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.

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

BRIEF OF EIGHTEEN CONSTITUTIONAL AND BUSINESS LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

JEROME M. MARCUS
CENTER FOR THE MIDDLE EAST AND INTERNATIONAL LAW
Antonin Scalia Law School
George Mason University
3301 Fairfax Drive
Hazel Hall, Room 433J
Arlington, VA 22201
Telephone: (610) 664-1184
jmarcus@marcuslaw.us

ADAM H. CHARNES
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

A & R Engineering and Testing, Inc. vs. Ken Paxton, Attorney General of Texas,

No. 22-20047.

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

Defendants-Appellants:
Ken Paxton, Attorney General of Texas (in his official capacity)

Counsel for State Defendants-Appellants Ken Paxton, Attorney General of Texas (in his official capacity):
Ken Paxton, Attorney General
Brent Webster, First Assistant Attorney General
Judd E. Stone II, Solicitor General
Eric J. Hamilton, Assistant Solicitor General
Benjamin Wallace Mendelson, Assistant Solicitor General

Plaintiff-Appellee:
A & R Engineering and Testing, Incorporated

Counsel for Plaintiff-Appellee A & R Engineering and Testing, Incorporated:
Lena F. Masri
Gadeir I. Abbas
Justin Sadowsky
CAIR Legal Defense Fund

***Amici Curiae* in support of Appellants:**
Anat Alon-Beck
David Bernstein
Juscelino Colares
Robin Charlow
Alan Dershowitz
Richard A. Epstein
Jesse M. Fried
Zohar Goshen
Tonja Jacobi
Eugene Kontorovich
Julian Ku
Gideon Parchomovsky
Jeremy A. Rabkin
Maimon Schwarzschild
Steven Davidoff Solomon
Alexander Tsesis
David Webber
Louise Weinberg

Counsel for *Amici Curiae* in support of Appellants:
Adam H. Charnes
Jerome M. Marcus

s/ *Adam H. Charnes*
ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who have studied and written on the First Amendment, antidiscrimination laws, and the legal aspects of Israel-focused boycotts. Some are also business law experts. All have a professional interest in the integrity of First Amendment principles and the neutral application of anti-discrimination laws. *Amici* are:[2]

Anat Alon-Beck is Assistant Professor of Law, Case Western Reserve University School of Law. Anat Alon-Beck's research focuses on corporate law and governance. Her work examines how legal and regulatory structures influence businesses.

David Bernstein is University Professor and Executive Director of the Liberty and Law Center, Antonin Scalia Law School, George Mason University. He has written extensively about the interaction of antidiscrimination laws and the First Amendment, including a book,

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4)(E).

[2] Affiliations are for identification purposes only.

You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws (2003).

Robin Charlow, Professor of Law at the Maurice A. Deane School of Law at Hofstra University, teaches, lectures, and publishes on a variety of relevant Constitutional Law topics, including free expression, equal protection, anti-discrimination, civil rights, and religion.

Juscelino Filgueiras Colares is the Schott-van den Eynden Professor of Business Law at Case Western Reserve University. He teaches a variety of courses on procedural, regulatory, and international business law. He is the author of *Restructuring Trade Agreements* (Wolters Kluwer 2021) and serves on the US Roster of Binational (Trade) Panelists to the United States-Mexico-Canada Agreement.

Alan Dershowitz is the Geordie Frankfurter Professor of Law Emeritus at Harvard Law School.

Richard A. Epstein is the inaugural Laurence A. Tisch Professor of Law, New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and senior lecturer, University of Chicago. Professor Epstein has written extensively on

issues of antitrust, antidiscrimination, constitutional, contracts, property, and tort law.

Jesse M. Fried is the Dane Professor of Law at Harvard Law School, where he teaches courses on the federal and state regulation of businesses.

Zohar Goshen is the Jerome L. Greene Professor of Transactional Law at Columbia Law School, the Co-Director of the Center for Israeli Legal Studies, and Ex-Chairman of the Israel Securities Authority (Israel's SEC).

As of July 1, 2022, Tonja Jacobi will be the Sam Nunn Chair in Ethics and Professionalism at Emory University School of Law. Specializing in constitutional law, criminal procedure, and judicial politics, she has published over 50 articles in peer reviewed journals and law reviews.

Eugene Kontorovich is Professor of Law and Director of the Center for the Middle East and International Law, Antonin Scalia Law School, George Mason University. Previously, he was a Professor of Law at Northwestern University. He has written over 30 articles on subjects including constitutional law, international law, and legal issues arising

from the Arab-Israeli conflict. He has written extensively about First Amendment issues, as well as anti-boycott laws, about which he has also testified before Congress and state legislatures.

