

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Haseeb Abdullah,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-CV-01245-RP
	§	
	§	
Ken Paxton, in his Official Capacity as	§	
Attorney General for the State of Texas,	§	
Glenn Hegar, in his Official Capacity as	§	
Comptroller of Public Accounts for the	§	
State of Texas and Director of the Texas	§	
Treasury Safekeeping Trust Company,	§	
<i>Defendants.</i>	§	

STATE DEFENDANTS' AMENDED MOTION TO DISMISS

Defendants Ken Paxton, Attorney General of Texas and Glenn Hegar, Comptroller of Public Accounts and Director of the Texas Treasury Safekeeping Trust Company (collectively, “State Defendants”) respectfully file this amended motion to dismiss Plaintiff Haseeb Abdullah’s claims. In support, State Defendants show the following:

I. PROCEDURAL BACKGROUND

Plaintiff filed his Original Complaint against Paxton, Hegar and Porter Wilson, the Executive Director of ERS, in their official capacity, as well as against Amy Bishop, who was represented by separate counsel, in her official capacity as Executive Director of TCDRS, alleging Chapter 808 of the Texas Government Code violates his rights under the United States and Texas Constitutions as well as certain state law torts. Dkt #1. The defendants filed motions to dismiss pursuant to rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. 15 and 16. In his reply, Plaintiff dropped his state law claims and his claims against Wilson and Bishop (Dkt. 18) and subsequently filed a Rule 41(a)(2) motion dismissing Wilson and Bishop (Dkt. 19). This Court granted Plaintiff’s Motion to Dismiss Wilson and Bishop and ordered Bishop and Wilson’s Motions to Dismiss were moot, noting

however “that Wilson’s motion to dismiss, (Dkt. 16), was also filed by Defendants Attorney General Ken Paxton and Comptroller Glenn Hegar, who remain parties to this case and may refile their motion to dismiss as appropriate.” Dkt. 20. The remaining State Defendants Paxton and Hegar now file this Amended Motion to Dismiss.

II. INTRODUCTION

Plaintiff is a beneficiary of the State of Texas Employee Retirement System (“ERS”). ERS manages benefits for State of Texas employees and retirees, including the ERS Retirement Trust Fund, which is defined benefit plan providing eligible retirees with a fixed standard annuity payment calculated via a formula that is independent of the overall value of the ERS trust fund. While employed by the State of Texas, Plaintiff contributed a percentage, determined by the Legislature, of his pre-tax monthly salary into his ERS retirement account. Although no longer a State employee, Plaintiff has voluntarily maintained his retirement account with ERS instead of rolling it over into another retirement plan.

Chapter 808 of the TEX. GOV’T. CODE, enacted by House Bill 89 in 2017, requires ERS to divest fund assets from companies that boycott Israel as long as such divestment can be accomplished without harming the value of fund. Plaintiff brought this lawsuit against the State Defendants alleging the divestment requirements of Chapter 808 violate his rights under the United States Constitution. He asks this Court to declare Chapter 808 of the Texas Government Code unconstitutional. Plaintiff’s claims should be dismissed on the following grounds:

- 1) Plaintiff’s claims are barred by sovereign immunity;
- 2) Plaintiff does not have standing to bring any claim asserted in this lawsuit; and
- 3) Plaintiff fails to state a claim for which relief can be granted.

III. STANDARD OF REVIEW

A. Rule 12(b)(1)

“A case is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional power to adjudicate the case.” *Home Builders Ass’n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). The party seeking to invoke jurisdiction bears the burden of demonstrating its existence. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). “[A] court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction.” *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009).

B. Rule 12(b)(6)

A complaint must be dismissed if the plaintiff fails to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6). To avoid dismissal, a plaintiff must plead sufficient facts to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* While the Court must accept all factual allegations as true, the Court “do[es] not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.” *Plotkin v. IP Axxess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005); *see also Iqbal*, 556 U.S. at 679.

