No. 19-50384

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BAHIA AMAWI,
Plaintiff – Appellee,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,
Defendants – Appellants.

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI; GEORGE HALE,
Plaintiffs – Appellees,

v.

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

Appeals from the United States District Court for the Western District of Texas, Austin Division
Case Nos. 1:158-cv-01100-RP and 1:18-cv-01091-RP

BRIEF OF ELEVEN CONSTITUTIONAL AND BUSINESS LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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Amawi v. Ken Paxton, in his official capacity as Attorney General of Texas; and

John Pluecker, et al. v. Board of Regents of the University of Houston System, et. al.,

No. 19-50384.

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

Defendants-Appellants:
Pflugerville Independent School District
Ken Paxton, Attorney General of Texas (in his official capacity)
Board of Regents of the University of Houston System
Trustees of the Klein Independent School District
Trustees of the Lewisville Independent School District
Board of Regents of the Texas A&M University System

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who have studied and written on the First Amendment, antidiscrimination laws, and the legal aspects of Israel-focused boycotts. They have a professional interest in the integrity of First Amendment principles and the neutral application of antidiscrimination laws. *Amici* are:[2]

David Bernstein is University Professor and Executive Director of the Liberty and Law Center, Antonin Scalia Law School, George Mason University. He has written extensively about the interaction of antidiscrimination laws and the First Amendment, including a book, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003).

Richard A. Epstein is the inaugural Laurence A. Tisch Professor of Law, New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, Hoover Institution, and the James Parker Hall

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4)(e).

[2] Affiliations are provided for identification purposes only.

Distinguished Service Professor Emeritus and senior lecturer, University of Chicago. Professor Epstein has written extensively on issues of antitrust, antidiscrimination, constitutional, and criminal law.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty-seven states have adopted measures preventing state government agencies from entering into certain kinds of economic relationships with businesses that discriminate against persons or businesses that have a connection to the State of Israel.[3] In addition, federal law has since 1977 made it a criminal offense for American businesses to comply with boycotts of Israel organized by foreign

[3] Such laws typically bar either government contracting with such companies, state pension fund investment in them, or (as in Texas) both.

countries, such as the Arab League boycott that has been maintained since the creation of Israel.

The district court opinion now before this Court, and the subsequent decision of the same court rejecting Texas's argument that plaintiffs' claims are moot because the statute plaintiffs had challenged was no longer on the books, are the product of two errors. First, on the merits of the First Amendment issue, the district court misapprehended the substance of First Amendment protections, and proceeded on the erroneous belief that economic activity—the decision to do or not to do business with someone—constitutes protected speech. Such a principle, if adopted by this Court, would invalidate many state and federal laws, such as state laws prohibiting the state from contracting with businesses that discriminate against LGBTQ persons.

Second, the trial court's decision on mootness reflects an impermissible eagerness to reach the constitutional questions and facially invalidate the statute at issue, when settled mootness principles make any decision on the merits both unnecessary and inappropriate.

In this brief, *Amici* present the following arguments:

1. Plaintiffs' claims are moot, because in light of the Texas Legislature's amendments to the statute, the plaintiffs in this case are no longer subject to it. The revisions to the statute conform the law with most laws throughout the United States that bar states from contracting with businesses that engage in discriminatory activity, and follow similar revisions of anti-BDS laws in other states. There is no reason to think that the Texas Legislature will re-adopt the original statute if this case is dismissed as moot. The district court's unsupported aspersions on the Legislature's motives and good faith failed to accord the requisite respect by a federal court to the state and its legislative choices. The district court's insistence on ruling on the merits—addressing a constitutional question when such a ruling was unnecessary—was improper and reversible.

2. The Supreme Court's cases make absolutely clear that a planned and organized refusal to do business—the substance of a boycott—represents economic activity and is *not* speech. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), so holds, notwithstanding the district court's erroneous reading of that case to the contrary. *NAACP v. Claiborne Hardware Co.*,

458 U.S. 886 (1982), upon which the trial court purported to base its decision, is not at all to the contrary; that decision is entirely focused not on economic activity, but on advocacy, on speech urging others not to engage in economic activity with particular businesses. *Claiborne Hardware* does not anywhere address the constitutional right to refrain from engaging in economic activity *itself*.

