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, No. 4:21-CV-3577

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

JAY ALAN SEKULOW [redacted]
Lead Counsel
STUART J. ROTH [redacted]
JORDAN SEKULOW* [redacted]
MARK GOLDFEDER* [redacted]
BENJAMIN P. SISNEY [redacted]
THE AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus Curiae
*Not admitted before this Court

5th Circuit Case No. 22-20047
A&R Engineering and Testing, Incorporated, v.
Ken Paxton, Attorney General of Texas

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1, 5th Cir. R. 26.1.1 and 28.2.1, the undersigned counsel certifies that *Amicus Curiae*, American Center for Law and Justice, has no parent corporations and issues no stock. The American Center for Law and Justice is not a publicly traded company and has no stock ("ticker") symbol. Adding to the list provided by the Appellant and Appellee, the undersigned lists the following as additional persons who may have an interest in the outcome of this case:

1. American Center for Law and Justice ("ACLJ"), *amicus curiae*
2. Goldfeder, Mark, Counsel for *amicus curiae*
3. Roth, Stuart J., Counsel for *amicus curiae*
4. Sekulow, Jay Alan, Lead Counsel for *amicus curiae*
5. Sekulow, Jordan, Counsel for *amicus curiae*
6. Sisney, Benjamin P., Counsel for *amicus curiae*

Certified this 21st day of April, 2022,

/s/ Benjamin P. Sisney
BENJAMIN P. SISNEY
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

INTEREST OF *AMICUS*[1]

Amicus Curiae, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued numerous cases before the Supreme Court of the United States and have participated as *Amicus Curiae* in a number of significant cases involving the Free Speech Clause of the First Amendment. *Amicus Curiae* filed a brief in support of the State of Arkansas and its similar statute, which is currently before the Eighth Circuit *en banc*. *Arkansas Times LP v. Waldrip*, vacated & rehearing *en banc* granted by Order, No. 19-1378 (8th Cir. June 10, 2021).

Amicus has dedicated time and effort to defending and protecting Americans' First Amendment freedoms. The ACLJ's commitment to the integrity of the United States Constitution and Bill of Rights compels it to support the State of Texas in its efforts to avoid becoming complicit in the global Boycott, Divestment and Sanctions (BDS) Movement. While the scope of this brief is limited to the specific issue of government speech, this is not to take away from *Amicus Curiae*'s opposition to the racially discriminatory impact of the BDS movement and its proponents. Further, the goals of the BDS movement itself do not qualify as protected speech, a point that

[1]Counsel for the parties consented to the filing of this brief. Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus* affirm that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Amicus Curiae has made elsewhere.[2] *Amicus Curiae* ACLJ, on behalf of its members, submits this Brief in support of the Appellant, Ken Paxton, Attorney General of Texas, and respectfully urges this Court to reverse.

FACTUAL BACKGROUND

The BDS Movement operates as a coordinated, sophisticated effort to disrupt the economy of the State of Israel, with the ultimate goal of destroying the sovereign nation altogether.[3] It uses the threat of withdrawing financial support in an effort to coerce companies or other entities to cease or refuse to engage in business relations with Israel, its nationals, and its residents.[4] Moreover, it often intentionally targets for discrimination people who are Jewish or who do business with persons who are

[2] Portions of this brief draw from work previously authored by *Amicus Curiae*. *See* Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 213 (2018); Mark Goldfeder, *Why Arkansas Act 710 Was Upheld, And Will Be Again*, 74 ARK. L. REV. (August 2021).

[3] *See* Rachel Avraham, *Goal of the BDS Movement: Delegitimize Israel*, UNITED WITH ISR. (July 10, 2013), https://unitedwithisrael.org/the-real-goal-of-the-bds-movement-is-israels-delegitimization/; Dr. Harold Brackman, *Boycott Divestment Sanctions (BDS) Against Israel: An Anti-Semitic, Anti-Peace Poison Pill*, SIMON WIESENTHAL CTR. (Mar. 2013), https://web.archive.org/web/20190214052941/http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/REPORT_313.PDF.

