PRESERVING THE RIGHT TO BOYCOTT: HOW THE EIGHTH CIRCUIT COULD HAVE DECIDED *ARKANSAS TIMES V. WALTRIP* IN A MANNER THAT PROVIDED FIRST AMENDMENT PROTECTION TO A TIME-HONORED WAY OF ALL AMERICANS, ESPECIALLY ETHNIC AND RELIGIOUS MINORITIES, TO EXPRESS THEIR POLITICAL GRIEVANCES

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INTRODUCTION

Over the past decade, the BDS (Boycott, Divestment and Sanctions) Movement has increased in prominence due to its opposition to Israel's construction of settlements on the West Bank, a more recent development in the contentious Israeli-Palestinian land dispute.[1] The Palestinians, desiring to preserve the West Bank for their aspirations of constructing their state, have attempted to use the BDS Movement to generate enough international pressure to curtail Israel's West Bank Expansion.[2] As the "B" in their title suggests, one of the main ways the BDS Movement has tried to apply such international pressure is by encouraging those sympathetic to their cause to boycott Israeli products.[3]

With the United States being a prominent supporter of Israel on the world stage, with many allies of Israel wielding a strong influence on its policymaking process,[4] state governments across the United States have reacted to the BDS Movement's call for boycotting Israel by enacting various opposition measures.[5] Perhaps a bit too on the nose, those opposition measures consisting of legislation, executive orders, or gubernatorial orders have been popularly dubbed "anti-BDS

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[1] Sara J. Watkins, Comment, *State Anti-BDS Laws Counteracting the Anti-BDS Movement and the Constitution*. 56 Duq. L. Rev. 199, 202 (2018).

[2] *Id*.

[3] *Id*. (explaining that the boycott applies to the Israeli government itself and Israeli companies).

[4] *American Israel Public Affairs Committee*, INFLUENCE WATCH, https://www.influencewatch.org/non-profit/american-israel-public-affairs-committee/ (last visited Jan. 27, 2023) ("AIPAC is one of Washington, D.C.'s most effective lobbying groups. It has 100,000 members and spent $3.5 million on lobbying in 2018, the most of all Jewish groups. Its bipartisan success is shown in that its bills are normally introduced and cosponsored by Members of Congress from both major parties.").

[5] *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/anti-bds-legislation, (last visited Jan. 27, 2023).

laws."[6] Anti-BDS laws come in two main varieties.[7] First are requirements for state contractors to sign written pledges not to participate in boycotts of Israel or its territories.[8] Second are requirements preventing state pension fund managers from investing in companies participating in such boycotts.[9]

Citing the Supreme Court case *N.A.A.C.P. v. Claiborne Hardware Co.*,[10] opponents of anti-BDS laws argue that these laws unconstitutionally restrict freedom of expression.[11] In response to these arguments, proponents of anti-BDS laws cite a different Supreme Court case, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,[12] and argue that, while calls for and otherwise expressing support for boycotts are protected speech, the purchasing decisions at the heart of boycotts are not.[13]

This Note argues that the best way to reconcile the holdings in *Clairborne* and *Rumsfeld* is to find the purchasing decisions at the heart of a political boycott, when accompanied by speech explaining what political goal those decisions are hoping to achieve and after careful consideration of certain factors, to be protected expressive conduct under the First Amendment.

Part I provides an overview and history of anti-BDS laws since their inception in 2015. Part II examines the political background of anti-BDS Laws and the power dynamics involved in the First Amendment debate. Part III examines the first two cases to challenge anti-BDS laws on First Amendment grounds in federal district court and explains why those cases ultimately failed to reach the federal circuit courts; among these cases, *Jordahl v. Brnovich*,[14] is the first instance of litigation over an anti-BDS statute. Part IV introduces and provides the procedural history of *Arkansas Times LP v. Waldrip*,[15] the main subject of this Note and the first case in which a federal court of appeals delved

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[6] *See generally* Daniel A. Klein, Annotation, *State Statutes or Executive Orders Restricting Boycotts of Israel*, 46 A.L.R.7th Art. 4 (2019). This is in contrast to measures simply denouncing the BDS movement.
[7] Sarah Mansur, *Free speech rights and the rise of anti-BDS legislation*, CHI. DAILY BULLETIN (May 1, 2019, 1:05 PM), https://www.chicagolawbulletin.com/law-day-israel-boycott-laws-free-speech-20190501.
[8] *Id.*
[9] *Id.*
[10] 458 U.S. 886 (1982).
[11] Mansur, *supra* note 7.
[12] 547 U.S. 47 (2006).
[13] Mansur, *supra* note 7 ("Proponents of anti-BDS laws assert that BDS participation is not speech and therefore has no constitutional protection.").
[14] 789 F. App'x 589 (9th Cir. 2020).
[15] 37 F.4th. 1386 (8th Cir. 2022).

into the First Amendment debate around an anti-BDS law, deciding its constitutionality on First Amendment grounds. Part V delves into the substance of the First Amendment debate in *Arkansas Times LP v. Mark Waldrip*. Part VI discusses a well-written amicus brief filed in Arkansas Times by prominent First Amendment scholars on behalf of two Jewish organizations who oppose anti-BDS laws. Part VII provides an overview of the historical role of boycotts as an important mode of expression in the United States and how the Eighth Circuit's decision undercuts it. Part VIII proposes an alternative to the Eighth Circuit's decision that preserves boycotts as an important mode of expression. Part IX analyzes two potential counterarguments. Lastly, Part X concludes by lamenting the Eighth Circuit's failure to enshrine boycotting as a protected expression.

I. AN OVERVIEW AND BRIEF HISTORY OF STATE ANTI-BDS LAWS

As of 2023, 37 states have enacted anti-BDS laws.[16] Formal opposition to the BDS movement by state governments began in April of 2015 when Tennessee's General Assembly passed a measure denouncing the BDS movement, labeling it "one of the main vehicles for spreading anti-semitism and advocating the elimination of the Jewish state."[17] After Tennessee kickstarted the anti-BDS movement, in June 2015 South Carolina ramped things up by barring its state government from contracting with companies that participate in "the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade . . . . "[18] A month later, Illinois enacted its own anti-BDS law that banned its public pension fund managers from investing in companies that boycott Israel.[19]

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[16] *Anti-Semitism: State Anti-BDS Legislation*, *supra* note 5.

[17] S. J. Res. 170, 2015 Gen. Assem., 109th Reg. Sess. (Tenn. 2015).

[18] S.C. CODE ANN. § 11-35-5300 (2023) ("[A] jurisdiction with whom South Carolina can enjoy open trade" is defined as including members of the World Trade Organization and with which the United States or similar agreements).

[19] 40 ILL. COMP. STAT. § 5/1-110.16 (2022) ("'Restricted companies' means companies that boycott Israel, for-profit companies that contract to shelter migrant children, Iran-restricted companies, Sudan-restricted companies, expatriated entities, companies that are domiciled or have their principal place of business in Russia or Belarus, and companies that are subject to Russian Harmful Foreign Activities Sanctions."). In December of 2021, the Illinois State Pension announced plans to divest from Unilever, the parent company of Ben and Jerry's, due to their decision to stop selling ice cream in the West Bank. *State Anti-BDS Legislation*, *supra* note 5.

After the first wave of anti-BDS laws in 2015, more states followed suit from 2016 to 2021.[20] Most of the anti-BDS laws followed the precedent of South Carolina in requiring, in slightly varying forms, state contractors to certify that they are not engaged in a boycott of Israel and to pledge never to do so.[21] Other states like Colorado followed Illinois' example and created a restricted list of companies for its public pension funds.[22] Not to be outdone by the movement it ignited, Tennessee passed legislation in April of 2022 that prohibits state contractors from participating in boycotts of Israel in the present or future.[23] In the current political climate, it is rare to see the state governments of deeply "red" and deeply "blue" states pass nearly identical legislation in agreement on any contentious political issue. However, when it comes to opposing the BDS movement, state governments across the nation have stood united over the last eight years.[24]

II. THE POLITICAL BACKGROUND OF ANTI-BDS LAWS AND THE POWER DYNAMICS INVOLVED IN THE FIRST AMENDMENT DEBATE

One of the main purposes of the First Amendment is to protect the speech of unpopular minorities from being stifled by government authorities.[25] Accordingly, an interlude discussing the political origin of anti-BDS laws and the contrasting influence of the Israel lobby and the Palestinian lobby in the United States is warranted in order to grasp the full significance of the First Amendment debate.

