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

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

A&R Engineering's brief confirms that this Court should vacate the preliminary injunction. Sovereign immunity precludes A&R Engineering's suit, and A&R Engineering cannot avail itself of *Ex parte Young* because an *Ex parte Young* action is available only against an official who both is tasked with enforcing a statute and who has demonstrated a willingness to do so. A&R Engineering has shown neither, and each failure independently forecloses the *Ex parte Young* exception to sovereign immunity. The company's accusations of a change in position by the Attorney General on this point ring hollow. The Attorney General did not threaten enforcement in responding to the appellate mootness argument that A&R Engineering now has changed its position on.

And while the district court lacked jurisdiction, A&R Engineering's claims are also meritless. A&R Engineering has not shown that Texas's anti-boycott statute violates the First Amendment. Texas's law limits the extent to which tax dollars give direct and indirect support to government contractors' economic discrimination against Israel. And because A&R Engineering's choice to avoid Israeli products in its transactions is not "inherently expressive," the Free Speech Clause does not protect that choice. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*"). Indeed, the en banc Eighth Circuit recently reached the same conclusion analyzing Arkansas's parallel Israel anti-boycott statute. *Ark. Times LP v. Waldrip as Tr. of Univ. of Ark. Bd. of Trs.*, 37 F.4th 1386 (8th Cir. 2022). If this Court addresses A&R Engineering's likelihood of success on the merits, it should refuse the company's invitation to create a circuit split.

ARGUMENT

I. The District Court Lacked Jurisdiction.

A&R Engineering both lacks standing to sue the Attorney General and cannot avail itself of *Ex parte Young* for the same reasons: the Attorney General is not statutorily tasked with enforcing the anti-boycott statute and has not demonstrated willingness to do so. To show standing based on enforcement authority, the plaintiff must "assert an injury that is the result of a statute's actual or threatened enforcement." *California v. Texas*, 141 S. Ct. 2104, 2114 (2021) (emphasis omitted). And for *Ex parte Young*, 209 U.S. 123 (1908), to apply, the defendant must have "'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *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)). A&R Engineering bears the burden to establish both standing and an exception to sovereign immunity, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Haverkamp v. Linthicum*, 6 F.4th 662, 671 (5th Cir. 2021), and has established neither.

A. A&R Engineering has not established that the Attorney General has a specific duty to enforce the anti-boycott statute.

A&R Engineering has not shown that the Attorney General has "the particular duty to enforce" the anti-boycott statute. *Tex. All. for Retired Ams.*, 28 F.4th at 672.

1. The complaint alleges only one enforcement connection between the Attorney General and the anti-boycott statute: the general duty to "enforc[e] and defend[] the constitutionality of Texas law." ROA.10. This allegation does not suffice. The Attorney General has no such general duty, and A&R Engineering cites nothing in

its complaint or brief substantiating such a duty, so the Court need not evaluate it further. But even if the Attorney General had this duty, *Ex parte Young* requires more than a "'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)); *Tex. Democratic Party v. Abbott,* 961 F.3d 389, 400-01 (5th Cir. 2020) ("[I]t is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" (quoting *Morris*, 739 F.3d at 746)).

A&R Engineering is wrong to suggest that the Supreme Court's recent decision in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), changed this analysis. That case does not hold that "any authority—even general authority" is enough. *See* A&R Br. 49. Rather, that case's plurality opinion held that certain state medical licensing officials may be proper defendants to challenge a Texas abortion law because of such officials' *specific* duties. According to the plurality, Texas law "impose[d] on the licensing-official defendants a duty to enforce a law that 'regulate[s] or prohibit[s] abortion.'" *Whole Woman's Health*, 142 S. Ct. at 536 (citing Tex. Health & Safety Code § 171.207(b)(3)). Specifically, Texas Occupations Code § 164.055 required certain officials to take "'disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code,' a part of Texas statutory law that *includes* S.B. 8." *Id.* (plurality op.) (alteration in original). Nothing in *Whole Woman's Health* changed this Court's rule against relying on generalized enforcement authority to avoid sovereign immunity or otherwise altered the *Ex parte Young* analysis relevant here.

