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
Case No. 18-cv-1091 consolidated with Case No.18-cv-1100
The Honorable Robert Pitman, District Judge

BRIEF OF APPELLEES JOHN PLUECKER, OBINNA DENNAR, ZACHARY ABDELHADI, AND GEORGE HALE IN RESPONSE TO STATE APPELLANTS

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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.

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STATEMENT REGARDING ORAL ARGUMENT

This case merits oral argument. It presents important questions about whether the State may force contractors to forego their First Amendment rights to participate in political consumer boycotts because the State disagrees with the message of those boycotts.

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Introduction

In 2017, the Texas Legislature passed House Bill 89 ("the Act"), which requires contractors who want to work for the State—or any of its political subdivisions or agencies—to sign a statement certifying that they are not currently participating in boycotts of Israel and will not engage in such boycotts for the life of the contract. The intent and effect of the Act are clear: to exclude those who take a political stance disfavored by the government from contracting with the State or any other governmental entities.

This case is not about the conflict between Israel and Palestine. This case is about only whether a government entity can dictate the political viewpoint of contractors with whom it does business. The First Amendment protects the rights of companies and individuals to participate in political boycotts, and the State cannot deny contracts to those who take a political stance with which it disagrees.

In a comprehensive 56-page opinion, the district court found that the Act violates the First and Fourteenth Amendments. The court correctly relied on the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which straightforwardly held that political consumer boycotts are protected under the First Amendment. Accordingly, the court preliminarily enjoined the Act's implementation.

After the Act was enjoined, and in response to that injunction, the State Legislature amended the Act. That amendment, H.B. 793, did not moot out Plaintiffs' claims. It did not address the aspects of the Act that the district court held to be unconstitutional. Instead, it merely narrowed the Act to purportedly eliminate sole proprietors, in an attempt to exclude the Plaintiffs in this action. But there remains a factual question about whether Plaintiffs and other sole proprietors are still being forced to choose between their First Amendment right to boycott Israel and contracting with the State or its entities, and, moreover, Defendants have failed to meet their burden under the voluntary cessation doctrine.

Because this case is not moot and the district court's order was correct on the merits, this Court should affirm the preliminary injunction.

Statement of Jurisdiction

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). As demonstrated below, this case is not moot and this Court retains subject-matter jurisdiction.

Issues Presented

1. Whether the district court's preliminary injunction order is moot.

2. If the district court's preliminary injunction order is not moot, whether the district court abused its discretion in preliminarily enjoining the Act.

Statement of the Case

I. The Act

The Act became effective in September 2017. It 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." Tex. Gov't Code § 2270.002.

"Boycott Israel" is defined as "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes." Tex. Gov't Code §808.001(1).

Statements by the Act's author, Representative Phil King, and Governor Greg Abbott make clear that the Act was intended to target participation in Boycott Divestment and Sanctions ("BDS") campaigns, which are non-violent campaigns, inspired by the anti-apartheid movement in South Africa, that encourage individuals, companies, and state actors to refrain from providing economic support to the Israeli

government, and to companies that allegedly violate Palestinian human rights. ROA.1243.[1]

Representative King referred to the Act as "the anti-BDS bill." ROA.1244 (citing ROA.1990-1991). Governor Abbot also referred to it as the "Anti-BDS" bill. ROA.1244 (citing ROA.1993). Additional statements surrounding the passage of the Act confirm that it was passed to target disfavored political expression. Representative King stated that "[t]he bill sends a strong message that Texas stands with its friends." ROA.1245 (citing ROA.1997). In Governor Abbott's official press release upon signing the bill he emphasized that "[a]nti-Israel Policies are anti-Texas policies." ROA.1245 (citing ROA.1993).

II. Plaintiffs' challenge to the Act

Plaintiffs Pluecker, Dennar, Abdelhadi, and Hale ("Plaintiffs") are sole proprietors who have been forced to choose between contracting for work with State government entities and exercising their First Amendment right to participate in political boycotts. Plaintiffs Pluecker, Dennar, and Abdelhadi were all either denied work or payment for work already completed because they could not sign the "No Boycott of Israel" certification. ROA.1246-1250 (citing ROA.2099-2101 (Pluecker

[1] Although there is no single organization that dictates the message or goals of all BDS campaigns, BDS campaigns generally seek the end of occupation in the West Bank, equal rights for Arab-Palestinian citizens of Israel, and the right of return for all Palestinian refugees. ROA.1243. BDS campaigns also reject all forms of discrimination, including Antisemitism and Islamophobia. *Id.*

Decl. at ¶ 10-17), ROA.1216-1217 (Abdelhadi Decl. at ¶¶ 9-12), ROA.2031-2032 (Dennar Decl. at ¶¶ 6-8)). In order to continue his work, Plaintiff Hale was forced to sign a "No Boycott of Israel" certification over his objections. ROA.1251 (citing ROA.2059-2061 (Hale Decl. at ¶¶ 11-18)).

Plaintiffs brought suit and requested that the district court issue a preliminary injunction against the enforcement of the Act because it violates the First and Fourteenth Amendments. Plaintiffs' suit was consolidated with the *Amawi* action.

III. The district court's preliminary injunction

The district court granted Plaintiffs' motion for a preliminary injunction, holding that Plaintiffs had shown that they were likely to prevail on the merits because: (1) the First Amendment protects political consumer boycotts, ROA.1264-1267; (2) the Act is viewpoint- and content-discriminatory, and is not narrowly tailored to serve a legitimate government interest, ROA.1270-1278; (3) the Act unconstitutionally conditions government contracts on the sacrifice of First Amendment rights, ROA.1279-1281; (4) the Act unconstitutionally compels speech, ROA.1282-1284; and (5) the Act is unconstitutionally vague, ROA.1284-1287. The district court further held that Plaintiffs met their burden of showing the remaining preliminary injunction factors. ROA.1287-1289. Thus, the Court enjoined further enforcement of the Act. ROA.1297.

IV. Post-injunction developments

After the district court's issuance of a preliminary injunction, the Texas Legislature amended the Act through H.B. 793 (the "Amendment"). ROA.1330-1331. The Amendment did not cure any of the defects that the district court held to be unconstitutional. Instead, it narrowed the application of the Act, purportedly excluding sole proprietors.

Shortly after the Amendment passed, Defendants moved to stay the preliminary injunction. Although Plaintiffs took no position on the stay, they did not—contrary to Defendants' representations—concede that the preliminary injunction was moot. Rather Plaintiffs stated: "*To the extent the State is correct that the preliminary injunction is moot*, this Court will not reach the merits of the State's appeal. 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." *Pluecker* Opp. to Motion to Stay at 4 (emphasis added); *see also id*. at 3 (similar).

While this appeal of the preliminary injunction was pending, Defendants moved to dismiss the underlying district court action as moot, ROA.1351-1357, 1408-1421, and Plaintiffs opposed the motion, ROA.2203-2218. The district court denied the motion to dismiss. ROA.2291-2304. No Defendant sought to certify the order denying the motion to dismiss for mootness for interlocutory review. Thus, mootness is not properly before this Court.

In November 2019, Plaintiffs filed in this Court a Motion to Modify the Briefing Schedule to Stay Appellate Proceedings. This motion was based on the Plaintiffs' pending motion for final declaratory judgment in the district court. *Amawi v. Paxton,* No. 18-cv-1091, Dkt. No. 111 (W.D. Tex. November 4, 2019). Defendants' Oppositions to Plaintiffs' Motion are due December 6. If granted, that final judgment would render moot this appeal from the preliminary injunction. This Court denied the motion to stay appellate proceedings.

