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, Austin Division

BRIEF FOR DEFENDANTS-APPELLEES

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General

BENJAMIN WALLACE MENDELSON
Assistant Solicitor General
Ben.Mendelson@oag.texas.gov

Counsel for Defendants-Appellees

Certificate of Interested Persons

No. 22-50315

Haseeb Abdullah,
Plaintiff-Appellant,

v.

Ken Paxton; Glenn Hegar,
Defendants-Appellees.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Defendants-Appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ Benjamin W. Mendelson
Benjamin W. Mendelson
Counsel of Record for
Defendants-Appellees

Statement Regarding Oral Argument

Defendants-Appellees agree that oral argument may be appropriate. This case implicates important questions regarding appellate jurisdiction, sovereign immunity, and Article III standing. Although the district court properly applied this Court's case law regarding those principles here, other cases in the Court's pipeline suggest that some confusion may remain regarding the contours of these important doctrines. For that reason, oral argument may be of use in the Court's decisional processes.

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Introduction

This appeal is about subject-matter jurisdiction. Specifically, it is about whether the federal courts have jurisdiction to adjudicate Plaintiff Haseeb Abdullah's constitutional challenges to a Texas statute requiring certain state entities to divest from publicly traded companies that boycott the State of Israel. Under this Court's precedents, there is no federal jurisdiction. That is so for three independent reasons.

First, this Court lacks appellate jurisdiction. Because of Abdullah's litigation choices, there is no final, appealable judgment. The operative complaint names four Defendants. ROA.7. Abdullah voluntarily dismissed two of them without prejudice. ROA.138-39, 141-42. The district court dismissed the remaining two Defendants because it concluded that Abdullah lacked standing. ROA.248-49. Under this Court's precedents, the district court's order is not a final judgment. And with no final judgment, there is no appellate jurisdiction.

Second, the district court lacked jurisdiction over the remaining two Defendants in this case—the Attorney General of Texas and the Texas Comptroller of Public Accounts—because both enjoy sovereign immunity. Abdullah attempted to invoke the exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). That exception, however, does not apply because the Comptroller is not statutorily tasked with enforcing the divestment statute, and Abdullah has not pled any facts showing that the Attorney General has demonstrated any willingness to do so.

Third, as the district court recognized, Abdullah lacks standing to bring this suit because he has suffered no cognizable injury. He has conceded that the divestment statute does not harm his First Amendment rights and that he has lost no money

because of it. His continued insistence that he is nonetheless injured because he *might* lose money at some indefinite point in the future is the definition of a speculative injury insufficient to satisfy Article III.

Statement of Jurisdiction

Neither this Court nor the district court has jurisdiction. Abdullah invoked the district court's subject-matter jurisdiction under 28 U.S.C. § 1331 because his federal claims arose under the U.S. Constitution. ROA.8. And he invokes this Court's jurisdiction under 28 U.S.C. § 1291. The district court entered its order on March 25, 2022, ROA.248-49, and Abdullah filed a timely notice of appeal on April 25, 2022, ROA.251. But as discussed below (in Part I), the order from which Abdullah appealed is not a final decision within the meaning of 28 U.S.C. § 1291. The district court also lacked jurisdiction for the reasons discussed in Parts II and III.

Issues Presented

The issues presented are:

1. Whether the district court's order is a final decision within the meaning of 28 U.S.C. § 1291.
2. Whether Abdullah demonstrated that the district court had subject-matter jurisdiction by establishing a waiver of or exception to the Defendants' sovereign immunity.
3. Whether Abdullah demonstrated Article III standing.

STATEMENT OF THE CASE

I. Statutory Background

Like all States (and most employers), Texas has created programs to provide income for state employees after they retire. *E.g.*, Tex. Gov't Code ch. 811 (establishing the Texas Employee Retirement System). As a general matter, retirement programs provide income based on investments in securities (whether stocks or bonds). Retirement programs commonly offer employees either defined-benefit plans or defined-contribution plans. In a defined-benefit plan, the retiree "receive[s] a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). By contrast, in defined-contribution plans, such as a 401(k) plan, "the retiree's benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions." *Id.*

Regardless of the structure of the plans from the beneficiary's perspective, retirement systems in Texas are typically run by private investment managers selected by the retirement system. *See* ROA.12. "In making and supervising investments of the reserve fund of a public retirement system," the retirement system's managers are required to act "solely in the interest of the participants and beneficiaries." Tex. Gov't Code § 802.203(a). Nevertheless, those systems remain public entities, *e.g.*, *id.* § 811.003, subject to the oversight of the Texas Legislature, *e.g.*, *id.* § 801.107.

The Texas Legislature has decided that such "State governmental entit[ies]"—relevant here the Employees Retirement System of Texas and the Texas County and

District Retirement System—*see id.* § 808.001(6), (6)(A), (6)(D), should generally decline to invest in companies that boycott the State of Israel. Accordingly, the Texas Comptroller of Public Accounts is required to maintain and provide to the retirement systems a list of companies that boycott Israel. *Id.* § 808.051(a). The Comptroller must update this list periodically, file it with the presiding officer of each house of the Legislature, provide it to the Attorney General, and post it on a publicly available website. *Id.* § 808.051(b)-(c). After the retirement systems receive the updated list, they must send a written notice to any listed companies informing them that they are listed, warning them that they may become subject to divestment, and offering the company the "opportunity to clarify its Israel-related activities." *Id.* § 808.053(a)(1)-(3).[1] If the company either clarifies that it is *not* boycotting Israel or ceases to do so, then it is removed from the list. *Id.* § 808.053(b)-(c). But, if the company continues to boycott Israel, the retirement systems "shall sell, redeem, divest, or withdraw all publicly traded securities of the company" with certain exceptions. *Id.* § 808.053(d). The statute also generally prohibits the retirement systems from purchasing the securities of a listed company in the first instance. *Id.* § 808.057. Eleven companies are currently on the latest version of the Comptroller's list.[2]

[1] Retirement systems also notify the Comptroller of any listed company in which they own securities. *Id.* § 808.052; *see id.* § 808.001(3)-(4).

[2] Tex. Comptroller of Pub. Accts., Divestment Statute Lists, https://comptroller.texas.gov/purchasing/publications/divestment.php (Oct. 2022). This Court may take judicial notice of the contents of a state agency's website. *Huskey v. Jones*, 45 F.4th 827, 831 n.3 (5th Cir. 2022); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005).

