19-50384

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bahia Amawi,

Plaintiff–Appellee,

v.

Ken Paxton, in his official capacity as Attorney General of Texas,

Defendants–Appellants.

John Pluecker, Obinna Dennar, Zachary Abdelhadi, George Hale,

Plaintiffs–Appellees,

v.

Board of Regents of the University of Houston System, Trustees of the Klein Independent School District, Trustees of the Lewisville Independent School District, Board of Regents of the Texas A&M University System,

Defendants–Appellants.

On Appeal from the United States District Court for the Western District of Texas — Nos. 1:18-cv-1091 and 1:18-cv-1100,
Hon. Robert Pitman, District Judge

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PLAINTIFFS–APPELLEES

Counsel listed on inside cover

Ramya Krishnan
Stephanie Krent
Alex Abdo
Knight First Amendment Institute
at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
ramya.krishnan@knightcolumbia.org

Attorneys for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

I certify that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs–Appellees:
Bahia Amawi
John Pluecker
Obinna Dennar
Zachary Abdelhadi
George Hale

Counsel for Plaintiff–Appellee Bahia Amawi:
Lena F. Masri
Gadeir Abbas
Justin Sadowsky
Carolyn Homer
John T. Floyd
Christopher M. Choate

Counsel for Plaintiff–Appellees John Pluecker, Obinna Dennar, Zachary Abdelhadi, and George Hale:
Edgar Saldivar
Thomas Buser-Clancy
Andre Segura
Adriana Piñon
Vera Eidelman
Brian Hauss
Kevin Dubose

Defendants–Appellants:
Ken Paxton, Attorney General of Texas (in his official capacity)
Board of Regents of the University of Houston System
Trustees of the Klein Independent School District
Trustees of the Lewisville Independent School District

Board of Regents of the Texas A&M University System

Defendant:
Pflugerville Independent School District

Counsel for Defendants–Appellants Attorney General Ken Paxton, Board of Regents of the University of Houston System, and Board of Regents of the Texas A&M University System:
Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins (lead counsel)
Matthew H. Frederick
Michael R. Abrams
Office of the Attorney General

Counsel for Defendants–Appellants Klein Independent School District and Lewisville Independent School District:
Thomas P. Brandt
Francisco J. Valenzuela
Laura O'Leary
Caroline Sileo

Counsel for Defendant Pflugerville Independent School District:
Todd Aaron Clark
Joey W. Moore

***Amici* signing this brief:**
William D. Araiza
Jack Balkin
Erwin Chemerinsky
Owen Fiss
Katherine Franke
Seth F. Kreimer
Genevieve Lakier
Burt Neuborne
Amanda Shanor
Geoffrey R. Stone
Nadine Strossen
Nelson Tebbe
Rebecca Tushnet

Counsel for *Amici*:
Ramya Krishnan
Stephanie Krent
Alex Abdo

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INTERESTS OF AMICI CURIAE[1]

Amici, listed below, are thirteen First Amendment scholars who have taught courses in constitutional law or the First Amendment, published articles and books on these topics, and dedicated significant attention to the study of First Amendment protections. Based on their experience, *amici* seek to explain the First Amendment's application to political boycotts by consumers.

William D. Araiza
Professor of Law
Brooklyn Law School

Jack Balkin
Knight Professor of Constitutional Law and the First Amendment
Yale Law School

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley, School of Law

Katherine Franke
Sulzbacher Professor of Law, Gender, and Sexuality Studies
Columbia Law School

Owen Fiss
Sterling Professor Emeritus of Law
Yale Law School

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that (1) this brief was authored entirely by *amici* and their counsel and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) apart from *amici* and their counsel, no other person contributed money to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Seth F. Kreimer
Kenneth W. Gemmill Professor of Law
University of Pennsylvania Law School

Genevieve Lakier
Assistant Professor of Law
University of Chicago Law School

Burt Neuborne
Norman Dorsen Professor in Civil Liberties
New York University School of Law

Amanda Shanor
Assistant Professor
The Wharton School
University of Pennsylvania

Geoffrey R. Stone
Edward H. Levi Distinguished Service Professor of Law
The University of Chicago

Nadine Strossen
John Marshall Harlan II Professor of Law
New York Law School

Nelson Tebbe
Professor of Law
Cornell Law School

Rebecca Tushnet
Frank Stanton Professor of the First Amendment
Harvard Law School

INTRODUCTION

The merits of this appeal turn on a narrow, but significant, dispute about the scope of the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that landmark case, the Supreme Court recognized the expressive character of political boycotts by consumers, and it held unconstitutional a damages award against the NAACP for its role in organizing such a boycott of white merchants in Claiborne County, Mississippi. The holding of *Claiborne* clearly applies to this case and requires the State of Texas to defend its anti-boycott law against First Amendment scrutiny.

