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

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| Amawi, *Plaintiff,* | ) | Civil Action No.: 1:18-CV-1091-RP [Lead Case] |
| v. | ) | |
| Pflugerville I.S.D., et al., *Defendants,* | ) | |
| Pluecker, et al., *Plaintiff,* | ) | Civil Action No. 1:18-CV-1100-RP [Consolidated Case] |
| v. | ) | |
| Paxton, et al., *Defendants.* | ) | |

**PLUECKER PLAINTIFFS' REPLY TO PAXTON'S RESPONSE TO PRELIMINARY INJUNCTION**

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## INTRODUCTION

Plaintiffs Pluecker, Dennar, Abdelhadi, and Hale (hereinafter "Plaintiffs"[1]) demonstrated that Texas Government Code 2270 et seq., (the "Act") is unconstitutional because it: (1) forces companies that wish to contract with the State to sacrifice their First Amendment right to engage in political boycotts of Israel; (2) seeks to suppress political expression based on its content and viewpoint; (3) compels speech by forcing contractors to publicly disavow any boycott participation; and (4) is so vague that a person of ordinary intelligence cannot ascertain what the law prohibits or allows. Accordingly, the law should be preliminarily enjoined.

Attorney General Paxton argues that Plaintiffs do not have standing, despite the fact that they have all been forced to choose between signing the "No Boycott of Israel" certification or losing their contract with the State. Paxton argues that Plaintiffs could boycott as individuals, but the Supreme Court has held that the First Amendment protects the political speech of corporations and other business entities.

On the merits, Paxton cannot avoid the controlling decision, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which held that political boycotts are protected under the First Amendment.[2] Paxton asserts that *Claiborne*'s holding is limited to domestic boycotts undertaken to secure a constitutional right. But the Supreme Court has not taken such a paltry view of First Amendment rights. Constitutional protections for expression have never depended

[1] The Court has consolidated the *Pluecker* case with *Amawi v. Pflugerville.* In this brief, "Plaintiffs" is understood to refer to only the four plaintiffs named above.

[2] Leading First Amendment scholars have similarly determined that *Claiborne* conclusively establishes that political boycotts are protected First Amendment activity. Brief of *Amici Curiae* First Amendment Scholars in support of Plaintiffs-Appellees, *Jordahl v. Arizona*, Case No. 18-16896, on appeal to the Ninth Circuit, *available at* https://knightcolumbia.org/sites/default/files/content/Cases/Jordahl/2019.01.24_AmicusBrief_Jordahl.pdf ("First Amendment Brief").

on the subject or viewpoint being expressed. The First Amendment protects the right to political protest, whether that protest's aims are domestic or foreign.

Paxton's primary defense of the Act is that it is aimed at prohibiting national origin discrimination. This is belied by the Act's plain text. The Act does not, as Paxton suggests, prohibit boycotts aimed at all Israelis or all Israeli products **on the basis of** their national origin, religion, or nationality. The Act prohibits refusing to deal with Israel or any company or person that does business in Israel or an Israeli-controlled territory. Thus, this prohibition applies **regardless of national origin, religion, or nationality**—and it extends to boycotts of entities that are not Israeli. Moreover, the Act does not prohibit national origin discrimination at all unless it involves a boycott of Israel. The Act's dramatic underinclusiveness demonstrates that it is not really aimed at preventing discrimination, but rather at suppressing disfavored expression.

Paxton has little to say about Plaintiffs' other claims that the law is unconstitutional because it (1) is viewpoint and content discriminatory, (2) compels speech, and (3) is excessively vague. Each is a sufficient, independent reason to enjoin the Act.

In a last-ditch effort to salvage some part of the Act, Paxton asserts that Plaintiffs have not met the standard for facial relief. But Plaintiffs have shown that the Act has no legitimate sweep, or, at least that its unconstitutional applications greatly outweighs any minor legitimate sweep. Thus, a facial injunction of the Act is warranted.

## ARGUMENT

### I. Plaintiffs have standing to challenge the Act

Plaintiffs are sole proprietors forced to choose between contracting with the State or exercising their First Amendment right to engage in political boycott. Despite this, Paxton argues that Plaintiffs have no standing to challenge the Act. Casting the Plaintiffs' political

choices as "deeply personal choices," Paxton argues that their activities are not "company" activities "within the meaning of [the Act]," and thus, Plaintiffs have not been harmed by the Act. Paxton' Omnibus Opposition ("Paxton") at 9-10. This argument fails for several reasons.

First, Plaintiffs Pluecker, Dennar, and Abdelhadi indisputably have standing because they refused to sign the anti-boycott certification, and lost the opportunity to contract with government entities as a result. Hale also has standing because his First Amendment right to boycott is being infringed while he remains under contract. These are Article III injuries-in-fact that are directly traceable to the Act's certification requirement. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1033 (D. Ariz. 2018). If the Act is declared unconstitutional and enjoined, Plaintiffs' injuries would be redressed. No more is required to establish Article III jurisdiction. *See Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992).

Second, it is not true that the Act applies only while the contractor is performing its work for the State. Instead, the Act requires the contractor to certify that it "does not boycott Israel," and that it "will not boycott Israel for the duration of the contract." Tex. Gov't Code § 2270.002. In other words, the Act prohibits contractors from boycotting at all during the contract period, even if the boycott is entirely segregated from the contract work.

