No. 22-379

In the Supreme Court of the United States

ARKANSAS TIMES LP,

Petitioner,

v.

MARK WALDRIP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* THE FORUM FOR CONSTITUTIONAL RIGHTS AND THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

CASES—CONT'D

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES—CONT'D

INTEREST OF THE *AMICI CURIAE*[1]

The Forum for Constitutional Rights (FCR) is a general public-benefit corporation that is organized and operated under Minnesota law. FCR provides public education about constitutional history and rights, including (but not limited to) rights enshrined by the First Amendment. FCR's public education efforts include filing *amicus* briefs in cases involving First Amendment rights and other key constitutional protections. FCR's advocacy is non-partisan.

The Foundation for Individual Rights and Expression[2] (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases concerning First Amendment expressive rights. *See, e.g.,* Brief of *Amicus Curiae* FIRE in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (No. 21-418); Brief of *Amici Curiae* FIRE et al. in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20-255).

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[1] This *amicus* brief is filed with the consent of Petitioner and Respondents after timely notice to both. S. Ct. R. 37.2(a). No counsel for a party authored this *amicus* brief in whole or in part; nor has any person or any entity, other than the named *amici curiae* and their counsel, contributed money intended to fund the preparation or submission of this *amicus* brief.

[2] Formerly known as the Foundation for Individual Rights in Education, FIRE changed its name in June 2022 to reflect the organization's newly expanded mission.

SUMMARY OF THE ARGUMENT

The First Amendment is our nation's first line of defense against the use of government by any party "to coerce uniformity of sentiment in support of some end thought essential." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943). The integrity of this safeguard depends on oversight by this Court—especially now, when the nation is deeply polarized and both sides of the aisle have exploited this divide to secure the passage of policies and laws mandating "what shall be orthodox in politics." *Id.* at 642.

This case presents a troubling iteration of this problem, with the State of Arkansas requiring all contractors doing business with the State to forfeit their free-speech rights related to boycotts of Israel. The Court has long recognized that boycotts are not just bare refusals to engage in commerce, but rather multifaceted exercises of First Amendment rights, including speech, assembly, association, and petition. As a result, the First Amendment stands squarely against Arkansas's boycott-ban and other laws like it that ultimately suppress or compel speech.

Amici therefore urge the Court to grant review and reverse. The Eighth Circuit upheld Arkansas's boycott-ban by characterizing the ban as a regulation of non-expressive commercial activity. The Eighth Circuit failed to recognize that the ban in fact enlists government to police matters of opinion protected by the First Amendment. By granting review, the Court stands to reaffirm that the First Amendment affords no haven for government-prescribed orthodoxy, even under the guise of commercial regulation.

ARGUMENT

I. Government is increasingly being enlisted to suppress or compel speech.

"The Constitution says that Congress (and the States) may not abridge the right to free speech." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). For good reason. "The vitality of civil and political institutions in our society depends on free discussion." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1941). "[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Id.* Free speech is therefore "one of the chief distinctions" that sets our nation apart from the world's totalitarian regimes. *Id.*

The importance of free speech in our society, however, does not guarantee political respect for this constitutional principle. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.* As a result, free speech is always at risk from perennial campaigns to have government "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943). Such efforts are often justified on the ground that "freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Id.*

Unfortunately, in recent times, there is growing support on both sides of the aisle for the proposition

that government may dictate political orthodoxy. At colleges and universities, left-leaning administrators have sought to suppress disfavored student speech and compel faculty speech. Consider the California Community Colleges. In March 2022, the Colleges evaluated implementation of regulations that would compel faculty members to accept and apply within their curricula concepts such as "intersectionality" and "axes of oppression."[3] The University of Illinois has gone a similar direction, adopting a tenure policy requiring faculty after the 2024–25 academic year to submit statements that align with the University's ideological views on diversity and inclusion.[4]

At the same time, right-leaning state governors and legislatures have proposed or implemented bans on the teaching of "divisive concepts."[5] One of the most prominent examples is Florida's so-called Stop WOKE Act, which forbids "'instruction' on eight specific 'concepts' related to 'race, color, national origin, or sex' that may run counter to government officials' notions of 'freedom.'"[6] Conservative public school

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[3] Letter from Joe Cohn, et al., FIRE Legis. & Policy Dir., to Regulations Coord., Cal. Cmty. Colls., at 3 (Apr. 22, 2022), https://bit.ly/3UWMNrz (quoting the proposed regulations).