As part of the Motion to Modify Briefing Schedule, Plaintiffs alternatively moved to supplement the Record on Appeal with evidence filed in the district court in support of the declaratory judgment motion demonstrating that the Amendment has not halted the application of the Act to sole proprietors. *Id*. at 2. This Court also denied that part of the motion.

Summary of Argument

This case is not moot.

Defendants[2] ask the Court to dismiss this case as moot, arguing that the 2019 Amendment—which came into law only after the district court enjoined the Act—

[2] The State Defendants, including the Attorney General and two universities, filed one appellate brief, and the School Districts filed a separate brief. Both briefs raise similar arguments concerning mootness and the merits. For the convenience of the Court, Plaintiffs will address those arguments together in this brief. Reference to "Defendants" therefore includes all named defendants in this action.

has removed Plaintiffs, and other sole proprietors, from the Act. This Court should not dismiss this case as moot for three reasons.

First, the Defendants moved to dismiss this case as moot in the district court, and the denial of that motion was not certified for interlocutory appeal. Therefore mootness of the case is not before this Court.

Second, Defendants' mootness arguments presents factual questions best resolved in the district court about whether Plaintiffs and other sole proprietors are still being required to sign "No Boycott of Israel" certifications. Although Defendants claim the Amendment has eliminated the possibility of Plaintiffs being subject to the challenged practice, Plaintiffs have introduced evidence before the district court to the contrary. Therefore, to the extent this Court determines that the Defendants' arguments on mootness must be addressed, it should remand the case to the district court to allow for the development of the evidentiary record on the issue.

Third, the case is not moot under the voluntary cessation doctrine. Defendants seeking to establish mootness must show that (1) it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968); and (2) that any "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979).

Defendants cannot meet this heavy burden for numerous reasons, including that the current Record on Appeal is silent as to whether the Act continues to be enforced against sole proprietors, the Amendment to the Act did not address the constitutional violations, and Defendants continue to vigorously defend the constitutionality of requiring Plaintiffs to sign "No Boycott of Israel" certifications.

The district court's preliminary injunction should be affirmed.

The district court correctly concluded that the Act is unconstitutional. Political consumer boycotts, like those the Act seeks to punish, are protected First Amendment activity under *Claiborne*, which controls this case. The Act unconstitutionally discriminates on the basis of viewpoint and content; it prohibits only boycotts against Israel and does so because the message contained in the speech is disfavored by the State. For instance, it does not prohibit boycotts against Palestine or reverse boycotts against BDS participants.

The Act is not narrowly tailored to serve a legitimate governmental purpose. Defendants' primary justification for the Act—that it is an anti-discrimination measure—is belied by the Act's text and history. The Act does not even mention national origin; nor does it prohibit discriminating against individuals or companies of Israeli origin if those individuals are not doing business in Israel. Instead, the Act prohibits refusing to do business with the State of Israel or companies that do business with Israel—even if those companies are not of Israeli origin.

The Act also unconstitutionally conditions government contracts on the sacrifice of First Amendment rights, impermissibly compels speech, and is unconstitutionally vague.

Having found that the Act violated the First and Fourteenth Amendments, the district court also correctly concluded that the remaining preliminary injunction factors were satisfied.

The Universities are proper parties.

The district court properly concluded that the University Boards of Regents were sued in their proper capacities, and are not immune from suit.

Standard of Review

A grant of a preliminary injunction is reviewed under an abuse of discretion standard. *United States v. Billingsley*, 615 F.3d 404, 408–09 (5th Cir. 2010).

Argument

I. This Court should not dismiss this case as moot.

A. This Court's determination of mootness should be limited to the preliminary injunction order.

As a threshold issue, Defendants' attempt to have this Court review the district court's denial of Defendants' motions to dismiss, State's Appellate Brief ("SAB") at 12-23, is inappropriate because that motion is not properly before this Court. Defendants did not move to certify the district court's order for interlocutory review.

See, e.g., 28 U.S.C. § 1292(b). Defendants also have waived any request for pendant review of that order. *Wallace v. County of Comal*, 400 F.3d 284, 292 (5th Cir. 2005) (finding arguments supporting pendant review waived, where they "are made for the first time in defendants' reply brief").[3]

Even if this Court finds that Defendants have demonstrated that the Amendment has mooted the district court's preliminary injunction, its decision should be limited to that order.[4] *Janvey v. Alguire*, 647 F.3d 585, 603 (5th Cir. 2011) ("Ordinarily the scope of appellate review under § 1292(a)(1) is confined to the issues necessary to determine the propriety of the interlocutory order itself.") (citing Wright, Miller & Cooper, Fed. Practice & Procedure: Jurisdiction 2D § 3291.1 (2011)).

Here, in addition to Plaintiffs' claims for injunctive relief, Plaintiffs also have pled a claim for declaratory relief, which may be afforded even where injunctive relief is not available. *Robinson v. Hunt County, Texas*, 921 F.3d 440, 450 (5th Cir. 2019), *reh'g denied* (May 16, 2019) ("A party may pursue both injunctive and declaratory relief, and '[a] court may grant declaratory relief even though it chooses

[3] Even if this Court determines that Plaintiffs' case is moot, the district court will still retain ancillary jurisdiction to determine Plaintiffs' request for attorneys' fees. *Lauren C. by & through Tracey K. v. Lewisville Indep. Sch. Dist.*, 904 F.3d 363, 373 (5th Cir. 2018); *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 470–71 (5th Cir. 2003).

[4] Defendants have misrepresented Plaintiffs' position on mootness. As discussed above, Plaintiffs did not concede that the preliminary injunction was moot or must be dissolved.

not to issue an injunction or mandamus.'") (citation omitted); *Familias Unidas v. Briscoe*, 544 F.2d 182, 190 (5th Cir.1975) ("While a defendant may unilaterally act in such a manner as to cure the allegedly offensive conduct and foreclose the necessity for injunctive relief, that same unilateral action by the defendant may have no effect whatsoever on the necessity for declaratory judgment relief.").

The impropriety of dismissing the entire case is especially clear given (1) that there is evidence before the district court about the continued enforcement of the Act against sole proprietors, and (2) the relaxed standing requirements for First Amendment claims. *See Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973) (in the First Amendment context, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *see also Sec'y of State of Md. v. Joseph H. Munson Co., Inc.,* 467 U.S. 947, 956 (1984).

Accordingly, Defendants' request for the Court to dismiss the entire case is misplaced and procedurally barred. Even if this Court determines that the district court's preliminary injunction order is moot, Plaintiffs still have a live claim for declaratory relief, and only the preliminary injunction should be dissolved as moot, with the remainder of the case remanded to the district court. However, because

neither the preliminary injunction nor the case is moot under the voluntary cessation doctrine, this Court should affirm the district court's preliminary injunction order.[5]

B. Defendants' mootness argument is best resolved in the district court.

According to Defendants, the Amendment to the Act means that no Plaintiff will be forced to choose between signing a "No Boycott of Israel" certification or contracting with a State agency. SAB at 14 (Defendants arguing that "no plaintiff could plausibly allege that he or she will enter [a contract with a "No Boycott of Israel" certification] in the future."). Defendants' claim, however, requires this Court to make a factual determination about whether Plaintiffs and other sole proprietors will be subject to "No Boycott of Israel" certifications. Because this claim concerns actions and events that post-date the issuance of the preliminary injunction, this Court does not have a full record on which to decide Defendants' mootness argument.

