No. 22-50315

In the United States Court of Appeals
For the Fifth Circuit

HASEEB ABDULLAH,
Plaintiff-Appellant,

v.

KEN PAXTON; GLENN HEGAR,
Defendants-Appellees.

On Appeal from the United States
District Court for the Western District of Texas,
(Pitman, R.), Case No. 1:20-cv-01245-RP

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

(1) Pursuant to L.R. 28.2.1, the cause number and style number are as follows: *Haseeb Abdullah v. Ken Paxton, Glenn Hegar*, No. 22-50315 in the United States Court of Appeals for the Fifth Circuit.

(2) 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 the Court may evaluate possible disqualification or recusal:

1. **Plaintiff-Appellant:** Haseeb Abdullah
2. **Defendants-Appellees:** Ken Paxton; Glenn Hegar
3. **Counsel for Appellant:** Christina A. Jump; Alyssa F. Morrison, Constitutional Law Center for Muslims in America
4. **Counsel for Appellees:** Benjamin Mendelson; Lanora C. Petit, Office of the Texas Attorney General; Taylor Gifford, Office of the Attorney General

/s/ Christina A. Jump
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STATEMENT REGARDING ORAL ARGUMENT

Appellant Haseeb Abdullah requests oral argument on any issues from which the Court believes it would benefit. In particular, Appellant requests oral argument on the question of whether the District Court erred in dismissing his claim for lack of subject matter jurisdiction based on its determination that he did not satisfy the Article III standing requirements of injury-in-fact and redressability.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Circuit Court Cases

District Court Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

The District Court properly had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, because Appellant's claims arise under the Constitution and the laws of the United States. On March 25, 2022, the District Court dismissed the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), without prejudice. ROA.248-249; ROA.250. Appellant filed a timely notice of appeal on April 25, 2022, seeking review of the March 25, 2022 order. ROA.251-252. This appeal is from a final order that disposes of all parties' claims. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF ISSUES

1. Whether the District Court erred in dismissing Appellant's claims for lack of subject matter jurisdiction where it determined that he failed to sufficiently demonstrate injury-in-fact and redressability to establish standing for his claims under the Free Speech and Establishment clauses of the First Amendment and the Due Process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History

Appellant Haseeb Abdullah ("Appellant" or "Abdullah") filed his Original Complaint against Defendants Ken Paxton in his official capacity as Texas Attorney General, and Glenn Hegar in his official capacity as Texas Comptroller of Public Accounts, alleging in relevant part that Chapter 808 of the Texas Government Code ("Chapter 808") is unconstitutional, and that its promulgation adversely affects his own vested and ongoing interest in the management of his pension benefits. *See generally* ROA.7-25.[1] Chapter 808 prohibits Texas public retirement systems from investing in, and requires divestment from, companies designated by Appellee Comptroller as participating in an economic boycott of Israel. Appellant challenges Chapter 808 pursuant to the First Amendment's Free Speech and Establishment clauses and the Fourteenth Amendment's Due Process protections.[2]

Appellant filed his Original Complaint on December 23, 2020. *See generally* ROA.7-25. Appellees filed their Amended Motion to Dismiss on July 9, 2021, pursuant to Fed. R. Civ. P. 12(b)(1) and (6). ROA.154-173. Appellant responded on

[1] Appellant originally brought his Complaint against Amy Bishop in her official capacity as Executive Director of TCDRS and Porter Wilson in his official capacity as Executive Director of ERS, asserting several Texas state law claims, in addition to the claims brought against Defendants Paxton and Hegar. However, Appellant subsequently voluntarily moved to dismiss his claims against Defendants Wilson and Bishop. Accordingly, this brief refers to the amended motion to dismiss briefing, which addresses only the remaining parties and claims. *See* ROA.254-202.

[2] Appellant does not appeal his claims brought pursuant to the commerce clause or the federal government's exclusive power to regulate foreign affairs. *See* ROA.9-10.

July 23, 2021, and Appellees replied on July 28, 2021. Docs. 27, 28. The District Court then referred this case to Magistrate Judge Dustin Howell, pursuant to 28 U.S.C. § 636(b)(1) and Rule 4(b) of Appendix C to the Local Rules of the Dist. Ct.. On November 8, 2021, Magistrate Judge Howell issued a "Report and Recommendation" ("the Report") recommending dismissal of this case due to lack of subject matter jurisdiction. The Report determined that Appellant failed to establish standing, and that Appellee Hegar was entitled to state sovereign immunity. *See generally* ROA.209-229. On March 25, 2022, District Court Judge Robert Pitman adopted the Report's recommendation that Appellant lacks standing to bring his claim.[3] ROA.248-250. Judge Pitman's Order declined to reach the Report's discussion of Appellee Hegar's sovereign immunity. ROA.248. Appellant filed a timely notice of appeal on April 25, 2022. ROA.251-252. This appeal is from a final order that disposes of all parties' claims.

[3] Magistrate Judge Howell found Appellant failed to satisfy both the injury-in-fact and redressability elements of standing. Judge Pitman's Order, however, only specifically mentions injury-in-fact and does not clarify whether he additionally adopts the finding regarding redressability. ROA.248 (clarifying that "the Court overrules Abdullah's objections as to the report and recommendation's finding that Abdullah failed to demonstrate an injury-in-fact sufficient to establish standing"). However, Judge Pitman's Order did state that he adopts the Magistrate Judge's recommendation subject to the sole clarification that he does not reach the question of Defendant Hegar's immunity. Accordingly, Appellant proceeds with the understanding that Judge Pitman intended to adopt both the injury-in-fact and redressability analyses.

