No. 19-50384

In the United States Court of Appeals for the Fifth Circuit

Bahia Amawi et al.,

Plaintiff-Appellees,

v.

Ken Paxton, in his official capacity as Attorney General of Texas et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, MISSOURI, OHIO, UTAH AND WEST VIRGINIA

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INTERESTS OF AMICI

Amici curiae—the States of Arizona, Arkansas, Georgia, Indiana, Kansas, Missouri, Ohio, Utah, and West Virginia—all have compelling interests in preventing invidious discrimination and not subsidizing activities contrary to state public policy with pubic moneys, and have effectuated those compelling interests by imposing conduct-based regulations on government contractors. Moreover, more than two dozen states—including several of *amici*—have enacted statutes or executive orders similar to the Texas statutes at issue (hereinafter the "Texas Act") challenged here.[1]

INTRODUCTION

This case presents a paradigmatic example of mootness: the law at issue has been amended in a manner such that it does not apply to *any* of the Plaintiffs, who no longer have any conceivable concrete stake in the controversy. To be sure, Plaintiffs continue to have an acute and palpable *desire* to obtain an advisory opinion about the constitutionality of H.B. 89 and H.B. 793. But bedrock and elementary principals of Article III jurisdiction mandate dismissal where (as here) that is all that is at stake.

Nor does the "voluntary exception" to mootness apply here. It is well-established that a presumption of good faith applies to governmental action that

[1] Under Federal Rule of Appellate Procedure 29(a)(2), states may file amicus briefs without leave of the court or consent of the parties.

moots a case. But the district court below committed clear error not only by failing to apply this presumption, but instead effectively presuming the bad faith of the Texas Legislature. And it further improperly reasoned that the Texas Attorney General's defense of the constitutionality of a Texas statute was somehow compelling evidence that this suit was not moot. But state attorneys general are *supposed* to defend state statutes against challenges, and the faithful discharge of their duties is neither remarkable nor untoward.

If this Court concludes that this dispute is not moot, however, it should reverse on the merits. Plaintiffs' constitutional arguments are deeply flawed and problematic in many respects, which is amply demonstrated by the Opening Brief of Appellant and Texas Attorney General Ken Paxton (hereinafter, "Texas"). This amicus brief focuses on two particular aspects: (1) that the First Amendment does not apply to the boycotts at issue at all and (2) the district court's wrongful dismissal of Texas's compelling interest in prohibiting discrimination.

ARGUMENT

I. THIS CONTROVERSY IS MOOT

The district court committed patent legal error by concluding that this dispute is not moot. It not only failed to apply the mandated presumption of good faith, it effectively presumed *bad* faith instead and imposed a standard under which a mootness determination would effectively be impossible in any case involving

challenges to statutes. It further went on to suggest that Article III justiciability requirements were in fact abolished in First Amendment cases, brazenly declaring that it "d[id] not matter … that the statute no longer applies to Plaintiffs." ROA.2302. Not so.

The district court also improperly relied on—indeed fixated on—the Texas Attorney General (and other Defendants) continuing to defend the constitutionality of H.B. 89. Respectfully, that is scarcely even probative to the mootness inquiry, rather than (as the district court believed) controlling evidence.

A. Enactment Of A Superseding Statute Presumptively Moots Cases Arising From The Prior One.

This case became moot once H.B. 793 became effective. It is a basic principle of justiciability than enactment of a new statutory scheme represents an intervening factual event that moots a challenge to the original statute. This Court has thus explained that "statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006). *Accord Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("A statutory change, however, is usually enough to render a case moot[.]"); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019) (same). Indeed, "[t]he exceptions to this general line of holdings are rare and typically involve situations

where it is *virtually certain that the repealed law will be reenacted*." *Blatchford*, 38 F.3d at 1510 (emphasis added).

For this reason, this Court presumes the good faith of governmental actors and that their actions do not constitute "voluntary cessation": "Government officials 'in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties.'" *Yarls v. Bunton*, 905 F.3d 905, 910-11 (5th Cir. 2018). *See also id.* at 910 ("[C]ourts are 'justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude.'" (citation omitted)); *America Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("[U]nlike in the case of a private party, we presume the government is acting in good faith.").

