No. 19-50384

In the United States Court of Appeals for the Fifth Circuit

BAHIA AMAWI,

Plaintiff-Appellee,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Defendants-Appellants.

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI; GEORGE HALE,

Plaintiffs-Appellees,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM; TRUSTEES OF THE KLEIN INDEPENDENT SCHOOL DISTRICT; TRUSTEES OF THE LEWISVILLE INDEPENDENT SCHOOL DISTRICT; BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

REPLY BRIEF FOR STATE APPELLANTS

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INTRODUCTION

In their response to Attorney General Paxton's motion to stay the district court's injunction, Plaintiffs conceded that they are no longer subject to Chapter 2271 of the Texas Government Code.[1] *See* Pluecker Opp. 4 (acknowledging that "[t]he narrowed scope of the law" means that it no longer applies to the Pluecker Plaintiffs); Amawi Opp. 3 (Amawi response brief "adopt[ing] the responsive position of the *Pluecker* Plaintiffs' opposition"). Plaintiffs now attempt to walk back that fatal admission, but the fact remains that the prohibition on contracts with companies boycotting Israel no longer applies to sole proprietors. That eliminates any live dispute between the parties. The case is therefore moot, and the district court's preliminary injunction cannot stand.

On the merits, Plaintiffs' briefs do little more than summarize and then urge this Court to adopt the district court's flawed preliminary injunction order. Plaintiffs continue to ignore that Chapter 2271 regulates conduct, not speech. It follows that Chapter 2271 does not violate the First Amendment.

The district court's preliminary injunction should be vacated, and this matter should be remanded with instructions to dismiss the case as moot. *See Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam).

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[1] Chapter 2270 was re-designated Chapter 2271 of the Texas Government Code, effective September 1, 2019. *See* Act of May 21, 2019, 86th Leg., R.S., ch. 467 (H.B. 4170), § 21.001(35), 2019 Tex. Sess. Law Serv. 908, 973.

ARGUMENT

I. Plaintiffs' Claims Are Moot.

A. Mootness is properly before the Court.

The question of mootness is properly before this Court because courts have an "independent obligation to examine this jurisdictional question." *McCorvey v. Hill*, 385 F.3d 846, 848 (5th Cir. 2004). Even if the parties do not raise a jurisdictional defect, this Court may determine whether the case on appeal comes within the "judicial Power" conferred by the Constitution, which is limited to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2. As the District of Columbia Circuit recently explained in an opinion dismissing an appeal for mootness, "Article III of the Constitution limits our jurisdiction to 'actual, ongoing controversies,' so we lose jurisdiction if a case becomes moot while an appeal is pending." *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 516 (D.C. Cir. 2019). Plaintiffs bear the burden to establish the Court's continued jurisdiction. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) ("In th[e preliminary injunction] context, the 'merits' on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction."). Plaintiffs cannot carry their burden because there is no "actual, ongoing" controversy between the parties. This entire case is moot.

B. Plaintiffs do not, and cannot, invoke any exception to mootness.

Mootness arises "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). "An appeal becomes moot if intervening events make it impossible

. . . to grant 'effectual relief' to the prevailing party." *Azar*, 2019 WL 6121445, at *2 (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). As State Appellants explained at length in their opening brief, the Court cannot grant "effectual relief" to Plaintiffs because there is nothing to give them relief from. State Appellants' Br. 12–23. Plaintiffs are free to sign contracts with any governmental entity in Texas without signing Chapter 2271's verification. *See* Tex. Gov't Code § 2271.001(2) ("'Company' has the meaning assigned by Section 808.001, *except that the term does not include a sole proprietorship*." (emphasis added)). Plaintiffs cannot overcome the fact that the challenged provision no longer applies to them,[2] thus depriving them of any cognizable interest in its legality.