Julian Ku is the Maurice A. Deane Distinguished Professor of Constitutional Law at the Maurice A. Deane School of Law at Hofstra University.

Gideon Parchomovsky is the Robert G. Fuller, Jr. Professor of Law at the University of Pennsylvania Carey Law School and teaches courses on the federal and state regulation of business.

Jeremy A. Rabkin is a Professor of Law at the Antonin Scalia Law School, George Mason University, where he teaches a variety of public law subjects. Before joining the faculty in June 2007, he was, for over two decades, a professor in the Department of Government at Cornell University.

Maimon Schwarzschild is a Professor of Law at the University of San Diego. He has written extensively on free speech issues, including the entry on "Civil Rights and Free Speech" in the *Routledge Encyclopedia of American Civil Liberties*.

Steven Davidoff Solomon is the Alexander F. and May T. Morrison Professor of Law, University of California, Berkeley School of Law.

Alexander Tsesis is the Raymond & Mary Simon Chair in Constitutional Law and Professor of Law at the Loyola University School of Law. He is the General Editor of the Cambridge University Press Studies on Civil Rights and Civil Liberties and of the Oxford Theoretical Perspectives of Law. He is the author of numerous books on free speech and civil rights, including *We Shall Overcome: A History of Civil Rights and the Law*, *The Thirteenth Amendment and American Freedom: A Legal History*, and *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*.

David Webber is Professor of Law and Paul M. Siskind Research Scholar at Boston University School of Law. He has written extensively about securities law, corporate law, and the intersection of politics and investment.

Louise Weinberg is holder of the William B. Bates Chair in the Administration of Justice, Emeritus, at the University of Texas School of Law. She has written extensively about civil rights and is the author of *Federal Courts: Judicial Federalism and Judicial Power* (West 1994).

Professor Weinberg is a member of the American Law Institute and serves as an invited Adviser to the ALI Restatement (Third) of Conflict of Laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to Chapter 2271 of the Texas Government Code. That statute 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 § 2271.002(b). Similar or identical so-called "anti-BDS" laws have been adopted in some 35 states, reflecting the states' strong consensus that the BDS movement is motivated by anti-Semitic animus and damages the states' interest in non-discriminatory conduct by their contractors. At least fifteen of those states have identical or nearly identical language to the questioned provisions of Texas's law.

The stakes in this case go far beyond boycotts of Israelis. The district court stated that Chapter 2271 regulates only commercial activity, and not protected speech, to the extent "Boycott Israel" means

"refusing to deal with" and "terminating business activities with" Israel and Israeli entities. *Id.* § 808.001(1). This is not entirely correct, however—the law only regulates whom a state may contract with; any business that does not seek to contract with Texas is free to do whatever it likes. A wide variety of uncontroversial laws would be thrown into doubt were this Circuit to adopt a contrary position—that business decisions of state contractors, including about whom to do business with, cannot be regulated when taken for some ideological purposes. Appellee's position would threaten a host of antidiscrimination statutes, including those protecting LGBTQ Americans; a variety of federal sanctions laws that prohibit doing business with people from particular countries, even when such restrictions are imposed to send a political message; and the fifteen other state anti-boycott laws with identical language, which have never been applied in the manner hypothesized by the district court.

The district court correctly decided the central constitutional issue in the case, holding that economic or business activity can be regulated on anti-discrimination and other grounds even when the activity is suffused with some kind of ideological motive. However, the court erred

by interpreting two words of the "residual clause" in the statute—which applies to a potential state contractor's "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with" Israel or Israeli entities, *id.*—as encompassing non-economic activity protected by the First Amendment. This latter statutory conclusion is erroneous and should be reversed.

ARGUMENT

I. The First Amendment protects only speech, not the right to engage in, or to refuse to engage in, economic activity.

At the outset, it is important to recognize the district court's correct acknowledgement that "the mere refusal to engage in a commercial/economic relationship with Israel or entities doing business in Israel is not 'inherently expressive' and therefore does not find shelter under the protections of the First Amendment." ROA.508. A boycott "is 'expressive only if it is accompanied by explanatory speech.'" *Id.* These conclusions comport with Supreme Court precedent.

"Boycott" could, in some contexts, refer to the kinds of activities protected by the First Amendment. As confirmed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), "The 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 and to effectuate rights guaranteed by the Constitution itself." *Id*. at 914. All parties here agree with that principle.

But Texas law clearly defines "boycott" to refer only to a company's non-expressive commercial choices. It should be noted that the law at issue does not prohibit boycotts at all—it only prohibits the government from contracting with a company that engages in particular boycotts, which themselves remain entirely legal. And when defining "boycott," the law applies only to a company's non-expressive commercial choices. Specifically, the Act defines "Boycott Israel" 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) (incorporated by § 2271.001(1)).

