No. 19-50384

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BAHIA AMAWI,

Plaintiff-Appellee,

v.

ATTORNEY GENERAL OF TEXAS, *et al.,*

Defendants-Appellants,

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
The Honorable Robert Pitman
(No. 1:18-CV-1100-RP)

BRIEF OF *AMICUS CURIAE* THE LOUIS D. BRANDEIS CENTER, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 29(c)(1), The Louis D. Brandeis Center, Inc. hereby certifies that it has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICUS CURIAE* [1]

The Louis D. Brandeis Center, Inc. (the "Brandeis Center" or the "Center") is an independent, non-partisan institution for public interest advocacy, research, and education. The Center's mission is to advance the civil and human rights of the Jewish people and to promote justice for all. The Center's education, research, and advocacy focus especially, but not exclusively, on the problem of anti-Semitism on college and university campuses.[2]

In fulfilling its mission, the Brandeis Center emphasizes the importance of clear, comprehensive, and specific anti-discrimination policies for government entities, including public universities. The Center publishes guidance documents for organizations seeking to adopt uniform definitions of anti-Semitism, which in some cases takes the form of anti-Israel boycotts, divestments, and sanctions, as discussed herein. In addition, the Brandeis Center provides guidance to universities on best practices for addressing anti-Semitism on campus. The

[1] Pursuant to Fed. R. App. P. 29, the Brandeis Center states that no counsel for any party authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no person—other than the Brandeis Center or its counsel—contributed money that was intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

[2] The Brandeis Center is not affiliated with the Massachusetts university, the Kentucky law school, or any other institutions that share the name and honor the memory of the late U.S. Supreme Court Justice.

Center's attorneys advise and represent students in higher education who have been victims of anti-Semitic conduct in violation of Title VI of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a).

The Center believes that the American people must respect and actively safeguard our First Amendment right to freedom of speech. The Center affirms the statement of its namesake, Justice Louis D. Brandeis, in *Whitney v. California*: "If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). At the same time, the Center believes that the government has the responsibility and authority to zealously protect the right of all citizens not to be discriminated against on the basis of race, national origin, ethnicity, or religion.

INTRODUCTION

Chapter 2270 of the Texas Government Code, as amended in May 2019 by H.B. 793, provides that a "governmental entity may not enter into a contract with a company for goods and services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract." Tex. Gov't Code § 2270.002. This verification means that the company does not refuse to deal with, terminate business activities with, or take other actions intended to penalize, inflict economic harm on, or limit

commercial relations with Israel or with someone doing business with Israel or an Israeli-controlled territory. Tex. Gov't Code § 808.001(1). The written verification requirement only applies, pursuant to H.B. 793, the 2019 amendment, to contracts that (1) are between a governmental entity and a company with ten or more full-time employees, and (2) have a value of $100,000 or more, to be paid at least in part from public funds.[3]

This law, as amended in 2019, disincentivizes discriminatory boycotting by requiring any substantial company that receives a government contract to certify that it will refrain from such conduct. Federal, state, and local governments across the United States regularly and appropriately prescribe similar conditions in government contracts to promote equality under the law, combat discrimination, and ensure that public funds are not used for illegal or invidious purposes. Many of those laws require government contractors to refrain from discrimination on the basis of national origin, race, religion, or other classifications as a condition to

[3] In this *amicus* brief we address the constitutionality of the Texas law as it currently stands. Although we agree with the Attorney General that the claims made by individual plaintiffs in their complaints are now moot, we believe the constitutional issues are important and should be resolved expeditiously. Consequently, this brief presents the reasons why this Court should uphold Texas' law even if corporations subject to it were to appear as plaintiffs and challenge the law.

receiving government contracts. Such conditions on contracting are a pillar of anti-discrimination laws at all levels of government.

