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

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

Appellant Haseeb Abdullah ("Abdullah" or "Appellant") brought the present lawsuit challenging the constitutionality of Chapter 808 of the Texas Gov't Code ("Chapter 808") and its application to his vested interest in the ongoing management of his pension benefits. *See generally* ROA.7-25. Chapter 808 requires Texas public retirement systems to refrain from investing in, and/or divest from, companies that Texas designates as participating in BDS. BDS stands for "boycott, divestment, and sanctions," and represents a peaceful economic boycott of Israel's occupation of Palestine.

Abdullah originally brought his Complaint against four defendants: Amy Bishop, in her official capacity as Executive Director of TCDRS; Porter Wilson, in his official capacity as Executive Director of ERS; Glenn Hegar, in his official capacity as the Texas Comptroller of Public Accounts; and Ken Paxton, in his official capacity as Attorney General of the State of Texas. *Id.* Appellant brought only Texas state law claims against former Defendants Bishop and Wilson, appended at the district court to the federal claims against Defendants/Appellees Hegar and Paxton. *Id.* at 18-22. Following Defendant's First Motion to Dismiss, Abdullah voluntarily dismissed Defendants Bishop and Wilson, based on applicable Eleventh Amendment immunity. ROA.138. He affirmed in his pleading that he no longer intends to pursue claims against those Defendants. ROA.110. The district court

dismissed those Defendants. ROA.141-42. The district court then referred this matter to a Magistrate Judge, who issued a Report & Recommendation ("R&R") recommending dismissal. ROA.209-29. As discussed in greater detail in Appellant's Opening Brief ("Appellant Br."), the district court partially adopted the Magistrate Judge's view and dismissed Appellant's case for want of Article III standing. ROA.248-29.[1]

Appellees assert dismissal was proper on three separate grounds:

First, Appellees assert this Court lacks appellate jurisdiction. Their analysis ignores important distinctions in the case law cited, and asks this Court to deny Abdullah the opportunity to cure any errors the Court may perceive.

Second, Appellees argue that sovereign immunity shields them from liability. Under relevant Fifth Circuit law, it does not. The district court judge expressly declined to determine Appellee Hegar's immunity, despite Appellees raising that argument. And, Appellees wholly failed to raise a sovereign immunity argument to the district court regarding Appellee Paxton.

Third, Appellees urge that Abdullah lacks Article III standing. As discussed herein and throughout Appellant's Opening Brief, this position contradicts

[1] Because the district court largely adopted the conclusions of the Magistrate Judge's R&R, Abdullah functionally briefed his opposition to the district court's ruling at the district court level, in response to the R&R. Accordingly, the arguments there parallel those Abdullah now raises on appeal. Abdullah therefore remains mindful of tailoring this Reply to respond only to new arguments raised in Appellees' response, to avoid a third iteration of reappearing legal positions.

established law. Abdullah addresses each of these arguments in turn, tailoring this Brief to only new arguments contained in Appellees' Response.

ARGUMENT

I. The District Court Issued a Final and Immediately Appealable Order

Appellees dispute this Court's jurisdiction to hear this appeal. Appellees' Response ("Resp.") at 21-24. Specifically, Appellees argue that Abdullah fell into a "finality trap" by failing to "sever or permanently forgo" his claims against former defendants Bishop and Wilson. This argument misses the mark. *Id.*

As this Court knows, courts of appeals may only review "final decisions" of the district courts. *See* 28 U.S.C. § 1291. Relying on *Williams v. Seidenbach,* Appellees assert that this matter contains no final decision from which to appeal. 958 F.3d 341, 349 (5th Cir. 2020) (*en banc*). Appellees cite *Williams* as support that "there is no final decision if a plaintiff voluntarily dismisses a defendant without prejudice, because the plaintiff is entitled to bring a later suit on the same cause of action" and can be "no final decision as to one defendant, until there is a final decision as to all." Resp. at 21 (quoting *Williams,* 958 F.3d at 343). Therefore, Appellees argue, when a plaintiff "voluntarily dismisses some [defendants] without prejudice, and litigates against the others to conclusion," no final appealable order exists. *Id.* at 21-22 (quoting *Williams,* 958 F.3d at 343).

