Jewish Daily Bulletin, Sept. 12, 1933, at 2, <https://perma.cc/8M9C-Q52G>; *see also The Jew Must Battle Hitlerism Standing Up, Declares Golden*, Jewish Daily Bulletin, July 13, 1934, at 7, <https://perma.cc/WXV6-QZPZ> (quoting Judge Isadore M. Golden, vice president of the Constitution B’nai B’rith Grand Lodge, stating in support of the boycott: “The cry of ‘hush-hush’ will never win Jewry’s battles. No people fighting for its rights can ever hope to succeed by soft pedaling.”).

### **C. Civil Rights Boycotts**

Leaders from other minority groups also naturally turned to the American boycott tradition in their pursuit of justice, which led to some of the Nation’s most famous and effective boycotts to advance equal justice under the law.

### 1. *Montgomery Bus Boycott*

Inspired by Rosa Parks's stand against racial segregation, civil rights leaders including Rev. Martin Luther King, Jr., organized a boycott of the Montgomery, Alabama bus system in 1955.<sup>3</sup> Upon hearing of Ms. Parks's arrest, Rev. King "agreed at once that some protest was necessary, and that the boycott method would be an effective one." Martin Luther King, Jr., *Stride Toward Freedom: The Montgomery Story* 32 (1958). King celebrated that the Constitution was on the side of the boycotters: "One of the great glories of democracy is the right to protest for right." *Id.* at 50.

For 13 months, Black residents refused to ride the bus, aiming not "to put the bus company out of business, but to put justice in business." *Id.* at 39. The boycott ended when transit segregation did. Some boycotters also sued, which led to the overruling of *Plessy v. Ferguson*'s "separate but equal" doctrine. *Gayle v. Browder*, 352 U.S. 903 (1956), *aff'ing* 142 F. Supp. 707, 717 (M.D. Ala.). A few years later, this Court wrote that it was "doubtful ... 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

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<sup>3</sup> Although this boycott is perhaps the most famous, it was not unique. Black southerners used boycotts to protest segregated public transportation for decades. *See, e.g.*, August Meier & Elliott Rudwick, *The Boycott Movement Against Jim Crow Streetcars in the South, 1900-1906*, 55 J. Am. Hist. 756 (1969).

law.” *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964).

## 2. *Divestment from South Africa*

Civil rights advocates did not limit their boycotts to protesting injustice in the United States. When South Africa entrenched its system of racial apartheid, advocates around the world began an organized boycott of the nation. See Cecelie Counts, *Divestment Was Just One Weapon in Battle Against Apartheid*, N.Y. Times, Jan. 27, 2013, <https://perma.cc/PWK3-BE6Q>.

Americans again energetically exercised their right to boycott. About half of Americans supported boycotting South Africa. Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States, 1969-1986*, 111 Pol. Sci. Q. 127, 146 (1996). Student activists persuaded universities around the United States to divest from South Africa. Stephen Kaufman, *Pressure to End Apartheid Began at Grass Roots in U.S.*, U.S. Mission to Int’l Orgs. in Geneva (Dec. 17, 2013), <https://perma.cc/W2V2-GZKP>. President Obama described joining the anti-apartheid movement as his “first act of political activism.” David Jackson, *Obama Inspired by Anti-Apartheid Campaign*, USA Today (Dec. 6, 2013), <https://perma.cc/5ZPH-UBGR>. Hundreds of large companies withdrew business from South Africa. Richard Knight, *Sanctions, Disinvestment, and U.S. Corporations in South Africa*, in *Sanctioning Apartheid* 67, 67 (Robert E. Edgar ed., 1990), <https://perma.cc/WPB4-5KGU>. Artists, musicians, and athletes refused to visit. John M. Wilson, *Conflict*

*of Conscience: A Cultural Boycott of South Africa is Forcing Entertainers to Make Hard—and Expensive—Moral Choices*, L.A. Times, Feb. 24, 1985, at U1.

Apartheid finally fell, thanks in part to the American boycott. Andre L. Smith, *Consumer Boycotts Versus Civil Litigation: A Rudimentary Efficiency Analysis*, 43 How. L.J. 213, 215 (2000). Nelson Mandela, in a visit to Washington, told Americans, “You have no idea how your involvement in the anti-apartheid struggle in our country actually helped to facilitate the transformation.” Chris Simkins, *US Anti-Apartheid Movement Helped Bring Change to South Africa*, VOA News (Apr. 24, 2014, 4:39 p.m.), <https://perma.cc/UA92-Q29F>.