By granting a preliminary injunction and denying the defendants' motions to dismiss, the district court denied the government's ability to promote equality under the law through regulation of discriminatory conduct. Texas should not be compelled by court order to award contracts to substantial companies that discriminate based on national origin; such discrimination is a naked assault on revered principles of equality. The First Amendment does not require government to subsidize discriminatory conduct. Anti-discrimination conditions are routinely placed on government contracts by federal, state, and local governments. The law challenged in this case fits squarely into conditions commonly inserted in government contracts.

The Act does not target speech. It reaches only the discriminatory *conduct* of state contractors who engage in a boycott of Israel. In fact, it permits contractors to speak passionately, to associate, and to advocate openly in any forum on any subject, including a boycott of Israel. Contractors who wish to engage in the conduct of actively boycotting Israel remain free to do so. The only consequence is that they thereby forego government contracts. There is no threat of further penalty or sanction.

Discrimination that is the subject of Texas' law is no less invidious than racial discrimination. It targets Israel and people who do business with Israel. It is a form of anti-Jewish discrimination. Anti-Semitism has a tragic and vast history. It has, over the centuries, taken many forms. Discrimination against Jews today is frequently masked as antagonism to Israel. *See infra* Part II.A.

For all of these reasons, Texas' policy of disincentivizing state contractors from actually engaging in discriminatory boycotts of (a) Israel and (b) those who do business with Israel—while steering clear of any regulation of speech—is entirely appropriate. The district court's decision should be reversed.

ARGUMENT

This brief focuses on two grounds for sustaining Texas' law against a First Amendment challenge. *First*, the Act is a valid exercise of Texas' authority to set conditions for the recipients of government contracts. *Second*, the Act targets discriminatory conduct. Such conduct, regardless of its motivation, is not protected by the First Amendment.

I. States May Constitutionally Promote Public Policy Goals By Prescribing How Government Funds Are Expended.

States are permitted to advance legitimate state interests through conditions in government contracts. As a result, anti-discrimination laws that impose

conditions on government subsidies and contracts routinely withstand constitutional challenges, including First Amendment assaults.[4]

The Supreme Court has repeatedly upheld laws that vindicate public-policy objectives by conditioning the expenditure of government funds through government contracts. Government has the constitutional authority to use competitive funding as an incentive or disincentive, even to encourage or discourage behavior that government may not regulate directly. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake"). In *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003), the

[4] Cases rejecting First Amendment challenges to conditions on government subsidies include *Cutter v. Wilkinson*, 544 U.S. 709, 732–33 (2005) (upholding against a First Amendment challenge a condition that States receiving federal funds for prison activities or programs have to comply with a federal statute aimed at protecting the free exercise of religion); *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (rejecting First Amendment challenge by university requiring that recipient of federal tuition assistance submit a certification that the university does not discriminate on the basis of sex); *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) (holding that conditioning tax-exempt status on a university's adoption of non-discrimination policies did not infringe the university's First Amendment rights); and *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 399–401 (S.D. Fla. 1991) (rejecting cable operator's First Amendment challenge to city's imposition of a requirement that cable operators provide universal service throughout the city's boundaries as a condition of being franchised).

Court held that federal library funding may be conditioned on the installation of content-filtering software on public computers. The Court rejected the argument that the statute violated the First Amendment. *See* 539 U.S. at 212. Rejecting a First Amendment contention, the Court held that the challenged statute "d[id] not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access." *Id.* Instead, said the Court, the law "simply reflect[ed] Congress' decision not to subsidize their doing so." *Id.*

The bottom-line rule is simple: "A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)) (citations, brackets, and internal quotation marks omitted).

The Supreme Court has consistently highlighted the distinction between direct regulation of constitutionally protected activity and mere incentive-setting conditions on subsidies. *Lyng v. International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America*, 485 U.S. 360 (1988), for example, featured a challenge to a law that made households ineligible for food stamps while "any member of the household [wa]s on strike." 485 U.S. at 362. The plaintiffs (unions and their members) claimed that this law violated their First

Amendment rights of association and expression. 485 U.S. at 363–64. The Court rejected both arguments. As to the right of free association, "the statute at issue . . . d[id] not order [the plaintiffs] not to associate together for the purpose of conducting a strike, or for any other purpose, and it d[id] not 'prevent' them from associating together." 485 U.S. at 366 (internal quotation marks omitted). As to the right of free expression, "the statute . . . require[d] no exaction from any individual; it d[id] not coerce belief; and it d[id] not require [plaintiffs] to participate in political activities or support political views with which they disagree. It merely decline[d] to extend additional food stamp assistance to striking individuals." 485 U.S. at 369 (internal quotation marks omitted).

