No. 22-20047

In the United States Court of Appeals for the Fifth Circuit

A & R Engineering and Testing, Incorporated,
Plaintiff-Appellee,

v.

Ken Paxton, Attorney General of Texas,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR DEFENDANT-APPELLANT

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Certificate of Interested Persons

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, Defendant-Appellant, as a governmental party, need not furnish a certificate of interested persons.

/s/ Eric J. Hamilton
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Statement Regarding Oral Argument

This case merits oral argument. The district court's order implicates important questions touching on areas ranging from First Amendment rights to core Article III doctrines to sovereign immunity. Indeed, the underlying merits question—what, if any, First Amendment rights are implicated by a State including as a term of its contracts a certification that a contracting counterparty is not engaged in an international boycott—implicates 26 other States' similar laws. *See* p. 5, *infra*. The Attorney General respectfully suggests that oral argument will assist the Court in resolving the important issues raised by this appeal.

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INTRODUCTION

The United States recognized the State of Israel the day it was founded. *See* Harry S. Truman, *Public Messages, Speeches, and Statements of the President: Statement by the President Announcing Recognition of the State of Israel, May 14, 1948*, Public Papers of the Presidents of the United States 258 (1964). Coordinated opposition either to Israel's existence, its legitimacy, or both have persisted since that day. Though recognizing that private individuals enjoy broad First Amendment protections to take whatever position regarding Israel they wish, Texas has decided to ensure large government contracts do not become vehicles through which tax dollars contribute to boycotts of Israel.

Texas accomplishes this end by requiring contracting counterparties to verify that they will abstain from boycotting Israel for the duration of the contract. In order to minimize any indirect or unintended imposition on private individuals' expressive rights, Texas law tailors this requirement in several ways. *First*, the law does not apply to business owners' individual activities, ensuring those individuals may engage in the full suite of protected First Amendment speech and expressive conduct without interference. *Second*, Texas law requires contracting entities only to forego commercial decisions that, standing alone, have never been accorded First Amendment protections akin to speech or expressive conduct, such as a refusal to deal. *Finally*, the State exempts both smaller contracts (those under $100,000) and contractors (those with fewer than ten employees) from this requirement. This carefully reticulated regime ensures that Texas's tax dollars are not conscripted into the service of

an international dispute while respecting private parties' rights to stake out positions as they see fit.

The district court nonetheless enjoined the Attorney General from enforcing this requirement on First Amendment grounds. In doing so, it shunned both relevant canons of interpretation that confirm the statute prohibits only economic discrimination. The district court properly rejected A&R Engineering's even more radical argument—namely, that an economic transaction, without more, is itself a protected form of expression—which would threaten laws similar to the one challenged here in more than two dozen other States.

But not only does A&R Engineering's claim lack merit—the district court had no jurisdiction over the Attorney General. The Attorney General lacks an *Ex parte Young*, 209 U.S. 123 (1908), enforcement connection to the statute and has never "demonstrated willingness" to enforce the law. *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 672 (5th Cir. 2022) (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020)). For the same reason, the company lacked standing to sue the Attorney General in the first place. Either basis is sufficient for this Court to vacate the preliminary injunction—as is A&R Engineering's decision to enter into a contract with Houston, over which the Attorney General had neither control nor responsibility. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950) (providing vacatur of lower court order is appropriate where party benefiting from such order renders appeal moot).

Statement of Jurisdiction

A&R Engineering invoked the district court's subject-matter jurisdiction under 28 U.S.C. § 1331 because its claim arose under the U.S. Constitution and is brought under 42 U.S.C. § 1983. ROA.10. Nonetheless, the district court lacked subject-matter jurisdiction over A&R Engineering's claim against the Attorney General. *See* pp. 11-14, *infra*. The district court entered a preliminary injunction on January 28, 2022, ROA.523, and the Attorney General timely filed a notice of appeal on January 31, 2022, ROA.524. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

Issues Presented

1. Whether A&R Engineering demonstrated that the district court had subject-matter jurisdiction by establishing: (a) standing and (b) a basis for overcoming the Attorney General's sovereign immunity.
2. Whether A&R Engineering established entitlement to a preliminary injunction on its claim that its First Amendment rights are violated by a law requiring it to verify that it boycotts neither Israeli nor Palestinian businesses before entering into a contract with a Texas governmental entity.
3. Whether, if this appeal is moot, this Court should vacate the district court's preliminary injunction and opinion and dismiss the case as moot.

STATEMENT OF THE CASE

I. Background

A. Texas's anti-boycott law.

Texas wants to prevent government contracts from becoming avenues through which private parties boycott Israel. The law, passed unanimously in the House and with overwhelming support in the Senate, *see* S.J. of Tex., 85th Leg., R.S. 1332 (2017) (discussing Tex. H.B. 89); H.J. of Tex., 85th Leg. R.S. 1749, 2460 (2017) (same), provides:

> A governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract.

Tex. Gov't Code § 2271.002(b). The term "Boycott Israel" means:

> [R]efusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

Id. § 808.001(1); *see also id.* § 2271.001(1). The statute's bar against boycotts of "entit[ies] doing business . . . in an Israeli-controlled territory," *id.* § 808.001(1), refers to businesses working in the West Bank and Gaza Strip. *Cf. Abudaya v. Holder*, 393 F. App'x 275, 276 n.1 (6th Cir. 2010). The law therefore prohibits the boycott of Palestinian businesses in these territories in the same manner as Israeli ones.

The law covers only large government contracts. For the statute to apply, the contract must be valued at over $100,000 and paid with public funds. Tex. Gov't

Code § 2271.002(a)(2). Contractors with fewer than ten employees are exempt even when fulfilling contracts larger than this minimum amount. *Id.* § 2271.002(a)(1); *see also id.* § 2271.001(2). The law also does not apply to people in their individual capacities. The owners, managers, and employees of firms contracting with the State or its subdivisions therefore remain free to engage in economic boycotts in their personal capacities if they so desire. Today, laws in at least 26 other States contain similar prohibitions.[1]

Relatedly, separate Texas statutes limit government contracts with companies that do business with foreign terrorist organizations or the Governments of Iran or Sudan. Tex. Gov't Code § 2252.152. Governmental entities also cannot contract with companies that were complicit in the Darfur genocide. Tex. Gov't Code § 2252.152.