1. Plaintiffs first assert that the voluntary cessation exception to mootness applies to their claims. Pluecker Resp. 16–20; Amawi Resp. 25–26. But it is indisputable that Plaintiffs' claims were mooted by an act of the Legislature, not the voluntary conduct of State Appellants. *See, e.g.*, *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011) (holding that Congress's action mooting the case could not be attributed to the FTC); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994) (noting the "implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of

[2] Several *amici* have weighed in to argue in the abstract that antidiscrimination laws are unconstitutional, but not one of them argues that this case remains live, and not one of them suggests that any actual plaintiff in this case is harmed in any way. Nor could they, because Plaintiffs are not injured by a law that does not apply to them. Plaintiffs' *amici* thus underscore the fact that Texas's antidiscrimination law is not before the Court.

the United States"); *Catawba Riverkeeper Found. v. N.C. Dep't of Transp.*, 843 F.3d 583, 591 & n.7 (4th Cir. 2016) (following "sister circuits" and "distinguish[ing] the actions of an executive entity from those of the legislature" in considering whether to vacate a district court's judgment on appeal); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1131–32 (10th Cir. 2010); *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 452 (1st Cir. 2009); *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879-80 (9th Cir. 2006); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194–95 (3rd Cir. 2001) (Alito, J.). Indeed, Pluecker Plaintiffs alleged, and the University Defendants admitted, that "prior to the enactment of [Tex. H.B. 89], none of the State agencies who are defendants in this case had a policy or practice of requiring contractors to certify that they would not boycott Israel." ROA.1659; ROA.1395. This case is thus about an act of the Texas Legislature, which is not a defendant. Even *Aladdin's Castle*, Plaintiffs' primary authority, recognizes this crucial distinction. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that *a defendant's* voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (emphasis added)). Because Plaintiffs challenge an act of the Legislature, the voluntary cessation doctrine is inapplicable.

2. But even if the Legislature were a defendant, Plaintiffs' claims would still be moot because Plaintiffs are no longer subject to the statutory requirement that they challenge. In their opening brief, State Appellants cited multiple Fifth Circuit cases explaining that "statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact

the statute after the lawsuit is dismissed." *See, e.g.*, State Appellants' Br. 10, 13 (citing *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 564 (5th Cir. 2006)). Plaintiffs try to dodge this precedent by asserting that the Legislature "has not abandoned the challenged conduct; it merely has attempted to apply the same challenged restrictions to others." Amawi Resp. 19; Pluecker Resp. 21. But that effectively concedes the point: H.B. 793 completely eradicates *Plaintiffs'* alleged injuries because the "challenged restrictions" do not apply to them. "Throughout the litigation, the *party seeking relief* must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam) (internal quotation marks omitted, emphasis added). Because of the passage of H.B. 793, Plaintiffs—the only parties seeking relief—no longer suffer an actual injury.

In that sense, this case is most analogous to *Hall v. Beals*, in which a group of plaintiffs challenged Colorado's six-month residency requirement to vote in an election. 396 U.S. 45, 46 (1969) (per curiam). After the 1968 election, and after a three-judge district court ruled on the merits of their claims, the Colorado Legislature reduced the residency requirement from six months to two. *Id.* at 48. The Supreme Court held that "the recent amendatory action of the Colorado Legislature has surely operated to render this case moot," as the plaintiffs could have voted in the 1968 election under the statute as then written (i.e., with the two-month provision in effect). *Id.* Accordingly, the case "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Id.*

Like Plaintiffs here, the plaintiffs in *Hall* objected, contending that the two-month residency requirement was just as unconstitutional as the original six-month requirement. *Id.* The Supreme Court summarily rejected that argument, observing that the plaintiffs' "opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests, or their interests at the time this litigation was commenced." *Id.* The Court vacated and remanded with directions to dismiss on mootness grounds. *Id.* at 50.

For the same reason that the *Hall* plaintiffs could not sustain an attack on a residency requirement that no longer injured them, Plaintiffs cannot challenge a verification requirement that no longer includes sole proprietors. It is immaterial that Chapter 2271's verification requirement still exists; what matters is that it does not apply to any named plaintiff. Under *Hall*, that is enough to deprive the Court of jurisdiction. *See also, e.g.*, *U.S. Dep't of Justice v. Provenzano*, 469 U.S. 14, 15–16 (1984) (per curiam) ("The new legislation, as the parties agree, plainly renders moot the single issue with respect to which certiorari was granted in each of these cases. That issue is no longer alive because, however this Court were to decide the issue, our decision would not affect the rights of the parties. These requests for records now are to be judged under the law presently in effect."); *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15 (1972) (per curiam) (First Amendment lawsuit rendered moot by intervening change in the law).