II. Appellant Abdullah's Allegations

Appellant Haseeb Abdullah worked as an attorney for the State of Texas from September 2008 until March 2018, during which time he made monthly contributions of a portion of his pre-tax salary to the State of Texas Employee Retirement System ("ERS"). ROA.9. The State requires that employees make this contribution, and the amounts of mandated employee contributions have risen in recent years in order to maintain the solvency of the ERS pension system. ROA.9. Although Appellant no longer works for the State of Texas, he remains an ERS member and ERS still maintains and oversees his pension benefits. ROA.9. Appellant now works for Travis County, which automatically deducts 7% of his gross salary from each pay period and deposits that into the Texas County and District Retirement Systems ("TCDRS," collectively with ERS, "the Retirement Systems"). ROA.12. Under this system, an employee becomes fully vested after eight years of service. *Id.*; *see also* TEX. CONST. ART. XVI, § 67(c)(1)(A) (requiring by law that the Texas legislature provide for the creation of a system of benefits for its employees and officers by a city or county).[4] Appellant and all other similarly situated Texas government employees rely on ERS and TCDRS to act in a fiduciary capacity and make sound financial decisions regarding the management and investment of the funds supporting their pension benefits.

[4] Appellant is now fully vested in both ERS and TCDRS.

Enacted in 2017, Chapter 808 of the Texas Government Code regulates how state retirement systems, including ERS and TCDRS, manage investments. Specifically, Chapter 808 prohibits the Retirement Systems from investing in, and requires divestment from, companies designated by the Comptroller as participating in BDS. BDS, which stands for "boycott, divestment, and sanctions," refers to the peaceful Palestinian-led movement to boycott Israel and Israeli-based products in protest of Israel's treatment of the Palestinian people. ROA.10. Provisions like Chapter 808 are broadly referred to as "anti-BDS laws." *Id.* Under Chapter 808's controlling provisions, the Comptroller prepares and maintains a list of companies considered by Texas to boycott Israel, as defined in Chapter. § 808.051. Once the Comptroller adds a company to this list, Chapter 808 requires the Retirement Systems to "sell, redeem, divest, or withdraw all publicly traded securities of the company." ROA.10 (quoting § 808.055). Chapter 808's divestment provisions require fiduciaries to examine factors unrelated to financial outcomes when making investment decisions on behalf of the relevant funds, with only minimal protection mechanisms in place. *See* § 808.056. Furthermore, Chapter 808 purports to expressly prohibit any private cause of action based on any "action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with" the Chapter. § 808.004. A facial constitutional

challenge to the lawfulness of the legislation therefore serves as Appellant's only avenue of redress.

Appellant brought suit challenging Chapter 808 as unconstitutional under the First Amendment's Free Speech and Establishment clauses, and the Fourteenth Amendment's Due Process clause. As a Texan with a concrete and vested interest in his retirement benefits, Appellant alleges that the actions mandated by Chapter 808, untethered to any financial considerations, place his interests at a material risk of ongoing and future harm. Without reaching the merits of whether Chapter 808 passes constitutional muster, the District Court dismissed Appellant's case for lack of standing, because it determined he failed to sufficiently demonstrate injury-in-fact and redressability. This appeal follows.

SUMMARY OF THE ARGUMENT

Chapter 808 of the Texas Government Code is an anti-BDS law designed to penalize companies that the State of Texas believes engage in a form of peaceful protest colloquially referred to as BDS. Although Chapter 808 controls certain economic decisions, its promulgation serves purely political purposes. As a result, Chapter 808 harms the financial interests of Appellant and all other similarly situated individuals. As noted above, "BDS" refers to the boycott of Israel and Israeli businesses and products, in protest of human rights abuses and systemic inequity perpetrated against the Palestinian people. BDS is a common form of protest engaged in by both individuals and many major companies, including Air Canada and Ben and Jerry's.[5] The BDS movement does not focus on the Israeli people or the Jewish faith; rather, its purpose is to put pressure on the Israeli government to treat the Palestinian people with equal freedom and dignity.[6] The very act of

[5] BDS is not a fringe movement; several large companies currently participate in the BDS campaign. These include Ben and Jerry's Homemade, Inc. and its parent company, Unilever. *See Companies that Boycott Israel in Violation of State Laws by State* (2021), JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/companies-that-boycott-israel-in-violation-of-state-laws-by-state; *see also Texas Comptroller Glenn Hegar: Ben & Jerry's and its Parent Company Added to Texas List of Companies that Boycott Israel*, TEX. COMPTROLLER OF PUB. ACCOUNTS (Sept. 23, 2021), https://comptroller.texas.gov/about/media-center/news/20210923-texas-comptroller-glenn-hegar-ben-and-jerrys-and-its-parent-company-added-to-texas-list-of-companies-that-boycott-israel-1632327961380. Similarly, Air Canada also supports the BDS campaign. *Companies that Boycott Israel*.

