No. 23-

IN THE

Supreme Court of the United States

HASEEB ABDULLAH,

Petitioner,

v.

JOHN SCOTT, IN HIS OFFICIAL CAPACITY AS INTERIM ATTORNEY GENERAL FOR THE STATE OF TEXAS; GLENN HEGAR, IN HIS OFFICIAL CAPACITY AS COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS AND DIRECTOR OF THE TEXAS TREASURY SAFEKEEPING TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTINA A. JUMP
Counsel of Record
CHELSEA G. GLOVER
SAMIRA S. ELHOSARY
CONSTITUTIONAL LAW CENTER FOR MUSLIMS IN AMERICA
100 North Central Expressway, Suite 1010
Richardson, Texas 75080
(972) 914-2507
cjump@clcma.org

Counsel for Petitioner

322137

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Question No. 1 presented:

Does a beneficiary of a public retirement fund have standing to bring a First Amendment facial challenge to a state statute that requires funds to divest from and refrain from investing in companies that the state believes boycott Israel? Does the standing analysis change when the plaintiff alleges the statute is unconstitutionally overbroad, purposefully endorses one religious viewpoint over others, and requires the managers of the funds to prioritize the state politicians' ideological viewpoints over their fiduciary duties to the beneficiaries?

Question No. 2 presented:

Did the Fifth Circuit err in failing to conduct a separate standing analysis for the constitutional injuries alleged, instead conducting only a cursory analysis that duplicates its economic injury analysis?

Question No. 3 presented:

Did the Fifth Circuit err in failing to evaluate stigmatic injury as sufficient to satisfy the injury-in-fact element of Article III standing to bring Establishment Clause claims, contradicting this Court's precedent and creating a circuit split?

PARTIES TO THE PROCEEDINGS

Haseeb Abdullah ("Petitioner" or "Mr. Abdullah") was the Plaintiff in the district court and the Appellant before the Fifth Circuit Court of Appeals, and is the Petitioner here.

Ken Paxton, in his official capacity as Attorney General for the State of Texas, was the Defendant before the district court and the Appellee before the Fifth Circuit Court of Appeals. Pursuant to Federal Rule of Civil Procedure 25(d), Petitioner replaces him here with interim Attorney General John Scott as Respondent, because Ken Paxton does not currently perform the role of Texas Attorney General.[1]

Glenn Hegar, in his official capacity as Comptroller of Public Accounts for the State of Texas and Director of the Texas Treasury Safekeeping Trust Company, was the Defendant before the district court and the Appellee before the Fifth Circuit Court of Appeals. He is the Respondent here in the same role.

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1. Zach Despart & James Barragán, "Texas AG Ken Paxton impeached, suspended from duties; will face Senate trial," Tex. Tribune (May 27, 2023) https://www.texastribune.org/2023/05/27/ken-paxton-impeached-texas-attorney-general/; Zach Despart & Robert Dowden, "Abbott taps John Scott, former Texas secretary of state, as interim attorney general," Tex. Tribune (May 31, 2023) https://www.texastribune.org/2023/05/31/john-scott-interim-attorney-general/ ("Scott, a former deputy attorney general, will run the agency because Ken Paxton has been suspended from office until his impeachment trial before the Texas Senate.").

RELATED CASES

Abdullah v. Paxton, No. 22-50315, United States Court of Appeals for the Fifth Circuit. Judgment entered April 11, 2023. Mandate entered May 3, 2023.

Abdullah v. Paxton, No. 1:20-cv-1245-RP, United States District Court for the Western District of Texas. Judgment entered March 25, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Haseeb Abdullah respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit Court of Appeals in this matter.

OPINIONS BELOW

The Fifth Circuit's decision is available at *Abdullah v. Paxton,* 65 F.4th 204 (5th Cir. 2023). Pet. App. 1a–10a. The District Court for the Western District of Texas' decision is available at *Abdullah v. Paxton*, No. 1:20-cv-1245-RP, 2022 U.S. Dist. LEXIS 79683, 2022 WL 1272024 (W.D. Tex. Mar. 25, 2022), which adopted part of the report and recommendations of the Magistrate Judge in *Abdullah v. Paxton,* 2021 U.S. Dist. LEXIS 215223 (W.D. Tex. Nov. 8, 2021). Pet. App. 11a–35a.

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on April 11, 2023. The Fifth Circuit issued its mandate on May 3, 2023. Petitioner timely filed this Petition on July 10, 2023. The jurisdiction of the Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Paragraph 1

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties

> made, or which shall be made, under their authority;¬–to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to Controversies between two or more States;– between a State and Citizens of another State,—between Citizens of different States,–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III § 2.

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. I.

Texas Government Code, Chapter 808: Prohibition on Investment in Companies that Boycott Israel

The full text of Tex. Gov't Code § 808.001, *et seq.* is reproduced at Pet. App. 36a–47a.

Tex. Gov't Code § 808.001, *et seq.*

STATEMENT OF THE CASE

I. Introduction

"Boycotts are not new."[1] Boycotts present a key traditional means of peaceful protest in American society. From colonial America's trade boycott of Great Britain in the 1760s[2] to the Montgomery bus boycotts in the 1950s[3]

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1. Chris Taylor, "Boycott Nation: How Americans are boycotting companies now," REUTERS (June 29, 2022), https://www.reuters.com/markets/us/boycott-nation-how-americans-are-boycotting-companies-now-2022-06-29/ (summarizing modern domestic boycotts, including those against Disney on one ideological end, and against Trump properties with "#grabyourwallet" on the other ideological end); *see also* "Charles Cunningham Boycott," ENCYCLOPEDIA BRITANNICA (June 15, 2023) https://www.britannica.com/biography/Charles-Cunningham-Boycott (providing the history and origin of the term "boycott" as deriving from unhappy tenants who refused to pay Irish land agent Captain Charles Cunningham Boycott, in 1880).

2. *See, e.g.*, Matthew Porterfield, *State & Local Policy Initiatives in Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 28 (1999) (discussing the history of colonial America's boycott of British goods in 1767, noting that "[b]oycotts organized by local assemblies were a primary tool in the colonial campaign of resistance to British rule that preceded the American Revolution"); *Doe v. McKesson*, No. 17-30864, 2023 U.S. App. LEXIS 15113, *77 (5th Cir. June 16, 2023) ("Political uprisings, from peaceful picketing to lawless riots, have marked our history from the beginning – indeed from before the beginning. The Sons of Liberty were dumping tea into Boston Harbor almost two centuries before Dr. King's Selma-to-Montgomery march occupied the full width of the bloodied Edmund Pettus Bridge.") (Willett, J., dissenting).

3. *See, e.g.*, *NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (finding it "doubtful" that "an organized refusal to ride

to consumer-led boycotts by gun owners protesting gun manufacturers and businesses that support gun control measures,[4] boycotts provide a method to bring about social and procedural changes in lawful, non-violent ways.[5] Boycotts serve as an important form of free speech for average citizens, a concept long protected in this country.[6] "One of the ways people can have their voice heard in an impactful way is through a boycott."[7]

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on Montgomery's buses in protest against a policy of racial segregation" would violate a valid state law).

4. *See, e.g.*, Christina Austin, "How Gun Maker Smith & Wesson Almost Went Out of Business When It Accepted Gun Control," Insider (Jan. 21, 2013), https://www.businessinsider.com/smith-and-wesson-almost-went-out-of-business-trying-to-do-the-right-thing-2013-1 (explaining the National Rifle Association's boycott of Smith & Wesson in 2000 due to the company's support for gun control legislation); "Gun Owners Organize Boycotts of Shops that Ban Firearms," CBS News Chi. (Sept. 2, 2014), https://www.cbsnews.com/chicago/news/gun-owners-organize-boycotts-of-shops-that-ban-firearms/ (describing how gun owners organized on social media to boycott establishments that ban firearms on their premises).

5. *See* "The Olympic Boycott, 1980," U.S. Dep't of State, https://2001-2009.state.gov/r/pa/ho/time/qfp/104481.htm (summarizing the Olympic boycott of 1980, including its reasons and impact).

6. *See, e.g., Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2430 (2022) (recognizing that "learning how to tolerate speech . . . of all kinds is part of learning how to live in a pluralistic society").

7. Taylor, *supra*, n.1.

Texas' legislative and executive branches disagree. Texas passed the statute at issue here, and others,[8] to punish companies that support this peaceful method. But the Texas statute does not stop there: it requires managers of retirement funds to place Texas' self-determined blacklist above managers' fiduciary duties, requiring them to disregard all other factors in favor of compliance with Texas' due process-free list of bad companies. And while the statute includes a cursory acknowledgment of the roles of fiduciaries, it negates that recognition by inserting an exemption from "conflicting statutory or common law obligations" for managers and the Comptroller, as well as a prohibition against affected parties bringing "any claim or cause of action, including breach of fiduciary duty" for actions taken pursuant to the statute. Tex. Gov't Code § 808.002 (Pet. App. 38a); Tex. Gov't Code § 808.004 (Pet. App. 39a–40a). Texas cannot grant itself and its actors wide-ranging immunity that abrogates all checks and balances, and Petitioner Haseeb Abdullah possesses standing to bring his suit challenging Texas' brazen attempt to do so.

II. Relevant Background Regarding Mr. Abdullah's Retirement Funds

Petitioner Haseeb Abdullah worked as an attorney for the State of Texas from September 2008 until March 2018. Complaint, Doc. 1, ¶¶ 1, 9. Mr. Abdullah worked for Texas through the Texas Department of Public Safety,

8. *See* Tex. Gov't Code § 2271, *et seq.* ("Prohibition on Contracts with Companies Boycotting Israel"); Tex. Gov't Code § 809.001, *et seq.* ("Prohibition on Investment in Financial Companies that Boycott Certain Energy Companies").

as an Attorney in the Administrative License Revocation section; the Texas Department of Insurance, Division of Workers' Compensation, as an Assistant General Counsel; and the Texas Department of Licensing and Regulation, as an Attorney in the Enforcement Division. *Id.* ¶ 10. For each month that he worked for the State of Texas, he made mandatory contributions to the Employees Retirement System of Texas ("ERS"). *Id.* ¶ 11. Although Mr. Abdullah no longer makes monthly contributions to ERS because he no longer works for the State of Texas, he remains an ERS member and ERS continues to maintain and oversee his vested pension. *Id.* ¶ 14. The ERS pension suffers from widely recognized insolvency risks necessitating additional contributions by State of Texas employees, agencies, and taxpayers in recent years to keep the ERS pension system solvent. *Id.* ¶ 13.

In April of 2018, Mr. Abdullah began work as an Assistant County Attorney for Travis County, in its Health and Social Services Division. *Id.* ¶ 30. Travis County is a member of the Texas County and District Retirement System ("TCDRS"), with mandatory participation by certain classes of employees, including Mr. Abdullah. *Id.* ¶ 31. Pursuant to the TCDRS, Mr. Abdullah contributes seven percent (7%) of his gross salary to TCDRS every pay period, and he became fully vested in 2022. *Id.*

Both the ERS and TCDRS are subject to Texas Government Code Chapter 808 ("Chapter 808"), titled "Prohibition on Investment in Companies that Boycott Israel." Tex. Gov't Code § 808.001, *et seq.* (Pet. App. 36a–47a). Under Chapter 808, ERS divested approximately $68 million of its fund from investments in DNB ASA, Norway's largest financial services group and one of

the most profitable companies in the world. Complaint, Doc. 1, ¶¶ 15–21. The sole reason ERS divested from DNB ASA is that Texas' Comptroller listed DNB ASA as a company participating in activities that support the boycott of Israel – not for any prudent financial concern. *Id.* ¶ 21. TCDRS likewise instructed its outside investment vendors to divest from or refrain from investing in DNB ASA, regardless of the vendors' fiduciary duties to clients like TCDRS' members. *Id.* ¶¶ 33–38. As a result of these actions, Mr. Abdullah's contributions became less fiscally sound. *Id.* ¶ 39.