In arguing that Chapter 2271 violates the First Amendment, appellee grossly misinterprets the two Supreme Court decisions bearing most directly on the constitutionality of statutes that bar government entities from doing business with entities that boycott a particular class of people. Correctly read, both decisions establish the constitutionality of Chapter 2271.

Rumsfeld v. FAIR, 547 U.S. 47 (2006), involved a challenge to the Solomon Amendment. That statute specified that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose federal funds. *Id.* at 51. Just as those challenging the Texas law argue that their free speech rights are violated by their ineligibility for state funds if they boycott Israel-related entities, so the law schools in *FAIR* argued that their free speech rights were violated by the anti-boycott-the-military Solomon Amendment. The Court unanimously upheld the Solomon Amendment, concluding that it targeted *conduct*, not speech. *Id.* at 60. Just as in the case at bar, where the plaintiffs remain free to criticize Israel and those who do business with it, the Court noted that the law schools remained free to object to the military's policy on

homosexuality and other matters.[3] What the law schools could not do is refuse to deal with, *i.e.*, boycott, military recruiters in the course of ordinary economic activity, action not protected by the First Amendment.

As a substantive matter, the activity at issue in *FAIR* was the same activity engaged in by appellee here—the refusal to deal with another party.[4] And the Supreme Court held that, in the First Amendment analysis of restrictions on economic activity, the court must distinguish between regulation of speech and regulation of action. The former, *FAIR* holds, is impermissible; the latter is not: "As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* (emphasis in original). The exact same is true of the Texas law here: it affects what the state contractors must *do*—not discriminate against Israeli-

[3] As the Court explained, "[l]aw schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds." *FAIR*, 547 U.S. at 60.

[4] Indeed, this is how federal law defines a "boycott." 26 U.S.C. § 999(b)(3)(A)(i).

affiliated businesses and persons in their economic transactions—not what they may or may not *say*.[5]

There is a common-sense reason why the First Amendment protects speech and not business activity. With business activity, only an explanation of the motives behind the conduct sends a message—the explanation is speech, the refusal to deal is conduct. If Mary purchases Coke instead of Pepsi, the message is inherently unknown; did Mary buy Coke because she prefers the taste, or because it was cheaper, or because she opposes PepsiCo's policies? Refusals to deal or boycotts of Israeli-related companies and individuals are no exception to this rule; they are no more inherently expressive than any other such conduct. If Jane buys Trader Joe's brand hummus instead of Sabra hummus, the message is unknown—did she make a choice based on price, or did she boycott Sabra because of its supposed affiliation with Israel? In short, standing alone, the political message intended by an economic transaction is unknown and unknowable without concomitant speech;

[5] *See Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917 (7th Cir. 1984) ("The appellants are free to communicate their views about the relative merits of the Arabs' political decisions [to boycott Israel] directly to the Arabs if they choose….").

and it is that speech, and not the economic transaction, that the First Amendment protects. The law here regulates only transactions, not any accompanying speech.

Moreover, even with respect to boycotts themselves, companies boycott Israeli-related businesses for a variety of non-ideological reasons, such as improving their appeal in Arab markets[6] and avoiding pressure campaigns or secondary boycotts from anti-Israel activists.[7] For example, Airbnb, a notable recent example of a U.S. firm boycotting Israel, explicitly stated that its decision had no political or expressive basis.[8] Despite explicitly denouncing "the BDS movement" and

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[6] *Orange confirms it plans to cut ties with Israeli firm, but says move not political*, Jerusalem Post (June 4, 2015), https://www.jpost.com/Breaking-News/Telecoms-operator-Orange-says-plans-to-end-Israel-deal-over-brand-licensing-no-mention-of-boycott-405071.

[7] Marcy Oster, *Israeli Burger Chain Won't Open in Dearborn, Michigan Due to BDS Threat*, Forward (July 25, 2019), https://forward.com/fast-forward/428239/israeli-burger-chain-wont-open-in-dearborn-michigan-due-to-bds-threat/; *see also Briggs & Stratton*, 728 F.2d at 917 (discussing participation in Israel boycott activities, in contravention of federal law, by a company with "economic motivation alone").

[8] *Listings in Disputed Regions*, Airbnb (Nov. 19, 2018), https://press.airbnb.com/listings-in-disputed-regions/. The company subsequently ended its partial boycott as part of a settlement of antidiscrimination lawsuits brought against it by Jewish plaintiffs.

expressing support for Israel, Airbnb was properly subject to the application of state anti-BDS laws, including in Texas.

