No. 22-379

IN THE

Supreme Court of the United States

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Petition asks whether the First Amendment permits States to selectively penalize specific consumer boycotts because of the message they express. Respondents do not dispute that federal courts have reached different conclusions on that question, that the opinion below authorizes government officials to punish or suppress disfavored consumer boycotts with impunity, or that Act 710, Ark. Code Ann. § 25-1-501 *et seq*. (West 2017), is content and viewpoint discriminatory insofar as it regulates expressive activity. Nor do they dispute that this is the *first time* a federal court of appeals has blessed a content-based law targeting specific consumer boycotts for punishment.

Respondents' arguments against review are mainly confined to defending the Eighth Circuit's decision on the merits. They contend that: (1) *International Longshoremen's Ass'n, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212 (1982), rejected a First Amendment right to boycott; (2) *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), protected only discrete elements of the boycott at issue there, and not the boycott itself; and (3) if *Claiborne Hardware* protects a right to boycott at all, it should be confined to boycotts vindicating constitutional rights.

These defenses are unavailing. *Longshoremen* and *Claiborne Hardware* recognized that the government's compelling interest in preventing industrial strife could justify certain incidental restrictions on First Amendment freedoms, such as the National Labor Relations Act's prohibition on secondary boycotts and picketing, but they did not

endorse a freewheeling government authority to suppress specific boycotts that express disfavored messages. Just the opposite, *Claiborne Hardware* held that the States' authority to regulate economic activity could not justify the complete suppression of the consumer boycott in that case, and barred tort liability for business losses arising from the boycott; *a fortiori*, the Court would not have approved a law that targeted civil rights boycotts in particular for penalties. That principle must extend to any attempt to suppress a particular consumer boycott because of its message—a right to boycott solely for the purpose of vindicating perceived constitutional rights would be infinitely malleable and itself viewpoint discriminatory.

I. This case raises a First Amendment question of exceptional importance.

This should have been an easier case than *Claiborne Hardware*. Whereas that decision addressed the intersection of common law tort liability with First Amendment expression, the content-discriminatory law here singles out specific boycotts for punishment. If Mississippi had imposed tort liability only on boycotts of segregated businesses, *Claiborne Hardware* would have been much shorter. *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000) (Scalia, J., dissenting from the denial of certiorari) (describing "civil-rights boycotts directed against businesses with segregated lunch counters" as an "activit[y] long thought to be protected by the First Amendment"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (doubting "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").

But the opinion below holds that consumer boycotts do not receive *any* First Amendment protection, and permits States to punish them on content- and viewpoint-discriminatory grounds. Furthermore, the opinion below is not limited to government funding conditions—its reasoning that no First Amendment rights are even implicated would apply equally to civil or criminal penalties. This novel ruling would have allowed Alabama to outlaw the Montgomery bus boycott, Florida to ban boycotts of apartheid South Africa, or Vermont to penalize boycotts of companies that support Planned Parenthood. It nullifies *Claiborne Hardware*.

These concerns are not hypothetical. Respondents acknowledge that this case implicates the constitutionality of laws in 28 States penalizing boycotts of Israel. Pet. 35; Opp. 3. Some States have already enacted copycat laws to penalize boycotts of the fossil fuel industry, Ky. Rev. Stat. § 41.480 (West 2022), and the firearms industry, Tex. Gov't Code Ann. § 2274 (West 2021). New bills threaten to expand these provisions to penalize boycotts of: the timber, mining, and agriculture industries; companies that do not meet environmental standards or disclosure criteria; companies that do not meet workplace diversity criteria; and companies that do not offer reproductive health care or gender affirming care. *See* H. 3564, 125th Sess. (S.C. 2023).

II. This case is an excellent vehicle for this Court to clarify and reaffirm *Claiborne Hardware*.

The Petition comes to the Court on appeal from a decision affirming a motion to dismiss. It presents a single, purely legal question: whether the First Amendment permits a State to selectively penalize participation in politically motivated consumer boycotts whose message the State disapproves. That question was squarely resolved below. And the Petition presents no disputes of fact, disagreements about the sufficiency of the evidence, or other fact-bound issues.

