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
No. 1:18-CV-1091
No. 1:18-CV-1100
Hon. Robert Pittman, District Judge

BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE IN SUPPORT OF DEFENDANTS-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.

Defendants-Appellants:
Pflugerville Independent School District
Ken Paxton, Attorney General of Texas (in his official capacity)
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

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September 10, 2019

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INTEREST OF *AMICUS CURIAE*

The American Jewish Committee ("AJC")[1] is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance human rights and democratic values in the United States and around the world. AJC frequently speaks out on issues of public concern, including events in the Middle East, Israeli-Palestinian relations, and anti-Semitism.

In accordance with its mission and values, AJC opposes the use of public funds to support the so-called Boycott, Divestment, and Sanctions ("BDS") movement, which markets itself as a non-violent movement to boycott, divest from, and sanction Israel with the putative goal of getting it to withdraw to its pre-1967 borders, but whose leadership in fact seeks

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for AJC certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting this brief; and no person other than the *amicus* or its counsel contributed money that was intended to fund preparing or submitting this brief. All parties were timely notified of AJC's intent to file this *amicus* brief. All parties have consented to the filing of this brief.

and has actively promoted the elimination of Israel as a Jewish state. AJC has actively sought to rally elected officials to reject the BDS movement. AJC has also supported legislation to ensure that no unit of government is compelled to waste public funds due to a contractor's decision to limit market access in the fulfillment of government contracts by boycotting Israeli goods or services. To that end, AJC supports Texas Government Code Chapter 2270 ("Chapter 2270"), which Plaintiffs seek to have declared facially unconstitutional and enjoined in its entirety. The U.S. District Court for the Western District of Texas (the "District Court") categorically enjoined enforcement of Chapter 2270 by Order entered April 25, 2019 (the "Order"). ROA.1242-97.

AJC respectfully submits that the State of Texas (the "State") and by extension Defendants Pflugerville Independent School District, Board of Regents of the University of Houston System, Trustees of the Klein Independent School District, Trustees of the Lewisville Independent School District, and Board of Regents of the Texas A&M University System (collectively, "Defendants") have a legitimate interest in protecting the State's commerce with Israel and its access to goods and services supplied by Israeli-connected companies and entities. AJC

agrees with the State that Chapter 2270 is constitutional, both facially and as applied. This brief focuses on facial constitutionality.[2]

The sweeping breadth of Plaintiffs' facial challenge to Chapter 2270's verification requirement, which seeks to enjoin Chapter 2270 categorically as applied to any party, would bar application of Chapter 2270 even under core circumstances where it clearly and unequivocally advances the State's legitimate interest in uninhibited market access. The State has a legitimate interest in safeguarding its commerce with Israel and its access to Israeli-connected goods or services, and its enforcement of that interest does not contravene the First Amendment. Plaintiffs' effort to transform this case into a referendum on whether boycotts are constitutionally protected speech presents a false dilemma. Chapter 2270's verification requirement directs nothing more than a factual disclosure; it does not compel State contractors to endorse or engage in speech opposing the BDS movement or BDS activities, does not prevent individuals affiliated with State contractors from participating in boycotts in their personal capacities, and does not prevent contractors

[2] Defendants have also argued that Plaintiffs' claims are moot. AJC takes no position on the question of mootness, as it is an issue outside of AJC's core interest in the case.

from expressing their personal views regarding boycotts or associating with others who share their views. Chapter 2270 requires verification of a fact, not a viewpoint, idea, or expression.

The scope of the relief sought by Plaintiffs is therefore substantially overbroad in relation to the narrow circumstances of this case, where parties that by their own admission are no longer subject to Chapter 2270 nonetheless feels constitutionally aggrieved by a requirement that other entities verify the fact that they are not participating in a boycott of Israel. On this slender reed, Plaintiffs would bar the State from enforcing Chapter 2270's verification requirement in all circumstances, even where well-settled precedent clearly permits the State to defend its legitimate interest in protecting the State's market access to goods and services originating in or connected to Israel. Undue facial restraint of Chapter 2270's verification requirement may result in the State being deprived of normal market access to prescription drugs, electronics, construction equipment, and other goods and services used in the State's exercise of its ordinary and legitimate functions. AJC thus respectfully submits this *amicus curiae* brief in support of the State and in opposition to Plaintiffs' facial challenge to Chapter 2270.