3. The voluntary cessation doctrine would not preserve Plaintiffs' claims in any event because they cannot overcome the presumption of good faith that attaches

to actions by government officials. *See Yarls v. Bunton*, 905 F.3d 905, 910–11 (5th Cir. 2018). To rebut that presumption, a plaintiff must present "evidence to the contrary." *Id.* Plaintiffs offer no such evidence. Instead, they argue that the Attorney General's opposition to their not-yet-dismissed claims somehow indicates that the Legislature will reenact the former statute if those claims are dismissed. *See, e.g.*, Amawi Resp. 18; Pluecker Resp. 23. But Plaintiffs provide no authority for the proposition that plaintiffs may pursue claims against a statute that does not apply to them.

None of the cases cited by Plaintiffs contradict the general rule that a case becomes moot when the challenged statute is amended to eliminate any injury to the plaintiffs. The cases on which Plaintiffs rely do not even consider the effect of a state legislature's amendment to the challenged statute. *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 307 (2012), involved a private party's voluntary cessation. There, a class of union members sued the union to recover mandatory contributions to a fund for political activities. After the Supreme Court granted certiorari, the union offered a full refund to the class members, then moved to dismiss the case as moot. *Id.* Noting that "postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye," *id.*, the Court held that a live controversy remained because the plaintiffs sought redress of a concrete injury—namely, the wrongful collection of union dues—and the outcome of the case would determine "how many employees who object to the union's special assessment will be able to get their money back." *Id.* at 308. In *United States v. Government of Virgin Islands*, 363 F.3d 276, 279 (3d Cir. 2004), the government of the Virgin Islands abandoned a contract intended to achieve compliance with a consent

decree. The court held that "voluntary termination of this particular contract did not clearly indicate that the [government] would not reenter this contract or enter a similar one in the future," *id.* at 286, but voluntary termination of the contract could not have mooted the United States' claims in any case because the consent decree remained in effect, *see id.* at 287-88. And in *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019), the court's analysis turned on the fact that the university's change to the challenged regulations was "ad hoc, discretionary, and easily reversible," in contrast to legislative changes, which "will presumptively moot the case unless there are clear contraindications that the change is not genuine," *id.*

To the extent courts have found a live controversy based on a defendant's conduct, they have relied on more than a mere defense of pending claims. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007), the Court found that the plaintiffs maintained standing despite the school district's voluntary cessation, but it did not reach that conclusion merely because "the district vigorously defend[ed] the constitutionality of its race-based program," *id.*, as Plaintiffs suggest (Pluecker Resp. 23). The Court explained that "the district vigorously defends the constitutionality of its race-based program, and nowhere suggests that if this litigation is resolved in its favor it will not resume using race to assign students." 551 U.S. at 719. There was evidently reason to believe that the school district would do just that; the Court noted that the district "ceased using the racial tiebreaker *pending the outcome of this litigation*." *Id.* (emphasis added). Similarly, the defendants in *Sasnett v. Litscher*, 197 F.3d 290, 291-92 (7th Cir. 1999), did

not merely maintain their existing position on the merits; they took further steps implying that they would reinstate the former regulations if they prevailed. As the court explained, "Even after the new regulation was in force, the defendants continued to pursue the litigation by asking the Supreme Court to review [the appeals court's] decision invalidating the old regulation. So they didn't think the suit had been mooted by the adoption of the new regulation, which implies that they wanted to go back to the old one." *Id.* And in *Pro-Life Cougars v. University of Houston*, 259 F. Supp. 2d 575, 581 (S.D. Tex.), *appeal dismissed*, 67 F. App'x 251 (5th Cir. 2003) (per curiam), the district court held that a challenge to a university speech policy remained live where the university had repealed the challenged policy and replaced it with a broader, more restrictive policy that applied to all speech, and where the university retained the power to reenact the previous policy.

