No. 19-50384

In the United States Court of Appeals for the Fifth Circuit

BAHIA AMAWI,

Plaintiff-Appellee,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Defendants-Appellants.

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF FOR STATE APPELLANTS

Counsel listed on inside cover

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General
kyle.hawkins@oag.texas.gov

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL R. ABRAMS
Assistant Attorney General

Counsel for State Defendants-Appellants Ken Paxton, Board of Regents of the University of Houston System, and Board of Regents of the Texas A&M University System

Certificate of Interested Persons

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

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

Counsel for State Defendants-Appellants Ken Paxton, Board of Regents of the University of Houston System, and Board of Regents of the Texas A&M University System:
Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins (lead counsel)
Matthew H. Frederick
Michael R. Abrams
Office of the Attorney General

Counsel for Defendants-Appellants Klein Independent School District and Lewisville Independent School District
Thomas P. Brandt
Francisco J. Valenzuela
Laura O'Leary

Counsel for Pflugerville Independent School District:
Todd Aaron Clark
Joey W. Moore

Plaintiffs-Appellees:
Bahia Amawi
John Pluecker
Obinna Dennar
Zachary Abdelhadi
George Hale

Counsel for Plaintiff-Appellee Bahia Amawi:
Gadeir Abbas
Christopher M. Choate
John T. Floyd
Carolyn Homer
Lena F. Masri

Counsel for Plaintiffs-Appellees Pluecker, Obinna Dennar, Zachary Abdelhadi, and George Hale:
Thomas Buser-Clancy
Kevin Dubose
Vera Eidelman
Brian Hauss
Adriana Piñon
Edgar Saldivar
Andre Segura

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Counsel of Record for State Defendants-Appellants Ken Paxton, Board of Regents of the University of Houston System, and Board of Regents of the Texas A&M University System

Statement Regarding Oral Argument

This case merits oral argument. The district court relied on the First Amendment to enjoin enforcement of a Texas statute that does not apply to any plaintiff in this case and does not regulate speech in the first place. The district court's preliminary injunction disregards Article III's limits on federal subject-matter jurisdiction and Supreme Court precedent holding that mere participation in a boycott does not qualify as speech.

Enjoining the enforcement of a duly enacted state law is a serious matter. The State Defendants-Appellants believe that oral argument will assist the Court in resolving this appeal.

TABLE OF CONTENTS

Certificate of Interested Persons iii
Statement Regarding Oral Argument v
Table of Authorities vii
Introduction 1
Statement of Jurisdiction 2
Issues Presented 2
Statement of the Case 3
I. Texas Government Code Chapter 2270 3
II. The Plaintiffs' Challenge to Chapter 2270 5
III. The District Court's Preliminary Injunction 7
IV. Defendants' Appeals and State Defendants' Motion to Stay 8
V. Attorney General Paxton's Motion to Dismiss for Lack of Subject-Matter Jurisdiction 10
Summary of the Argument 10
Standard of Review 12
Argument 12
I. Plaintiffs' Claims Are Moot, and the Preliminary Injunction Must Be Vacated for Lack of Subject-Matter Jurisdiction. 12
A. Plaintiffs' claims are moot. 12
B. This Court's precedents require vacatur of a preliminary injunction following the loss of subject-matter jurisdiction. 23
II. Chapter 2270 Is Constitutional. 26
A. Plaintiffs are not likely to succeed on the merits because the First Amendment does not protect the right they assert. 27
B. Plaintiffs will suffer no irreparable injury. 38
C. The preliminary injunction irreparably injures the State and adversely affects the public interest. 39
D. The injunction is vastly overbroad. 40

III. The Boards of Regents Are Entitled to Dismissal Because They Are Immune from Suit 41
Conclusion 44
Certificate of Compliance 45
Certificate of Service 45

TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott v. Perez,
138 S. Ct. 2305 (2018) 39

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,
570 U.S. 205 (2013) 34

Ark. Times LP v. Waldrip,
362 F. Supp. 3d 617 (E.D. Ark. 2019) 29, 31, 33, 38

Athenaeum v. Nat'l Lawyers Guild, Inc.,
No. 653668/16, 2017 WL 1232523 (N.Y. Sup. Ct. Mar. 30, 2017) 36

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 41

Bob Jones University v. United States,
461 U.S. 574 (1983)..... 36

Brazos Valley Coalition for Life, Inc. v. City of Bryan,
421 F.3d 314 (5th Cir. 2005) 18

Briggs & Stratton Corp. v. Baldrige,
728 F.2d 915 (7th Cir. 1984) 32

Camfield v. Oklahoma City,
248 F.3d 1214 (10th Cir. 2001) 19

Ctr. for Individual Freedom v. Carmouche,
449 F.3d 655 (5th Cir. 2006) 13

City of El Cenizo v. Texas,
890 F.3d 164 (5th Cir. 2018)..... 12, 27, 39

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 13

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 15, 16, 17, 19

Cole v. Richardson,
405 U.S. 676 (1972) 33-34

Cooper v. McBeath,
11 F.3d 547 (5th Cir. 1994)..... 21

Duke Power Co. v. Greenwood County,
299 U.S. 259 (1936) 24

Envtl. Conservation Org. v. City of Dallas,
529 F.3d 519 (5th Cir. 2008)..... 14

Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.,
441 F.2d 560 (5th Cir. 1971) 24

Fantasy Ranch Inc. v. City of Arlington,
459 F.3d 546 (5th Cir. 2006) 10, 13, 20

Farmhand, Inc. v. Anel Eng'g Indus., Inc.,
693 F.2d 1140 (5th Cir. 1982) 15

Grano v. Barry,
733 F.2d 164 (D.C. Cir. 1984)..... 25

Griffin v. Lee,
621 F.3d 380 (5th Cir. 2010) (per curiam)..... 12

Habetz v. La. High School Athletic Ass'n,
842 F.2d 136 (5th Cir. 1988) (per curiam) 17, 18

Hall v. Louisiana,
884 F.3d 546 (5th Cir. 2018)..... 21

Hijar v. Burrus,
474 U.S. 1016 (1985)..... 25

Hollon v. Mathis Indep. Sch. Dist.,
491 F.2d 92 (5th Cir. 1974) (per curiam) 23, 24, 25

Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.,
765 F.3d 396 (5th Cir. 2014) 12

Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.,
456 U.S. 212 (1982) 31, 32

Kane v. Nat'l Union Fire Ins. Co.,
535 F.3d 380 (5th Cir. 2008) (per curiam)..... 12

Lance v. Coffman,
549 U.S. 437 (2007) (per curiam) 15

Los Angeles Cty. v. Davis,
440 U.S. 625 (1979) 10, 20, 21

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994)..... 40

Maryland v. King,
567 U.S. 1301 (2012) (Roberts, C.J., in chambers) 39

Moore v. La. Bd. of Elementary and Secondary Educ.,
743 F.3d 959 (5th Cir. 2014) 24

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982).....27, 29, 30

Nat'l Black Police Ass'n v. Dist. of Columbia,
108 F.3d 346 (D.C. Cir. 1997) 22

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 38

New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,
434 U.S. 1345 (1977) (Rehnquist, J., in chambers) 39

Nken v. Holder,
556 U.S. 418 (2009) 40

O'Hare Truck Serv., Inc. v. City of Northlake,
518 U.S. 712 (1996) 34

Olivier v. Univ. of Tex. Sys.,
988 F.2d 1209 (5th Cir. 1993) (unpublished table decision) 43

Pickering v. Bd. of Educ.,
391 U.S. 563 (1968) 35

Reynolds v. New Orleans City,
272 F. App'x 331 (5th Cir. 2008) (per curiam) 18

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 36

Rumsfeld v. Forum for Academic and Institutional Rights,
547 U.S. 47 (2006) 27, 28, 29, 35

Slade v. Tex. S. Univ. Bd. of Regents,
232 S.W.3d 395 (Tex. App.—Houston [1st Dist.] 2007, no pet.) 43

Sossamon v. Lone Star State of Texas,
560 F.3d 316 (5th Cir. 2009), *aff'd on other grounds*,
563 U.S. 277 (2011) 22

Sw. Ctr. for Biological Diversity v. Bartel,
409 F. App'x 143 (9th Cir. 2011) (mem. op.) 25

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 14

Teague v. Cooper,
720 F.3d 973 (8th Cir. 2013) 19

Texans for Free Enter. v. Tex. Ethics Comm'n,
732 F.3d 535 (5th Cir. 2013) 12

Texas v. United States,
809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*,
136 S. Ct. 2271 (2016) (mem.) 24, 25

Tex. Med. Providers Performing Abortion Servs. v. Lakey,
667 F.3d 570 (5th Cir. 2012) 27