### 3. *Claiborne County Boycott*

Meanwhile, racial discrimination remained stubbornly entrenched in the United States. Starting in 1966, Black Mississippians organized a protest of white-owned businesses to protest racial injustice. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982). The boycott had a significant impact, prompting the targeted companies to sue in state court, where they obtained tort damages for lost earnings based on a claim of malicious interference with business. *Id.* at 891-94. Boycotters argued that “the right to boycott and inflict losses on complainants was a legally protected right afforded them under the laws and Constitution of the United States,” *id.* at 892 n.10 (quotation omitted), but the trial judge disagreed, awarding nearly a million dollars in lost profits to the merchants. *Id.* at 893. The Mississippi upheld the imposition of liability. *Id.* at 894.

This Court reversed, holding that “the boycott clearly involved constitutionally protected activity.” *Claiborne Hardware*, 458 U.S. at 911, 920. The Court left open the possibility that “a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct ... may restrict protected First Amendment activity,” *id.* at 915 n.49, but “[t]he right of the States to regulate economic activity could not 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.” *Id.* at 914. Thus, the First Amendment barred the state from awarding damages based on the merchants’ losses because those losses were caused by Black citizens’ collective refusal to deal with white merchants. *Id.* at 922. The Court acknowledged what the lessons of history made clear: Politically motivated economic boycotts were fully protected by the First Amendment.

## **II. THE DECISION BELOW JEOPARDIZES THE RIGHTS OF JEWS AND NON-JEWS ALIKE.**

### **A. Boycotting is a Jewish Tradition as Well as an American One**

Just as “Americans have engaged in an almost continuous series of boycotts,” Glickman, *supra*, at 1, “[t]hroughout history Jews have been participants in consumer boycotts,” Monroe Friedman, *Consumer Boycotts: Effecting Change Through the Marketplace and Media* 131 (1999); *see also, e.g.*, Paula E. Hyman, *Immigrant Women and Consumer Protest: The New York City Kosher Meat Boycott of 1902*, 70 *Am. Jewish*

Hist. 91, 93 (1980). Some 500 years ago, Ottoman Jews organized an eight-month boycott of the port city Ancona to protest the Pope's seizure of property and execution of two dozen Anconan Jews. *See* Marc Saperstein, *Martyrs, Merchants and Rabbis: Jewish Communal Conflict as Reflected in the Responsa on the Boycott of Ancona*, 43 *Jewish Soc. Stud.* 215 (1981). During the 1970s, Jews organized boycotts of Mexico and France to voice disapproval of Mexico's support of an anti-Zionism resolution and France's release of a Palestinian prisoner. Friedman, *supra*, at 138-142.

As Americans have exercised their right to boycott, American Jewish voices have been part of the chorus. Jewish leaders organized the boycott of Nazi Germany. *See supra* at 8-11. And Jewish groups around the country supported the Montgomery bus boycott by raising funds and expressing solidarity. *E.g.*, *Clevelanders Rally Behind Bus Boycotters*, *Cleveland Call & Post*, Mar. 17, 1956, at 1B (noting Jewish Community Foundation donated funds and Rabbi Rosenthal spoke in support at rally).

Jewish groups also joined the boycott of South Africa. Brandeis University Chaplain Rabbi Albert Axelrad maintained, "Judaism's teaching on the matter [of divestment] are lucidly clear." Marjorie N. Feld, *Nations Divided: American Jews and the Struggle over Apartheid* 112 (2014). Thus, he argued "[i]t is both morally and educationally inappropriate for a university, especially ours, rooted as it is in the history and values of the Jewish people, to accept funding which accrues from such an atrocious system, thereby participating in propping it up and

perpetuating it.” *Id.* Others agreed. The Union of American Hebrew Congregations developed a manual to help both congregations and individuals participate in the “no-buy” campaigns. *UAHC Steps Up Anti-Apartheid Campaign*, Jewish Telegraphic Agency, Oct. 15, 1986, <https://perma.cc/QX2T-FX6V>. Ultimately, “[n]early every major Jewish organization issued statements in support” of divestment from South Africa. Feld, *supra*, at 118.