The district court ignored virtually all other precedential authority and instead focused on *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). But this Court has repeatedly recognized that *Aladdin's Castle* is limited to a narrow and extreme set of facts. *See, e.g.*, *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 321–22 (5th Cir. 2005) (explaining that *Aladdin's Castle*'s outcome was based upon the city "openly conceded ... that it intended to reenact the disputed ordinance as soon as the Supreme Court vacated the judgment for mootness"); *Habetz v. La. High Sch. Athletic Ass'n*, 842 F.2d 136,

137-38 (5th Cir. 1988) (distinguishing *Aladdin's Castle* based on the fact that the "defendant city's past conduct indicated a likelihood that it would return to its challenged practices once the threat of litigation had passed").

Nothing remotely equivalent to *Aladdin's Castle* occurred here. The ordinary presumption of good faith thus applies here. And virtually nothing was offered to rebut that presumption aside from Defendants continuing to defend the constitutionality of H.B. 89—which, as explained below, is insufficient to defeat mootness. *Infra* at 8-12.

The presumption of good faith thus both applies and is dispositive here.

B. The District Court Failed To Apply The Presumption Of Good Faith

The district court here, however, inverted the controlling standard: instead of presuming the good faith of the Texas Legislature as controlling precedent mandated, it effectively presumed bad faith and required Texas to disprove it. It thus refused to find mootness because "it [wa]s not 'absolutely clear' Texas will not re-adopt the law." ROA.2301.

That was clear error: Requiring Texas to prove with absolute certainty that it would never re-adopt HB 89 effectively creates a presumption of *bad* faith, and one that is all-but irrebuttable. Few, if any, things in politics are "absolutely certain." And to the extent that they appear to be so, any one election cycle can

change that it a heartbeat. The burden imposed by the district court is thus effectively insurmountable and turns the presumption of good faith on its head.

That, unsurprisingly, is not the law. Instead, this Court has explained that instead of "absolute certainty" of non-reenactment, the proper inquiry is whether "there is a *substantial likelihood* that the challenged statute will be reenacted or replaced by another constitutionally suspect law." *Reynolds v. New Orleans City*, 272 F. App'x 331, 336-37 & n.3 (5th Cir. 2008) (emphasis added).

The district court made no such finding, nor would any such finding be tenable on this record. Under this Court's governing standard, reversal is mandated here.

C. H.B. 793 Eliminates Plaintiffs' Personal Stake In The Case

Even leaving presumptions aside, this case is plainly moot because H.B. 793 effectively and *completely* eliminates Plaintiffs' personal stake in this case, depriving federal courts of Article III jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). "To test whether subsequent developments have mooted a suit, we ask whether the claim could have been brought 'in light of the ... statute as it now stands.'" *Rocky Mountain Farmers*, 913 F.3d at 949 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)). Because the H.B. 793 plainly does not apply to Plaintiffs, this test requires dismissal for mootness.

The district court's response to these bedrock principles is stunning: "It does not matter, as Defendants contend, that the statute no longer applies to Plaintiffs." ROA.2302. In the district court's view, it was entirely irrelevant that Plaintiffs now lack any personal, concrete stake in this controversy. Instead, it viewed Article III justiciability requirements as all-but abolished for First Amendment challenges. That holding is erroneous.

The district court relied heavily on *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) to dispense with Article III niceties. ROA.2302-03. But, as the Fourth Circuit has explained, "*Broadrick* … cannot be read so broadly." *Rock for Life-UMBC v. Hrabowski*, 411 F. App'x 541, 548 (4th Cir. 2010). Instead, it recognizes that "overbreadth doctrine relaxes *prudential* limitations on standing that would normally prevent a plaintiff from vindicating the constitutional rights of other speakers, [but] *it does not dispense* with the 'obligat[ion] as an initial matter to allege a distinct and palpable injury as required by *Article III*.'" *Id.* (quoting *Burke v. City of Charleston*, 139 F.3d 401, 405 n.2 (4th Cir. 1998)) (emphasis added). "*Broadrick* … [thus] does not circumvent the requirement that a plaintiff suffer an individual injury from the existence of the contested provision to begin with." *Id.*

The Ninth Circuit has similarly explained that "[a]pplication of the overbreadth doctrine [of *Broadrick*] does not, however, eliminate the requirement

that the plaintiffs first possess Article III standing." *ACLU of Nevada v. Heller*, 44 F. App'x 767, 768 (9th Cir. 2002); *accord Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 144 (2d Cir. 2000) (explaining that under *Broadrick* "*the prudential limitations* against third party standing are relaxed" (emphasis added)).