Texas' law does not forbid anyone from boycotting Israel—collectively or individually. Instead, the law "merely declines to extend" a subsidy—by way of a government contract—to state contractors "for the duration of" their participation in any such boycott. 485 U.S. at 367 n.5, 369.

The district court's decision conflicts with a wide range of federal, state, and municipal laws and policies. Twenty-six States besides Texas have imposed conditions on government contracts similar to Texas' law by requiring contractors to refrain from boycotting Israel or by divesting state funds from entities participating in boycotts of Israel. Nineteen of these States require contractors to

certify their compliance with the applicable conditions.[5] More broadly, the federal government, as well as a large number of state and local governments, condition government contracts on the contractors' refraining from discrimination on the basis of national origin, race, sexual orientation, and other classifications.[6] The

[5] Six States (Colorado, Illinois, Indiana, New York, New Jersey, and Mississippi) also require divestment from entities participating in boycotts of Israel. Among the States that require contractors to certify compliance with applicable conditions, Iowa and North Carolina maintain a list of companies that are banned from contracting with those States due to their participation in boycotts of Israel. *See* Iowa Code Ann. § 12J.3(1)(a); N.C. Gen. Stat. Ann. § 147-86.80(4). In Iowa and North Carolina, prospective contractors are only required to certify compliance with the law if they wish to remove themselves from the list of banned companies. *See* Iowa Code Ann. § 12J.3(2)(b); N.C. Gen. Stat. Ann. § 147-86.81(a)(1)(b).

[6] *See, e.g.*, Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), *amended by* Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014) (requiring that all contracts between the federal government and contractors include a clause prohibiting the contractor from "discriminat[ing] against any employee or applicant for employment because of race, creed, color, sex, sexual orientation, gender identity, or national origin"). State laws include: Alaska Stat. Ann. § 36.30.040(16); Ariz. Exec. Order No. 99-4/999 (1999), *amending* Ariz. Exec. Order No. 75-5 (1975); Cal. Pub. Cont. Code § 2010; Conn. Gen. Stat. Ann. § 4a-60(a)(1); Del. Code Ann. tit. 29, § 6519A; Del. Code Ann. tit. 29, § 6962(7)(a)(1); Idaho Exec. Order No. 2004-05 Art. II (2004); 775 Ill. Comp. Stat. Ann. 5/2-105; Ind. Code Ann. § 22-9-1-10; Iowa Code Ann. § 19B.7; Kan. Stat. Ann. § 44-1030; Ky. Rev. Stat. Ann. § 45.600; Me. Rev. Stat. Ann. tit. 5, § 784; Md. Code Ann., State Fin. & Proc. § 13-219; Mass. Exec. Order No. 246 (1984); Mich. Comp. Laws Ann. 37.2209; Minn. Stat. Ann. § 181.59; Mo. Exec. Order No. 87-06 (1987); Mont. Code Ann. § 49-3-207; Nev. Rev. Stat. Ann. § 338.125; N.J. Stat. Ann. § 10:2-1; N.Y. Lab. Law § 220-e; Ohio Rev. Code Ann. § 125.111; Okla. Stat. Ann. tit. 25, §§ 1301–02; 16 Pa. Code § 49.101; Vt. Stat. Ann. tit. 21, § 495a; Wash. Exec. Order No. 66-03 (Aug. 2, 1966) (rescinded by Wash. Exec. Order No. 97-04 (Dec. 9, 1997)