And Jewish groups stood with the NAACP after it was fined for the Claiborne County boycott, recognizing that restrictions on boycotts threaten Jewish rights. Rabbi Alexander M. Schindler, president of the Union of American Hebrew Congregations, decried the Mississippi trial court decision as “constitutionally dubious and a threat to every organization actively engaged in the fight for social justice.” *Major Synagogue, Church Groups Launch Drive to Aid NAACP Appeal*, Jewish Telegraphic Agency, Oct. 14, 1976, at 2, <https://perma.cc/4YB7-M6HU>. Rabbi Schindler immediately perceived the decision’s potential implications for the Jewish community: “If Blacks can be thrown into bankruptcy for refusing to patronize merchants they regard as hostile to their interests, then Jews can be similarly victimized for withdrawing their patronage from concerns which discriminate against them or who cooperate with the Arab boycott ....” *Id.* The Executive Director of the American Jewish Congress echoed these concerns, writing a letter of support to the NAACP: “We believe that precedents established in such a decision are extremely dangerous not merely to the NAACP but to all groups involved in using social action to protect

constitutional rights and to achieve social change.” *Jewish Groups Aiding NAACP*, Jewish Telegraphic Agency, Oct. 8, 1976, at 4, <https://perma.cc/FTH5-9XFS>.

As a result, Jewish groups helped raise thousands of dollars for the NAACP so it could appeal the decision. *Id.* When the case reached this Court, the American Jewish Congress wrote an amicus brief in support: “[P]olitically motivated economic boycotts have a long and honored history in America.” Br. of Amicus Curiae American Jewish Congress 9, *NAACP v. Claiborne Hardware Co.*, No. 81-202, 1981 WL 390216 (1981). The Congress thought it settled law that “boycotts which have ‘important economic, social, and political’ purposes constitute an exercise of basic constitutional rights which have always rested on the highest rung of the hierarchy of First Amendment values.” *Id.* at 12 (citations, internal quotation marks, and alterations omitted).

### **B. The Decision Below Ignores the Past and Threatens the Present of American, and Jewish, Boycotts**

With scant analysis, the decision below brushed aside *Claiborne Hardware* and the long American history of boycotting, contending that this Court had “stopped short of declaring that a ‘boycott’ itself—that is, the refusal to purchase from a business—is protected by the First Amendment.” *Ark. Times LP v. Waldrip as Tr. of Univ. of Ark. Bd. of Trs.*, 37 F.4th 1386, 1392 (8th Cir. 2022) (citing *Claiborne Hardware*, 458 U.S. at 913). The decision then treated collective, organized, politically motivated boycotts

directed at changing public policy as simply “non-expressive commercial decisions” beyond the First Amendment’s protection.<sup>4</sup> As discussed more fully in the Petition, the court’s analysis conflicts with *Claiborne Hardware* and other First Amendment principles.

The decision also cannot be reconciled with history. The Eighth Circuit’s decision would have allowed states to criminalize or otherwise punish participation in boycotts, including the boycott of Nazi Germany and divestment from South African apartheid, which American Jews have exercised their rights to lead and join. *See also Flowers*, 377 U.S. at 307 (finding it “doubtful ... 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”).

These concerns are not speculative: Several laws passed to penalize participation in the BDS movement are worded broadly enough to apply to the anti-Nazi and anti-apartheid movements. Although Arkansas’s law is targeted specifically at the anti-Israel viewpoint, anti-BDS laws in other states penalize Americans who participate in a boycott of *any* “jurisdiction with which this state can enjoy open

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<sup>4</sup> Treating participation in the BDS movement as a “non-expressive commercial decision[]” is particularly disingenuous when one considers that many anti-BDS laws expressly permit boycotts motivated by economic or business purposes, penalizing only those that are motivated by *political* concerns. *E.g.*, Tex. Gov. Code § 808.001(1) (exempting “action[s] made for ordinary business purposes”).

trade.” Ala. Code § 41-16-5(a)(1); *accord, e.g.*, Ky. Rev. Stat. § 45A.607 (similar); Ohio Rev. Code § 9.76 (B) (similar); S.C. Code § 11-35-5300(A) (similar). Those Americans who boycotted Nazi Germany before America entered World War II and those who divested from South Africa during its apartheid years would run afoul of these modern anti-BDS laws, ratified by the decision below.