Plaintiffs have filed evidence in the District Court that goes to the question of whether Plaintiffs "could plausibly allege," SAB 14, that they will continue to be presented with contracts including "No Boycott of Israel" certifications in the

[5] If this Court does determine that the entire case is moot, it will not reach the merits of the preliminary injunction order, because mootness is jurisdictional. *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999) ("We have no power under Article III to decide the merits of a case that is moot when it comes before us.").

future.[6] That evidence includes examples of sole proprietors—including one of the Plaintiffs here—being presented with "No Boycott of Israel" certifications **after** passage of the Amendment, and other examples of current contracts and policies that still require sole proprietors to sign "No Boycott of Israel" certifications. *Amawi*, No. 18-cv-1091, Dkt. Nos. 111-1, 111-2, 111-3.[7]

The evidence filed in the district court goes directly to the question of whether Plaintiffs retain a concrete interest in having the Act declared unconstitutional. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("'As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'") (citation omitted); *see also Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 313 (5th Cir. 2015) (same). However, the evidence is not part of the Record on Appeal because it concerns actions taken following both the issuance of the district court's injunction and the Amendment. Accordingly, to the extent this Court does not reject Defendants' arguments on mootness under the voluntary cessation doctrine, as

[6] In opposition to Plaintiffs' alternative request to supplement the record on appeal with this evidence, Defendants alluded to the need for the evidence to be vetted through the discovery process. State Appellants' Response to Appellees' Motion to Modify Briefing at 5. This argument underscores the propriety of remanding the case to the district court for further proceedings.

[7] The State cannot sidestep the relevance of this evidence by arguing that, after the Amendment, it is not responsible for continued enforcement of the Act against sole proprietors. The State entities that continue their enforcement do so in the name of State law, and the Attorney General is responsible for that enforcement. To the extent the Attorney General truly believed that State entities that continue to enforce "No Boycott of Israel" certifications against sole proprietors are in violation of State law, he surely could instruct them to cease such actions.

explained below, it should remand the case to the district court to allow further development of the record.

C. This case is not moot under the voluntary cessation doctrine.

This case is not moot because "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 (1982).

Defendants' arguments rely on general principles of standing—not mootness. *See e.g.* SAB at 13; School Districts' Appellate Brief (SDAB) at 28.[8] In *Laidlaw*, the Supreme Court cautioned against conflating the standing requirements that exist at the beginning of a lawsuit with mootness, especially where the defendant has induced mootness by voluntarily ceasing the challenged action:

> The Court of Appeals incorrectly conflated this Court's case law on initial standing, with its case law on mootness. Such confusion is understandable, given this Court's repeated description of mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Careful reflection, however, reveals that this description of mootness is not comprehensive. For example, a defendant claiming that its voluntary compliance moots a case bears a formidable burden. By contrast, it is the plaintiff's burden, in a lawsuit brought to force compliance, to establish standing by

[8] Defendants rely on *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018), *as revised* (Feb. 1, 2018), *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014), *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) and *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam), but each of these cases address standing, not mootness.

> demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue and that the threatened injury is certainly impending. **The plain lesson is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.**

Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 169–71 (2000) (emphasis added) (citations omitted); *see also K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013) ("Mootness, however, is more than 'the doctrine of standing set in a time frame.' '[A] defendant cannot automatically moot a case simply by ending its [challenged] conduct once sued.'") (citations omitted).

To demonstrate that a case is moot under the voluntary cessation doctrine, Defendants must show: (1) it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Concentrated Phosphate Exp. Ass'n*, 393 U.S. at 203; and (2) any "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," *Davis*, 440 U.S. at 631.

1. The voluntary cessation doctrine applies here.

Defendants argue that the voluntary cessation doctrine does not apply because the Attorney General is named as a defendant, but it was the Legislature that amended the law.[9] SAB at 21-22. Fifth Circuit precedent is contrary to this

[9] Defendants rely on *Hall v. Louisiana*, 884 F.3d 546 (5th Cir. 2018) for this proposition, but that case is inapposite. It concerned solely a question of vacatur and did not reach any question concerning mootness and voluntary cessation.

argument. In *Cooper v. McBeath*, 11 F.3d 547, 551 (5th Cir. 1994), the named defendant was the Administrator of the Texas Alcoholic Beverage Commission, and the Court considered whether a legislative amendment had rendered the case moot. In rejecting the mootness suggestion, the Court reasoned its decision was "controlled by the Supreme Court's recent decision in *Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 . . . (1993)." *McBeath*, 11 F.3d at 551. The Court then applied the voluntary cessation analysis enunciated in *City of Jacksonville* and *Aladdin's Castle*: "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.* (quoting *City of Jacksonville*, 508 U.S. at 661-662; *Aladdin's Castle*, 455 U.S. at 289);[10] *see also Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Com'rs*, 622 F.2d 807, 824 (5th Cir. 1980) (applying voluntary cessation doctrine to a mootness claim where legislative amendments had changed the law, even though suit was filed against grand jury commissioners); *cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (applying voluntary cessation doctrine where the governor stopped enforcing the

[10] *McBeath* also relied on the Supreme Court's articulation of the voluntary cessation doctrine in *Concentrated Phosphate Exp. Ass'n*, 393 U.S. at 203 ("[A] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

challenged policy, even though suit was filed against the Director of the Department of Natural Resources).[11]

The Fifth Circuit also applies the voluntary cessation test to government actions generally. In *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009), *aff'd*, 563 U.S. 277 (2011), the Court considered the applicability of the voluntary cessation test discussed in *Laidlaw* to "voluntary governmental cessation of possibly wrongful conduct." *Id.* at 325. While it concluded that the practice of "according a presumption of good faith" to government actors "**without evidence to the contrary**" was consistent with *Laidlaw*, it did not dispense with the burden to demonstrate that the challenged conduct would not recur. *Id.* (emphasis added). Instead, the Court still required the government "to make 'absolutely clear' that the [challenged conduct] cannot 'reasonably be expected to recur.'" *Id*.

Although the Court in *Sossamon*, described the burden it imposed on the government as "lighter," *id.*, controlling Supreme Court precedent mandates

[11] Because *Ex Parte Young* requires that an official of the State be named, Defendants' attempt to distinguish between the Attorney General and the Legislature for the purpose of voluntary cessation should be rejected. *Martin v. Houston*, 226 F. Supp. 3d 1283, 1289 (M.D. Ala. 2016) ("Houston argues that the repeal was the handiwork of the Alabama Legislature and that he, a representative of a separate branch of government, played no part in the repeal process. Therefore, he continues, this case is 'no different from a case where, say, one of the parties has died.' Hogwash. This lawsuit is another chapter in the legal fiction penned by *Ex parte Young*. The Eleventh Amendment bars a direct suit against the State itself, leaving Houston as the only party against whom Martin can seek to vindicate his rights. To hold the voluntary-cessation framework inapplicable in this situation would be to undermine federal enforcement of the Constitution against state legislation; couching a legislative repeal as an external cause of mootness would allow a state government to dodge judicial review willy-nilly, simply by repealing challenged laws.") (citations omitted).

imposition of a "heavy" burden, *Laidlaw*, 528 U.S. at 170, to show a case is not moot, even with respect to government actors. In *Trinity Lutheran*, 137 S. Ct. 2012, the Supreme Court rejected the argument that governmental voluntary cessation of the challenged practice had mooted the case. In so doing, the Supreme Court applied the *Laidlaw* test without any qualification for the fact that it was a governmental actor who had voluntarily ceased the challenged practice. *Id.* at 2019 n.1 (noting that announcement by the Governor that he would cease challenged practice "does not moot this case. We have said that such voluntary cessation of a challenged practice does not moot a case unless 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'") (citing *Laidlaw*, 528 U.S. at 189)[12]; *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (where federal government had allegedly ceased offending conduct, the Court found that the case was not moot, because the government did not meet its "heavy burden" of showing that it was "'absolutely clear that the

[12] The Supreme Court may expand on the application of the voluntary cessation doctrine to State legislative amendments in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, N.Y.*, 139 S. Ct. 939 (2019). There, both the City and State of New York amended the gun control laws that were subject to challenge, and therefore filed a motion suggesting mootness with the Supreme Court. The Supreme Court denied that motion, but instructed the parties to be prepared to discuss mootness at oral argument, which is scheduled for December 2, 2019.

allegedly wrongful behavior could not reasonably be expected to recur.'") (internal citations omitted).[13]

2. Defendants have not met their burden under the voluntary cessation doctrine.

Regardless of whether this Court imposes a "lighter" burden or the normal "heavy" burden for voluntary cessation, Defendants must show that (1) the challenged conduct cannot be expected to recur; and (2) the Amendment has eradicated the effects of the alleged violation. *Davis*, 440 U.S. at 631. Defendants cannot meet either standard.

