No. 19-50384

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BAHIA AMAWI,

Plaintiff-Appellee,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,

Defendants-Appellants.

JOHN PLUECKER; OBINNA DENNAR; ZACHARY ABDELHADI; GEORGE HALE,

Plaintiffs-Appellees,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM; TRUSTEES OF THE KLEIN INDEPENDENT SCHOOL DISTRICT; TRUSTEES OF THE LEWISVILLE INDEPENDENT SCHOOL DISTRICT; BOARD OF REGENTS OF THE TEXAS A&M UNIVERSITY SYSTEM,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF T'RUAH AND J STREET AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief, as required by Fifth Circuit Rule 29.2. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae Signing this Brief:
T'ruah: The Rabbinic Call for Human Rights
J Street

Pursuant to Rules 26.1(a) and 29(a)(4)(A), amici curiae state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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December 3, 2019 /s/ *Jonathan L. Backer*
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INTEREST OF AMICI CURIAE

Jewish tradition reflects a strong commitment to freedom of thought and expression. T'ruah: The Rabbinic Call for Human Rights brings together rabbis and cantors from all streams of Judaism, together with members of the Jewish community, to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah represents more than 2,000 Jewish clergy across North America, along with thousands of Jewish lay people and activists. Grounded in Torah and Jewish historical experience and guided by the Universal Declaration of Human Rights, T'ruah calls upon Jews to assert Jewish values by raising their voices and taking concrete steps to protect and expand human rights in North America, Israel, and the occupied Palestinian territories. T'ruah believes that a just and secure future for Israelis and Palestinians will best be achieved by a negotiated resolution to the Israeli-Palestinian conflict that results in both peoples living peacefully side by side, each within their own sovereign states. While T'ruah does not reject out of hand the strategic, targeted use of boycott and divestment in justice campaigns, T'ruah does not affiliate with the Global Boycott, Divestment, Sanctions ("Global BDS") movement out of concern that its lack of distinction between Israel proper and the occupied Palestinian territories points to a potential rejection of Israel's right to exist, a right recognized by the United Nations and other international bodies, and because of concern about anti-Semitism among some BDS activists. At the same

time, T'ruah opposes efforts to stifle or penalize participation in the Global BDS movement, as such censorship is contrary to Jewish values and the First Amendment. T'ruah believes that the Jewish community is strengthened by vigorous debate on issues that are vital to the well-being of Israel and the worldwide Jewish community. Free speech—including the right to boycott and the right to speech with which we vehemently disagree—constitutes an essential component of democracy, a basic human right, and a fundamental value of Judaism. Jewish tradition teaches this in Talmud, where the rabbis frequently use colorful language to repudiate each other's opinions, while leaving even rejected opinions in the text for later study. T'ruah also believes that boycotts and other forms of economic pressure are a protected and legitimate form of protest, and one in which the Jewish community has participated—for example, in support of the rights of farmworkers, against German-made goods during and following the Nazi era, and against Pepsi when it abided by Arab States' boycott of Israel.

J Street organizes and mobilizes pro-Israel, pro-peace Americans who want Israel to be secure, democratic, and the national home of the Jewish people. Working in American politics and the Jewish community, J Street advocates for policies that advance shared U.S. and Israeli interests as well as Jewish and democratic values, leading to a two-state solution to the Israeli-Palestinian conflict. Strong and vibrant debate has characterized the Jewish tradition for millennia, and the same openness

should govern discourse about Israel today. Those who believe that there is one acceptable view on Israel—theirs—should not be allowed to impose constraints on what constitutes acceptable speech in the Jewish community or in the broader marketplace of ideas. J Street believes that censorship of those who question American or Israeli policy puts the intellectual integrity and future of the Jewish community at risk and threatens to further calcify opinions about the Israeli-Palestinian conflict, making more remote the realization of a just and secure future for both Israelis and Palestinians.[1]

INTRODUCTION

In 2005, a coalition of Palestinian civil-society organizations called on "people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel . . . until Israel meets its obligation to recognize the Palestinian people's inalienable right to self-determination," thus sparking the Global BDS movement. *Palestinian Civil Society Call for BDS*, BDSMovement.net (July 9, 2005), https://perma.cc/ZV73-82HZ. The Global BDS movement blurs the distinction between "Israel proper"—the territory that Israel possessed prior to the 1967 Arab-Israeli War—and Israeli settlements on the land that it conquered in that