[4] Haley Gluhanich, *Univ. of Illinois Insists Forcing Faculty to Promote DEI Against Their Will Doesn't Threaten Academic Freedom*, FIRE (Oct. 17, 2022), https://bit.ly/3UTGcOI.

[5] Lauren Camera, *Teachers, Parents File Lawsuit Against New Hampshire's 'Divisive Concepts' Law*, U.S. NEWS & WORLD. REP. (Dec. 13, 2021), https://bit.ly/3hIPfnn ("New Hampshire is one of eight Republican-controlled states that's passed laws . . . restricting how educators teach or talk about racism, sexism, discrimination and other topics related to inequality.").

[6] *FIRE Challenges Stop WOKE Act's Limits on How Florida Professors Can Teach About Race, Sex,* FIRE (Sept. 7, 2022), https://bit.ly/3UWaaBv.

administrators have also imposed bans on student speech, requiring, for instance, transgender high school students to use only their given names in their bylines for school newspaper stories.[7]

In some cases, political bodies have sought to suppress speech and compel speech at the same time. In 2021, students and teachers in Minnesota's Becker Public School District started speaking out against "incidents of bullying and homophobia."[8] As this discussion became a central focus of school board meetings,[9] the school board issued a communications plan.[10] The plan instructed district employees that they could "not make statements to the media, individuals, or entities outside the District related to students or personnel matters."[11] The plan further mandated that: "internal communication must be positive and a priority."[12] After a group of teachers sued, the school board rescinded the plan.[13]

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[7] Eduardo Medina, *Nebraska School Shuts Down Student Newspaper After L.G.B.T.Q. Publication*, N.Y. TIMES (Aug. 29, 2022), https://nyti.ms/3UOizXQ.

[8] Jenny Berg, *Becker Students Demand District 'Do Better' on Racism, Homophobia After Recent Incidents*, STAR TRIB. (Apr. 20, 2021), https://bit.ly/3gtOgqJ.

[9] *See* Jenny Berg, *Two Becker School Board Members Resign Following Anti-LGBTQ Presentation*, STAR TRIB. (Apr. 18, 2022), https://bit.ly/3Atasbd.

[10] David Griswold, *Becker School District Rescinds Controversial Communications Policy*, KARE-11 (Aug. 24, 2022), https://bit.ly/3USvMiT.

[11] *Id.* (quoting the communications plan).

[12] Callan Gray, *Lawsuit Alleges Becker Public Schools Policy Restricts Free Speech, Mandatory Reporting for Educators,* KSTP-5 (Aug. 19, 2022), https://bit.ly/3gp19SU.

[13] *See* Griswold, *supra* note 10.

Litigation often proves necessary to overcome politically-driven speech restrictions of this nature. When administrators at Clovis Community College directed the removal of flyers with anti-communist and anti-abortion messages, the conservative student group that posted the flyers had to sue. *See Flores v. Bennett*, No. 1:22-cv-01003-JLT, 2022 WL 9459604 (E.D. Cal. Oct. 14, 2022). A federal court granted a preliminary injunction, concluding that Clovis's flyer removal had "a chilling effect" counter to the "central purpose of the university system": "to foster creative inquiry, which develops through the expression of a diversity of viewpoints." *See id.* at *9–13.

The same admonition may be found in a recent order enjoining the above-mentioned Stop WOKE Act. *See Pernell v. Fla. Bd. of Gov's of the State Univ. Sys.*, No. 4:22cv304-MW/MAF, 2022 U.S. Dist. LEXIS 208374, at *152 (N.D. Fla. Nov. 17, 2022). The court determined that the Act served to ban "professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of the opposite viewpoints." *Id.* at *8–9. In practice, this meant Florida law students hypothetically would not be allowed to hear Justice Sotomayor read passages from her memoir that "endorse[d] affirmative action." *Id.* at *17. This led the court to conclude: "the First Amendment does not permit . . . Florida to muzzle its university professors" and "impose its own orthodoxy of [political] viewpoints." *Id.* at *151–52.

