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 OF APPELLANTS TRUSTEES OF THE KLEIN INDEPENDENT SCHOOL DISTRICT AND TRUSTEES OF THE LEWISVILLE INDEPENDENT SCHOOL DISTRICT

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CERTIFICATE OF INTERESTED PERSONS

BAHIA AMAWI,
Plaintiff- Appellee,

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

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Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, Appellants, as governmental parties, need not furnish a certificate of interested parties.

/s/ Thomas P. Brandt
THOMAS P. BRANDT
Counsel of Record for Defendants-Appellants Trustees of the Lewisville Independent School District and the Trustees of the Klein Independent School District

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants Trustees of the Lewisville Independent School District ("Lewisville ISD") and Trustees of the Klein Independent School District ("Klein ISD") (collectively the "School Districts") request that this case be set for oral argument because they believe that oral argument could significantly aid the decisional process in this case.

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JURISDICTIONAL STATEMENT

Zachary Abdelhadi ("Abdelhadi") is the only Plaintiff-Appellee suing Lewisville ISD. Obinna Dennar ("Dennar") is the only Plaintiff-Appellee suing Klein ISD.

Abdelhadi and Dennar lack standing to assert claims against the School Districts.

This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1292(a)(1) because the School Districts are appealing the district court's order of April 25, 2019 which, *inter alia*, granted Plaintiffs' motion for a preliminary injunction. ROA.1242-1297, 1316-1317.

The School Districts timely appealed pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) by filing their notice of appeal within 30 days of the district court's April 25, 2019 order. ROA.1242-1297, 1316-1317.

ISSUES PRESENTED

Dennar and Abdelhadi claim that Texas Government Code Chapter 2270 (the "Act"), as originally enacted, violated their rights under the First Amendment's Free Speech Clause. ROA.1652-1680. The Act withdrew from the School Districts the authority to enter into any contract for goods or services unless that contract contained a certification that the contractor did not boycott Israel, as defined in the statute. ROA.1657 [¶23] (citing TEX. GOV'T CODE §2270.002). Dennar and Abdelhadi claim that, because they are sole proprietors who make private purchasing decisions based on a company's alleged support of Israel or Israeli entities, the Act proscribed them from entering into contracts with the School Districts to judge student debate tournaments.

Issue 1: Whether Dennar and Abdelhadi's claims against the School Districts should be dismissed for lack of jurisdiction because:

(1) Appellees' claims are moot because the Act has been amended such that it does not apply to sole proprietorships;

(2) Dennar and Abdelhadi lack standing to pursue injunctive relief against the School Districts because they cannot show a real and immediate threat of repeated injury; and

(3) Dennar and Abdelhadi never had standing to assert their claims against the School Districts because the Act's certification

requirement is not fairly traceable to any action by the School Districts' Trustees.

Issue 2: Whether this Court should vacate the district court's order granting a preliminary injunction against the School Districts because:

(1) Dennar and Abdelhadi's claims were mooted exclusively through the actions of third parties;

(2) Dennar and Abdelhadi never had standing to assert claims against the School Districts;

(3) the district court failed to apply mandatory authority;

(4) failing to vacate the order would impermissibly prejudice the School Districts by retaining an erroneous opinion that the School Districts might not be able to appeal on the merits; and

(5) the injunction was overbroad.

Issue 3: Whether the district court erred[1] in granting a preliminary injunction against the School Districts because:

(1) the district court did not find that Appellees clearly demonstrated a substantial likelihood of success on the merits of their claims against the School Districts;

[1] Because the district court analyzed Appellees' motion for a preliminary injunction only as a facial challenge to the constitutionality of the Act (as originally enacted), the district court's preliminary injunction analysis is subject to *de novo* review. *Infra* at 46 and n. 24.

(2) Dennar and Abdelhadi failed to plead or provide evidence of any policy, custom, or practice of the Trustees of either School District that was the moving force behind any constitutional violation;

(3) neither Dennar nor Abdelhadi engaged in expressive conduct protected by the First Amendment;

(4) the district court did not find that Appellees clearly demonstrated that their threatened injury outweighs the threatened harm to the School Districts;

(5) neither Dennar nor Abdelhadi clearly demonstrated a substantial threat that they would suffer irreparable injury if an injunction against the School Districts was not granted; and

(6) neither Dennar nor Abdelhadi clearly demonstrated that granting a preliminary injunction against the School Districts would not disserve the public interest.

STATEMENT OF THE CASE

I. THE ORIGINAL ACT

In April of 2017, the Texas Legislature enacted HB 89, codified at TEX. GOV'T CODE §§808.001 *et seq*. and §§2270.001 *et seq*. (the "Act"). ROA.1657 [¶23]. The Act withdrew authority from the School Districts to enter into a contract with any company for goods or services unless the contract contained a written verification from the company that it does not boycott Israel and will not boycott Israel during the term of the contract. ROA.1657 [¶23]. (*citing* TEX. GOV'T CODE §2270.002). The Act defined the term "company" to include sole proprietorships. ROA.1657-58 [¶23].

Before the Legislature imposed these requirements, the School Districts had never required any employee or independent contractor to provide a certification concerning activities which constitute a boycott of Israel, and they had never even considered requiring such a certification. ROA.1121-22 [B. Champion Decl., ¶¶10-13]; ROA.1198 [K. Rogers Aff. ¶¶10-13].

II. DENNAR'S ALLEGATIONS CONCERNING THE ACT AND KLEIN ISD

Dennar is a graduate student who has allegedly judged high school debate tournaments on a contract basis with public school districts since 2015. ROA.1663 [¶50]. He claims that he has judged tournaments at Klein ISD. ROA.1664 [¶50]. He identifies himself as a sole proprietor. ROA.1654 [¶7].

Dennar alleges that he boycotts consumer products offered by certain businesses, such as L'Oreal and Sabra, due to his perception of the businesses' support for, or benefit to, Israel. ROA.1664 [¶52].

Dennar alleges that in 2017, he was approved by Klein High School's debate coordinator to judge a debate tournament, and that he judged this debate tournament. ROA.1665 [¶53]. Dennar further alleges that, after judging the tournament, somebody from Klein ISD provided him with an Independent Contractor Agreement, which included a form that contained "the certification language required by the Act." ROA.1665 [¶54]. Dennar contends that he "was required to sign the boycott form in order to be paid." ROA.1665 [¶54]. Believing that he was engaged in a boycott of Israel, Dennar refused to sign the form. ROA.1665 [¶55]. Dennar never submitted any of the contract documents to Klein ISD to obtain payment for his work judging the 2017 debate tournament at Klein High School. ROA.1665 [¶55].[2]

Dennar did not allege that he made any further attempt to judge debate tournaments at Klein ISD, nor did he allege that Klein ISD ever refused to permit him to judge any debate tournament. ROA.1665-66 [¶¶53-57]. Dennar blamed his

[2] In this lawsuit, Dennar does not seek payment from Klein ISD for his work judging the 2017 debate tournament at Klein High School. Dennar only seeks injunctive relief against Klein ISD to stop it from complying with a law that no longer applies to him. ROA.1652-1679.

inability to judge high school debate tournaments on the Act's certification requirement. ROA.1666 [¶¶57-58].

III. ABDELHADI'S ALLEGATIONS CONCERNING THE ACT AND LEWISVILLE ISD

Abdelhadi is a college student who claims that he looked forward to judging debate tournaments for Lewisville ISD. ROA.1667 [¶66]. He identifies himself as a sole proprietor. ROA.1654 [¶7].

Abdelhadi alleges that he boycotts consumer products offered by certain businesses due to his perception of the businesses' support for Israel's occupation of the Palestinian territories. ROA.1668 [¶68]. Specifically, Abdelhadi avoids using VRBO because it lists vacation rentals in Israeli settlements, and he avoids purchasing PepsiCo, Strauss Group, and HP products because of their purported affiliation with the IDF. ROA.1668 [¶68].

Abdelhadi claims that his former debate teacher offered him a chance to judge debate tournaments, and that he expressed a desire to do so. ROA.1668-69 [¶69]; ROA.2016 [Abdelhadi Aff. ¶9]. Abdelhadi claims that his former debate teacher sent him contract documents from Lewisville ISD which included a certification concerning boycotting Israel. ROA.1669 [¶70]; ROA.2016 [Abdelhadi Aff. ¶10]; ROA.2026. This document quoted portions of TEX. GOV'T CODE §2270.001, included the statement "My company does not and will not boycott Israel," and provided an option to check "Agree" or "Do Not Agree." ROA.2026.

Abdelhadi refused to check the "Do Not Agree" option and refused to sign the form. He did not submit the contract documents to Lewisville ISD. ROA.1669 [¶¶72-73]; ROA.2016 [Abdelhadi Aff. ¶12]. Abdelhadi blamed his inability to judge public high school debate tournaments on the Act's certification requirement. ROA.1669 [¶74].

IV. DENNAR AND ABDELHADI SUE THE SCHOOL DISTRICTS.

It is undisputed that: (1) the Texas Legislature had withdrawn the School Districts' authority to enter into contracts unless they contained a No Boycott of Israel certification;[3] (2) Dennar *was* permitted to serve as a debate judge at Klein ISD;[4] and (3) Dennar and Abdelhadi blamed their inability to judge debate tournaments on *the Act's* certification requirement.[5] Nevertheless, Dennar and Abdelhadi sued the Trustees of Klein ISD and Lewisville ISD. ROA.1652-1680.