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made any monetary contribution intended to fund this brief's preparation or submission. All parties have consented to the filing of this brief.

war and has since occupied by targeting the movement's boycotts at the entirety of the economy and people of Israel and its settlements rather than at companies that specifically help to perpetuate Israel's presence in the West Bank and the Gaza Strip. Some leaders of the Global BDS movement have trafficked in anti-Semitic ideas and rhetoric and have questioned the right of the Jewish people to self-determination. Because of those and other troubling aspects of the Global BDS movement, amici do not support or participate in its initiatives.

Despite amici's concerns about aspects of the Global BDS movement, amici recognize that consumer boycotts—even those with which amici disagree—are forms of collective action that powerfully communicate political messages. Indeed, consumer boycotts played a critical role in the founding of the United States, the dismantlement of Jim Crow, and the struggle against apartheid in South Africa. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1000 (1989) (noting that the Montgomery Bus Boycott led to *Gayle v. Browder*, 352 U.S. 903 (1956), which "effectively overruled *Plessy v. Ferguson*"); Cecile Counts, *Divestment Was Just One Weapon in the Battle Against Apartheid*, N.Y. Times (Jan. 27, 2013), https://perma.cc/PWK3-BE6Q; *Virginia Nonimportation Resolutions, 22 June 1770*, Nat'l Archives: Founders Online, https://perma.cc/ES2G-XANY (last visited Dec. 2, 2019) (calling for colonial boycott of British and European goods). Consumer

boycotts also have been used by the American Jewish community as a tool of self-defense. In the wake of Adolph Hitler's rise to power, Jewish groups organized a boycott of German goods. *Rabbi Wise Breaks Silence on Boycott; Calls It Duty of All Self-Respecting Jews*, Jewish Telegraphic Agency (Aug. 15, 1933), https://perma.cc/MD4D-33Y4 (quoting Rabbi Stephen S. Wise as saying, "As long as Germany declares the Jews to be an inferior race, poisoning and persecuting them, decent, self-respecting Jews cannot deal with Germany in any way, buy or sell or maintain any manner of commerce with Germany or travel on German Boats"). By referencing the aforementioned examples of consumer boycotts, amici in no way mean to equate those boycotts' motivations or targets to those of the Global BDS movement. The point is, rather, that those who oppose the Global BDS movement cannot censor its activities without exposing other activism with which they agree to similar suppression.

Given this history and amici's strong commitment to freedom of thought and expression, amici reject the choice of many lawmakers to express their disagreement with the Global BDS movement's positions and tactics by enacting laws that penalize companies and individuals for participating in boycotts against Israel. To date, 27 states have adopted laws designed to discourage and penalize boycotts against Israel. *Anti-Semitism: State Anti-BDS Legislation*, Jewish Virtual Library, https://perma.cc/CVB5-JH5J (last visited Nov. 21, 2019). And the U.S. Senate has

passed a bill that, if signed into law, would encourage other states to adopt similar anti-BDS legislation. Combatting BDS Act of 2019, S. 1, 116th Cong. §§ 401–08 (as passed by Senate, Feb. 5, 2019).

Amici oppose anti-BDS laws because they penalize individuals for expressing their views about the Israeli-Palestinian conflict. Instead of encouraging or even simply permitting constructive dialogue about this important issue, anti-BDS laws drive people into ideological corners, making the possibility of political progress on the conflict more remote. Congress and state legislatures are free to express their institutional opposition to the Global BDS movement through resolutions or hearings on the subject, but the First Amendment does not permit governments to use fiscal policy to pick winners and losers among those expressing their views on policy debates.

This appeal concerns Texas's anti-BDS law, known as House Bill 89 (H.B. 89), which is codified as amended at Texas Government Code Sections 808.001 to .102 and 2271.001 to .002. Appellees are individuals who participate in or support the Global BDS movement and who have either (1) lost public employment in the State of Texas because of their refusal to pledge their nonparticipation in boycotts against Israel by signing a contract with a provision to that effect required by H.B. 89 or (2) stopped participating in boycotts against Israel in order to protect their jobs. *See Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 731–35 (W.D. Tex.