This demonstrates that the laws are not about the content of speech, but about conduct:[9] a company can express support for Israel, but engage in discriminatory refusals to deal, and be subject to the law. Conversely, a company can put a banner on its webpage "Down with the Zionist Oppressor," and such behavior would not fall within the scope of the law.

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), is not at all to the contrary. With *Claiborne Hardware*, as with *FAIR*, the facts, and the claims actually at issue, matter. In *Claiborne Hardware*, a group of businesses sued people and organizations because the defendants *urged others* not to do business with the plaintiffs. *Id.* at 909-10. The defendants urged this boycott because the plaintiff businesses discriminated, and supported discrimination, against African Americans. What was at issue, the Court's opinion repeatedly makes clear, was the *persuasion*, not the economic conduct itself. *Id.* at

[9] At the least, the ubiquity of non-ideological boycotts makes a facial challenge to the law inappropriate.

909–12, 926–29, 933. That was what defendants objected to, because it successfully discouraged others from patronizing the plaintiff businesses and they lost money as a result.

That persuasion is what the Court held was constitutionally protected. African Americans who were not already refusing to patronize white-owned stores "repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form." *Id.* at 909. *Claiborne Hardware* nowhere states that the First Amendment protects the decision not to do business with another party. There could be no such holding because there was no challenge in that case to any individual decision not to patronize one of the plaintiffs' stores. Instead, the claim was that *pure speech to others,* urging those others not to buy in white-owned stores, was tortious. *Claiborne Hardware* held that that claim failed because the First Amendment protects speech trying to persuade others to act. But the Court never stated that *economic action* comes within the First Amendment's protections.

Indeed, the same day it issued *Claiborne Hardware*, the Court decided *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212 (1982). That case involved a union that refused to load and unload ships engaged in trade with the Soviet Union to protest the Soviet invasion of Afghanistan. *Id.* at 214. The Supreme Court held that the union's actions constituted a secondary boycott that violated the National Labor Relations Act. *Id.* at 222.

The Court rejected the union's argument that its boycott was protected by the First Amendment. The Court explained: "[C]onduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *Id.* at 226. It is impossible to reconcile appellee's reading of *Claiborne Hardware*, that the action of engaging in an economic boycott receives First Amendment protection, with *International Longshoremen's Association*, decided the same day.

II. A First Amendment right to do business or to refuse to do business with particular persons would revolutionize economic regulation and invalidate numerous antidiscrimination laws.

A. State laws barring states from doing business with entities that discriminate would be unconstitutional under appellee's argument.

The Supreme Court has never held that a state is required to contract with businesses who refuse to do business with—*i.e.*, discriminate against—particular categories of persons or entities. No Supreme Court decision imposes any constitutional limitation on a state's decision that the state itself will refrain from doing business with a party that—in the state's view—discriminates against others in a manner the state, in its discretion, regards as improper. That is the only effect of Chapter 2271: it provides that Texas will refuse to enter a business transaction with parties that, in Texas's view, improperly discriminate against Israeli persons, Israeli-owned businesses, or those who do business with such persons or entities.

The imposition of such restrictions is entirely commonplace in the current legal environment: a plethora of federal and state laws bar private businesses from discriminating against other persons and

businesses on the basis of race, gender, national origin, sexual identity, sexual preference, and familial status.

Perhaps the most similar example to the Texas law at issue is federal legislation criminalizing compliance with foreign boycotts of Israel, consistent with the longstanding United States policy against discriminatory boycotts of the Jewish State.[10] *See* Export Administration Act of 1979, 50 U.S.C. § 4607(a)(1) (2012) (repealed 2018); John S. McCain National Defense Authorization Act, Pub. L. No. 115-232, §§ 1741–1781, 132 Stat. 1636, 2208–38 (2018) (including the Anti-Boycott Act of 2018, 50 U.S.C. § 4842).

Crucially, the federal Israel anti-boycott law contains no exemption for "political boycotts"—that is, it applies to anyone who participates in covered boycotts of Israel, even if they do so for ideological reasons, rather than economic pressure. Nevertheless, despite the vigorous federal criminal enforcement against boycotting companies for the past four decades, no defendants have successfully

[10] See *Jimmy Carter Administration: Statement by President Carter Upon the Signing of Anti-Boycott Legislation* (June 22, 1977), Jewish Virtual Library, https://www.jewishvirtuallibrary.org/statement-by-president-carter-upon-the-signing-of-anti-boycott-legislation.

claimed that the First Amendment shields them from criminal liability.[11] If appellee's argument against Chapter 2271 were correct, these decades-old federal anti-boycott laws would be invalid as well, so long as a defendant could plausibly claim that it is boycotting Israel for, *inter alia*, ideological reasons.