A governmental party's mere defense against pending claims is not evidence of intent to reinstate a superseded statute, nor is it otherwise sufficient to keep a plaintiff's claims alive. Here, the State Defendants continue to oppose Plaintiffs' claims on the merits because Plaintiffs continue to press them. The Attorney General's Office has a responsibility under the Texas Constitution to defend its clients, *see* Tex. Const. art. 4, § 22 ("The Attorney General shall represent the State in all suits and pleas . . . ."), and it believes that Plaintiffs' claims lack merit. It is not clear what Plaintiffs would have defendants do when plaintiffs continue to press moot claims, much less why that would change Plaintiffs' position on mootness. Presumably, if the Attorney General stopped opposing their claim, Plaintiffs would declare victory, not agree that their claims are moot.

At any rate, the Attorney General's litigation position has no effect on mootness here. The Attorney General's Office has no power to reinstate the previous version of the statute. Its opposition to Plaintiffs' claims on the merits is no evidence that the Legislature acted in bad faith when it amended the statute to exclude sole proprietors, let alone that it will amend the statute to include them once Plaintiffs' claims are dismissed. The bare possibility that the Legislature could reenact the previous statute, *see* Amawi Resp. 18, is not enough. Without clear evidence that they will once again be subjected to the challenged verification requirement, Plaintiffs cannot possibly establish that their claims remain live.

4. Plaintiffs cannot maintain their claims based on alleged injuries to third parties, either, because Plaintiffs themselves cannot show any concrete harm from the statute. The district court held, and Plaintiffs reassert, that Plaintiffs continue to have standing to challenge Chapter 2271, "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Amawi Resp. 27 (citing the district court's order on General Paxton's motion to dismiss, ROA.2303, which in turn quoted *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). But *Broadrick* "cannot be read so broadly," *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 548 (4th Cir. 2010), and overbreadth doctrine cannot preserve their claims. Instead, the "overbreadth doctrine relaxes prudential limitations on standing that would normally prevent a plaintiff from vindicating the constitutional rights of other speakers, [but] it does not dispense with the 'obligat[ion] as an initial matter to allege a distinct

and palpable injury as required by Article III.'" *Id.* (quoting *Burke v. City of Charleston*, 139 F.3d 401, 405 n.2 (4th Cir. 1998)). "*Broadrick* … [thus] does not circumvent the requirement that a plaintiff suffer an individual injury from the existence of the contested provision to begin with." *Id.* Similarly, while the Fifth Circuit has noted that "a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing," *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006), Plaintiffs cannot plausibly allege that Chapter 2271 chills their speech because it has no application to sole proprietors. Any self-censorship would be "imaginary or wholly speculative," *see id.*, and thus insufficient to confer standing or maintain a live controversy.

Pluecker Plaintiffs also argue that the district court retains jurisdiction to grant declaratory relief. Pluecker Resp. 11. But because there is no ongoing violation of law, that would amount to a retrospective declaration regarding past acts. The narrow exception to sovereign immunity established in *Ex parte Young*, 209 U.S. 123 (1908), allows only for prospective relief against state officers when there is an ongoing violation of federal law. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). As explained above, Plaintiffs wholly fail to prove any ongoing violation of their First or Fourteenth Amendment rights. Thus, Plaintiffs' requested declaratory judgment is barred by sovereign immunity because it is purely retrospective.

Even when an ongoing violation of federal law supports prospective relief against an officer acting in his official capacity, sovereign immunity still bars retrospective relief. In *Edelman v. Jordan*, for example, the lower court entered a prospective injunction to stop an ongoing violation of federal law, yet the Supreme Court still held

that the lower court's retrospective injunction was barred by sovereign immunity. 415 U.S. 651, 666–69 (1974). As the Supreme Court later explained in *Quern v. Jordan*, "[t]he distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." 440 U.S. 332, 337 (1979); *see also Green v. Mansour*, 474 U.S. 64, 68 (1985) ("We have refused to extend the reasoning of *Young*, however, to claims for retrospective relief."); *Chiz's Motel & Rest., Inc. v. Miss. State Tax Comm'n*, 750 F.2d 1305, 1308 (5th Cir. 1985) (stating that "federal courts remain barred under the eleventh amendment from granting legal or equitable retroactive relief"). Here, Plaintiffs can only seek relief based on past conduct because there is no alleged ongoing constitutional violation. That relief is barred by sovereign immunity, and Plaintiffs cannot avail themselves of any exception to the *Ex parte Young* doctrine, as *Edelman*, *Green* and Fifth Circuit precedent confirm.

