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 OF PLAINTIFF-APPELLEE

June 15, 2022

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF ORAL ARGUMENT

Without endorsing the reasons presented by Texas, A&R agrees this case merits oral argument.

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INTRODUCTION

On October 13, 2021, Rasmy Hassouna was astonished to see a loyalty oath to a foreign country slipped into the latest agreement between Mr. Hassouna's company—A&R Engineering—and the City of Houston. After 17 years of contracting with Houston, Rasmy could not believe that he was being asked to disavow his boycott of Israel and abandon his modest efforts to encourage others to do the same. He refused to go along, holding firm to his conviction that the Constitution would ultimately vindicate him. As Rasmy wrote to Houston: "it is my right to boycott Israel and any products of Israel" and that requiring the certification was "against my constitutional right." Rasmy believes in the First Amendment and the right of Americans like himself to boycott as their conscience demands. And Judge Hanen's decision below rewarded Rasmy's faith in the Constitution.

Rasmy Hassouna, an American citizen from Gaza and others boycott Israel as part of a movement known as "Boycott, Divestment, and Sanctions," or BDS. The BDS movement opposes the Israeli occupation of Gaza and the West Bank and seeks to pressure Israel to treat

Palestinians with dignity. The State of Texas—like many other states—opposes the BDS movement.

Had the State limited its opposition to simply condemning the BDS movement, this case would not arise. But Texas, like many other states, has gone further. Texas has enacted an Anti-BDS law that prohibits state and local entities from entering into contracts with those who participate in the BDS movement. And—since Texas does not know who is and is not participating in the movement otherwise—it has done so by requiring certifications in state and local government contracts that the individual does not participate in the BDS movement and will not participate in the BDS movement for the duration of the contract.

The Anti-BDS law violates the Constitution. The right to engage in political boycotts has been long established by the Supreme Court in the landmark case *NAACP v. Claiborne Hardware*. The requirement that one certifies that they do not boycott Israel is unconstitutional compelled speech. And because the Anti-BDS Law contains vague prohibitions to make sure all supporters (and only supporters) of the BDS movement are punished, the law is unconstitutionally vague and overbroad. This Court

should thus affirm the preliminary injunction imposed by the District Court.

JURISDICTIONAL STATEMENT

Other than Texas's incorrect assertion that the district court lacks authority over the Attorney General, *see* Argument § V, below, A&R does not disagree with Texas's statement of jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a law which prohibits political (but not economic) refusals to deal with Israel, and no other country, violates the First Amendment as a content-based speech restriction that is not narrowly tailored to meet any compelling government interest.

2. Whether a requirement that compels an individual to certify that it does not engage in political boycotts of Israel compels speech in violation of the First Amendment.

3. Whether the residual clause "otherwise taking any action," or the safe harbor clause for "ordinary business purposes," as a safe harbor, render the statute overbroad or void for vagueness.

4. Whether this Court has jurisdiction to enjoin the Attorney General when the Attorney General has announced plans to enforce the challenged law in this case in state court, should the injunction be dissolved.

5. Whether this Court, if it finds the appeal moot, should go beyond that and dismiss the case, even as Appellee seeks relief broader

than the preliminary injunction and relief against non-Appellee City of Houston, including damages.

STATEMENT OF THE CASE

A. Texas Enacts Anti-Boycott, Divestment, and Sanctions Legislation Requiring Government Contracts to Prohibit Boycotts of Israel.

In recent years, public officials throughout the United States have advanced measures to penalize and suppress calls for boycott, divestment, and sanctions against Israel. In May 2017, Texas passed the Anti-BDS Act, codified at Tex. Gov't Code § 2270.001 *et. seq*. The Act contains a section titled "Prohibition on Contracts with Companies Boycotting Israel." Tex. Gov't Code § 2270.002.

Tex. Gov't Code § 2270.002 states:

> 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.

The Act defines "boycott Israel" to mean, "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict 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." Tex. Gov't Code § 808.001.

The Act defined "company" to include, "a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or any limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of those entities or business associations that exist to make a profit." Tex. Gov't Code § 808.001.

Both Representative Phil King, the bill's sponsor, and Governor Gregg Abbott have referred to H.B. 89 as the "anti-BDS bill." *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 731 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020). Representative King has described the BDS movement as "economic warfare" and stated that H.B. 89 reflects Texas's disapproval of the movement because "[t]he BDS movement is directed at harming and destroying Israel, pure and simple." *Id.* Upon signing the bill, Governor Abbott proclaimed that "[a]nti-Israel policies are anti-Texas policies, and we will not tolerate [boycott] actions against an important ally." *Id.* Similarly, King stated that "[t]he bill sends a strong message that Texas stands with its friends," and Abbott responded to

a news report about this litigation by tweeting "Texas stands with Israel. Period." *Id.* When asked by a media outlet what motivated him to introduce H.B. 89, King provided four reasons:

> First, as a Christian, my religious heritage is intrinsically linked to Israel and to the Jewish people. Second, as an American, our national security is dependent in great part on a strong Israel, often our only friend in the Middle East. Third, as a Texas legislator, our state has a substantial Jewish population and this issue is important to them. Texans have historical ties and do a lot of business with Israel. Fourth, it's just the right thing to do.

Id.

The Act took effect on September 1, 2017. H.B.89.

In 2019, a federal District Court in the Western District of Texas preliminarily enjoined the Act as unconstitutional. *Amawi*, 373 F. Supp. 3d 717. Days later, the Texas Legislature amended the Anti-BDS Act in three ways.

First, the legislature excluded from the law sole proprietorships. H.B. 793. Second, it excluded companies with 9 or fewer full-time employees. *Id.* Third, it excluded contracts with a value of less than $100,000. *Id.* No other changes to the Anti-BDS Act were made.

As a result of those changes, the Fifth Circuit found the *Amawi* case moot and dissolved the preliminary injunction. 956 F.3d 816.

B. A&R is denied a contract because it boycotts Israel.

Mr. Rasmy Hassouna is the owner of A&R Engineering and a Palestinian from Gaza, Palestine. ROA.607.

A&R boycotts Israel in its capacity as a corporation and Mr. Hassouna boycotts Israel in his personal capacity. ROA.194. He cares deeply about the treatment of Palestinians, including his many relatives, by the State of Israel. In particular, Mr. Hassouna boycotts the State of Israel, and has attended multiple peaceful protests calling for boycotting Israel, due to its treatment of Palestinians. ROA.615-617. However, Mr. Hassouna's beliefs and his activism are nuanced; he maintains positive relationships and has had business relationships with Jewish people and those of Israeli origin. ROA.613. He would never refuse to hire those of Israeli origin based on their national origin. ROA.617. Mr. Hassouna also has multiple clients of Israeli national origin. *Id.* In fact, it was an Israeli client that helped Mr. Hassouna establish his business. *Id.* Mr. Hassouna [doesn't] "have a problem with Israeli people or Jewish people. The problem is with Israel's policies and what they're doing." ROA.618.