2019). They sued the Attorney General of Texas, Ken Paxton, along with Appellees' past, current, or would-be employers whose contracts included the anti-boycott provision. *Id.* at 730.[2]

Relying on longstanding Supreme Court precedent establishing that consumer boycotts are entitled to First Amendment protection, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982), the district court held that Appellees are likely to establish that H.B. 89 unconstitutionally restricts their freedom of speech, *Amawi*, 373 F. Supp. 3d at 751. For that reason, the district court preliminarily enjoined H.B. 89. *Id.* at 759. Other courts have reached the same conclusion in evaluating the constitutionality of other states' anti-BDS laws. *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1040 (D. Ariz. 2018), *appeal docketed* No. 18-16896 (9th Cir. Oct. 3, 2018); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018). *But see Arkansas Times LP v. Waldrip*, 362 F. Supp. 3d. 617, 623 (E.D. Ark. 2019), *appeal docketed* No. 19-1378 (8th Cir. Feb. 25, 2019). This Court should affirm the district court's well-reasoned opinion.

[2] Appellants include Attorney General Paxton and the Boards of Regents for the University of Houston and the Texas A&M University System (the "State Appellants") and the Trustees of the Klein and Lewisville Independent School Districts (the "School District Appellants").

ARGUMENT

I. THE FIRST AMENDMENT IS A CRUCIAL SAFEGUARD FOR MINORITY GROUPS AND VIEWPOINTS.

As the Supreme Court famously stated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That bedrock First Amendment principle applies with full force to debate over the Israeli-Palestinian conflict, which has been a source of disagreement and friction in U.S. foreign policy since even before Israel achieved independence in 1948. H.B. 89 is a brazen attempt to penalize those who engage in collective action to express their opposition to Israel's government and its policies and is, in turn, a violation of the First Amendment's protection of free expression. Even though amici do not support the Global BDS movement, historical experience and tradition teach that Jews must speak out against government censorship like H.B. 89.

In a 1790 letter to the Hebrew Congregation in Newport, Rhode Island, President George Washington wrote that "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." *From George Washington to the Hebrew Congregation in Newport, Rhode Island, 18 August 1790*, Nat'l Archives: Founders Online, https://perma.cc/XM7V-SLTX (last visited Dec. 2, 2019). That promise of freedom of religion drew many Jewish immigrants to the shores of the United States. But, for American Jews and other minorities, America

has not always lived up to that promise. During two dark chapters of American history—the First Red Scare (1917–20) and the McCarthy Era (late 1940s through 50s)—fears of Communism fueled government censorship and repression. And, as two examples show, Jews were among the victims of those epochs' injustices.

As the First Red Scare took hold, Congress enacted the Espionage Act of 1917, which, among other things, gave the Postmaster General the power to crack down on supposedly subversive publications. Pub. L. No. 65-24, tit. XII, 40 Stat. 217, 230–31. Using that authority, Postmaster General Albert S. Burleson threatened to revoke the *Jewish Daily Forward*'s second-class postage rates in response to the outlet's publication of articles expressing opposition America's involvement in World War I. Mike Wallace, *Greater Gotham: A History of New York City from 1898 to 1919*, at 991 (2017); 2 Zosa Szajkowski, *Jews, Wars, and Communism: The Impact of the 1919-20 Red Scare on American Jewish Life* 30 (1974). Louis Marshall, a prominent lawyer and one of the founders of the American Jewish Committee—a group founded in 1906 to secure civil and religious rights for Jews—successfully interceded on behalf of the *Forward* to preserve the newspaper's mail privileges, but at a heavy price. Irving Howe, *World of Our Fathers* 539–40 (NYU Press 2005) (1976); Moses Rischin, *The Early Attitude of the American Jewish Committee to Zionism (1906–1922)*, 49 Publications of the Am. Jewish Hist. Soc'y 188, 196 (1960). Abraham Cahan, the newspaper's editor, pledged to cease

publication of pacifist articles, and Marshall promised Burleson that he would act as a "private censor" and identify any *Forward* articles that "could be considered as contrary to the public interests." Letter from Louis Marshall to Postmaster General A. S. Burleson (Jan. 5, 1918), *reprinted in* 2 *Louis Marshall: Champion of Liberty* 975 (Charles Reznikoff ed., 1957). The *Forward* kept its doors open, but only by succumbing to censorship.

