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
Case No. 18-cv-1091 consolidated with Case No.18-cv-1100
The Honorable Robert Pitman, District Judge

BRIEF OF APPELLEES JOHN PLUECKER, OBINNA DENNAR, ZACHARY ABDELHADI, AND GEORGE HALE IN RESPONSE TO SCHOOL DISTRICT APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This case merits oral argument. It presents important questions about whether the State may force contractors to forego their First Amendment rights to participate in political consumer boycotts because the State disagrees with the message of those boycotts.

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Introduction

In 2017, the Texas Legislature passed House Bill 89 ("the Act"), which requires contractors who want to work for the State—or any of its political subdivisions or agencies—to certify that they are not participating in boycotts of Israel and will not engage in those boycotts for the life of the contract. The intent and effect of the Act are clear: to exclude companies that take a political stance disfavored by the government from contracting with the State or any other governmental entities.

Two of the Plaintiffs, Dennar and Abdelhadi, attempted to judge debate at high school tournaments carried out by the two School District Defendants. Abdelhadi was denied the ability to contract with Klein ISD because he could not sign the "No Boycott of Israel" certification. Plaintiff Dennar was denied the ability to be paid by Lewisville ISD, after already judging at the tournament, because he could not sign a "No Boycott of Israel" certification. Thus, both suffered violations of their First Amendment rights because of the Act.

The School Districts defend the constitutionality of the Act, while simultaneously contesting that they have no interest in the Act and are improper parties to this suit. The School Districts' arguments concerning mootness, the constitutionality of the Act, the remaining preliminary injunction factors, and the scope of the injunction largely mirror arguments in the State's brief. For the sake

of efficiency and avoiding duplication, Plaintiffs address those arguments in the simultaneously filed Brief of Appellees in Response to the State Appellants, and, pursuant to F.R.A.P. 28(i), adopt and incorporate those arguments here.

In this brief, Plaintiffs will address those arguments that are unique to the School Districts: that Abdelhadi and Dennar lacked standing to sue the School Districts, and failed to prove municipal liability. Neither of those arguments survives scrutiny.

Regarding standing, Abdelhadi and Dennar were both presented School District contracts that included a "No Boycott of Israel" certification. Both suffered injury to their First Amendment rights by being forced to choose between contracting with the School Districts or maintaining their constitutionally protected boycott. That is sufficient to establish standing in the First Amendment context.

Regarding municipal liability, the School Districts both have policies that require the inclusion of "No Boycott of Israel" certifications in their contracts. These policies resulted in Abdelhadi and Dennar suffering injury by being forced to choose between contract work and exercising their First Amendment rights. Accordingly, the School Districts' policies satisfy the "moving force" requirement for municipal liability.

Statement of Jurisdiction

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

Issues Presented

1. Whether Plaintiffs Dennar and Abdelhadi had standing to sue the School Districts.

2. Whether the School Districts' policies requiring "No Boycott of Israel" certifications were the moving force of Plaintiffs' injuries.

Statement of The Case

Plaintiffs adopt and incorporate by reference the statement of the case set forth in their Brief of Appellees in Response to the State Appellants. F.R.A.P. 28(i).

Standard of Review

A grant of a preliminary injunction is reviewed under an abuse of discretion standard. *United States v. Billingsley*, 615 F.3d 404, 408–09 (5th Cir. 2010).

Summary of Argument

The School Districts argue that Dennar and Abdelhadi lack standing to sue the School Districts because they cannot show that the School Districts caused their complained of harms. However, both Dennar and Abdelhadi were presented with contracts that included a "No Boycott of Israel" certification, as mandated by

the School Districts. Therefore, Dennar and Abdelhadi lost the opportunity to contract with the School Districts. No more is required for Article III standing.

Similarly, the School Districts argue that Dennar and Abdelhadi cannot demonstrate municipal liability because they cannot show a district policy was the moving force behind their injuries. However, the School Districts' own policies required that contracts include a "No Boycott of Israel" certification, and there is no suggestion that the clauses were inserted into the contracts presented to Abdelhadi or Dennar by some rogue actor. Accordingly, this argument fails.

Argument

I. The district court correctly found that Dennar and Abdelhadi had standing to sue the School Districts

The Trustees of the Klein Independent School District ("KISD") and the Trustees of the Lewisville Independent School District ("LISD") (collectively the "School Districts") assert that Dennar and Abdelhadi lack standing to sue the School Districts because they have failed to allege a sufficient causal connection between the actions of the School Districts and their injuries. The district court properly rejected that argument. ROA.1262-1263.

