DISCLOSURE STATEMENT

Counsel for *amici curiae* certify that the Institute for Free Speech and the Foundation for Individual Rights in Education are nonprofit corporations, have no parent companies, subsidiaries, or affiliates, and that no publicly held company owns more than 10 percent of their stock.

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INTEREST OF AMICI

Founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission, the Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights to speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to the regulation of core political activity. It also files *amicus* briefs in cases affecting First Amendment rights.

The Foundation for Individual Rights in Education is a non-profit, non-partisan education and civil liberties organization dedicated to promoting and protecting First Amendment rights at our nation's institutions of higher education. FIRE has defended constitutional liberties on behalf of students and faculty at our nation's colleges and universities and participated as *amicus curiae* in many cases,

Counsel for all parties have consented to participation by the Institute and FIRE as *amici curiae*.

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INTRODUCTION

The statute before this Court doubtless arose from good intentions: a desire to protect Israel and ensure that an evil like the Shoah, or Holocaust, "never arise again."[1] But prohibiting boycotts of Israel is counterproductive. Such viewpoint-based restrictions could just as easily be used against Israel, or any other target disfavored by a state or local government. And chilling expression only exacerbates the "thoughtlessness [that] can wreak more havoc than all the evil instincts taken together."[2]

Freedom of expression—including expression one believes mistaken—and freedom of association are necessary if societies, including our own, are to avoid the mistakes of the past. This case involves a crucial subset of the right to speech and association: the ability of individuals to engage in the mutual, expressive economic activity of a political boycott.

This right has been specifically recognized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and its progeny. In deciding that the boycott in that case

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[1] "We must make sure that from now until the end of days all humankind stares this evil in the face...and only then can we be sure it will never arise again." President Ronald Reagan, speech at the cornerstone-laying ceremony (October 5, 1988), United States Holocaust Memorial Museum, *Frequently Asked Research Questions*, https://www.ushmm.org/collections/ask-a-research-question/frequently-asked-questions (alteration in original).

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 288 (Revised ed. 1994).

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was protected, the Court did not

1. The First Amendment’s protections of boycotts lie at the nexus of speech, assembly, petition, and association.

Boycotts are composed of numerous speech and conduct “elements . . . that [are] ordinarily entitled to protection under the First and Fourteenth Amendments.” *Id*. at 907. But a boycott is more than the sum of its parts, and so is the First Amendment protection accorded to it. Bo0.970588 .q 0.978:1 (14.04 0 0 14.04 2(40.97058870

guaranteeing the right of people to make their voices heard on public issues.'" *Id*. at 908 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 295 (1981)).

Thus, the starting point of the Supreme Court's analysis in *Claiborne Hardware*, and of any court in a boycott case, is "[t]he fact that [a nonviolent, politically motivated boycott] is constitutionally protected." *Id*. at 915. The question is whether the boycott at issue is a political one, or whether it involves the "narrowly defined instances"—such as suppressing competition or engaging in unfair trade practices—under which "incidental" restrictions on the freedoms underlying

Rather, the Court looked to the context and nature of the anticompetitive action. Regarding the former, the purpose of the boycott was to influence an association vote, not to influence the general public to secure "legislation or executive action." *Id*. at 499; *see also id.* at 506 (contrasting activity in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), which took "place in the open political arena"). Furthermore, the defendant's actions were motivated by its own "personal financial interests," not its desire to secure or protect some right. *Id*. at 502; *id*. at 509 (noting "economically interested party"); *id*. at 508-09 (contrasting with "aim of vindicating rights" in *Claiborne Hardware*). Thus, in both context and nature, the activity was not a protected boycott.

A holistic analysis also distinguishes *Superior Court Trial Lawyers Ass'n*. That case involved a boycott by court-appointed attorneys who represented indigent defendants in about 85% of cases in the District of Columbia. 493 U.S. at 414-15. A group of lawyers who regularly accepted the assignments, and who made most of their income from those assignments, voted to strike until the city increased the fees paid for appointments. *Id*. at 416.

The Supreme Court rejected the application of *O'Brien* to determine whether the boycott contained expressive conduct and was thus protected. Such

3. The boycott here is protected under the source, context, and nature test.

Here, as in

associational rights—those who merely donated in *NAACP v. Alabama* or who participated in the boycott in *Claiborne Hardware* were not necessarily members of the NAACP either. Nevertheless, those participating in the restricted boycotts are allied in a meaningful way, in a way that amplifies their voices.

For the reasons above, this Court should hold that Arkansas's law is unconstitutional.

Respectfully submitted,

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Dated: April 15, 2019

CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by