On October 13, 2021, the City of Houston sent A&R a renewal contract to provide engineering services for the City. ROA.193. A&R valued

the contract at about $1 million to $1.5 million. ROA.618. The contract represents 10-15% of A&R's total business. *Id.*

The renewal contract required A&R to certify that it "is not currently engaging in, and agrees for the duration of this Agreement, not to engage in, the boycott of Israel as defined by Section 808.001 of the Texas Government Code. ROA.193 That same day, the Owner and Executive Vice President of A&R, Mr. Hassouna, refused to sign the contract unless Section 2.19.1 was removed from it. *Id.* As he explained, "Israel is an occupier of my homeland and it is an Apartheid State. It is my right and duty to boycott Israel and any products of Israel. This policy is against my constitutional right and against International Law. I demand that you take the paragraph about Israel off from the contract. I will send the contract document to my Attorney to advi[s]e me on what legal actions to be pursued." ROA.193-194.

Mr. Hassouna thus refused to sign the contract because he did not want to be held in the future to say that A&R would not boycott Israel in the course of the contract. Because Texas law would not permit Houston to offer the contract without the Anti-BDS language, A&R filed suit.

C. The District Court Grants A&R's Request for Preliminary Injunction

A&R filed suit against Houston and Texas Attorney General Ken Paxton. ROA.8-20. A&R quickly sought a preliminary injunction. ROA.188-207. The Attorney General filed a motion to dismiss the complaint. ROA.236-263. Thereafter, the Court heard arguments on the Motion for Preliminary Injunction and Motion to Dismiss the Complaint. During the hearing, Mr. Hassouna testified as to his freedom to participate in peaceful boycotts as an American. ROA.610. Mr. Hassouna firmly believes in his right to demonstrate: "as long as you['re] doing it peacefully… you shouldn't be punished for it." ROA.611. He further testified as to his belief that the anti-BDS clause in Texas' contact was, "punishing…A&R Engineering, just for – having an opinion." *Id.*

The Court then issued an Order as to A&R's Motion for Preliminary Injunction and Defendants' Motion to Dismiss. ROA.491-520. The Court found that A&R had standing. ROA.501. The Court found that A&R may soon suffer an injury by losing the opportunity to renew the contract. ROA.501-502. The Court further found the injury was traceable to Texas and was a result of the anti-BDS law. *Id.* The Court also found that a favorable decision would prevent the injury. *Id.* The Court then rejected

Texas' arguments that A&R lacked standing to seek relief involving any contracts beyond its own and because its claims were vague or overbroad. ROA.503-504. On the issue of ripeness, the Court found the case ripe because even though neither party signed the contract, both parties were fully prepared to renew the contract. ROA.504-505. Thus, the Court denied Texas' Motion to Dismiss. *Id.*

On whether the First Amendment was implicated, the Court found that A&R's boycott of Israel was not inherently expressive, because even if A&R was not purchasing Israeli goods, it would be impossible for someone to realize A&R was boycotting Israel unless A&R specifically publicized its boycott. ROA.508. But the Court agreed with A&R that the residual clause in the Texas Code was vague because the terms "any action" were extremely broad, undefined, and that these "actions" that intend to "penalize or inflict economic harm on Israel" could possibly include conduct protected under the First Amendment. ROA.510. The Court found that the plain language of this law prohibits A&R's refusal to deal with Israeli businesses as well as anything intended to economically harm Israel, including constitutionally protected conduct. ROA.511. Therefore,

the Court found that the statute in question covers speech protected by the First Amendment. ROA.511-512.

Lastly, the Court examined whether Texas was allowed to put speech restrictions on entities that are being paid with taxpayer funds. ROA.512. The Court determined that since Plaintiff was contracted with the government, it was therefore seen as a governmental entity and should be held to the same standard as government employees. ROA.512-513. Therefore, the Court balanced the Plaintiff's free speech interests and Texas' interests in regulating speech. *Id.* The Court recognized Plaintiff's interest in boycotting Israel due to his pro-Palestine stance and being from Gaza which is controlled by Israel. ROA.513. The Court recognized Texas' interest in maintaining its economic relations with Israeli companies which contribute to the overall economy as well as an interest in "ensuring the wellbeing of its Jewish population." ROA.513-514. But the Court found that Texas' interest cannot be used to justify restricting Plaintiff's First Amendment rights as there is no proof that Plaintiff's conduct would undermine the economic interests of Texas or threaten Jewish citizens of Texas. ROA.517-518.

On January 28, 2022, the Court also granted A&R's Motion for Preliminary Injunction. ROA.521-523. The Court enjoined the City of Houston from including, in its proposed contract with Plaintiff, the clause found in Subsection 2.19.1 of the contract's current draft. ROA.521. The Court further enjoined the State of Texas from attempting to enforce Chapter 2271 of the Texas Government Code as to either Plaintiff or Houston in the negotiation or performance of the contract for Professional Materials Engineering Labor and Services (found in Doc. No. 7-1), if and when it is executed." ROA.522. That contract was later executed. *See* Suggestion of Mootness.

On January 31, 2022, Texas Attorney General Ken Paxton filed a Notice of Appeal with the US Court of Appeals for the Fifth Circuit. ROA.524-25. Paxton further filed a Motion to Stay the Preliminary Injunction Pending Appeal. ROA.526-533. During the briefing, A&R and the City of Houston entered into a contract. On May 6, 2022, the Court entered an Order denying the Emergency Motion to Stay the Preliminary Injunction Pending Appeal and granted stay in the case. Dkt. 51. A&R also filed an Opposed Notice of Suggestion of Mootness, which was carried with the case.

SUMMARY OF ARGUMENT

The merits of this case are controlled by *NAACP v. Claiborne Hardware* and not *Rumsfeld v. FAIR*. *Claiborne* is exactly on point. In contrast, *FAIR* did not mention either *Claiborne* or boycotts.

Instead, *FAIR* exclusively held that a government can require colleges, as a condition of receiving federal funds, to perform particular acts (there, "to treat military recruiters like other recruiters") so long as what the government concretely requires (in *FAIR,* "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter" as well) is ministerial. This case is the opposite of *FAIR*.