[6] *See FAQ's Section 1: Understanding BDS,* bdsmovement.net, https://bdsmovement.net/faqs#collapse16241 (last visited Aug. 8, 2022) (explaining that "[a]nchored in the Universal Declaration of Human Rights, the BDS movement, led by the Palestinian BDS National Committee, is inclusive and categorically opposes as a matter of principle all forms of racism, including Islamophobia and anti-semitism" and that "BDS

boycotting in itself constitutes a peaceful tool widely used by activists in the U.S. and around the world.[7] And, many states enacted anti-BDS laws designed explicitly to suppress boycotts representing a particular political viewpoint and type of political expression. Texas is one of those states. Litigants in courts around the country question the constitutionality of these laws, as applied to each litigant's own interests; Appellant does so now.[8]

The law at issue in this case, Chapter 808, requires fiduciaries in charge of managing Texans' retirement funds to place factors wholly unrelated to financial benefit above all else. As noted *supra*, under Chapter 808 the Comptroller creates and maintains a list of companies that the State perceives as engaging in BDS activity, and the Retirement Systems must then refrain from investing in, or must divest from, all listed companies. ROA.10. This legislation is unconstitutional under the First Amendment's Establishment and Free Speech clauses, and the Fourteenth

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Campaigns target the Israeli state because of its responsibility for serious violations of international law[,]" but the "BDS movement does not boycott or campaign against any individual or group simply because they are Israeli."

[7] *U.S.: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUMAN RIGHTS WATCH (April 23, 2019), https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses.

[8] *See, e.g., Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 743-45 (W.D. Tex. 2019) (holding that boycotts against Israel are inherently expressive conduct and protected speech); *see also Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz 2018), vacated and remanded, 789 F. App'x 589 (9th Cir. 2020) (enjoining the state from enforcing the certification requirement for public contracts regarding boycotting Israel under the statute as it was written at the time of initiation of litigation); *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018) (discussing whether a Kansas anti-BDS law was overinclusive where it also banned political boycotts, which are a permissible form of political speech).

Amendment's Due Process clause. Appellant's pension benefits are administered by ERS and TCDRS; he relies on those Retirement Systems to make sound investment decisions based not on political pursuits, but on financial outcomes. Chapter 808's unconstitutional requirements place that reliance in jeopardy and pose an ongoing risk of harm to Appellant's retirement benefits. The District Court stopped short of assessing the merits of Appellant's claim and dismissed this case on the threshold question of subject matter jurisdiction. Specifically, the District Court held that Appellant failed to establish injury-in-fact and redressability sufficient to support Article III standing. The District Court erred. And, it imposed an improperly high burden on Appellant at the early pleadings stage. The following briefing only addresses the issue of standing, consistent with the scope of the District Court's ruling.

Appellant's interest in his retirement benefits is not abstract; it is both concrete and current. But the District Court held that because Appellant does not allege a specific dollar amount of harm to his pension fund, he cannot assert an injury-in-fact. ROA.218 ("Defendants argue that Abdullah has not and cannot show that … divestment as regulated by the statute has or will cause him financial harm[;] the undersigned agrees"). That holding fails to properly apprehend Appellant's harm: he does not claim harm to a specific asset of the fund, or that his benefits have—at present at least—been diminished by a particular amount. Instead, he alleges that the

use of unconstitutional legislation subjects him to the ongoing harm of his benefits being managed with factors unrelated to financial health put first, which presents a credible threat of future harm to those benefits. Under applicable law, this suffices to create a legally actionable injury-in-fact at the pleading stage.

The District Court further erred in concluding that Appellant's allegations under the First Amendment's Establishment and Free Speech clauses are not sufficiently particularized to him. The District Court held that Appellant failed to allege that the challenged law has a chilling effect on his own speech. Further, it characterized his Establishment clause claim as a generalized grievance about state policy. Appellant makes clear, however, that he does not base his standing in his own ability to speak; rather, he pleads that the chilling effect of Chapter 808 results in harm to his financial interests. Furthermore, he does not allege an abstract objection to anti-BDS legislation, and in fact he does not express his own personal opinion on the subject at all. Instead, he alleges an interest in his own financial benefits, arguing that the unconstitutionality of Chapter 808 places his financial interests at risk. The District Court additionally erred in its conclusion that Appellant lacks standing to bring a due process claim because he cannot show a property right in the "management of the ERS" or a loss of benefits. Finally, the District Court erred when it concluded that Appellant's claims are not capable of redress by a favorable decision. An accurate reading of the harm alleged shows how declaratory

and injunctive relief finding Chapter 808 unlawful would provide the precise relief Appellant requests and directly ameliorate Appellant's harm.

ARGUMENT

I. Applicable Legal Standards

A. *De Novo* Review

This Court reviews grants of dismissal under Fed. R. Civ. P. 12 (b)(1) and (6) *de novo*. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011) (reviewing district court's dismissal for failure to state a claim *de novo*); *see also Wooten v. Roach*, 964 F.3d 395, 402 (5th Cir. 2020) (explaining that the court "review[s] questions of jurisdiction *de novo*"). Courts review factual findings for clear error. *See United States v. Hernandez-Mandujano*, 721 F.3d 345, 348 (5th Cir. 2013) (explaining that factual findings are reviewed for clear error).