2. In addition to generalized enforcement authority, A&R Engineering contends that the Attorney General has specific authority to enforce the anti-boycott statute. These arguments fail because they go beyond the complaint and either do not exist or are not specific to the anti-boycott statute.

First, this Court can disregard A&R Engineering's allegations of specific enforcement authority because they appear nowhere in A&R Engineering's complaint. The complaint only alleges that the Attorney General "is responsible for enforcing and defending the constitutionality of Texas law." ROA.10. The fact that the "operative complaint does not adequately plead that [the Attorney General] ha[s] a sufficient connection [to] the enforcement of the challenged act" is enough to justify this Court vacating the district court's preliminary injunction. *Haverkamp*, 6 F.4th at 672 (internal quotation marks omitted; third alteration in original). A&R Engineering's brief in this Court even acknowledges that it was required to "plead a connection to enforcement." A&R Br. 50 (citing *Haverkamp*, 6 F.4th at 671).

Second, none of A&R Engineering's theories of enforcement involve a "particular duty to enforce the statute in question." *Tex. All. for Retired Ams.*, 28 F.4th at 672. Section 808.102 of the Texas Government Code does not apply. It authorizes the Attorney General to "bring any action necessary to enforce this chapter." Tex. Gov't Code § 808.102. As the Attorney General explained in his opening brief, "this chapter" means Chapter 808 of the Government Code, not Chapter 2271, which contains the anti-boycott statute at issue here. *Id.*; Att'y Gen. Br. 13. Nor do the authorities "to initiate a quo warranto suit" and "to restrain municipalities" on which A&R Engineering relies supply an *Ex parte Young* connection to the anti-boycott

statute. A&R Br. 48. A&R Engineering never explains how these authorities are specifically tied to the anti-boycott statute. The Attorney General is entitled to sovereign immunity because the anti-boycott statute "does not specially task [him] with its enforcement, or suggest that he will play any role at all in its enforcement." *Morris*, 739 F.3d at 746. If "the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent and [the] *Young* analysis ends." *Tex. Democratic Party*, 961 F.3d at 401.

3. A&R Engineering's allegation that the Attorney General's "enforcement authority directly lead [*sic*] to the injury A&R suffered," A&R Br. 50, likewise appears nowhere in its complaint. The Attorney General is involved in this dispute only because A&R Engineering sued him; by contrast, in its complaint, A&R Engineering alleges that *the City of Houston* provided A&R Engineering with a draft contract containing the anti-boycott statute clause. ROA.14. It further claimed that the company complained to *the City* about the clause's inclusion. ROA.14-15. And it alleges *the City* rejected the company's demand to remove the challenged language. ROA.14-15. The complaint describes a dispute between A&R Engineering and the City. The City's choice to "take[] no position . . . on the constitutionality of" the anti-boycott statute does not somehow empower A&R Engineering to sue the Attorney General any more than any other third party's litigation position might. ROA.120.

4. A&R Engineering's concern for the consequences of a finding that the Attorney General has sovereign immunity also does not entitle it to the *Ex parte Young* exception. A plaintiff cannot create jurisdiction by claiming that a court "ultimately will have to decide" an issue "either in this appeal or in a future one." A&R Br. 47;

see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998) (rejecting the "doctrine of 'hypothetical jurisdiction'"). Such an argument misses the point of jurisdictional limitations, which (in part) determine *which* court resolves a given issue, as well as *when* a court will resolve it—that is, now or in the future.

A&R Engineering's accusation that the Texas Legislature was "do[ing] an end around of Section 1983 and the Supremacy Clause" by not giving a government official the specific duty to enforce the anti-boycott law is equally irrelevant. A&R Br. 49. A&R Engineering claims *Whole Woman's Health* embraced this argument; it did the opposite. As the Supreme Court explained, "those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments." 142 S. Ct. at 537. "[M]any federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases." *Id.* at 538. Just so. If the Attorney General attempted to enforce the anti-boycott statute against A&R Engineering, the company may cite the First Amendment in its defense, along with any other then-applicable defenses. Nor does the Attorney General's sovereign immunity deprive the district court of jurisdiction over the City of Houston. But A&R Engineering cannot create federal jurisdiction by expressing a strong preference for a pre-enforcement federal forum and then selecting some state official as a nominal defendant as a way of indulging that preference. *See Haverkamp*, 6 F.4th at 669.