In contrast to the *prudential* standing limitations relaxed in First Amendment overbreadth cases, "the requirement of injury in fact is a hard floor of Article III jurisdiction[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Because no *Plaintiff* here has any injury in fact going forward, this "hard floor" compels dismissal here.[2]

D. The District Court Wrongly Fixated On Texas's Defense Of Its Own Law

Much of the district court's error appears to arise from its inordinate focus on the Texas Attorney General performing his duties under Texas law—*i.e.*, defending the constitutionality of H.B. 89. It therefore reiterated *four* separate times language to the effect that the Texas Attorney General and other defendants "continue to defend the constitutionality of H.B. 89," which is the core of its reasoning. ROA.2298; ROA.2301. That rationale is flawed for four reasons.

[2] The district court somehow reasoned that even though it is conceded that H.B. 793 does *not* apply to Plaintiffs, "Plaintiffs *own* rights of free expression are still allegedly violated" and "Plaintiffs' speech remains chilled." ROA.2303. That reasoning is bizarre: if a statute concededly does not apply to someone, it can neither violate their rights nor chill their speech.

First, there is *nothing* extraordinary or even notable about state attorneys general defending the constitutionality of statutes of their respective state. That is, after all, *their job*, and one that they typically have sworn an oath to perform. Instances in which they refuse to defend laws are supposed to be rare, not commonplace.

There is thus nothing even particularly *probative* about a state attorney general defending the constitutionality of a state law—let alone dispositive, as the district court all-but stated here. Indeed, the fact that the Texas Attorney General would defend the constitutionality of a Texas statute here is no more surprising than the Texas Attorney General arguing on behalf of Texas, rather than New Mexico, in *Texas v. New Mexico*, 571 U.S. 1173 (2014).

Moreover, the Supreme Court specifically and unanimously faulted the Ninth Circuit for refusing to certify a question to the Arizona Supreme Court because the state would not concede a legal provision was unconstitutional if its interpretation was rejected. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). Indeed, the Court specifically rejected the Ninth Circuit's approach of imposing as the "price for certification a concession by the Attorney General that Article XXVIII 'would be unconstitutional if construed as [plaintiff Yniguez] contended it should be[.]'" *Id.* But here the district court did something quite similar: imposing, as the price of taking Defendants' mootness arguments

seriously, that they concede the unconstitutionality of H.B. 89. That was improper for the discretionary call of whether to certify in *Arizonans for Official English*, and it is even more inappropriate for the mandatory Article III jurisdictional inquiry here.

More generally, the district court's reasoning is in sharp tension with the basic premise of our adversarial system of jurisprudence: attorneys are *supposed* to advance arguments in support of the interests of the parties they represent. There is nothing remarkable about the fact that they might argue that the actions of the parties they represent do not violate governing law, whether that be common law duties, statutory law, or the U.S. Constitution. A party advancing an argument in support of its interests is thus an awfully weak premise to build *any* conclusion—let alone one as extraordinary as a challenge to a statute not being moot despite its conceded inapplicability to all plaintiffs.

Second, the district court's reasoning presents parties with an improper choice: either argue mootness or the merits, but not both (since arguing the latter will apparently preclude the former). That violates the basic principle that jurisdiction must be analyzed independently from the merits. *See, e.g.*, *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570 (2008) ("The Supreme Court has made clear that when considering whether a

plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.").

Third, even assuming this "continues to defend" evidence was even relevant, the defendants here are not even the pertinent decision-makers. To the extent that the district court was concerned about Texas's potential "reenactment" of HB 793, the actions of Texas's Attorney General are irrelevant: he has no vote in the Texas House or Senate, and cannot veto legislation either. Thus, even if his performance of his duty to defend Texas law were somehow problematic, it has no bearing on whether the *Texas Legislature* is likely to reenact H.B. 89.