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[20] *Anti-Semitism: State Anti-BDS Legislation*, *supra* note 5.
[21] *See id.*
[22] *Id.* (noting that in 2022, Colorado's pension fund also divested from Unilever.)
[23] TENN. CODE ANN. § 12-4-119(b) (2023).
[24] *Anti-Semitism: State Anti-BDS Legislation*, *supra* note 5. ("The New York State Assembly passed an anti-BDS resolution with a near-unanimous vote . . . ."). Alabama's anti-BDS legislation did pass unanimously. *Alabama Legislature Unanimously Condemns Anti-Israel BDS Movement*, SOUTHERN JEWISH LIFE MAGAZINE (Feb. 18, 2016), https://sjlmag.com/2016/02/17/alabama-legislature-unanimously-condemns-anti-israel-bds-movement/. When is the last time that the legislative bodies in perhaps the bluest of blue and reddest of red states have both received unanimous or near unanimous votes *in agreement* on the same issue?
[25] *See* U.S. CONST. amend. I.

A. An Introduction to AIPAC and the Israel Lobby

Since Israel's founding in 1948, the United States has been a fervent supporter.[26] The United States "annually provides $3.3 billion in Foreign Military Financing and $500 million cooperative programs for missile defense."[27] Additionally, the United States also "participates in a variety of exchanges with Israel, including joint military exercises, research, and weapons development" and has economic and commercial ties with Israel "anchored by bilateral trade of close to $50 billion in goods and services annually."[28] As written by the State Department prominently on its website, the bond between America and Israel "has never been stronger."[29]

The "unbreakable bond"[30] between the United States and Israel is at least partially the result of intense lobbying from supporters of Israel.[31] One of the largest pro-Israel lobbying groups is the American Israel Public Affairs Committee (AIPAC).[32] AIPAC "specifically focuses its influence on members of Congress and other advocacy and lobbying groups to promote arms agreements and other U.S. government support for Israel . . . ."[33] AIPAC gained political influence in the 1980s, creating a "nationwide network of semi-independent groups which acted in concert with [it] and other pro-Israel Jewish advocacy groups."[34] Today, AIPAC spends "tens of millions of dollars in lobbying and campaign funds . . . ."[35] AIPAC "also organizes fundraisers outside of its official network, which creates significant influence through unofficial channels."[36] Other methods of influence wielded by AIPAC include trips to Israel for freshman members of Congress as part of its

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[26] *See U.S. Relations With Israel,* U.S. DEP'T OF STATE (Jan. 20, 2021), https://www.state.gov/u-s-relations-with-israel/ ("Israel is a great partner to the United States, and Israel has no greater friend than the United States.").
[27] *Id.*
[28] *Id.*
[29] *Id.* ("Americans and Israelis are united by our shared commitment to democracy, economic prosperity, and regional security. The unbreakable bond between our two countries has never been stronger.").
[30] *Id.*
[31] *See American Israel Public Affairs Committee, supra* note 4.
[32] *See id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* (saying that in 2018, AIPAC spent $3.5 million on lobbying, and their vice CEO Richard Fishman earned $877,000).
[36] *Id.*

"educational arm" called the American Israel Education Foundation.[37]

AIPAC's political influence is so significant that its proposed legislation is almost always introduced and co-sponsored by a mix of Democrats and Republicans.[38] Both Republican and Democrat leaders have spoken at AIPAC's conferences and in 2020 AIPAC claimed that they expected to host "two-thirds of all Members of Congress" at that year's conference.[39]

B. The Israel Lobby's Influence at the State Level and How that Influence Created Anti-BDS Laws

Pro-Israel lobbying groups greatly influenced state enactments of anti-BDS laws from 2016-2021.[40] The Center for Public Integrity thoroughly examined anti-BDS laws passed by states across the nation and traced their origin to communication between pro-Israel lobbyists with state lawmakers and state executive branch officials.[41] Afterwards, the Center for Public Integrity concluded that the language used in such laws and executive orders was "crafted" by pro-Israel activists.[42] In one such instance, pro-Israel lobbyists wrote the language in the governor of Louisiana's anti-BDS executive order and post-order press release.[43] In another instance, pro-Israel lobbyists provided frequent feedback to the sponsor of Nevada's anti-BDS legislation before approving the bill's language.[44] Similarly, the

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[37] *Id.*
[38] *See id.*
[39] *Id.*
[40] *See* Liz Essley Whyte, *How a bill that seeks to shut down boycotts of Israel is spreading state-to-state*, THE CTR. FOR PUB. INTEGRITY (May 1, 2019), https://publicintegrity.org/politics/state-politics/copy-paste-legislature/how-a-bill-that-seeks-to-shut-down-boycotts-of-israel-is-spreading-state-to-state (The Center for Public Integrity is a non-profit journalism organization "dedicated to investigating systems and circumstances that contribute to inequality in our country.").
[41] *Id.* (explaining that this finding was part of a broader, two-year study of "copycat legislation in state houses.").
[42] *Id.*
[43] *Id.* ("In Louisiana, Democratic Gov. John Bel Edwards did not write his anti-boycott executive order nor the press release accompanying it. Both drafts were sent to him by Mithun Kamath, a lobbyist for the Jewish Federation of Greater New Orleans. In an email obtained in a public records request by the Center for Public Integrity, Kamath said that the draft executive order had been reviewed by AIPAC and Israel Action Network, a group founded by the Jewish Federations of North America to 'counter delegitimization of Israel'. . . . The final executive order and press release were nearly word-for-word what the Federation had delivered.").
[44] *Id.*

sponsor of South Carolina's anti-BDS legislation called a pro-Israel lobbyist his "buddy and wordsmith-in-chief."[45]

According to the Center for Public Integrity, pro-Israel lobbyists advocating for anti-BDS legislation "are building off goodwill generated from years of courting state officials with—sometimes free—trips to Israel."[46] Before Nevada passed its anti-BDS law, then-Lieutenant Governor Mark Hutchinson, an affiliate of the Israeli-American Coalition for Action, had taken several AIPAC-sponsored trips to Israel over the years and worked with a pro-Israel lobbyist to craft the bill's language.[47] One Nevada assemblywoman supporting the anti-BDS bill emailed Hutchinson for feedback on her planned testimony, which he, in turn, forwarded to the lobbyist to communicate for approval.[48] Similar to Hutchinson, Alan Clemmons, the sponsor of South Carolina's anti-BDS legislation, said that a trip to Israel inspired his legislation. [49]

C. The Contrasting Influence of the Palestinian Lobby and Its Failure to Stop Anti-BDS Laws

Given the power dynamics of the First Amendment debate around anti-BDS laws, the Israel lobby wields significant influence on both federal and state government officials, using that influence to stifle the speech of the BDS movement. But, what about the Palestinian lobby? How does its power and influence compare to its opposition?

1. Percentages and Numbers in Key States: The Arab Voter Base vs. The Jewish Voter Base

Palestinians compromise five percent of the larger Arab American population as of 2019.[50] As discussed by Dr. Mitchell Bard, a foreign policy analyst specializing in American Middle

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[45] *Id.* Straight out of the horse's mouth.
[46] *Id.* (demonstrating that *free* does not equate to no expectations attached).
[47] Whyte, *supra* note 40 ("Former Nevada Lt. Gov. Mark Hutchison worked closely with a pro-Israel lobbyist, Dillon Hosier, to craft and pass the bill modeled from Arizona's law, according to emails obtained by the Center for Public Integrity.").
[48] *Id.* ("At one point an assemblywoman supporting the bill asked for the lieutenant governor's thoughts on her planned testimony. His office forwarded the testimony to Hosier, the lobbyist.'Hits all the right notes' the lobbyist replied.").
[49] *Id.*
[50] Mitchell Bard, *The Pro-Israel & Pro-Arab Lobbies*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/the-pro-israel-and-pro-arab-lobbies (last visited Sept. 5, 2023) [hereinafter *The Pro-Israel & Pro-Arab Lobbies*].