B. A&R Engineering has not established the Attorney General's willingness to enforce the anti-boycott statute.

Even if A&R Engineering had shown the Attorney General has the "particular duty" to enforce the anti-boycott statute, it has not shown that he has "a demonstrated willingness to exercise [the] duty." *Tex. All. for Retired Ams.*, 28 F.4th at 672. A&R Engineering identifies no instance where the Attorney General has attempted to enforce the anti-boycott statute. Instead, to justify the *district court's* jurisdiction to enter the preliminary injunction, it takes out of context a *post-injunction* brief filed in this Court.

First, A&R Engineering cannot rely on facts developed on appeal to establish the district court's jurisdiction. "'[A]ll questions of subject matter jurisdiction except mootness'" are "'determined as of the date of the filing of the complaint.'" *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) (quoting *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991)). If the Attorney General was entitled to sovereign immunity when the district court entered an injunction against him, then that injunction should be vacated. The Attorney General's post-injunction statements are irrelevant.

Second, the Attorney General has not threatened A&R Engineering with enforcement of the anti-boycott statute. After obtaining an injunction against the Attorney General that explicitly applied during "performance of the contract," ROA.522, A&R Engineering sought the dismissal of the Attorney General's appeal by arguing the injunction had "run its course"—even though the contract had not been fully performed, Sugg. of Mootness 3. The Attorney General responded by

pointing out the injunction's continued effect. A&R Engineering notes that the Attorney General stated that the preliminary injunction "'explicitly bars the Attorney General from initiating enforcement actions after contract execution'" and that "'[t]his aspect of the preliminary injunction continues to constrain the Attorney General.'" A&R Br. 46-47 (quoting Resp. to Sugg. Mootness 2). But these sentences only explain the Attorney General's perception that the injunction continues to apply, a fact A&R Engineering now accepts. They do not threaten enforcement.

A&R Engineering's claim that it feels threatened also rings hollow. Just one week after the Attorney General supposedly threatened enforcement, A&R Engineering insisted the appeal was moot a second time because "the Attorney General has no enforcement authority over private contracts." Reply in Supp. of Sugg. of Mootness 4. It was only after the Attorney General asked this Court to vacate the district court's order if it viewed the appeal as moot that A&R Engineering made a *volte-face*, disavowing its mootness argument and interpreting the Attorney General's statement as a threat. *See* Att'y Gen. Br. 34.

Finally, A&R Engineering's accusations of a "complete change in position" by the Attorney General on his "enforcement authority" and "willingness to enforce" are wrong. A&R Br. 46. The Attorney General has done nothing of the sort—but more to the point, A&R Engineering bears the burden of showing the Attorney General's connection to enforcement and willingness to enforce the anti-boycott statute. *Haverkamp*, 6 F.4th at 671. A&R Engineering has failed to do so. The Attorney General is not required to assist A&R Engineering in its future endeavors by either explaining what official, if any, can enforce the anti-boycott statute, let alone by

identifying an official who "would have responsibility for enforc[ement]." *Id.* In sum, A&R Engineering has not shown that the Attorney General is specifically tasked with enforcing the anti-boycott statute or that he has demonstrated willingness to do so. The failure to show either is enough to deprive the district court of jurisdiction over the Attorney General.

C. This Court should vacate the district court's injunction against the State of Texas, which A&R Engineering does not defend.

This Court should vacate the preliminary injunction for an additional reason: the district court lacked authority to enjoin the State of Texas. As the Attorney General explained, the State is not a party to this litigation, and even if it were, sovereign immunity would deprive the district court of jurisdiction to enjoin the State. *See* Att'y Gen. Br. 13-14. A&R Engineering does not defend this aspect of the district court's order. Accordingly, this Court should vacate the preliminary injunction on this basis as well.

