No. 22-20047

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A & R ENGINEERING AND TESTING, INCORPORATED,

Plaintiff-Appellee,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Case No. 4:21-cv-3577

Brief of *Amici Curiae* The Louis D. Brandeis Center for Human Rights Under Law and Hadassah, The Women's Zionist Organization of America, Inc. in Support of Defendant-Appellant and Reversal

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CERTIFICATE OF INTERESTED PERSONS

The number and style of this case is No. 22-20047, *A & R Engineering and Testing, Inc. v. Paxton*.

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A)(1), The Louis D. Brandeis Center for Human Rights Under Law and Hadassah, The Women's Zionist Organization of America, Inc. hereby certify that they have no parent corporation, and no publicly held corporation owns ten percent or more of their stock.

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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INTEREST OF *AMICI CURIAE*

The Louis D. Brandeis Center for Human Rights Under Law (the "Brandeis Center" or the "Center") is an independent, non-partisan institution for public interest advocacy, research, and education. The Center's mission is to advance the civil and human rights of the Jewish people and to promote justice for all. The Center's education, research, and advocacy focus especially, but not exclusively, on the problem of anti-Semitism on college and university campuses.

In fulfilling its mission, the Brandeis Center emphasizes the importance of clear, comprehensive, and specific anti-discrimination policies for government entities. The Center publishes guidance documents for organizations seeking to adopt uniform definitions of anti-Semitism, which in some cases manifests in the form of anti-Israel boycotts, divestments, and sanctions, as discussed herein. The Center's attorneys also advise and represent students in higher education who have been victims of anti-Semitic conduct in violation of Title VI of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a).

The Center believes that the American people must respect and actively safeguard our First Amendment right to freedom of speech. The Center affirms the statement of its namesake, Justice Louis D. Brandeis, in *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not

enforced silence." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). At the same time, the Center believes that the government has the responsibility and authority to vigorously protect the right of all citizens not to be discriminated against on the basis of race, national origin, ethnicity, or religion.

Hadassah, The Women's Zionist Organization of America, Inc. ("Hadassah") is the largest Jewish women's organization in the United States. Hadassah brings women together to effect change and advocate on such critical issues as ensuring Israel's security, combating antisemitism, and promoting women's health. Through Hadassah's two Jerusalem hospitals, Hadassah delivers exemplary patient care and supports world-renowned medical research.

Hadassah has a long-standing policy against all forms of organized boycotts and denounces the systematic global campaign to delegitimize the State of Israel employing the tactics of boycott, divestment, and sanctions. The Hadassah Medical Organization has benefited from many collaborative initiatives—including those with Palestinian physicians and researchers—and, unfortunately, has experienced the frustration and stagnation caused when international partners withdraw from these joint ventures. Hadassah calls on members of the academic, cultural, and business communities to speak out against delegitimization of Israel and to actively

pursue partnerships that can better the world and support a future of peace in the Middle East.[1]

INTRODUCTION

It is well-settled that States may advance legitimate interests, such as combatting the scourge of discrimination, through the imposition of conditions on government contracts, and that they are not required to deploy state funds to subsidize discriminatory conduct. The district court, however, refused to apply these basic principles here, where the State of Texas seeks to refrain from contracting with entities that partake in discriminatory boycotts against Israel. This Israel-exception to the States' established authority to set conditions for government contracts has no basis in the law. And the result is that the State of Texas must now subsidize conduct—economic sanctions directed at a particular nation and its citizens—that the people of Texas, through their elected representatives, have determined to be discriminatory and sought to disincentivize. This Court should remedy this problematic state of affairs by reversing the district court's order.

[1] Pursuant to Fed. R. App. P. 29, the Brandeis Center and Hadassah state that no counsel for any party authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and that no person other than the Brandeis Center, Hadassah or their counsel contributed money that was intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Federal, state, and local governments across the United States regularly and appropriately use similar conditions on government contracts to promote equality under the law, combat discrimination, and ensure that public funds are not used for illegal or invidious purposes. Many of those laws, like the act at issue here, require government contractors to refrain from discrimination on the basis of national origin, race, religion, or other classifications as a condition to receiving government contracts. Such conditions on contracting are a pillar of anti-discrimination laws at all levels of government.