First, Defendants have failed to demonstrate conclusively that the challenged conduct cannot be expected to recur. As discussed above, Defendants' mootness arguments to this Court raise factual questions about the continued application of the Act to sole proprietors that the Record on Appeal does not sufficiently answer, and regarding which there is relevant evidence to the contrary before the district court. Accordingly, with an incomplete record on the issue, Defendants cannot meet this core part of their burden.

Second, the challenged conduct has not abated because the Amendment did not alter or remove the unconstitutional provisions of the Act. The Amendment does

[13] These cases post-date *U.S. Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556 (1986), and thus refute Defendants' suggestion that in *Galioto*, the Supreme Court implicitly adopted a new rule that the voluntary cessation doctrine did not apply to governmental entities.

nothing to address the district court's holding that requiring companies to certify that they do not boycott Israel to access State contracts is facially unconstitutional. As the district court noted, the Amendment just purportedly applies the unconstitutional law to fewer companies. ROA.2303. Accordingly, this case differs from those relied on by Defendants, such as *Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546 (5th Cir. 2006), where the statutory change "discontinue[d] a challenged practice." *Id.* at 564; *see also Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 322 (5th Cir. 2005) (noting "to the extent that Ordinance 1443 addresses and resolves a claim directed at prior versions of the Sign Code, such claim is moot"); *Habetz v. Louisiana High Sch. Athletic Ass'n*, 842 F.2d 136, 137 (5th Cir. 1988) (challenged policy repealed); *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (challenged provisions repealed).[14] These cases do not address a circumstance like the one before this Court, in which, rather than cure the facial defects of what

[14] *See also U.S. Fleet Services v. City of Fort Worth, TX*, 33 Fed. App'x 704, at *1 (5th Cir. 2002) (challenged ordinance replaced with an ordinance not challenged by plaintiffs); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116-117 (4th Cir. 2000) (legislative action significantly altered the challenged practice); *Teague v. Cooper*, 720 F.3d 973, 976 (8th Cir. 2013) (challenged statute repealed and replaced); *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1222–23 (10th Cir. 2001) (challenged provisions repealed); *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 496 (5th Cir. 1986) (complained of time limitation repealed); *Barnes v. Pierce*, 338 F. App'x 373, 376 (5th Cir. 2009) (amended policy addressed complaint); *Reynolds v. New Orleans City*, 272 F. App'x 331, 339 (5th Cir. 2008) (challenged order no longer in effect). Other cases relied on by Defendants find that the case is not moot. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).

was held to be a facially invalid law, an amendment simply narrows the law's application to purportedly exclude the plaintiffs challenging the law.

Instead, because the Amendment to the statute has resulted in a substantially similar statute with the same unconstitutional requirements, this case is not moot. *McCorvey*, 385 F.3d at 849 n.3 (5th Cir. 2004) ("[A]n exception to this mootness rule exists where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or **one that is substantially similar**.") (emphasis added), *Reynolds*, 272 F. App'x at 337 n.3 ("An important exception to this general rule [of mootness] applies if there is a substantial likelihood that the challenged statute will be reenacted or **replaced by another constitutionally suspect law**.") (emphasis added).[15]

This exception to mootness is critical; otherwise legislatures could avoid judicial review through gamesmanship. Here, the Legislature did not cease its unconstitutional conduct, it simply narrowed the scope of the Act to (in theory, though not in practice) exclude sole proprietors like Plaintiffs. A finding of mootness here would raise serious concerns about the ability of government bodies to evade judicial review of unconstitutional laws by amending them to surgically

[15] *Cf. City of Jacksonville, Fla.*, 508 U.S. at 662 ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.").

exclude the plaintiffs challenging the laws, thereby frustrating judicial review and wasting judicial and party resources.

Third, Defendants' continued vigorous defense of the constitutionality of the Act is evidence that, absent a judicial order, they will continue enforcing the requirement against Plaintiffs and other Texans. Numerous cases have found that the government's continued defense of a law it claims is no longer in effect undercuts the position that the challenged conduct could not recur. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (finding case was not moot where "the district vigorously defends the constitutionality of its race-based program"); *Knox v. Serv. Employees Intern. Union, Local 1000*, 567 U.S. 298, 307 (2012) (finding voluntary cessation doctrine not met where union continued to defend challenged practice); *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) ("Additionally, the GVI's continued defense of the validity and soundness of the contract prevents the mootness argument from carrying much weight."); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019) (continued defense of program undercut mootness argument); *Sasnett v. Litscher*, 197 F.3d 290, 291–92 (7th Cir.1999) (voluntary alteration of a regulation did not moot case where State vigorously defends old regulation), *abrogated on other grounds Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 581 (S.D. Tex. 2003), *dismissed*, 67 F. App'x 251

(5th Cir. 2003) (case not moot where Defendant changed policy only after issuance of preliminary injunction and continued to defend constitutionality of original policy on appeal).

Finally, Defendants cannot show that "events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. First, the Amendment did not eradicate the constitutional violations that Plaintiffs have facially challenged. The Amendment did nothing to address the unconstitutionality of forcing companies to sign "No Boycott of Israel" certifications. Second, as discussed above, the current Record on Appeal cannot answer whether the legislative change actually resulted in sole proprietors no longer having to sign "No Boycott of Israel" certifications or lose work.

Because Defendants have failed to meet their burden under the voluntary cessation doctrine, this case is not moot.

II. The Court should affirm the preliminary injunction.

A. The First Amendment protects the right to join in a political consumer boycott.

The Supreme Court recognized that the First Amendment protects political consumer boycotts in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) Nevertheless, Defendants argue that Plaintiffs' political consumer boycotts constitute unprotected economic conduct. Defendants rely on two cases: (1)

Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc. ("*FAIR*"), 547 U.S. 47 (2006), an opinion that does not even mention the word "boycott"; and (2) *Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212 (1982) ("*Longshoremen*"), which predates *Claiborne* and is cabined to secondary labor boycotts. Neither case is applicable, and *Claiborne* is controlling.

1. *Claiborne* controls.

Claiborne firmly established the First Amendment right to participate in political consumer boycotts. There, the Supreme Court considered an NAACP-organized boycott of white-owned businesses. The *Claiborne* boycott took "many forms," *id.* at 907, including a collective refusal to buy goods from the boycotted stores, speeches, public meetings, and nonviolent picketing, as well as individual instances of violence and threats of violence. *Id*. at 898–906. The Mississippi Supreme Court "concluded that the entire boycott was unlawful" under the common law tort theory because the boycott had been effectuated through violence and threats. *Id*. at 894–95. It accordingly imposed liability on the boycott participants "for all damages 'resulting from the boycott.'" *Id*. at 921.

The U.S. Supreme Court reversed, holding that the boycott, and activities associated with it, were protected under the First Amendment. *Id*. at 911, 915. The Court acknowledged the state's power to regulate economic activity, but distinguished the regulation of economic boycotts and political boycotts: "While

States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id*. at 913. Thus, the Court ruled that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change . . . ." *Id*. at 914. The Court held that "the nonviolent elements of petitioners' activities"—including the concerted refusal to deal at the heart of the boycott, as well as the speeches, nonviolent picketing, and public meetings supporting the boycott—"are entitled to the protection of the First Amendment." *Id*. at 915.

The Court's opinion clearly reached the boycott itself: "The Mississippi Supreme Court did not sustain the chancellor'' imposition of liability on a theory that state law prohibited a **nonviolent, politically motivated boycott**. The fact that **such activity is constitutionally protected**, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed." *Id*. (emphasis added). The Court also held that a "careful limitation on damages liability" had to be imposed to accommodate "the important First Amendment interests at issue in this case."

> Petitioners **withheld their patronage** from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality . . . While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity.

Id. at 918 (emphasis added). The only plausible reading of this section is that the Court is referring to the act of withholding patronage when it describes "nonviolent, **protected** activity."

Claiborne thus established that the collective withholding of patronage as part of a consumer boycott, a political practice going all the way back to the boycotts of British goods during the American Revolution, is fully protected by the First Amendment. The Court expressly rejected the trial court's "view that voluntary participation in the boycott was a sufficient basis on which to impose liability." *Id*. at 921.

"In light of the principles set forth" in its opinion, the Supreme Court found it "evident that such a damages award may not be sustained in this case." *Id*.; *see also id*. at 926 ("For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings **or his active participation in the boycott itself**.") (emphasis added). If, as Defendants maintain, the First Amendment does not protect nonviolent participation in a political boycott, the Court would have had no basis for limiting the damages award the state court had imposed on nonviolent boycott participants. The Court was willing to entertain individual liability "for the consequences of [individuals'] violent deeds," but rejected "imposition of all damages 'resulting from the boycott.'" *Id*. at 921, 933.

Therefore, Defendants incorrectly interpret *Claiborne* to stand for the proposition that the First Amendment merely protects engagement in nonviolent "speech, assembly, association, and petition" in support of a boycott. SAB at 29. If the Court had wanted to hold that only speech, assembly, association, and petitioning in support of the boycott were protected, it easily could have done so. Instead, it held that all of the peaceful activities undertaken in support of the boycott—including the collective refusal to deal—were protected.

The obvious application of *Claiborne*'s holding to political consumer boycotts is further reflected in the Supreme Court's subsequent decisions in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). Both cases concerned concerted refusals to deal that were at least partially motivated by economic self-interest. In both, the Court recognized that *Claiborne* established a First Amendment right to nonviolent participation in politically-motivated boycotts, as opposed to the economically-motivated boycotts at issue in those cases. *See Allied Tube*, 486 U.S. at 508 (distinguishing *Claiborne* because "the boycott in *Claiborne* was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution"); *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 426 (distinguishing *Claiborne* because "[t]hose who joined the *Claiborne Hardware* boycott sought no special

advantage for themselves. . . . They sought only the equal respect and equal treatment to which they were constitutionally entitled"). The Supreme Court's distinction between political and economic boycotts in these cases would have been entirely unnecessary if *Claiborne* protected only speech supporting boycotts and not the boycott itself.

Defendants also assert that *Claiborne* is limited to the redress of civil rights grievances. SDAB at 61-62. But the *Claiborne* boycott was not simply a demand for the local government to respect constitutional rights. It was directed at "both civic and business leaders," 458 U.S. at 907, and "sought to bring about political, social, and economic change," *id*. at 911. Therefore, the Supreme Court held that the boycott was protected as a form of "expression on public issues," just like the boycotts at issue here. *Id*. at 913; *see also Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 197 (8th Cir. 1994) (holding that appealing to a private company through a consumer boycott protesting discriminatory labor practices was "constitutionally safeguarded" under *Claiborne*). In holding that the boycott was constitutionally protected, the Supreme Court expressly reaffirmed our "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Claiborne*, 458 U.S. at 913 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

That commitment—and equally our First Amendment rights—are not limited to expressing demands to the government.

There is likewise no basis for limiting the First Amendment's reach to expression concerning domestic constitutional issues, and the Supreme Court has never so limited the protections of the First Amendment. *See Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (law that prohibited displaying signs critical of foreign governments within 500 feet of an embassy violated the First Amendment).

Rather, the principle established in *Claiborne* protects the rights of Plaintiffs to participate in political boycotts of Israel. Plaintiffs are motivated by the desire to "vindicat[e] rights of equality and freedom" for Palestinians, and are "designed to force governmental and economic change." *Compare Claiborne*, 458 U.S. at 914-15; *with* ROA.1243, ROA.1246-1252 (citing ROA.2098-2099 (Pluecker Decl. at ¶ 6 ("I have supported [BDS] campaigns . . . because I believe in attempts to promote justice and effectuate human rights in Israel and the Palestinian territories.")), ROA.1248 (Abdelhadi Decl. at ¶ 5), ROA.2030 (Dennar Decl. at ¶ 5), ROA.2058 (Hale Decl. at ¶ 9)). Further, Plaintiffs are not motivated "by any desire to lessen competition or to reap economic benefits." *Compare Allied Tube*, 486 U.S. at 508; *with* ROA.2099 (Pluecker Decl. at ¶ 7 ("My support for BDS campaigns is not motivated by my own economic self-interest.")); ROA.2030 (Dennar Decl. at ¶ 4); ROA.2015 (Abdelhadi Decl. at ¶ 5).

As the district court noted, Defendants do not dispute that Plaintiffs' boycotts are political; the boycotts support the BDS movement's "dispute with the Israeli government's policies." ROA.1265 (citing ROA.304, Texas Resp. Mots. Dismiss). If there were any doubt that the Act targets political boycotts, the statutory definition of "Boycott Israel" makes it clear by explicitly excluding refusals to deal for "ordinary business purposes." Tex. Gov't Code § 808.001(1).[16] In other words, if a person boycotts Israel based on their opposition to the policies of the Israeli government, such an action is prohibited. But if a person makes the same decision for business reasons, such an action is permissible. Thus, the Act's text specifically aims to regulate politically motivated activity, which violates the First Amendment.

Accordingly, the district court correctly concluded that "*Claiborne* . . . governs this case," and that under *Claiborne*, "boycotts are speech." ROA.1264-1265. Two other district courts that analyzed similar anti-BDS provisions reached the same result. *See Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1042 (D. Ariz. 2018) ("[W]hen a statute requires a company, in exchange for a government contract, to promise to refrain from engaging in certain actions that are taken in response to larger calls to action that the state opposes, the state is infringing on the very kind of expressive conduct at issue in *Claiborne*."); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1013 (D. Kan. 2018) ("The conduct . . . is protected for the same

[16] As discussed further below, the limits of this exception are impermissibly vague.

reason as the boycotters' conduct in *Claiborne* was protected. [Plaintiff] and others have "banded together" to express, collectively, their dissatisfaction with Israel and to influence governmental action."); *but see Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d 617 (E.D. Ark. 2019).

2. *FAIR* and *Longshoremen* are inapposite.

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

Defendants erroneously attempt to characterize *FAIR* as a case about boycotts. As the district court noted, "[t]he Supreme Court did not treat the *FAIR* plaintiffs' conduct as a boycott: the word 'boycott' appears nowhere in the opinion, the decision to withhold patronage is not implicated, and *Claiborne*, the key decision recognizing that the First Amendment protects political boycotts, is not discussed." ROA.1265.

Defendants' argument that the *FAIR* plaintiffs construed their actions as a boycott and cited to *Claiborne* cuts against them. SAB at 32-33. The fact that the *FAIR* plaintiffs asked the Court to consider the prohibition on military recruiting on campus as a political consumer boycott akin to *Claiborne*, but the Court declined and did not reference either boycotts or *Claiborne* indicates that the Court did not treat *FAIR* as a case about political boycotts. Further, it is simply not plausible to suggest that *FAIR* overruled *Claiborne sub silentio*.

FAIR's silence regarding *Claiborne* should not be surprising because the cases are distinguishable in several material respects.[17]

First, unlike the boycott in Claiborne and the boycotts in this case, *FAIR* did not involve a boycott of consumer goods and services. Rather, the Court made clear that the law at issue mandated only non-expressive action—allowing military recruiters on campus.

In contrast, as the district court held, boycotts are inherently expressive conduct. ROA.1264. Unlike a school's refusal to allow a recruiter on campus, an individual's decision to join in a political consumer boycott, much like the decision to march in a parade, constitutes a recognizable, expressive activity. "[T]he practice

[17] Even if there were tension between *FAIR*'s and *Claiborne*'s reasoning, this Court is bound to follow *Claiborne*. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.") (citation omitted).

of persons sharing common views banding together to achieve a common end" in this way "is deeply embedded in the American political process." *Claiborne*, 458 U.S. at 907 (citation omitted)*; Koontz*, 283 F. Supp. 3d at 1024 ("boycotts—like parades—have an expressive quality"); *Jordahl*, 336 F. Supp. 3d at 1042.

Second, the Solomon Amendment at issue in *FAIR* did not "restrict[] what the law schools may say about the military's policies" or the ability of "[s]tudents and faculty . . to associate to voice their disapproval of the military's message." 547 U.S. at 65, 69-70 (2006). In other words, it did not require law schools to disavow participation in boycotts of the military. *Id*. at 60.

In sharp contrast, the Act requires contractors to affirmatively certify that they are not participating in boycotts of Israel, and this severely hampers or chills their ability to speak out about Israel or BDS campaigns. ROA.2017 (Abdelhadi Decl. at ¶ 15); ROA.2033 (Dennar Decl. at ¶ 14); ROA.2061-62 (citing Hale Decl. at ¶¶ 19-22); ROA.2101-02 (citing Pluecker Decl. at ¶¶ 18-19). At the very least, contractors who sign a form promising not to boycott will be chilled from engaging in such speech, which further supports the conclusion that the Act is facially unconstitutional because it restricts and chills protected expression and association. *See Baggett v. Bullitt*, 377 U.S. 360, 367–68 (1964).

Finally, the government interests at issue in *FAIR* are not present here. The Supreme Court held that the Solomon Amendment is a content-neutral regulation of

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

Defendants' reliance on *Longshoremen* is equally unavailing. *Longshoremen* predates *Claiborne*, and *Claiborne* expressly cites to and distinguishes the secondary boycotts by labor unions at issue in *Longshoreman* from the political consumer boycotts before it. *Claiborne*, 458 U.S. at 912 (internal quotation marks omitted) ("Secondary boycotts and picketing by labor unions may be prohibited as part of Congress' striking the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife."). Even as the Court recognized the States' "broad power" to regulate such "economic activity," it refused to "find a comparable right to prohibit peaceful political activity such as that found" in the *Claiborne* boycott. *Id*. at 913. Thus, the district court correctly concluded that *Longshoremen* is inapplicable here because "[t]he [Supreme] Court . . . expressly cabined

Longshoremen to the labor context." ROA.1268-1269; *Jordahl*, 336 F. Supp. 3d at 1041.[18]

B. The Act discriminates on the basis of content and viewpoint.

Content-based regulations, which "target speech based on its communicative content," are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Nat. Inst. Of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Viewpoint discrimination is an "egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of VA*, 515 U.S. 819, 829 (1995).

[18] Defendants' reliance on *Briggs & Stratton Corp. v. Baldridge*, 728 F.2d 915 (7th Cir. 1984) is similarly misguided. SAB at 32. In *Briggs*, the plaintiffs "concede[d] that their desire to answer the questionnaires [verifying their boycott participation] [was] motivated by economics: . . . [they] hope[d] to avoid the disruption of trade relationships that depend on access to the Arab states." *Id.* at 917. Accordingly, the district court and the Seventh Circuit analyzed the companies' claims under the commercial speech doctrine, declining to extend the full constitutional protections for political expression. *Id*. at 917–18.

The district court correctly concluded that the Act falls squarely into the prohibitions against both content- and viewpoint-based discrimination. ROA.1270-1273. On its face, it punishes a particular category of speech: political boycotts of Israel. The law exempts from its purview boycotts on other topics, *e.g.* against other nations or for other reasons. Most glaringly, the Act allows contractors who boycott Palestinian companies or companies that engage in reverse boycotts of BDS participants to continue to contract with the State. Under the Act, only contractors who do not share the State's declared position on the Israel-Palestine political controversy are denied the opportunity to contract with state and local government entities. And, as the district court found, Defendants have admitted that this is precisely the Act's intent. ROA.1271 ("[Texas] admits that H.B. 89 'espouses the State's policy of supporting Israel and takes the position that public funds will not be used to pay for companies that choose to engage in a boycott that is contrary to this policy.'") (citing ROA.305, Texas Resp. Mots. Prelim. Inj.).

Defendants' only argument on appeal is that the Act is not viewpoint- or content- discrimination because it regulates conduct, not speech.[19] SAB at 35. For all the reasons previously discussed, this is incorrect. Further, viewpoint- and conduct-based discrimination against inherently expressive conduct is

[19] Defendants have therefore abandoned the justification that the Act constitutes government speech, which the district court rejected. ROA.1271-1272.

unconstitutional. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.") (citations omitted).

C. The Act unconstitutionally conditions contracts on the sacrifice of First Amendment rights.

The district court correctly concluded that the Act "imposes an unconstitutional condition on public employment by requiring contractors to cease and refrain from engaging in constitutionally protected speech." ROA.1281.

The Constitution does not permit conditioning public employment, including contract work, on the sacrifice of First Amendment rights. "Our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

This is equally true for independent contractors who have no prior relationship with the government agency. *Umbehr*, 518 U.S. at 674; *Perry*, 408 U.S. at 597 (the prohibition of unconstitutional conditions on speech applies "regardless of the public

employee's contractual or other claim to a job"); *Oscar Renda Contracting, Inc. v. City of Lubbock*, Tex., 463 F.3d 378 (5th Cir. 2006).

Because the Act conditions contracting work on the sacrifice of First Amendment rights, Defendants must demonstrate that the Act's necessary impact on the provision of public services justifies infringing the free speech rights of thousands of government contractors. Defendants have failed to meet that burden.

When the State makes a single adverse employment decision that infringes on First Amendment rights, this Court employs the test established in *Pickering v. Bd. of Edu.*, 391 U.S. 563 (1968), to determine whether that action passes constitutional muster.

Under *Pickering*, government regulation of protected employee or contractor speech is proper only if "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee or contractor], as a citizen, in commenting upon matters of public concern." *Id.* at 568. Accordingly, the Fifth Circuit has held that under *Pickering*, the government interest in constraining speech must relate to the governments' interest in providing services efficiently. *Kinney v. Weaver*, 367 F.3d 337, 362 (5th Cir. 2004) (en banc) (the relevant issue is not merely "the weight of the governmental interest considered in abstract terms;" instead what matters is "how the speech at issue *affects* the government's interest in providing services

efficiently") (emphasis in original); *see also Hoover v. Morales*, 164 F.3d 221, 226 (5th Cir. 1998).

Where a law preemptively affects the speech of an untold number of employees, courts find that the First Amendment implications are even more serious. Such a "sweeping statutory impediment to speech," "gives rise to far more serious concerns than could any single supervisory decision." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 467-68 (1995) ("*NTEU*"). Accordingly, the adjustments made to the level of scrutiny in these contexts amounts to "a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2472 (2018).