[4] Ziva Dahl, *Birds of a Feather? The Link Between BDS and Hamas*, OBSERVER (Apr. 22, 2016), http://observer.com/2016/04/birds-of-a-feather-the-link-between-bds-and-hamas/.

Jewish.[5] In its objectives, activities, and effects, the BDS movement is definitionally antisemitic.[6]

In response, many state governments have taken a stance against the BDS movement by passing legislation that requires these governments to only engage in contracts with business partners who do not support the BDS movement.[7] In 2017, the State of Texas passed such a law, joining many other states. The law, which

---

[5] *Concern Mounts Over BDS Moves Against Kosher Food Products in Miami*, KOSHER TODAY (June 29, 2016), http://www.koshertoday.com/breaking-news-concern-mounts-bds-moves-kosher-food-products-miami/; *see* Daniel Greenfield, *Racist BDS Activists Try to Put Pig's Head in Kosher Food, Put it in Halal Instead*, FRONT PAGE MAG. (Oct. 24, 2014), http://www.frontpagemag.com/point/243757/racist-bds-activists-try-put-pigs-head-kosher-food-daniel-greenfield; *Student Voices: What Students are Saying About Antisemitism on Their Campuses*, AMCHA INITIATIVE, http://www.amchainitiative.org/student-voices-being-jewish-on-campus (last visited Apr. 21, 2022); Scott Jaschik, *2 Events Unsettle Jewish Students at Brown*, INSIDE HIGHER EDUC. (Mar. 21, 2016), https://www.insidehighered.com/news/2016/03/21/two-events-unsettle-jewish-students-brown-university; Kemberlee Kaye, *Dozens of Groups Support Plea for Help from Vassar Jewish Students*, LEGAL INSURRECTION (May 12, 2016), http://legalinsurrection.com/2016/05/dozens-of-groups-support-plea-for-help-from-vassar-jewish-students; Ben Cohen, *Analysis: Hindered by New Anti-Discrimination Laws, BDS May Increasingly Target U.S. Jews*, TOWER (Feb. 7, 2016), http://www.thetower.org/2921-analysis-hindered-by-new-anti-discrimination-laws-bds-may-increasingly-target-u-s-jews.

[6] *See* Mark Goldfeder, *The Danger of Defining Your Own Terms: Responding to the Harvard Law Review on Antidiscrimination Law and the Movement for Palestinian Rights,* 3 J. OF CONTEMP. ANTISEMITISM, no. 2, 2020, at 141, 141-148; Mark Goldfeder, *Defining Antisemitism*, Seton Hall Law Review: Vol. 52 : Iss. 1, Article 3 (2021).

[7] *Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIBR. (last visited Apr. 21, 2022), https://www.jewishvirtuallibrary.org/anti-bds-legislation [hereinafter *State Anti-BDS Legislation*].

passed unanimously in the House and with overwhelming support in the Senate, see S.J. of Tex., 85th Leg., R.S. 1332 (2017) (discussing Tex. H.B. 89); H.J. of Tex., 85th Leg. R.S. 1749, 2460 (2017) (same) prohibits the State from contracting with companies that discriminatorily boycott Israel. The law was amended in 2019 to exclude individual contractors and narrowed to apply only to state contracts with companies that have more than 10 full-time employees and when the contract is worth more than $100,000.[8]

The State of Texas does a tremendous amount of business with Israel. In 2020, Texas exported nearly $1.1 billion worth of manufacturing goods to Israel, and since 1996, Texas exports to Israel have totaled nearly $19 billion. Israel now ranks as Texas's 37th leading trade partner.[9] The State also has hundreds of millions of dollars in contracts and binational research grants with Israel, and nearly 300 Texas companies do business in Israel.[10] Simply put, it makes bad business sense for the State to contract with suppliers and others who are actively engaged in an economic boycott of one of Texas' largest business partners.[11]

---

[8] H.B. No. 793 (2019) (with amendment markup), available at https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB00793F.pdf#navpanes=0.
[9] *State-to-State Cooperation: Texas and Israel*, JEWISH VIRTUAL LIBR. (last viewed Apr. 21, 2022), https://www.jewishvirtuallibrary.org/texas-israel-cooperation.
[10] *Id.*
[11] *Id*.