In this case, Plaintiffs are sole proprietors. A sole proprietorship is a "'business in which one person owns all the assets, owes all the liabilities, **and operates in his or her personal capacity**.'" *CU Lloyd's of Texas v. Hatfield,* 126 S.W.3d 679, 684 (2004) (emphasis added) (citing *Blacks Law Dictionary* (7th ed. 1999)). Texas courts recognize that a sole proprietorship has no legal existence apart from the sole proprietor. *See Ideal Lease Serv., Inc. v. Amoco Prod. Co., Inc*., 662 S.W.2d 951, 952 (Tex. 1983) (a "sole proprietorship has a legal existence only in

the identity of the sole proprietor.").[3] In other words, there is no distinction between decisions of the "company" (the sole proprietorship) and those of the "individual" who operates it (the sole proprietor). *Id.*; *see also, e.g., W. Alliance Ins. Co. v. N. Ins. Co. of N.Y.*, 176 F.3d 825, 833 & n. 2 (5th Cir.1999) (distinctions between a sole proprietor and his sole proprietorship are "legally irrelevant"). The personal consumption and financial decisions of the individual owner affect and belong to the sole proprietorship. Accordingly, under Texas law, Plaintiffs' individual decisions are the same as those of their sole proprietorship. For example, Mr. Dennar's refusal to purchase HP products is indistinguishable from his sole proprietorship's decision. Plaintiffs' Preliminary Injunction Motion ("PI") at 10.

Even if there were a legally cognizable distinction between a sole proprietor and an individual, Plaintiffs' declarations state, without qualification, that they do not purchase certain products, such as HP goods, as part of their boycott. *See e,g.*, Abdelhadi Decl. at 2. There is no evidence that they make different decisions for their sole proprietorship than they do as individuals. For instance, there is no reason to believe that Mr. Pluecker would boycott Sabra products in his "personal" capacity but discontinue that boycott in his sole proprietor capacity, if such a distinction existed. Paxton argues that Plaintiffs' boycotts are purely personal by taking out of context Plaintiffs' statement that their boycotts are "wholly unrelated to the contracting activities Plaintiffs seek to perform." Paxton at 10. This statement means only that Plaintiffs' boycotts[4] do not impair their ability to perform their contracted work, not that their boycott does not extend to their capacity as a sole proprietor. PI at 23.

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[3] *See also Bush v. Bush*, 336 S.W.3d 722, 740 (Tex. App. 2010) ("A sole proprietorship does not have a separate legal existence distinct from the operator of the business.").

[4] "Plaintiffs' Boycotts" is understood to refer the current boycott of Mr. Pluecker, Mr. Dennar, and Mr. Abdelhadi, and the prior boycott of Mr. Hale that he was forced to discontinue.

Third, even in cases where it is possible to distinguish between a company's activities and its owners' private activities, the Act violates the company's First Amendment rights. The Supreme Court has expressly "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons." *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (citation omitted). And the ability of one entity (a company's owner) to speak cannot rectify the First Amendment harm to another (the company). *See Agency for Int'l Dev. v. All. for Open Society Int'l, Inc.*, 570 U.S. 205, 219 (2013).[5]

## II. Plaintiffs are likely to prevail on the merits

### A. The Act unconstitutionally conditions public contracts on the sacrifice of First Amendment rights

#### 1. Political boycotts are protected under the First Amendment

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Supreme Court held that the right to engage in political boycotts is protected First Amendment activity. PI at 16-18. As two district courts examining similar anti-boycott laws have found, *Claiborne* controls here and squarely establishes that Plaintiffs' political boycotts are protected First Amendment expression. *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018); *Jordahl*, 336 F. Supp. 3d 1016. Prominent First Amendment scholars have reached the same conclusion.[6]

Paxton argues that *Claiborne* stands only for the proposition that domestic boycotts

[5] Moreover, Paxton's attempted construction leads to confusion about whether a sole proprietor is engaging in political boycotts in an individual capacity or as a business, thereby creating an unconstitutional chilling effect on expression. For instance, having signed the certification, Mr. Hale does not feel like he can engage in a political boycott at all. Hale Decl. ¶ 10. There is no reasonable construction under which the Act does not implicate sole proprietors' ability to engage in political boycotts.

[6] *See* First Amendment Brief.

focused on Fourteenth Amendment rights are protected by the First Amendment. Paxton at 17. Paxton's reasoning would suggest that the *Claiborne* boycott was constitutionally protected only because the Supreme Court ratified the legal and constitutional rights it sought to vindicate. Such a rationale would make constitutional protection for boycotts so narrow and tenuous that it would be practically irrelevant. But *Claiborne* did not so limit its reach.