B. Fed. R. Civ. P. 12(b)(1)

Under Rule 12(b)(1), "it is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain v. Real Est. Bd. of New Orleans*, 444 U.S. 232, 246 (1979) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). To evaluate subject matter jurisdiction, courts "accept all factual allegations in the plaintiff's complaint as true," even if disputed. *Den Norske Stats Oljeselskap A.S. v. HeereMac V.O.F.*, 241 F.3d 420, 424 (5th Cir. 2001); *see also Galindo v.*

City of Del Rio, No. DR-20-CV-20-AM/CW, 2021 U.S. Dist. LEXIS 126766, at *6-7 (W.D. Tex. Mar. 26, 2021) (explaining that where a party makes a facial attack on the sufficiency of the allegations, "arguing that a complaint fails to allege facts upon which subject matter jurisdiction may be based," the court must assume the truthfulness of the facts alleged). On a jurisdictional challenge, dismissal is only appropriate if the court is satisfied that the plaintiff "cannot prove a plausible set of facts" justifying the court's exercise of jurisdiction over his claim. *See Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). Jurisdiction serves as a threshold question that must be settled before reaching the merits of any given claim.

II. Appellant's Allegations Satisfy Injury-in-Fact and Sufficiently Establish Standing

Article III of the Constitution requires any party seeking to invoke the jurisdiction of federal courts to demonstrate an "actual case or controversy." *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). Encompassed in the Article III standing inquiry are three primary considerations: (1) the plaintiff must demonstrate that he has suffered an injury that is both concrete and particularized and actual or imminent (injury-in-fact); (2) the alleged injury must be fairly traceable to the challenged conduct (causation); and (3) the injury must be capable of redress by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC) Inc.*, 528 U.S. 167, 180-81 (2000). Plaintiffs must demonstrate standing for each particular injury. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Courts liberally construe

a plaintiff's injury and "general factual allegations of injury resulting from the defendant's conduct may suffice." *La. State Conf. of the NAACP v. Louisiana*, No. 19-479-JWD-SDJ, 2020 U.S. Dist. LEXIS 246999, at *59-60 (M.D. La. June 26, 2020). This principle holds particularly true at the pleadings stage, where litigants do not yet have the benefit of discovery. Courts must therefore "presume that general allegations embrace those specific facts that are necessary to support the claim." *Id*.

Although liberally construed, a plaintiff's allegations must demonstrate that the injuries alleged are real and not merely hypothetical, and they must show "more than a generalized grievance" about a law they simply don't like. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). A plaintiff himself must be an injured party. In the present matter, the District Court dismissed Appellant's claims on two separate standing grounds, without reaching the merits of his constitutional claims. First, the District Court erroneously held that Appellant failed to allege a cognizable injury-in-fact stemming from the application of Chapter 808 to his own retirement benefits, and noted that any theoretical injury lacked particularization. Second, the District Court viewed Appellant's injuries as not capable of redress by a favorable decision. *See generally* ROA.209-229. For the reasons set forth below, both conclusions were in error.

A. Appellant Sets Forth a Cognizable Injury-In-Fact

Appellant asserts that the divestment requirements of Chapter 808 render it unconstitutional under both the First and Fourteenth Amendments to the U.S. Constitution. The application of Chapter 808 to his retirement benefits creates both an ongoing harm and a real risk of future harm. In analyzing Appellant's standing, however, the District Court adopted Appellees' version of his claims, believing that "[Appellant] has not and cannot show that prior or future divestment as regulated by the statute has or will cause him financial harm." ROA.218. This conclusion is in error. And, this analysis imposes an improperly high burden on the Appellant at this early stage in litigation. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (explaining that a complaint should not be dismissed at the pleadings stage unless it appears "beyond doubt" that no set of facts can be proven that would entitle the plaintiff to relief on the claims asserted). On a motion to dismiss, courts must determine "whether a claim has been stated, not proved." *Phoenix v. Lafourche Par. Gov't,* No. 19-1004, 2020 U.S. Dist. LEXIS 105685, at *27 (E.D. La. June 17, 2020). Appellant carries his burden here.

Where a claimant alleges a realistic risk of ongoing and/or future harm, he establishes standing. The Declaratory Judgment Act expressly permits this kind of standing analysis, recognizing that litigants demonstrate standing by showing actual present harm or a possibility of future harm, "even though the injury-in-fact has not

yet been completed." *Bauer v. Texas,* 341 F.3d 352, 357 (5th Cir. 2003) (internal citations omitted); *see also Full Serv. Sys. Corp. v. Innovative Hosp. Sys.,* No. 1:08CV103-LG-RHW, 2010 U.S. Dist. LEXIS 90258, at *1 (S.D. Miss. Aug. 30, 2010) (explaining that the requirement under the Declaratory Judgment Act is "identical to the case and controversy requirement under Article III"); *Comsat Corp. v. FCC,* 250 F.3d 931, 936 (5th Cir. 2001) (explaining that a threatened injury satisfies the injury in fact requirement of Article III, as long as the threat is real). Although no precise test exists to evaluate how imminent a future injury for standing purposes, a "truly uncertain potentiality" may deprive a litigant of standing, but a "decent probability [of injury] will confer it." *Planned Parenthood Gulf Coast Inc.,* v. *Kliebert,* 141 F. Supp. 3d 604, 631 (M.D. La. 2015). Even where a plaintiff has not yet suffered concrete injury, he need only "allege facts from which the continuation of the dispute may be reasonably inferred[,]" as long as the controversy is not "conjectural, hypothetical, or contingent." *Bauer,* 341 F.3d at 358-59. Appellant does so here.

His Complaint asserts the following: (1) he has vested financial benefits that are presently managed by ERS and TCDRS; (2) ERS and TCDRS are subject to the relevant provisions of Chapter 808; (3) Chapter 808 requires unconstitutional considerations unrelated to financial interests, as specified in his Complaint; (4) decisions adverse to the financial health of the funds have already been made, and

the Retirement Systems are presently struggling with solvency; and (5) having his retirement benefits administered through an unconstitutional scheme, rather than with the exclusive aim of financial optimization subjects him to ongoing harm to his benefits and creates an appreciable risk of future harm to the same. ROA.9-11.

As explained in the record, Appellant does not ground his harm in past divestment from any particular asset; rather, he premises his claim on "the ongoing and future injury which runs coterminous with the continued application of unconstitutional legislation" to his benefits. ROA.238. Appellant's Complaint provides as an example ERS' decision to divest from DNB ASA, a valuable entity, solely because of its participation in BDS. ROA.9-10. Although just one example, Appellant includes it in his Complaint to illustrate how the harm created by Chapter 808 is actual, and not merely abstract or hypothetical. Appellant provides further examples of testimony from the Chief Investment Official of ERS. When questioned about Chapter 808, the CIO stated that it is always a cause for concern when the flexibility of being able to invest in free markets is constrained, and that it is "a negative" to narrow the "investment environment that [ERS] has to work with in finding good companies that [ERS] can invest in at a reasonable price" in order to benefit the trust. ROA.11. Furthermore, ERS already faces questions about future

insolvency.[9] To affirm dismissal of Appellant's claims, this Court must satisfy itself that he can prove no set of facts ultimately entitling him to relief. Here, where no dispute exists that Chapter 808 applies to Appellant's benefits, and he alleges harm based on the administration of those benefits pursuant to Chapter 808's non-economic considerations, dismissal is premature. *See Keys v. Wolfe,* 709 F.2d 413, 417 (5th Cir. 1983) (explaining that dismissal is only proper if the court is satisfied that the claimant can prove no set of facts entitling him to relief). Appellant alleges what is necessary and available to him at this stage of litigation. This holds true even without a precise dollar amount reduction to his benefits – standing at the pleadings stage does not require that level of specificity. Where he credibly alleges harm likely to occur as a result of the challenged policy, this Court should either resolve inferences about the degree of that harm in his favor or defer that analysis until after initial discovery. And because Appellant alleges a cognizable claim, he need not wait to suffer irreparable harm. *See, e.g., Pac. Gas. & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983) (explaining the principle that "one does not have to await the consummation of threatened injury to obtain preventative relief").

[9] *Texas Employee Retirement System (ERS) Solvency Analysis*, REASON FOUNDATION (April 5, 2021), https://reason.org/solvency-analysis/texas-ers/ (explaining the ongoing solvency issues faced by ERS, in part because of underperforming investments).

The District Court held that Section 808.056 of Chapter 808 ameliorates any potential harm to Appellant's financial interests. Section 808.056 sets forth the conditions that must be satisfied before a State entity can cease divesting from a listed company. At first glance, Section 808.056 appears to provide a safeguard against any damaging effects of Chapter 808. A closer look reveals that it does not.

The Magistrate Judge's Report concludes that Chapter 808 "explicitly" protects the value of the pension fund, and prioritizes this protection over divestment; the quoted language from the statute is less protectionist than the Report represents. ROA.218. First, Section 808.056, by its plain language, only addresses divestment, not initial investment, and therefore does nothing to ensure sound initial investment decisions. Second, Section 808.056 creates a high burden before a Retirement System may seek permission to cease divesting in a particular asset. In relevant part, that divestment "may" be ceased "only if clear and convincing evidence" shows that the "state governmental entity has suffered or will suffer a loss" in the value of "all assets." *Id*. (quoting TEX. GOVT. CODE § 808.056) (emphasis added). Even then, divestment from a listed company may occur "only to the extent necessary." *Id*. Upon this showing, cessation may only occur after the state governmental entity clears the added high hurdle of providing "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." § 808.056. Then, the recipients still need to agree. Furthermore, the statute uses the permissive "may," rather than the mandatory "shall," and therefore creates the option for action by the government officials but no requirement for action.

At most, Section 808.056 creates only discretionary redress preceded by burdensome evidentiary and procedural steps. No language in the statute requires that divestment give way to financial concerns. This construction neither commands nor favors financial protection over divestment. Instead, the statute sets divestment as the default, with financial outcomes secondary. A hypothetical opposite statutory mandate that divestment may occur only upon a showing of clear and convincing evidence would be more indicative of financial priorities over political ones. But that is not how the Texas legislature chose to write the law. A discretionary provision creating no concrete guarantees of action cannot, by definition, remedy the possibility of harm.

The District Court's conclusion that Appellant could avoid any potential harm by withdrawing his funds and rolling them over into a different fund greatly oversimplifies the facts. ROA.217. That conjecture ignores two key facts: first, Appellant continues to actively contribute through his current employer, so even the Report's erroneous assumption does not address the entirety of his interests. Second,

while well beyond the appropriate pleading analysis applicable at this stage, the Report's assumption that Appellant simply "could have withdrawn his funds" ignores the complicated realities of potentially doing so. *See, e.g., What happens to my benefits*?, ers.texas.gov, https://ers.texas.gov/contact-ers/additional-resources/faqs/What-happens-to-my-benefits (last visited Aug. 9, 2022) (explaining that "if you withdraw your retirement contributions, you cancel your membership and future retirement benefit with ERS. If you return to state employment, you will be considered a new employee with no ERS service credit. You can have some or all of your withdrawn account paid directly to you or rolled over to a qualified retirement plan. You won't be able to withdraw the full amount -20% will be withheld to pre-pay federal income tax"). Appellant should not need to choose between incurring heavy penalties for withdrawing his funds or leaving them where they are administered pursuant to an unconstitutional law.

Finally, the District Court erred in concluding that Appellant did not establish standing for his due process claim. In order to allege an injury under the Fourteenth Amendment's Due Process clause, a plaintiff must show (1) a property interest protected by the Amendment; and (2) that the loss of that interest amounts to a deprivation of due process. *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). The District Court found that Plaintiff failed to identify a property interest because he "does not point to a statute providing him with a property right in the

management of the ERS." ROA.225. However, a property interest need not be prescribed by statute in order to give rise to a due process claim. Rather, for "a person to have a property interest within the ambit of the Fourteenth Amendment, he 'must have more than an abstract need or desire for it[;]' … [h]e must, instead, have a legitimate claim of entitlement to it." *Blackburn*, 42 F.3d at 936 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Property interests in the context of due process claims stem from a variety of sources, including "independent sources such as state statutes, local ordinances, existing rules, contractual provisions or mutually explicit understandings" *Id*. The "hallmark of property" is "an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 430 (1982). Appellant's property interests in his retirement funds arise from a State of Texas created program, with mandatory Texas public employee participation. ROA.9. He does not claim that due process protections attach to any particular asset administered by the program or any one divestment decision, but to his own pension benefits. Appellant challenges whether Chapter 808 passes constitutional muster under the Fourteenth Amendment, as applied to this benefits. ROA.18 ("Under the Fifth Amendment's Due Process clause, Plaintiff is entitled to a right to be heard, and a meaningful opportunity to respond, regarding . . . harm to . . . the property of his investments[;] Plaintiff has been afforded no such opportunity prior to the deprivation of his property interests

that has occurred, and continues to occur, as a result of Section 808's requirements that those administering such interests unconstitutionally discriminate against certain companies, in contravention of their fiduciary duty to make decisions that optimize Plaintiff's financial outcomes"). Outside of the present lawsuit, Appellant has no viable process for redress.[10]

B. Appellant Pleads Sufficiently Particularized Harm

The District Court concluded that Appellant's allegations of injury lack particularization. Specifically, the District Court faulted Appellant for failing to show a specific harm to his pension benefits or articulate how his *own* speech was chilled or suppressed. ROA.221-225. Of course, any litigant seeking to invoke federal jurisdiction must satisfy all aspects of the standing inquiry; the District Court's analysis, however, urges a narrow reading of the harm alleged in Appellant's Complaint and the law applicable to his suggested standing framework. That reading is neither accurate nor appropriate at this stage.

[10] As noted above, Section 808.004 deprives would-be litigants of any private cause of action. *See* § 808.004 (directing that "[a] person, including a member, retiree, or beneficiary of a retirement system to which this chapter applies, an association, a research firm, a company, or any other person may not sue or pursue a private cause of action against the state, a state governmental entity, a current or former employee, a member of the governing body, or any other officer of a state governmental entity, or a contractor of a state governmental entity, for any claim or cause of action, including breach of fiduciary duty, or for violation of any constitutional, statutory, or regulatory requirement in connection with any action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with this chapter").

An injury is sufficiently particularized under Article III "when it affects the plaintiff in a personal and individual way." *Vaughaun v. Lewisville Indep. Sch. Dist.,* 475 F. Supp. 3d 589, 593 (E.D. Tex. 2020). To satisfy this "test, Plaintiffs … must allege more than an injury to *someone's* concrete, cognizable interest; they must be [themselves] among the injured." *McMahon v. Fenves,* 946 F.3d 266, 271 (5th Cir. 2020) (internal quotations omitted). And a mere "generalized grievance" at the existence of a particular law or policy, absent a connection with the litigant's personal interests is insufficient. *Valley Forge Christian Coll.,* 454 U.S. at 475. The District Court found this language from *Valley Forge* persuasive, adopting the Appellees' argument that "Abdullah's claims are no more than generalized grievances about state policy[,]" particularly as applied to his First Amendment challenges. ROA.221.

The District Court's reliance on *Valley Forge,* for its conclusion that Appellant's allegations constitute no more than a generalized grievance, is misplaced. In *Valley Forge,* the plaintiffs challenged the conveyance of a piece of government-owned property to a nonprofit "operating under the supervision of a religious order." *Id.* at 466. Those plaintiffs, a nonprofit organization dedicated to the separation of church and state, brought suit alleging that this conveyance violated the Establishment clause, because it benefited a particular religious group. *Id*. In analyzing standing, the *Valley Forge* court reasoned that the only "injury alleged by

[plaintiffs]…is the deprivation of the fair and constitutional use of [their] tax dollar." *Id.* at 476. In other words, the plaintiffs grounded their claim in so-called taxpayer standing. When the *Valley Forge* plaintiffs brought suit, however, well-settled law already established that "the expenditure of public funds in an allegedly unconstitutional manner it not an injury sufficient to confer standing[,]" even where the plaintiff is a taxpayer. *Id.* at 477-78; *see also Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952) (dismissing for lack of standing a lawsuit brought by taxpayers claiming that a New Jersey law permitting the reading of biblical passages in the classroom violated the Establishment clause). A ruling otherwise grants every American taxpayer standing to challenge any action or project that involves the use of tax funds. Unlike the claimants in *Valley Forge,* Appellant here is not a mere bystander to a law with which he has disagreement—Appellant has a direct and personal interest at stake. The challenged law affects his own pension benefits and the solvency of the funds that ensure those benefits remain stable. As noted above, the stability of that fund and the ways in which Chapter 808 contributes to instability are both real and established risks to Appellant's contributions.