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

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

1. The anti-boycott statute does not prohibit expressive conduct.

By limiting itself to economic discrimination, the anti-boycott statute does not proscribe First Amendment-protected conduct. The First Amendment protects speech and "conduct that is inherently expressive." *FAIR*, 547 U.S. at 66. Like the federal government's prohibition on discrimination against military recruiters addressed in *FAIR*, the anti-boycott law's ban on economic discrimination against

Israel regulates neither speech nor inherently expressive conduct. *Id.* at 70; Att'y Gen. Br. 15.

a. A&R Engineering's argument relying on the Supreme Court's inapposite decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), would cause a circuit split, which this Court is "always chary to create." *Gahagan v. United States Citizenship Immigr. Servs.*, 911 F.3d 298, 304 (5th Cir. 2018). The en banc Eighth Circuit recently rejected the application of *Claiborne* to a materially indistinguishable Arkansas statute. *Waldrip*, 37 F.4th at 1392. While A&R Engineering correctly notes that "*Claiborne* deals with political boycotts," A&R Br. 18, the Eighth Circuit's 9-1 decision explains that *Claiborne* does not "declar[e] that a 'boycott' itself . . . is protected by the First Amendment," *Waldrip*, 37 F.4th at 1392 "*Claiborne* only discussed protecting expressive activities *accompanying* a boycott, rather than the purchasing decisions at the heart of a boycott." *Id. Claiborne* is consistent with *FAIR*'s later "h[olding] that First Amendment protection does not extend to non-expressive conduct intended to convey a political message." *Id.* at 1391.

A&R Engineering disagrees, instead claiming that *Claiborne*'s boycotting language indicates that the First Amendment protects "refusing to deal" and "terminating business activities" as inherently expressive activities. Tex. Gov't Code § 808.001(1). But *Claiborne*'s boycott included much more than refusing to deal. The *Claiborne* boycott "'took many forms' including speeches, picketing, marches, and pamphleteering." *Waldrip*, 37 F.4th at 1392 (quoting *Claiborne*, 458 U.S. at 907, 909-11). For example, *Claiborne* defendant Charles Evers, who A&R Engineering discusses, A&R Br. 22-23, participated in the boycott by assuming a leadership role,

signing a letter, giving speeches, and leading meetings, *Claiborne*, 458 U.S. at 926. Thus, courts reading *Claiborne* must "examine the *elements* of a boycott to determine which activities are constitutionally protected." *Waldrip*, 37 F.4th at 1392.

Claiborne did not "declare[] that there can be no liability for 'withh[olding] patronage" or "voluntary participation in [a] boycott." A&R Br. 22 (first alteration in original). In fact, the question of whether a refusal to deal, without more, is constitutionally protected inherently expressive conduct was not before the *Claiborne* Court. Rather, *Claiborne* acknowledged that the chancery court "did not appear to hold that a concerted refusal to deal—without more—was actionable under the common law of Mississippi." 458 U.S. at 891 n.7. A&R Engineering is also wrong to claim that the Attorney General's argument would have allowed Mississippi to criminalize a boycott of white-owned businesses or to require Mississippians to certify that they will not boycott white-owned businesses. A&R Br. 24. Such a law would plainly violate the Equal Protection Clause.

b. The conduct covered by the anti-boycott statute is not inherently expressive because refusing to deal, terminating business activities, and similar acts, standing alone, communicate nothing. Att'y Gen. Br. 15-16. A&R Engineering offers two reasons why the anti-boycott statute bans inherently expressive conduct even if *FAIR* applies; both lack merit.