The Legislature, however, inserted several safeguards to ensure that this policy does not harm state employees. *First*, a retirement system is "not subject to a requirement of this chapter if [it] determines that the requirement would be inconsistent with its fiduciary responsibilit[ies]," including "the duty of care established under Section 67, Article XVI, Texas Constitution." *Id.* § 808.005. *Second*, a retirement system "may cease divesting" from listed companies if the entity "has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed companies." *Id.* § 808.056(a), (a)(1); *accord id.* § 808.056(b) (providing limits to the statute's exceptions). *Third*, a retirement system may also cease divesting if "an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed companies." *Id.* § 808.056(a)(2).

In order to invoke one of the exceptions in § 808.056, a retirement system must "provide a written report to the comptroller, the presiding officer of each house of the legislature, and the attorney general setting forth the reason and justification" for exercising its power "to cease divestment or to remain invested in a listed company." *Id.* § 808.056(c). The statute also provides that "[t]he attorney general may bring any action necessary to enforce this chapter." *Id.* § 808.102.

II. Factual Background

The Plaintiff Haseeb Abdullah worked as an attorney in various agencies of the State of Texas from approximately 2008 to 2018. ROA.8-9. During each month of his employment, he contributed a portion of his salary to the Employees Retirement

System of Texas, known as ERS, which is available to employees of the State and most state agencies. ROA.9. Abdullah is no longer a state employee and no longer contributes to ERS, but his benefits have vested, and ERS continues to manage funds to pay those benefits. ROA.9. In 2018, Abdullah began working for Travis County, Texas. ROA.11. Although county employees do not contribute to the state ERS, Travis County is a member of the Texas County and District Retirement System, known as TCDRS. ROA.12. Accordingly, Abdullah contributes a portion of his salary to TCDRS each pay period. ROA.12.

Both the ERS and the TCDRS retirement plans in which Abdullah enrolled are defined-benefit plans (*i.e.*, pensions), so investment success or the overall value of the fund is irrelevant to the amount of money that Abdullah will receive upon retirement. Abdullah alleges that while employed by the State, he contributed a portion of his salary into a mandatory program. ROA.9. Although ERS has optional 401(k) programs, ERS has only one mandatory program: ERS's State of Texas Retirement program. *See* Emps. Ret. Sys., State of Texas Retirement for Active Employees, https://www.ers.texas.gov/Active-Employees/Retirement/State-of-Texas-Retirement. Under that program, Abdullah will receive a fixed monthly annuity payment when he is eligible to retire, calculated based on his highest average salary while employed by the State, the number of years of his employment, and a fixed multiplier. *See* Emps. Ret. Sys., Standard Annuity, https://www.ers.texas.gov/Active-Employees/Retirement/Standard-Annuity.

Similarly, the retirement benefits of contributing TCDRS employees like Abdullah are not based on the gains or losses of TCDRS's investments. While TCDRS

invests the assets that its members contribute collectively, Tex. Gov't Code § 845.301(a), the benefits that employees receive are not based on the performance of those investments. Rather, they are based on member contributions, a guaranteed seven percent interest rate compounded annually, and other factors not relevant here. *Id.* §§ 845.306, .314.[3] Importantly, "[a] particular person or subdivision has no right in a specific security or in an item of cash other than an undivided interest in the assets of the retirement system." *Id.* § 845.502.

III. Procedural History

Abdullah disagrees with the Legislature's policy that state retirement systems should avoid investing in companies that boycott Israel. He sued Texas Attorney General Ken Paxton, Texas Comptroller of Public Accounts Glenn Hegar, Executive Director of ERS Porter Wilson, and Executive Director of TCDRS Amy Bishop, all in their official capacities. ROA.7. Abdullah alleged that the divestment statute violated the Free Speech Clause, the Establishment Clause, the Due Process Clause, various provisions of the Texas Constitution, and also asserted claims for breach of fiduciary duty, breach of the Foreign Commerce Clause, and breach of the "Federal Government's Exclusive Power to Regulate Foreign Affairs." ROA.13, 15, 17, 19, 20-23 (emphasis omitted).

The Defendants moved to dismiss on several grounds. ROA.68, 87. Relevant here, they argued that sovereign immunity barred all of Abdullah's state-law claims

[3] *See* Tex. Cnty. & Dist. Ret. Sys., A Plan That Works for you, https://www.tcdrs.org/members/the-plan/ (summarizing the fundamental aspects of TCDRS retirement plans).

because the *Ex parte Young* exception to sovereign immunity does not permit the federal courts to adjudicate alleged violations of state law, ROA.78, 90, that the *Ex parte Young* exception did not apply to Abdullah's claims against the Comptroller, ROA.91, and that Abdullah lacked standing to bring any of his claims, ROA.79, 92-93.

Abdullah responded by voluntarily dismissing his state-law claims. ROA.110. Because he alleged only state-law claims against Wilson and Bishop, Abdullah stated that he did not intend to pursue his case against them. ROA.110. Accordingly, he filed a motion for voluntary dismissal of his claims against Wilson and Bishop under Federal Rule of Civil Procedure 41(a)(2). ROA.138. The district court then entered an order dismissing them without prejudice. ROA.141-42. Abdullah never filed an amended complaint.

The remaining two Defendants, the Attorney General and the Comptroller, filed an amended motion to dismiss, ROA.154, and the remainder of the case was referred to a magistrate judge, ROA.209. The magistrate judge recommended that the district court grant the motion because the *Ex parte Young* exception to sovereign immunity did not apply to Abdullah's claims against the Comptroller, ROA.215, and because Abdullah lacked standing to bring any of his claims, ROA.227-28.

The district court agreed with the magistrate judge that Abdullah lacked standing and granted the motion to dismiss on that basis. ROA.248-29. It expressly did not reach the issue of sovereign immunity. ROA.248-49. The district court then entered a purported final judgment. ROA.250. Abdullah appealed. ROA.251.

On appeal, Abdullah expressly abandons his claims under the Commerce Clause and the federal government's exclusive power to regulate foreign affairs. Appellant Br. 3. Thus, with his state law claims voluntarily dismissed, his only remaining claims on appeal are alleged violations of the Free Speech Clause, the Establishment Clause, and the Due Process Clause. *Id.*

Summary of the Argument

The Court lacks jurisdiction for three reasons, and the district court lacked jurisdiction for two.

I. This Court lacks appellate jurisdiction because the order Abdullah appealed is not a final decision with the meaning of 28 U.S.C. § 1291. The Attorney General and Comptroller do not dispute that the district court issued what purported to be a final judgment or that Abdullah filed a timely notice of appeal. But under this Court's precedents, because Abdullah dismissed Wilson and Bishop without prejudice and never took any further action regarding those Defendants, the district court's order is neither final nor appealable.