Appellees do not dispute that the district court *intended* to issue a final order within the meaning of the law. Nor do they dispute that Abdullah timely filed his appeal through the proper channels. Instead, Appellees argue that because Abdullah voluntarily dismissed Defendants Bishop and Porter and did not subsequently amend his Complaint to remove them or seek a partial final judgment under Fed. R. Civ. P. 54(b), the district court's order is not final under *Williams* for the purposes of this appeal. Or, to quote Judge Willett's concurrence in *Williams*: Appellees take the tenuous position that the case can be "over yet not final– or, more specifically, not final enough for purposes of appeal yet too final for district court alteration." *Williams*, 958 F.3d at 355. But *Williams* itself did not reach the express question of whether a final order is appealable in these circumstances; because of its factual distinctions from Appellant's case, this Court need not do so here.[2]

[2] The *en banc Williams* court did not actually reach the precise question of whether these circumstances create an appealable final order. *Williams,* 958 F.3d at 349 (explaining that because the Plaintiffs had properly exercised one method of preserving their right to appeal, the court "need not answer certain questions that have been raised in this *en banc* proceeding" and providing as an example that "some have argued that voluntary dismissal of a defendant or claim without prejudice is a final decision and thus does not deprive this court of appellate jurisdiction—and that we should thus revisit *Ryan. See Williams v. Seidenbach*, 935 F.3d 358, 361-62 (5th Cir. 2019) (Haynes, J., concurring)[, and] [o]thers have responded that a voluntary dismissal without prejudice is not a "final decision" because the dismissal decides nothing—the plaintiff can re-file—and at a minimum, *stare decisis* commands respect for that understanding of finality because it is not demonstrably erroneous").

Appellees represent that this case lacks finality because two defendants were dismissed without prejudice. The logic underpinning this argument presumes that a district court's order cannot be final if the voluntarily dismissed defendants could theoretically be haled back into litigation at any time on the same cause of action. Resp. at 21-22. But Appellees overlook that here, unlike in *Williams*, Appellant brought only state law claims against the voluntarily dismissed Defendants Bishop and Williams. The district court only had jurisdiction over those claims originally because they attached to the federal law claims against Appellees. Neither party disputes that Judge Pitman's Order disposed of all federal claims in this matter. Abdullah therefore could not, even if he tried, successfully re-file his claims against Defendants Bishop and Wilson in the district court. No federal claims remain, and the state law claims would instantly fail. The problem that Appellees purport dooms this appeal is simply not present here. Furthermore, Appellant disclaimed his intent to pursue any further litigation against Defendants Wilson and Bishop before the district court, recognizing they "arise under state law" and therefore implicate state sovereign immunity. ROA.110; *see also Williams,* 958 F.3d at 355 (Willett, J., concurring) (suggesting that, to untangle the "muddled" precedent that leaves parties mired in litigation limbo, parties could simply "bindingly disclaim[] their right to reassert any dismissed-without-prejudice claims").

Appellant's decision to dismiss Defendants Bishop and Wilson resulted from evaluating Eleventh Amendment state sovereign immunity. Although often operating like an affirmative defense, state sovereign immunity is jurisdictional in nature. *See Union Pac. R.R. v. La. PSC,* 662 F.3d 336, 340 (5th Cir. 2011) (explaining that state sovereign immunity "is unique because it acts as an affirmative defense, while also containing traits more akin to a limitation on subject-matter jurisdiction"); *see also Cozzo v. Tangipahoa Parish Council-President Gov't,* 279 F.3d 273, 280 (5th Cir. 2002) (noting that Eleventh Amendment immunity operates like a jurisdictional bar, depriving federal courts of jurisdiction over suits against a state). The concurrence in *Williams* and other federal case law conclude that jurisdictional bars functionally differ from other voluntary dismissals. Where a case is dismissed, voluntarily or otherwise, "for lack of subject matter jurisdiction, the plaintiff cannot refile that claim unless it first cures the jurisdictional defect." *Williams,* 958 F.3d at 353-354. So, although Abdullah "is not totally precluded from bringing a second suit, he must, nevertheless, prove his case preliminarily to the district court before being allowed the right to relitigate." *Id.* A dismissal "without prejudice" on its face may still "involve[] prejudice in the legal sense." *Id.* (quoting *LeCompte v. Mr. Chip, Inc.,* 528 F.2d 601, 604 (5th Cir. 1976)); *see also Nunez v. Ind. Dep't of Child Servs.,* 817 F.3d 1042, 1043-44 (7th Cir. 2016) (explaining that although dismissal "without prejudice" "would ordinarily pose a problem for …

appellate jurisdiction[,]" "dismissal based on Eleventh Amendment immunity was not based on a defect that could have been cured by amending the complaint[,]" meaning "the dismissal without prejudice was final in practical terms and amounted to an appealable final judgment").