Texas does not require A&R to purchase anything from Israel; it only punishes A&R if it declines to purchase something from Israel for political reasons or calls for others to do the same as part of a boycott. And while *FAIR* turned on the administrative and logistical nature of the time-and-space tasks required by the law, Texas here requires A&R and others to state that they are not engaging in boycotts of Israel, which is tantamount to an oath Texas is compelling Hassouna—the sole owner of A&R—to make for a foreign country's benefit.

Similarly, because the Ant-BDS law targets expressive speech and does so in a non-neutral manner (targeting boycotts of Israel and only Israel), it cannot qualify for the intermediate scrutiny test of *United States v. O'Brien*.

Even if the Anti-BDS law was otherwise constitutional, it is—as the District Court correctly explained—unconstitutionally vague and over-broad. As the District Court explained, its plain language covers a host of constitutionally protected activity.

Texas also suggests that the Attorney General is not a proper *Ex Parte Young* defendant. But the Anti-BDS Law specifically gives the Attorney General enforcement authority. And as Texas's own opposition to the Suggestion of Mootness explains, the Attorney General believes it has the authority to go into state court to seek to invalidate A&R's contract with Houston. So the Attorney General has proclaimed in its own filings an ongoing interest in "bringing an enforcement action on the contract at issue." Response to Appellee's Suggestion of Mootness at 3, but has only not done so because of the preliminary injunction. On top of that, the Attorney General also has the authority under Texas law to go into state court to prohibit municipalities such as Houston from entering into

contracts that violate the Anti-BDS Law challenged here. That is all that is necessary for the Attorney General to be a proper defendant.

Finally, even if this appeal is moot, the case is not, as A&R will continue to be covered by the law for future government contracts (including the renewal contract in this case). Further, A&R's damages claims against Houston, which is not a party to this appeal, remain.

ARGUMENT

I. The Anti-BDS Law violates the First Amendment.

A. Claiborne protects political boycotts.

This case is controlled *by NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and not *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). *See generally Amawi*, 373 F. Supp. 3d 717, 743-45, *Koontz*, 283 F. Supp. 3d at 1023-24, *Jordahl*, 336 F. Supp. 3d at 1042-43, *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1226-29 (N.D. Ga. 2021); *Arkansas Times LP v. Waldrip*, 988 F.3d 453, 461-63 (8th Cir. 2021), *reh'g en banc granted* (June 10, 2021). As *Amawi* explained, "*Claiborne* deals with political boycotts; *FAIR*, in contrast, is not about boycotts at all." *Id.* at 743. In *FAIR*, "[t]he Supreme Court did not treat the *FAIR* plaintiffs' conduct as a boycott: the word 'boycott' appears nowhere in the opinion, the decision to withhold patronage is

not implicated, and *Claiborne*, the key decision recognizing that the First Amendment protects political boycotts, is not discussed." *Id*. (footnote omitted).

Also in *FAIR*, "'[t]he conduct regulated by the Solomon Amendment,' the Court held, 'is not inherently expressive' because it requires 'explanatory speech' to communicate its message." *Id.* (quoting *FAIR*, 547 U.S. at 66) In *FAIR*, the Government did not care why it was not being granted access to on-campus student interviews. 546 U.S. at 57 ("The Solomon Amendment does not focus on the content of a school's recruiting policy" but instead "looks to the result achieved by the policy and compares the 'access ... provided' military recruiters to that provided other recruiters"). Here, the Anti-BDS Act only cares about "refusing to deal with, terminating business activities with, or otherwise taking any action," when the reason is because of a message it disagrees with. Tex. Gov't Code § 808.001 (only applying when the refusal "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"). And so, in order to enforce the

Anti-BDS Act, the Government requires a specific certification creating the very "speech" that was absent and detached from *FAIR* as a necessary part of the Court's conclusion. *Compare* Tex. Gov't Code § 2270.002 (requiring certification) *with FAIR*, 547 U.S. at 66 (refusal to provide military recruiters access was "expressive only because the law schools accompanied their conduct with speech explaining it"); *see also Jordahl*, 336 F. Supp. 3d at 1042 ("when a statute requires a company, in exchange for a government contract, to promise to refrain from engaging in certain actions that are taken in response to larger calls to action that the state opposes, the state is infringing on the very kind of expressive conduct at issue in *Claiborne*").

Indeed, in *FAIR*, the only thing the Government cared about was the conduct, and that conduct was administrative and logistical in nature. The Government wanted access to schools for military recruiters on the same terms as other recruiters. It did not care about the reasoning why the access was or was not provided.

Here, in stark contrast, Texas does not care about the conduct itself. It only cares about the reasons and beliefs that motivated the conduct. As far as the Anti-BDS Law is concerned, A&R is free to not buy

Israeli products because they are too expensive, low quality, or even because the product in question is made by a company owned by people of a particular religion. Only if A&R declines to buy Israeli products because of a refusal to do business "with Israel" or in order "to penalize, inflict harm on, or limit commercial relations specifically with Israel," would the Anti-BDS law apply. Texas's law specifically exempts decisions made "for ordinary business purposes," further clarifying that it is targeting only political activity. And, again in stark contrast to *FAIR*, to ensure that only political activity designed to send a political message is covered, the Texas law itself requires (through a certification) a covered entity like A&R to provide the "'explanatory speech' to communicate its message." *Amawi*, 373 F. Supp. 3d at 743 (quoting *FAIR*, 547 U.S. at 66).

FAIR does not mention *Claiborne*, or other important First Amendment cases such *as FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 415-16 (1990), and *International Longshoreman's Association v. Allied International, Inc.*, 456 U.S. 212 (1982), at all. When the Supreme Court overrules, abrogates, or distinguishes prior decisions, it does so expressly. The Supreme Court's unanimous,

narrow decision in *FAIR* cannot be read to have upset decades of prior boycott caselaw covertly and without dissent.

B. Texas's attempt to separate boycotts from their expressive elements is unworkable and contrary to Claiborne.

Texas argues (at 18-19) that *Claiborne* does not apply because, according to Texas, *Claiborne* did not protect the refusal to purchase itself, but only advocacy related to the boycott. Putting aside for now whether the Anti-BDS also covers activities beyond the refusal to purchase, *see* § III, below, that is incorrect. *Claiborne*, relying on *NAACP v. Alabama ex rel. Flowers*, 377 U. S. 288, 302, 307 (1964), noted that "an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation," even "without more," would violate the First Amendment. 458 U.S. at 914 n.48. As *Claiborne* explained, quoting the Eighth Circuit approvingly, "the right to petition is of such importance that it is not an improper interference … even when exercised by way of a boycott." *Id.* And so the Supreme Court declared that there can be no liability for "withh[olding] patronage from the white establishment." *Id.* at 918. Nor could there be liability for "voluntary participation in the boycott." *Id.* at 921. Likewise, "liability may not be imposed on Evers for his presence at

NAACP meetings ***or his active participation in the boycott itself***." *Id.* at 926 (emphasis added).

