18-16896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL AND MIKKEL (MIK) JORDAHL, P.C.,

Plaintiffs–Appellees,

v.

THE STATE OF ARIZONA AND MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,

Defendants–Appellants,

and

JIM DRISCOLL, COCONINO COUNTY SHERIFF, *et al.*,

Defendants.

On Appeal from the United States District Court for the District of Arizona — No. 3:17-cv-08263

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

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CORPORATE DISCLOSURE STATEMENT

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

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INTERESTS OF AMICI CURIAE[1]

Amici 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.

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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 curiae*, their members, 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

This is an easy First Amendment case. The State has enacted a law designed to silence a particular political viewpoint expressed through a consumer boycott. In its landmark ruling in *N.A.A.C.P. 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 holding of *Claiborne* clearly applies to the facts of this case and requires that the State defend its anti-boycott law against First Amendment scrutiny. Under even the less stringent standard of review articulated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968), the law is unconstitutional.

The State enacted the law at issue 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 toward Israel. The Act requires state contractors to sign a "written certification" that they are not engaged in a "boycott of Israel." A.R.S. § 35-393.01(A). The Act defines "boycott" as "engaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with Israel," if those actions are taken either (1) "[i]n compliance with or

adherence to calls for a boycott of Israel" or (2) "[i]n a manner that discriminates on the basis of nationality, national origin or religion." A.R.S. § 35-393(1) .

The State's primary defense of the law is that it is meant to combat discrimination, but that assertion is a pretext for the State's clear intent to suppress a particular political viewpoint. This is evident from both the text and legislative history of the Act. A key provision of the text hinges its application on protected expression and association. Specifically, the first subsection of the Act applies to boycotts of Israel undertaken in adherence to "calls" for boycotts, thereby encompassing only boycotts that involve individuals with "common views banding together to achieve a common end." *Claiborne*, 458 U.S. at 907 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)). The Act is also overinclusive, in that it applies to non-discriminatory boycotts, *see* A.R.S. § 35-393(1)(a), and dramatically underinclusive, in that it applies only to boycotts of *Israel*. Finally, the Act extends beyond just boycotts to "other actions that are intended to limit commercial relations with Israel." A.R.S. § 35-393(1). In doing so, it sweeps in all manner of constitutionally protected expression and association. These features of the Act reveal its impermissible focus on political expression.

The Act's legislative history confirms that Arizona's legislators enacted the law to suppress a political viewpoint and political movement with which they

disagree. Multiple legislators, including the Act's primary sponsor, made statements throughout the legislative process highlighting their opposition to the BDS campaign and their intent to undermine the BDS movement. As explained below, the Act is little more than an effort to decide a controversial political debate by legislative fiat. The First Amendment forbids this kind of coercion.

The State argues that First Amendment freedoms must in some circumstances yield to the government's compelling interest in combatting certain forms of discrimination. *Amici* agree. This would be a different case, for instance, if the Act were a viewpoint-neutral regulation that prohibited state contractors from discriminating in the performance of their contract with the State. But the Act is far broader in a critical respect: it requires contractors to certify that they are not engaged in a boycott of Israel, even if the boycott has no connection to their state contract, and, in some circumstances, even if the boycott is not discriminatory. And it is far narrower in another: it applies only to boycotts of Israel, and so would not apply to discriminatory refusals to deal with companies based in other countries. These features of the law evidence the State's actual aim of suppressing speech critical of Israel. This case thus does not require the Court to confront a number of hard questions about the circumstances in which the government's interest in fighting discrimination may overcome First Amendment rights. In particular, the Court need not decide whether the government's interest in preventing

discrimination may ever justify a prohibition on politically motivated consumer boycotts.

The Act is clearly directed at the suppression of speech with which the State disagrees. For that reason alone, it violates the First Amendment.