East Foreign Policy and Director of the Jewish Virtual Library,[51] the "disproportionate influence of the American Jewish Population" is in "direct contrast with the electoral involvement of Arab Americans."[52] While acknowledging that "[a]bout half of the Arab population is concentrated in five states—California, Florida, Michigan, New Jersey, and New York—that are all key to the electoral college," Bard claims that "the Arab population is dwarfed by that of the Jews in every one of these states except Michigan."[53] Thus, because of their population in key swing states, the Arab population does not have nearly as much influence over national or state elections.[54] To quote President Harry S. Truman at the 1948 Arab-Israeli peace talks in Geneva, "I won't tell you what to do or how to vote, but I will only say this. In all of my political experience, I don't ever recall the Arab vote swinging a close election."[55]

2. The Power and Influence of Pro-Palestinian Lobbying Groups vs. The Israel Lobby: A Stark Contrast

Despite receiving funding from oil producers and groups like the Ford Foundation,[56] "[f]rom the beginning, the Arab lobby has faced a disadvantage in electoral politics and organization."[57] One reason that the Arab lobby, and especially Palestinian-focused groups within the Arab lobby, is severely disadvantaged in electoral politics and organization is a lack of funds and effective spending.[58] Perhaps the one group that can rival the Israel lobby regarding access to funds is ultra-wealthy, oil-producing Arab states like Saudi Arabia and Qatar.[59] However, most of the lobbying money received from those Arab states is spent towards advancing specific, often economic goals of the states and their rulers rather than strengthening the

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[51] MITCHELL BARD, mitchellbard.com (Last visited Mar. 3, 2023). http://mitchellbard.com. Bard is also Executive Director of American-Israeli Cooperative Enterprise and a foreign policy activist. *Id.*

[52] *The Pro-Israel & Pro-Arab Lobbies*, *supra* note 50.

[53] *Id.* (including a table that breaks down the Jewish and Arab population by number and percentage in each of these states.).

[54] *See id.*

[55] *Id.*

[56] *Id.* ("For a number of years, AFME was the principal pro-Arab-American organization . . . . [T]he group received funding from oil companies and other corporations as well as the Ford Foundation, the State Department, and the Saudi national airline.").

[57] *See id*.

[58] *Id.*

[59] *Id.*

relations between them and the United States.[60] In contrast to the pro-Israel lobby, the National Association of Arab Americans (NAAA), the "most influential" registered pro-Arab lobbying group, does not enjoy the support of most major American corporations, except for a few oil companies. This stands in contrast to AIPAC and the pro-Israel lobby, perhaps reflecting that corporations "may feel constrained by the implicit threat of some form of retaliation by the Israeli lobby."[61] There is not even a record of lobbyists working on behalf of the Palestinian Authority.[62] Overall, the Israel lobby outspent pro-Arab groups forty-to-one in the last fourteen election cycles, demonstrating that Palestinian lobbying groups have to work under a substantial monetary disadvantage compared to their opposition.[63]

D. The Perfect Foundation for First Amendment Litigation

When one considers the content of anti-BDS laws combined with the power dynamics in play between the supporters of Israel and the supporters of Palestine, the latter taking the battle to the judicial forum is unsurprising. The essence of the First Amendment is to protect one's freedom of expression against those in power who seek to infringe upon it.[64] When the political process fails to protect one's First Amendment rights, the judicial branch is the only resourse. With Palestinian Americans being a tiny minority of the United States population and lacking the funds and strategic leadership to exert themselves in the political process beyond their numbers provide, it is unsurprising that laws from the Israel lobby designed to curtail a form of Palestinian expression against Israel is a hot button First Amendment debate.

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[60] *See id.*

[61] *Id.* ("The formal Arab lobby is the National Association of Arab-Americans (NAAA) . . . consciously patterned after its counterpart, the American Israel Public Affairs Committee (AIPAC).") ("Even today, arguably, [NAAA] is the most influential component of the [Arab] lobby. Nevertheless, most of the nation's major corporations have not supported the Arab lobby. . . . [T]he reason is that most corporations prefer to stay out of foreign policy debates; moreover, corporations may feel constrained by the implicit threat of some form of retaliation by the Israeli lobby.").

[62] *Id.*

[63] *See id.*

[64] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances.").

III. 2017-2022: THE FIRST AMENDMENT BATTLE IS TEASED BUT ULTIMATELY AVOIDED IN THE FEDERAL DISTRICT COURTS

Litigation over the constitutionality of anti-BDS laws has been waged in federal courts across the United States. The first constitutional challenge to an anti-BDS law was in the 2017 Arizona case *Jordahl v. Brnovich*.[65] This case involved an attorney that contracted with the state of Arizona to provide legal services, which the state of Arizona stopped paying him for after he refused to promise that he would not participate in boycotts of Israel.[66] After the state refused to pay him, the attorney challenged Arizona's anti-BDS law on the grounds that it violated his First Amendment rights.[67] The District Court of Arizona ruled in his favor, finding that boycotts of Israel were expressive conduct protected by the First Amendment and issuing an injunction of the certification requirement of Arizona's anti-BDS law; Arizona then appealed to the Ninth Circuit, who found the case moot.[68]

The federal district courts saw more action around anti-BDS laws in 2017 with *Koontz v. Watson*,[69] a case brought by an educator in Kansas that lost out on a position as a teacher-trainer in Kansas' Department of Education after she refused to certify that she would not participate in a boycott of Israel.[70] After the teacher brought suit on First Amendment grounds, the District Court of Kansas found that her right to boycott was protected speech under the First Amendment, the law violated that right, and that an injunction was necessary to protect the public interest; the state of Kansas appealed.[71] Kansas modified its anti-BDS during the appeals process to exempt the teacher, and, likely anticipating that her claim would be found moot on appeal, the

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[65] Jordahl v. Brnovich, 789 F. App'x 589, 591 (9th Cir. 2020).
[66] *Id.*
[67] *Id.*
[68] *Id.* Because Arizona changed its anti-BDS law to exempt the attorney (while leaving most of the substance of the law intact) during the appeals process, the Ninth Circuit found the attorney's claim to be moot and ultimately did not address the constitutionality of Arizona's anti-BDS law. *Id.*
[69] Koontz v. Watson, 283 F.Supp.3d 1007 (D. Kan. 2018).
[70] *Id.* at 1014.
[71] *Id.* at 1021–22 ("The plaintiff has met her initial burden. The First Amendment protects the right to participate in a boycott, as the Supreme held explicitly in *NAACP v. Claiborne Hardware Co.*" (citation omitted)) ("The conduct prohibited by the Kansas Law is protected for the same reason as the boycotters' conduct in *Claiborne* was protected.").

teacher dropped her case.[72] Once again, the underlying First Amendment issue was left unresolved by the circuit courts.[73]

In the summer of 2021, a federal district court in Georgia denied a motion to dismiss against a plaintiff challenging the constitutionality of Georgia's anti-BDS law, finding the statute "imposes a condition on those who contract with the state of Georgia that implicates the contractor's First Amendment rights."[74] In Texas in early 2022, a federal district court implemented an injunction on a Texas anti-BDS law.[75] To avoid the risk of having the entirety of their anti-BDS law being found unconditional, Georgia and Texas also narrowed the scope of their anti-BDS law to not apply to the plaintiff at-hand.[76]

IV. THE TIPPING POINT IN ARKANSAS: THE FIRST AMENDMENT DEBATE IS FINALLY DECIDED (AND THEN RE-DECIDED) IN A FEDERAL COURT OF APPEALS WITH *ARKANSAS TIMES LP V. MARK WALDRIP*

In 2017, Arkansas passed an anti-BDS law that followed the South Carolina model, requiring contractors to certify in writing that they are not currently and will not engage in a boycott of Israel for the duration of the contract.[77] Titled "An Act to Prohibit Public Entities From Contracting With and Investing in Companies That Boycott Israel,"[78] the law defines a "boycott of Israel" to be "engaging in refusals to deal," "terminating business activities," and "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or Israeli-controlled territories, in a discriminatory manner."[79] The statute goes on to state that

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[72] *See State Legislation: Kansas*, PALESTINE LEGAL (Dec. 16, 2020), https://legislation.palestinelegal.org/location/kansas/; *see also Federal Judge Issues Injunction Against Kansas Anti-Boycott Law (Updated)*, PALESTINE LEGAL (July 11, 2018), https://palestinelegal.org/news/2018/2/6/federal-judge-issues-injunction-against-kansas-law?rq=kansas.

[73] *Federal Judge Issues Injunction Against Kansas Anti-Boycott Law (Updated),* PALESTINE LEGAL (July 11, 2018), *https://palestinelegal.org/news/2018/2/6/federal-judge-issues-injunction-against-kansas-law?rq=kansas.*

[74] Martin v. Wrigley, 540 F. Supp. 3d 1220, 1229 (N.D. Ga. 2021) (detailing when a well-known journalist was prevented from giving a speech at a public university in Georgia due to Georgia's anti-BDS statute).