B. A&R Engineering rejects the City of Houston's contract.

A&R Engineering and Testing is a Texas corporation that provides engineering consulting services to clients in both the private and public sectors. ROA.608. The

[1] Ala. Code § 41-16-5; Ariz. Rev. Stat. § 35-393.01; Ark. Code § 25-1-503; Cal. Pub. Cont. Code § 2010; Fla. Stat. § 287.135(2)(a); Ga. Code § 50-5-85; Idaho Code § 67-2346; Iowa Code § 12J.6; Kan. Stat. § 75-3740f; Ky. Rev. Stat. § 45A.607; La. Stat. § 39:1602.1; Md. Code Regs. 01.01.2017.25; Mich. Comp. Laws § 18.1261(12); Minn. Stat. § 16C.053; Mo. Stat. § 34.600; Nev. Rev. Stat. § 333.338; N.C. Gen. Stat. § 147-86.82; Ohio Rev. Code § 9.76; Okl. Stat. tit. 74, § 582; 62 Pa. Stat. and Cons. Stat. § 3604; 37 R.I. Gen. Laws § 37-2.6-3; S.C. Code § 11-35-5300; Exec. Order No. 2020-01, Governor Kristi Noem (Jan. 14, 2020), https://tinyurl.com/bdzjctyd; Utah Code § 63G-27-201; W. Va. Code § 5A-3-63 (eff. July 1, 2022); Wisc. Stat. § 16.75(10p)(b).

City of Houston has been a client of A&R Engineering's for about 17 years and does a substantial amount of business with the firm; for example, last year, the City paid A&R Engineering about $300,000. ROA.9, 14, 609, 618.

In the fall of 2021, A&R Engineering and the City renegotiated their contract. ROA.9. The City offered the company a three- to five-year contract worth an estimated $1.5 million. ROA.51, 618. As required by state law, the contract offered by the City included language under which A&R Engineering would affirm that it did not and would not boycott Israel. ROA.48. A&R Engineering objected to that clause. ROA.401-02. Its sole owner, Rasmy Hassouna, told the City that Israel is an "Apartheid State" and the "occupier of [his] home land." ROA.402. Though Mr. Hassouna testified that A&R Engineering has never "boycotted anybody," ROA.619, 621, Mr. Hassouna told the City at the time that it was his "right and duty to boycott Israel and any products of Israel," ROA.402. Citing the anti-boycott statute, the City refused to remove the clause from the contract. ROA.399-400.

II. Procedural History

Having reached an impasse in negotiations, A&R Engineering filed a complaint in the U.S. District Court for the Southern District of Texas on October 29, 2021, naming the City and the Attorney General of Texas as defendants. ROA.8-24. A&R Engineering alleged that the anti-boycott statute violated the First and Fourteenth Amendments, ROA.15-18, and the company moved for a preliminary injunction, ROA.122-24, while the Attorney General moved to dismiss the complaint, ROA.243-64. The City professed neutrality in the dispute and agreed to hold the contract open for A&R Engineering. ROA.120, 220-21. The district court held a

hearing on the pending motions at which Mr. Hassouna alone testified. ROA.569-70.

On January 28, 2022, the district court entered a preliminary injunction and denied the Attorney General's motion to dismiss. ROA.491-523. After holding that A&R Engineering had standing and its claim was ripe, ROA.499-505, the district court rejected the company's argument that the statute's proscriptions against "refusing to deal" and "terminating business relationships" violated the Constitution, ROA.505-08. It held that "the mere refusal to engage in a commercial/economic relationship with Israel or entities doing business in Israel . . . does not find shelter under the protections of the First Amendment." ROA.508. But the district court faulted as unconstitutionally vague the statute's residual clause, which prohibits "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations" with Israel. ROA.508-11. In reaching that conclusion, the district court held that the residual clause could, in theory, prohibit protected activity like giving speeches, picketing, posting flyers, encouraging boycotting, and sponsoring protests. ROA.510.

After concluding that the statute proscribed protected conduct, the district court considered whether Texas could nonetheless regulate such conduct by its contractors. ROA.512. Applying the balancing test from *Pickering v. Board of Education*, 391 U.S. 563 (1968), the district court found that A&R Engineering's interests outweighed the State's interests. ROA.512-18. Having concluded that A&R Engineering was likely to succeed on the merits, the court considered the three other preliminary injunction factors, concluding that each favored an injunction. ROA.518-19.

The district court concluded A&R Engineering faced irreparable injury because of the revenue it risked losing. ROA.519. The balance of equities tilted in the company's favor because there was no evidence the contract would undermine Texas's relationship with Israel. ROA.519. Finally, the district court cited the case's First Amendment subject matter in holding the public interest favored an injunction. ROA.519-20.

The court issued a preliminary injunction against the City and the State of Texas itself. ROA.520. The preliminary injunction ordered the City to omit the Israel anti-boycott verification clause from the contract under consideration, ROA.521, and barred the State of Texas from enforcing the law against either the City or A&R Engineering, both during contract negotiations and for the "performance of the contract."[2] ROA.521-22.

On January 31, 2022, the Attorney General filed a notice of appeal and moved the district court to stay the preliminary injunction and proceedings. ROA.524-43. Both motions remain pending. Consistent with the preliminary injunction, A&R Engineering and the City executed a contract omitting the anti-boycott statute's verification language on February 10, 2022. Sugg. of Mootness, Ex. B. Four weeks later,

[2] The district court erroneously entered its injunction against the "State of Texas," ROA.521-22, even though the State of Texas is not a defendant. *See* pp. 13-14, *infra.* Because A&R Engineering's arguments below were directed against the Attorney General in his official capacity, this brief proceeds on the assumption that A&R Engineering will defend the injunction as though it were directed against the Attorney General. ROA.210-12.

A&R Engineering filed a suggestion of mootness in this Court. The Attorney General responded, and a motions panel carried that motion with the case.

Summary of the Argument

The district court erred by entering the preliminary injunction. *First*, the district court lacked jurisdiction twice over. A&R Engineering failed to establish its standing and the Attorney General enjoys sovereign immunity, largely for the same reason: the Attorney General lacks the required enforcement connection to the anti-boycott statute to which A&R Engineering objects. Because that law does not task the Attorney General with its enforcement, the *Ex parte Young* action is unavailable to A&R Engineering, and the company cannot show that any injury it suffers is fairly traceable to the Attorney General.