ARGUMENT

I. Contrary to the State's assertion, Arizona's 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 N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S. 886, 911 (1982); *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, seeking 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 reasoned 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. Such "peaceful political activity," the Court recognized, "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

The Supreme Court emphasized in *Claiborne* that "[t]he boycott of white merchants at issue in [the] case took many forms." *Id.* at 907. First and foremost, it involved the boycott itself—the collective refusal to patronize white merchants in Claiborne County—which was launched at a meeting of the NAACP. *Id*. The Court recognized the historical pedigree of this kind of collective action, noting 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 that the boycott was also "supported by speeches and nonviolent picketing." *Id.* At both the beginning and the end of its analysis, it stated that "[e]ach of these elements" is protected by the First Amendment. *Id.*; *see also id.* at 911 ("The established elements of speech, assembly,

association, and petition, 'though not identical, are inseparable.'" (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945))).

The State argues that *Claiborne* covers only the speech associated with boycotts, not the boycotts themselves, *see* State's Br. 41–43, but this misreads *Claiborne*, as well as subsequent Supreme Court precedent. *Claiborne* holds that political boycotts by consumers—that is, collective refusals to patronize businesses—are protected by the First Amendment. 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 Claiborne*, 458 U.S. at 906–34. 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.

The State's argument about the reach of *Claiborne* is also impossible to square with the Court's earlier decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The State posits that the *Claiborne* Court meant to address only the constitutionality of

penalizing the *speech* associated with the NAACP's boycott. But if the Court had believed it was addressing only the lawfulness of the associated speech, it would have dispensed with the case summarily under *Brandenburg*, which addresses whether speech that incites unlawful activity may be punished. The Court's lengthy analysis of whether the First Amendment applied to the nonviolent aspects of the boycott would have been unnecessary.

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 a lawyers' association that refused to represent indigent defendants until they received an increase in fees. 493 U.S. at 414. 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.* (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 915.

The Court's reasoning 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.

Here, however, the Act regulates boycotts that are materially indistinguishable from the boycott at issue in *Claiborne*. BDS boycotts are nonviolent, politically motivated boycotts involving individual consumers who have "banded together and collectively expressed their dissatisfaction," *Claiborne*, 458 U.S. 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 BDS 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 boycott, BDS boycotts encompass

many "elements." *Id*. For the plaintiff in this case, participating in a BDS boycott means "networking with other people involved in the boycott movement," "speak[ing] about it," "writing and objecting to" companies that have a presence in the West Bank, signing petitions to those companies, refusing to purchase products from those companies, and contacting U.S. legislators to "object[] to what U.S. policy is" on issues relating to the conflict between Israel and Palestine. ER 174–75.

For these reasons, the Act's regulation of BDS boycotts triggers First Amendment scrutiny under *Claiborne*.

B. The cases relied upon by the State do not disturb *Claiborne*'s coverage of political boycotts by consumers.

The Supreme Court's cases concerning economic- or labor-related boycotts do not disturb *Claiborne*'s central holding that political boycotts by consumers are covered by the First Amendment. *See* State's Br. 24–33, 34–35.

The State relies principally on the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* ("*FAIR*"), but *FAIR* is inapposite. *See* 547 U.S. 47 (2006). 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.[2] *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*,

[2] Notably, all of the cases on which the State relies most heavily either pre-date *Claiborne* or do not cite it. *See generally FAIR*, 547 U.S. 47;

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. The Court upheld the law, concluding that it did not regulate conduct that was "inherently expressive" for the purposes of the First Amendment. *FAIR*, 547 U.S. 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

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Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc., 456 U.S. 212 (1982); *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984).

boycott inheres in its "inseparable" synthesis of assembly, association, petitioning, 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 (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 military affairs. Accordingly, an important foundation of *FAIR* is absent.

The State's reliance on *Longshoremen's* and *Briggs* is also misplaced. *See* State's Br. 31–35. Decided unanimously less than two months after *Longshoremen's*, *Claiborne* made clear that cases like *Longshoremen's* establish only that "Governmental 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*). 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 the cases the State relies upon disturb *Claiborne*'s holding that political boycotts by consumers are subject to First Amendment scrutiny.

II. Arizona's law cannot survive even the standard of scrutiny articulated in *O'Brien*.

The Act cannot withstand First Amendment scrutiny. The parties disagree as to the level of scrutiny this Court should apply, *see* Appellees' Br. 27, 37–38

(arguing for strict scrutiny, or, in the alternative, a heightened level of scrutiny); State's Br. 44 (arguing for *O'Brien* scrutiny), but this is a dispute the Court need not resolve. Even under the less stringent standard of scrutiny articulated by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968), the Act is unconstitutional.