Mr. Abdullah publicly expressed his opposition to the divestment requirements of Chapter 808. On August 21, 2019, Mr. Abdullah made public comments to the ERS Board of Trustees to express his opinion that ERS' decision to divest from DNB ASA ran counter to his own fiduciary interests, as well as the investment advice of ERS' own in-house employee investors. *Id.* ¶ 26. And on June 25, 2020, Mr. Abdullah made public comments to the TCDRS Board of Trustees, explaining how TCDRS' divestment decision not only ran counter to his own fiduciary interests, but also contradicted the investment advice from TCDRS' own investment vendors. *Id.* ¶ 40. In both instances, the ERS and TCDRS Boards of Trustees did not change their decision to divest from and refrain from investing in DNB ASA, due to the obligations imposed by Chapter 808. *Id.* ¶¶ 29, 41.

III. The Lower Courts Erroneously Dismissed Mr. Abdullah's Claims

Mr. Abdullah sued Texas Attorney General Ken Paxton,[9] Texas Comptroller Glenn Hegar, Executive Director of ERS Porter Wilson, and Executive Director of TCDRS Amy Bishop, all in their official capacities, for violations of the First Amendment's Free Speech and Establishment Clause protections and violations of the Due Process Clauses of the Fourteenth Amendment, violations of the Texas Constitution, and breach of fiduciary duty claims against Executive Director Defendants Wilson and Bishop. *Id.* ¶¶ 45–113. Mr. Abdullah seeks declaratory judgment finding Texas' anti-BDS legislation unconstitutional, and enjoining its further use.

The United States District Court for the Western District of Texas granted Mr. Abdullah's motion to voluntarily dismiss Executive Director Defendants Wilson and Bishop from the case, along with any state law claims. Doc. 20. The district court then granted Defendants' motion to dismiss the rest of Mr. Abdullah's complaint, holding that Mr. Abdullah failed to allege an "injury in fact" sufficient to confer Article III standing for any remaining claims. Pet. App. 11a–12a.

On appeal, the Fifth Circuit affirmed the district court's dismissal. Pet. App. 1a. The Fifth Circuit's holding derived from its conclusion that because Mr. Abdullah did

9. As described *supra*, p. ii, n.1, due to Ken Paxton's impending impeachment trial he cannot currently perform the duties of the role of Attorney General, and Petitioner Abdullah therefore substitutes Interim Attorney General John Scott pursuant to Fed. R. Civ. P. 25(d).

not plead a definitive decrease in his ultimate retirement benefits or an infringement on his own freedom of speech and religious expression, he therefore failed to demonstrate an injury-in-fact supporting Article III standing. Pet. App. 5a–10a. Mr. Abdullah timely files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. Chapter 808 of the Texas Government Code Facially Violates the First Amendment as Both Overbroad and Unconstitutionally Vague

Chapter 808, titled "Prohibition on Investment in Companies that Boycott Israel," prohibits "state governmental entities" (Texas' retirement systems and permanent school fund) from investing in companies Texas believes "boycott Israel," and requires divestment from any companies the Texas Comptroller designates. Tex. Gov't Code §§ 808.001 (Pet. App. 36a–38a); 808.054 (Pet. App. 43a–44a); 808.057 (Pet. App. 46a). Chapter 808 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." *Id.* § 808.001(1) (Pet. App. 36a). The statute requires the Texas Comptroller to "prepare and maintain, and provide to each state governmental entity, a list of all companies that boycott Israel." *Id.* § 808.051(a) (Pet. App. 41a). The relevant state governmental entity must then instruct the listed companies to cease boycotting Israel within 90 days;

if the Comptroller believes the listed companies continue to boycott Israel, the state governmental entity must "sell, redeem, divest, or withdraw all publicly traded securities of the company[.]" *Id.* § 808.053 (Pet. App. 42a–43a). Additionally, Chapter 808 prohibits state governmental entities from acquiring any securities of a listed company. *Id.* § 808.057 (Pet. App. 46a). Finally, Chapter 808 tasks the Attorney General with bringing any action necessary for its enforcement. *Id.* § 808.102 (Pet. App. 47a).

As the Fifth Circuit recognized, the Texas legislature enacted Chapter 808 to prohibit state retirement and school funds from investing in companies that boycott Israel or otherwise engage in or support the BDS movement. Pet. App. 2a–3a. BDS stands for "boycott, divestment, and sanctions," and the BDS movement refers to the "pro-Palestinian movement that 'seeks to put economic pressure on Israel' to substantially improve its treatment of Palestinians." Pet. App. 3a, n.2 (citing *Amawi v. Paxton*, 956 F.3d 816, 819–20 & n.1 (5th Cir. 2020)). Texas Representative Phil King explicitly identified the BDS movement in his Statement of Intent when he introduced Chapter 808, and characterized the movement as "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." Rep. Phil King, "Bill Analysis," H.B. 89, 85R15045 TSR-F (Apr. 24, 2017) (positing that "legislation is needed to prevent Texas' taxpayer resources from supporting businesses engaged in discriminatory trade practices against Israel"). The BDS movement neither

endorses nor condones antisemitism,[10] and in fact several Jewish organizations support the BDS Movement.[11] Yet Texas officials mischaracterize the BDS movement, as well as any boycotts of Israel or Israeli citizens, as discriminatory against all Jewish people. *See* Letter from Att'ys Gen. to Jean Paul Bradshaw II, Lathrop GPM (Aug. 23, 2022) https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Morningstar%20Letter%20re%20BDS.pdf (Texas Attorney General Paxton signing onto letter with the misrepresentation that "[t]he BDS movement is an anti-Semitic campaign to intimidate the Jewish people and delegitimize the State of Israel"). Texas officials represent the intent of Chapter 808 as reaffirming Texas' economic relationship with Israel, and preventing anti-Jewish discrimination. *See* "Texas Antisemitism Study Highlights Rising Hate, Makes Eight Recommendations to Fight Back," Tex. Hist. Comm'n (Dec. 19, 2022), https://www.thc.texas.gov/news-events/press-releases/texas-antisemitism-study-highlights-

10. *See* "Racism and Racial Discrimination are the Antithesis of Freedom, Justice & Equality," BDS Movement (Mar. 7, 2017) https://bdsmovement.net/news/racism-and-racial-discrimination-are-antithesis-freedom-justice-equality ("Adhering to the UN definition of racial discrimination, the BDS movement does not tolerate any act or discourse which adopts or promotes, among others, anti-Black racism, anti-Arab racism, Islamophobia, anti-Semitism, sexism, xenophobia, or homophobia.").

11. These organizations include but are not limited to International Jewish Collective for Justice in Palestine, Jewish Voice for Peace US, and Boycott from Within (Israeli citizens for BDS). *See* "Jewish Groups Across the Globe Applaud Barcelona Mayor Colau," BDS Movement (Feb. 24, 2023), https://bdsmovement.net/news/jewish-groups-across-globe-applaud-barcelona-mayor-colau.

rising-hate-makes-eight ("The 2021 law . . . was one of multiple state efforts in recent years to recognize and combat rising antisemitism. In 2017, Gov. Abbott signed [Chapter 808] that empowered Texas to lead the national fight against the Boycott, Divestment and Sanctions (BDS) movement.").

But Chapter 808 contains unconstitutionally overbroad language, in violation of the First Amendment. *See Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("[I]t is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."); *303 Creative LLC v. Elenis*, 600 U.S. ___, 2023 U.S. LEXIS 2794, *34 (2023) ("Nor in any event do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive."). Chapter 808's stated goal of impeding the BDS movement violates the First Amendment's prohibition against state restriction of expression based on the expression's message or content. *303 Creative*, 2023 U.S. LEXIS 2794, at *22 ("[T]he First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech . . . deeply misguided . . . Equally, the First Amendment protects acts of expressive association."); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Prohibiting the BDS movement also violates the right to boycott, protected by the First Amendment and this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S.

886, 914 (1982) (recognizing that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change"); *see also Doe v. McKesson*, No. 17-30864, 2023 U.S. App. LEXIS 15113, *78 (5th Cir. June 16, 2023) (Willett, J., dissenting) ("Our Constitution explicitly protects nonviolent political protest. *Claiborne* is among our most significant First Amendment cases.") (internal citations omitted).

And Chapter 808's language extends its reach beyond improperly targeting the BDS movement. The statute's definition of "boycott Israel" includes far more than any intentionally discriminatory economic actions against Israel or Israeli citizens, encompassing all economic activity, regardless of reason, that results in limiting commercial relations with the State of Israel or any person or entity doing business in Israel or in any contested Israeli-controlled territories. Tex. Gov't Code § 808.001(1) (Pet. App. 36a). Chapter 808 prohibits state retirement funds from investing in, and requires divestment from, companies the Texas Comptroller believes refuse to deal with, cease dealing with, or "tak[e] any action that is intended to . . . limit commercial relations" with Israel or *any* "person or entity doing business in Israel or in an Israeli-controlled territory." *Id.* While the statute excludes actions taken for "ordinary business purposes" from its definition of "boycott Israel," Chapter 808 fails to define its use of "ordinary business purposes." And it fails to reference any other statute defining that term. No language in the statute prevents the Comptroller from deciding a company engages in boycotts of Israel if, for example, the company determines it no longer

wants to have commercial relations with a particular person or business located in Israel that the federal government identifies as supporting violence or terrorism, or presenting a danger to the United States.[12]

The Comptroller's continued instruction for divestment from Unilever demonstrates the overbreadth and resulting chilling effect Chapter 808 imposes. During the summer of 2021, ice cream company Ben & Jerry's (owned by parent company Unilever) announced its decision to support the BDS movement by not renewing its licensing agreement in Israel.[13] Shortly after that, Comptroller Hegar added both Ben & Jerry's and Unilever to Texas' list of "Companies that boycott Israel."[14] In June of 2022,

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12. "Commerce Adds NSO Group and Other Foreign Companies to Entity List for Malicious Cyber Activities," U.S. Dep't of Com. (Nov. 3, 2021), https://www.commerce.gov/news/press-releases/2021/11/commerce-adds-nso-group-and-other-foreign-companies-entity-list (adding, among others, two Israeli companies to the United States Commerce Department's Entity List "based on evidence that these entities developed and supplied spyware to foreign governments that used these tools to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers").

13. Olivia Solon, "Ben & Jerry's withdraws sales from Israeli settlements but clashes with parent company Unilever," NBC News (July 19, 2021), https://www.nbcnews.com/business/business-news/ben-jerry-s-withdraws-sales-israeli-settlements-clashes-parent-company-n1274403.

14. "Texas Comptroller Glenn Hegar: Ben & Jerry's and its Parent Company Added to Texas List of Companies That Boycott Israel," Tex. Comptroller of Public Accounts (Sept. 23, 2021), https://comptroller.texas.gov/about/media-center/news/20210923-texas-comptroller-glenn-hegar-ben-and-jerrys-

Unilever released a statement clarifying that "[w]e have never expressed any support for the Boycott Divestment Sanction (BDS) movement and have no intention of changing that position."[15] And while Comptroller Hegar expressed pleasure about "Unilever's recent statement affirming its support for Israel," Comptroller Hegar retains Unilever on Texas' list through the filing date of this Petition.[16] Even if Texas did enact Chapter 808 to stem any perceived discrimination, it continues to label companies as supporting the effort to "boycott Israel" even after they publicly and expressly disclaim any support for BDS.

Chapter 808's purported exceptions[17] do little to preserve the statute's constitutionality, and only succeed in rendering the statute vague and incomprehensible.

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and-its-parent-company-added-to-texas-list-of-companies-that-boycott-israel-1632327961380.

15. "Texas Comptroller Glenn Hegar's Statement on Unilever's Israel Decision," TEX. COMPTROLLER OF PUBLIC ACCOUNTS (June 30, 2022), https://comptroller.texas.gov/about/media-center/news/20220630-texas-comptroller-glenn-hegars-statement-on-unilevers-israel-decision-1656600197116.

16. *Id.*; "Companies that Boycott Israel" (last updated September 2022), https://comptroller.texas.gov/purchasing/publications/divestment.php.

17. *See* Pet. App. 6a–7a (finding the divestment requirement not absolute because "the Texas Legislature notably built safeguards into § 808 providing several relevant exceptions"). The Fifth Circuit identified Sections 808.005 and 808.056(a) as exceptions without acknowledging the negating language in Sections 808.002 and 808.004, despite Mr. Abdullah's counsel identifying those provisions at oral argument. *Id.*

Section 808.005 claims state governmental entities are not subject to the requirements of Chapter 808 "if the state governmental entity determines that the requirement would be inconsistent with its fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets[.]" *Id.* § 808.005 (Pet. App. 40a). And, Section 808.056 permits state governmental entities to "cease divesting" from a listed company, but "only if clear and convincing evidence" exists of either of two acceptable circumstances. *Id.* § 808.056(a) (Pet. App. 45a). First, the entity may show that it "has suffered or will suffer a loss in the hypothetical value of all assets under management [due to] having to divest from listed companies under this chapter." *Id.* § 808.056(a)(1) (Pet. App. 45a). Or, the entity may show that "an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed companies under this chapter." *Id.* § 808.056(a)(2) (Pet. App. 45a).