Respondents contend that this case is a poor vehicle because the Arkansas Times is not participating in a boycott of Israel. Opp. 19. Yet the district court correctly held, and Respondents do not seriously contest, that "[t]he Arkansas Times has standing to bring its boycott-restriction claim because it suffered an injury in fact when it lost a government contract after refusing to comply with Act 710's certification provision. It does not have to allege that it intends to boycott Israel or that it would have boycotted Israel but for Act 710." Pet. App. 55a. The Arkansas Times' injury is the fact that it is being forced to choose between the loss of government advertising contracts and the disavowal of First Amendment freedoms. *See Cole v. Richardson*, 405 U.S. 676, 680 (1972) ("Nor may [government] employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities . . . ."). That injury can be cured by an order enjoining the certification requirement. No more is required for standing.

Respondents alternatively argue that "this case may not directly tee up" the constitutionality of content-based anti-boycott laws, because the law at issue here is a government funding condition, not an outright prohibition. Opp. 21–22. But as the Eighth Circuit acknowledged below: "The government imposes an unconstitutional condition when it requires someone to give up a constitutional right in exchange for a government benefit. This includes making government benefits contingent on endorsing a particular message or agreeing not to engage in protected speech." Pet. App. 5a (internal citations omitted). It is well-established that the government may not seek, through a condition on funding, to control the recipient's First Amendment activities outside the funded program. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013). Because Act 710 restricts Petitioner's activity outside any government-funded program, the fact that it is a funding condition does not alter the core constitutional question—can the State selectively penalize a specific consumer boycott when it opposes the boycott's message?

III. The opinion below is wrong.

A. Respondents' attempts to distinguish *Claiborne Hardware* are unpersuasive.

Respondents contend that *Claiborne Hardware* did not address whether a concerted refusal to purchase consumer goods and services merits First Amendment protection. Opp. 11–12. The decision shows otherwise. This Court began its First Amendment analysis by stating that "[t]he black citizens named as defendants in this action banded together and collectively expressed their

dissatisfaction with a social structure that had denied them rights to equal treatment and respect," 458 U.S. at 907, and concluded by holding that "[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 & n.48 (citing *Flowers*, 377 U.S. at 307). The Court characterized the petitioners' collective withholding of "patronage" as "nonviolent, protected activity." *Id.* at 918. And it went on to hold that liability could not constitutionally be imposed for business losses resulting from the boycott itself. *See id* at 921–24. Neither its holding nor its reasoning is limited to the speech and association supporting the boycott.

Respondents alternatively suggest that the First Amendment may protect boycotts that seek to vindicate other constitutional rights, but not boycotts directed at foreign governments (such as apartheid South Africa). Opp. 13. However, *Claiborne Hardware* held that consumer boycotts seeking to bring about "political, social, and economic change," 458 U.S. at 911, are a form of protected "expression on public issues," *id.* at 913. The notion that expression on public issues is protected only when it seeks to vindicate some *other* constitutional right is contrary to the central premise of the First Amendment, namely that the government cannot penalize expression because of its content or viewpoint. Expression is equally protected whether it seeks to vindicate a right to abortion, or to challenge such a right as unfounded. And the First Amendment robustly protects protests of foreign governments, like other expression on public issues, against content-discriminatory

regulation. *See Boos v. Barry*, 485 U.S. 312, 321–22 (1988).

B. This Court's other precedents are consistent with *Claiborne Hardware*'s recognition that the First Amendment protects consumer boycotts.