If that were not enough, *Claiborne* indicated an intent to protect refusals to deal in some circumstances by clarifying when such refusals to deal were not protected. According to *Claiborne*, the Sherman Act did not violate the First Amendment not because concerted refusals to deal were not protected association or speech but because "[t]he right of business entities to 'associate' to suppress competition may be curtailed" as a form of unfair trade practice. *Id.* at 912 (citation omitted). Meanwhile, "[s]econdary boycotts" performed "by labor unions" may be restricted despite encroaching on First Amendment activity because of "the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *Id.* (cleaned up) (citation omitted). But the highly regulated labor context is not present here

The Supreme Courts' later discussions of *Claiborne* wash away any remaining doubt that boycotts—or at least some elements of the boycott itself—remain protected by the First Amendment. *See F.T.C. v. Super. Ct. Tr. Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (distinguishing between

protected boycotts that "sought no special advantage for themselves" and unprotected ones that do); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) (similar, noting *Claiborne* "protected the nonviolent elements of a boycott").

Indeed, applying Texas's attempt to distinguish the act of boycotting from the advocacy of boycotting to the facts of *Claiborne* itself shows why Texas's interpretation of Claiborne is unsustainable. If Texas is right, Mississippi could have criminalized the boycotting of white owned businesses in Claiborne County, while exempting advocacy of the now-outlawed boycott from the reach of the law.[1] Mississippi could have also mandated that every resident of Mississippi sign a certification stating that they do not boycott white-owned businesses of Claiborne County. 458 U.S. at 902. And then Mississippi could have used either the refusal to sign the certification or the advocacy of the boycott by Charles Evers and others as evidence to prove that those individuals violated the law. *See also A&R Engr. and Testing, Inc. v. City of Houston*, ROA.508, 2022 WL 267880, at *9 (S.D. Tex. Jan. 28, 2022) ("it would be difficult, if not

[1] Indeed, Mississippi did and does criminalize secondary boycotts, and used those provisions to attempt to stop civil rights boycotts. *See Henry v. First Nat. Bank of Clarksdale,* 595 F.2d 291, 303 n.6 (5th Cir. 1979).

impossible, for someone to realize Plaintiff was engaged in a boycott simply based on participation" as "no one would know of its boycott, absent additional speech").

Prior to the Supreme Court deciding *Claiborne,* the Fifth Circuit held in that case the Constitution protects the freedom to engage in political boycotts itself: "At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This view accords insufficient weight to the First Amendment's protection of political speech and association." *Henry*, 595 F.2d at 303 (footnote describing laws criminalizing boycotts, restraints of trade, and unlawful conspiracies omitted). *Claiborne* relied on this very part of *Henry* in explaining its ruling. *Id.* at 914-15.

C. Texas's concerns about the effect of *Claiborne* on other laws is misplaced.

Texas complains (at 19-20) that ruling that political boycotts are protected speech would render other state laws unconstitutional. But most of these examples arise from a recent attempts to prohibit political boycotts, which are also suspect, and which have not been tested by the Courts. Ky. Rev. Stat.§ 45A.607 (prohibiting boycotts of countries

engaging in free trade); 37 R.I. Gen. Laws § 37-2.6-3 (similar); S.C. Code § 11-35-5300 (similar).

The only exception is a portion of the Export Administration Act that prohibits individuals and companies from doing business with foreign countries that require a boycott of Israel as a term of doing business. Export Administration Act of 1979, Pub. L. 96- 72 § 8, 93 Stat. 503, 521 (1979); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232 §§ 1771-84, 132 Stat. 1636, 2234-38 (2018); 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); *see generally Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 916 (7th Cir. 1984). As part of the federal government's effort to disrupt the Arab League's boycott of Israel, the Export Administration Act prohibited companies from allowing themselves to be forced into participating in the Arab League's boycott of Israel. *Id.* Foreign countries do not have traditional First Amendment rights. *See Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). As *Amawi* explained in rejecting this same argument, the Export Administration Act did not prohibit a boycott at all, and dealt only with less-protected economic speech. 373 F. Supp. 3d at 746; *see also FTC*

v. SCTLA, 439 U.S. 411, 426-27 (1990) (unlike political boycotts, prohibition of economic boycotts does not violate the First Amendment).

Finally, Texas complains (at 20) that if political boycotts were illegal, then the decision to purchase items from countries listed under international sanctions must also be illegal. Not so. As explained above, the First Amendment does not prohibit a state from outlawing a purchase outright, just as it does not prohibit a state from requiring access to military recruiters or requiring an individual to purchase healthcare. It is only when the government prohibits the act of purchasing or refraining from purchasing something as a consequence of one's beliefs or participation in First Amendment-protected activity that the government crosses the line. So the government can prohibit doing business in Iran outright. But it cannot prohibit doing business in Iran by those people (and only those people) who, say, support Shia control over the Middle East. And the government cannot allow doing business with Iran, but require a certification from those who do that states, for example, they do not support Sharia law.

D. The *O'Brien* test is inapplicable.

Because a boycott is protected speech, and because the Anti-BDS clause discriminates on the basis of Israel (prohibiting boycotts of Israel but

not any other political view), it must be reviewed under strict scrutiny and stricken as unconstitutional.

Texas claims (at 29) the Anti-BDS law "remains constitutional under the *United States v. O'Brien* test for neutral regulations promoting substantial government interests. That test sustains a statute's validity." *United States v. O'Brien*, 391 U.S. 367 (1968). This is wrong for two reasons.

1. The Anti-BDS law is not a neutral regulation.

First, the law is decidedly not neutral. Instead, it targets anti-Israel protests and only anti-Israel protests. Texas argues (at 30) to the contrary, as it must, because it "takes no side in the Israeli-Palestinian conflict." As the sponsors of this law made very clear, this is disingenuous as a factual matter. *Amawi*, 373 F. Supp. 3d at 731 (cleaned up). But it is also wrong as a matter of the text of the Anti-BDS Law itself.

One, the law does not prohibit actions taken that is intended to penalize Palestine. Rather, the law prohibits actions "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict harm on, or limit commercial relations specifically with Israel." Tex. Gov't Code § 808.001. It also contains an

additional prohibition from refusing to deal with a person or entity because that person or entity is "doing business in Israel or in an Israeli-controlled territory," a provision that was plainly designed to protect Israelis and Israeli settlers, rather than Palestinians. *Id.* But other than that one part of the law, there is no corresponding equality between Israel and Palestine, which, in the law's own terms, applies "specifically" to boycotts targeting "Israel." That is because the law's clear intent was to stifle anti-Israel boycotts, not anti-Palestine ones.