The *Claiborne* boycott was not simply a demand for the local government to respect constitutional rights. It was directed at "both civic and business leaders," 458 U.S. at 907, and "sought to bring about political, social, and economic change," *id.* at 911. Therefore, the Supreme Court held that the boycott was protected as a form of "expression on public issues," just like the boycotts at issue here. *Id.* at 913; *see also id.* at 915 (quoting *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)) (characterizing the *Claiborne* boycott as "speech protesting racial discrimination" and "essential political speech lying at the core of the First Amendment"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 197 (8th Cir. 1994) (holding that a union-organized consumer boycott to protest a grocery store's discriminatory labor practices was "constitutionally safeguarded" under *Claiborne*). In holding that the boycott was constitutionally protected, the Supreme Court expressly reaffirmed the "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Claiborne*, 458 U.S. at 913 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

There is no basis for limiting the First Amendment's reach to expression concerning domestic constitutional issues, and the Supreme Court has not so limited its First Amendment interpretation. *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (law that prohibited displaying signs critical of foreign governments within 500 feet of an embassy violated the First Amendment).

Such a limitation would ignore the Supreme Court's express instruction that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Sullivan*, 376 U.S. at 270-71. Paxton's view would permit outlawing boycotts protesting Apartheid-era South Africa, Wal-Mart, or Nike. But that has never been the test for determining whether boycotts—or any other forms of political expression—are constitutionally protected.

**a) *Rumsfeld* is inapposite.**

Paxton attempts to argue that political boycotts constitute discriminatory, unexpressive conduct by relying on a case that the Supreme Court did not view as a case about boycotts: *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47 (2006). This misreads *Rumsfeld* and would squarely contradict *Claiborne*.

*Rumsfeld* rejected a First Amendment challenge to the Solomon Amendment, which allows the Department of Defense to deny federal funds to law schools that prohibit or impede military representatives from participating in on-campus recruiting. 547 U.S. at 55. The Supreme Court held that the Solomon Amendment's access requirement does not regulate inherently expressive conduct. *Id.* at 65–68. On the other hand, *Claiborne* made clear that political boycotts, especially boycotts of consumer goods and services, are a form of "expression on public issues," and "essential political speech lying at the core of the First Amendment." 458 U.S. at 913, 915 (citation and internal quotation marks omitted).

Paxton apparently believes that *Rumsfeld* overruled Claiborne *sub silentio*, even though neither a citation to *Claiborne* nor the word "boycott" appears anywhere in the *Rumsfeld* opinion. It strains belief to suggest that the Supreme Court would reverse a monumental First

Amendment decision like *Claiborne* without even citing to it.[7]

*Rumsfeld* is not controlling because it is distinguishable from *Claiborne* and this case for four reasons: First, while the Solomon Amendment principally regulated unexpressive conduct, the Act directly regulates expression and association. *Rumsfeld* held that denying military recruiters equal access to campus services during job fairs, as required by the Solomon Amendment, was not inherently expressive conduct. In contrast, consumer boycotts are ubiquitous today, and boycotting is a "practice . . . deeply embedded in the American political process." *Claiborne*, 458 U.S. at 907. Accordingly, boycotts, like parades, are understood to be expressive. First Amendment Brief at 10-11. Indeed, Paxton acknowledges that BDS campaigns are understood to express a "dispute with the Israeli government's policies." Paxton at 18.

In *Koontz*, the district court rejected the comparison to *Rumsfeld* for this reason:

> It is easy enough to associate plaintiff's conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians. And boycotts—like parades—have an expressive quality. Forcing plaintiff to disown her boycott is akin to forcing plaintiff to accommodate Kansas's message of support for Israel. Because [the law] regulates inherently expressive conduct and forces plaintiff to accommodate Kansas's message, it is unlike the law . . . in *Rumsfeld*.

*Koontz*, 283 F. Supp. 3d at 1024.

Similarly, the district court in *Jordahl* found that the collective nature of the boycotts targeted by Israel anti-boycott laws distinguishes those laws from the law in *Rumsfeld*:

> [W]hen a statute requires a company, in exchange for a government contract,

[7] Even if this Court determines that a tension exists between the controlling holding in *Claiborne*, and the logic of *Rumsfeld*, the Court is bound to follow *Claiborne*. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (noting that lower courts should not find that the Supreme Court has overruled a previous case by implication and reaffirming that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)).

> to promise to refrain from engaging in certain actions that are taken in response to larger calls to action that the state opposes, the state is infringing on the very kind of expressive conduct at issue in *Claiborne*. Such a regulation squarely raises First Amendment concerns. Indeed, reasoning otherwise would completely undermine the First Amendment's long-held precedents protecting First Amendment rights to assemble so that citizens of this Country can collectively "secure compliance" with their political demands.

*Jordahl*, 336 F. Supp. 3d at 1042.

Second, unlike the Solomon Amendment, the Act affects all aspects of a contractor's participation in a boycott. While the Solomon Amendment left law schools free to boycott the military in other respects, as long as they allowed military recruiters on campus, the Act requires contractors to affirmatively certify that **they are not participating in boycotts** of Israel, full stop. By expressly prohibiting contractors from participating in political boycotts, the Act directly seeks to accomplish exactly what *Claiborne* prohibits.

Third, the Supreme Court held that the Solomon Amendment is a speech-neutral regulation that promotes the government's substantial "interest in raising and supporting the Armed Forces." *Rumsfeld*, 547 U.S. at 67. The Court observed that "judicial deference is at its apogee when Congress legislates under its authority to raise and support armies." *Id.* at 58 (internal quotation marks and alterations omitted). No comparable interest exists here.