INTRODUCTION

Defendants have a legitimate interest in ensuring that taxpayers' funds are spent responsibly in a free and open market, and are not wasted due to the conduct of persons who contract with the State, regardless of the contractors' motives. Defendants should not be compelled to expend taxpayer resources inefficiently due to a contractor's personal decision to limit the State's market access to particular goods and services. A contractor's refusal to deal with Israeli-connected companies, goods, or services may result in Defendants either lacking access to or paying more for prescription drugs, electronics, construction equipment, and other goods or services used by Defendants in the exercise of their essential government functions. In its core application, Chapter 2270 safeguards the State's legitimate interest in ensuring that it has full and unimpeded access to all goods and services available on the market, including those of Israeli origin, in the fulfillment of government contracts.

The Supreme Court has long recognized that the government is not obliged to expend public funds in a manner contrary to its own express interests in deference to a contractor's preferred use of public resources

to a different end, regardless of whether that preference is couched as an exercise of personal or political expression. *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003). The Texas Legislature enacted the verification requirement of Chapter 2270 in response to persistent efforts by the BDS movement to impede commerce with Israel under the guise of protest against the Israeli government's occupation of Palestinian territories. Chapter 2270 expresses the State's valid interest in protecting its access to a free and open market, including its commerce with Israel, by ensuring that it is not deprived of access to Israeli goods or services through the actions of State contractors refusing to deal, terminating business activities, or otherwise limiting commercial relations with Israel, or with persons or entities doing business in Israel or in Israeli-controlled territories. Tex. Gov't Code § 808.001(1), 2270.0001-2270.002. Chapter 2270's verification requirement only obliges State contractors to provide a written verification that they do not and will not boycott Israel during the term of the contract. *See id.*[3]

[3] This factual verification requirement is far less restrictive than decades-old federal law prohibiting domestic companies from participating in the Arab League boycott of Israel. *See* 50 U.S.C. § 4607; 15 C.F.R. Part 760.[3] That restriction has withstood constitutional scrutiny. *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 918 (7th Cir. 1984).

There is no legal justification to deprive the State of its power to enforce Chapter 2270 in the core circumstance where a State contractor's refusal to deal with Israel would directly impede the State's legitimate interest in engaging in commerce with Israel and having access to Israeli-sourced or Israeli-connected goods and services. The First Amendment does not oblige the State to subordinate its legitimate interests in unhindered access to goods such as pharmaceuticals, office accessories, heavy equipment, and other products used in ordinary government functions, to an individual State contractor's preference to see public funds allocated in a different manner.

Conversely, enforcing Chapter 2270 simply requires State contractors to verify a fact—that they are not participating in a boycott of Israel. This factual verification is no different from verifying that the contractor uses a State-mandated procurement process, or that its goods or services meet certain quality or safety standards, or any of dozens of other factual verifications State contractors may be required to make to satisfy the State that its taxpayers' resources are being used responsibly. The verification does not require contractors to express or endorse any particular point of view regarding Israel or the BDS movement, nor does

it compel contractors to refrain from criticizing Israel, supporting the BDS movement, associating with others who support the BDS movement, or advocating in favor of a boycott. Every avenue of free speech and expression remains open to every State contractor, so long as it is factually true that they are not boycotting Israel and thereby depriving the State of market access to Israeli goods and services.

While Plaintiffs seek to posture this appeal as a test case on the question of whether all political boycotts are constitutionally protected speech under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), that question is not before this Court. Indeed, following the 2019 amendments to Chapter 2270, Plaintiffs themselves, as sole proprietorships, are no longer subject to Chapter 2270's coverage and are not required to make the statutory verification. *See* ROA.1352; ROA.1358. Under these circumstances—where Chapter 2270 is plainly constitutional in its core application and Plaintiffs themselves are not even subject to its terms, Plaintiffs' putative facial challenge is overreaching and inapposite. Entry of facial declaratory and injunctive relief against Chapter 2270's verification requirement is therefore unwarranted.

