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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BAHIA AMAWI, JOHN PLUECKER,) AU:18-CV-01091-RP
OBINNA DENNAR, ZACHARY ABDELHADI,)
GEORGE HALE,)
Plaintiffs,)
v.) AUSTIN, TEXAS
PFLUGERVILLE INDEPENDENT SCHOOL DISTRICT,)
KEN PAXTON, 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, STATE)
OF ARIZONA,)
Defendants.) MARCH 29, 2019

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROBERT PITMAN

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09:00:02 1 (Open court)

09:00:02 2 THE CLERK: The Court calls A:18-CV-1091, *Bahia*
09:00:08 3 *Amawi*, and others, v. *Pflugerville Independent School District*,
09:00:12 4 and others, for motions hearing.

09:00:14 5 THE COURT: If we could have announcements for the
09:00:16 6 record, please.

09:00:18 7 MR. ABBAS: Good morning, Your Honor. Appearing for
09:00:19 8 the Plaintiff Bahia Amawi is Carolyn Homer, myself, Gadeier
09:00:23 9 Abbas, and Lena Masri. Carolyn will be directing Bahia, and
09:00:31 10 I'll be giving argument.

09:00:32 11 THE COURT: Okay. Very good. Thank you.

09:00:34 12 MR. BUSER-CLANCY: Good morning, Your Honor. Thomas
09:00:37 13 Buser-Clancy from the ACLU of Texas for the Pluecker
09:00:41 14 plaintiffs. With me today is Edgar Saldivar from the ACLU of
09:00:41 15 Texas, Brian Hauss from the ACLU Foundation, and Kevin Dubose
09:00:47 16 from Alexander Dubose and Jefferson.

09:00:49 17 THE COURT: Thank you very much. Good morning.

09:00:50 18 MR. ABRAMS: Good morning, Your Honor.
09:00:51 19 Michael Abrams and Randall Miller on behalf of Attorney General
09:00:55 20 Ken Paxton, the Board of Regents of the University of Houston,
09:00:59 21 and the Board of Regents of the Texas A&M System.

09:01:01 22 I'll be arguing on behalf of General Paxton's motion
09:01:02 23 to dismiss and response to preliminary injunction, and
09:01:04 24 Mr. Miller will be addressing the Board of Regents's motion to
09:01:07 25 dismiss.

09:01:08 1 THE COURT: Okay. Thank you.

09:01:10 2 MR. BRANDT: Your Honor, Tom Brandt for the trustees
09:01:12 3 of Lewisville ISD and Klein ISD.

09:01:15 4 THE COURT: Good morning.

09:01:17 5 MR. CLARK: Your Honor, Todd Clark. I'm monitoring
09:01:20 6 on behalf of Pflugerville Independent School District. We have
09:01:22 7 an agreement with Ms. Amawi's counsel regarding delay of
09:01:25 8 service in this proceeding.

09:01:27 9 THE COURT: Okay. Thank you very much.

09:01:28 10 All right. We're here for a hearing on the
09:01:31 11 plaintiffs' preliminary injunction and the defendant school
09:01:40 12 districts' and universities' motion to dismiss. Obviously, my
09:01:42 13 order was overgenerous with the time I gave you this morning.
09:01:44 14 Don't feel like you need to take up the entire time. I just
09:01:46 15 wanted to make sure you understood you'd have my entire morning
09:01:49 16 if we need it. I don't imagine we will.

09:01:52 17 So the way I'd like to proceed is, if we could
09:01:55 18 start with the preliminary injunction, and then at the
09:01:59 19 conclusion of that we can move to any argument with regard to
09:02:03 20 the motions to dismiss.

09:02:05 21 Let me get for the record from counsel your
09:02:11 22 impression as to whether or not -- just to confirm that there
09:02:14 23 are no contested issues of fact that are of any moment to the
09:02:18 24 issues that are before the Court. Would anybody like to make
09:02:22 25 the representation?

09:02:22 1 MR. ABBAS: Your Honor, Gadeier Abbas for Bahia.

09:02:24 2 We don't believe that there are contested issues of
09:02:27 3 fact, but we do believe that, because there is a likelihood of
09:02:30 4 appeal, that establishing a sound evidentiary record at the PI
09:02:34 5 hearing is of value and relevant to some of the other PI
09:02:38 6 factors.

09:02:38 7 THE COURT: Okay. And then what would your -- what
09:02:40 8 would that consist of from your side?

09:02:44 9 MR. ABBAS: Fifteen to 20 minutes direct examination
09:02:46 10 of Bahia Amawi.

09:02:49 11 THE COURT: Okay. Very good.

09:02:49 12 MR. ABBAS: Yes, Your Honor. We'll keep it brief.

09:02:51 13 THE COURT: It's fine. Anything you need to get in
09:02:52 14 the record.

09:02:53 15 MR. BUSER-CLANCY: Your Honor, Thomas Buser-Clancy
09:02:54 16 for the Pluecker plaintiffs. We don't believe there are any
09:02:55 17 contested issues of fact here.

09:02:58 18 THE COURT: And do you need to put anything into the
09:02:58 19 record in terms of evidence today?

09:03:00 20 MR. BUSER-CLANCY: No, Your Honor. We'll be relying
09:03:01 21 on the declarations and the exhibits to those declarations that
09:03:04 22 we've submitted to the court.

09:03:05 23 THE COURT: Okay. Thank you very much.

09:03:07 24 MR. ABRAMS: Your Honor, we also do not believe there
09:03:08 25 are contested issues of fact.

09:03:14 1 MR. BRANDT: Your Honor, we have stipulated as to
09:03:15 2 some exhibits, and I'd like to tender those into evidence at
09:03:17 3 this time for the Court's convenience.

09:03:19 4 THE COURT: Okay. That would be great. You may
09:03:20 5 approach.

09:03:21 6 MR. BRANDT: And we'll circulate it to Plaintiffs'
09:03:23 7 counsel.

09:03:24 8 MR. BUSER-CLANCY: We don't have any objection.

09:03:35 9 THE COURT: Okay. And these are defendant exhibits,
09:03:39 10 and so this would be Defendant Pflugerville Independent School
09:03:44 11 District.

09:03:44 12 MR. BRANDT: No, Your Honor. This is Klein ISD.

09:03:47 13 THE COURT: Klein.

09:03:48 14 MR. BRANDT: And Lewisville ISD. And we are not
09:03:50 15 agreeing that there are no contested issues of fact.

09:03:53 16 THE COURT: Okay.

09:03:55 17 So, first of all, with regard to these exhibits,
09:03:57 18 you've tendered these Exhibits 1 through 7 without objection?

09:04:01 19 MR. BUSER-CLANCY: Without objection, Your Honor.

09:04:02 20 THE COURT: Okay. So admitted.

09:04:03 21 So, when it comes your time, if you could just put in
09:04:08 22 the record what the contested facts are. Do you intend to
09:04:11 23 introduce any evidence other than exhibits?

09:04:13 24 MR. BRANDT: That's the evidence we intend to offer
09:04:15 25 along with the attachments to the motions to dismiss that we

09:04:19 1 filed. But those were just the very simple forms that we
09:04:25 2 talked about.

09:04:25 3 THE COURT: Great. Thank you very much.

09:04:27 4 Okay. Mr. Abbas?

09:04:34 5 MS. HOMER: Good morning, Your Honor. Carolyn Homer
09:04:36 6 from the Council on American Islamic Relations for plaintiff
09:04:40 7 Bahia Amawi, and I will be doing her direct examination. So at
09:04:42 8 this time, if we may call Ms. Amawi to the stand.

09:04:44 9 THE COURT: Ms. Amawi, if you could come forward,
09:04:46 10 please. And if you could walk toward the window there and
09:04:49 11 around the wall back toward me.

09:05:12 12 (Witness sworn)

09:05:12 13 THE COURT: Ms. Homer, you may proceed.

09:05:14 14 MS. HOMER: Thank you, Your Honor.

09:05:16 15 **BAHIA AMAWI,**

09:05:16 16 having been first duly sworn, testified as follows:

09:05:16 17 **DIRECT EXAMINATION**

09:05:16 18 **BY MS. HOMER:**

09:05:16 19 Q. Good morning, Ms. Amawi. Could you please introduce
09:05:20 20 yourself to the court.

09:05:20 21 A. Good morning. My name is a Bahia Amawi. I'm a speech
09:05:24 22 language pathologist and mother of four children.

09:05:27 23 Q. What do you do as a speech language pathologist,
09:05:30 24 Ms. Amawi?

09:05:30 25 A. I evaluate and treat children with speech and language

09:05:35 1 delays or disorders and communication issues. And it could be
09:05:39 2 something as simple as an articulation issue or more involved
09:05:43 3 as autism.

09:05:45 4 Q. What education did you complete to become a speech
09:05:47 5 language pathologist?

09:05:49 6 A. I have a bachelor's and a master's degree in speech
09:05:52 7 language pathology.

09:05:53 8 Q. Do you have any certifications?

09:05:55 9 A. I do, yes. We have something called CCC, which is
09:05:59 10 Certificate of Clinical Competency.

09:06:02 11 Q. Ms. Amawi, you live in the Austin area, correct?

09:06:06 12 A. Yes.

09:06:06 13 Q. How long have you lived in the Austin area?

09:06:08 14 A. Around 20 years.

09:06:09 15 Q. And have you worked as a speech language pathologist while
09:06:12 16 in the Austin area?

09:06:13 17 A. Yes, ma'am. I started, yes, as a full-time employee with
09:06:15 18 Austin ISD. And then once I started having kids, I switched to
09:06:20 19 contracting and I contracted with Round Rock ISD and, just more
09:06:25 20 recently, Pflugerville ISD.

09:06:26 21 Q. And how long have you contracted with Pflugerville ISD?

09:06:30 22 A. Around nine years.

09:06:31 23 Q. What services have you been providing to Pflugerville ISD?

09:06:35 24 A. My duties varied at Pflugerville ISD, everything from
09:06:39 25 subbing to speech therapist while on maternity leave, providing

09:06:44 1 therapy in group setting or one on one, and doing evaluations
09:06:48 2 and re-evals. And primarily my job was to be part of an early
09:06:52 3 childhood team, which I collaborated with other colleagues of
09:06:56 4 mine, speech therapists and psychologists, to evaluate kids who
09:07:00 5 are three to five years old.

09:07:02 6 Q. And do you perform any bilingual assessments?

09:07:07 7 A. Yes. So because I have -- I speak Arabic and I have a
09:07:10 8 degree in speech pathology, so I help mainly in the cases that
09:07:13 9 have Arabic as a second language.

09:07:16 10 Q. And how old are the children you work with?

09:07:18 11 A. From three to five years old.

09:07:19 12 Q. And how many Arabic-speaking children do you perform
09:07:24 13 assessments on?

09:07:26 14 A. It's hard to give exact number. It varies. But the fact
09:07:31 15 that every year they keep calling me, so I know there's a
09:07:34 16 demand for it and there's a need.

09:07:36 17 Q. And why do Arabic-speaking school children in Pflugerville
09:07:41 18 need the specific services you provide?

09:07:44 19 A. We have -- we're required to test individuals in their
09:07:50 20 native language or home language. And since we don't have any
09:07:53 21 formal assessments in Arabic, it is key to have someone who has
09:07:58 22 knowledge of the language. And, being a speech therapist, that
09:08:01 23 also adds to it because I know exactly what part of the formal
09:08:05 24 assessments to utilize which are relevant to the language and
09:08:08 25 which are not. And, when doing formal assessments, I know

09:08:12 1 exactly how to prompt the kids and elicit them for sounds.

09:08:16 2 Q. How have you felt about the contract work you perform for

09:08:20 3 Pflugerville ISD?

09:08:22 4 A. I love working with them. I felt that I was doing a great

09:08:26 5 service there because it's something that I can tell there's a

09:08:29 6 need for it and I enjoy working with children. And it was very

09:08:32 7 rewarding, and I had really good relationship with them.

09:08:35 8 Q. Ms. Amawi, do you currently perform speech language

09:08:38 9 pathology services for Pflugerville ISD?

09:08:40 10 A. No.

09:08:41 11 Q. When did you stop?

09:08:43 12 A. I stopped in the beginning of October.

09:08:47 13 Q. So it's been nearly six months?

09:08:49 14 A. About, yeah.

09:08:50 15 Q. Since October who has provided Arabic-speaking speech

09:08:56 16 language pathology service to Pflugerville school children?

09:09:00 17 A. To my knowledge it had to be translators.

09:09:03 18 Q. And can you explain the difference between a translator

09:09:06 19 and a speech language pathologist providing those services.

09:09:08 20 A. Sure. So translators don't have the background of speech

09:09:11 21 language pathology, so they have to be basically fed what to

09:09:16 22 say to the -- the child. And a lot of time information can get

09:09:20 23 lost in that way and may not get an appropriate assessment,

09:09:24 24 which means the child may not be appropriately serviced as

09:09:28 25 well.

09:09:28 1 Q. So what consequences are there for a child who is not
09:09:31 2 appropriately assessed?

09:09:32 3 A. Well, they could be placed in the wrong setting, in the
09:09:35 4 wrong kind of service. Instead of getting ESL because they
09:09:39 5 have dialectal differences, you know, they could be placed with
09:09:41 6 speech language issues, and so they're taken away from their
09:09:45 7 curriculum. Because when you're in speech therapy, you have to
09:09:48 8 be removed from the classroom, which means you lose valuable
09:09:51 9 education time and it can affect the child in that essence.

09:09:53 10 Q. Who else in the Austin area has the Arabic bilingual skill
09:10:00 11 set and is a speech language pathologist?

09:10:03 12 A. I'm not aware of anybody else.

09:10:06 13 Q. Now, you mentioned that you stopped providing services to
09:10:11 14 Pflugerville in October. Why did you stop providing speech
09:10:14 15 language pathology services?

09:10:16 16 A. So, for the first time this year, an addendum was added to
09:10:19 17 my original contract, and this addendum including House
09:10:23 18 Bill 89, which required me to confirm that I do not currently
09:10:27 19 boycott the State of Israel and do not plan to during my time
09:10:32 20 to boycott the State of Israel while working with Pflugerville.

09:10:37 21 MS. HOMER: Your Honor, I would like to mark
09:10:39 22 Plaintiff Amawi's Exhibit 1 for the record. And may I approach
09:10:41 23 the witness.

09:11:15 24 THE COURT: You may.

09:11:15 25 Q. (BY MS. HOMER) MS. Amawi, do you recognize this document?

09:11:15 1 A. Yes, I do.

09:11:16 2 Q. What is it?

09:11:16 3 A. This is an addendum that was added this year for the first
09:11:19 4 time.

09:11:19 5 Q. And is that an accurate copy of the addendum you received?

09:11:23 6 A. It looks like it, yes.

09:11:24 7 Q. And where is the new clause you mentioned?

09:11:26 8 A. It's on page 13, letter I.

09:11:30 9 Q. And can you just read the first paragraph of letter I into
09:11:34 10 the record.

09:11:35 11 A. Yes.

09:11:36 12 Q. "Pursuant to Section 2270.001 of Texas Government Code,
09:11:42 13 the contractor affirms that it does not currently boycott
09:11:46 14 Israel; and will not boycott Israel during the term of the
09:11:49 15 contract."

09:11:50 16 MS. HOMER: Your Honor, I'd like to move the
09:11:52 17 admission of Exhibit 1 into the record.

09:11:54 18 THE COURT: Any objection?

09:11:54 19 MR. MILLER: No objection.

09:11:55 20 THE COURT: Without objection, so admitted.

09:11:58 21 Ms. Homer, can I interrupt you just briefly.

09:12:00 22 Ernie, if folks want to come inside the bar and seat,
09:12:04 23 we want as many people to be able to sit down. If you'd like
09:12:07 24 to, we have seats up front. You can just come forward through
09:12:10 25 that. And, as people come in, I want to accommodate as many

09:12:14 1 people as we can.

09:12:15 2 MS. HOMER: Thank you, Your Honor.

09:12:16 3 THE COURT: Sure. Excuse me.

09:12:18 4 Q. (BY MS. HOMER) Ms. Amawi, did you sign this addendum
09:12:20 5 including paragraph I?