Fourth, although the plaintiffs in *Rumsfeld* characterized their actions as a boycott, the Supreme Court did not treat it as one. The term "boycott" does not even appear in the opinion. Whatever the scope of First Amendment protection for other actions might be, *Claiborne* makes clear that political boycotts of consumer goods and services—like the boycott here—are protected under the First Amendment. *See also Beverly Hills Foodland*, 39 F.3d at 197.[8]

[8] Paxton also asserts that "a general boycott of companies whose practices [a company] disagrees with . . . would not be considered a boycott of Israel, regardless of whether Israel may be implicated in some manner." Paxton at 15. This argument, though, has no basis in the text of

**b) Secondary political boycotts by consumers are protected by the First Amendment.**

Paxton argues that Plaintiffs' boycotts are "secondary boycotts"—that is, targeted at entities that do business with those the boycotters politically oppose—which can be regulated under *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) (*Longshoremen*) and *Briggs & Stratton Corp. v. Baldridge*, 728 F.2d 915 (7th Cir. 1984) (*Briggs II*). This ignores that *Claiborne* considered a secondary boycott, and held that it was protected. *See Claiborne*, 458 U.S. at 891–92 (describing trial court finding that the boycott violated Mississippi's "statutory prohibition against secondary boycotts). Much like Plaintiffs' boycotts of companies doing business in Israel, the boycott of white-owned businesses in *Claiborne* aimed to change the practices of those businesses **and** to bring broader societal and political change. Both of those goals are protected under the First Amendment.

Paxton's relies on *Longshoremen* to suggest the opposite, but it was decided before *Claiborne*. And *Claiborne* distinguished *Longshoremen*, expressly holding that although the government cannot prohibit political boycotts generally, "[s]econdary boycotts and picketing **by labor unions** may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." 458 U.S. at 912 (emphasis added). Thus, *Longshoremen* holds that only secondary boycotts by labor unions, and not secondary boycotts by consumers, are an exception to the general rule that political boycotts are protected. As the *Jordahl* court observed:

> *Longshoremen* does not purport to state that there is no constitutional right to

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the Act, which prohibits both a general boycott that encompasses products made in Israel and a political boycott targeted at companies that support the Israeli government or military. Tex, Gov. Code § 808.001 (2). Moreover, Paxton's suggestion that the Act intends to punish only political boycotts confirms that the Act constitutes viewpoint and content discrimination.

> engage in boycotting activities. It does, however, highlight the context in which this type of governmental infringement on the First Amendment rights of labor unions and their members is justified. Outside of the labor union context, however, the government has a much higher burden . . . . Indeed, only a few months after *Longshoremen* was decided, . . *Claiborne* expressly found that non-union boycotting activities aimed "to bring about political, social and economic change" were protected activities under the First Amendment.

*Jordahl*, 336 F. Supp. 3d at 1041. Because Plaintiffs seek to engage in political boycotts, not union-organized secondary boycotts, *Longshoremen* is inapposite.

Paxton's reliance on *Briggs* is similarly misguided. Paxton at 16. The plaintiffs in *Briggs* did not present a case about a political boycott. Rather, they challenged provisions in the Export Administration Act ("EAA") that prohibit U.S. companies from participating in government-led boycotts of countries friendly to the United States for economic reasons. *See* 50 U.S.C. § 4607. Although they argued that the EAA violated their First Amendment rights by prohibiting them from filling out questionnaires propounded by the Arab League states, they "concede[d] that their desire to answer the questionnaires [verifying their boycott participation] [was] motivated by economics: . . . [they] hope[d] to avoid the disruption of trade relationships that depend on access to the Arab states." *Briggs II*, 728 F.2d at 917. Accordingly, the district court and the Seventh Circuit analyzed the companies' claims under the commercial speech doctrine, declining to extend the full constitutional protections for political expression. *Id.* at 917–18.

Applying that standard, the Seventh Circuit held that the EAA was a constitutionally permissible restriction on speech to "forestall[] attempts by foreign governments to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions." *Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307, 1319 (E.D. Wis. 1982) (*Briggs I*) (internal quotation marks omitted); *see also Briggs II*, 728 F.2d at 916 (adopting the district court's opinion). The statute in *Briggs* was enacted to

protect American businesses from having to choose sides in a foreign dispute, but here the Act coerces American businesses into doing just that by imposing the State's preferred policy position. The State's use of its economic power to suppress participation in disfavored political boycotts is just as "repugnant to American values and traditions" as the Arab League's forced boycott participation.

Even putting that aside, *Briggs* does not apply here. First, "the substantial state interests advanced by the government in *Briggs*—foreign policy and international trade relations—are simply not present here." *Jordahl*, 336 F. Supp. 3d at 1044; *see also Movsesian v. Victoria Verischerung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) ("The Constitution gives the federal government the exclusive authority to administer foreign affairs.").

Second, *Briggs* did not consider the right to political protests. The plaintiffs conceded that their interests were to maintain trade relationships with the Arab League, so the court analyzed plaintiffs' interests as economic, not political like the boycotts at issue here. *Briggs II*, 728 F.2d at 917. *Claiborne* expressly distinguished "boycott[s] organized for economic ends," which are unprotected, from political boycotts, which are protected. *Claiborne*, 458 U.S. at 915 (citation omitted). As noted previously, the fact that a boycotter is a business does not inherently change its boycott from a political one to an economic one, and Paxton's attempt to characterize political boycotts by sole proprietors and corporations as "commercial boycotts" cannot change this conclusion. Rather, the distinction lies between protected political boycotts and boycotts undertaken for economic interests. *See* PI at 17 (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988); *Trial Lawyers*, 493 U.S at 426). Because the boycotts targeted by the Act are political, they are entitled to First Amendment protection.