Fourth, the district court's reasoning appears to be punitive: *i.e.*, that denial of mootness is somehow the appropriate response for Texas's "failure" to concede the unconstitutionality of HB 89 following the district court's conclusion that the law was likely unconstitutional. *See, e.g.*, Order at 11 (suggesting that this case is not moot because "Texas has continued to defend the constitutionality of a law it says no longer exists"). Indeed, the district court's explicit focus on Texas "continu[ing] to defend the constitutionality of H.B. 89, in this Court *and on appeal to the Fifth Circuit*" suggests that the district court may have regarded Texas electing to appeal its reasoning as somehow improper. *Id.* (emphasis added).

But Article III jurisdiction cannot be created simply for retributive purposes; nor can it spring into existence because a party advanced (in the lower court's view) the "wrong" position.

II. THE TEXAS ACT[3] DOES NOT IMPLICATE THE FIRST AMENDMENT

Even if Plaintiffs' suit is not moot, it fails because Plaintiffs' boycotts do not warrant First Amendment protection at all.

A. This Case Is Controlled By *FAIR* And Its "Inherently Expressive" Requirement

As the Supreme Court has explained, because boycotting (*i.e.*, selective refusals to deal/buy) is conduct rather than pure speech, it could only enjoy First Amendment protection if it were "inherently expressive" conduct. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. ("FAIR"),* 547 U.S. 47, 66 (2006) (The Court "ha[s] extended First Amendment protection *only* to conduct that is inherently expressive." (emphasis added)); *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) ("The Supreme Court has made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive.'" (quoting *FAIR*, 547 U.S. at 66)).

[3] As used in Sections II and III, the "Texas Act" refers to both H.B. 89 and H.B. 793, assuming that this Court either views the challenge to H.B. 89 as not moot or concludes that Plaintiffs somehow have standing to challenge H.B. 793 even though it concededly does not apply to them.

This "inherently expressive" test is a threshold, dispositive requirement. And *FAIR* specifically addressed whether similar boycotting conduct was inherently expressive and concluded that it was not. That same analysis is controlling here.

FAIR considered whether there was a First Amendment right to boycott the military based on disagreement with governmental policy. 547 U.S. at 66. There, Congress refused to subsidize with federal funds law schools that boycotted the military for on-campus recruiting due to their disagreement with the military's then "Don't Ask, Don't Tell" policy. *Id.* at 51–52. *FAIR* explained that if "explanatory speech is necessary" to convey the political message of the conduct at issue, that "is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection[.]" *Id.* at 66.

The Court's analysis in *FAIR* is squarely on point here. Absent explanatory speech, no reasonable observer is likely to understand the purported "message" conveyed by Plaintiffs' commercial purchasing decisions, such as purchasing a Dell computer instead of one from Hewlett Packard, or buying a different type of hummus. Only by explicating why, for example, they bought hummus made by Trader Joe's rather than Sabra with explanatory speech would a reasonable observer have any clue that Plaintiff Amawi's and Pluecker's grocery purchases were somehow related to Israeli governmental policy. Absent such explanatory

speech, reasonable observers would undoubtedly assume such purchases were made on the basis of ordinary and mundane considerations, such as taste and price.

FAIR also notably rejected the law schools' attempted bootstrapping of the required "inherently expressive" analysis, which pointed to the boycotting action being part of a larger campaign or message. The Supreme Court thus considered the inherent expressiveness of each action *individually*. 547 U.S. at 64–66. That same approach precludes any injunctive relief here, because the purchase decisions at issue here are not even minimally expressive—let alone *inherently* expressive—when considered on their own, without explanatory speech.

FAIR further explained that the anti-boycotting statute in that case did not implicate the First Amendment because it "affect[ed] what [plaintiffs] must *do* … not what they may or may not *say*," and thus was constitutional. *Id.* at 60. So too here. The Texas Act does not require Plaintiffs to *say* anything or refrain from *saying* anything; it only constrains what they must *do—i.e.*, not boycott Israel. Texas's statute is thus constitutional for the same reasons the Solomon Amendment was in *FAIR*.

The district court distinguished *FAIR* on the basis that "*FAIR*, in contrast, is not about boycotts at all. The Supreme Court did not treat the FAIR plaintiffs' conduct as a boycott: the word 'boycott' appears nowhere in the opinion … and *Claiborne*, the key decision recognizing that the First Amendment protects

political boycotts, is not discussed." ROA.1265. That is mere semantic gameplaying bereft of substance.