ARGUMENT

I. The Core Application of Chapter 2270 to State Contractors Who Seek to Impair the State's Commerce with Israel Is Unquestionably Valid

The posture of Plaintiffs' claim—seeking equitable relief with respect to a statutory verification requirement to which they are no longer subject—cannot overshadow the legitimate sweep of Chapter 2270's verification requirement as applied to its core function. It is clear the State may lawfully impose appropriate limits to protect the State's commerce with Israel and to avoid having public funds wasted due to a contractor's personal decision to deprive the State of market access to Israeli-connected goods and services. This valid application of Chapter 2270 precludes Plaintiffs' facial challenge to its constitutionality.

The list of companies targeted by the BDS movement includes more than three dozen major consumer and industrial companies, including Teva Pharmaceuticals, Caterpillar, and Hewlett Packard. *See* www.bdslist.org/full-list (last visited September 5, 2019). It is clear how a contractor's boycott directed to these companies could directly implicate the State's valid interests. Consider the following examples:

- A hospital contracting with the State to provide medical services to State employees engages in a boycott of Israel, and

refuses to purchase any prescription drugs manufactured by Israeli pharmaceutical manufacturer Teva Pharmaceutical or its affiliates. Instead, the hospital sources less effective and/or more expensive medications from other pharmaceutical companies, with the State's employees bearing the health consequences and its taxpayers bearing the added financial costs. The State has legitimate interests in ordinary access to the pharmaceutical market and in not subsidizing the hospital's boycott.

- A procurement company contracting with the State to supply office equipment engages in a boycott of Israel, and refuses to source office equipment from Hewlett Packard, instead purchasing other brands at a higher price and/or with less desirable features from other companies. The State has legitimate interests in ordinary access to the office equipment market and in not expending taxpayer funds to subsidize the procurement contractor's boycott.
- A construction company contracting with the State boycotts Caterpillar and refuses to purchase or use any equipment

> manufactured by Caterpillar though it would be the most suitable and cost-efficient equipment for the job. The State has legitimate interests in ordinary access to the heavy equipment market and in the proper expenditure of taxpayer funds on public construction projects.

In each example, there is a direct relationship between Chapter 2270's verification requirement and the contractors' duties, and failure to enforce the verification requirement imposes a direct detriment and cost on the operations of the State. Because application of Chapter 2270 in these core circumstances is clearly valid under long-settled Supreme Court precedent, Plaintiffs' facial challenge cannot proceed.

A. A Facial Challenge Cannot Lie Against Chapter 2270 Unless It Is Unconstitutional in Every Application.

Federal courts exercise judicial review with great caution, particularly in the context of purported facial challenges. The Supreme Court has explained facial challenges "are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). First, "[c]laims of facial invalidity often rest on speculation" and "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Id.* (quoting *Sabri*

v. United States, 541 U.S. 600, 609 (2004)). Second, facial challenges "run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring) (internal citation omitted)). Third, facial challenges "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

For these reasons, "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Id.* at 450 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[4] A facial challenge "must fail where the statute has a 'plainly

[4] There is a limited exception to this rule for First Amendment "overbreadth doctrine" challenges, where "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep[.]" *Havlak v. Vill. of Twin Oaks (In re Josephine Havlak Photographer, Inc.)*, 864 F.3d 905, 912 (8th Cir. 2017) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal citations omitted)). As discussed in § II, *infra*, there is no basis in the

legitimate sweep.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-740 (1997) (Stevens, J., concurring in judgments)). "Exercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Id.* (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)). *See also Justice v. Hosemann*, 771 F.3d 285, 296 (5th Cir. 2014) (quoting *Catholic Leadership Coal. Of Tex. v. Reisman*, 764 F.3d 409, 440 (5th Cir. 2014)) (stating that a facial challenge must "establish that no set of circumstances exists under which [the law] would be valid or that the statute lacks any plainly legitimate sweep," and describing the burden as a "high hurdle to overcome").