And, even if *Williams* did apply to the facts here, this Court could simply send Abdullah back to the district court with instructions to amend his complaint or request a partial final order under Fed. R. Civ. P. 54(b). *See Williams,* 958 F.3d at 344 (explaining that, after dismissal of the Williamses' appeal for want of appellate jurisdiction, Plaintiffs "sought and obtained partial final judgment under Rule 54(b) … and appealed again"). But this procedural maneuvering, while permissible, does not promote judicial economy. Here, Abdullah made clear that he has no intention to pursue his prior claims against Defendants Bishop and Wilson; even if he intended to, he cannot bring them back into federal court without the federal claims against Appellees Paxton and Hegar. The "finality trap" described in *Williams* does not apply to the facts here. In the alternative, if this Court determines it lacks appellate jurisdiction, Abdullah respectfully requests remand and leave to cure that defect.

II. Appellees are Not Entitled to Sovereign Immunity

Appellees argued before the district court, as they do here, that Appellee Hegar does not satisfy the *Ex Parte Young* exception to sovereign immunity. 209 U.S. 123 (1908). Although Judge Pitman adopted the Magistrate Judge's R&R on standing,

he did not adopt its determination on sovereign immunity. Instead, he expressly declined to reach that question. ROA.248-49. On appeal, Appellees revive their argument that sovereign immunity shields Appellee Hegar from suit. They now also argue, for the first time, that Appellee Paxton is similarly entitled to sovereign immunity, despite being explicitly named by position in the enforcement provision of Chapter 808. Although "this court has held that an argument of Eleventh Amendment immunity may be made at any time, even on appeal," this Court should "decline to exercise [its] discretion" to decide this question. *Bryant v. Tex. Dep't of Aging & Disability Servs.,* 781 F.3d 764, 771 (5th Cir. 2015). There is no need. The district court's R&R set forth a full analysis of Appellee Hegar's purported sovereign immunity; Judge Pitman could have simply adopted this reasoning or modified it, as he did as to standing. But he declined to do so. At a minimum, this indicates that even with the benefit of the Magistrate Judge's analysis, the question remains open. As applied to Appellee Paxton, neither the district court nor Abdullah himself had the benefit of briefing or argument on this issue. Factually complex questions regarding sovereign immunity are better reserved for the district court, and this Court should remand to permit resolution there.

A. Sovereign Immunity Does Not Attach to the Comptroller

Appellees resurrect their previous argument that Appellee Hegar possesses immunity from this suit because he lacks the requisite connection to enforcement of Chapter 808. This argument remains as incorrect now as it was at the district court.

Eleventh Amendment state sovereign immunity generally bars suits against a state or individual acting as an agent of the state. However, *Ex Parte Young* carved out an exception for circumstances where a litigant brings suit for prospective relief against a state official who violated federal law. 209 U.S. 123 (1908). To fall within the *Young* exception, defendants must have some connection to the enforcement and administration of the challenged law. *See Morris v. Livingston,* 739 F.3d 740, 742 (5th Cir. 2014) (explaining the proper defendant must have some connection to the challenged law). While this Court has yet to "outline[] a clear test for when a state official is sufficiently connected to the enforcement of a state law so as to be a proper defendant under *Ex Parte Young*" (*Tex. Democratic Party v. Hughs,* 997 F.3d 288, 291 (5th Cir. 2021)), this Court does require "some scintilla of affirmative action by the state official" exist as to the specific law challenged. A mere generalized duty to enforce the laws does not suffice. *Id.* at 401.

Appellees' argument that sovereign immunity attaches to the Comptroller because "the divestment statute gives primary responsibility to the individual retirement systems to divest securities" misses the mark. Resp. at 26. Although the

individual retirement systems perform the administrative day-to-day work of investing and divesting, they do so while acting to enforce the legislature's statutory mandate. *See* Tex. Gov't Code § 808.053(d). Absent this mandate, divestment on BDS grounds would not be a factor. Although the retirement funds apply Chapter 808 in their investment decisions, they do so only within the parameters set forth by the legislature, with no authority to alter those terms. Promulgation, application and enforcement of Chapter 808 fall to both the Comptroller and the Attorney General. *See generally* Chapter 808.