[75] Elliot Setzer**,** *Eight Circuit Upholds Arkansas Anti-BDS Law,* LAWFARE (July 8, 2022), https://www.lawfareblog.com/eighth-circuit-upholds-arkansas-anti-bds-law.

[76] *See id.*

[77] *See* Ark. Code Ann. § 25-1-503 (West 2017).

[78] An Act to Prohibit Public Entities from Contracting with and Investing in Companies that Boycott Israel; and for Other Purposes, SB 513, 2017 Ark. Acts 710.

[79] *Id.* § 25-1-502(1)(A)(i).

participation in a boycott of Israel can be inferred from a "statement" referencing that an entity 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."[80] The phrase "other actions" became the center of the First Amendment debate in *Arkansas Times LP v. Mark Waldrip.*[81]

The newspaper, the Arkansas Times, contracted with the University of Arkansas-Pulaski Technical Community College to publish advertisements in their periodic publications.[82] When the contract was up for renewal in 2018, the University of Arkansas-Pulaski Technical Community College, pursuant to Arkansas' anti-BDS law, asked the Arkansas Times to certify that it was not and would not engage in a boycott of Israel for the duration of the contract.[83] Like the plaintiffs in *Jordahl* and *Koontz*, the Arkansas Times claimed that Arkansas' anti-BDS law unconstitutionally infringed on its freedom of expression by "impermissibly compelling speech regarding government contractors' political beliefs, association, and expression and restricting them from engaging in protected First Amendment activities, including boycott participation and boycott-related speech" and sought an injunction.[84] The United States District Court for the Eastern District of Arkansas denied the Arkansas Times injunctive relief and dismissed its claim,[85] citing *Rumsfeld* and finding that economic boycotts were neither speech nor epxressive conduct, and therefore not protected by the First Amendment; specifically, the court found that "meetings, speeches, and non-violent picketing" were protected by the First Amendment but "individual purchasing decisions" were not.[86] The court's ruling prompted the Arkansas Times to appeal to the Eighth Circuit Court of Appeals.[87]

After reaching the Eighth Circuit, the First Amendment battle in took a quick succession of twists and turns. Initially, in its 2021 decision, the Eighth Circuit reversed the district court's ruling and remanded, finding the certification requirement unconstitutional because the prohibition on "'other actions

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[80] *Id.* § 25-1-502(1)(B).
[81] Ark. Times LP v. Waldrip, 988 F.3d 453, 464 (8th Cir. 2021).
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 458 (departing from district court precedent in *Jordahl* and *Koontz*).
[86] Waldrip, 362 F.Supp.3d at 625.
[87] Waldrip, 37 F.4th at 1387.

intended to limit commercial relations with Israel'" was an unacceptable infringement on freedom of expression.[88] However, in 2022, the Eighth Circuit, sitting *en banc*, reversed course on its earlier decision and found that the certification requirement limited "non-expressive commercial conduct" and thus did not violate the First Amendment and that the statute's requirement that contractors for public entities had to certify that they would not boycott Israel for the contract's duration did not constitute "compelled speech" in violation of the First Amendment.[89] Thus, albeit in a flipflopping manner that was likely due to the different composition of the court at each hearing, the Eighth Circuit Court of Appeals had the honor of being the first federal circuit court to issue a decision on the First Amendment debate around anti-BDS laws.

V. THE CORE ISSUE AT THE HEART OF *ARKANSAS TIMES LP V. MARK WALDRIP* AND THE GREATER DEBATE AROUND THE CONSTITUTIONALITY OF ANTI-BDS LAWS: ARE BOYCOTTS, INCLUDING CALLS FOR BOYCOTTS, PROTECTED SPEECH?

The main issue that the Eighth Circuit had to wrestle with in *Arkansas Times LP v. Mark Waldrip* was reconciling *N.A.A.C.P. v. Claiborne Hardware Co.*, cited by the "Arkansas Times," and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*, cited by the state of Arkansas.[90]

N.A.A.C.P. v. Claiborne Hardware Co. was a 1980's case involving white store owners in Mississippi who were the target of a civil rights boycott.[91] The white store owners sued the N.A.A.C.P. for their lost business earnings and were initially awarded damages.[92] On appeal, the Supreme Court reversed and ruled that nonviolent boycotts are "a form of speech or conduct ordinarily entitled to protection" under the First Amendment.[93] About the boycott in the case at hand, the Supreme Court held that the First Amendment protected its speeches, nonviolent picketing, and calls for others to join.[94] Perhaps referencing whether the purchasing decisions at the heart of a political boycott are protected expression, the court acknowledged that while states can regulate economic activities, it found "no

[88] *Id.* at 1390.
[89] *Id.*
[90] *Id.*
[91] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 888–89 (1982).
[92] *Id.* at 889–96.
[93] *Id.* at 907.
[94] *Id.* at 907.

comparable right to prohibit peaceful political activity such as that found in the boycott in this case."[95]

Rumsfeld v. Forum for Academic & Institutional Rights, Inc. was a case involving the Solomon Amendment, which required college and graduate schools to provide assistance and access to military recruiters.[96] To protest the military's "Don't Ask, Don't Tell" policy, several law schools across the country refused access to military recruiters on campus, and the Association of Law Schools and Law Facilities brought suit to challenge the Solomon Amendment's constitutionality to try to protect their right to protest in this fashion.[97] The Supreme Court found that the law schools' conduct was not the kind of "inherently expressive" conduct like flag burning that the Court found was protected by the First Amendment.[98] The Court came to this conclusion because it believed that an outsider would not know why the universities would not permit military recruiters on campus without an accompanying explanation.[99] The Court illustrated this point by saying that someone who sees military recruiters doing their job outside of the laws schools' campuses would have "no way of knowing whether the law school is expressing its disapproval of the military…."[100]

In concluding its holding on the petitioners' freedom of expression argument, the *Rumsfeld* Court warned against considering an action expressive conduct merely because speech was "attached" to it.[101] The Court then provided the example that a decision allowing someone to be exempted from paying taxes under the guise of freedom of expression would be improper.[102] In providing that example, the Court articulated that attaching an explanation as to the political reasons for not paying one's taxes should not create a presumption that the act of not paying one's taxes is protected expression.[103] If it were found that not paying one's taxes, under those circumstances, was protected

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[95] *See id.* at 886.
[96] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 51 (2006).
[97] Setzer, *supra* note 76.
[98] Rumsfeld, 547 U.S. at 66 ("Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive.").
[99] *Id.* ("The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection . . . .").
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

expression, the burden would then be placed on the government to prove that they have a sufficient substantive reason as to why making one pay their taxes should override the citizen's act of protected expression in not paying. The Court strongly disfavored shifting the burden to the government in such a situation.[104]

A. The Eighth Circuit Finds that the Actions at the Heart of the Boycott Are Not Protected Expression

In *Arkansas Times LP v. Mark Waldrip*, one of the Arkansas Times' central arguments is that the phrase "other actions that are intended to limit commercial relations with Israel" in Arkansas' anti-BDS law included boycotts, a protected form of speech under *N.A.A.C.P. v. Claiborne Hardware Co.*[105] In trying to balance the First Amendment precedent of the two aforementioned Supreme Court cases, the Eighth Circuit ultimately found a way to circumvent the precedent of *N.A.A.C.P. v. Claiborne Hardware Co.*, falling back on *Rumsfield v. Forum for Academic & Institutional Rights, Inc.* in reaching its decision.[106] According to the *Arkansas Times* court, "[c]ontrary to Arkansas Times's argument, *Claiborne* only discussed protecting expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott."[107] In other words, the court's interpretation of *N.A.A.C.P. v. Claiborne Hardware Co.* is that calls for or otherwise expressing support for boycotts is constitutionally protected speech but actually participating in boycotts is not necessarily.[108] The court found the purchasing decisions in a boycott to not be inherently expressive because, citing and analogizing to the absence of military recruiters on university campuses in *Rumsfeld*, an independent observer could

[104] *See id.* (citing United States v. O'Brien, 391 U.S. 367 (1968)). *O'Brien* is a famous Supreme Court case ("the Vietnam draft card burning case") explaining when the government can have a sufficient substantive reason for regulating conduct, even if such conduct is protected expression. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968). For administrability reasons, one can see why the *Rusmfeld* court would not be eager to excessively impose the burden-shifting *O'Brien* analysis on the government, especially for matters that are obviously important to public policy-like paying one's taxes.