5. Finally, Pluecker Plaintiffs and Amawi devote significant space in their briefs alluding to evidence that the Court properly excluded from this appeal. *See, e.g.*, Pluecker Resp. 13–15; Amawi Resp. 27. That evidence, which purports to show isolated instances in which sole proprietors were required to sign Chapter 2271's verification notwithstanding H.B. 793, was correctly kept out of the record because it is irrelevant. Plaintiffs raised facial challenges to Chapter 2271, and the district court's preliminary injunction facially enjoined the State Defendants from including a no-boycott verification in any state contract. *See* ROA.1263 n.4 ("[T]he Court will not construe Plaintiffs' claims as bringing as-applied challenges."); ROA.1297.

This appeal is about the plain language of the statute, and the Court needs no new evidence to ascertain what the current iteration of Chapter 2271 requires. Sole proprietors are not required to sign a no-boycott verification. Tex. Gov't Code § 2271.001(2). If any governmental entity requires a sole proprietor to sign a no-boycott verification after May 7, 2019 (the day H.B. 793 took effect), that action would not be traceable to State Appellants or to Chapter 2271. Plaintiffs' "new" allegations thus have no place in this lawsuit. Indeed, the record properly before the Court reflects just the opposite of Plaintiffs' allegations: Plaintiff George Hale entered into a new contract with Texas A&M University-Commerce after H.B. 793 passed that omits the no-boycott verification. ROA.1378. And Amawi executed a contract to work for Pflugerville Independent School District. ROA.1312. For these reasons, the Court need not remand this matter to ascertain whether it is moot, *contra* Pluecker Resp. 13–15; the Court can make that determination based on the existing record.

C. Plaintiffs do not dispute that if the case is moot, the preliminary injunction must be dissolved.

In their opening brief, the State Appellants explained that under longstanding precedent, a district court's preliminary injunction must be vacated when the case becomes moot on appeal. *See* State Appellants' Br. 23–25. That principle follows from the nature of a preliminary injunction, which exists to preserve the status quo pending final resolution of the plaintiff's claims. *See, e.g.*, *Hollon*, 491 F.2d at 93. Now that Plaintiffs' claims have become moot, however, the district court lacks jurisdiction to enter final judgment or grant further relief. State Appellants' Br. 25. Because Plaintiffs do not contest these points in their briefs, they appear to concede that when

a case becomes moot on appeal of a preliminary injunction, the preliminary injunction must be dissolved. That should be the result here.

II. Chapter 2271 Is Constitutional.

Even if Plaintiffs' claims were not moot, reversal would be appropriate because Plaintiffs did not meet their burden as to *any* preliminary injunction factor. *See City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018). On the merits, Plaintiffs largely repeat the district court's preliminary injunction order. State Appellants have already responded at length to those points. *See* State Appellants' Br. 26–38. Nothing in Plaintiffs' brief changes the analysis. Plaintiffs' boycotts do not implicate the First Amendment and thus do not warrant First Amendment protection.

A. The First Amendment does not protect Plaintiffs' boycotts.

Plaintiffs' claims rest on an asserted constitutional right to boycott. *See, e.g.*, ROA.25 (Amawi asserting that "[j]oining voices together to participate in and call for political boycotts is protected association under the First Amendment."); ROA.1677 (Pluecker Plaintiffs contending that "[p]articipation in this boycott is protected expression on a matter of public concern."). Amawi characterizes her boycott as a "refus[al] to buy certain brands of hummus and olive oil." Amawi Resp. 1; *see also* Pluecker Resp. 46 (noting that Plaintiff Abdelhadi boycotts companies like Hewlett Packard). That description indicates precisely why her boycott is not constitutionally protected speech. *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), plainly holds that boycotting conduct must be "inherently expressive" to qualify as protected speech. 547 U.S. at 66.