The appellee's argument would require overturning a wide variety of anti-discrimination laws. Many state and local laws prohibit the government from funding or doing business with persons and businesses that discriminate against LGBTQ Americans, regardless of the boycotter's religious, moral, or ideological opposition to gay marriage or other actions of LGBTQ Americans. California, for example, refuses to provide state funding or sponsorship of travel for state employees and contractors to states whose laws on "sexual orientation, gender identity, or gender expression" do not meet with California's approval. Cal. Gov't Code § 11139.8(b)(2). This provision restricts a state contractor, or even a professor at a state university,

[11] *See Briggs & Stratton*, 728 F.2d at 917–18; *Karen Mar. Ltd. v. Omar Int'l Inc.*, 322 F. Supp. 2d 224, 227 (E.D.N.Y. 2004).

from visiting one of these states on business, or to present at a conference. Five other states and numerous cities have similar laws.[12]

A number of states and cities have adopted prohibitions in the LGBTQ context directly analogous to Texas's law challenged in this case. For example, former New York Governor Andrew M. Cuomo signed an Executive Order banning all state agencies and authorities from doing business with companies that promote or tolerate discrimination, including on the basis of sexual orientation and gender identity.[13] Former Governor Terry McAuliffe of Virginia issued an executive order banning state contracts with firms that discriminate on the basis of sexual orientation or gender identity.[14] Former Governor

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[12] *See* Christy Mallory & Brad Sears, *Discrimination, Diversity and Development: The Legal and Economic Implications of North Carolina's HB2* 26-27 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Discrimination-Diversity-and-Development_The-Legal-and-Economic-Implications-of-North-Carolinas-HB2.pdf.

[13] *Governor Cuomo Signs Executive Order Banning State Agencies From Doing Business With Companies That Promote, Tolerate Discrimination*, LongIsland.com (Feb. 4, 2018), https://www.longisland.com/news/02-05-18/governor-cuomo-signs-executive-order-banning-state-agencies-from-doing-business-with-companies-that-promote-tolerate-discrimination.html.

[14] Laura Vozzella, *McAuliffe bans state contracts with firms engaged in anti-LGBT discrimination*, Wash. Post. (Jan. 5, 2017),

Rick Snyder of Michigan issued an executive directive that companies seeking contracts, grants, or loans from the state must agree not to discriminate on the basis of sexual orientation or gender identity.[15] And the City of San Francisco adopted legislation prohibiting city contracts with and purchases from companies in states that sanction what San Francisco deems discrimination against the lesbian, gay, bisexual, and transgender community.[16]

If Chapter 2271 is unconstitutional because of some absolute constitutional protection of any discrimination that the offender chooses to call a "boycott," all laws limiting state contracting on antidiscrimination/anti-boycott grounds would violate the First

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https://www.washingtonpost.com/local/virginia-politics/mcauliffe-bans-state-contracts-with-firms-engaged-in-anti-lbgt-discrimination/2017/01/05/5f701dc0-d35f-11e6-945a-76f69a399dd5_story.html.

[15] Jonathan Oosting, *Snyder bans LGBT discrimination through state contracts*, Detroit News (Dec. 28, 2018), https://www.detroitnews.com/story/news/local/michigan/2018/12/28/-snyder-bans-lgbt-discrimination-state-contracts/2432577002/.

[16] *San Francisco Is First To Ban City Contracts With Businesses In States With Anti-LGBT Laws*, KPIX (Sept. 27, 2016), https://sanfrancisco.cbslocal.com/2016/09/27/san-francisco-is-first-city-to-ban-city-contracts-with-businesses-in-states-with-anti-lgbt-laws/.

Amendment. Like Texas's statute, each of these governmental prohibitions is targeted at economic activity, regardless of ideological motivation. If the political rationale for appellee's boycott of Israel insulates it from a state law targeting its economic actions, then parties subject to laws like those in New York, Virginia, Michigan, California, and San Francisco could evade those laws by claiming that they are engaged in an ideological boycott of those whose lifestyles they disapprove of. Appellee claims that it does not want to disturb *other* anti-discrimination laws, but the only distinction it seems to make between them is that it disagrees with the policy behind Chapter 2271 and believes the persons protected by it are not worthy of protection because of the conduct of their government or some other reason. *See* ROA.589–91.

More generally, Supreme Court authority would amount to little if it can be avoided, in ways reminiscent of old-fashioned notice pleading, by simply using a different word with the same or similar meaning. Antidiscrimination laws ban or regulate refusals to deal regardless of how they are labeled. Most who refuse to deal with people on the basis of state-protected categories—such as gender identity, veteran's status,

felon status, and so forth—do not describe their actions as "discrimination." Nonetheless, those actions can be regulated as discrimination.[17] Conversely, in the long history of antidiscrimination laws, no court has ever held that discriminatory business conduct achieves constitutional protection if the discriminator simply labels it a "boycott" and articulates ideological objections to the conduct of the targeted group.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), African American families sued a private school for excluding black children from the school. The defendants argued that they had a constitutional freedom of association right to do so. The Supreme Court unanimously rejected that argument, proclaiming that "the Constitution … places no value on discrimination, and while [i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment … it has never been accorded affirmative constitutional protections." *Id.* at 176 (alterations and omission in the

[17] *Economic Discrimination*, *Black's Law Dictionary* (7th ed. 1999) ("Any form of discrimination within the field of commerce, such as boycotting a particular product or price-fixing.").

original) (citations and quotation marks omitted). Surely the defendants could not have avoided this result by arguing the following: (1) we have an ideological commitment to segregation; (2) the plaintiffs have shown their ideological opposition to segregation by trying to integrate our school; (3) we are therefore boycotting these families for ideological reasons. Yet appellee's argument, extended to other sorts of antidiscrimination laws, would logically demand that the defendants would have prevailed in *Runyon* had they simply termed their refusal to admit African American children an ideologically motivated boycott.

Finally, traditional antidiscrimination laws cannot be distinguished from Chapter 2271 because they apply to "constitutionally protected classes." First, as noted previously, much of the conduct that comes within the moniker of "discrimination" can easily be restyled as "ideological boycott." Second, the notion that "classic" antidiscrimination laws get special waivers from constitutional free speech protections is unsupported. There are no special "protected classes" from private discrimination under the Constitution. Congress and state legislatures choose what categories to protect, based on the prevailing felt needs of the time. Thus, various jurisdictions protect

categories ranging from race to military recruiter status (the Solomon Amendment, in fact, was modeled directly on Title IX's antidiscrimination provisions) to sexual orientation to political ideology to appearance to membership in a motorcycle gang.[18] There is no plausible textual or precedent-based argument that laws banning discrimination based on race, sex, etc. are exempt from First Amendment scrutiny but anti-BDS laws are not because of the category of people protected.

Third, the Texas law at issue is itself an antidiscrimination law, banning discrimination against those who do business with Israel-related entities. This is no more or less a constitutionally protected status than any other category the legislature chooses to protect.

The Texas law is similar to "classic" antidiscrimination legislation in that it protects Texas residents from discrimination based on national origin, ethnicity, and religion. It is hardly debatable that with regard to small businesses and individuals, those most likely to face

[18] John Carpenter, *Tired of Stereotyping, Bikers Turn to Law*, N.Y. Times (Nov. 26, 2001), https://www.nytimes.com/2001/11/26/us/tired-of-stereotyping-bikers-turn-to-law.html.

boycotts for doing business with Israel are those who are most likely to have the closest personal ties to Israel, *i.e.*, Israeli-Americans and Jews. Indeed, the BDS movement itself originated in a blatantly anti-Semitic conference in Durban, South Africa in 2001,[19] so the targeting of Jews with connections to Israel is not a bug but a feature of the movement.

B. Texas has entirely rational business reasons for barring discrimination against a particular country by those with whom the state chooses to do business.

Even if Texas did not regard the relevant boycotts as improperly discriminatory, it would still have an entirely valid reason for refusing to do business with entities that themselves discriminate against Israeli-owned companies, as a simple example will show. Suppose Texas hires a consultant to improve its cybersecurity efforts. Suppose also that it is not allowed to consider the boycotting activities of the consultant and hires one who boycotts Israeli software. Further suppose that unequivocally the best software for the job is Israeli-owned Checkpoint, and a state contract with that company would cost $50 million. The

[19] Gerald Steinberg, *Fifteen Years Later, The Durban Conference's Hatred Still Affects Us*, The Tower (Sept. 18, 2016), http://www.thetower.org/3931-fifteen-years-later-the-durban-conferences-hatred-still-affects-us.

consultant, however, boycotts Israel, so he causes Texas to purchase inferior McAfee software, which costs $75 million. In this scenario, the state winds up with worse software costing an extra $25 million. Why would any state agree to contract with someone who might do this? If Texas is not free to avoid doing business with entities who boycott Israeli companies, it will have no way to protect itself from paying more money than necessary for a lower quality product.

This is not a hypothetical concern. Appellee works as a consultant on soil volatility related to the structural stability of buildings. ROA.608. If it refused to buy the optimal products or services because of their Israeli origin—something appellee's counsel indicated below that it wanted to do, ROA.626—that refusal could have potentially disastrous, even fatal, effects.[20] Texas, Houston, and other state and

[20] Israel is widely known as the "start-up nation," and its companies are the cutting edge of a wide variety of unique technologies. For example, in the field of soil analysis, the tech firm Asterra, based in the Israeli town of Rosh Ha'ayin, has pioneered a novel and award-winning method of soil moisture analysis using data analysis of satellite imagery. Its "Earthworks" product is designed to "point[] out areas of concern and potential failure locations so that immediate and long-term problems can be found, and preventative repairs made, before more expensive damage and safety issues occur." *EarthWorks: Ground Infrastructure Assessment*, https://asterra.io/products/earthworks/.

local entities should not bear the burden of engaging in the highly factual inquiry of establishing whether every particular contractor's discriminatory policies will in fact impinge on the performance of each particular contract.

Purely for reasons of good and effective government alone, therefore, Texas should have the right to ensure that the entities with which it does business do not rule out dealings with Israeli companies, just as a state purchaser of tulips should be free to avoid doing business with flower-sellers who discriminate against Dutch companies.

C. Appellee's constitutional argument would immunize business decisions to trade with Iran, Cuba, and Russia, and require that statutes barring such trade be struck down.

If appellee were correct that decisions *not* to do business with people or companies associated with a particular country constitute speech indicating policy disapproval of that country, then the converse must also be true: ideological decisions to conduct business with a

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Amici have no view of whether satellite-based or traditional sampling analysis is best suited to appellee's needs. But the government can legitimately refuse to contract with appellee because it would rule out the use of this technology regardless of its merits, simply because of the nationality of its makers.

country must also be (or at least, can be claimed to be) speech signifying support or approval. That would create a novel, broad—and intolerable—First Amendment carve-out to foreign sanctions laws.

Sanctions restricting trade with countries like Iran, Cuba, and Russia apply regardless of the motive for such dealings. In appellee's constitutional logic, however, economic dealings with Cuba could represent not mere commerce, but First Amendment speech indicating support for the Cuban government regime or opposition to U.S. Cuba policy.

The notion that economic actions constitute speech is so far-fetched that there have been no successful First Amendment challenges to foreign sanctions laws.[21] The few that have been brought have been rejected on the grounds that doing business is "action," and not "inherently expressive," even when motivated by ideological reasons, such as to "express his belief in peace and … protest against

[21] *Karpova v. Snow*, 402 F. Supp. 2d 459 (S.D.N.Y. 2005), *aff'd*, 497 F.3d 262 (2d Cir. 2007), involved a person "sanctioned for exporting services to Iraq." The motivation was ideological, but the court concluded "the Regulations and penalties at issue reach only plaintiff's actions—not her speech." *Id*. at 473.

government action that would harm innocent Iraqi citizens." *Clancy v. Office of Foreign Assets Control*, 559 F.3d 595, 605 (7th Cir. 2009). Just as engaging in business with a country sends no inherent message unless accompanied by speech, *id.*, not doing business also sends no inherent message.[22]

III. The district court erred in its reading of the "residual clause" of the statute

While upholding most of the law, the district court found the statute's "residual clause" to be "fatally flawed." ROA.510. That provision prohibits "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations" with Israel or Israeli entities. The district court concluded that this clause "could include conduct protected by the First Amendment, such as giving speeches, nonviolent picketing outside Israeli businesses, posting flyers," and so forth. *Id.* The district court's reading of the residual clause is error and should be reversed. It conflicts with the text of the

[22] The foreign sanctions context cannot be distinguished on the basis of the compelling governmental foreign policy interests involved, because the sanctions were sustained on the grounds that they did not raise First Amendment questions at all. *Clancy*, 559 F.3d at 605.

statute, rules of statutory interpretation, and the interpretation given to the same language by every other state with similar laws.

A. The district court ignored a basic principle of statutory construction requiring adoption of a plausible and constitutional reading of a challenged provision.

The definition of "Boycott Israel" includes three categories of actions: (1) "refusing to deal with" Israel or an Israeli entity, (2) "terminating business activities with" Israel or an Israeli entity, and (3) "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with" Israel or an Israeli entity. Tex. Gov't Code § 808.001(1). Unlike categories (1) and (2), the district court concluded that category (3) included First Amendment protected speech. But like the activities described in (1) and (2), the phrase "other actions" in (3) is clearly limited to non-expressive commercial conduct.

The well-established rule, based on the presumption of constitutionality, is that constitutional questions should be avoided whenever possible. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827). The district court refused to acknowledge even the possibility that the legislature intended a constitutional meaning. This ruling

represents *clear error*, since another permissible interpretation exists and the available evidence suggests that this other interpretation is correct.[23]

Anti-BDS laws with identical or similar language are on the books in 35 states,[24] some for over seven years. Yet none of them has *ever* been applied to non-commercial speech of the kind imagined by the district court. Indeed, at least fifteen other states have identical "any actions" language in their anti-BDS measures, and none of them has ever applied it or interpreted it to apply to anything other than business activity.[25] Thus, the district court's reading is not merely hypothetical, but far-fetched in light of how such laws have been understood and

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[23] *See* Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, and Will Be Again*, 74 Ark. L. Rev. 607 (2022).