United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ., 665 F.2d 553 (5th Cir. 1982) 43

United States v. Escalante,
239 F.3d 678 (5th Cir. 2001) 38

United States v. O'Brien,
391 U.S. 367 (1968) 35, 36

U.S. Fleet Servs. v. City of Fort Worth, Tex.,
33 F. App'x 704 (5th Cir. 2002) (unpublished table decision) 18, 22

U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556 (1986) 19

Valero Terrestrial Corp. v. Paige,
211 F.3d 112 (4th Cir. 2000) 19, 20

Veasey v. Abbott,
870 F.3d 387 (5th Cir. 2017) 39, 40

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 38

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 37

Yarls v. Bunton,
905 F.3d 905 (5th Cir. 2018) 22

Constitutional Provisions, Statutes, and Rules:

28 U.S.C.
§ 1292(a)(1) 2
§ 1331 2

42 U.S.C. § 1983 2

Act of May 6, 2019, 86th Leg., R.S., ch. 30, Tex. H.B. 793 1

Ark. Code Ann. § 25-1-502(1)(A)(i) 38

Fed. R. App. P.
8(a)(1)(A) 8
8(a)(2)(A)(ii) 8

Tex. Const., art. 1, § 3a 4

Tex. Educ. Code
§ 61.003(3) 42
§ 61.003(6) 42
§ 61.003(10) 42
§ 111.01 42
§ 111.20(a) 42

Tex. Gov't Code
§ 808.001(1) 3, 37, 38
§ 808.001(2) 4
§ 2251.001(3) 4
h. 2270 ..... *passim*
§ 2270.001 ..... 3, 8
§ 2270.002 4
§ 2270.002(b) 3

Other Authorities:

48 C.F.R. § 9.406-2 34

American Heritage Dictionary (5th ed. 2016) 32

Brief for the Respondents, *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347175 32-33

Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) 34

OFCCP v. Goya de Puerto Rico, Inc., 67 Fed. Reg. 53028-01, Notice of Debarment (Dep't of Labor Aug. 14, 2002) 34

OFCCP v. Pacific Coast Feather Co., 61 Fed. Reg. 56248-01, Notice of Debarment (Dep't of Labor Oct. 31, 1996) 34

Order on Mot. for Stay Pending Appeal, *Jordahl v. Brnovich*, No. 18-16896 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting), ECF No. 26 ..... 31, 33

INTRODUCTION

The decision below categorically enjoins enforcement of Texas Government Code Chapter 2270, which requires the State's business partners to verify that they do not and will not boycott Israel. That statute no longer applies to the plaintiffs in this case, who have effectively conceded that their claims are moot. The statute does not violate the First Amendment, in any case, because the regulated conduct—participation in a boycott that discriminates based on national origin—does not qualify as speech. By nevertheless entering a preliminary injunction against enforcement of the statute against any business, the district court exceeded its authority under Article III and disregarded controlling Supreme Court precedent holding that the mere refusal to deal with a particular party is not protected speech.

There is no real dispute that this case is moot. Less than two weeks after the injunction issued, Texas Governor Greg Abbott signed into law H.B. 793, Act of May 6, 2019, 86th Leg., R.S., ch. 30, which removes sole proprietors from the class of "companies" required to certify that they do not boycott Israel. Because H.B. 793 passed the Legislature by overwhelming supermajorities, the change in law took effect immediately. H.B. 793 removes all five of the plaintiffs in this case from Chapter 2270's scope. Each has conceded in district court and in this Court that they are no longer subject to Chapter 2270. Yet the district court refused to vacate its injunction—even though no plaintiff has standing—which would enjoin Defendants from enforcing Chapter 2270 against any person or business.

Even assuming that this case presents a live controversy, the preliminary injunction should be vacated because it rests on a misunderstanding of the First Amendment. Chapter 2270 regulates conduct, not speech. Plaintiffs' engagement in an economic boycott—their decision, for example, not to purchase a brand of hummus associated with an Israeli company—is neither speech nor "inherently expressive" conduct. The district court erred in finding otherwise, and the other faults it found with Chapter 2270 are inseparable from, and must be reversed alongside with, that first mistaken conclusion. This Court should vacate the preliminary injunction and order the district court to dismiss this case for lack of subject-matter jurisdiction.

Statement of Jurisdiction

The district court's jurisdiction was invoked initially under 28 U.S.C. § 1331 because the Plaintiffs-Appellees' claims arise under the U.S. Constitution and are brought pursuant to 42 U.S.C. § 1983. The district court entered a preliminary injunction on April 25, 2019, ROA.1242-97, and the State Defendants timely filed their notice of appeal on April 29, 2019. ROA.1307-09. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). As set out below, the case became moot after it was filed, and the district court now lacks subject-matter jurisdiction.

Issues Presented

1. Whether Plaintiffs' claims are moot.

2. If Plaintiffs' claims are not moot, whether Chapter 2270 violates the First Amendment.

3. Whether the district court erred when it rejected the immunity defenses raised by the Board of Regents of the University of Houston System and the Board of Regents of the Texas A&M University System.

STATEMENT OF THE CASE

I. Texas Government Code Chapter 2270

In 2017, the Texas Legislature set out to prevent the State and its political subdivisions from doing business with companies who engage in invidious economic boycotts of Israel. To accomplish that goal, the Legislature enacted Chapter 2270 of the Texas Government Code, an antidiscrimination law requiring companies that contract with the State to sign a "written verification" confirming they will not boycott Israel. *See* Tex. Gov't Code § 2270.001 *et seq*. The law provides that a "governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract." *Id.* § 2270.002(b).

Texas law defines the term "boycott Israel" to mean "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory." *Id.* § 808.001(1). The statutory definition specifically excludes "an action made for ordinary business purposes." *Id*.

When Chapter 2270 took effect in 2017, it applied broadly to almost every type of business association. The 2017 definition of "company" in section 2270.002, which has since been supplanted, included "a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit." *Id.* § 808.001(2); *see also* ROA.291 (describing the 2017 version of Tex. Gov't Code § 808.001(2)). The term "governmental entity" is similarly broad, encompassing "a state agency or political subdivision of this state." Tex. Gov't Code § 2251.001(3).

As the above text illustrates, Chapter 2270 does not concern personal economic decisions, nor does it prevent individuals from freely expressing their views on Israel or the Israeli-Palestinian conflict. *See id.* § 2270.002. Instead, it simply prevents the State and its subdivisions from entering into contracts with companies that refuse to agree that they do not and will not boycott Israel or Israeli businesses. Chapter 2270 thus fits comfortably within the State's foundational nondiscrimination principles. *See, e.g.*, Tex. Const., art. 1, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.").

During its 2019 session, the Texas Legislature decided to significantly narrow the scope of Chapter 2270 and reduce the number and type of business associations it covers. In particular, it passed H.B. 793 to remove sole proprietorships from Chapter 2270's coverage. *See* ROA.1352; ROA.1358. As amended by H.B. 793, Chapter

2270's verification requirements apply only to contracts that (1) are between a governmental entity and a company with 10 or more full-time employees, and (2) have a value of $100,000 or more, to be paid at least in part from public funds. ROA.1352; ROA.1358. The bill explicitly provides that the term "company" "does not include a sole proprietorship." ROA.1352; ROA.1358. House Bill 793 passed by a vote of 105-0 in the House of Representatives and a vote of 28-3 in the Senate. ROA.1352; *see* ROA.1360-63.

On May 7, 2019, Governor Greg Abbott signed H.B. 793 into law. ROA.1352. Because it received a vote of two-thirds of all members elected to each house, it took effect immediately upon the Governor's signature. ROA.1352. As of May 7, 2019, no sole proprietor in Texas is required to verify that he or she does not and will not boycott Israel or Israeli businesses as a condition of contracting with the State or a state subdivision.

II. The Plaintiffs' Challenge to Chapter 2270

Last year, five plaintiffs ("Plaintiffs" or "Plaintiffs-Appellees"), all of whom are sole proprietors, brought suit to challenge Chapter 2270. Each had entered into a contract or sought to enter into a contract with a governmental entity. The 2017 version of Chapter 2270, which was in effect at the time they filed their complaint, required Plaintiffs to certify that they did not boycott Israel and would not do so during the term of their contracts. Plaintiffs broadly objected to Chapter 2270's verification requirements because they wished to boycott Israel or otherwise discriminate against Israeli businesses.

Plaintiff Bahia Amawi, a speech pathologist who has contracted with Pflugerville Independent School District in the past to provide speech therapy services, claims that she "make[s] economic decisions on the basis of [her] support for Palestine and [her] ethical objections to Israel's mistreatment of Palestinians." ROA.93. For example, she "refuse[s] to buy the Sabra brand of hummus because of its connections to Israel." ROA.94. Whenever she is aware that "products are made in or affiliated with Israel," she makes the "personal choice to avoid them." ROA.94.