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federal government places similar anti-discrimination conditions on its funding for public and private universities.[7] Such conditions appropriately incentivize private actors to distance themselves from discrimination and ensure that government funds—that is, public funds—are not used to subsidize or support discriminatory conduct. It is difficult to imagine what our schools, labor force, and communities would look like if the First Amendment prevented governments from setting contract conditions that combat racism, sexism, anti-Semitism, and other

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because "[s]ubsequent federal and state statutes [such as Wash. Rev. Code Ann. § 49.60.180] render[ed] [66-03] obsolete"); Wis. Stat. Ann. § 16.765. For local laws on point, see Christy Mallory & Brad Sears, Williams Institute, *An Evaluation of Local Laws Requiring Government Contractors to Adopt Non-Discrimination and Affirmative Action Policies to Protect LGBT Employees* 2 n.7 (2012) (citing 61 local ordinances that "prohibit discrimination on the basis of sexual orientation in employment by local government contractors"), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Govt-Contractors-Non-Discrim-Feb-2012.pdf.

[7] *See, e.g.*, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); 34 C.F.R. § 100.3 (Department of Education regulation prohibiting educational institutions that receive federal financial assistance from discriminating on the basis of race, color, or national origin); 34 C.F.R. § 106.21 (Department of Education regulation prohibiting schools that receive federal financial assistance from discriminating on the basis of sex).

discriminatory conduct. Texas' law does no more than use contract conditions to discourage discrimination and is, therefore, constitutionally sound.

II. Boycotting Israel Is Discriminatory Conduct, Not Speech, and Is Not Immune from State Regulation.

A. Texas' Law Targets Discrimination on the Basis of National Origin and Religion.

Discrimination is not protected speech. This explains why it is "well within the State's usual power to enact" anti-discrimination measures "when a legislature has reason to believe that a given group is the target of discrimination." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658 (2000); *see also Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 981 (9th Cir. 2005), *as amended on denial of rehearing and rehearing en banc* (Feb. 13, 2006) (state anti-discrimination law was "enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds"). The federal government and many States have repeatedly and appropriately exercised these powers by directly prohibiting private discrimination in employment[8] and in public accommodations on the basis of national origin, religion, and other classifications.[9]

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[8] *See, e.g.*, Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17); Barry A. Hartstein, *50 Ways from Sunday – Can a Corporation Have a Successful Nationwide Policy that Is Consistent with State and Local Laws: Survey of State EEO and Related Laws, Including Significant Recent Developments and Jury Verdicts* iii (2009), http://apps.americanbar.org/labor/eeocomm/mw/Papers/009/data/papers/19.pdf

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A boycott focusing on a single country discriminates on the basis of national origin by categorically treating that country's affiliated persons and products as different from all other persons or products irrespective of their relative merit. National origin discrimination is one of the textbook categories of impermissible discrimination that may be rooted out by state and federal laws without violating the First Amendment. *See, e.g.*, *Athenaeum v. Nat'l Lawyers Guild, Inc.*, 2017 WL 1232523, *5 (N.Y. Sup. Ct. Mar. 30, 2017) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973)) (refusal to "accept[] money from Israeli organizations," could violate New York State Human Rights Law and New York City Human Rights Law notwithstanding the First Amendment).

The discriminatory nature of a boycott against Israel and people who do business with Israel is doubly invidious, because such boycotts have historically been motivated by animus towards Jewish people on the basis of their religion.

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("[M]ost states have state [fair employment practices] laws similar to Title VII that prohibit discrimination on the basis of . . . religion and national origin.").

[9] *See, e.g.*, Title II of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000a to 2000a-6); *State Public Accommodation Laws*, National Conference of State Legislatures (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx ("All states with a public accommodation law prohibit discrimination on the grounds of . . . ancestry [*i.e.*, national origin] and religion.").