Dennar and Abdelhadi brought claims pursuant to 42 U.S.C. §1983, asserting violations of their constitutional rights. ROA.1676-78 [¶¶102-111]. They sought injunctive relief against the School Districts. ROA.1678-79 [¶¶B, C].[6]

V. THE DISTRICT COURT IMPOSES A PRELIMINARY INJUNCTION.

On January 7, 2019, Dennar and Abdelhadi filed their Motion for

[3] *Supra* at 17.
[4] *Supra* at 18.
[5] *Supra* at 18-20.
[6] On January 15, 2019, the district court consolidated Dennar and Abdelhadi's lawsuit with a previously filed lawsuit of Appellee Amawi. ROA.2120-21.

Preliminary Injunction. ROA.1929-2118. On February 1, 2019, the School Districts filed their Motions to Dismiss,[7] and also filed responses to Dennar and Abdelhadi's Motion for Preliminary Injunction.[8]

On March 20, 2019, in the hope of preserving the Court's and the parties' limited resources, the School Districts notified the district court of then-pending legislation (H.B. 793 and S.B. 491) in the Texas Legislature which would moot this case. ROA.864-996. The School Districts suggested that the district court impose a brief stay, pending expiration of the legislative session, in order to determine whether the Legislature would take action that would moot the case. ROA.864-996. On March 26, 2019, the district court denied this motion. ROA.1080-1081.

On March 29, 2019, the district court held a hearing on the Plaintiffs' Motions for Preliminary Injunction and Defendants' Motions to Dismiss. ROA.810-811, 1082, 1472-1557.

On April 25, 2019, the district court entered an order granting the Motions for Preliminary Injunction and denying the Motions to Dismiss. ROA.1242-1297.

On May 2, 2019, the School Districts filed their Notice of Appeal, appealing

[7] ROA.513-563.

[8] ROA.569-727. Although the district court originally denied the School Districts' motions for extension of time and, subsequently, for leave to file their responses to the Motion for Preliminary Injunction [*see* ROA.494-495, 763-764; *see also* ROA.776-780, 808-809], the district court, without objection, agreed to take the responses into consideration in deciding the Motion for Preliminary Injunction. ROA.1555, line 24-ROA.1556, line 2; ROA.1084-1239.

the district court's April 25, 2019 order. ROA.1316-1317.

VI. THE TEXAS LEGISLATURE AND THE GOVERNOR AMEND THE ACT.

On May 7, 2019, Governor Abbott signed HB 793 into law, which amended the Act to provide, among other things, that regulated companies under the Act "do[] not include a sole proprietorship." ROA.1426-1432.[9] The amended Act only applies to business entities, other than sole proprietorships, with ten or more full-time employees and with a value of $100,000 or more. ROA.1428-1429.

Pursuant to their board-adopted policies, the School Districts immediately complied with the Legislature's amendments to the Act. ROA.1020 [Policy BF(LOCAL): "Newly enacted law is applicable when effective."]; ROA.1047 [same].

SUMMARY OF THE ARGUMENT

The School Districts' Trustees should never have been parties to this lawsuit. Appellees' concerns arise solely from decisions made by the Texas Legislature over which the School Districts had no control: the Legislature enacted a presumptively constitutional statute which removed the School Districts' authority to enter into certain contracts unless they contained a specific provision. The Trustees have never even considered requiring such a provision in their contracts. Nevertheless, Dennar and Abdelhadi sued the School Districts under

[9] *See also* https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2270.v2.htm; https://capitol.texas.gov/tlodocs/86R/billtext/html/HB00793F.HTM.

Section 1983, claiming that the Legislature's Act is unconstitutional. Dennar and Adbelhadi never had standing to assert claims against the School Districts' Trustees, and they were not entitled to receive the extraordinary remedy of a preliminary injunction against the Trustees. This Court should dismiss the claims against the School Districts and vacate the preliminary injunction order.

This case has become moot because the Legislature amended the Act such that it no longer applies to sole proprietors, like Dennar and Abdelhadi. Because Appellees are no longer subject to the State's No Boycott of Israel certification requirement, they lack standing to pursue their claims, as they do not present the Court with any case or controversy. The courts lack subject matter jurisdiction over Dennar and Abdelhadi's claims and their lawsuit should be dismissed. Additionally, since the Act's certification does not apply to them, Dennar and Abdelhadi lack standing to pursue injunctive relief because they cannot demonstrate a real and immediate threat of repeated injury.

Furthermore, Dennar and Abdelhadi always lacked standing to assert claims against the School Districts because their alleged injuries are not fairly traceable to any action of the School Districts' Trustees, but were the result of the independent action of a third party, the Texas Legislature. In fact, Dennar and Abdelhadi blame their alleged injuries on the Act. Appellees' reliance on alleged School District

policies fails because these "policies" are also the result of the independent action of third parties, and not of any action by the School Districts' Trustees.

The Court should vacate the preliminary injunction order against the School Districts because: (1) Dennar and Abdelhadi's claims became moot through no action of the School Districts; (2) Appellees always lacked standing to assert their claims against the School Districts; (3) if the Court were to dismiss this case based on standing grounds, but fail to vacate the district court's order, the School Districts would be unfairly prejudiced by, through no fault of their own, being unable to appeal the merits of the district court's erroneous order; and (4) the district court misapplied binding precedent concerning municipal liability standards and protected expressive conduct under the First Amendment. Additionally, the Court must vacate the preliminary injunction because it is overbroad.

Alternatively, this Court should reverse and vacate the preliminary injunction against the School Districts because: (1) the district court did not find that Dennar and Abdelhadi clearly demonstrated a substantial likelihood of success on the merits of their claims against the School Districts; (2) Appellees failed to plead and provide evidence of any policy, custom, or practice of the Trustees of either School District that was the moving force behind any alleged deprivation of constitutional rights; (3) Dennar and Abdelhadi's private consumer purchase

decisions are not expressive activity protected under the First Amendment; (4) the district court misapplied binding precedent; (5) the district court erred in holding that Appellees would suffer irreparable harm without an injunction against the School Districts; (6) the district court did not find that Appellees clearly demonstrated that their threatened injury outweighed the threatened harm to the School Districts; and (7) a preliminary injunction against the School Districts disserves the public interest.

ARGUMENT

I. THE STANDARD OF REVIEW FOR JURISDICTIONAL ISSUES.

This Court's standard of review for jurisdictional issues is *de novo*. *Family Rehabilitation, Inc. v. Azar*, 886 F.3d 496, 500 (5th Cir. 2018). "The proponent of jurisdiction has the burden of establishing it." *Id*.

II. DENNAR AND ABDELHADI'S CLAIMS ARE MOOT, THE DISTRICT COURT NEVER HAD JURISDICTION, AND THIS COURT SHOULD VACATE THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER.

A. STANDING IS CONSTITUTIONALLY REQUIRED THROUGHOUT A LAWSUIT.

The Constitution limits the jurisdiction of federal courts to "Cases" or "Controversies," and, therefore, courts require litigants to show a "personal stake" in the lawsuit. *Camreta v. Greene*, 563 U.S. 692, 701 (2011). "The core component of standing is an essential and unchanging part of the case-or-

controversy requirement of Article III" of the Constitution. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

There must be a case-or-controversy throughout the entirety of the legal proceedings, not just at its inception. *Camreta*, 563 U.S. at 701. Any change that eliminates the actual controversy after the commencement of a lawsuit renders the action moot. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 527 (5th Cir. 2008); *Ctr. for Indivual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006).

"A controversy is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation." *U.S. v. Lares–Meraz*, 452 F.3d 352, 354–55 (5th Cir. 2006). "A moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Id*.

B. LEGISLATIVE CHANGES TO STATUTES MOOT CASES.

"[S]tatutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact that statute after the lawsuit is dismissed." *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006); *see also, e.g.*, *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("Suits regarding the constitutionality of statutes become moot once the statute is repealed."); *Habetz v. Louisiana High Sch. Athletic Ass'n*,

842 F.2d 136, 137 (5th Cir. 1988) (vacating the district court's judgment and remanding for dismissal because the defendant had mooted the controversy by amending its bylaws to remove the provision at issue in the lawsuit); *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 496 (5th Cir. 1986) (claim for declaratory relief against a state bar rule became moot when the state bar amended the rule); *Barnes v. Pierce*, 338 Fed. App'x 373, 376 (5th Cir. 2009) (finding a prisoner's claims moot, vacating the district court's judgment, and remanding for dismissal because, during the pendency of the appeal, the Texas Department of Criminal Justice adopted an amended policy which addressed the matter at issue); *Reynolds v. New Orleans City*, 272 Fed. App'x 331, 339 (5th Cir. 2008) (facial challenge to a statute became moot when the statute was repealed).