Another Plaintiff, John Pluecker, desires to "participate" in a "campaign" that targets Israel with boycotts, divestments, and sanctions, also known as a "BDS boycott campaign." ROA.2099-2100. He refused to sign a contract with the University of Houston because of the Chapter 2270 certification, alleging that he "did not want to forfeit [his] participation in a BDS boycott campaign." ROA.2100.

The other Plaintiffs take a similar position. Zachary Abdelhadi, Obinna Dennar, and George Hale, who sought contracts with Lewisville Independent School District, Klein Independent School District, and Texas A&M University-Commerce, respectively, wish to participate in a boycott of Israeli products, *see* ROA.2016; ROA.2030-32; ROA.2057-59, for example, L'Oreal shampoo and skin-care products sold to tourists at the Dead Sea.

Plaintiffs filed two separate lawsuits in the Western District of Texas challenging enforcement of Chapter 2270. In the first, filed on December 16, 2018, Amawi sued Attorney General Ken Paxton and the Pflugerville Independent School District. ROA.19-29. In the second, Pluecker, Abdelhadi, Dennar, and Hale (the "Pluecker Plaintiffs"), sued Attorney General Paxton, the Board of Regents of the Texas A&M

University System, the Board of Regents of the University of Houston System, the Trustees of Klein Independent School District, and the Trustees of Lewisville Independent School District. ROA.1652-80. (This brief refers to these entities as "Defendants" or "Defendants-Appellants.")

Plaintiffs challenged Chapter 2270 under the First and Fourteenth Amendment, ROA.25-27; ROA.1676-78, alleging that Chapter 2270 infringes their constitutional right to boycott. ROA.25; ROA.1677. They further alleged that the definition of "boycott Israel" is unconstitutionally vague. ROA.26; ROA.1677-78. The district court consolidated the two cases, with Amawi's case as lead. ROA.237-38.

III. The District Court's Preliminary Injunction

A few days after filing these actions, Amawi and the Pluecker Plaintiffs moved for preliminary injunctions. ROA.68-69 (Amawi); ROA.1738-41 (Pluecker). Defendants (with the exception of Pflugerville Independent School District, which reached an agreement with Amawi not to oppose her preliminary injunction), responded to the motions and filed motions to dismiss. *See* ROA.243-51; ROA.287-316; ROA.513-34; ROA.539-59; ROA.788-803. The court held a hearing on all pending motions on March 29, 2019. ROA.1472-1557.

On April 25, 2019—just 12 days before H.B. 793 took effect—the district court denied the motions to dismiss and entered a preliminary injunction. ROA.1242-97. The district court rejected Defendants' various immunity and jurisdictional defenses, finding that Plaintiffs' claims are ripe, that they have standing to sue, and that their injuries could be redressed by a favorable ruling against Defendants. ROA.1254-63. The district court then held that boycotts are constitutionally protected speech,

ROA.1270; that Chapter 2270 is unconstitutional content- and viewpoint-based discrimination, ROA.1272; that Chapter 2270 does not serve a compelling state interest, ROA.1277; that Chapter 2270 is not sufficiently tailored to serve that interest, ROA.1278; that Chapter 2270 unconstitutionally compels Plaintiffs to speak, ROA.1283; and that the definition of "boycott Israel" is unconstitutionally vague, ROA.1286-87. The Court entered the following preliminary injunction:

> Defendants, and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order, are preliminarily **ENJOINED** from enforcing H.B. 89, codified at Tex. Gov. Code § 2270.001 *et seq.*, or any 'No Boycott of Israel' clause in any state contract.

ROA.1297.

IV. Defendants' Appeals and State Defendants' Motion to Stay

Attorney General Paxton immediately moved in district court for a stay pending appeal and requested expedited consideration. ROA.1298-1305. Among other things, Attorney General Paxton argued that the case was on the cusp of mootness due to the passage of H.B. 793. ROA.1302-03. The Defendants also filed notices of appeal. ROA.1307-09; ROA.1316-17.

On May 7, as expected, H.B. 793 took effect and exempted each plaintiff in this case from Chapter 2270's coverage. The next day, however, the district court denied Attorney General Paxton's motion for a stay pending appeal. ROA.1343-50; *see* Fed. R. App. P. 8(a)(1)(A), 8(a)(2)(A)(ii). The district court indicated that it was unpersuaded by the substance of Attorney General Paxton's First Amendment arguments, but it did not address mootness. ROA.1345-49.

After the district court denied the motion to stay, Attorney General Paxton filed a motion to stay the preliminary injunction in this Court. In response, Plaintiffs offered three significant concessions. First, both Amawi and the Pluecker Plaintiffs conceded that they are no longer subject to Chapter 2270's certification requirements. *See* Pls.-Appellees John Pleucker, Obinna Dennar, Zachary Abdelhadi, and George Hale's Resp. to Def. Att'y General Ken Paxton's Opposed Mot. to Stay Inj. Pending Appeal at 2, 4 (May 20, 2019) ("Pluecker Opp.") (acknowledging that Plaintiffs "are all sole proprietors" and that the enjoined law "no longer applies" to them); Pl. Bahia Amawi's Opp'n to Def. Att'y General Ken Paxton's Mot. to Stay Inj. Pending Appeal at 3 (May 20, 2019) ("Amawi Opp.") (explaining that Amawi "adopts the responsive position of the *Pluecker* Plaintiffs' opposition"). Second, they conceded that the preliminary injunction cannot stand in light of the case's mootness. *Id.* at 4 ("Either the District Court will itself dissolve the preliminary injunction . . . or this Court will do so without reaching the merits of the State's appeal."); Amawi Opp. 3 (adopting Pluecker Plaintiffs' substantive opposition). Third, they effectively conceded that Defendants-Appellants are entitled to a stay pending appeal. Their briefing explained that they "take no position as to whether the underlying preliminary injunction order should be stayed due to the passage of H.B. 793 and its subsequent removal of sole proprietors from the No Boycott requirement." Pluecker Opp. 15.

This Court granted a stay pending appeal on May 28, 2019.

V. Attorney General Paxton's Motion to Dismiss for Lack of Subject-Matter Jurisdiction

On May 8—the day after H.B. 793 became law—Attorney General Paxton filed a motion to dismiss in district court. ROA.1351. The motion brought H.B. 793 to the court's attention and noted that no plaintiff is covered by the law as it now exists. ROA.1354. Attorney General Paxton argued that the case is now moot and the court lacks subject-matter jurisdiction. ROA.1351; ROA.1353-54 (citing *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006), for the proposition 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" (quotation marks omitted)).

On July 23, 2019, the district court denied Attorney General Paxton's motion to dismiss. ROA.2291-2304. The district court concluded that the voluntary cessation exception to mootness applies and that Attorney General Paxton failed to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." ROA.2296 (citing *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979)). In the meantime, Amawi (but not the Pluecker Plaintiffs) has filed an opposed motion for permanent injunction, ROA.1336-40, which remains pending in the district court.

Summary of the Argument

Chapter 2270 no longer applies to the sole proprietors who brought this lawsuit and who remain the only plaintiffs in this case. The change in the law precipitated by

H.B. 793 renders this case moot. The district court incorrectly found that the voluntary cessation exception to mootness applies, notwithstanding the rule that legislative changes to existing statutes moot pending claims absent extraordinary circumstances. No such circumstances are present here. Because this case is moot, the Court must dissolve the district court's preliminary injunction.

The district court's application of First Amendment principles to Chapter 2270 was fundamentally mistaken and would require reversal regardless of any jurisdictional defect. Chapter 2270 regulates conduct, not speech; it is a targeted nondiscrimination measure that fits comfortably within existing First Amendment precedent. Nor is Chapter 2270 unconstitutionally vague; it can be construed to avoid any hint of constitutional difficulty, and it should have been so construed by the district court. The district court erred in adopting the broadest possible reading of Chapter 2270 instead of interpreting it to accord with applicable First Amendment precedent. Plaintiffs' constitutional claims thus fail as a matter of law, which provides an independent basis to vacate the district court's preliminary injunction.

Finally, the Boards of Regents of the University of Houston System and the Texas A&M University System are not proper parties and should not have been subject to the injunction. The undisputed evidence shows that they did not enter into the contracts at issue here. And in any event, the Boards are state entities who properly asserted sovereign immunity as a defense to suit and injunctive relief. The district court erred in enjoining the Boards and rejecting their immunity defenses.

