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

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

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INTRODUCTION

Dennar and Abdelhadi ("Appellees") never had standing to sue the Trustees of Klein and Lewisville Independent School Districts (the "Schools") based on a statute enacted by the Texas Legislature. Appellees' claims against the Schools are based on the remarkable theory that the Schools were somehow free to disregard, and should have disregarded, a duly enacted and presumptively constitutional State statute. Appellees' approach promotes lawlessness. It would require the Schools to sit in judgment over the State Legislature's actions. It would have the Schools ignore the Legislature's restrictions on the Schools' authority to enter into contracts and would have the Schools take *ultra vires* actions by entering into contracts which did not comply with the Legislature's restrictions. This Court should reject Appellees' theory; dismiss Appellees' claims against the Schools; and reverse and vacate the preliminary injunction entered against the Schools.

Appellees' suit against the Schools has always been flawed because it was the action of the State, not the Schools, that allegedly violated Appellees' rights. What is even more remarkable than Appellees' frivolous underlying theory of recovery against the Schools is Appellees' persistence in pursuing the Schools even after the State amended its statute such that it no longer applies to Appellees. Appellees' claims are moot because the statute does not apply to them.

ARGUMENT

I. THE COURT SHOULD REVERSE AND VACATE THE PRELIMINARY INJUNCTION ENTERED AGAINST THE SCHOOLS.

A. APPELLEES FAILED TO ESTABLISH ARTICLE III STANDING TO PURSUE CLAIMS AGAINST THE SCHOOLS.

In order to demonstrate Article III standing to pursue claims against the Schools, Dennar and Abdelhadi needed to identify conduct that was fairly traceable to the Schools' Trustees which injured Appellees. ISDs' Brief, 30-31; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Additionally, because they seek to impose municipal liability on the Schools under 42 U.S.C. §1983, Appellees needed to show that they were injured due to a policy, custom, or practice of the Schools' Trustees. ISDs' Brief, 33-34. Appellees failed to meet their burden of establishing that they have standing to pursue claims for injunctive relief against the Schools. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

1. Appellees' Facial Challenge to H.B. 89 Did Not Create a Case or Controversy Against the Schools.

Although Dennar and Abdelhadi acknowledge that their motion for preliminary injunction presented a facial challenge to the constitutionality of H.B. 89,[1] Appellees provided no authority to support their mistaken proposition that the Schools were appropriate defendants in an action asserting a facial challenge

[1] Appellees' Brief, 49. Appellants refer to the Pluecker Plaintiffs' Brief in Response to State Appellants as "Appellees' Brief," and their Brief in Response to School District Appellants as "Appellees' School Brief."

against a State law. No Article III case or controversy ever existed between Appellees and the Schools with respect to a facial challenge against the State's Act, because the Schools did not enact this legislation and do not control it. ISDs' Brief, 30-33; *infra* at 18-22. Consequently, the district court lacked jurisdiction to enter a preliminary injunction against the Schools. This Court should reverse and vacate the preliminary injunction against the Schools.

2. The Attorney General's Presence in the Lawsuit Does Not Fulfill Appellees' Burden Regarding Article III Causation.

Appellees acknowledge that *Lujan* requires plaintiffs to show a causal connection between the alleged injury and the conduct complained of, and that the injury must be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Appellees' School Brief, 4-5 (citing *Lujan*, 504 U.S. at 560).[2]

Appellees incorrectly argue that, because the Schools attribute responsibility for the Act to the State, and because the Attorney General is before the Court in the present lawsuit, Appellees have established constitutional standing for their claims against the Schools. Appellees' School Brief, 5-6.

[2] The Court should reject Appellees' attempt to distinguish *Lujan* and *Barber* on the basis that these cases did not engage in further discussion of the causation element. Appellees' School Brief, 6. The causation requirement is fundamental and obvious: a plaintiff cannot sue a defendant for an injury that was caused by conduct for which the defendant is not responsible. Appellees attribute their alleged injuries to the Act. ROA.1666 [¶¶57-58]; ROA.1669 [¶74]. The Schools are not responsible for the Act. Appellees lack standing to sue the Schools for injuries caused by the Act.

Most fundamentally, Appellees err by focusing on the "independent action of some third party **not before the court**" portion of the *Lujan* causation standard while ignoring the requirement that the conduct at issue be fairly traceable to the challenged action of the defendant. Appellees' School Brief, 5 (Appellees' emphasis). It is illogical to assert that, because the conduct at issue in this lawsuit was fairly traceable to a defendant who is before the Court, Appellees have standing to assert claims against another defendant, and the Court can "allocate fault between multiple responsible parties." Appellees' School Brief, 5. This argument does not demonstrate that any injurious action is fairly traceable to the Schools' Trustees.