C. By Amending the Act, the Legislature Mooted Dennar and Abdelhadi's Claims Against the School Districts.

Dennar and Abdelhadi seek injunctive relief against the School Districts based on the provisions of HB 89, as originally enacted by the Legislature in 2017, and codified at Tex. Gov't Code §§ 808.001 *et seq*. and §§2270.001 *et seq*. ROA.1929; ROA.1652 [¶2]; ROA.1678-79 [¶¶B, C].

1. The Amended Act Does Not Apply to Appellees.

On May 7, 2019, Governor Abbott signed into law an amended version of the Act. ROA.1426-32; *see also supra* at 22, n. 9. The Legislature amended the Act to provide that regulated companies under the Act "do[] not include a sole

proprietorship." ROA.1428. The amended Act only applies to business entities, other than sole proprietorships, with ten or more full-time employees and with a value of $100,000 or more. ROA.1428-29.

Appellees identify themselves as sole proprietors. ROA.1654 [¶7]. The amended Act's no-boycott of Israel certification provision does not apply to them. Because the Act explicitly does not apply to them, Dennar and Abdelhadi's claims are moot. Therefore, the Court lacks subject matter jurisdiction over their claims against the School Districts, and the Court must dismiss this action.

2. Dennar and Abdelhadi Face No Real and Immediate Threat of Harm.

In light of the Legislature's amendment of the Act, Appellees lack standing to pursue injunctive relief against the School Districts because they face no real and immediate threat of harm.

In order to establish standing to seek injunctive relief, plaintiffs must show that "there is a real and immediate threat of repeated injury." *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018), *as revised* (Feb. 1, 2018) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Past injury alone is insufficient to create standing; instead, plaintiffs must show a real and immediate threat that they will be wronged again. *Id.*; *see also Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) ("'Past exposure to illegal conduct does not in itself

show a present case or controversy regarding injunctive relief.'") (quoting *In re Stewart*, 647 F.3d 553, 557 (5th Cir. 2011)).

The School Districts do not have, and have never had, policies, customs, or practices prohibiting contracts with sole proprietors based on whether they boycott Israel. ROA.1121-22 [B. Champion Decl., ¶¶10-13]; ROA.1198 [K. Rogers Aff., ¶¶10-13].[10] In fact, "[i]f not for the state law being challenged in this lawsuit [the School Districts] would not independently require [their] contractors to make any certifications with respect to boycotting (or not) Israel or any other nation." ROA.1122 [B. Champion Decl., ¶13]; ROA.1198 [K. Rogers Aff., ¶13].

Pursuant to the School District's board-adopted policies, as of the moment on May 7, 2019, that Governor Abbott affixed his signature to HB 793 amending the Act, the School Districts were no longer bound by the certification provisions of the Act to which Appellees objected. ROA.1020 [Policy BF (LOCAL) "Newly enacted law is applicable when effective."]; ROA.1047 [same].

Because the Legislature amended the Act such that it no longer applies to sole proprietors, Dennar and Abdelhadi cannot show a real and immediate threat of repeated injury from the Act. Additionally, Appellees cannot show a real and immediate threat of repeated injury based on any policy, custom, or practice of the

[10] The "Act" referenced in these documents is the original Act, prior to its amendment on May 7, 2019.

School Districts barring sole proprietors from contracting with them based on whether they boycott Israel, because no such policy, custom, or practice exists.[11]

For these reasons, Dennar and Abdelhadi lack standing to seek injunctive relief against the School Districts. As Appellees' only claims against the School Districts are for injunctive relief, the Court should dismiss their claims against the School Districts for lack of standing. ROA.1678-79.

D. DENNAR AND ABDELHADI NEVER HAD STANDING TO ASSERT CLAIMS AGAINST THE SCHOOL DISTRICTS.

At all stages of this litigation Dennar and Abdelhadi lacked standing to assert their claims against the School Districts. Because they object to the requirements of the Act, and not to any action which is fairly traceable to the School Districts' Trustees, Appellees never had standing to pursue claims against the School Districts. Consequently, the district court never had jurisdiction over Appellees' claims against the School Districts.

1. The Elements of Constitutional Standing

The Constitution limits the jurisdiction of federal courts to cases or controversies. *Camreta,* 563 U.S. at 701. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. The "irreducible constitutional minimum of standing contains three elements." *Id*. "First, the plaintiff must have suffered an injury in

[11] Appellees also lack standing to file a claim against the School Districts based on a general disagreement with the content of the amended Act. *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* "Second, there must be a causal connection between the injury and the conduct complained of" such that the alleged injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party. *Id.* Additionally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (citations omitted).

Although various court-imposed, prudential requirements of standing may be relaxed in the First Amendment context, plaintiffs "still must show that they satisfy the core Article III requirements of injury, causation, and redressability." *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018), *as revised* (Aug. 9, 2018). A plaintiff must demonstrate standing separately for each form of relief sought. *Gilbert v. Donahoe*, 751 F.3d 303, 313 (5th Cir. 2014) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Additionally, at the preliminary injunction stage, plaintiffs must make a clear showing that they have standing. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

2. The Act is the Result of Independent Action by the Legislature.

Dennar and Abdelhadi always lacked standing to pursue injunctive relief against the School Districts because they did not meet the second *Lujan* standing element. Appellees did not clearly show that their alleged constitutional injuries

are fairly traceable to any action by the Trustees of the School Districts. *Lujan*, 504 U.S. at 560; *see also, e.g., Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 333 (5th Cir. 2002); *Barber*, 860 F.3d at 352. To the contrary, Dennar and Abdelhadi explicitly blamed *the Act*, not the Trustees, for their alleged injuries. ROA.1666-67 [¶¶58-63]; ROA.1669-70 [¶¶74-77]; ROA.1677-78 [¶¶107-111].

The Act's certification requirement is not fairly traceable to any action by the School Districts' Trustees; instead, it was the result of independent action of a third party, the Legislature. ROA.1657 [¶23 (citing TEX. GOV'T CODE §2270.002)]. By passing the Act, the Legislature withdrew from the School Districts the authority to enter into any contract for goods or services unless that contract contained a certification that the contractor did not boycott Israel. ROA.1657 [¶23].[12] In fact, Dennar and Abdelhadi acknowledge that: (1) before the Texas Legislature enacted this legislation, the School Districts did not require contractors to make any certifications concerning boycotting Israel; and (2) but for the Act, the School Districts "would not be put in the position of requiring their

[12] Citing TEX. GOV'T CODE §2270.002, "**PROVISION REQUIRED IN CONTRACT**. 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." (emphasis added).

contractors to choose a particular political stance as a condition to doing business." ROA.1659 [¶28].[13]

Because the Act's certification requirement is not fairly traceable to any action of the School Districts' Trustees, Dennar and Abdelhadi did not establish the causation element necessary to demonstrate constitutional standing for their claims against the School Districts. *Lujan*, 504 U.S. at 560. Therefore, the district court lacked jurisdiction to impose a preliminary injunction against the School Districts. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (the court exceeded its authority in adjudicating procedures concerning an issue which the plaintiffs lacked standing to pursue). The Court should reverse and vacate the preliminary injunction order and dismiss the claims against the School Districts.

3. The (LEGAL) "Policies" Are the Result of Independent Action By Third Parties.

Additionally, because Appellees assert claims for municipal liability against the School Districts under Section 1983, they needed to demonstrate that an official policy, custom, or practice of the School Districts' Trustees was the "moving force" which caused a violation of constitutional rights. ROA. 1676-78 [¶¶102-111]; *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. Dep't of Social Sciences*, 436 U.S. 658, 694 (1978) and noting that "the unconstitutional conduct must be directly attributable to the

[13] *See also* ROA.1122 [B. Champion Decl., ¶¶12-13]; ROA.1198 [K. Rogers Aff., ¶¶12-13].

municipality"); *Carmichael v. Galbraith*, 574 Fed. App'x 286, 291 (5th Cir. 2014) (a school district may only be held liable under §1983 for its own policies and customs).[14]

Dennar and Abdelhadi incorrectly argued that "the requirement that company contactors [sic] sign the certificate concerning Israel *is* an officially promulgated policy of Defendants." ROA.754 (emphasis in original). They relied on provisions in the School Districts' policy manuals which bear the designation "CH (LEGAL)" and state:

> Required Contract Provision
>
> A district may not enter into a contract with a company for goods and services unless the contract contains a written verification from the company that it does not boycott Israel and will not during the term of the contract. Gov't Code 2270.002.

ROA.755.

However, Appellees disregarded the distinctions between provisions with the "(LEGAL)" designation and policies which bear the "(LOCAL)" designation. Provisions with the (LEGAL) designation, like CH (LEGAL), are *not* adopted by

[14] *See also Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) ("recovery from a municipality is limited to acts…which the municipality has officially sanctioned or ordered"); *id.* at 483 ("municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"); *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (a local government may be liable under §1983 only "if *the governmental body itself* subjects a person to a deprivation of rights.") (emphasis added, citations omitted); *Rodriguez v. City of Houston*, 651 Fed. App'x 282, 284 (5th Cir. 2016) ("A municipality is only liable under § 1983 for its own acts.").

the School Districts' Trustees. ROA.1017; ROA.1044.[15] Policy BF (LOCAL) explains that provisions with the (LEGAL) designation

> contain provisions from federal and state statutes and regulations, case law, and other legal authority that together form the framework for local decision making and implementation. These policies are binding on the District until the cited provisions are repealed, revised, or superseded by legislative, regulatory, or judicial action.