Respondents maintain that *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), rejected First Amendment protection for boycotts. Opp. 15–18. But *FAIR* did not address a consumer boycott, and neither *Claiborne Hardware* nor the word "boycott" appears anywhere in the opinion. Respondents implausibly analogize the consumer boycotts at issue here and in *Claiborne Hardware* to the law schools' discriminatory treatment of military recruiters in *FAIR*—arguing that either all concerted refusals to deal must receive constitutional protection or none must. But *FAIR* involved judicial deference to Congress' authority to raise and support the armed forces, 547 U.S. at 58, a compelling interest unrelated to the suppression of expression, while Act 710 selectively penalizes boycotts of Israel because Arkansas disagrees with their message.

There are also good reasons to distinguish between consumer boycotts and businesses' discriminatory refusals to deal. Americans have long used consumer boycotts to express their political beliefs, and government officials have historically refrained from dictating what factors consumers may consider in deciding whether to patronize a particular business. Those historical and contextual factors support *Claiborne Hardware*'s recognition that the First Amendment protects consumer boycotts. *See*

Amici Br. of First Amendment Scholars 16–18. In short, there is a world of difference between this Court's decision in *FAIR*, which upheld a law requiring government-funded universities to allow equal access to military recruiters, and the opinion below, which authorizes States to engage in content and viewpoint discrimination against specific consumer boycotts.

Respondents' reliance on *FTC v. Superior Court Trial Lawyers Ass'n* (*SCTLA*), 493 U.S. 411 (1990), is equally misplaced. Opp. 14–15. True, the Court noted that "nothing in the FTC's order would curtail" efforts to publicize the boycott or petition government officials. *Id.* at 426. That was not the Court's basis for distinguishing *Claiborne Hardware*, though. The Court explained that the *Claiborne Hardware* boycott "differ[ed] in a decisive respect" because its participants "sought no special advantage for themselves," whereas the "immediate objective [of the *SCTLA* boycott] was to increase the price that [the boycott participants] would be paid for their services." *Id.* at 426, 427. The Court accordingly concluded that the First Amendment did not exempt the *SCTLA* boycott from the antitrust laws' content-neutral regulation of anticompetitive activity. *See id.* at 428. The Court's distinction between the "political" boycott in *Claiborne Hardware* and the "economic" boycott in *SCTLA* would have been meaningless if *Claiborne Hardware* did not protect boycott participation at all. And nothing in *SCTLA* suggests that the Court would have tolerated a content-discriminatory anti-boycott law like the one here.

Nor did this Court preclude a First Amendment right to boycott in *Longshoremen*. There, the Court held that a labor union's refusal to handle any cargo

arriving from or destined for the Soviet Union, which disrupted shipping throughout the United States, constituted an illegal secondary boycott under the NLRA. 456 U.S. at 222–26 (discussing 29 U.S.C. § 158(b)(4)). Rejecting the union's First Amendment defense, the Court held that the NLRA's categorical prohibition on secondary boycotts "reflect[s] a careful balancing of interests," *id*. at 226, such as preventing "heavy burden[s] on neutral employers" and the "widening of industrial strife," *id.* at 223. Echoing that decision, *Claiborne Hardware* stated that "[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." 458 U.S. at 912 (internal quotation marks omitted) (citing, inter alia, *Longshoremen*, 456 U.S. 212). In other words, *Longshoremen* and *Claiborne Hardware* concluded that the government's compelling interest in effective labor regulation, which is unrelated to the suppression of expression, justifies some incidental burdens on unions' expressive activities—including picketing and boycotts. *Claiborne Hardware*, 458 U.S. at 912. No such content-neutral interest justifies Act 710's highly selective restriction on boycotts of Israel.[1]

Whereas the antitrust and labor laws broadly regulate whole categories of economic activity in order to vindicate compelling governmental interests unrelated to the suppression of expression, Act 710 singles out boycotts protesting the Israeli government

[1] Gilded Age lower court decisions anticipating the NLRA's boycott provisions, Opp. 8, are similarly inapposite.

for punishment. The only plausible explanation for Act 710's exclusive focus on boycotts of Israel is the government's singular distaste for the message those boycotts express. That is paradigmatic content discrimination, and it triggers strict scrutiny. While "the strong governmental interest in certain forms of economic regulation" may justify content-neutral boycott "regulation[s that] have an incidental effect on rights of speech and association," *Claiborne Hardware*, 458 U.S. at 912, it does not save Act 710, which punishes expressive activity because of its message.