**c) *Waldrip* is unpersuasive**

Paxton has filed a Notice of Supplemental Authority, pointing this Court to a recent decision by the Eastern District of Arkansas, *Arkansas Times LP v. Waldrip et al.*, No. 4:18-CV-00914 BSM, which declined to enjoin a "No Boycott of Israel" provision. The majority of *Waldrip*'s reasoning is mirrored by Paxton's arguments and should be rejected for the same reasons. *Waldrip* also did not address several arguments raised here, including that the Act impermissibly discriminates on the basis of viewpoint and content and is excessively vague.

*Waldrip* also opines that *Claiborne*'s holding applies only to speech surrounding a boycott, and not the boycott itself. *Waldrip* at 13. Neither *Claiborne* nor subsequent case law supports this view. In *Claiborne*, several of the affected businesses sued and sought to recover economic damages allegedly caused by the boycott—*e.g.*, the value of the goods not purchased. *Claiborne*, 458 U.S. at 891-92. The Supreme Court held that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott. . . ." *Id.* at 914. The Court explicitly recognized that the collective refusal to deal at the heart of the boycott—and the heart of business' claims against the boycott participants—was entitled to the same constitutional protection as the speech, assembly, and petitioning in support of the boycott. *See* 458 U.S. at 918 ("**Petitioners withheld their patronage** from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of **nonviolent, protected activity**." (emphases added)). If the Court had wanted to hold that only the speech and petitioning in support of the boycott were protected, it could easily have said so.

Instead, it held that all of the peaceful activities undertaken in support of the boycott—including the collective refusal to deal—were protected under the First Amendment.

This view is confirmed by the Supreme Court's subsequent decision in *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). In *Trial Lawyers*, the Supreme Court considered a boycott by a lawyers' association seeking increased fees for representing indigent clients. The Court made clear that it was assessing only the boycott, and not the speech associated with it. *Id.* at 426. It then contrasted the lawyers' boycott, which sought "an economic advantage for those who agreed to participate" and so was not protected, with the boycott in *Claiborne*, which was protected because the boycotters "sought only . . . equal respect and equal treatment," not "any special advantage for themselves." *Id.* Thus, the Court distinguished political boycotts, which are protected under the First Amendment, and self-interested economic boycotts, which are not. This distinction would not have been necessary unless *Claiborne* clearly stood for the proposition that political boycotts—and not just the speech supporting such boycotts—are constitutionally protected.

**2. A more stringent version of the *Pickering* balancing test applies**

Because the Act conditions contract work on the sacrifice of constitutional rights, it is subject to the *Pickering* balancing test. *Pickering v. Bd. of Edu.*, 391 U.S. 563, 568 (1968); PI at 20-21. Additionally, because the Act preemptively affects the First Amendment Rights of an untold number of contractors, the *Pickering* test becomes more stringent to reflect the "far more serious concerns" at issue. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 467-68 (1995) ("*NTEU*"). The State "must show that the interests of both potential audiences and a vast group of present and future [contractors] in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the

Government." *Id*. at 468 (quoting *Pickering*, 391 U.S. at 571). The State "must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475 (citation omitted).

Paxton is wrong to say that *Pickering* applies only to employees. Paxton at 22-23. Both the Supreme Court and the Fifth Circuit have held that the *Pickering* test applies to contractors. PI at 20 (citing *Bd. of County Comm'rs, Wabaunsee County, Kan. V. Umbehr*, 518 U.S. 668, 674 (1996); *Oscar Renda Contracting, Inc. v. City of Lubbock, Tex.*, 463 F.3d 378 (5th Cir. 2006)). Paxton is also incorrect that *Pickering* does not apply to expressive conduct. *See Brady v. Fort Bend County*, 145 F.3d 691, 707 (5th Cir. 1998) (applying *Pickering* test to expressive conduct); *Thompson v. Shock*, 852 F.3d 786, 792 (8th Cir. 2017).

Paxton additionally relies on *Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018) to oppose *Pickering*'s applicability here, Paxton at 23, but *Janus* did not disavow *Pickering*. Instead, it observed that when *Pickering* is applied to a "speech-restrictive law with 'widespread impact,'" as opposed to a single decision by a single employer, the "standard *Pickering* analysis requires modification." *Janus*, 138 S.Ct. at 2472. Therefore, "when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Id.* This is precisely the test that Plaintiffs have articulated and that Defendants fail to meet.

Instead of engaging with *Pickering*, Paxton argues that *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) should control here, but *Regan* is inapposite. The *Regan* Court considered a challenge by a nonprofit corporation that was denied tax-exempt

status because it engaged in lobbying activities. The Supreme Court's decision affirmed that "the government may not deny a benefit to a person because he exercises a constitutional right." *Id.* at 545. However, the Court found that tax exemptions constitute a "form of subsidy," and there is a distinction between denying a benefit on the basis of a protected constitutional activity and choosing not to subsidize that activity.[9] *Id.* at 544.