[105] *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1390 (8th Cir. 2022).

[106] *Id.* at 1392.

[107] *Id.*

[108] Setzer, *supra* note 76 (noting a distinction between a boycott intending to effectuate rights and serve "'parochial economic interests'").

not tell why boycotters made those decisions without accompanying expressive conduct.[109]

B. The Eighth Circuit Holds that Arkansas' Anti-BDS Law Does Not Infringe Upon Constitutionally Protected Expression Accompanying a Boycott of Israel

With the Eighth Circuit narrowly interpreting the holding of *N.A.A.C.P. v. Claiborne Hardware Co*. to mean that only expressing support for boycotts is protected expression under the First Amendment, the constitutionality of Arkansas' statute hinged on whether or not its prohibition on "other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories" included such expression.[110] Citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the court found that Arkansas' anti-BDS law prohibited "purely commercial, non-expressive conduct."[111] The court noted that the law "does not ban Arkansas Times from publicly criticizing Israel, or even protesting the statute itself" and "only prohibits economic decisions that discriminate against Israel."[112] The court found this to be the case by choosing a method of statutory interpretation that presumes an ambiguous phrase in a statute should be read in a limiting manner to preserve its constitutionality.[113] With this principle in mind, the court found that the preceding phrases "engaging in refusals to deal" and "terminating business activities" dealt with purely commercial activities and that "other actions" should be interpreted in the same fashion.[114]

In her dissent, Judge Jane Kelly, the author of the Eighth Circuit's 2021 opinion,[115] disagreed with the majority's characterization of "other actions" as strictly applying to unprotected commercial conduct.[116] Instead, Judge Kelly argues that this phrase "could encompass a much broader array of

[109] *Waldrip*, 37 F.4th at 1392.
[110] *Id.*
[111] *See id.* at 1394.
[112] *Id.*
[113] *See* Setzer, *supra* note 76 ("First, the majority employed a presumption that an ambiguous statute should be construed with a limiting interpretation that preserves its constitutionality.").
[114] *Id.* ("The court reasoned that because the specific phrases listed before the 'other actions' provision ('engaging in refusals to deal' and 'terminating business activities') related solely to commercial activities, it followed that the general phrase 'other actions' did as well.").
[115] Ark. Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021), vacated by 37 F.4th 1386, 1395 (8th Cir. 2022).
[116] Waldrip, 37 F.4th at 1395 (Kelly, J., dissenting).

conduct . . . at least some of which would be protected by the First Amendment."[117] Judge Kelly went on to further state that "donating to causes that promote a boycott of Israel, encouraging others to boycott Israel, or even publicly criticizing the Act with the intent to 'limit commercial relations with Israel' as a general matter. And any of that conduct would arguably fall within the prohibition."[118] In other words, while seemingly sharing the majority's view that the *Claiborne Hardware Co.* holding only applies to prohibitions of expressive activities accompanying a boycott rather than the purchasing decisions themselves, Judge Kelly disagreed with the majority's finding that Arkansas' anti-BDS law prohibits purely commercial conduct and does not adequately infringe upon the expression related to that conduct to be found unconstitutional.[119]

VI. FIRST AMENDMENT SCHOLARS ON ANTI-BDS LAWS

Several groups filed amicus briefs out of concern for the precedent the Eighth Circuit would set in upholding the district court's decision.[120] Among these parties were prominent First Amendment scholars from Columbia University's Knight First Amendment Institute and from Georgetown Law's Institute for Constitutional Advocacy and Protection (ICAP). Though both groups of scholars are highly respected in their expertise of the First Amendment and crafted well-written (and in many ways overlapping) arguments,[121] the argument of ICAP is especially worth analyzing because of *who* they represented--two well-respected Jewish political groups.[122] These two groups were concerned about the negative effect that such a decision by the Eighth Circuit would set on the right of unpopular minorities to express their concerns and desires through boycotting.[123]

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[117] *Id.*
[118] *Id.*
[119] *See id.*
[120] *See*, *e.g.*, Brief of T'ruah and J Street as Amici Curiae in Support of Plaintiff-Appellant and Reversal, Arkansas Times LP v. Waldrip as Tr. of Univ. of Arkansas Bd. of Trustees, 37 F.4th 1386 (8th Cir. 2022) (No. 19-1378) [hereinafter *Brief of T'ruah and J Street*]; *Arkansas Times v. Waltrip*, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY (last visited May 12, 2023), https://knightcolumbia.org/cases/arkansas-times-v-waldrip.
[121] *See generally Brief of T'ruah and J Street*, *supra* note 126; *Arkansas Times v. Waltrip*, *supra* note 126.
[122] *Brief of T'ruah and J Street*, *supra* note 126.
[123] *See generally id.*; *Arkansas Times v. Waltrip*, *supra* note 126.

A. Amicus Brief Action: Prominent First Amendment Scholars Articulate an Argument for How to Reconcile Claiborne Hardware Co. *and* Rumsfeld

ICAP, on behalf of the Jewish organizations T'ruah and J Street, filed an amicus brief, claiming that Arkansas' anti-BDS law violates the First Amendment by prohibiting the boycotts of Israel.[124] In its brief, ICAP argued that consumer boycotts are legitimate forms of collective action that communicate political messages and contribute to an open and honest dialogue.[125]

Writing in support of its belief that the act of boycotting is protected speech, ICAP emphasized the First Amendment's purpose in protecting speech of unpopular minorities from those in positions of power, citing historical precedent of boycotts as an effective mode of expression to enact positive change.[126] ICAP wrote that consumer boycotts "played a critical role in the founding of the United States [and] the dismantlement of Jim Crow . . . ."[127] ICAP also noted that the Jewish community itself had effectively used boycotts as "a tool of self-defense," referencing American Jews' boycott of German goods during Adolf Hitler's rise to power in the 1930s.[128] ICAP went on to reference two "dark chapters of American history," the First Red Scare of the 1920s and the latter Red Scare of the McCarthy Era.[129] ICAP analogized these dark chapters of American history to the situation of Palestinian Americans today by describing how Jewish Americans were a discriminated minority during

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[124] *Georgetown Law's ICAP Files Amicus Brief Arguing Arkansas's Anti-BDS Law Violates First Amendment*, GEORGETOWN LAW, https://www.law.georgetown.edu/icap/our-press-releases/georgetown-laws-icap-files-amicus-brief-arguing-arkansass-anti-bds-law-violates-first-amendment/ (last visited Mar. 19, 2023). T'ruah and J Street are two Jewish groups that are opposed to anti-BDS Laws. *Id.*

[125] *Brief of T'ruah and J Street*, *supra* note 126, at 1–7.

[126] *Id.* at 4–5.

[127] *Id.* at 4 (citing Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1000 (1989); 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)).

[128] *Id.* at 4–5 (citing *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.")).

[129] *Id.*

those two periods and needed the First Amendment to protect their speech.[130]

1. To ICAP, the First Amendment Serves an Important Role in Protecting the Expression of Unpopular Minorities, and Boycotts are a Form of Such Expression

After explaining how the First Amendment serves an important role in protecting the speech of unpopular minorities and how boycotts have historically been an important mode of expression for such minorities, ICAP explained how the Supreme Court recognized this principle in *Claiborne Hardware Co*.[131] Subsequently, ICAP asserted its belief that the Eastern District of Arkansas was wrong in its "strained reading" of its holding that the First Amendment did not protect the "individual purchasing decisions" at the heart of a boycott.[132] In arguing against the district court's holding, ICAP claimed that if "only the meetings, speeches, and picketing that supported the boycott" were protected by the First Amendment, then the Supreme Court's holding would make "little sense" because "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."[133]

To bolster its argument that the First Amendment protects purchasing decisions of a boycott, ICAP also cited *FTC v. Superior Court Trial Lawyers Association*, a case where the Supreme Court found that the act of boycotting is protected expression under the First Amendment.[134] The First Amendment issue at the heart of *FTC v. Superior Court Trial Lawyers Association* involved the constitutionality of a cease-and-desist order by the FTC to court-appointed attorneys who boycotted representing indigent defendants due to poor compensation rates.[135] Despite the FTC's order specifically applying to the act of boycotting further legal representation and not to the act of publicizing or speaking in support of the boycott, the Court found the purchasing decision of a boycott to be a protected form of