Appellees again rely on *City of Austin v. Paxton* for the proposition that "[w]here a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [the Court's] *Young* analysis ends." Resp. at 15 (quoting 943 F.3d 993, 998 (5th Cir. 2019)). But as Abdullah explained below, Appellees mischaracterize this application.[3] Although *City of Austin* does support the concept that an official named in a statute is a proper *Young* defendant, it also recognizes that "the challenged law need not actually state the official's duty to enforce it." *City of Austin,* 943 F.3d at 998. This explicit statement makes the duty even more clear. *Id.* Although somewhat muddled, the "correct interpretation of *Young* concludes that no … special charge need be found directly

[3] Appellees also entirely undercut their own upcoming argument that the Attorney General is entitled to sovereign immunity, as he is directly named under the "enforcement" section of Chapter 808. Resp. at 25. Appellant addresses that argument *infra*.

in the challenged statute" as "long as there [are] sufficient indicia of the defendant's enforcement powers found elsewhere in the laws of the state." *Okpalobi v. Foster,* 244 F.3d 405, 418-19 (5th Cir. 2001). In addition to the Comptroller's specific duties enumerated within Chapter 808, his role as Comptroller inherently includes enforcing the State's financial obligations. Appellee Hegar is charged with effectively acting as the chief financial officer over the state government and its related programs.[4] The very structure of Texas state governance creates his authority over financial matters like Chapter 808.

Appellee Hegar's connection to Chapter 808 exceeds this general duty to oversee financial matters in Texas; it is directly woven into the text of the statute. Chapter 808 specifically tasks the Comptroller with creating and promulgating the list of companies from which to divest for engaging in BDS activity, removing those companies from that list if they cease BDS participation, and assessing whether a state entity should cease divestment from any company on the list. Specifically, Section 808.051 provides that "[t]he comptroller shall prepare and maintain and provide to each state governmental entity, a list of all companies that boycott Israel[;]" "(b) the comptroller shall update the list annually or more often as the comptroller considers necessary ... [;]" and "(c) the comptroller shall file the list with

[4] *So what does a Comptroller do, anyway?* COMPTROLLER.TEXAS.GOV (Oct. 2016), https://comptroller.texas.gov/economy/fiscal-notes/2016/october/comptroller.php.

the presiding officer of each house of the legislature and the Attorney General and post the list on a publicly available website." TEX GOV. CODE § 808.051. This provision tasks the Comptroller with creating, maintaining and publishing the list of companies that boycott Israel, which triggers the investment/divestment decisions giving rise to this suit. Under Section 808.053(c), if a listed "company ceases boycotting Israel, the comptroller shall remove the company from the list." Removing a company from that list lifts any restrictions on investing in it. These actions easily qualify as enforcing, administering and maintaining the provisions of Chapter 808, regardless of whether the enforcement section specifically names his role. Appellees' arguments minimize the Comptroller's role in administering Chapter 808.[5] Yet the Comptroller's own public statements demonstrate his decision-making authority. In response to Unilever's statement "affirming its support for Israel[,]" the Comptroller announced that his "office will carefully review the details of the new arrangement before coming to a final decision on

[5] The degree of control exercised by the Secretary of State in *Mi Familia Vota v. Abbott* does not compare to the Comptroller's enumerated duties under Chapter 808; Appellees' reliance on that case is unpersuasive. 977 F.3d 461 (5th Cir. 2020). In *Mi Familia Vota,* this Court reasoned that the Secretary of State was protected by sovereign immunity, because although the Secretary possessed authority to provide standards for certifying electronic voting devices that were eligible for the Texas's Countywide Polling Place Program, he had no authority to force counties to print and use only paper ballots. *Id.* at 468. Even if the Court ordered those plaintiffs' requested relief, the local officials could simply decide "whether to incur the expense of" paper ballots or instead use the electronic devices they already had in place. *Id.* Here, in contrast, if this Court grants Abdullah's request for declaratory and injunctive relief, the Comptroller is precisely the individual tasked with determining which companies to place on the list and remove from the list. The funds cannot list and de-list companies of their own accord.

removing Unilever or Ben & Jerry's from our list of companies that boycott Israel."[6] The Comptroller publicly applauded Airbnb for its apparent support of Israel, promising his office would act accordingly. Appellee Hegar's public statement explained how his "office made the decision to add Airbnb to Texas' list of companies that boycott Israel" based on information available at that time, and that Airbnb's change in position spurred the office of the Comptroller to "carefully review the details of this decision before removing Airbnb from [its] anti-Israel list."[7] The Comptroller thereby recognized and asserted his authority over Chapter 808.