II. The remaining Defendants both enjoy sovereign immunity, and the *Ex parte Young* exception does not apply to Abdullah's claims against them. The Comptroller is not statutorily tasked with enforcing the divestment statute, and Abdullah has not pled facts showing that the Attorney General has demonstrated any willingness to enforce it against him. In fact, he has not pled that the Attorney General has done or will do anything at all relevant to this action.

III. Finally, the district court was correct to conclude that Abdullah has not demonstrated standing to bring this suit—primarily because he has not adequately

alleged that he suffered an actual or imminent injury. To the contrary, Abdullah has conceded that the divestment statute does not harm his First Amendment rights and that he has lost no money because of it. Any allegations that he might someday lose some money is the definition of a speculative injury that is insufficient to satisfy Article III.

Indeed, there are at least four reasons to think that Abdullah *cannot* show any non-speculative risk that his retirement payments will ever fall short because of the divestment statute. *First*, the amount of retirement benefits that Abdullah will receive from both of his retirement accounts is wholly unrelated to ERS and TCDRS's individual investment choices—let alone the market performance of those investments. *Second*, statutory exceptions in the divestment statute prioritize fiduciary duties over divestment. *Third*, only eleven of thousands of publicly traded companies[4] even appear on the Comptroller's current list.[5] Abdullah has not alleged that any divestments have occurred or will ever occur that could materially affect the retirement systems' ability to make his fixed annuity payments. *Fourth*, Abdullah has never pled when he will be eligible to retire, so he has not shown when ERS and TCDRS will need to possess the funds necessary to pay him, whether now or thirty years from now.

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[4] Over two thousand publicly traded companies are listed on the New York Stock Exchange alone. *See* N.Y. Stock Exchange, NYSE Listings, International Listings, https://www.nyse.com/listings/international-listings. This figure does not include publicly traded companies listed on other major exchanges, including the Nasdaq.

[5] Tex. Comptroller of Pub. Accts., Divestment Statute Lists, *supra*.

Standard of Review

This Court "reviews a dismissal for lack of subject-matter jurisdiction *de novo*." *Gallegos-Hernandez v. United States*, 688 F.3d 190, 193 (5th Cir. 2012).

Argument

I. The Court Lacks Appellate Jurisdiction.

This Court need not reach any of the issues in Abdullah's brief because it lacks jurisdiction to consider them. Due to his choice to voluntarily dismiss his claims against Wilson and Bishop without prejudice, Abdullah has fallen into what some have described as the "finality trap." *Williams v. Seidenbach*, 958 F.3d 341, 349 (5th Cir. 2020) (en banc); Terry W. Schackmann & Barry L. Pickens, *The Finality Trap: Accidentally Losing Your Right to Appeal (Part I)*, 58 J. Mo. B. 78, 78 (2002). That is, his choice not to sever or permanently forgo his claims against these two Defendants deprives this Court of an appealable order.

As this Court explained in *Williams*, "[u]nder 28 U.S.C. § 1291, courts of appeals may review only 'final decisions' of the district courts." 958 F.3d at 343. As this Court has held, "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." *Id.* (internal quotation marks omitted). "And in a suit against multiple defendants, there is no final decision as to one defendant until there is a final decision as to all defendants." *Id.* Thus, when a plaintiff sues multiple

defendants, voluntarily dismisses some of them without prejudice, and litigates against the others to conclusion, there is typically no final appealable order or judgment. *Id.*[6]

Because this Court has recognized that the confluence of these rules can create a "trap" for some litigants, *Williams* discussed at length what precautions litigants can and should take to avoid losing their right to appeal. *Id.* at 349. In particular, a plaintiff may amend his complaint to remove claims or parties, seek severance of parties under Rule 21, seek the entry of a partial final judgment under Rule 54(b), or voluntarily dismiss a defendant *with* prejudice. *Id.* at 344. But if the plaintiff does none of those things, he is left without an appealable judgment.

For example, in *Williams*, the plaintiffs sued multiple defendants, and the district court granted summary judgment in favor of some of them. *Id.* The plaintiffs then moved to dismiss the remaining defendants under Rule 41(a). *Id.* The district court granted the plaintiffs' request without specifying whether the dismissals occurred with or without prejudice. *Id.* By rule, that made those dismissals without prejudice. Fed. R. Civ. P. 41(a)(2). Applying its existing case law, this Court dismissed the appeal for lack of a final decision under 28 U.S.C. § 1291. *Williams*, 958 F.3d at 344. In response, the *Williams* plaintiffs obtained a partial final judgment under Rule 54(b) and appealed again. *Id.* On rehearing en banc, this Court ultimately

[6] As a purely technical matter, an "order" dismissing a claim for lack of jurisdiction is not a "judgment" of the court—by definition, a court that lacks jurisdiction cannot issue a judgment. *See Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688-89 (5th Cir. 1980). Because courts often use the terms interchangeably, so does this brief.

held that Rule 54(b) "authorized the district court to enter partial final judgment following the dismissal of the remaining defendants under Rule 41(a)," so the appeal proceeded. *Id.*

Like the *Williams* plaintiffs, Abdullah has fallen into the so-called "finality trap." As explained above, Abdullah initially sued the Attorney General, the Comptroller, the Executive Director of ERS, and the Executive Director of TCDRS. ROA.7. After the Executive Directors moved to dismiss, Abdullah moved to voluntarily dismiss his claims against them under Rule 41(a)(2). ROA.138. The district court then entered an order dismissing them without specifying whether the dismissal occurred with or without prejudice. ROA.141-42. The dismissal was therefore without prejudice because "[u]nless the order states otherwise, a dismissal under [Rule 41(a)(2)] is without prejudice." Fed. R. Civ. P. 41(a)(2). The district court then granted the remaining Defendants' motion to dismiss for lack of standing, ROA.249, and entered what purported to be a final judgment, ROA.250. But *Williams* expressly reaffirmed that "there is no final decision if a plaintiff voluntarily dismisses a defendant without prejudice," and "in a suit against multiple defendants, there is no final decision as to one defendant until there is a final decision as to all defendants." *Williams*, 958 F.3d at 343.[7]

[7] For the avoidance of doubt, the Attorney General and Comptroller take no position on whether these holdings represent the *correct* interpretation of the relevant statutory provisions and rules. The Court granted *en banc* review to address that question and ultimately upheld these holdings. *See Williams*, 958 F.3d at 343-44.

To date, Abdullah has not taken any of the routes out of the "finality trap" recognized by this Court. He has not dismissed the two directors with prejudice, amended his complaint, requested severance of the two directors under Rule 21, or sought a partial final judgment under Rule 54(b). *Id.* at 346; *see also CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020) (explaining that "any intention to issue a partial final judgment under Rule 54(b) must be unmistakable").

Because Abdullah did none of those things, there is no "final decision[]" within the meaning of 28 U.S.C. § 1291. The Court lacks appellate jurisdiction. Although permitting Abdullah to cure this jurisdictional defect might ordinarily be appropriate, doing so here would be futile because the *district court* lacked jurisdiction over his claims against the Attorney General and Comptroller for two independent reasons.

II. Sovereign Immunity Bars This Suit.

The district court lacked jurisdiction to order the relief Abdullah seeks because "state sovereign immunity precludes suits against [these] state officials in their official capacities." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020). "Sovereign immunity is jurisdictional," *Cozzo v. Tangipahoa Par. Council--President Gov't*, 279 F.3d 273, 280 (5th Cir. 2002), and "the burden of proof . . . is on the party asserting jurisdiction," *Haverkamp v. Linthicum*, 6 F.4th 662, 671 (5th Cir. 2021) (alteration in original) (cleaned up).

Abdullah's claims against the Comptroller and Attorney General do not fit within *Ex parte Young*'s "narrow exception" to sovereign immunity, which is "grounded in traditional equity practice" and "allows certain private parties to seek

judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). To fall within that exception, Abdullah must have done two things: sue a proper defendant, *id.* at 553, and seek a proper form of relief, *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 242 (5th Cir. 2020). Because a route around sovereign immunity is not dispensed in gross, Abdullah's "operative complaint" must "adequately plead" each element for each defendant and each requested form of relief. *Haverkamp*, 6 F.4th at 672. This Court need not reach whether Abdullah has sought a proper form of relief—and he has not—because he has not named a proper defendant, which itself has two conditions.

First, "[t]o be sued, state officials 'must have some connection' to the state law's enforcement." *Tex. Democratic Party*, 961 F.3d at 400 (quoting *Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 517 (5th Cir. 2017). To meet this element, "it is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" *Id.* at 400-01 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). "[I]f the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent and [the Court's] *Young* analysis ends." *Id.* at 401. Similarly, "[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." *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019).

Second, the named state official must have taken some step to demonstrate a willingness to enforce the challenged statute against the plaintiff. "[A] mere connection

to a law's enforcement is not sufficient—the state officials must have taken some step to enforce." *Tex. Democratic Party*, 961 F.3d at 401. Although "how big a step" remains unclear, the Court has explained that "[e]nforcement typically involves compulsion or constraint," "a demonstrated willingness to exercise one's enforcement duty," and that "the bare minimum appears to be some scintilla of affirmative action by the state official." *Id.* at 401 (internal quotation marks omitted).

Although the district court chose not to reach the issue, Abdullah has not shown that the Comptroller meets the first requirement. He also has not shown that the Attorney General meets the second.

A. Sovereign immunity bars suit against the Comptroller.

The Comptroller has sovereign immunity, and the *Ex parte Young* exception does not apply to Abdullah's claims against him because the Comptroller is not the state officer or entity empowered to enforce the divestment statute. "Where 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." *City of Austin*, 943 F.3d at 998. That is the case here.

1. The divestment statute gives primary responsibility to the individual retirement systems to divest securities—and thereby to enforce the Legislature's policy against using state funds to subsidize companies who boycott Israel. *See* Tex. Gov't

Code § 808.053(d). Because the Comptroller is not the entity charged with enforcing the statute, the *Young* analysis as to the Comptroller ends.[8]

The divestment statute places primary responsibility for implementing the Legislature's divestment policy on individual retirement systems (here ERS and TCDRS). The Comptroller is required to maintain and provide the retirement systems (as well as the Legislature, the Attorney General, and the public) a list of companies that boycott Israel. *Id.* § 808.051. But after the list is compiled and distributed, the Comptroller's role is complete: the retirement systems themselves, not the Comptroller, "shall sell, redeem, divest, or withdraw all publicly traded securities of the company" if the listed company continues to boycott Israel. *Id.* § 808.053(d). The Comptroller himself does not have the power to divest from listed companies or reinvest in them. Nor does he have the power to force the retirement systems to divest listed securities: "[t]he attorney general"—not the Comptroller—"may bring any action necessary to enforce this chapter." *Id.* § 808.102.[9]

Moreover, even if a court enjoined the Comptroller from updating his list, the retirement systems would remain obligated to continue divesting from the current

[8] Wilson and Bishop at least work at the funds, although it is unclear if they would be the relevant individuals in charge of divesting securities. Regardless, they moved to dismiss Abdullah's claims against them as outside the scope of *Ex parte Young*, ROA.69, 90-91, because Abdullah had brought only state-law claims against them, ROA.110. State-law claims fall outside the scope of *Ex parte Young. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

[9] Abdullah's claims against the Attorney General fail for the reasons discussed in Part II.B.

list, subject to several statutory exceptions discussed below. *See id.* §§ 808.005, .056. Accordingly, any injunction directing the Comptroller not to update his list "would not afford Abdullah the relief he seeks which is to restore the relevant fiduciaries' obligations to administer the funds in a way that expressly prioritizes maximizing financial outcomes, not political preferences." ROA.215 (Report and Recommendation of Magistrate Judge); *see* ROA.188-89; Appellant Br. 31 (arguing that Abdullah's injury is the possibility of harm to his financial interests).

2. This Court's precedent confirms that standing alone, the Comptroller's role in compiling a list of companies that boycott Israel does not create a sufficient enforcement connection to satisfy *Ex parte Young.*

For example, in *Mi Familia Vota v. Abbott*, the plaintiffs challenged certain provisions of the Texas Election Code, including a provision that permitted counties to participate in the State's Countywide Polling Place Program if they used electronic voting machines and not paper ballots. 977 F.3d 461, 465 (5th Cir. 2020). The plaintiffs sued the Texas Secretary of State, who asserted sovereign immunity. *Id.* at 467. Though the election code required the Secretary to "provide standards for certifying electronic devices and may exclude counties whose electronic voting devices do not meet certain standards from the Program," that authority did not abrogate sovereign immunity for a claim "based on [a] prohibition of the use of paper ballots for those counties participating" in the program. *Id.* at 468. The Court noted that it "could order the Secretary not to enforce" a requirement that all votes in certain counties must be cast electronically, but "that still would not *require*" those counties to "print and use paper ballots." *Id.* at 458. Because "[t]he Secretary is not responsible for

printing or distributing ballots," "[d]irecting the Secretary not to enforce the electronic-voting-devices-only provision . . . would not afford the Plaintiffs the relief that they seek," and the Secretary was "not a proper defendant." *Id.* at 468. Accordingly, the Secretary had sovereign immunity. *Id.* at 469.

By contrast, in *K.P. v. LeBlanc*, doctors who performed abortions challenged the constitutionality of a Louisiana statute denying the physician the benefits of participating in a medical malpractice compensation fund. 627 F.3d 115, 119 (5th Cir. 2010). Under the relevant Louisiana statute, doctors could not participate in the fund for abortion-related procedures. *Id.* at 120. The doctors sued the fund's oversight board, which asserted sovereign immunity. *Id.* The Court held that the Board fell within the *Ex Parte Young* exception because the Board was required "to differentiate between claims allowable and not allowable under the statute," *id.* at 124, and "to determine whether a claim presented to it has been statutorily excluded . . . from coverage," *id.* at 125. "By virtue of these responsibilities," the Court concluded the "Board members are delegated some enforcement authority." *Id.* at 125. Thus, the "specific enforcement action[]" of the state officials that warranted the application of the *Young* exception was "prohibiting payment of claims under the abortion statute." *City of Austin*, 943 F.3d at 1001.

This case is analogous to *Mi Familia*—not *K.P.* In *Mi Familia*, the Court held that the Secretary lacked sufficient enforcement authority because there was a disconnect between what the Court could order the Secretary to do—namely, not to enforce an electronic-voting-devices-only provision in the election code—and what the Plaintiffs wanted—namely, for the Secretary to print and distribute paper ballots.

Mi Familia, 977 F.3d at 468. Because the Secretary had no power to distribute or require the use of paper ballots, any injunction against the Secretary would not have afforded plaintiffs the relief they sought. *Id.* Here, if a court were to order the Comptroller to cease updating the divestment list, ERS and TCDRS would still have to divest from companies *already* listed—assuming they even own such securities, which Abdullah has not alleged save for one already-completed divestment decision. But unlike in *K.P.*, the Comptroller has no analogous power to force divestment. Indeed, the retirement systems are not necessarily required to divest from the companies on the Comptroller's list as per multiple statutory exceptions. *See* Tex. Gov't Code §§ 808.005, .056.

* * *

In sum, the Legislature expressly gave retirement systems the power to enforce the divestment statute vis-à-vis individual companies and gave the Attorney General the power to enforce it vis-à-vis the retirement systems. But it gave no enforcement power to the Comptroller. "[I]f the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent," and the Court's "*Young* analysis ends." *Tex. Democratic Party*, 961 F.3d at 401.

B. Sovereign immunity bars suit against the Attorney General.

Though the Legislature gave the Attorney General the authority to enforce the divestment statute (at least vis-à-vis retirement systems that refuse to comply), Tex. Gov't Code § 808.102, "the mere fact that the Attorney General *has* the authority to enforce" the statute at issue is inadequate because it "cannot be said to 'constrain'" Abdullah from doing anything, *City of Austin*, 943 F.3d at 1001. Even

assuming that the Attorney General's power to enforce the divestment statute extends beyond ERS and TCDRS to Abdullah (which is highly questionable), Abdullah has pleaded no facts showing that the Attorney General has "a demonstrated willingness to exercise" that enforcement duty, has engaged in "compulsion or constraint" against Abdullah, or even pleaded "'some scintilla' of affirmative action" by the Attorney General. *Tex. Democratic Party*, 961 F.3d at 401 (quoting *City of Austin*, 943 F.3d at 1002).[10]

Here, Abdullah's Complaint nowhere alleges any actions *at all* that the Attorney General has taken or imminently will take regarding the divestment statute. Abdullah certainly has not explained how such actions could be characterized as compulsion, constraint, or a demonstrated willingness to enforce the divestment statute *against him*. The only time that Abdullah even *mentions* the Attorney General in his Complaint is in reference to section 808.056 of the divestment statute, ROA.17-18, 20. But that statutory provision merely states that before the retirement systems may cease divesting from a listed company, they are required to provide a written report to several people, including the Attorney General. Tex. Gov't Code § 808.056(c). But that the Attorney General receives a report, or that he "may" enforce the divestment statute, *id.* § 808.102, does not show that he has done or will do anything, *see Richardson*, 978 F.3d at 243 (holding that statutes authorizing a state official to take an action with permissive "may" language do not confer a legal duty to take the

[10] Though the Attorney General did not argue that he was entitled to sovereign immunity in the district court, this jurisdictional argument is properly raised on appeal. *See Cozzo*, 279 F.3d at 280.

contemplated action). Thus, Abdullah has not met his burden to overcome the Attorney General's sovereign immunity.

III. Abdullah Lacks Standing.

Even if Abdullah has adequately pleaded a route around sovereign immunity, the district court was correct to dismiss his case for lack of standing. Article III of the Constitution requires a plaintiff to demonstrate an injury in fact that is fairly traceable to the challenged actions of the defendants and likely redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). As the party invoking federal jurisdiction, Abdullah bears the burden to establish these elements. *Id*. at 561. And he must show standing for every claim against every defendant for every form of relief. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Here, Abdullah fails to meet all three standing requirements.

A. Abdullah has not adequately pleaded a cognizable injury.

Abdullah's claims fail at the first step because he has pled nothing more than a speculative injury. An Article III injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. The "'actual or imminent' requirement is satisfied only by evidence"—or, at the pleading stage, plausible allegations—"of a 'certainly impending' harm or a 'substantial risk' of harm." *Shrimpers & Fishermen of RGV v. Tex. Comm. on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 & n.5 (2013)). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury

is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper*, 568 U.S. at 409 (emphasis in original). The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Id.* (cleaned up) (emphases in original).

Abdullah alleges that the divestment statute violates the Free Speech Clause, the Establishment Clause, and the Due Process Clause, abandoning his other claims, Appellant Br. 3 & n.2. Yet, he makes several important concessions bearing on his theory of injury. Specifically, Abdullah—who has never alleged any infringement on his own religious beliefs—admits that he has not lost any ability to speak. *Id.* at 11; ROA.242. Moreover, he "does not claim a right to any particular asset . . . or any specific divestment decision, but only to his own pension benefits." ROA.244. And he admits that the divestment statute has caused him no "harm to a specific asset of the fund," and that "his benefits have—at present at least" not "been diminished by a particular amount." Appellant Br. 10-11. Thus, his only alleged injury is "credible threat of future harm to those benefits" because "the use of unconstitutional legislation" causes "his benefits [to be] managed with factors unrelated to financial health put first." *Id.*

Abdullah's injury is speculative, conjectural, and hypothetical. As this Court has recognized, "[i]ncreased-risk claims—even when they are particularized—often cannot satisfy the 'actual or imminent' requirement." *Shrimpers*, 968 F.3d at 424. Indeed, the Court found "a powerful argument that 'increased-risk[-]of-harm' claims . . . fail to meet the constitutional requirement that a plaintiff demonstrate

harm that is 'actual or imminent, not conjectural or hypothetical.'" *Id.* (second alteration in original) (quoting *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007)). Thus, assuming Abdullah *can* show standing based on a *possible* future loss of money, he must show "a likely and credible chain of events" that will occur such that a future loss of money is "certainly impending." *Prestage Farms, Inc. v. Bd. of Sup'rs of Noxubee Cnty.*, 205 F.3d 265, 268 (5th Cir. 2000). He cannot do that here for four reasons: *First*, because Abdullah is enrolled in a defined-benefit program, his future benefits will not change based on the market performance of ERS and TCDRS's portfolios. *Second*, ERS and TCDRS may invoke multiple statutory exceptions to divestment that prioritize fiduciary duties over divestment. *Third*, Abdullah has not alleged that any divestment has occurred or will ever occur that will materially affect ERS or TCDRS's ability to pay his benefits. *Fourth*, Abdullah has never pled when he will be eligible to retire, so he has not shown when ERS and TCDRS will need to possess the funds necessary to pay him, whether now or thirty years from now.

1. Abdullah's retirement benefits are unrelated to market performance.

As an initial matter, Abdullah's assertion of "credible threat of future harm to [his] benefits" because they are "managed with factors unrelated to financial health put first" makes no sense because the amount of retirement benefits that Abdullah will receive is unrelated to market performance. Appellant Br. 10-11. Based on his allegations, both the ERS and the TCDRS retirement plans in which Abdullah enrolled are defined-benefit plans. S*upra* at 5-7. "In a defined-benefit plan, retirees

receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole*, 140 S. Ct. at 1618. Thus, even if investing in companies that discriminated against Israel would make ERS more money, it would not benefit Abdullah because "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool" but only a right to a certain defined level of benefits. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999).

Accordingly, because Abdullah is entitled only to fixed retirement payments regardless of performance, the only way he might lose money is if "the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits." *Thole*, 140 S. Ct. at 1621. But "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail." *Id.* at 1622. Moreover, any alleged misconduct by the administrators of a defined benefit plan will not affect Abdullah's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. *Id.* Abdullah has not alleged that will happen.

2. Statutory exceptions prioritize fiduciary duties over divestment.

Indeed, due to the statutory structure, Abdullah *cannot* allege that the entire ERS and TCDRS plans would fail because of the divestment statute such that they could not pay Abdullah his fixed annuity payments. Specifically, the divestment statute states that a retirement system "is not subject to a requirement of this chapter if the [retirement system] determines that the requirement would be inconsistent with its

fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets." Tex. Gov't Code § 808.005. So, if the retirement systems determine that divesting from certain companies or assets undermines their ability to pay their retirees, then they are not required to divest. Further, the statute creates an exception that permits the retirement systems to invest in listed companies if the retirement system "has suffered or will suffer a loss in the hypothetical value of all assets under management by the [retirement system] as a result of having to divest from listed companies," or "an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed companies." *Id.* §§ 808.056-.057. So, if ERS or TCDRS will suffer a *loss* in the hypothetical value of their assets because of the divestment statute—let alone a loss so severe as to endanger their ability to pay defined-benefit retirees—they do not have to divest. Abdullah's contrary arguments (at 19-20) about these exceptions misstate the statute's plain text.

First, contrary to his contentions, Appellant Br. 19-20, the exceptions do apply to both initial investment and divestment. "*Except as provided by Section 808.056*, a state governmental entity may not acquire securities of a listed company." Tex. Gov't Code § 808.057 (emphasis added). Further, that section 808.056 permits but does not require the retirement systems to cease divesting if the exception's criteria are met by using the term "may" only underscores why Abdullah lacks standing. *See* Appellant Br. 19-20. Abdullah pleads nothing more than speculation about whether investment managers subject to fiduciary duties would choose *not* to exercise

authority to invest in listed companies if doing so became necessary to serve the interests of the funds' beneficiaries.

Second, Abdullah quibbles (at 19) with the language of the exception that permits divestment if a retirement system "has suffered or will suffer a loss in the hypothetical value of all assets under management . . . as a result of having to divest from listed companies." Tex. Gov't Code § 808.056(a)(1). He emphasizes the statute's use of the word "all," but that language simply means that a retirement system may cease divesting if its assets *as a whole* would lose *any* amount of value as a result of divestment, even one dollar.

Third, Abdullah notes (at 19-20) that the retirement systems must file a report with various state officers before ceasing divestment and asserts that those state officers must agree with the report before the retirement systems may divest. But there is no requirement that any of those state officers, including the Comptroller and the Attorney General, agree with the report. Tex. Gov't Code § 808.056(c). And it is entirely speculative that they would use that report in a way that would endanger the retirement systems' ability to pay retirees.

3. Abdullah has not alleged that any material divestments have occurred or will ever occur.

a. Even if the statute contained no exceptions to divestment, Abdullah's alleged future loss of money would remain speculative, conjectural, and hypothetical because he does not allege that there has ever been—or will ever be—a divestment of such magnitude that it would imperil ERS or TCDRS's ability to pay his benefits. Only eleven companies are on the latest version of the divestment list, and it is

entirely speculative whether more will be added or removed in the future.[11] There are thousands of publicly traded companies, and ERS manages approximately $29 billion in trust fund assets.[12] TCDRS manages $45 billion.[13] Accordingly, in order for Abdullah to show the imminent collapse of ERS and TCDRS—and thereby a sufficient risk of a financial Article III injury—he would have to show that ERS and TCDRS's inability to invest in eleven out of thousands of publicly traded companies would so egregiously harm the retirement systems that they could not make his annuity payments.

Abdullah comes nowhere close to that. Abdullah has not alleged that either retirement system currently holds or wishes to purchase the securities of any other listed company in the first instance, and, if they do, whether holding those securities (or deciding to purchase them) falls within one of the statutory exceptions in the divestment statute. Moreover, Abdullah has not alleged that TCDRS has divested from anything, and he has only alleged that ERS has divested from one company, DNB ASA. ROA.9.[14] ERS divested approximately $68 million from DNB ASA,

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[11] Tex. Comptroller of Pub. Accts., Divestment Statute Lists, *supra*.

[12] *See* Emps. Ret. Sys. of Tex., Whom We Serve, https://ers.texas.gov/about-ers/ers-organization/whom-we-serve.

[13] *See* Tex. Cnty. & Dist. Ret. Sys., Strength in Numbers, https://tinyurl.com/2p9jp5m4.

[14] Abdullah does allege that TCDRS sent letters to its outside investment vendors "updating them on companies from which they should divest" and "encouraging divestment from DNB ASA." ROA.12. Assuming such investors are even covered by the divestment statute, *but see* Tex. Gov't Code § 808.055; *id.* § 808.001

ROA.9, which represents less than one-quarter of one percent of ERS's approximately $29 billion in total assets, ROA.163 (citing Emps. Ret. Sys. of Tex., Whom We Serve, *supra*). Nowhere does Abdullah explain how such a tiny asset sale could imperil the solvency of such large institutional investors, nor does he allege that ERS lost money as a result of this trade. *See* ROA.9.

b. Abdullah's two additional arguments about ERS do not improve his standing. *First*, he notes that contributions from state employees have increased in recent years in order to keep ERS solvent, ROA.9; Appellant Br. 17, but is not able to trace any of ERS's alleged financial problems to the operation of the divestment statute. *Second*, Abdullah references the five-year-old testimony of an ERS official that the potential impact of the divestment statute on ERS "is really non-quantifiable." ROA.11; Appellant Br. 17. But this official came nowhere close to suggesting that ERS would be unable to pay individual employees their annuities: even drawing all inferences to support Abdullah, this official (at most) vaguely suggested that the divestment statute might negatively impact ERS in some way. ROA.11. And five years after that official's testimony, Abdullah cannot point to any security on the divestment list that ERS owns. Though the statute took effect five years ago, *see* Act of Apr. 27, 2017, 85th Leg., R.S., ch. 1, 2017 Tex. Sess. Law Serv. 1, 1 (H.B. 89), Abdullah can point to only one actual divestment and does not allege any losses caused by that divestment. As the district court concluded, "any alleged injury is not

(defining "[i]ndirect holdings"), Abdullah never alleges that TCDRS or its outside investors actually owned or divested any such securities.

'impending' any more than it has been at all times since the statute went into effect and qualifies as 'uncertain potentiality.'" ROA.221.

4. Abdullah has never pled when he will receive his retirement benefits.

Finally, 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. He states that "he is still an ERS member, and his vested pension continues to be maintained and overseen by ERS," ROA.9, and that, as a Travis County employee, he pays a portion of his salary to TCDRS each pay period, ROA.12. But he never pleads *when* he will begin to receive retirement payments, let alone that ERS or TCDRS will be insolvent and unable to pay his benefits at this indefinite point in the future. In other words, "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.

At bottom, Abdullah has not shown "a likely and credible chain of events" that will occur such that his future loss of money is "certainly impending." *Prestage Farms,* 205 F.3d at 268. The opposite is true. With no way to show that the divestment statute will cause him to lose any money, Abdullah's allegations are nothing more than "generalized grievances" about state policy. *Carney v. Adams*, 141 S. Ct. 493, 499 (2020).

5. Abdullah's constitutional claims do not alter the injury analysis.

Rather than pleading actual facts demonstrating that ERS or TCDRS's compliance with the divestment statute will actually cause him a discrete financial harm, Abdullah makes a series of arguments about each of his specific claims and their possible implications for standing purposes. Appellant Br. 21-29. But the merits of his constitutional claims represent a separate inquiry from whether he has standing to pursue them. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). Abdullah does not point to any *facts* about any of his constitutional claims that alter the Article III injury analysis discussed above.

a. *Due process.* Abdullah has no standing to assert a due process claim because he cannot point to a property right in any individual ERS or TCDRS security—only a right to a defined benefit paid out of the contributions and investment income from those two retirement systems. Abdullah alleges that the divestment statute violates the Due Process Clause. ROA.17-18. To have standing to assert a due process claim, one must have a property interest in the first instance. *Bryan v. City of Madison*, 213 F.3d 267, 274-75 (5th Cir. 2000); *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). Property interests are not created by the Constitution, but rather, by independent sources such as state law. *Bryan*, 213 F.3d at 275.

As Abdullah correctly concedes, he "does not claim that due process protections attach to any particular asset . . . or any one divestment decision"—only to "his own pension benefits." Appellant Br. 22; *see* ROA.244. The laws governing TCDRS's administration explain that "[a] particular person or subdivision has no right in a specific security or in an item of cash other than an undivided interest in

the assets of the retirement system." Tex. Gov't Code § 845.502. And this is consistent with how defined-benefit plans typically work: participants "possess no equitable or property interest in the plan." *Thole*, 140 S. Ct. at 1620. "Instead, members have a right to a certain defined level of benefits, known as 'accrued benefits.'" *Hughes*, 525 U.S. at 440.

Thus, Abdullah's only possible property right is not in any particular security held by the retirement systems, but only in the amount of his fixed annuity payments. But for all the reasons explained above, it is entirely speculative that ERS and TCDRS will ever be unable to make those payments. Abdullah's due process claim in no way alters the standing analysis.

b. ***First Amendment.*** Likewise, Abdullah's Establishment and Free Speech Clause claims do not alter the Article III injury analysis. Abdullah does not allege that the divestment statute in any way hinders his ability to speak. To the contrary, he expressly disclaims that he seeks to "base his standing in his own ability to speak," and he has never alleged that the divestment statute somehow infringes on his own religious beliefs. Appellant Br. 11. Rather, he repeatedly admits that "he pleads harm by the application of unconstitutional legislation to his concrete financial interests." *Id*. at 26; *see id*. at 11.

Nonetheless, Abdullah references the First Amendment overbreadth doctrine. To the extent he suggests that the overbreadth doctrine alters the standing analysis in this case, Appellant Br. 26-29, he is wrong. Plaintiffs sometimes "assert that the requirements of standing are relaxed in the First Amendment context. That is true, but only as relating to the various court-imposed prudential requirements of

standing. They still must show that they satisfy the core Article III requirements of injury, causation, and redressability." *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018) (citation omitted). In other words, "Article III standing retains rigor even in an overbreadth claim." *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 210 (5th Cir. 2011). "Although various prudential standing principles have been relaxed in some First Amendment cases, this relaxation does not eliminate the distinct and independent requirement of Article III that the dispute between the parties must amount to a case or controversy." *Id.* Because Abdullah has disclaimed any First Amendment injury, he must show a financial one, and the overbreadth doctrine in no way alters that analysis.

c. ***Third-Party Standing.*** Finally, to the extent that Abdullah asserts (at 26-27) that he may proceed under a third-party standing theory, his Complaint nowhere pleads the necessary requirements. "The Supreme Court crafted a prudential exception to the traditional rule against third-party standing where the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the possessor's ability to protect his own interests." *Vote.Org v. Callanen*, 39 F.4th 297, 303 (5th Cir. 2022) (internal quotation marks omitted). Nowhere in his Complaint has Abdullah alleged with whom he has a close relationship, much less why that third-party might be hindered from asserting his own rights. And in any event, this Court has suggested that the text of 42 U.S.C. § 1983 might not even permit claims under a third-party standing theory. *Vote.org*, 39 F.4th at 304-05.