The Act does not concern a subsidization of speech, but the denial of a contract. Even if the contract were construed as a public benefit, the Act would fall on the wrong side of the *Regan* analysis. The Act does not limit its prohibition to the use of State monies in the boycott of Israel; it prohibits boycotting **at all** if the contractor works for the State. Contrary to Paxton's suggestion, Plaintiffs cannot boycott Israel under one status and contract with the state under a different status. Paxton at 22. The plaintiff in *Regan* could divide its activities between a 501(c)(3) and (c)(4). But, as sole proprietors, Plaintiffs cannot divide their political expression and contract work between entities. Further, Paxton's suggestion that companies can boycott through another company is nonsensical. The fictional ability of a separate company to boycott does not eliminate the First Amendment harms inflicted on the first. *All. for Open Society Int'l, Inc.*, 570 U.S. at 219. In any event, the Act defines Company to expressly include "affiliate entities," making such a solution itself a violation of the Act. Tex. Gov't Code § 808.001(2).

**3. The Act does not satisfy the modified *Pickering* test.**

In order to satisfy the modified *Pickering* test, the State must point to an interest in regulating broad swaths of speech that relates to the effective provision of government services. *NTEU*, 513 U.S. at 468 (the State "must show that the interests of both potential audiences and a vast group of present and future [contractors] in a broad range of present and future expression

[9] Similarly, *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984), relied on by Paxton, concerned the grant of federal financial assistance to universities. *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004) did not concern the First Amendment.

are outweighed by that expression's **'necessary impact on the actual operation'** of the Government.") (emphasis added); *Hoover v. Morales*, 164 F.3d 221, 226 (5th Cir. 1998)).

Paxton has failed to identify any interest related to the actual operation of the government that is implicated by the Act, let alone one that would justify the broad speech restrictions here. Paxton does not attempt to argue that ensuring that contractors do not boycott Israel has any bearing on the provision of their services. Nor could he. Whether contractors boycott Israel is fundamentally unrelated to their ability to perform contract work. PI at 23. Accordingly, the Act fails the modified *Pickering* test.

Paxton asserts that the Act is justified by the State's general interest in regulating its economic affairs, and that such an interest justifies "incidental burdens" on speech. Paxton at 20. This generalized interest is not cognizable under *Pickering*. Regardless, the cases Paxton cites stand only for the idea that the State may impose "generally applicable economic regulations" without violating the First Amendment. *See Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 581 (1983) (striking down tax on newspapers because it applied only to the press); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571 (1991) (upholding ban on public nudity despite incidental burden on expressive conduct of nude dancers).

The Act does not incidentally burden speech; it singles out particular speech and punishes it. The incidental burden doctrine does not apply when a law directly targets protected expression, and especially when it targets such expression based on its subject matter and viewpoint. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (rejecting argument that regulation that imposed a burden based on content and viewpoint of speech was an "incidental

burden" on speech).[10] Finally, the idea that the Act was passed in order to assert some economic interest is belied by the legislative findings, which state that the economic effect of the Act was indeterminate. PI at 23 n.4 (citing Clay Decl. at Ex. 7).

Paxton also asserts that the Act is justified as an anti-discrimination measure. This argument fails for three reasons. First, Paxton fails to point to any evidence, from the legislative history or otherwise, to demonstrate that Texas has encountered a real, not hypothetical, problem with widespread discrimination by companies against Israel or entities that do business with Israel. Paxton's explanation that the Act is specifically meant to address the existence of the BDS movement only reflects the government's unconstitutional attempt to silence one side in a political debate. Paxton at 2–4.

Second, the Act's scope far exceeds Paxton's reference to national-origin discrimination. National origin discrimination is discrimination based on "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).[11] Although Paxton asserts that the Act concerns "economic boycotts that target Israelis on the basis of nationality or national origin," Paxton at 8, this interpretation is not supported by the text of the Act. The Act defines "boycott" to include refusals to deal with the Israeli government, as well as "a person or entity doing business in

[10] *See also Airbnb, Inc. v. City & County of San Francisco*, 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016) (distinguishing neutral economic regulations from regulations that "single out those engaged in expressive activity," target "specific speaker[s] . . .for disparate or unfavorable treatment" or those "motivated by a desire to suppress speech").

[11] *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), concerned the application of a law that generally prohibited gender discrimination in places of public accommodation. The Court found that the law was not aimed at the suppression of speech and was not viewpoint discriminatory. The Court further found that the law was applied in the least restrictive manner and so as to not overly burden the plaintiffs' expressive activities. Here, the Act is aimed at suppressing particular speech on the basis of its viewpoint and is not narrowly tailored.

Israel or in an Israeli-controlled territory" **regardless of the origin, nationality, or religion of those people or companies**. Tex. Gov. Code §808.001(1). For instance, Plaintiffs' boycotts, which include American companies like HP and VRBO, are prohibited under the Act. Moreover, the Act prohibits boycotts that are not **on the basis of** nationality or national origin. Plaintiffs' boycotts and similar boycotts do not target individuals on the basis of their ancestry, citizenship, or religion. *See e.g.* PI at 8 (noting that Mr. Dennar would not boycott a company solely because its owner was of Israeli origin); PI at 10 (noting that Mr. Abdelhadi does not boycott all Israeli companies). Rather, they focus on companies supporting Israel's occupation of the Palestinian territories, including companies that contract with the Israeli Defense Forces and operate in Israeli settlements in the West Bank. PI at 8-11.