Indeed, boycott campaigns have been generated by, and have implemented, anti-Semitism since at least as early as the eighteenth century.[10] In the twentieth century, Nazi encouragement led to a resurgence of anti-Jewish boycotts. The Nazi regime's first nationwide action against Jews was a boycott.[11] Post-World War II boycotts have formally targeted the State of Israel, but have been closely associated with a history of general boycotts against Jews.[12] As former Brandeis Center President and General Counsel Kenneth Marcus explained, "The pre-Nazi, Nazi, Arab League and BDS [*i.e.*, modern Boycott, Divestment, and Sanctions campaign] boycotts all share common elements. They seek to deny Jewish legitimacy or normalcy as punishment for supposed Jewish transgressions."[13]

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[10] *See Fighting Anti-Semitism: Hearing on H.B. 476 Before the H.R. Comm. on Gov't Accountability & Oversight*, 131st Gen. Assemb. 4–6 (Ohio 2016) (statement of Kenneth L. Marcus, President and General Counsel, Brandeis Center), http://brandeiscenter.com/wp-content/uploads/2017/10/16-06-09_Ohio_House_of_Representatives_Testimony.pdf.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 13. Marcus has further explained:

> The modern BDS campaign is anti-Semitic, as its predecessors were, because some of its proponents act out of conscious hostility to the Jewish people; others act from unconscious or tacit disdain for Jews; and still others operate out of a climate of opinion that contains elements that are hostile to Jews and serve as the conduits through whom anti-Jewish tropes and memes are communicated; while all of them work to sustain a movement that attacks the commitment to

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Texas' law thus combats odious discrimination on the basis of both nationality and religion.

The Boycott, Divestment and Sanctions Campaign ("BDS") is a movement organized by those who seek to destroy Israel as a Jewish state. Omar Barghouti, co-founder of the BDS movement, denies the right of Jewish self-determination[14] and opposes a Jewish state in any borders.[15] The three key demands of the BDS movement[16] are a thinly veiled call for destruction of the Jewish state. First, BDS calls for an end to "occupation" and "dismantling the Wall" – a call that has been interpreted to mean Israel should withdraw from land over which it gained control in 1967, so that this land can become the state of "Palestine." Second, although Arab citizens of Israel currently have equal rights under law (confirmed by the fact

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Israel that is central to the identity of the Jewish people as a whole.

Kenneth L. Marcus, *The Definition of Anti-Semitism* 213 (2015).

[14] Roberta P. Seid *"Omar Barghouti at UCLA: A Speaker Who Brings Hate,"* Jewish Journal (January 16, 2014) https://jewishjournal.com/opinion/126186/ ("He denied that the Jewish people have a right to self-determination.")

[15] Ari Ingel, *"The Deceptive Language of Omar Barghouti"* (August 1, 2019) https://blogs.timesofisrael.com/the-deceptive-language-of-omar-barghouti/ ("Definitely, most definitely we oppose a Jewish state in any part of Palestine. No Palestinian, rational Palestinian, not a sell-out Palestinian, will ever accept a Jewish state in Palestine.")

[16] Palestinian Civil Society Calls for BDS (Open Letter, July 9, 2005) https://bdsmovement.net/call

that Arab citizens serve in the Israeli Parliament and as Judges and Justices on Israeli courts, including the Supreme Court), BDS calls for recognition of equal rights for Arab citizens of Israel. Third, BDS demands a right of "return" for descendants of Palestinian refugees not to the "State of Palestine" that would be created on the lands from which Israel would withdraw under BDS' first demand, but rather to the Land of Israel. The BDS movement alleges that there are now over 7.25 million Palestinian refugees[17] that a democratic Israel must absorb. This would erase Israel's identity as a Jewish state. Omar Barghouti has acknowledged that the "return" of Palestinian "refugees" as the Palestinians define the term,[18] means the elimination of the Jewish state of Israel.[19] He said, "If the refugees were

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[17] *What is BDS,* website maintained by the Palestinian BDS National Committee (BNC); https://bdsmovement.net/what-is-bds