Here, Plaintiffs' facial challenge to Chapter 2270 fails because it not only has a plainly legitimate sweep, but the valid application of Chapter 2270 goes to the very core of the Legislature's reason for enacting it—to preserve the State's commerce with Israel and access to a free and open market in carrying out legitimate government functions.

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record to conclude that a "substantial number" of Chapter 2270's applications are unconstitutional in relation to its core sweep of legitimate application to safeguard the State's commerce with Israel.

B. Chapter 2270 Is Constitutionally Valid in Its Core Application.

The State is constitutionally authorized to defend its legitimate interest in the responsible expenditure of public funds, including its interest in access to all commerce, goods, and services. The First Amendment does not include a right of public contractors to divert, dilute, or squander public funds merely because the contractor prefers they be spent differently, regardless of whether the contractor's preference is couched as protected political expression. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Am. Library Ass'n*, 539 U.S. at 212 (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (internal citation omitted)). "Within broad limits, 'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 211 (quoting *Rust*, 500 U.S. at 194). In *Rust*, for example, Congress appropriated federal funding for family planning services and prohibited the use of such funds in programs that provided abortion counseling. 500 U.S. at 178. The Supreme Court upheld the restriction, finding that it did not compel the recipients to relinquish their constitutional right to engage in abortion counseling, but only

insisted on public funds being spent "for the purposes for which they were authorized." 500 U.S. at 196.

Similarly, in *American Library Association*, the Court affirmed that Congress could impose a restriction on its Internet assistance programs to public libraries and require libraries to install filtering software on Internet-accessible computers that blocks images constituting obscenity or child pornography and that prevents minors from obtaining access to harmful material. 539 U.S. at 212. The Court held that the restriction "simply reflects Congress' decision not to subsidize" libraries choosing not to install such software, while leaving the libraries "free to do so without federal assistance." *Id.* And in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court upheld a restriction limiting tax exemption status to nonprofit organizations that do not engage in substantial lobbying activities, and rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Id.* at 546 (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959)); *see also id.* at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.").

These holdings establish as a "general matter" that "if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds," and "[t]his remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev. v. Alliance for Open Soc'y*, 570 U.S. 205, 214 (2013). The limitation on this general rule is that a funding condition may not be used specifically to impose an "unconstitutional burden on First Amendment rights." *Id.* The "relevant distinction," the Court had held, "is between conditions that define the limits of the government spending program" and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214-15.

The application of Chapter 2270's verification requirement to safeguard the State's commerce with Israel and to ensure the State retains market access to Israeli-connected goods like pharmaceuticals, electronics, and heavy equipment is plainly a condition that limits State spending programs, not a condition that leverages funding to regulate speech. Protecting commerce and the State's market access defines Chapter 2270's core function. In its analysis of Chapter 2270, the House Committee Report identified Israel as a "key ally and trading partner of

the United States" and identified the purpose of the legislation: "Texas should act to prevent taxpayer resources from supporting businesses which work to isolate Israel from global trade." *See* Tex. H.B. 89, Committee Report (Substituted) at 1, 85R 21507 (Sept. 1, 2017), available at https://capitol.texas.gov/tlodocs/85R/analysis/pdf/HB00089H.pdf (last accessed September 5, 2019).

These findings identify legitimate State interests in preserving the State's commerce with Israel and access to Israeli goods, and ensuring the State is not contracting with unduly risky partners. When application of Chapter 2270's verification requirement is viewed in light of these declared State interests, there is no question a State contractor who refuses to participate in commerce with Israel, regardless of motive, could readily and materially impact the State's legitimate interests. Indeed, even those First Amendment scholars supporting a challenge to Arizona's similar verification requirement acknowledged that such a requirement would pass constitutional muster to the extent it "regulated solely the manner in which its contractors performed their state contracts," while arguing against applications of the verification requirement that lack a "relationship to the state contract." *See* Brief of *Amicus Curiae* First

Amendment Scholars in Support of Plaintiffs-Appellees [Dkt. No. 72], pp. 19-20, *Jordahl v. Arizona*, No. 18-16896 (9th Cir. filed Jan. 24, 2019).