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[130] *See id.* at 8 ("Anti-BDS laws like [Arkansas' anti-BDS law] are troubling echoes of the past and cannot be squared with the First Amendment and the jurisprudence that has emerged construing its protections.")
[131] *Id.* at 14.
[132] *Id.*
[133] *Id.* at 15–16.
[134] *Id.* at 16 (citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)).
[135] *Id.*

expression because " '[e]very concerted refusal to do business with a potential customer or supplier has an expressive component.' "[136]

2. ICAP Asserts That the District Court Misunderstood and Misapplied the Holding in *Rumsfeld*

After arguing that a proper interpretation of *Claiborne Hardware Co.* and other subsequent cases show that the act of boycotting is in itself a protected form of expression, ICAP went on to attack the district court's view on *Rumsfeld*.[137] ICAP claimed that the Solomon Amendment at the heart of *Rumsfeld* was written in "facially neutral" language that denied federal contracts to schools that boycotted hosting military recruiters for "any reason, political or apolitical."[138] In other words, the Supreme Court was okay with the neutral language of the Solomon Amendment allowing for the federal government to withhold contracts for reasons that were "political," such as a value judgment on the military as a career path for their students.[139] With that in mind, for a boycott to be considered a form of expression protected by the First Amendment, accompanying speech explaining their *political* reasons for boycotting was necessary.[140]

Unlike the Solomon Amendment, Arkansas' anti-BDS law was not written in facially neutral language, according to ICAP.[141] In making this point, ICAP emphasized the language banning contracts with companies that "engage in refusals to deal, terminat[e] business activities" or "otherwise limit commercial relations with Israel in a discriminatory manner."[142] ICAP hypothesized on what an example of facially neutral language would look like in Arkansas' anti-BDS law, concluding that it would probably deny contracts to companies who refuse to do business with Israel for purely apolitical reasons, such as a

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[136] *Id.*
[137] *Id.* at 18.
[138] *Id.*
[139] *See id.* at 18–19 ("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.").
[140] *See id.* at 19.
[141] *Id.*
[142] *Id.* (Citing ARK. CODE ANN. § 25-1-502(1)(A)(i)). ICAP claimed that the language of Arkansas' anti-BDS law shows that it was "a policy intended to penalize expressive activism concerning the Israeli-Palestinian conflict." *Id.* at 20.

domestic company that pledges to only partake in business deals with other domestic companies.[143]

Not only does Arkansas' anti-BDS law not use neutral language to avoid implicating protected political expression, but ICAP also found that it goes out of its way to ban protected political expression.[144] In reinforcing this point, ICAP cited the mechanism to determine whether a company is boycotting Israel.[145] Arkansas' anti-BDS law's mechanism to make such a determination requires the Arkansas Development and Finance Authority "to consider . . . 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.'"[146] In the view of ICAP, "[t]his provision specifically authorizes state agencies to make contracting decisions based on the content of speech that accompanies boycott activities[,]" which 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."[147]

3. ICAP Finds that the District Court Underestimates the Expressive Power of "Individual Purchasing Decisions" When They Are Part of a Coordinated, Collected Effort

In wrapping up its argument that Arkansas' anti-BDS law is an unconstitutional infringement on freedom of expression, ICAP notes what it believes to be a fundamental flaw in the reasoning of the district court: its inability to perceive the powerful expressive effect of "individual purchasing decisions" when those decisions are part of a coordinated, collective effort to boycott.[148] ICAP analogizes boycotts to parades, citing to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[149] In *Hurley*, the Supreme Court found that "[p]arades are . . . a form of expression," because they are composed of "marchers who are making some sort of collective point, not just

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[143] *See id.* at 19.
[144] *Id.* at 19–20.
[145] *Id.* at 20.
[146] *Id.* (quoting ARK. CODE ANN. § 25-1-502(1)(B)).
[147] *Id.*
[148] *Id.* at 20 ("By examining boycotts at the molecular level, the district court underestimates their expressive value.")
[149] *Id.* at 21.

to each other but to bystanders along the way."[150] ICAP argued that the district court failed to understand the "Supreme Court's boycott jurisprudence" by "analyzing consumer boycotts through too narrow of a lens" and "fail[ing] to see their expressive power at the collective level."[151] ICAP found a similar analogy in campaign contributions, for which campaign finance law recognizes the principle "that group association amplifies expression that might be less powerful by itself."[152] In the eyes of ICAP, boycotts are the "mirror image of campaign financing."[153] ICAP argued, "[i]nstead 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," and "[t]he 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."[154]

Additionally, ICAP explained that the "[i]mpact of anti-BDS laws on collective expression is evident from the stories of the plaintiffs who have come forward to challenge them."[155] Referencing several other federal court cases litigating the constitutionality of anti-BDS laws,[156] ICAP explained how anti-BDS laws prevented individuals and companies from joining in collective action and effectively forced them to "stand on the sidelines . . . ."[157] After making this point, ICAP concluded its

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[150] *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995)).
[151] *See id.* ("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.").
[152] *Id.* 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.'" *Id.* (quoting 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.'" *Id.* (quoting Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkley, 454 U.S. 290, 294 (1981)).
[153] *Id.* at 22.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 22–23. In making this point, the ICAP cities *Koontz* and *Jordahl* and explains how the anti-BDS laws in those cases stopped the plaintiffs from partaking in collective expression. *Id.* (citing Koontz v. Watson, 283 F.Supp.3d 1007, 1013–14 (D.Kan. 2018); Jordahl v. Brnovich, 336 F.Supp.3d 1016, 1028-29 (D. Ariz. 2018)).
[157] *Id.* at 23.

brief with the firm stance that anti-BDS laws like Arkansas' "cannot be reconciled with the First Amendment."[158]

4. Despite Their Compelling Argument, ICAP is Ultimately Ignored by The Eighth Circuit

By upholding the original district court decision and narrowly interpreting *Claiborne Hardware Co.* to find that the act of boycotting was not a protected form of expression,[159] the Eighth Circuit effectively ignored the arguments of the First Amendment scholars and ICAP; instead, the Eighth Circuit, even the dissent,[160] allowed the constitutionality of Arkansas' anti-BDS law to hinge solely on whether it infringed upon accompanying explanatory speech.[161]

VII. THE EIGHTH CIRCUIT'S PRECEDENT IMPAIRS AN IMPORTANT MODE OF EXPRESSION AND AFFECTS FIRST AMENDMENT RIGHTS OF A VULNERABLE MINORITY

The Eighth Circuit missed an important opportunity to reconcile the holdings in *Claiborne Hardware Co.* and *Rumsfeld* in a way that would preserve political boycotts as a protected mode of expression. By finding that the expression accompanying a boycott is protected under the First Amendment but not the purchasing decision at the heart of it, the Eighth Circuit is taking away one's right to participate in a boycott without repercussions from the state; if not overturned, their decision will have negative consequences like stifling effective political participation for minorities, including supporters of the BDS movement. The best way to reconcile the holdings of *Claiborne Hardware Co.* and *Rumsfeld* in a way that preserves freedom of expression would have been to find the purchasing decisions of a political boycott to be protected expression when accompanied by explanatory speech explaining what political goal those decisions are hoping to achieve.

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[158] *See id.* ("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."). In their view, quoting Justice Louis Brandeis, a zionist, "'the remedy'" for unpopular speech "'is more speech, not enforced silence.'" *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). While ICAP believes that "Arkansas is free to express its opposition to boycotts against Israel," it cannot transform that opposition into laws that "penalize those who participate in them." *Id.*

[159] Ark. Times LP v. Waldrip, 37 F.4th 1386, 1392 (8th Cir. 2022).

[160] *Id.* at 1395 (Kelly, J., dissenting).

[161] *Id.* at 1392.