At bottom, regardless of the claim, Abdullah must show a non-speculative financial injury, and he has not.

B. Abdullah's alleged injury is neither fairly traceable to the Defendants, nor redressable by any possible relief ordered against them.

For largely the same reasons that the Attorney General and Comptroller have sovereign immunity, Abdullah has not shown how any alleged future loss of money could be fairly traceable to them, or likely redressable by any relief ordered against them. "This court has acknowledged that our Article III standing analysis and *Ex parte Young* analysis 'significantly overlap.'" *City of Austin*, 943 F.3d at 1002 (quoting *Air Evac*, 851 F.3d at 520). To meet standing's traceability and redressability requirements, Abdullah must show that his alleged increased risk of a future loss of money is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). Further, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" *Id.* at 561 (internal quotation marks omitted). Assuming that Abdullah has adequately pleaded that ERS and TCDRS's failure to invest in one of eleven companies will so endanger the retirement systems' survival that they will be unable to pay his defined benefits, he has not plausibly pleaded that doing so is either traceable to or redressable by either the Comptroller or the Attorney General.

1. Abdullah's alleged injury is neither traceable to the Comptroller nor redressable by relief against him.

As explained above, the divestment statute requires the Comptroller to maintain and provide to the retirement systems a list of companies that boycott Israel. Tex. Gov't Code § 808.051(a). But after the retirement systems receive the list, the Comptroller fades from the picture: it is the retirement systems themselves, not the

Comptroller, who "shall sell, redeem, divest, or withdraw all publicly traded securities of the company," *id.* § 808.053(d), or rather determine if one of the statutory exceptions apply, *see id.* §§ 808.005, .056. This is not a ministerial choice: the divestment statute ultimately tasks the retirement systems with divesting securities subject to their own, preexisting fiduciary and legal duties. The Comptroller himself does not have the power to divest from listed companies or to force the retirement systems to do so.

Further, as explained above, Abdullah has not shown the Comptroller has done anything to injure him. The Comptroller has placed only eleven companies on the latest version of the divestment list.[15] Abdullah has not pleaded how ERS and TCDRS's general inability to invest in those eleven out of thousands of publicly traded companies would so egregiously harm the retirement systems that they could not make his annuity payments. Moreover, Abdullah has only alleged that one entity, ERS, has actually divested from one listed company, DNB ASA, ROA.9, which represents a tiny fraction of ERS's total holdings, *see* ROA.163. He has never alleged that TCDRS has divested from anything, that either retirement system even holds (or wishes to purchase) the securities of any other listed company in the first instance, and, if they do, whether holding those securities (or deciding to purchase them) falls within one of the statutory exceptions in the divestment statute. Based on his Complaint, Abdullah has not shown that any future financial injury is fairly traceable to the Comptroller.

[15] Tex. Comptroller of Pub. Accts., Divestment Statute Lists, *supra*.

Nor would any injunction directing the Comptroller not to continue publishing the divestment list redress Abdullah's alleged injury of a future loss of money. *See* Appellant Br. 31 (arguing that Abdullah's injury is the possibility of harm to his financial interests). ERS and TCDRS would still be required to divest the securities currently on the list—subject to the conditions described above. *Supra* at 25-27. It is entirely "speculative" and not "likely" that declaratory or injunctive relief against the Comptroller will have any effect on Abdullah's retirement benefits at some unspecified time in the future. *Lujan*, 504 U.S. at 561.

That Abdullah included a plea for nominal damages in his Complaint in addition to requesting declaratory and injunctive relief does not alter this result. ROA.24. Nominal damages "are unavailable where a plaintiff has failed to establish a past, completed injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 n.* (2021). Abdullah has admitted that he has not yet suffered any such harm, Appellant Br. 10-11, making such relief inappropriate. Moreover the *Ex parte Young* exception to sovereign immunity permits only prospective injunctive or declaratory relief, not damages. *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020).

2. Abdullah's alleged injury is neither traceable to the Attorney General nor redressable by relief against him.

Finally, Abdullah has also pleaded no facts tracing his alleged future loss in money to the Attorney General's potential ability to enforce the retirement systems' divestment of listed companies. The Plaintiff bears the burden of establishing all three elements of standing. *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019). But here, Abdullah's Complaint nowhere alleges any actions *at all* that the Attorney

General has taken or will take relating to ERS or TCDRS, much less actions that could cause a future financial injury to Abdullah's retirement benefits. The only time that Abdullah even *mentions* the Attorney General in his Complaint is in reference to section 808.056 of the divestment statute, ROA.17-18, 20. But that statutory provision merely states that before the retirement systems may cease divesting from a listed company, they are required to provide a written report to several people, including the Attorney General. Tex. Gov't Code § 808.056(c). That the Attorney General receives a report, or that he "may" enforce the divestment statute, *id.* § 808.102, does not show that he has done or will do anything, *see Richardson*, 978 F.3d at 243 (holding that statutes authorizing a state official to take an action with permissive "may" language do not confer a legal duty to take the contemplated action). Because Abdullah has not alleged that the Attorney General has done or will do anything that could injure his retirement benefits, no injunctive or declaratory relief entered against the Attorney General could redress Abdullah's alleged injury.

Conclusion

The Court should dismiss the appeal for lack of jurisdiction. Alternatively, it should affirm the district court's order dismissing Abdullah's claims.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Judd E. Stone II
Solicitor General

Lanora C. Pettit
Principal Deputy Solicitor General

/s/ Benjamin Wallace Mendelson
Benjamin Wallace Mendelson
Assistant Solicitor General
Ben.Mendelson@oag.texas.gov

Counsel for Defendants-Appellees

Certificate of Service

On October 10, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Benjamin W. Mendelson
Benjamin W. Mendelson

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,886 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Benjamin W. Mendelson
Benjamin W. Mendelson