3. The position adopted by the district court creates a rule that any antidiscrimination law is unconstitutional as applied if the discriminating party can argue that his discrimination constitutes an ideologically motivated refusal to deal, or boycott. If this rule were to be adopted by the Fifth Circuit, the constitutionality of a wide range of federal and state laws barring discrimination against a wide variety of groups would be in serious jeopardy.

ARGUMENT

I. IN ITS EAGERNESS TO REACH THE MERITS, THE TRIAL COURT ERRED BY HOLDING THAT PLAINTIFFS' CLAIMS ARE NOT MOOT.

The principle that constitutional questions should be avoided whenever possible is as old as the principle that a statute's constitutionality is a question that federal courts may reach when they must. The district court, in its apparent eagerness to reach the merits

here, ignored this principle. In doing so it clearly erred, because, before argument was held on the merits of plaintiffs' claims, the Texas Legislature had revised the statute at issue to exempt plaintiffs, and any other individual contractor or sole proprietorship, from the law's ambit. *See Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 357 (5th Cir. 2010).

Invoking cases in which the bona fides of the allegedly unconstitutional actor were in serious question, the district court held that the case was not moot because the Texas Legislature might, at some point in the future, revise the statute again to reach the plaintiffs. This effort to reach the merits represents legal error for two reasons.

First, the changes made by the Texas Legislature could not possibly be characterized as a stratagem to defeat judicial review, while leaving Texas free to reach these plaintiffs later. Instead, the changes made by the Texas Legislature do nothing more than bring Texas law into line with a host of laws in other jurisdictions throughout the United States—both laws barring state contracting with businesses

supporting Israel-focused discrimination[4] and a very wide variety of other federal and state laws barring other forms of discrimination.[5] The purpose of such exemptions is to avoid the administrative burden of application to *de minimis* cases, and to recognize as a policy matter (though not a constitutional one) the different balancing of interests in limiting small-scale operators from freely choosing their contractual partners,[6] both factors that are genuinely present in the current case.

The notion that the amendment is some trick to avoid the present litigation has absolutely no basis in any identifiable fact, and has no credibility in context. Several other states have put such limits into

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[4] *See*, *e.g.*, Ala. Code § 41-16-5(c)(2); Fla. Stat. § 215.4725(1)(b); Kan. Stat. Ann. § 75-3740e(c).

[5] *See*, *e.g.*, 42 U.S.C. § 2000e(b) (excluding from Title VII employers with 14 or fewer employees).

[6] The exemptions to the Fair Housing Act for buildings of up to four units, provided that one of them is owner occupied, are commonly known as the "Mrs. Murphy exemption," in honor of a hypothetical elderly boardinghouse owner, whose interests in choosing tenants in ways that would otherwise violate antidiscrimination law Congress choose to accommodate. 42 U.S.C. § 3603(b).

anti-BDS laws, both when they faced litigation[7] and when they did not.[8] In this context, these cases simply alerted the Texas Legislature to the need for a *de minimis*/small dealer exception. Indeed, in Kansas, a similar amendment led the district court to dismiss a challenge as moot.[9] Notwithstanding that dismissal, the legislature has not considered revisiting the exemption, nor has there been any suggestion that it might do so. The practice of other similarly situated states with similar legislative revisions suggests that the notion that Texas will reenact the provisions is fanciful. In short, the district court's speculation—without any factual support—that Texas might for some reason be different is simply an inadequate basis for the continuation of Article III jurisdiction. *See Log Cabin Republicans v. United States*, 658

[7] *See*, *e.g.*, Kan. Stat. Ann. § 75-3740e(c) (restrictions do not apply to contractors who are "individuals" and to amounts under $100,000).

[8] *See*, *e.g.*, Wis. Stat. Ann. § 16/75(10p)(c) (exempting contracts worth under $100,000).

[9] *See Koontz v. Watson*, No. 5:17-cv-04099-DDC-KGS, Dkt. 33 (D. Kan. June 29, 2018). In Kansas, the ACLU agreed that its litigation became moot by changes identical to those in this case. *ACLU Withdraws Free Speech Lawsuit Against Law Requiring Contractors to Sign Document Promising Not to Boycott Israel* (June 29, 2018), https://www.aclu.org/press-releases/after-court-defeat-kansas-changes-law-aimed-boycotts-israel.

F.3d 1162, 1167 (9th Cir. 2011) ("Cases rejecting mootness [after legislative repeal] 'are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted.'").