Notably, the *FAIR* plaintiffs themselves had no difficulty understanding that they were engaged in a boycott, describing themselves as having engaged in a "*boycott* of any institution that discriminates." Brief for Respondents, *FAIR*, 2005 WL 2347175, at *29 (Sept. 21, 2005) (emphasis added). And they notably cited *Claiborne* four separate times. *Id.* at 17, 29-30. The *FAIR* Court thus was not unaware of *Claiborne*; the Justices simply found *Claiborne* of such minimal relevance as to be unworthy of citation by any single one of them.

In addition to the *FAIR* plaintiffs' own acknowledgement that they were engaged in a boycott, dictionary definitions confirm the obvious: *i.e.*, a concerted refusal to deal with the military was unambiguously boycotting conduct. *See*, *e.g.*, *American Heritage Dictionary* 220 (5th ed. 2015) (defining "boycott" as "To abstain from or act together in abstaining from using, buying, *dealing with,* or participating in…." (emphasis added)). Neither Plaintiffs nor the district court has even attempted to show that their interpretation of "boycott" can be reconciled with that word's ordinary meaning.

This *FAIR*-didn't-use-the-word-"boycott" rationale thus cannot withstand scrutiny.

B. *Longshoremen* Further Militates In Favor Of Reversal

Plaintiffs' claims are also in severe and irreconcilable tension the Supreme Court's decision in *Longshoremen*. There, a union "stop[ped] handling [Russian] cargoes … to protest the Russian invasion of Afghanistan." *International Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 214 (1982). The "'[u]nion's sole dispute [wa]s with the USSR over its invasion of Afghanistan,'" which the Court acknowledged was political. *Id.* at 223–26.

Faced with an unlawful secondary-boycott claim, the union in *Longshoremen* attempted to raise a First Amendment defense. But the Court *unanimously* rejected the purported "right" to engage in a political boycott against the U.S.S.R.: prohibiting the union's boycott did "not infringe upon the First Amendment rights of the [union] and its members." *Id.* at 226. The Court further explained that it was "even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *Id.* at 226. The BDS-type boycotts regulated by the Texas's Act similarly do not seek to persuade Israel that its policies should be changed because they are in error, but instead seek to coerce a change in those policies through deliberate infliction of economic pain.

Longshoremen is on all fours here: Replace "union" with "lawyer," "Soviet Union" with "Israel," and occupation of "Afghanistan" with "the West Bank," and

that effectively is this case. Plaintiffs' First Amendment claim here should fare no better than in *Longshoremen*.

The district court distinguished *Longshoremen* as merely a labor law case, and limited it to its narrow facts: reasoning that because "BDS boycotts are not a labor union practice coercing participation in industrial strife," *Longshoremen* was irrelevant. ROA.1269.

That was patent error. *Longshoremen* did not recognize a First Amendment interest and then conclude that "governmental infringement" of that interest was justified by the government's purportedly unique interest in regulating labor law. Indeed, *Longshoremen*'s terse analysis is dismissive of the idea that any First Amendment interest existed *at all*, announcing succinctly what all nine Justices considered obvious: there was no "protected activity under the First Amendment." 456 U.S. at 226–27. That conclusion is underscored by the absence of any discussion of compelling state interests or narrow tailoring. And, further clarifying that *Longshoremen* is not limited to labor law, the Supreme Court itself aptly explained that the boycott in *Longshoremen* was "*not a labor dispute* with a primary employer *but a political dispute* with a foreign nation." 456 U.S. at 224 (emphasis added).

Plaintiffs here similarly have a political dispute with a foreign nation, Israel, concerning its governmental policy and, on that basis, are engaged in a boycott of goods from that country. *Longshoremen* is thus controlling here.

C. The Texas Act Is Constitutional Because It Imposes (At Most) Incidental Burdens On Expression

Plaintiffs' First Amendment claims also fail under a long line of cases recognizing that economic regulations imposing only incidental burdens on expression do not violate the First Amendment. That is precisely the case here.

"[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.… [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citing *FAIR*); *accord International Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Sorrell*). The Supreme Court has thus "distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose 'incidental burdens' on expression." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741 (2018).

This well-established incidental-burden rule is "why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs; … and

why antitrust laws can prohibit 'agreements in restraint of trade[.]'" *Sorrell*, 564 U.S. at 567 (citations omitted).