But three caveats immediately follow these exceptions, that gut them completely. The very next subsection clarifies that entities may cease divesting from a listed company pursuant to Section 808.056 "only to the extent necessary to ensure that the state governmental entity does not suffer a loss in value or deviate from its benchmark as described by Subsection (a)." *Id.* § 808.056(b) (Pet. App. 46a). And, "[b]efore a state governmental entity may cease divesting from a listed company," the entity "must provide a written report to the comptroller, the presiding officer of each house of the legislature, *and* the attorney general setting forth the reason and justification, supported by clear and convincing evidence, for deciding to cease divestment or to remain invested in a listed company."

Id. § 808.056(c) (Pet. App. 46a) (emphasis added). But that's not all: the entity must then continue to update that written report semi-annually. *Id.* § 808.056(d) (Pet. App. 46a). And, even after meeting these requirements, Chapter 808 imposes no requirement that Texas officials approve the request to cease divestment. Few, if any, managers of state retirement funds will realistically choose to challenge the Comptroller, Legislature, and Attorney General by utilizing the exception in Section 808.056(a)—simultaneously risking subjecting themselves to enforcement actions by the Attorney General. *See id.* § 808.102 (Pet. App. 47a). And if the Attorney General did initiate enforcement proceedings against any such brave fund managers, they would have no right to challenge that action.

Chapter 808 also contains multiple alarming provisions designed to insulate state actors from precisely that type of challenge by any affected parties. Section 808.002 exempts the state governmental entities and the Comptroller "*from any conflicting statutory or common law obligations*, including any obligations with respect to making investments, divesting from any investment, [or] preparing or maintaining any list of companies[.]" *Id.* § 808.002 (Pet. App. 38a) (emphasis added). And while the separate statute of Texas Government Code § 802.203 requires these same state fund investment managers to "discharge [their] duties solely in the interest of the participants and beneficiaries: (1) for the exclusive purpose of: (A) providing benefits to participants and their beneficiaries," Section 808.002 nulls any existing requirement to act in the beneficiaries' best interest. Tex. Gov't Code § 802.203. Section 808.002 moots the exception articulated in Section 808.005, exempting state governmental entities from those requirements even

when an entity determines the requirement "*would be inconsistent with its fiduciary responsibility* . . . or *other duties imposed by law* relating to the investment of entity assets." *Id.* § 808.005 (Pet. App. 40a) (emphasis added). Chapter 808 therefore requires state governmental entities to choose between complying with Chapter 808 while ignoring any existing conflicting legal obligations, or honoring those pre-existing legal obligations while risking an enforcement action by the Attorney General for failing to comply with Chapter 808. Unsurprisingly, entities unanimously choose the former route to date.

And, Chapter 808 grants state actors complete immunity from private suits challenging its validity, and threatens any would-be plaintiffs with the burden of costs and attorneys' fees. Section 808.004 prevents any person, including beneficiaries of a covered public retirement fund, or any company from filing a cause of action against the state governmental entity or the state for any claim, "including breach of fiduciary duty, or for any violation of any constitutional, statutory, or regulatory requirement" connected with action taken under Chapter 808.[18] *Id.* § 808.004(a) (Pet. App. 39a). Chapter 808 next declares that anyone bringing suit "is liable for paying the costs and attorney's fees of a person sued in violation of this section." *Id.* § 808.004(b) (Pet. App. 40a).

The Fifth Circuit agreed with the Texas Defendants that the exceptions in Sections 808.005 and 808.056

18. In full, Section 808.004 prevents private suit "for any claim or cause of action, including breach of fiduciary duty, or for any violation of any constitutional, statutory, or regulatory requirement in connection with any action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with this chapter." Tex. Gov't Code § 808.004(a) (Pet. App. 39a).

provide a "safeguard" against the risk of economic harm to beneficiaries like Mr. Abdullah, yet failed entirely to address the competing fact that Sections 808.002 and 808.004 simultaneously render these exceptions toothless. Pet. App. 6a–7a. Chapter 808's own language forecloses any realistic opportunity that a retirement fund's divestment from a listed company will not risk the health of the retirement fund. The statute provides cover for both the managers of the retirement funds and the Texas Comptroller, should they violate any existing laws, and prohibits all challenges to decisions made under Chapter 808. If a retirement fund manager wants to take advantage of Section 808.056 to invest in (or refrain from divesting from) a listed company, that manager must present evidence to the Comptroller, Attorney General, and the heads of both houses of the Texas Legislature explaining how it meets one of the two express conditions of Section 808.056 to the heightened degree of a clear and convincing standard, and then must indefinitely continue to update that report twice a year. Tex. Gov't Code § 808.056(b)–(d) (Pet. App. 46a). Even then, Chapter 808 provides no "shall" requirement mandating that state officials grant permission to cease divestment. It's no wonder none even tried in the nearly six years since Chapter 808's enactment.

Taken together, the provisions in Chapter 808 unlawfully chill not only the free speech of companies that choose to boycott Israel as part of the BDS movement, but also that of companies limiting or terminating business relations with anyone in Israel (or Israeli-controlled territories) for any reason. If they do, they risk getting tarred by Texas as "wish[ing] to . . . see Israel fail."[19]

19. *See* Ken Paxton, "Paxton Wins Major Case Defending Texas' Anti-Boycott of Israel Law," (Apr. 18, 2023) https://www.

II. Mr. Abdullah Possesses Standing to Challenge Chapter 808 as Facially Unconstitutional under the First Amendment

To demonstrate Article III standing sufficient to pursue claims in federal court, a plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021). This Court recognizes that "[v]arious intangible harms can also be concrete . . . includ[ing] harms specified by the Constitution itself." *Id.* at 2204. In addition to Article III's standing requirements, prudential considerations limit the cases brought before federal courts: "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). However, "there are situations where competing considerations outweigh any prudential rationale against third-party standing, and [] this Court has relaxed the prudential-standing limitation when such concerns are present." *Id.* at 956. Those concerns exist here.

This Court has long recognized the importance of protecting First Amendment rights from vague and substantially overbroad regulations reasonably likely to chill speech. *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing

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texasattorneygeneral.gov/news/releases/paxton-wins-major-case-defending-texass-anti-boycott-israel-law.

space to survive, government may regulate in the area only with narrow specificity."). Courts therefore hesitate to reject standing in First Amendment cases due to prudential considerations. *Sec'y of Md.*, 467 U.S. at 956 (recognizing that "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (acknowledging that plaintiffs may properly "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

"Because constitutional challenges based on the First Amendment present unique standing considerations, plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010); *see also Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact.").

The Fifth Circuit erred when it held Mr. Abdullah could not demonstrate an injury-in-fact based on threats of future economic harm to his assets in two affected defined-benefit retirement systems. Pet. App. 7a–8a. Misapplying this Court's recent decision in *Thole v. U.S. Bank NA*, the Fifth Circuit reached the erroneous conclusion that because "good or bad" investment or divestment decisions do not affect the amounts of Mr. Abdullah's fixed future

payments, he lacks standing. Pet. App. 7a (citing *Thole v. U.S. Bank NA*, 140 S. Ct. 1615, 1618 (2020)). The Fifth Circuit next improperly characterized Mr. Abdullah's claim that he suffers from the threat of future economic harm due to the risk of the retirement plans' failure from underfunding as insufficient, going as far as to argue that Mr. Abdullah "ignores Texas' ability to obtain funds by taxes, fees, assessments, etc."—arguments not advanced by Defendants at any stage in this matter. Pet. App. 8a. Finally, in its minimal analysis of whether Mr. Abdullah possesses standing to pursue his constitutional claims, the Fifth Circuit erroneously held he "cannot assert arguments based only on other's [sic] rights (such as the companies that are on the divestment list)." Pet. App. 10a. The Fifth Circuit erred in this brief analysis of Mr. Abdullah's injury and ability to pursue First Amendment claims by looping back to its earlier analysis of his economic harm.[20]

A. Mr. Abdullah sufficiently pleads injury-in-fact based on the substantially increased risk of plan failure resulting from poor fiduciary management.

The Fifth Circuit's misapplication of *Thole* to foreclose Mr. Abdullah's injury-in-fact argument ignores several relevant distinguishing factors addressed by this Court in *Thole*. *Thole* turned on precedent for Employee Retirement Income Security Act ("ERISA") plans. In *Thole*, this Court cited its own precedent that evaluated private

20. The entirety of the Fifth Circuit's analysis of Mr. Abdullah's standing under the First Amendment comprises one paragraph. Pet. App. 9a–10a.

defined-benefit plans governed by ERISA, observing that "the employer, not plan participants, is on the hook for plan shortfalls," and "plan participants possess no equitable or property interest in the plan." 140 S. Ct. at 1620 (citing *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008)). But that's not what happened here. ERISA specifically excludes state retirement plans. 29 U.S.C. § 1003(b) (specifying that "[t]he provisions of this title shall not apply to any employee benefit plan if . . . (1) such plan is a governmental plan"); 29 U.S.C. § 1002(32) (defining the term "governmental plan" as "a plan established or maintained for its employees . . . by the government of any State or political subdivision thereof"). The district court did not allow this case to progress even to limited discovery, where it could have considered any identical or substantially similar requirements as ERISA governing Texas' state retirement plans. And unlike the plaintiffs in *Thole*, who were already retired and receiving monthly benefits from their defined-benefit plans, Mr. Abdullah has yet to retire or receive benefits from his defined-benefit plans. *Compare Thole*, 140 S. Ct. at 1618 ("Thole and Smith have been paid all of their monthly pension benefits so far, and they are legally and contractually entitled to receive those same monthly payments for the rest of their lives.") *with* Pet. App. 2a ("At retirement, Abdullah will be eligible to receive fixed monthly payments."). These significant distinctions between the facts in *Thole* and those present here merit analysis, yet the Fifth Circuit failed to do that.

As this Court recognized in *Thole*, beneficiaries in a defined-benefit plan may have standing "if the mismanagement of the plan was so egregious that it

substantially increased the risk that the plan and the employer would fail and be unable to pay the plaintiffs' future pension benefits." *Thole*, 140 S. Ct. at 1622. At oral argument, the Fifth Circuit brushed aside Mr. Abdullah's reliance on the current insolvency of Texas' state retirement plans, and instead *sua sponte* proposed that Texas could (and would) use its budget surplus or raise taxes to pay out Mr. Abdullah's monthly benefits should the retirement plans lack funds. *See* Pet. App. 8a (holding no credible threat of retirement plan failure due to "Texas' ability to obtain funds by taxes, fees, assessments, etc."). Defendants did not make this argument at any stage of the proceedings, and the record contains no evidence addressing this claim. In fact, one of Mr. Abdullah's retirement plans, ERS, remains underfunded today despite Texas' $32.7 billion budget surplus, because the Texas Legislature refuses to direct that surplus to fully fund the underfunded retirement systems.[21]

The Fifth Circuit also failed to consider the blanket exemptions Chapter 808 provides to both the Comptroller and the managers of retirement funds, excusing them from their fiduciary duties required by law and shielding them from liability for divestment and investment actions taken under Chapter 808 even when those actions harm the

21. Karen Brooks Harper, "State retirees struggle through inflation while budget plans leave them out," Tex. Tribune (Apr. 5, 2023), https://www.texastribune.org/2023/04/05/texas-budget-retirees/ (published one month subsequent to the Fifth Circuit's *sua sponte* presumption to the contrary at oral argument); Shawn Mulcahy, "Texas Senate approves overhaul of pension plans for new state employees," Tex. Tribune (Apr. 28, 2021),https://www.texastribune.org/2021/04/28/texas-pension-ers-overhaul/ (noting that ERS will not be fully funded until 2054).

funds. Tex. Gov't Code §§ 808.002 (Pet. App. 38a); 808.004 (Pet. App. 39a–40a). The enactment of Chapter 808 itself sufficiently demonstrates the Texas Legislature's intent to prioritize ideological political goals over the benefits due to Texas' public employees. Yet the enactment of a nearly identical statute, mandating divestment from profitable companies with Environmental and Social Governance ("ESG") policies like BlackRock Inc. and HSBC Bank because those companies "boycott energy company[ies]," further shows that Texas continues to subject state employees' benefits to its preferred political agenda, and will likely become even broader and bolder in doing so if left unchecked. *See* Tex. Gov't Code § 809.001, *et seq.* ("Prohibition on Investment in Financial Companies that Boycott Certain Energy Companies"). The Fifth Circuit erred when it minimized and provided its own excuses for the credible risk Chapter 808 poses to Mr. Abdullah's retirement plans, and Mr. Abdullah properly pled his injury-in-fact based on the realistic threat of future harm. At the pleadings stage, that is all he needs to do.

B. Mr. Abdullah possesses sufficient standing to challenge Chapter 808 as unconstitutionally overbroad

Because Mr. Abdullah establishes an injury-in-fact directly traceable to the enforcement of Chapter 808 by Defendants, an injury redressable by the court order that he seeks striking down Chapter 808, Mr. Abdullah demonstrates sufficient standing to pursue his First Amendment overbreadth claims. He need not suffer an injury to his own First Amendment right to speak. *Sec'y of Md.*, 467 U.S. at 958 (holding non-charity properly brought First Amendment challenges to a statute regulating

charities that "satisfies the requirement of 'injury-in-fact,' and . . . can be expected satisfactorily to frame the issues in the case"); *see also Mothershed v. Justs. of the Supreme Ct.*, 410 F.3d 602, 611 (9th Cir. 2005) (allowing plaintiff to proceed with constitutional challenges where he "satisfies our requirements for overbreadth standing because he has suffered an injury-in-fact and can be expected to pursue the First Amendment claim vigorously"); *Penny Saver Publ'ns., Inc. v. Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990) (holding "the prudential concerns of standing are outweighed by society's interest in having Penny Saver bring this action . . . Penny Saver may still have standing regardless of whether it is complaining about its own [F]irst [A]mendment rights"). Chapter 808 imposes the chilling effect described above for companies by preventing both their participation in the BDS movement and their ability to end commercial relations with people or businesses in Israel for any reason. *See infra* Reasons for Granting the Petition, Section I, pp. 9-19. Yet this Court recognizes that "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of Md.*, 467 U.S. at 958 (distinguishing that the plaintiff's own "ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake"). The Fifth Circuit's holding contradicts both this Court's precedent and that of other circuits, and therefore requires reversal. *Compare* Pet. App. 9a–10a (erroneously concluding that because "Abdullah does not allege that § 808 infringes on *his* ability to speak. . . . [h]e cannot assert arguments based only on other's rights (such as the companies that are on the divestment list)") to *Mothershed*, 410 F.3d at 610

(recognizing that a "plaintiff's ability to invoke so-called 'overbreadth standing' has nothing to do with whether or not his own First Amendment rights are at stake") and *Penny Saver*, 905 F.3d at 154 (acknowledging the plaintiff "may still have standing regardless of whether it is complaining about its own [F]irst [A]mendment rights").

III. Mr. Abdullah Establishes Standing Sufficient to Bring His Establishment Clause Claim

The Fifth Circuit erred in holding that Mr. Abdullah could not pursue his claim that Chapter 808 violates the First Amendment's Establishment Clause. Mr. Abdullah cites in his Complaint to Representative Phil King's own comments explaining why he introduced the bill to establish Chapter 808, including his statement that "as a Christian, my religious heritage is intrinsically linked to Israel and to the Jewish people." Doc. 1, ¶ 62; *see also* Aaron Howard, "Texas rep to file anti-BDS bill" (Nov. 10, 2016), https://www.philking.com/2016/11/11/texas-rep-to-file-anti-bds-bill-by-aaron-howard/ (noting that King stated "You can't have Christianity without having a literal, historical, and spiritual Israel" as a reason for introducing the bill).[22] The First Amendment's Establishment Clause prohibits states from passing laws like Chapter 808 in the interest of one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid

22. Petitioner Abdullah presents this comment as made by Rep. King, despite its omission of Jerusalem's significance in other religions as well, including Islam.

one religion, aid all religions, or prefer one religion over another"); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1723 (finding the actions of Colorado to be "inconsistent with the State's obligation of religious neutrality"). Representative King's statement amounts to at least some evidence of state endorsement of Christianity and Judaism over other religions, by itself causing stigmatic injuries to non-adherents to those religions who find themselves affected by Chapter 808, including Mr. Abdullah. *See Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1137 (D. Haw. 2017) (finding the Executive Branch's statements calling for a ban on Muslim immigration to "betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court . . . that the stated secular purpose is, at the very least, secondary to a religious objective of temporarily suspending the entry of Muslims").

Sidestepping Mr. Abdullah's allegations in this regard, the Fifth Circuit cited its own faulty precedent that a plaintiff "must allege a personal violation of rights" to demonstrate standing under the Establishment Clause. Pet. App. 9a (citing *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) ("The Establishment Clause is no exception to the requirement of standing."). The Fifth Circuit's holdings conflict with this Court's precedent, as well as this country's well-established principles. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (describing state sponsorship of a religious message as "impermissible because it sends the ancillary message to members of the audience who are nonadherants that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community"). Other circuits disagree with the Fifth

Circuit's holding on that point as well, most notably the Fourth and Ninth Circuits. These circuits recognize the stigmatic injuries resulting from statutes that reflect governmental preference for any religion over another as sufficient to confer standing. *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012) (holding Jewish student properly alleged stigmatic injury from school endorsement of Christian bible study course); *Cath. League for Religious & Civ. Rts. v. City & Cnty. of San Francisco*, 624 F.3d 1043 (9th Cir. 2009) (recognizing stigmatic injury asserted by Catholic organization from non-binding resolution criticizing local Cardinal's instruction).

The Fifth Circuit erred when it relied on its own faulty precedent over constitutional jurisprudence. In *Barber*, the Fifth Circuit dismissed the plaintiffs' claims for lack of standing to challenge a Mississippi statute that protected those with specific enumerated "religious beliefs or moral convictions" opposing same-sex marriage, sex outside of marriage, and transgender identity from adverse state action.[23] *Barber*, 860 F.3d at 350–51. The *Barber* plaintiffs included gay and transgender persons likely

23. Many of the legal conclusions reached in *Barber* run counter to this Court's existing precedent in *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding no lawful basis for state to refuse to recognize same-sex marriage) and *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding private consensual extramarital adult sexual conduct free from government condemnation), as well as this Court's subsequent holding in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Title VII's prohibition of sex discrimination includes discrimination against homosexual and transgender individuals); *see also id.* at 1837 (Kavanaugh, J., dissenting) (referring to this Court's opinion in *Bostock* as an "important victory" by LGBTQ+ Americans).

to be negatively affected by the statute. These plaintiffs pled injuries based on the message sent by enactment of the statute at issue—that "the state government disapproves of and is hostile to same-sex couples, to unmarried people who engage in sexual relations, and to transgender people." *Id.* at 351–52. The Fifth Circuit rejected that argument, holding instead that plaintiffs "made no clear showing of a personal confrontation with [the statute]: The beliefs listed in that section exist only in the statute itself." *Id.* at 354 ("Just as an individual cannot 'personally confront' a warehoused monument, he cannot confront statutory text."). The Fifth Circuit went even further in *Barber*, equating the plaintiffs' argument as "indistinguishable from allowing standing based on a generalized interest of all citizens in the government's complying with the Establishment Clause without an injury-in-fact." *Id.* (citation omitted).

The Fifth Circuit in *Barber* mistakenly discounted the plaintiffs' arguments that this Court's decision in *Santa Fe* supports their claims of stigmatic injury to sufficiently imbue Establishment Clause standing. Instead, the Fifth Circuit rationalized that conflict as justified because it viewed itself as bound to follow its own precedent over Supreme Courts precedent: "But *Santa Fe* does not address the standing of the instant plaintiffs, and its broad language does not eliminate the injury-in-fact requirement. In fact, we are bound by [Fifth Circuit precedent] to require proof of a personal confrontation with the religious exercise." *Id*. While *Santa Fe* addressed the merits of the plaintiffs' claims that a policy permitting student-led prayers at football games broadcast over the speaker system violated the Establishment Clause, this Court plainly recognized

the harm caused by policies that lend state support to a particular religion over another. *Santa Fe*, 530 U.S. at 316 ("Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury."); *see also Kennedy v. Bremerton*, 142 S. Ct. 2047, 2431-32 (2022) (distinguishing *Santa Fe* due to the absence of any official endorsement or forced participation in the acts at issue).

Fifth Circuit Judge Dennis dissented from the *Barber* decision denying rehearing *en banc*: "In my view, the panel opinion committed serious error in concluding that the plaintiffs lack standing to bring suit under the Establishment Clause." *Barber v. Bryant*, 872 F.3d 671, 673 (5th Cir. 2017) (Dennis, J., dissenting). As Judge Dennis explained, "[i]n cases involving challenges to laws or official policies in the plaintiffs' own communities, the stigmatic harm suffered by non-adherents is sufficient to establish an injury-in-fact." *Id.* at 674 (Dennis, J., dissenting). Judge Dennis rejected the Fifth Circuit's dismissal of this Court's *Santa Fe* holding as inapplicable, and noted instead that this Court "described the injury the non-adherent plaintiffs in that case actually suffered from the 'mere passage by the [school d]istrict of a policy that has the purpose and perception of government establishment of religion.'" *Id.* at 675 (Dennis, J., dissenting) (citing *Santa Fe*, 530 U.S. at 314).

Consistent with Judge Dennis' observations, the Fifth Circuit's decision in *Barber* and its holding as to Mr. Abdullah conflict with multiple other circuits' precedent recognizing that stigmatic injuries do sufficiently confer

standing under the Establishment Clause. *Id.* at 677 (Dennis, J. dissenting) ("Until the panel opinion in this case, our court's precedent was not in conflict with these holdings [from the Fourth and Ninth Circuits]."). The Ninth Circuit recognized the right of Catholics in San Francisco to challenge a non-binding San Francisco resolution that condemned a local Cardinal's instruction to stop placing children for adoption with homosexual households, because "[i]t would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government's preferment of other religious views." *Cath. League*, 624 F.3d at 1048. The Ninth Circuit recognized, and rightly followed, this Court's precedent that "treated standing (and therefore the concreteness element of standing) as sufficient in all of these cases, even though nothing was affected but the religious or irreligious sentiments of plaintiffs." *Id.* at 1050 ("No one was made to pray, or to pray in someone else's church, or to support someone else's church, or limited in how they prayed on their own, or made to worship, or prohibited from worshiping, in any of these cases.").

The Fourth Circuit ruled similarly, holding that a Jewish family had standing to challenge a school district's endorsement of a Christian bible school course, and did so based solely on the plaintiffs' "feelings of marginalization and exclusion." *Moss*, 683 F.3d at 607. ("Feelings of marginalization and exclusion are cognizable forms of injury, particularly in the Establishment Clause context, because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are outsiders, not full members of the

political community.'") (citing *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005)). The Fourth Circuit recognized the plaintiffs' standing in *Moss* even though the Jewish student never took the course at issue. *Id.*

Texas' Chapter 808 reflects an endorsement of the Christian beliefs of the sponsoring representative and support of the Jewish faith, rendering the statute unconstitutional under the Establishment Clause. Mr. Abdullah rightly challenges the statute as a non-adherent based on its exclusionary background, history and impact. The Fifth Circuit erred when it required Mr. Abdullah to demonstrate a specific effect on his <u>*own*</u> religious beliefs in order to demonstrate standing sufficient to challenge this unconstitutional and undisputedly religiously-motivated law. The Fifth Circuit's holding in this case conflicts with this Court's precedent and that of multiple other circuits, and requires this Court's intervention to resolve.

CONCLUSION

"The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative*, 2023 U.S. LEXIS 2794, at *44. The animus toward the BDS movement openly expressed by the Texas legislature provides no justification to enact laws in violation of the First Amendment. The words of the sponsoring legislator himself, coupled with those of prior defendant Ken Paxton (and not negated in any way by Interim Attorney General John Scott) provide more than sufficient basis to demonstrate Mr. Abdullah's standing at this early stage. The Fifth Circuit erroneously affirmed dismissal of Mr. Abdullah's case, and failed

to apply this Court's standing jurisprudence for First Amendment Free Speech and Establishment Clause claims. The Fifth Circuit also wrongly substituted both its own contradictory precedent for that of this Court, and its own factual presumptions beyond the record (proven false just one month later) over the properly required legal analysis. Both are wrong. Both contradict other circuit courts' holdings. And both disregard the precedent of this Court and Mr. Abdullah's constitutional right to be heard and pursue his claims in a court of law. Petitioner Haseeb Abdullah therefore respectfully requests this Court grant his Petition for a writ of certiorari.

Respectfully submitted,

Christina A. Jump
Counsel of Record
Chelsea G. Glover
Samira S. Elhosary
Constitutional Law Center
for Muslims in America
100 North Central Expressway,
Suite 1010
Richardson, Texas 75080
(972) 914-2507
cjump@clcma.org

Counsel for Petitioner

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50315

HASEEB ABDULLAH,

Plaintiff-Appellant,

versus

KEN PAXTON; GLENN HEGAR,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:20-CV-1245

Before RICHMAN, *Chief Judge*, and HAYNES and GRAVES, *Circuit Judges.*

PER CURIAM:

In this case, Haseeb Abdullah challenges the constitutionality of Texas Government Code § 808. He contends that § 808's divestment requirement violates the First Amendment and the Due Process Clause. The district court concluded that Abdullah lacked standing and dismissed his claims. For the reasons discussed below, we AFFIRM.

Appendix A

I. Factual Background

Abdullah is a former State of Texas employee and a current Travis County employee. By virtue of these employments, Abdullah has contributed to (and is therefore a beneficiary of) two relevant retirement plans. The first is a defined-benefit plan maintained by the Texas Employee Retirement System ("ERS"), and the second is a defined-benefit plan administered by the Texas County and District Retirement System ("TCDRS"). ERS and TCDRS (together, the "Systems") collect employee contributions in a fund and manage the fund's investment to increase its overall value. At retirement, Abdullah will be eligible to receive fixed monthly payments. The payment amount will be calculated based on a number of standard factors.[1] Notably, however, the amount will be independent of the market performance of the overall fund and any individual investment decisions made by the Systems.

Because the Systems are public entities, their investments are subject to the oversight of the Texas Legislature. *See, e.g.*, Tex. Gov't Code §§ 802.203(a), 811.003, 801.107. In 2017, the Texas Legislature enacted Texas Government Code § 808, which is a prohibition on investment in companies that boycott the country of Israel

1. The ERS plan payments are calculated based on, inter alia, an employee's start date, years of service, and salary; the TCDRS plan payments are based on overall member contributions, a guaranteed seven percent interest rate (compounded annually), and other factors not relevant here.

or otherwise engage in the "BDS movement."[2] Under § 808, the Texas Comptroller is required to maintain a list of companies that boycott Israel and provide that list to the Systems. Tex. Gov't Code § 808.051. The Systems are then directed to "sell, redeem, divest, or withdraw all publicly traded securities of the [listed] company." *Id.* § 808.053(d). If the Systems fail to comply, the Texas Attorney General is authorized to bring an enforcement action. *Id.* § 808.102.

Relevant here, Abdullah sued the Texas Comptroller and the Texas Attorney General (collectively, "Defendants") in federal court. He sought a declaratory judgment that § 808's divestment requirement violates (1) the Freedom of Speech Clause; (2) the Establishment Clause; and (3) the Due Process Clause. Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (6). The district court concluded that Abdullah lacked Article III standing and dismissed his claims. Abdullah timely appealed.

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2. The "BDS movement" is a pro-Palestinian movement that "seeks to put economic pressure on Israel" to substantially improve its treatment of Palestinians. *Amawi v. Paxton*, 956 F.3d 816, 819-20 & n.1 (5th Cir. 2020). "BDS" refers to the actions that the movement's participants engage in, including boycotts, divestments, and sanctions. In an effort to curtail participation in the BDS movement, many states have enacted "anti-BDS laws." Abdullah alleges in various claims that § 808 is one such law and is unconstitutional. But—given our decision on standing—we do not reach the merits of those claims.

Appendix A

II. Jurisdiction & Standard of Review

We have appellate jurisdiction under 28 U.S.C. § 1291.[3] We review a district court's dismissal for lack of standing de novo. *Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 513 (5th Cir. 2017). In doing so, we apply the same standard as the district court—accepting all well-pleaded factual allegations in the complaint as true and viewing them in the light most favorable to the plaintiff. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

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3. Defendants urge that we lack appellate jurisdiction. In doing so, they observe that (1) Abdullah originally also named two individual directors as defendants; (2) he later moved to voluntarily dismiss the directors; and (3) the district court thereby dismissed the directors, *without prejudice*. Because the directors were dismissed without prejudice, Defendants contend that the order appealed from here is not "final" under § 1291 since it technically did not resolve all claims against all parties. *See Williams v. Seidenbach*, 958 F.3d 341, 343 (5th Cir. 2020) (en banc).

We disagree. Though a voluntary dismissal could preclude our review in some situations, that is not the case here. Abdullah concedes that his claims against the directors were barred by sovereign immunity—a jurisdictional defect. Under our precedent, dismissals based on jurisdictional issues must, by their very nature, be without prejudice. *See, e.g., Warnock v. Pecos County*, 88 F.3d 341, 343 (5th Cir. 1996). But, regardless of how it was titled, the order in this circumstance was analogous to a dismissal *with prejudice*. In other words, Abdullah cannot re-plead his claims against the directors—they are plainly precluded by the jurisdictional bar. Thus, the district court's order was sufficiently final, and our appellate jurisdiction is sound.

III. Discussion

We agree with the district court that Abdullah lacks standing to pursue his claims. Article III grants jurisdiction to federal courts only over actions involving an "actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Accordingly, Abdullah bears the burden of establishing the three "familiar elements of standing." *Shrimpers & Fishermen of RGV v. Tex. Comm'n on Env't Quality*, 968 F.3d 419, 424 (5th Cir. 2020) (per curiam). To do so, he must demonstrate that he has suffered "(1) an injury in fact, (2) that is fairly traceable" to the Defendants' actions, (3) that is likely to be redressed by a favorable outcome. *Id.*; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). All three elements are "an indispensable part of [Abdullah's] case." *Lujan*, 504 U.S. at 561.

Our analysis begins and ends with the first element: injury in fact. To satisfy this requirement, Abdullah must plead that "he has sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles*, 461 U.S. at 101 (internal quotation marks and citation omitted). That injury needs to be "concrete and particularized," as well as "actual or imminent." *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (quotation omitted). Importantly, it cannot be speculative, conjectural, or hypothetical. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). Allegations of only a "possible" future injury similarly will not suffice. *Id.*; *see also Shrimpers*, 968 F.3d at 424. Abdullah alleges he has

incurred two types of injuries in connection with § 808's divestment requirement: (1) a threat of a future economic loss and (2) several constitutional violations. We address both in turn, but neither proves successful.

A. Threat of Future Economic Injury

First, Abdullah claims he satisfied the injury-in-fact requirement because he has alleged there is a realistic risk that § 808 will cause him to suffer future economic harm. At the outset, we note that Abdullah concedes that he has not *currently* sustained any monetary injury—he has not pleaded that he is eligible for retirement, that he currently qualifies for any payments from the Systems, or, most importantly, that those payments have been reduced as a result of the divestment requirement.

Rather, Abdullah's purported injury rests on an entirely forward-looking theory. He avers that the Systems—as managers of his vested financial benefits—are required to base their divestment decisions on the dictates of § 808, rather than pure free market considerations. He contends that these constraints on the Systems' discretion will have an adverse effect on the fund's overall financial health, reducing his future pension benefits. Per Abdullah, this threat of diminished future payments is sufficient to establish the injury-in-fact requirement.

We disagree. At the outset, we observe that the divestment requirement is not absolute. Rather, the Texas Legislature notably built safeguards into § 808

providing several relevant exceptions. For example, under § 808.005, the Systems do not have to comply if they conclude that divesting "would be inconsistent with [their] fiduciary responsibilit[ies]" or would conflict with "other duties imposed by law." Similarly, § 808.056(a)(1) permits investment in listed companies if the Systems determine that divesting will cause them to "suffer a loss in the hypothetical value of all assets under management." Finally, under § 808.056(a)(2), the Systems are exempted from compliance if the relevant portfolios utilize "a benchmark-aware strategy," that "would be subject to an aggregate expected deviation from its benchmark as a result of having to divest."

With those exceptions in mind, we turn to Abdullah's allegations here. We conclude that his alleged injury is—at most—speculative; he has wholly failed to allege that any risk of economic harm is "*certainly* impending." *See Clapper*, 568 U.S. at 409 (emphasis in original) (quotation omitted). Abdullah's future benefits do *not* hinge on market performance; at retirement, he will receive payments from two separate defined-benefit plans. As the Supreme Court has observed, defined-benefit plans—by their very nature—do not fluctuate based on the value of the overall fund. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618, 207 L. Ed. 2d 85 (2020) (observing that payments under such plans do not fluctuate based on any "good or bad" investment or divestment decisions). The defined-benefit plans Abdullah is enrolled in are no different—as noted above, his payments are fixed, and calculation of those payments is based on entirely independent factors.

Because Abdullah cannot show how any investment or divestment decisions will affect *his* future payments, he cannot show that he has suffered an injury. *Id.* at 1619. Put plainly, because "the outcome of this suit [will] not affect [his] future benefit payments," he lacks any concrete stake in this lawsuit. *Id.*

The only way Abdullah could demonstrate he will "actually" suffer future economic harm is if he plausibly alleged that, as a result of § 808's constraints, the Systems will not be able to pay out his benefits *at all* when he reaches retirement. *See id.* at 1621. Abdullah tries his hand at this argument, urging that the Systems are underfunded, so there is a credible threat the fund will fail. But we are unconvinced—this theory is simply too speculative (and also ignores Texas's ability to obtain funds by taxes, fees, assessments, etc.).

In sum, we are unconvinced by Abdullah's argument that this injury is "certainly impending"—rather, it's a speculative view of the distant future, at best. *Prestage Farms, Inc. v. Bd. of Superiors of Noxubee Cnty.*, 205 F.3d 265, 268 (5th Cir. 2000). Accordingly, the threat of "future injury under these circumstances is too conjectural and hypothetical to provide Article III standing." *Id.*

B. Constitutional Injuries

Abdullah alternatively asserts that § 808 inflicts several constitutional injuries sufficient for Article III standing. We recognize that violations of constitutional rights may of course, in some instances, satisfy the injury-

in-fact requirement. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204, 210 L. Ed. 2d 568 (2021). But the Supreme Court has long rejected the argument that a "claim that the Constitution has been violated" is enough on its own "to confer standing." *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Rather, Abdullah must still establish a violation of his own personal rights. *See id.* at 474-75; *see also Barber v. Bryant*, 860 F.3d 345, 352-53 (5th Cir. 2017) ("The Establishment Clause is no exception to the requirement of standing," and a plaintiff still "must allege a personal violation of rights.").

Abdullah has failed to allege facts demonstrating that § 808 causes *him* an injury by violating his own personal Fourteenth or First Amendment rights. As to the former, in order to assert a due process claim, Abdullah must allege that he will suffer an injury to a vested property interest. *See Bryan v. City of Madison*, 213 F.3d 267, 274-75 (5th Cir. 2000); *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). He certainly has a property interest in his future payments from the Systems. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999); *see also Thole*, 140 S. Ct. at 1620. However, for the reasons discussed above, Abdullah has failed to plead that § 808 poses any credible threat to those payments. Therefore, his due process claim does not provide an independent basis for standing.

As to the latter—the First Amendment claims—Abdullah does not allege that § 808 infringes on *his*

ability to speak. Nor does he allege that § 808 infringes on *his* own religious beliefs. He cannot assert arguments based only on other's rights (such as the companies that are on the divestment list). *See Lujan*, 504 U.S. at 563 ("[T]he party seeking review" must "be himself among the injured." (quotation omitted)). Abdullah "must assert *his own legal rights and interests*, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge*, 454 U.S. at 474 (emphasis added) (quotation omitted). He has failed to do so here.

In sum, we conclude Abdullah's constitutional claims do not establish injury in fact as required for Article III standing.[4]

IV. Conclusion

For the reasons discussed above, we AFFIRM the district court's dismissal of Abdullah's claims.

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4. Defendants also urge that sovereign immunity bars Abdullah's claims. Because we conclude Abdullah lacks standing, we need not reach that issue. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) (recognizing that while "jurisdictional questions ordinarily must precede merits determinations[,] . . . there is no mandatory sequencing of jurisdictional issues" (internal quotation marks and citation omitted)).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED MARCH 25, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:20-CV-1245-RP

HASEEB ABDULLAH,

Plaintiff,

v.

KEN PAXTON and GLENN HEGAR,

Defendants.

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Dustin Howell concerning Defendants Ken Paxton and Glenn Hegar's ("Defendants") Motion to Dismiss, (Dkt. 26). (R. & R., Dkt. 32). In his report and recommendation, Judge Howell recommends that the Court grant the motion. (*Id.* at 20). Plaintiff Haseeb Abdullah ("Abdullah") timely filed objections to the report and recommendation. (Objs., Dkt. 33).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations

within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because Abdullah timely objected to each portion of the report and recommendation, the Court reviews the report and recommendation *de novo*.

Having done so, the Court overrules Abdullah's objections as to the report and recommendation's finding that Abdullah failed to demonstrate an injury-in-fact sufficient to establish standing. (Dkt. 32, at 7–19). As this finding alone must result in dismissal of Abdullah's claims, the Court clarifies that this holding does not reach the report and recommendation's discussion of sovereign immunity. (*See id.* at 4–7).

Accordingly, **IT IS ORDERED** that the report and recommendation of Magistrate Judge Howell, (Dkt. 32), is **ADOPTED** subject to the clarification provided above by this Court.

Defendants Motion to Dismiss, (Dkt. 26), is **GRANTED** insofar as the Court finds that Abdullah has failed to establish standing.

SIGNED on March 25, 2022.

/s/
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, DATED NOVEMBER 8, 2021

FOR THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

Case No. 1:20-CV-1245-RP

HASEEB ABDULLAH,

Plaintiff

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND GLEN HEGAR, IN HIS OFFICIAL CAPACITY AS COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS AND DIRECTOR OF THE TEXAS TREASURY SAFEKEEPING TRUST COMPANY,

Defendants

November 8, 2021, Decided;
November 8, 2021, Filed

Appendix C

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN UNITED STATES DISTRICT JUDGE

Before the Court are State Defendants' Amended Motion to Dismiss, Dkt. 26; Plaintiff Haseeb Abdullah's Amended Response, Dkt. 27; and State Defendants' Reply, Dkt. 28. The District Court referred the Motion to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

I. BACKGROUND

This is a Declaratory Judgment Act[1] case. Plaintiff Haseeb Abdullah alleges violations of his constitutional rights. Abdullah is a beneficiary of the State of Texas Employee Retirement System ("ERS"). ERS manages benefits for State of Texas employees and retirees, including the ERS Retirement Trust Fund, which is a defined benefit plan providing eligible retirees with a fixed standard annuity payment calculated via a formula that is independent of the overall value of the ERS trust

1. The Declaratory Judgment Act, which authorizes a federal court to "declare the rights and other legal relations of any interested party seeking such declaration," is merely a procedural device and does not create any substantive rights or causes of action. 28 U.S.C. § 2201(a); *Harris Cty., Tex. v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015).

fund. While employed by the State of Texas, Abdullah contributed a percentage, determined by the Legislature, of his pre-tax monthly salary into his ERS retirement account. Although no longer a State employee, Abdullah has voluntarily maintained his retirement account with ERS instead of rolling it over into another retirement plan.

Chapter 808 of the Texas Government Code, enacted by House Bill 89 in 2017, requires ERS to divest fund assets from companies that boycott Israel as long as such divestment can be accomplished without harming the value of fund. Plaintiff brought this lawsuit against the State Defendants alleging the divestment requirements of Chapter 808 violate his rights under the United States Constitution. He asks this Court to declare Chapter 808 of the Texas Government Code unconstitutional.

Abdullah filed his Original Complaint against Ken Paxton, Attorney General for the State of Texas; Glenn Hegar, Comptroller of Public Accounts for the State of Texas and Director of the Texas Treasury Safekeeping Trust Company; Porter Wilson, the Executive Director of ERS; and Amy Bishop, in her official capacity as Executive Director of the County & District Retirement System. Dkt. 1. Abdullah dropped his state law claims and his claims against Wilson and Bishop, filing a Rule 41(a)(2) motion dismissing them, Dkt. 19, which the Court granted. Hegar and Paxton remain parties and filed the Amended Motion to Dismiss now before the Court. They allege that Abdullah's claims should be dismissed because: (1) his claims are barred by sovereign immunity; (2) he lacks standing to bring any claim asserted in this lawsuit; and

(3) he fails to state a claim for which relief can be granted. Dkt. 26, at 2.

II. LEGAL STANDARDS

Defendants move to dismiss Abdullah's claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The undersigned finds this case is properly dismissed for lack of subject matter jurisdiction, so does not address the parties' Rule 12(b)(6) arguments.

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). A federal court properly dismisses a case for lack of subject-matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of

disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

III. DISCUSSION

A. Sovereign Immunity of the Comptroller

Defendants first argue that Abdullah's claims against Comptroller Hegar are barred by sovereign immunity. Defendants assert that state sovereign immunity precludes suits against state officials in their official capacities, *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019), cert. denied sub nom. *City of Austin, Texas v. Paxton*, 141 S. Ct. 1047, 208 L. Ed. 2d 519 (2021), and that the *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), exception allowing "suits for prospective ... relief against state officials acting in violation of federal law," does not apply. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020).

Defendants assert that in order for the *Ex parte Young* exception to apply, state officials must have some connection to the state law's enforcement to ensure that the suit is not effectively a suit against the state itself. *Id.*, at 400-01; *see also City of Austin v. Paxton*, 943 F.3d at 998 (holding that when "conducting [the] *Ex parte Young* analysis, [the court] first consider[s] whether the plaintiff has named the proper defendant or defendants. Where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, [the] *Young* analysis ends."). Defendants argue that it is not enough that the official have a "'general duty

to see that the laws of the state are implemented.'" Dkt. 26 at 5 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). If the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent. *Id.* And, a mere connection to a law's enforcement is not sufficient—the state officials must have taken some step to enforce the law. *Id.*

Defendants further maintain that Chapter 808 limits Hegar's duties to: (1) preparing and maintaining a list of companies that boycott Israel, § 808.051(a); (2) providing that list to the state governmental entities, *id.*; (3) updating the list, § 808.051(b); (4) filing the list with the legislature and the attorney general, § 808.051(c); and (5) posting the list on a publicly available website, *id.* Thus, they argue, while Hegar may be tasked with implementing certain provisions of Chapter 808, he is not charged with enforcing it. Additionally, Chapter 808 specifically includes an enforcement provision, which provides that "[t]he attorney general may bring any action necessary to enforce this chapter." Tex. Gov't Code § 808.102. Because, Defendants argue, the Comptroller does not take affirmative action to enforce Chapter 808, the *Ex parte Young* exception to sovereign immunity does not apply. Dkt. 26, at 6.

Abdullah responds that he meets the *Ex parte Young* requirements as his suit alleges a violation of federal law by a state official, and requests prospective injunctive relief. He asserts that Defendants overstate the law and that there need be "only a scintilla of enforcement by the relevant state official for enforcement to apply." *Langan v. Abbott*, 518 F. Supp. 3d 948, 953 (W.D. Tex. 2021). Abdullah

argues that Chapter 808 delegates significant authority to the Comptroller. Tex. Gov't. Code § 808.051. He argues that Chapter 808 tasks the Comptroller with the creation, maintenance, and publication of the list of companies that boycott Israel, which triggers the investment/divestment decisions forming the subject of this suit. Additionally, under Section 808.053(c), if a listed "company ceases boycotting Israel" the Comptroller is tasked by the statute with removing the company from the list. Abdullah asserts that since removing a company from that list lifts any investment restrictions with it, this action qualifies as enforcing and maintaining the provisions of Section 808. *Id.* § 808.053(c).

Abdullah further points out that Section 808.056(c) provides that if a state governmental entity intends to cease divestment from a listed company, it must first "provide a written report to the comptroller ... setting forth the reason and justification, supported by clear and convincing evidence." *Id.*; Dkt. 1. Abdullah argues that since the Comptroller is tasked with creating and promulgating the list of companies that should be divested from on the grounds that they engage in anti-Israel activity, removing the companies if they cease such participation, and assessing whether an entity should cease divestment from a company on the list, these acts qualify as more than a "scintilla of enforcement" of Section 808, and *Ex parte Young* applies.

The undersigned finds Abdullah's argument unconvincing. The Texas Attorney General is specifically named as the enforcer of Chapter 808 in the statute. As

stated in *City of Austin v. Paxton*, 943 F.3d at 998, "where a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends." *See Morris*, 739 F.3d at 745-46 (holding an inmate could not sue the Governor for the enactment of a health services fee when the statute in issue specifically tasked the TDCJ as responsible for its enforcement). Moreover, enjoining the Comptroller from its statutory tasks would not afford Abdullah the relief he seeks, which is to "restore the relevant fiduciaries' obligations to administer the funds in a way that expressly prioritizes maximizing financial outcomes, not political preferences." Dkt. 27, at 14-15; *see Mi Familia Vota v. Abbott*, 977 F.3d 461, 468 (5th Cir. 2020). Therefore *Ex parte Young* does not apply and Hegar is entitled to sovereign immunity.

B. Standing

Defendants next move to dismiss asserting that Abdullah lacks standing to bring his claims because he cannot establish the requisite injury for each claim.

Jurisdiction is "a threshold issue that must be resolved before any federal court reaches the merits of the case before it." *Perez v. U.S.*, 312 F.3d 191, 194 (5th Cir. 2002); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Article III standing involves three primary considerations: (1) the plaintiff must demonstrate that he has suffered an injury that is both concrete and particularized and actual or imminent (injury in fact); (2) that injury must be fairly

traceable to the challenged conduct (causation); and (3) the injury must be capable of being redressed by a favorable decision (redressability). *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC) Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *see also Lewis v. Casey*, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (explaining that standing must be satisfied as to each particular injury). All three elements are "an indispensable part of the plaintiff's case," and the party seeking to invoke federal jurisdiction bears the burden to establish them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

An injury is "concrete" if it is "real, and not abstract." *TransUnion LLC v. Ramirez*, --- U.S. ----, 141 S. Ct. 2190, 2204, 210 L. Ed. 2d 568 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016)). Certain harms readily qualify as concrete injuries under Article III, including traditional tangible harms such as physical or monetary injury. *Id.* But a harm need not be tangible to be concrete; various intangible harms can meet this requirement, including violations of constitutional rights, such as freedom of speech or the free exercise of religion. *TransUnion*, 141 S. Ct. at 2204. A harm is particularized if the plaintiff has *personally* suffered the harm. *Lujan*, 504 U.S. at 560 n.1. Plaintiffs must demonstrate that the injuries alleged are "more than a generalized grievance." *See Valley Forge Christian Coll. v. Ams United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Finally, a harm is actual or imminent if the harm has happened or is sufficiently threatening, not merely if it may occur at some future time. *Lujan*, 504 U.S. at 564.

Appendix C

Abdullah brings the following constitutional claims: (1) violation of his First Amendment right to free speech; (2) violation of the Establishment Clause; (3) violation of the Due Process clauses of the Fifth[2] and Fourteenth Amendments; and (4) breach of the dormant Commerce Clause.

First, Defendants argue that Abdullah has failed to allege any injury to his ERS benefits upon which to base standing. Dkt. 26, at 8. Abdullah responds that he has standing to bring claims predicated on the impact that Chapter 808 has on the administration of his pension benefits. Dkt. 27, at 7.

Defendants make several arguments to support their claim that Abdullah has not suffered a financial injury from Chapter 808. First, they point out that Abdullah is entitled to the receipt of an annuity from the State. An annuity affords a beneficiary a fixed amount of retirement based upon a formula calculated by multiplying his average salary by years of service plus a statutory multiplier. Unlike a 401(k) or other market-based account, this number is unaffected by changes in the market. Second, Defendants note that Abdullah chose to leave his funds in ERS after his separation from the State, and that choice is optional. Abdullah could have withdrawn his funds from ERS and rolled them over into a qualifying

2. The due process component of the Fifth Amendment applies only to federal actors. As there are no federal actors involved in this suit, the undersigned analyzes Abdullah's claims under the Fourteenth Amendment only. *See Blackburn v. City of Marshall*, 42 F.3d 925, 930 n. 3 (5th Cir. 1995).

account of his choosing, that does not have the divestment requirements of Chapter 808. Third, Defendants argue that Abdullah's claim that Chapter 808 "operate[s] to effectuate divestment decisions that go against sound financial decision-making and the advice of financial experts" is not true. Chapter 808 explicitly provides that:

> (a) A state governmental entity may cease divesting from one or more listed companies only if clear and convincing evidence shows that:
>
> (1) the state governmental entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed companies under this chapter; or
>
> (2) an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed companies under this chapter.
>
> (b) A state governmental entity may cease divesting from a listed company as provided by this section only to the extent necessary to ensure that the state governmental entity

> does not suffer a loss in value or deviate from its benchmark as described by Subsection (a).

Tex. Govt. Code § 808.056. Defendants maintain that the plain language of Chapter 808 provides that protecting the overall value of the pension fund takes priority over divestment pursuant to the statute. Defendants argue that Abdullah has not and cannot show that prior or future divestment as regulated by the statute has or will cause him financial harm. The undersigned agrees.

Abdullah responds that he need not show a tangible financial loss and that he does not premise his claims on past financial harm. Instead, he argues "his injury is ongoing and coterminous with the existence and application of Section 808." Dkt. 27, at 8. He asserts that he need not set out a dollar amount to establish an injury in fact, because he can establish a probability of future harm. *Id.* at 9 (citing *New Orleans ILA Pensioners Ass'n v. Bd. Of Trs. of New Orleans Empr's Int'l Longshoremen's Ass'n AFL-CIO Pension Fund*, No. 07-6349, 2008 U.S. Dist. LEXIS 5343, 2008 WL 215654, at *3 (E.D. La. Jan. 24, 2008); *Planned Parenthood Gulf Coast, Inc., v. Kliebert*, 141 F. Supp. 3d 604, 631 (M.D. La. 2015) aff'd sub nom. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2016), opinion withdrawn and superseded, 862 F.3d 445 (5th Cir. 2017), and aff'd sub nom. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017); *Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001); *Prestage Farms, Inc. v. Bd. of Supervisors of Noxubee Cnty., Miss.*, 205 F.3d 265, 268 (5th Cir. 2000)).

Abdullah argues that his standing derives from his status as an individual whose financial interests face a credible threat of injury.

The undersigned finds that Abdullah has failed to establish a credible threat of injury, and the cases he cites do not support his argument. In *New Orleans v. ILA Pensioners*, the court did not hold that a probability of *any* future harm in the context of a defined benefits plan is sufficient to confer standing. Instead, the court found that "a plaintiff might well be able to establish injury in fact by including well-pleaded allegations that imprudent or disloyal conduct created an appreciable risk that a fund will be unable to satisfy existing liabilities." *ILA Pensioners*, 2008 U.S. Dist. LEXIS 5343, 2008 WL 215654, at *4. This is based upon the prior statement that, "participants do not have standing to sue on behalf of [their] [p]lan for losses caused by fiduciary breach, unless the participants can establish that the remaining pool of assets will be inadequate to pay for the plan's outstanding liabilities." 2008 U.S. Dist. LEXIS 5343, [WL], at *3. In this case, Abdullah has not argued that Chapter 808 puts the entire ERS in jeopardy (or even his annuity in jeopardy), and thus this case is not persuasive.

Similarly, *Kliebert* is not on point. 141 F. Supp. 3d at 624-25. In *Kliebert*, Planned Parenthood and Medicaid recipients brought a Section 1983 action seeking a temporary restraining order and preliminary injunction preventing the Secretary of Louisiana Department of Health and Hospitals from terminating their Medicaid provider agreements, claiming a future impediment to

services for Medicaid recipients and planned parenthood. The court found standing existed in that case because "an agency's prospective, not yet consummated, action will be found ripe for review if 'the scope of the controversy has been reduced to more manageable proportions ... by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.'" *Id.* (citing *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)). Kleibert had threatened to terminate the agreements on prior occasions, and the court had found that the termination would harm the Medicaid recipients and Planned Parenthood. The court found that a "future injury" would establish standing if either "the injury is certainly impending" or "there is substantial risk that the harm will occur." *Kliebert*, 141 F. Supp. 3d at 624 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)). In this case, Abdullah has not established a substantial risk of harm to him by the continuing application of Chapter 808 as he has not shown that his future benefits will be affected, and he has certainly not shown a harm that is immediately impending.

Abdullah's other cited cases similarly fail to support his claims. He cites *Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001), for the proposition that a threatened injury satisfies the injury-in-fact requirement so long as that threat is real, rather than speculative. However, as in *Comsat*, where the court found standing was not present because Comsat could not link its losses to the regulation in issue, Abdullah has failed to articulate

more than a speculative financial injury caused by Section 808. He cites *Prestage Farms*, 205 F.3d at 268, for the proposition that "the risk of injury may be founded on a likely and credible chain of events"; however, in that case the court found no standing existed because the party failed to show the challenged ordinance had a "concrete effect" on its business endeavors. The court stated, "[w]hile the risk of injury may be founded on a likely and credible chain of events, the injury must be 'certainly impending.' Federal courts consistently deny standing when claimed anticipated injury has not been shown to be more than uncertain potentiality." *Id.* In this case, any alleged injury is not "impending" any more than it has been at all times since the statute went into effect and qualifies as a "uncertain potentiality." Abdullah has not identified a "credible chain of events" resulting in a potential loss to him. A threatened future injury must be "real and immediate; not conjectural or hypothetical" in order to demonstrate Article III standing. *Lujan*, 504 U.S. at 559-61. Abdullah's claim of a future injury to his benefits, which are a sum certain, is not concrete—it is speculative and hypothetical.

Defendants further assert that Abdullah lacks standing because any harm he can show is not particularized to him. Dkt. 26, at 11. They argue that Abdullah's claims are no more than generalized grievances about state policy. *Id.* The undersigned agrees. Abdullah asserts that he grounds his claim on his property interest in his pension fund. Dkt. 27, at 10. However, the Supreme Court has held that a participant in a defined-benefit pension plan has an interest in his fixed future payments only, not

the assets of the pension fund. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999). Section 808.056 specifically provides that divestment should cease if it will cause a loss in the value of the assets under ERS management, thereby cancelling any impending harm caused by the statute. Abdullah is entitled to a set annuity and not a fluctuating amount based on the assets present in the ERS, and unless the assets in general are insufficient to support his annuity, he suffers no harm. Abdullah fails to establish an injury particularized to him.

As for Abdullah's First Amendment free speech claim, Defendants argue that divestment pursuant to Chapter 808 does not harm Abdullah's First Amendment rights because he has not pled a particularized injury.[3] Defendants point out that Abdullah does not state his connection to, belief in, or participation in the BDS[4] movement. Dkt. 26, at 11. He has not pled that his individual speech has been chilled or his ability to boycott has been impacted by Chapter 808. Dkt. 26, at 12.

An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S.at 560. That is, the plaintiff must have "a direct stake in the

3. An intangible interest, such as that of free speech, satisfies the concreteness requirement of standing. *See Spokeo*, 136 S. Ct. at 1549.

4. The BDS movement refers to the movement to boycott, divest, and sanction Israel-related businesses, in response to Israel's occupation of Palestinian territory and treatment of Palestinian citizens and refugees.

outcome." *See Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). To satisfy this injury-in-fact test, Abdullah must allege more than an injury to someone's concrete, cognizable interest; he must "be [himself] among the injured." *Id.* at 734-35; *see McMahon v. Fenves*, 946 F.3d 266, 270 (5th Cir. 2020). Abdullah has failed to allege any injury to himself or his ability to express himself. He is free to express his opinions about BDS without harm to him.

Moreover, subjective ideological interests are not enough to confer standing. *See Sierra Club*, 405 U.S. at 729-35. The United States' system of governance assigns the vindication of value preferences to the democratic political process, not the judicial process, *see Lujan*, 504 U.S. at 576, because limiting the right to sue to those most immediately affected "who have a direct stake in the outcome" prevents judicial review "at the behest of organizations who seek to do no more than vindicate their own value preferences," *Sierra Club*, 405 U.S. at 740.

Abdullah argues that Chapter 808 constitutes impermissible viewpoint discrimination because it penalizes a form of peaceful protest asserting the rights of the Palestinian people, while not taking similar action against other methods or views of peaceful protest. Dkt. 27, at 11. He asserts that he has "overbreadth standing" and cites cases in support. Dkt. 27, at 12; *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005) (finding that despite not asserting his First Amendment rights were violated, an attorney satisfied the requirements for overbreadth standing because he

suffered a financial injury-in-fact and could be expected to pursue the First Amendment claim vigorously); *Clark v. City of Lakewood*, 259 F.3d 996, 1010-11 (9th Cir. 2001) (holding that the owner of an adult entertainment establishment had overbreadth standing to pursue a First Amendment challenge against provisions of an ordinance that required the employees of such establishments to obtain a license because the licensing scheme—although not directly applicable to the owner—threatened his business' viability). The undersigned finds that the overbreadth doctrine is inapplicable, as Abdullah, unlike the litigants in the cases he cites, cannot establish he has suffered a financial harm. Therefore, Abdullah lacks standing to assert his First Amendment free speech claim against Defendants.

Similarly, Defendants argue that Abdullah has suffered no particularized injury with regard to his Establishment Clause claim because he has not been personally harmed by the divestment. Dkt. 26, at 12. Defendants assert that in an Establishment Clause case, plaintiffs must "identify [a] personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485-86. Abdullah responds that his harm "stems not from the mere existence or observation of Section 808, but from the direct connection between that legislation and his existing financial interests." Dkt. 27, at 13. As stated above, however, Abdullah has failed to plead an injury to his financial interests as a consequence of Section 808. Additionally, his overbreadth argument, which he applies

in the context of both his First Amendment free speech and Establish Clause claims, fails for the reasons set forth above. Moreover, Adbullah alleges only an economic injury as the basis for his Establishment Clause claim, and he has failed to plead the requirements to establish standing for third party claims, i.e., that he has a close relationship with a person who possesses the right, and there is a barrier to that person's ability to protect his or her own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004). The undersigned finds that Abdullah does not have standing to bring an Establishment Clause claim.

Abdullah also alleges due process violations. Defendants assert that Abdullah has failed to identify a liberty or property as required to make out a due process claim. Dkt. 26, at 13-14. Defendants maintain that Abdullah has no property interest in how ERS manages retirement funds or in any particular investment decision, and thus does not have a right to due process regarding those decisions. *Id.* Abdullah again relies on his interest in his pension benefits and asserts he does not claim any harm from any particular investment decision. Dkt. 27, at 13.

Under the Constitution, a property interest cannot be taken without due process. To prevail on this type of due process claim, the plaintiffs must demonstrate: (1) that the claimed interest is a property interest protected by the Fourteenth Amendment; and (2) that the alleged loss of that interest amounts to a deprivation of due process of law. *See Blackburn*, 42 F.3d at 935. Property

interests are not created by the Constitution but are "defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Abdullah does not point to a statute providing him with a property right in the management of the ERS. Additionally, he has failed to plead a loss of any benefits based upon management of the ERS, nor can he, as his benefits are fixed, and the legislature has provided that if Abdullah's fixed benefits are in jeopardy, any divestiture negatively effecting those benefits shall cease. Abdullah does not have standing to bring a due process claim, as he has not established the necessary injury.

Abdullah also pleads a claim under the Commerce Clause. Under the Commerce Clause, the federal government has the power to "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. Under the dormant Commerce Clause, a judicial creation, "the states lack the power to impede this interstate commerce with their own regulations." *Dickerson v. Bailey*, 336 F.3d 388, 395 (5th Cir. 2003). The dormant Commerce Clause serves as "a substantive restriction on permissible state regulation of interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 447, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991). The Fifth Circuit has held that "the only parties that have standing to bring a dormant Commerce Clause challenge are those who both engage in interstate commerce and can show that the ordinance at issue has

adversely affected their commerce. *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 476 (5th Cir. 2013). Abdullah has pled neither of these requirements, and he has failed to plead Section 808's negative effect on his annuity. Accordingly, he lacks standing to bring a dormant Commerce Clause claim.