The Appellee, A&R Engineering and Testing, Inc. ("A&R"), is a Texas corporation that provides engineering consulting services to clients in both the private and public sectors. In the fall of 2021, the City of Houston offered A&R a contract worth an estimated $1.5 million, and A&R objected to the clause affirming that they would not boycott Israel. A&R filed a complaint in the U.S. District Court for the Southern District of Texas on October 29, 2021, alleging that the anti-boycott statute violated the First and Fourteenth Amendments, and moved for a preliminary injunction, while the Attorney General moved to dismiss the complaint.

On January 28, 2022, the District Court entered a preliminary injunction and denied the Attorney General's motion to dismiss. The District Court rejected the company's argument that the statute's proscriptions against "refusing to deal" and "terminating business relationships" violated the Constitution, holding that "the mere refusal to engage in a commercial/economic relationship with Israel or entities doing business in Israel . . . does not find shelter under the protections of the First Amendment." *A & R Eng'g & Testing, Inc. v. City of Houston*, No. 4:21-CV-03577, 2022 WL 267880, at *9 (S.D. Tex. Jan. 28, 2022). But the District Court found the statute's residual clause (which prohibits "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations" with Israel) to be unconstitutionally vague in that it could theoretically be read to prohibit protected boycott activity. The court issued a preliminary injunction against the City

and the State of Texas itself. On January 31, 2022, the Attorney General filed a notice of appeal and moved the district court to stay the preliminary injunction and proceedings.

ARGUMENT

I. THE TEXAS STATE LAW DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT CONSTITUTES PERMISSIBLE GOVERNMENT SPEECH AND DOES NOT UNCONSTITUTIONALLY COMPEL PRIVATE SPEECH.

The District Court erred in its interpretation of the statute in question, statute, Tex. Gov. Code §808.001(1). The language in the statute makes clear that it only applies to non-expressive commercial activity, and to the extent that there could reasonably be any ambiguity, the Court should have looked to the normal canons of construction to uphold the presumption of constitutionality, so that the phrase "otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations," Tex. Gov. Code §808.001(1), would be read as the legislature intended, *i.e.*, to cover only commercial conduct such as that listed in the preceding phrases ("refusing to deal with" and "terminating business activities with"), and not extending to advocacy. Indeed, the cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). In dismissing those canons, the District Court was simply wrong to conclude that there was "only one reasonable interpretation" of this phrase, Op., 21. Demonstrably, the legislature of the State of

Texas along with the combined legislatures of over a dozen other states[12] have clearly understood this and similar language in other state bills to apply only to commercial conduct. "But even assuming, arguendo, that the Court was right in its determination that the phrase could be read, divorced from context, as applying to expressive activities, the Court still erred in its determination of unconstitutionality.

Tex. Gov. Code §808.001(1) is a clear example of constitutional government speech occurring in the context of a governmental spending program (*i.e.*, commercial contracting for goods and services) within which the State of Texas has determined which agendas and viewpoints it will and will not support as a commercial operator. The government is not required to remain viewpoint-neutral in such circumstances. Instead, it is permitted to take or not take a position of its own. In this case, the State of Texas has merely chosen not to fund, through commercial contracts, companies that participate in activity at odds with the State's own commercial policies and interests — the boycott of Israel, its businesses, and its people.

To the extent that private speech is even implicated here, the statute has no unconstitutional chilling effect, nor does it unconstitutionally compel private speech, as no one is compelled to contract with the State in the first instance. Further, any

[12] The restriction against "any action" is included in the anti-boycott laws enacted by the legislatures of 14 States other than Texas, as well as the Executive Orders issued in Maryland and South Dakota.

private individual, acting in a personal capacity and according to a personal choice, may boycott the State of Israel and may engage in related speech of his or her choosing. He or she just cannot do so while expecting that their customer — the State of Texas, a trade ally of the State of Israel — continue to contract with that individual or their business.

It is alleged that the certification requirement impermissibly compels speech and impermissibly restricts state contractors from engaging in protected First Amendment activities[13] without a legitimate justification. The statute does neither. The statute only regulates government speech (*i.e.*, in the form of spending and business transactions) and relays the government's decision concerning those companies with which it wishes to conduct business. "[A]s a matter of law, there is a fundamental difference between a state suppressing free speech and a state simply choosing how to spend its dollars. To argue otherwise would be to suggest that [the] state is constitutionally obligated to support the BDS Movement, which is not only irrational but also has no basis in law."[14]

Indeed, the very opposite is true. "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v.*

[13] These activities include boycott participation and boycott-related speech.
[14] Andrew Cuomo, *If You Boycott Israel, New York State Will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-new-york-state-will-boycottyou/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html?utm_term=.17 cf47bcda43.

Texas Division, Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015). Without this ability, the government "would [simply] not work." *Id.* In fact, the Supreme Court has continually refused "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals." *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

In *Rust v. Sullivan*, the Supreme Court found that regulations prohibiting the use of Title X funds for abortion, and even the pure speech of abortion-related counseling, did not violate any free speech rights held by program recipients. *Rust*, 500 U.S. at 173. As the Court noted, holding a program unconstitutional because the government advocates for one viewpoint but not a countervailing one would mean that government funding of efforts to establish democracy abroad would require equal funding for efforts advocating for communism and fascism. *Id*. at 194. Just like in *Rust*, the State here is not denying a benefit to anyone, "but is instead simply insisting that the public funds be spent for the purposes for which they were authorized." *Id*. at 196. No one is being asked to relinquish any speech rights; rather the terms of the statute merely confirm that the State's commercial contracting funds are authorized to be spent *only in furtherance of the commercial policies and*

interests of the State. Contracting with companies that wish to undermine those interests — unremarkably — is therefore not authorized.

Notably, nothing in the statute affects in any way the boycott activities of any individual who, while operating a company, may simultaneously comply with the statute's terms *commercially* and at the same time be engaging in anti-Israel boycott activities *personally*. In essence, an individual could boycott Israel in their personal time, and have their company continue to contract with the State, as long as *their company* does not engage in the boycott. This separation between the individuals and their companies further evidences the fact that the statute, truly, is strictly about business.

The relationship between Israel and Texas has led to quantifiable financial gains, advances in technology, environmental developments, and any of a number of successful partnership enterprises that make it in the best interest of Texas for the parties to maintain a healthy relationship.[15] *It would be absurd to think that the State of Texas cannot refrain from doing official commercial business with companies that boycott one of the State's key trade partners*. Forcing the State to strain this relationship would be asking the government to act against its own interests. No constitutional provision or law requires such an absurd result.

[15] *State-to-State Cooperation: Texas and Israel*, JEWISH VIRTUAL LIBR. (last viewed Apr. 21, 2022), https://www.jewishvirtuallibrary.org/texas-israel-cooperation.

Here, just as in *Walker*, there is no issue of compelled speech whatsoever. To make sure that the commercial interests of the State are *not* infringed, Texas asks that companies that contract with State entities to certify in writing their commitment to *not* engage in the boycott of Israel for the duration of their contract. The government is not requiring individual companies or institutions who engage in BDS activities targeting Israel to alter their beliefs, stop their support for BDS, or change their message in any way. The statute merely expresses the *State's* position on the issue, explains how and where it will spend public contracting funds within its jurisdiction, and notifies the public as to its actions. This action is (or at least should be) unremarkable, and is entirely consistent with the Supreme Court's prior rulings in *Rust* and *Walker*.

Finally, even supposing *arguendo* that the statute did somehow impose on protected First Amendment activity (which it does not), the analysis should not end there. Because Appellees challenged the condition that Texas placed on its funding, the Court applied the traditional balancing test used in unconstitutional conditions cases. That test, first established in *Pickering v. Board of Education*,[16] and later clarified in *Connick v. Myers*,[17] balances the public employee or contractor's speech

[16] *Pickering v. Bd. of Education*, 391 U.S. 563 (1968).

[17] *Connick v. Myers*, 461 U.S. 138 (1983). While *Pickering* dealt with public employees, for purposes that matter here, the Court's opinions in *Board of County Commissioners v. Umbehr* 518 U.S. 712 (1996), and *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 673 (1996), expanded *Pickering* to the private sector.

rights to comment on matters of public concern against the government's interest in operational efficiency.[18] As the Supreme Court has noted,

> [i]n striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."[19]

As applied to the statute in question, the test should have clearly favored upholding *an anti-discrimination bill* which (1) the District Court acknowledged could help ensure the safety of the Jewish population in Texas, *A & R Eng'g & Testing, Inc. v. City of Houston*, No. 4:21-CV-03577, 2022 WL 267880, at *13 (S.D. Tex. Jan. 28, 2022); and (2) which *also* has strong business efficiency considerations because it targets a friendly trade partner and those who support it in a way that the state considers risky[20]; against the *theoretical* secondary and tertiary boycotting of a foreign nation – which is not even necessarily related to a "matter of public

---

[18] *See generally* Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 DUQ. L. REV. 133 (2008).

[19] *Umbehr*, 518 U.S. at 676 (quoting from *Pickering*, 391 U.S. at 568) (cited by Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 65-66 (2018)).

[20] For example, a contractor might use a less efficient or more costly means of fulfilling their contractual duties to the government because they wished to avoid using an Israeli firm or product.

concern"[21]; and the conducting of which the Texas public itself finds deeply offensive.[22] The District Court even recognized that A & R's interest "rests on some nonmaterial actions it may or may not have taken in the past, and on some vague notion that it may want to boycott in the future," *id.* at *12, but still somehow found in A & R's favor. The District Court was wrong when it concluded that "[t]here is no proof, nor even a strong contention, that any action Plaintiff might take would affect Texas's relationship with Israel." *Id.* That is *exactly* what the State of Texas has repeatedly explained, supported, and contended.

CONCLUSION

Because the purpose of the law challenged here is a legitimate expression of state and national policy in foreign relations and commerce, *i.e.*, government speech, there is no First Amendment violation. The same is true for the thirty-one other states

---

[21] *See* D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 258-59 (1990). *See also* Greendorfer, *supra* note 19, at 66-67, noting that,

> the typical Pickering case involves individuals who are speaking on a matter of local (or, at least, domestic) concern, such as the functioning of school districts, public hospitals, or local law enforcement. Certainly, such speech is valuable and important to the functioning of a robust and healthy democracy. Economic attacks upon companies that do business in a foreign nation to protest that foreign nation's policies, however, have remote and nebulous connections to the interests of a state and its citizens.

[22] *See Pereira v. Comm'r of Soc. Servs*., 733 N.E.2d 112, 121 (Mass. 2000) (factoring community relations into a *Pickering-Connick* analysis).

that have similar provisions in their own funding requirements and agreements. For these reasons, and those advanced by Attorney General Paxton, *Amicus Curiae* respectfully urges this Court to reverse.

Dated: April 21, 2022

Respectfully submitted,

JAY ALAN SEKULOW [redacted]
Lead Counsel
STUART J. ROTH [redacted]
JORDAN SEKULOW* [redacted]
MARK GOLDFEDER* [redacted]

/s/ Benjamin P. Sisney
BENJAMIN P. SISNEY [redacted]
THE AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus Curiae
*Not admitted before this Court

CERTIFICATE OF COMPLIANCE WITH FRAP 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,295 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14-point font size, Times New Roman style.

Dated: April 21, 2022

Respectfully submitted,

/s/ Benjamin P. Sisney

BENJAMIN P. SISNEY (D.C. Bar # 1044721)
THE AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on April 21, 2022, using CM/ECF. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Benjamin P. Sisney

BENJAMIN P. SISNEY
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amicus Curiae
*Admitted to Fifth Circuit Bar