09:12:22 6 A. No, I did not.

09:12:23 7 Q. Why not?

09:12:24 8 A. It goes against my principles and values.

09:12:27 9 Q. And what principles and values of yours does it violate?

09:12:30 10 A. It prevents me from exercising my free speech and
09:12:34 11 political expression.

09:12:35 12 Q. And, Ms. Amawi, why -- like, what is your political
09:12:39 13 expression that relates to Israel?

09:12:44 14 A. It should be my own judgment regarding what I decide
09:12:46 15 regarding the political turmoil over there, whether I decide to
09:12:52 16 support it or not. It should be up to me to learn about it and
09:12:54 17 gain facts and make my own judgment based on that.

09:12:57 18 Q. And, Ms. Amawi, why are you personally invested in the
09:13:02 19 politics surrounding Israel?

09:13:03 20 A. I am of Palestinian-American origin. So this bill not
09:13:07 21 only attacked me as an American but also as a Palestinian. And
09:13:11 22 I have family that still lives in the occupied territory of
09:13:14 23 West Bank. So for me this is like a slap in the face, almost.

09:13:21 24 Q. And, Ms. Amawi, have you personally visited the West Bank?

09:13:24 25 A. Yes. Numerous times.

09:13:26 1 Q. And what are some examples of actions you've seen and
09:13:29 2 experienced in the West Bank as it relates to Israel?

09:13:32 3 A. Well, there's a lot of human abusers there. There is
09:13:37 4 violations that, for instance, restricts freedom of movement,
09:13:43 5 where there are streets only accessible for Israelis and not
09:13:48 6 Palestinians. So main roads, for instance, are cut off for
09:13:50 7 Palestinians, and they have to use longer routes to make it
09:13:53 8 difficult for them to move.

09:13:56 9 They have curfews that last for weeks or could be a
09:14:00 10 month, even, preventing them from going out to grocery stores
09:14:03 11 and to get treatment or health issues. Schools are constantly
09:14:08 12 closed. And then, of course, you have constant searches. You
09:14:11 13 can be searched any time they want to at every crossing. You
09:14:14 14 need visas to go from city to city. So imagine if I wanted to
09:14:17 15 go into downtown, I'd need a visa from Round Rock to come here.

09:14:21 16 And then, of course, you have at nighttime they come
09:14:25 17 in the middle of the night and they come pick up the kids. And
09:14:27 18 they come up on people's doors and pick up their children and
09:14:31 19 take them in for custody.

09:14:33 20 Q. Ms. Amawi, do you boycott Israel?

09:14:35 21 A. Yes, I do.

09:14:36 22 Q. How do you boycott Israel?

09:14:38 23 A. I do not buy any products that are made in Israel or in
09:14:43 24 their settlements. Or when I become aware of a new product, I
09:14:45 25 avoid buying them.

09:14:46 1 Q. And how do you determine what products are from Israel?

09:14:50 2 A. I read the labels. I pay attention to the labels. And

09:14:53 3 every time I go shopping, I make sure I pay attention to the

09:14:56 4 labels.

09:14:56 5 Q. And what sorts of products are you checking the labels on?

09:14:59 6 A. So, when I go grocery shopping at the local store or

09:15:03 7 Walmart or Target, basically, anything from clothing to food

09:15:08 8 items, toys, my materials for my work as well and for my kids,

09:15:14 9 I check the labels. And if it says "made in Israel," I do not

09:15:18 10 purchase them. Even containers or anything that holds my

09:15:21 11 supplies.

09:15:21 12 Q. You mentioned toys that you use for your kids and for

09:15:25 13 work. What sorts of toys are those?

09:15:28 14 A. We use a lot of game boards, books, car -- toy cars, and a

09:15:37 15 lot of games of that sort.

09:15:40 16 Q. And how are using those toys and cars and games to perform

09:15:44 17 speech language pathology services?

09:15:46 18 A. So we use activities to engage the kids to elicit speech

09:15:51 19 sounds from them. So we use those kind of functional kind of

09:15:54 20 play in order to elicit speech.

09:15:57 21 Q. Does your boycott of Israel extend to the toys and games

09:16:01 22 you use for performing assessments for Pflugerville school

09:16:09 23 children?

09:16:09 24 A. Yes.

09:16:09 25 Q. Ms. Amawi, can you in good conscience sign paragraph I of

09:16:13 1 this addendum and promise not to boycott Israel?

09:16:17 2 A. No.

09:16:17 3 Q. Did you sign this addendum?

09:16:19 4 A. No.

09:16:19 5 Q. When you refused to sign the no-boycott-of-Israel clause,

09:16:23 6 what happened?

09:16:23 7 A. I couldn't return to back to work.

09:16:25 8 Q. Have you worked since October?

09:16:27 9 A. No.

09:16:27 10 Q. Have you been paid since October?

09:16:29 11 A. No.

09:16:29 12 Q. If this no-boycott-of-Israel clause was removed from the

09:16:33 13 addendum, would you sign it?

09:16:34 14 A. Yes.

09:16:34 15 Q. And would you go back to work for PFI -- for Pflugerville

09:16:38 16 ISD?

09:16:39 17 A. Yes.

09:16:41 18 Q. Thank you, Ms. Amawi.

09:16:42 19 MS. HOMER: Your Honor, I have no further question.

09:16:43 20 THE COURT: Thank you. Mr. Miller?

09:16:44 21 MR. MILLER: Briefly, Your Honor.

09:16:45 22 **CROSS-EXAMINATION**

09:16:45 23 **BY MR. MILLER:**

09:17:01 24 Q. Ms. Amawi, you mentioned that some of the items that you

09:17:04 25 do not buy because of their connection to Israel are toys. Do

09:17:08 1 you tell other people that the reason you don't buy certain
09:17:12 2 toys is because of a certain company's connection to Israel?
09:17:17 3 A. I do not talk about the conflicts or, you know, my
09:17:22 4 personal boycott at work at all. That issue doesn't come up at
09:17:26 5 all.
09:17:26 6 Q. And I believe -- do you remember filling out a declaration
09:17:30 7 in this lawsuit?
09:17:31 8 A. What do you mean?
09:17:32 9 Q. Did you submit a written statement in this case that your
09:17:35 10 attorney filed --
09:17:36 11 A. Oh, yes. That one, yes.
09:17:37 12 Q. -- in this lawsuit?
09:17:38 13 And was another product you mentioned that you do not
09:17:41 14 buy Sabra hummus?
09:17:42 15 A. Yes.
09:17:43 16 Q. And is your decision not to buy Sabra hummus related to
09:17:48 17 your job as a speech language pathologist?
09:17:50 18 A. In that case it is not. But there are other products I do
09:17:53 19 not buy for my -- I don't purchase that have to do with my job.
09:17:58 20 Q. I'm sorry. I didn't understand. So Sabra hummus is not
09:18:02 21 related to your job; is that correct?
09:18:04 22 A. No, it's not.
09:18:05 23 Q. Thank you Ms. Amawi.
09:18:06 24 A. Uh-huh.
09:18:08 25 MS. HOMER: No further questions, Your Honor.

09:18:09 1 THE COURT: Okay. All right. If there are no
09:18:14 2 further questions, you may step down.

09:18:16 3 THE WITNESS: Thank you.

09:18:18 4 THE COURT: Any further witnesses or evidence you'd
09:18:19 5 like to present before argument? Any further evidence or
09:18:22 6 witnesses?

09:18:22 7 MR. ABBAS: No, Your Honor. Just argument now on the
09:18:25 8 PI.

09:18:26 9 THE COURT: Very good. The floor is yours.

09:18:28 10 MR. ABBAS: May it please the Court:

09:18:49 11 HB 89 strikes at the very heart of the First
09:18:52 12 Amendment. And so while the typical kind of quotes -- the
09:18:57 13 cliché quotes of the First Amendment that adorn many a First
09:19:00 14 Amendment brief are often looked over, in this case I think
09:19:03 15 it's warranted to remember that the purpose of the First
09:19:08 16 Amendment is broader than any particular case and that the
09:19:12 17 purpose of the First Amendment is to expand the debate and to
09:19:18 18 allow the free exchange of information.

09:19:22 19 So the Supreme Court in *Thomas v. Collins* said,
09:19:24 20 quote: It is therefore our tradition to allow the widest room
09:19:27 21 for discussion, the narrowest range for its restrictions.

09:19:31 22 *New York Times v. Sullivan* said: Debate on public
09:19:34 23 issues should be uninhibited.

09:19:37 24 These guide stars for the First Amendment should
09:19:41 25 dictate the outcome in this case. And the clarity of the

09:19:45 1 issues are such that this Court need not look beyond the four
09:19:49 2 corners of *Claiborne* to decide its outcome.

09:19:54 3 *Claiborne* controls this case. *Claiborne* control this
09:19:58 4 case because this is a clear and unmistakable and indisputable
09:20:03 5 political boycott. Bahia Amawi is responding to a 2005 effort
09:20:09 6 by Palestine Civil Society activists to enlist the help of
09:20:14 7 others, worldwide and the United States and beyond, to boycott,
09:20:18 8 divest, and sanction Israel for political reasons, not for
09:20:22 9 economic reasons.

09:20:23 10 And *Claiborne* deals with that. *Claiborne* deals with
09:20:26 11 that squarely. And not only does *Claiborne* make clear that the
09:20:30 12 basket of rights in the First Amendment, the right to assemble,
09:20:37 13 the right to speak, the right to petition, the right to
09:20:40 14 associate, that basket of rights that, synthesized together,
09:20:44 15 comprises the right to boycott, not only does it explicitly
09:20:49 16 establish and protect that right, it also deals with the
09:20:52 17 counter-arguments that the defendants variously raise.

09:20:57 18 It identifies that there are instances where speech
09:21:01 19 can be restricted. Quote: Government regulation, as an
09:21:05 20 incidental effect on First Amendment freedoms, may be justified
09:21:10 21 in certain narrowly defined instances.

09:21:13 22 And then *Claiborne* goes on to specify what those
09:21:17 23 narrowly defined instances are. For example, the right of
09:21:20 24 business entities to associate, to suppress competition, may be
09:21:24 25 curtailed. Secondary boycotts and picketing by labor unions

09:21:30 1 may be prohibited as part of Congress's striking of a balance
09:21:35 2 between the rights of a labor union and the rights of neutrals.

09:21:40 3 Those are the things that -- those are the exceptions
09:21:46 4 that *Claiborne* articulates to the general proposition that the
09:21:51 5 right of people to gather together and to engage themselves in
09:21:56 6 boycott activity is protected by the First Amendment.

09:21:59 7 And just like any other unenumerated right, the right
09:22:06 8 to boycott is implied from the various explicit guarantees in
09:22:14 9 the First Amendment. The fact that this right not only
09:22:20 10 implicates Bahia's freedom to speak, but also her freedom to
09:22:26 11 associate, also her freedom to petition, and her freedom to
09:22:30 12 assemble with others to communicate what their views are.

09:22:36 13 And there's no -- while the government attempts to
09:22:45 14 convince this Court that the HB 89 is really simply a
09:22:52 15 nondiscrimination piece of legislation, their -- the intent of
09:22:58 16 the bill and the law is very clear: Representative Phil King,
09:23:03 17 the author of the bill, in describing why it needs to exist
09:23:08 18 says, quote: You can't have Christianity without having a
09:23:12 19 literal, historical, and spiritual Israel.

09:23:15 20 He described HB 89 as an anti-BDS measure. He said:
09:23:21 21 The BDS movement is directed at harming and destroying Israel,
09:23:26 22 pure and simple. That's not what Bahia is trying to do. But
09:23:29 23 that doesn't stop Governor Abbott, after the filing of this
09:23:32 24 lawsuit, to make it very clear what he was trying to do:
09:23:35 25 Quote, Texas stands with Israel, period, unquote.

09:23:39 1 Attorney General Paxton, he said after the lawsuit
09:23:47 2 was filed that people, quote, don't have a right to use the
09:23:51 3 money they obtain from government contracts in furtherance of
09:23:56 4 boycott activity. This is what they're -- this is what they're
09:23:59 5 saying. What the State of Texas is saying is that, because
09:24:02 6 Bahia Amawi goes to the grocery store and buys one brand of
09:24:06 7 hummus and not another brand of hummus, that she cannot work
09:24:09 8 for the Pflugerville School District. That is an illegal
09:24:13 9 restraint on her speech, that is illegal condition on
09:24:17 10 government employments, and that is a restriction the
09:24:20 11 Constitution does not allow.

09:24:25 12 But it's more than just restriction on Bahia's speech
09:24:28 13 that creates the constitutional problems. This law compels
09:24:34 14 speech. It is a loyalty oath that the State of Texas is asking
09:24:37 15 Bahia Amawi to sign. It is a loyalty oath that Bahia Amawi is
09:24:42 16 being asked to sign to the State of Israel. She is being asked
09:24:45 17 to promise to refrain from certain conduct in the future. She
09:24:50 18 can boycott Illinois, but she can't boycott Israel. She can
09:24:55 19 boycott the city of Dallas, but she can't boycott Israel. She
09:24:59 20 can boycott any other country in the world -- Saudi Arabia,
09:25:03 21 Canada, Mexico, France -- but she cannot boycott Israel.

09:25:08 22 That lifts the mystery. There's no question. The
09:25:15 23 facts speak for themselves. This is a content-based
09:25:17 24 restriction on Bahia's right. It is an attempt to compel her
09:25:22 25 speech in favor of Israel, speech that she does not want to

09:25:27 1 engage in, and speech that the First Amendment gives her the
09:25:33 2 right to refrain from making.

09:25:35 3 But the Anti-BDS Act does not limit itself to
09:25:47 4 prohibiting Bahia from purchasing decisions. That's very
09:25:51 5 important. The text of Section 808.001 says -- defines the
09:26:00 6 boycott of Israel as, quote, refusing to deal with, terminating
09:26:05 7 business activities with, or otherwise taking any action ...
09:26:07 8 So that's all the economic. But otherwise taking any action
09:26:11 9 that is intended to penalize, inflict harm on, or limit
09:26:17 10 commercial relations with, State of Israel.

09:26:19 11 That's not an economic activity. That is
09:26:25 12 pamphleteering. That is asking people to come to court with
09:26:27 13 her today. That is talking about the BDS in any venue. So
09:26:35 14 understand that the law that Texas has passed is not simply
09:26:39 15 about Bahia's economic choices. It's also about purely her
09:26:42 16 activism. Any protest in favor of BDS that's pro-Palestine,
09:26:50 17 critical of Israel, would be intended to penalize, inflict harm
09:26:55 18 on, or possibly limit commercial relations with Israel.

09:26:58 19 So even if Bahia were to agree, okay, fine. When I
09:27:03 20 go to the supermarket next time, I'll buy the Israel brand of
09:27:08 21 hummus and not the store brand of hummus, she would still have
09:27:11 22 to commit to not attend protests, to not attend gatherings, to
09:27:17 23 not post on social media or communicate online about her views
09:27:22 24 about Israel, her views on the Palestine. And that is pure
09:27:26 25 First Amendment activity -- pure First Amendment activity.

09:27:30 1 So, whereas the government makes many different
09:27:32 2 arguments about the -- whether or not the nature of her boycott
09:27:42 3 is inherently expressive or not narrowly expressive, they gloss
09:27:47 4 over the fact that the statute sweeps wider to cover things
09:27:51 5 that don't have anything to do with economics and things that
09:27:54 6 have to do purely with her First Amendment activism.

09:27:59 7 And that's why this case is not a close call. This
09:28:02 8 case is well within the established parameters of First
09:28:10 9 Amendment-protected boycott activity. And what facilitates
09:28:16 10 the -- what could facilitate the Court's willingness to impose
09:28:23 11 an injunction on the law is the balance of equities and the
09:28:30 12 public interest.

09:28:31 13 In First Amendment cases, the public interest and the
09:28:36 14 irreparable harm are -- the default go to the side that has the
09:28:42 15 First Amendment violation. But here the public interest and
09:28:47 16 the balance of equities does not regard Bahia alone. The
09:28:51 17 balance of equities and the public interest also regards the
09:28:54 18 students that the government is depriving of Bahia's services.