Of course, efforts to have government impose some form of orthodoxy pervade American history. In the same decade that Americans ratified the First Amendment, Congress enacted the Sedition Act of

1789. The Act "made it a crime" to "utter or publish . . . malicious writing or writings against the [federal] government." *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964). The Act was "vigorously condemned as unconstitutional in an attack . . . by Jefferson and Madison." *Id.* The ensuing controversy "crystallized a national awareness of the central meaning of the First Amendment." *Id.*

In the early 1900s, the nation experienced many attempts to enlist government to suppress disfavored speech and compel favored speech. The Espionage Act of 1917 prohibited the publication of materials that criticized the nation's involvement in World War I. *See Frohwerk v. United States*, 249 U.S. 204, 205– 07 (1919) (Espionage Act prosecution of a publisher who criticized the deployment of American soldiers as an "inexcusable mistake"). California passed a law that banned red flags as political expression. *See Stromberg v. California,* 283 U.S. 359, 360–61 (1931) (discussing California's law). Other states banned the teaching of evolution. *See Epperson v. Arkansas*, 393 U.S. 97, 98 (1968) ("This appeal challenges the constitutionality of the 'anti-evolution' statute which the State of Arkansas adopted in 1928 . . . .").

Thankfully, these laws and others like them failed to gain traction over time, due in large part to free-speech jurisprudence developed by the Court. This jurisprudence has reminded the nation time and again that fidelity to the First Amendment matters most when speech "induces a condition of unrest, creates dissatisfaction . . . or even stirs people to anger." *Terminiello*, 337 U.S. at 4. Today, however, the nation is on the verge of abandoning this ideal as

"dominant political and community groups" on both the left and right increasingly enlist government to mandate a "standardization of ideas." *Id.*

II. The Court should grant review in this case to protect its free-speech jurisprudence.

This case presents a critical test of the Court's First Amendment precedents. In 2017, the Arkansas legislature passed Act 710—a statute that requires "government contractors to certify that they are not participating, and will not participate, in boycotts of Israel." Pet. 3; *see* Ark. Code Ann. § 25-1-501 *et seq.* (2017). Despite this Court's well-settled conclusion that boycotts entail free speech, the Eighth Circuit held that Arkansas's boycott-ban did not violate the First Amendment. Pet. App. 3a. Without the Court's intervention, the Eighth Circuit's judgment stands to embolden both sides of the aisle in their respective efforts to have government prescribe "orthodox[y]" in "matters of opinion." *Barnette*, 319 U.S. at 641.

Act 710 expressly suppresses disfavored speech and compels favored speech. The Act establishes that government entities may not contract with private persons unless those persons certify that they are not "currently engaged in, and agree[] for the duration of the contract not to engage in, a boycott of Israel." Ark. Code Ann. § 25-1-503(a)(1). Act 710 allows companies to buy back their right-to-boycott if the company "offers to provide . . . goods or services for at least twenty percent (20%) less than the lowest certifying business." *Id.* § 25-1-503(b)(1). Act 710 defines "boycott of Israel" as "engaging in refusals to deal, terminating business activities, or other actions . . .

intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner." Ark. Code Ann. § 25-1-502(1)(A)(i).

The Eighth Circuit upheld Act 710 based on the view that the Act prohibits only "purely commercial, non-expressive conduct," placing the Act outside the First Amendment. Pet. App. 11a. To reach this view, the Eighth Circuit reframed the Act as banning mere "economic decisions that discriminate against Israel" rather than banning criticism of Israel or efforts to "protest[] the statute itself." *Id.* In dissent, Judge Kelly explains that the green eyeshades donned by the Eighth Circuit cannot alter Act 710's true colors. The Act restricts the freedom of private contractors to participate in speech and other First-Amendment-protected "boycott-associated activities," Pet. App. 19a (Kelly, J., dissenting)—rights settled by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