Appellees claim that "even if the court were to order the Comptroller to cease updating the divestment list, ERS and TCDRS would still have to divest from companies *already* listed." Resp. at 30 (emphasis in original). This is not accurate. Chapter 808 explicitly tasks the Comptroller with removing companies from the list, and updating and publishing it. Appellee Hegar's office exercises its authority pursuant to Chapter 808 to consider and determine which companies should be

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[6] *Texas Comptroller Glenn Hegar's Statement on Unilever's Israel Decision,* COMPTROLLER.TEXAS.GOV (June 30, 2022), https://comptroller.texas.gov/about/media-center/news/20220630-texas-comptroller-glenn-hegars-statement-on-unilevers-israel-decision-1656600197116.

[7] *Statement from Texas Comptroller Glenn Hegar on Airbnb Announcement Regarding Israeli Listings in the West Bank,* COMPTROLLER.TEXAS.GOV (April 9, 2019) https://comptroller.texas.gov/about/media-center/news/20190409-statement-from-texas-comptroller-glenn-hegar-on-airbnb-announcement-regarding-israeli-listings-in-the-west-bank-1554829200000. While Appellee Hegar used the "anti-Israel lot" language, BDS protests policies of a government and not Israel itself.

placed on the list as well as when they should be removed. That he works in tandem with other entities and agents does not negate these functions, nor does it render him an improper *Young* Defendant.

B. Sovereign Immunity Does Not Attach to the Attorney General

Appellees next argue, for the first time in this matter, that Attorney General Ken Paxton is entitled to sovereign immunity. This is both erroneous and inconsistent with Appellees' own arguments. With respect to the Comptroller, Appellees repeatedly quote the language from *Young* that "where a state actor or agency is statutorily tasked with enforcing the challenged law… [the Court's] *Young* analysis ends." *City of Austin,* 943 F.3d at 998; Resp. at 25, 26 and 30. Indeed, Chapter 808's "Enforcement" section states that the "attorney general may bring any action necessary to enforce this chapter." § 808.102. In other words, he is the official charged with enforcing compliance with Chapter 808 in Texas. The R&R tipped its hand at this same conclusion, noting in its discussion of sovereign immunity that the "Texas Attorney General is specifically named as the enforcer of Chapter 808 in the statute." Doc. 32 at 7 (citing *City of Austin,* 943 F.3d at 998).

Appellees' attempt to sidestep this self-defeating argument lacks merit. They argue Appellee Paxton is not a proper *Young* defendant, despite being named in the statute, because he cannot "constrain" Abdullah from doing anything. Resp. at 20. This argument misinterprets *Young's* requirements. While accurate that *Young*

requires a connection to the enforcement of the law, *Young* does not require the defendant to directly constrain the litigant himself from doing something. Rather, the defendant must have a connection to enforcement of the law creating the specified harm. The legislature tasked Appellee Paxton with precisely that duty. And, as Abdullah has repeatedly articulated, he alleges no injury to his own ability to speak. He instead challenges Chapter 808 as unconstitutional, which therefore jeopardizes his financial interests. Appellee Paxton's enforcement of the challenged legislation causes the exact injury Appellant identifies.

Appellees also argue that Chapter 808's use of the permissive "may" relieves Appellee Paxton of any legal duty. But the case Appellees rely on for this proposition is wholly distinguishable. *See Richardson v. Hughs,* 978 F.3d 220, 242 (5th Cir. 2020). Although *Richardson* did discuss sovereign immunity, its analysis of the word "may" did not occur in the context of an agent's enforcement power. In *Richardson*, the state agent in question had discretionary authority under certain legislation, and the district court issued an order directing the agent to exercise that discretion in a specific way. The Fifth Circuit found that because the agent was vested with discretionary authority, the district court could not dictate how the agent applied that discretion. *Id.* at 227. Here, by contrast, Abdullah does not ask this Court to direct the Attorney General to enforce Chapter 808 against specific entities or in a specific manner. He instead asks for a declaration that the law is unconstitutional

on its face. Furthermore, under Appellees' urged view, there could never be any proper federal defendant. Appellees' Brief argues vigorously that neither an agent named in the statute nor an un-named agent can be proper defendants. Appellees ask this Court to upset the precedent on which Appellees' own brief relies in their arguments on behalf of the Comptroller, and render Chapter 808 judicially untouchable. This Court should not acquiesce to do so.[8]

III. Abdullah Possesses Article III Standing to Bring this Suit

Appellant's remaining claims arise under the Free Speech Clause and the Establishment Clause of the First Amendment, and the Due Process Clause of the Fourteenth Amendment. The district court dismissed these claims for want of Article III standing. Appellees argue this Court should affirm that dismissal. Resp. at 37-47.