The School Districts cite the three requirements for standing articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), but argue that Dennar and Abdelhadi fail to meet only one of those elements: causation. School Districts'

Appellate Brief ("SDAB") at 31. That element requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 560 (citation omitted).

The School Districts assert that the unconstitutional policies identified in this case "are the result of independent action by third parties." SDAB at 31. But this statement omits an important part of the *Lujan* causation standard: it says that the required causal connection can "not [be] the result of the independent action of some third party **not before the court**." *Lujan*, 504 U.S. at 560 (emphasis added). The School Districts argue that the injury resulted from an independent action by the Texas Legislature, and the State of Texas was before the court in the form of "Ken Paxton in his official capacity as Attorney General." This is not a situation where the responsibility is alleged to be traceable to a third party not before the court, or where the court lacks the opportunity to allocate fault between multiple responsible parties. All the responsible parties are before the court, and Dennar and Abdelhadi have standing under the allegations presented in this case.

The *Lujan* standard does not require that a party be the sole cause of the injury for a plaintiff to have standing over it. It merely requires that there be "**a** causal connection between the injury and the conduct complained of." *Id.* The

fact that the Legislature also bears responsibility for the injuries to Dennar and Abdelhadi does not mean that there is not also a causal connection between the School Districts and the injuries. The School Districts offered the contracts with the unconstitutional "No Boycott of Israel" certifications to Dennar and Abdelhadi. Mr. Abdelhadi and Mr. Dennar could not sign the School Districts' contracts because of their involvement in BDS boycotts, and thus they were denied the ability to either judge or be paid for judging at the debate tournaments. Neither Dennar nor Abdelhadi ever had any dealings with the Legislature. The parties who they dealt with directly and thus the parties responsible, in addition to the Attorney General, for violating their constitutional rights were the School Districts.

The district court recognized that Plaintiffs' allegations were sufficient to satisfy the requisite causal connection. ROA.1262-63. Although the School Districts assert that the court's ruling "disregarded binding precedent regarding the causation element of constitutional standing," SDAB at 38, the precedents they cite do not support that argument. They cite *Lujan*, but that case was decided on the first and third elements of standing; it contains no discussion of the causation connection other than reciting it as an element of standing, in the language quoted previously. *See generally Lujan*, 504 at 560-78. The same is true for *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017), which does nothing more than cite *Lujan*'s

statement of the elements of standing, without any further discussion of causation. *See generally, id.* at 352-58.

The only case cited by the School Districts that discusses causation is *Ford v. NYLCare Health Plans of the Gulf Coast*, 301 F.3d 329 (5th Cir. 2002). In that case, a physician sought to file a class action against an HMO for false advertising. He alleged that because of misleading advertising, patients had switched from his care to the HMO, thus causing him to lose income. The court rejected this argument because of the complete lack of evidence that the physician's decline in income was related to the advertisements of the HMO. In fact, during the relevant period, all of his partners' incomes increased, despite practicing in an environment with the same HMO and the same advertising. *Id.* at 333. The court noted that any decrease in Fords income might have **"**been a result of the fact that he is not employed full time as a physician . . . and spends a significant period of time filming a fishing show for a sports network." *Id.* at 334 (internal quotations omitted).

The failure of causal connection in *Ford* was a lack of evidence connecting the harm to the alleged conduct in any way. There is no similar deficiency in this case. It is undisputed that the School Districts presented the contracts with the unconstitutional provisions to Dennar and Abdelhadi, and that the plaintiffs lost the opportunity to contract with the School Districts because they could not sign the

"No Boycott of Israel" certification. This was the injury alleged—that Dennar and Abdelhadi were forced to choose between exercising their right of speech and being hired for a job for which they were otherwise qualified. The School Districts cannot cite any case denying standing based on causal connection under these circumstances.

The other two cases relied on by the School Districts both involve allegations of improper acts by law enforcement officers, and the issue was whether they were acting pursuant to an official municipal policy. *See Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986); *Rodriguez v. City of Houston*, 651 F. App'x 282 (5th Cir. 2016) (cited in SDAB at 33, n. 14, 35, 36). In *Pembaur*, sheriff's deputies attempted to serve capiases on patients in a physician's office after consulting and being directed by the County Prosecutor, who was a person capable of making County policy. *Pembaur*, 475 U.S. at 484-85. The Court held that under those circumstances, the County could be liable under section 1983. *Id.* at 485. In contrast, in *Rodriguez*, an intoxicated off-duty policeman shot and killed someone in a fight at a party. This Court found no official municipal policy that condoned that conduct, but did find a policy that prohibited police officers from exercising police authority or carrying a weapon while under the influence of alcohol. *Rodriguez*, 651 F. App'x at 285. The Court found no causal connection between any official policy and the injury to the decedent.