Third, if the Act were meant to further a non-discrimination interest, it is wildly underinclusive. Most anti-discrimination statutes regulate unexpressive conduct by prohibiting discrimination based on protected characteristics, such as race, sex, national origin, religion, and sexual orientation. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571-72 (1995). Similarly, in the case of the debarment laws on which Paxton relies, the State may debar contractors for such unlawful discrimination. The Act, on the other hand, targets inherently expressive conduct (political boycotts), and prohibits such conduct only when it targets Israel, territories controlled by Israel, or companies that do business in Israel. The Act does not prohibit boycotts of any other country or place, nor does it prohibit discrimination based on any protected characteristic.

"Such '[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (quoting *Brown v. Ent.*

*Merchants Ass'n*, 564 U.S. 786, 802 (2011)). And the existence of content-neutral alternatives—such as a statute prohibiting contractors from engaging in discrimination based on nationality, national origin, or religion generally—"undercut[s] significantly any defense of such a statute, casting considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (alteration in original) (citations omitted). The only interest actually served by the Act "is that of displaying the [State's] special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids." *Id*. at 396.

Even if the State could demonstrate that the Act is genuinely addressed to a compelling interest, it also would have to demonstrate that the remedy proposed here—forcing government contractors throughout Texas to disavow participation in boycotts of Israel—is appropriately tailored to that problem. As noted above, the State has not made this showing, nor can it. The application of even a facially neutral anti-discrimination law to a protected form of expression and association, such as a political boycott, protest, or parade, violates the First Amendment.[12] S*ee Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657–59 (2000); *Hurley*, 515 U.S. at 568. The *Claiborne* boycott itself expressly targeted white-owned businesses, *Claiborne*, 458 U.S. at 900, and yet this did not undermine the boycott's constitutional protection. Under Paxton's logic, the government could have suppressed the boycott at issue in *Claiborne*, as well as the boycott campaigns targeting colonial Great Britain and apartheid South Africa, as racial or nationality discrimination. Such a result is flatly inconsistent with this country's constitutional tradition.

**B. The Act is viewpoint and content discriminatory**

The Act impermissibly suppresses political expression on the basis of its content and

[12] Similarly, while a State may debar a contractor for participating in unlawful discrimination, it could not debar a contractor for participating in protected expression.

viewpoint by targeting those who engage in political boycotts of Israel because the State disagrees with the message of those boycotts. PI at 24. Paxton concedes that the Act is aimed at singling out those who disagree with the State's policy on Israel. Paxton at 19 (noting that the Act "espouses the State's policy" on Israel and denies contracts to those engaged in "efforts that undermine Texas policy.").

To avoid the inevitable conclusion that this is viewpoint and content discrimination, Paxton argues that the Act is government speech. Paxton at 19. Paxton cites *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). There, the Supreme Court affirmed the constitutionality of Texas refusing to issue a license plate with an image of the confederate flag. The Court found that Texas license plates "are meant to convey and have the effect of conveying a government message." *Id.* at 2245. Here, no reasonable observer would conclude that Plaintiffs' decisions to boycott Israel constitute government speech merely because Plaintiffs have or sought a contract with a State agency. For example, no reasonable person would assume that Mr. Dennar's refusal to purchase HP products is attributable to the State merely because Mr. Dennar signed up to judge a high school debate tournament.

The Act does not prohibit boycotts undertaken only while working on a particular State contract. Instead, it entirely prohibits contractors from boycotting Israel on their own time and dime if they have signed a state contract. Accordingly, the Act is not a regulation of "government speech," but rather a restriction on the First Amendment rights of contractors. Because this restriction stems from "a disagreement with the message [Israel boycotts] convey," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Act must withstand strict scrutiny. As explained previously, Paxton has failed to demonstrate that the Act is narrowly tailored to support a compelling government interest. Accordingly, the Act is unconstitutional.

**C. The Act compels speech in violation of the First Amendment.**

Paxton relies on *Rumsfeld* to argue that speech is not compelled. Paxton at 13. But, in *Rumsfeld*, the plaintiffs were not required to sign a certification that they would not boycott the military or otherwise make any statement. Here, the Act compels contractors to reveal whether they boycott Israel in order to punish those who do through the denial of State contracts. The State has no legitimate interest in compelling speech on this subject because Plaintiffs' participation, or lack thereof, in boycotts of Israel is unrelated to their ability to perform contracting work for the State. Paxton does not contend otherwise. Accordingly, the Act compels speech in violation of the First Amendment. PI at 27-29 (citing, *e.g. Baird v. State Bar of Arizona*, 401 U.S. 1, 7 (1971) ("a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.")).