In evaluating a motion to dismiss, a district court should employ a two-pronged approach. First, the court should identify and set aside “pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. Second, the court should assume the veracity of the plaintiff’s “well-pleaded factual allegations . . . and then determine whether they plausibly give rise to an entitlement for relief.” *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). If the factual allegations “do not permit the court to infer more than the mere possibility of misconduct,” then the complaint fails to show a plausible claim for relief. *Id.* (citing FED. R. CIV. P. 8(a)(2)).

The court should dismiss a complaint if the plaintiff has failed to “nudge[] [his] claims” of unlawful conduct “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. In other words, if the “well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” then the complaint fails to “show[] that the pleader is entitled to relief” under Rule 8(a)(2) and must be dismissed. *Iqbal*, 556 U.S. at 679. Likewise, a court should dismiss when, based on the plaintiff’s own allegations, he has no cognizable claims.

IV. ARGUMENT

A. Plaintiff’s Claims Against Comptroller Are Barred by Sovereign Immunity.

“[F]or over a century now, [the Supreme Court has] made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.” *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). Generally, state sovereign immunity precludes suits against state officials in their official capacities. *See City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). The important case of *Ex parte Young*, 209 U.S. 123 (1908), is an exception to that baseline rule, but it permits only “suits for prospective ... relief against state officials acting in violation of federal law.” *Texas Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (quoting *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, (2004)).

In order for the *Ex parte Young* exception permitting suits for prospective relief against state officials acting in violation of federal law to apply, state officials must have some connection to the state law’s enforcement to ensure that the suit is not effectively a suit against the state itself. *Texas Democratic Party v. Abbott*, 961 F.3d 389, 400–01 (5th Cir. 2020); *see also City of Austin v. Paxton*, 943 F.3d 993, 998 (holding that when “conducting [the] *Ex parte Young* analysis, [the court] first consider[s]

whether the plaintiff has named the proper defendant or defendants. Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [the] *Young* analysis ends.”). It is not enough that the official have a “*general* duty to see that the laws of the state are implemented.” *Id.* (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (emphasis added)). If the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent. *Id.* Moreover, a mere connection to a law’s enforcement is not sufficient—the state officials must have taken some step to enforce. *Id.* The Fifth Circuit has noted that:

One panel observed that ‘[e]nforcement typically involves compulsion or constraint.’ *K.P. v. LaBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). Another defined it as ‘a demonstrated willingness to exercise’ one’s enforcement duty. *Morris*, 739 F.3d at 746. But the bare minimum appears to be ‘some scintilla’ of affirmative action by the state official. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

Texas Democratic Party, 961 F.3d at 401.

The Fifth Circuit recently provided additional clarity regarding *Ex parte Young*’s requirement that a state official be tasked with enforcement of the allegedly unconstitutional law and the connection of that enforcement to the relief sought by the plaintiff. *See Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020). In *Mi Familia Vota*, the Court analyzed the secretary of state’s connection to the enforcement of the challenged voting provisions and concluded that “[d]irecting the Secretary not to enforce the electronic-voting-devices-only provision in section 43.007 would not afford the Plaintiffs the relief that they seek, and therefore, the Secretary of State ‘is not a proper defendant.’” *Id.*; *see also Texas Democratic Party v. Hughs*, 997 F.3d 288, 291 (5th Cir. May 7, 2021) (holding that the Secretary of State was not sufficiently connected to enforcement of early-voting law, thereby precluding suit against Secretary to enjoin its enforcement); *Langan v. Abbott*, No. 1:20-CV-275-RP, 2021 WL 466124, at *4 (W.D. Tex. Feb. 8, 2021) (holding that Plaintiffs’ claims against Attorney General Paxton were barred by Eleventh Amendment immunity because they did not demonstrate a

sufficient connection to the enforcement of the challenged statute).

Chapter 808 specifically includes an enforcement provision, which states “[t]he attorney general may bring any action necessary to enforce this chapter.” TEX. GOV’T CODE § 808.102. The Comptroller, on the other hand, is statutorily tasked with the following:

- preparing and maintaining a list of companies that boycott Israel (§ 808.051(a));
- providing that list to the state governmental entities (*id.*);
- updating the list (§ 808.051(b));
- filing the list with the legislature and the attorney general (§ 808.051(c));
- posting the list on a publicly available website (*id.*).