Second, A&R Engineering is not likely to succeed on the merits of its First Amendment claim. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*), confirms that the law's bars against "refusing to deal" and "terminating business activities," Tex. Gov't Code § 808.001(1), infringe neither speech nor expressive conduct. The statute's residual clause, which prohibits "otherwise taking any action," must be read in conjunction with these previous two categories—and, so interpreted, it likewise does not infringe First Amendment rights. *Id. Ejusdem generis* and constitutional avoidance suggest that this residual clause applies only to acts of economic discrimination, for which, standing alone, there is no First Amendment right. Even if the anti-boycott statute covered some protected conduct, it remains constitutional under *United States v. O'Brien*, 391 U.S. 367 (1968), which saves neutral regulations promoting substantial government interests. A&R

Engineering cannot defend the district court's order under a compelled-speech rubric because the anti-boycott statute does not compel the company to take a "loyalty oath" as the company alleges. ROA.593.

Finally, if, as A&R Engineering argues, this appeal is indeed moot, this Court should vacate the preliminary injunction and instruct the district court to dismiss the case. Long-settled appellate principles indicate that a party who, having prevailed below, forecloses appellate review by mooting the underlying dispute may not benefit from that foreclosure by retaining a beneficial district court decision. If this appeal is moot due to A&R Engineering's execution of a new contract, vacatur is required.

Standard of Review

This Court must assure itself of both its and the district court's jurisdiction. *Griffin v. Lee*, 621 F.3d 380, 383-84 (5th Cir. 2010) (per curiam). As here, when the district court lacks jurisdiction, appellate courts "have jurisdiction on appeal, not on the merits but for the purpose of addressing the lower court's jurisdiction to entertain the suit." *Id.* at 384. This Court assesses these jurisdictional questions of law *de novo*. *Hous. Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 400 (5th Cir. 2014).

This Court "review[s] a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018) (quoting *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013)). "[A] district court by definition abuses its discretion when it makes an error of law." *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384 (5th Cir. 2008) (per curiam).

ARGUMENT

I. The District Court Lacked Jurisdiction On Both Standing And Sovereign-Immunity Grounds.

As this Court has observed, a plaintiff who sues a state official regarding a law that does not specially task that official with its enforcement commits two independent errors, each sufficient to deprive the district court of jurisdiction. *First*, because state officials named in their official capacities are treated as the State itself, these officials enjoy sovereign immunity. Because an *Ex parte Young* action is available against only officials who have a "sufficient connection [to] the enforcement of the challenged act," *Haverkamp v. Linthicum*, 6 F.4th 662, 670 (5th Cir. 2021) (per curiam), that action is by definition unavailable against officials without such a connection, leaving a plaintiff without that vehicle to avoid immunity. *Second*, where standing is premised on enforcement authority, the plaintiff must "assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future." *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Without that showing, the plaintiff cannot show traceability. *Id.* at 2113-14. The analyses are distinct, *see Tex. All. for Retired Ams.*, 28 F.4th at 674, but here, sovereign immunity applies and standing is lacking for the same reasons: the anti-boycott statute does not make the Attorney General responsible for its enforcement, and the Attorney General has never "demonstrated willingness" to enforce the statute. *Id.* at 672 (quoting *Tex. Democratic Party*, 978 F.3d at 179).

A. The district court held that A&R Engineering had standing to sue the Attorney General because the company's threatened loss of a contractual relationship

constituted an injury in fact. It found that injury was "fairly traceable to [the Attorney General]'s conduct because it is a direct result of the enactment of [the anti-boycott law]." ROA.501-02. Concluding the standing analysis, the district court found that "[a] favorable decision . . . would redress or prevent Plaintiff's injury." ROA.502. The only connection A&R Engineering offers between the Attorney General and the anti-boycott law is that the Attorney General "is responsible for enforcing and defending the constitutionality of Texas law." ROA.10.

This Court has already rejected that all-encompassing theory in both the standing and *Ex parte Young* contexts. Plaintiffs often argue that a given official's general duty to see that state laws are properly implemented implies a specific duty to enforce a challenged law. *See, e.g.*, *Hull v. Whitaker*, No. 5-19-CV-00026-OLG-RBF, 2019 WL 2288458, at *6 (W.D. Tex. May 29, 2019). But this Court has repeatedly held that an "official must have more than 'the general duty to see that the laws of the state are implemented.'" *Tex. All. for Retired Ams.*, 28 F.4th at 672 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). Instead, "the official must have 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *Id.* (quoting *Tex. Democratic Party*, 978 F.3d at 179). And without the required connection to enforcement, the harm A&R Engineering claims—that it may be unable to contract with the City because of the anti-boycott law—cannot be traced to the Attorney General, and A&R Engineering's sole basis for standing fails. *California*, 141 S. Ct. at 2113.

B. Nor does any part of the anti-boycott law assign the Attorney General "the particular duty to enforce the statute in question." *Tex. All. for Retired Ams.*, 28 F.4th

at 672. The statute "does not specially task [the Attorney General] with its enforcement, or suggest that he will play any role at all in its enforcement." *Morris*, 739 F.3d at 746. A&R Engineering appears to acknowledge as much. *See* Sugg. of Mootness Reply 4. That the anti-boycott law does not call for enforcement by the Attorney General is particularly telling given that the Attorney General is responsible for enforcing a separate prohibition on state government investment in companies that boycott Israel. *See* Tex. Gov't Code § 808.102. But the Legislature did not extend that authority to the anti-boycott law at issue here—so the Attorney General has no connection to enforcing it, and A&R Engineering cannot rely on *Ex parte Young*. "[I]f the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent and [the *Ex parte*] *Young* analysis ends." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 401 (5th Cir. 2020).[3]

C. At a minimum, the district court lacked jurisdiction to enjoin "[t]he State of Texas." ROA.521-22; *see also* ROA.491. "The Eleventh Amendment bars a state's citizens from filing suit against the state or its agencies in federal courts . . . unless the state has waived its immunity." *Cozzo*, 279 F.3d at 280-81. The district court did not hold that the State waived immunity, nor could it. And A&R Engineering did not

[3] The Attorney General did not assert sovereign immunity in the district court. He challenged standing, though on different grounds. Because jurisdiction depends on both an exception to sovereign immunity and standing, arguments in favor of sovereign immunity and against standing may be raised for the first time on appeal. *Cozzo v. Tangipahoa Par. Council-President Gov't*, 279 F.3d 273, 280 (5th Cir. 2002) (sovereign immunity); *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (standing).

file suit against the State. ROA.10. It sued the Attorney General. ROA.10. Consistent with its complaint, A&R Engineering sought injunctive relief against the Attorney General—not the State of Texas. ROA.210-12. The district court erred by instead enjoining the State.