C. History and tradition support *Claiborne Hardware*'s recognition that the First Amendment protects consumer boycotts.

As Petitioner and *amici* have discussed, consumer boycotts are deeply ingrained in this country's democratic traditions. This nonviolent protest tactic has been essential to social movements throughout American history—from the colonial boycotts of British goods to the boycotts of Axis powers before World War II to the Civil Rights Era boycotts protesting segregation to the boycott against apartheid South Africa. *See* Pet. 22–24; Amicus Br. of Prof. Lawrence Glickman 3–15; Amicus Br. of T'ruah *et al.* 5–15. Respondents fail to identify any robust historical support for the government's asserted authority to regulate consumer boycotts, much less its authority to penalize specific consumer boycotts because of their message.[2] They instead argue that the

[2] Other than the NLRA, the only anti-boycott law Respondents identify is the federal Export Administration Act ("EAA") and its state analogues. *See* Opp. 3. The EAA prohibits

First Amendment does not encompass an absolute right to engage in politically motivated commercial transactions or refusals to deal. Opp. 8. The question here, however, is whether the First Amendment permits *content-discriminatory* laws penalizing specific consumer boycotts. There is no tradition suggesting the government enjoys that power.

Respondents argue that the Framers did not believe in an individual's freedom of conscience to decide whether to join a boycott, citing evidence that merchants who violated the First Continental Congress's call for a boycott of British goods were subject to coercion. But the fact that the First Continental Congress, a non-governmental body, may have countenanced coercion to *promote* its boycott of British goods sheds no light on the constitutionality of a State government's content-discriminatory anti-boycott law. Boycott organizers sometimes resort to pressure tactics to enforce compliance with the boycott call. *See Claiborne Hardware*, 458 U.S. at 903–06. The fact that the American revolutionaries used similar

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U.S. companies from entering into explicit or tacit agreements with foreign governments to boycott countries friendly to the United States. *See* 50 U.S.C. § 4842(a)(1)(A) (prohibiting refusals to deal "pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country"). It does not target any *particular* boycott because of its message, and it has been justified on the content-neutral ground that it vindicates the government's important interest in "forestalling attempts by foreign governments to 'embroil American citizens in their battles against others by forcing them to participate in [boycott] actions'" as part of their business dealings abroad. *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307, 1319 (E.D. Wis. 1982) (citation omitted), *aff'd*, 728 F.2d 915 (7th Cir. 1984). No such interest has been asserted here. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1043–44 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020).

tactics does not imply they believed the government should have the authority to suppress private boycotts. To the contrary, when Loyalist critics challenged the legality of the colonial boycotts, American leaders insisted on their right to boycott under the English Constitution; and when the British government sought to suppress the nonimportation and non-consumption associations, the First Continental Congress responded by declaring the right to peaceably assemble. Pet. 22–23 & n.6. That history supports *Claiborne Hardware*'s conclusion that the First Amendment protects consumer boycotts against arbitrary or discriminatory government suppression.

Likewise, early congressional enactments restricting trade with foreign nations tell us nothing about whether the First Amendment was understood to protect *privately organized* consumer boycotts. The federal government's authority to regulate international trade and to impose trade sanctions is undisputed and irrelevant. Respondents point to no evidence that this authority historically encompassed the power to selectively prohibit private citizens from banding together in a voluntary consumer boycott of a foreign country. Nor have Respondents explained why the government's authority to prohibit invidious discrimination in access to public accommodations, housing, employment, and other areas of commercial activity is incompatible with First Amendment protection for *consumer* boycotts, which have a unique historical pedigree. *See* Amici Br. of First Amendment Scholars 13 n.3. If citizens cannot be forced to purchase broccoli, they cannot be forced to engage in unwanted consumer transactions because the

government disapproves of the message their boycott sends.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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