There is no other provision in Chapter 808 tasking the Comptroller with any responsibilities related to its enforcement nor does it task the Comptroller with identifying the companies on the list in which the state governmental entities invest. Chapter 808 does not create a connection between preparing/disseminating a list of companies and the enforcement of the divestiture.

Moreover, enjoining the Comptroller from its statutory tasks would not afford Plaintiff the relief he seeks, which is to “restore the relevant fiduciaries’ obligations to administer the funds in a way that expressly prioritizes maximizing financial outcomes, not political preferences.” Dkt. 17; *see Mi Familia Vota*, 977 F.3d at 468 (holding that “[a]lthough a court can enjoin state officials from enforcing statutes, such an injunction must be directed to those who have the authority to enforce those statutes).

There is no scintilla of affirmative action on the part of the Comptroller in enforcing Chapter 808 that would allow the *Ex parte Young* exception to apply to the Comptroller in this case. Therefore, the requisite connection to create an exception under *Ex parte Young* is absent and all claims brought against the Comptroller should be dismissed. *See Texas Democratic Party*, 961 F.3d at 401 (holding that if the official sued is not statutorily tasked with enforcing the challenged law, then the requisite

connection is absent).

B. Plaintiff lacks standing.

Jurisdiction is “a threshold issue that must be resolved before any federal court reaches the merits of the case before it.” *Perez v. U.S.*, 312 F.3d 191, 194 (5th Cir. 2002); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998). “[S]tanding is perhaps the most important of the jurisdictional doctrines.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (internal quotation omitted). It is not “to be placed in the hands of concerned bystanders,” as they may “use it simply as a vehicle for the vindication of value interests.” *Hollingsworth v. Perry*, 570 U.S. 693, 707, (2013). “The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013). “[S]tanding is not dispensed in gross”; a party must have standing to challenge each ‘particular inadequacy in government administration.’” *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357–58 & n. 6 (1996)); see also U.S. Const. art. III, § 2, cl. 1.

To establish standing, a plaintiff must show: (1) an actual or imminent, concrete and particularized “injury-in-fact”; (2) that is fairly traceable to the challenged action of the defendant (causation); and (3) that is likely to be redressed by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); see also *National Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 815 (2003) (holding that “[t]o have standing, a plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (holding that “the requirement of injury in fact is a hard floor of Article III jurisdiction”). All three elements are “an indispensable part of the plaintiff’s case,” and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). When a case is

at the pleading stage, as it is here, Plaintiff must “clearly . . . allege facts demonstrating” each element. *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

A plaintiff must also meet the following prudential requirements for standing developed by the Supreme Court. First, a “plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Id.* at 499; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). Second, a plaintiff must present a claim that is “more than a generalized grievance.” *City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007) (internal quotation marks omitted). Finally, the complaint must “fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’” *Valley Forge*, 454 U.S. at 475, (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

Because he has not alleged any injury in fact, this “hard floor” compels dismissal here. To the extent Plaintiff is attempting to bring claims on behalf of other similarly situated individuals or rest his standing on the legal rights or interests of third parties, those claims should be dismissed.¹

1) Plaintiff has no standing to bring claims predicated on an injury to his ERS benefits, because Chapter 808 has not caused, nor could it cause, any injury to such benefits.

Injury-in-fact is the most important element. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). An injury-in-fact is “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). The injury must be “particularized,” meaning it “must affect the plaintiff in a personal and individual way.” *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). Additionally, the injury must be “concrete,” meaning

¹ Throughout his Complaint, Plaintiff references “all other similarly situated individuals.” *See eg* ¶¶54, 65, 72, 75, 82, 85, 90, 96, 103, 108. A “plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

“it must actually exist.” *Id.* A plaintiff cannot “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.” *Id.* at 1549.