Under *O'Brien*, a law regulating First Amendment activity will be upheld only "if it furthers an important or substantial governmental interest" and "the governmental interest is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. In an attempt to satisfy this test, the State points to four interests: "(1) prohibiting discrimination, (2) regulating commerce/general police power, (3) denying state subsidies to actions contrary to public policy, and (4) denying contracts to unreliable businesses." State's Br. 39. None of these interests supports the Act. Prohibiting discrimination is undoubtedly a compelling interest in many contexts, but its invocation here is a pretext, and transparently so. As the text and history of the Act demonstrate, the Act is directed squarely at the suppression of a particular political viewpoint. The State's other asserted interests are either insubstantial or illegitimate and, accordingly, fare no better.

A. The State's asserted antidiscrimination interest is a pretext for its purpose of suppressing the political views of the BDS movement.

As an initial matter, *amici* do not challenge the State's authority to enact antidiscrimination laws. For example, it is hornbook law that "acts of invidious discrimination in the distribution of publicly available goods, services, and other

advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (holding that the government's compelling interest in "eradicating discrimination against its female citizens" justified a state public accommodations law, as applied to compel a private organization to accept female members); *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (same). *Amici* therefore agree with the State that a "[government's] anti-discrimination interests *may* justify potential infringements on First Amendment interests." State's Br. 46 (emphasis added). The question of when an interest in preventing discrimination justifies infringing First Amendment rights and, specifically, whether that interest may ever justify an outright prohibition on political boycotts by consumers, is a difficult one. It is one, however, that the Court need not reach in this case.

The antidiscrimination interest asserted here is pretextual. The Act was designed to and, in fact, does target BDS boycotts so as to suppress particular political views.

This conclusion flows directly from the Act's text. The Act requires state contractors to certify that they are not engaging and will not engage in a "boycott of Israel" for the duration of their contract. A.R.S. § 35-393.01(A). The Act defines "boycott" as "engaging in a refusal to deal, terminating business activities or

performing other actions that are intended to limit commercial relations with Israel or with persons or entities doing business in Israel or in territories controlled by Israel," if those actions are taken either (1) "[i]n compliance with or adherence to calls for a boycott of Israel" or (2) "[i]n a manner that discriminates on the basis of nationality, national origin or religion." A.R.S. § 35-393(1).

At least four aspects of this definition expose the Act's purpose of suppressing particular political views. First, a key provision of the Act hinges its application on expression or association. Specifically, the first subsection of the Act applies only to boycotts that comply with or adhere to "calls" for a boycott of Israel. This limitation focuses the Act's attention not on boycotts generally, but specifically on coordinated or political boycotts—those involving collective action "to achieve a common end." *Claiborne*, 458 U.S. at 907 (internal quotation marks omitted). This selective targeting of *expressive* and *associational* boycotts confirms the State's impermissible purpose of suppressing the political expression and association of BDS supporters. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 394 (1992) (holding that selectivity can "create[] the possibility that the [government] is seeking to handicap the expression of particular ideas"); *see also Jaycees*, 468 U.S. at 622 (explaining that government regulations discriminate on the basis of association when they "seek to impose penalties or withhold benefits from individuals because

of their membership in a disfavored group" (citing *Healy v. James*, 408 U.S. 169, 180–84 (1972))).

Second, and relatedly, the first subsection of the Act is overinclusive, in that it applies to political boycotts of Israel whether or not they are discriminatory.[3] This overinclusivity is confirmed by the second subsection, which prohibits boycotts undertaken "[i]n a manner that discriminates on the basis of nationality, national origin or religion." A.R.S. § 35-393(1)(b). If the State's true interest were in preventing discrimination, it is unclear how the first subsection improves on the language of the second. The Act's first subsection, it follows, is not only an overly restrictive means of advancing any antidiscrimination interest, but an entirely unnecessary one. It reveals the Act's true purpose of suppressing a particular point of view disfavored by the State.