Here, Texas has the power to both prohibit discriminatory conduct by businesses and regulate intra-state commerce. Those regulations of commercial conduct at most impose incidental burdens on expression. And that minimal burden is perhaps best expounded by Justice O'Connor, who explained that "[t]he Constitution does not guarantee a right to choose employees, customers, *suppliers, or those with whom one engages in simple commercial transactions*, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (emphasis added).

Notably, If Justice O'Connor's statement accurately reflects the governing law, Plaintiffs' First Amendment claims necessarily fail. And there is little reason to doubt that it is: during her tenure, Justice O'Connor's views were frequently controlling or ultimately vindicated, particularly on issues of discrimination. And Justice O'Connor had joined the *Claiborne* majority two years earlier, underscoring that *Claiborne* is nowhere near as broad as Plaintiffs wish.

Any incidental burden the Texas Act imposes thus does not violate the First Amendment.

III. THE TEXAS ACT SERVES COMPELLING STATE INTERESTS IN DENYING STATE SUBSIDIES TO DISCRIMINATORY CONDUCT

The district court also wrongly discounted Texas's compelling interests in prohibiting discrimination, largely by denying that boycotts of Israel could ever be discrimination against Israelis and viewing the Texas Act as viewpoint-based discrimination. But the Texas Act—like virtually every anti-discrimination measure that has ever come before it—is both content- and viewpoint-neutral. Plaintiffs may disagree with the Texas Legislature's choice to protect Israelis and those doing business with them from economic discrimination. And they are entirely free to use their First Amendment rights to call for repeal, donate to candidates that support its desired legislative initiatives, and speak to their heart's content on any and all such issues. But the First Amendment does not provide Plaintiffs with a heckler's veto that they may exercise against the Texas Act.

A. The Texas Act Properly Advances The State's Compelling Interest In Prohibiting Discrimination

The district court's reasoning rejecting Texas's anti-discrimination interest is deeply flawed. It first suggested that the Texas Act "contrast[s with] most anti-discrimination statutes [which] prohibit discrimination based on protected characteristics." ROA.1274. That is classic circular reasoning—the reason that characteristics are "protected" is because legislatures have enacted statutes to protect them. Under the district court's tautological analysis, Title VII is

unconstitutional because Congress had never previously made race, sex, or national origin "protected characteristics" before Title VII. But no anti-discrimination statute is unconstitutional simply because it makes a characteristic "protected" for the first time.

The district court and Plaintiffs further deny that the Texas Act prohibits discrimination on the basis of either national origin or nationality. ROA.1273-76. But their reasoning conflicts with an intuitively obvious, indeed virtually self-evident fact: targeting a particular group (and those associating with them) for the intentional infliction of economic harm *is discrimination, by definition*. Plaintiffs self-aggrandizingly attempt to cast their selective meting out of financial pain against a specific target group as virtuous and not-in-any-way discrimination. That effort fails as a matter of logic and precedent.

Neither Plaintiffs nor the district court appear to dispute that a business's refusal to hire African Americans (*i.e.*, a hiring boycott) would be textbook discrimination. But suppose instead the business refuses to purchase products from businesses owned by African Americans. Plaintiffs' counsel has suggested elsewhere that this is not discriminatory because it merely involves suppliers (rather than public accommodations or employers).[4] But that merely changes the *target* of the discrimination, not the refusal's *discriminatory character*. *See, e.g.*,

[4] *See* Plaintiffs' Answering Brief, *Jordahl v. Brnovich*, No. 18-16896, 2019 WL 296918, at 45-46 (filed 9th Cir. Jan. 17, 2019).

Bains LLC v. Arco Prods Co., 405 F.3d 764, 769-70 (9th Cir. 2005) (holding disparate treatment against Sikh-owned company in commercial transactions was actionable discrimination under 42 U.S.C. §1981).

Now substitute "Mexicans and Mexican-Americans" for "African Americans." That again merely changes the category of discrimination (nationality and ethnicity, instead of race), not the fundamental discriminatory character. *Lamarr-Arruz v. CVS Pharmacy, Inc.*, 271 F. Supp. 3d 646, 657 (S.D.N.Y. 2017) (maltreatment based on ethnicity and national ancestry is actionable discrimination under §1981).