Defendants also argue that Abdullah has failed to adequately plead redressability. To establish redressability, a plaintiff must show that it is likely, as opposed to merely speculative, that the alleged injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61.

Abdullah asserts that his "injury arises solely from the promulgation of unconstitutional and unlawful legislation that creates the real and existing possibility of harm to his financial interests. A favorable declaration by this Court could eliminate the harm and restore the relevant fiduciaries' obligations to administer the funds in a way that expressly prioritizes maximizing financial outcomes, not political preferences." Dkt. 27, at 14-15. However, a Declaratory Judgment that Section 808 is unconstitutional and enjoinment of its use would have no effect on Abdullah's financial interests or his ultimate annuity payments. Abdullah has failed to allege a harm to him that would be redressed by a finding that Section 808 violated his rights. He therefore does not have standing to bring this claim.

Courts have repeatedly held that a generalized grievance against allegedly illegal governmental conduct

does not satisfy the standing requirements of Article III. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 743, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995); *Lujan*, 504 U.S. at 573-77; *Allen v. Wright*, 468 U. S. 737, 754, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). The Court finds that Abdullah lacks the requisite standing to sue Defendants, and thus this Court lacks jurisdiction over his claims.

IV. RECOMMENDATION

Based on the foregoing, the undersigned **RECOMMENDS** that the District Court **GRANT** State Defendants' Amended Motion to Dismiss, Dkt. 26, and **DISMISS** Abdullah's claims against Hegar and Paxton for lack of jurisdiction.

IT IS FURTHER ORDERED that this case be removed from the Magistrate Court's docket and returned to the docket of the Honorable Robert Pitman.

V. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen days after the party is served with a copy of the Report shall bar that

party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except on grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

To the extent that a party has not been served by the Clerk with this Report and Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED November 8, 2021.

/s/ Dustin M. Howell
DUSTIN M. HOWELL
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — TEXAS GOVERNMENT CODE CHAPTER 808 — PROHIBITION ON INVESTMENT IN COMPANIES THAT BOYCOTT ISRAEL

GOVERNMENT CODE

TITLE 8. PUBLIC RETIREMENT SYSTEMS

SUBTITLE A. PROVISIONS GENERALLY APPLICABLE TO PUBLIC RETIREMENT SYSTEMS

CHAPTER 808. PROHIBITION ON INVESTMENT IN COMPANIES THAT BOYCOTT ISRAEL

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 808.001. DEFINITIONS. In this chapter:

(1) "Boycott Israel" means 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.

(2) "Company" means a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit.

(3) "Direct holdings" means, with respect to a company, all securities of that company held directly by a state governmental entity in an account or fund in which a state governmental entity owns all shares or interests.

(4) "Indirect holdings" means, with respect to a company, all securities of that company held in an account or fund, such as a mutual fund, managed by one or more persons not employed by a state governmental entity, in which the state governmental entity owns shares or interests together with other investors not subject to the provisions of this chapter. The term does not include money invested under a plan described by Section 401(k) or 457 of the Internal Revenue Code of 1986.

(5) "Listed company" means a company listed by the comptroller under Section 808.051.

(6) "State governmental entity" means:

(A) the Employees Retirement System of Texas, including a retirement system administered by that system;

(B) the Teacher Retirement System of Texas;

(C) the Texas Municipal Retirement System;

(D) the Texas County and District Retirement System;

(E) the Texas Emergency Services Retirement System; and

(F) the permanent school fund.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.002. OTHER LEGAL OBLIGATIONS. With respect to actions taken in compliance with this chapter, including all good faith determinations regarding companies as required by this chapter, a state governmental entity and the comptroller are exempt from any conflicting statutory or common law obligations, including any obligations with respect to making investments, divesting from any investment, preparing or maintaining any list of companies, or choosing asset managers, investment funds, or investments for the state governmental entity's securities portfolios.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.003. INDEMNIFICATION OF STATE GOVERNMENTAL ENTITIES, EMPLOYEES, AND OTHERS. In a cause of action based on an action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with this chapter, the state shall, without regard to whether the person performed services for compensation, indemnify and hold harmless for actual damages, court costs, and attorney's fees adjudged against, and defend:

(1) an employee, a member of the governing body, or any other officer of a state governmental entity;

(2) a contractor of a state governmental entity;

(3) a former employee, a former member of the governing body, or any other former officer of a state governmental entity who was an employee, member of the governing body, or other officer when the act or omission on which the damages are based occurred;

(4) a former contractor of a state governmental entity who was a contractor when the act or omission on which the damages are based occurred; and

(5) a state governmental entity.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.004. NO PRIVATE CAUSE OF ACTION. (a) A person, including a member, retiree, or beneficiary of a retirement system to which this chapter applies, an association, a research firm, a company, or any other person may not sue or pursue a private cause of action against the state, a state governmental entity, a current or former employee, a member of the governing body, or any other officer of a state governmental entity, or a contractor of a state governmental entity, for any claim or cause of action, including breach of fiduciary duty, or for violation of any constitutional, statutory, or regulatory requirement in connection with any action, inaction, decision, divestment, investment, company communication, report, or other determination made or taken in connection with this chapter.

(b) A person who files suit against the state, a state governmental entity, an employee, a member of the governing body, or any other officer of a state governmental entity, or a contractor of a state governmental entity, is liable for paying the costs and attorney's fees of a person sued in violation of this section.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.005. INAPPLICABILITY OF REQUIREMENTS INCONSISTENT WITH FIDUCIARY RESPONSIBILITIES AND RELATED DUTIES. A state governmental entity is not subject to a requirement of this chapter if the state governmental entity determines that the requirement would be inconsistent with its fiduciary responsibility with respect to the investment of entity assets or other duties imposed by law relating to the investment of entity assets, including the duty of care established under Section 67, Article XVI, Texas Constitution.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.006. RELIANCE ON COMPANY RESPONSE. The comptroller and a state governmental entity may rely on a company's response to a notice or communication made under this chapter without conducting any further investigation, research, or inquiry.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Appendix D

SUBCHAPTER B. DUTIES REGARDING INVESTMENTS

Sec. 808.051. LISTED COMPANIES. (a) The comptroller shall prepare and maintain, and provide to each state governmental entity, a list of all companies that boycott Israel. In maintaining the list, the comptroller may review and rely, as appropriate in the comptroller's judgment, on publicly available information regarding companies, including information provided by the state, nonprofit organizations, research firms, international organizations, and governmental entities.

(b) The comptroller shall update the list annually or more often as the comptroller considers necessary, but not more often than quarterly, based on information from, among other sources, those listed in Subsection (a).

(c) Not later than the 30th day after the date the list of companies that boycott Israel is first provided or updated, the comptroller shall file the list with the presiding officer of each house of the legislature and the attorney general and post the list on a publicly available website.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.052. IDENTIFICATION OF INVESTMENT IN LISTED COMPANIES. Not later than the 30th day after the date a state governmental entity receives the list provided under Section 808.051, the state governmental entity shall notify the comptroller of the listed companies

in which the state governmental entity owns direct holdings or indirect holdings.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.053. ACTIONS RELATING TO LISTED COMPANY. (a) For each listed company identified under Section 808.052, the state governmental entity shall send a written notice:

(1) informing the company of its status as a listed company;

(2) warning the company that it may become subject to divestment by state governmental entities after the expiration of the period described by Subsection (b); and

(3) offering the company the opportunity to clarify its Israel-related activities.

(b) Not later than the 90th day after the date the company receives notice under Subsection (a), the company must cease boycotting Israel in order to avoid qualifying for divestment by state governmental entities.

(c) If, during the time provided by Subsection (b), the company ceases boycotting Israel, the comptroller shall remove the company from the list maintained under Section 808.051 and this chapter will no longer apply to the company unless it resumes boycotting Israel.

(d) If, after the time provided by Subsection (b) expires, the company continues to boycott Israel, the state governmental entity shall sell, redeem, divest, or withdraw all publicly traded securities of the company, except securities described by Section 808.055, according to the schedule provided by Section 808.054.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.054. DIVESTMENT OF ASSETS. (a) A state governmental entity required to sell, redeem, divest, or withdraw all publicly traded securities of a listed company shall comply with the following schedule:

(1) at least 50 percent of those assets must be removed from the state governmental entity's assets under management not later than the 180th day after the date the company receives notice under Section 808.053 or Subsection (b) unless the state governmental entity determines, based on a good faith exercise of its fiduciary discretion and subject to Subdivision (2), that a later date is more prudent; and

(2) 100 percent of those assets must be removed from the state governmental entity's assets under management not later than the 360th day after the date the company receives notice under Section 808.053 or Subsection (b).

(b) If a company that ceased boycotting Israel after receiving notice under Section 808.053 resumes its boycott, the state governmental entity shall send a written notice

to the company informing it that the state governmental entity will sell, redeem, divest, or withdraw all publicly traded securities of the company according to the schedule in Subsection (a).

(c) Except as provided by Subsection (a), a state governmental entity may delay the schedule for divestment under that subsection only to the extent that the state governmental entity determines, in the state governmental entity's good faith judgment, and consistent with the entity's fiduciary duty, that divestment from listed companies will likely result in a loss in value or a benchmark deviation described by Section 808.056(a). If a state governmental entity delays the schedule for divestment, the state governmental entity shall submit a report to the presiding officer of each house of the legislature and the attorney general stating the reasons and justification for the state governmental entity's delay in divestment from listed companies. The report must include documentation supporting its determination that the divestment would result in a loss in value or a benchmark deviation described by Section 808.056(a), including objective numerical estimates. The state governmental entity shall update the report every six months.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.055. INVESTMENTS EXEMPTED FROM DIVESTMENT. A state governmental entity is not required to divest from any indirect holdings in actively

or passively managed investment funds or private equity funds. The state governmental entity shall submit letters to the managers of each investment fund containing listed companies requesting that they remove those companies from the fund or create a similar actively or passively managed fund with indirect holdings devoid of listed companies. If a manager creates a similar fund with substantially the same management fees and same level of investment risk and anticipated return, the state governmental entity may replace all applicable investments with investments in the similar fund in a time frame consistent with prudent fiduciary standards but not later than the 450th day after the date the fund is created.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.056. AUTHORIZED INVESTMENT IN LISTED COMPANIES. (a) A state governmental entity may cease divesting from one or more listed companies only if clear and convincing evidence shows that:

(1) the state governmental entity has suffered or will suffer a loss in the hypothetical value of all assets under management by the state governmental entity as a result of having to divest from listed companies under this chapter; or

(2) an individual portfolio that uses a benchmark-aware strategy would be subject to an aggregate expected deviation from its benchmark as a result of having to divest from listed companies under this chapter.

(b) A state governmental entity may cease divesting from a listed company as provided by this section only to the extent necessary to ensure that the state governmental entity does not suffer a loss in value or deviate from its benchmark as described by Subsection (a).

(c) Before a state governmental entity may cease divesting from a listed company under this section, the state governmental entity must provide a written report to the comptroller, the presiding officer of each house of the legislature, and the attorney general setting forth the reason and justification, supported by clear and convincing evidence, for deciding to cease divestment or to remain invested in a listed company.

(d) The state governmental entity shall update the report required by Subsection (c) semiannually, as applicable.

(e) This section does not apply to reinvestment in a company that is no longer a listed company.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.057. PROHIBITED INVESTMENTS. Except as provided by Section 808.056, a state governmental entity may not acquire securities of a listed company.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Appendix D

SUBCHAPTER C. REPORT; ENFORCEMENT

Sec. 808.101. REPORT. Not later than January 5 of each year, each state governmental entity shall file a publicly available report with the presiding officer of each house of the legislature and the attorney general that:

(1) identifies all securities sold, redeemed, divested, or withdrawn in compliance with Section 808.054;

(2) identifies all prohibited investments under Section 808.057; and

(3) summarizes any changes made under Section 808.055.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.

Sec. 808.102. ENFORCEMENT. The attorney general may bring any action necessary to enforce this chapter.

Added by Acts 2017, 85th Leg., R.S., Ch. 1 (H.B. 89), Sec. 2, eff. September 1, 2017.