09:29:00 19 Texas identified no tangible problem with the Boycott
09:29:08 20 Divestment Sanctions movement in Texas. There's no -- there's
09:29:12 21 nothing in the record, there's nothing in the legislative
09:29:16 22 history, that quantifies the extent of the damage that the
09:29:20 23 State of Texas is alleging. They don't really even allege any
09:29:25 24 damage to the Texas economy.

09:29:27 25 So they went out and fixed the problem in search of a

09:29:32 1 solution and, while doing so, they took an Arabic-speaking
09:29:39 2 speech language pathologist away from three-, four-, and
09:29:43 3 five-year-olds who need her services to learn how to talk.
09:29:49 4 They took away a speech pathologist that, for almost a decade,
09:29:54 5 provided services unique to her and uniquely important to the
09:30:00 6 students that she serves. That's what the State of Texas has
09:30:05 7 done here.

09:30:05 8 The State of Texas has run roughshod over the First
09:30:10 9 Amendment, and, in doing so, they've deprived their own
09:30:15 10 students -- Bahia's students, Pflugerville's students -- of the
09:30:20 11 benefit of having Bahia's expertise with her.

09:30:25 12 I'll reserve the balance of my time.

09:30:27 13 THE COURT: Thank you, Mr. Abbas.

09:30:31 14 Mr. Buser-Clancy.

09:30:34 15 MR. BUSER-CLANCY: Good morning, Your Honor. For the
09:30:38 16 Pluecker plaintiffs.

09:30:39 17 Your Honor, I'll do my best not to duplicate what
09:30:41 18 Mr. Abbas has already covered, but there are a few particular
09:30:44 19 points that I wanted to address today. The first deals with
09:30:47 20 *Claiborne*, which is clearly controlling in this case. The
09:30:51 21 defendants have tried to argue that *Claiborne* does not get to
09:30:54 22 the core of the political boycott itself. But both the context
09:30:59 23 of *Claiborne* and the texts of the opinion itself refute that
09:31:03 24 notion.

09:31:03 25 *Claiborne* was decided after the Mississippi Supreme

09:31:07 1 Court held individuals who participated in a boycott liable for
09:31:12 2 their collective refusal to deal and the economic harm that
09:31:16 3 resulted therein. The Supreme Court analyzed that imposition
09:31:20 4 of liability and held that the damages couldn't result from
09:31:25 5 their participation in the boycott and said specifically: The
09:31:29 6 right of the states to regulate economic activity could not
09:31:33 7 justify a complete prohibition against a nonviolent politically
09:31:38 8 motivated boycott.

09:31:39 9 So it's clear from the text of *Claiborne* itself that
09:31:42 10 it reaches the act of boycotting itself, despite Defendants'
09:31:45 11 arguments to the contrary.

09:31:46 12 The second way you know that *Claiborne* reaches the
09:31:50 13 acts of the boycott itself is subsequent Supreme Court
09:31:53 14 decisions. In *FTC v. Superior Court Trial Lawyers Association*,
09:31:59 15 the Supreme Court analyzed a very different boycott. It looked
09:32:03 16 at a boycott of trial lawyers who were boycotting the contracts
09:32:06 17 they were getting for representing indigent individuals. In
09:32:10 18 analyzing that boycott, the Supreme Court was clear we're not
09:32:12 19 looking at the speech aspects associated with it, we're looking
09:32:15 20 at the boycott itself.

09:32:17 21 And what the Supreme Court said was that the Trial
09:32:19 22 Lawyers boycott was very different from the boycott at issue in
09:32:23 23 *Claiborne*. The Trial Lawyers boycott there was economically
09:32:26 24 self-motivated and, therefore, not protected. But *Claiborne's*
09:32:30 25 boycott was politically motivated and, therefore, was

09:32:34 1 protected. And that's the distinction that the Court drew in
09:32:38 2 that case.

09:32:38 3 If *Claiborne* hadn't reached a politically motivated
09:32:41 4 consumer boycott, the decision of the Supreme Court in the
09:32:45 5 *Trial Lawyers* case would not have made sense. It's clear that
09:32:48 6 both *Claiborne* and subsequent Supreme Court opinions have
09:32:51 7 interpreted *Claiborne* to reach the act of a boycott itself.

09:32:55 8 The second way that Defendants try to avoid the
09:33:00 9 inevitable conclusion that *Claiborne* is controlling is by
09:33:02 10 arguing that *Claiborne* only reaches domestic political speech.
09:33:05 11 But there's no basis at all for that in either *Claiborne* or
09:33:09 12 this First Amendment.

09:33:11 13 *Claiborne* dealt with a boycott of both civic and
09:33:14 14 economic leaders, and it specifically said that the boycott
09:33:17 15 regarded political, social, and economic change. It wasn't
09:33:23 16 just targeted at constitutional issues. Nonetheless, the
09:33:27 17 boycott was found to be protected.

09:33:30 18 Moreover, it's clear that the First Amendment
09:33:32 19 protects the right to protest, to speak out against, foreign
09:33:36 20 governments. That's *Boos v. Barry*. In that case the court
09:33:40 21 analyzed a speech restriction on individuals protesting foreign
09:33:44 22 embassies and held that that speech restriction could not pass
09:33:47 23 constitutional muster because the First Amendment protected the
09:33:51 24 right to protest.

09:33:52 25 So, Your Honor, it's clear that *Claiborne* protects

09:33:56 1 consumer political boycotts, whether they're domestic or
09:34:00 2 foreign in nature, and *Claiborne* controls this decision and
09:34:03 3 holds that it's protected under the First Amendment.

09:34:06 4 Defendants are going to talk a lot about *FAIR*, so I
09:34:08 5 would like to address that briefly right now. If you read
09:34:13 6 *FAIR*, it's clear -- which I'm sure everyone has. But it's
09:34:17 7 clear *FAIR* is not talking about a political consumer boycott.
09:34:22 8 It's talking about a very different issue of allowing
09:34:25 9 recruiters onto a campus to recruit for law schools. It's
09:34:30 10 totally different. And, in fact, the text of *FAIR* doesn't
09:34:33 11 mention the word "boycott" at all, and it doesn't mention
09:34:36 12 "*Claiborne*" at all.

09:34:37 13 So a view that *FAIR* somehow overturned the seminal
09:34:43 14 decision holding that consumer political boycotts are protected
09:34:46 15 without mentioning the word "boycott" or without mentioning the
09:34:50 16 case that it was overturning, *Claiborne*, is simply not
09:34:53 17 supportable in any respect.

09:34:57 18 And I would also point out that *FAIR* is further
09:35:01 19 distinguishable in terms of what it actually covered. So *FAIR*
09:35:05 20 covered allowing individuals -- allowing military recruiters
09:35:10 21 onto a campus, and that's all that happened. The Court found
09:35:13 22 that was an expressive activity. But *Claiborne* specifically
09:35:17 23 found that boycotts are expressive. So that's the first
09:35:20 24 distinction.

09:35:21 25 But the second distinction is that, in *FAIR*, the law

09:35:24 1 schools only had to allow the military recruiters onto campus.
09:35:28 2 They did not have to sign a certification saying that they are
09:35:31 3 not going to boycott the military writ large. That's very
09:35:35 4 different from the issue here where companies have to sign a
09:35:39 5 certification saying they do not boycott Israel. And that
09:35:44 6 no-boycott certification is not limited to the time where
09:35:47 7 they're providing services to the government, it's holistic.
09:35:51 8 They have to sign that boycott certification that says, in no
09:35:54 9 respect are they boycotting Israel, which is a further way of
09:35:58 10 distinguishing *FAIR*.

09:35:59 11 Finally, Your Honor, the last way that *FAIR* is very
09:36:01 12 distinguishable is that the interest involved. The court found
09:36:04 13 that, in terms of recruiting people for the Department of
09:36:06 14 Defense, recruiting people to raise a military, that's where
09:36:10 15 the government's interests are at their zenith. And it was --
09:36:14 16 the court found that they should be very deferential to the
09:36:17 17 government.

09:36:17 18 No such interest has been articulated here. In fact,
09:36:21 19 the legislature didn't put forth really any interest or any
09:36:25 20 factual findings for the need for the no-boycott certification.
09:36:29 21 So there's not the counterbalancing interest that was at issue
09:36:33 22 in *FAIR*, rendering *FAIR* further distinguishable.

09:36:37 23 So, Your Honor, given that *Claiborne* holds that
09:36:41 24 consumer political boycotts are protected under the First
09:36:44 25 Amendment, under the modified Pickering test, the defendants

09:36:48 1 bear a very large burden in order to justify a restraint on
09:36:52 2 political expression that affects a vast swath of contractors.
09:36:57 3 They need to show a real, not hypothetical, interest that
09:37:01 4 relates to the provision of government services, and they
09:37:05 5 haven't done that at all in this case and nor could they.

09:37:08 6 There is no reason that Mr. Pluecker's boycott and
09:37:12 7 refusal to buy Sabra hummus impacts his ability to act as
09:37:17 8 translator for the University of Houston. There's no reason
09:37:20 9 that Mr. Dennar or Mr. Abdelhadi's refusal to purchase Loreal
09:37:24 10 products, HP products, things along those lines, impacts their
09:37:27 11 ability to judge a debate tournament. That interest simply
09:37:32 12 doesn't exist.

09:37:32 13 Defendants are going to talk about standard
09:37:33 14 antidiscrimination measures, but that's not what this statute
09:37:36 15 is. An antidiscrimination measure prohibits -- for national
09:37:40 16 origin, for instance, prohibits discrimination on the basis of
09:37:45 17 national origin. The statute at issue here prohibits refusing
09:37:49 18 to deal with Israel or any company that does business with
09:37:52 19 Israel, full stop, end of story. And the fact that it's not
09:37:56 20 targeting standard antidiscrimination measures is made clear
09:37:59 21 when you look at the plaintiffs at issue here.

09:38:02 22 For instance, Mr. Abdelhadi boycotts HP products. HP
09:38:08 23 is an American company. So he's not boycotting HP because of
09:38:13 24 its Israeli national origin. That doesn't make sense. Rather,
09:38:16 25 he's boycotting HP because of certain political actions that HP

09:38:19 1 takes that he has political disagreement with -- core First
09:38:23 2 Amendment activity.

09:38:24 3 And, in fact, the boycott prohibition doesn't look at
09:38:30 4 why one is refusing to do business with Israel at all, so it
09:38:34 5 doesn't -- it's not targeted at discrimination on the basis of
09:38:37 6 national origin. So, on its face, it's not an
09:38:40 7 antidiscrimination measure, despite Defendants' protest to the
09:38:44 8 contrary.

09:38:44 9 So that's why the act is unconstitutional under the
09:38:50 10 unconstitutional conditions doctrine. There are three
09:38:53 11 independent reasons that I'll address briefly why the act is
09:38:56 12 also unconstitutional.

09:38:58 13 The second is that it is clearly viewpoint and
09:39:00 14 content discrimination, yet targets a particular form of
09:39:03 15 speech, boycotts against Israel, and it targets it because of
09:39:07 16 its content. As Mr. Abbas has already pointed out, that is
09:39:10 17 extremely clear from the history surrounding the act. The act
09:39:13 18 was called an anti-BDS measure. It was clearly designed to
09:39:16 19 combat BDS campaigns because the government disagrees with
09:39:19 20 those campaigns.

09:39:20 21 But it's also clear when you look at how the act
09:39:22 22 operates. One is not allowed to boycott Israel, but one could
09:39:26 23 boycott Palestine, one could boycott Germany. In fact, one
09:39:30 24 could engage in reverse boycott and boycott those who
09:39:35 25 participate in BDS campaigns. All of those are permissible

09:39:40 1 under the act. But if a company takes a disfavored stance the
09:39:42 2 State doesn't like and boycotts Israel, then they're subject to
09:39:45 3 punishment. That's the clear hallmark of a viewpoint and
09:39:47 4 content discriminatory act, and that's why it's
09:39:50 5 unconstitutional.

09:39:51 6 The State admits that they're trying to target BDS
09:39:55 7 campaigns. But to avoid the inevitable conclusion that that's
09:39:58 8 viewpoint and content discrimination, they instead say that,
09:40:01 9 no, this is government speech. And they point to the case in
09:40:05 10 which Texas license plates that displayed Confederate flags
09:40:09 11 were found to be government speech.

09:40:11 12 This case couldn't be any more different than that.
09:40:14 13 License plates which bear the word "Texas" and convey a
09:40:17 14 message, the Supreme Court found that reasonable people would
09:40:19 15 understand that to be the Texas government speaking.

09:40:21 16 Here no reasonable person is going to say, oh,
09:40:24 17 Mr. Abdelhadi signed a contract to go judge a debate
09:40:28 18 tournament, therefore, his boycott is Texas's boycott. That
09:40:31 19 doesn't make sense. And it's made further clear by the fact
09:40:34 20 that the prohibition doesn't limit itself to not boycotting
09:40:39 21 Israel while you're performing the services for the government,
09:40:41 22 rather, it says you cannot boycott Israel, full stop.

09:40:46 23 And there's just no reasonable view that
09:40:47 24 Mr. Abdelhadi's boycott and Mr. Pluecker's boycott are going to
09:40:50 25 be attributed to the State simply because they've signed a

09:40:53 1 contract to provide services for the State.

09:40:54 2 The other reason that Mr. Abbas touched on that the
09:40:58 3 act is unconstitutional is that it unconstitutionally compels
09:41:02 4 speech. Here the act forces individuals to publicly declare
09:41:06 5 that they won't boycott Israel. I think it's clear from this
09:41:09 6 hearing itself that the Israel-Palestine controversy is
09:41:13 7 extremely controversial and is a matter of public import. But
09:41:16 8 the State has required individuals to take a public stance on
09:41:20 9 whether they do or do not boycott Israel in order to contract
09:41:23 10 with them, and that has no reasonable fit to any normal
09:41:27 11 government interest or any rational government interest.

09:41:30 12 As I just articulated, Mr. Pluecker's boycott of
09:41:34 13 Sabra hummus is not related to his ability to translate. So
09:41:38 14 the fact that the government is forcing an individual to
09:41:40 15 publicly declare that they won't boycott Israel
09:41:43 16 unconstitutionally compels their speech about a matter of
09:41:46 17 public controversy when there's no rational fit for the
09:41:49 18 government interests.

09:41:49 19 Finally, Your Honor, the act is also unconstitutional
09:41:55 20 because it's unconstitutionally vague. As Mr. Abbas alluded
09:41:58 21 to, the act doesn't just prohibit boycotting as one might
09:42:02 22 typically understand it. It also prohibits any act -- any
09:42:05 23 action that's intended to inflict -- excuse me. Let me make
09:42:10 24 sure I get the words right -- any action that is intended to
09:42:13 25 penalize or inflict economic harm on Israel or any company that

09:42:17 1 does business in Israel.

09:42:19 2 What that "any" action clause means, a person of
09:42:24 3 ordinary intelligence could not figure out, as Mr. Abbas
09:42:26 4 alluded to it very well, likely includes picketing, it very
09:42:30 5 well likely includes encouraging others to join BDS campaigns.
09:42:34 6 But what else it might include is unclear.

09:42:37 7 It could include, for instance, going to a
09:42:39 8 Palestinian film festival, donating money to a Palestinian
09:42:43 9 cause. Is that an action intended to cause harm to Israel,
09:42:46 10 given how many people view this issue particularly as a
09:42:49 11 zero-sum game?

09:42:50 12 And the act's vagueness is only compounded by the
09:42:53 13 fact that it includes a nebulous exception at the end. It
09:42:56 14 doesn't include actions intended for ordinary business
09:42:59 15 purposes, but there's no definition of what an "ordinary
09:43:02 16 business purpose" is. So what you have is an extremely broad
09:43:06 17 act that prohibits a vast swath of speech where you can't
09:43:09 18 figure out exactly what's prohibited, and then you have a
09:43:11 19 nebulous exception at the end for "ordinary business purposes."

09:43:14 20 That's the hallmark of an unconstitutionally vague
09:43:17 21 law because that allows the government unbridled discretion in
09:43:20 22 terms of how they're going to enforce the law. And inevitably
09:43:25 23 what's going to happen is individuals who speak out about BDS,
09:43:28 24 who are public about BDS, they're the ones who are going to be
09:43:32 25 targeted, they're the ones who the government is actually going

09:43:34 1 to come after because there's no other way to figure this out.
09:43:38 2 And that chills speech, and it is further a violation of the
09:43:41 3 First Amendment.