This acknowledgment that there is a constitutionally permissible core application of the verification requirement to the performance of State contracts confirms Plaintiffs' facial challenge is overbroad, in that it reaches permissible applications of Chapter 2270 and prevents the State from enforcing its legitimate interest in preserving its commerce with Israel. If anything, Chapter 2270's verification requirement imposes far fewer limitations than the federal government's longstanding prohibition on domestic participation in the Arab League's boycott of Israel, which passed constitutional muster more than three decades ago. *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 918 (7th Cir. 1984). When the State's valid interests are coupled with its well-recognized authority to impose funding restrictions and to refuse the needless waste of public funds, the justification for a facial challenge dissolves. *See Alliance for Open Society*, 570 U.S. at 214; *Am. Library Ass'n*, 539 U.S. at 211-12; *Rust*, 500 U.S. at 193-94; *Regan*, 461 U.S. at 546. Plaintiffs have failed to offer any rationale for their facial challenge sufficient to overcome Chapter 2270's legitimate core purpose.

II. Plaintiffs' Allegations and Circumstances Do Not Support a Facial Challenge to Chapter 2270

Plaintiffs' inability to allege a cognizable facial challenge to Chapter 2270 is reinforced when considered against Plaintiffs' exceptional circumstances. Though Plaintiffs attempt to posture this appeal as a referendum on whether all political boycotts are constitutionally protected expression, that is a false trail. Plaintiffs themselves are sole proprietorships, are no longer subject to Chapter 2270's verification requirement following the 2019 amendments, and have identified no State contractor still subject to Chapter 2270 that is engaged in or wants to engage in such a boycott. Plaintiffs are thus seeking a purely advisory opinion on a constitutional question; this Court has made clear it will not provide advisory opinions. *Ramirez-Ortiz v. Barr*, No. 17-60722, 2019 U.S. App. LEXIS 23495, at *7 (5th Cir. Aug. 6, 2019) (citing *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

Plaintiffs' entire facial challenge is built on the shaky foundation that they oppose the concept of any State contractor having to verify a fact they are not themselves required to verify, and, as far as the record reflects, no State contractor subject to the verification requirement has opposed. While it is possible some hypothetical contractor could claim at

some unspecified date in the future that Chapter 2270 forces it to choose between participating in a *bona fide* political boycott or giving up a State contract, that is not the dilemma Plaintiffs face, nor have Plaintiffs identified any other State contractor facing such a choice. Having failed to raise the question even on their own behalf, or on behalf of a substantial number of other State contractors, Plaintiffs cannot make it the basis for a facial challenge.

The parties and the District Court have dedicated considerable time and attention to *Claiborne Hardware*'s reach, and whether it is limited to expressive conduct in support of a political boycott or protects the political boycott itself as its own mode of expressive activity. The District Court held that *Claiborne Hardware*, rather than *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("*FAIR*"), "governs this case" because it "deals with political boycotts" and extends First Amendment protection to the "decision to 'withhold patronage[.]'" ROA.1265-66. Several other district court decisions have applied *Claiborne Hardware* to enjoin enforcement of other states' verification laws. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018). The State

responds that *FAIR* limits the constitutional protections for boycotting conduct to "inherently expressive" activities. (State Br. at 28).

The entire debate, however, is directed to a superfluous question insofar as this case is concerned. Neither the active nor expressive elements of a political boycott are at issue here. Plaintiffs are not subject to Chapter 2270's verification requirement at all following the 2019 amendments. *See* ROA.1352; ROA.1358. Thus, whether by act or expression, Chapter 2270 does not regulate Plaintiffs' participation in or expression in favor of any existing or anticipated boycott. Nor has any other State contractor come forward following the 2019 amendments to claim that its participation in or expression in support of an actual or anticipated boycott has been impeded by Chapter 2270.