Appellees incorrectly claim that because they dealt directly with School personnel, rather than the Legislature, the Schools bear some share of responsibility for the restrictions imposed by the Act. Appellees' School Brief, 6. The State bears sole responsibility for any injury caused by the Act's No-Boycott certification requirement because the State compelled inclusion of the No-Boycott language in School contracts. *See, e.g., Bennett v. Spear,* 520 U.S. 154, 170-71 (1997) (action was "fairly traceable" to governmental entity which compelled a subordinate entity to take the action which was challenged in the lawsuit).

The Attorney General's presence in this lawsuit does not satisfy the *Lujan* causation requirement with respect to claims against the Schools.

3. Appellees Failed to Identify Conduct Which Was Fairly Traceable to the Schools' Trustees.

Appellees incorrectly argue that they have shown Article III causation against the Schools because: 1) School employees provided contracts that complied with H.B. 89; and 2) the Schools' websites included provision CH (LEGAL) which explained the requirements of H.B. 89. Appellees' School Brief, 4-9. Appellees have no evidence to connect either the contract language or CH (LEGAL) to any action by the Schools' Trustees, nor have Appellees shown that these provisions arose from a policy, custom, or practice adopted by the Schools' Trustees. Consequently, Appellees have failed to demonstrate standing sufficient to support preliminary injunctive relief against the Schools. ISDs' Brief, 30-39.

a) Appellees' Reliance on the Contract Language is Unavailing.

Appellees have no evidence that the language to which they objected in the Schools' contract documents resulted from any action by the Schools' Trustees. The mere existence of contract provisions which were required by H.B. 89 does not demonstrate any involvement by the Schools' Trustees. Instead, the undisputed evidence shows that the contract documents were not discussed or approved by the Schools' Trustees. ISDs' Brief, 52; ROA.1123 [¶17]; ROA.1199 [¶17].

School employees' inclusion of the No-Boycott language in contract documents was compelled by a presumptively constitutional State law[3] and reflected policy decisions made by the Legislature. The No-Boycott provision did not arise from any policy decision made by the Schools' Trustees. To the contrary, the Schools' Trustees never even considered including any No-Boycott certification requirement in their contracts. ROA.1121-22 [¶¶10-13]; ROA.1198 [¶¶10-13].

The contract documents are insufficient to establish standing for Appellees' claims against the Schools because the No-Boycott provisions they contain are fairly traceable only to the Legislature, not to the Schools.

b) Appellees' Reliance on CH (LEGAL) is Unavailing.

In their reliance on "policy" CH (LEGAL), Appellees elevate form over substance and disregard undisputed evidence concerning the Schools' inability to add, delete, or amend the provisions on the Schools' websites which bear the designation "(LEGAL)." Appellees' School Brief, 9, 12-16.

Appellees rely on CH (LEGAL), which contains an explanation of the requirements imposed on the Schools by H.B. 89, to argue that "there were School District policies requiring 'No Boycott of Israel' certifications." Appellees' School

[3] Appellees failed to address the Schools' authority demonstrating that legislatures are presumed to have acted constitutionally. ISDs' Brief, 38, n.20. Appellees have, therefore, conceded this point. Additionally, the Code Construction Act explains that, "[i]n enacting a statute, it is presumed that…compliance with the constitutions of this state and the United States is intended." Tex. Gov't Code §311.021(1).

Brief, 9 (citing ROA.1581; ROA.1608). Appellees incorrectly contend that, because these provisions are called "policies" and because they appear on the Schools' websites, they were adopted by, and are controlled by, the Schools and are, therefore, official policies of the Schools. *See* Appellees' School Brief, 9, 13-14.

The undisputed evidence demonstrates that only policies which bear the designation "(LOCAL)" are adopted by the Schools. ISDs' Brief, 34-35; ROA.1017; ROA.1044; ROA.1121 [¶¶5, 7]; ROA.1197 [¶¶5, 7].[4] The Schools are powerless to change, edit, or amend the (LEGAL) provisions. Instead, an independent entity, the Texas Association of School Boards ("TASB"), distributes these (LEGAL) provisions, and only TASB is authorized to modify them. ISDs' Brief, 35; ROA.1121, ROA.1123 [¶¶9, 16]; ROA.1197, ROA.1199 [¶¶9, 16]. The mere fact that CH (LEGAL) bears the title "policy" and appears on the Schools' websites is insufficient to establish that CH (LEGAL) is a policy which the Schools' Trustees decided upon, approved, and imposed. Instead, CH (LEGAL) was merely TASB's description of the law as it existed prior to the Legislature's amendment of the Act. ROA.1581; ROA.1608.

[4] The evidence does not support Appellees' contention that, in order to be added to the Schools' websites, the Schools' Trustees are required to adopt both (LEGAL) and (LOCAL) provisions. Appellees' School Brief, 14 (citing ROA.1576 and ROA.1603 which state only that school boards must adopt **local** policies).