1. The conduct at issue here—decisions not to purchase certain items, such as hummus, olive oil or technology products—is not inherently expressive and therefore does not constitute protected First Amendment speech. In *FAIR*, the Supreme Court held that a group of law schools' decision to exclude military recruiters from their campuses was not protected by the First Amendment because it did not qualify as speech. The Court made clear that "First Amendment protection [extends] only to conduct that is inherently expressive." *Id.* at 66. And if explanatory speech is needed to explain the "message" of conduct, then by definition, it is not *inherently* expressive. *Id.* It follows from *FAIR* that the decision not to purchase a certain product, like hummus, does not constitute speech. Unless Amawi specifically expressed her reasons for not purchasing some brands of hummus or olive oil, how would the public know about her boycott? That complete lack of expressive behavior is what brings her conduct within the confines of *FAIR* and outside the purview of the First Amendment. *See Ark. Times LP v. Waldrip*, 362 F. Supp. 3d 617, 624 (E.D. Ark. 2019) ("Very few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the *absence* of certain goods from a contractor's office mean that the contractor is engaged in a boycott of Israel.").

2. Even if Chapter 2271 regulates expressive conduct and is thus subject to First Amendment protection, it is at best subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 384 (1968), not the strict form of modified *Pickering* analysis that the district court applied and that Plaintiffs assert this Court should apply. *See FAIR*, 547 U.S. at 67. Under that standard, "an incidental burden

on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*[3] Chapter 2271 meets and exceeds that standard.

Chapter 2271 serves the compelling state interest of preventing national origin discrimination among companies seeking the State of Texas's business. The district court characterized Chapter 2271 as unlike "anti-discrimination statutes prohibit[ing] discrimination based on protected characteristics." ROA.1274. But a boycott of Israel necessarily discriminates on the basis of Israeli national origin. To refuse to do business with individuals and entities on the basis of their nationality is to discriminate on the basis of nationality/national origin—by definition. *See, e.g.*, *Athenaeum v. National Lawyers Guild, Inc.*, No. 653668/16, 2017 WL 1232523, at *5-7 (N.Y. Sup. Ct. Mar. 30, 2017) (holding that blanket refusal to deal "because Plaintiff [wa]s an Israeli corporation" stated viable claim of national-origin discrimination). And because Chapter 2271 is a valid antidiscrimination measure, it follows that it is viewpoint neutral. *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) ("federal and

[3] Pluecker Plaintiffs wrongly contend that State Appellants waived reliance on *O'Brien*. Pluecker Resp. 41. General Paxton asserted that Chapter 2271 survives any standard of review, which would include the *O'Brien* standard, in his response to the preliminary injunction motions, ROA.305, and specifically contended that the *O'Brien* framework applies in his motion to stay the preliminary injunction, ROA.1301. The district court considered, and rejected, General Paxton's *O'Brien* argument in its ruling on the motion to stay. ROA.1348. The argument was not waived.

state antidiscrimination laws . . . [are] permissible content-neutral regulation[s] of conduct.").

3. Finally, the district court erred in finding Chapter 2271 unconstitutionally vague, and Plaintiffs' wholesale adoption of that reasoning lacks merit. A company subject to Chapter 2271 must verify that it does not (a) refuse to deal with, (b) terminate business activities with, or (c) otherwise take "any action" intended to penalize, inflict economic harm on, or limit commercial relations with Israel (or someone doing business with Israel or an Israeli-controlled territory). Tex. Gov't Code § 808.001(1).

Plaintiffs challenged the term "any action" as unconstitutionally vague. ROA.1968-71. But the "any action" clause in Section 808.001 could plausibly be read under the *noscitur a sociis* canon (that the meaning of a word may be ascertained from words or phrases associated with it), and thus given a similar meaning as the first two clauses: "refusing to deal" and "terminating business activities"—*i.e.*, also referring to types of economic conduct, not speech. *See Waldrip*, 362 F. Supp. 3d at 623 ("While the statute also defines a boycott to include 'other actions that are intended to limit commercial relations with Israel,' Ark. Code Ann. § 25-1-502(1)(A)(i), this restriction does not include criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech. Familiar canons of statutory interpretation, such as constitutional avoidance and edjusdem generis, counsel in favor of interpreting 'other actions' to mean commercial conduct similar to the listed items.").