Third, the Act is also dramatically underinclusive, for it applies only to boycotts of *Israel*. A.R.S. § 35-393.01. Accordingly, the Act substantially fails to fulfill the State's purported interest in "prohibiting discrimination," State's Br. 39,

[3] As the district court noted, the State has acknowledged that the second subsection of the Act does not apply to Jordahl's boycott. *See* ER 2 n.3. Accordingly, it is not the case that all collective boycotts of Israel encompassed by the first subsection of the Act are, as a categorical matter, undertaken "[i]n a manner that discriminates on the basis of nationality, national origin or religion." A.R.S. § 35-393(1)(b); *see id.* § 35-393(1) (defining boycotts of Israel as boycotts "that are intended to limit commercial relations with Israel or with persons or entities doing business in Israel or in territories controlled by Israel").

evidencing the State's intent, rather, to disfavor a particular viewpoint. As the Supreme Court recently noted, "[s]uch '[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (quoting *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011)). Moreover, that the Act is both underinclusive *and* overinclusive is strong evidence of the State's motive to suppress speech. *See F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 396 (1984) ("The patent overinclusiveness and underinclusiveness of [a regulation] undermines the likelihood of a genuine [governmental] interest." (internal quotation marks omitted)).

Finally, the Act's definition of "boycott" also applies to an array of other protected speech and conduct, in that it encompasses "*other actions* that are intended to limit commercial relations with Israel or with persons or entities doing business in Israel or in territories controlled by Israel." A.R.S. § 35-393(1) (emphasis added). On its face, this text sweeps in the panoply of expressive and associational activity that individuals, such as the plaintiff in this case, engage in as part of their collective boycott of Israel. It would appear to apply, for example, to the plaintiff's public discussion of his participation in the BDS movement, to his petitioning of companies that operate in the West Bank, and to his efforts to convince his federal

representatives to alter the United States's policies toward Israel. Thus, the Act is plainly unconstitutional even under the State's narrow interpretation of *Claiborne*.

The Act's legislative history further supports these conclusions. *See, e.g.*, House Floor Session, Part 4, Third Reading, Feb. 17, 2016 (then-House Speaker Gowan, the Act's primary sponsor, discussing the BDS movement and explaining that "this movement—that's the whole reason for this bill"); *id.* (repeated reference from representatives to the BDS movement and "anti-BDS bill[s]" of other states similar to the Act); Ariz. House Republican Caucus News Release, Feb. 4, 2016 (explaining that the Act's purpose was to penalize "companies engaging in actions *that are politically motivated* and intended to penalize, inflict economic harm on, or otherwise limit commercial relations with Israel, its products, or partners" (emphasis added)); *see also* ER 260 ("The core of the Act is directed at typical BDS boycotts."); State's Br. 21 (arguing that the district court's injunction forced the State to "subsidize BDS boycotts"); *id.* at 32 (discussing "[t]he BDS-type boycotts regulated by the Act"). This history shows that the overriding purpose of the Act has little to do with discrimination and is, instead, to suppress the political views of the BDS movement and of other critics of Israel and of the policies of the United States toward Israel. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (concluding that "contemporaneous statements made by members of the decisionmaking body" were evidence of a law's improper purpose).

In light of the Act's text and legislative history, the State's asserted antidiscrimination interest is insufficient to support the Act under *O'Brien*.

B. The State's other asserted interests are also inadequate.

The State's other asserted interests are also inadequate to justify the Act under *O'Brien*. Each claimed interest only underscores the focus of the Act on suppressing a particular political viewpoint.

Two of the State's asserted interests rely on a mistaken characterization of the Act as a legitimate exercise of control over State subsidies. The State argues that the Act is meant only to control the use of State funds by its contractors, State's Br. 49, and to align government spending with the State's "public policy," *id.* But these defenses are belied by the reach of the Act. The Act prohibits state contractors from engaging in a political boycott of Israel even if that boycott has no relationship to the state contract. That is, the Act conditions eligibility for state contracts on the political expression of would-be contractors, even if that expression is wholly unrelated to the services paid for by the State. This is fatal to the State's reliance on its spending power, because the government may not, as a general matter, condition the award of a contract on the political views or political activities of the applicants. *See League of Women Voters*, 468 U.S. at 399–401; *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 217–21 (2013) ("*USAID*").