ROA.1020; ROA.1047.[16]

Thus, although they are included on the School Districts' websites under the label of "Board Policies," the (LEGAL) "policies" contain only a description of the law in a given area, as that law has been enacted by federal and state statutes and regulations or as that law has been developed in the courts. These "policies" are not adopted by the School Districts, and they do not reflect choices made by the School Districts' Trustees. To the contrary, the School Districts are themselves bound by the statements of law enacted or developed by legislatures or courts, and the Trustees are powerless to modify the content of the (LEGAL) provisions. ROA.1121 [B. Champion Decl., ¶¶7, 9]; ROA.1197 [K. Rogers Aff. ¶¶7, 9].

[15] Provision A18 (LEGAL) explains: "Please note that (LEGAL) policies are NOT adopted by the Board. These documents are snapshots of often rapidly evolving law and are intended to inform decision makers and others of the legal context. Some lag will occur between the enactment of new law and its reflection in the manual. Current law will supersede any out-of-date (LEGAL) policy, in accordance with BF (LOCAL) in this manual."

[16] *See also* ROA.1015 and ROA.1042, stating, "The legally referenced '(LEGAL)' policies track the language of the U.S. and Texas Constitutions; federal and state statutes…attorney general opinions, the Texas Administrative Code…and other sources of authority defining the legal context for local school district governance and management."

Because the provisions with the (LEGAL) designation are not adopted by the School Districts and do not reflect choices made by the Trustees, even though they are labeled "policies," they do not constitute policies of the School Districts as that term is used in Section 1983 case law. *Pembaur*, 475 U.S. at 483 (no municipal liability unless the municipal policymaker makes a deliberate choice from among various alternatives); *see also id*. at 479; *Rodriguez*, 651 Fed. App'x at 284 ("A municipality is only liable under § 1983 for its own acts."). Dennar and Abdelhadi's reliance on CH (LEGAL) is misplaced, as this provision is merely a statement of the law which was enacted by the Legislature, not a policy adopted by the School Districts' Trustees.[17]

Dennar and Abdelhadi seek to hold the Trustees liable for conduct which they do not control, based on decisions made by another entity. Section 1983 does not authorize liability on this basis. *Pembaur*, 475 U.S. at 479, 483; *Rodriguez*, 651 Fed. App'x at 284. Because CH (LEGAL) is not fairly traceable to any action of the School Districts' Trustees, Appellees' reliance on this provision is unavailing.

[17] Only policies with the (LOCAL) designation are voted on and adopted by the School Districts' Trustees. ROA.1020 [Policy BF (LOCAL), "Adoption and Amendment"]; ROA.1047 [same]; ROA.1121 [B. Champion Decl., ¶5]; ROA.1197 [K. Rogers Aff., ¶5]. The School Districts have never had any (LOCAL) policies requiring any company to certify that it does not boycott Israel, and the Trustees have never considered adopting such a policy. ROA.1121 [B. Champion Decl., ¶10]; ROA.1198 [K. Rogers Aff., ¶10].

Dennar and Abdelhadi did not establish the causation element necessary to demonstrate constitutional standing for their claims against the School Districts. *Lujan*, 504 U.S. at 560. Therefore, the district court lacked jurisdiction to impose a preliminary injunction against the School Districts. *See, e.g.*, *Blum*, 457 U.S. at 1002. The Court should reverse and vacate the preliminary injunction order and dismiss the claims against the School Districts.

4. The District Court Erred in its Analysis of the Causation Element of Constitutional Standing.

The district court erred by holding that Dennar and Abdelhadi met the causation element of constitutional standing by pleading that the School Districts' Trustees "have the exclusive power and duty to govern and oversee the management of the public schools in their districts, including the authority to enter into contracts and delegate that contractual authority." ROA.1262 (citation omitted). In fact, as explained above, by enacting TEX. GOV'T CODE §2270.002, the Texas Legislature *withdrew from the Trustees the authority* to enter into any contract for goods or services unless that contract included the no-boycott certification required by the Act. *Supra* at 32.[18]

[18] For this same reason, the district court erred in concluding that, because Appellees pled that the School Districts included the no-boycott certification clauses in contracts provided to Dennar and Abdelhadi, and because the Trustees have authority over those contracts, the no-boycott certification requirement is fairly traceable to the Trustees of the School Districts. ROA.1262-63. Instead, these contract provisions are the result of the independent action of the Legislature, not the School Districts' Trustees. The Court should reject the district court's conclusion.

The district court also erred by holding that: (1) "[i]t is *immaterial* that the genesis of Plaintiffs' injuries is a statute passed by the Texas Legislature" (ROA.1262[19]); and (2) "[w]hat matters is whether the Trustees are applying the no-boycott certification requirement to the Plaintiffs; *it does not matter whether their hands were tied in doing so*." ROA.1263 (emphasis added). By so holding, the district court disregarded binding precedent regarding the causation element of constitutional standing, which requires Dennar and Abdelhadi to demonstrate clearly that their alleged injuries are fairly traceable to action by the Trustees of the School Districts, and not the result of the independent action of the Texas Legislature. *Lujan*, 504 U.S. at 560; *see also, e.g.*, *Ford*, 301 F.3d at 333; *Barber*, 860 F.3d at 352.

The district court's reasoning places all local governments in the untenable position of either: (1) disregarding binding, presumptively valid legislation because it may subsequently be held unconstitutional; or (2) being subject to civil liability for following laws which they could neither control nor modify. Local governmental entities are not required to make such a choice because: (1) legislatures are presumed to have acted constitutionally;[20] and (2) plaintiffs lack constitutional standing to sue local governments for injuries that are the result of

[19] Emphasis added.

[20] *Ill. v. Krull*, 480 U.S. 340, 351 (1987); *Ala. State Fed'n of Teachers, AFL-CIO v. James*, 656 F.2d 193, 195 (5th Cir. 1981) (citing *McDonald v. Bd. of Election Comm'r*, 394 U.S. 802, 809 (1969)).

the independent action of some third party, such as the Legislature. *Lujan*, 504 U.S. at 560; *Ford*, 301 F.3d at 333.

For these reasons, this Court should reject the district court's conclusion that the Act's no-boycott certification requirement is fairly traceable to the School Districts' Trustees. Because Dennar and Abdelhadi did not meet their burden of clearly showing constitutional standing, the Court should reverse and vacate the preliminary injunction order and dismiss the claims against the School Districts.

E. THE COURT SHOULD VACATE THE PRELIMINARY INJUNCTION ORDER AGAINST THE SCHOOL DISTRICTS.

1. The Law of Vacatur

The remedy of vacatur sounds in equity. *See, e.g.*, *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994); *Hall v. Louisiana*, 884 F.3d 546, 553 (5th Cir. 2018). Federal courts are to dispose of moot cases in the manner "'most consonant to justice'…in the view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp*, 513 U.S. at 24 (quoting *U.S. v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-78 (1916)); *see also Hall*, 884 F.3d at 553. "The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.*; *Hall*, 884 F.3d at 553.

Courts should vacate prior decisions in a moot case whose review "'is prevented through happenstance.'" *Id*. at 23 (citing *Karcher v. May*, 484 U.S. 72, 82, 83 (1987), and n. 3. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness to be forced to acquiesce in the judgment." *Id*. at 25; *Hall*, 884 F.3d at 553. Indeed, it is the Supreme Court's "normal practice" to vacate a prior decision "when mootness frustrates a party's right to appeal." *Camreta*, 563 U.S. at 698. Vacatur "ensures that those who have been prevented from obtaining the review to which they are entitled [are] not…treated as if there had been a review." *Id*. at 712. "Vacatur expunges an adverse decision that would be reviewable had [the] case not become moot." *Id*. at 712 n. 10. This equitable remedy prevents "an unreviewable decision from spawning any legal consequences, so that no party is harmed by" a "preliminary adjudication." *Id*. at 713.

When considering vacatur, courts also look to the public interest. *Id*. at 26-27; *Hall*, 884 F.3d at 553. The public interest "is best served by granting relief when the demands of orderly procedure cannot be honored." *Id*. at 27; *Hall*, 884 F.3d at 553.

In deciding whether to vacate, courts are to look to the equities of the individual case. *Hall*, 884 F.3d at 553 (citing *Staley v. Harris County, Tex.*, 485

F.3d 305, 312 (5th Cir. 2007) (*en banc*)).[21]

2. The School Districts Are Entitled to Vacatur of the Preliminary Injunction.

The equities of this case favor vacatur of the preliminary injunction against the School Districts.

First, the School Districts took no action to moot this case, which became moot due to the Legislature's amendment of the Act. *Supra* at 27-28.