II. A&R Engineering Is Not Entitled To A Preliminary Injunction.

The district court also erred on the merits when it granted A&R Engineering a preliminary injunction. A&R Engineering was required to make the familiar four-factor showing necessary for preliminary relief: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.'" *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 463-64 (5th Cir. 2021) (quoting *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006)). "A preliminary injunction is an extraordinary remedy that should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id.* at 464 (quoting *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 268 (5th Cir. 2012)). A&R Engineering carried its burden as to none of them.

A. A&R Engineering is not likely to succeed on the merits.

A&R Engineering has not shown there is a substantial likelihood it will succeed on its First Amendment claim because the anti-boycott statute does not affect protected First Amendment conduct: it neither prohibits speech or expressive conduct,

nor does it compel speech. Even if it incidentally burdened First-Amendment-protected activity, the State's interests would nonetheless satisfy First Amendment scrutiny under *O'Brien*.

1. "Refusing to deal" and "terminating business activities" are not protected conduct.

A&R Engineering alleges that by prohibiting it from "refusing to deal with" and "terminating business activities with" Israel, the anti-boycott statute violates the First Amendment. ROA.13. The district court correctly rejected this argument, ROA.508, as, without more, neither refusing to deal with a counterparty nor terminating business activities are expressive conduct protected by the First Amendment.

a. The First Amendment's Speech Clause protects both speech and "conduct that is inherently expressive." *FAIR*, 547 U.S. at 66. But if explanatory speech is needed to explain the "message" of conduct, the conduct is not *inherently* expressive. *Id.* at 65-66. Nor does conduct gain First Amendment protection just because it is accompanied by speech. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66. A&R Engineering must prove as a preliminary matter that its conduct is inherently expressive so as to gain First Amendment protection in the first place. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

The district court correctly held that "'refusing to deal with' or 'terminating business relationships with' Israel, is clearly not . . . speech." ROA.506. That court also correctly concluded that these components of the anti-boycott statute do not

prohibit expressive conduct. "[T]he mere refusal to engage in a commercial/economic relationship with Israel or entities doing business in Israel is not 'inherently expressive' and therefore does not find shelter under the protections of the First Amendment." ROA.508. As the district court correctly explained, it "would be difficult, if not impossible" for an outside observer "to realize [A&R Engineering] was engaged in a boycott simply based on" engaging in these two prohibited activities. ROA.508. The nature of A&R Engineering's boycott "would not be clear . . . without some explanatory speech," after all, because an "observer [might] attribute the lack of Israeli products to a number of other ordinary business purposes." ROA.508.

This explanation not only tracks common sense, but the Supreme Court's decision in *FAIR*. Just as the anti-boycott statute prevents economic discrimination against Israel by certain contractors receiving public funds, Tex. Gov't Code § 2271.002, the statute at issue in *FAIR*, the Solomon Amendment, prevented discrimination against military recruiters by universities receiving federal funds, 547 U.S. at 55. A number of law schools objected to the Amendment, seeking instead to "restrict[] the access of military recruiters to their students because of disagreement" with a former military policy barring openly gay persons from military service. *Id.* at 51-52 & n.1. To avoid the loss of federal funds, the law schools argued that the First Amendment protected their decision to restrict military recruiters' access. *Id.* at 51-52.

The Supreme Court rejected the law schools' argument. It first concluded that the Solomon Amendment did not regulate speech. *Id.* at 48. The law "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they

may or may not *say*." *Id.* at 60. "Law schools remain free under the statute to express whatever views they may have" on the military's policies without losing federal funding. *Id.* But the Court also held that this refusal to deal with military recruiters was not protected expressive conduct, because "First Amendment protection [extends] only to conduct that is inherently expressive" like "flag burning." *Id.* at 66. "[T]he point" of excluding military recruiters "is not 'overwhelmingly apparent'" because "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military." *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

So too here. An entity's "refusing to deal" or "terminating business activities" is no more expressive than refusing military recruiters. Tex. Gov't Code § 808.001(1). "It is highly unlikely that, absent any explanatory speech, an external observer would ever notice that a contractor is engaging in a primary or secondary boycott of Israel." *Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d 617, 624 (E.D. Ark. 2019), *rev'd by* 988 F.3d 453, 467 (8th Cir. 2021), *vacated & rehearing en banc granted by* Order, No. 19-1378 (8th Cir. June 10, 2021). Indeed, corporate workplaces lack a near-infinite number of products all the time—for example, Sodastream sparkling water and Hewlett-Packard computers. But a firm's "decision not to purchase from Hewlett-Packard and Sodastream is expressive only if it is accompanied by explanatory speech." Order on Motion for Stay Pending Appeal at 5, *Jordahl v. Brnovich*, 789 F. App'x 589 (9th Cir. 2020) (No. 18-16896), ECF No. 26 (Ikuta, J., dissenting). "An observer . . . has no way of knowing whether" the firm "is expressing its disapproval" of those companies or purchased competitors' products "for

reasons of their own." *FAIR*, 547 U.S. at 66. And if that conduct—like A&R Engineering's—requires such a fulsome explanation, then it is not inherently expressive, and not protected by the First Amendment. *Id.*

b. In the district court, A&R Engineering brushed *FAIR* aside in favor of the Supreme Court's earlier and inapposite decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). ROA.506. The district court correctly rejected that argument, ROA.508, as *Claiborne* merely stands for the proposition that the First Amendment protects nonviolent "speech, assembly, association, and petition" *in support of* a boycott of certain merchants to protest racial discrimination. *Claiborne*, 458 U.S. at 911.