Two, even if the law was neutral as it related to the Israeli-Palestinian dispute alone, Israel and Palestine are not the only two countries on the planet. Individuals are free to boycott Sweden, Mexico, China, and Saudi Arabia. They are also free—indeed, encouraged—to boycott Russia.[2] Indeed, A&R's owner boycotts Venezuela as well, and that poses no barrier to contracting with Houston. ROA.619. This is not, like a non-discrimination provision prohibiting discrimination on the basis of race, religion, or sex, apply broadly. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (antidiscrimination provision is viewpoint neutral when it

[2] ." Gov. Greg Abbott (@GregAbbott_TX), Twitter (February 26, 2022, 1:46 PM), https://twitter.com/GregAbbott_TX/status/1497659463892934662?s=20&t=DM4wU63IsfhKVFJ9AlTD6A.

"does not distinguish between prohibited and permitted activity on the basis of viewpoint").

2. The Anti-BDS law is related to the suppression of free expression.

Second, even if the Anti-BDS clause was somehow neutral, it is also false that "the governmental interest is unrelated to the suppression of free expression." 391 U.S. at 377. Here, the suppression of free expression is not only related but is the very purpose of the Anti-BDS Act. *See Koontz*, 283 F. Supp. 3d at 1023 ("conduct the Kansas Law aims to regulate is inherently expressive" under *Claiborne*). Indeed, *Claiborne* specifically rejected the application of *O'Brien* precisely because laws prohibiting political boycotts target free expression. 458 U.S. at 912-915. And the Supreme Court has further noted that speech is not unrelated to the suppression of free expression when it cannot be ""***justified*** without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis original and citation omitted). Here, as explained in Sections A-C above and Section III below, one cannot tell whether an individual is or is not violating the law without reference to regulated speech.

II. The Anti-BDS Law constitutes compelled speech.

Even if the prohibition of boycotting Israel is constitutionally valid, the separate certification required by the law is not. As the district court in *Amawi* explained, the certification is not a mere generic request that the signer verify that it will follow the law, 373 F. Supp. 3d at 754-55. Rather, it is an invasive attempt "to make inquiries about a person's beliefs or associations," 373 F. Supp. 3d at 754 (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971)), "solely for the purpose of withholding a right or benefit because of what he believes," 373 F. Supp. 3d at 755 (quoting *Baird*, 401 U.S. at 7).

Moreover, as explained above in Section II, even if *FAIR* controls, the boycott may only be prohibited because of the lack of any speech component to the prohibition. The certification creates that speech component, rendering the Anti-BDS unconstitutional in any event.

Furthermore, the anti-BDS certification requirement is an unconstitutional loyalty oath of sorts. And, unlike the generic defend-the Constitution-and-oppose- treason oath in *Cole*, 405 U.S. at 678, the certification here is directed at one specific type of activity—refusing to purchase goods from Israel— which is not in and of itself unlawful.

Instead, the law merely prohibits a "governmental entity" from entering into contracts absent the no-boycott certification, Tex. Gov't Code § 2270.002, and requires the various Texas Retirement Systems and the permanent school fund from investing in entities that Texas has found to boycott Israel, Tex. Gov't Code § 808.001, *et seq*. Requiring a certification adhering to the political values of Texas on an a matter wholly unrelated to the contract violates the First Amendment. *See NAM v. SEC,* 748 F.3d 359, 371 (D.C. Cir. 2014) (holding that compelled disclosure regarding whether minerals were conflict-free constituted compelled speech in violation of the First Amendment because the regulation did not narrowly or reasonably "fit" the asserted government interest); *see also Robinson v. Reed*, 566 F.2d 911 (5th Cir. 1978) (per curiam) (observing that compelled disclosures about a plaintiff's personal life which were unrelated to her employment would not withstand constitutional scrutiny).

Although the District Court did not reach this issue, the opinion's reasoning helps explain why the certification is both unconstitutional and why Texas requires it as part of the Anti-BDS law. As the District Court explained, "it would be difficult, if not impossible, for someone to

realize Plaintiff was engaged in a boycott simply based on the conduct prohibited by the statute. It would require an individual to specifically publicize the absence of Israeli products at Plaintiff's office or among Plaintiff's work materials." *A&R Engineering*, ROA.508, 2022 WL 267880 at *9. An "observer," whether that observer is a member of the public or the government itself, the District Court reasoned, "would not be clear that the absence [of Israeli purchases] was due to a boycott without some explanatory speech. Instead, the observer may attribute the lack of Israeli products toa number of other ordinary business purposes." *Id.*

While A&R disagrees with the District Court that this makes the prohibition on boycott, standing alone, unconstitutional, this "is not all that the statute" accomplishes. *Id.* at *10. If it did, Texas would be in the same clueless position as all other people as to why A&R does not purchase goods from Israel. So Texas requires A&R to certify that it does not participate in an expressive boycott. And in doing so, Texas compels speech. Texas compels that speech not because they want to make sure individuals follow the law, but instead for the precise purpose to make sure that those who necessarily support their political

boycott with speech are punished due to their inability to truthfully speak to the contrary.

Texas's reliance (at 32) on *Ali v. Hogan* fails. There, the Court did not reach the merits of Ali's constitutional challenge because it found that the certification in question only asked whether Ali had (past tense) refused to engage in Israel in the course of submitting a bid, and Ali had not submitted any bid, with or without the certification. *Ali v. Hogan*, 26 F.4th 587, 596-97 (4th Cir. 2022). Meanwhile, Ali also only boycotted Israel in his personal capacity. *Id.* at 597. So the problem for the Fourth Circuit was not that the certification was not compelled speech—an issue the Fourth Circuit did not reach—but that Ali did not have standing to challenge it because he had not shown in any particular instance that he was unable to sign it. *Id.* (concluding that "we are unable to accept the proposition that Ali is prohibited from signing the Section C certification and submitting a bid on a Maryland procurement contract"). While A&R disagrees with the reasoning in *Ali*, that case concerns a very different context and prohibition than the Texas law applies to.