Second, the School Districts notified the district court on numerous occasions during the course of this litigation that the Legislature was in the process of amending the Act in such a way that the Appellees' claims would become moot. ROA.601, 677-78, 864-996, 1075-1079, 1113, 1189-1190. The School Districts urged the district court to stay any ruling on the preliminary injunction until the end of the legislative session precisely to avoid the unnecessary expenditure of the Courts' and the parties' limited resources on a matter which promised quickly to become moot and whose mootness would justify vacatur. ROA.864-869.[22] The School Districts should not be prejudiced by the continued existence of an opinion

[21] Courts do not only vacate prior decisions when parties lack standing due to mootness, but also when they lack standing for any reason. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811 (1997); *United States v. Hays*, 515 U.S. 737 (1995); *Friends of St. Frances Xavier Cabrini Church v. Federal Emergency Management Agency*, 658 F.3d 460, 468 (5th Cir. 2011) ("Because [plaintiff] lacks standing to raise its claims, we VACATE the judgment of the district court and REMAND the case with instructions to DISMISS for lack of standing."); *Doe v. Tangipahoa Parish School Board*, 494 F.3d 494 (5th Cir. 2007) (vacating the district court's judgment for lack of standing).

[22] Thus, the situation in the case at bar is precisely the opposite of that presented in *Ministry of Oil of the Republic of Iraq v. Kurdistan Region of Iraq*, 634 Fed. App'x 953, 960 (5th Cir. 2015) and *Staley*, 485 F.3d at 313, in which this Court found that the defendants' failure to advise the court as to changes in the circumstances weighed against vacatur.

in a lawsuit which has become moot when they timely notified the district court of circumstances beyond the School Districts' control which would moot the case.

Third, it would be fundamentally unfair for the School Districts "to be forced to acquiesce" to the district court's preliminary injunction order when the case has become moot for reasons beyond the School Districts' control. *See U.S. Bancorp*, 513 U.S. at 25. This is particularly true in this case because the district court fundamentally misapplied binding precedent concerning standing, municipal liability under Section 1983, and First Amendment case law. *Supra* at 37-39; *infra* at 53-64.

Fourth, the public interest is best served by vacatur because the "demands of orderly procedure" might not be honored in the case at bar. The public interest would not be served if the Court were to dismiss the case based on jurisdictional grounds without considering the merits *and* without vacating the preliminary injunction. *See U.S. Bancorp*, 513 U.S. at 27; *Hall*, 884 F.3d at 553. In such an event, the district court's flawed opinion would remain as precedent, in a circumstance in which the School Districts would be hindered in their ability to obtain review of the merits of the district court's preliminary injunction order.

As illustrated by two decisions of this Court, *AT&T Communications of Southwest, Inc. v. City of Dallas, Tex.*, 243 F.3d 928 (5th Cir. 2001) and *AT&T Communications of Southwest, Inc. v. City of Austin*, 235 F.3d 241 (5th Cir. 2000),

the equities favor vacatur of the preliminary injunction against the School Districts. Both of the *AT&T* cases involved municipal ordinances which were preempted by Texas legislative action, thereby mooting the cases. This Court vacated the district courts' judgments, noting in each case that the defendants' actions did not moot the case, but instead that legislative action mooted the case. *City of Dallas*, 243 F.3d at 931; *City of Austin*, 235 F.3d at 244. This Court should similarly vacate the district court's April 25, 2019 order in the case at bar because this case became moot through no action of the School Districts, and consideration of the merits on this appeal may be frustrated through no fault of their own.

F. THE PRELIMINARY INJUNCTION MUST BE VACATED BECAUSE IT IS OVERBROAD.

The district court imposed a preliminary injunction enjoining all Defendants "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 (emphasis added). In crafting this broad preliminary injunction, the district court disregarded "the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" *O'Donnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). As this Court has explained, a district court abuses its discretion when it does not narrowly tailor an injunction to remedy the specific action at issue in the lawsuit.

Id. (citing *John Doe # 1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)). An injunction which is overbroad must be vacated. *Id*.

The case at bar involves only claims by sole proprietors seeking declaratory and injunctive relief against the Act, as it was originally enacted. ROA.1654 [¶7]; ROA.1678-79. The district court's preliminary injunction, on the other hand, purports to enjoin all Defendants from including *any* "No Boycott of Israel" clause in *any* state contract. ROA.1297. This preliminary injunction is well beyond the scope of the specific action at issue in this lawsuit. It must, therefore, be vacated. *O'Donnell*, 892 F.3d at 163 (citing *Veneman*, 380 F.3d at 818).

III. ALTERNATIVELY, THE COURT SHOULD REVERSE THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER AGAINST THE SCHOOL DISTRICTS ON THE MERITS.

A. THE STANDARD OF REVIEW FOR A PRELIMINARY INJUNCTION.

A plaintiff seeking the extraordinary remedy of a preliminary injunction must clearly show: (1) a substantial likelihood that he will prevail on the merits; (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted; (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin; and (4) that granting the preliminary injunction will not disserve the public interest. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); *see also, e.g., Sells v. Livingston*, 561 Fed. App'x 342, 344 (5th Cir. 2014).

Each of these elements is a mixed question of law and fact, and this Court reviews the district court's factual findings for clear error and its legal conclusions *de novo*. *Netherland v. Eubanks*, 302 Fed. App'x 244, 246 (5th Cir. 2008) (citing *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)). However, a facial challenge to the constitutionality of a statute presents a pure question of law which this Court reviews *de novo*. *Id*. (citing *Carmouche*, 449 F.3d at 662). This Court reviews a district court's decision to grant a preliminary injunction for abuse of discretion. *Doe I v. Landry*, 909 F.3d 99, 106 (5th Cir. 2018).

B. THE DISTRICT COURT'S LIKELIHOOD-OF-SUCCESS ANALYSIS DOES NOT IMPLICATE THE SCHOOL DISTRICTS.

A district court should not grant the extraordinary remedy of a preliminary injunction if plaintiffs fail to clearly show a substantial likelihood of success on the merits of their claims. *Supra* at 44. The district court erred by entering a preliminary injunction against the School Districts without finding that Dennar and Abdelhadi clearly demonstrated a substantial likelihood of success on their claims *against the School Districts*. ROA.1263-1287.

In order to impose municipal liability on the School Districts' Trustees under Section 1983, Dennar and Abdelhadi needed to show that a policy, custom, or practice of the Trustees was the moving force resulting in a constitutional deprivation. *Pembaur*, 475 U.S. at 483. However, in its analysis of the motion for preliminary injunction, the district court did not conclude that Appellees clearly

demonstrated a substantial likelihood of success with respect to identifying any policy, custom, or practice of the Trustees which was the moving force resulting in a deprivation of their constitutional rights. ROA.1263-1287. In fact, the district court made no mention whatsoever of the School Districts in its analysis of the likelihood-of-success element of Appellees' preliminary injunction motion. ROA.1263-1287.[23]

Instead, the district court merely held that "Plaintiffs are likely to succeed on their claims that H.B. 89 is unconstitutional under the First Amendment." ROA.1287. The district court expressly limited its preliminary injunction analysis to the Appellees' facial challenges to the statute (as originally enacted). ROA.1263,[24] n.4 ("the Court will not construe Plaintiffs' claims as bringing as-applied challenges.").[25]

[23] Elsewhere in its opinion, the district court rejected the School Districts' motions to dismiss because the district court found that Dennar and Abdelhadi met the significantly lower pleading standard applicable to defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6). ROA.1295 ("taking Plaintiffs' factual allegations as true and viewing them in the light most favorable to the Plaintiffs, the Court finds that Plaintiffs have plausibly alleged a policymaker (the Trustees), whose policy (including the no-boycott certification in their school districts' contracts) is the moving force behind Plaintiffs' injuries (chilled speech)."). This holding does not reflect the higher standard of proof required for the extraordinary remedy of a preliminary injunction. *Gee*, 862 F.3d at 457. The holding also does not reflect any analysis of the evidence showing that the Trustees took no action in connection with the Act's certification requirement. *Infra* at 50-54.

[24] Because the district court analyzed Appellees' motion for a preliminary injunction only as a facial challenge to the constitutionality of the Act (as originally enacted), the district court's preliminary injunction analysis is subject to *de novo* review. *Netherland*, 302 Fed. App'x at 246 (citing *Carmouche*, 449 F.2d at 662).

[25] Appellees have not appealed this determination.

However, facial challenges to the Act are properly brought only against the State, which enacted the law, not the School Districts, whose authority to contract was circumscribed by the Act, and who had no part in enacting or enforcing the law. *Buchanan v. Alexander*, 919 F.3d 847, 854 (5th Cir. 2019) ("The proper defendants to a facial challenge are the parties responsible for creating or enforcing the challenged law or policy."); TEX. GOV'T CODE §§2270.001 *et seq*.[26] The district court's finding of a substantial likelihood of success on Appellees' facial challenge to the constitutionality of the Act does not apply to the claims against the School Districts, because Dennar and Abdelhadi did not assert a facial challenge to any law or policy enacted by the School Districts' Trustees. ROA.1677-78 [¶¶107-111, Request for Relief, ¶A].

Additionally, although the district court made its likelihood-of-success determination only in connection with Appellees' facial challenges to the Act, the district court acknowledged that the *application* of the Act was the only conduct "fairly traceable to the Trustees." ROA.1263; *see also* ROA.1262 (in which the district court acknowledged that "the genesis of Plaintiffs' injuries is a statute passed by the Texas Legislature"). Nevertheless, the district court imposed a

[26] As explained above, the Legislature withdrew the School District's authority to enter into certain contracts unless they contained the no-boycott provision. *Supra* at 32. Because legislatures are presumed to have acted constitutionally, it is appropriate for the School Districts to obey state laws. *Krull*, 480 U.S. at 351; *James*, 656 F.2d at 195 (citing *McDonald*, 394 U.S. at 809).

sweeping preliminary injunction against all Defendants, including the School Districts. ROA.1297.