In *Claiborne*, the Court made clear that boycotts involve "constitutionally protected activity." *Id.* at 911. The Court thus refused to buy the notion that government prohibitions of boycotts were nothing more than economic regulations. *Id.* at 911–12. The Court recognized boycotts involved and required the exercise of core First Amendment rights, including "speech, assembly, association, and petition." *Id.* And through the exercise of these rights, participants in a boycott sought to "bring about political, social, and economic change" through peaceful means. *Id.* The Court recognized that in this vital context, "the First Amendment needs breathing space." *Broadrick v. Oklahoma,* 413 U.S. 601, 611–12 (1973).

The Court noted the boycott in *Claiborne* "was supported by speeches and nonviolent picketing," with participants encouraging the public to join their cause. 458 U.S. at 907. It was also undisputed that the boycott sought "to influence governmental action" — namely, enhanced governmental efforts to uphold "rights of [racial] equality and of freedom." *Id.* at 914. Against this reality and the First Amendment, "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a non-violent, politically motivated boycott." *Id.*

Claiborne cannot be squared with the Eighth Circuit's decision in this case. By treating boycotts as nothing more than commercial activity, the Eighth Circuit sweeps away all the "elements of [a] boycott" that constitute "speech or conduct" protected by the First Amendment. *Id.* at 907. The Eighth Circuit also sweeps away this Court's emphatic rejection of laws that ultimately serve to suppress disfavored speech or compel favored speech. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Act 710 does not require contractors to abjure all boycotts—only those concerning Israel. *See* Ark. Code Ann. § 25-1-502(1)(A)(i). The Act also does not ban contractors from participating in all boycotts of Israel—only "discriminatory" ones. *Id.* The Act leaves contractors free to participate in an indiscriminate boycott that happens to include Israel (e.g., a boycott of all nations deemed insufficiently supportive of a carbon tax). The Act forbids only those boycotts that

target Israel alone, exposing a manifest government effort to "handicap the expression of particular ideas" to the benefit of "one side of a debate." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392, 394 (1992).

Act 710 also does not simply prohibit contractor participation in boycotts of Israel. The law requires contractors to sign a "written certification" that they will not boycott Israel for the duration of a public contract. Ark. Code Ann. § 25-1-503(a)(1). "Forcing free and independent individuals to endorse ideas they [may] find objectionable" raises considerable First Amendment concerns. *Janus v. Am. Fed. of State, Cnty., & Muni. Emps.,* 138 S. Ct. 2448, 2464 (2018). Compelled speech "invades the sphere of intellect and spirit which is the purpose of the First Amendment." *Wooley v. Maynard,* 430 U.S. 705, 715 (1977). It does not matter whether government is compelling something as seemingly minor as a state motto on a license plate or something as profound as the Pledge of Allegiance. *See id.; Barnette*, 319 U.S. at 641 ("Compulsory unification of opinion achieves only the unanimity of the graveyard.").

Act 710 thus stands opposed to this Court's free-speech jurisprudence. The State of Arkansas cannot elide the rights of speech, association, and petition that travel together with boycotts. Nor can Arkansas abridge the right of contractors to make their own expressive choices about whether to boycott Israel or take similar actions. The Eighth Circuit neglected these concerns by deeming Arkansas to be regulating economic behavior. Arkansas is in fact prohibiting "[f]ree trade in ideas"—a trade the First Amendment fully protects. *Claiborne*, 458 U.S. at 910.

CONCLUSION

Left in place, Arkansas's attempt to prescribe what shall be orthodox on the subject of boycotting Israel risks undermining this Court's longstanding free-speech jurisprudence. For generations, this body of law has established that the First Amendment protects speakers and viewpoints of all persuasions against popular efforts to either suppress disfavored speech or compel favored speech. Today, dominant majorities on both sides of the political aisle seek to use government to end debate rather than protect it. By granting review here, the Court may help to stem this alarming tide that otherwise risks washing away the free trade of ideas. The Court may reaffirm that under the First Amendment, free speech, even in the form of boycotts, is about "more than self-expression" —"it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

Respectfully submitted,

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