Americans, both Jewish and non-Jewish, continue to engage energetically in boycotts as an expression of their moral, political, and social ideals. A quarter of Americans are currently engaged in at least one boycott. *See* Chris Taylor, *Boycott Nation: How Americans Are Boycotting Companies Now*, Reuters (June 29, 2022), <https://perma.cc/5QDW-DNYT>. These boycotts are conducted in support of many causes across the political and ideological spectrum, including to protest antisemitism. *See, e.g.*, Shirley Halperin, *UTA Chief Jeremy Zimmer Implores Agents: ‘Please Support the Boycott of Kanye West’*, Variety (Oct. 23, 2022), <https://perma.cc/T7UY-7QZW>.

Some in the Jewish community have also organized boycotts of BDS participants. *E.g.*, *Boycott ‘Antisemitic’ Ben & Jerry’s, Says Simon Wiesenthal Center*, The JC (Oct. 21, 2021), <https://perma.cc/XCS7-DPRN>. Under the decision below, this anti-BDS counter-boycott isn’t constitutionally protected counter-speech, but rather could itself be outlawed.

More broadly, the decision below would allow governments to pick and choose which viewpoints to

allow and which to penalize, even criminalize. States would have license to elevate the interests of any foreign nation—or any other political position—over the rights of Americans, including Jews. The First Amendment cannot be so easily brushed aside.

States have already been emboldened to suppress boycotts motivated by ideologies that they do not share. Several states now penalize companies that boycott fossil fuel energy companies or firearm entities. *E.g.*, Tex. Sess. L. Serv. Ch. 529-530 (west), to be codified at Tex. Gov't Code § 2274.001 et seq.; Ky. Rev. Stat. § 41.480; W. Va. Code §§ 12-1C-1 to -7; Wyo. Stat. § 13-10-302. *See* Anti-Boycott Legislation Tracker, JustVision, <https://justvision.org/boycott/legislation-tracker> (last visited Nov. 4, 2022). Other states may prohibit other boycotts from across the political and ideological spectrum. The decision below gives government free rein to dictate to Americans which ideologies are tolerated and which are not, a result incompatible with the First Amendment.

**C. The Claim that Political Speech is Motivated by Antisemitism Is Not Itself Grounds for Bringing it Beyond First Amendment Protection**

Some amici below argued that the usual First Amendment analysis should be short circuited because, in their view, the BDS movement is antisemitic. *See* Br. of Amicus Curiae Shurat Hadin-Israel Law Center, *Arkansas Times v. Waldrip*, No. 19-1378 (8th Cir.), 2019 WL 2526775; Br. of Amicus Curiae Zachor Legal Institute, *Arkansas Times v.*

*Waldrip*, No. 19-1378 (8th Cir.), 2021 WL 1603980. This is incorrect.

To begin, there is no allegation or suggestion that the Arkansas Times is motivated by antisemitism. And amici do not accept that the BDS movement is inherently antisemitic. Anti-BDS arguments that rely on fallacious grounds of antisemitism make it harder to counter the very real antisemitism faced by the Jewish community at home and abroad.

The most widely accepted definitions of antisemitism reject the notion that criticism of Israel's policies is inherently antisemitic. See *The Working Definition of Antisemitism*, International Holocaust Remembrance Alliance, <https://perma.cc/L6Q9-9FVP> (last visited Nov. 17, 2022); *The Jerusalem Declaration on Antisemitism*, <https://perma.cc/NUT9-2ZE4> (last visited Nov. 17, 2022). In fact, treating Israel and Jews as interchangeable is itself a form of antisemitism. See Jerusalem Declaration, Guideline B.<sup>5</sup>

Indeed, the Jewish community itself is divided on the merits of the BDS movement. *U.S. Jews' Connections with and Attitudes Toward Israel*, Pew

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<sup>5</sup> Some BDS supporters have advanced antisemitic rhetoric, but that does not infect the entire movement. Again *Claiborne Hardware* is instructive: "A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." 458 U.S. at 934.