09:43:42 4 Thank you, Your Honor.

09:43:43 5 THE COURT: Thank you very much. Anyone else for the
09:43:45 6 plaintiffs?

09:43:46 7 (No response)

09:43:46 8 THE COURT: Okay. Mr. Abrams?

09:43:49 9 MR. ABRAMS: Good morning, Your Honor. The
09:44:02 10 plaintiffs just argued that this is an easy case. But two
09:44:06 11 federal judges have recognized that *Rumsfeld v. FAIR* controls
09:44:11 12 and governs the disposition of this case.

09:44:14 13 THE COURT: Two have found otherwise, haven't they?

09:44:16 14 MR. ABRAMS: Correct. It's essentially two to two.

09:44:18 15 THE COURT: I'll be the tiebreaker.

09:44:22 16 MR. ABRAMS: And, well, we hope you break it in our
09:44:25 17 favor.

09:44:25 18 And the reason that those two courts have found that
09:44:28 19 *Rumsfeld* controls is that First Amendment protects speech that
09:44:32 20 is conduct, that is -- protects speech or conduct that is
09:44:35 21 inherently expressive.

09:44:37 22 And so to prevail on their First Amendment claims,
09:44:39 23 the plaintiffs must show that boycotting Israeli products, that
09:44:43 24 is, a refusal to buy a particular brand of hummus or a
09:44:47 25 particular brand of shampoo or Ahava, the Dead Sea product, or

09:44:51 1 which toys to buy, is either speech or inherently expressive.

09:44:55 2 But -- and this is the key distinction that *FAIR*
09:44:59 3 raises -- if a accompanying speech is needed to explain the
09:45:01 4 conduct, then the conduct is not inherently expressive. And so
09:45:05 5 that's what the Eastern District of Arkansas recognized in the
09:45:09 6 *Waldrip* opinion, which is that purchasing decisions like those
09:45:11 7 at issue in this case are not inherently expressive. It is
09:45:14 8 highly unlikely that, absent an explanatory speech, an external
09:45:20 9 observer would ever notice that a contractor is engaging in a
09:45:22 10 primary or secondary boycott of Israel.

09:45:25 11 And that's what the Court just heard this morning,
09:45:27 12 that Ms. Amawi does not speak about her boycott. And so when
09:45:30 13 she goes to the grocery store and buys a particular brand of
09:45:33 14 hummus, no one knows that that is because of her boycott of
09:45:36 15 Israel. And so that action --

09:45:38 16 THE COURT: So when she loses her contract and she
09:45:40 17 has to explain to people why she lost it, wouldn't she then be
09:45:45 18 saying it's because of my support?

09:45:48 19 MR. ABRAMS: Well, and that goes to the important
09:45:50 20 distinction of what the act does and does not prohibit. As the
09:45:53 21 plaintiffs have referenced *Claiborne* as standing for the
09:45:56 22 proposition that speeches and meetings and picketing are
09:45:59 23 protected by the First Amendment --

09:46:00 24 THE COURT: And boycott.

09:46:01 25 MR. ABRAMS: And we don't disagree. So Ms. Amawi can

09:46:03 1 go to a BDS rally, having signed the contract, and that does
09:46:08 2 not violate her certification under Chapter 2270. So she can
09:46:12 3 speak out against any policies that she disagrees with, and
09:46:16 4 that is not violation of Chapter 2270.

09:46:19 5 The plaintiffs are seeking to read Chapter 2270
09:46:22 6 incredibly broadly, but Chapter 2270 can be read in a
09:46:26 7 constitutionally restricted manner to apply to economic actions
09:46:33 8 rather than the speech that would accompany a boycott. And
09:46:36 9 that's what --

09:46:37 10 THE COURT: You would characterize this as an
09:46:39 11 economic -- you think that these plaintiffs' motivations are
09:46:41 12 economic?

09:46:42 13 MR. ABRAMS: No. No. The decision -- the act is
09:46:45 14 economic. Now, we recognize that the motivations behind it are
09:46:51 15 political in nature, but that was also true in *FAIR*, and that
09:46:54 16 was also true in *Longshoremen's*. In *Longshoremen's*, for
09:46:58 17 example, the union was protesting the Soviet Union's invasion
09:47:02 18 of Afghanistan. In *FAIR* the law schools were protesting the
09:47:05 19 military's position regarding gays in the military and the
09:47:09 20 "don't ask, don't tell" policy. And so those were undeniably
09:47:13 21 political positions.

09:47:14 22 But the point of *FAIR* is that if it's -- if it's just
09:47:17 23 conduct and you would need to express what that conduct is for
09:47:22 24 in order to explain the meaning behind it, then that doesn't
09:47:25 25 fall within the scope of the First Amendment. And so I think

09:47:31 1 that that is the critical distinction here, is that, you know,
09:47:34 2 the acts themselves, *Claiborne* did not address that.

09:47:38 3 And that's what Judge Miller found in the *Waldrip*
09:47:41 4 case and what Judge Ikuta found in her dissent from the Ninth
09:47:45 5 Circuit's motion to -- denial of the motion to stay in the
09:47:49 6 *Jordahl* opinion, that *Claiborne* did not reach the issue of the
09:47:52 7 actual purchasing decisions, which is what Chapter 2270
09:47:56 8 actually addresses.

09:48:00 9 THE COURT: Well, it does a lot more than that,
09:48:02 10 right? It's pretty expansive.

09:48:04 11 MR. ABRAMS: Well, Your Honor, I think we can look at
09:48:06 12 the three, sort of, clauses in -- it's Section 808.001. There
09:48:11 13 are three clauses. So a contractor has to certify that they do
09:48:15 14 not boycott Israel and will not boycott Israel during the terms
09:48:19 15 of the contract. And then Section 808.001, Section 1 defines
09:48:23 16 what boycott Israel is. And so -- and I have it here in front
09:48:26 17 of me, Your Honor.

09:48:27 18 The first clause means refusal to deal with. And the
09:48:31 19 plaintiffs have not raised a vagueness challenge to that, and I
09:48:34 20 think that they haven't argued that that is unconstitutionally
09:48:37 21 vague or that it covers noneconomic conduct. So that's the
09:48:42 22 first clause.

09:48:42 23 The second clause is terminating business activities
09:48:44 24 with, which, again, I think is pretty clear refers to economic
09:48:48 25 conduct. And, again, Plaintiffs have not challenged.

09:48:53 1 So then you get to the third clause of Section
09:48:55 2 808.001, which is: Taking any action that is intended to
09:49:02 3 penalize, inflict economic harm, or limit commercial relations
09:49:05 4 specifically Israel or with a person or entity doing business
09:49:08 5 in Israel or in an Israeli-controlled territory, but doesn't
09:49:11 6 include ordinary business purposes.

09:49:13 7 And so what we'd ask the Court to do is essentially
09:49:16 8 what the court did in *Waldrip* opinion, which is read the
09:49:19 9 term -- that third clause, "any action," in relation to the
09:49:24 10 first two terms, in other words, to refer to economic conduct.
09:49:27 11 And also to refer to the fact that it says, "taking any action
09:49:32 12 specifically with Israel." So if you're not acting
09:49:35 13 specifically with Israel or accompanying Israel, then it
09:49:38 14 doesn't fall within the scope of the act.

09:49:39 15 So, for instance, the plaintiffs have argued that
09:49:42 16 attending a BDS rally would be intended to penalize Israel.
09:49:47 17 Well, they aren't taking action specifically with relation to
09:49:50 18 Israel by attending the rally. Picketing is the same thing.

09:49:53 19 And so this goes generally to the principle that we
09:49:56 20 raised in both our motion to dismiss and in response to the
09:49:58 21 preliminary injunction, which is that -- and the Fifth Circuit
09:50:02 22 has recognized this as well in several cases -- the courts have
09:50:05 23 a duty to interpret a provision in a way that avoids
09:50:11 24 constitutional issues.

09:50:12 25 And so we'd agree that if the language of the act

09:50:15 1 actually covered going out and speaking at a rally, there would
09:50:19 2 be constitutional problems there. But the Section 808.001 can
09:50:24 3 be interpreted in a way that does not implicate that speech.
09:50:28 4 So, in other words, it can be interpreted in a way that only
09:50:31 5 addresses conduct. And I think that that's key distinction
09:50:35 6 that *FAIR* raises and the one that we'd ask this Court to apply.

09:50:39 7 If it would be all right, I'd like to talk about the
09:50:40 8 facts of *FAIR* and why we contend it governs here. In *FAIR* the
09:50:49 9 law school sought to boycott the military by banning military
09:50:52 10 recruiters based on their strong political disagreements over
09:50:56 11 the military's "don't ask, don't tell" policy. And so Congress
09:51:00 12 passed the Solomon amendment to require law schools, on pain of
09:51:02 13 losing federal funds, to provide equal access to military
09:51:06 14 recruiters on campus.

09:51:08 15 The court made clear that government regulation of
09:51:10 16 boycotting activity neither compels nor prohibits any actual
09:51:14 17 speech. The Solomon amendment neither limits what law schools
09:51:16 18 may say nor requires them to say anything and, thus, it
09:51:19 19 regulated conduct, not speech. It affected what they must do,
09:51:24 20 afford equal access to military recruiters, not what they must
09:51:28 21 say.

09:51:28 22 And the same thing is true here. Chapter 2270
09:51:31 23 doesn't govern what the plaintiffs must -- may or may not say;
09:51:34 24 it only governs what they can do. And I'd actually like to
09:51:38 25 note that the incidental compelled speech in *FAIR* was actually

09:51:45 1 probably more than what's at issue here because, in *FAIR*, the
09:51:47 2 lawsuit had to send out e-mails saying the recruiters were on
09:51:51 3 campus or, you know, post on bulletin boards that the military
09:51:54 4 recruiters are here. Nothing of the sort is implicated here.
09:51:58 5 The only thing that the plaintiffs have to do is certify that
09:52:01 6 during the course of their employment, they won't engage in
09:52:03 7 certain economic conduct.

09:52:05 8 It does not require the plaintiffs to take a loyalty
09:52:07 9 oath to Israel or to Texas or to anyone. The plaintiffs can do
09:52:12 10 or say whatever they want and however they feel about the --

09:52:15 11 THE COURT: So they can say: I'm ethically
09:52:18 12 constrained from buying products from Israel; they just have to
09:52:22 13 do it?

09:52:23 14 MR. ABRAMS: I think that a fair reading of *FAIR* is
09:52:26 15 that it only governs economic conduct. And so you can speak
09:52:31 16 out and support a boycott. But, when it comes down to, in the
09:52:34 17 capacity of your company action, you cannot.

09:52:40 18 THE COURT: You just can't participate in it.

09:52:41 19 MR. ABRAMS: You can't participate in the actual act
09:52:44 20 itself. But you can engage --

09:52:46 21 THE COURT: Which the whole idea of a boycott is
09:52:48 22 expressive. I mean, that's what *Claiborne* says.

09:52:51 23 MR. ABRAMS: Well, *Claiborne* arose in a unique
09:52:54 24 context, and, I mean, I think --

09:52:57 25 THE COURT: Well, *FAIR* and *Longshoremen* were unique

09:53:00 1 contexts, right, a military and a labor case. *Claiborne* was
09:53:04 2 not limited. Can you identify anything in *Claiborne* that
09:53:08 3 limits it?

09:53:08 4 MR. ABRAMS: Yes. Well, I think that the way that
09:53:13 5 Judge Ikuta read the *Claiborne* opinion is that the Court did
09:53:17 6 not hold that the boycotters' refusal to purchase from
09:53:20 7 white-owned businesses was protected by the First Amendment or
09:53:22 8 even addressed the issue. So in that case Judge Ikuta said
09:53:26 9 that the plaintiffs may engage in meetings, speeches, and
09:53:29 10 pickets about their disagreement with Israel policies without
09:53:33 11 any interference from Arizona. And we'd argue the same is true
09:53:36 12 here.

09:53:37 13 And I think that the key line from *Claiborne* supports
09:53:39 14 her reading of that case. In *Claiborne* the court said: In
09:53:43 15 sum, the boycott clearly involved constitutionally protected
09:53:46 16 activity. The established elements of speech, assembly,
09:53:49 17 association, and petition, though not identical, are
09:53:53 18 inseparable. Through exercise of these First Amendments
09:53:56 19 rights, Petitioners sought to bring political, social, and
09:54:01 20 economic change.

09:54:01 21 And I think the fact that the court distinguished
09:54:03 22 *Claiborne* in the *SCT Lawyer* case actually helps our position in
09:54:08 23 the sense that the court has not expanded *Claiborne* and, in
09:54:10 24 *FAIR*, you know, didn't even cite to *Claiborne*, because the
09:54:15 25 proposition that that type of economic or even politically

09:54:18 1 motivated boycott could be restricted. And so I think that
09:54:21 2 *Claiborne* can be limited and, in fact, has been read to be
09:54:24 3 limited to --

09:54:25 4 THE COURT: You said *FAIR* stands for the proposition
09:54:28 5 that politically motivated boycott can be -- what did you just
09:54:33 6 say?

09:54:33 7 MR. ABRAMS: Yeah. *FAIR* stands for the proposition
09:54:35 8 that a state can regulate conduct even if that conduct has
09:54:41 9 underlying political motivations.

09:54:43 10 THE COURT: Okay. But it had nothing to do with the
09:54:46 11 boycott.

09:54:46 12 MR. ABRAMS: It was a boycott, though.

09:54:47 13 THE COURT: Okay.

09:54:48 14 MR. ABRAMS: I mean, I think that the law schools
09:54:51 15 were refusing to allow military recruiters access to their
09:54:53 16 campus. That is -- the court didn't use the word "boycott,"
09:54:55 17 but that's how the plaintiffs in that case described their
09:54:57 18 actions. I mean, that's what it was. It was a collective
09:55:01 19 refusal to allow the law school -- to allow the military equal
09:55:04 20 access to their campuses, and it motivated by a political
09:55:07 21 disagreement with the military.

09:55:10 22 So I think that the distinction that the plaintiffs
09:55:12 23 are trying to raise is that they are not motivated by
09:55:15 24 economics, they are motivated by, you know, politics and their
09:55:20 25 ideological beliefs. And the same thing was true in *FAIR*. The

09:55:22 1 exact same thing was true in *FAIR*, as was true in
09:55:27 2 *Longshoremen's*.

09:55:27 3 THE COURT: So it was clear what the government's
09:55:28 4 interest in *FAIR* was. What's the State of Texas's interest
09:55:31 5 here that it's trying to protect?

09:55:32 6 MR. ABRAMS: Your Honor, this is an
09:55:34 7 antidiscrimination measure.

09:55:36 8 THE COURT: No. In fact, it's -- it's not. It in
09:55:42 9 fact, by inference, allows discrimination against anyone except
09:55:47 10 Israel.

09:55:50 11 MR. ABRAMS: Well, we disagree with that.

09:55:52 12 THE COURT: Well, but it does. To their point, you
09:55:57 13 can discriminate against anyone on the basis of national origin
09:56:02 14 except one country -- people of one country. That's not an
09:56:05 15 antidiscrimination statute. That's an "antidiscrimination
09:56:09 16 against a specific country" statute.

09:56:11 17 MR. ABRAMS: No. I think that what the Legislature
09:56:12 18 did was identify a particular -- a particular category, which
09:56:17 19 in this case was Israel and Israeli-owned companies and, by
09:56:21 20 extension, Israeli citizens, that were vulnerable to a
09:56:27 21 particular type of economic boycott. And the Legislature
09:56:29 22 determined that --

09:56:29 23 THE COURT: Well, everybody is vulnerable to it.
09:56:32 24 Pick a country that's not vulnerable to a boycott.

09:56:35 25 MR. ABRAMS: But I think that Israel is uniquely

09:56:38 1 vulnerable to these type of political boycotts.

09:56:41 2 THE COURT: Just because more people do it. How is
09:56:44 3 it more vulnerable to boycott than any other country in the
09:56:48 4 world?