That case arose out of a NAACP branch's organization of a boycott of white merchants who refused to meet their demands for racial equality. *Id.* at 899-900. A state court found that "the entire boycott was unlawful" and held multiple organizations and individuals liable for damages to businesses targeted by the boycott. *Id.* at 895-96. But the Supreme Court held that state-court decision swept too far: instead, certain non-violent "elements of the boycott," such as "speeches and nonviolent picketing" and "encourag[ing] others to join in its cause," were "form[s] of speech or conduct that [are] ordinarily entitled to protection under the First and Fourteenth Amendment." *Id.* at 907 (footnote omitted). The State therefore could not prohibit these "nonviolent elements of petitioners' activities" even as it properly exercised its power "to regulate economic activity." *Id.* at 914-15. The Supreme Court likewise recognized that the boycott also involved unprotected activity, even as it held that the lower court could not impose civil liability on all boycott

participants "merely because [they] belonged to a group, some members of which committed acts of violence." *Id.* at 920.

But "*Claiborne* does not hold that individual purchasing decisions are constitutionally protected, nor does it create an unqualified right to engage in political boycotts." *Waldrip*, 362 F. Supp. 3d at 626; *see also* Order on Motion for Stay Pending Appeal at 6, *Jordahl*, No. 18-16896, ECF No. 26 (Ikuta, J., dissenting) ("The [*Claiborne*] Court did not hold that the boycotters' refusal to purchase from white-owned businesses was protected by the First Amendment, or even address the issue. Therefore, *Claiborne*'s reasoning is not applicable to [Plaintiff's] claim."). Nor did the Court foreclose a State from preventing its tax dollars from potentially financing a would-be contractor's plans to engage in national-origin economic discrimination.

c. If accepted, A&R Engineering's theory of a First Amendment right to expression-by-refused-transaction threatens far more than laws limiting State involvement with economic discrimination against Israel. Numerous States have laws broadly prohibiting contracts with companies boycotting any entity based in or doing business in a country with which the State enjoys open trade. *See, e.g.*, Ky. Rev. Stat. § 45A.607; 37 R.I. Gen. Laws § 37-2.6-3; S.C. Code § 11-35-5300. Other States bar government contracts with businesses that participate in international boycotts. *See, e.g.*, 30 Ill. Comp. Stat. § 582/5; N.Y. State Fin. Law § 139-h; Exec. Order No. 130, Anti-Boycott Covenant, Governor Michael Dukakis (Dec. 6, 1976), https://tinyurl.com/yckm9vcf. And outside the government procurement context, federal law has long barred participation in certain economic boycotts. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232 §§ 1771-

74, 132 Stat. 1636, 2234-38 (2018); Export Administration Act of 1979, Pub. L. 96-72 § 8, 93 Stat. 503, 521 (1979).

If the First Amendment compels States to open up their government-procurement processes to subsidize contractors' international boycotts, it likely also compels indirect support for other allegedly expressive transactions. Nothing would prevent a would-be government contractor that expresses itself by doing business with terrorist organizations or the Governments of Iran or Sudan from defying Texas's law against contracts with such companies under First Amendment auspices. Tex. Gov't Code § 2252.152. Similar laws in other States would also violate the First Amendment, *see, e.g.*, Cal. Pub. Cont. Code § 2203; N.J. Stat. § 52:32-58; S.C. Code § 11-57-500, as would parallel federal procurement laws, *see, e.g.*, 22 U.S.C. § 8515. In addition, federal bans on transactions with sanctioned countries and individuals may run afoul of the right that A&R Engineering argues. 50 U.S.C. § 1702; *see also*, *e.g.*, Exec. Order No. 14,071, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, 87 Fed. Reg. 20999. (April 6, 2022).

The First Amendment does not give A&R Engineering a right to pressgang the State's government-contracting process into its plans to participate in international economic discrimination. Under *FAIR*, the anti-boycott statute's proscriptions against "refusing to deal" and "terminating business activities" do not ban speech. Tex. Gov't Code § 808.001. Nor do they bar "conduct that is inherently expressive." *FAIR*, 547 U.S. at 66. The district court correctly rejected A&R Engineering's challenge to these aspects of the anti-boycott statute.

2. The residual clause does not prohibit protected conduct.

After concluding that the anti-boycott statute's bars on "refusing to deal" and "terminating business activities" did not violate the First Amendment, the district court held that the statute's residual clause was unconstitutionally vague. *See* ROA.508-11. The preliminary injunction is wrong for three reasons. *First*, the residual clause is not overbroad. *Second*, it is not vague, and A&R Engineering lacked standing to challenge the residual clause's alleged vagueness. *Third*, even if legally infirm, the residual clause is severable from the rest of the statute.

Where a plaintiff asserts both vagueness and overbreadth, the "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 755 (5th Cir. 2010) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). "If it does not, then the overbreadth challenge must fail." *Id.* (quoting *Hoffman Estates*, 455 U.S. at 494). "If the ordinance passes the overbreadth test, the court moves to 'examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.'" *Id.* at 755-56 (quoting *Hoffman Estates*, 455 U.S. at 494-95).

The district court did not separately analyze overbreadth and vagueness. It deemed the residual clause impermissibly vague because it could include First Amendment-protected conduct such as "giving speeches, nonviolent picketing outside Israeli businesses, posting flyers, encouraging others to refuse to deal with Israel

or Israeli entities, or sponsoring a protest . . . .” ROA.510. The statute proscribes no such activity, as the applicable canons of construction make clear.

a. The residual clause is not overbroad. Overbreadth challenges “can succeed only [if] overbreadth is substantial in relation to the statute’s legitimate reach.” *Hersh v. United States ex rel. Mukasey,* 553 F.3d 743, 762 (5th Cir. 2008). Put differently, “[t]here must be a significant imbalance between the protected speech the statute should not punish and the unprotected speech it legitimately reaches.” *Id.* “The fact that a court can hypothesize situations in which the statute will impact protected speech is not alone sufficient.” *Id.* “The party challenging the statute must demonstrate a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court before a statute will be struck down as facially overbroad.” *Id.* “Facial challenges to the constitutionality of statutes should be granted ‘sparingly.’” *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). “They . . . ‘threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.’” *Id.* at 763 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)).

The district court “hypothesize[d] situations . . . impact[ing] protected speech” without considering whether “a significant imbalance” existed. *Id.* at 762. It did not find “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections,” and no such danger exists. *Id.* The statute does not even cover the district court’s hypothesized situations.

"The first step in overbreadth analysis is to construe the challenged statute." *Id.* at 763 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). Properly understood, the residual clause does not encompass *any* protected expression and clearly does not include a "substantial amount" of overbreadth. *Fairchild*, 597 F.3d at 755. Once again, the statute defines "Boycott Israel" to mean:

> refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

Tex. Gov't Code § 808.001. The statute's residual clause, prohibiting "otherwise taking any action," only prohibits economic discrimination. *Id.* With the required intent, it covers conduct such as imposing higher prices, delaying shipment or service, providing inferior goods or services, imposing burdensome conditions on transactions, paying a lower wage, or providing inferior employee benefits. Though not a flat "refus[al] to deal" or "terminati[on] [of] business activities," such conduct nonetheless constitutes economic discrimination. It "is clear" that "[t]he provision is a catch-all for commercial activities that do not fit the first two categories, but have the same purpose—to reduce the company's business interactions with Israel in a discriminatory way." *Waldrip*, 988 F.3d at 467 (Kobes, J., dissenting).

The residual clause covers neither speech nor expressive conduct. The statute's general reference to "or otherwise taking any action" is interpreted as *ejusdem generis*, or "of the same kind," as "refusing to deal" and "terminating business activities." *United States v. Kaluza*, 780 F.3d 647, 657 n.29 (5th Cir. 2015) (quoting 2A

Norman Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 47:17 (7th ed. 2014)). As a rule, the clause's invocation of "or otherwise" triggers the canon's application. *Ala. Educ. Ass'n v. State Superintendent of Educ.*, 746 F.3d 1135, 1148 (11th Cir. 2014). Under this canon of interpretation, "where general words follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically enumerated." *Kaluza*, 780 F.3d at 660-61. *Ejusdem generis* "limits the scope of . . . catchall language to the same class or category as the specific items that precede its use." *In re Millwork*, 631 S.W.3d 706, 712 (Tex. 2021) (per curiam).

The Supreme Court applied this canon to a similarly structured statute in *Circuit City, Inc. v. Adams*, 532 U.S. 105, 114 (2001). The statute at issue referred to "employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* at 112 (quoting 9 U.S.C. § 1). The Court called the term "any other class of worker" a "residual phrase" and held it "should be read to give effect to the terms 'seamen' and 'railroad employees' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 114-15. A broader interpretation capturing literally "any other class of workers engaged in foreign or interstate commerce" would have drained the explicit enumeration of "seamen" and "railroad employees" of meaning. *Id.* at 114. The same rationale disproves the district court's reading of the anti-boycott statute's residual clause to include speeches, picketing, protesting, and flyers. ROA.510. The Legislature's precision in specifying "refusing to deal" and "terminating business relations" belies the district court's expansive

interpretation. *Cf. Waldrip*, 362 F. Supp. 3d at 623 ("[*E*]*jusdem generis* . . . counsel[s] in favor of interpreting 'other actions' to mean commercial conduct similar to the listed items.").[4]

The doctrine of constitutional avoidance also supports this interpretation. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the Legislature]." *Hersh*, 553 F.3d at 753-54 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).[5] Relatedly, the Texas Legislature has provided that when interpreting Texas law, it is "presumed that[] compliance with the constitution[] of . . . the United States is intended." Tex. Gov't Code § 311.021(1). Accordingly, the Texas Supreme Court has "narrowly construed"

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[4] The related canon of *noscitur a sociis* illuminates the meaning of "intended to penalize, inflict economic harm on, or limit commercial relations." Tex. Gov't Code § 808.001(1). Under that canon, "a word is known by the company it keeps." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). Statutes are read to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to' [the statute]." *Id.* at 575 (citation omitted). Applied to the residual clause, this canon confirms that "penalize" has an economic character like "inflict economic harm" and "limit commercial relations." Tex. Gov't Code § 808.001(1).

[5] The Supreme Court has spoken approvingly of the avoidance canon in First Amendment overbreadth cases. *See Osborne v. Ohio*, 495 U.S. 103, 119-20 (1990); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). It also declined to apply the doctrine in *United States v. Stevens*, 559 U.S. 460, 481 (2010), as observed in *Serafine v. Branaman*, 810 F.3d 354, 369 (5th Cir. 2016). *Cf. Sisney v. Kaemingk*, 15 F.4th 1181, 1198-99 (8th Cir. 2021) (criticizing *Serafine*'s discussion of avoidance).

statutes "to avoid vagueness and overbreadth concerns." *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 736 (Tex. 2017) (citing *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000)). Thus, any ambiguity in the residual clause should be resolved in favor of the law's constitutionality.

b. The residual clause also is not vague, and A&R Engineering lacks standing to press such a challenge. The district court wrongly held that A&R Engineering had standing to challenge the residual clause's vagueness because "a case or controversy exists with respect to the 'refusing to deal with' or 'terminating business activities with'" clauses. ROA.504. To the contrary, "standing is not dispensed in gross." *Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 734 (2008). "[P]laintiffs can seek judicial review of state laws and regulations *only* insofar as they show a plaintiff was (or imminently will be) *actually* injured by a particular legal provision." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) (per curiam). A&R Engineering cannot bootstrap vagueness standing with its standing to challenge other aspects of the law.

For A&R Engineering to have standing to make a vagueness challenge, its "injury must be traceable to the allegedly vague provision." *Freedom Path, Inc. v. I.R.S.*, 913 F.3d 503, 507 (5th Cir. 2019); *cf. United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009) ("[A] [party] who engages in some conduct that is *clearly* proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). In *Doe I v. Landry*, 909 F.3d 99, 114 (5th Cir. 2018), this Court found standing where plaintiffs alleged that they wanted to engage in regulated conduct but were "deterred from doing so because of the Act's vagueness." *Id.* at 115. The Court held that

another plaintiff lacked standing because the law did not apply to her and so she was not "affected" by the law's "uncertainties." *Id.* at 114.

A&R Engineering is not "affected by" the anti-boycott statute's alleged "uncertainties." *Id.* The company did not reject the City's contract because of uncertainty about its obligations. It rejected the contract because, although it presently does not boycott "anybody," it wants to preserve its "freedom to boycott whoever." ROA.619. The company's owner testified that A&R Engineering "will never" give up its ability to boycott Israel. ROA.616. "I will not sign this contract even if that cost me 15 percent of my business." ROA.618. A&R Engineering has made clear that it would not execute the contract even if the statute only prohibited "refusing to deal" and "terminating business activities." Tex. Gov't Code § 808.001(1). Thus, because the residual clause's alleged uncertainty is immaterial to A&R Engineering's conduct, it lacks standing for its vagueness challenge.