[18] The definition of "Palestinian refugee" is unique in world history. Historically, the term "refugee" has been applied *only* to individuals actually displaced during wartime. When it comes to Palestinians, however, the term has been expanded to include children and grandchildren of the original refugees. There were approximately 650,000 original Arab refugees in 1949, but today's number of alleged Palestinian refugees has ballooned to 7.25 million. *See*, Romirowsky, Asaf. *"The Real Palestinian Refugee Crisis."* The Tower. (May 2014) http://www.thetower.org/article/the-real-palestinian-refugee-crisis/

[19] Ostrof, Maurice, *BDS Opposes The Two-State Solution,* Jerusalem Post (May 12, 2013); https://www.jpost.com/Blogs/2nd-Thoughts/BDS-opposes-the-two-state-solution-of-the-Arab-Israel-conflict-364648

to return, you would not have a two-state solution, you'd have a Palestine next to a Palestine."[20]

The yearning for Zion – the desire to reconstitute Jewish sovereignty in the Jewish people's ancient homeland – is an essential ethnic and religious component of Jewish identity. Zionism as a *political* movement may have originated in the nineteenth century. But the desire of Jews to return to their ancestral homeland is thousands of years old.[21] For centuries, Jews have not only prayed facing Jerusalem, they have prayed to return to Jerusalem. Every year at Passover and Yom Kippur (the Day of Atonement), Jews have declared and continue to declare, "Next Year in Jerusalem." Jewish prayer contains a daily benediction for the rebuilding of Jerusalem, and for God to "return his presence to Zion." The Jewish Grace After Meals contains a blessing that God should "build Jerusalem, the holy city, speedily in our days," and begins with Psalm 126, an ecstatic vision for the Jewish return to Zion. For thousands of years, Jewish brides and grooms have taken a moment during their joyous wedding rites to recall the destruction of Jerusalem and shatter a glass as a token of mourning while reciting a verse in

[20] *Id.*

[21] Daniel Gordis, *Israel: A Concise History of a Nation Reborn,* 31 (2016).

Psalms chapter 137 that vows: "If I forget you, Jerusalem, may my right hand wither."[22]

Recent narrations by Jews of Ethiopia (the "Beta Israel") demonstrate how inherent Zionism is to Judaism. Ethiopian Jewish refugees came to Israel from isolated villages far removed from modernity. They endured tremendous hardship in reaching Israel.[23] Some literally walked across the desert to Sudan. Throughout their ordeal, these Jews were motivated by compelling determination to reach Zion – the Jewish homeland.[24] When they finally arrived in Israel, many were shocked

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[22] *Psalms* 137:5-6.

[23] Operation Solomon; https://en.wikipedia.org/wiki/Operation_Solomon

[24] The Executive Director of Israel's Association for Education and Social Integration of Ethiopian Jews in Israel recently wrote:

> How strong was our belief in the sanctity of Jerusalem in our homes in Ethiopia!
>
> The most powerful educational concept that resonated within children and adults alike in Ethiopia, passed down from generation to generation, was awareness of the need for us to safeguard the purity of our hearts and deeds in order that we would one day be worthy of entering Jerusalem — Heaven on earth.
>
> The ideal of Jerusalem was the force that provided us with the stamina to persevere during the arduous trek through the desert. It was the dream that kept us going. We wanted to reach it, achieve it. We buried our beloved family members, left possessions behind willingly, and lost them to vicious thieves. We struggled to keep going despite the terrible conditions and the hunger, only because of our goal to reach Jerusalem of Gold, and after so many generations, stand at the gates of the Holy Temple.

Michal Avera Samuel, *We Did Not Know: How Ethiopian Jews Discovered the Second Temple Was Gone,* Times of Israel (July 17, 2018);

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to learn that the Jewish Temple had been destroyed almost twenty centuries earlier.[25] Ethiopian Jews may have been sequestered for centuries and were totally unaware of Zionism, the *political* movement. But the religious devotion to Zion – an integral component of their Jewish identity – motivated them to persevere and reach Jerusalem.