A. The Historical Role of Boycotts in American Politics and How the Decision in Arkansas Times *Diminishes This Important Mode of Expression*

1. Boycotts: An American Pastime

To borrow a simple but profound quote from Lawrence Glickman, "[c]onsumer politics is as American as apple pie."[162] In writing about the power that consumer activists have wielded and used to shape American history, Glickman claims that "consumer activists have sought to employ consumer power, not because they naively believed in a simple form of the sovereignty of shoppers but because they thought that collective consumer action was a necessary element of democratic politics and a way to combat powerful economic entities."[163] Indeed, the power of consumer activism has been a superbly effective tool to enact change, including in such notable instances as the American colonist protesting their treatment by the British government by refusing to buy English goods, members of the "free produce" movement in the Antebellum period refusing to buy goods made by enslaved people, American Jews' refusal to buy goods from Nazi Germany (as noted by ICAP), and, of course, civil rights activists refusing to do business with racist segregationists, like the business owners in *Claiborne Hardware Co.*[164]

2. Collectivism: The Nature of a Boycott's Power

Boycotts gain their power from their collective nature.[165] In ancient Greece, ostracism was a collaborative, punitive action by a community to try to change a dissident's behavior by cutting off their sense of protection and other resources provided by the community.[166] In today's market economy, boycotts are a modern form of ostracism.[167] Like ostracism, the essence of every boycott is a "fundamentally social act" by a group designed to

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[162] Lawrence B. Glickman, *The American Tradition of Consumer Politics*, THE AMERICAN HISTORIAN, https://www.oah.org/tah/issues/2017/may/the-american-tradition-of-consumer-politics/ (last visited Mar. 31, 2023). Glickman published a book in 2009 called *Buying Power: A History of Consumer Activism in America*. *Id.*

[163] *Id.*

[164] *See id*; *Brief of T'ruah and J Street*, *supra* note 126 at 4–5; *see generally* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409 (1982).

[165] *See* Glickman, *supra* note 171.

[166] *See id.* ("The idea of the boycott was to update the ancient practice of ostracism—a community's punishment of a malefactor by leaving her or him 'severely alone'. . . .").

[167] *Id.*

alter someone's (or another group's) behavior by refusing to purchase their goods or services or support their business enterprise, thereby attacking their economic resources and sense of protection in a market economy.[168] A more recent example is the boycott of Anheuser-Busch.[169] Customers disgruntled with Anheuser-Busch's recent marketing campaign involving a transgender woman have successfully used a boycott of Bud Light to get the company's CEO to distance the company from, and, to some extent, shift responsibility for ever producing that campaign.[170]

Over the years, American consumer activists have acknowledged the power of boycott as a collective action.[171] Labor Leader John Mitchell compared boycotts to other sources of collective power, like voting and striking.[172] Activists in the free produce movement thought of boycotts as their means of becoming the new, collective ruling class over producers.[173] With these analogies in mind, ICAP was correct in emphasizing the collective power of individual purchasing that is part of a coordinated effort to boycott.[174] Similar to voting and striking,[175] ICAP's examples of marching in a parade and contributing to finance funds also provide apt comparisons to the collective nature of a boycotts' expressive power.

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[168] *Id.*

[169] Katherine Hamilton, *Bud Light Executive Says Misinformation Drove Controversy: Mulvaney Campaign Was* '*Not An Advertisement*', FORBES (May 8, 2023, 10:56 AM), https://www.forbes.com/sites/katherinehamilton/2023/05/08/bud-light-executive-says-misinformation-drove-controversy-mulvaney-campaign-was-not-an-advertisement/?sh=3285626a2afe. According to Forbes, "right-wing criticism" coincided with Bud Light sales dropping more than 20% at the end of April. *Id.*

[170] *Id.* Anheuser-Busch CEO Michel Doukeris claims that the campaign in question was never intended to be an advertisement of the company and that the controversial cans featuring the likeness of a transgender activist at the center of the campaign were never intended to be mass produced. *Id.* The marketing director that created the campaign took a-what many insiders assume was involuntary-leave of absence. Elizabeth Napolitano, *Bud Light executives put on leave after Dylan Mulvaney uproar, report say*s, CBS NEWS (April 25, 2023, 1:02 PM), https://www.cbsnews.com/news/bud-light-dylan-mulvaney-transgender-anheuser-busch/.

[171] *See* Glickman, *supra* note 171 ("Consumer activists throughout history, however, held that consumption was a public measure, meaning boycotts were a profound threat to the established order.").

[172] *See id.*

[173] *Id.* ("'The world is divided into two classes, producer and consumers; the first being the many, the second the few, the first the ruled, the second the rulers.' By attempting to coordinate aggregate consumer power—and to use that power to supplement a grassroots social movement—advocates of free produce sought to invert the 'ruled' into the 'rulers.'")

[174] *Brief of T'ruah and J Street*, *supra* note 126 at 21–23; *see* Glickman, *supra* note 171.

[175] *See* Glickman, *supra* note 171.

3. By Not Recognizing the Purchasing Decisions at the Heart of a Boycott as Protected Expression, the Eighth Circuit is Not Protecting the Right to Contribute to the Collective Power of a Boycott and Therefore is Effectively Not Protecting the Right to Boycott

By recognizing the speech accompanying a boycott as protected expression while simultaneously not giving the same protection to the purchasing decision at the heart of the boycott, the Eighth Circuit, in situations like that of *Arkansas Times,* is denying the opportunity to actually participate in a boycott without fear of government reprisal.[176] The essence of a boycott is a collective, coordinated effort of individual purchasing decisions designed to "ostracize" someone (or some group) in the market economy and thereby compel them to alter their behavior.[177] Therefore, if someone is not making purchasing decisions to contribute to such a collective effort, it cannot be said that they are truly participating in the boycott. Someone that is merely voicing support for a boycott with written or oral speech can be said to be an activist and a vocal supporter of the political goals that the boycott is intended to accomplish. However, if they cannot make the choice not to purchase and can only express support for others doing so, they are not a *participant* in the boycott.[178]

4. The Negative Near-Term Consequences of the Eighth Circuit's Decision on the Supporters of the BDS Movement and its Troubling Precedent Going Forward

Like the boycotters in *Claiborne Hardware Co.*,[179] Palestinian Americans, as an ethnic minority without a significant lobbying influence, cannot effect change through the political process.[180] Given the disproportionate influence of the Israel lobby, at the federal and state level in American politics, supporters of the BDS movement stand little chance of getting their government[181] to heed their concerns over Israel's

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[176] *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1390 (8th Cir. 2022).
[177] *See* Glickman, *supra* note 171.
[178] In short, boycotting is a verb that is synonymous with the purchasing decisions that its participants make.
[179] *See generally* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 898–903 (1982). The African American boycotters in Claiborne Hardware Co. were also an unpopular minority with a limited influence over state and local politics in Mississippi. *See id.*
[180] *See The Pro-Israel & Pro-Arab Lobbies*, *supra* note 50.
[181] Governments that they pay taxes to like every other citizen.

expansion, much less getting them to take any state action designed to curtail Israel's behavior. With international pressure from the United States government effectively not an option, one of the strongest ways that Palestinian-Americans have for changing the Israeli government is by engaging in consumer activism to exert economic pressure on Israeli businesses. Since Israeli businesses exert significant lobbying influence on Israel's political process, putting substantial economic pressure on Israeli businesses effectively translates to significant political pressure on the Israeli government.[182] Even though Palestinian-Americans' concerns might fall on deaf ears when it comes to the United States government, their chances of getting American businesses that transact with Israeli businesses to sympathize with their cause and make their purchasing decisions accordingly stands a significantly better chance.

By finding that the First Amendment does not protect the purchasing decisions at the heart of a boycott, the Eighth Circuit gave the green light to state governments to place substantial limitations on the ability of American businesses to make purchasing decisions that contribute to the collective economic pressure on Israel. As a result, American businesses sympathetic to the cause of the BDS movement have an ultimatum between supporting the BDS movement by choosing not to buy Israeli products or having the option to take advantage of the lucrative contract opportunities that are offered by state governments. Suppose a business wants to have the option of contracting with a state government with an anti-BDS law. In that case, the most they can do is be a cheerleader on the BDS movement's sidelines, which obviously does not produce any financial pressure if their purchasing decisions do not change. So, not only do Palestinian-Americans that support the BDS movement lack the resources to use state action to support their cause, but state action is actively being used against them to attenuate the next best tool they have left for asserting pressure for change on the Israeli government. To say the least, the near-term consequences of the Eighth Circuit's decision on the supporters of the BDS movement are troubling, as is the precedent of this decision on the ability of

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[182] *See* William L. Ochsenwald, Russell A. Stone, Eliahu Elath, *Israel*, BRITANNICA (Apr. 12, 2023) https://www.britannica.com/place/Israel ("Israeli citizens take an active interest in public affairs above and beyond membership in political parties. The pattern of Israel's social and economic organization favours participation in trade unions, employers' organizations, and interest groups concerned with state and public affairs.").

minorities with limited political influence to use boycotts as a tool for change.