Plaintiff states that he “does not premise his claim on a past financial harm; rather, his injury is ongoing and coterminous with the existence and application of Section 808.” Dkt. 17 at pg 8. Neither in his Complaint nor in any other pleading before this Court does Plaintiff clearly articulate his alleged “injury.” He asserts that his “standing derives from his status as an individual whose financial interests face a current credible threat of injury, due to the promulgation of unlawful legislation motivated by political and not financial considerations.” *Id.* at 9.

Significantly, Plaintiff does not allege any facts to suggest that his retirement pay has changed or will change in any way as a result of the divestment. Unlike a traditional 401(k) or market-based investment plan where the performance of the fund directly impacts the ultimate retirement payout, ERS retirement payouts are determined by formulas that do not take investment success or the overall value of the fund into account.² Upon reaching eligibility, Plaintiff will receive a standard annuity from ERS for the rest of his life. The amount of his monthly payments will be calculated based on his average salary for a statutory period while employed by the state, his years of state service and a statutory multiplier. If there is money left in his account after his death, his beneficiary will receive the balance.³ It is also worth noting that while Plaintiff was required to contribute to his ERS account during his State employment, he is not required to maintain his ERS account following separation. As a former employee, Plaintiff has the option to (1) leave his funds at ERS, where they will continue to accrue 2% interest annually; (2) withdraw his entire account balance; (3) roll over his entire account balance to a qualifying account; or (4) a combination of a withdrawal and a rollover.⁴

Plaintiff also has not clearly alleged facts of any concrete injury he has suffered as a result of

² See <https://www.ers.texas.gov/Active-Employees/Retirement/Standard-Annuity>

³ *Id.*

⁴ <https://www.ers.texas.gov/Former-Employees/Retirement/Withdraw-Your-ERS-Retirement>

the divestment from DNB ASA, an investment that accounted for approximately .23% of the overall value of the plan.⁵ He has made no assertion that the ERS pension is worth less or his vested financial interest has been compromised or harmed as a result of the divestment. In fact, as a defined benefit plan in which the amount of his annuity payout is independent of the overall value of the fund, that is not an assertion he can make against ERS. He has not identified a specific or tangible loss nor has identified any past or future personal injury suffered by him *as a consequence* of the alleged constitutional error.

Plaintiff's generalized grievance is that "[b]ecause of the requirements of Texas Government Code 808, Plaintiff as well as all other similarly situated individuals, cannot rely on the assurance that investment decisions are being made based on the determinations regarding optimal financial outcomes." Dkt. 1 ¶43. Section 808 specifically states otherwise.

- (a) A state governmental entity may cease divesting from one or more listed companies only if clear and convincing evidence shows that:
 - (1) the state governmental entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed companies under this chapter; or
 - (2) an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed companies under this chapter.
- (b) A state governmental entity may cease divesting from a listed company as provided by this section only to the extent necessary to ensure that the state governmental entity does not suffer a loss in value or deviate from its benchmark as described by Subsection (a).

Tex. Govt. Code §808.056. The plain language of Chapter 808 is that protecting the overall value of the pension fund takes priority over divestment pursuant to the statute. Therefore, any concern that

⁵ Plaintiff alleges that ERS divested \$68 million from DNS ASA. Doc 1 at ¶ 15. Even if accurate, this accounts for only .23% of the \$29 billion of retirement trust assets ERS manages on behalf of state employees and retirees. See <https://ers.texas.gov/about-ers/ers-organization/who-we-serve>

divesting from DNB ASA or any other listed company would cause the pension fund to experience an overall loss, the governmental entity, including ERS, could cease divestment. In any event, a negative impact from divestment in DNB ASA or a future divestment from another listed company is purely hypothetical. Plaintiff has suffered literally ZERO financial harm as a result of ERS's divestment from DNB ASA nor has he pleaded any facts suggesting such harm and any future harm.

A concrete and particularized injury generally exists if the “plaintiff is himself an object of the action (or forgone action) at issue.” *Lujan*, 504 U.S. at 561–62. Here, Plaintiff is challenging a law that neither requires nor forbids any action by the plaintiff himself. He makes no claim that *his* speech or *his* or ability to boycott has been violated, deterred, or chilled. In fact, Plaintiff completely fails to mention his connection to, participation in, or even his personal beliefs related to the “BDS” movement,⁶ which arguably would be a factual cornerstone to a claim that he has been deprived of that right in any personal or individual way. Moreover, Plaintiff fails to articulate a connection between any violation of the First Amendment and the harm he claims to “his liberty interests in the disposition of his own property.” *See National Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. at 815.

Without any particularized and concrete harm, Plaintiff’s claims amount to no more than generalized grievances embodying his disagreement with state policy. In this case, Plaintiff’s “value preferences are not sufficiently particularized, but are general, public-interest grievances, and ‘[v]indicating the public interest . . . is the function of [the legislative and executive branches],’ not the judicial branch.” *Lujan*, 504 U.S. at 576. An objection to a policy does not rise to the level of an actual injury sufficient to confer Article III standing. Simply put, Plaintiff’s options and entitlements through ERS are completely unaffected by Chapter 808’s divestment requirement and ERS’s divestment from DNB ASA. To the extent that his claims are predicated on such an injury (which, at a minimum,

⁶ The BDS movement refers to boycotts, divestment, and sanctions in response to Israel’s occupation of Palestinian territory and its treatment of Palestinian citizens and refugees.

include his claims under Tex. Const., Art. I §§ 3, 3a, 7, 19; Tex. Const., Art. XVI § 67; breach of fiduciary duty; due process), he lacks standing to bring them.

a) Divestments pursuant to Chapter 808 do not injure Plaintiff's First Amendment speech rights.

The First Amendment generally protects individuals against government actions that chill or infringe their speech. But Plaintiff makes no claim in this lawsuit that *his* speech has been chilled or *his* or ability to boycott has been deterred as a result of Chapter 808 or ERS's divestment from DNB ASA. He asserts that Chapter 808 is viewpoint discrimination and has a chilling effect on the speech of "individuals and corporations to engage in the peaceful boycott" of Israel, including DNB ASA, but those are generalized claims and are neither personal nor individual. Dkt. 1 ¶46. Chapter 808's divestment requirement in no way inhibits, regulates, or affects Plaintiff's conduct or chosen speech. Nor does he plead that *he* was inhibited from any form of boycott or expression by Defendant's actions. Not only does he have no injury, but no conceivable First Amendment injury could possibly be traceable to Chapter 808 or the Defendant's compliance with it. He lacks standing to bring a First Amendment claim.

b) Plaintiff lacks standing to bring an Establishment Clause violation because he has not been personally harmed by any divestment decision pursuant to Chapter 808.

Similarly, Plaintiff alleges that Chapter 808 violates the First Amendment Establishment Clause based on comments by a legislator regarding Jews and Israel. Dkt. 1. at ¶¶ 61-62. But even if this were a viable claim, Plaintiff could not bring it because he has no personalized injury stemming from any alleged "religious preference." In an Establishment Clause case, plaintiffs must identify "a personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S.

464, 485 (1982); *see, e.g., Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007) (plaintiffs alleging injury stemming from religious invocations recited at public school must, at a minimum, have been exposed to the invocations in order to have been injured by them; mere abstract knowledge that invocation were said is insufficient to confer standing). Further, when plaintiffs challenging government action under the Establishment Clause “allege only economic injury to themselves” and “do not allege any infringement of their own religious freedoms,” they will have standing only if they may raise the constitutional claims of third parties. *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). In order to have standing based on the claims of third parties, the party asserting the right must demonstrate that he “has a ‘close’ relationship with the person who possesses the right,” and that “there is a ‘hindrance’ to the possessor’s ability to protect his own interests.” *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); *see also Singleton*, 428 U.S. at 115–16.

Here, Plaintiff does not allege any infringement on his religious beliefs nor does he have the type of “close relationship” that would allow him to vindicate such beliefs on behalf of another. Indeed, Plaintiff does not even identify his religion. More importantly, even if Plaintiff had bothered to plead a generalized offense to his religious beliefs, he still cannot show any manner in which he was personally affected by Chapter 808’s divestment provisions via his participation in ERS as he plays no role in making investment decisions in ERS nor are his entitlements affected by divestment under Chapter 808. The Supreme Court has decisively rejected standing based on “the abstract injury in nonobservance of the Constitution asserted by citizens.” *Valley Forge*, 454 U.S. at 482 (internal quotation omitted).

c) Chapter 808’s divestment provisions do not injure any due process right held by Plaintiff.

Plaintiff alleges procedural due process violations under the United States and Texas

Constitutions. However, he makes only conclusory allegations that he has some “property right” and a “liberty interest” implicated by Chapter 808 divestment. He fails to identify the nature of any property or liberty interest of which *he* is deprived by ERS’s decision to divest any particular asset. Plaintiff has no interest or right in how ERS manages retirement funds or in any particular investment decision. Such decisions are not his “property” nor is he at “liberty” to make them. Plaintiff has identified no law that gives an ERS beneficiary a right to any notice or hearing regarding individual divestment decisions by ERS. Additionally, as explained above, Plaintiff has not—and cannot—show he has suffered any loss in retirement benefits or that any divestment decision pursuant to Chapter 808 would or could affect these benefits. Moreover, the constitutional provisions establishing ERS (Tex. Const. Art. XVI § 67), together with ERS’s statutes and rules, form the trust document (Trust Document) that governs the rights of ERS members and annuitants. Under the terms of the Trust Document, Plaintiff has no property or liberty right to dictate how the ERS trust funds are invested or to countermand limitations the Texas legislature may place on such investments as authorized by the Texas Constitution. Consequently, Plaintiff has no rights to support standing or claims based on alleged deprivation of property or liberty rights without due process or due course of law. He simply has no due process injury and lacks standing to bring a due process claim under the U.S. or Texas Constitutions.

d) Plaintiff lacks standing to bring a violation of the dormant Commerce Clause.

Plaintiff has not alleged a single fact that *he* has suffered any financial injury. Plaintiff must first have Article III standing before he can assert any claim that may fall within the “zone of interests” protected by the dormant Commerce Clause. *See Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473-74 (5th Cir. 2013).

2) No Redressability.

Moreover, Plaintiff’s generalized grievances, none of which have resulted in any specific or

tangible loss to Plaintiff, would not be redressed by a favorable decision. Plaintiff seeks a declaratory judgment finding Chapter 808, a statute that does not affect his actual protected interests, unconstitutional and enjoining its future use. It difficult for Plaintiff to establish standing to challenge a government action if he isn't its direct object. See *Inclusive Cmty's. Project, Inc. v. Dep't of Treasury*, 946 F.3d 649, 655 (5th Cir. 2019). If the Court were to grant his requested relief, it would have no impact on or change the current status of Plaintiff's pension accounts nor would it confer on him a right to sue the Attorney General or the Comptroller the next time he objects to an investment decision. Plaintiff does not have the right to direct the investments of the pension plan. He has no liberty interests in the investment decisions of the pension plan. He has entrusted ERS and TCDRS to make investment decisions consistent with state law. In addition, a favorable decision would have no impact on any boycotting activities in which Plaintiff may be involved.

C. Plaintiff's Claims Should Be Dismissed Pursuant to FED. R. CIV. P. 12(b)(6).

1) First Amendment – Freedom of Speech

For the same reasons Plaintiff does not have standing to bring a claim under the First Amendment, he fails to plead facts that *his* First Amendment rights have been violated or that *he* has suffered any injury that could plausibly give rise to an entitlement to relief. Plaintiff has plead no factual allegations that his speech or his ability to boycott has been chilled or deterred, or that he has suffered any injury in terms of his personal conduct or any decreased value in his pension. These generalized grievances are conclusory and, therefore, are not entitled to the assumption of truth nor a determination as to whether they plausibly give rise to an entitlement for relief. See *Iqbal*, 556 U.S. at 679.