This means that Defendants bear a much heavier burden than they would in an ordinary public-employee speech case. *NTEU*, 513 U.S. at 468. Defendants "must show that the interests of both potential audiences and a vast group of present and future [contractors] in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* (*quoting Pickering*, 391 U.S. at 571). To make this showing, Defendants "must do more than simply 'posit the existence of the disease sought to be cured.' . . . [They] must demonstrate that the recited harms are real, not merely

conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id*. at 475 (omission in original) (citation omitted).

The district court found that Defendants made "no attempt to meet this heavy burden." ROA.1280. Defendants have no interest that can outweigh such a sweeping restriction on speech, much less one grounded in "promoting the efficiency of the public services it performs through [Plaintiffs' contracted work]." *Hoover*, 164 F.3d at 226. The speech targeted by the Act is wholly unrelated to the contracting activities Plaintiffs seek to perform. ROA.1276. There is no reason that participation in a boycott against Israel makes an individual any less capable of translating an art essay, judging a high school debate tournament, or producing a podcast. ROA.1247-1248, 1251.

Instead of trying to meet its burden, Defendants argue on appeal that the test articulated in *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), should apply here, and not the modified *Pickering* analysis. SAB at 35. By failing to make this argument in opposition to the preliminary injunction in the district court, Defendants have waived it. Further, because the Act is directed at punishing disfavored speech, *O'Brien* is inapplicable. *See Texas v. Johnson*, 491 U.S. 397, 407 (1989) ("[W]e have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which the governmental interest is unrelated to the suppression of free expression.") (citation and quotation marks omitted). Regardless, the Act also fails

the standard articulated in *O'Brien* because Defendants cannot show that the Act promotes a substantial government interest.

D. The Act compels speech.

Defendants argue that, because the First Amendment does not protect boycotts, the Act does not compel speech. SAB at 33. As previously discussed, that argument contradicts *Claiborne*. The Act's certification requirement compels contractors to reveal whether they engage in protected activity—boycotting Israel—in order to punish those who do.

The First Amendment protects both the right to speak and the right to refrain from speaking. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

In accordance with this principle, courts consistently have struck down government attempts to compel speech on political issues. In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), the Supreme Court explained: "[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Id*. at 6.

Accordingly, when a state inquires into these protected areas, "a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Id*. at 6-7. "And whatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes." *Id*. at 7.

Here, the district court correctly held that the Act compels contractors to reveal whether they boycott Israel for the State's impermissible purpose of punishing a disfavored belief. ROA.1283-1284. Those who reveal their participation in boycott activities against Israel are condemned to lose state contracts.

Even if the First Amendment did not protect boycotts, the Act would still not pass constitutional muster because Defendants have failed to articulate any legitimate government interest for the certification requirement. Compelled speech on matters wholly unrelated to the performance of job duties violates the First Amendment. *See Nat'l Ass'n of Mfrs. v. S.E.C.*, 748 F.3d 359, 371 (D.C. Cir. 2014) (holding that compelled disclosure regarding whether minerals were conflict-free constituted compelled speech in violation of the First Amendment because the regulation did not narrowly or reasonably "fit" the asserted government interest); *see also Robinson v. Reed*, 566 F.2d 911 (5th Cir. 1978) (per curiam) (observing that compelled disclosures about a plaintiff's personal life which were unrelated to her employment would not withstand constitutional scrutiny).

As the district court found, there is no legitimate state interest in compelling speech on this subject because Plaintiffs' participation or lack thereof in Israel boycotts are unrelated to their ability to perform contracting work for the State. ROA.1282-1284. Rather, the only plausible state interests are to compel accommodation of the State's message in support of Israel and to punish disfavored beliefs—both impermissible government goals. ROA.1283. Because the Act compels speech on matters of controversy that are unrelated to the work performed by public contractors, it violates the Constitution.

E. The Act is impermissibly vague.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cramp v. Bd. of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278, 287 (1961) (citation omitted).

As applied to statutes that are "capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 556, 573 (1974). This is because "First Amendment freedoms need breathing space to survive, [so the] government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citations omitted); *Cramp*, 368 U.S. at 287.

The Act prohibits "any action that is intended to penalize [or] inflict economic harm on. . . Israel or [any] person or entity doing business in Israel." Tex. Gov. Code. § 808.001(1). It is fundamentally unclear what this encompasses, especially given the degree of complexity surrounding the Israel-Palestine conflict.

On appeal, Defendants do not contest that the Act as written is impermissibly vague. Defendants argue only that the Court should have applied a limiting construction to read the phrase "any action" as constituting only economic conduct. But Defendants' unsupported construction does not clarify the law. SAB at 37. A person of reasonable intelligence could not discern what sorts of acts—even economic acts—would be considered "intended to penalize [or] inflict economic harm on Israel." A contractor reading the statute's expansive catchall definition would likely assume that the Act prohibits activities like picketing to encourage other consumers to refuse to purchase products offered by companies that contract with the Israeli government or operate in Israeli settlements, since such picketing is designed to "penalize" those companies and "limit commercial relations" with them. Conceivably any pro-Palestinian action, such as donating to a Palestinian organization, purchasing a ticket to a Palestinian film festival, or purchasing art at a Gaza liberation fair, could be considered an action intended to "penalize" Israel.

The vagueness problem is compounded by the Act's nebulous exception. The Act excludes from its vast purview any action taken for "ordinary business

purposes." The Act does not define the phrase "ordinary business purposes," and the term is not defined in Texas case law. This leaves a person of reasonable intelligence with even less clarity about what conduct is prohibited under the Act. One plausible reading of the Act is that contractors must purchase products from companies that do business in Israel if they cannot come up with an economic justification for not doing so. After all, the Act prohibits "refusing to deal with or terminating business activities with . . . a person or entity doing business in Israel." *Id*. at §808.001(1); ROA.1286-1287.

Here again, Defendants do not deny that the law is impermissibly vague. Instead, Defendants argue that the district court should have narrowed the definition of "ordinary business purpose" to mean "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.'" SAB at 38. However, this interpretation is not supported by any authority or even the plain meaning of the term. Further, Defendants' proposed narrowing interpretation only adds more confusion. Plaintiffs do not boycott companies "*because* they are based in Israel or doing business in Israel." They boycott certain companies because they object to specific actions those companies have taken. For instance, Plaintiff Abdelhadi boycotts companies like Hewlett Packard based on their specific support for the Israeli Defense Forces. ROA.2015

(Abdelhadi Decl. at ¶ 7); *see also* ROA.2030-2031 (Dennar Decl. at ¶ 5); ROA.2058-2059 (Hale Decl. at ¶ 9); ROA.2098-2099 (Pluecker Decl. at ¶ 6). Accordingly, Defendants' narrowing construction would result in Plaintiffs' actions meeting both the general definition of boycott and the exception to that definition. Whether the Act proscribes Plaintiffs' actions is fundamentally unclear to a person of ordinary intelligence.

Defendants' unsupported interpretations of the terms in the statute are little comfort to those whose speech is chilled by the certification requirement and the Act's facially vague definition of boycott activity. *See Baggett*, 377 U.S. at 368 (holding that a loyalty oath requiring state employees to disavow subversive acts and membership in the Communist Party was "unconstitutionally vague" because of "[t]he susceptibility of the statutory language to require forswearing of an undefined variety of 'guiltless knowing behavior'"). "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Id*. at 372.

F. Plaintiffs will continue to suffer irreparable harm.

The district court correctly found that Plaintiffs have suffered and will continue to suffer irreparable harm absent a preliminary injunction. ROA.1287-

1288. Defendants' arguments on this point merely restate their mootness and merits arguments. SAB at 38; SDAB at 66. The district court correctly followed Supreme Court and Fifth Circuit precedent and held that "the loss of First Amendment freedoms justifies the grant of a preliminary injunction." ROA.1287-1288 (citing *Texans for Free Enter. v. Texas Ethics Com'n*, 732 F.3d 535, 539 (5th Cir. 2013)); *see also Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012).