Second, to avoid mootness, the district court erroneously relied on the fact that the Texas Attorney General is still in court defending the original statute; the State did not simply admit defeat, pay attorney's fees to the plaintiff, and agree to the entry of judgment against it. This reasoning is mistaken on two separate grounds. First, Texas law is not made by the Texas Attorney General, but by the Texas Legislature. Therefore, evidence of what the Attorney General is doing sheds no light on what the Texas Legislature will do. And there is absolutely nothing in any record to suggest that the Texas Legislature intends to revise this statute again to re-impose the provisions it deleted four months ago.

In addition, the Texas Attorney General has no choice but to remain in court, because the plaintiff is still pressing claims for attorney's fees, costs, and other relief. Therefore, the fact that the Texas Attorney General remains an active party in the case says nothing even

about the Attorney General's view regarding the wisdom of revising the statute in the future.

II. THE FIRST AMENDMENT PROTECTS ONLY SPEECH, NOT THE RIGHT TO ENGAGE IN, OR TO REFUSE TO ENGAGE IN, ECONOMIC ACTIVITY.

The decision below grossly misinterprets the two Supreme Court decisions bearing most directly on the constitutionality of statutes barring government entities from doing business with entities that boycott a particular class of people. Correctly read, both decisions require reversal in this case.

FAIR involved a challenge to the Solomon Amendment. That statute specified that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose federal funds. 547 U.S. at 51. Just like those challenging the Texas law argue that their free speech rights are violated by their ineligibility for state funds if they boycott Israel-related entities, the law schools in *FAIR* argued that their free speech rights were violated by the anti-boycott-the-military Solomon Amendment. The Court unanimously upheld the Solomon Amendment, concluding that it targeted *conduct*, not speech. *Id.* at 60. Just as in the

case at bar, where the plaintiffs remain free to criticize Israel and those who do business with it, the Court noted that the law schools remained free to object to the military's policy on homosexuality and other matters.[10] What the law schools could not do is refuse to deal with, *i.e.*, boycott, military recruiters in the course of ordinary economic activity, action not protected by the First Amendment.

As a substantive matter, the activity at issue in *FAIR* was the same activity engaged in by the plaintiffs here—the refusal to deal with another party.[11] And the Supreme Court held that, in the First Amendment analysis of restrictions on economic activity, the court must do exactly what the trial court here failed to do: distinguish between regulation of speech and regulation of action. The former, *FAIR* holds, is impermissible; the latter is not: "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may

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[10] As the Court explained, "[l]aw schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds." *FAIR*, 547 U.S. at 60.

[11] Indeed, this is how federal law defines a "boycott." 26 U.S.C. § 999(b)(3)(A)(i).

or may not *say*." *Id*. (emphasis in original). The exact same is true of the Texas law here: it affects what the state contractors must *do*—not discriminate against Israeli-affiliated businesses and persons in their economic transactions—not what they may or may not *say*.[12]

The district court dismissed *FAIR* as irrelevant because the opinion did not contain the word "boycott." The law school plaintiffs themselves, however, explicitly called their conduct a "boycott." *See* Brief for Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347175, at *29 ("the government is squelching the law school's chosen means of protest—a limited sort of *boycott* of any institution that discriminates") (emphasis added). The district court erred in disregarding binding Supreme Court authority because it did not contain the magic word "boycott."

There is a common-sense reason why the First Amendment protects speech and not business activity. With business activity, only an explanation of the motives behind the conduct sends a message—the

[12] *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917 (7th Cir. 1984) ("The appellants are free to communicate their views about the relative merits of the Arabs' political decisions [to boycott Israel] directly to the Arabs if they choose….")

explanation is speech, the refusal to deal is conduct. If Mary purchases Coke instead of Pepsi, the message is inherently unknown; did Mary buy Coke because she prefers the taste, or because it was cheaper, or because she opposes PepsiCo's policies? Refusals to deal or boycotts of Israeli-related companies and individuals are no exception to this rule; they are no more inherently expressive than any other such conduct. If Jane buys Trader Joe's brand hummus instead of Sabra hummus, the message is unknown—did she make a choice based on price, or did she boycott Sabra because of its supposed affiliation with Israel? In short, standing alone, the political message intended by an economic transaction is unknown and unknowable without concomitant speech; and it is that speech, and not the economic transaction, that the First Amendment protects. The law here regulates only transactions, not any accompanying speech.