Denying Jews the right to self-determination is anti-Semitic because it demands that Jews shed an integral part of their identity as Jews. It delegitimizes this aspect of their Jewish identity. The International Holocaust Remembrance Alliance ("IHRA") definition of anti-Semitism includes the following as illustrative of anti-Semitism: "Denying the Jewish people their right to self-determination, *e.g.*, by claiming that the existence of the State of Israel is a racist endeavor."[26] The IHRA definition recognizes that denying this core Jewish belief is de facto anti-Semitism. By denying the right of Jewish self-determination and seeking to destroy the Jewish state, the BDS movement is also discriminatory and anti-Semitic.

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https://blogs.timesofisrael.com/we-did-not-know-how-ethiopian-jews-discovered-the-second-temple-was-gone/

[25] *Id.*

[26] International Holocaust Remembrance Alliance*, Working Definition of Anti-Semitism*; https://www.holocaustremembrance.com/node/196

States are not limited to targeting only familiar and long-recognized forms of discrimination. Federal, state, and local governments have regularly extended the protections of anti-discrimination laws to new categories including gender preferences, and individual States and municipalities have often led the way. Justice Brandeis observed that each State may "serve as a laboratory" of democracy in order to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The District Court recognized that Texas has joined "[t]wenty-five states [that] have enacted legislation or issued executive orders restricting boycotts of Israel." *Amawi v. Pflugerville Independent School District,* 373 F.Supp.3d 717, 730 (W.D. Tex. 2019). These "laboratories of democracy" have properly exercised their constitutional authority.[27]

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[27] State laws directed at state contractor participation in anti-Israel boycotts have engendered a broader federal law prohibiting participation in any discriminatory boycotts led by foreign nations. *See* the Anti-Boycott Act of 2018, Pub. L. No. 115-232, §§ 1771–74, which prohibits "any United States person . . . from taking or knowingly agreeing to take [certain] actions with intent to comply with, further, or support any boycott fostered or imposed by any foreign country, against a country which is friendly to the United States." 50 U.S.C. § 4842(a)(1). The prohibited actions include "[r]efusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country." *Id.* § 4842(a)(1)(A). The Anti-Boycott Act was first introduced in the Senate and House of Representatives by bi-partisan sponsors

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B. The District Judge Erred in Reading the *Claiborne Hardware* Case As Giving First Amendment Protection To All Politically Motivated Boycotts.

The District Judge granted a preliminary injunction because he mistakenly believed that discriminatory conduct such as an economic boycott amounts to free speech if it is politically motivated. 373 F.Supp.3d at 749. This was an unjustifiable application and extension of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and went beyond the reach of that decision. The District Court's reading of *Claiborne Hardware* conflicts with precedent, policy, and the country's history of combatting discrimination.

To be sure, *Claiborne* identified several "elements of the boycott" as "safeguarded by the First Amendment." 458 U.S. at 907–09. But "individual purchasing decisions" were not among these protected elements. If a disinterested observer sees a Texas company engaged in a boycott of Israel he sees little more

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in 2017 as the "Israel Anti-Boycott Act." *See* Israel Anti-Boycott Act, S. 720, H.R. 1697, 115th Cong. (2017). This Bill declared, like analogous state laws, "opposition of the United States to actions to boycott, divest from, or sanction Israel." *Id.*; *see, e.g.*, Ark. Code Ann. § 25-1-501(3); 2016 Ariz. Sess. Laws ch. 46, § 2(D). It ultimately passed in modified form within the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1771–74, 132 Stat. 1636, 2234–38 (2018). The Senate has also recently passed the Combating BDS Act of 2019, S. 1, 116th Cong. §§ 401–08, which would establish that federal law does not preempt state and local laws that prohibit contracts with or require divestment of state assets from entities boycotting Israel.

than "individual purchasing decisions." Texas' law reaches only non-expressive discriminatory conduct and does not regulate speech that supports a boycott.

Like the constitutionally-sound statute in *Lyng v. International Union*, Texas' law "does not order [the plaintiffs] not to associate together for the purpose of conducting a [boycott], or for any other purpose, and it does not prevent them from associating together." 485 U.S. at 366. Contractors are free to accept a contract with Texas even while associating with boycotters or speaking, writing, and advocating in support of boycotts of Israel. Texas' law applies to them only if they actively and actually engage in boycotting conduct while contracting with the State.