The district court erred by imposing a preliminary injunction without finding that Dennar and Abdelhadi clearly showed a substantial likelihood of success on the merits of their claims against the School Districts. *See*, *e.g.*, *Gee*, 862 F.3d at 457. The Court should reverse the preliminary injunction against the School Districts.

C. DENNAR AND ABDELHADI ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS AGAINST THE SCHOOL DISTRICTS.

Appellees are unlikely to succeed on the merits of their claims against the School Districts because courts lack jurisdiction and should dismiss their claims due to mootness and lack of standing. *Supra* at 25-39.

Additionally, because Dennar and Abdelhadi failed to plead or provide evidence of any policy, custom, or practice of the School Districts' Trustees which was a moving force behind an alleged constitutional deprivation, they did not clearly show a substantial likelihood of success in their claims against the School Districts. *Supra* at 31-37; *infra* at 49-55.

Furthermore, because it misapplied U.S. Supreme Court precedent, the district court erred by concluding that Dennar and Abdelhadi engaged in expressive activity protected by the First Amendment. *Infra* at 55-64.

1. Dennar and Abdelhadi Did Not Demonstrate that Any Policy, Custom, or Practice of the School Districts Was the Moving Force Behind Any Constitutional Deprivation.

a) The Policy, Custom, or Practice Requirement

Respondeat superior liability does not apply to Section 1983 claims against governmental entities. *Piotrowski*, 237 F.3d at 578 (citing *Monell*, 436 U.S. at 694). Instead, in order to establish liability of a governmental entity under Section 1983, a plaintiff must demonstrate that an official policy, custom, or practice of the governmental entity was the "moving force" which caused a violation of constitutional rights. *Supra* at 33; *Piotrowski*, 237 F.3d at 578. In order to establish municipal liability under Section 1983, "there must be both municipal culpability and causation." *Piotrowski*, 237 F.3d at 578, n.17 (citing *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998)); *see also, e.g., Pembaur*, 475 U.S. at 483; *Rodriguez*, 651 Fed. App'x at 284.

A plaintiff who claims to have been injured due to an officially promulgated policy must specifically identify the policy and must show a direct causal link between the governmental policy and the constitutional deprivation. *Piotrowski*, 237 F.3d at 580; *see also Whitley v. Hanna*, 726 F.3d 631, 648-49 (5th Cir. 2013). A school district is liable under Section 1983 only "if a final policymaker *adopts* a policy that is the moving force behind a constitutional violation." *Yara v. Perryton Indep. Sch. Dist.*, 560 Fed. App'x 356, 359 (5th Cir. 2014) (emphasis added)

(citing *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003)). The final policymaker for a school district is the board of trustees. *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993); *Rivera*, 349 F.3d at 247.

In the absence of proof of an officially promulgated governmental policy, a plaintiff may establish municipal liability through proof that a deprivation was caused by a municipal custom or practice that is so widespread as to have the force of law. *Piotrowski*, 237 F.3d at 579. A custom or practice creating municipal liability only arises when the policymaker acquiesces to persistent, often repeated, constant constitutional violations by employees of the governmental entity. *Yara*, 560 Fed. App'x at 359 (citing *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009)). Plaintiffs who provide no evidence that a school board has knowledge of the allegedly unconstitutional conduct fail to meet their burden of establishing a custom or practice capable of supporting municipal liability under Section 1983. *See Yara*, 560 Fed. App'x at 359; *see also, e.g.*, *Hicks-Fields v. Harris County, Texas*, 860 F.3d 803, 808 (5th Cir. 2017) (noting that plaintiffs must establish actual or constructive knowledge of the objectionable custom by the policymaker).

b) No Policy, Custom, or Practice of the Trustees

i. Conduct by Employees is Insufficient.

Neither Dennar nor Abdelhadi provided allegations, arguments, or evidence to support a finding that the School Districts' Trustees (the School Districts'

policymakers) took *any* action in connection with them, much less that a policy, custom, or practice of the School Districts' Trustees was the moving force of any constitutional deprivation that they allegedly suffered. ROA.1665 [¶¶53-55]; ROA.1668-69 [¶¶69-70]. Instead, as the district court explained, Dennar and Abdelhadi alleged that they were offered contracts (which complied with the Act) by School District *employees*. ROA.1295. Because respondeat superior liability does not apply, Dennar and Abdelhadi's allegations and evidence concerning action by School District employees is insufficient to meet their burden of proof concerning their likelihood of success against the School Districts. *Piotrowski*, 237 F.3d at 578.

ii. The Contract Provisions Are Insufficient.

Dennar's only evidence in support of his motion for a preliminary injunction against the Trustees of Klein ISD consisted of a declaration in which he claims to have been given an independent contractor agreement when he judged a debate tournament at Klein High School. ROA.2031 [Dennar Decl., ¶6]. Abdelhadi's only evidence in support of his motion for a preliminary injunction against the Trustees of Lewisville ISD consisted of a declaration in which he claims that a teacher sent him a contract for speech and debate judging. ROA.2016 [Abdelhadi Decl., ¶10]. These contract forms included language reflecting the requirements of the Act, as originally enacted by the Legislature.

This evidence does not demonstrate either knowledge or involvement by the School Districts' Trustees, much less an officially promulgated policy, custom, or practice of the Trustees. *See* ROA.1123 [B. Champion Decl., ¶17, explaining that the School District's contract forms were not discussed or approved by the Trustees and that the superintendent, who works continuously and very closely with the Trustees, does not believe that the Trustees had any knowledge of the contract provisions]; ROA.1199 [K. Rogers Aff., ¶17, same].

For this reason, the mere existence of contract provisions reflecting the requirements of the Act, as it was originally enacted, is insufficient to meet Dennar and Abdelhadi's burden of clearly demonstrating a substantial likelihood of success on the merits for their claims against the School Districts. *Yara*, 560 Fed. App'x at 359; *Hicks-Fields*, 860 F.3d at 808.

iii. CH (LEGAL) is Insufficient.

As explained more fully above, Dennar and Abdelhadi's reliance on "policy" CH (LEGAL) was also insufficient to meet their burden of clearly showing a substantial likelihood of success on the merits for their claims against the School Districts. *Supra* at 33-37; ROA.754-55. The existence of CH (LEGAL) does not establish that this provision amounted to a "policy" of the Trustees, as that term is employed in Section 1983 jurisprudence. Instead, the School Districts' provisions which bear the (LEGAL) designation are merely

explanations of the state of the law, as enacted by legislatures, determined by regulators, or developed by courts. These provisions do not reflect policy choices made by the School Districts' Trustees. *Supra* at 34-35 (citing ROA.1020, 1047, 1015, 1042). In fact, the School Districts' Trustees are powerless to change, edit, or amend provisions with the (LEGAL) designation. ROA.1121 [B. Champion Decl., ¶9]; ROA.1197 [K. Rogers Aff., ¶9].

Because the Trustees do not deliberate about or adopt the provisions bearing the (LEGAL) designation, these provisions are not "policies" within the meaning of Section 1983. *E.g.*, *Pembaur*, 475 U.S. at 483 ("municipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"); *Yara*, 560 Fed. App'x at 359 ("A school district is responsible under §1983 if a final policymaker adopts a policy that is the moving force behind a constitutional violation."); *Rodriguez*, 651 Fed. App'x at 284 ("A municipality is only liable under § 1983 for its own acts."). CH (LEGAL) does not demonstrate culpability or causation by the Trustees; it merely reflects the policy determinations of the Texas Legislature prior to its 2019 amendments to the Act. ROA.1026; ROA.1224; *Piotrowski*, 237 F.3d at 578, n.17. Therefore, the CH (LEGAL) "policies" cannot support municipal liability under Section 1983.

c) The District Court Erred in its Analysis.

In its preliminary injunction analysis, the district court made no mention of the evidence which demonstrated that: (1) the School Districts have not adopted any policies prohibiting contracting with companies that boycott Israel; (2) CH (LEGAL) was not adopted by the Trustees, but was provided to the School Districts by a third party; (3) the Trustees are powerless to change, edit, or amend CH (LEGAL); (4) the Trustees never considered prohibiting contracts with companies that boycott Israel; (5) absent the Act, the School Districts would not have required contractors to provide certifications concerning boycotting Israel; and (6) the Trustees did not discuss or approve the independent contractor contract forms. ROA.1121-23 [B. Champion Decl., ¶¶9-13, 16-17]; ROA.1197-99 [K. Rogers Aff., ¶¶9-13, 16-17].