A&R Engineering first contends that the *FAIR* statute "did not care about the reasoning why the access was or was not provided," while the anti-boycott statute requires an intent to penalize or harm, and explicitly excludes "action[s] made for ordinary business purposes." A&R Br. 19-21. This is a distinction without a

difference. A boycotter's subjective intent to harm Israel through a refusal to deal does not convert that refusal into an *inherently* expressive act. "[I]t would not be clear that the absence [of Israeli goods] was due to a boycott without some explanatory speech." ROA.508. The anti-boycott statute's distinction between an intent to harm Israel and "action[s] made for ordinary business purposes" merely separates discriminatory from non-discriminatory acts. Tex. Gov't Code § 808.001. *Second*, A&R Engineering's distinction fails on its own terms. The federal government *did* care about the reason universities excluded its military recruiters. As the Supreme Court recognized, the Solomon Amendment did not apply to *some* schools with pacifism policies. *FAIR*, 547 U.S. at 55 (quoting 10 U.S.C. § 983(c)(2) (2000)). Both the *FAIR* statute and the anti-boycott statute depend on the regulated entity's purpose, which is constitutional because neither law regulates expressive conduct.

A&R Engineering also argues that the anti-boycott statute's certification requirement makes a refusal to deal inherently expressive. A&R Br. 20, 31, 33. But this merely reiterates the argument explicitly rejected by *FAIR*, that "[t]he expressive component of a [refusal to deal] is not created by the conduct itself but by the speech that accompanies it." *FAIR*, 547 U.S. at 66. The certification requirement does not transform an ordinary refusal to deal into expressive conduct, just as speech explaining one's refusal to pay taxes does not give that refusal protection by the First Amendment. *See id.*

c. In addition to creating a circuit split, adopting A&R Engineering's argument would jeopardize numerous other laws that regulate business dealings. Laws prohibiting business with sanctioned countries, for example, would violate A&R

Engineering's purported right to expression by transaction. *See* Att'y Gen. Br. 19-20. A&R Engineering responds that the First Amendment only applies when a transaction is banned "as a consequence of one's beliefs or participation in First Amendment-protected activity." A&R Br. 27. But surely some individuals desire to transact business with individuals, entities, or countries currently sanctioned by the United States on ideological grounds. A&R Engineering does not explain why its reasoning would not permit a plaintiff doing business with sanctioned Russian entities, for example, to evade sanctions by claiming its commerce is "a consequence of [its] beliefs." *Id.*

A&R Engineering also attempts to distinguish the Attorney General's citation of the Export Administration Act by asserting that law "dealt only with less-protected economic speech" but it gives no reason why a government contractor's refusal to deal with Israel should receive different treatment. A&R Br. 26. That law covers "[r]efusing . . . to do business with or in [a] boycotted country" at a foreign country's request. 50 U.S.C. § 4842(a)(1)(A). A&R Engineering's argument that "[f]oreign countries do not have traditional First Amendment rights," A&R Br. 26, also misses the mark because the Export Administration Act regulates "United States person[s]," who have First Amendment rights, not foreign countries, 50 U.S.C. § 4842(a). If accepted, A&R Engineering's arguments call into question the status of multiple laws relating to commerce and foreign affairs. *See* Att'y Gen. Br. 19-20.

2. The residual clause is not overbroad.

a. The residual clause is not overbroad because it only prohibits economic discrimination. The statute covers: "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" with Israel or a person doing business in Israel. Tex. Gov't Code § 808.001(1). 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)).

A&R Engineering's arguments against application of the *ejusdem generis* canon conflict with the Eighth Circuit's recent interpretation of Arkansas's indistinguishable parallel statute. *See Waldrip*, 37 F.4th at 1393. Like Texas's anti-boycott statute, Arkansas's law includes a residual clause following proscriptions on "refusals to deal" and "terminating business activities." *Id.* Arkansas's residual clause covers "other actions that are intended to limit commercial relations . . . in a discriminatory manner." *Id.* 1390. (quoting Ark. Code § 25-1-502(1)(A)(i)). Because "[t]he more specific phrases" before the residual clause "relate solely to commercial activities," "[i]t follows that the more general phrase, 'other actions,' does too." *Id.* at 1393. Thus, A&R Engineering is wrong to argue the residual clause prohibits speech or inherently expressive acts, such as giving speeches, picketing, or encouraging others to boycott Israel. *See* A&R Br. 38.

b. The Attorney General's brief explained that the residual clause's "otherwise taking any action" language captures economic conduct like paying a lower wage, imposing higher prices, or providing inferior service, among other things. Att'y Gen. Br. 23. A&R Engineering disputes this construction. The company contends that "the idea of imposing higher prices or providing inferior services or conditions make [*sic*] no sense" and asks "why would a company do that?" A&R Br. 40. Unfortunately, companies engaging in discrimination are capable of such acts; indeed, discrimination complaints often allege that a business has served an individual an inferior product at a higher price because of a protected characteristic. *See, e.g.*, Natasha Dado, *CAIR-MI Files Complaint Against Ypsilanti Tim Hortons On Behalf Of Muslim Woman*, ClickOnDetroit (July 19, 2019), https://bit.ly/3RwZzwf.