**D. The Act is impermissibly vague**

The Act is impermissibly vague because a person of ordinary intelligence cannot discern what is permitted or prohibited by the Act. PI at 29-33. Paxton does not deny that a person of ordinary intelligence could not discern what is meant by the prohibition against "any action that is intended to penalize [or] inflict economic harm on. . . Israel or [any] person or entity doing business in Israel." Tex. Gov. Code at §808.001(1). Instead, in a footnote, he asserts that the phrase "any action" refers only to economic conduct. Paxton at 16 n.5. This unsupported assertion does not make the law any more clear. A person of reasonable intelligence could not discern what sorts of acts—even economic acts—would be considered "intended to penalize or inflict economic harm on Israel." For instance, donating to an organization that promotes BDS could be considered an action intended to "penalize" Israel. *See also* PI at 31-32. .

The problem with the Act's expansive, ambiguous prohibition is compounded by its

undefined exception for "ordinary business purposes." Paxton argues that the lack of definition of "ordinary business purpose" does not on its own render the Act impermissibly vague. Paxton at 23 n.7. But he cannot explain how a person of ordinary intelligence is supposed to understand what falls into this exception. Paxton asserts that "ordinary business purposes" has a "corollary" in Federal Bankruptcy Law. But without any specific reference to that law, no ordinary person could be expected to intuit such a corollary. Regardless, the statute cited by Paxton, 11 U.S.C. § 547(c)(2), does not refer to, let alone define, "ordinary business purposes."

Finally, Paxton also asserts that "ordinary business purposes" is any business action taken other than those taken with a desire not to do business with a company because that company is based in Israel. Paxton at 23 n.7. This definition is invented out of whole cloth. The Act does not define "ordinary business purposes" in this way, and this is not a commonly understood meaning. The expansive definition of "Boycott Israel" combined with its nebulous exception, renders the law's boundaries unknowable and, therefore, impermissibly vague.

## III. Plaintiffs have met the remaining factors of the preliminary injunction test

Paxton does not contest, and therefore concedes, that First Amendment injuries are irreparable. PI at 33. Nor does he contest that because the State cannot have a legitimate interest in enforcing an unconstitutional law, the balance of equities weights in favor of enjoining unconstitutional laws, *id.* at 34, and the public interest favors enjoinment, *id.* at 35. Instead, Paxton asserts that because the Act does not violate Plaintiffs' First Amendment rights and because the Act is justified by a legitimate State interest, no injunction should issue. Paxton at 25. This argument is merely redundant of Paxton's merits arguments, and for all the reasons previously expressed, such arguments are unavailing.

## IV. The Court should issue a broad injunction to the law

In seeking to limit this Court's relief, Paxton argues that Plaintiffs' pleadings are not adequate to support a facial challenge, but he does not articulate what Plaintiffs' pleadings are lacking. Paxton at 12. With respect to First Amendment challenges, plaintiffs may show either that "no set of circumstances exists under which [the Act] would be valid or that it lacks any plainly legitimate sweep," or that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). Here, Plaintiffs have met both standards.

Plaintiffs' claim is "facial" in that it is not limited to Plaintiffs' particular case, but challenges defects in the law that manifest in its application to any State contractor. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (citations omitted). In fact, contrary to Paxton's insistence, "[t]he label is not what matters." *Id*. Plaintiffs need only show that their claim and the relief that would follow—an injunction prohibiting enforcement of the Act—reach beyond the particular circumstances of Plaintiffs. *Id.*

Plaintiffs' briefing more than adequately explains the Act's facial defects: (1) the Act imposes unconstitutional conditions on government contracts—its certification requirement violates the First Amendment *on its face* because it unduly restricts a government contractor's ability to engage in political boycotts; (2) the Act's certification requirement violates the First Amendment *on its face* because it discriminates against protected expression based on the expression's content and viewpoint—it prohibits government contractors from boycotting Israel or businesses supporting Israel's occupation of the Palestinian territories, while allowing contractors to participate in other boycotts, including boycotts of other foreign countries and "reverse boycotts" targeting companies engaged in boycotts of Israel; (3) the Act's certification

requirement violates the First Amendment *on its face* because it compels speech related to government contractors' protected political beliefs associations, and expression; and (4) the Act's certification requirement violates the Fourteenth Amendment's due process clause *on its face* because its terms are impermissibly vague—the Act fails to give government contractors fair notice of what activities and conduct would be construed as violating the Act.

Because the Act is designed to quash political expression on the basis of that expression's content and viewpoint, there are no circumstances under which the Act could be constitutionally applied, including the two hypothetical examples offered by Paxton. The Act would still be unconstitutional if used to suppress a political boycott by either a grocery store or a tech company. Paxton appears to imply that the Act is constitutional as applied to larger companies, but the Supreme Court has squarely held that the government may not suppress political speech on the basis of the speaker's corporate identity. *Citizens United*, 558 U.S. at 365.

Even if this Court determines that the Act has some legitimate sweep, Plaintiffs have still justified a facial challenge because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. The Act does not legitimately target nationality-based discrimination, but, even if it did, the Act would still be overbroad because it prohibits contractors from declining to do business with the Israeli government or companies that support the Israeli government for political, not discriminatory, reasons. PI at 26. This over-breadth justifies a facial challenge and broad injunction.

**Conclusion**

Plaintiffs request that this Court enter a preliminary injunction, prohibiting the enforcement of the Act.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on January 29, 2019, this document will be filed via the Court's ECF system, which will serve electronic notice on all counsel of record.

*/s/Edgar Saldivar*
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