STANDARD OF REVIEW

Federal courts have an obligation to assure themselves of their own jurisdiction, *Griffin v. Lee*, 621 F.3d 380, 383 (5th Cir. 2010) (per curiam), and appellate courts in particular have an independent obligation to ensure that the district court properly exercised jurisdiction. *Id.* When the district court lacks jurisdiction, appellate courts "have jurisdiction on appeal, not on the merits but for the purpose of addressing the lower court's jurisdiction to entertain the suit." *Id.* at 384. This Court assesses questions of jurisdiction de novo. *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 400 (5th Cir. 2014).

The Court "review[s] a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018) (quoting *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 537 (5th Cir. 2013)). "A district court by definition abuses its discretion when it makes an error of law." *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 384 (5th Cir. 2008) (per curiam).

ARGUMENT

I. Plaintiffs' Claims Are Moot, and the Preliminary Injunction Must Be Vacated for Lack of Subject-Matter Jurisdiction.

A. Plaintiffs' claims are moot.

A few days after the district court entered the preliminary injunction, the Legislature revised Chapter 2270 to exclude "sole proprietors" from the statute's coverage. *See supra* p. 8. Chapter 2270 no longer impacts any plaintiff. Plaintiffs' claims against that statute are therefore moot.

1. Mootness is "the doctrine of standing in a time frame." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006). The doctrine requires the "requisite personal interest that must exist at the commencement of litigation (standing)" to "continue throughout its existence (mootness)." *Id.* Mootness arises "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). This Court has long held that "*any* set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Carmouche*, 449 F.3d at 661 (emphasis added). Those circumstances include "statutory changes that discontinue a challenged practice," which 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.*, 459 F.3d at 564 (finding that city's amended ordinance addressed all issues raised by the pre-amendment complaint, rendering the challenge to the pre-amendment ordinance moot).

Because each plaintiff is a sole proprietor, ROA.79; ROA.1939, Chapter 2270 no longer requires them to refrain from boycotting Israel as a condition of contracting with the State. Four of the five plaintiffs—Bahia Amawi, John Pluecker, Obinna Dennar, and Zachary Abdelhadi—refused to sign contracts with the certification clause, but Chapter 2270 does not require that clause to appear in any future contract they might sign. ROA.24; ROA.1660-61; ROA.1665-66; ROA.1669. The fifth plaintiff, George Hale, alleged that he signed his contract with Texas A&M University-Commerce "under protest." ROA.1674. But like the other plaintiffs, he lacks standing to seek prospective relief because Chapter 2270 no longer applies to him. *See*

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (explaining a plaintiff has the burden to establish standing by putting on evidence that the "threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur").

Moreover, because of H.B. 793's amendments to Chapter 2270, Texas A&M University-Commerce has amended its contract with Hale to remove the certification formerly required under the prior version of the statute. ROA.1364; ROA.1378. Hale signed the amended contract and is now bound by that contract and only that contract. *See* ROA.1364; ROA.1378.

The result is that today, no plaintiff is under a contract with the certification requirement. And no plaintiff could plausibly allege that he or she will enter any such contract in the future. Indeed, Plaintiffs have all conceded that they are no longer subject to Chapter 2270. In particular, the Pluecker Plaintiffs concede that because they "are all sole proprietors," the enjoined law "no longer applies" to them. Pluecker Opp. 2, 4; ROA.2206 ("[P]ursuant to HB 793, sole proprietors, including the *Pluecker* Plaintiffs, are no longer required to certify that they do not boycott Israel."). Amawi agrees. *See* Amawi Opp. 3 ("adopt[ing] the responsive position of the Pluecker Plaintiffs' opposition"); ROA.2210 (acknowledging that Amawi is exempt from the law).

This case is therefore moot. Plaintiffs would not be able to bring suit today against Chapter 2270, because Chapter 2270 no longer applies to them or their contracts with the defendant governmental entities. That means they no longer have a "personal stake in the outcome of this lawsuit." *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 527 (5th Cir. 2008). Their lingering disagreements with a law

that does not apply to them, *e.g.*, ROA.1336-40, are insufficient to confer standing. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

2. This should have been an open and shut mootness determination, but the district court made at least three fundamental legal errors in denying Attorney General Paxton's motion to dismiss.[1] First, the district court misread the mootness exception articulated in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). That case has been limited to its particular facts, which are not present here. Second, the district court incorrectly attributed the mooting event—the Legislature's amendment of the challenged statute—to the Attorney General, a member of the executive branch. Finally, the district court failed to apply the presumption of good faith to which governmental acts are entitled. Each error is sufficient to undermine the district court's conclusion.

[1] Attorney General Paxton requested in his motion to dismiss that the district court vacate its injunction, which the court retained inherent authority to act on, notwithstanding this appeal. *See Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145–46 (5th Cir. 1982) (stating that district courts have discretion to modify injunctive relief after appeal has been taken). The district court refused to do so.

a. In *Aladdin's Castle*, the Supreme Court held that a city's amendment of a challenged ordinance on appeal did not moot a pending legal challenge because the city admitted that it would reinstate the challenged ordinance if the case were dismissed. The challenge in *Aladdin's Castle* involved an ordinance related to coin-operated amusement establishments, which (1) directed the chief of police to consider whether a license applicant had any "connections with criminal elements," and (2) prohibited a licensee from allowing children under 17 from operating a device unless accompanied by a parent or legal guardian. *Id.* at 285–86.

When Aladdin's Castle, Inc. proposed to open an amusement center in a shopping mall, the city made an exception to the 17-and-under prohibition so long as children under the age of seven were accompanied by an adult. *Id.* at 286. But Aladdin's application for a license was denied because the police chief determined that Aladdin's parent company had "connections with criminal elements." *Id.* at 287. Aladdin sued the city in a Texas state court and obtained an injunction requiring the city to issue the license. *Id.* Less than a month after complying with the injunction, the city repealed Aladdin's 7-and-under exemption and reinstated the 17-and-under requirement. *Id.* The city also attempted to refine its definition of "connections with criminal elements." *Id.* Aladdin filed suit in federal court to enjoin the revised ordinance. On appeal, the Fifth Circuit found both the 17-and-under requirement and the "criminal elements" provision unconstitutional. *Id.* at 288. While the case remained pending on appeal, the city eliminated the "criminal elements" provision altogether, without informing the Fifth Circuit, but conceded at oral argument in the Supreme

Court that it intended to reinstate "precisely the same provision if the District Court's judgment were vacated." *Id.* at 288, 289 & n.11.

The Supreme Court held that the challenge to the "criminal elements" provision was not moot, observing that the city's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated. The city followed that course with respect to the age restriction, which was first reduced for Aladdin from 17 to 7 and then, in obvious response to the state court's judgment, the exemption was eliminated." *Id.* at 289 (footnote omitted). On those unique facts, there was "no certainty that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction." *Id.*

This Court has consistently recognized that the exception to mootness articulated in *Aladdin's Castle* applies only if the facts indicate that the defendant will revert to its previous conduct if the case is dismissed as moot. In *Habetz v. Louisiana High School Athletic Association*, 842 F.2d 136, 137–38 (5th Cir. 1988) (per curiam), for example, a female athlete sued to enjoin a high school athletic association's by-laws, which prevented her from trying out for a boys' baseball team. *Id.* at 137. While the case was on appeal, the association amended its by-laws to allow female athletes to try out for male sports teams when a school lacked a female team in that sport. *Id.* The Court found the challenge moot and noted that in *Aladdin's Castle*, "the defendant city's past conduct indicated a likelihood that it would return to its challenged practices once the threat of litigation had passed." *Id.* at 137 & n.4. Without

any similar indication that the association would reinstate its former by-laws, the district court's judgment was vacated with instructions to dismiss. *Id.* at 138.

This Court has further held that when a statutory amendment eliminates a live dispute between the parties, the party seeking to avoid dismissal bears the burden of proving that the voluntary cessation exception applies. In *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, 421 F.3d 314, 321 (5th Cir. 2005), the Court distinguished *Aladdin's Castle* on the basis that the city "openly conceded . . . that it intended to reenact the disputed ordinance as soon as the Supreme Court vacated the judgment for mootness." It rejected the plaintiff's attempt to avoid mootness based on the voluntary cessation exception because the record contained "nothing whatever to suggest that the City intends to repeal [the amendment to the challenged ordinance] when this case is over." *Id.* at 322; *see also Reynolds v. New Orleans City*, 272 F. App'x 331, 336–37 & n.3 (5th Cir. 2008) (per curiam) (noting that "disputes concerning repealed legislation are 'generally moot,'" but the plaintiff may invoke an exception if it proves "a substantial likelihood that the challenged statute will be reenacted or replaced by another constitutionally suspect law" (citation omitted)); *U.S. Fleet Servs. v. City of Fort Worth, Tex.*, 33 F. App'x 704, 2002 WL 432606, at *1 (5th Cir. 2002) (unpublished table decision) (finding *Aladdin's Castle* inapplicable because "[t]here is no indication in the pending case that the enactment of the new ordinance was a ruse or that the city intends to reenact the repealed ordinance").