Research Center (May 11, 2021), <https://perma.cc/RPS5-JFVC>. This is unsurprising: There was no uniform Jewish view on the merits of earlier boycotts either. Leadership of the American Jewish Committee, for example, which opposes BDS, also refused to endorse anti-Nazi boycotts, believing them to be strategically unwise and to jeopardize “an understanding between Nazi authorities and the Jewish population of Germany.” American Jewish Committee, *The Anti-German Boycott: A Statement of the Position of the American Jewish Committee* 2 (1935). Avoiding direct conflict, the Committee preferred to “rely upon the moral forces of America and of other enlightened countries in the world” to combat Hitler’s evil. Moshe R. Gottlieb, *The First of April Boycott and the Reaction of the American Jewish Community*, 57 *Am. Jewish Hist. Q.* 516, 555 (1968) (quoting Draft American Jewish Committee Statement). Yet these disagreements led to debate within the Jewish community, not suppression; neither side of the debate seriously questioned that anti-Nazi boycotters had the legal right to protest.

Moreover, the notion that the Arkansas law seeks to protect the Jewish community is belied by its history. The Arkansas legislator who sponsored the law challenged here was not driven by concern for Arkansas Jews. Arkansas Senate Majority Leader Bart Hester readily conceded that he “ha[d]n’t spoken to leadership in the Jewish community” and that he “didn’t need the local [Jews] opinion on this.” *Boycott* at 26:54-27:05 (Just Vision 2021). Rabbi Barry Block, who leads Arkansas’s largest synagogue, opposes both the BDS movement *and* the anti-BDS law, emphasizing the law “has nothing to do with the

Jewish people of Arkansas.” Jeremy Ben-Ami & Jill Jacobs, *Americans Shouldn’t Forfeit Their Freedom of Speech So States Can Support Israel*, NBC News (Jan. 15, 2020), <https://perma.cc/5A5Z-8TB7>; *see also* *Boycott* at 25:46-26:20 (quoting Rabbi Block: “Supporting Israel is of the greatest importance to me. I could not be stronger in my opposition to boycotts of any Israeli products. However, I was appalled that a newspaper would have to sign an oath that it wouldn’t participate in any kind of political action. American freedoms are terribly important to American Jews.”).

Amici also reject the suggestion, raised by the State’s amici below, that boycotting a nation based on objection to its policies is analogous to discrimination against individuals based on their religion or national origin. *See* Br. of Amici Curiae States of Arizona et al. 4-6, *Ark. Times v. Waldrip*, No. 19-1378 (8th Cir.), 2021 WL 1499712. This view denigrates the real harm that invidious discrimination inflicts on marginalized individuals, including Jews.

Similar arguments were made by Nazi propagandists, who equated the anti-Nazi boycott with discrimination against German-Americans. Boycotters rejected these claims: “We desire here again to emphasize that we have no quarrel with our American citizens of German birth or ancestry. Our movement is not directed against any class of people; it is aimed only at German goods, ships and shipping.” Samuel Untermyer, *To Our Patriotic German-American Citizens*, *Jewish Daily Bulletin*, May 15, 1934, at 15.

Were legislatures truly concerned about antisemitism, they would pass laws forbidding contractors from engaging in that discrimination. Arkansas, for example, already has such a law for contractor employment. Ark. Code § 25-17-101. But the anti-BDS law does not prohibit discrimination against individuals based on religion or national origin; instead, it penalizes political expression disfavored by the State.<sup>6</sup>

Similarly, the mere claim that someone's expressive conduct is motivated by antisemitism, racial animus, or other hateful motive is not a basis for the State to deny their speech rights. Advocates who believe someone's views are misguided should challenge them directly, not enlist the power of the State to silence them.

#### **D. A Robust First Amendment Protects the Jewish Community and Other Minority Groups**

Carving out exceptions to the First Amendment's protections imperils the Jewish community.

In a 1790 letter to a Rhode Island Hebrew congregation, 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*

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<sup>6</sup> As noted above, *see supra* at 19 n.4, several states expressly permit boycotting for business or economic reasons and punish the boycott only if it is expressive.

*in Newport, Rhode Island, 18 August 1790*, Founders Online, National Archives, <https://perma.cc/XM7V-SLTX>. That promise of religious freedom drew many Jewish immigrants to America's shores. Of course, for Jews and other marginalized groups, America has not always lived up to that promise.

But whatever prejudices government officials may harbor, the Constitution constrains their ability to act on them. "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.").

Just as Jewish groups fought against attacks on the right to boycott in *Claiborne Hardware*, see *supra* at 17-18, amici ask this Court not to let the dangerous precedent below stand. This Court should grant the petition and ensure that these essential First Amendment freedoms are not eroded.

**CONCLUSION**

For the foregoing reasons, amici respectfully urge this Court to grant the petition.

Respectfully submitted,

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