No. 22-20047

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A & R Engineering and Testing, Inc.,
Plaintiff–Appellee,
v.
Ken Paxton, in his official capacity as Attorney General of Texas,
Defendant–Appellant.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division — No. 4:21-cv-3577

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PLAINTIFF–APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state that they are natural persons and are therefore not required to file a corporate disclosure statement.

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INTERESTS OF AMICI CURIAE[1]

Amici, listed below, are twelve 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 and the speech associated with such boycotts.

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[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.

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INTRODUCTION

The State of Texas has enacted a law that burdens peaceful political boycotts of Israel. *See* H.B. 89, 2017 Leg., 85th Sess. (Tex. 2017); H.B. 793, 2019 Leg., 86th Sess. (Tex. 2019) (together, the "Act"). It did so to suppress a political viewpoint and movement with which it disagreed. The central question in this appeal is whether the law must survive First Amendment scrutiny. *Amici* write respectfully to explain that it must.

The Act targets participation in Boycott, Divestment, and Sanctions (BDS) campaigns. Indeed, both the Act's sponsor and the governor who signed it into law called it the "anti-BDS bill."[2] The Act achieves its aim by requiring state contractors to verify in writing that they do not "boycott Israel" and will not for the duration of their contracts, unless one of two exceptions applies: the contract is valued at under $100,000, or the contractor has fewer than ten employees. Tex. Gov't Code § 2271.002. The Act defines "boycott Israel" broadly to include "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

[2] *See* Aaron Howard, *Texas Rep to File Anti-BDS Bill*, Jewish Herald-Voice (Nov. 10, 2016), https://jhvonline.com/texas-rep-to-file-antibds-bill-p21849-90.htm; Press Release, Office of the Texas Governor, *Anti-Israel Policies Are Anti-Texas Policies* (May 2, 2017), https://gov.texas.gov/news/post/anti-israel-policies-are-anti-texas-policies.

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.*

The parties disagree about whether this Act warrants First Amendment scrutiny. As *amici* explain below, it does for two independent reasons.

First, the law targets a key form of expression—political boycotts by consumers. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), 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 district court in this case erred in finding that *Claiborne* has no application to the Act. Contrary to its decision, *Claiborne* clearly held that the First Amendment covers political boycotts by consumers, not merely the speech associated with those boycotts.

The State's *amici* 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. Their purpose is to ensure consumers' equal access to "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). 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 495–96; *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 731, 749–751 (W.D. Tex. 2019), *vacated as moot sub nom.*, *Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020). 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 terms, only to expressive conduct.

Second, in addition to targeting constitutionally protected boycotts, the Act sweeps in pure political speech. The Act does this by defining "boycott Israel" to include "any action" that is intended to penalize or inflict economic harm on Israel. *See id.* As the district court correctly concluded, this definition inarguably reaches acts of pure political speech, including speech advocating for boycotts or condemning Israel. ROA 511. The State's attempts to limit the definition's scope to

purely economic conduct are unpersuasive, because such a limitation is inconsistent with the definition's plain text. This supplies an independent reason for applying First Amendment scrutiny.

Amici therefore respectfully request that this Court affirm the district court's issuance of the preliminary injunction.

ARGUMENT

I. Texas's anti-boycott law is subject to First Amendment scrutiny because it restricts political boycotts by consumers.

The Act burdens politically motivated consumer boycotts by requiring state contractors to certify that they will not boycott Israel for the duration of their contracts. Tex. Gov't Code § 2271.002(b). The primary question before this Court is whether political boycotts by consumers are covered by the First Amendment. The district court held that they are not, reasoning that the First Amendment covers only the speech associated with political boycotts, but not political boycotts themselves. Respectfully, the district court erred. In *Claiborne*, the Supreme Court 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.

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 id.* at 911; *F.T.C. v. Superior Ct. Trial Laws. 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 "[e]ach of the[] elements" of the NAACP's boycott, the Court concluded that the boycott was an exercise of the "inseparable" First Amendment rights of "speech, assembly, and petition." *Id.* at 907, 911–12 (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. *See id.* at 912–15. Siding with the boycotters, the Court held that, although "States 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.

Texas's law regulates political boycotts that fall squarely within *Claiborne*'s coverage. The Act applies to boycotts of Israel that are nonviolent, that are politically motivated, and that involve 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. Contrary to the district court's ruling, *Claiborne* held that the First Amendment covers political boycotts in addition to the speech associated with those boycotts.

The district court interpreted *Claiborne* as holding that the First Amendment covers only the speech associated with boycotts, and not boycotts themselves. That interpretation of *Claiborne* is incorrect.

Claiborne, itself, was clear on this point. As explained 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 906–15. 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, and, ultimately, that the NAACP's nonviolent activities were "entitled to the protection of the First Amendment," *id*. at 915.

If the Supreme Court had intended to apply the First Amendment as narrowly as suggested by the district court, the Court's analysis would have proceeded differently. Specifically, if the Court had held that only the boycotters' *speech* was protected by the First Amendment, 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.

The district court's interpretation of *Claiborne* is also impossible to square with the Court's earlier decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). According to the district court, *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 addresses whether speech that incites unlawful activity may 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 boycott itself was constitutionally protected, and thus the boycott could not have been the foundation for a charge of incitement. This, of course, is why *Claiborne* is recognized as one of the Supreme Court's seminal First Amendment decisions and not as a mere application of *Brandenburg*.