The State enacted its anti-boycott law with the express purpose of undermining the Boycott, Divestment, Sanctions (or "BDS") movement—a political movement that seeks to influence the policies of the State of Israel and the policies of the United States towards Israel. The Act requires state contractors to sign a "written verification" that they do not "boycott Israel" and will not for the duration of their contracts. Tex. Gov't Code § 2271.002. The Act defines "boycott Israel" 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." *Id.* § 808.001(1). "[A]ction[s] made for ordinary business purposes" are exempted from this definition. *Id.*

Appellants' primary defense of the law is that it is not subject to First Amendment scrutiny under *Claiborne*, based on their claim that *Claiborne* covers only the speech associated with political boycotts, and not political boycotts themselves. *See* State Appellant Br. at 27–33. Alternatively, they suggest that *Claiborne* covers only political boycotts intended to vindicate a particular statutory or constitutional interest. *See id*. at 29; Sch. Dist. Appellant Br. at 61–62. The district court correctly rejected those arguments. As *amici* explain below, *Claiborne* squarely held that the First Amendment covers political boycotts by consumers, not just the speech associated with those boycotts, and that it covers all such boycotts, so long as they are peaceful.

Appellants' *amici* appear to imply that this interpretation of *Claiborne* would implicate the constitutionality of public accommodations laws, but Texas's law is distinguishable from ordinary public accommodations laws in important ways. For instance, ordinary public accommodations laws prohibit discrimination against broad classes of people (for example, on the basis of race, religion, or sex), and they do so without regard to whether the discriminating conduct is designed to express a particular message. By contrast, the text and legislative history of the Act reveal the State's intent to silence a particular form of expression (political boycotts) based on its message (the political viewpoint of the BDS movement). *See, e.g.*, ROA.1244–45; ROA.1274–76. And unlike ordinary public accommodations laws, the Act does

not prohibit refusals to serve broad categories of people. Instead, it targets only actions "intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel," Tex. Gov't Code § 808.001(1), and it expressly exempts actions taken "for ordinary business purposes." *Id.* In other words, the Act "applies by its express terms *only* to expressive conduct." ROA.1267.

The district court correctly concluded that the Act is subject to First Amendment scrutiny under *Claiborne*. Should the Court reach that question, *amici* respectfully urge the Court to do the same.

ARGUMENT

I. Texas's anti-boycott law is subject to First Amendment scrutiny.

A. *Claiborne* established that political boycotts by consumers are covered by the First Amendment.

Government restrictions on political boycotts by consumers are subject to First Amendment scrutiny. *See Claiborne*, 458 U.S. at 911; *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990). In *Claiborne*, the Supreme Court reviewed a civil judgment against the NAACP for its role in organizing a boycott of white merchants in Claiborne County, Mississippi. *See Claiborne*, 458 U.S. at 889. The boycott's "acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice," *id.* at 907, in part by causing "the [boycotted] merchants [to] sustain economic injury as a result of their campaign," *id.* at 914. In response, a group of white merchants sued

the NAACP and many of the boycott's participants to recover business losses caused by the boycott and to enjoin future boycotting efforts. *Id*. at 889.

The Supreme Court rejected the merchants' claims, holding, in relevant part, that the "nonviolent elements of [the boycott] [we]re entitled to the protection of the First Amendment." *Id.* at 915. The Court's analysis proceeded in two steps. At the first step of its analysis, the Court addressed "whether [the boycott was] protected in any respect by the Federal Constitution." *Id.* at 907. To that end, the Court analyzed the "many forms" that the boycott took, beginning with the boycott itself—that is, the collective refusal to patronize white merchants in Claiborne County. *Id.* Recognizing the historical pedigree of boycotts as a form of collective action, the Court explained that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Id.* (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)). The Court went on to explain, in detail, how the boycott was also "supported by speeches and nonviolent picketing." *Id*.; *see also id.* at 909–12. Following a thorough discussion of each element of the NAACP's boycott, the Court concluded that the boycott was an exercise of the "inseparable" First Amendment rights of "speech, assembly, association, and petition." *Id*. at 911 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