And, for most BDS boycotters, that is effectively what their boycotts are: *blanket and categorical* refusals to deal with *all Israelis*, based on nationality/national origin. Indeed, the Plaintiffs in the *Jordahl* case admitted as much: "the regular BDS boycott [is] of all of Israel" and is "boycott of all Israeli products."[5] BDS boycotters select targets based solely on membership in a particular group (*i.e.*, Israelis), and nothing more. *Id.* The quintessential nature of those boycotts is *discriminatory*. And Texas may properly proscribe—or at least refuse to subsidize—such discrimination. *See, e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("Invidious private discrimination may be characterized as

[5] *See* Excerpts of Record, *Jordahl*, at 177-80, 183-84 (plaintiffs' admission that "the regular BDS boycott [is] of all of Israel"), 218 ("boycott of all Israeli products").

a form of exercising freedom of association protected by the First Amendment, but *it has never been accorded affirmative constitutional protections*." (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (emphasis added); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

To use a real-world example, AirBnB refused to do business with Israelis (but not Palestinians) in the West Bank, viewing it as occupied territory.[6] It would, however, freely rent in Northern Cyprus, Kashmir, Western Sahara, and many other disputed/occupied territories.[7] But even though AirBnB expressly singled out Israelis for distinctly disfavored treatment, Plaintiffs blink reality by denying any discriminatory effect to that uniquely anti-Israeli policy. *See, e.g.*, *Dawson v. Steager*, 139 S. Ct. 698, 705 (2019) ("[D]iscrimination [is] something we've often described as treating similarly situated persons differently." (cleaned up)).[8]

The district court also appears to be adhering to artificially narrow concepts of "nationality" and "national origin" that it believes are binding on the states. But nothing about the First Amendment compels the States to mirror exactly the

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[6] *See* https://www.nbcnews.com/news/world/airbnb-plans-remove-listings-israeli-west-bank-settlements-n938146.

[7] *Id.*

[8] AirBnB subsequently ceased its discriminatory policy as part of a settlement of lawsuits filed against it. *See* https://press.airbnb.com/update-listings-disputed-regions/. But although that policy has been terminated, it was emblematic of the pervasive discriminatory effect inherent in boycotts of Israel while it was in effect.

federal definitions as the exclusive categories of discrimination. Moreover, federal law recognizes that discrimination against Israelis/Jews takes on elements of race, nationality, and religion. *See*, *e.g.*, Marc A. Greendorfer, *The BDS Movement: That Which We Call A Foreign Boycott, By Any Other Name, Is Still Illegal*, 22 Roger Williams U. L. Rev. 1, 29, 37 (2017); *Sinai v. New England Tel. & Tel. Co.*, 3 F.3d 471, 474 (1st Cir. 1993) ("That Israel is a Jewish state, albeit not composed exclusively of Jews, is well established."); *Magana v. Commonwealth*, 107 F.3d 1436, 1446 (9th Cir. 1997) ("Clearly, the line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place or nation of origin, is not a bright one. Often, the two are identical as a factual matter." (cleaned up)).

But that blurring—and constellation—of biases typically involved in boycotts of Israel hardly immunizes them from regulation. Nor can Plaintiffs gerrymander anti-discrimination law such that Texas's Act amazingly does not implicate any of nationality, national origin, or citizenship. That approach disguises the *substantive* discriminatory effect.

B. The Texas Act Is Content- And Viewpoint-Neutral

The district court's reasoning that the Texas Act is not a valid anti-discrimination measure appears to be heavily premised on its belief that the Texas Act is a content- or viewpoint-based regulation of speech. ROA.1270-76. That

contention is ultimately irrelevant because Plaintiffs' conduct is not "inherently expressive," and thus not entitled to First Amendment protection at all. *See* Texas Opening Br. at 27-38; *supra* at 12-17. But even if that were otherwise, Plaintiffs' content/viewpoint-based arguments fail for three reasons.