Moreover, even with respect to boycotts themselves, companies boycott Israeli-related businesses for a variety of non-ideological reasons, such as improving their appeal in Arab markets[13] and avoiding

[13] *Orange Confirms It Plans to Cut Ties with Israeli Firm, But Says Move Not Political*, Jerusalem Post (June 4, 2015),

pressure campaigns or secondary boycotts from anti-Israel activists.[14] For example, Airbnb, the most notable recent example of a U.S. firm boycotting Israel, explicitly stated that its decision had no political or expressive basis.[15] Despite explicitly denouncing "the BDS movement" and expressing support for Israel, Airbnb was properly subject to the application of state anti-BDS laws, including in Texas. This demonstrates that the laws are not about the content of speech, but about conduct:[16] a company can express support for Israel, but engage in discriminatory refusals to deal, and be subject to the law. Conversely,

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https://www.jpost.com/Breaking-News/Telecoms-operator-Orange-says-plans-to-end-Israel-deal-over-brand-licensing-no-mention-of-boycott-405071.

[14] Marcy Oster, *Israeli Burger Chain Won't Open in Dearborn, Michigan Due to BDS Threat* (July 25, 2019), https://forward.com/fast-forward/428239/israeli-burger-chain-wont-open-in-dearborn-michigan-due-to-bds-threat/ (last visited Sept. 5, 2019); *see also Briggs & Stratton*, 728 F.2d at 917 (discussing participation in Israel boycott activities, in contravention of federal law, by a company with "economic motivation alone").

[15] *Listings in Disputed Regions* (Nov. 19, 2018), https://press.airbnb.com/listings-in-disputed-regions/. The company subsequently ended its partial boycott as part of settlement of antidiscrimination lawsuits brought against it by Jewish plaintiffs.

[16] At the least, the ubiquity of non-ideological boycotts makes a facial challenge to the law inappropriate.

a company can put a banner on its webpage "Down with the Zionist Oppressor" and would not fall within the scope of the law.

Claiborne Hardware is not at all to the contrary. With *Claiborne Hardware*, as with *FAIR*, the facts, and the claims actually at issue, matter; neither is accurately described by the decision below. In *Claiborne Hardware* a group of businesses sued people and organizations because the defendants *urged others* not to do business with the plaintiffs. 458 U.S. at 909-10. The defendants urged this boycott because the plaintiff businesses discriminated, and supported discrimination, against African Americans. What was at issue, the Court's opinion repeatedly makes clear, was the *persuasion*, not the economic conduct itself. *Id.* at 909-12, 926-29, 933. That was what defendants objected to, because it successfully discouraged others from patronizing the plaintiff businesses and they lost money as a result. And that persuasion is what the Court held was constitutionally protected. African Americans who were not already refusing to patronize white-owned stores "repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most

direct form." *Id.* at 909-10. *Claiborne Hardware* nowhere states that the First Amendment protects the decision not to do business with another party. There could be no such holding, as the district court should have recognized, because there was no challenge in that case to any individual decision not to patronize one of the plaintiffs' stores. Instead, the claim was that *speech to others,* urging those others not to buy in white-owned stores, was tortious. *Claiborne Hardware* rejected that claim because the First Amendment protects speech trying to persuade others to act. But the Court never states that *economic action* comes within the First Amendment's protections.

Indeed, the same day it issued *Claiborne Hardware*, the Court decided *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212 (1982). That case involved a union that refused to load and unload ships engaged in trade with the Soviet Union to protest the Soviet invasion of Afghanistan. *Id.* at 214. The Supreme Court held that the union's actions constituted a secondary boycott that violated the National Labor Relations Act. *Id.* at 222.

The Court rejected the union's argument that its boycott was protected by the First Amendment. The Court explained: "conduct

designed not to communicate but to coerce merits still less consideration under the First Amendment." *Id.* at 226. It is impossible to reconcile the district court's reading of *Claiborne Hardware*, that the action of engaging in an economic boycott receives First Amendment protection, with *International Longshoremen's Association*, decided the same day.

III. A FIRST AMENDMENT RIGHT TO DO BUSINESS OR TO REFUSE TO DO BUSINESS WITH PARTICULAR PERSONS WOULD REVOLUTIONIZE ECONOMIC REGULATION AND INVALIDATE NUMEROUS ANTIDISCRIMINATION LAWS.

A. State Laws Barring States From Doing Business With Entities That Discriminate Are Unconstitutional Under The District Court's Rationale.