The district court's decision jeopardizes the government's ability to promote equality under the law through regulation of discriminatory conduct. The district court failed to reconcile its decision with longstanding precedent upholding the constitutionality of anti-discrimination laws that prevent government actors from subsidizing invidious conduct. Instead, its preliminary injunction order compels the State of Texas to award a contract to a company that discriminates based on national origin—nothing less than a naked assault on principles of equal treatment. Contrary to the district court's holding, the First Amendment does not require the government to subsidize discriminatory conduct and permits it to place anti-discrimination conditions on government contracts—which federal, state, and local governments routinely and appropriately do. *See infra* Part I. Texas's anti-Israel boycott

contracting law fits squarely into these commonplace conditions included in government contracts.

Chapter 2271 of the Texas Government Code (the "Act") instructs in relevant part 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 § 2271.002(b). "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." *Id.* § 808.001(1). The Act enforces this requirement, and disincentivizes discriminatory boycotting, by requiring that an entity seeking a government contract certify that it will refrain from this discriminatory conduct or else accept the consequence of ineligibility for the contract. *Id.* § 2271.002(b).

The Act does not target speech. It targets only the discriminatory *conduct* of state contractors who engage in a boycott of Israel. In fact, it permits contractors to speak passionately, to associate, and to advocate openly in any forum and on any subject, including in support of boycotts of Israel. Contractors who wish to engage

in the conduct of actively boycotting Israel are free to do so and forgo their contracts; the State of Texas makes no threat of further penalty or sanction. But discriminatory conduct is not protected speech.

Anti-discrimination laws like the Act are no less appropriate simply because they target discrimination against Israel and people who do business with Israel, rather than other forms of invidious discrimination. Indeed, it is "well within the State's usual power to enact" anti-discrimination measures "when a legislature has reason to believe that a given group is the target of discrimination." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658 (2000). And the tragic and voluminous history of discrimination against the Jewish people—including a recent, violent attack on a synagogue in Texas—makes clear that the legislature had good reason to pass the anti-discrimination law at issue here; indeed, anti-Semitism is often manifest in the form of discrimination against Israel, and of anti-Israel boycotts in particular. *See infra* Part II.A. It is this legacy of discrimination that the Act is designed to combat.

The legislative sponsor's Statement of Intent described the basis for the Act as follows:

> There is a concerted effort underway to isolate Israel from the global community through discriminatory trade practices that include boycotting, divestment, and sanctions (BDS) against Israeli-based businesses and companies doing business in Israel. . . . State law currently restricts investment in Iran and Sudan to prevent public funds from going to organizations that support terrorism or genocide. Similar legislation is needed to prevent Texas' taxpayer resources from

> supporting businesses engaged in discriminatory trade practices against Israel.[2]

That finding is entitled to substantial deference. And while the district court's narrow reading of *Claiborne*—under which purely economic conduct is not constitutionally protected—was correct, the district court erred in nevertheless finding the Act invalid based on an overly broad reading of the residual clause of the Act's definition of covered conduct. *See infra* Part II.B.

For all of these reasons, Texas's decision to disincentivize state contractors from actually engaging in discriminatory boycotts of Israel and those who do business with Israel—while steering clear of any regulation of speech—is entirely appropriate. The district court's decision should be reversed and remanded.

ARGUMENT

This brief focuses on two reasons the Act is appropriate under the First Amendment. First, the Act is a valid exercise of the State of Texas's authority to set conditions for the recipients of government contracts. Second, the Act targets discriminatory conduct, which is not protected under the First Amendment.

[2] Sen. Res. Ctr. 85(R)-H.B. 89, Bill Analysis (Engrossed), at 1 (Tex. 2017), https://bit.ly/3K7Y56M.

I. States Are Permitted To Impose Conditions On Government Contracts To Promote Public Policy Objectives, As Texas Has Done Here To Discourage Discrimination.