After establishing First Amendment coverage, the Court proceeded to the second step of its analysis, by weighing the State's economic interests in regulation against the boycotters' interests in exercising their First Amendment right to boycott. Siding with the boycotters, the Court held that, although "[s]tates have broad power to regulate economic activity," they "do not [have] a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. The Court explained that "peaceful political activity" like the NAACP's boycott differed, for purposes of the First Amendment, from economic activity designed to "destroy legitimate competition." *Id*. at 914. Accordingly, the Court held that the "nonviolent elements of [the boycott] [we]re entitled to the protection of the First Amendment." *Id.* at 915; *see also id.* at 914 n.48 (suggesting that "an organized refusal to ride on [a city's] buses in protest against a policy of racial discrimination" was constitutionally protected). And it decided that states may not impose damages for the consequences of such activity. *Id.* at 918.

The law at issue here regulates political boycotts that fall squarely within the coverage of *Claiborne*. The law applies to boycotts of Israel that are nonviolent, that are politically motivated, and that involve individual consumers who have "banded together and collectively expressed their dissatisfaction," *id.* at 907, with the policies of Israel and the policies of the United States toward Israel. Like the NAACP's boycott in *Claiborne*, the "acknowledged purpose [of many of these boycotts] [i]s

to secure compliance by both civic and business leaders with a lengthy list of demands for equality." *Id*. And like the NAACP's boycott, these boycotts encompass many "inseparable" elements. *Id*. at 911 (quoting *Thomas*, 323 U.S. at 530). For these reasons, the Act's regulation of political boycotts by consumers triggers First Amendment scrutiny under *Claiborne*.

B. *Claiborne* covers political boycotts in addition to the speech associated with those boycotts.

Appellants interpret *Claiborne* as holding that the First Amendment covers only the speech associated with the NAACP's boycott, but not the boycott itself. *Amici* respectfully disagree with that interpretation of *Claiborne*.

Claiborne, itself, was clear on this point. As noted above, the Court analyzed the NAACP's boycott and each of its associated elements at length, beginning with the collective refusal to patronize white merchants. *See id*. at 907–15. And it held that "[e]ach of these elements," *id.* at 907, was protected by the First Amendment.

The Court could have described the reach of its opinion very differently. It could have explained that only the *speech* associated with the NAACP's boycott enjoyed First Amendment protection. Instead, it held that the NAACP's activities were an exercise of the "inseparable" rights "of speech, assembly, association, and petition," *id.* at 911 (internal quotation marks omitted), and, ultimately, that the NAACP's nonviolent activities were "entitled to the protection of the First Amendment," *id*. at 915. Indeed, the Court concluded that a "careful limitation on

damages liability" was required to give effect to this protection. *Id.* at 918. The Court held that "[w]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." *Id.* The Court therefore reversed the judgment of liability against the NAACP, which awarded "all damages resulting from the boycott," *id.* at 921 (internal quotation marks omitted), and which failed to exempt the nonviolent decision of boycotters to "with[o]ld their patronage from the white establishment of Claiborne Country," *id.* at 918.

If the Supreme Court had intended to hold that only the speech associated with the NAACP's boycott was covered by the First Amendment, its analysis would have proceeded differently. Specifically, it would have been necessary for the Court to determine whether the boycotters' purportedly unprotected purchasing decisions nonetheless justified the judgment of liability against them. The Court did not conduct that analysis, because its holding reached all of the nonviolent activity encompassed by the NAACP's boycott and associated expression. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., joined by Kennedy, J., concurring) (describing *Claiborne* as "holding that a state common common-law prohibition on malicious interference with business could not, under the circumstances, be constitutionally applied to a civil-rights boycott of white merchants").

Appellants' interpretation of *Claiborne* is also difficult to square with the Court's earlier decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). According to Appellants, *Claiborne* addressed only the constitutionality of penalizing the *speech* associated with the NAACP's boycott. Were that so, the Supreme Court would have dispensed with the case summarily under *Brandenburg*, which addressed whether speech that incited unlawful activity could be punished. Under *Brandenburg*, the question in *Claiborne* would have been whether the *speech* associated with the NAACP's boycott had incited an unlawful boycott. The *Claiborne* Court did not address that question, however, because it held that the NAACP's boycott itself, and not just the speech associated with it, was constitutionally protected. This, of course, is why *Claiborne* is recognized as one of the Supreme Court's seminal First Amendment decisions.