This Court's view that *Aladdin's Castle* is limited to its facts comports with the national consensus. The Fourth Circuit, for example, has held that *Aladdin's Castle*

"is generally limited to the circumstance, and like circumstances, in which a defendant openly announces its intention to reenact 'precisely the same provision' held unconstitutional below." *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (citing *Aladdin's Castle*, 455 U.S. at 289 & n.11). Other Circuits have agreed. *See, e.g.*, *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013) ("[W]e agree with the Fourth Circuit 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.") (quotation marks omitted); *Camfield v. Oklahoma City*, 248 F.3d 1214, 1223-24 (10th Cir. 2001) (holding that "*Aladdin's Castle* is inapposite in cases such as this where there is no evidence in the record to indicate that the legislature intends to reenact the prior version of the disputed statute").

Indeed, the Supreme Court itself appears to recognize that *Aladdin's Castle* applies only in a very narrow factual context. In *U.S. Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556 (1986), for example, "a unanimous Supreme Court dismissed as moot a former mental patient's challenge to a firearms statute, because, after certiorari had been granted but before the case was decided, Congress amended the statute to permit former mental patients to apply for an exemption from the bar on firearms purchases by current and former mental patients." *Valero*, 211 F.3d at 116 (citing *Galioto*, 477 U.S. 556). It "did so without once inquiring whether the United States could be said to have 'voluntarily c[eased]' its prior practice of categorically refusing to permit former mental patients to purchase firearms." *Id.*

b. Despite that uniform nationwide authority, the district court read *Aladdin's Castle* broadly. It rejected the Fourth Circuit's reasoning in *Valero*—even though this Court *endorsed Valero* in *Fantasy Ranch*, *see* 459 F.3d at 564 (citing *Valero*, 211 F.3d at 116). And it wrongly required Attorney General Paxton to prove that (1) it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," and (2) any "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." ROA.2296 (quoting *Davis*, 440 U.S. at 631). The district court found that the "allegedly wrongful behavior" might recur because Attorney General Paxton appealed from the order granting a preliminary injunction. ROA.2296-98. And it found that the unconstitutional effects of Chapter 2270 had not been eradicated, even though it no longer applied to Plaintiffs, because the statute still applied to other types of business associations not before the court. ROA.2302.

The burden to show that the case continued to present a live controversy should have fallen on Plaintiffs, and they could not possibly meet their burden under *Aladdin's Castle* to avoid mootness here. There has also been no "open[] announce[ment]" that Attorney General Paxton or the Texas Legislature intends to reenact the prior version of Chapter 2270. *Valero*, 211 F.3d at 116. To the contrary, H.B. 793 passed by a vote of 105-0 in the House of Representatives and 28-3 in the Senate. ROA.1352. This broad support for H.B. 793 provides no basis to infer that the Legislature will amend the statute *again* to include sole proprietors in the definition of "companies" subject to Chapter 2270.

And there is no question that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. The district court's reasoning—that "[a]ll [H.B. 793] does is limit [Chapter 2270's] reach to fewer companies," ROA.2303—ignores that H.B. 793 "completely and irrevocably eradicate[s]" the alleged harms to *Plaintiffs*. They are indisputably not subject to Chapter 2270 as it now exists. As a result, they have no ground to press onward with their claims and no basis to invoke federal court jurisdiction.

c. The district court should not have applied voluntary-cessation doctrine in the first place because the change in law that mooted Plaintiffs' claims did not result from the voluntary action of any Defendant. The district court mistakenly viewed the question as one of voluntary cessation in part because it failed to distinguish cases involving statutory amendments, which can only be reversed with approval from the Legislature and the Executive, and cases involving city ordinances and similar rules, which can be reinstated by the defendant alone. *See* ROA.2294 (citing *Cooper v. McBeath*, 11 F.3d 547, 550 (5th Cir. 1994), which involved an allegedly unconstitutional city ordinance). Those distinctions are critical here. The amendment that removed Plaintiffs from the scope of Chapter 2270 was accomplished by the Legislature in a duly enacted statute, but the Plaintiffs sued the Attorney General of Texas, who has no power to reenact the prior version of the law. *See Hall v. Louisiana*, 884 F.3d 546, 553 (5th Cir. 2018) ("In the present case, the appeal was mooted by actions of the Louisiana legislature, which is not a party to this suit. No 'fault' in mooting the appeal is attributable to any of the defendants, even though some of them are officials of the State of Louisiana."). *Aladdin's Castle* is distinguishable on that basis

alone because it was not in dispute that the City of Mesquite had the direct power (and intent) to reinstate the challenged policies, not to mention direct responsibility for changing the challenged policies in an attempt to moot the case on appeal.

d. By implicitly assuming that the Legislature might reenact the former version of Chapter 2270 in its next regular legislative session (which does not commence until January 2021), and thus, that H.B. 793 was somehow a "ruse" to avoid pending litigation, *cf. City of Fort Worth, Tex.*, 33 F. App'x 704, 2002 WL 432606, at *1, the district court also ignored the presumption of good faith that attaches to actions by government officials. As this Court has recognized:

> [W]e are "justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude." Absent evidence to the contrary, we are to presume public-spiritedness, says the Supreme Court. 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) (quoting *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd on other grounds*, 563 U.S. 277 (2011)). That presumption applies even when the change in state policy is made by an official who retains the power to change it back. *See Sossamon*, 560 F.3d at 325 (holding that an affidavit from the Executive Director of the Texas Department of Criminal Justice was sufficient to moot a challenge to prison conditions); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("[T]he mere

power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists."). It applies with even greater force when a state legislature acts.

The court turned that presumption on its head, concluding that the *Legislature* was likely to reenact the allegedly offending provisions merely because the *Attorney General* had taken the obvious course of appealing an erroneous and facially overbroad injunction. There was no evidence in the record that the Legislature acted in bad faith when it passed H.B. 793, or that Attorney General Paxton acted in bad faith in appealing the district court's injunction. Indeed, this Court has already granted a stay, indicating that Attorney General Paxton demonstrated a likelihood of success on the merits. All of this leads to the inescapable conclusion that *Aladdin's Castle* does not control, that the legislative changes to the law reflected in H.B. 793 render this case moot, and that the district court erred in requiring Attorney General Paxton to show that the voluntary cessation doctrine does not apply. For all of these reasons, the Court should hold that the passage of H.B. 793—superseding legislation that eliminates the harms alleged by Plaintiffs—has mooted this litigation.

B. This Court's precedents require vacatur of a preliminary injunction following the loss of subject-matter jurisdiction.

Because Plaintiffs' complaints attack a statutory provision that does not apply to them, their claims for prospective injunctive relief are moot, and the district court lacks subject-matter jurisdiction. *See supra* Part I.A. It follows, as this Court has long held, that the district court's preliminary injunction must be vacated. *See, e.g., Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam).

1. In *Hollon*, this Court reviewed "a preliminary injunction against the enforcement of a high school regulation which bars married students from participating in athletics and certain other extracurricular activities." *Id.* But after the district court entered that injunction, the plaintiff graduated. *Id.* At the moment he graduated, his "interest in th[e] proceeding terminated," rendering the action moot. *Id.*

That mootness, this Court held, required the preliminary injunction to be vacated. *Id.* Quoting long-settled Supreme Court authority, this Court explained that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Id.* (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)).

That holding properly respects the nature of a preliminary injunction, which exists only "to preserve the status quo during litigation to determine the merits of the case for permanent injunction." *Id.* (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560 (5th Cir. 1971)); *see also Texas v. United States*, 809 F.3d 134, 187 n.205 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (preliminary injunction exists to "favor the status quo" and "maintain things in their initial condition . . . until after a full hearing permits final relief to be fashioned"). It follows that when the district court no longer has the power to reach the merits, any preliminary or temporary relief necessarily must be vacated. *See Hollon*, 491 F.2d at 93.

This Court has faithfully applied that principle for decades. *E.g.*, *Moore v. La. Bd. of Elementary and Secondary Educ.*, 743 F.3d 959 (5th Cir. 2014) (vacating district

court's injunction and remanding for dismissal of all claims where intervening decision by state supreme court eliminated the threat of injury to plaintiffs). So, too, has the Supreme Court. *E.g.*, *Hijar v. Burrus*, 474 U.S. 1016 (1985) (ordering vacatur of injunction when cause is moot). *Hollon*'s holding reflects the fundamental rule that when a case becomes moot on appeal, any operative preliminary injunction must be dissolved. *E.g.*, *Sw. Ctr. for Biological Diversity v. Bartel*, 409 F. App'x 143, 145 (9th Cir. 2011) (mem. op.) ("Because the portions of the [regulation] that were the subject of litigation in district court no longer exist, we dismiss the appeal as moot and remand to the district court with instructions to vacate the injunction."); *Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984) (legislative developments mooted case and required the court to "dissolve the remaining injunction").