States are permitted to advance legitimate state interests through conditions on government contracts. As a result, anti-discrimination laws that employ conditions on government subsidies and contracting routinely withstand constitutional challenges, including challenges under the First Amendment.[3]

These anti-discrimination laws are constitutionally valid for the same reason the Supreme Court has repeatedly upheld other laws that use conditions on government contracts to vindicate public policy objectives: the government has the authority and right to use competitive funding as an incentive or disincentive, even to affect behavior that the government is not permitted to regulate directly. *See, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) ("[T]he

[3] Cases rejecting First Amendment challenges to conditions on government subsidies include *Cutter v. Wilkinson*, 544 U.S. 709, 732–33 (2005) (upholding against a First Amendment challenge a condition that States receiving federal funds for prison activities or programs had to comply with a federal statute aimed at protecting the free exercise of religion), *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (rejecting First Amendment challenge by university requiring that recipient of federal tuition assistance submit a certification that the university does not discriminate on the basis of sex), *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983) (holding that conditioning tax-exempt status on a university's adoption of non-discrimination policies did not infringe the university's First Amendment rights), and *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 399–401 (S.D. Fla. 1991) (rejecting cable operator's First Amendment challenge to city's imposition of a requirement that cable operators provide universal service throughout the city's boundaries as a condition of being franchised).

Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."). In *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003), the Court considered a challenge to a condition on library funding, providing that libraries receiving government funds must install content-filtering software on public computers. The Court rejected the argument that the statute violated the First Amendment. *See id.* at 212. The Court wrote that the statute "d[id] not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access." *Id.* Instead, the statute "simply reflect[ed] Congress' decision not to subsidize their doing so." *Id.*

The bottom-line rule is simple: "A refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)) (citations, brackets, and internal quotation marks omitted).

The Supreme Court has consistently highlighted the distinction between direct regulation of constitutionally protected activity and mere incentive-setting conditions on subsidies. *Lyng v. United Automobile Workers*, 485 U.S. 360 (1988), for example, featured a challenge to a law that made households ineligible for food stamps while "any member of the household [wa]s on strike." *Id.* at 362. The

plaintiffs (unions and their members) claimed that this law violated their First Amendment rights of association and expression. *Id.* at 363–64. The Court rejected both arguments. *Id.* at 364. As to the right of free association, "the statute at issue . . . d[id] not order [the plaintiffs] not to associate together for the purpose of conducting a strike, or for any other purpose, and it d[id] not prevent them from associating together." *Id.* at 366 (internal quotation marks omitted). As to the right of free expression, "the statute . . . require[d] no exaction from any individual; it d[id] not coerce belief; and it d[id] not require [plaintiffs] to participate in political activities or support political views with which they disagree. It merely decline[d] to extend additional food stamp assistance to striking individuals." *Id.* at 369 (internal quotation marks omitted).

Here, the Act is constitutionally appropriate for the same reasons. Texas's law does not forbid anyone from boycotting Israel, collectively or individually. Instead, the Act "merely declines to extend" a subsidy—by way of a government contract—to state contractors "for the duration of" their participation in any such boycott. *Id.* at 367 n.5, 369.

The district court's decision threatens to undermine a wide range of federal, state, and municipal laws and policies that fall within these constitutional bounds. Twenty-six States besides Texas have imposed conditions on government contracts similar to the Act at issue here, either by requiring contractors to refrain from

boycotting Israel or by divesting state funds from entities participating in boycotts of Israel. *See* Appellant's Br. 5 n.1 (listing state laws). More broadly, the federal government, as well as a large number of state and local governments, condition government contracts on the contractors' refraining from discrimination on the basis of national origin, race, sexual orientation, and other classifications.[4] The federal government places similar anti-discrimination conditions on its funding for public and private universities.[5]

Such conditions appropriately incentivize private actors to distance themselves from discrimination, and ensure that government funds—that is, public funds—are not used to subsidize or support discriminatory conduct. It is difficult to

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[4] *See, e.g.*, Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), *amended by* Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014) (requiring that all contracts between the federal government and contractors include a clause prohibiting the contractor from "discriminat[ing] against any employee or applicant for employment because of race, creed, color, sex, sexual orientation, gender identity or national origin").