Texas also suggests (at 33) that "[t]he contract's verification language merely sought A&R Engineering's statement on its present and

future activity." First, it is impossible to construe a "statement on A&R Engineering's … future activity" as demanding anything other than protected speech. *See also* Cole, 405 U.S. at 680 ("[e]mployment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection"). Second, Texas's characterization is incorrect. The certification does not ask A&R if it currently is purchasing anything from Israel or whether A&R is planning on purchasing anything in the future. Rather, the certification asks whether A&R participates in a political boycott, and ***as a result*** does not and will not purchase anything from Israel, for political, as opposed to economic reasons. Texas's request is one for political fealty rather than a question about mens rea.

It also is a request devoid of any relationship to the contract. This is not a case where Texas is requiring A&R not to boycott Israel in its capacity as a contractor. Rather, A&R must disavow boycotting Israel even in situations unrelated to the contract. As a result, "the certification that one does not and will not boycott Israel is a political or ideological message the First Amendment prevents Texas from compelling." *Amawi*, 373 F. Supp. 3d at 755; *see also Robinson*, 566 F.2d at 913

("Inquiries into personal beliefs and associational choices come within this protection" and violate the law when they have "nothing to do with the performance" of a contract).

III. The Anti-BDS Law is vague and overbroad.

A law is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Cramp v. Bd. of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278, 287 (1961). "In evaluating vagueness, a reviewing court should consider: (1) whether the law gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, and (2) whether the law provides explicit standards for those applying them to avoid arbitrary and discriminatory applications." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 551 (5th Cir. 2008) (cleaned up) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

When dealing with a statute "capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*,

415 U.S. 566, 573 (1974). This First Amendment rule is called the overbreadth doctrine. When a statute is capable of an interpretation penalizing a substantial amount of speech that is constitutionally protected, the law is unconstitutional. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–575 (1987). To be clear, a statute is not overbroad merely because it ultimately is found to penalize a substantial amount of speech. Instead, "plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." *U.S. v. Williams*, 553 U.S. 285, 304 (2008).

A. The residual law is vague and overbroad.

1. The plain language of the statute covers protected speech.

The statute at issue prohibits "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict harm on, or limit commercial relations specifically with Israel." Tex. Gov't Code § 808.001.

As multiple courts have now explained, the plain language of the statute sweeps in substantial unconstitutional behavior. "For example, donating to a Palestinian organization, purchasing art at a Gaza

liberation fair, donating to an organization like Jewish Voice for Peace that organizes BDS campaigns, or picketing outside Best Buy to urge shoppers not to buy HP products because of the company's relationship with the IDF—all these activities may be seen as 'taking any action that is intended to penalize, inflict harm on, or limit commercial relations specifically with Israel.'" *Amawi* 373 F. Supp. 3d at 756. "[A]ctions intended to penalize or inflict economic harm on Israel could include conduct protected by the First Amendment, 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 which encourages local businesses to terminate business activities with Israel." *A&R Engineering*, ROA.510, 2022 WL 267880 at *11; *see also Waldrip*, 988 F.3d at 466 ("a contractor could readily conclude that it was prohibited from both refusing to economically engage with Israel and supporting or promoting a boycott of Israel or Israeli-goods. A contractor that does not want to risk violating the terms of its contract would likely refrain even from activity that is constitutionally protected.").

2. The canons of construction cannot save the residual clause.

Texas attempts (at 23-25) to rely on two related canons of interpretation, the ejusdem generis canon and the noscitur a sociis canon, to attempt to restrain "other action" to actions like "refusing to deal" and "terminating business with." But where does that leave the Court or any other reader of the statute? After all, picketing a business is like refusing to deal with it. Encouraging others to terminate their business with an Israeli company is like terminating business. As the District Court stated, the canon may limit "any actions" to "actions related to economic or commercial harm," but "it is difficult, if not impossible, to see how 'any action' is limited to conduct outside the purview of the First Amendment." Instead, the clause "suggests that the Legislature intended the breadth of the Act to extend beyond merely 'refusing to deal with' or 'terminating business activities with' Israel."

Texas suggests (at 23) that the residual clause should only apply to "economic discrimination …. 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." The first problem with this argument is that

it rearranges and rewrites the statute. The residual clause does not apply merely to "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a person or entity doing business with Israel." It first and foremost applies to actions "intended to penalize, inflict harm on or limit commercial relations specifically with Israel."

In any event, other than "these are other actions that are constitutional," the list of actions Texas suggests the residual clause would apply to make no sense. Paying a lower wage or providing inferior benefits are things one does to employees, and your own employee would not be "doing business in Israel or in an Israeli-controlled territory" except on behalf of you. And the idea of imposing higher prices or providing inferior services or conditions make no sense—why would a company do that in a manner which would harm the company's own reputation, except to the extent it already is, in fact, a refusal to do business. Saying, "I will sell you this computer for $10,000,000," or "I will sell you this computer on the condition that you bring me a live dodo bird" is just another way of saying "I will not sell you this computer." It is already covered by the refusal to do business clause.

Texas separately attempts (at 25-26) to rely on the constitutional avoidance doctrine. But the constitutional avoidance doctrine here does not and cannot apply. *See United States v. Simms*, 914 F.3d 229, 251 (4th Cir. 2019). If it did, the canon would defeat the vagueness rule, as the canon would require some particular interpretation of the statute, and then, assuming that interpretation, the statute would no longer be vague. *See also Williams*, 553 U.S. at 304 (overbreadth doctrine applies when the statute is "unclear whether it regulates a substantial amount of protected speech.") "Due process requires [legislatures] to speak in definite terms, particularly where the consequences for individual liberties are steep." *Simms*, 229 F.3d at 251. "For similar reasons, although courts must interpret statutes under the presumption that legislators do not intend to violate the Constitution, judges cannot revise invalid statutes." *Id.*

As the District Court cogently explained, "the Court cannot rewrite the statute to be what it is not." *A&R Engineering*, ROA.511, 2022 WL 267880 at *11 (cleaned up). Any action, plain and simple, means any action. It does not mean any constitutionally unprotected action.

3. The overbreadth of the residual clause renders it facially unconstitutional.

Finally, Texas takes a shot in the dark (at 26-28), claiming that maybe A&R does not have standing to challenge the overbreadth of the Anti-BDS Law because A&R would refuse to sign the certification regardless of how broad it is, because it also prohibits boycotts of Israel. Putting aside that the prohibition on boycotts and the certification requirement both violate the First Amendment regardless of the residual clause, it is bedrock law that the Supreme "Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (citation omitted). That is, of course, why the overbreadth test requires a "substantial" amount of protected conduct covered, as opposed to merely the plaintiff's own conduct or speech. It is, at its heart, a facial challenge. *U.S. v. Stevens*, 559 U.S. 460, 472-474 (2010).