During the McCarthy Era, congressional committees including the infamous House Un-American Activities Committee (HUAC) and Senator Joseph McCarthy's Permanent Subcommittee on Investigations delved into individuals' private associations in an attempt to uncover supposed Communist affiliations. Fear of those investigations prompted Americans to engage in widespread private censorship and even self-censorship to avoid being branded as Communist sympathizers. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 42–46 (2006). One target of those largely unchecked investigations was a Jewish woman named Anna Rosenberg, whom Secretary of Defense George C. Marshall nominated in 1950 to be Assistant Secretary of Defense. After receiving a unanimous confirmation vote in the Senate Committee on Armed Forces, rumors began circulating that Rosenberg had associated with or been a member of the Communist Party in the 1930s. Aviva Weingarten, *Jewish Organisations' Response*

to Communism and to Senator McCarthy 112 (2008). Openly anti-Semitic supporters of Senator McCarthy—Gerald L.K. Smith, Wesley Swift, and Benjamin Freedman—lobbied Congress in an attempt to defeat Rosenberg's nomination. *Id.* at 113. Freedman obtained files from HUAC showing that someone named Anna Rosenberg belonged to a Communist literary society in the 1930s. *Id.* He also engineered unreliable testimony by a witness who claimed to have known Rosenberg when she had supposedly been active in Communist circles. *Id.* at 113–15.

Rosenberg eventually secured Senate confirmation, in part because Jewish leaders rallied to her defense. Stuart Svonkin, *Jews Against Prejudice* 121 (1997). For Jewish organizations, the attacks on Rosenberg exposed how anti-Semites could capitalize on anti-Communist hysteria to tarnish Jews' reputations. An Anti-Defamation League (ADL) publication described Rosenberg as "a latter-day Dreyfus," invoking the name of the Alsatian French military officer of Jewish descent who was convicted on trumped-up espionage charges. *Id.* at 120 (quoting 7 ADL Bulletin, Dec. 1950, at 5). And the ADL's national director, Benjamin Epstein, warned that all Jews were "targets" of the Rosenberg affair because "[t]he goal was to keep Jews out of Washington and out of public office; to label them as unreliable citizens, as second grade citizens, as traitors." *Id.* (quoting 8 ADL Bulletin, Jan. 1951, at 2).

Since the end of the McCarthy Era, First Amendment case law has matured to offer more robust protections against the types of injustices that the *Forward* and Anna Rosenberg faced. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Supreme Court struck down a law similar to the one wielded against the *Forward* that allowed the Postmaster General to detain mail from abroad deemed "communist political propaganda" and release it only upon request by the intended recipient. *Id.* at 306–07. And in *Watkins v. United States*, 354 U.S. 178 (1957), the Court overturned a criminal contempt conviction of a man who refused to divulge to HUAC the names of people who had once associated with the Communist Party, stating that the First Amendment denies Congress "a general power to expose where the predominant result can only be an invasion of the private rights of individuals." *Id.* at 200.

As Jewish organizations, amici are mindful that carving out exceptions to the First Amendment's protections imperils the Jewish community. "If American Jews have attained an unprecedented measure of security and success in America, one major reason is the majestic sweep of the Constitution and the Bill of Rights." Albert Vorspan & David Saperstein, *Tough Choices: Jewish Perspectives on Social Justice* 40 (1992); *see also* Aryeh Neier, *Defending My Enemy* 7 (1979) ("It is dangerous to let the Nazis have their say. But it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other

and to the world for succor. . . . When the time comes for Jews to speak, to publish, and to march in behalf of their own safety, [states] and the United States must not be allowed to interfere."). Anti-BDS laws like H.B. 89 are troubling echoes of the past and cannot be squared with the First Amendment and the jurisprudence that has emerged construing its protections.

II. H.B. 89 AND ITS ANALOGUES VIOLATE THE FIRST AMENDMENT.

Under H.B. 89, a contract for "goods or services" with any "governmental entity" in Texas must contain a written verification that the contractor (1) "does not boycott Israel" and (2) "will not boycott Israel during the term of the contract." Tex. Gov. Code § 2271.002(b).[3] To "boycott Israel" is defined as:

> refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory.