The Supreme Court has never held that a state is required to contract with businesses who refuse to do business with—*i.e.*, discriminate against—particular categories of persons or entities. No Supreme Court decision imposes any constitutional limitation on a state's decision that the state itself will refrain from doing business with a party that—in the State's view—discriminates against others in a manner the State, in its discretion, regards as improper. That is the only effect of the statute here at issue: it provides that Texas will refuse to enter a business transaction with parties that, in Texas's view,

improperly discriminate against Israeli persons, Israeli-owned businesses, or those who do business with such persons or entities.

The imposition of such restrictions is entirely commonplace in the current legal environment: a plethora of federal and state laws bar private businesses from discriminating against other persons and businesses on the basis of race, gender, national origin, sexual identity, sexual preference, and familial status. Perhaps the most similar example to the Texas law at issue is federal legislation criminalizing compliance with foreign boycotts of Israel. *See* Export Administration Act of 1979, 50 U.S.C. § 4607(a)(1) (2012) (repealed 2018); John S. McCain National Defense Authorization Act, Pub. L. 115-232 §§ 1741-1781, 132 Stat. 1636, 2208-38 (2018) (including the Anti-Boycott Act of 2018, 50 U.S.C. § 4842).

Crucially, the federal Israel anti-boycott law contains no exemption for what the district court called "political boycotts"—that is, it applies to anyone who participates in a boycott promoted by a foreign country, even if they do so out of ideological sympathy, rather than economic pressure. Nevertheless, despite the vigorous federal criminal enforcement against boycotting companies for the past four decades, no

defendants have successfully claimed that the First Amendment shields them from criminal liability.[17] If the district court's opinion were an accurate statement of the law, federal anti-boycott laws would be invalid as well, so long as a defendant could plausibly claim that it is boycotting Israel for, *inter alia*, ideological reasons.

But the decades-old federal anti-boycott law would only be the first such law to go; many more would follow. A significant number of state and local laws prohibit the government from funding or doing business with persons and businesses that discriminate against LGBTQ Americans, regardless of the boycotter's religious, moral, or ideological opposition to gay marriage or other actions of LGBTQ Americans.[18]

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[17] *See Briggs & Stratton*, 728 F.2d at 917-18 (holding that companies' responses to Arab League questionnaires about their business activities with Israel are not protected by the First Amendment); *Karen Mar. Ltd. v. Omar Int'l, Inc.*, 322 F. Supp. 2d 224, 227 (E.D.N.Y. 2004); *Gen. Elec. Co. v. N.Y. State Assembly Comm. on Governmental Operations*, 425 F. Supp. 909, 916 (N.D.N.Y. 1975).

[18] Laws dealing with sexual orientation and gender identity are particularly relevant because, unlike race or sex discrimination, most states and the federal government do not forbid such discrimination outright: that is, they do not ban it by private parties. However, many states and the federal government nonetheless prohibit government contracting with businesses that engage in refusals to deal on the basis of such factors. The anti-BDS laws follow the same model: not banning

California, for example, refuses to provide state funding or sponsorship of travel for state employees and contractors to states whose laws on "sexual orientation, gender identity, or gender expression" do not meet with California's approval. Cal. Gov't Code § 11139.8(b)(2). This provision restricts a state contractor, or even a professor at a state university, from visiting one of these states on business, or from presenting at a conference. Five other states and numerous cities have enacted similar laws.[19]

Moreover, a number of states and cities have adopted prohibitions in the LGBTQ context directly analogous to Texas's law challenged in this case. For example, New York Governor Andrew M. Cuomo signed an Executive Order banning all state agencies and authorities from doing business with companies that promote or tolerate discrimination,

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the refusals to deal outright, but still refusing to indirectly support them with public funds.

[19] *See* Christy Mallory & Brad Sears, Discrimination, Diversity and Development: The Legal and Economic Implications of North Carolina's HB2 at 26-27 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Discrimination-Diversity-and-Development_The-Legal-and-Economic-Implications-of-North-Carolinas-HB2.pdf.

including on the basis of sexual orientation and gender identity.[20] Governor Terry McAuliffe of Virginia issued an executive order banning state contracts with firms that discriminate on the basis of sexual orientation or gender identity.[21] Governor Rick Snyder of Michigan issued an executive directive that companies seeking contracts, grants, or loans from the state must agree not to discriminate on the basis of sexual orientation or gender identity.[22] And the City of San Francisco adopted legislation prohibiting city contracts with and purchases from companies in states that sanction what San Francisco deems

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[20] *Governor Cuomo Signs Executive Order Banning All State Agencies and Authorities from Doing Business with Companies that Promote or Tolerate Discrimination* (Feb. 4, 2018), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-banning-all-state-agencies-and-authorities-doing-business.