CH (LEGAL) is insufficient to establish Article III standing for Appellees' claims against the Schools because it is fairly traceable only to conduct by the Legislature and TASB, not to any action by the Schools' Trustees.

B. DENNAR AND ABDELHADI DID NOT MEET THEIR BURDEN TO CLEARLY ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS AGAINST THE SCHOOLS.

1. No Policy of the Schools Caused Appellees' Alleged Injuries.

A plaintiff seeking to impose municipal liability under Section 1983 must demonstrate that an official policy, custom, or practice of the governmental entity was the "moving force" which caused a violation of constitutional rights. ISDs' Brief, 33-34, 49-50. Appellees failed to clearly establish a substantial likelihood of success on their Section 1983 municipal liability claim against the Schools because: (1) their reliance on contract language and CH (LEGAL) is unavailing; (2) they waived any argument that a custom or practice officially sanctioned by the Schools was the moving force behind any violation of their constitutional rights; and (3) their attempts to distinguish cases explaining the appropriate municipal liability standard are meritless.

a) Neither the Contract Language nor CH (LEGAL) Reflect a Policy of the Schools.

Appellees disregard the well-established municipal liability standard under Section 1983 when they incorrectly assert that, "[w]hether the School Districts

originated the requirement to include these clauses or they were directed to by the Legislature is irrelevant"). Appellees' School Brief, 9.

In support of their claims against the Schools, Appellees rely only on allegations concerning the existence of No-Boycott language in contract documents provided by School employees and on the CH (LEGAL) provision contained on the Schools' websites. Appellees' School Brief, 9, 13-16. Neither the contract language nor the description of the requirements of H.B. 89 contained in CH (LEGAL) constitutes a policy created by the Schools' Trustees. *Supra*, at 12-15. Instead, they only reflect policy determinations of the Legislature, and they could only support claims against an appropriate representative of the State.

b) Appellees Have Waived Any Claim Based on Any Alleged Custom or Practice of the Schools.

Appellees have not argued that the Schools' Trustees established or acquiesced to a custom or practice concerning the No-Boycott provision, or that the Schools' Trustees were even aware that School contract documents included the No-Boycott contract language required by H.B. 89.[5] Appellees have, therefore, waived any argument for municipal liability based on an alleged custom or practice of which the Schools' Trustees were aware and to which they acquiesced. ISDs' Brief, 50.

[5] The Schools' Trustees did not discuss or approve the contract documents. ROA.1123 [¶17]; ROA.1199 [¶17].

c) Appellees Failed to Distinguish Cases Establishing the Standard for Municipal Liability Under Section 1983.

Appellees' attempt to distinguish *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *Rodriguez v. City of Houston*, 651 Fed App'x 282 (5th Cir. 2016) is unavailing. Appellees' School Brief, 8-9. The Schools rely on these cases, and others,[6] for the proposition that a municipality may only be held liable under Section 1983 for injuries caused by its own policies.

Appellees contend that the Schools injured them by giving them contract documents which included the No-Boycott certification which was, at the time, required by the Act. The contract language was required by State law, not by any School policy. No evidence connects the contract language with any action by the Schools' Trustees, who never even considered imposing a No-Boycott requirement for School contracts. ROA.1121-22 [¶¶10-13]; ROA.1198 [¶¶10-13]. For these reasons, the existence of the No-Boycott language in the contract documents does not support a Section 1983 claim against the Schools. ISDs' Brief, 33-34, 49-55.

Appellees' attempt to distinguish various cases on the basis that they "involved officials acting outside of clearly defined policies" also fails, because it relies on the mistaken proposition that CH (LEGAL) is a policy adopted by the

[6] ISDs' Brief, 33-34, n. 14, 49-50, 52-53, 55. Appellees do not address the seminal case concerning municipal liability under Section 1983: *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 692, 694 (1978). They also do not address: *Connick v. Thompson*, 563 U.S. 51, 60 (2011); *Whitley v. Hanna*, 726 F.3d 631, 648-49 (5th Cir. 2013); *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003); *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998); or *Carmichael v. Galbraith*, 574 Fed. App'x 286, 291 (5th Cir. 2014).

Schools' Trustees which was furthered by including No-Boycott provisions in contract documents. Appellees' School Brief, 14-15. Both of these propositions are incorrect. *Supra* at 12-15.

Finally, Appellees' reliance on *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405 (1997) and *Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir. 2012) is misplaced. Appellees' School Brief, 15. These cases support the Schools' position because they demonstrate that municipal liability under Section 1983 is conditioned upon a policy of the municipality or upon action taken or directed by the municipality itself or its authorized decision maker. The No-Boycott certification requirement was directed by the State, not the Schools. It reflected a policy decision of the State, not of the Schools. Neither these cases, nor the facts presented by this appeal, support a finding of municipal liability against the Schools.

2. Appellees' Facial Challenge to H.B. 89 Did Not Support Preliminary Injunctive Relief Against the Schools.

a) The Likelihood of Success Holding Does Not Implicate the Schools.

The Court should reject Appellees' contention that the district court's likelihood of success holding "was broadly applicable to all defendants." Appellees' School Brief, 10. Appellees are mistaken in arguing that a finding that Dennar and Abdelhadi are likely to succeed on a facial challenge to the

constitutionality of H.B. 89 demonstrates that they are likely to succeed on their claims against all Defendants. *Id*. at 11. This argument ignores the fact that Appellees needed to show that a policy of the Schools was the moving force behind a constitutional deprivation. *Supra*, at 15. Additionally, this argument ignores the district court's explanation that: (1) it limited its preliminary injunction analysis to a facial challenge to H.B. 89;[7] and (2) it found that *application* of the Act was the only conduct fairly traceable to the Schools.[8] ROA.1263; ROA.1263, n.4.

The district court made no finding concerning whether Appellees clearly established a substantial likelihood of success in demonstrating that a policy of the Schools was the moving force of Appellees' alleged injuries based on the alleged unconstitutionality of H.B. 89. ROA.1287. Instead, the district court held only that Appellees are likely to succeed on their claims that H.B. 89 is unconstitutional. *Id*. This finding does not support a preliminary injunction against the Schools because Appellees only asserted a facial challenge against H.B. 89, not against any School policy.

[7] Appellees failed to rebut the Schools' authority establishing that de novo review applies to a facial challenge to the constitutionality of a statute. ISDs' Brief, 45. Appellees have, therefore conceded this point.

[8] The Schools dispute this finding insofar as it finds any relevant conduct to be fairly traceable to the Schools.

b) The Schools Were Not Responsible for the Act.

Appellees offer no support for the proposition that a subordinate governmental entity whose conduct is constrained by a State law is an appropriate Defendant in a facial challenge to the constitutionality of the State law. Instead, Appellees merely attempt to distinguish *Buchanan v. Alexander*, 919 F.3d 847, 854 (5th Cir. 2019), which stands for the proposition that the proper defendants to a facial challenge are the parties responsible for creating or enforcing the challenged law or policy. ISDs' Brief, 47.

Appellees argue that *Buchanan* supports their position because it directed the plaintiffs to sue a university, rather than its officials, based on a challenge to the university's policies. Appellees' School Brief, 11-12. Appellees claim that they complied with *Buchanan*'s dictate because they sued the Schools, rather than School employees. *Id*. at 12.

Appellees miss the point. *Buchanan* held that the only proper defendant in a facial challenge to a law or policy is the entity which is responsible for that law or policy. 919 F.3d at 854-55. Appellees' motion for preliminary injunction was a facial challenge to the constitutionality of H.B. 89, not to any policy adopted by the Schools. ROA.1263, n.4; Appellees' Brief, 49; *see also* ISDs' Brief, 47 (citing ROA.1677-78 [¶¶107-111, Request for Relief, ¶A]). Because the Schools are not

responsible for H.B. 89, they were not proper defendants for a facial challenge to H.B. 89.

The Court should also reject Appellees' incorrect contention that the Schools are proper defendants in a facial challenge to H.B. 89 because they are responsible for enforcing the law. Appellees' School Brief, 12. By following the restrictions that the Legislature imposed upon the Schools by means of H.B. 89, the Schools were not "enforcing" this law. *Id.*

To "enforce" a law means "to compel observance of or obedience to" the law.[9] The Schools did not compel observance or obedience to H.B. 89. Appellees' argument disregards the content of H.B. 89, which prohibited the Schools from entering into certain contracts. ISDs' Brief, 32, n.12. By including No-Boycott certifications in their contracts, the Schools were *complying* with a law which regulated their conduct, not *enforcing* this law. If the Schools had refused to comply with this law and had entered into *ultra vires* contracts in violation of H.B. 89, the Attorney General would be tasked with enforcing this law by pursuing the Schools. *See* Appellees' Brief, 14, n.7 (explaining that the Attorney General is responsible for enforcement of the Act).

Because the Schools were not responsible for creating or enforcing H.B. 89, they were not proper defendants in a facial challenge to this law. *Buchanan*,

[9] https://www.thefreedictionary.com/enforce (last visited December 29, 2019).

919 F.3d at 854. The district court erred in entering a preliminary injunction against the Schools based on a facial challenge to H.B. 89.

3. Appellees' Private Purchasing Decisions Were Not Expressive Conduct Protected by the First Amendment.

Dennar and Abdelhadi claim that their private purchasing decisions constitute expressive conduct protected by the First Amendment. ROA.1664 [¶52]; ROA.1668 [¶68]; ROA.1677 [¶104]. Due to the context in which they occur, Appellees' private purchasing decisions are not constitutionally protected expressive conduct. The district court erred by concluding that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and not *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), was controlling.

a) Context is King.

The determining factor in harmonizing the U.S. Supreme Court's precedents in *Claiborne* and *Texas v. Johnson*, 491 U.S. 397 (1989), which found conduct to be expressive under the First Amendment, and *FAIR*, which found conduct not to be expressive, is the context of the conduct. Context is king.

b) Conduct Was Expressive in the Contexts of *Claiborne* and *Johnson*.

In *Claiborne*, hundreds of African-Americans launched a boycott in which they sought participation by all African-Americans in their small community of Claiborne County. 458 U.S. at 900, n.28. The boycott was obvious and public and it included: boycott enforcers monitoring store entrances; meetings, marches, and

picketing; and publicly announced lulls and fluctuations in when and how the boycott occurred. *Id*. at 900-906. The boycott was expressive conduct because of its context.

Similarly, in *Johnson*, the context of the conduct rendered it expressive. The plaintiff was one of about 100 demonstrators who raucously marched through downtown Dallas chanting, spray painting buildings, distributing literature, and giving speeches. 491 U.S. at 399-400. Johnson burned a flag while other demonstrators chanted, "America, the red, white, and blue, we spit on you." *Id*. at 399. The flag burning was the culmination of the demonstration coinciding with the Republican Party's re-nomination of President Reagan. *Id*. at 406. The expressive nature of the conduct (burning the flag) was obvious and unmistakable, as recognized by the Texas Court of Criminal Appeals[10] and the U.S. Supreme Court.[11]

c) The Same Conduct Would Not Be Expressive in a Different Context.

Without the contexts present in *Claiborne* and *Johnson*, however, the parties' conduct in those cases would not have been expressive. For instance, an African-American citizen's decision to enter an African American-owned store in

[10] "'Given the *context* of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey.'" *Johnson*, 491 U.S. at 400 (quoting *Johnson v. State*, 755 S.W.2d 92, 95 (Tex. Crim. App. 1988) (emphasis added)).

[11] "The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 406.

a large city would not signal to a reasonable observer that the citizen intended to express an opinion about the treatment of African-Americans. Instead, the citizen might prefer the African-American-owned store because it had a sale, or was owned by a friend, or for any number of other reasons.

Similarly, burning a flag is not *ipso facto* expressive conduct. Someone might burn a flag to retire it respectfully or to signal disapproval as part of a protest. The context of the burning is essential to determining whether it is constitutionally protected expressive conduct. *Johnson*, 491 U.S. at 405 ("We have not automatically concluded, however, 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.") (emphasis added).

d) Conduct Was Not Expressive in the Context of *FAIR*.

The context in *FAIR* differed considerably. In *FAIR* the Supreme Court considered whether requiring a military recruiter to interview in a campus building which was not part of the university's law school expressed anything concerning the law school's protest against governmental policies. 547 U.S. at 66. The law schools boycotted military recruiters because the schools disapproved of certain governmental policies. *Id*. at 51. However, the only conduct at issue was the law schools' refusal to make law school buildings available to military recruiters. *Id*.

The law schools were not burning flags, giving speeches, marching, distributing literature, publicly castigating other law schools for not joining their boycott, or engaging in any other outward sign that a boycott was taking place. Instead, the law schools simply required military recruiters to recruit in other buildings. *Id*. at 66. As the Supreme Court recognized, a military recruiter walking alone through a throng of college students, professors, and visitors and into a campus building would not alert a reasonable observer that the recruiter had been exiled from law school buildings as part of any expressive conduct. *Id*. Any number of reasons might explain why a recruiter would enter one building as opposed to another.

e) In its Context, Appellees' Conduct is Not Expressive.

The context of Appellees' conduct in the case at bar is like *FAIR* and unlike *Claiborne* and *Johnson*. Abdelhadi and Dennar make purchases online and at store counters in greater obscurity than a military recruiter entering a campus building. A military recruiter would at least be in uniform. Abdelhadi and Dennar are indistinguishable from any other customers in line at a store checkout. In their online purchases, Abdelhadi and Dennar are indistinguishable among the billions of people using the internet.

In Claiborne County during the boycott and in Dallas during the Republican convention, no observer needed to ask why the boycotters or protestors did what they did. On college campuses and at retail checkout counters no observer would

realize that there was even conduct to ask a question about. Context is king, and in the context of the case at bar, Abdelhadi and Dennar's purchases are not expressive conduct protected by the First Amendment.

C. Appellees Did Not Meet Their Burden to Clearly Establish the Other Elements of a Preliminary Injunction.

1. Dennar and Abdelhadi Would Not Suffer Irreparable Harm Without an Injunction Against the Schools.

Appellees did not respond to the Schools' argument that, because a preliminary injunction against the State would have been sufficient to accomplish Appellees' desired outcome (lifting of the State's restriction on the Schools' authority to enter into certain contracts), Appellees did not clearly establish that they would suffer irreparable harm without an injunction against the Schools. *Cf.* ISDs' Brief, 65-66; Appellees' Brief, 47-48. Appellees have, therefore, conceded the Schools' argument on this point.

2. The Threatened Injury to Appellees Did Not Outweigh the Threatened Injury to the Schools.

The Court should reject Appellees' mistaken perspective regarding the Schools' relationship to the Act. Appellees argue that "Defendants have no legitimate interest in enforcing an unconstitutional law,"[12] but the Schools did not *enforce* H.B. 89; they merely complied with its presumptively constitutional requirements. *Supra* at 13, n.3; 26.

[12] Appellees' Brief, 48.

Appellees do not address the Schools' explanation that they have a significant interest in functioning within the scope of the authority granted to them by the State. *Cf.* ISDs' Brief, 67; Appellees' Brief, 48-49. Instead, Appellees would have the Schools sit in judgment over the constitutionality of a State law and enter into *ultra vires* contracts merely because Appellees believe the law is unconstitutional. Appellees' position is particularly objectionable in the context of the suit at bar because: (1) *amici* demonstrate that the constitutionality of the Act is hotly contested among constitutional scholars; and (2) an injunction against the State would have been sufficient to accomplish Appellees' desired outcome.

3. A Preliminary Injunction Against the Schools Disserves the Public Interest.

The Court should reject Appellees' misreading of the Schools' argument concerning public interest and a potential award of attorneys' fees. Appellees' Brief, 49, n.20. The Schools' argument does not apply to all instances in which preliminary injunctive relief is at issue. The Schools merely argue that it is against the public interest to expose them to a potential award of attorneys' fees based solely on the Schools' compliance with a presumptively constitutional State law. This is particularly true when an injunction against the Schools was wholly unnecessary, as is the case here. *Supra* at 26. Appellees offer no meaningful response to these arguments.

D. APPELLEES' REQUEST FOR INJUNCTIVE RELIEF AGAINST THE SCHOOLS BECAME MOOT WHEN THE LEGISLATURE AMENDED THE ACT.

1. Further Factual Development is Not Required.

The Court should reject Appellees' illogical argument that factual development is required in order to determine whether the amendment to the Act moots the case. Appellees' Brief, 13, 20. The Legislature amended the Act such that it no longer requires sole proprietors to sign a No-Boycott certification. ROA.1426-1432. Appellees admit that they are sole proprietors. ROA.1657 [¶7]. Thus, to the extent that any governmental entity were to ask Appellees to sign a No-Boycott certification, the governmental entity would not be doing so pursuant to the Act, and Appellees' lawsuit seeking redress for H.B. 89's certification requirements would not be implicated.

The Schools' Trustees never even considered requiring such a certification. ROA.1121-22 [¶¶10-13]; ROA.1198 [¶¶10-13]. Appellees' vague contention that some other governmental entity might ask them, or other sole proprietors, to sign a No-Boycott certification is mere speculation and is beyond the scope of Appellees' claims against the Schools. Appellees' Brief, 13-14.

2. Voluntary Cessation Does Not Apply to the Schools.

In their voluntary cessation argument, Appellees implicitly argue that, because the Legislature amended the Act such that it no longer applies to them, the Schools have voluntarily ceased to violate Appellees' constitutional rights.

Appellees' Brief, 15-24. The voluntary cessation doctrine is inapplicable to Appellees' claims against the Schools. Under H.B. 89, the Schools lacked the authority to enter into contracts with Dennar and Abdelhadi unless they contained a No-Boycott certification. ISDs' Brief, 17. Under the amended statute, the Legislature is no longer restricting the Schools from contracting with Appellees. ROA.1426-1432. The Schools themselves never even considered requiring a No-Boycott certification. ROA.1121-22 [¶¶10-13]; ROA.1198 [¶¶10-13]. This is not voluntary cessation by the Schools.