[3] After the district court preliminarily enjoined H.B 89, the Texas legislature amended the statute to exclude sole proprietorships. *See* Acts 2019, 86th Leg., ch. 30 (H.B. 793), § 1 (May 7, 2019) (codified as amended at Tex. Gov. Code § 2271.001). Appellants contend that this amendment to H.B. 89 mooted the case. Sch. Dist. Appellants' Br. 27–30; State Appellants' Br. 12–23. Amici take no position on whether the case is moot. But whether the statute applies to sole proprietorships does not affect its constitutionality under the First Amendment. *See Citizens United v. FEC*, 558 U.S. 310, 343 (2010) ("The [Supreme] Court has . . . rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978))).

Id. § 808.001(1). The statute clarifies that "action[s] made for ordinary business purposes" do not constitute a boycott against Israel. *Id.*

A. Consumer Boycotts Are Protected by the First Amendment.

The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I. First Amendment safeguards "do[] not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), but also protect conduct "inten[ded] to convey a particularized message" that is likely to "be understood by those who view[] it," *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). Appellants argue that the district court erred in holding that H.B. 89 violates the First Amendment because Appellees' individual purchasing decisions are "not inherently expressive." State Appellants' Br. 28; *see also* Sch. Dist. Appellants' Br. 58 ("Abdelhadi and Dennar's conduct is not expressive and is not protected by the First Amendment."). This argument cannot be reconciled with the Supreme Court's case law establishing that politically motivated boycotts like those discouraged by H.B. 89 are entitled to First Amendment protection.

Of direct relevance to this case is *Claiborne Hardware*, in which the Supreme Court held that consumer boycotts are political expression protected by the First Amendment. 458 U.S. at 907. *Claiborne Hardware* grew out of a boycott launched in 1966 by black citizens of Port Gibson, Mississippi, against white-owned businesses as a vehicle for demanding racial equality and integration. *Id.* at 889.

The boycott had a significant impact, prompting the targeted companies to file suit in state court where they obtained tort damages for lost earnings based on a claim of malicious interference with business. *Id.* at 891–94. Holding that "each . . . element[] of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments," the Supreme Court reversed the judgment against the boycott participants. *Id.* at 907, 934. Those protected elements included the boycott itself, which was "supported by speeches and nonviolent picketing" and calls by participants for others to join the cause. *Id.* at 907.

Through a strained reading of *Claiborne Hardware*, State Appellants parse the elements of a boycott, concluding that the meetings, speeches, and non-violent picketing are entitled to First Amendment protection, but not the "individual purchasing decisions" that those aspects of a boycott support. State Appellants' Br. 30, 32. But in *Claiborne Hardware*, it was the boycott participants' refusal to patronize white-owned businesses—not their speeches, meetings, and picketing—that proximately caused the businesses to lose earnings. If, as State Appellants argue, only the meetings, speeches, and picketing that supported the boycott had received First Amendment protection from the *Claiborne Hardware* Court, then the boycott participants still could have been held liable for interfering with business relations through their coordinated effort to withhold their business from the targeted

companies.[4] *Claiborne Hardware*'s holding would make little sense unless—contrary to State Appellants' rendering—political boycotts themselves are protected by the First Amendment. *See Amawi*, 373 F. Supp. 3d at 744 ("There would be no basis for this damages limitation if the decision to withhold patronage were not . . . protected [by the First Amendment].").

The First Amendment's applicability to consumer boycotts themselves—and not just the speech and conduct that support them—is confirmed by *FTC v. Superior Court Trial Lawyers Association (SCTLA)*, 493 U.S. 411 (1990). That case concerned a coordinated effort by trial lawyers to refuse to represent indigent criminal defendants in protest of the District of Columbia's compensation rates for such representation. *Id.* at 414. The Federal Trade Commission (FTC) determined that the lawyers' boycott amounted to an unfair trade practice and issued a cease-and-desist order. *Id.* at 419–20. That order applied only to the lawyers' "concerted refusal . . . to accept any further assignments" and not to their "efforts to publicize the boycott, to explain the merits of [their] cause, and to lobby District officials to enact favorable legislation." *Id.* at 426. Thus, *SCTLA* presented the Court with an

[4] A cause of action exists under Mississippi law for malicious injury to business where "[1] one engages in some act [2] with a malicious intent to interfere and injure the business of another, and [3] injury does in fact result." *Par Indus., Inc. v. Target Container Co.*, 708 So. 2d 44, 48 (Miss. 1998) (quoting *Cenac v. Murry*, 609 So. 2d. 1257, 1271 (Miss. 1992)).

unambiguous question of whether consumer boycotts, isolated from any accompanying expressive activity, are protected by the First Amendment.