Additionally, the district court misapplied binding precedent concerning municipal liability under Section 1983 when, with respect to the School Districts' causation arguments, it concluded that: (1) "[i]t is *immaterial* that the genesis of Plaintiffs' injuries is a statute passed by the Texas Legislature";[27] (2) "[i]t is also *immaterial* that the Trustees 'never adopted' H.B.89's no-boycott certification requirement";[28] and (3) '[w]hat matters is whether the Trustees are applying the

[27] ROA.1262 (emphasis added).
[28] ROA.1262 (emphasis added).

no-boycott certification requirement to the Plaintiffs; *it does not matter whether their hands were tied in doing so*."[29]

Governmental entities, like the School Districts, can be found liable under Section 1983 only for their own choices or actions, and not for the choices or actions of other entities. *Monell*, 436 U.S. 658; *Piotrowski*, 237 F.3d at 578, 580; *Pembaur*, 475 U.S. at 483 *Rodriguez*, 651 Fed. App'x at 284. To the contrary, if actions by School District employees,[30] in obedience to state law,[31] create a constitutional deprivation, it is the State, not the School Districts, which is properly subject to liability under Section 1983. *Monell*, 436 U.S. at 692 (attributing liability for A's conduct to B if B causes A to subject another to a deprivation of rights).

Dennar and Abdelhadi failed to clearly demonstrate a substantial likelihood of success on the merits of their claims against the School Districts. The Court should, therefore, reverse the district court's order granting a preliminary injunction against the School Districts.

[29] ROA.1263 (emphasis added).
[30] Respondeat superior does not apply to §1983 claims against governmental entities. *Piotrowski*, 237 F.3d at 578 (*citing Monell*, 436 U.S. at 694).
[31] Legislatures are presumed to have acted constitutionally. *Supra* at 38 (*citing Krull*, 480 U.S. at 351; *James*, 656 F.2d at 195; and *McDonald*, 394 U.S. at 809).

2. The Court Erred in Holding That Dennar and Abdelhadi Engaged in Expressive Conduct Protected by the First Amendment.

The district court erred by holding that Dennar and Abdelhadi's choices in making purchasing decisions, online and at store counters, based on their understanding about companies that allegedly engage in behavior with regard to Israel with which Dennar and Abdelhadi disagree, were expressive conduct under the First Amendment. ROA.1263-1283. The district court reached this erroneous legal conclusion by holding that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and not *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), was controlling.

Conduct is not constitutionally protected speech "'whenever the person engaging in the conduct intends thereby to express an idea.'" *FAIR*, 547 U.S. at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)); *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Courts extend First Amendment protection "*only* to conduct that is inherently expressive." *FAIR*, 547 U.S. at 66 (emphasis added).

To determine whether conduct "possesses sufficient communicative elements to bring the First Amendment into play, [the Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed

it.'" *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)).

Conduct is not "inherently expressive" if the expressive component of the actions "is not created by the conduct itself but by the speech that accompanies it." *FAIR*, 547 U.S. at 66. The need for such explanatory speech "is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection…" *Id*. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id*. As the Supreme Court stated in *FAIR*, an individual's announcement of an intention to express his disapproval of the IRS by not paying taxes does not convert the failure to pay taxes into protected expression under the First Amendment. *Id*.

In cases concerning allegedly expressive conduct, context matters. In *FAIR*, the Court held that the Solomon Amendment requiring law schools to treat military recruiters in the same manner as they treated non-military recruiters did not violate the law schools' freedom of speech. *Id*. at 68. The Court contrasted the context of *Johnson*[32] in which it found the flag burning at issue to be sufficiently expressive

[32] In *Johnson*, the Court recognized that it has not "automatically concluded…that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have *considered the context* in which it occurred." *Johnson*, 491 U.S. at 405 (emphasis added). In *Johnson*, the Court described the context for the flag burning at issue, *id*. at 399 and 406, and found that the, "expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." *Id*. at 406.

to be protected under the First Amendment, with the context of law schools requiring military recruiters to recruit outside of the law school: "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *FAIR*, 547 U.S. at 66.

Like the law schools' conduct in *FAIR*, Abdelhadi and Dennar's conduct is not expressive and is not protected by the First Amendment. Abdelhadi avoids using VRBO because it lists vacation rentals in Israeli settlements, and he avoids purchasing PepsiCo, Strauss Group, and HP products because of their purported affiliation with the IDF. ROA.1668 [¶68].

Dennar alleges that he "boycotts consumer products offered by businesses supporting Israel's occupation of Palestinian territories or that, directly or indirectly, economically benefit the state of Israel," but does support Israeli companies that stand against Israel's occupation of Palestinian territories and support the plight of the Palestinian people. ROA.1664 [¶52]. Specifically, Dennar boycotts L'Oreal and Sabra products. ROA.1664 [¶52].

An observer, like the one posited by the Court in *FAIR* (547 U.S. at 66), would have no way of knowing whether Dennar uses Tribe hummus, instead of

Sabra, because of their respective packaging, ingredients, prices, stances on alleged illegal Israeli settlements, or any other reason. Nor would the observer have any way of knowing why Dennar purchased a product from Dove, for instance, rather than a L'Oreal product.

Similarly, an observer like the one posited in *FAIR* would have no way of knowing that Abdelhadi does not book vacation properties online using VRBO, but instead uses another service like Airbnb, because VRBO allegedly lists vacation rentals in Israeli settlements. Nor would anyone observing Abdelhadi buying groceries or computer equipment know that Abdelhadi did not buy PepsiCo, Strauss Group, or HP products because of those companies' purported affiliation with the IDF.

Indeed, unlike the flag burner in *Johnson* who was clearly participating in a publicly visible, obviously political demonstration, all of Abdelhadi and Dennar's economic choices are performed privately and discreetly via the internet or at a store checkout counter. The non-expressive nature of Abdelhadi and Dennar's conduct is so readily apparent that, after listing the products that they do not purchase, Appellees needed to explain their purchasing decisions.[33] The need for such explanatory speech "is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection…" *FAIR*, 547 U.S. at 66.

[33] ROA.1825 [Abdelhadi Declaration ¶8]; ROA.1839-1840 [Dennar Declaration ¶5].

The district court erred in rejecting the reasoning of *FAIR* and instead relying on *Claiborne*, 458 U.S. at 886, to hold that Abdelhadi and Dennar's purchasing decisions are expressive conduct protected by the First Amendment. ROA.1264-1267. The district court's reading of *Claiborne* was overbroad and incorrect.

In *Claiborne*, the African American residents of Port Gibson, Mississippi, and other areas of Claiborne County, presented white elected officials "with a list of particularized demands for racial equality and integration." *Claiborne*, 458 U.S. at 889; *see id.* at 898-899, 907. As this petition for redress of grievances was unsuccessful, several hundred African Americans, at a local NAACP meeting, voted to boycott the white merchants in the area. *Id*. at 889, 907. The boycott continued for years. *Id*. at 898. The boycott of white businesses was supported by meetings, peaceful picketing, speeches, marches, and outreach to increase participation in the boycott. *Id*. at 903, 907-911. Additionally, "discipline" was imposed by the boycotters on any African American who violated the boycott. *Id*. at 903. This "discipline" would come in the form of store watchers who would collect the names of the "traitors" whose names would be read aloud at local NAACP meetings and published in print. The "traitors" were "'called demeaning names, and socially ostracized for merely trading with whites.'" *Id*. at 903-904.

The boycott "discipline" also had violent aspects to it, including gun shots fired at a house, a brick thrown through a window, and destruction of a garden. *Id*. at 904.

As explained above, context matters. *Supra* at 57. In *Claiborne*, the Court repeatedly described the context of the boycott at issue, and the Court repeatedly took pains to specify that it was issuing a decision about the specific boycott in question. *Id.* at 889-890. *Claiborne* concerned some expressive conduct in the context of a public, well known boycott for the redress of grievances. *Claiborne*, 458 U.S. at 907-915. At the time of the boycott, Claiborne County had 10,900 residents, only 2,500 of whom were white.[34] Most, if not everyone, in Claiborne County knew about the economic choices being made by the boycotters and understood their significance to the local economy. *Id.* at 900-901. In this context, a resident's decision to make purchases from a particular retail establishment expressed a political stance. However, nowhere in *Claiborne* did the Court hold that all political boycotts are protected by the First Amendment.

In contrast to the situation in *Claiborne*, Abdelhadi and Dennar's economic choices concerning whether to purchase one product or another online or at a checkout counter do not convey to anyone that they, among the millions of people making online or checkout counter purchases, are engaging in expressive conduct.

[34] Transcript of Oral Argument at 51 (l. 10-15), *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (81-202). https://www.supremecourt.gov/pdfs/transcripts/1981/81-202_03-03-1982.pdf.

Contrary to district court's holding in the case at bar, *Claiborne* did not hold that all political boycotts, including boycotts of Israel, are protected by the First Amendment. In fact, NAACP's counsel at oral argument contradicted this overly broad assertion: "Nor do we think this case presents the issue of the constitutionality of a boycott that is unrelated to a petition for the redress of grievaces [sic] against the government."[35] The NAACP's counsel repeatedly told the Court that the case only presented the question of the constitutionality of "a boycott of business enterprises in support of a petition for redress of civil rights grievances."[36] Moreover, the questions presented in the NAACP's petition for review emphasized that the boycott in question was one for the redressing of grievances where some of the boycott activity was peaceful and some was not. *Claiborne*, 458 U.S. at 897, 907-934. Nowhere in the questions presented is the issue of whether all political boycotts are protected by the First Amendment, much less the issue of whether all private purchasing decisions are expressive conduct protected by the First Amendment. *Id.*

In fact, not all of the boycott activity in *Claiborne* itself was found to be protected by the First Amendment. *Claiborne*, 458 U.S. at 915. Specifically, the

[35] Transcript of Oral Argument at 10 (l. 19-22), *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (81-202). https://www.supremecourt.gov/pdfs/transcripts/1981/81-202_03-03-1982.pdf.