In order to possess Article III standing, a litigant must establish (1) an injury in fact that is both concrete and particularized and actual or imminent; (2) that this injury is fairly traceable to the challenged conduct; and (3) that the injury is capable of redress by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC) Inc.,* 528 U.S. 167, 180-81 (2000). Where "the injury-in-fact has not yet been completed[,]" litigants possess standing if they show actual present harm

[8] In *Amawi v. Pflugerville Indep. Sch. Dist.,* 373 F. Supp. 3d 717 (W.D. Tex. 2019) (overturned on other grounds), the plaintiffs challenged a similar anti-BDS law. Although the case was ultimately rendered moot when the Texas legislature amended the challenged law, the provision regarding enforcement of that law was identical to the one in Chapter 808. The Attorney General was the named defendant, and the case proceeded without dismissing him on sovereign immunity grounds. The same result applies here.

or possible of future harm. *See Comsat Corp. v. FCC,* 250 F.3d 931, 936 (5th Cir. 2001) (recognizing that "a threatened injury satisfies the injury in fact requirement so long as that threat is real"). Appellees argue Appellant's harm merely constitutes speculation, insufficient to support injury-in-fact, and is neither fairly traceable to Appellees' actions nor capable of redress by this Court. Abdullah already addressed these arguments twice before the district court and once before this Court. *See generally* Appellant Br. To avoid a fourth round on those arguments, Abdullah limits his Reply to new arguments raised in Appellees' Response. Abdullah addresses each of these arguments below.

A. Abdullah Adequately Pleads a Cognizable Injury-in-Fact

Appellees first argue that Appellant's allegations fail to articulate a cognizable injury-in-fact. Resp. at 22. Although the Response breaks this argument into several discrete subparts, the crux of Appellees' position rests on the idea that any harm caused by Chapter 808 remains too speculative to grant Article III standing. This argument fails. Particularly at the Rule 12 stage, where courts draw all reasonable inferences in favor of the non-moving party, courts do not dismiss complaints 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." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). As Appellees acknowledge, "at the pleadings stage, plausible allegations—'of a certainly impending harm or a substantial risk of harm'" suffice. Resp. at 32

(quoting *Shrimpers & Fishermen of RGV v. Tex. Comm. on Env't. Quality,* 968 F.3d 419, 424 (5th Cir. 2020) (internal quotations omitted)).

Appellees correctly note that Abdullah does not claim harm to his *own* ability to speak, nor does he assert ownership over any specific asset of the relevant funds. Resp. at 33. Throughout this suit, Appellant remains clear and consistent: Chapter 808 is facially unconstitutional under both the First Amendment and the Fourteenth Amendment. Because of Chapter 808's unconstitutional mandates, Appellees wrongly consider factors other than financial benefit in the administration of Appellant's pension benefits, jeopardizing his vested interest in those benefits. This harm remains ongoing, running coterminous with Chapter 808. Abdullah also pleads a credible future injury: when he does retire, he will rely at least in part on his accrued pension benefits. Appellees characterize Appellant's harm as speculative for four separate reasons, addressed *infra.*

1. Appellant's defined-benefit plan does not ameliorate any risk of future harm

Appellant's retirement plans with ERS and TCRS are structured as defined-benefit plans, meaning that he will receive a predetermined level of benefits. Because of this structure, Appellees argue that "the payments do not fluctuate with the value of the plan," and therefore "even if investing in [listed] companies … would make ERS more money, it would not benefit Abdullah because" plan members cannot claim a right to "any particular asset that composes a part of the

plan's general asset pool" and have only a right to a certain defined level of benefits. Resp. at 35 (quoting *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 440 (1999)). Appellees' circular reasoning fails. Abdullah does not claim any right to a particular asset in the general asset pool; he does, however, claim a right to the health of his own defined level of benefits.

Nor does Abdullah allege that he would receive greater benefits, should investing in listed companies provide that result; he alleges that Chapter 808's promulgation poses a risk to the health of the entire fund. As Appellees correctly noted below, Abdullah will lose money if the plan fails; he will lose his retirement benefits. And, as the Supreme Court recognized and Appellees also note, a risk that the plan itself may be harmed enough to impact an individual's benefit constitutes a credible threat of harm. *Thole v. U.S Bank N.A.,* 140 S. Ct. 1615, 1621 (2020). As pled in his Complaint, relevant individuals expressed credible concern about tying the health of the funds' investment decisions to the non-financial factors mandated by Chapter 808. And the fiscal solvency of the fund recently got called into question. ROA.10-11. Parsing out the degree of harm is a question better suited for discovery, not summary dismissal at the pleadings stage.