Likewise, the term "ordinary business purpose," to which Plaintiffs objected on vagueness grounds, could be understood by ordinary readers, *see United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001), to mean a purpose unrelated to the intent to harm or avoid doing business with Israel, Israeli products, Israeli companies, or companies "doing business in Israel or in an Israeli-controlled territory." Tex. Gov't Code § 808.001(1). Pluecker Plaintiffs argue that State Appellants' construction does not provide guidance to a reasonable observer. They contend that it is unclear whether a boycott of companies like Hewlett Packard would fall within this definition if the boycott of Hewlett Packard objects to the company's "specific support for the Israeli Defense Forces." Pluecker Resp. 46. The answer is clearly "yes." Boycotting a company because of that company's "support for the Israeli Defense Forces" is boycotting activity aimed at a company at least in part because that company is "doing business in Israel." Chapter 2271 is not unclear to a person of ordinary intelligence.

B. Plaintiffs have no evidence of irreparable harm.

To obtain a preliminary injunction, a plaintiff must show not only a substantial likelihood of success on the merits but also "that he is likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs cannot make this showing. Reversal will not threaten Plaintiffs with irreparable harm because Chapter 2271 did not violate their constitutional rights in the first place, and the district court was wrong to find otherwise when it granted the preliminary injunction. Moreover, as discussed above, even if they faced some injury when they filed their complaint, Plaintiffs face no threat of injury in the future, let

alone irreparable injury, because Chapter 2271 does not apply to them. The district court's injunction can and should be reversed on that basis alone.

III. The Boards of Regents Should Have Been Dismissed.

The district court erred in granting injunctive relief against the Board of Regents of the University of Houston System and the Board of Regents of the Texas A&M University System because both Boards are improper parties to this lawsuit. The Complaint and surrounding evidence make clear that Plaintiffs John Pluecker and George Hale were contracting, or attempting to contract, with the University of Houston and Texas A&M University-Commerce, respectively, rather than with the University of Houston System or Texas A&M System. *See* ROA.2105-16 (drafts of contracts between the University of Houston and John Pluecker); ROA.2084-95 (contract between Texas A&M University-Commerce and George Hale).

Plaintiffs assert that the Boards of Regents retain functional control over the University of Houston and Texas A&M University-Commerce, Pluecker Br. 50–51, but they ignore the evidence that both Boards delegated authority to execute and administer the contracts at issue to the universities themselves. ROA.248. Plaintiffs did not rebut that evidence in the district court and do not do so on appeal. The Boards are not proper parties and should have been dismissed.

Even if the Boards were proper parties because they were functionally responsible for the contracts at issue, as the district court concluded, Plaintiffs' claims against them should have been dismissed because both have immunity from suit under the Eleventh Amendment. The complaint made clear the Boards themselves had been

sued. *See* ROA.1656 (asserting that Pluecker Plaintiffs are suing "[t]he Board of Regents [of the University of Houston System] . . . in its official capacity."); ROA.1657 (suing "[t]he Board of Regents [of Texas A&M System] . . . in its official capacity."). As such, the Boards were entitled to sovereign immunity as arms of the State, and all claims against them should have been dismissed. *See Olivier v. Univ. of Tex. Sys.*, 988 F.2d 1209, 1993 WL 81990, at *1 (5th Cir. Mar. 9, 1993) (per curiam); *see also United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 556–61 (5th Cir. 1982) (concluding that the Board of Regents of Stephen F. Austin State University is an arm of the State and noting that the board members are appointed by the Governor with consent of the Senate). If Plaintiffs had intended to sue the Board members individually, as they now contend was their aim, they could have done so (or amended their complaint to make that clear), but they chose not to. The Boards—the only parties named in the live complaint—should have been dismissed.

CONCLUSION

The preliminary injunction should be vacated, and this matter should be remanded with instructions that the case be dismissed.

Respectfully submitted.

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Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,592 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

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Certificate of Service

On December 17, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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