[36] Transcript of Oral Argument at 4 (l. 3-5) at 55 (l. 2-5), *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (81-202). https://www.supremecourt.gov/pdfs/transcripts/1981/81-202_03-03-1982.pdf.

Court held that the violent elements of the boycott were not protected by the First Amendment. *Id*. The Court also recognized that secondary boycotts may be prohibited.[37] *Id*. at 912 (citing *NLRB V. Retail Store Employees*, 447 U.S. 607, 617-618 (1980) and *Longshoremen v. Allied International, Inc.*, 4565 U.S. 212, 222-223, and n. 20 (1982)).

Notwithstanding the clear differences between the public and well-known purchasing decisions made in a small community in *Claiborne* and Dennar and Abdelhadi's purchasing decisions performed in obscurity, the district court found the two cases to be akin because they both involved boycotts. ROA.1265, n. 5. This ignores the Supreme Court's emphasis that the context of conduct determines whether it is expressive. The district court distinguished *FAIR*, reasoning that that case did not involve a boycott, as the Supreme Court did not use the word "boycott" in its decision. ROA.1265. Although the word "boycott" does not appear in *FAIR*, the law schools' decision to ban military recruiters from their respective campuses in objection to a policy is a boycott.[38]

[37] A secondary boycott is "[a] boycott of the customers or suppliers of a business so that they will withhold their patronage from that business. • For example, a group might boycott a manufacturer who advertises on a radio station that broadcasts messages considered objectionable by the group." BOYCOTT, Black's Law Dictionary (11th ed. 2019). Dennar and Abdelhadi allegedly boycott certain companies doing business with Isarael and/or Israeli entities so that they withhold their patronage from Israel and/or the Isaraeli entities.

[38] "An action designed to achieve the social or economic isolation of an adversary, esp. by the concerted refusal to do business with it." BOYCOTT, Black's Law Dictionary (11th ed. 2019).

The district court erred in not focusing on *FAIR*'s key point and its application here. *FAIR* did not consider the law schools' boycott of military recruiters to be expressive activity because of its context. The law schools' actions would not have communicated their purported message to a reasonable observer. Nor would Dennar or Abdelhadi's conduct. The district court clearly erred by finding a similarity between the context present in *Claiborne* and the one in the instant case.

Moreover, in contrast to the boycotters in *Claiborne*, Abdelhadi and Dennar's purchasing decisions are not part of a petition or boycott for the redress of grievances. Abdelhadi and Dennar's decisions are meant to economically sanction companies that they believe are engaged in allegedly unethical activities. ROA.1664-1665, 1668 [¶¶51-52, 68]; ROA.2015-2016 [Abdelhadi Declaration ¶¶6-8]; ROA.2030-2031 [Dennar Declaration ¶¶4-5]. Their conduct is more similar to the union members' secondary boycott in *Longshoremen* that was unprotected by the First Amendment and can be governmentally proscribed, than to the *Claiborne* boycott.

For these reasons, Abdelhadi and Dennar have not established a substantial likelihood of success on the merits of their claims. This Court should, therefore, reverse the preliminary injunction order.

D. The District Court Erred in Holding that Dennar and Abdelhadi Would Suffer Irreparable Harm Without an Injunction Against the School Districts.

Dennar and Abdelhadi would not have suffered irreparable harm if the district court had denied their motion for a preliminary injunction against the School Districts. As explained above, Dennar and Abdelhadi lacked jurisdiction to assert their claims against the School Districts, and their private purchasing choices are not expressive conduct protected by the First Amendment. *Supra* at 30-39, 55-64.

Additionally, even if the Act infringed on their First Amendment rights, Dennar and Abdelhadi would not have suffered irreparable harm without a preliminary injunction against the School Districts because the preliminary injunction entered against the State of Texas would have achieved the outcome Appellees sought. The Legislature withdrew from the School Districts the authority to enter into certain contracts unless the contractor provided the certification required by the Act. *Supra* at 32. A preliminary injunction prohibiting the State from enforcing the Act would have provided the School Districts with authority to enter into contracts with Dennar and Abdelhadi without regard to the Act's certification requirement. The School Districts themselves never required, and never considered requiring such a certification, and they would have immediately ceased to follow the Act's proscriptions if the State were

preliminarily enjoined from enforcing the Act. ROA.1121-23 [B. Champion Decl., ¶¶10-13, 19]; ROA.1198, 1200 [K. Rogers Aff., ¶¶10-13, 19]; *see also* ROA.1020 [Policy BF (LOCAL)]; ROA.1047 [same].

E. The District Court Erred in Holding That the Threatened Injury to Dennar and Abdelhadi Outweighed the Threatened Harm to the School Districts.

The district court erred by entering a preliminary injunction against the School Districts without finding that Dennar and Abdelhadi clearly demonstrated that their threatened injury outweighed the threatened harm to the School Districts. *Supra* at 44 (citing *Gee*, 862 F.3d at 457).

The district court's "Balance of Equities" analysis addressed only the relative interests of the State of Texas and Appellees; the district court did not discuss any of the School Districts' interests. ROA.1289.

Dennar and Abdelhadi never had constitutional standing to bring claims against the School Districts in this lawsuit. *Supra* at 30-39. As the Constitution limits the jurisdiction of federal courts to cases or controversies, and as standing is an essential and unchanging part of the case-or-controversy requirement, the School Districts, and indeed, the entire federal judicial system, have significant interests in avoiding litigation by individuals who lack constitutional standing to pursue their claims. *Supra* at 30-31 (citing *Camreta*, 563 U.S. at 701; *Lujan*, 504 U.S. at 560).

Additionally, although the School Districts deny that Appellees' private decisions about whether to purchase a particular brand of hummus or computer constitute expressive activity protected by the First Amendment,[39] any alleged constitutional violation caused by the Legislature's Act would properly be addressed by an injunction against the State, not against the School Districts. The School Districts did not have any control over the enactment, or the subsequent amendment, of the Legislature's Act which is at issue in this lawsuit. *Supra* at 17, 22. The School Districts have a significant interest, long recognized by the U.S. Supreme Court and by this Court, in being subject to liability under Section 1983 only for their own decisions and actions. *Supra* at 48-49 (citing, e.g., *Monell*, 436 U.S. at 694; *Pembaur*, 475 U.S. at 483; *Piotrowski*, 237 F.3d at 578).

Finally, the School Districts have a significant interest in functioning within the scope of the authority granted to them by the State of Texas. To have ignored the requirements of the Act would have meant entering into *ultra vires* contracts in violation of a restriction which the Texas Legislature duly imposed upon the School Districts. As legislatures are presumed to act constitutionally,[40] and as it is by no means obvious that the Act violated Dennar and Abdelhadi's First Amendment rights, the School Districts had a significant interest in following the Legislature's conditions for contracts.

[39] *Supra* at 55-64.
[40] *Supra* at 38.

Dennar and Abdelhadi did not clearly establish that their alleged injury outweighed the harm to the School Districts. The Court should, therefore, reverse the preliminary injunction against the School Districts.

F. THE DISTRICT COURT ERRED IN HOLDING THAT THE PRELIMINARY INJUNCTION AGAINST THE SCHOOL DISTRICTS WOULD NOT DISSERVE THE PUBLIC INTEREST.

The preliminary injunction against the School Districts disserves the public interest because it is based on claims for which Dennar and Abdelhadi lacked standing and on conduct which is unprotected by the First Amendment. The public interest is disserved by granting such an extraordinary remedy in this context. S*ee, e.g.*, *Blum*, 457 U.S. at 1002; *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005).

Furthermore, the district court's improper preliminary injunction against the School Districts could potentially create liability for an award of attorney's fees against the School Districts merely for complying with a presumptively constitutional statute passed by the Legislature.[41] The public interest is better served by using public funds to provide public education and not to pay attorney's fees for an unnecessary injunction in litigation which arose from the School Districts' legitimate compliance with state law and not from any action taken by the School Districts' Trustees.

[41] *Supra* at 38.

CONCLUSION

This Court should dismiss Dennar and Abdelhadi's claims against the Trustees of Klein Independent School District and Lewisville Independent School District for lack of jurisdiction and should vacate the district court's April 25, 2019 order. Alternatively, this Court should reverse the district court's April 25, 2019 order, deny Dennar and Abdelhadi's motion for preliminary injunction, dismiss their claims against the School Districts' Trustees, and award costs to the School Districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on this 6th day of September, 2019, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Thomas P. Brandt
Thomas P. Brandt

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

- this brief contains 12,995 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type requirements of FED. R. APP. P. 32(a)(6) because:

- this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with a 14 point font named Times New Roman.

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Dated: September 6, 2019

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