2. Chapter 808's exceptions for fiduciary duties recommend insufficient actions

Appellees next argue that Chapter 808 ameliorates any risk of harm to the funds. Chapter 808 includes language acknowledging that a retirement system "is

not subject to a requirement of this chapter if the [system] determines that the requirement would be inconsistent with its fiduciary responsibility." Tex. Gov't Code § 808.005. It also purports to allow retirement systems to cease divestment or invest if failure to do so would harm the entire fund. *Id.* at §§ 808.056-057. However, to use Appellant's own logic, statutes authorizing the relevant individual or agency to take an action with permissive "may" language confer no legal duty of the contemplated action. Resp. at 31-32 (citing *Richardson,* 978 F.3d at 243). This language provides no guaranteed protection to plan-holders. The retirement systems and those in charge of administering them may continue to divest, regardless of the financial outcome, if they choose. An optional safeguard like this provides no safeguard at all.

3. Abdullah need not allege precise harm created by specific divestments at this stage

Abdullah pleads all that he must at this stage to survive summary dismissal. Appellees disagree, asserting that Appellant's claims fail because he does not identify any material divestment that put the funds in jeopardy, and that he "has not alleged that either retirement system currently holds or wishes to purchase the securities of any other listed company in the first instance." Resp. at 38. Abdullah cannot answer these questions prior to discovery; he cannot reasonably know what investment decisions the funds contemplate, or their future financial strategy. But Abdullah does know, and does plead, that Chapter 808 mandates non-financial

considerations in the administration of his pension benefits: ERS has already divested from at least one financially significant company; and ERS's Chief Investment Officer at the time, Tom Tull, expressed concern over the application of Chapter 808 to the funds. ROA.9, 11; Resp. at 38-39. Furthermore, the funds will switch to a new model this year that will depend in part on the performance of the investments, to address the poor financial state of the current system. Although Appellees correctly note Abdullah does not plead that the funds are on the brink of imminent collapse, he alleges facts demonstrating a legitimate and credible risk of future harm. With the benefit of discovery, Abdullah can likely show a set of facts entitling him to relief. That satisfies his burden at this stage.

4. Abdullah need not wait for consummation of his injury before bringing suit

Appellees' argument that Abdullah "cannot show ERS and TCDRS will be unable to pay his benefits when they become due because he has never pleaded when he will be eligible to retire" lacks both merit and credibility. Resp. at 40. Abdullah need not wait for his injury to fully materialize before possessing standing to bring suit; that is precisely the purpose of the Declaratory Judgment Act. *See Bauer v. Texas,* 341 F.3d 352, 357 (5th Cir. 2003) (holding that litigants may establish standing when they demonstrate a possibility of future harm, "even though the injury-in-fact has not yet been completed"). By Appellees' reasoning, Abdullah must be able to conclusively show that ERS and TCDRS "will be insolvent and unable to

pay his benefits at" the time of his intended retirement. Resp. at 40. This exceeds his current burden. Furthermore, Appellant's retirement is not a vague and speculative future possibility; it is a certain event. Appellees' reliance on *Lujan* for the proposition that Appellant's retirement plans constitute mere "'some day' intentions" fails to persuade. Resp. at 40 (citing *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 564 (1992)). The *Lujan* plaintiffs based their standing on the possibility that they may some day visit certain countries, and that certain environmental regulations may destroy their ability to witness certain species even if they did eventually make that travel. Here, in contrast, Abdullah will retire, and he will rely upon his retirement benefits when he does. As this Court recently articulated, reliance on *Lujan* in a case involving vastly distinct factual circumstances fails as "an apples-to-oranges comparison." *Ghedi v. Mayorkas,* 16 F.4th 456, 465 (5th Cir. 2021). That Abdullah cannot currently plead a specific amount of harm that will accrue by that as yet unspecified time goes far beyond his burden at this stage. Abdullah alleges ongoing harm, as long as the challenged statute applies to his interests, because it requires the funds to consider unconstitutional factors untethered to financial benefit. He need not wait for that harm to fully materialize before he brings suit.

B. Appellant Possesses Standing to Bring His Constitutional Claims

In the interest of avoiding repetition, Abdullah addresses Appellees' arguments on standing for his constitutional claims only in summary. Abdullah

agrees that "the merits of his constitutional claims represent a separate inquiry from whether he has standing to pursue them." Resp. at 41 (citing *Hollingsworth v. Perry,* 570 U.S. 693, 700 (2013)). However, Abdullah's constitutional claims—particularly his First Amendment claims—remain relevant to analyze prudential standing.