A&R Engineering also argues a government contractor cannot violate the statute by paying an employee a lower wage because "your own employee would not be 'doing business in Israel or in an Israeli-controlled territory' except on behalf of you." A&R Br. 40. A&R Engineering is wrong again. A government contractor's employees might do business in Israel in their personal capacity or in connection with other business if they are not exclusively employed by the contractor. If they do such business, the residual clause ensures they do not face economic discrimination.

c. The residual clause is also limited by the avoidance canon, which resolves ambiguities in statutes in favor of such laws' constitutionality. *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 753-54 (5th Cir. 2008). The Eighth Circuit applied this canon to the Arkansas statute, citing Arkansas state law. *Waldrip*, 37 F.4th at 1393. The canon similarly applies to Texas law and would be applied by the Texas Supreme

Court interpreting this statute. *See* Att'y Gen. Br. 25-26 (citing Tex. Gov't Code § 311.021(1); *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 736 (Tex. 2017)).

A&R Engineering's brief gives no reason for this Court to take a different approach. The company cites the Fourth Circuit's decision in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), but the interpretation supported by the federal government there "directly conflict[ed] with how courts and the United States itself ha[d] thoughtfully interpreted th[e] statute" for more than 30 years. *Id.* at 252. This Court has never construed Texas's anti-boycott statute, and the Attorney General's argument is supported by other courts' interpretations of similar statutes. And to be clear, though the Attorney General contends that his reading of the residual clause provides the best interpretation of the statute's text, that reading—that the residual clause does not encompass speech or expressive conduct—need only be "fairly possible" in order for the avoidance canon to apply. *Fed. Sav. & Loan Ins. Corp. v. Glen Ridge I Condominiums, Ltd.*, 750 S.W.2d 757, 759 (Tex. 1988) (orig. proceeding) (per curiam).

3. A&R Engineering lacks standing to argue vagueness, and the ordinary-business exception is not vague.

A&R Engineering contends that the anti-boycott statute's exception for "an action made for ordinary business purposes," Tex. Gov't Code § 808.001(1), is vague. Because this exception has no relationship to A&R Engineering's injury, the company lacks standing to raise a vagueness challenge. *See* Att'y Gen. Br. 26-27.

To maintain a vagueness claim, the plaintiff's "injury must be traceable to the allegedly vague provision." *Freedom Path, Inc. v. I.R.S.*, 913 F.3d 503, 507 (5th Cir. 2019). A&R Engineering's brief offers potential problems on behalf of other companies—Ben and Jerry's, Airbnb, and so on—but they connect none of those questions to the injury described in the complaint. *See* A&R Br. 43-44. The ordinary-business exception's alleged vagueness is immaterial to A&R Engineering. A&R Engineering's owner testified that it rejected the City's draft contract because it wants to preserve its "freedom to boycott whoever" and "will never" give up its ability to boycott. ROA.616, 619. Though A&R Engineering defends its standing to argue *overbreadth*, A&R Br. 42, it offers no reason to believe it has standing for a *vagueness* claim.