4. The residual clause should not be severed.

Texas (at 28-29) then suggests maybe the residual clause can be severed. But Texas did not raise the issue of severability in the District Court, *see* ROA.266-294, and so that issue is forfeited for purposes of this appeal.

Even if it were not, "severability is an inquiry into legislative intent." *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 798 (Tex. App.--Austin 2008) (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)). As explained in the statement of the case above, the purpose of the law was not to control particular purchasing decisions but to punish those who participate in the BDS movement by making them ineligible for government contracts.

B. The safe harbor provision makes the Anti-BDS law overbroad and vague.

The safe harbor provision, protecting decisions made for "ordinary business purposes," is also unconstitutionally vague, and thus overbroad. What is and is not considered a "business purpose" depends on the eye of a beholder. Refusing to deal with Israel because a business's brand involves social consciousness, like Ben and Jerry's, may be an ordinary business purpose. Or it may not. Likewise, complying with

the demands of one's employees (like Disney's recent opposition to certain Florida education laws) may or may not be seen as an ordinary business decision. Complying with another government entity's legal requirements, because the refusal is part of a broader anti-discrimination policy, or in order to avoid international commercial boycotts are also potentially within—or not within—the scope of the safe harbor provision.

The application of this safe harbor is not some mere hypothetical. Texas has applied its Anti-BDS Act to Airbnb, who refused to list properties in certain Israeli-controlled territories in the West Bank.[3] Airbnb appeared to take the position based on a variety of potentially "ordinary business purposes," including pressure from customers and reliance on its own antidiscrimination policy.[4] Indeed, in announcing its refusal to list properties, Airbnb stated "Airbnb does not support

[3] *See* Elizabeth Findell, *In pro-Israel move, Texas books boycott of Airbnb*, AUSTIN- AMERICAN STATESMAN (Mar. 11, 2019), *available at* https://www.statesman.com/news/20190311/in-pro-israel-move-texas-books-boycott-of-airbnb.

[4] *See* Amanda McCaffrey, Airbnb's Listings in Disputed Territories: A Tortured Compromise, Just Security (July 29, 2019), *available at* https://www.justsecurity.org/ 65114/airbnbs-listings-in-disputed-territories-a-tortured-compromise/.

the BDS movement, any boycott of Israel, or any boycott of Israeli companies."[5] Although Airbnb relented when Texas and others threatened to punish them, rather than make a legal challenge,[6] the dispute highlights the real and consequential nature of the vagueness problem.

IV. The remaining factors favor a preliminary injunction.

The Fifth Circuit has repeatedly held that "the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013); *see also* ROA.518 ("In the case of the loss of any rights generated by the First Amendment, irreparable injuries are basically presumed") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Meanwhile, the scales of equity sharply tip in favor of upholding fundamental First Amendment values. *See, e.g., Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2008). Texas—who has no valid interest in enforcing a law that violates the First Amendment—is

[5] *Id.*

[6] *See* Elizabeth Findell, *Airbnb reverses policy that landed it on Texas' anti-Israel list*, AUSTIN-AMERICAN STATESMAN (Apr. 9, 2019), *available at* https://www.statesman.com/news/20190409/airbnb-reverses-policy-that-landed-it-on-texas-anti-israel-list.

thus unlikely to be able "to articulate the harm it will suffer if enjoined from enforcing the relevant code provision." *Texans for Free Enter.*, 732 F.3d at 539. And "[i]njunctions protecting First Amendment freedoms are always in the public interest." *Id.* (citation omitted).

The District Court's analysis in this case favoring an injunction was therefore correct. ROA.518-519. Permitting A & R to maintain its contract with the "No Boycott of Israel" paragraph stricken serves the "public interest in upholding free speech and association rights." *E.g. Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012).

V. The Attorney General is a proper defendant.

Texas's argument (at 11-14) that the Attorney General is not a proper *Ex Parte Young* rests on a complete change in position from what the Attorney General said in filings to this Court months ago.

In its opening brief, Attorney General argues that it has neither enforcement authority nor a willingness to enforce the challenged Anti-BDS. That is the opposite of what the Attorney General said to this Court three months ago. "[T]he preliminary injunction explicitly bars the Attorney General from initiating enforcement actions after contract execution." Response to Suggestion of Mootness at 2. The Attorney General

identified this restriction as an ongoing restriction on its enforcement authority. "This aspect of the preliminary injunction continues to constrain the Attorney General." *Id.*

It is not entirely clear whether the Attorney General's prior statement to the Court is accurate. *But see* § VI(A), below (noting that A&R no longer believes this appeal is moot). And whether this appeal is moot, or whether the Attorney General is a proper defendant or not, should not substantively affect the ultimate resolution of this dispute. *See* § VI(B), below (noting that Houston remains a proper defendant in this case and therefore ultimately a final judgment in this case will result against Houston). Whatever path the Court takes, it ultimately will have to decide whether the Anti-BDS law violates the First Amendment in this case, either in this appeal or in a future one.

If the Court decides to reach this issue, and finds this appeal not moot, the Attorney General is a proper defendant in the case. All one needs to do is to look at the statute itself. Section 808.102 of the Texas Government Code states, in full: "The attorney general may bring any action necessary to enforce this chapter."

Under this provision, the Attorney General continues to have the ability to prohibit Houston from entering into renewals or other contracts with A&R that do not contain the Anti-BDS certification. Further, under Texas law, the Attorney General has the power to initiate a quo warranto suit to test whether a public corporation or municipality has the power to act in a particular way, *State ex rel. Grimes County Taxpayers Ass'n v. Texas Municipal Power Agency*, 565 S.W.2d 258, 276 (Tex. App. 1978), including the power to enter into contracts, *Upshur-Rural Elec. Co-op. Corp. v. State ex rel. Southwestern Elec. Power Co.*, 381 S.W.2d 418, 421 (Tex. App. 1964). This power to restrain municipalities from running afoul of state law has been used in a variety of contexts, including when the Attorney General recently brought lawsuits against Texas municipalities for running afoul of state COVID laws. *See generally State v. El Paso County*, 618 S.W.3d 812 (Tex. App. 2020).

Although A&R can only guess what position the Attorney General might take in reply, it seems as of now he wants it both ways. He claims the power to enforce the Anti-BDS law against both Houston and directly against A&R. But, perhaps—despite Section 808.102—because this is based on general rather than "specific" grants of authority under Texas

law, he argues A&R cannot bring a claim against him under Section 1983. According to the Attorney General, Texas can simply do an end around of Section 1983 and the Supremacy Clause by giving the Attorney General broad, general powers instead of precise, specific ones.