Claiborne Hardware was a Supreme Court decision that vindicated the right to combat discrimination in the public sphere. Invoking it to invalidate Texas' law would turn that historic decision on its head. Lower court decisions refused to extend *Claiborne* to reach such an unsound result. In *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (2d Cir. 1992), for example, the court rejected defendant-boycotters' efforts to use *Claiborne* and the First Amendment to shield their discriminatory boycott. The court held that the state anti-discrimination law at issue was aimed at "discrimination, not speech," and that States have "the constitutional authority. . . and a substantial, indeed compelling, interest in prohibiting" such conduct, thereby meeting the

constitutional criteria for regulations which incidentally limit speech. 986 F.2d at 295 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)). The court had no trouble distinguishing *Claiborne* because the Supreme Court in *Claiborne* had "noted that it was not 'presented with a boycott designed to secure aims that are themselves prohibited by a valid state law,'" such as discrimination. 986 F.2d at 297 (quoting *Claiborne*, 458 U.S. at 915 n.49). The boycott in *Jews for Jesus*, like the boycotts discouraged by Texas' law, was conduct. That conduct was properly regulated by anti-discrimination laws. It was not speech protected by the First Amendment.[28]

Extending *Claiborne* would ignore the exceptional factors that led to the holding in that case. The "unique historical, constitutional, and institutional concerns" surrounding racial bias in the United States prompted the Supreme Court to scrutinize state efforts that might undermine the civil rights movement. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). In cases concerning First Amendment rights that bear upon racial bias, the Supreme Court has expressly

[28] *Claiborne* itself confirms that its result was based on the boycott participants' accompanying expressive activities, not on the act of boycotting. The *Claiborne* court listed categories of conduct that, under the First Amendment, are "insufficient predicate[s] on which to impose liability," including: "[r]egular attendance and participation" in meetings, membership in an association, and communicating the names of individuals who patronized certain businesses. 458 U.S. at 924–25. The commercial act of boycotting is notably not listed.

modified its freedom-of-speech analysis because racial discrimination "violates deeply and widely accepted views of elementary justice." Rooting it out can justify state regulation that might otherwise encroach on the First Amendment. *Bob Jones Univ.*, 461 U.S. at 592.

It would be perverse if the Court's condemnation of state torts invoked to *facilitate* discrimination in *Claiborne* would now *shield* state contractors who engage in commercial activity that discriminates against Israel. The structure of federal, state, and local laws forbidding discrimination on the basis of national origin, religion, and other classifications and conditioning the receipt of government funding and contracts on commitments to refrain from discrimination conflicts with a reading of *Claiborne* that immunizes a discriminatory boycott from applicable state laws.

A court that would invalidate Texas' law under these circumstances effectively requires state governments to support and subsidize discriminatory conduct. That result would devastate our Nation's revered anti-discrimination laws. The First Amendment does not validate such a result. Only by reversing the District Court order will this Court protect our most sacred values.

CONCLUSION

This Court should reverse the District Court's decision and order that the complaint be dismissed.

Dated: September 6, 2019

Respectfully submitted,

By /s/ *Nathan Lewin*

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and complies with the word count limitations set forth in Fed. R. App. P. 29(a)(5). This Brief has 5,679 words, excluding the portions exempted by Fed. R. App. P. 32, according to the word count feature of Microsoft Word used to generate this Brief.

Dated: September 6, 2019 By /s/ *Nathan Lewin*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief in support of Defendants-Appellants with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 6, 2019.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: September 6, 2019 By /s/ *Nathan Lewin*

United States Court of Appeals

FIFTH CIRCUIT
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September 10, 2019

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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. Lewin,

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

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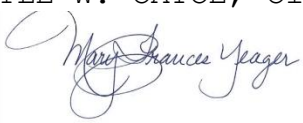

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Mr. Eugene Volokh

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