VIII. THE ALTERNATIVE THAT COULD HAVE PRESERVED BOYCOTTS AS A MODE OF POLITICAL EXPRESSION, ESPECIALLY FOR THOSE WITH LIMITED INFLUENCE ON THE POLITICAL PROCESS

In trying to reconcile the holdings of *Claiborne Hardware Co.* and *Rumsfeld*, a better alternative for the Eighth Circuit that would have preserved political boycotts as a protected mode of expression would have been to recognize the purchasing decision of a boycott as protected expression when accompanied by speech explaining the political goal behind those decision. In making this decision, the court could have considered important factors, like public policy concerns and evidence supporting the genuineness of the alleged political motive for the boycott. If they had applied this alternative method, the Eighth Circuit would have established that the purchasing decisions of a boycott and accompanying speech would be protected from state actions that openly infringe upon such political expression.

If the Eighth Circuit only had to analyze the holding of *Claiborne Hardware Co.* alone, this approach is arguably not even necessary since the court found multiple elements of a boycott that were "ordinarily entitled to protection under the First and Fourteenth Amendments."[183] ICAP is most likely correct in arguing that the *Claiborne* Court was referencing both the speech and purchasing decisions of a boycott as included in those elements, especially since the court distinguished between the protection of speech-purchasing decisions used for political purposes from speech-purchasing decisions for economic purposes.[184] Additionally, as ICAP pointed out, the *Claiborne* court's holding would make little sense if only the participant's oral speeches and picket signs were protected and not their purchasing decisions because, otherwise, the store owners still would have had a viable business interruption suit.[185] It would seem that the Eighth Circuit had to do mental gymnastics to find the opposite, that *Claiborne* made it clear that purchasing decisions were not protected by the First Amendment.[186]

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[183] 458 U.S. at 907 (1982).
[184] *See Brief of T'ruah and J Street*, *supra* note 126, at 15.
[185] *Id.*
[186] *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1391–94 (8th Cir. 2022).

This alternative approach is necessitated by having to accommodate the holding of *Rumsfeld*, which at the very least complicates determining when non-inherently expressive actions, like the purchasing decisions of a boycott, are protected by the First Amendment.[187] To view the *Rumsfeld* holding as allowing for non-inherently expressive actions to be brought under the umbrella of the First Amendment's protection when combined with speech explaining the political reasons for taking such actions, one will almost certainly have to accept the argument made by ICAP's view of the *Rumsfeld* Court's decision.[188] In the view of ICAP, the *Rumsfeld* Court favored the Department of Defense because of the "facially neutral language" in the Solomon Amendment that did not specifically ban protected political expression.[189] Had the language in the Solomon Amendment gone out of its way to specifically ban protected political expression, such as the law school's protest of the "Don't Ask, Don't Tell" policies of the military, ICAP felt that the Supreme Court would have found the Solomon Amendment unacceptable.[190] In light of this view of the *Rumsfeld* holding, combining non-inherently expressive actions with protected speech explaining the political reasons for taking such actions *could* bring the action itself under the protection of the First Amendment. This could be the case when it comes to state actions that are not facially neutral and openly seek to stifle such expression.

IX. TWO COUNTER ARGUMENTS

A. The Eighth Circuit, the District Court for the Eastern District of Arkansas, and Others: Purchasing Decisions in a Boycott are Never Protected Expression, even if it is for a Political Purpose and There is Accompanying Protected Speech Explaining that Purpose

As was the case with the Eighth Circuit and the Eastern District of Arkansas,[191] those who believe that purchasing decisions are not inherently expressive will likely also claim that attaching protected explanatory speech to such an action will not bring those purchasing decisions under the First Amendment's umbrella of protection. Proponents of this view will probably cite

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[187] *See* Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 61–70 (2006).
[188] *See Brief of T'ruah and J Street*, *supra* note 126, at 118.
[189] *Id.*
[190] *See id.*
[191] *See Ark. Times LP*, 37 F.4th 1386.

the previously mentioned warning from the *Rumsfeld* Court against considering an action expressive conduct merely because speech is attached to it.[192] In doing so, they will probably provide the following quote from *Rumsfeld*: "[I]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it," along with the Court's subsequent example of it being the unsavory effect of someone not paying their taxes be considered an act of protected expression because they had announced their displeasure with the IRS beforehand.[193]

Based on this quote and example from the *Rumsfeld* Court, it is unclear whether it found that protected explanatory speech can never bring the action under the umbrella of the First Amendment or if it was merely cautioning against being too hasty to alter the unprotected status of a non-inherently expressive action because of explanatory speech.[194] The inclusion of an example of someone not paying their taxes could be interpreted as the Court suggesting outer limits on considering non-inherently expressive actions combined with explanatory speech to be protected political expression based on obvious public policy concerns.[195] By cautioning against the notion that linking speech to non-inherently expressive conduct would be "enough" to create protected expression, the Court might have been ruminating on the need for additional measures like a test that analyzes various factors for determining when protected explanatory speech can bring the action that it is tied to under the First Amendment's protection. Such factors might include evidence for the genuineness of their political motive and the absence of evidence for an ulterior economic motive.[196]

Regardless of what the *Rumsfeld* Court meant in the quote above and by providing their subsequent example, the *Claiborne* court more easily falls on the side of purchasing decisions being protected expression.[197] With *Claiborne* and *Rumsfeld*, the Eighth Circuit had two prominent Supreme Court cases to look to in deciding if a boycott's purchasing decisions were protected expression or could become protected expression. A better approach, both for its practical results and for the sake of honestly reading the decisions of *Rumsfeld,* would have been to

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[192] 547 U.S. at 66.
[193] *Id.*
[194] *Id.*
[195] *See id.*
[196] *See id.*
[197] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

recognize the ambiguity in regards to the *Rumsfeld* Court's feelings on whether explanatory speech can ever bring the action that it is tied to under the protection of the First Amendment. Unfortunately, despite having multiple creative ways for reconciling the holding of *Claiborne* and *Rumsfeld* in a way that recognizes the purchasing decisions of a boycott, and thus boycotting itself, as protected expression, the Eighth Circuit declined to do so and chose to take a radical approach to its reading of both cases by drawing a clear line in the sand in finding the purchasing decisions of a boycott to never be protected expression.

B. From ICAP and Others: Purchasing Decisions in a Political Boycott Are Protected Expression. Rumsfeld Does Not Require a "Test" or Any Other Considerations Other Than Explanatory Speech for a Purchasing Decision to Be Protected Conduct

Because ICAP views the Supreme Court as having already recognized purchasing decisions in a political boycott as protected expression in *Claiborne Hardware Co*. and that *Rumsfeld* did not alter that status, they (and others that are like-minded) will likely take issue with the idea that the *Rumsfeld* Court was hinting at the need for a test or other additional measures in deciding whether accompanying explanatory speech can make the purchasing decisions of a boycott protected expression.[198] However, the *Rumsfeld* Court's warning about combating speech with conduct being "enough" to create protected expression almost certainly does not support this view.[199] With *Rumsfeld* being "good law" as well and seemingly distinguishing *Claiborne* by emphasizing that combining non-inherently expressive actions with explanatory speech is not enough to consider those actions protected expression, an even-handed attempt to reconcile *Rumsfeld* with *Claiborne* has to at least take into account the notion that non-inherently expressive conduct needs speech attached to it *and* a test or some other form of consideration as well.

X. CONCLUSION

Boycotting has been an important way in which Americans, especially persecuted minorities, have expressed their political grievances since the founding of the United States. Such a foundational, time-honored form of expressing political

[198] *Brief of T'ruah and J Street*, *supra* note 126, at 15, 18.
[199] 547 U.S. at 66 (2006).

grievances deserves First Amendment protection. As prominent First Amendment scholars have argued, *Claiborne* most likely recognized that both the purchasing decisions and accompanying explanatory speech of a boycott are protected by the First Amendment. A fair reading of the ambiguous holding in *Rumsfeld* is that, despite requiring some level of consideration be paid to combinations of explanatory and non-inherently expressive actions like purchasing decisions, the *Claiborne* holding stands. Had the Eighth Circuit given an honest analysis of the holdings of both the *Claiborne* and *Rumsfeld* decisions, it would have been able to reconcile both holdings in such a way as to preserve the ability to make the purchasing decisions of a boycott, which are inseparable from the act of boycotting, without fear of government reprisal in situations like the current war that state governments are waging against the BDS movement.