09:56:49 5 MR. ABRAMS: Well, the fact that there is a bigger
09:56:51 6 movement with respect to Israel than other countries. And so
09:56:54 7 the Legislature identified that it was -- it was in -- the
09:56:58 8 State did not want to extend -- and I want to go back to this
09:57:03 9 idea of the State is not saying that citizens in general cannot
09:57:10 10 boycott Israel. This is specifically with respect to State
09:57:13 11 contracts. If you want to sign a contract with the State, you
09:57:16 12 have to agree to certain nondiscrimination principles. And
09:57:19 13 that's what the State is doing here. The State is saying: If
09:57:22 14 you want to sign a contract with the State, there are certain
09:57:25 15 types of conduct that you cannot engage in.

09:57:28 16 THE COURT: If you want access to public benefit.

09:57:31 17 MR. ABRAMS: Correct. Your Honor, the
09:57:32 18 unconstitutional conditions doctrine says that the State cannot
09:57:34 19 condition a benefit on -- on a restriction on speech. And so
09:57:38 20 it ultimately -- this case ultimately turns on: Is an economic
09:57:41 21 boycott of Israel constitutional protected?

09:57:45 22 THE COURT: Right.

09:57:45 23 MR. ABRAMS: And that's what *FAIR* says, and that's
09:57:47 24 where *FAIR* controls. But this is an antidiscrimination
09:57:51 25 measure.

09:57:51 1 THE COURT: Is there anything in the record to
09:57:53 2 suggest -- what would you point to in the record that would
09:57:55 3 lead me to believe that it was broadly an antidiscrimination
09:58:01 4 statute?

09:58:02 5 MR. ABRAMS: Well, I think that the Legislature said
09:58:03 6 that the -- and we cite this in our response to the preliminary
09:58:07 7 injunction -- that the law was passed to ban discriminatory
09:58:11 8 trade practices. And this is -- it's a narrow
09:58:15 9 antidiscrimination measure aimed at particular problem, and
09:58:20 10 that's what the Legislature was aiming to eradicate in a
09:58:24 11 specific context of state contracts.

09:58:27 12 THE COURT: So a citizen who wants access to a public
09:58:32 13 benefit then has to agree to be bound by what the State has
09:58:36 14 found to be its interest in protecting a particular country?

09:58:43 15 MR. ABRAMS: This -- the contractor is bound to
09:58:47 16 comply with the State's nondiscrimination principles, and that
09:58:52 17 is what is happening here. It is not -- again, the contractor
09:58:57 18 can go out and speak and attend rallies and engage in, you
09:59:01 19 know, any other -- post on social media, all other types of
09:59:07 20 speech elements.

09:59:08 21 THE COURT: Other than boycott.

09:59:09 22 MR. ABRAMS: Other than the specific economic acts
09:59:11 23 that *Rumsfeld v. FAIR* says. That if -- if conduct -- or if
09:59:18 24 speech is needed to explain it, it's not protected by the First
09:59:21 25 Amendment.

09:59:30 1 And, Your Honor, just to the idea that a state can
09:59:33 2 narrow an antidiscrimination measure, Congress could pass a
09:59:36 3 measure protecting workers over forty, but not under forty.
09:59:39 4 And I think it's the same principle here. A state can
09:59:42 5 recognize that there are certain groups that are vulnerable to
09:59:45 6 discrimination.

09:59:46 7 THE COURT: But that's a categorical approach, right?
09:59:49 8 It can't say a guy over forty who, by the way, is Jim who lives
09:59:54 9 in Pflugerville, that's not -- that's not categorical, right?

09:59:59 10 MR. ABRAMS: Well, I don't know that the plaintiffs
10:00:01 11 have cited to any case that says that the State doesn't have --
10:00:04 12 I mean, the State has a wide latitude in passing laws that
10:00:07 13 further its interests, especially when it's in the position of
10:00:11 14 giving contracts to --

10:00:12 15 THE COURT: That's right. But interests look to be a
10:00:15 16 preference to a particular country rather than what you would
10:00:19 17 like to describe as antidiscriminatory. It's a preferential
10:00:24 18 statute; it's not an antidiscrimination statute.

10:00:27 19 MR. ABRAMS: I don't think that that's clear on the
10:00:28 20 face of the statute. I mean, I think the face of the statute
10:00:31 21 just says that a certain type of economic conduct with respect
10:00:34 22 to a certain country is prohibited. I mean, I think that the
10:00:38 23 plaintiffs try to read in statements by the legislators or the
10:00:40 24 governor. But the text of the statute is clear, and it applies
10:00:46 25 to specific economic actions with relation to Israel.

10:00:54 1 And so I think we've discussed the compulsion of
10:00:57 2 speech, that there's no -- the State -- it's even less than
10:01:00 3 what was in *FAIR*, where you had to -- where military recruiters
10:01:04 4 had to send e-mails. There's no compulsion here that Ms. Amawi
10:01:08 5 or any of the other plaintiffs have to say anything with
10:01:11 6 respect to Israel. They just can't engage in certain limited
10:01:16 7 actions.

10:01:17 8 I'd also like to get to one of the concepts that we
10:01:20 9 raise in our brief, which is the idea of the law applying to
10:01:25 10 individuals versus companies. This law only applies to actions
10:01:29 11 taken in respect to the individuals in their company capacity.
10:01:34 12 And so it does not apply, and Ms. Amawi recognized on the
10:01:39 13 stand, that her action to buy Sabra hummus is not taken in
10:01:45 14 relation to her actions as a schoolteacher.

10:01:47 15 And so Mr. Abbas was acting what the State's interest
10:01:50 16 is in someone buying hummus at the grocery store. That's not
10:01:55 17 what the State is trying to do here. The State has no interest
10:01:58 18 in restricting anyone's personal actions. It's only with
10:02:00 19 respect to companies and only with respect to companies that
10:02:02 20 have signed contracts with the State.

10:02:12 21 Finally, Your Honor, the plaintiffs have raised sort
10:02:14 22 of a quasi-facial and quasi-as-applied challenge. And courts
10:02:18 23 have noted that as-applied challenges are favored compared to
10:02:23 24 facial challenges. And so we'd ask that the Court construe
10:02:27 25 this as an applied-challenge, look to the specific conduct that

10:02:30 1 is at issue here, and then determine whether that conduct falls
10:02:33 2 within the scope of chapter 2270 and is also, you know,
10:02:38 3 governed by *FAIR* or not.

10:02:40 4 And so, for all of these reasons, unless there are
10:02:42 5 further questions, we'd ask that the Court deny the plaintiffs'
10:02:45 6 motions for preliminary injunction and grant the motion to
10:02:47 7 dismiss.

10:02:48 8 THE COURT: Thank you, Mr. Abrams.

10:02:51 9 Any reply. I'm sorry. Go ahead. Sure.

10:03:04 10 MR. BRANDT: May it please the Court, Tom Brandt for
10:03:06 11 the trustees of Klein ISD and Lewisville ISD.

10:03:11 12 I would like to make two main points, give you two
10:03:15 13 very brief illustrations, and then come to a very simple,
10:03:19 14 central theme. The two main points are -- and I won't belabor
10:03:23 15 the second one because you've already been talking about it,
10:03:25 16 but I will be focusing on the first one, that is, no action.
10:03:29 17 The second one is no protected activity. I'll talk a little
10:03:32 18 bit about that, but I think you've already plowed that field
10:03:35 19 pretty well.

10:03:36 20 But the part that's unique here is the no action.
10:03:42 21 And then the two brief illustrations are to illustrate for
10:03:46 22 the Court in kind of a visual way no moving force and no
10:03:49 23 authority.

10:03:52 24 All right. The central theme of my presentation is
10:03:54 25 that the case against the trustees of Klein ISD and Lewisville

10:03:59 1 ISD is frivolous as a matter of fact and as a matter of law.
10:04:07 2 It should be dismissed and no injunction should issue against
10:04:10 3 the trustee of Klein or Lewisville ISD. And I'll explain.

10:04:14 4 First of all, the two illustrations: Man walks into
10:04:17 5 a bank, pulls out a gun, sticks it into the clerk's face. The
10:04:20 6 frightened clerk turns over cash. The man walks out. No one
10:04:24 7 would blame the clerk. No one would blame the clerk. This is
10:04:29 8 a frivolous case against the trustees of Klein ISD and
10:04:32 9 Lewisville ISD.

10:04:34 10 The second illustration: A young child enters into a
10:04:37 11 contract with an adult. The young child breaches the contract.
10:04:41 12 The adult sues the young child. No court in this country would
10:04:45 13 enforce that contract against the child. Why? Because the
10:04:48 14 child did not have authority, did not have capacity, to make
10:04:51 15 that contract fulfilled.

10:04:53 16 The case against Lewisville ISD trustees an Klein ISD
10:04:58 17 trustees is frivolous and should be dismissed.

10:05:06 18 I'll now go to the first of my two main points, which
10:05:07 19 is no action. The trustees of Lewisville ISD and Klein ISD,
10:05:12 20 the trustees, took no action with respect to the plaintiffs
10:05:15 21 that are suing them: Mr. Dennar suing Klein ISD; Mr. Abdelhadi
10:05:21 22 suing Lewisville ESD. No action at all.

10:05:25 23 The moving force, which is the constitutional concept
10:05:29 24 under *Monell* and its progeny, *Pembaur* and the like, say that if
10:05:34 25 a constitutional injury occurred -- and, if it did, then this

10:05:38 1 Court is here to rectify that situation. But if a
10:05:41 2 constitutional injury occurred, the only person -- the only
10:05:48 3 entities that can be held liable for that are those entities or
10:05:51 4 persons who were the moving force behind the constitutional
10:05:54 5 deprivation.

10:05:55 6 There is no moving force on behalf of the trustees.
10:06:01 7 What the trustees did was simply exist, and the Legislature
10:06:06 8 passed a law which said they have no ability, no authority, to
10:06:14 9 enter into contracts. Now, there is a lot of talk about --
10:06:20 10 about the effect of this, and rightfully so. But from the
10:06:24 11 perspective of the school districts, what you have is the State
10:06:28 12 stripping away authority from the school districts to enter
10:06:31 13 into contracts except under certain conditions.

10:06:34 14 So now what it really means, when you read the
10:06:36 15 statute carefully, you realize it means that, just like that
10:06:41 16 child has no capacity, no authority, to enter into that
10:06:46 17 contract, the school districts have no capacity, no authority,
10:06:49 18 to enter into contracts unless they abide by the state law
10:06:53 19 which is required of them.

10:06:55 20 That cannot be laid to blame at the feet of the
10:06:58 21 trustees. If that is -- if this is an unconstitutional
10:07:03 22 statute, if the act itself is unconstitutional, so be it. That
10:07:08 23 is the issue between the State and the plaintiffs. It is not
10:07:12 24 an issue that the ISD should be involved with at all.

10:07:16 25 THE COURT: So, to understand you, the school

10:07:18 1 districts derive their authority to contract through the State?

10:07:22 2 MR. BRANDT: Actually, I don't think that's entirely
10:07:25 3 true.

10:07:25 4 THE COURT: Okay.

10:07:26 5 MR. BRANDT: But what has happened, I think that ISDs
10:07:29 6 are independent school districts. They are supposed to be
10:07:32 7 independent. What this -- I think it launches into an entirely
10:07:38 8 different discussion as to whether or not we would have the
10:07:42 9 authority. But read the statute on its face, and if it's --
10:07:45 10 it's a duly enacted statute of the State of Texas, so we have
10:07:49 11 to assume that it means what is it says. Until a court has
10:07:52 12 said, no, you cannot restrict school districts that way, then
10:07:58 13 school districts are going to have to follow the law that's
10:08:01 14 established whether they like it or not.

10:08:04 15 So, again, there could be -- and we'll get to it,
10:08:09 16 too. One of the responses by the plaintiffs is, oh, that's not
10:08:13 17 true. You've got -- you've got authority to enter into
10:08:17 18 contracts under the education code. They bring that up. But,
10:08:21 19 if you read the education code, it specifically says in there
10:08:23 20 that has to do with you have the authority -- school districts
10:08:28 21 have the authority to enter into contracts as provided under
10:08:31 22 law. I'll get you the exact language in minute.

10:08:35 23 But it -- it -- we don't have authority to enter into
10:08:38 24 contracts if the law is saying we don't have authority to enter
10:08:42 25 into a contract unless we have this certain provision that we

10:08:45 1 meet. Right? Just like the State could say: You have to bid
10:08:51 2 your contracts in a certain way and you have to follow those
10:08:54 3 procedures. That sort of thing.

10:08:56 4 But one of the things that is interesting about this
10:08:59 5 case is that, if you read the plaintiffs' complaint, they
10:09:03 6 repeatedly concede this point, yet they're still seeking an
10:09:07 7 injunction against my clients. If you look at paragraphs 28,
10:09:12 8 58 through 63, 74 through 78 in the plaintiffs' complaint, you
10:09:16 9 will see they repeatedly talk about the act was the cause of
10:09:20 10 the alleged injuries.

10:09:22 11 They even go so far as to say in paragraph 28: The
10:09:27 12 trustees likely would not be put in the position of requiring
10:09:30 13 their contractors to choose a particular political stance as a
10:09:33 14 condition of doing business with them.

10:09:35 15 That's an admission that we had no part in this, and
10:09:38 16 they believe we had no part in this. Well, then why have they
10:09:43 17 sued us? It's frivolous. We had -- there's no evidence in
10:09:47 18 front of the Court. In fact, there's evidence to the contrary.

10:09:51 19 Exhibit 7 is the e-mail string between Mr. Abdelhadi
10:09:55 20 and his former debate coach at Lewisville ISD. And in that
10:09:59 21 string you'll see that he even admits himself, he says to her:
10:10:03 22 Why is the State requiring this? Why is the State? He
10:10:12 23 initially understood that this was a State issue. It wasn't
10:10:16 24 that the school district is having an issue.

10:10:18 25 There's another thing, too, in that -- in that e-mail

10:10:21 1 exchange. First -- there's several things that are interesting
10:10:26 2 about that e-mail exchange. For one thing, the -- the former
10:10:29 3 debate coach reaches out to Dennar and says, you know, would
10:10:34 4 you like to -- I'm sorry -- to Abdelhadi, would you like to be
10:10:40 5 a debate judge for us? You used to be on the team. You know,
10:10:44 6 you can be a debate judge now. You get paid for it. And he
10:10:48 7 says okay. But she also says: I'm not sure you can get on
10:10:52 8 because it's so -- such a last-minute thing. You might or
10:10:55 9 might not.

10:10:56 10 So we don't really know. The record is not developed
10:10:59 11 as to whether he actually didn't get to debate that day or that
10:11:04 12 tournament because of the restriction. It might have been
10:11:06 13 because he didn't get his ducks in a row. That's part of the
10:11:10 14 ripeness issue. They haven't developed the record with regard
10:11:13 15 to that or with Mr. Dennar in reference to Klein ISD either.
10:11:17 16 They haven't developed the record. And that's why I stood up
10:11:20 17 earlier and said: I'm not saying that there are no -- I'm not
10:11:23 18 stipulating there are no disputes here. There are. This needs
10:11:27 19 to be developed.

10:11:28 20 I need to take their deposition, presuming --
10:11:32 21 actually, I would like it to be dismissed so I don't have to
10:11:35 22 bother with the deposition of anyone, but I would like to
10:11:37 23 cross-examine Mr. Abdelhadi and Mr. Dennar, but they're not
10:11:40 24 here. They haven't called them. They have the burden. Why
10:11:43 25 don't they call their clients to the stand? Because -- I don't

10:11:45 1 know. That's their decision. But this Court has to deal with
10:11:49 2 the evidence you have.

10:11:49 3 Now, one of the things in that e-mail exchange, the
10:11:55 4 teacher also says to him: Hey, you can -- you can -- you can
10:12:03 5 judge for some of the tournaments that are paid for by the
10:12:06 6 booster club because those funds are not going to be -- they
10:12:12 7 can -- they can do this contract with you without complying
10:12:18 8 with the statute because, as you know, the statute only says
10:12:22 9 local governments are required to have this restriction.
10:12:28 10 They're required to obtain these certifications before they
10:12:31 11 enter into a contract but she says to him: We've got some
10:12:36 12 tournaments coming up that are booster club paid. He doesn't
10:12:39 13 follow up. Another thing, in fact, the information that I have
10:12:43 14 indicates that he never went to any of the debates that he
10:12:47 15 could have judged that were being paid for by the booster club.