Appellant alleges that Chapter 808 constitutes impermissible viewpoint discrimination unconstitutionally favoring one religion over another. ROA.14-16. The District Court did not discuss the merits of these arguments, because it held that he had failed to articulate a particularized injury. Specifically, the District Court

concluded that Appellant "has not pled that his individual speech has been chilled or his ability to boycott has been impacted by Chapter 808[;]" or shown that he is personally harmed by the divestment. ROA.222, 224 (citing ROA.165 for the idea that in Establishment clause cases, the plaintiff must allege more than the psychological consequence produced by the observation of conduct with which one disagrees). The District Court correctly held that Appellant does not premise his claim on his *own* ability to speak. Instead, he pleads harm by the application of unconstitutional legislation to his concrete financial interests. Although Appellant's specific application of the standing doctrine is unique, that is because the factual context in which his claims arise are unique. The legal framework that he sets forth, however, is well-established: a litigant has First Amendment standing where he can demonstrate an injury stemming from the unconstitutionality of the challenged law, even though his own ability to speak is not at issue.

The requirement that a plaintiff assert only his own legal rights and interests "is relaxed in the First Amendment context because 'when there is a danger of chilling free speech, … society's interest in having the statute challenged' may outweigh the prudential considerations that normally counsel against third-party standing." *Mothershed v. Justs. of the Sup. Ct.*, 410 F.3d 602, 610 (9th Cir. 2005) (citing *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)). On that basis, federal courts routinely permit suits where the plaintiffs' *own* constitutional

free speech rights may not be directly inhibited, but rather they suffer an injury due to the promulgation of unconstitutional legislation. Where a plaintiff relies on this so-called "overbreadth standing," his standing "has nothing to do with whether not [his] own First Amendment rights are at stake[,]" but instead turns upon whether the plaintiff "satisfies the requirement of 'injury-in-fact,' and whether [he] can be expected satisfactorily to frame the issues in the case." *Id.* at 958; *see also Ass'n of Immig. Att'ys v. INS.,* 675 F. Supp. 781, 785 (S.D.N.Y. 1987) (stating that "[w]here First Amendment rights are at stake, prudential considerations require an even further relaxation of standing requirements[;] in that situation a challenge may be permitted by one whose own First Amendment rights may not be at risk because the existence of the statute may chill the rights of free expression of persons not before the court") (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973)). For example, in *Forty-Second Street Co. v. Koch,* a business owner opposed the condemnation of his property on the grounds that the urban renewal project had the purpose and effect of discriminating against minorities. 613 F.Supp. 1416, 1418 (S.D.N.Y. 1985). That court found the plaintiff had standing even though his own rights under the First Amendment and the were not directly harmed. The court reasoned that "although plaintiffs generally lack standing to assert the rights of third parties … this case falls squarely within a firmly established exception: 'vendors and those in like positions have been uniformly permitted to resist efforts at restricting

their operations by acting as advocates for the rights of third parties'" when they can establish an injury-in-fact. *Id.* at 1422 (quoting *Craig v. Boren,* 429 U.S. 190, 195 (1976)). Similarly, the court in *Clark v. City of Lakewood* held that "financial loss is a sufficient injury in fact" where the impact derives from an unlawful ordinance, even though the plaintiff's own speech was not limited. 259 F.3d 996, 1001 (9th Cir. 2001). The *Clark* court explained that, in the context of First Amendment cases, prudential considerations weigh in favor of jurisdiction "so long as the plaintiff also suffers an injury in fact." *Id.* at 1010. As discussed above, Appellant satisfies this requirement.

Although frequently arising in the context of business owners or vendors whose financial interests are implicated by the challenged law, no bright line rule exists limiting standing for overbreadth challenges to only those situations. In *Mothershed,* the Ninth Circuit found standing where the plaintiff "though not alleging any First Amendment harm to himself—has incurred a financial injury." *Mothershed,* 410 F.3d at 610. There, an attorney alleged that the Arizona Supreme Court Rules on *pro hac vice* admission requirements for out-of-state attorneys violated the First Amendment rights of Arizonans. *Id.* at 605. That court held that the plaintiff demonstrated standing because "though not alleging any First Amendment harm to himself—he has incurred financial injury." *Id.* at 611. Again, Appellant here recognizes the factual differences between his case and the cases set

forth above; the cited cases, however, stand for the principle that where a plaintiff can show injury to his financial interests, courts apply a relaxed standard in their standing inquiry. When "there is a danger of chilling free speech, the concern that constitutional adjudication be avoided … may be outweighed by society's interest in having the statute challenged." *Sec'y of Md.*, 467 U.S. at 956. The District Court itself implicitly acknowledged the potential applicability of the overbreadth doctrine to Appellant, explaining that in the present context, "the overbreadth doctrine is inapplicable, as Abdullah, unlike the litigants in the cases he cites, cannot establish he has suffered a financial harm[;] [t]herefore, [he] lacks standing." ROA.224. However, as discussed above, the District Court erred in concluding that Appellant failed to show an injury-in-fact. And here, where application of an unconstitutional law to his actual financial interests causes ongoing damage coupled with a credible threat of future harm, Appellant sufficiently demonstrates a particularized injury.[11]