[5] *See, e.g.*, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."); 34 C.F.R. § 100.3 (Department of Education regulation prohibiting educational institutions that receive federal financial assistance from discriminating on the basis of race, color, or national origin); 34 C.F.R. § 106.21 (Department of Education regulation prohibiting schools that receive federal financial assistance from discriminating on the basis of sex).

imagine what our schools, labor force, and communities would look like if the First Amendment prevented governments from setting contract conditions that combat racism, sexism, anti-Semitism, and other discriminatory conduct. The Act, like the broader use of conditions to discourage discrimination, is constitutionally sound.

II. Boycotting Israel Is Discriminatory Conduct, Not Speech, And Is Not Immune From State Regulation.

A. The Act Targets Discrimination on the Basis of National Origin and Religion, Which Are Not Constitutionally Protected Forms of Expression.

Discrimination is not protected speech. This explains why it is "well within the State's usual power to enact" anti-discrimination measures "when a legislature has reason to believe that a given group is the target of discrimination." *Dale*, 530 U.S. at 658; *see also Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 981 (9th Cir. 2005) *as amended* (Feb. 13, 2006) (state anti-discrimination law was "enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds"). The federal government and many States have repeatedly and appropriately exercised these powers by directly prohibiting private discrimination on the basis of

national origin, religion, and other classifications, including in the context of employment,[6] education,[7] and public accommodations.[8]

A boycott focusing on a single country discriminates on the basis of national origin by treating that country's affiliated persons and products as categorically different from all other persons or products, and subject to adverse treatment on that basis alone. Indeed, the legislative sponsor's Statement of Intent sets out the legislative finding that "[t]here is a concerted effort underway to isolate Israel from the global community through discriminatory trade practices that include boycotting, divestment and sanctions (BDS) against Israeli-based businesses and companies doing business in Israel." Sen. Res. Ctr. 85(R)-H.B. 89 (Engrossed), at

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[6] *See, e.g.*, Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17); Barry A. Hartstein, National Conference on Equal Employment Opportunity Law, *50 Ways from Sunday – Can a Corporation Have a Successful Nationwide Policy that Is Consistent with State and Local Laws: Survey of State EEO and Related Laws, Including Significant Recent Developments and Jury Verdicts* iii (2009) ("[M]ost states have state [fair employment practices] laws similar to Title VII that prohibit discrimination on the basis of . . . religion and national origin.").

[7] *See, e.g.*, Executive Order 13,899, 84 Fed. Reg. 68799 (Dec. 11, 2019) (interpreting Title VI of the Civil Rights Act of 1964 to prohibit "[d]iscrimination against Jews" "when the discrimination is based on an individual's race, color, or national origin").

[8] *See, e.g.*, Title II of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000a to 2000a-6); *State Public Accommodation Laws*, National Conference of State Legislatures (June 15, 2021), https://bit.ly/3uYWOdG ("All states with a public accommodation law prohibit discrimination on the grounds of . . . ancestry [*i.e.*, national origin] and religion.").

1 (Tex. 2017). The Statement of Intent also explained that "legislation is needed to prevent Texas' taxpayer resources from supporting businesses engaged in discriminatory trade practices against Israel." *Id*. Legislative supporters of the Act further elucidated that the Act "would help ensure that the dollars of Texas taxpayers were not used to discriminate on the basis of national origin." House Res. Org. 85(R)-H.B. 89, Bill Analysis, at 5 (Tex. 2017). These findings—that the practices of BDS are tantamount to national origin discrimination, and that the Act is necessary to combat such discrimination—are entitled to great deference. *See, e.g.*, *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997); *Washington v. Glucksberg*, 521 U.S. 702, 788 (1997) (Souter, J., concurring).

National origin discrimination is one of the textbook categories of impermissible discrimination that state and federal laws validly seek to root out without violating the First Amendment. *See, e.g.*, *Athenaeum v. Nat'l Lawyers Guild, Inc.*, 2017 WL 1232523, at *2, 5 (N.Y. Sup. Ct. Mar. 30, 2017) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973)) (denying motion to dismiss New York State Human Rights Law and New York City Human Rights Law claims for refusing to "accept[] money from Israeli organizations," since defendant's refusal, being "solely because Plaintiff is an Israeli corporation," did not implicate First Amendment protections).