2. Applied here, *Hollon* requires the Court to vacate the district court's preliminary injunction. As in *Hollon*, Plaintiffs secured a preliminary injunction upon the district court's determination that their claims were likely to succeed on the merits. But those claims are now moot. *See supra* Part I.A. The district court cannot grant any further relief because it lacks subject-matter jurisdiction. *Cf. Texas*, 809 F.3d at 187 n.205 (preliminary relief appropriate only while assessing availability of "final relief"). That makes it this Court's "duty . . . to set aside the decree below and to remand the cause with directions to dismiss." *Hollon*, 491 F.2d at 93 (cleaned up).

3. Finally, Plaintiffs conceded in stay briefing before this Court that vacatur is appropriate due to mootness. In his motion to stay the preliminary injunction, the Attorney General demonstrated that the loss of subject-matter jurisdiction requires

vacatur. Defendant Attorney General Ken Paxton's Opposed Motion to Stay Injunction Pending Appeal and for a Temporary Administrative Stay Pending Consideration of this Motion at 10-12 (May 10, 2019) (citing the same cases discussed above). Plaintiffs' briefing offered no disagreement. In fact, the Pluecker Plaintiffs conceded that the preliminary injunction must be dissolved: "Either the district court will dissolve the preliminary injunction based on the motion currently pending before it, or this Court will on Appeal without reaching the merits of the case." Pluecker Opp. 3; *see also id*. at 4 ("Either the District Court will itself dissolve the preliminary injunction, and indeed the State has filed a motion before the District Court requesting exactly that, or this Court will do so without reaching the merits of the State's appeal."). So, too, did Amawi. *See* Amawi Opp. 3 (adopting Pluecker Plaintiffs' substantive opposition).

It thus was no surprise that Plaintiffs explicitly declined to oppose a stay pending appeal. Their briefing at the stay stage explained that they "take no position as to whether the underlying preliminary injunction order should be stayed due to the passage of H.B. 793 and its subsequent removal of sole proprietors from the No Boycott requirement." Pluecker Opp. 15. That all but concedes that this Court cannot leave the preliminary injunction intact.

II. Chapter 2270 Is Constitutional.

Even if Plaintiffs' claims were not moot, reversal would be appropriate because Plaintiffs did not meet their burden as to *any* preliminary injunction factor. "To be entitled to a preliminary injunction, the applicants must show (1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer

irreparable injury if the injunction is not granted, (3) their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *City of El Cenizo*, 890 F.3d at 176 (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)). The district court misunderstood or misapplied each of those considerations.

A. Plaintiffs are not likely to succeed on the merits because the First Amendment does not protect the right they assert.

Plaintiffs' claims rest on an asserted constitutional right to boycott. *See, e.g.*, ROA.25 (Amawi asserting that "[j]oining voices together to participate in and call for political boycotts is protected association under the First Amendment."); ROA.1677 (Pluecker Plaintiffs contending that "[p]articipation in this boycott is protected expression on a matter of public concern"). As Plaintiffs implicitly recognize, however, boycotts constitute protected speech under the First Amendment only if they qualify as speech in the first place. But participation in a boycott—the act of refusing to purchase disfavored products—does not qualify as speech. And because Chapter 2270 applies only to participation in a boycott, it does not regulate speech and thus does not implicate the First Amendment.

1. The district court's injunction rests on its conclusion that "[b]oycotts are speech." ROA.1264. In reaching that conclusion, it characterized the First Amendment issue as "one of dueling precedents." ROA.1264. But while it is true that Plaintiffs relied on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and the State relied on *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006)

("*FAIR*"), the "dueling precedents" characterization is inaccurate because neither case supports the district court's conclusion. Instead, *FAIR* plainly holds that boycotting conduct must be "inherently expressive" to qualify as protected speech. 547 U.S. at 66. The conduct at issue here—decisions not to purchase certain items, such as Sabra hummus, *see* ROA.93-94, ROA.2058-2059—are not inherently expressive and therefore do not constitute protected First Amendment speech.

In *FAIR*, the Supreme Court held that a group of law schools' decision to exclude military recruiters from their campuses was not protected by the First Amendment because it did not qualify as speech. The law schools challenged the Solomon Amendment, which required them (through the threatened denial of federal funds) to grant the military equal access to their campuses for recruiting purposes. 547 U.S. at 51–55. The schools sought to "restrict[] the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military," but to avoid the loss of federal funds, they argued that their decision to exclude military recruiters was protected by the First Amendment. *Id.* at 51–52. Rejecting the law schools' argument, the Supreme Court explained that "the Solomon Amendment regulate[d] conduct, not speech." *Id.* at 48. After all, the Amendment "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60.

The Court made clear that "First Amendment protection [extends] only to conduct that is inherently expressive." *Id.* at 66. If explanatory speech is needed to explain the "message" of conduct, then by definition, it is not *inherently* expressive. *Id.*

It follows from *FAIR* that the decision not to purchase a particular product or engage in a transaction with a particular person does not constitute speech.

Like the Solomon Amendment challenged in *FAIR*, Chapter 2270 does not regulate speech because it does not require covered businesses to say or refrain from saying anything. Chapter 2270 is limited to conduct; it determines only what covered businesses must *do*—*i.e.*, not boycott Israel—if they wish to contract with the State. Nothing about Plaintiffs' refusal to purchase certain products was inherently expressive. As in *FAIR*, those actions would be expressive only if Plaintiffs "accompanied their conduct with speech explaining it." *Id.* As a district court in Arkansas explained in rejecting a First Amendment challenge to a nearly identical policy against contracting with entities that boycott Israel, "[v]ery few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the *absence* of certain goods from a contractor's office mean that the contractor is engaged in a boycott of Israel." *Ark. Times LP v. Waldrip*, 362 F. Supp. 3d 617, 624 (E.D. Ark. 2019), *appeal filed*, No. 19-1378 (8th Cir. Feb. 25, 2019).

The Supreme Court's decision in *Claiborne*, which the district court concluded is the controlling precedent, merely stands for the proposition that engagement in nonviolent "speech, assembly, association, and petition" in support of a boycott of certain merchants to protest racial discrimination is protected by the First Amendment. *See Claiborne*, 458 U.S. at 911; *Waldrip*, 362 F. Supp. at 625 ("*Claiborne* applies to nonviolent, primary political boycotts to vindicate particular statutory or constitutional interests."). There, a local branch of the NAACP organized a boycott

of white merchants in Claiborne County, Mississippi who refused to meet their demands for racial equality. *See Claiborne*, 458 U.S. at 899–900. A state court found that "the entire boycott was unlawful," *id.* at 895, and held multiple organizations and individuals liable for damages to businesses targeted by the boycott, *id.* at 896.

The Supreme Court held that certain non-violent "elements of the boycott," such as "speeches and nonviolent picketing" and "encourag[ing] others to join in its cause," were "form[s] of speech or conduct that [are] ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* at 907 (footnote omitted); *see also id.* at 909 (explaining that the First Amendment extended to activities such as "peaceful picketing," "a peaceful march and demonstration," "public address," reading "names of boycott violators" aloud at meetings, and publishing the names of violators in a local newspaper). The Supreme Court determined that the First Amendment prevented the State from prohibiting these "nonviolent elements of petitioners' activities" under its power "to regulate economic activity." *Id.* at 914-15. The Court recognized that the boycott also involved unprotected activity; however, it held that the State could not impose civil liability on all boycott participants "merely because [they] belonged to a group, some members of which committed acts of violence." *Id.* at 920; *id.* at 933 ("The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award.").

But *Claiborne* did not address the question whether the First Amendment protects a decision not to purchase certain goods or patronize certain businesses. Nor did the Court consider the question presented here: whether the State itself may

choose not to contract with businesses engaged in a boycott that discriminates based on national origin. *See Waldrip*, 362 F. Supp. 3d at 626 ("*Claiborne* does not hold that individual purchasing decisions are constitutionally protected, nor does it create an unqualified right to engage in political boycotts."); *see also* Order on Motion for Stay Pending Appeal at 6, *Jordahl v. Brnovich*, No. 18-16896 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting), ECF No. 26 (noting that in *Claiborne*, the "Court did not hold that the boycotters' refusal to purchase from white-owned businesses was protected by the First Amendment, or even address the issue. Therefore, *Claiborne*'s reasoning is not applicable to [Plaintiff]'s claim.").