On the record before this Court, therefore, the question is not the expressive status of a political boycott (since no such boycott is at issue here), but simply whether the First Amendment requires a categorical injunction based on Plaintiffs' principled disagreement with Chapter 2270's verification requirement—a requirement no longer applicable to Plaintiffs. Plaintiffs are not faced with the choice of abandoning a boycott to keep their government contracts, as they need not make the statutory

verification at all. Under *FAIR*, even a "compelled statement of fact[]" that is "plainly incidental to the [law's] regulation of conduct" and does not contain any government-mandated message that the recipient of funds "must endorse" is a "far cry from the compelled speech" that the Supreme Court has previously found to be unconstitutional. *FAIR*, 547 U.S. at 61-62 (citing *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). Here, Plaintiffs are not even subject to the alleged "compelled statement of fact."

FAIR makes clear that "fact-based disclosure requirements … implicate the First Amendment only if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make." *Beeman v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1099-1100 (9th Cir. 2011), *rehearing en banc granted*, 661 F.3d 1199 (9th Cir. 2011), *question certified*, 682 F.3d 779 (9th Cir. 2012), *vacated on other grounds*, 741 F.3d 29 (9th Cir. 2014). Here, Plaintiffs are required to endorse no viewpoint or message with which they disagree. They can advocate against Chapter 2270, advocate against Israel, speak or editorialize for or against a boycott, speak or editorialize

for or against withdrawal to pre-1967 borders, deliver any other viewpoint, content, or message they wish with respect to Chapter 2270, the BDS movement, or Israel, and even participate in a boycott of Israel—all without statutory consequence. Chapter 2270's verification requirement, in short, compels Plaintiffs to do nothing. Plaintiffs have identified no other State contractor differently situated with respect to the effect of Chapter 2270's verification requirement, and no party still subject to Chapter 2270's verification requirement after the 2019 amendments has come forward to allege that Chapter 2270 has forced it to choose between a political boycott and its contract.

These circumstances distinguish this case from the Arizona and Kansas cases, as in both cases the plaintiffs asserted an impediment to their participation in ongoing boycotts of Israel. *See Jordahl*, 336 F. Supp. 3d at 1028 ("Mr. Jordahl personally participates in a boycott of consumer goods and services offered by businesses supporting Israel's occupation of the Palestinian territories."); *Koontz*, 283 F. Supp. 3d at 1013 ("In May 2017, plaintiff Esther Koontz began boycotting Israeli businesses.").[5] In

[5] AJC believes the Arizona and Kansas cases were wrongly decided, and has filed an *amicus* brief in the appeal of the *Jordahl* case to present its

each case, therefore, there was at least a party claiming it had to choose between participating in a political boycott or making a verification to keep its government contract. Plaintiffs are no longer required to make such a verification, and no other contractor still subject to the verification requirement has come forward to challenge the Texas statute.

These circumstances, in short, do not support a facial constitutional challenge. Essentially, Plaintiffs are asking this Court to undertake analysis of a facial challenge based on nothing more than the asserted right of a hypothetical, but presently non-existent, State contractor to boycott Israel. Plaintiffs cannot mount a facial constitutional challenge by asserting a First Amendment right to boycott, where Plaintiffs themselves are not impeded in their exercise of that alleged right and have identified no other State contractor in a different position. In deciding a facial challenge, a court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 450.

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views. Irrespective of AJC's disagreement with those rulings, however, the plaintiffs in those cases are in a different posture than Plaintiffs here.

First Amendment jurisprudence does recognize an "overbreadth doctrine" permitting invalidation of a law as overbroad if "a substantial number of its applications are unconstitutional." *Serafine v. Branaman*, 810 F.3d 354, 363 (5th Cir. 2016) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). But "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself -- the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Thus, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds. *Id.* at 801.

Plaintiffs' claims fall well short of satisfying the stringent requirements for a facial First Amendment challenge. Plaintiffs have not shown that a substantial number of Chapter 2270's applications are unconstitutional judged in relation to its plainly legitimate sweep.