The Supreme Court's later decision in *Trial Lawyers* confirms this reading of *Claiborne*. In *Trial Lawyers*, the Federal Trade Commission issued a cease-and-desist order against an association of lawyers who refused to represent indigent defendants until they received an increase in fees. 493 U.S. at 414–20. In considering the association's First Amendment defense, the Court first made clear that the case did not concern the *speech* associated with the lawyers' refusal. *Id.* at 426 ("[N]othing in the FTC's order would curtail such activities . . . ."). Instead, it

concerned solely the lawyers' "concerted refusal . . . to accept any further assignments." *Id.*

The lawyers argued that their concerted refusal was analogous to the boycott in *Claiborne*, but the Supreme Court held that the NAACP's boycott "differ[ed] in a decisive respect." *Id*. Whereas the *Claiborne* boycott sought political gains, the *Trial Lawyers* boycott sought economic ones. As the Court explained, "[t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves." *Id.* They did not "stand to profit financially from a lessening of competition in the boycotted market." *Id.* at 427 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 508 (1988)). In *Trial Lawyers*, however, the "clear objective" of the association was "to economically advantage the participants" by securing increased compensation. *Id*. at 428. The Court reasoned that "[s]uch an *economic* boycott [was] well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself," and, therefore, subject to regulation. *Id.* at 427 (emphasis added); *cf. Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("A group boycott or refusal to deal for political purposes may be speech . . . though a similar boycott for purposes of maintaining a cartel is not." (citing *Claiborne*, 458 U.S. at 912–15)).

The Court's analysis in *Trial Lawyers* reflects its recognition that *Claiborne*'s protection extended to the NAACP's boycott, and not just to the speech associated

with that boycott. What distinguished the boycott in *Trial Lawyers* was its economic, rather than political, purpose.

C. *FAIR* and the other cases relied upon by Appellants do not disturb *Claiborne*'s coverage of political boycotts.

None of the other cases relied upon by Appellants disturbs *Claiborne*'s central holding that political boycotts by consumers are covered by the First Amendment.

Appellants rely principally on the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), *see* State Appellant Br. at 28–29, Sch. Dist. Appellant Br. at 56–59, but *FAIR* is inapposite. First, nothing in *FAIR* calls into question *Claiborne*'s central holding. *FAIR* does not cite *Claiborne*, much less explicitly overturn it. *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

Second, *FAIR* is not a consumer boycott case. In *FAIR*, an association of law schools brought a First Amendment challenge against a law that withheld federal funding from educational institutions that denied military recruiters access to their campuses. *FAIR*, 547 U.S. at 51. The Court upheld the law, concluding that it did not regulate conduct that was "inherently expressive" for the purposes of the First Amendment. *Id*. at 66. Because *FAIR* did not involve collective action with any recognized historical pedigree, the Court asked whether an "observer" would understand the law schools' exclusion of military recruiters as expressive. *Id.* The

Court concluded that an observer would not, because the purpose of the exclusion, which had the effect of "requiring military interviews to be conducted [off] campus," would not be "overwhelmingly apparent." *Id.* (internal quotation marks omitted).

By contrast, the key holding of *Claiborne* is that political boycotts by consumers *are* inherently expressive. In the same way that "[p]arades are . . . a form of expression, not just motion," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 568 (1995), consumer boycotts, *Claiborne* established, are not just purchasing decisions. As with parades, the expressive quality of a consumer boycott inheres in its "inseparable" synthesis of speech, assembly, association, and petition. *See Claiborne*, 458 U.S. at 911 ("Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change."). And also as with parades, consumer boycotts are "deeply embedded in the American political process." *Id.* at 907 (internal quotation marks omitted). It is no surprise, then, that the *FAIR* Court neither invoked nor disturbed *Claiborne*. *FAIR* simply did not concern the kind of collective action at issue in *Claiborne*.

Third, *FAIR*'s analysis is inapplicable here because, as the Court observed in that case, "judicial deference is at its apogee when Congress legislates under its authority to raise and support armies." *FAIR*, 547 U.S. at 58 (internal quotation marks and alterations omitted). In the Court's view, Congress's decision to withhold funds from law schools for excluding military recruiters deserved such deference.

Id. But, here, the Act has nothing to do with Congress's authority to raise and support armies. Accordingly, an important foundation of *FAIR* is absent.