The Supreme Court has held, however, that a union's politically motivated secondary boycott on goods from a particular country does not qualify as protected speech. In *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982), the Court determined that a boycott of Russian goods by the International Longshoremen's Association (ILA) violated the National Labor Relations Act's ban on secondary boycotts. *Id.* at 226–27. The president of the ILA "ordered ILA members to stop handling cargoes arriving from or destined for the Soviet Union" in protest of "the Russian invasion of Afghanistan." *Id.* at 214. In response, longshoremen on "the east and gulf coasts refused to service ships carrying Russian cargoes." *Id.* at 215. This had the effect of placing "a heavy burden on neutral employers" carrying the goods ILA was boycotting. *Id.* at 223. Like Plaintiffs' boycott of Israel and Israeli products, the boycott in *Longshoremen* was "not a labor dispute with a primary employer but a political dispute with a foreign nation." *Id.* at 224.

Most critically for purposes of Plaintiffs' claims, the Court summarily rejected the ILA's First Amendment argument, noting that the Court has "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment." *Id.* at 226.

Likewise, in the context of the Arab boycott of Israel, the Seventh Circuit rejected the argument that companies had a First Amendment right "to answer questions asked by Arab boycott offices pursuant to the Arabs' trade boycott of Israel." *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 916 (7th Cir. 1984). The court noted that the "appellants [we]re free to communicate their views about the relative merits of the Arabs' political decisions"; they simply could not engage in particular conduct, including "furnish[ing] information about businesses relationships with boycotted countries or blacklisted persons in violation of the Act." *Id.* at 917.

FAIR governs here, and the district court erred in holding otherwise. Plaintiffs' individual purchasing decisions are not inherently expressive conduct subject to First Amendment protection. The district court reasoned that *FAIR* does not apply because "the word 'boycott' appears nowhere in the [*FAIR*] opinion," *see* ROA.1265, but the conduct at issue in *FAIR*—*i.e.*, a concerted refusal to deal with the military—was unambiguously boycotting conduct, *see* American Heritage Dictionary 220 (5th ed. 2016) (defining "boycott" as "[t]o abstain from or act together in abstaining from using, buying, dealing with, or participating in"). Indeed, 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 the Respondents at 29, *Rumsfeld v. Forum for Academic*

& Institutional Rights, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347175, at *29. Notably, they cited *Claiborne* four separate times. *Id.* at 17, 29–30. The *FAIR* Court thus was not unaware of *Claiborne*; rather, it found that *Claiborne* was of minimal relevance. *FAIR* is squarely on point, and it should have controlled the district court's analysis.

2. The district court's misinterpretation of *Claiborne* and *FAIR* tainted the remainder of its order granting the preliminary injunction. The Court concluded that Chapter 2270 is impermissible content- and viewpoint-based discrimination, ROA.1270-73, but this ignores that Chapter 2270 governs conduct, not speech, so it cannot constitute content or viewpoint discrimination. Indeed, Plaintiffs remain free to speak about any issue surrounding the Israeli-Palestinian conflict. *See* Order on Motion for Stay Pending Appeal, *Jordahl*, *supra*, at 6 (Ikuta, J., dissenting) (observing that "[Plaintiff] may, of course, engage in meetings, speeches, and picketing about his disagreement with Israel's policies without any interference from Arizona"). Chapter 2270 applies only to economic actions—not the speech associated with those actions. Thus, it does not impermissibly address or target speech.

Nor does Chapter 2270's verification requirement impermissibly compel speech. "Certification requirements for obtaining government benefits, including employment or contracts, that merely elicit information about an applicant generally do not run afoul of the First Amendment." *Waldrip*, 362 F. Supp. 3d at 622. Chapter 2270 merely requires potential contractors to verify that they will not engage in certain conduct. It does not require any business to certify that it "has not engaged, or will not engage, in protected speech activities," *Cole v. Richardson*, 405 U.S. 676, 680

(1972), let alone require contractors "to profess a specific belief," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013).

Chapter 2270's verification requirement is best understood as a nondiscrimination requirement that state contractors must sign before they can obtain the benefit of a state contract. It is undisputed that "[t]he Constitution accords government officials a large measure of freedom" when they are "in the course of contracting for goods and services." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724 (1996). In this sense, Chapter 2270 is analogous to debarment laws, which exclude contractors from the privilege of obtaining government contracts for a certain period. Such laws, for instance, deny state contracts to companies who are found systematically to have refused to hire black or Hispanic workers. The United States has long vigorously exercised its debarment power against contractors on this ground; it will even move to debar companies based on their failure to adhere to or provide an affirmative-action policy.[2] Companies can take controversial positions and use their dollars toward that end; but government, in turn, can decide that it will not subsidize discrimination by contributing its dollars to those companies. Debarment laws, in the end, are not understood to "suppress" a First Amendment right to engage in discriminatory practices or to "coerce" a company to express a viewpoint. They are

[2] Exec. Order No. 11246, §§ 212 & 301, 30 Fed. Reg. 12319, 12323, 12324 (Sept. 24, 1965); 48 C.F.R. § 9.406-2 (vigorously exercised); OFCCP v. Goya de Puerto Rico, Inc., 67 Fed. Reg. 53028-01, Notice of Debarment (Dep't of Labor Aug. 14, 2002); OFCCP v. Pacific Coast Feather Co., 61 Fed. Reg. 56248-01, Notice of Debarment (Dep't of Labor Oct. 31, 1996) (debarment action regarding affirmative action policies).

understood to provide that a company may forfeit state business by engaging in discriminatory practices. If a company can exert its economic leverage to try to injure Israel, Texas can exert a counter-force to try to mitigate that injury.

3. Because Chapter 2270 does not implicate speech or inherently expressive conduct, does not discriminate based on viewpoint, and does not compel speech, it was unnecessary for the district court to evaluate the State's interest in passing Chapter 2270 and balance that interest against the alleged harms to Plaintiffs. But even if the State's interest were at issue, the district court erred in discarding the State's powerful anti-discrimination motive.

Chapter 2270 at most regulates expressive conduct, and thus, if it is subject to any level of review, it is at best subject to intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), not the "stricter form of the *Pickering* test" that the district court applied, ROA.1279-80 (discussing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). *See FAIR*, 547 U.S. at 67. Under intermediate scrutiny, "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (explaining the *O'Brien* test). Chapter 2270 meets and exceeds that standard.

Chapter 2270 serves the compelling state interest of preventing national-origin discrimination among companies seeking the State of Texas's business. The district

court characterized Chapter 2270 as unlike "anti-discrimination statutes prohibit[ing] discrimination based on protected characteristics."[3] ROA.1274. But a boycott of Israel necessarily discriminates on the basis of Israeli national origin. To refuse to do business with individuals and entities on the basis of their nationality is to discriminate on the basis of national origin—by definition. *See, e.g.*, *Athenaeum v. Nat'l Lawyers Guild, Inc.*, No. 653668/16, 2017 WL 1232523, at *5-7 (N.Y. Sup. Ct. Mar. 30, 2017) (holding that blanket refusal to deal "because Plaintiff [wa]s an Israeli corporation" stated viable claim of national-origin discrimination). Israel is overwhelmingly populated by Israelis—*i.e.*, individuals and businesses with Israeli national origin. Boycotts against Israel and Israelis are national-origin discrimination under any reasonable construction of that term, just as blanket refusals to conduct any business with citizens of any other country would be.

That fact suffices to establish Chapter 2270's compelling state interest in preventing invidious discrimination, *see, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628-29 (1984); *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983), and that interest could not be achieved absent the regulation. And because Chapter 2270 is a

[3] In discarding the State's antidiscrimination interest, the district court relied on statements surrounding the passage of Chapter 2270, and even those surrounding this litigation, and concluded in part from those statements that the Legislature intended to "silence speech with which Texas disagrees." ROA.1273. The statements cited by the district court, however, do not demonstrate any nefarious intent, and, in any event, they do not speak to the motivations of the entire Texas Legislature in enacting Chapter 2270. *See O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

valid antidiscrimination measure, it follows that it is viewpoint neutral. *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (noting that "federal and state antidiscrimination laws . . . have previously [been] upheld against constitutional challenge" and that the Court had cited Title VII of the Civil Rights Act of 1964 "as an example of a permissible content-neutral regulation of conduct"). For these reasons, even if the State's interest in passing Chapter 2270 needed to be balanced against any potential restrictions on Plaintiffs' free-speech rights, Chapter 2270 would still survive constitutional scrutiny.