[21] Laura Vozzella, *McAuliffe bans state contracts with firms engaged in anti-LGBT discrimination*, Wash. Post. (Jan. 5, 2017), https://www.washingtonpost.com/local/virginia-politics/mcauliffe-bans-state-contracts-with-firms-engaged-in-anti-lbgt-discrimination/2017/01/05/5f701dc0-d35f-11e6-945a-76f69a399dd5_story.html.

[22] Jonathan Oosting, *Snyder bans LGBT discrimination through state contracts*, Detroit News (Dec. 28, 2018), https://www.detroitnews.com/story/news/local/michigan/2018/12/28/-snyder-bans-lgbt-discrimination-state-contracts/2432577002/.

discrimination against the lesbian, gay, bisexual, and transgender community.[23] Ironically, the American Civil Liberties Union—which represents plaintiffs in this case—has vigorously pushed for and defended these laws. The ACLU acknowledges that in many states it is "legal to fire or refuse to hire someone based on their sexual orientation," but argues that companies that do so "must not be allowed to do so with taxpayer dollars."[24] It inexplicably ignores the obvious: if the First Amendment requires states to contract with those who discriminate against people and entities who do business in Israel, it also requires states to contract with those who discriminate against other groups the state wishes to protect, including LGBTQ people.

If the district court opinion were affirmed, all laws limiting state contracting on antidiscrimination/anti-boycott grounds would violate the First Amendment. Like Texas's statute, each of these governmental

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[23] *San Francisco Is First To Ban City Contracts With Businesses In States With Anti-LGBT Laws* (Sept. 27, 2016), https://sanfrancisco.cbslocal.com/2016/09/27/san-francisco-is-first-city-to-ban-city-contracts-with-businesses-in-states-with-anti-lgbt-laws/ (last visited Sept. 5, 2019).

[24] See Eugene Kontorovich, *For the ACLU, Antipathy to Israel Trumps Antidiscrimination,* Wall St. J. at A17 (Feb. 12, 2019).

prohibitions is targeted at economic activity, regardless of ideological motivation. If the political rationale for the plaintiffs' boycott of Israel insulates them from a state law targeting their economic actions, then parties subject to laws like those in New York, Virginia, Michigan, California, and San Francisco could evade those laws by claiming that they are engaged in an ideological boycott of those whose lifestyles they disapprove of.

More generally, Supreme Court authority would amount to little if it can be avoided, in ways reminiscent of old-fashioned notice pleading, by simply using a different word with the same or similar meaning. Antidiscrimination laws ban or regulate refusals to deal regardless of how they are labeled. Most who refuse to deal with people on the basis of state-protected categories—such as gender identity, veteran status, felon status, and so forth—do not describe their actions as "discrimination." Nonetheless, those actions can be regulated as discrimination.[25] Conversely, in the long history of antidiscrimination laws, no court has ever held that discriminatory business conduct

[25] *Economic Discrimination*, *Black's Law Dictionary* (8th ed. 2004) ("Any form of discrimination within the field of commerce, such as boycotting a particular product or price-fixing.").

achieves constitutional protection if the discriminator simply labels it a "boycott" and articulates ideological objections to the conduct of the targeted group.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), African American families sued a private school for excluding black children from the school. The defendants argued that they had a constitutional freedom of association right to do so. The Supreme Court unanimously rejected that argument, proclaiming that "the Constitution … places no value on discrimination, and while [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment … it has never been accorded affirmative constitutional protections." *Id.* at 176 (alterations and omission in the original) (citations and quotation marks omitted). Surely the defendants could not have avoided this result by arguing the following: (1) we have an ideological commitment to segregation; (2) the plaintiffs have shown their ideological opposition to segregation by trying to integrate our school; (3) we are therefore boycotting these families for ideological reasons. Yet the district court opinion in the instant case, extended to other sorts of antidiscrimination laws, would logically demand that the

defendants would have prevailed in *Runyon* had they simply termed their refusal to admit African-American children as an ideologically motivated boycott.

Finally, traditional antidiscrimination laws cannot be distinguished from the Texas law challenged in the case at bar because they apply to "constitutionally protected classes." First, as noted previously, much of the conduct that comes within the moniker of "discrimination" can easily be restyled as "ideological boycott." Second, the notion that "classic" antidiscrimination laws get special waivers from constitutional free speech protections is unsupported. There are no special "protected classes" from private discrimination under the Constitution. Congress and state legislatures choose what categories to protect, based on the prevailing felt needs of the time. Thus, various jurisdictions protect categories ranging from race to military recruiter status (the Solomon Amendment, in fact, was modeled directly on Title IX's antidiscrimination provisions) to sexual orientation to political ideology to appearance to membership in a motorcycle gang.[26] There is

[26] John Carpenter, *Tired of Stereotyping, Bikers Turn to Law*, N.Y. Times (Nov. 26, 2001), https://www.nytimes.com/2001/11/26/us/tired-of-stereotyping-bikers-turn-to-law.html.

no plausible textual or precedent-based argument that laws banning discrimination based on race, sex, etc., are exempt from First Amendment scrutiny but anti-BDS laws are not because of the category of people protected.

Third, the Texas law at issue is itself an antidiscrimination law, banning discrimination against those who do business with Israel-related entities. This is no more or less a constitutionally protected status than any other category the legislature chooses to protect.

Moreover, contrary to the oft-heard claim that the law protects a "foreign country," the text of the law defines boycotting Israel as "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or *with a person or entity doing business in Israel or in an Israeli-controlled territory*." Tex. Gov't Code Ann. § 808.001(1) (emphasis added). The vast majority of potential subjects of such actions by Texans are not the government of Israel, but individuals and companies that do business in Israel, such as Lockheed Martin, based in Fort Worth, which has made over one billion dollars in reciprocal

procurement contracts with Israeli defense companies,[27] and American Airlines, which will soon be flying from Dallas to Tel Aviv. All of these companies fall within the protections of Texas's law.

The Texas law is, in any event, similar to "classic" antidiscrimination legislation in that it protects Texas residents from discrimination based on national origin, ethnicity, and religion. It is hardly debatable that, with regard to small businesses and individuals, those most likely to face boycotts for doing business with Israel are those who are most likely to have the closest personal ties to Israel, *i.e.*, Israeli-Americans and Jews. Indeed, the BDS movement itself originated in a blatantly antisemitic conference in Durban, South Africa in 2001,[28] so the targeting of Jews with connections to Israel is not a bug but a feature of the movement.

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[27] *Lockheed Martin spends over $1b in Israel* (Feb. 12, 2017), https://en.globes.co.il/en/article-f-35-reciprocal-procurement-up-33-in-2016-1001176697.

[28] Gerald Steinberg, *Fifteen Years Later, The Durban Conference's Hatred Still Affects Us*, The Tower (Sept. 18, 2016), http://www.thetower.org/3931-fifteen-years-later-the-durban-conferences-hatred-still-affects-us.

To get a sense of the BDS movement's real-world effects, consider a recent incident involving the Burgerim restaurant chain. Burgerim, a national U.S. chain, originated in Israel. An Israeli-American entrepreneur licensed the name and concept, and began franchising in the U.S., with the company legally headquartered in California.[29] The owner lives in the U.S.[30] In short, Burgerim is an American company owned by an Israeli immigrant to the United States.

When an Arab-American businessman announced plans to open a Burgerim franchise in Dearborn, Michigan, he was met with threats of violence and economic boycott. He eventually chose not to open the franchise despite a large investment.[31] The boycotters' stated rationale for boycotting Burgerim focused on the fact that the company was founded in Israel and is owned by an Israeli-American, while

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[29] Burgherim, https://www.burgerim.com.

[30] Oren Loni, *Meet the Owner of Burgerim*, https://medium.com/oren-loni-burgerim-president/oren-loni-meet-the-owner-of-burgerim-ffdcd106a814 (last visited Sept. 5, 2019).

[31] Ana Bauman, *Dearborn burger franchise founded in Israel delays opening after backlash, threats*, Detroit Free Press (July 23, 2019), https://www.freep.com/story/news/local/michigan/wayne/2019/07/23/dearborn-burgerim-burger-chain-isreali-threats/1801109001/.

acknowledging that the company has no legal ties to Israel.[32] If the First Amendment forbids Texas from acting against this sort of national-origin discrimination in setting contracting policy, it is hard to see what sort of antidiscrimination rules would be safe.