Even if A&R Engineering had professed confusion about how to conform its conduct to the law, the company's vagueness allegations fail. "The complainant must demonstrate that the law is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 497. This Court has "rejected that a law 'must delineate the exact actions a [person] would have to take to avoid liability.'" *Doe I*, 909 F.3d at 118 (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552 (5th Cir. 2008)). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (internal quotation marks omitted).

A&R Engineering has not shown that the statute is unconstitutionally vague. For the same reasons the residual clause is not overbroad, the anti-boycott statute gives government contractors fair notice that economic discrimination against covered entities is prohibited. By theorizing about the statute's application to flyers, picketing, and other conduct, the district court violated the rule that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)).

c. If this Court finds an infirmity in the residual clause, the clause should be severed from the statute. "Whether unconstitutional provisions of a state statute are severable 'is of course a matter of state law.'" *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011) (quoting *Virginia v. Hicks*, 539 U.S. 113, 121 (2003)). Under Texas law, unless the statute provides otherwise, an invalid "provision" in a statute "[is] severable" if "the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application." Tex. Gov't Code § 311.032(c). "Thus, the proper inquiry under Texas law focuses on whether, if one provision of a statute is invalid, the remaining provisions can still be given effect in the absence of the invalid provision." *Nat'l Fed'n of the Blind*, 647 F.3d at 211. Even if the anti-boycott statute only prohibits "refusing to deal" and "terminating business activities," the law will continue to have meaningful effect. Tex. Gov't Code § 808.001(1). Therefore, if it is invalid, the residual

clause is severable, and this Court should direct the district court to modify its injunction.

3. Even if the anti-boycott statute regulated speech or expressive conduct, it remains constitutional.

To the extent that the anti-boycott statute regulates speech or expression, it remains constitutional under the *United States v. O'Brien* test for neutral regulations promoting substantial government interests. That test sustains a statute's validity:

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Doe I, 909 F.3d at 108 (quoting *O'Brien*, 391 U.S. at 377) (alterations in original). The district court erred by applying the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test applicable to limitations on public employees' First Amendment rights without first determining whether *O'Brien* permits the government to regulate the speech or expressive conduct at issue. *See* ROA.512-18.

a. There is no dispute on *O'Brien*'s first element. The Legislature exercised settled constitutional authority in adopting the law. In addition, the anti-boycott statute furthers at least three important or substantial government interests. *First*, the statute limits the extent to which tax dollars give direct and indirect support to government contractors' boycotts. *Second*, it curtails economic discrimination based on national origin against Israeli and Palestinian businesses and individuals. *Cf.* ROA.514-15. *Third*, the statute furthers Texas's interest in its economic partnership

with Israel. As the district court noted, "[t]here are major Israeli companies currently operating in Texas in many important industries, including the areas of aerospace and petroleum/petrochemicals." ROA.514. "They employ Texans and contribute to the overall economy." ROA.514.

b. Turning to *O'Brien*'s third factor, none of these interests is related to the suppression of free expression. "[A] regulation satisfies this criterion . . . if it can be 'justified without reference to the content of the regulated speech." *J & B Ent. v. City of Jackson*, 152 F.3d 362, 376 (5th Cir. 1998) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991) (Souter, J., concurring)). This Court has also considered under this element whether a statute is content neutral. *Id.*; *Doe I*, 909 F.3d at 110.

The statute is content neutral. It takes no side in the Israeli-Palestinian conflict that A&R Engineering frames its complaint around. *See* ROA.9. The statute's reference to "Israeli-controlled territory" unambiguously bars economic discrimination against Palestinians. Tex. Gov't Code § 808.001(1). *Cf. Abudaya*, 393 F. App'x at 276 n.1. Discrimination against Gaza City and Ramallah businesses is prohibited as forcefully as boycotts affecting Tel Aviv and Haifa firms. And the statute is justified without reference to the content of the regulated speech. As explained, it ensures that major public contracts do not become vehicles for tax dollars to subsidize economic discrimination. It also strengthens Texas's economic partnership with Israel. *See* ROA.514.

c. Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest. *O'Brien*'s fourth

element is met if the "substantial government interest . . . would be achieved less effectively absent the regulation." *LLEH, Inc. v. Wichita County*, 289 F.3d 358, 367 (5th Cir. 2002) (emphasis omitted). A statute is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* The existence of "adequate alternative means of expression" is relevant. *Kleinman v. City of San Marcos*, 597 F.3d 323, 329 (5th Cir. 2010).

The statute is appropriately tailored to the goal of preventing the use of tax dollars for economic discrimination against Israelis and Palestinians. The anti-boycott statute does not apply to people acting in their individual capacities. The owners, managers, and employees of public contractors are free to boycott. In addition, the statute applies to only the most significant government contractors where the harm is the greatest. For the law to apply, the contract value must exceed $100,000, and the contractor must employ at least ten employees. Tex. Gov't Code. § 2271.002(a). Moreover, covered government contractors may express themselves outside boycotting. Even if the law covered speech or expression, it would not prevent a government contractor from publicly criticizing Israel or protesting. Accordingly, even if the anti-boycott statute did prohibit speech or expression, it is constitutional.

4. The anti-boycott statute does not compel protected speech.

Independent of its boycotting allegations, the complaint alleges that the anti-boycotting statute compels speech in violation of the First Amendment by requiring contractors to verify that they do not and will not boycott Israel. ROA.15, 17. The district court did not address this claim, and it does not provide an alternative ground on which to affirm. The Supreme Court has identified two possible categories of

compelled speech violating the First Amendment. *First*, "forcing an individual, through his speech, to affirm a 'religious, political, [or] ideological cause[]" that the individual did not believe in." *United States v. Arnold*, 740 F.3d 1032, 1034 (5th Cir. 2014) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977)). *Second*, "forcing 'an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" *Id.* (quoting *Wooley*, 430 U.S. at 714-15). This second category refers to compelled speech that "requir[es] the individual to be a 'mobile billboard' for the state's message" such as forcing a driver to display the State's motto on a license plate. *Id.* at 1034 n.7.

The verification requirement does not force an individual to affirm a cause or serve as a mobile billboard. The contract language to which A&R Engineering objected required the company to "certif[y]" that it "is not currently engaged in, and agrees for the duration of this Agreement not to engage in, the boycott of Israel as defined by [Texas law]." ROA.48. A&R Engineering's owner interpreted the provision as a "a loyalty oath" to Israel. ROA.593.