Even if A&R Engineering had standing, the ordinary-business exception is not vague. A&R Engineering cites only newspaper articles and a blog post discussing the non-party Texas Comptroller of Public Accounts' reported determination that Airbnb boycotted Israel. A&R Br. 44-45. None of these cited materials claim the ordinary-business exception factored into the dispute, which the cited articles report ended with Airbnb reversing its policy and condemning the boycott, divestment, and sanctions movement. Regardless, "ordinary people can understand [the exception's] meaning." *United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001). The statute uses "ordinary business purposes" to contrast discriminatory purpose, i.e., "inten[t] to penalize, inflict economic harm on, or limit commercial relations specifically with Israel." Tex. Gov't Code § 808.001(1). This Court has similarly used the term "ordinary business practice" in opposition to "discrimination." *Olivarez v. T-*

Mobile USA, Inc., 997 F.3d 595, 598 (5th Cir. 2021). Exceptions to numerous federal and state statutes refer to "ordinary business." *See, e.g.*, 22 U.S.C. § 9006(f)(3); Tex. Code Crim. Pro. art. 18B.001(10)(B).

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

To the extent that the anti-boycott statute regulates First Amendment conduct, it remains constitutional under the *United States v. O'Brien*, 391 U.S. 367 (1968), test. That test upholds a neutral regulation:

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government 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 v. Landry, 909 F.3d 99, 108 (5th Cir. 2018) (quoting *O'Brien*, 391 U.S. at 377). A&R Engineering does not dispute the first, second, and fourth elements.

The anti-boycott statute is neutral. It protects Palestinians and their businesses as it does Israelis, as the statute includes "person[s] or entit[ies] doing business . . . in an Israeli-controlled territory," which includes the West Bank and Gaza Strip. Tex. Gov't Code § 808.001(1)). A&R Engineering does not argue that Palestinians and Palestinian businesses do not "do[] business . . . in an Israeli-controlled territory." *Id.* Instead, it reads excerpts of legislative history in isolation to argue that the statute only prohibits economic discrimination against Israelis. But even if A&R Engineering had identified an inconsistency between legislative statements about the anti-boycott statute and the statute's text, "[t]he text is the alpha and the omega of

the interpretive process." *Bosque Disposal Sys., LLC v. Parker Cnty. Appraisal Dist.*, 555 S.W.3d 92, 92 (Tex. 2018) (alteration in original). A&R Engineering cannot elevate purpose over text to transform the plain meaning of the latter.

A&R Engineering also contends the statute is not neutral because discrimination against businesses in Sweden, Mexico, and other countries is allowed while Texas law forbids the same conduct directed towards an Israeli business. A&R Br. 29. If A&R Engineering is correct that the First Amendment gives it a right to express itself through its transactions and that laws cannot regulate transactions pertaining to specific countries, then federal sanctions statutes and other laws at the federal and state levels will become subject to strict scrutiny.

In addition, the governmental interests supporting the anti-boycott statute are unrelated to the suppression of expression. The Attorney General identified three interests justifying the anti-boycott statute: The statute limits the extent to which tax dollars give direct and indirect support to government contractors' boycotts, it curtails economic discrimination based on national origin, and it furthers Texas's interest in its economic partnership with Israel. Att'y Gen. Br. 29-30. A&R Engineering ignores these interests. Thus, under *O'Brien*, even if the anti-boycott statute regulates some expression, it remains constitutional.

5. The anti-boycott statute does not unconstitutionally compel speech.

A&R Engineering attempts to support the district court's preliminary injunction on the alternative ground that the anti-boycott statute compels protected speech by

requiring contractors to verify that they do not and will not boycott Israel. The company's arguments lack merit.

A&R Engineering's arguments conflict with recent decisions in both the Fourth and Eighth Circuits. Like A&R Engineering, the plaintiff in *Ali v. Hogan*, a case involving a Maryland anti-boycott executive order similar to the Texas statute, claimed that Maryland's verification requirement imposed a loyalty oath. 26 F.4th 587, 591 (4th Cir. 2022); A&R Br. 1, 31. The Fourth Circuit rejected that argument and held the plaintiff lacked standing for that reason. *Ali*, 26 F.4th at 599-600. A&R Engineering attempts to distinguish *Ali* by pointing to that court's finding that the plaintiff could have signed the verification statement since it was backward-looking and the plaintiff had not boycotted Israel. A&R Br. 34 (citing *Ali*, 26 F.4th at 597). But the company overlooks the Fourth Circuit's analysis of "an additional source of direct injury," the plaintiff's claim that the verification "constitute[d] an unconstitutionally vague loyalty oath." *Ali*, 26 F.4th at 599. A&R Engineering contends it suffered the same injury, but the Fourth Circuit rejected that argument, because the verification there "[did] not require" the plaintiff to "pledge any loyalty to Israel or profess any other beliefs." *Id.* It makes no difference that the Fourth Circuit decided the issue on standing grounds instead of on the merits. Because the verification requirement did not compel speech, it did not create an Article III injury. *See id.*