B. Texas Has Entirely Rational Business Reasons For Barring Discrimination Against A Particular Country By Those With Whom The State Chooses To Do Business.

Even if Texas did not regard the relevant boycotts as improperly discriminatory, it would still have an entirely valid reason for refusing to do business with entities that themselves discriminate against Israeli-owned companies, as a simple example will show. Suppose Texas hires a consultant to improve its cybersecurity efforts. Suppose also that it is not allowed to consider the boycotting activities of the consultant and hires one who boycotts Israeli software. Further suppose that by far the best software for the job is Israeli-owned Checkpoint, and a State contract with that company would cost $50 million. The consultant, however, boycotts Israel, so he causes Texas to purchase inferior

[32] Amer Zahr, *Boycott Burgerim? Yes!*, https://www.civilarab.com/boycott-burgerim-yes/ (last visited Sept. 5, 2019).

McAfee software, which costs $75 million. In this scenario, the state winds up with worse software costing an extra $25 million. Why would any state agree to contract with someone who might do this? If Texas is not free to avoid doing business with entities who boycott Israeli companies, it will have no way to protect itself from paying more money than necessary for a lower quality product.

For purely business reasons alone, therefore, Texas should have the right to ensure that the entities with which it does business do not rule out dealings with Israeli companies, just as a state purchaser of tulips should be free to avoid doing business with flower-sellers who discriminate against Dutch companies. Instead, as a general matter, Texas should have the right to ensure that the persons and businesses with which it contracts will themselves, in their business capacity, purchase all products and services from the best possible sources, regardless of the ideology of the source or the purchaser.[33]

[33] The Texas statute, even as originally enacted, did not regulate conduct in a person's private capacity. A sole proprietor could decline to purchase Israeli products for home consumption.

C. The District Court's Rationale Would Constitutionally Immunize Business Decisions To Trade With Iran, Cuba, And Sudan, And Require That Statutes Barring Such Trade Be Struck Down.

If one were to adopt the premise of the district court's holding—that decisions not to do business with people or companies associated with a particular country are themselves speech indicating policy disapproval of that country—then the converse must also be true: ideological decisions to do business with a country must also be (or at least, can be claimed to be) speech signifying support or approval. That would create a novel, broad—and intolerable—First Amendment carve-out to foreign sanctions laws.

Laws restricting trade with countries like Iran, Cuba, and Sudan apply regardless of the motive for such dealings. In the district court's logic, however, economic dealings with Cuba could represent not mere commerce, but First Amendment speech indicating support for the Cuban government regime or opposition to U.S. Cuba policy. Of course, the ability to claim an ideological "boycott" to avoid sanctions laws would make such laws unworkable, but this is the natural consequence of the district court's opinion.

The notion that economic actions constitute speech is so far-fetched that there have been no successful First Amendment challenges to foreign sanctions laws.[34] The few that have been brought have been rejected on the grounds that doing business is "action," and not "inherently expressive," even when motivated by ideological reasons, such as to "express his belief in peace and his protest against government action that would harm innocent Iraqi citizens." *Clancy v. Office of Foreign Assets Control of U.S. Dep't of Treasury*, 559 F.3d 595, 605 (7th Cir. 2009). Just as engaging in business with a country sends no inherent message unless accompanied by speech, *id.,* not doing business also sends no inherent message.[35]

[34] *Karpova v. Snow*, 402 F. Supp. 2d 459, 472–73 (S.D.N.Y. 2005), *aff'd*, 497 F.3d 262 (2d Cir. 2007), involved a person "sanctioned for exporting services to Iraq." The motivation was ideological, but the court concluded "the Regulations and penalties at issue reach only plaintiff's actions—not her speech." *Id.*

[35] The foreign sanctions context cannot be distinguished on the basis of the compelling governmental foreign policy interests involved, because the sanctions were sustained on the grounds that they did not raise First Amendment questions at all. *Clancy*, 559 F.3d at 605.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 6,470 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Century Schoolbook 14-point font using Microsoft Word 2016.

DATED: September 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

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USDC No. 1:18-CV-1100

Dear Mr. Charnes and Mr. Marcus,

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

Sincerely,

LYLE W. CAYCE, Clerk

Mary Frances Yeager

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