International Longshoremen's Association, AFL-CIO v. Allied International, Inc., 456 U.S. 212 (1982) and *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984) are also inapt. *See* State Appellant Br. at 31–32; Sch. Dist. Appellant Br. at 63. Decided unanimously less than two months after *Longshoremen's*, *Claiborne* made clear that cases like *Longshoremen's* established only that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined circumstances." *Claiborne*, 458 U.S. at 912. For example, as the Court explained, "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Id*. (internal quotation marks omitted) (citing *Longshoremen's*, 456 U.S. at 222–23 & n.20). But *Claiborne* refused to extend *Longshoremen's* logic to "peaceful political" boycotts. *Id*. at 913. Under *Claiborne*, peaceful political boycotts by consumers receive First Amendment protection even if, under *Longshoremen's*, economic boycotts do not.

Briggs is also unhelpful to the State's position. That case suggested that even economic boycotts may be entitled to some level of First Amendment protection.

Briggs, 728 F.2d at 917–18 (recognizing that economic boycotters were engaging in commercial speech, but affirming the district court's holding that substantial government interests outweighed the First Amendment interests in commercial speech).

Accordingly, none of these cases disturbs *Claiborne*'s holding that political boycotts by consumers are covered by the First Amendment.

D. *Claiborne* covers political boycotts by consumers whether or not intended to vindicate "particular statutory or constitutional interests."

In the alternative, Appellants suggest that *Claiborne* reaches only political boycotts intended to vindicate "particular statutory or constitutional interests." State Appellant Br. at 29 (quoting *Ark. Times LP v. Waldrip*, 362 F. Supp. 3d 617, 625 (E.D. Ark. 2019)); *see also* Sch. Dist. Appellant Br. at 61–62. Respectfully, that suggestion should be rejected. Appellants mistake the Supreme Court's *description* of the boycott in *Claiborne* for a *prescription* of the reach of the First Amendment. In *Claiborne*, the Supreme Court noted that the NAACP's boycott "sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." *Claiborne*, 458 U.S. at 914. But nothing in the Court's opinion suggests that its constitutional holding turned on that description. The key consideration for the Court was not that the boycotters had a "particular statutory or constitutional interest[]," *Ark. Times*, 362 F. Supp. 3d at 625, but, rather, that they

had engaged in "peaceful political" activity, *Claiborne*, 458 U.S. at 913–14. That fact was critical because it differentiated the "peaceful political" boycott in *Claiborne*, *id*. at 913, from "a boycott organized for economic ends," *id*. at 915 (quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)).

Appellants' alternative account of *Claiborne* is also inconsistent with broader First Amendment jurisprudence. As a general matter, the First Amendment covers speech without regard to its content or expressive aim. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 444–45 (1963) ("For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."). Appellants' interpretation of *Claiborne* would violate that principle, by extending the First Amendment's coverage to boycotts seeking to vindicate a domestic legal interest, but not to boycotts seeking to vindicate a foreign or non-legal interest. There is no precedent for that constraint on the First Amendment's reach, and it is difficult to understand why the Court in *Claiborne* would have imposed it.

In fact, the historical pedigree that the *Claiborne* Court invoked—of "persons sharing common views banding together to achieve a common end," *Claiborne*, 458 U.S. at 907 (quoting *Citizens Against Rent Control*, 454 U.S. at 294)—is filled with boycotts initiated to serve diverse ends, not just domestic legal ones. They include,

for example, abolitionists' 1790s boycott of sugar produced by Caribbean slave plantations, the boycott of Japanese silk to protest Japan's invasion of China, and the boycott of companies operating in South Africa to protest apartheid. That diverse tradition has continued with the more recent boycotts of Nike for supporting Colin Kaepernick, and of companies owned by President Trump's family to protest the policies and actions of the President. Appellants' interpretation of *Claiborne* would exclude these boycotts from its reach without any principled basis. The *Claiborne* Court could not have intended such a result.

CONCLUSION

The Act regulates the type of "peaceful political" boycotts that *Claiborne* held implicate "inseparable" First Amendment rights. *Claiborne* is, therefore, on all fours here, and requires that the State defend its anti-boycott law against First Amendment scrutiny.

Dated: December 3, 2019

Respectfully submitted,

/s/ Ramya Krishnan

Ramya Krishnan
Stephanie Krent
Alex Abdo
Knight First Amendment Institute at
Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
ramya.krishnan@knightcolumbia.org

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,455 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

Dated: December 3, 2019

/s/ Ramya Krishnan
Ramya Krishnan

CERTIFICATE OF SERVICE

I, Ramya Krishnan, certify that on December 3, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 3, 2019

/s/ Ramya Krishnan
Ramya Krishnan