Amici note that this would be a different case if the Act regulated solely the manner in which its contractors performed their state contracts. But the Act is not so limited. The Supreme Court's unconstitutional-conditions cases are instructive on this point. In *League of Women Voters*, the Court struck down a law banning educational broadcasting stations that received federal grants from "engag[ing] in editorializing." *League of Women Voters*, 468 U.S. at 366. The Court reasoned, in relevant part, that the law violated the First Amendment because it went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and "barred [stations] from using even wholly private funds to finance [their] editorial activity." *Id.* at 399–400. More recently, in *USAID*, the Court struck down a statute that required nongovernmental organizations to adopt a policy against prostitution and sex trafficking in order to receive federal funds. *USAID*, 570 U.S. at 210–11. The Court held that the statute violated the First Amendment because "the [requirement] by its very nature affect[ed] 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

Like the statutes in *League of Women Voters* and *USAID*, the Act is not restricted to conduct within the scope of the State-funded program. Instead, it prohibits a contractor's boycott activity even if it is entirely unrelated to a state contract. The Supreme Court's decision in *Regan v. Taxation Without*

Representation of Washington, 461 U.S. 540 (1983), upon which the State heavily relies, underscores the constitutional significance of this distinction. There, the Court rejected a First Amendment challenge to the tax code's denial of § 501(c)(3) status to organizations that engage in substantial lobbying. Crucial to the Court's conclusion, however, was the fact that the tax code allowed the plaintiff nonprofit group to continue lobbying and, simultaneously, "receive deductible contributions to support its *non-lobbying* activity." *Regan*, 461 U.S. at 545 (emphasis added). The group had merely to "return[] to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and [an independent affiliate] for lobbying." *Id.* at 544.

Here, by contrast, the Act forecloses those engaged in a political boycott of Israel from entering into *any* contract with the State. The State argues that Jordahl may continue to boycott Israel and contract with the State "by setting up a separate business entity to perform his non-governmental work." State's Br. 51. That argument is without merit. The Act applies to "compan[ies]," A.R.S. § 35-393.01, and a "company" relevantly includes "a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate" of the company. *Id.* § 35-393(2). Thus in 2016, and again in 2017, the State asked Jordahl to execute a written certification on his firm's behalf that the firm "is not currently engaged in a boycott of Israel," that "no wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or

affiliates" of the firm are "engaged in a boycott of Israel," and that neither the firm nor any of the above-mentioned associated entities would be "engaged in a boycott of Israel" for the duration of the contract agreement. ER 292, 309–10. Unlike the law in *Regan*, therefore, the Act does not "simply require that if a [funding] recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activities." *See Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir. 1998). [4]

Finally, the State argues that is has an interest in avoiding contractors who "are unreliable due to their fixation on political matters," State's Br. 8, but even assuming that it would be constitutional for the State to disfavor contractors with strong political views, its selective application of that principle solely to collective boycotts of Israel betrays its intent to suppress disfavored speech. The Act does not require state contractors to certify that they are not engaged in boycotts of *other*

[4] To the extent the State asserts an interest not merely in how contractors perform the contract, but also in how contractors spend their wages, this interest is plainly inconsistent with the Supreme Court's precedent in this area. *Cf.* State's Br. 53 (Because "money is fungible, . . . the provision of public funds inevitably results in a subsidization of the activities of the fund recipient."). As explained in the text above, that precedent makes clear that the government may regulate protected conduct only within the scope of a program funded by the government. Extending that logic beyond subsidies to *wages* would give the government nearly unlimited authority to regulate its contractors' political speech and activities.

countries, thus permitting the State to enter into contracts with individuals boycotting any country other than Israel. Treating those participating in a boycott of Israel as inherently more unreliable than other boycotters evidences the State's impermissible viewpoint discrimination.

For these reasons, the State's asserted interests in enacting its anti-boycott law are a clear pretext for its intent to silence a particular political viewpoint.

CONCLUSION

For the reasons outlined above, *amici* respectfully urge the Court to affirm the district court's decision.

Dated: January 24, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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