10:12:51 16 This is the kind of nitty-gritty fact things that are
10:12:54 17 not ripe for consideration, yet --

10:12:57 18 THE COURT: But that wouldn't matter, right? Because
10:12:59 19 if he had the right to do it with public funds, it's not -- you
10:13:03 20 don't have to insist that he do it by being second class and
10:13:07 21 doing it -- doing a work-around through the booster club.

10:13:10 22 MR. BRANDT: What I'm saying to Your Honor is that
10:13:12 23 the image that you've been given in the pleadings is that this
10:13:16 24 is something he's dying to do.

10:13:18 25 THE COURT: He shouldn't have to find a work-around

10:13:20 1 to this, though, if --

10:13:20 2 MR. BRANDT: That's not a work-around.

10:13:22 3 THE COURT: Let me speak first.

10:13:23 4 MR. BRANDT: Yeah. Sure.

10:13:25 5 THE COURT: If he does have the right to that public
10:13:27 6 benefit, you shouldn't expect him or require him to find a
10:13:33 7 work-around for -- through a booster club. And his failure to
10:13:37 8 seek something other than a direct route to what he's entitled
10:13:41 9 to it, assuming he is entitled to it, that's not prejudicial to
10:13:45 10 him.

10:13:46 11 MR. BRANDT: But one of the things it indicates to
10:13:48 12 you, Your Honor, is that this debate coach doesn't care what
10:13:53 13 his political views are. There's no viewpoint discrimination
10:13:57 14 going on at the district level, you see, not even among the
10:14:01 15 very lowest level, much less at the highest level of trustees.
10:14:05 16 They're saying, hey, why don't you do this? We'll help you out
10:14:07 17 here. There's just nothing -- there's no content viewpoint
10:14:11 18 discrimination at all.

10:14:13 19 Mr. Dennar actually debate -- did the judging for
10:14:17 20 Klein, and they didn't -- and then they sent him the paperwork
10:14:21 21 afterwards or he was going to fill it out afterwards.
10:14:24 22 Actually, no. They sent him the paperwork ahead of time. He
10:14:27 23 came, he judged, and then afterwards they said, Okay. To get
10:14:32 24 paid, here, fill out the paperwork, and he never filled out the
10:14:35 25 paperwork. Neither one of them, Abdelhadi nor Dennar, never

10:14:40 1 presented any of the forms to us that they -- that they were
10:14:45 2 presented.

10:14:45 3 And one of the things that they've also said is that
10:14:49 4 we have forms, and that shows that we were somehow a moving
10:14:53 5 force here. Those forms that you've seen were not something
10:14:57 6 that the board of trustees ever ruled on, never ever took any
10:15:03 7 action on. So all you have is low-level people doing something
10:15:06 8 that they perceived to be required by a state statute, and the
10:15:11 9 board of trustees, who are under *Monell* and under -- they are
10:15:16 10 the policy makers. So they have not done anything.

10:15:20 11 Also -- and this is an extremely important point --
10:15:24 12 on the legal policies, this case, if -- if one good thing can
10:15:30 13 come for the school districts, it would be this: That
10:15:33 14 the Court recognize and announce that the legal policies of the
10:15:39 15 school districts are not policies in the *Monell* sense. And
10:15:44 16 here's why. I've given you all of the policies in a notebook.
10:15:48 17 These -- first of all, you have to understand the difference
10:15:50 18 between a legal policy and a local policy.

10:15:53 19 Local policies are adopted. And this is very arcane
10:15:59 20 school law stuff, but it's important. Local policies are ones
10:16:03 21 that are adopted by school districts. The board of trustees
10:16:08 22 looks at it and says, yes, that's going to be our policy. The
10:16:13 23 policies that says "legal" behind them, those policies are
10:16:17 24 never adopted by the board. It is more like a magazine
10:16:21 25 subscription that school districts buy, and they pay TASB

10:16:28 1 Policy Services, and every TASB watches the law, watches the
10:16:35 2 case law, watches the statutes, and kind of organizes all of
10:16:39 3 the law that pertains to school districts, puts it in this sort
10:16:44 4 of package, and ships it off to all the school districts. So
10:16:48 5 they all say, oh, those are the laws we're living under. Okay.

10:16:52 6 That's how the legal policy gets in the, quote,
10:16:55 7 policies of the school district. But the board of trustees
10:17:02 8 never adopt it. And inside those policies it says -- not only
10:17:08 9 does it say these are not to be adopted by the board and
10:17:10 10 they're not to be changed by the board because it is a third
10:17:17 11 party's description to the school districts of what they think
10:17:18 12 the law is, their best summary of the law, and it also says
10:17:25 13 "subject to court challenge" or "superseding by a statute or
10:17:28 14 legislative act," whatever.

10:17:30 15 What that means is that if this Court declares the
10:17:34 16 act unconstitutional, then, poof, those legal policies are gone
10:17:42 17 automatically. You don't have to take any action against the
10:17:46 18 trustees because, first of all, they've never done anything,
10:17:51 19 nothing. And if you do take action against the act -- if you
10:17:55 20 declare it constitutional, so be it; if you declare it
10:17:59 21 unconstitutional, so be it. But if you do declare it
10:18:02 22 unconstitutional, then it's lifted out automatically from the
10:18:07 23 legal policies.

10:18:08 24 But more to the point, the central point there is:
10:18:12 25 School districts do not adopt legal policies. And it kind of

10:18:17 1 makes sense, right, because we're -- we're not talking about
10:18:21 2 school boards as a group of jurists that are sitting around and
10:18:25 3 saying I think our policies should be that the law should be
10:18:28 4 this way. That would be ridiculous. That's for the courts to
10:18:32 5 decide -- for the legislature to provide the law. They are not
10:18:36 6 law-givers. They're trustees over school districts. Their
10:18:39 7 focus is on educating children. It's not on passing laws.

10:18:43 8 So that part of it would be very, very helpful to
10:18:46 9 school districts, not only to Klein ISD and Lewisville ISD, but
10:18:52 10 to school districts throughout the state. And that's
10:18:55 11 particularly why I am so animated in this case, because I think
10:18:58 12 that this is wrong. Regardless of how you decide the dispute
10:19:03 13 between these two parties, my people should go. My people
10:19:06 14 should be dismissed and dismissed forthwith because there's no
10:19:11 15 possible way that they are constitutionally responsible for any
10:19:16 16 of the action that are being alleged against them. And you
10:19:19 17 know that both legally because there's no moving force here,
10:19:22 18 but you also know it factually because you know that the record
10:19:25 19 is not developed enough yet to show any custom or practice.
10:19:30 20 And you know also that they have not pled a policy custom or
10:19:34 21 practice of the school districts, and they certainly can't
10:19:37 22 provide a custom because this statute was just passed in 2017.
10:19:44 23 There's not been time for any school district to develop a
10:19:47 24 custom about this, a practice, a long-standing practice.

10:19:53 25 In fact, both Klein ISD and Lewisville ISD, their

10:19:56 1 response when they got sued was: What? What? What is this?
10:20:00 2 We've never even heard of this. That's how uninvolved the
10:20:04 3 school districts are in this raging debate that's going on at
10:20:08 4 the legislature and now in this courtroom, because they're
10:20:12 5 focused on a totally different -- totally different thing.

10:20:16 6 And you know that's the case because the evidence you
10:20:18 7 have in front says: We don't -- we didn't care what Dennar
10:20:24 8 believed. We said come on. Oh, and you have to fill out these
10:20:28 9 papers. Well, that was just a ministerial act. No one was
10:20:32 10 saying, Hey, Dennar come in. Wait a minute. What do you
10:20:36 11 believe? No one did that. No one said to Mr. Abdelhadi, Hey,
10:20:39 12 come in. Oh, what do you believe? Not personally. No one did
10:20:43 13 that. No one at the school district did that. What they did
10:20:46 14 was they said, You have to fill out this paperwork. My hands
10:20:50 15 are tied. But there was no animus. There was no
10:20:51 16 discriminatory intent whatsoever.

10:20:53 17 Now, I will mention this, and I think it's worth
10:20:55 18 focusing on for a minute. I know the issue on -- I had two
10:21:00 19 main points. The first one that I wanted to make sure
10:21:02 20 the Court was aware of was no action, no action at all. The
10:21:05 21 case is frivolous against the school district trustees and
10:21:08 22 should be dismissed immediately.

10:21:10 23 Now, as to the political -- I'm sorry. As to First
10:21:13 24 Amendment issue, I think that there is three things that you
10:21:16 25 need to consider. First is, regardless of -- I mean, you -- of

10:21:21 1 course you need to consider *Rumsfeld v. FAIR*, you have to
10:21:26 2 consider *Claiborne*, you have to consider all those cases. But
10:21:29 3 you also have to consider a couple of things.

10:21:32 4 One, statutory rules of construction, the *ejusdem*
10:21:35 5 *generis* rule; number two, the context of the definition, and,
10:21:40 6 number three, constitutional avoidance.

10:21:42 7 Number one, *ejusdem generis*, the Latin phrase being
10:21:45 8 "of the same kind." You heard the presentation from counsel
10:21:48 9 opposite about the fact that these -- there were two -- two
10:21:57 10 lists of specific commercial activities, and then a catchall
10:22:02 11 which was broad, right?

10:22:03 12 The canon of rules of construction say: When you
10:22:07 13 have a list and it starts with specifics and then it follows
10:22:11 14 with a general, the general statement should be read as of the
10:22:16 15 same kind as the specifics. That's the rule of *e-j-u-s-d-e-m*
10:22:25 16 *generis*, *g-e-n-e-r-i-s*. That Latin phrase is what that means.

10:22:30 17 Second point: Look at what the statute did. It
10:22:35 18 imported a definition from where: Chapter 808. Chapter 808
10:22:43 19 deals with pension funds -- public pension funds and
10:22:46 20 investments. It deals exclusively with commercial activities
10:22:50 21 and investments. Then you -- so for the Legislature -- the
10:22:55 22 Legislature could have repeated that definition in 2270, but
10:23:04 23 instead it imported it. It said: Look to this other statute.
10:23:06 24 But when you do that, there's a context that that's in which
10:23:09 25 would argue that it is commercial activity.

10:23:11 1 Finally, the plaintiffs say repeatedly that the
10:23:14 2 statute is vague -- that it's vague. They plead that. That's
10:23:20 3 one of the bases they have for going for an injunction. If
10:23:24 4 it's vague, that means it's susceptible of different
10:23:28 5 interpretations. That means, under the constitutional
10:23:30 6 avoidance doctrine, this Court is required to construe the
10:23:33 7 statute in a way as to avoid constitutional issues.

10:23:41 8 And, if you have the *ejusdem generis* construction,
10:23:43 9 you have the context of where the statutory definition came
10:23:49 10 from, then you certainly have plenty of -- of ability to say:
10:23:53 11 That definition should be construed as to deal with only
10:23:59 12 economic activity.

10:24:01 13 Now, that presupposes the issue of whether boycotts
10:24:08 14 themselves are economic activity, but you've -- you've already
10:24:12 15 addressed that. But my point is that issue needs to be
10:24:19 16 addressed regardless because I think if this -- I hope I'm not
10:24:23 17 going to be going up on appeal; I hope I'm out of this case.
10:24:28 18 But if this case likely goes up on appeal for whatever reason,
10:24:30 19 whatever side is aggrieved, then I think the Court should
10:24:33 20 address both the issue of is a boycott a First Amendment
10:24:36 21 activity? Yes or no? And then -- then also is -- is this
10:24:44 22 definition limited to boycotts, limited to economic activity,
10:24:48 23 commercial activity or not? And then it would tee up the issue
10:24:52 24 very nicely for any appellate review.

10:24:55 25 But I would urge the Court to also consider the

10:24:58 1 issues of ripeness that we raised. I would also ask the Court
10:25:01 2 to please consider the arguments that I've raised on
10:25:07 3 constitutional grounds in Docket Number 46-1 and 46-2. And
10:25:13 4 then I'll just leave that to the Court's consideration. But we
10:25:16 5 go into some detail in those proceedings, where we actually did
10:25:21 6 go back and listen to the arguments in *Claiborne*, I believe it
10:25:24 7 was, and we cite to some of the provisions there. So I think
10:25:27 8 it would be helpful for your research to see some of that.

10:25:30 9 And I would urge, Your Honor, that the -- that you
10:25:34 10 dismiss with prejudice the trustees of Klein ISD from this case
10:25:40 11 and trustee of Lewisville ISD. Thank you.

10:25:43 12 THE COURT: Thank you very much.

10:25:50 13 MR. MILLER: Your Honor, I was going to speak on
10:25:52 14 behalf of the University System Regents. It was principally a
10:25:55 15 motion to dismiss, but it briefly contained the response to the
10:25:58 16 PI. I'm glad to do that whenever the Court would like to hear
10:26:01 17 it.

10:26:01 18 THE COURT: Let's hold off on that if you have
10:26:05 19 predominantly a motion to dismiss.

10:26:06 20 MR. MILLER: Yes, Your Honor.

10:26:06 21 THE COURT: Okay.

10:26:14 22 MR. ABBAS: Your Honor, the motion to dismiss issues
10:26:16 23 largely mirror the PI issues, and so one -- one through-point
10:26:23 24 that the Court can pull through and really resolve the motion
10:26:26 25 to dismiss and the preliminary injunction on is the concession

10:26:30 1 that the Attorney General made, that the boycott of these
10:26:35 2 plaintiffs is -- was made for political purposes and not for
10:26:39 3 economic purposes.

10:26:40 4 And *Claiborne* is very clear that it does distinct --
10:26:44 5 it makes a distinction between political boycotts and economic
10:26:48 6 boycotts, and it defines a political boycott as, quote,
10:26:55 7 differentiated from a boycott organized for economic ends.

10:26:58 8 Because this boycott, the boycott of Ms. Amawi, is a
10:27:02 9 political boycott, it's subject to *Claiborne*. And what's even
10:27:06 10 more, one thing that's gotten lost in the shuffle, is that the
10:27:11 11 law does allow you to avoid purchasing things from Israel for
10:27:15 12 ordinary purposes. For ordinary business purposes, one
10:27:19 13 cannot -- can refrain from purchasing products from Israel.

10:27:23 14 And what that means is that the law is the opposite
10:27:27 15 of the situation in *FAIR*. The law is only concerned with
10:27:32 16 conduct that is accompanied by expressive action. And so here
10:27:39 17 the -- it's not a distinction between does this conduct -- is
10:27:44 18 this conduct inherently expressive or not inherently
10:27:47 19 expressive. The only conduct that's being regulated is conduct
10:27:54 20 that is undertaken alongside a political point.

10:27:58 21 And that's why Bahia, for instance, she could boycott
10:28:05 22 Israeli pharmaceutical companies because of concerns about the
10:28:09 23 Israeli FDA equivalent, safety reasons with those
10:28:14 24 pharmaceutical products, but she could not do the same thing
10:28:21 25 because of -- for political reason connected to Israel's

10:28:26 1 conduct itself.

10:28:27 2 And what underscores the importance of this Court's
10:28:30 3 intervention is the political reality that this law passed that
10:28:36 4 State House unanimously. I think it was 126 or so to zero, and
10:28:41 5 then it passed the Senate 26 to 5. Five out of 150 state
10:28:48 6 lawmakers voted against the anti-BDS act, and so this is what
10:28:54 7 the First Amendment was built for. The First Amendment was
10:28:58 8 built to protect the rights of unpopular views to be aired, and
10:29:05 9 Bahia's view about the boycott divestment sanctions Israel
10:29:11 10 about her boycott activity is a minority perspective. It's a
10:29:17 11 minority perspective in a fast-involving area of intense public
10:29:22 12 debate. Since the filing in December, there's been many months
10:29:24 13 spent on issues related to Israel, issues related to Palestine,
10:29:28 14 in the media and all across the country.