The discriminatory nature of a boycotts against Israel and people who do business with Israel are doubly invidious, because such boycotts have historically been motivated by animus towards Jewish people on the basis of their religion. Boycott campaigns have provided an outlet for anti-Semitism since at least as early as the eighteenth century.[9] In the twentieth century, Nazi encouragement led to a resurgence of anti-Jewish boycotts; in Germany, the Nazi regime's first nationwide action against Jews was a boycott.[10] Post-World War II boycotts have formally targeted the State of Israel, but have been closely associated with this history of general boycotts against Jews.[11] As Brandeis Center Founder and Chairman Kenneth Marcus has explained, "[t]he pre-Nazi, Nazi, Arab League and BDS [*i.e.*, modern Boycott, Divestment, and Sanctions campaign] boycotts all share common elements: they seek to deny Jewish legitimacy or normalcy as punishment for supposed Jewish transgressions."[12] Marcus has further explained:

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[9] *See* Walter Laqueur, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day* (Oxford, U.K.: Oxford University Press, 2006); *Fighting Anti-Semitism: Hearing on H.B. 476 Before the H.R. Comm. on Gov't Accountability & Oversight*, 131st Gen. Assemb. 4–6 (Ohio 2016) (statement of Kenneth L. Marcus, President and General Counsel, Brandeis Center), https://bit.ly/36zxzW6.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 13.

> The modern BDS campaign is anti-Semitic, as its predecessors were, because some of its proponents act out of conscious hostility to the Jewish people; others act from unconscious or tacit disdain for Jews; and still others operate out of a climate of opinion that contains elements that are hostile to Jews and serve as the conduits through whom anti-Jewish tropes and memes are communicated; while all of them work to sustain a movement that attacks the commitment to Israel that is central to the identity of the Jewish people as a whole.[13]

Antisemitic tropes and sentiments, meanwhile, have led to tragic consequences against Jews throughout the world, including recently in Texas.[14] The Act thus combats odious discrimination on the basis of both nationality and religion.

And States are of course not limited to targeting discrimination that falls into pre-existing legal classifications. Federal, state, and local governments have regularly extended the protections of anti-discrimination laws to new categories of individuals—with individual States and municipalities often leading the way—as our Nation's understanding of additional forms of discrimination becomes more acute. In fact, the federal government recently confirmed that Title VI of the Civil Rights Act of 1964 prohibits "[d]iscrimination against Jews" "when the

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[13] Kenneth L. Marcus, *The Definition of Anti-Semitism* 213 (2015).

[14] *See, e.g.*, Annabelle Timsit, The Washington Post, *Antisemitic Tropes cited by the Texas synagogue hostage-taker have deep roots* (Jan. 18, 2022), https://wapo.st/382pfhT; Jennifer Medina, Christopher Mele, & Heather Murphy, The New York Times, *One Dead in Synagogue Shooting Near San Diego; Officials Call It Hate Crime* (Apr. 27, 2019), https://nyti.ms/3KzvI23; Jemina McEvoy, Forbes, *Synagogue Attacks And Slurs: Jewish Community Rocked By Rise In Anti-Semitism Amid Israel-Gaza Fighting* (May 20, 2021), https://bit.ly/38BuTrv.

discrimination is based on an individual's race, color, or national origin." Executive Order 13,899, 84 Fed. Reg. 68799 (Dec. 11, 2019).

As explained by Justice Brandeis, the ability of each state to "serve as a laboratory" of democracy in order to "try novel social and economic experiments without risk to the rest of the country" must be safeguarded. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It is within this tradition that Texas, along with dozens of States, have passed similar statutes. These laboratories of democracy have worked as they ought.[15]

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[15] These state laws directed at state contractor participation in anti-Israel boycotts have also engendered a broader federal law prohibiting participation in any discriminatory boycotts led by foreign nations. The Anti-Boycott Act of 2018 prohibits "any United States person . . . from taking or knowingly agreeing to take [certain] actions with intent to comply with, further, or support any boycott fostered or imposed by any foreign country, against a country which is friendly to the United States." 50 U.S.C. § 4842(a)(1). The prohibited actions include "[r]efusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country." *Id.* § 4842(a)(1)(A). The Anti-Boycott Act was first introduced in the Senate and House of Representatives by bipartisan sponsors in 2017 as the "Israel Anti-Boycott Act." *See* Israel Anti-Boycott Act, S. 720, H.R. 1697, 115th Cong. (2017). This Bill declared, like analogous state laws, "opposition of the United States to actions to boycott, divest from, or sanction Israel." *Id.*; *see, e.g.*, Ark. Code Ann. § 25-1-501(3); 2016 Ariz. Sess. Laws ch. 46, § 2(D). It ultimately passed in modified form within the National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1771–74, 132 Stat. 1636, 2234–38 (2018). The Senate has also recently referred to committee the Combating BDS Act of 2021, S. 2119, 117th Cong. § 2, which would expressly establish that federal law does not preempt state and

(Cont'd on next page)

B. Boycotts Are Not Automatically Constitutionally Protected, Contrary to Appellant's Novel Interpretation of *Claiborne*.

Contrary to Appellee's position in the district court, the discriminatory conduct here is not immunized from regulation merely because it might be related to a boycott. *See* Dist. Ct. Dkt. 7 at 6 (Nov. 15, 2021, S.D. Tex.). Appellee's position would unjustifiably extend *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), against the weight of precedent, policy, and this Nation's history of combatting discrimination.

While *Claiborne* identified several "elements of the boycott" at issue in that case that were "safeguarded by the First Amendment," 458 U.S. at 907–09, "purely economic conduct" was not among them, as the district court rightly pointed out—yet that is all an observer who sees a Texas company engaged in a boycott of Israel would be able to surmise. ROA 508 ("[I]t would be difficult, if not impossible, for someone to realize Plaintiff was engaged in a boycott simply based on the conduct prohibited by the statute."). To be sure, any accompanying speech might alter this conclusion, but the Act is sensitive to this distinction (as it should be) by requiring only that state contractors refrain from non-expressive discriminatory conduct—such as "terminating business activities"—and by abstaining from any regulation of

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local laws that prohibit contracts with or require divestment of state assets from entities boycotting Israel. *See also* Appellant's Br. 19–20 (discussing state laws prohibiting participation in economic boycotts).

speech in support of a boycott. Tex. Gov't Code § 808.001(1). Relying on analogous reasoning in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006), the district court correctly confirmed that "mere refusal to engage in a commercial/economic relationship with Israel" is not protected First Amendment activity, regardless of whether individual purchasing decisions are connected to a collective call to oppose Israel. ROA 508. Thus, the Act passes constitutional muster because it only "affects what [contractors] must *do*[,] . . . not what they may or may not *say*." *FAIR*, 547 U.S. at 60.

While the district court acknowledged that the Act primarily defines boycotts as economic conduct, it wrongly held that the residual clause of the Act's definition encompasses speech. That interpretation is unduly expansive.[16] Indeed, the Act, like the constitutionally-sound statute in *Lyng*, "does not order [the plaintiffs] not to associate together for the purpose of conducting a [boycott], or for any other purpose, and it does not prevent them from associating together." 485 U.S. at 366. Contractors are free to accept a contract with Texas while associating with

[16] *Amici* agree with Appellant's position that various canons of construction require reading the residual clause more narrowly. *See* Appellant's Br. 23–26; *see also Circuit City, Inc. v. Adams*, 532 U.S. 105, 114 (2001) (*ejusdem generis*); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (*noscitur a sociis*); *Hersh v. United States ex rel. Mukasey,* 553 F.3d 743, 753–74 (5th Cir. 2008) (constitutional avoidance).

boycotters—as well as while speaking, writing, and advocating in support of boycotts of Israel—so long as they do not themselves actively and actually engage in boycotting conduct during the term of a contract with the State of Texas.[17]

To extend First Amendment protection to discriminatory boycotts would turn *Claiborne*—a decision vindicating the right to combat discrimination in the public sphere—on its head. Precedent refusing to extend *Claiborne* confirms this. In *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (2d Cir. 1992), for example, the court rejected defendant-boycotters' efforts to use *Claiborne* and the First Amendment to inoculate their discriminatory boycott. The court held that the state anti-discrimination law at issue was aimed at