3. Appellees' Reliance on *Cooper*, *Ciudadanos*, and *Trinity Lutheran* Against the Schools is Misplaced.

Appellees' reliance on *Cooper v. McBeath,* 11 F.3d 547, 551 (5th Cir. 1994) is misplaced. *Cooper* involved a challenge to the constitutionality of State statutes which was asserted against the head of the State agency that was in charge of enforcing those statutory provisions. *Cooper* was, in essence, an action against the State. Although this aspect of *Cooper* may find a parallel in Appellees' claims against the Attorney General, the Schools are not in an analogous position with respect to H.B. 89. The Schools did not enforce H.B. 89; they merely complied with its presumptively constitutional provisions in order to have authority to enter into contracts. *Supra* at 13, n.3; 26. Additionally, in *Cooper*, the statutory amendments merely modified a residency requirement which still applied to the plaintiffs. Thus, the plaintiffs still had a valid case or controversy involving the

amended statutory provisions. *Id.* at 551. This is not true of the case at bar, in which the amended Act does not apply to any of the Appellees.

Appellees' reliance on *Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Com'rs*, 622 F.2d 807, 824 (5th Cir. 1980) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) is also misplaced because those cases involved situations in which the defendants themselves made the decisions that implicated the plaintiffs' constitutional rights. In *Ciudadanos*, the statute at issue gave complete discretion to the defendants, both before and after it was amended, to follow the grand jury selection system which was being challenged in the lawsuit. *Ciudadanos*, 622 F.2d at 812-13, 824-25. In *Trinity Lutheran*, the defendant ceased following its own policy concerning making grants to religious organizations when instructed to do so by the governor. *Trinity Lutheran*, 137 S. Ct. at 2019, n.1.

In the case at bar, the Schools never made any decisions which allegedly implicated Appellees' constitutional rights. Instead, the Legislature withdrew the Schools' authority to enter into contracts with sole proprietors, such as Appellees, unless the contracts contained a No-Boycott certification. ISDs' Brief, 17. The Schools themselves never decided to include such a requirement in their contracts, and they were not given discretion to choose whether to comply with the Legislature's requirement. ISDs' Brief, 38, n.20. The Legislature's modification

of its own policy concerning contracts with State agencies did not amount to a voluntary cessation by the Schools who had, themselves, never even considered requiring a No-Boycott certification. ROA.1121-22 [¶¶10-13]; ROA.1198 [¶¶10-13].

4. If Voluntary Cessation Applies, the Schools Have Met its Standards.

Even if the Schools could be deemed to have engaged in voluntary cessation on the basis of the Legislature's amendment of an Act which constrained the Schools' authority to contract, Appellees' claims against the Schools would still be mooted by the State's amendment of the Act, because: (1) the challenged conduct cannot be expected to recur; and (2) the amendment has eradicated the effects of the alleged violation with respect to the Schools. *See* Appellees' Brief, 20 (citing *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979).

Appellees cannot expect that the Schools would, themselves, require Appellees to sign a No-Boycott certification as a condition of providing services to the Schools, because the Schools have never even considered requiring contractors to sign any No-Boycott certification. ROA.1121-22 [¶¶10-13]; ROA.1198 [¶¶10-13]; *see also* ROA.1659 [¶28].

The Court should reject Appellees unsupported assertion that "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." Appellees' Brief, 23. Appellees fail to distinguish between the Schools and the other Defendants.

The Schools have *never* defended the constitutionality of the Act.[13] Instead, the Schools have asserted that: (1) Dennar and Abdelhadi lacked standing to pursue claims against the Schools; (2) Appellees failed to demonstrate any policy of the Schools that injured them; and (3) Dennar and Abdelhadi have not engaged in expressive conduct protected by the First Amendment. ISDs' Brief, 25-39, 49-65.

Since May 7, 2019, Appellees have been free to enter into contracts with the Schools without signing a No-Boycott certification. Thus, the amendment has eradicated the effects of the alleged violation with respect to Appellees' claims against the Schools. Appellees' claims against the Schools have been mooted by the Legislature's amendment of the Act such that it does not apply to Appellees.[14]

[13] The Schools disagree with the American Jewish Committee's amicus brief insofar as it argues that the Schools have an interest in protecting "the State's commerce with Israel," access to particular goods and services, or the expenditure of taxpayer funds vis a vis the Act. *See* p. 2 *et. seq*. The Schools take no position concerning those interests.

[14] The Court should, therefore, dismiss Appellees' claims against the Schools. *See also infra* at 34-36.

E. APPELLEES CONCEDED THE SCHOOLS' ARGUMENTS CONCERNING VACATUR.

Appellees offered no response to the Schools' arguments concerning their entitlement to vacatur of the preliminary injunction against the Schools. ISDs' Brief, 39-43. Appellees have, therefore, conceded these arguments.

F. APPELLEES' ARGUMENTS CONCERNING OVERBREADTH OF THE PRELIMINARY INJUNCTION ARE WITHOUT MERIT.

Appellees misrepresent the Schools' argument concerning the overbreadth of the preliminary injunction. *Cf.* ISDs' Brief, 43-44; Appellees' Brief, 49. The Schools do not argue that the preliminary injunction "should have been limited to Plaintiffs,"[15] but that the preliminary injunction, which purports to prohibit all Defendants from including *any* No-Boycott clause in *any* State contract, is well beyond the scope of Appellees' facial challenge to H.B. 89. ISDs' Brief, 44.