First, the Texas Act here no more aims to "suppress disfavored viewpoints" (Answering Br.1) than the law in *FAIR*. The legislative history in *FAIR* confirmed that the Solomon Amendment was targeted at one—and only one—particular type of boycott and was designed to penalize those who engaged in it. *FAIR*, 547 U.S. at 57-58. But despite Congress's obvious targeting there, the Solomon Amendment was a "'neutral regulation.'" *FAIR*, 547 U.S. at 67; *accord Burt v. Gates*, 502 F.3d 183, 187 (2d Cir. 2007). And the Supreme Court held the Solomon Amendment was constitutional. So too is the Texas Act.[9]

Second, the Texas Act applies to all boycotts of Israel, and is agnostic as to underlying motivation—*i.e.*, viewpoint. The Texas Act thus applies to boycotts designed to protest Israel's settlement policies as too tough. And it applies equally to those boycotting Israel as being too soft in not promoting settlement expansion. And it further applies to those merely seeking to curry favor with anti-Semitic

[9] Notably, Plaintiffs' own counsel used to understand this basic reality of the Solomon Amendment, telling the Supreme Court that "[t]he legislative history of the Solomon Amendment makes clear that it was enacted to retaliate against law schools for expressing disapproval of the employment policies of military employers." Brief for ACLU, *FAIR*, 2005 WL 2376813, at *6 (Sept. 21, 2005).

customers. The Texas Act does not care *what message* a boycotter is trying to send—only what the boycott's *economic substance* is.

Third, it is similarly well-established that anti-discrimination statutes "make[] no distinctions on the basis of the organization's viewpoint." *Rotary Club*, 481 U.S. at 549. Instead, "federal and state antidiscrimination laws … [are] *permissible content-neutral regulation[s]* of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (emphasis added). Indeed, even for a cable operator selecting what content to carry—undeniably expressive activity—mandating editorial decisions "free of discriminatory intent … has no connection to the viewpoint or content." *NAAAOM v. Charter Communications, Inc.*, 915 F.3d 617, 629-30 (9th Cir. 2019).

The district court attempted to escape this virtually unbroken line of precedents by pointing to the Texas Act applying only to "Israel, not any other country." ROA.1272. But anti-discrimination laws have never been constitutionally suspect because they ban only a subset of discrimination. Congress may, for example, ban age discrimination only against the old but not young in the Age Discrimination in Employment Act ("ADEA"). *See* 29 U.S.C. §621. And the ADEA has repeatedly survived constitutional challenge. *See, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226 (1983). So too should the Texas Act.

Indeed, it is doubtful any anti-discrimination act can survive if Plaintiffs' "targeting" position is accepted and applied faithfully. The legislative histories of the Civil Rights Act of 1964 and Fair Housing Act of 1968, for example, are replete with condemnation of particular subsets of discrimination—principally discrimination against African-Americans in the Jim Crow South. *See*, *e.g.*, *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 608-11 (2004) (Thomas, J., dissenting) (Congressional "motivation … was to prevent invidious discrimination against racial minorities, especially blacks."). But that hardly renders those landmark statutes unconstitutional.

Moreover, the district court's reasoning—that targeting single nations by statute violates the First Amendment—could upend federal sanctions law. If Plaintiffs have a First Amendment right not to do business with Israel, why would they also not have a corresponding right to do business *with* countries like North Korea, Iran, Sudan, or Apartheid South Africa? Certainly doing business with such countries would have far more obvious expressive value than commercial supply decisions: intentionally buying a product with a "Made in North Korea" label is, after all, *a lot* more expressive than buying hummus with "Trader Joe's" packaging. And if the Texas Act is impermissible viewpoint discrimination because it only addresses Israel, how is a North Korea sanctions measure any different? But the district court offered no method of this common approach of

sanctions law (*i.e.*, targeting only a single nation) with its view that a statute applying to only one country presumptively violates the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's issuance of the preliminary injunction and instruct it to dismiss this entire suit as moot. Alternatively, if this Court concludes that this action is not moot, it should reverse on the merits.

Respectfully submitted,

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I, Drew C. Ensign, hereby certify that I electronically filed the foregoing the Brief of *Amici Curiae* States of Arizona, Arkansas, Georgia, Indiana, Kansas, Missouri, Ohio, Utah, and West Virginia Supporting Reversal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on September 6, 2019, which will send notice of such filing to all registered CM/ECF users.

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

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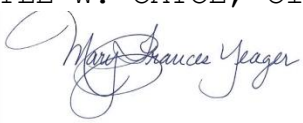

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Case No. 19-50384

BAHIA AMAWI

Plaintiff - Appellee

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Defendants - Appellants

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI; GEORGE HALE;

Plaintiffs - Appellees

v.

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

Defendants - Appellants