This case is easily distinguished from *Amawi v. Pflugerville ISD*, 373 F.Supp.3d. 717 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020). The *Amawi* plaintiffs, who were active participants in the BDS movement, challenged the constitutionality of the “no

contracts” portion of H.B. 89, codified at Tex. Gov. Code § 2270.001 et seq., alleging that they lost the benefit of public employment with the State of Texas, or feared losing such employment, because H.B. 89 prohibited them from exercising their First Amendment right to boycott the State of Israel if they contracted with the State to provide goods or services. *Id.* at 730. This Court held that the *Amani* plaintiffs’ boycotts were protected speech and that §2201.001 et seq. was viewpoint and content-based discrimination restricting the rights of companies attempting to contract with the State to provide goods or services. *Id.* at 747. Unlike the *Amani* plaintiffs, who were actively engaged in the BDS movement, Plaintiff has asserted no facts in this case that he participates in boycotts of Israel nor does he clearly state whose boycotting activity he is seeking to protect. In addition, § 2270.002, in its original form, directly restricted the *Amani* plaintiffs’ personal ability to contract with the State, which is a level of proximity not present in this case. Chapter 808 relates solely to the State’s *investing* priorities with third parties. Investment priorities do not restrict the speech rights of any ERS beneficiary.

Plaintiff has made no assertion that he is involved to any degree in boycotting Israel or the BDS movement. Regardless, even if Plaintiff does participate in boycotting Israel, Section 808 has zero impact or effect on his personal conduct, behavior or speech. Again, an objection to a policy does not give rise to an actual injury.

2) First Amendment – Establishment Clause

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). To determine whether legislation runs afoul of that command, the Court is guided by the three-part test for Establishment Clause claims set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* “Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate

the challenged law or practice.” *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010).

Plaintiff cites to *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1134 (D. Haw. 2017), for the proposition that statements made in the passing of legislation can reveal overtly religious intentions. However, *Hawai’i v. Trump* is easily distinguished from the case at hand. There are repeated examples throughout the court’s opinion of Mr. Trump referring to his executive order as a “Muslim ban” and a “shutdown of Muslims entering the United States.” As the court said, there was nothing veiled or secret about the Executive’s motive specific to the issuance of the Executive Order. *Id.* at 1137. This is a far cry from the Representative King’s reference to his own Christian faith and support for Israel. *See* Dkt. 1 ¶62.

In addition, an executive order requires the approval and signature of one person – the President of the United States, and therefore, the statements of the President would clearly indicate the intent of the executive order. Conversely, Section 808 was debated in and passed by both the Texas House of Representatives and Senate. While Plaintiff alleges that the sponsor of House Bill 89 made comments referencing his support for Israel as a matter of international and domestic politics, Plaintiff fails to set forth sufficient facts that religious preference or animus was part of the legislative process or considered by any other members when passing this bill. Moreover, Plaintiff has failed to articulate how an alleged inability to support the BDS movement gives preferential treatment to any particular religion. For the same reasons Plaintiff does not have standing to bring this claim, he fails to plead sufficient facts that he is part of a protected class and has suffered an injury in fact.

3) Federal and State Due Process Claims.

“[F]or a person to have a procedural due process claim that damages or other relief can remedy, he must have been denied life, liberty, or property protected by the Fourteenth Amendment.” *Wilson v. Birnberg*, 667 F.3d 591, 597 (5th Cir. 2012). Whether Plaintiff possessed such

a property interest is “determined by reference to state law,” *Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 252 (5th Cir. 1984), and must “stem from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings.” *Blackburn v. City of Marshall*, 42 F.3d 925, 936–37 (5th Cir. 1995). Here, Plaintiff has identified no protected interest under state law for which he would be entitled to due process nor does he have the right to direct the investments of the pension plan. It is the ERS board of trustees, as established in the Texas Constitution, who administers the system and invests the funds. *See* TEX CONST. § 67(a)(3). Plaintiff admits that it is the Board that has the authority to use its judgment to invest the funds of the system. Dkt. 1 ¶¶ 88-89. Plaintiff’s public comments (*Id.* ¶¶ 26, 29, and 40-41) do not confer on him authority to make investment decisions for ERS. His personal judgment does not control the statewide retirement system.