Appellees' reliance on *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), is inapposite to the Schools' argument. Although *Broadrick* permits a wide range of plaintiffs to assert claims of facial overbreadth against statutes that restrict expression, the district court's preliminary injunction constitutes far more than "a facial injunction to the Act." Appellees' Brief, 49 (citing ROA.1263 at n.4). Instead, the preliminary injunction purports to enjoin H.B. 89, any subsequent Act, and any other potential source of any No-Boycott clause in any State contract.

[15] Appellees' Brief, 49.

ROA.1297. This is not merely a finding that H.B. 89 was facially overbroad. It is an as-applied injunction against any No-Boycott clause in connection with any State contract. The district court lacked authority to issue such an injunction. ISDs' Brief, 43-44.

Appellees failed to rebut the Schools' authority which demonstrates that an injunction which is overbroad must be vacated. This Court should vacate the district court's overbroad preliminary injunction.

II. THE COURT SHOULD DISMISS DENNAR AND ABDELHADI'S CLAIMS AGAINST THE SCHOOLS.

A. BECAUSE MOOTNESS IMPLICATES JURISDICTION, THE COURT CAN DISMISS APPELLEES' CLAIMS AGAINST THE SCHOOLS.

As Appellees admit, mootness of Dennar and Abdelhadi's claims against the Schools is a jurisdictional issue. Appellees' Brief, 13, n.5. Courts must always consider jurisdictional issues. *E.g.*, ISDs' Brief, 26 (citing *U.S. v. Lares-Meraz*, 452 F.3d 352, 354-55 (5th Cir. 2006). When jurisdiction ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Bettter Env't*, 523 U.S. 83, 94-95 (1998).

Appellees' reliance on *Janvey v. Alguire*, 647 F.3d 585, (5th Cir. 2011), is inapposite. Appellees' Brief, 11. *Janvey* is distinguishable because it did not involve an assertion of mootness, which brings into question the on-going validity of an order granting a preliminary injunction. Instead, *Janvey* involved a motion to

compel arbitration, which would not have had any effect on the validity of the preliminary injunction at issue. *Id.* at 604.

B. APPELLEES FACE NO THREAT OF HARM FROM THE SCHOOLS.

Since May 7, 2019, the Schools have been free to enter into contracts with Dennar and Abdelhadi. ROA.1426-1432. Appellees cannot show any real and immediate threat of harm from the Schools. ISDs' Brief, 28-30. Consequently, Appellees lack standing to pursue injunctive relief against the Schools, and the Court should dismiss Appellees' claims against the Schools. *Id*.

C. APPELLEES' CLAIM FOR DECLARATORY RELIEF DOES NOT PRESERVE DENNAR AND ABDELHADI'S CLAIMS AGAINST THE SCHOOLS.

Appellees' argument that their claim for declaratory relief preserves the lawsuit from mootness is inapplicable to Dennar and Abdelhadi's claims against the Schools. Appellees' Brief, 11. Dennar and Abdelhadi sought declaratory relief only concerning H.B. 89 and sought only injunctive relief against the Schools. ROA.1678-79; ISDs' Brief, 30.[16]

Because the Schools had no part in passing or amending the Act, they are not proper Defendants for a claim for declaratory relief against the Act. Consequently, Appellees' claim for declaratory relief against the Act, as initially enacted, is not sufficient to preserve their claims against the Schools from mootness.

[16] By failing to contest the Schools' assertion that "Appellees' only claims against the School Districts are for injunctive relief," Appellees conceded this point. ISDs' Brief, 30.

D. APPELLEES' POTENTIAL CLAIM FOR ATTORNEYS' FEES DOES NOT PRESERVE DENNAR AND ABDELHADI'S CLAIMS AGAINST THE SCHOOLS

As Dennar and Abdelhadi *always* lacked standing to sue the Schools, the district court lacked jurisdiction to enter a preliminary injunction against the Schools, and the unauthorized preliminary injunction cannot legitimately support a claim for attorneys' fees against the Schools. *See* ISDs' Brief, 30-39. This Court should reverse the district court, vacate the injunction, and dismiss the claims against the Schools, explicitly holding that Dennar and Abdelhadi are not entitled to attorney's fees and costs from the Schools.

CONCLUSION

This Court should dismiss Dennar and Abdelhadi's claims against the Schools, vacate the district court's April 25, 2019 order, and award costs to the Schools.

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 2nd day of January, 2020, 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 6,474 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:

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Dated: January 2, 2020

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