Indeed, following the 2019 amendments, Plaintiffs have identified no contractor and no set of circumstances in which application of the verification requirement would be unconstitutional. Plaintiffs certainly have made no showing that Chapter 2270's verification requirement imposes the same alleged harm or has the same operational consequences with respect to all State contractors. Plaintiffs also have made no showing of a realistic danger that Chapter 2270's verification requirement will significantly compromise the recognized First Amendment protections of any contractors not before the Court. Plaintiffs' personal opposition to Chapter 2270's verification requirement, which no longer applies to them, thus supplies no basis for this Court to undertake a facial analysis of Chapter 2270 in its entirety, much less to enjoin Chapter 2270's legitimate core functions for the sake of the alleged boycott rights of a hypothetical State contractor.

CONCLUSION

The District Court's categorical injunctive relief is neither supported nor necessary under the circumstances of this case. Plaintiffs improperly seek to bar all applications of Chapter 2270's verification requirement, even those plainly supported by the State's legitimate

interests in preserving its own access to the market and maintaining its commerce with Israel. Plaintiffs have failed to satisfy the stringent requirements even to assert such a facial challenge, much less secure the broad declaratory and injunctive relief sought. For these reasons, Plaintiffs' facial challenge to Chapter 2270 should be rejected, and the District Court's categorical injunction should be vacated.

Dated: September 10, 2019

Respectfully submitted,

/s/ Gregory E. Ostfeld
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American Jewish Committee

CERTIFICATE OF COMPLIANCE

I, Gregory E. Ostfeld, hereby verify that:

1. The foregoing Brief of *Amicus Curiae* American Jewish Committee in Support of Defendants-Appellants complies with type-volume limits of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 5,257 words.

2. The foregoing Brief of *Amicus Curiae* American Jewish Committee in Support of Defendants-Appellants complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Office 365 Word in 14-point Century typeface.

September 10, 2019

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for *Amicus Curiae*
American Jewish Committee

CERTIFICATE OF SERVICE

I hereby verify that on or before September 10, 2019, I filed the foregoing Brief of *Amicus Curiae* American Jewish Committee in Support of Defendants-Appellants with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit. I verify that all participants in the case are registered CM/ECF users and that service was accomplished by the CM/ECF system.

September 10, 2019

/s/ Gregory E. Ostfeld
Gregory E. Ostfeld
Counsel for *Amicus Curiae*
American Jewish Committee

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
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Suite 115
NEW ORLEANS, LA 70130

September 10, 2019

Mr. Gregory E. Ostfeld
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Chicago, IL 60601

No. 19-50384 Bahia Amawi v. Pflugerville Indep Sch Dist, et al
USDC No. 1:18-CV-1091
USDC No. 1:18-CV-1100

Dear Mr. Ostfeld,

The following pertains to your brief electronically filed on September 6, 2019.

We filed your brief. However, you must make the following corrections within the next 14 days.

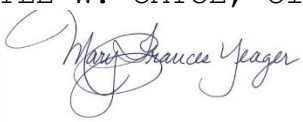
You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED. R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below)

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc: Mr. Michael Abrams
Mr. Mark M. Baker
Mr. Thomas Phillip Brandt
Mr. Adam Howard Charnes
Mr. John Thomas Floyd III
Mr. Brian Hauss
Mr. Kyle Douglas Hawkins
Ms. Carolyn M. Homer
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Mr. Jerome M. Marcus
Ms. Lena F. Masri
Ms. Laura Dahl O'Leary
Ms. Adriana Cecilia Pinon
Mr. Edward L. Rothberg
Mr. Edgar Saldivar
Mr. Andre Segura
Mr. Francisco J. Valenzuela
Mr. Eugene Volokh

Case No. 19-50384

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

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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September 11, 2019

Mr. Gregory E. Ostfeld
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No. 19-50384 Bahia Amawi v. Pflugerville Indep Sch Dist, et al
USDC No. 1:18-CV-1091
USDC No. 1:18-CV-1100

Dear Mr. Ostfeld,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

If your brief was insufficient and required corrections, the paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

Mary Frances Yeager

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Mr. Thomas Phillip Brandt
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Mr. Drew C. Ensign
Mr. John Thomas Floyd III
Mr. Jay Mark Goldstein
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