Moreover, there was no procedural or statutory requirement that any plan beneficiaries be given notice or an opportunity to be heard prior to the Board’s decision to reallocate funds. However, it is important to point out Plaintiff clearly states in his Complaint that he did have the opportunity to make public comments before the ERS Board. Dkt. 1 ¶26.

It is unclear how § 808.056(c) imposes an improper burden on Plaintiff. It states:

(c) Before a state governmental entity may cease divesting from a listed company under this section, the state governmental entity must provide a written report to the comptroller, the presiding officer of each house of the legislature, and the attorney general setting forth the reason and justification, supported by clear and convincing evidence, for deciding to cease divestment or to remain invested in a listed company.

(d) The state governmental entity shall update the report required by Subsection (c) semiannually, as applicable.

TEX. GOV’T CODE § 808.0056. This does not impose any burden on Plaintiff. It only establishes what ERS is required to include in their report and who receives that report.

4) Foreign Commerce Clause & Foreign Affairs

The Foreign Commerce Clause, or the dormant Commerce Clause, applies to commercial

activities with foreign nations and provides the federal government with broad powers to override state laws that conflict with the federal government's desire for a unified and consistent foreign commerce policy. It "is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *Dep't of Revenue v. Davis*, 553 U.S. 328, 337–38 (2008). The threshold question in any dormant Commerce Clause inquiry is whether there is an attempt to regulate commerce with foreign nations. As the Supreme Court explained in *Veazie v. Moor*, "Commerce with foreign nations [] must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial." *Veazie v. Moor*, 55 U.S. 568, 573 (1852). "[T]he dormant Commerce Clause 'protects the interstate market, not particular interstate firms.'" *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 727 (5th Cir.2004) (*quoting Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 98 S.Ct. 2207, 2215 (1978)) (stating that the fact that a regulation might cause truck purchasers to turn to other competing truck manufacturers did not burden interstate commerce). A state statute impermissibly discriminates "only when a [s]tate discriminates among similarly situated in-state and out-of-state interests." *Id.* at 725 (*quoting Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493, 500 (5th Cir. 2001)).

Chapter 808 does not attempt to, nor does it regulate commerce with foreign nations, and Plaintiff has plead no facts to the contrary. The divestment requirement of Chapter 808 does not distinguish between investments in foreign and domestic securities. Plaintiff has not alleged sufficient facts that Chapter 808 imposes an excessive burden, or even any burden, on interstate commerce. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004) (holding that an ordinance does not violate the dormant Commerce Clause when the burdens imposed on interstate commerce are no greater than those imposed on intrastate commerce). Furthermore, Plaintiff has failed to identify any federal law in conflict with Chapter 808 or how Chapter 808 imposes

restrictions on investments with foreign countries or encroaches on the federal government's authority to regulate foreign affairs.

V. CONCLUSION

For the reasons stated, the State Defendants respectfully request the Court dismiss Plaintiff's claims.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2021 a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Taylor Gifford

TAYLOR GIFFORD

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Haseeb Abdullah,
Plaintiff,

V.

CIVIL ACTION NO. 1:20-CV-01245-RP

Ken Paxton, in his Official Capacity as Attorney General for the State of Texas, Glenn Hegar, in his Official Capacity as Comptroller of Public Accounts for the State of Texas and Director of the Texas Treasury Safekeeping Trust Company,
Defendants.

ORDER GRANTING DEFENDANTS' AMENDED MOTION TO DISMISS

On this day, the Court considered Defendants Ken Paxton, Attorney General of Texas, Glenn Hegar, Comptroller of Public Accounts and Director of the Texas Treasury Safekeeping Trust Company, (collectively, “State Defendants”), Amended Motion to Dismiss Plaintiff’s Complaint.

After due consideration of the motion, the Court has found it meritorious. Therefore, the Amended Motion to Dismiss should be **GRANTED**.

It is therefore, **ORDERED** that all Plaintiff's claims against State Defendants are hereby **DISMISSED WITH PREJUDICE**.

SIGNED on this _____ day of _____, 2021.

HON. ROBERT PITMAN
UNITED STATES DISTRICT JUDGE