[17] Even if the district court's expansive interpretation of the residual clause were correct, the court's injunction should still be vacated or narrowed on the grounds that it sweeps too broadly. It is blackletter law that "[t]he scope of injunctive relief is dictated by the extent of the violation established." *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Here, the district court held that much of the Act is constitutional, including the Act's bans on "refusing to deal" and "terminating business activities" with Israel. Only the residual clause was found to be constitutionally infirm. Yet instead of simply enjoining enforcement of the residual clause against Appellee to the extent it infringes on speech, the district court inexplicably enjoined enforcement of the *entire Act* against Appellee. Thus, the scope of the injunction (enjoining enforcement of the entire Act against Appellee) plainly exceeds the violation established (the unconstitutionality of the residual clause). As a consequence, the injunction needlessly enjoins constitutional conduct, is unlawfully "overbroad," and "must be vacated," *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 478 (5th Cir. 2020), or at a minimum narrowed.

"discrimination, not speech," which states have "the constitutional authority . . . and a substantial, indeed compelling, interest in prohibiting," thereby meeting the constitutional criteria for regulations which incidentally limit speech. *Id.* at 295 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)). The court had no trouble distinguishing *Claiborne*, because the Supreme Court in *Claiborne* had "noted that it was not 'presented with a boycott designed to secure aims that are themselves prohibited by a valid state law,'" such as discrimination. *Id.* at 297 (quoting *Claiborne*, 458 U.S. at 915 n.49). The boycott in *Jews for Jesus*, like the boycotts discouraged by the Act, was conduct properly regulated by anti-discrimination laws, not speech protected by the First Amendment, and the collective element in these boycotts was of no moment to the court.[18]

Extending *Claiborne* would ignore the singular factors that led to the holding in that case. The "unique historical, constitutional, and institutional concerns" surrounding racial bias in the United States required the Supreme Court to critically evaluate state efforts to undermine the civil rights movement. *Pena-Rodriguez v.*

[18] *Claiborne* itself confirms that its result was based on the boycott participants' accompanying expressive activities, not on the act of boycotting itself. The *Claiborne* court listed categories of conduct that, under the First Amendment, are "insufficient predicate[s] on which to impose liability," including: "[r]egular attendance and participation" in meetings, membership in an association, and communicating the names of individuals who patronized certain businesses. 458 U.S. at 924–25. Notably, the act of boycotting is not listed.

Colorado, 137 S. Ct. 855, 868 (2017). Thus, when evaluating First Amendment challenges in the context of racial bias, the Court expressly modifies its freedom-of-speech analysis to accommodate the fact that racial discrimination "violates deeply and widely accepted views of elementary justice," such that rooting it out can justify state regulation that might otherwise encroach on the First Amendment. *Bob Jones Univ.*, 461 U.S. at 592. It would be perverse to allow the Court's piercing scrutiny of state torts that were used to *facilitate* discrimination in *Claiborne* to now *shield* state contractors from the requirement that they refrain from discriminating against Israel, effectuated through a refusal to engage in certain commercial transactions. Our entire structure of federal, state, and local laws forbidding discrimination on the basis of national origin, religion, and other classifications—and conditioning the receipt of government funding and contracts on commitments to refrain from discrimination—makes clear that *Claiborne* should not, and cannot, be read to immunize a discriminatory boycott from applicable state laws.

For a court to strike down the challenged law under these circumstances would be to require States to support and subsidize discriminatory conduct. That result would, moreover, cast a shadow of uncertainty over the constitutionality of our Nation's deeply embedded anti-discrimination laws. This is not what the First Amendment requires. To the contrary: Only by reversing the district court's

preliminary injunction order in this case will this Court protect our most sacred values.

CONCLUSION

This Court should reverse the district court's order granting a preliminary injunction.

Dated: April 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Fifth Circuit Rule 32.3, I hereby certify the following:

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,025 words, exclusive of exempted portions.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14 point Times New Roman font.

Dated: April 21, 2022

/s/ Akiva Shapiro
Akiva Shapiro

CERTIFICATE OF SERVICE

On April 21, 2022, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1.

Dated: April 21, 2022

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