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); *see also Claiborne*, 458 U.S. at 914–15.

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 *Longshoremen's* do not disturb *Claiborne*'s coverage of political boycotts.

The district court relied principally on the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006), 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. And it is not credible to suggest the Court upended a signature civil rights ruling without

so much as an acknowledgement. *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. 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 assembly, petition, and speech. *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. 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 (cleaned up). 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 military affairs. Accordingly, an important foundation of *FAIR* is absent.

The State's law professor *amici* point to *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982), but that case is also inapt. *See* Amicus Br. of Eighteen Constitutional and Business Professors at 16; Amicus Br. of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh at 12–13. Decided unanimously less than three months after *Longshoremen's*, *Claiborne* made clear that cases like *Longshoremen's* establish only that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." *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.

Accordingly, neither *FAIR* nor *Longshoremen's* disturbs *Claiborne*'s holding that political boycotts by consumers are covered by the First Amendment.

II. Texas's anti-boycott law also attracts First Amendment scrutiny because it sweeps in pure political advocacy.

Texas' law suffers from a further First Amendment defect: in addition to targeting constitutionally protected non-violent and politically motivated consumer boycotts, it sweeps in pure political advocacy. The Act does this by defining "boycott Israel" to include "any action" that is intended to penalize or inflict economic harm on Israel. Tex. Gov't Code § 808.001(1). As the district court correctly concluded, this language reaches acts of pure political speech, including speech advocating boycotts or condemning Israel. ROA 509–10. Accordingly, the

State must defend the Act against First Amendment scrutiny on this independent ground.

When interpreting a statute, the Court "start[s] with the text." *United States v. Winters*, 986 F.3d 942, 947 (5th Cir. 2021). As the district court observed, the Act's definition of "boycott Israel" does not simply include "refusing to deal with" and "terminating business activities with" Israel or Israeli citizens or businesses. Tex. Gov't Code § 808.001(1). It also includes a residual clause, which proscribes "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel." *Id*.

The plain text of the residual clause includes pure political speech. ROA 510–11. By its terms, the phrase "any action" would include writing a letter to the editor of the local newspaper that expressed support for a boycott of Israel, and invited members of the community to join the effort. It would include contacting state elected officials to urge them to limit Texas's trade with Israel. It would also include a vast array of other constitutionally protected conduct, including "giving speeches, nonviolent picketing outside Israeli businesses, posting flyers, encouraging others to refuse to deal with Israel or Israeli entities, or sponsoring a protest which encourages local businesses to terminate business activities with Israel." *Id*. at 510. As the district court concluded: "Each of these actions might be intended to penalize or

inflict economic harm on Israel or Israeli entities, and each of these actions falls under the protective shield of the First Amendment." *Id.*

The State argues that the residual clause should be construed to apply only to "conduct [which] constitutes economic discrimination," Gov't Br. at 23, but this limitation is not supported by the clause's plain text. While the residual clause may indeed cover instances of economic discrimination, "such as imposing higher prices, delaying shipment or services, [or] providing inferior goods or services," *id.*, nothing in the clause limits its scope to such conduct. To the contrary, the clause expressly covers "*any* action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel." Tex. Gov't Code § 808.001 (emphasis added). The use of the modifier "any" strongly suggests that the legislature intended the clause to sweep beyond the narrow category of discriminatory conduct to which the State points. ROA 510–11; *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." (internal quotation marks omitted)); *accord Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227–28 (2008). Thus, several courts have held that similar residual clauses cover not only economic conduct, but also acts of pure political speech. *See, e.g.*, *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018) (finding that "the potential reach of … 'other actions'" in state anti-BDS boycott law extended to inherently expressive conduct), *vacated*

& remanded, 789 F. App'x 589 (9th Cir. 2020); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1023 (D. Kan. 2018) (similar).

Nor does the State's resort to canons of statutory construction, Gov't Br. at 23–26, 24 n.4, save its reading of the residual clause. *Ejusdem generis* and constitutional avoidance are "useful rule[s] of construction[] where words are of obscure or doubtful meaning." *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923). But they are "not a license for the judiciary to rewrite language enacted by the legislature." *United States v. Albertini*, 472 U.S. 675, 680 (1985). As this Court has made clear: "If the statutory text is unambiguous, [the Court's] inquiry begins and ends with the text." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013); *see also Ali*, 552 U.S. at 227 (rejecting statutory arguments based on *ejusdem* and *noscitur*). Here, the district court correctly found that "the plain reading of the residual clause provides only one reasonable interpretation"—that it applies to acts of pure political speech. ROA 511. The State's attempt to narrow the residual clause by relying on *ejusdem generis* and constitutional avoidance therefore fails in light of the clause's clear meaning.

CONCLUSION

The Act regulates non-violent politically motivated consumer boycotts, as well as the speech associated with those boycotts. *Claiborne* is, therefore, on all fours here, and requires that the State defend its anti-boycott law against First

Amendment scrutiny. *Amici* respectfully urge the Court to affirm the issuance of the preliminary injunction.

Dated: June 22, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,774 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: June 22, 2022

/s/ Ramya Krishnan
Ramya Krishnan

CERTIFICATE OF SERVICE

I, Ramya Krishnan, certify that on June 22, 2022, 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: June 22, 2022

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