4. Finally, the district court erred in finding Chapter 2270 unconstitutionally vague. A company subject to Chapter 2270 must verify that it does not (a) refuse to deal with, (b) terminate business activities with, or (c) otherwise take "any action" intended to penalize, inflict economic harm on, or limit commercial relations with Israel (or someone doing business with Israel or an Israeli-controlled territory). Tex. Gov't Code § 808.001(1). Plaintiffs did not challenge the first two clauses in section 808.001(1) on vagueness grounds, but did contend that the term "any action" is unconstitutionally vague. ROA.1968-71. The district court should have rejected this argument.

The "any action" clause in section 808.001 could plausibly be read under the *noscitur a sociis* canon (that the meaning of a word may be ascertained from words or phrases associated with it), and thus given a similar meaning as the first two clauses: "refusing to deal" and "terminating business activities"—*i.e.*, also referring to types of economic conduct, not speech. In fact, the district court in Arkansas applied

an identical narrowing construction. *See Waldrip*, 362 F. Supp. 3d at 623 ("While the statute also defines a boycott to include 'other actions that are intended to limit commercial relations with Israel,' Ark. Code Ann. § 25-1-502(1)(A)(i), this restriction does not include criticism of Act 710 or Israel, calls to boycott Israel, or other types of speech. Familiar canons of statutory interpretation, such as constitutional avoidance and *edjusdem generis*, counsel in favor of interpreting 'other actions' to mean commercial conduct similar to the listed items."); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality . . . .").

Likewise, the term "ordinary business purpose," which Plaintiffs objected to on vagueness grounds, could also have been read in a way such that ordinary people would know its meaning: would a company have taken a business action in the absence of any intention not to deal with a company merely because that company is based in Israel or is "doing business in Israel or in an Israeli-controlled territory"? Tex. Gov't Code § 808.001(1); *see United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001). So read, the district court could have addressed the vagueness concerns that Plaintiffs strained to read into the statute.

B. Plaintiffs will suffer no irreparable injury.

To obtain a preliminary injunction, a plaintiff must show not only a substantial likelihood of success on the merits but "that he is likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs did not make this showing. Reversal will not threaten Plaintiffs

with irreparable harm because Chapter 2270 did not violate their constitutional rights in the first place, and the district court was wrong to find otherwise when it granted the preliminary injunction. But as of May 7, 2019, Chapter 2270 does not apply to Plaintiffs at all. *See supra* p. 8. And because Chapter 2270 cannot be enforced against them, reversal of the preliminary injunction cannot harm Plaintiffs in any way. They are not required to sign Chapter 2270's verification today, and they will not be required to do so if the district court's injunction is reversed with instructions that it be dissolved. And at least one Plaintiff, George Hale, has already signed a new contract that does not require verification under Chapter 2270. ROA.1364; ROA.1378. Plaintiffs face no threat of injury, let alone irreparable injury, now that Chapter 2270 does not apply to them.

C. The preliminary injunction irreparably injures the State and adversely affects the public interest.

On the other hand, the severe harm to the State and the public interest tilt heavily in favor of reversal. *City of El Cenizo*, 890 F.3d at 176. Unless the district court's wide-ranging injunction is reversed, the State will be unable to enforce nondiscrimination provisions in thousands of contracts. That demonstrates irreparable injury because "the inability to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (recognizing that when a State is enjoined from enforcing a statute, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws" (citing *Maryland v. King*, 567 U.S.

1301 (2012) (Roberts, C.J., in chambers))); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

The threat of irreparable harm to Defendants continues, even though Chapter 2270 as amended no longer applies to Plaintiffs, because both the statute and the preliminary injunction reach far beyond the parties to this case. Chapter 2270 continues to apply to any business entity with 10 or more employees. And the district court did not tailor its injunction to the individual Plaintiffs, or even to sole proprietors. Instead, it broadly enjoined enforcement of Chapter 2270 "or any 'No Boycott of Israel' clause in any state contract." ROA.1297. The district court's comprehensive injunction thus threatens irreparable injury to Defendants because it thwarts the State's clear policy against providing financial support to entities that boycott Israel.

"Because the State is the appealing party, its interest and harm merge with that of the public." *Veasey*, 870 F.3d at 391 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Therefore, for the reasons set out above, the public interest strongly favors reversal.

D. The injunction is vastly overbroad.

Even if the district court's First Amendment analysis were correct, its injunction—reaching all state contracts regardless of their effect on Plaintiffs—is impermissibly overbroad. The Supreme Court has explained that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (emphasis added). At a minimum, the district court was required to provide at least some explanation why an injunction limited to the five plaintiffs here would not provide

"complete relief" *to Plaintiffs*. But the district court did not do so, instead dismissing the State's argument that Plaintiffs' claims were as-applied rather than facial challenges in a brief footnote. ROA.1263. Nor did the district court address other questions in its injunction order—such as severability—that are required in constitutional challenges to legislation. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" (citation omitted, alteration in original)). Because the district court's expansive preliminary injunction reaches far beyond the injuries alleged by Plaintiffs, it is an abuse of discretion, and it could not stand even if Plaintiffs had met their burden on the relevant preliminary injunction factors.

III. The Boards of Regents Are Entitled to Dismissal Because They Are Immune from Suit.

The district court erred in granting injunctive relief against the Board of Regents of the University of Houston System and the Board of Regents of the Texas A&M University System, *see* ROA.1297, because both Boards are improper parties to this lawsuit. The Complaint and surrounding evidence make clear that Plaintiffs John Pluecker and George Hale were contracting, or attempting to contract, with the University of Houston and Texas A&M University-Commerce, respectively, rather than with the University of Houston System or Texas A&M System. *See* ROA.2105-13 (drafts of contracts between the University of Houston and John Pluecker); ROA.2084-95 (contract between Texas A&M University-Commerce and George

Hale). But the University of Houston is a different entity from the Board of Regents of the University of Houston System,[4] and Texas A&M University-Commerce is a statutorily distinct entity from the Board of Regents of the Texas A&M University System.[5] As a result, Plaintiffs sued two state entities that were not parties to any of the contracts that Plaintiffs raise in their complaint.

Even if the Boards were proper parties, Plaintiffs' claims against them should have been dismissed because both have immunity from suit. The district court concluded that the board members had been named in their individual capacities, but any fair reading of the complaint made clear the Boards themselves had been sued. *See* ROA.1656 (asserting that Pluecker Plaintiffs are suing "[t]he Board of Regents [of the University of Houston System] . . . in its official capacity."); ROA.1657 (suing

---

[4] The University of Houston System was established by section 111.20 of the Texas Education Code, whereas the University of Houston was established by section 111.01. The University of Houston is defined as "a coeducational institution of higher education located in the city of Houston on state properties hereby designated University of Houston." Tex. Educ. Code § 111.01. The University of Houston System, on the other hand, is "composed of all those institutions and entities presently under the governance, control, jurisdiction, and management of the Board of Regents of the University of Houston." *Id.* § 111.20(a).

[5] The Texas A&M University (TAMU) System was created and is governed by the Texas Education Code, which defines it as an "[o]ther agency of higher education." *See* Tex. Educ. Code § 61.003(6) (expressly naming TAMU System, as well as other, large university systems). The Texas Education Code further defines "University system" as "the association of one or more public senior colleges or universities . . . under the policy direction of a single governing board." *See id.* § 61.003(10). Distinguishing a university system from a university within that system, the Education Code expressly names Texas A&M University-Commerce as a "[g]eneral academic teaching institution." *See id.* § 61.003(3).

"[t]he Board of Regents [of Texas A&M System] . . . in its official capacity."). As such, the Boards were entitled to sovereign immunity as arms of the State, and all claims against them should have been dismissed. *See Olivier v. Univ. of Tex. Sys.*, 988 F.2d 1209, 1993 WL 81990, at *1 (5th Cir. 1993) (unpublished table decision); *see also United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 556–61 (5th Cir. 1982) (concluding that the Board of Regents of Stephen F. Austin State University is an arm of the State and noting that the board members are appointed by the Governor with consent of the Senate); *Slade v. Tex. S. Univ. Bd. of Regents*, 232 S.W.3d 395, 398 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("As an arm of the State, Texas Southern's Board of Regents is entitled to sovereign immunity.").

Conclusion

The preliminary injunction should be vacated, and this matter should be remanded with instructions that the case be dismissed.

Respectfully submitted.

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
kyle.hawkins@oag.texas.gov

Matthew H. Frederick
Deputy Solicitor General

Michael R. Abrams
Assistant Attorney General

Counsel for State Defendants-Appellants Ken Paxton, Board of Regents of the University of Houston System, and the Board of Regents of the Texas A&M University System

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Certificate of Compliance

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,665 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Service

On August 30, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins