

NOTES

“DEEPLY EMBEDDED”: *ARKANSAS TIMES LP V. WALDRIP* AND THE RIGHT TO BOYCOTT*

I. INTRODUCTION

On February 21, 2023, the Supreme Court denied certiorari in *Arkansas Times LP v. Waldrip* (*Waldrip III*).¹ Opponents of the Boycott, Divestment, Sanctions (BDS) campaign rejoiced, claiming victory.² And they could, at least for the time being. The Court, by not considering the question presented—whether Arkansas could require those seeking state contracts to certify that they were not engaged in a boycott of Israel, and would not be for the life of the contract—provided opponents of BDS with a judicial blessing for their counter-campaign.³ This effect of the holding was made clear in the response of Kenneth Marcus, founder and chairman of the Louis D. Brandeis Center for Human Rights Under Law; he stated: “Today is a great day for the cause of justice. This morning, the U.S. Supreme Court let stand an important appeals court victory for anti-BDS legislation and civil rights law by denying cert. in the Arkansas anti-BDS case, *Arkansas Times LP v. Waldrip*.”⁴

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1. Ark. Times LP v. Waldrip (*Waldrip III*), 37 F.4th 1386 (8th Cir. 2022) (en banc), cert. denied, 143 S. Ct. 774 (2023); Eugene Volokh, S. Ct. Denies Review of Eighth Circuit En Banc Case Upholding Arkansas “Anti-BDS” Statute, REASON: VOLOKH CONSPIRACY (Feb. 21, 2023, 11:44 AM), <https://reason.com/volokh/2023/02/21/s-ct-denies-review-of-eighth-circuit-en-banc-case-upholding-arkansas-anti-bds-statute/> [<https://perma.cc/MUB7-4NF5>].

2. See, e.g., ADL (@ADL), TWITTER (Feb. 22, 2023, 3:43 PM), <https://twitter.com/ADL/status/1628495721191145474> [<https://perma.cc/EM2Z-C8UZ>] (“We welcome the Supreme Court’s decision not to hear Arkansas Times LP v. Waldrip, a case that upheld Arkansas’ anti-BDS law. BDS seeks to delegitimize Israel and undermines a peaceful resolution to the I-P conflict. States should have the right to use legal means to fight it.”); Tom Cotton (@TomCottonAR), TWITTER (Feb. 21, 2023, 10:56 AM), <https://twitter.com/TomCottonAR/status/1628061125290913793> [<https://perma.cc/7JTY-BEU6>] (“A great win for Arkansas and America in the fight against the anti-Semitic BDS movement. Outstanding news.”).

3. See Andrew Chung, U.S. Supreme Court Spurns Challenge to Arkansas Law Against Contractors Boycotting Israel, REUTERS (Feb. 21, 2023), <https://www.reuters.com/legal/us-supreme-court-spurns-challenge-arkansas-law-against-contractors-boycotting-2023-02-21> [<https://perma.cc/B2JA-FAAZ>].

4. Press Release, Kenneth L. Marcus, Chairman, Brandeis Ctr., Brandeis Center Statement on Supreme Court Action Letting Arkansas Anti-BDS Law Stand (Feb. 21, 2023), <https://brandeiscenter.com/brandeis-center-statement-on-supreme-court-action-letting-arkansas-anti-bds-law-stand/> [<https://perma.cc/C4PD-YM65>] (“Anti-Israel boycotts will now be seen for what they are: discriminatory conduct rather than political speech.”); see also David Israel, US Supreme Court Lets Stand Arkansas’ Anti BDS Law, JEWISH PRESS (Feb. 22, 2023), <https://www.jewishpress.com/news/us-news/us-supreme-court-lets-stand-arkansas-anti-bds-law/2023/02/22/> [<https://perma.cc/AXV4-FJ4D>].

For proponents of BDS, perhaps the most prominent campaign to support international pressure on Israel regarding its treatment of Palestinians, the decision was a setback.⁵ Arkansas is one of dozens of states with such a law on the books.⁶ And prior to the Eighth Circuit's decision to uphold the Arkansas law in 2022, no anti-boycott law of similar content had ever survived appellate-level scrutiny.⁷ At the time of the Supreme Court's denial of certiorari to the Eighth Circuit case, a similar case was pending in the Fifth Circuit.⁸ There was a glimmer of hope for BDS proponents that the Fifth Circuit would find Texas's version of the law to be unconstitutional, creating a circuit split and paving the way for the Supreme Court to be more amenable to an appeal in the next term.⁹ But in July 2023, the Fifth Circuit dismissed the suit for lack of standing, vacating the injunction that had been placed on enforcement of the Texas law.¹⁰

How did the Eighth Circuit come to a different conclusion than the district courts that preceded it? This Note argues that a close read of the decision reveals a failure to apply settled law on boycotts and the protections of the First Amendment. Rather than relying on longstanding precedent regarding the explicit protections for certain political boycotts expressed by the Supreme Court in *NAACP v. Claiborne Hardware Co.*, the Eighth Circuit reinterpreted the holding, with irresponsibly thin justification.¹¹ In so doing, it failed to recognize that the challenged law constituted viewpoint discrimination.

This Note begins by providing the facts and procedural history of *Waldrip III* in Section II. Parts III.A and III.B recount the history of the BDS movement and its predecessors, as well as the legislative response to boycotts of Israel at the state and federal levels in the United States. Then, Part III.C explores the major First Amendment decisions primarily relied upon by each party in *Waldrip III*—namely, *Claiborne* and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*.¹² Part III.D provides the history of federal court decisions regarding laws substantially similar to the one at issue in *Waldrip III*.

5. Chung, *supra* note 3.

6. ARK. CODE ANN. § 25-1-503 (West 2024); *see also Types of Legislation*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/types-of-legislation/> [https://perma.cc/G5MS-FU7V] (last visited Apr. 21, 2024); *see also infra* Part III.B.2.

7. *Types of Legislation*, *supra* note 6. Virginia has passed a nonbinding resolution that condemns “the international Boycott, Divestment, and Sanctions movement and its activities in Virginia,” but efforts to institute anti-boycott legislation have otherwise failed. *Id.*; *see also* H.R.J. Res. 177, 2016 Leg., Reg. Sess. (Va. 2016).

8. *See* A&R Eng'g & Testing, Inc. v. Scott, 72 F.4th 685 (5th Cir. 2023); *CAIR To Deliver Oral Argument in Texas Free Speech Anti-BDS Case*, CAIR-TEX. (Nov. 4, 2022), <https://www.cairdfw.org/index.php/component/content/article/281-cair-to-deliver-oral-argument-in-texas-free-speech-anti-bds-case> [https://perma.cc/H7JT-X6RZ].

9. PHILIP ALLEN LACOVARA, FEDERAL APPELLATE PRACTICE § 17.1(c)(1) (2008) (explaining that circuit court splits tend to lead to certiorari).

10. *A&R Eng'g & Testing, Inc.*, 72 F.4th at 691.

11. 458 U.S. 886 (1982); *see also Waldrip III*, 37 F.4th 1386, 1391–92 (8th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 774 (2023).

12. 547 U.S. 47 (2006).

Part IV.A analyzes the Eighth Circuit’s decision and argues that the court should have read *Claiborne* as controlling. Part IV.B argues that the challenged law constitutes impermissible viewpoint discrimination and should have been struck down.

II. FACTS AND PROCEDURAL HISTORY

In 2017, the Arkansas General Assembly passed Act 710 (“the Act”).¹³ The Act prohibited state entities from contracting with any company or individual that failed to certify that they were not engaged and would not engage in a boycott of Israel throughout the life of the contract.¹⁴ The law offered a carveout to companies that would offer to “provide the goods or services for at least twenty percent (20%) less than the lowest certifying business,” or those with contracts with total potential values of less than \$1,000.¹⁵

The Act defined “boycott Israel” and “boycott of Israel” to mean “engaging in refusals to deal, terminating business activities, or *other actions* that are intended to limit commercial relations with Israel, or persons or entities that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner.”¹⁶

The *Arkansas Times*, a weekly newspaper based in Little Rock, is published by Arkansas Times LP.¹⁷ For many years, the paper contracted with Pulaski Technical College (“Pulaski Tech”), also in Little Rock, to run the school’s paid advertisements in the print edition.¹⁸ A few months before the passage of the Act, the school became part of the University of Arkansas system.¹⁹ In October 2018, as Arkansas Times and Pulaski Tech prepared to enter new advertising contracts, the text of the Act brought the proceedings to a halt. Pulaski Tech informed Arkansas Times that, as a state entity, the school’s ability to contract with the paper depended, in part, on the publisher’s willingness to sign the certification mandated by the Act.²⁰ The publisher refused to either sign the certification or accept the twenty percent reduction in payment proffered by the Act.²¹ By December, Arkansas Times had initiated a lawsuit against the members of the University of Arkansas Board of Trustees (UABT) and filed a motion for preliminary injunction.²² The certification requirement of the Act, they argued, violated the First Amendment, unconstitutionally compelling speech, restricting

13. ARK. CODE. ANN. § 25-1-503 (West 2024); Katherine Hung, *Arkansas Passes Anti-BDS Law*, BRANDEIS CTR. (Apr. 3, 2017), <https://brandeiscenter.com/arkansas-passes-anti-bds-law/> [<https://perma.cc/SY65-VM7G>].

14. § 25-1-503.

15. *Id.* § 25-1-503(b).

16. *Id.* § 25-1-502 (emphasis added).

17. Ark. Times LP v. Waldrip (*Waldrip II*), 988 F.3d 453, 460 (8th Cir. 2021), *aff’d en banc*, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

18. *Id.*

19. *Id.* at 460.

20. *Id.*

21. *Id.*

22. Petition for Writ of Certiorari at 6, Ark. Times LP v. Waldrip, 143 S. Ct. 774 (2023) (No. 22-379).

participation in political boycotts, and discriminating based on subject matter and viewpoint.²³

The Arkansas District Court denied the Arkansas Times's motion for a preliminary injunction and dismissed the case with prejudice.²⁴ The Act, in the court's view, did nothing to restrict any actions that the contractor might take other than their "purchasing activities with respect to Israel."²⁵ Even though the Act's definition of a boycott included both the refusal to deal with Israel and "other actions that are intended to limit commercial relations with Israel," the court did not construe "other actions" to include conduct with greater First Amendment protection—"criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech."²⁶

Proceeding from the finding that the Act only prohibited economic activity, the court looked to the Supreme Court's decisions in *FAIR*²⁷ and *Claiborne*.²⁸ *FAIR*, according to the Eighth Circuit, stood for the proposition that boycotts on their own were not constitutionally protected speech or inherently expressive conduct, because they required supplemental, explanatory speech to communicate the actual message of the boycott.²⁹ Further, the court concluded that to the extent *Claiborne* establishes a First Amendment right to boycott at all, it "does not include political boycotts directed towards foreign governments concerning issues that do not bear on any domestic legal interest."³⁰

On appeal, a divided panel of the United States Court of Appeals for the Eighth Circuit reversed the district court.³¹ Contrary to the district court's conclusion, the panel construed the statutory "other actions" to include constitutionally protected speech and association.³² *Claiborne*, as read by the panel, had given First Amendment protection to actions like "promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts," actions that the Arkansas General Assembly had specifically singled out for regulation in the text of the Act.³³ These findings guided the panel's reading of "other actions" and led to the conclusion that the Act impermissibly regulated protected speech.³⁴

The Eighth Circuit granted an en banc rehearing.³⁵ Judge Kobes, who was the lone dissenter in the panel hearing, this time wrote the majority opinion overturning the

23. *Waldrip III*, 37 F.4th 1386, 1390 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

24. *Ark. Times LP v. Waldrip (Waldrip I)*, 362 F. Supp. 3d 617 (E.D. Ark. 2019).

25. *Id.* at 623.

26. *Id.* (quoting ARK. CODE ANN. § 25-1-502(1)(A)(i) (West 2024)).

27. 547 U.S. 47 (2006).

28. 458 U.S. 886 (1982); *Waldrip I*, 362 F. Supp. 3d at 623–24.

29. *Waldrip I*, 362 F. Supp. 3d at 624.

30. *Id.* at 625.

31. *Waldrip II*, 988 F.3d 453, 467 (8th Cir. 2021), *aff'd en banc*, 37 F.4th 1386 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 774 (2023).

32. *Id.* at 465–66.

33. *Id.* at 465.

34. *Id.* at 466–67.

35. *Waldrip III*, 37 F.4th at 1390.

Waldrip II decision.³⁶ The circuit court affirmed the district court's order to deny the motion for a preliminary injunction and dismissed the case altogether.³⁷ The majority stated that "[t]he basic dispute in this case is whether 'boycotting Israel' only covers unexpressive commercial conduct, or whether it also prohibits protected expressive conduct."³⁸ Rather than reading *Claiborne* to protect actual boycott participation, the court saw a narrower scope, extending protections only to "expressive activities accompanying a boycott, rather than the purchasing decisions at the heart of a boycott."³⁹ With *Claiborne* deemed inapplicable to the actual economic decisions that created a boycott, the court turned to *FAIR*.⁴⁰ In the court's reading, the holding of *FAIR* limited First Amendment protection to conduct that a neutral observer would understand to be the expression of an idea.⁴¹ Thus, the economic decisions at the heart of a boycott were not constitutionally protected, because a neutral observer would not infer expression from that conduct absent any explanatory speech.⁴²

With those principles in mind, the court addressed the objection to the "other actions" provision.⁴³ "Other actions," in the court's eyes, restricted only commercial activities, in the same manner as "engaging in refusals to deal" and "terminating business activities."⁴⁴

On February 21, 2023, the Supreme Court denied certiorari on an appeal by the Arkansas Times.⁴⁵

III. PRIOR LAW

The Eighth Circuit is not the first U.S. court to rule on the issue of the anti-boycott laws, nor to address First Amendment protection for political boycotts more generally.⁴⁶ For decades, courts have tried to set the boundaries of that protection as they relate to the latter.⁴⁷ To understand the import of the decision in *Waldrip III*, context is necessary.

Part III.A contains a brief history of the BDS movement, what many scholars regard as "the most prominent organization today to promote a boycott and divestment campaign against Israel."⁴⁸ Part III.B begins with a brief explanation of anti-boycott

36. *Id.*

37. *Id.*

38. *Id.* at 1391.

39. *Id.* at 1392.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1393.

44. *Id.* at 1394 ("It does not ban Arkansas Times from publicly criticizing Israel, or even protesting the statute itself. It only prohibits economic decisions that discriminate against Israel.").

45. *See* Volokh, *supra* note 1.

46. *See infra* Part III.C.

47. *See infra* Part III.D.

48. *See* Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 3–4 (2017) [hereinafter Greendorfer, *BDS Movement*]; *What Is BDS?*, BDS MOVEMENT [hereinafter BDS MOVEMENT], <https://bdsmovement.net/what-is-bds> [https://perma.cc/BK3A-E83E] (last visited Apr. 21, 2024) ("BDS is now a vibrant global

laws pertaining to Israel, at the federal level, before addressing the primary focus of this Note, the statutory and decisional landscape regarding anti-boycott laws pertaining to Israel at the state level. Next, Part III.C explores the major First Amendment decisions primarily relied upon by each party in *Waldrip III*—namely, *Claiborne*⁴⁹ and *FAIR*.⁵⁰ Part III.D provides the history of federal court decisions regarding laws substantially similar to the one at issue in *Waldrip III*.

A. *The Boycott, Divestment, Sanctions Movement*

The BDS movement was started in 2005, with the goal of forcing government action in Israel.⁵¹ There is no single organizational body with “centralized decision-making and agency” with regards to the direction of the movement.⁵² The words refer to boycotts of Israeli goods and services, calls to divest from Israeli companies, and advocacy for government sanctions against Israel.⁵³ The stated impetus of the movement is that “Israel is occupying and colonising Palestinian land, discriminating against Palestinian citizens of Israel and denying Palestinian refugees the right to return to their homes. It is maintaining a regime of occupation, settler colonialism and apartheid over the Palestinian people.”⁵⁴

The website for the BDS movement lists three specific demands: “Ending [Israel’s] occupation and colonization of all Arab lands and dismantling the Wall [around Gaza]”; “[r]ecognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality”; and “[r]especting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN Resolution 194.”⁵⁵

Supporters of the movement and its strategy liken each to the global anti-apartheid movement wielded against South Africa in the late twentieth century.⁵⁶ On the economic front, companies that are based in Israel, contract with the Israeli military, or

movement made up of unions, academic associations, churches and grassroots movements across the world.”); David Halbfinger, Michael Wines & Steven Erlanger, *Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/world/middleeast/bds-israel-boycott-antisemitic.html> [<https://perma.cc/H5R9-2NXX>] (“With its adherents prominent in the British Labour Party and critics fighting it in Washington and dozens of state capitals, B.D.S. has become a proxy for the Israeli-Palestinian conflict in the United States and Europe, with all the emotion the conflict stirs.”).

49. 458 U.S. 886 (1982).

50. 547 U.S. 47 (2006).

51. See BDS MOVEMENT, *supra* note 48.

52. See, e.g., Timothy Cuffman, Note, *The State Power To Boycott a Boycott: The Thorny Constitutionality of State Anti-BDS Laws*, 57 COLUM. J. TRANSNAT’L L. 115, 122 (2018).

53. *Id.* at 122–24.

54. BDS MOVEMENT, *supra* note 48.

55. *Id.*

56. *The Boycott, Divestment and Sanctions Campaign (BDS)*, ANTI-DEFAMATION LEAGUE (May 24, 2022), <https://www.adl.org/resources/glossary-term/boycott-divestment-and-sanctions-campaign-bds> [<https://perma.cc/DTU6-UWJP>] (“They argue that the same boycott and isolation tactics used to help dismantle the South African White minority government should be used against Israel in order to force it to change its policies towards the Palestinians.”).

otherwise interact with the country have been subjected to boycotts.⁵⁷ In addition to these economic aims, proponents have also sought to limit cultural and academic engagement with Israel by artists and scholars.⁵⁸

Opponents of BDS have alleged that the movement, in substance and in practice, is anti-Semitic.⁵⁹ Focusing on the conduct of some of the more famous BDS participants and what they alleged to be undue scrutiny of the Israeli government, opponents of BDS often refer to the movement as a campaign dedicated to the destruction of Israel, violence against Israelis, and animus toward Jewish people in Israel and all over the world.⁶⁰

BDS supporters deny the charge that they are motivated by anti-Semitism.⁶¹ The BDS movement website explicitly denounces anti-Semitism and disputes the notion that Palestinians and their allies should be expected to focus their attention on abuses committed by countries other than Israel.⁶² Many BDS supporters would characterize their movement as merely anti-Zionist, and not anti-Semitic.⁶³ However, many opponents of BDS have responded that to be anti-Zionist *is* to be anti-Semitic.⁶⁴

57. See Halbfinger et al., *supra* note 48.

58. See *id.*

59. See *id.*; Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 48 (2018) [hereinafter Greendorfer, *Boycotting*] (“The BDS Movement was not only founded with the discriminatory goal of eliminating the State of Israel because of its Jewish nature, it has been promoted and supported by individuals and groups committed to the spread of hate and named as designated terror organizations by the United States.”).

60. See Greendorfer, *Boycotting*, *supra* note 59, at 48; Tovah Lazaroff, ‘BDS Movement Is Antisemitic,’ *British Home Secretary Says*, JERUSALEM POST (May 19, 2022, 8:54 PM), <https://www.jpost.com/bds-threat/article-707088> [<https://perma.cc/K4VH-EGT5>] (“Everything we have seen around the BDS movement is racist . . . the antisemitic tropes, the cartoons, the chants [and] the flag-waving” (alteration in original) (quoting Priti Patel, Brit. Home Sec’y, Address to the Conservative Friends of Israel (May 16, 2022)); see also 165 Cong. Rec. H7182 (July 23, 2019) (statement of Rep. Eliot Engel) (“[H]ere is the thing about the global BDS movement: I don’t believe it promotes racial justice or social change at all. It promotes a one-sided view of the Israeli-Palestinian conflict that seeks to marginalize Israel and that would deny the Jewish people the right to national self-determination . . .”).

61. See Arno Rosenfeld, *Leading Jewish Scholars Says BDS, One-State Solution Are Not Antisemitic*, FORWARD (Mar. 25, 2021), <https://forward.com/news/466639/leading-jewish-scholars-say-bds-one-state-solution-are-not-antisemitic/> [<https://perma.cc/9QRK-JPFA>] (“Boycotting Israel and calling for an end to its Jewish majority is not inherently antisemitic, according to a new definition of antisemitism released Thursday by a group of more than 200 scholars of Jewish studies.”); see also, e.g., *Statement: Criticizing Israel Is Not anti-Semitic*, BDS AUSTRALIA, <https://bdsaustralia.net.au/about/not-antisemitic/> [<https://perma.cc/N4WQ-Y6HH>] (last visited Apr. 21, 2024).

62. See BDS MOVEMENT, *supra* note 48.

63. See, e.g., *Our Approach to Zionism*, JEWISH VOICE FOR PEACE, <https://www.jewishvoiceforpeace.org/zionism/> [<https://perma.cc/6YAY-7XYR>] (last visited Apr. 21, 2024) (“Through study and action, through deep relationship with Palestinians fighting for their own liberation, and through our own understanding of Jewish safety and self determination, we have come to see that Zionism was a false and failed answer to the desperately real question many of our ancestors faced of how to protect Jewish lives from murderous antisemitism in Europe.”); Hadas Thier, *Anti-Zionism Is Not Anti-Semitism*, JACOBIN (Dec. 12, 2019), <https://jacobin.com/2019/12/antisemitism-zionism-donald-trump-israel-palestine> [<https://perma.cc/A2SJ-MHXY>].

64. See, e.g., Isaac Chotiner, *Is Anti-Zionism Anti-Semitism?*, NEW YORKER (May 11, 2022), <https://www.newyorker.com/news/q-and-a/is-anti-zionism-anti-semitism> [<https://perma.cc/D7JW-SYQK>].

B. Statutory Landscape Regarding Boycotts of Israel

1. Federal Law

About fifteen years after the initiation of the Arab League boycott of Israel,⁶⁵ the U.S. government began its legislative response by amending the Mutual Security Act of 1954 with the Mutual Security Act of 1960.⁶⁶ The amended Act declared that the purposes of the 1954 law were “negated and the peace of the world is endangered when nations which receive assistance under this Act wage economic warfare against other nations assisted under this Act, including such procedures as boycotts.”⁶⁷ More direct action was taken in 1977, when Congress passed amendments to the Export Administration Act (EAA), which sought to “prohibit compliance with or support of any foreign boycott against a country which is friendly to the United States, with specified exceptions.”⁶⁸ The intended effect was to penalize companies that joined the Arab League boycott of Israel.⁶⁹ President Carter described the bill as intended “to end

(quoting Anti-Defamation League director Jonathan Greenblatt as saying, “[I]f you peel back the layers in anti-Zionism, it is a historic form of delegitimization targeting Jews”); *Anti-Zionism and Anti-Semitism*, AM. JEWISH COMM. (October 2020), <https://www.ajc.org/sites/default/files/pdf/2020-10/AntiZionism%20and%20Antisemitism.pdf> [<https://perma.cc/64WP-ZCDY>] (“The belief that the Jews, alone among the people of the world, do not have a right to self-determination—or that the Jewish people’s religious and historical connection to Israel is invalid—is inherently bigoted.”).

65. See, e.g., Nancy Turck, *The Arab Boycott of Israel*, 55 FOREIGN AFFS. 472, 472 (1977) (describing the Arab League boycott as “an instrument . . . intended to prevent Arab states and discourage non-Arabs from directly or indirectly contributing to Israel’s economic and military strength” in light of ongoing war and hostility); see also *Arab Economic Boycott*, ADL (Sept. 1, 2016), <https://www.adl.org/resources/glossary-term/arab-economic-boycott> [<https://perma.cc/F4CU-EXVD>] (“The Arab Economic Boycott was initiated in 1946 by the newly formed League of Arab States. The boycott was aimed at preventing the continued growth of the Jewish community in Mandate-era Palestine by boycotting the goods and services produced by Jewish businesses.”).

66. Pub. L. No. 86-472, 74 Stat. 134 (1960) (amending 22 U.S.C. § 1750) (repealed 1961).

67. *Id.* sec. 2, § 2, at 134; see also *Mutual Security Act of 1960: Hearings on HR 115-10 Before the Comm. on Foreign Affs.*, 86th Cong. 780, 780–82 (“Thus, one may hope that in a few years Israel will be in sight of economic balance. This advance would be much faster if Israel were not the victim of a declared war by her neighbors, who disrupt her trade by boycotts and blockades. . . . It is disturbing to reflect that we, ourselves, have involuntarily become implicated in the Arab boycott.” (emphasis added) (statement of Rabbi Philip S. Bernstein, Chairman, American-Israel Pub. Affs. Comm.)).

68. 50 U.S.C. § 4607 (repealed 2018).

69. S. REP. NO. 95-104, at 16–19 (1978); *Abrams v. Baylor Coll. of Med.*, 581 F. Supp. 1570, 1581 (S.D. Tex. 1984) (noting that Congress’s concern regarding boycotts of Israel was the impetus behind the 1977 amendment to the EAA and that “the ‘especial class’ of persons to be protected by the EAA is comprised not only of Israelis but of American Jews as well”); Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, NEW YORKER (June 16, 2016), <https://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott> [<https://perma.cc/K975-B9UU>]; see also Ben Cardin, *Setting the Record Straight: Nothing in the Israel Anti-Boycott Act Restricts Constitutionally-Protected Free Speech*, MEDIUM (July 20, 2017), <https://medium.com/@SenatorBenCardin/setting-the-record-straight-nothing-in-the-israel-anti-boycott-act-restricts-constitutionally-13bfa7428d8> [<https://perma.cc/EEV5-VDPD>] (“Congress amended the Export Administration Act (EAA) in 1977 to prohibit U.S. persons from complying with unauthorized foreign boycotts—specifically, the Arab League Boycott of Israel”); *Office of Antiboycott Compliance*, DEP’T OF COM., <https://www.bis.doc.gov/index.php/enforcement/oac> [<https://perma.cc/73WN-EEJ8>] (last updated 2024) (“The Arab League boycott of Israel is the principal unsanctioned foreign boycott that U.S. persons must be concerned with today.”).

the divisive effects on American life of foreign boycotts aimed at Jewish members of our society.”⁷⁰

According to the Department of Commerce, participation in the boycott included

- [a]greements to refuse or actual refusal to do business with or in Israel or with blacklisted companies;
- [a]greements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality;
- [a]greements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies; and/or
- [a]greements to furnish or actual furnishing of information about the race, religion, sex, or national origin of another person.⁷¹

Since the passage of the EAA, the relevant provisions have “primarily persisted by way of a series of executive orders and/or presidential notices, pursuant to the President’s power under the International Emergency Economic Powers Act.”⁷²

Many of the countries that once made up the Arab League no longer participate in the boycott, lessening its power.⁷³ Consequently, Congress has begun to focus its attention on the most prominent contemporary movement advocating for political and economic isolation of the State of Israel: the BDS movement.⁷⁴ In 2015, Congress passed the Trade Facilitation and Trade Enforcement Act.⁷⁵ It contains several provisions explicitly aimed at discouraging compliance with “actions by states, nonmember states of the United Nations, international organizations, or affiliated agencies of international organizations” to engage in “boycott of, divestment from, and sanctions against Israel.”⁷⁶ Additionally, lawmakers have proposed bills like the Israel Anti-Boycott Act (IABA), a 2017 amendment to the EAA which sought to further

70. Presidential Statement on Signing H.R. 5840 into Law, 1 PUB. PAPERS 1136 (June 22, 1977).

71. MARTIN A. WEISS, CONG. RSCH. SERV., ARAB LEAGUE BOYCOTT OF ISRAEL 1 (2017). Former President Carter’s justification for the law is emblematic of the enduring public debate on whether boycotts of Israel are inherently anti-Semitic. *See* Presidential Statement on Signing H.R. 5840 into Law, *supra* note 70 (“The bill seeks instead to end the divisive effects on American life of foreign boycott aimed at Jewish members of our society.”).

72. *See* Cuffman, *supra* note 52, at 126. They have also recently reappeared in statute. *See* John S. McCain National Defense Authorization Act, Pub. L. No. 115-232, 132 Stat. 1636, sec. 1773, at 2234 (2019) (amending 50 U.S.C. § 4842) (containing the relevant language of the former EAA in the Anti-Boycott Act of 2018).

73. *See* WEISS, *supra* note 71, at 3.

74. *See, e.g.*, H.R. Res. 246, 116th Cong. (2109); Eric Cortellessa, *US House Overwhelmingly Passes Anti-BDS Resolution*, TIMES OF ISRAEL (July 24, 2019), <https://www.timesofisrael.com/us-house-overwhelmingly-passes-anti-bds-resolution/> [<https://perma.cc/GL8M-MVMS>]. The American Israel Public Affair Committee said, “The resolution sends a powerful message that the House of Representatives explicitly rejects discrimination directed against the Jewish state through economic, cultural and political boycotts. Underscoring the House’s solid pro-Israel position, the resolution was cosponsored by 350 representatives—strong majorities of both parties.” *Id.*

75. 19 U.S.C. § 4452.

76. *Id.* § 4452(f)(1).

“counter the effects of actions to boycott, divest from, or sanction Israel.”⁷⁷ The IABA, proposed by Senators Ben Cardin (D-Md.) and Rob Portman (R-Ohio), sought to declare that Congress “opposes the United Nations Human Rights Council resolution . . . which urges countries to pressure companies to divest from, or break contracts with, Israel.”⁷⁸ It also sought to amend the EAA to impose civil and criminal penalties for, among other offenses, “support[ing] any boycott fostered or imposed by any international governmental organization against Israel or any request by any international governmental organization to impose such a boycott.”⁷⁹ “International governmental organizations” included, but was not limited to, the United Nations and the European Union, but did *not* include civil society organization like the international BDS movement.⁸⁰ In an open letter to a prominent critic, Senator Cardin wrote that it was false to suggest that the bill would “prevent U.S. companies and individuals from expressing their points of view, speaking in favor of [BDS] activities, engaging in boycott activity of their own accord, or being critical of Israel.”⁸¹ The point became moot, as the bill died.⁸²

The failure of the IABA was followed in the Senate by a more explicit bill: the Strengthening America’s Security in the Middle East Act of 2019, which included the Combating BDS Act, a law which would have clarified that state anti-BDS laws would not be preempted by federal law.⁸³

2. State Law

In 2016, then-Governor of New York Andrew Cuomo announced an executive order requiring all state entities to divest from any institution or company that was found to “participate in boycott, divestment or sanctions activity targeting Israel, either directly or through a parent or subsidiary.”⁸⁴ The order declared that “the State of New York and Israel enjoy a special historical relationship and share a commonly forged cultural bond,” and that the “State of New York unequivocally rejects the BDS campaign and stands firmly with Israel.”⁸⁵ The executive order was summed up

77. S. 720, 115th Cong., sec. 3(3) (2017) (amending 50 U.S.C. § 4602(5)); *see also* *Wielding Antidiscrimination Law To Suppress the Movement for Palestinian Rights*, 133 HARV. L. REV. 1360, 1364 (2020) [hereinafter *Wielding Antidiscrimination Law*].

78. S. 720, sec. 3(1).

79. *Id.* sec. 4(b), § 8(a)(1).

80. *Id.* sec. 6(a)(2).

81. *See* Cardin, *supra* note 69.

82. *100+ Groups Urge Congress To Stop Insertion of IABA in Omnibus Bill*, PALESTINE LEGAL (Dec. 5, 2018), <https://palestinelegal.org/news/amended-unconstitutional-iaba> [https://perma.cc/75BZ-RMC4] (“The IABA has failed to pass for two years . . .”).

83. S. 1, 116th Cong., tit. IV, § 402 (2019); Rubio reintroduced the Combating BDS Act as a standalone bill in 2023, *See* S. 1637, 118th Cong (2023). In 2019, the House also passed a resolution condemning BDS and “all efforts to delegitimize the State of Israel.” *See* H.R. Res. 246, 116th Cong. (2019); *see also* *Wielding Antidiscrimination Law*, *supra* note 77, at 1364.

84. Exec. Order No. 157, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.157 (West 2024).

85. *Id.*

succinctly in the headline to Cuomo’s *Washington Post* op-ed announcing the order: “If you boycott Israel, New York state will boycott you.”⁸⁶

To those unfamiliar with the rancorous debates around the BDS movement, it may have come as a surprise that a liberal state like New York is one of dozens of states, “red” and “blue” alike, with laws like Act 710 on the books.⁸⁷ As of the writing of this Note, thirty-eight states “have adopted laws, executive orders, or resolutions designed to discourage boycotts against Israel.”⁸⁸ These laws can be broadly dropped into three buckets: conditional state contracts, prohibitions on state investments, and coercive “defunding” laws.⁸⁹ The law at issue in *Waldrip III* concerns conditional state contracts.⁹⁰

From Alabama, to Maryland, to Idaho, states have adopted laws that prohibit state and local governments from contracting with individuals and entities that engage in boycotts of Israeli companies.⁹¹ In some states, the restrictions are not bound to Israel’s

86. Andrew Cuomo, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html [https://perma.cc/Z4DZ-G4JE].

87. *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR. <https://www.jewishvirtuallibrary.org/anti-bds-legislation> [https://perma.cc/N9U4-FMFZ] (last updated Feb., 2024).

88. *Id.*; see also, e.g., 62 PA. STAT. AND CONS. STAT. ANN. §§ 3601–06 (West 2024) (targeting only anti-Israel boycotts in the “Prohibited Contracts Act”); see, e.g., N.D. CENT. CODE ANN. § 54-44.4-15(2) (West 2024) (“A state entity that enters a contract that includes a provision prohibiting discrimination shall require the contract to include a provision prohibiting a party to the contract from boycotting Israel for the duration of the contract.”).

89. See *Types of Legislation*, *supra* note 6. For examples of conditional state contract statutes, see FLA. STAT. ANN. § 287.135(2)(a) (West 2024) (making any company that is engaged in a broadly-defined boycott of Israel “ineligible” for a state contract), and KAN. STAT. ANN. § 75-3740f(b) (West 2024) (“The state may not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person to boycott the government of Israel or its instrumentalities . . .”). For examples of prohibitions on state investments, see 40 ILL. COMP. STAT. ANN. 5/1-110.16(d)(2) (compelling the state pension fund to divest from companies that boycott Israel), and COLO. REV. STAT. ANN. § 24-54.8-202(1)–(2) (West 2024) (prohibiting state investment by state retirement funds in companies that boycott Israel). For examples of coercive “defunding” legislation, see H.B. 998, 2014 Leg., Reg. Sess. (Md. 2014) (as introduced), and S.B. 647, 2014 Leg., Reg. Sess. (Md. 2014) (as introduced). See *Legislation: Maryland*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/location/maryland/> [https://perma.cc/6UMT-HS4X] (describing Maryland House Bill 998 and Senate Bill 647, which would have “imposed penalties on public higher education institutions that directly or indirectly provided funds to entities that supported academic boycotts” had they passed).

90. See *Waldrip III*, 37 F.4th 1386, 1390 (8th Cir. 2022) (en banc) (“In 2017, Arkansas passed a law requiring public contracts to include a certification that the contractor will not ‘boycott’ Israel. Arkansas Times sued, arguing that the law violates the First Amendment.”), *cert. denied*, 143 S. Ct. 774 (2023).

91. ALA. CODE § 41-16-5(b) (West 2024) (“[A] governmental entity may not enter into a contract . . . with a business entity unless the contract includes a representation that the business entity is not currently engaged in, and an agreement that the business entity will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with which this state can enjoy open trade.”); Md. Exec. Order No. 01.01.2017.25 (Oct. 23, 2017) (establishing Maryland’s conditional state contracts law, but clearly excluding noncommercial actions); IDAHO CODE ANN. § 67-2346 (West 2024) (announcing a similar law, but, like the Arkansas law, broadening the scope to prevent individuals and entities from taking “other actions that are intended to discriminate against, inflict economic harm, or otherwise limit commercial

internationally recognized borders, but also include disputed territories controlled by Israel.⁹² Crucially, for those who wish to engage in pro-Palestinian advocacy, there is great variance in the scope of the prohibited activity.⁹³ As discussed in Section II, one of the two central disputes in *Waldrip III* was whether the phrase “other actions” encompasses pure political speech that falls squarely within the protections of the First Amendment.⁹⁴

The standard structure of conditional state contract laws requires individuals or entities that seek to contract with the state to certify that they do not engage in boycotts of Israel, and will not do so through the duration of their contract.⁹⁵ In many cases, the individual or entity is asked to sign a certification attesting to the fact that they do not support or engage in boycotts of Israel, with attendant penalties for falsification in the initial certification or violation of the terms during the life of the contract.⁹⁶ In some states, such laws have been narrowed since their original passage, to exclude certain individuals and contracts that fall below a specific monetary threshold.⁹⁷

There is some variance in the geographic scope of the prohibited boycott activity, which is relevant for those few who may object to, for example, products created in the West Bank, but not those within the internationally recognized borders of Israel.⁹⁸ But the crucial variation, the one at the heart of the challenged Arkansas law, comes in the

relations specifically with the state of Israel or territories under its control, or persons or entities doing business in the state of Israel or territories under its control”).

92. See, e.g., IDAHO CODE ANN. § 67-2346; OHIO REV. CODE ANN. § 9.76; see also Cuffman, *supra* note 52, at 132 & nn.72–73 (“Four U.S. state laws merely apply to boycotts of ‘Israel,’ without specifying whether or not ‘Israel’ includes the West Bank, Gaza, and the Golan Heights. Fourteen states explicitly refer to boycotts of the ‘territories controlled by Israel,’ or some variant thereof, in addition to Israel itself, as conduct falling within the scope of the laws.” (footnote omitted)).

93. Cuffman, *supra* note 52, at 130–31, 130 n.67, 131 n.68 (“[O]nly nine state laws explicitly mention ‘divestment,’ or some variant thereof, while only three state laws explicitly mention ‘sanctions.’” (footnote omitted)).

94. See *supra* Section II; *Waldrip III*, 37 F.4th at 1395 (Kelly, J., dissenting) (“At issue in this case is the meaning of the third prong of the statutory definition of ‘boycott of Israel’: ‘other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories,’ ‘in a discriminatory manner.’” (quoting ARK. CODE ANN. § 25-1-502(1)(A)(i) (West 2024))).

95. See *Types of Legislation*, *supra* note 6; see also, e.g., FLA. STAT. ANN. § 287.135(2)(a) (West 2024); KAN. STAT. ANN. § 75-3740f(b) (West 2024).

96. *Types of Legislation*, *supra* note 6. The dissent in *Waldrip* argued that the legislature had not created a form certification, causing the state to draft its own for the Arkansas Times and other contractors to sign. *Waldrip III*, 37 F.4th at 1397 (Kelly, J., dissenting). The dissent noted that the form drafted by the State asked the Arkansas Times to “[agree] and [certify] that, as a contractor, it will not engage in a ‘boycott of Israel’ for the duration of its contract. But the certification does not define or even cite to the statutory definition of ‘boycott of Israel.’ Rather, a contractor is left to determine on its own what activity is or is not prohibited.” *Id.* (citation omitted).

97. See *infra* note 176 and accompanying text.

98. Compare MINN. STAT. ANN. § 3.226 (West 2024) (“The legislature may not enter into a contract with a vendor that engages in discrimination against Israel, or against persons or entities doing business in Israel”), with TEX. GOV’T CODE ANN. § 808.001 (West 2024) (“‘Boycott Israel’ means refusing to deal with . . . a person or entity doing business in Israel or in an Israeli-controlled territory.”).

form of the vague appendage “other actions,” which also appears in some other state laws.⁹⁹

C. *Major Supreme Court Decisions Relied Upon in Waldrip III*

1. *NAACP v. Claiborne Hardware Co.*

In March 1966, a group of approximately five hundred Black citizens of Claiborne County, Mississippi approved a petition for the local government, entitled “Demands for Racial Justice.”¹⁰⁰ The demands, drafted by the local NAACP chapter and presented to Claiborne County, ranged from the legalistic to the social.¹⁰¹ The citizens demanded the desegregation of all public schools, and an end to verbal abuse of Black people.¹⁰² As noted in the Supreme Court decision, sixteen years later, the petitioners included a demand that Black people “are not to be addressed by terms as ‘boy,’ ‘girl,’ ‘shine,’ ‘uncle,’ or any other offensive term, but as ‘Mr.,’ ‘Mrs.,’ or ‘Miss,’ as is the case with other citizens.”¹⁰³ The NAACP chapter found the response of the local officials lacking and decided to take further action by initiating a boycott of white merchants in Port Gibson and elsewhere in Claiborne County.¹⁰⁴ In the first step of the boycott, Mississippi Action for Progress directed that all its federal funds marked for the purchase of food for children be spent only at Black-owned stores.¹⁰⁵ “[T]he consequences of this decision,” wrote Justice Stevens, “were significant.”¹⁰⁶

From 1966 until 1970, the boycott of white businesses by the local NAACP chapter persisted, supported by picketing, public meetings, speeches, and public pleas.¹⁰⁷ At the same time, several incidents heightened the tension surrounding the boycott, including the murder of the Reverend Dr. Martin Luther King, Jr. and the shooting death of a Black man named Roosevelt Jackson by Port Gibson police officers.¹⁰⁸ Charles Evers, field secretary of the NAACP in Mississippi at the time, promised that Black community members who failed to comply with the boycott would be “disciplined.”¹⁰⁹ Claiborne County citizens testified to incidents of violence and threats of reprisal against such community members, including shots fired into the home of a Black couple who wanted to go to a white-owned dry cleaner.¹¹⁰

99. See, e.g., ARIZ. REV. STAT. ANN. § 35-393 (West 2024). Though the portions of this law that applied to sole proprietors, companies with fewer than ten employees, and contracts worth less than \$100,000 were eventually struck down, “boycott” is still defined as “engaging in a refusal to deal, terminating business activities or performing *other actions* that are intended to limit commercial relations.” *Id.* (emphasis added); FLA. STAT. ANN. § 215.4725 (West 2024); NEV. REV. STAT. ANN. § 332.065(2) (West 2024).

100. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 898–99 (1982).

101. *Id.* at 899.

102. *Id.*

103. *Id.* at 900.

104. *Id.*

105. *Id.* at 900–01.

106. *Id.* at 901.

107. *Id.* at 902–04.

108. *Id.* at 901–02.

109. *Id.* at 902.

110. *Id.* at 905.

In 1969, seventeen white merchants filed suit against the NAACP, Mississippi Action for Progress, Inc., and 146 individuals, for their role in the boycott, seeking to recover losses sustained as a result of the boycott and to put a stop to any future boycott.¹¹¹ It was not until 1976 that a chancery court judge found the defendants liable for malicious interference and held that they had violated both a statutory prohibition on secondary boycotts and a Mississippi antitrust statute.¹¹² The defendants' claim that their conduct was permitted by the First Amendment was rejected, and the chancellor not only imposed damages on them, but entered a "broad permanent injunction" against any further boycott activity.¹¹³ The Mississippi Supreme Court reversed a significant portion of this holding but upheld the imposition of liability, on the theory that "certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers."¹¹⁴ The "force, violence, and threats" that were a part of enforcing the boycott thus led the court to conclude that the *entire* boycott was unlawful, and that the "agreed use of illegal force, violence, and threats"—never established at trial—did not constitute speech protected by the First Amendment.¹¹⁵

The U.S. Supreme Court did not accept the claims of the plaintiff merchants and, sixteen years after the boycott commenced, found that the nonviolent elements of the boycott were entitled to First Amendment protection.¹¹⁶ The Court engaged in a two-step inquiry.¹¹⁷

First, the Court considered the question of whether "petitioners' activities [were] protected in any respect by the Federal Constitution."¹¹⁸ Looking to the "many forms" taken by the boycott, the Court began with the core of the boycott—the concerted economic effort to pressure white businesses—before moving to the speeches and picketing that accompanied the original act.¹¹⁹ The Court stated: "As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.'"¹²⁰ That some members of the boycott engaged in violent, unprotected conduct did not destroy constitutional protection for everyone else.¹²¹ After analyzing each "element" of the boycott, the Court concluded that the boycott was an exercise of the "inseparable" First Amendment rights of "speech, assembly, association, and petition."¹²²

The second step of the analysis was to determine whether Mississippi's interest in regulation of its own economic conditions was of sufficient weight to allow the state to

111. *Id.* at 889.

112. *Id.* at 891–92.

113. *Id.* at 892–93.

114. *Id.* at 894.

115. *Id.* at 895.

116. *Id.* at 933–34.

117. *See id.* at 907.

118. *Id.*

119. *Id.*

120. *Id.* (citation omitted) (quoting 454 U.S. 290, 294 (1984)).

121. *See id.* at 908.

122. *Id.* at 907–12.

regulate the speech of the boycotters.¹²³ Once again, the Court found the petitioners' arguments persuasive: "States have broad power to regulate economic activity," but they "do not [have] a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."¹²⁴ In the Court's analysis, "[p]eaceful political activity," like that undertaken by the Black residents of Claiborne County, was distinct from economic activity designed to "destroy legitimate competition," which the state has greater power to regulate.¹²⁵ The Court held that the "nonviolent elements of [the boycott] [we]re entitled to the protection of the First Amendment."¹²⁶

2. *Rumsfeld v. FAIR*

In 2003, FAIR, an association of law schools and their faculty, brought suit against the U.S. government over its enforcement of the Solomon Amendment.¹²⁷ The Solomon Amendment "prevented the Department of Defense (DOD) from providing specified federal funds to any institution of higher education 'that either prohibits, or in effect prevents' military recruiters 'from gaining entry to campuses.'"¹²⁸ FAIR, which sought to promote compliance with antidiscrimination policies of member schools, had fought versions of the Solomon Amendment for years.¹²⁹ The organization sought to restrict the access of military recruiters to students, in light of the then-extant congressional policy "with respect to homosexuals in the military."¹³⁰ After the September 11 terrorist attacks, the federal government pushed beyond the original language of the amendment, requiring universities to provide military recruiters "access to students equal in quality and scope to that provided to other recruiters."¹³¹

FAIR argued that this violated its First Amendment rights to speech and association, on many different grounds.¹³² Most relevant to this Note, FAIR argued that compliance with the amendment would "significantly affect the law schools' ability to express their particular message or viewpoint."¹³³ The conduct required by the Solomon Amendment, FAIR argued, was inherently expressive, and if forced to allow

123. *Id.* at 912.

124. *Id.* at 913.

125. *Id.* at 914.

126. *Id.* at 915.

127. *Rumsfeld v. FAIR*, 547 U.S. 47, 52 (2006). The Solomon Amendment requires the Department of Defense, Department of Education, and other agencies to deny a university federal funding if it refuses to allow military recruiting on campus. 10 U.S.C. § 983.

128. *FAIR*, 547 U.S. at 52 (quoting 10 U.S.C. § 983(b)).

129. Linda Greenhouse, *U.S. Wins Ruling over Recruiting at Universities*, N.Y. TIMES (Mar. 7, 2006), <https://www.nytimes.com/2006/03/07/politics/politicsspecial1/us-wins-ruling-over-recruiting-at-universities.html> [<https://perma.cc/8KX6-Z523>] ("It was a setback, although hardly an unexpected one, to a coalition of law schools that brought the constitutional challenge, as well as to the Association of American Law Schools, which represents nearly all accredited law schools and since 1991 has required adherence to a nondiscrimination policy on sexual orientation as a condition of membership. Many law schools initially chose to comply with the association's policy by barring military recruiters . . .").

130. *FAIR*, 547 U.S. at 52.

131. *Id.* at 53 (quoting *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 283 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005)).

132. *Id.*

133. *Id.* (quoting *FAIR v. Rumsfeld*, 291 F. Supp. 2d at 304).

the recruiters on campus, the schools could be viewed as communicating agreement with military policies.¹³⁴

The Court rejected the argument that the challenged statute impermissibly regulated speech, stating “that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.”¹³⁵ However, the Court still considered whether the conduct was “inherently expressive.”¹³⁶ This question was grounded in its *United States v. O’Brien* holding that First Amendment protections extended to forms of “symbolic speech”¹³⁷ where the conduct is “inherently expressive.”¹³⁸

The actions at issue, the Court concluded, were not expressively on par with, for example, burning an American flag.¹³⁹ Instead, an onlooker unaware of a law school’s position on the military’s policies would need supplementary speech to understand why the school was treating its recruiters differently from those of other organizations.¹⁴⁰ The Court asserted that it is not “overwhelmingly apparent” why a school would choose to do so.¹⁴¹ The Court found “strong evidence that the conduct at issue [was] not so inherently expressive that it warrant[ed] protection under *O’Brien*,” because the act of treating those recruiters differently would not be easily understood to express anything in particular, let alone the actual reason for doing so.¹⁴² Thus, in the view of the Court, the Solomon Amendment regulated mere unexpressive conduct, not speech, and was not subject to the *O’Brien* test.¹⁴³

D. Federal District Court Decisions Concerning Laws Substantively Identical to Act 710

The cases discussed below reveal just a sample of the legislation aimed at boycotts like those at issue in *Waldrip III*. The cases examined here—*Koontz v. Watson*,¹⁴⁴ *Jordahl v. Brnovich*,¹⁴⁵ and *Amawi v. Pflugerville Independent School District*¹⁴⁶—were resolved with opinions that provide the most clarity on issues in *Waldrip III*.¹⁴⁷ *Amawi* also serve as an introduction to viewpoint discrimination, which this paper argues should have been the controlling consideration in *Waldrip III*.

134. *Id.* at 65.

135. *Id.*

136. *Id.* at 64.

137. 391 U.S. 367, 376 (1968).

138. *FAIR*, 547 U.S. at 66.

139. *Id.*

140. *Id.*

141. *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

142. *Id.*

143. *See id.*

144. 283 F. Supp. 3d 1007 (D. Kan. 2018).

145. 336 F. Supp. 3d 1016 (D. Ariz. 2018), *vacated on other grounds*, 789 Fed. Appx. 589 (9th Cir. 2020).

146. 373 F. Supp. 3d 717 (W.D. Tex. 2019).

147. Though *Martin v. Wrigley*, 540 F. Supp. 3d 1220 (N.D. Ga. 2021), *Ali v. Hogan*, 26 F.4th 587 (4th Cir. 2022), and *Am. Muslims for Palestine v. Ariz. State Univ.*, No. CV-18-00670-PHX, 2018 U.S. Dist. LEXIS

1. *Koontz v. Watson*

In June 2017, Kansas enacted H.B. 2409,¹⁴⁸ requiring all state contractors to certify that they are not engaged in a boycott of Israel.¹⁴⁹ The law defined boycotts as engaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with persons or entities doing business in Israel or in territories controlled by Israel, if those actions are taken either:

(1) In compliance with or adherence to calls for a boycott of Israel other than those boycotts to which 50 U.S.C. § 4607(c) applies; or

(2) in a manner that discriminates on the basis of nationality, national origin or religion, and that is not based on a valid business reason.¹⁵⁰

Esther Koontz, a member of a Mennonite Church USA organization, began boycotting Israeli businesses that year, in recognition of the Mennonite Church USA resolution “calling on Mennonites to take steps to redress the injustice and violence that both Palestinians and Israelis have experienced.”¹⁵¹ Koontz was asked to sign a certification confirming that she was not participating in a boycott of Israel, prior to beginning work as a contracted teacher-trainer in a statewide program in Kansas.¹⁵² Koontz refused to sign, and the program director instructed her that she could not be paid as a contractor until she signed the certification.¹⁵³ Koontz brought a Section 1983 claim against the Kansas Commissioner of Education, Randall Watson.¹⁵⁴

In assessing the substance of Koontz’s claim that state law had deprived her of a constitutional right, the court considered the unconstitutional conditions doctrine.¹⁵⁵ In *Pickering v. Board of Education*, the Supreme Court provided a test for determining whether a State had infringed on the First Amendment rights of a government employee, requiring courts to strike “a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁵⁶ In *Board of County Commissioners v. Umbehr*, the Court extended *Pickering* to cover the speech rights of independent contractors with the government, holding that “independent contractors are protected, and that the *Pickering* balancing test, adjusted to weigh the government’s interests as contractor rather than as employer,

202068 (D. Ariz. Nov. 29, 2018) also concern challenges to anti-boycott laws, they are not discussed in this Note.

148. H.B. 2409, 2017 Leg., Reg. Sess. (Kan. 2017) (enacted).

149. *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1013 (D. Kan. 2018) (citing KAN. STAT. ANN. § 75-3740f(a) (West 2024)).

150. H.B. 2409 (current version at KAN. STAT. ANN. § 75-3740e(a) (West 2024)).

151. *Koontz*, 283 F. Supp. 3d at 1013.

152. *Id.* at 1014.

153. *Id.*

154. 42 U.S.C. § 1983; *Koontz*, 283 F. Supp. 3d at 1012; *Koontz v. Watson—Challenge to Kansas Law Targeting Boycotts of Israel*, ACLU (Oct. 11, 2017), <https://www.aclu.org/cases/koontz-v-watson-challenge-kansas-law-targeting-boycotts-israel> [<https://perma.cc/6M3X-2Y4S>].

155. *Koontz*, 283 F. Supp. 3d at 1020.

156. 391 U.S. 563, 568 (1968).

determines the extent of their protection.”¹⁵⁷ That test “requires [a] plaintiff to show, first, that the First Amendment protects the conduct that she claims led to the state denying a benefit.”¹⁵⁸

In the court’s view, Koontz met this burden.¹⁵⁹ The court concluded that Koontz’s actions fell under the protection identified in *Claiborne*—protection for the *specific elements* of the boycott, rather than protection only for the *right to participate* in a boycott.¹⁶⁰ These specific elements included meeting “with other likeminded individuals to organize and discuss the boycott,” and supporting the boycott “with speeches, nonviolent picketing, and encouragement to others to join their cause.”¹⁶¹

Applying the *Pickering* test to the Kansas law and relying on the ruling in *Claiborne*, the court found that “[t]he conduct prohibited by the Kansas Law is protected for the same reason as the boycotters’ conduct in *Claiborne* was protected.”¹⁶² Having determined that the plaintiff met her burden, the court found the countervailing state interests lacking.¹⁶³ The compelling governmental interest was determined to be, quite simply, viewpoint discrimination.¹⁶⁴ As the court put it: “The Kansas Law’s legislative history reveals that its goal is to undermine the message of those participating in a boycott of Israel.”¹⁶⁵ Even the secondary interest in ensuring comfort for Israeli companies that conducted business in Kansas was held to be an impermissible goal.¹⁶⁶ “But even if one assumed,” the opinion goes on,

Kansas had passed the law to achieve constitutionally permissible goals that would not change the outcome here. It is still unconstitutional because it is not narrowly tailored to achieve those permissive goals. If Kansas had passed its law to regulate boycotts intended to suppress economic competition coming from Israel—a goal that *Claiborne* permits—the Kansas Law is overinclusive. It is overinclusive because it also bans political boycotts, which is impermissible.¹⁶⁷

Crucial to any analysis of the law at issue in *Waldrip III* is the Kansas District Court’s analysis of *Rumsfeld v. FAIR*.¹⁶⁸ The *Waldrip III* court understood the holding

157. 518 U.S. 668, 673 (1996).

158. *Koontz*, 283 F. Supp. 3d at 1021 (citing *Umbehr*, 518 U.S. at 675).

159. *Id.*

160. *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–08 (1982)).

161. *Id.* (citing *Claiborne*, 458 U.S. at 907).

162. *Id.* at 1022.

163. *Id.*

164. *Id.*

165. *Id.* at 1013, 1022. (“[L]egislators made statements during debate about the Kansas Law that its purpose was to stop people from antagonizing Israel.”).

166. *Id.* at 1022 (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (quoting *Chi. Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972))).

167. *Id.* at 1023 (footnote omitted).

168. 547 U.S. 47, 66 (2006). As a principal case relied upon by the Eighth Circuit in deciding *Waldrip III*, past treatment of *FAIR* in litigation over laws substantially similar to the law at issue in *Waldrip III* is instructive. See *Waldrip III*, 37 F.4th 1386, 1391–94 (8th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 774 (2023).

of *FAIR* to bar the regulation of inherently expressive conduct by state actors.¹⁶⁹ “Conduct is inherently expressive when someone understands that the conduct is expressing an idea without any spoken or written explanation.”¹⁷⁰ The Kansas law, in the court’s view, regulated conduct that was altogether different from the conduct in *FAIR*, and the court qualified it as inherently expressive.¹⁷¹

At first blush, this *Waldrip III* holding would appear to be conclusive on the Kansas law. If the act of boycotting Israel is inherently expressive conduct, then regulations aimed at that conduct are a violation of the First Amendment. But it is not so simple. The court in *Koontz* was terse in asserting that boycotting Israel is inherently expressive.¹⁷² This underlines the difficulty at the heart of “inherently expressive conduct,” as a doctrine. For the court, “[i]t is easy enough to associate the plaintiff’s conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians.”¹⁷³ But the *Waldrip III* court did not spare one word to discuss the basis for that claim.¹⁷⁴ It did not cite studies on how widely this conduct would be understood to be political in nature, nor did it cite opinions of other courts on this conduct. The opinion included no support for the assertion that boycotting Israel is inherently expressive.¹⁷⁵ Far from being conclusive on this point, the court’s ruling actually exposed a weak point in the argument: determining what is “inherently expressive” may depend in great part on whoever happens to be assessing that claim.

Koontz was one of several major federal district court cases regarding boycott laws like the one at issue in *Waldrip III*.¹⁷⁶ Each of these cases was eventually resolved in the same manner as *Koontz*: state legislatures, in response to defeats at district court, amended the laws to narrow the class of excluded person and organizations, rendering the claims of the original plaintiffs moot.¹⁷⁷

169. *Waldrip III*, 37 F.4th at 1392; see also *Koontz*, 283 F. Supp. 3d at 1023.

170. *Koontz*, 283 F. Supp. 3d at 1023 (citing *FAIR*, 547 U.S. at 65–66). The Supreme Court did not recognize the conduct at issue in *FAIR*—refusing to send emails and post notices on bulletin boards on behalf of the U.S. military—as inherently expressive, let alone as speech under constitutional protection. See *FAIR*, 547 U.S. at 66.

171. *Koontz*, 283 F. Supp. 3d at 1024.

172. See *id.*

173. *Id.*

174. See *Waldrip III*, 37 F.4th at 1393–94.

175. See *id.*

176. See *supra* notes 144–146.

177. Compare KAN. STAT. ANN. § 75-3740e(b), (c) (West 2017), with KAN. STAT. ANN. § 75-3740e(b), (c) (West 2024) (amending the law to remove sole proprietorships from the definition of “company” and adding a requirement that the contract be worth more than \$100,000); Press Release, ACLU, After Court Defeat, Kansas Changes Law Aimed at Boycotts of Israel (June 29, 2018), <https://www.aclu.org/press-releases/after-court-defeat-kansas-changes-law-aimed-boycotts-israel> [https://perma.cc/U8EY-DBSM] (explaining that the amended version of the Kansas law no longer applies to sole proprietors or individuals and companies that conduct less than \$100,000 worth of business in the state, and that the certification limits boycotts of Israeli goods and services “that constitute an integral part of business conducted or sought to be conducted with the state”); compare ARIZ. REV. STAT. ANN. § 35-393(2) (West 2016), with ARIZ. REV. STAT. ANN. § 35-393(2) (West 2024) (removing sole proprietorships from the definition of “company”); *Jordahl v. Brnovich* (*Amicus*), CTR. FOR CONST. RTS. (Sep. 17, 2020), <https://ccrjustice.org/home/what-we-do/our-cases/jordahl-v-brnovich-amicus> [https://perma.cc/V4YS-3GD7] (explaining that “modifications to the Arizona law and its application to the plaintiff”—substantially similar to

2. *Jordahl v. Brnovich*

Jordahl v. Brnovich concerned an Arizona law that explicitly “aimed at divesting state funding from companies that engage in a boycott of Israel.”¹⁷⁸ Arizona House Bill 2617 provided that

[a] public entity may not enter into a contract with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel.¹⁷⁹

Like the law in *Koontz*, the Arizona law in *Jordahl* included language that barred covered individuals and entities from “performing other actions that are intended to limit commercial relations with Israel.”¹⁸⁰ Here, the sole proprietor who brought suit was Mikkel Jordahl, an Arizona lawyer who personally participated in a boycott of Israel.¹⁸¹ Like *Koontz*, Jordahl was moved by the position of his church, the Evangelical Lutheran Church in America.¹⁸² Jordahl also belonged to Jewish Voice for Peace (JVP), an organization that supports BDS.¹⁸³ He sought to support JVP with financial and legal resources at the same time as he worked as a government contractor, providing legal advice to prisoners in an Arizona county jail.¹⁸⁴

In 2016, following the passage of the anti-boycott law, the county where Jordahl provided legal services asked Jordahl to sign a written certification that neither his firm nor any of its subsidiaries were “currently engaged in a boycott of Israel” nor would do so for the duration of the contract.¹⁸⁵ Jordahl signed the certification under protest, and later claimed that he turned down opportunities to provide services to organizations like JVP over the ensuing year, for fear he would run afoul of the certification requirement.¹⁸⁶ In 2017, he refused to sign the certification and the county refused to

those made to the Kansas law and *Koontz*— “made the case moot.”); compare TEX. GOV’T CODE ANN. § 808.001(2) (West 2024), with TEX. GOV’T CODE ANN. § 2271.001(2) (West 2024) (eliminating sole proprietorships from the definition of “company” despite the language remaining in the original statute); see also *Amawi v. Paxton*, 956 F.3d 816, 819 (5th Cir. 2020) (“[T]his appeal is moot because, twelve days after the district court’s ruling, Texas enacted final legislation that exempts sole proprietors from the ‘No Boycott of Israel’ certification requirement.”).

178. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1028 (D. Ariz. 2018) (quoting *Fact Sheet for House Bill*, H.B. 2617, 52 Leg., 2d Sess., at 1 (Ariz. 2016) (enacted)), *vacated on other grounds*, 789 F. App’x 589 (9th Cir. 2020).

179. H.B. 2617, 52nd Leg., 2d Reg. Sess. (Ariz. 2016) (amending ARIZ. REV. STAT. ANN. § 35-393). The Arizona statute was amended in 2019 to change “boycott of Israel” to “boycott of goods or services from Israel.” § 35-393.01(A) (emphasis added).

180. *Jordahl*, 336 F. Supp. 3d at 1028 (quoting § 35-393.01(A)).

181. *Id.*

182. *Id.*

183. *Id.* at 1029; see also Rob Gloster, *JVP Among 20 Groups Banned from Israel for BDS Support*, N. CAL. JEWISH NEWS (Jan. 8, 2018), <https://jweekly.com/2018/01/08/jvp-among-20-groups-banned-israel-bds-support/> [<https://perma.cc/ENT8-2Z6N>].

184. *Jordahl*, 336 F. Supp. 3d at 1029.

185. *Id.*

186. *Id.*

pay him for his services.¹⁸⁷ Jordahl brought suit against the Arizona Attorney General, alleging that the anti-boycott law violated his First and Fourteenth Amendment rights.¹⁸⁸

Jordahl argued that the certification constituted viewpoint and content discrimination and impermissibly compelled speech.¹⁸⁹ Further, he argued that those impositions were not justified by any legitimate government interests.¹⁹⁰ Arizona argued that the activities Jordahl wished to participate in were unexpressive commercial conduct, not entitled to First Amendment protection.¹⁹¹ To the extent that such conduct was entitled to any protection, the State argued, it was decisively outweighed by the interests in regulating commercial activity and preventing discrimination on the basis of national origin.¹⁹²

The court rejected the defendant's reliance on the Supreme Court's 1982 decision in *International Longshoremen's Ass'n v. Allied International, Inc.*,¹⁹³ and on the 1984 Seventh Circuit decision *Briggs & Stratton Corp. v. Baldrige*.¹⁹⁴ The court found that *Longshoremen*, establishing limits on First Amendment protections for economic boycotts, merely "highlight[ed] the context in which this type of governmental infringement on the First Amendment rights of labor unions and their members is justified."¹⁹⁵ *Claiborne*, decided by the Supreme Court just a few months after *Longshoremen*, provided the relevant law regarding the government's burden in infringing on such activity.¹⁹⁶ *Claiborne*, in the court's articulation, held that "each 'element[] of the boycott [was] a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendment.'"¹⁹⁷ The *Jordahl* court asserted that *Claiborne* "stands for the proposition that collective boycotting activities undertaken to achieve social, political or economic ends is conduct that is protected by the First Amendment."¹⁹⁸

The court applied the *Claiborne* holding to the state law, as had occurred in *Koontz*.¹⁹⁹ Since "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process," and the

187. *Id.*

188. *Id.* The court granted the state of Arizona's request to intervene for the purpose of defending the facial constitutionality of the law. *Id.* at 1030.

189. *Id.* at 1039.

190. *Id.*

191. *Id.*

192. *Id.*

193. 456 U.S. 212 (1982).

194. 728 F.2d 915 (7th Cir. 1984); *see also Jordahl*, 336 F. Supp. 3d at 1040 (first citing *Int'l Longshoremen*, 456 U.S. 212; and then citing *Briggs & Stratton Corp.*, 728 F.2d 915).

195. *Jordahl*, 336 F. Supp. 3d at 1041.

196. *Id.*

197. *Id.* (alterations in original) (emphasis added) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 906 (1982)).

198. *Id.*

199. *Id.* at 1042 ("[W]hen a statute requires a company, in exchange for a government contract, to promise to refrain from engaging in certain actions that are taken in response to larger calls to action that the state opposes, the state is infringing on the very kind of expressive conduct at issue in *Claiborne*."); *see also Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022 (D. Kan. 2018).

text of the Arizona law sought to restrict precisely that activity—Jordahl had a legitimate claim to First Amendment protection.²⁰⁰ The court found that the law impermissibly restricted Jordahl’s ability to engage in a collective endeavor to influence political change (i.e., his ability to engage in constitutionally protected speech).²⁰¹

The *Jordahl* decision came in September 2018.²⁰² The following year, the Arizona legislature narrowed the application of the anti-boycott law “to exclude sole proprietors, companies with fewer than 10 employees, and contracts worth less than \$100,000.”²⁰³

3. *Amawi v. Pflugerville*

Amawi v. Pflugerville, unlike many of the anti-boycott cases discussed in this Note, received extensive coverage in mainstream media sources.²⁰⁴ Bahia Amawi, a Palestinian-American speech pathologist working in a Texas school district, counted herself as a participant in BDS.²⁰⁵ After nine years working with the school district, Amawi was asked to sign an addendum to her renewal contract certifying that she did not boycott Israel and would not do so during the term of her contract.²⁰⁶

In 2017, Texas enacted a bill prohibiting state entities from contracting with companies that boycott Israel.²⁰⁷ Here, “boycott Israel” was defined as “refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory.”²⁰⁸ The bill’s sponsor, Representative Phil King, was fairly straightforward about the aims of the bill:

First, as a Christian, my religious heritage is intrinsically linked to Israel and to the Jewish people. Second, as an American, our national security is

200. *Jordahl*, 336 F. Supp. 3d at 1041–42 (quoting *Claiborne*, 458 U.S. at 907).

201. *Id.* at 1042.

202. *See generally id.*

203. S.B. 1167, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (enacted); ARIZ. REV. STAT. ANN. § 35-393(2) (West 2024) (removing “a sole proprietorship” from definition of “Company”); § 35-393.01(A) (adding “with a value of \$100,000 or more” to “contract”); *see also* *Legislation: Arizona*, PALESTINE LEGAL, <https://legislation.palestinelegal.org/location/arizona/#legislation-sb-1167-2> [https://perma.cc/7QAY-2DVP] (last updated Jan. 19, 2023).

204. 373 F. Supp. 3d 717, 731 (W.D. Tex. 2019), *vacated on other grounds sub nom.* *Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020); *see also* Jacey Fortin, *She Wouldn’t Promise Not To Boycott Israel, so a Texas School District Stopped Paying Her*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/speech-pathologist-texas-israel-oath.html> [https://perma.cc/LJ2K-2HZA]; Glenn Greenwald, *A Texas Elementary School Speech Pathologist Refused To Sign a Pro-Israel Oath, Now Mandatory in Many States—so She Lost Her Job*, INTERCEPT (Dec. 17, 2018), <https://theintercept.com/2018/12/17/israel-texas-anti-bds-law/> [https://perma.cc/Q25G-URMK].

205. *Amawi*, 373 F. Supp. 3d at 731. As the court noted, Amawi’s participation in the boycott amounted to consumer decisions in her personal life like refraining from the purchase of Sabra-brand hummus because of its connections to Israel. *Id.* at 731–32.

206. *Id.* at 732.

207. *Id.* at 730–31 (quoting TEX. GOV’T CODE ANN. § 808.001 (West 2024)).

208. § 808.001.

dependent in great part on a strong Israel, often our only friend in the Middle East. Third, as a Texas legislator, our state has a substantial Jewish population and this issue is important to them. Texans have historical ties and do a lot of business with Israel. Fourth, it's just the right thing to do.²⁰⁹

As a result of the alleged harm wrought upon her by the law, Amawi brought suit alongside several other plaintiffs alleging harm for their support of BDS under the law.²¹⁰ Before proceeding to any analysis of the plaintiffs' First Amendment challenges to the law, the court had to first determine whether the First Amendment even applied to the conduct.²¹¹ The inquiry began with a rehash of the "dueling precedents,"²¹² the rules expressed by *Claiborne* and *FAIR*, and concluded, once again, that *Claiborne* was the controlling case.²¹³ In *FAIR*, the Court "did not treat the . . . plaintiffs' conduct as a boycott: the word 'boycott' appears nowhere in the opinion, the decision to withhold patronage is not implicated, and *Claiborne* . . . is not discussed."²¹⁴ Thus, *FAIR* could not possibly control a decision regarding state contracts conditioned on disengagement or pledges to not engage in a political boycott.²¹⁵

The majority in *Amawi* expressed the position that the *Claiborne* Court was specific in articulating First Amendment protections for *every* nonviolent element of a political boycott.²¹⁶ In *Claiborne*, those elements had included picketing; public meetings to further the cause of the boycott; and the particular act of boycotting—in that case, the decision to "withh[old] patronage from the white establishment of Claiborne County."²¹⁷ Texas, in its motion to dismiss in *Amawi*, had argued that the *Claiborne* Court had only offered First Amendment protections to a narrower range of elements within the NAACP boycott, *not* to "the act of refusing to buy from white merchants."²¹⁸ The court in *Amawi* was blunt on this point: "Texas is incorrect."²¹⁹

Having concluded that *Claiborne* controlled the interpretation of the Texas statute at issue, the majority asserted that, nevertheless, boycotts of Israel were not protected speech.²²⁰ The state rehashed the same argument made in *Jordahl* regarding *Briggs* and *Allied International*.²²¹ Texas argued that so-called secondary boycotts had already been excluded from First Amendment protection by the *Longshoremen* Court and that the decision in *Briggs*, allowing the federal government to prevent companies from responding to questionnaires sent by "Arab countries . . . engaged in a long-standing

209. *Amawi*, 373 F. Supp. 3d at 731; *see also* Aaron Howard, *Texas Rep To File Anti-BDS Bill*, PHILKING (Nov. 10, 2016), <https://www.philking.com/2016/11/11/texas-rep-to-file-anti-bds-bill-by-aaron-howard/> [<https://perma.cc/Q78T-9D73>].

210. *Amawi*, 373 F. Supp. 3d at 732–35.

211. *Id.* at 742–43.

212. *Id.* at 743.

213. *Id.*

214. *Id.*

215. *See id.* at 743–45.

216. *Id.* at 744 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915, 918 (1982)).

217. *Id.* (alteration in original) (quoting *Claiborne*, 458 U.S. at 918).

218. *Id.* (quoting Defendant Att'y Gen. Ken Paxton's Motion to Dismiss at 11, *Amawi*, 373 F. Supp. 3d 717 (Nos. 18-CV-1091, 18-CV-1100)).

219. *Id.*

220. *Id.* at 745.

221. *Id.*; *see also supra* notes 195–198.

trade boycott of Israel,” was a permissible portion of the Export Administration Act.²²² As the court in *Amawi* was quick to conclude, these arguments are facially weak and irrelevant to the issues at hand.²²³ After dispensing with one more particularly weak argument on the scope of *Claiborne*, the court reached its conclusion: political boycotts are protected speech, and none of the exceptions that Texas put forth applied to the speech in this case.²²⁴ Having dispensed with all arguments to the contrary, the court was finally able to proceed to the plaintiffs’ challenges to the statute.²²⁵ The relevant challenge, in this case, was that the statute constituted impermissible content- and viewpoint-based restriction of protected speech.²²⁶

The court began its content- and viewpoint-based discrimination analysis by stating a key principle of First Amendment doctrine: “[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²²⁷ Speech regulations, which are presumptively unconstitutional,²²⁸ are content-based “if the law applies to particular speech because of the topic discussed or the idea or message expressed.”²²⁹ Content-based speech laws may only be justified on the basis that they serve compelling state interests and are narrowly tailored to do so.²³⁰

Viewpoint discrimination describes government action to “impermissibly ‘license one side of a debate’ and ‘create[] the possibility that the [government] is seeking to handicap the expression of particular ideas.’”²³¹ The Supreme Court has labeled viewpoint discrimination an “egregious form” of content discrimination.²³² The *Amawi* court quoted the Supreme Court’s assertion that viewpoint-based regulations are “particularly pernicious.”²³³ Whereas the general category is often subject to strict scrutiny, “viewpoint discrimination is significantly worse, often leading to per se invalidation.”²³⁴

With the settled precedent and principles in mind, the *Amawi* court found that Texas had impermissibly sought to license just one side of a high-temperature political debate and restrict the other.²³⁵ As one plaintiff mentioned, no equivalent conditioning

222. *Amawi*, 373 F. Supp. 3d at 745–46 (omission in original) (quoting *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 916 (7th Cir. 1984)).

223. *See id.* at 745–46 (“*Longshoremen* is the exception, not the rule. . . . *Briggs* is even less relevant.”).

224. *Id.* at 746–47 (“There is no authority to support the notion that speech must be concerned with domestic affairs to enjoy constitutional protection; indeed, the Supreme Court has held just the opposite.”).

225. *Id.* at 747.

226. *Id.*

227. *Id.* (quoting *Chi. Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972)).

228. *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)).

229. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

230. *Id.* (citing *Reed*, 576 U.S. at 163).

231. *Id.* at 748 (alterations in original) (citing *R.A.V.*, 505 U.S. at 394).

232. Lackland H. Bloom, Jr., *The Rise of the Viewpoint Discrimination Principle*, 72 SMU L. REV. F. 20, 21 n.4 (2019) (quoting *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

233. *Amawi*, 373 F. Supp. 3d at 747 (quoting *R.A.V.*, 505 U.S. at 430).

234. Bloom, *supra* note 232, at 21.

235. *Amawi*, 373 F. Supp. 3d at 751.

was placed on the contracts of individuals who boycotted *Palestinian* companies.²³⁶ Contrary to the State's assertion, the court concluded that the government's ability to determine the content of its own speech did not extend so far as to allow it to control political boycotts by its contractors.²³⁷ In the court's analysis, none of the proffered state interests—prohibiting national-origin discrimination, prohibiting state contractors from violating antidiscrimination principles, and aligning commerce with state policy—were served by the statute.²³⁸ And even if they had been, according to the court, the statute was *still* too broad.²³⁹

Ultimately, the court concluded that the plaintiff's First Amendment claims were likely to succeed, as the bill constituted impermissible content- and viewpoint-based restrictions, imposed unconstitutional conditions on public employment, and compelled speech for an impermissible purpose.²⁴⁰

IV. PERSONAL ANALYSIS

The court in *Waldrip III* blessed an unconstitutional law. It did so by misstating, or outright ignoring, persuasive authority from lateral courts on the precise subject of anti-boycott provisions in government contracting and also misstated or ignored Supreme Court precedent on the strength of the state's power to restrict speech.²⁴¹ The Eighth Circuit was incorrect in holding that *Claiborne* only expressed protection for the elements of political boycotts more traditionally associated with speech and in excluding the actual act of boycotting from implicit protection.²⁴² And even if one were to accept the court's argument that *Claiborne* did not express protection for the actual act of boycotting, and that *FAIR* controlled, it would still be the case that (1) the court did not present thorough analysis of whether a boycott of Israel would be inherently expressive conduct and (2) the text of the statute and filings by the state make clear that the *legislature itself* considered boycotts of Israel to be inherently expressive.²⁴³

Part IV.A analyzes the holding of *Claiborne* and why it, and not *FAIR*, is the controlling case for consideration of political boycotts. Part IV.B applies the doctrine of viewpoint discrimination, discussed in the analysis of *Amawi* and *Jordahl*, to the facts of *Waldrip III*.

236. *Id.* at 747–48 (quoting Pluecker Motion for a Preliminary Injunction at 30, *Amawi*, 373 F. Supp. 3d 717 (Nos. 18-CV-1091, 18-CV-1100)).

237. *See id.* at 748 (“Here, however, no reasonable observer would attribute Plaintiffs’ decisions to boycott Israel to the State of Texas, and Texas does not argue otherwise.”).

238. *Id.* at 748–51.

239. *Id.* at 751 (“But even if Texas’s stated interests were the actual interests advanced by the statute—and even if they were compelling—the Court finds that H.B. 89 still sweeps too broadly.”).

240. *Id.* at 757–58.

241. *See Waldrip III*, 37 F.4th 1386, 1393 (8th Cir. 2022) (en banc) (“So this case turns on what Act 710 bans: protected boycott-related activity, or non-expressive commercial decisions?”), *cert. denied*, 143 S. Ct. 774 (2023). That quote misstates the holding of *Claiborne* by failing to understand that the commercial decisions in *Claiborne* were, in fact, the “protected boycott-related activity.” *Id.*; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909–10, 929 (1982).

242. *Waldrip III*, 37 F.4th at 1392.

243. *See infra* notes 267–272.

A. *Claiborne Provided First Amendment Protection for Boycotts and Should Have Controlled Rather Than FAIR*

The fundamental question at the heart of *Waldrip III* is whether the *Claiborne* Court intended for the actual boycott—the collective action whereby people lawfully, peacefully withhold patronage in order to bring about political or social change—to be one of the “nonviolent elements” worthy of First Amendment protection.²⁴⁴ Both the district court and the Eighth Circuit construed the *Claiborne* holding to apply only to the supplementary elements of the NAACP boycott more easily understood as “speech”—picketing, speechifying, and meetings.²⁴⁵ That interpretation of *Claiborne*, though not completely without merit, does not withstand the weight of textual and decisional evidence for the opposite conclusion: that *Claiborne* declared boycotts themselves to be protected by the First Amendment. In this case, the Eighth Circuit panel had it right.

Further, *FAIR* clearly did not control. Proceeding from its erroneous reading of *Claiborne*, the court reasoned that a politically motivated consumer boycott is similarly not protected, “[b]ecause those commercial decisions are invisible to observers unless explained.”²⁴⁶ But if this reasoning were to be accepted, then each element of any protest activity would need to be analyzed with the *FAIR* test for inherently expressive conduct to receive First Amendment protection. To do so would subject protest actions like sit-ins or other forms of collective protest to a new, higher standard of protective review—a standard that these actions could not satisfy.

A close textual analysis of *Claiborne* reveals the missteps of the *Waldrip III* court, which failed to undertake much analysis of the words they cited.

The *Claiborne* Court explicitly analyzed the “petitioners’ activities.”²⁴⁷ The first paragraph of that analysis began with a description of one of those activities: “The boycott of white merchants at issue in this case took many forms.”²⁴⁸ The phrase that concluded the transition paragraph, “petitioners’ activities,” was given meaning by the beginning of the paragraph that followed, with “the boycott of white merchants.”²⁴⁹ Thus far, it seems clear that “petitioners’ activities” and “the boycott of white merchants” are one and the same, and “at issue” in *Claiborne*.²⁵⁰ The Court continued to describe the launch of the boycott; its “acknowledged purpose;” and the supporting elements—speeches and nonviolent picketing, along with word-of-mouth encouragement.²⁵¹ The following paragraph began: “Each of these elements of the

244. See *Waldrip III*, 37 F.4th at 1392; see also *Claiborne*, 458 U.S. at 915.

245. *Waldrip III*, 37 F.4th at 1392 (“It then held that the boycott ‘clearly involved constitutionally protected activity’ and that ‘[e]ach of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.’” (alteration in original) (quoting *Claiborne*, 458 U.S. at 907, 911)).

246. *Id.* at 1394; see also, Petition for Writ of Certiorari, *supra* note 22, at 28 (“[W]alking and sitting in restaurants are not inherently expressive activities, but that has never justified denying them First Amendment protection.”).

247. *Claiborne*, 458 U.S. at 907.

248. *Id.*

249. *Id.*

250. See *id.*

251. *Id.*

boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.”²⁵² Here, the order was reversed; the content of the general word “each” was described prior to using the word.

“Each of these elements” should be read to include the boycott itself, alongside the supporting elements. The Court cited its own decision to emphasize that the protected activity was the collective expression of dissatisfaction with certain political or social facts:

As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” . . . In emphasizing “the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues,” we noted the words of Justice Harlan . . . :

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”²⁵³

It seems difficult to conclude that the *Citizens Against Rent Control* Court was not referring to boycotts when it described effective advocacy, enhanced by group association.

And yet, this is what Judge Kobes and the Eighth Circuit did in *Waldrip III*.²⁵⁴ The majority, in applying the *Claiborne* phrase “took many forms,” only included some of the forms specified in the opinion—picketing; speeches; and encouragement, “a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.”²⁵⁵ The court did not explain why it had ignored the other forms specified in *Claiborne*, specifically, the boycott itself and the meeting that launched the boycott. The *Waldrip III* majority held that the *Claiborne* Court “stopped short of declaring that a ‘boycott’ itself—that is, the refusal to purchase from a business—is protected by the First Amendment”²⁵⁶ and that the Court had only granted protection to “peaceful political activity such as that found in the boycott in this case.”²⁵⁷ The distinction between “the boycott” and the “peaceful political activity found in the boycott,” contrary to the court’s assertion, was not intended to indicate a difference between the boycott itself and the accompanying speech, but rather between the violent and nonviolent elements of the boycott.

Successive courts considering First Amendment challenges to anti-boycott laws substantially similar to the one contemplated in *Waldrip III* have read *Claiborne* to

252. *Id.* (emphasis added).

253. *Id.* at 907–08 (citations omitted) (first quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981); and then quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

254. *Waldrip III*, 37 F.4th 1386, 1392 (8th Cir. 2022) (en banc) (“Contrary 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.”), *cert. denied*, 143 S. Ct. 774 (2023).

255. *Id.* (“So *Claiborne* instructs us to examine the *elements* of a boycott to determine which activities are constitutionally protected.”).

256. *Id.*

257. *Id.* (quoting *Claiborne*, 458 U.S. at 913).

stand for the proposition that the boycott itself is protected activity. In *Koontz*, the Kansas District Court held that the “[t]he First Amendment protects the right to participate in a boycott as the Supreme Court held explicitly in *NAACP v. Claiborne Hardware Co.*”²⁵⁸ In *Jordahl*, the Arizona District Court held that “the Supreme Court in *Claiborne* expressly found that non-union boycotting activities aimed ‘to bring about political, social and economic change’ were protected activities under the First Amendment.”²⁵⁹ And in *Amawi*, the Texas Western District Court understood that one of the “nonviolent elements” protected by the *Claiborne* Court “was the petitioners’ decision to ‘withh[old] patronage from the white establishment of Claiborne County.’”²⁶⁰

These decisions were all made in the last five years and concerned laws that were textually and substantively similar to the law at issue in *Waldrip III*.²⁶¹ Of course, an appellate court is not bound by the decisions of district courts, and the existence of dominant interpretations and conclusions does not and should not foreclose the possibility or propriety of different ones. But the fact remains that the judges who found protection for boycotts showed their work. Their decisions are heavy with textual interpretation of *Claiborne*. The decision in *Waldrip III* includes nothing of the sort.

Finally, the Supreme Court, in subsequent decisions, has been even more clear on the contours of First Amendment protection for boycotts. In *FTC v. Superior Court Trial Lawyers Ass’n*, the Court considered whether defense lawyers who boycotted their Criminal Justice Act assignments in order to receive greater pay were engaging in an “unfair method of competition,” in violation of the Federal Trade Commission Act.²⁶² The lawyers in that case claimed that the boycott was protected under *Claiborne*.²⁶³ But the Court distinguished between the boycott in *Claiborne* and the lawyers’ boycott.²⁶⁴ Unfavorably contrasting the lawyers’ boycott with the NAACP boycott, the Court declared that “[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself.”²⁶⁵ In the petition for certiorari, Arkansas Times argued, “*Superior Court Trial Lawyers Association* thus reaffirmed *Claiborne Hardware*’s fundamental distinction between ‘economic boycotts,’ which are subject to rational government regulation, and

258. *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1021 (D. Kan. 2018) (citing *Claiborne*, 458 U.S. at 907).

259. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1041 (D. Ariz. 2018) (quoting *Claiborne*, 458 U.S. at 907), *vacated on other grounds*, 789 F. App’x 589 (9th Cir. 2020).

260. *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 744 (W.D. Tex. 2019) (alteration in original) (quoting *Claiborne*, 458 U.S. at 918).

261. Compare ARIZ. REV. STAT. ANN. § 35-393 (West 2024), and TEX. GOV’T CODE ANN. §§ 808.001, 2271.001 (West 2024), and KAN. STAT. ANN. § 75-3740f (West 2024), with ARK. CODE ANN. § 25-1-503 (West 2024); see also Monika Chawla, *Third Federal Court Holds Anti-Boycott Law Is a Violation of First Amendment in Amawi v. Pflugerville*, VILL. L. REV. BLOG (July 20, 2020), <https://www.villanovawreview.com/post/562-third-federal-court-holds-anti-boycott-law-is-a-violation-of-first-amendment-in-amawi-v-pflugerville> [<https://perma.cc/MBS3-E3N8>] (discussing similarities among the laws, complaints, and defenses at issue in the three cases cited *supra* notes 258–260).

262. 493 U.S. 411, 418–19 (1990) (citing D.C. CODE §§ 11-2601–2609 (West 2024)); see also 15 U.S.C. § 45(a)(1).

263. *Super. Ct. Trial Lawyers Ass’n*, 493 U.S. at 419.

264. *Id.* at 427.

265. *Id.*

‘peaceful, political activity such as that found in the [Mississippi] boycott,’ which is ‘entitled to constitutional protection.’”²⁶⁶

Absent any more substantive explanation to the contrary, the conclusion should have been obvious: *Claiborne* provides qualified protection to boycotts.

Even if we were to accept the *Waldrip III* court’s argument that *Claiborne* did not provide protection for the actual act of boycotting and that *FAIR* controlled, since a boycott would be considered conduct, and not speech, the opinion is lacking, as the majority devoted very little space to discussion of *FAIR*. In *FAIR*, the Court spent significant time explaining its belief that the regulated conduct was ultimately unexpressive, and therefore undeserving of First Amendment protection.²⁶⁷ To extend the same reasoning to boycotts intended to limit commercial relations with Israel, *Waldrip III* relied entirely on the assumptions that, for purely economic reasons, the Arkansas Legislature intended only to ban commercial decisions.²⁶⁸ The opinion did not investigate what might have been implied in the Act by “discriminatory manner.”²⁶⁹ When it did deign to “acknowledge that one of the Act’s six legislative findings suggest[ed] a broader purpose. . . . Arkansas Times’s interpretation . . . [was] outweighed by the other findings, which evidence[d] a purely economic purpose.”²⁷⁰ Put more simply: *FAIR* could only control if one were to ignore the provisions of the Arkansas law that would be inconvenient to such a finding.

The interpretation proposed in this Note was available to the *Waldrip III* majority. The panel decision, as well as the dissent to the Eighth Circuit decision, dissected the text of the Act in great detail, which one would expect for a case that relied heavily on statutory interpretation.²⁷¹ Rather than weighing heavily in the State’s favor by beginning with a presumption of constitutionality, as the majority did, the dissent focused on the words of the statute and the legislative intent.²⁷²

B. *The Challenged Statute Constitutes Impermissible Viewpoint Discrimination and Should Have Been Struck Down*

In *Waldrip III*, the court ignored the issue of viewpoint discrimination, a “particularly pernicious” form of content-based discrimination.²⁷³ The court’s failure to

266. Petition for Writ of Certiorari, *supra* note 22, at 20–21 (alteration in original) (quoting *Super. Ct. Trial Lawyers Ass’n*, 493 U.S. at 428 & n.12).

267. *Rumsfeld v. FAIR*, 547 U.S. 47, 66–68 (2006).

268. *Waldrip III*, 37 F.4th 1386, 1394 (8th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 774 (2023).

269. ARK. CODE ANN. § 25-1-502(1)(A)(i) (West 2024).

270. *Waldrip III*, 37 F.4th at 1394 n.2.

271. *See id.* at 1395 (Kelly, J., dissenting).

272. *Id.*

273. *R.A.V. v. St. Paul*, 505 U.S. 377, 430 (1992); *see also* *Chi. Police Dep’t v. Mosley*, 408 U.S. 92, 95–96 (1972) (striking down a statute that prohibited all picketing unrelated to labor disputes near a school when school was in session). Justice Marshall cast the decision as a bulwark against impermissible government incursion into “our people[’s] . . . right to express any thought, free from government censorship.” *Id.* at 96; *see also* *Carey v. Brown*, 447 U.S. 455, 471 (1980) (invalidating an anti-picketing statute substantially similar to the statute in *Mosley*); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (striking down a Texas statute that made it a crime to desecrate a venerated political object, including a state or national flag). The plaintiff had burned an American flag during a political demonstration. *Id.* The following year, the Court even struck down a federal statute designed to prohibit the disrespectful desecration of the flag. *United States v. Eichman*, 496

consider the doctrine is evidenced most vividly by the fact that the phrase does not appear once in the opinion. Analysis of the doctrine's history would have led to the conclusion that the Arkansas law engaged in impermissible viewpoint discrimination, with no applicable exceptions, by regulating politically expressive conduct.

It is a longstanding principle of Supreme Court jurisprudence that, absent a few exceptions, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²⁷⁴ Speech regulations, which are presumptively unconstitutional,²⁷⁵ are content-based "if the law applies to particular speech because of the topic discussed or the idea or message expressed."²⁷⁶ Viewpoint discrimination, a subset of content discrimination, occurs when government action impermissibly "license[s] one side of a debate."²⁷⁷ Since at least 1972, the Supreme Court had laid the groundwork for overturning statutes as impermissibly viewpoint-based,²⁷⁸ and the Court has continued to apply the doctrine with regularity. For example, in *Good News Club v. Milford Central School*, decided in 2001, the Court held that a school district which had permitted use of its facilities for civic and educational extracurricular activities had violated viewpoint discrimination principles in denying access for the purposes of Bible study.²⁷⁹

The *Waldrip III* court should have analyzed the Arkansas law under this doctrine. Peaceful boycotts are protected First Amendment speech,²⁸⁰ and the government sought to restrict that speech based on the specific speaker's viewpoint, rather than with any facially neutral law. The text of the statute claimed that it intended only to further the state's economic and antidiscriminatory goals, but as in *Amawi*, the terms of the statute itself contradicted this claim.²⁸¹

The Act defined "boycott Israel" and "boycott of Israel" as follows: "engaging in refusals to deal, terminating business activities or other actions that are intended to limit commercial relations with Israel, persons or entities that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner."²⁸² This definition specifies a single point of view that will exclude an entity or individual from being able to obtain a government contract. The legislature chose to, as Justice Scalia wrote in *R.A.V.*, "license one side of a debate to fight freestyle."²⁸³

U.S. 310, 312 (1990). See Todd R. Tunstall, *The Flag Burning Debate*, 1 L. & SOC'Y REV. U. CAL. SANTA BARBARA 63, 63–69 (2002) for a historical account of the *Johnson* and *Eichman* decisions.

274. See *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 747 (W.D. Tex. 2019) (quoting *Mosley*, 408 U.S. at 95).

275. *Id.* (citing *R.A.V.*, 505 U.S. at 395).

276. *Id.* (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015)).

277. *Id.* (quoting *R.A.V.*, 505 U.S. at 392).

278. See *Mosley*, 408 U.S. at 92.

279. 533 U.S. 98, 120 (2001) ("When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment.")

280. See *supra* Part III.A.

281. See *Amawi*, 373 F. Supp. 3d at 751.

282. ARK. CODE ANN. § 25-1-502 (West 2024).

283. *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

A state's interest in regulating economic activity and promoting a policy of antidiscrimination, though compelling, has never been qualified as compelling *enough* to permit viewpoint discrimination.²⁸⁴ In *R.A.V.*, Justice Scalia concluded that even the interest in ensuring the "basic human rights of members of groups that have historically been subjected to discrimination" was not enough to overcome "[t]he existence of adequate content-neutral alternatives" to the challenged ordinance that would achieve the same goal.²⁸⁵ "[T]he only interest distinctively served by the content limitation [in the case]," Justice Scalia wrote, "is that of displaying the city council's special hostility towards the particular biases thus singled out."²⁸⁶

What else could the Arkansas law reflect but the Arkansas legislature's hostility toward a particular point of view? The interests that the Arkansas legislature described in the legislative findings section of the law are not compelling enough to allow abridgement of First Amendment protections.²⁸⁷ Rather than serving economic or antidiscrimination interests, the law evinces hostility toward a particular viewpoint. This finding is grounded primarily in the strength of the court's decisions prohibiting viewpoint discrimination, but also, in part, in the fact that the legislature did not seem to be clear on the interests it sought to pursue. The legislative findings described in the law emphasize that regulating the "discriminatory decisions" of the boycott was intended to achieve a goal that was at once economic and antidiscriminatory.²⁸⁸ The *Waldrip III* majority then described the law as both "primarily" and "purely" economic, an outright contradiction.²⁸⁹

As the *Waldrip III* dissent noted, the final legislative finding indicated that "Arkansas seeks to implement the policy of 'examining a company's *promotion* or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts.'" ²⁹⁰ As the dissent noted, "By the express terms of the Act, Arkansas seeks not only to avoid contracting with companies that refuse to do business with Israel. It also seeks to avoid contracting with anyone who supports or promotes such activity."²⁹¹

Whether or not the Act was intended to limit purely economic decisions is debatable, at best, and in reality, it is contradicted by the text of the statute itself. The Act describes an antidiscriminatory intent without defining what "discriminatory" or "antidiscriminatory" mean in this context. The text of the statute purports to make it more difficult for those seeking government contracts to take "other actions that are intended to limit commercial relations with Israel," without limiting the actions to

284. *Id.* at 395 ("We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But . . . [t]he existence of adequate content-neutral alternatives thus 'undercuts significantly' any defense of such a statute." (quoting *Boos v. Barry*, 485 US 312, 329 (1988))).

285. *Id.*

286. *Id.* at 396.

287. ARK. CODE ANN. § 25-1-501 (West 2024).

288. The law only requires certification that the entity seeking a contract is not boycotting Israel "in a discriminatory manner." See § 25-1-502(1)(A)(i). This might be easier to justify if the statute defined "discriminatory manner," but it does not. See *id.*

289. *Waldrip III*, 37 F.4th 1386, 1393–94 (8th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 774 (2023).

290. *Id.* at 1396 (Kelly, J., dissenting) (quoting § 25-1-501(6)).

291. *Id.* at 1396–97.

economic behavior.²⁹² The conclusion is unavoidable: the Act impermissibly regulates one viewpoint in a high-temperature political debate and should have been declared unconstitutional.

V. CONCLUSION

The Eighth Circuit's decision to uphold the Arkansas anti-boycott law has the potential to abrogate long-standing protections for political boycotts. In its deficient interpretation of *Claiborne*, application of *FAIR*, and refusal to truly scrutinize the legislative purposes of Act 710, the court failed to grant the protections of the First Amendment to those whose speech is threatened.

292. § 25-1-502(1)(A)(i).