[11] The Report further posits that Appellant's harm is not sufficiently particularized because "a participant in a defined benefit pension plan has an interest in his fixed future payments only, not the assets of the pension fund." ROA.222. (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999)). The Report erroneously relies on *Hughes Aircraft Co*. for support for its particularization argument. First, the holding in *Hughes Aircraft Co*. did not turn on standing, and does not address the issue of particularized harm. Additionally, rather than undermining Appellant's claim, the language and analysis in *Hughes Aircraft Co*. actually supports Appellant's standing argument. After outlining the differences between an ERISA defined contribution plan and an ERISA defined benefit plan, the *Hughes* court held that "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool[;]" [i]nstead, members have a right to" their "accrued benefits." *Hughes Aircraft Co*., 525 U.S. at 439-40. Appellant here relies only on his interest in his own contributions, consistent with the language contained in *Hughes.*

III. Appellant Sufficiently Demonstrates Redressability by a Favorable Decision

Finally, the District Court erred in concluding that a favorable decision cannot redress the harm Appellant pleads.[12] Even if this Court disagrees that Appellant's allegations satisfy the injury-in-fact requirements, it should assume without deciding that Appellant establishes all other standing elements before conducting a separate redressability analysis. *See Inclusive Cmtys. Project Inc. v. Dep't of Treas.*, 946 F.3d 649, 656, n.9 (5th Cir. 2019) (explaining that because "the standing test is conjunctive, [the court] assume[s], without deciding, that [plaintiff] has satisfied Article III's injury-in-fact requirement"); *see also Williams v. Parker*, 843 F.3d 617, 621 (5th Cir. 2016) (explaining the conjunctive nature of the standing inquiry).

The Report presumed that a favorable ruling could not redress Appellant's injury because "a Declaratory Judgment that Section 808 is unconstitutional and enjoinment of its use would have no effect on Abdullah's financial interests or his ultimate annuity payments." ROA.227. This erroneous conclusion reflects an inaccurate reading of Appellant's harm. Appellant does not allege that he presently suffers a precise dollar amount reduction to his payments, a fact on which the District Court relied for its injury-in-fact analysis. His requested relief does not include

[12] As stated above, although Judge Pitman's Order adopting the Magistrate Judge's Report only expressly adopts the injury-in-fact analysis, Appellant presumes for the sake of this appeal that he intended to also adopt the redressability finding.

monetary damages in an amount purportedly already suffered, and he does not seek any related compensatory damages – the District Court is correct that those types of injuries would not be redressable at this stage. Appellant's Complaint instead specifies that the heart of his injury derives from Chapter 808's application of unconstitutional factors to his financial interests, which creates a very real risk of future harm. ROA.14-16, 20, 22-23. Appellant challenges the overall harm created by the facial unconstitutionality of the challenged legislation, not one specific dollar amount tied to any one past divestment or failure to invest.

Initially, the Report properly describes this alleged harm: "Abdullah asserts that his injury arises solely from the promulgation of unconstitutional and unlawful legislation that creates the real and existing possibility of harm to his financial interests." ROA.227 (internal quotations omitted). But it then sidesteps that accurately tailored analysis and concludes that redressability does not exist because at this time, his financial interest would remain unchanged in dollar amount. *Id.* In other words, the Report correctly identifies the injury alleged, and then makes a redressability determination based on an incorrect reading of that harm. Although a currently demonstrable reduction in Appellant's annuity payments might bolster standing, Appellant need not identify this to satisfy the requested relief. Instead, Appellant alleges that Chapter 808 is unconstitutional and that it creates an ongoing harm and credible risk of future harm. A declaratory ruling against the named

Defendants finding this legislation unlawful and enjoining its continued use would plainly redress the harm Appellant alleges. The facial unconstitutionality of this Texas law is "without question, fairly traceable to and redressable by the State itself" and the authority in charge of promulgating and enforcing that legislation. *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017). This holds particularly true where the challenged law creates no private right of action as here, leaving a suit against the State seeking to constrain the actions of the proper and only defendants as the sole available redress Appellant has. *Id.* (comparing redressability in the context of a challenge to a voting law, that created no private right of action, to the redressability analysis in *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) where redressability did not exist because private actors, not the state, enforced the challenged legislation). Appellant named the proper Defendants and clearly articulates his harm as well as the relief he seeks to redress that harm. The District Court erred in concluding that Appellant failed to satisfy the applicable redressability requirements.

CONCLUSION

For the reasons set forth herein, Appellant Haseeb Abdullah respectfully requests that this Court reverse the decision of the District Court and find that Appellant has standing to proceed on the merits of his claims.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by CM/ECF delivery on August 11, 2022 on all counsel or parties of record on the service list.

/s/ Christina A. Jump

Christina A. Jump

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 7,581 words, as determined by the word-count function of Microsoft Word, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and 5th Cir. R. 32.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) and 5th Cir. R. 32.1 because it has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Roman-style font, 12-point for footnotes.

/s/ Christina A. Jump

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