Likewise, the Eighth Circuit rejected the *Waldrip* plaintiff's compelled speech claim. The court concluded that Arkansas's verification language "d[id] not require [contractors] to publicly endorse or disseminate a message." *Waldrip*, 37 F.4th at 1394. "A factual disclosure of this kind, aimed at verifying compliance with

unexpressive conduct-based regulations, is not the kind of compelled speech prohibited by the First Amendment." *Id.*

A&R Engineering supports its argument with this Court's inapposite decision in *Robinson v. Reed*, 566 F.2d 911 (5th Cir. 1978). The City of Houston's request that its contractor confirm it will not economically discriminate against Israel during the life of the contract does not compare to the *Robinson* plaintiff's allegation that the U.S. Air Force required her to attend seminars that "compelled her to disclose facts about her home life, her beliefs, and her associations." *Id.* at 913. *Cole v. Richardson*, 405 U.S. 676, 679-80 (1972), which A&R Engineering cites, A&R Br. 35, upheld the constitutionality of an oath addressing future conduct. It disproves A&R Engineering's argument that a "statement on . . . future activity" necessarily "demand[s] . . . protected speech." A&R Br. 35.

B. The other factors disfavor a preliminary injunction.

A&R Engineering's inability to show a likelihood of success on the merits suffices for this Court to vacate the preliminary injunction. *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 203 (5th Cir. 2003). But none of the other preliminary-injunction factors favor A&R Engineering either, and each is a sufficient reason to vacate the district court's injunction. *See* Att'y Gen. Br. 33-34.

Given the execution of the contract at issue, A&R Engineering plainly lacks an irreparable harm. "[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* (alteration in

original). The company and the City have already begun performance on a contract that omits the language required by the anti-boycott statute. Nothing in A&R Engineering's argument specifies the threat of irreparable harm it perceives. And though the company argues elsewhere in its brief that the Attorney General has threatened to bring an enforcement action, A&R Engineering does not argue that such an action is "likely." Without an irreparable harm, A&R Engineering is not entitled to a preliminary injunction—and it should be vacated.

As for the balance of equities, if the Court holds that the Attorney General specifically enforces the anti-boycott statute, then the inability to enforce duly enacted laws creates its own irreparable harm. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Finally, the inability to enforce the law cuts against the public interest. *See Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017).

III. With A&R Engineering's Change In Position, The Parties Agree That The Appeal Is Not Moot.

As the Attorney General explained in his response to A&R Engineering's suggestion of mootness, the appeal is not moot because the preliminary injunction remains in effect. *See* Resp. to Sugg. of Mootness 2. The preliminary injunction explicitly covers conduct occurring during "performance of the contract," ROA.522, and it is undisputed that the contract is presently being performed, *see* Sugg. of Mootness, Ex. B at 13.

A&R Engineering's brief reverses the company's earlier position on mootness, and though the parties now agree that the appeal is not moot, they disagree as to why. A&R Engineering claims the Attorney General's response to the suggestion of

mootness threatened enforcement if the injunction is vacated. A&R Br. 52. A&R Engineering is wrong. *See* pp. 7-9, *supra*. The Attorney General's response did not address what, if anything, the Attorney General would do if the injunction were vacated. A&R Engineering also argues that "[t]he fact that the Attorney General cares deeply" about the appeal "further shows that the appeal is not moot." A&R Br. 52. But a litigant's passion does not sustain an Article III case or controversy. This Court should hold the appeal is not moot for the reasons provided in the Attorney General's response to the suggestion of mootness.

CONCLUSION

The Court should vacate the preliminary injunction.

Respectfully submitted.

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Certificate of Service

On July 21, 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 5,978 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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