[24] *See Anti-Semitism: State Anti-BDS Legislation*, Jewish Virtual Library, State Anti-BDS Legislation, https://www.jewishvirtuallibrary.org/anti-bds-legislation.

[25] *See* Ariz. Rev. Stat. Ann. § 35-393(1); Ark. Code § 25-1-503; Fla. Stat. Ann. § 215.4725(1)(a); Ga. Code Ann. § 50-5-85(a)(1); Kan. Stat. Ann. § 75-3740e(a); La. Stat. Ann. § 39:1602.1(c)(1); Md. Order No. 2017-25 (Oct. 23, 2017); Miss. Code. Ann. § 27-117-3(a); Mo. Ann. Stat. § 34.600(3)(1); Nev. Rev. Stat. Ann. § 333.338(3)(a)(1); Ohio Rev. Code Ann. § 9.76(a)(1); Okla. Stat. Ann. tit. 74, § 582(e)(1); S.B. 143, 1st Reg. Sess. (Ky. 2019); S.D. Order No. 2020-01 (Jan. 14, 2020).

applied. Indeed, despite extensive litigation surrounding anti-BDS laws in this circuit and elsewhere, no other court has ever adopted the broad interpretation of the district court—with the exception of a divided Eighth Circuit panel whose strained construction of state law was promptly reheard en banc.[26]

B. The district court ignored the principle of *ejusdem generis*.

The district court also disregarded the appropriate canon of statutory construction, *ejusdem generis*. Under this "statutory canon … [w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (internal quotation marks omitted); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) (same). "Other actions" should thus include only conduct similar in kind to its preceding terms: "refusing to deal with" and "terminating business activities with," *i.e.*, non-expressive

[26] *Ark. Times LP v. Waldrip*, 988 F.3d 453, 464 (8th Cir. 2021), *reh'g en banc granted*, No. 19-1378 (8th Cir. June 10, 2021). The en banc court heard oral argument on September 21, 2021.

commercial activity. The "possibility" of this other interpretation is fortified by the fact that *15* other states share exact or similar language in their anti-BDS bills, and all of them read it precisely the way that Texas does—as applying only to other, similarly non-expressive, commercial activity. *See* note 25, *supra*.

C. The district court interpreted the statute identically to the now-vacated divided Eighth Circuit panel, without the context the Eighth Circuit found crucial.

The district court adopted the interpretation of an Eighth Circuit panel which considered an identical statutory phrase—"any actions"—in Arkansas' sister law. But the now-vacated, divided Eighth Circuit opinion based its interpretation on two factors not present here. Specifically, the divided panel relied on (1) legislative history that is neither present here nor discussed by the district court, and (2) the fact that the statute allowed evidence from corporate statements to be used in determining if the company were boycotting Israel.[27] While the Eighth Circuit panel majority erred in its understanding and

[27] *Ark. Times*, 988 F.3d at 465.

application of other aspects of the Arkansas statute,[28] even it did not believe that the words "any actions" *in themselves*—and without problematic legislative history and separate provisions about the evidentiary use of boycott statements—could be interpreted to apply to protected speech. Thus, the vacated Eighth Circuit panel decision provides no support to the district court's interpretation of Texas law; indeed, by relying on factors absent here, that decision undermines the decision below.

CONCLUSION

This Court should reverse the judgment to the extent that it interpreted the statutory phrase "any actions" to reach beyond commercial conduct and otherwise affirm the judgment.

[28] As the Eighth Circuit dissent highlights, *Ark. Times*, 988 F.3d at 468 (Kobes, J., dissenting), a unanimous Supreme Court has held that "the First Amendment ... does not prohibit the evidentiary use of speech ... to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). The proper understanding of the Arkansas law's use of corporate statements that are themselves permitted use of speech is that they may establish the element of intent for *prohibited* conduct that is still purely commercial.

Respectfully submitted,

s/ *Adam H. Charnes*

JEROME M. MARCUS
CENTER FOR THE MIDDLE EAST
AND INTERNATIONAL LAW
Antonin Scalia Law School
George Mason University
3301 Fairfax Drive
Hazel Hall, Room 433J
Arlington, VA 22201
Telephone: (610) 664-1184
jmarcus@marcuslaw.us

ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

Counsel for Amici Curiae

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 6,498 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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s/ *Adam H. Charnes*
ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

s/ *Adam H. Charnes*
ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com