10:29:32 15 And the purpose of the First Amendment is to ensure
10:29:37 16 that a political orthodoxy does not get established. There is
10:29:40 17 a political orthodoxy in Texas right now. That political
10:29:47 18 orthodoxy is reflected and enshrined in the anti-BDS law that
10:29:52 19 the Texas Legislature passed and the governor signed.

10:29:55 20 And the only way, the only possibility, for Bahia and
10:29:57 21 the other plaintiffs and others to maintain the ability to
10:30:02 22 express themselves and to resist the suppression of their views
10:30:09 23 that Texas is pursuing is for this Court to intervene and
10:30:14 24 strike down HB 89. Strike down HB 89 so that Bahia can go back
10:30:21 25 to work. An injunction that this Court issues against the law

10:30:27 1 would trigger the conditional stipulation with Pflugerville
10:30:31 2 School District that would allow her to go back to work.

10:30:35 3 Beyond that, there's this issue of -- and Your Honor
10:30:43 4 touched upon this -- the promise that the certification that
10:30:49 5 the State of Texas is requiring Bahia to make is not -- is not
10:30:55 6 antidiscrimination, because it compels behavior. In order to
10:31:00 7 not boycott Israel, she needs to buy the hummus from Israel.
10:31:04 8 She needs to buy the toys that she uses with her students from
10:31:08 9 Israel. That's how she would promise not to boycott Israel.

10:31:14 10 So where the State has taken the position that it
10:31:17 11 doesn't want state funds going to people that are going to then
10:31:21 12 take those state funds and use it to support a boycott of
10:31:25 13 Israel, the opposite is actually true. What the State of Texas
10:31:29 14 is requiring, if this law is left standing, is for independent
10:31:35 15 contractors to expend money in ways that they find
10:31:41 16 unconscionable so that they can affirmatively disclaim their
10:31:43 17 boycott of Israel. And that's compelled speech.

10:31:46 18 It's compelled speech because they're signing
10:31:49 19 something that is communicating a very clear message, publicly
10:31:56 20 and unmistakably, that they are required by the State of Texas
10:32:00 21 to align themselves with the State of Israel.

10:32:03 22 As a final point, the distinction that the Texas --
10:32:06 23 that the State of Texas is making between Bahia's personal life
10:32:11 24 and her life as a speech pathologist is a distinction without a
10:32:15 25 difference. However the Court approaches the issue of the sole

10:32:20 1 proprietorship issue, in her -- when she goes grocery shopping,
10:32:25 2 she boycotts Israel; when she buys equipment to be a speech
10:32:30 3 pathologist, she boycotts Israel; when she buys toys for her
10:32:34 4 children that she ends up using with three-, four-, and
10:32:37 5 five-year-olds to teach them how to talk, she boycotts Israel.
10:32:41 6 So however the Court approaches the issue of the sole
10:32:44 7 proprietorship, the fact remains that Bahia Amawi as a person
10:32:51 8 is indistinguishable from Bahia Amawi as the speech
10:32:55 9 pathologist.

10:32:57 10 Your Honor, if the Court does not intervene -- today
10:33:00 11 we are here discussing about independent contractors. If
10:33:05 12 the Court doesn't intervene, likely, I imagine, in the near
10:33:09 13 future we'll be talking about employers -- employees.

10:33:12 14 Thank you, Your Honor.

10:33:13 15 THE COURT: Thank you.

10:33:19 16 MR. BUSER-CLANCY: Your Honor, I'll start by
10:33:20 17 addressing some of the issues raised by counsel for the school
10:33:24 18 districts, and then I'll close by addressing the constitutional
10:33:26 19 issues.

10:33:29 20 The counsel for the school districts puts forth two
10:33:31 21 main arguments: The first deals with ripeness in terms of the
10:33:34 22 record, and the second deal with *Monell* liability.

10:33:37 23 Addressing the first, there are certain uncontested
10:33:42 24 facts that are all we need to have standing and for the issue
10:33:45 25 to be ripe here. It's not contested that Plaintiffs Dennar and

10:33:50 1 Abdelhadi boycott Israel. The declarations establish that.
10:33:53 2 There's no question about that. It's also not contested that
10:33:55 3 Plaintiffs Dennar and Abdelhadi were presented with contracts
10:33:58 4 by the school districts that contained a no-boycott-of-Israel
10:34:02 5 certification. Under First Amendment standing laws, that's all
10:34:06 6 that's needed for the issue to be ripe.

10:34:08 7 Counsel for the school districts asserts that we
10:34:12 8 don't know what would have happened if they tried to run it up
10:34:15 9 the chain further or done something else. But the fact is they
10:34:18 10 were presented with an unconstitutional boycott certification,
10:34:22 11 and they boycott. There's nothing else they could have done
10:34:25 12 unless the school districts are indicating that they would have
10:34:28 13 found some work-around the law, but the law requires that they
10:34:31 14 not contract in that particular position. I think that's clear
10:34:34 15 that they have standing to challenge under the First Amendment
10:34:37 16 standing rules.

10:34:38 17 I would point the Court to *Fernandes v. Limmer* which
10:34:42 18 is a Fifth Circuit decision, 663 F.2d 619. And what that says
10:34:46 19 in a permit requirement is that, when someone is challenging an
10:34:49 20 unconstitutional requirement for a permit under First Amendment
10:34:52 21 grounds, they don't even have to apply for the permit. The
10:34:55 22 fact that there's an unconstitutional condition existing within
10:34:57 23 the permit requirements gives an individual standing. Here
10:35:01 24 it's clear Dennar and Abdelhadi were presented with contracts
10:35:04 25 that contained the unconstitutional provision.

10:35:07 1 Now, with respect to *Monell* liability and this moving
10:35:11 2 force notion, a couple of things: First, *Monell* liability
10:35:16 3 exists to distinguish the acts of the municipality from the
10:35:20 4 acts of employees of the municipality. That's the *Pembaur*
10:35:25 5 decision that Defendants are relying on.

10:35:27 6 There's no allegation here, no credible allegation,
10:35:30 7 that some rogue employee slipped this contractual provision
10:35:35 8 into the documents. What's clear is that the school districts
10:35:39 9 included this. And, in fact -- and this is why Defendants
10:35:43 10 spent a long time talking about policies -- within the school
10:35:46 11 district policies and the exhibits that you've been given today
10:35:51 12 for both Pflugerville ISD and Klein ISD, there are specific
10:35:52 13 policies that require the inclusion of the no-boycott-of-Israel
10:35:57 14 certification. Those occur in Exhibit 3 on page 5 of 19, and
10:36:05 15 that's for Lewisville ISD. They also occur in Exhibit 6,
10:36:17 16 again, on page 5 of 19. So there exist policies from
10:36:22 17 Lewisville ISD and Klein ISD that require the inclusion of a
10:36:26 18 no-boycott-of-Israel certification.

10:36:29 19 Defendants' arguments is that these policies aren't
10:36:34 20 really policies under *Monell* because they are legal policies
10:36:38 21 and the board doesn't consider legal policies. It just
10:36:42 22 automatically includes them.

10:36:44 23 There are a couple of responses to this, Your Honor.
10:36:48 24 The first is that that's not actually how the legal policies of
10:36:52 25 the ISDs work. And I would point the Court to Exhibit 5 which

10:36:57 1 discusses the legal policies, and it's on page 2. And what it
10:37:01 2 says is: After board review of legally referenced policies and
10:37:06 3 adoption of local policies, the new materials should be
10:37:09 4 incorporated. So even within their own policies there's a
10:37:13 5 provision which says: You have to review these legal policies
10:37:16 6 before you include them, perhaps to see if they're
10:37:19 7 unconstitutional.

10:37:20 8 The second point is: A school district can't
10:37:22 9 automate away *Monell* liability by saying we're not going to
10:37:25 10 look at policies; we're just to incorporate a bunch of them,
10:37:28 11 and we don't know what's in here. The board of trustees, they,
10:37:33 12 as defendants, admit they're the final policy makers for the
10:37:36 13 school district. They have adopted legal policies that require
10:37:40 14 the inclusion of no-boycott certifications. For Plaintiffs
10:37:43 15 Abdelhadi and Dennar, they were the person -- people who were
10:37:46 16 enforcing that boycott certification against them. So when one
10:37:50 17 is seeking prospective injunctive relief to no longer have that
10:37:54 18 boycott certification enforced against them, the school
10:37:57 19 districts were proper parties.

10:37:59 20 And, finally, Your Honor, to that note I would point
10:38:01 21 the Court to two decisions. The first is *Air Evac EMS, Inc.*,
10:38:07 22 which is 851 F.3d 507, and the second is *KP v. LeBlanc*,
10:38:12 23 627 F.3d 115. What both of these cases deal with -- in a
10:38:18 24 slightly different context, admittedly, but they deal with 1983
10:38:21 25 liability. And what they say is that, in terms of being liable

10:38:25 1 for prospective injunctive relief, if you are enforcing a law
10:38:29 2 against a particular plaintiff, you're a proper party for that
10:38:33 3 plaintiff to seek relief against.

10:38:35 4 Here the school districts were enforcing the
10:38:37 5 unconstitutional law, and, therefore, it was proper for
10:38:40 6 Plaintiffs Abdelhadi and Dennar to seek injunctive relief
10:38:45 7 saying: Don't include these in our debate contracts that we're
10:38:47 8 being given. And for that reason we think the school districts
10:38:49 9 are certainly proper parties for the prospective injunctive
10:38:53 10 relief that Plaintiffs are given.

10:38:54 11 And if Your Honor doesn't have any more questions
10:38:57 12 about that, I'll turn to the constitutional issues.

10:38:58 13 THE COURT: Thank you. Please.

10:38:59 14 MR. BUSER-CLANCY: Just a few quick points on this.

10:39:01 15 The first is the question starting again, as I think
10:39:05 16 the Court should, with *Claiborne*. Counsel for the Attorney
10:39:10 17 General said that Judge Ikuta in the Ninth Circuit found that
10:39:15 18 *Claiborne* didn't reach the actual boycott. With all due
10:39:19 19 respect to Judge Ikuta, I think that's fundamentally untrue and
10:39:23 20 that's belied by the text of *Claiborne* itself. I already read
10:39:26 21 the Court one passage where they reach the idea of the boycott
10:39:29 22 itself, and I would just like to read one more, which is at 926
10:39:35 23 of *Claiborne*, where it says:

10:39:36 24 For the reasons set forth above, liability may not be
10:39:39 25 imposed on Evers for his presence at NAACP meetings, going to

10:39:45 1 other speech aspects, or his active participation in the
10:39:49 2 boycott itself.

10:39:49 3 There are numerous quotes throughout *Claiborne* which
10:39:52 4 make clear that, yes, it is holding that all of the other
10:39:58 5 aspects of boycotts, the association, the picketing, it is
10:40:00 6 holding that those are protected by the First Amendment. But
10:40:03 7 it is also squarely reach the boycott itself. There's no
10:40:06 8 doubt.

10:40:06 9 Next, with respect to *FAIR*, the counsel for the
10:40:11 10 Attorney General points out that *FAIR* was also political in
10:40:15 11 nature. But what *FAIR* was not was a consumer political
10:40:18 12 boycott. And I think that's a key distinction because consumer
10:40:22 13 political boycotts are deeply engrained in American tradition,
10:40:27 14 and that's what *Claiborne* recognized.

10:40:29 15 From the British boycotts during revolutionary times
10:40:34 16 to the boycotts of white civil merchants to the boycotts of
10:40:37 17 apartheid South Africa, political consumer boycotts have an
10:40:40 18 engrained American tradition. The courts have -- *Claiborne* has
10:40:44 19 recognized that, and that's what distinguishes -- that's one of
10:40:46 20 the many things that distinguishes *FAIR*. In fact --

10:40:52 21 THE COURT: There's a great tradition of universities
10:40:55 22 taking political positions like in *FAIR* as well.

10:40:57 23 MR. BUSER-CLANCY: I think they take political
10:40:59 24 positions. I think that's correct. I think the particular
10:41:02 25 position of not allowing recruiters on boycott, the court found

10:41:07 1 that it, you know, didn't have this widespread understanding
10:41:08 2 which I think is very different from the issue in *Claiborne*
10:41:12 3 where the court said, you know, political consumer boycotts are
10:41:15 4 widely understood and are deeply engrained in the American
10:41:17 5 conscience as an act of expression. And I think that's a key
10:41:21 6 distinguishing factor.

10:41:22 7 And, Your Honor, I would also point out that the
10:41:27 8 interpretations of *FAIR* that Defendants are seeking, the end
10:41:32 9 result of those would be that political -- that any state could
10:41:37 10 eliminate political consumer boycotts for any -- if they found
10:41:41 11 them disfavored. They could say that you can speak about the
10:41:46 12 boycotts but actually criminalize the boycott itself.

10:41:49 13 And so logical implication of the reading of *FAIR*
10:41:52 14 that Defendants are giving is that political consumer boycotts,
10:41:55 15 in their entirety, could be outlawed if the state disfavored
10:41:59 16 that particular version of boycott. It's not limited -- their
10:42:01 17 reading of *FAIR* is not limited to the particular act here.
10:42:04 18 Their reading of *FAIR* says: Political consumer boycotts, in
10:42:09 19 gross, are not protected by the First Amendment. I think
10:42:12 20 that's a very dangerous reading, and it does damage to a very
10:42:14 21 deeply engrained American tradition.

10:42:16 22 With respect to the arguments on vagueness, both
10:42:22 23 counsel have offered this Court a narrowing construction of the
10:42:26 24 definition of "boycott of Israel" under, you know,
10:42:30 25 constitutional interpretation doctrines with Latin words that

10:42:34 1 I'm not going to try to pronounce here.

10:42:36 2 But I think what's important is, from the perspective
10:42:39 3 of a person of ordinary intelligence who reads that they're not
10:42:42 4 allowed to boycott Israel and then reads the text that says I
10:42:46 5 can't take any action that's intended to penalize Israel, that
10:42:49 6 person is not going to know about this canon of construction
10:42:52 7 which all of sudden liberates them to do these other things. A
10:42:56 8 person of ordinary intelligence is not going to be able to
10:42:58 9 figure out that their speech acts associated with the boycott
10:43:01 10 of Israel are permitted under a litigation position developed
10:43:05 11 here. That still renders it unconstitutional.

10:43:08 12 The law also further reaches those speech acts
10:43:11 13 because of the chilling construction. As we've pointed out to
10:43:14 14 the Court on multiple occasions, the notion that this will be
10:43:20 15 applied neutrally is belied by the fact that the -- that in
10:43:25 16 order to figure which actions are intended to penalize Israel
10:43:29 17 and what falls under "ordinary business purposes," it's going
10:43:31 18 to be very difficult for the State to do that unless it starts
10:43:35 19 targeting those who are speaking out. And, given that, there's
10:43:37 20 going to be chilling effect on speech even if there is a
10:43:40 21 narrower reading that certain canons of constitutional
10:43:45 22 construction would support.

10:43:46 23 With respect to the idea that the act is a neutral
10:43:51 24 antidiscrimination measure, I would just like to make two quick
10:43:55 25 points. The first is that counsel for the Attorney General

10:43:57 1 said that the act prohibits refusing to deal with Israel or
10:44:03 2 Israeli-owned businesses. That's not what the act prohibits.
10:44:06 3 The act prohibits refusing to deal with Israel or any -- let me
10:44:12 4 make sure I get this right -- or with a person or entity doing
10:44:15 5 business in Israel.

10:44:19 6 And the reason that's a key distinction on the
10:44:22 7 antidiscrimination measure is because that means that the act
10:44:25 8 encompasses companies that aren't Israeli or of Israeli origin.
10:44:29 9 The act actually encompasses many American companies, like HP,
10:44:34 10 like formerly Airbnb, companies of those nature which are
10:44:38 11 American companies, but they are being boycotted because --
10:44:41 12 because individuals who participate in the boycott have a
10:44:44 13 political disagreement with certain acts that they're taking
10:44:46 14 with respect to the controversy in Israel.

10:44:50 15 And I think that squarely demonstrates that the act
10:44:54 16 isn't getting at neutral antidiscrimination measures; but,
10:44:57 17 rather, it's targeting particularly individuals who are taking
10:45:01 18 actions for -- their political beliefs and based on political
10:45:05 19 disagreement, and that's core-ly within the First Amendment.