While the prudential standing inquiry for First Amendment claims is in some situations relaxed, Appellant does not ask to be relieved of Article III standing requirements by virtue of pleading speech-related claims. His Brief acknowledges that the relaxed First Amendment standing analysis applies to prudential standing considerations, without eliminating the threshold constitutional standing inquiry. *See, e.g.,* Appellant Br. at 36-37 (citing *Mothershed v. Justs. of the Sup. Ct.,* 410 F.3d 602, 610 (9th Cir. 2005)) as support that the requirement that a plaintiff assert only his own legal rights and interests relaxes in the First Amendment context, where the danger of chilling free speech may outweigh prudential standing considerations); *see also id.* (citing *Ass'n of Immigr. Attys v. Immigr. & Naturalization Serv.,* 675 F. Supp. 781, 785 (S.D.N.Y. 1987) to explain that First Amendment rights implicate prudential considerations and require a relaxed standing argument).

While special standing considerations implicated by the First Amendment may not alter Article III, they remain relevant for this Court's and the district court's standing inquiry. A proper First Amendment standing analysis must consider the special status that speech rights hold and safeguard them with particular rigor. This

status is the reason for the overbreadth doctrine, as described in Appellant's Opening Brief. The overbreadth doctrine, a unique standing framework, applies only to First Amendment claims. Because of the special status of speech rights, a plaintiff whose own speech has not been limited may still have standing where he can show an injury-in-fact resulting from the promulgation of unconstitutional legislation. *See* Abdullah Br. at 26-29. Again, Appellant does not allege this fully replaces traditional standing requirements. His allegations do fall squarely within the overbreadth doctrine, however, and satisfy all threshold Article III requirements, as set forth *supra.*[9]

C. Appellant Pleads Harm Traceable to and Capable of Redress by Appellees

Finally, Appellees argue that "Abdullah's alleged injury is neither fairly traceable to the Defendants, nor redressable by any possible relief ordered against them." Resp. at 44. Turning first to redressability, Abdullah alleges that the unconstitutional application of Chapter 808 directly causes the ongoing injury he suffers. Relief from this Court in the form of a declaration of Chapter 808 as unconstitutional and an order requiring compliance with all constitutional obligations would directly redress that harm.

[9] With respect to "third-party standing," as referenced in Appellees' brief, Abdullah does not assert standing on behalf of another party. Resp. at 43. That doctrine, separate from the overbreadth standing doctrine, is not relevant to the claims here.

As to causation, Appellees' position seeks to effectively insulate Chapter 808 from any judicial review or challenge. The legislature explicitly tasked Appellee Paxton with enforcing the law; it further tasked Appellee Hegar with administering several sections of the law, consistent with the general duty to act as chief financial officer of the State of Texas. As addressed in Appellant's Opening Brief, where the facial constitutionality of a state law is at issue the harm created is "without question, fairly traceable to and redressable by the State itself." *OCA-Greater Hous. v. Texas,* 867 F.3d 604, 613-14 (5th Cir. 2017). Although an injury is not "fairly traceable" to a challenged law when a truly independent act of a third party intervenes and it is "uncertain whether the third party [will] take the required step[,]" here no uncertainty exists. *See also Massachusetts v. EPA,* 549 U.S. 497, 523 (2007) (finding causation even though Massachusetts would not incur an injury unless individuals chose to drive less fuel-efficient cars as a result of the EPA's decision not to regulate emissions levels). The retirement funds have already acted, and must continue to act, pursuant to the mandates of Chapter 808. And although the retirement funds may enact the administrative steps prescribed by Chapter 808, the State of Texas enforces the law through its agents–not the retirement funds. An appropriate reading of Appellant's Complaint and subsequent briefing establishes how his alleged injury stems from applying the unconstitutional legislation to his interests. The redress for this harm, then, comes from a declaration of the law as invalid. This Court may

properly order that redress and compel action by the parties who enforce the law, in their capacities as agents of the State of Texas.

CONCLUSION

Appellant Haseeb Abdullah's claims satisfy all requirements of subject matter jurisdiction, including Article III standing. His dismissed state law claims against prior defendants have no impact on this Court's jurisdiction. He respectfully requests this Court reverse and remand this matter for further proceedings on the merits, or in the alternative remand with leave to amend.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii), because it contains 6,320 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

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, I caused to be filed with the Court and served on opposing counsel through the CM/ECF system the foregoing Brief.

/s/ Christina A. Jump