G. The balance of equities and the public interest weighs in Plaintiffs' favor.

As this Court has held, the balance of equities between a plaintiff's constitutional right and the government's interest in enforcing an unconstitutional law weighs heavily in favor of preserving constitutional rights. Plaintiffs' injuries outweigh any harm to Defendants because they "can never have a legitimate interest in administering [a regulation] in a manner that violates federal law." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 471 (5th Cir. 2017). Further, "injunctions protecting First Amendment freedoms are always in the public interest." *Texas Ethics Com'n*, 732 F.3d at 539 (citation omitted); *see also Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012).

Defendants have no legitimate interest in enforcing an unconstitutional law—revised or not. The remainder of Defendants' arguments merely restate their merits

arguments. SAB at 39-40; SDAB at 66-67. The district court correctly concluded that the First Amendment injuries suffered by Plaintiffs and all others subject to the Act weighs in favor of issuing a preliminary injunction.[20]

H. The district court's facial injunction was appropriate.

Defendants contend that the district court's injunction was overly broad and should have been limited to Plaintiffs. SAB at 40-41; SDAB at 43-44. Defendants ignore that in the First Amendment context, plaintiffs may challenge laws beyond their particular application to the plaintiffs. *Broadrick*, 413 U.S. at 612. Furthermore, Plaintiffs met their burden on a First Amendment challenge to show either that "no set of circumstances exists under which [the Act] would be valid or that it lacks any plainly legitimate sweep," or that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). The Act has no legitimate sweep, and, even if it did, a substantial number of its applications are unconstitutional. Therefore, the district court correctly interpreted Plaintiffs' challenge as facial and issued a facial injunction to the Act. ROA.1263 at n.4 (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)).

[20] The School District's unsupported argument that it would not be in the public interest to issue an injunction against them because it might also subject them to a claim for attorneys' fees should be rejected. SDAB at 68. If potential attorneys' fees exposure were sufficient to defeat the public interest prong of the preliminary injunction statute, then every potentially successful § 1983 case would be precluded from achieving injunctive relief.

III. The district court properly denied the Universities' motion to dismiss.

The Board of Regents of University of Houston System ("UHS") and the Board of Regents of the Texas A&M University System ("TAMUS"), (collectively the "Universities") argue that they were entitled to dismissal because (a) they are improper parties, and (b) they are entitled to immunity. Both arguments fail.

A. The Universities are proper parties.

The Universities assert that they are improper parties because Plaintiffs Pluecker and Hale's claims were based on actual or prospective contractual relationships with the University of Houston, not the UHS, and with Texas A&M University-Commerce, not the TAMUS. SAB at 41-42. The district court properly rejected this argument. ROA.1291.

Pluecker and Hale sued the UHS Board in the name of the University of Houston and the TAMUS Board in the name of Texas A&M University-Commerce. ROA.1290 (citing ROA.1656-1657 at ¶¶19, 22). They alleged that "the organization and control of the University of Houston is vested in the Board of Regents of the University of Houston System." ROA.1656 at ¶19 (quoted in ROA.1291) (citing TEX. EDUC. CODE §§ 111.11, 111.20(c)). Similarly, they alleged that Texas A&M University-Commerce "is a component of the Texas A&M University System and is under the management and control of the Board of Regents of the Texas A&M University System. ROA.1657 at ¶22 (quoted in ROA.1291) (citing Tex. Educ.

Code §87.551)). The district court noted, "[t]he Universities do not contest these facts." ROA.1291. The Universities still do not contest, or even mention, those facts to this Court.

Based on the allegations in the Complaint and pursuant to the Texas Education Code, the district court concluded, "Plaintiffs have plausibly alleged that the Boards are ultimately responsible for the contracting practices and policies of the Universities." ROA.1291. The Universities do not address or rebut that conclusion here.

Accordingly, the district court was correct to hold that "Plaintiffs do not fail to state a claim upon which relief can be granted merely because the University of Houston and TAMUC are formally distinct entities from the University of Houston System and the Texas A&M University System, respectively." ROA.1291.

B. The Universities are not immune to a suit against them in their official capacities for prospective injunctive relief.

This issue is controlled by *Ex parte Young*, 209 U.S. 123, 155-56 (1908), and its progeny, which recognize an exception to sovereign immunity when state officers are sued in their official capacity for prospective injunctive relief from violations of federal law. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989) (state official sued in official capacity can be sued for injunctive relief under section 1983); *LeBlanc*, 729 F.3d at 439 (no immunity for suit against a state actor sued in

official capacity for prospective, injunctive relief from ongoing violation of federal constitution); *AT&T Comm. V. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 643 (5th Cir. 2001) (no immunity for state officials sued for prospective injunctive relief from continuing violation of federal law).

The Universities do not address or distinguish any of these cases. Instead they cite three cases, SAB 43, all of which are either outside the *Ex parte Young* exception to sovereign immunity, or they prove the ongoing vitality of that exception:

- *Olivier v. Univ. of Tex. Sys.*, 988 F.2d 1209, 1993 WL 81990 (unpublished table opinion). Although this Court found immunity from Olivier's Section 1983 claims, it specifically stated that immunity would not bar claims for prospective relief under *Ex parte Young*. *Id.* at *1 n.8.
- *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553 (5th Cir. 1982). This suit was brought for civil rights violations related to the denial of tenure and termination of a faculty position. This Court found the board of regents was immune from contractual claims for back pay, *id.* at 561, but affirmed claims for prospective injunctive relief in the form of reinstatement. *Id.* at 565. Although the relief of reinstatement was rendered moot by the

claimant's death, this Court affirmed attorney's fees related to that claim for prospective injunctive relief.

- *Slade v. Texas S. Univ. Bd. of Regents*, 232 S.W.3d 395 (Tex. App.—Houston [1st. Dist.] 2007, no pet.). The court found immunity from a claim for breach of contract or a declaratory judgment to enforce a contract with the State. *Id.* at 401. There was no request for prospective injunctive relief, and no federal or constitutional claims asserted.

None of these cases undermine the holding of *Ex parte Young*, or the legion of cases following it, that state officials sued in their individual capacity for prospective injunctive relief from ongoing federal law are not immune.

The Universities also argue that Pluecker and Hale sued only the Boards, who are immune as arms of the State, and not individual Board members. SAB at 42-43. The district court rejected this argument based on Rule 17(d). ROA.1259 (citing Fed. R. Civ. P. 17(d)). That rule provides that "[a] public officer who is sued in an official capacity may be designated by official title rather than by name." *Id.* Here, the official title of all the regents, collectively, is the "Board of Regents," and that is the official title under which they were sued. Accordingly, the district court "construe[d] the Pluecker Plaintiffs' complaint to name the individual members of the Boards as defendants by designating them by their official titles." ROA 1259.

The Universities do not address the rule or confront this analysis, but instead revert to the simplistic approach of reciting the names of the Boards in the complaint and calling that a "fair reading." The district court's analysis is sound, and the case law previously cited demonstrates that university boards of regents do not enjoy immunity when sued in their official capacities for prospective injunctive relief from violations of federal laws. *See Olivier*, 1993 WL 81990 at *1 n.8; *United Carolina Bank*, 665 F.2d at 556.

Conclusion

For all these reasons, this Court should affirm the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with Fed. R. App. P. 32(a)(7)(B) and (C) because it contains 12,847 words. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, roman style typeface of 14 points or more.

/s/ *Edgar Saldivar*

Edgar Saldivar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed electronically on November 26, 2019 and will, therefore, be served electronically upon all counsel.

/s/ *Edgar Saldivar*

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