Neither *Pembauer* nor *Rodriguez* have any relevance here. There is no allegation that a rogue school district official undertook to insert an anti-boycott clause in a contract, raising a question of whether there was a School District policy to require it. We know there were School District policies requiring "No Boycott of Israel" certifications, because those official policies are available online, and were entered into evidence by the School Districts themselves. ROA.1581, ROA.1608. Whether the School Districts originated the requirement to include these clauses or they were directed to by the Legislature is irrelevant—it was a School District policy, the policy was carried out, and Dennar and Abdelhadi suffered a constitutional deprivation as a result.

Finally, the School Districts lament the unfairness of having to choose between following the Legislature's directive or "being subject to civil liability." SDAB at 38. But the only remedy at issue in this appeal is prospective injunctive relief. If the injunction is affirmed, the School Districts are not exposed to civil liability, they would only have to delete the unconstitutional provision from their contracts in the future.

II. The preliminary injunction against the School Districts should be affirmed.

A party seeking a preliminary injunction must show:

- Likely success on the merits;

- Likely irreparable harm in the absence of preliminary relief;
- Balance of equities favor the movant;
- A preliminary injunction is in the public interest.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (quoted in ROA.1252). The district court properly found that all four factors were satisfied. ROA.1289.

As stated above, Plaintiffs have briefed the majority of the discussion concerning the merits of the district court decision in their response to the State's Appellate Brief, which are adopted and incorporated by reference herein. F.R.A.P. 28(i). Accordingly, in this brief Dennar and Abdelhadi address only those arguments unique to the School Districts.

A. The district court properly determined a likelihood of success against all defendants.

The School Districts complain that "the district court made no mention whatsoever of the School Districts in its analysis of the likelihood-of-success element of Appellees' preliminary injunction motion." SDAB at 45-46. The Court also "made no mention" of Attorney General Paxton, or the Boards of Trustees of the Universities, or any other particular defendants. Instead, the Court's holding was broadly applicable to all defendants:

> In light of the foregoing, the Court finds that Plaintiffs are likely to succeed on their claims that H.B. 89 is unconstitutional under the First

> Amendment because it (1) is an impermissible content- and viewpoint-based restriction on protected expression; (2) imposes unconstitutional conditions on public employment; (3) compels speech for an impermissible purpose; and (4) is void for vagueness.

ROA.1287. If Dennar and Abdelhadi are likely to succeed on their claims that the Act is unconstitutional under the First Amendment, then they are likely to succeed against all defendants who used the Act to unconstitutionally force them to choose between exercising their First Amendment rights and being employed by a subdivision of the State—including the School Districts.

The School Districts also assert that facial challenges can only be brought against the Legislature who enacted the unconstitutional statute, and not the subdivisions of the State that carried out the policy. They cite one case in support of this notion, *Buchanan v. Alexander*, 919 F.3d 847, 854 (5th Cir. 2019). That case has nothing to do with legislative bodies and subdivisions of the state that put the legislative policies into action. It involved a university professor who was terminated because of inappropriate behavior and speech. The plaintiff brought a section 1983 claim against several individuals: the university's president/chancellor, a college dean, the vice chancellor for human resources, and the director for equal employment opportunity. *Id.* at 850. This Court held that she "sued the wrong parties."

> [W]hen professors or students challenge a university's policies, the proper defendant party is the university or university board. Here, Dr. Buchanan has sued only employees and officials with individual and

> limited roles in administration of LSU's polices, but with no ultimate authority to enforce them. She failed to sue the Board of Supervisors, which is responsible for the creation and enforcement of the policies. The Board, therefore, is the only proper party defendant to a facial challenge to LSU's policies.

Id. at 854-55. In contrast, Dennar and Abdelhadi did not limit themselves to suing individual employees of the School Districts, but instead sued the Boards of Trustees in the name of the School Districts, as directed by *Buchanan*. Thus, the party defect identified in *Buchanan* is not present here.

Finally, the School Districts focus on a line in *Buchanan* stating that "[T]he proper defendants to a facial challenge are the parties responsible for creating or enforcing the challenged law or policy." *Id.* at 854. The School Districts want to shorten that statement to "the parties responsible for creating . . . the challenged law." But those who **enforce** the law are included in this standard as well. The Legislature never presented a contract with the unconstitutional provision in it to Dennar or Abdelhadi. The Legislature did not refuse to hire them unless they agreed to that clause. The School Districts were responsible for carrying out the Legislature's directive, they did so, and they are fairly included in the order granting prospective injunctive relief.