This contradicts the Supreme Court's holding in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021). There, the Supreme Court held that a party's claim against a state agency could proceed so long and to the extent it had any authority—even general authority—to enforce the challenged law. *Id.* at 535. Ultimately, standing against the state in that case failed based on the Texas Supreme Court's determination that no state defendant had any authority—general or specific—to enforce the law at all, 23 F.4th 380, 385 (5th Cir. 2022), *certified question accepted* (Jan. 21, 2022), *certified question answered*, 22-0033, 2022 WL 726990 (Tex. Mar. 11, 2022). That is contrary to the situation here, where the Texas Attorney General himself maintains that it has authority to enforce the challenged law.

Even ignoring the Supreme Court's binding holding in *Whole Women's Health*, this case is a far cry from *Texas All. for Retired Americans v. Scott*, 28 F.4th 669 (5th Cir. 2022). There, the Court found that

the Secretary of State did not have the authority to "compel or constrain" officials to print ballots without the straight-ticket option, and so there was no *Ex Parte Young* claim against him. *Id.* at 673. This Court went on to say that general provisions giving the Secretary the "general duty" to implement election law did not change that impotence. *Id.* at 674.

Likewise, in *Haverkamp v. Linthicum*, 6 F.4th 662, 671 (5th Cir. 2021), the lack of *Ex Parte Young* jurisdiction was due to the failure of the plaintiff to plead a connection to enforcement. And in *Haverkamp* that a failure of pleading, as Judge Dennis noted in a special concurrence, rather than an inadequacy as a matter of law. *Id.* at 672.

Here, even putting aside the Attorney General's threat to invalidate A&R's contract for a moment, the facts of this case prove not only that the Attorney General has enforcement authority in this case, but also that the enforcement authority directly lead to the injury A&R suffered. When A&R sued Houston and the Attorney General, Houston took no position. ROA.233, and said that it would offer the contract without the Anti-BDS certification if the Court allowed it, ROA.221, ROA.572. And then, when the District Court enjoined the Attorney General from interfering with Houston's ability to offer the contract, Houston did just that,

leading to the currently-executed contract. *See* Suggestion of Mootness. The Attorney General's enforcement authority over Houston was exactly the source of A&R's injury.

Now Houston and A&R could comfortably proceed under its contract going forward, except for the Attorney General's threat to bring an enforcement action voiding the contract. *See* Response to Suggestion of Mootness. If that is not a significant connection, then nothing is.

As *Whole Woman's Health* makes clear, there is no strategic loophole around *Ex Parte Young* or the Supremacy Clause when any state actor "may or must take enforcement actions" for violations of the challenged state law. 142 S. Ct. at 535. This Court has standing over the Attorney General.

VI. The case is not moot.

A. The appeal is not moot.

A&R previously suggested the appeal—but not the case—was moot. A&R's suggestion was based on its assumption—and its own reading of Texas law—that the Attorney General has no authority to void the contract now that it has been entered into. *See* Suggestion of Mootness*; see also Walker v. Whitehead*, 83 U.S. 314, 318 (1872) (no "clearer case of a law

impairing the obligation of a contract, within the meaning of the Constitution" than when the state voids a validly-entered-into contract); *see generally* *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494 (5th Cir. 2001) (state declaring contracts void violates the Contracts Clause). But mootness only asks if both parties have a continuing stake in the case, rather than how strong that stake is. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 192-93 (2000). While the Court must decide the mootness issue for itself—and that is the reason why A&R raised the issue (in order to avoid a substantial delay in this litigation without resolution, *see* Mootness Reply at 2)—given the Attorney General's continued threat of seeking to void A&R's contract for unconstitutional reasons, A&R now agrees that, under *Friends of the Earth*, this case is not moot.

If the appeal over the preliminary injunction is truly moot, then it would stand to reason that A&R would have no interest either way as to whether the preliminary injunction is vacated. The fact that the Attorney General cares deeply that it is, of course, further shows that the appeal is not moot.

B. Even if the appeal is moot, the case is not moot.

But even if the appeal is moot, the case is not. A&R has done and continues to do business with Houston. A&R's contract with Houston needs to be renewed every few years. And so it is all but guaranteed that were this case to be dismissed, this dispute will arise again in the exact same posture it arose now in a few years.

And if this case were dismissed now, it would have to be dismissed again after the contract is entered into (or another vendor is selected), making final resolution impossible. As this case has shown, (a) Houston can only hold open a contract for so long while a case proceeds to judgment, and (b) A&R will be irreparably harmed in the meantime by the inability to sign the contract even if Houston could indefinitely hold open the contract. So another preliminary injunction will be issued. And when that preliminary injunction issues, then everyone will be right back here. Under the precedent this case sets, the granting of the preliminary injunction would moot the case, preventing a final resolution yet again. This is the very essence of capable-of-repetition-yet-evading-review. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Gulf Coast Indus. Workers' Union v. Exxon Co., U.S.A.*, 712 F.2d 161, 163 n.1 (5th Cir. 1983).

Accepting Texas's invitation to declare the whole case moot would ultimately mean that any challenges to laws prohibiting government entities from entering into contracts—whether they be prohibitions on the basis of Anti-BDS clauses, on the failure to utilize unconstitutional quotas or other forms of racial discrimination, on tests that discriminate against the religious or practitioners of particular religions—would never be resolvable on final judgment.

Finally, even if this Court accepted Texas's argument in every single aspect, dismissal of the case would be inappropriate for the sole reason that A&R seeks damages against Houston. Injunctive relief cannot cure A&R's claims to damages, whether nominal, constitutional, or economic due to the delay in Houston's issuance of a constitutionally-appropriate contract for A&R to sign.

CONCLUSION

Boycotts of Israel are controversial and unpopular. But while this case involves a law targeting a boycott of Israel, anti-boycott laws could target a hose of other boycotts. Texas has already made boycotting oil companies unlawful. Tex. Gov't Code § 809.001. Other states could target boycotts of social media, or companies that donate to the wrong political party,

companies that are too woke (like Nike), or companies that are not woke enough (like Chick-fil-a). It could do so not just by preventing boycotters from contracting with state and local governments, but through criminal penalties as well. If the First Amendment means anything, it means the Government should be prohibited from punishing people for taking sides in political controversies. And it should be prohibited from probing into individuals' political beliefs by forcing them to explain why they do or do not make personal choices such as what product to buy.

The Court should affirm the decision of the District Court. In the alternative, the Court should hold the appeal in abeyance until a final decision is rendered before the District Court, and then consolidate the appeals.

Respectfully submitted,

Dated: June 15, 2022June 15, 2022 **CAIR LEGAL DEFENSE FUND**

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I hereby certify that, on June 15, 2022, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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