Verification requirements like this do not impose a loyalty oath, as the Fourth Circuit recently held. The plaintiff in *Ali v. Hogan*, 26 F.4th 587, 591 (4th Cir. 2022), challenged contract bid language under which he would "certif[y] and agree[]" that he had not "refused to transact or terminated business activities, or taken other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories." Like A&R Engineering, the *Ali* plaintiff alleged the language was "an unconstitutional loyalty oath." *Id.* at 599. The Fourth Circuit concluded it was not. *Id.* at 599-600.

Nothing in the certification required the plaintiff to "pledge any loyalty to Israel or profess any other beliefs." *Id.* at 600. For that reason, the Fourth Circuit held the plaintiff lacked a compelled-speech Article III injury in fact. *Id.* at 599-600.

The same analysis applies to the verification language that the City proposed to A&R Engineering. *See* ROA.48. "The Constitution accords government officials a large measure of freedom" when they are "in the course of contracting for goods and services." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724 (1996). Thus, "[c]ertification requirements for obtaining government benefits, including employment or contracts, that merely elicit information about an applicant generally do not run afoul of the First Amendment." *Waldrip*, 362 F. Supp. 3d at 622; *see also Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984), *superseded by statute on other grounds*, *NCAA v. Smith*, 525 U.S. 459, 466 n.4 (1999) (rejecting argument that conditioning federal financial assistance on compliance with Title IX's prohibition on gender discrimination violated the First Amendment). The contract's verification language merely sought A&R Engineering's statement on its present and future activity and did not seek a loyalty oath. The verification requirement does not compel protected speech.

B. The other factors disfavor a preliminary injunction.

Because "the absence of likelihood of success on the merits is sufficient to make the district court's grant of a preliminary injunction improvident as a matter of law" the Court "need not address the three remaining prongs of the test for granting preliminary injunctions." *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003). Regardless, the remaining three preliminary injunction factors

of irreparable harm, balance of equities, and public interest each disfavor equitable relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A&R Engineering was never threatened with irreparable harm because the anti-boycott statute does not violate its constitutional rights in the first place, and the district court was wrong to conclude otherwise. But even if A&R Engineering had shown a First Amendment violation, its argument that this appeal is moot is irreconcilable with the proposition that it continues to face a threat of irreparable harm.

On the other hand, the severe harm to the State and the public interest tilt heavily in favor of reversal. *City of El Cenizo*, 890 F.3d at 176. "Because the State is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). If this Court holds that the Attorney General enforces the anti-boycott statute, then "the inability to enforce . . . duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Veasey*, 870 F.3d at 391 (recognizing that when a State is enjoined from enforcing a statute, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws"); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Therefore, the remaining preliminary injunction factors each disfavor a preliminary injunction.

III. If The Appeal Is Moot, The Preliminary Injunction Should Be Vacated And The Case Dismissed As Moot.

If this Court dismisses this appeal as moot, it should also vacate the preliminary injunction and order the district court to dismiss the case as moot. "A controversy

is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation." *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999). "Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). "If a case becomes moot on appeal, the general rule is still to vacate the judgment of the lower court and remand with instructions to dismiss the case as moot." *Goldin*, 166 F.3d at 718. Vacatur also applies to interlocutory appeals from orders granting equitable relief. *See Azar v. Garza*, 138 S. Ct. 1790, 1791 (2018) (per curiam).

Vacatur of the preliminary injunction is the default rule for good reason: it "avoid[s] the unfairness of a party's being denied the power to appeal an unfavorable judgment by factors beyond its control." *Goldin*, 166 F.3d at 719. "[I]f the mootness can be traced to the actions of the party seeking vacatur, the decision of the lower court will usually be allowed to stand," *id.* (emphasis omitted), but the Attorney General played no role in the parties' execution of the contract. To the contrary, he sought a stay of the preliminary injunction in the district court that would have prevented mootness. *See* ROA.526-35. Accordingly, the default rule applies, and A&R Engineering should not be permitted to both foreclose the Attorney General's ability to secure appellate review *and* retain the benefit of the district court's injunction and decision below.

Likewise, if the Court dismisses the appeal as moot, it should also order the district court to dismiss the case as moot. While arguing *the appeal* is moot, A&R Engineering contends *its case* is not because its contract at issue runs for only three to five years, and because A&R Engineering may well engage in other governmental contracts subject to the anti-boycott law. Report of Parties to the Court at 2, *A & R Engineering and Testing, Inc. v. Paxton*, No. 4:21-cv-03577, ECF No. 49 (S.D. Tex. Mar. 4, 2022). But A&R Engineering did not plead these future harms in its complaint. There, A&R Engineering sought an injunction applicable to "any contract [with] the City of Houston," ROA.19, but did not substantiate that request with allegations regarding future renewal of the contract at issue or other contracts with the City. Indeed, A&R Engineering does not even allege that other contracts have had, or will have, the anti-boycott language it challenges. ROA.8-20. Nor did A&R Engineering sue the other governmental entities with which A&R Engineering might contract in the future. ROA.10.

A&R Engineering correctly did not include these speculative future contracts precisely because they would not suffice to establish A&R Engineering's standing in any event. Standing's injury-in-fact element requires a showing that the injury is "concrete and particularized" and also "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the same day will be—do not support a finding of [an] 'actual or imminent' injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). And renewal of the recently executed contract is not imminent. A&R Engineering cannot even specify

when it will expire. By its terms, the contract may run into 2027. *See* Sugg. of Mootness, Ex. B at 13, 18. Whatever injury A&R Engineering could allege from a future contract with the City is "conjectural" and "hypothetical" not "imminent." *Spokeo*, 578 U.S. at 339. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Am. Muslims for Palestine v. Ariz. State Univ.*, No. CV-18-00670-PHX-DWL, 2018 WL 6250474, at *6 (D. Ariz. Nov. 29, 2018) ("possibility of speaking in the future at other schools" that "incorporate no-boycott clauses into their speaker contracts" was "insufficient" to support standing).

Absent some ongoing basis for standing, the case is moot if the appeal is moot. If this Court dismisses this appeal as moot, it should order the district court to dismiss the case as moot in addition to vacating the preliminary injunction.

Conclusion

The Court should vacate the preliminary injunction.

Respectfully submitted.

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Certificate of Service

On April 14, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,036 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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