10:45:10 20 And, finally, I would like to -- with respect to this
10:45:12 21 point, I would like to touch on the idea that there are certain
10:45:15 22 antidiscrimination measures that -- that are narrower in focus,
10:45:18 23 such as antidiscrimination measures aimed at people over 40.

10:45:23 24 I actually think this is a great example to
10:45:25 25 distinguish an antidiscrimination measure from what we have

10:45:29 1 here, because antidiscrimination measures aimed at people over
10:45:33 2 40 don't say that the company cannot fire anyone over 40,
10:45:36 3 period. What they say is: The company cannot fire anyone over
10:45:41 4 40 on the basis of the fact that they're over 40.

10:45:45 5 Here, on the other hand, it says: You're prohibited
10:45:49 6 from refusing to deal with Israel or any person or entity doing
10:45:53 7 business with Israel, period. It has no notion of "on the
10:45:57 8 basis of their national origin" or anything along those lines.
10:46:02 9 So the standard antidiscrimination measure is not what we have
10:46:05 10 here. We have a measure that's trying to force individuals to
10:46:08 11 actively engage with Israel that violates their First Amendment
10:46:11 12 principles.

10:46:12 13 On the compelled speech idea, the counsel for the
10:46:18 14 Attorney General noted that, in *FAIR*, some e-mails had to be
10:46:22 15 sent out. But that's fundamentally different from certifying
10:46:28 16 that one is not going to boycott Israel, full stop, in its
10:46:33 17 entirety. A certification that one doesn't boycott Israel is
10:46:39 18 forcing the individual to disavow certain associations with
10:46:42 19 those who are boycotting Israel and to take a particular stance
10:46:45 20 and to publicly declare it.

10:46:47 21 *Cole v. Richardson*, coming from the Supreme Court,
10:46:50 22 says that the government can't condition employment on oaths
10:46:53 23 that abjure political expression and association. That's
10:46:56 24 exactly what this is here.

10:46:58 25 And the final point about sole proprietors,

10:47:02 1 Your Honor, the case law is very clear that Texas doesn't
10:47:06 2 distinguish between an individual's personal capacity and their
10:47:10 3 sole proprietorship. The whole notion of a sole proprietorship
10:47:14 4 is that there's no distinction between what an individual does
10:47:17 5 and what their sole proprietor does. That's *CU Lloyd's* and a
10:47:20 6 variety of other cases that we've cited in your briefs.

10:47:23 7 And so the notion that this is only aimed at
10:47:26 8 companies, not individuals, as applied to sole -- at issue here
10:47:30 9 with respect to sole proprietors, there is fundamentally no
10:47:34 10 distinction. But the idea that it would be okay to enforce
10:47:38 11 this on companies has also been rejected by the Supreme Court.
10:47:42 12 The Supreme Court has squarely held that it's not okay to
10:47:46 13 discriminate against a company's First Amendment rights simply
10:47:49 14 because they're an LLC as opposed to a sole proprietor or
10:47:53 15 anything along those lines.

10:47:55 16 Defendants ask that the Court to try to narrowly
10:47:57 17 construe what's happening here as an-applied challenge or
10:48:00 18 something along those lines, but the constitutional principles
10:48:03 19 that we've set forth speak to a facial challenge. The question
10:48:07 20 isn't: Has this law been construed in a particular way that
10:48:12 21 harms these plaintiffs in a very nuanced way that wouldn't
10:48:15 22 exist in the broader context? Rather, the law on its face
10:48:18 23 unconstitutionally compels all companies to choose between
10:48:23 24 their First Amendment rights and their livelihood, and it
10:48:26 25 compels speech on that subject and is unconstitutional for a

10:48:31 1 variety of other issues.

10:48:33 2 And I would like to leave the Court with this
10:48:35 3 statement which I think sums it up: If there's any fixed star
10:48:38 4 in our constitutional constellation, it is that no official,
10:48:41 5 high or petty, can prescribe what shall be orthodox in
10:48:46 6 politics, nationalism, religion, or matters of opinion or force
10:48:51 7 citizens to confess by word or act their faith therein.

10:48:53 8 That's the *West Virginia Board of Education* case.
10:48:55 9 That's precisely what this act does. That's why it's
10:48:58 10 unconstitutional and why we request preliminary injunction.

10:49:02 11 THE COURT: Thank you.

10:49:03 12 Mr. Miller, you'll get your chance eventually.

10:49:09 13 MR. MILLER: Yes, Your Honor.

10:49:10 14 THE COURT: I'd like to wrap up, if we could.

10:49:12 15 MR. BRANDT: Yes, Your Honor. Very quickly, the
10:49:15 16 uncontested facts that you heard about do not carry the day.
10:49:18 17 First of all, he said there were only two uncontested facts:
10:49:21 18 The plaintiffs boycott Israel. I'll stop there for a minute
10:49:24 19 and just say, when you're talking about a content or viewpoint
10:49:28 20 discrimination, you have to define your viewpoint. And I don't
10:49:31 21 think the evidentiary record has sufficiently done that. I
10:49:34 22 want to preserve that point.

10:49:36 23 But, more importantly, though, they say, okay,
10:49:39 24 Plaintiffs boycott Israel. Whatever that means, it doesn't --
10:49:43 25 I think it's vague. Number two, Plaintiffs were presented with

10:49:46 1 contracts. All right. That's it. Those are the two
10:49:51 2 undisputed facts that he claims are undisputed.

10:49:53 3 My point is this: That doesn't carry the day for
10:49:56 4 him. He's got to prove that there was someone at the school
10:49:59 5 district, particularly the trustees, since that's who he sued.
10:50:04 6 But he has to start with constitutional deprivation, which
10:50:08 7 means there's someone who did something to Mr. Abdelhadi or
10:50:12 8 Mr. Dennar because of their viewpoint; that they were motivated
10:50:20 9 to do something against them because of their viewpoint. There
10:50:24 10 is zero evidence of that with respect to the trustees or,
10:50:29 11 actually, with respect to any of the low-level employees of the
10:50:34 12 district. None.

10:50:38 13 Secondly, the issue that he talks about with respect
10:50:41 14 to the legal policies, again, I described them in general. But
10:50:48 15 with regard to Exhibit 1, you can look at page 4 of 6, and it
10:50:57 16 talks about the language -- the legally referenced policies
10:51:03 17 track the language of U.S. Constitutions. That's what that --
10:51:06 18 other sources of law. That's what it's designed for.

10:51:09 19 Then you look on page 4 of 6. Page 4 of 6 says: No
10:51:16 20 adoption. Please note that legal policies are not adopted by
10:51:20 21 the board.

10:51:22 22 Go to Exhibit 2, page 1 of 2. TASB updates, which
10:51:28 23 are numbered sequentially, present to the local board legal
10:51:31 24 policies for its review and local policies for its
10:51:37 25 consideration and adoption.

10:51:39 1 It's just as I said earlier, like a magazine. Here's
10:51:42 2 a magazine. You don't adopt a magazine; you just read it,
10:51:46 3 consider it. But the local policies are the ones that are to
10:51:52 4 be adopted. There was no adoption of any policy here.

10:51:55 5 Then going to Exhibit 2, 1 of 2, this is where,
10:52:00 6 again, it describes what the legal policies are.

10:52:04 7 Then we go to Exhibit 3 -- I'm sorry -- Exhibit 4,
10:52:13 8 page 4 of 6. Again, this says: Please note the legal policies
10:52:19 9 are not adopted by the board.

10:52:22 10 Exhibit 5 -- and I'll end there. But the fact of the
10:52:31 11 matter is, internally, two of the documents that we've provided
10:52:35 12 to the Court is proof that the school district took no action
10:52:40 13 whatsoever.

10:52:41 14 And as far as this last thing about a facial
10:52:44 15 challenge, there's not anything that the trustees have done
10:52:48 16 that can be opposed facially. There's nothing. If the board
10:52:55 17 had adopted a policy -- say the board had said: You know what?
10:52:59 18 We really agree with State, and we want to do this, too. So
10:53:02 19 then they could have adopted a local policy. Then you could
10:53:07 20 have said, Okay, you can challenge that local policy on its
10:53:10 21 face. They claim that they're making a facial challenge
10:53:14 22 against the trustees, but there's nothing there. There's
10:53:18 23 nothing to be facially challenged.

10:53:21 24 Your Honor, I'd ask that the Court dismiss with
10:53:23 25 prejudice the school district trustees and deny the injunction

10:53:28 1 as to them.

10:53:29 2 THE COURT: Thank you, Mr. Brandt.

10:53:30 3 Mr. Miller?

10:53:42 4 MR. MILLER: Yes, Your Honor. As the last almost two
10:53:49 5 hours have demonstrated, there's a heated dispute about the
10:53:53 6 Texas Law House Bill 89. And the University of Houston System
10:53:59 7 Board of Regents and the Texas A&M University System Board of
10:54:03 8 Regents, any acts or omissions by them is not in dispute. And
10:54:09 9 so, to the extent this Court enters an injunction, they would
10:54:15 10 be improper parties.

10:54:17 11 But more to the heart of the motion to dismiss that
10:54:19 12 the University System defendants have filed, the basic analysis
10:54:25 13 that this Court will need to look at is *Ex parte Young*. Have
10:54:30 14 the plaintiffs in fact met the *Ex parte Young* requirements to
10:54:33 15 establish an exception to immunity for the boards? And in this
10:54:37 16 case they simply have not, Your Honor. They have not named
10:54:44 17 public officials. They've named a state entity, a statutorily
10:54:48 18 distinct state entity, both the Board of Regents for University
10:54:52 19 of Houston System and the Board of Regents for the Texas A&M
10:54:56 20 University System.

10:54:57 21 And in their response, essentially, they're trying to
10:55:00 22 paint the picture that their labeling of the boards themselves
10:55:03 23 was a shorthand is the way I interpret their arguments. But
10:55:07 24 that's not what *Ex parte Young* says. *Ex parte Young* is very
10:55:10 25 specific, as is Rule 17(d) of the Federal Rules of Civil

10:55:17 1 Procedure. It says "a public official." They have not met
10:55:18 2 that requirement. And so, for that reason alone, the
10:55:21 3 University Systems Boards of Regents should be dismissed.

10:55:24 4 And very briefly I would like to address, even though
10:55:27 5 the Court does not get to the merits of the arguments, because
10:55:31 6 counsel has brought up two of the cases he cited in his
10:55:34 7 response, I would like to briefly address those for the Court.

10:55:38 8 The contracts entered into by both Mr. Hale and
10:55:42 9 Mr. Pluecker were with specific local universities, not the
10:55:46 10 Board of Regents themselves. And, in response, the plaintiffs
10:55:51 11 cite a few opinions to justify why in fact, even if they get
10:55:55 12 over *Ex parte Young*, the boards of trustees are proper.

10:56:00 13 And what they cite for that proposition, one of the
10:56:02 14 cases, comes out of Fifth Circuit in 1970. It's *Harkless v.*
10:56:08 15 *Sweeny Independent School District*. And in that case, this was
10:56:11 16 a post -- this was a case that occurred after desegregation.
10:56:15 17 There was a school district that chose not to hire a number of
10:56:19 18 African-American teachers back to the school after
10:56:21 19 desegregation. And so the officials sued at the school
10:56:25 20 district, they were the ones that were in fact over the hiring
10:56:30 21 decisions. They had the discretion and the authority to make
10:56:32 22 those decisions.

10:56:33 23 In this case the board of trustees do not have
10:56:38 24 discretion or authority in terms of where House Bill 89 fits
10:56:43 25 into certain contracts but not others. Likewise, the

10:56:46 1 plaintiffs have also cited *Gonzalez v. Feinerman*, a case out of
10:56:52 2 the Seventh Circuit. And that case involves a prisoner who
10:56:54 3 sued two prison physicians and a warden for lack of adequate
10:56:58 4 care for a hernia. Again, Your Honor, we're talking about
10:57:01 5 public officials who were sued who are carrying out
10:57:04 6 discretionary acts that they had the authority to carry out.

10:57:10 7 And again, here the other two cases *Air Evac EMS*
10:57:15 8 *Inc., V. the Texas Department of Insurance* from the Fifth
10:57:17 9 Circuit. In this case, Your Honor, there was a law that gave
10:57:22 10 the state officials that were sued the authority to both set
10:57:26 11 the rates that emergency service provider could recover, and
10:57:32 12 those same officials also had the authority to preside over
10:57:35 13 administrative hearings to determine if the rates were
10:57:37 14 adequate. Again, we have discretion, we have enforcement
10:57:40 15 authority.

10:57:41 16 And, lastly, Your Honor, the case they cite is *KP*
10:57:44 17 *LeBlanc v. -- excuse me -- KP v. LeBlanc*, a 2010 Fifth Circuit
10:57:49 18 opinion where members of the Louisiana Patient's Compensation
10:57:52 19 Fund Oversight Board had the authority to decide whether or not
10:57:56 20 the Louisiana Patient Compensation Fund, when in fact applied
10:58:02 21 to abortion providers to pay for their claims. So, again,
10:58:05 22 there was a level of discretion there, there was a level of
10:58:07 23 enforcement, that was given to these public officials under the
10:58:10 24 law. We simply do not have that here.

10:58:12 25 As has been stated before the Court by other counsel,

10:58:16 1 this is a law that was enacted by the State. And under the
10:58:21 2 education code, the universities follow the laws of the State
10:58:24 3 of Texas.

10:58:25 4 And so for these reasons, principally because
10:58:27 5 Plaintiffs have not met the requirements under *Ex parte Young*,
10:58:31 6 they should be dismissed from this lawsuit. Thank you,
10:58:36 7 Your Honor.

10:58:36 8 THE COURT: Thank you, Mr. Miller. And, actually,
10:58:38 9 those issues were fairly well briefed before, as all these
10:58:39 10 were. But if you do have any last word ...

10:58:47 11 MR. BUSER-CLANCY: Your Honor, we'll submit on the
10:58:49 12 briefing on these issues.

10:58:50 13 THE COURT: Okay. Right. This has been very helpful
10:58:53 14 today. I appreciate both the briefing and the arguments today.
10:58:57 15 Has anything arisen today that is sufficiently either outside
10:59:01 16 the record or outside previous briefing that either party would
10:59:04 17 need an opportunity for a short period of posthearing briefing?
10:59:08 18 I don't -- nothing has come up that I would identify as being
10:59:14 19 helpful to me, but I want to give you the opportunity to let me
10:59:18 20 know that.

10:59:18 21 MR. ABBAS: No, Your Honor.

10:59:19 22 MR. ABRAMS: Not from the State's perspective,
10:59:22 23 Your Honor.

10:59:22 24 MR. BRANDT: Your Honor, provided that the Court does
10:59:24 25 take into consideration 46-1 and 462, then if that's --

10:59:29 1 THE COURT: Yes, sir.

10:59:30 2 MR. BRANDT: Okay. Then I have nothing.

10:59:31 3 THE COURT: Okay. Very good.

10:59:32 4 MR. BUSER-CLANCY: No, Your Honor.

10:59:33 5 THE COURT: Okay. Thank you very much. Well, again,

10:59:35 6 I appreciate both the briefing and the argument today. It's

10:59:37 7 been very helpful to me in sort of both setting up the issues

10:59:45 8 that are at play here. And so I appreciate very much the time

10:59:48 9 that you've spent doing that. I will take this issue under

10:59:52 10 advisement, all of the pending issues, and we will get an order

10:59:55 11 out in due course.

10:59:57 12 Is there anything else we need to visit about today?

11:00:00 13 Anything from the plaintiffs?

11:00:01 14 MR. ABBAS: No, Your Honor.

11:00:02 15 MR. BUSER-CLANCY: No, Your Honor.

11:00:02 16 THE COURT: Defendants?

11:00:02 17 MR. ABRAMS: No, Your Honor.

11:00:03 18 MR. BRANDT: No, Your Honor.

11:00:04 19 THE COURT: Okay. Well, again, thank you very much.

11:00:07 20 Have a good day and have a good weekend. Thank you.

11:00:10 21 Court's adjourned.

11:00:12 22 (End of transcript)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 8th day of April 2019.

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/S/ Arlinda Rodriguez
Arlinda Rodriguez, Texas CSR 7753
Expiration Date: 10/31/2021
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