B. The School Districts' policies were the moving force behind the constitutional injuries suffered by Dennar and Abdelhadi.

The School Districts ask this Court to indulge in a fiction that they had no policy requiring the inclusion of the anti-boycott provision in their contracts. They suggest this, despite these undisputed facts:

- The Legislature passed the Act requiring anti-boycott language in all contracts between service providers and state agencies or subdivisions;
- The School Districts included this requirement in their policy manuals, which are posted online, ROA.1581, ROA.1608, and;
- The School Districts tendered contracts containing the statutorily required language to Dennar and Abdelhadi.

Yet, despite this chain of interconnected events, the School Districts point their fingers above and below them in this chain, and blame the Legislature and the School District employees who interacted directly with Dennar and Abdelhadi, while pretending that they exist in a cocoon of blamelessness. That characterization defies common sense and the factual record.

At the heart of the School Districts' argument is its insistence that a policy listed online as part of their policy manuals is not really a policy. The justification for this argument is that some policies contain the designation "LOCAL" and others contain the designation "LEGAL." *See* SDAB at 34-36. The policies designated "LOCAL" originate from the School Board Trustees, whereas the "LEGAL" policies originate from, and are required by some law or legal authority.

As the School Districts note, the policy manuals contain a LOCAL policy stating that the "LEGAL" policies "contain provisions from federal and state statutes and regulations, case law, and other legal authority that together form the framework for local decision making and implementation. **These policies are binding on the District**. . . ." SDAB at 35 (citing ROA.1020, ROA.1047) (emphasis added). Another policy provides that the policies designated as LEGAL are sources of authority "defining the legal context for local school district governance and management." SDAB at 35 n.16 (citing ROA.1015, ROA.1042). There is nothing to suggest that these provisions are not "policies" of the School Districts; to the contrary, both of the provisions just cited internally refer to them as "policies." Further, to be added to the official policy manual, the School Districts are required to review and adopt both LEGAL and LOCAL policies. ROA.1576, ROA.1603. Accordingly, the district court correctly concluded that, "[W]hat matters is whether including the no-boycott certification requirements in their contracts is an official policy of the School Districts. It is, whether designated as 'local or legal policy.'" ROA.1295, n. 14.

The School Districts do not cite a single case where a school district's designated and publicized policy was held not to be a policy because it originated from State legislation. Instead, they rely solely on cases involving officials acting

outside of clearly defined policies.[1] The presence here of a formal, written, published policy that was followed to the word distinguishes this case from every case cited the School Districts. It is also sufficient to support a claim that Defendants' policies are the "moving force" of the violations alleged. *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 405 (1997) (conclusion that the action taken by municipality itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains); *Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) (when municipal policy itself violates federal law, such policy necessarily constitutes the "moving force").

Finally, the School Districts assert that the contracts with the unconstitutional clauses were tendered to Dennar and Abdelhadi by School District employees, and the respondeat superior doctrine does not apply in section 1983 actions. SDAB at 50-51. But Dennar and Abdelhadi have never alleged respondeat superior theories in this case; their complaint derives from the School District policies, which happen to be carried out by School District employees. As

[1] *See, e.g.*, SDAB at 48-55, citing *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001) (alleging police officers assisted private investigator and ex-boyfriend of plaintiff to terrorize her); *Yara v. Perryton Indep. School Dist.*, 560 F. App'x 356 (5th Cir. 2014) (allegations of student that involved simulated Jewish persecution and resulted in injury); *Hicks-Fields v. Harris Cnty.*, 860 F.3d 803 (5th Cir. 2017) (allegations of excessive force by jailer in fatally punching detainee in the face); *Rodriguez*, 651 F. App'x 282 (allegations that off-duty, intoxicated police officer fatally shot someone in a fight at a party). *But see Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986) (sheriff's deputies serving capias documents on patients in a doctor's office pursuant to directions of County Prosecutor were following County policy).

the district court found, "No facts suggest that the contracts provided to Plaintiffs were not standard LISD or KISD contracts, or that rogue employees offered them in violation of School District policies." ROA.1295. There is a straight line from the Act to the School District policy manual to the language of the contracts tendered to Dennar and Abdelhadi. That cannot be blamed on the employees.

CONCLUSION

For all these reasons, this Court should affirm the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and (C) because it contains 3,552 words. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, roman style typeface of 14 points or more.

s/ *Edgar Saldivar*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed electronically on December 12, 2019, and will, therefore, be served electronically upon all counsel.

s/ *Edgar Saldivar*
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