The Supreme Court answered that question in the affirmative: "Every concerted refusal to do business with a potential customer or supplier has an expressive component." *Id.* at 431. The Court nevertheless upheld the FTC's order, not because the boycott was nonexpressive, but because it sought only "to economically advantage the participants." *Id.* at 428. That is, the boycott, expressive as it was, nonetheless constituted an antitrust violation. In turn, because the boycott's objectives were purely economic, the Court held that it could be subject to antitrust law without offending First Amendment principles. *Id.* at 427; *see also* Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 Duke L.J. 1037, 1066–67 (2010) ("[A]ny speech interests inherent in the conduct at issue [in *SCTLA*] are trumped not only by the government's substantive interest in antitrust regulation but also by the government's 'administrative efficiency interests in antitrust regulation.'" (quoting *SCTLA*, 493 U.S. at 430)). Plainly, companies and individuals who boycott Israel are motivated by political convictions, not economic self-interest. Accordingly, the government interests that justified the FTC's order in *SCTLA* do not underlie H.B. 89.

School District Appellants concede that some consumer boycotts receive First Amendment protection, but they maintain that boycotts aligned with the Global BDS

movement do not. Sch. Dist. Appellants' Br. 61. According to School District Appellants, the boycott at issue in *Claiborne Hardware* was expressive because the "significance" of the "economic choices" made by residents to boycott white-owned businesses in Port Gibson, a community with a majority-black population, was obvious to "[m]ost, if not everyone," in the county. *Id.* School District Appellants argue that, in contrast with the Port Gibson boycott, individuals who refrain from buying goods or services associated with Israel "do not convey to anyone that they, among the millions of people making online and checkout counter purchases, are engaging in expressive conduct" because those decisions are "performed in obscurity." *Id.* 61, 63.[5] But this argument fails. In advancing this argument, School District Appellants correctly discuss the Port Gibson boycott activity in the aggregate, instead of as a series of isolated individual purchasing decisions. *See*

[5] As a fallback, School District Appellants argue that *Claiborne Hardware* is distinguishable because the boycott at issue in that case was "in support of a petition for redress of civil rights grievances" and did not concern another country's alleged human rights violations. Sch. Dist. Appellants' Br. 62. But the First Amendment does not favor expression concerning particular political topics. So long as speech or expressive conduct concerns something of "public concern," it is entitled to First Amendment protection. *See Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (holding that the Westboro Baptist Church's military-funeral pickets expressing anti-gay animus address something of "public import" even if they "fall short of refined social or political commentary" and are therefore protected by the First Amendment). The public import of the Israeli-Palestinian conflict is beyond dispute, and expressive conduct concerning it does not receive lesser First Amendment protection just because it might not touch upon "civil rights grievances" with the United States or its political subdivisions.

infra pt. III. The political message of the collective conduct of all those who participate in the Global BDS movement is no less obvious to outside observers than that of the Port Gibson boycotters. The nationwide effort to enact anti-BDS laws is, itself, proof certain of this.

In arguing that Appellees' conduct is not expressive, Appellants erroneously rely on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR),* 547 U.S. 47 (2006). State Appellants' Br. 27–29, 32–33; Sch. Dist. Appellants' Br. 56–58. *FAIR* upheld a federal law known as the Solomon Amendment that withholds contracts and grants to universities that bar ROTC or military recruiters from campus. 547 U.S. at 70. The Solomon Amendment is facially neutral: it denies contracts to universities that close their gates to ROTC or military recruiters for any reason, political or apolitical. 10 U.S.C. § 983 (withholding grants and contracts to universities that have "a policy or practice . . . that either prohibits, or in effect prevents" the establishment of an ROTC unit or campus access to military recruiters). Because of the Solomon Amendment's neutral terms, a university might be denied a federal contract for turning away ROTC or military recruiters based on the apolitical judgment that the school's curriculum better prepares students for civilian rather than military life. Accordingly, the Court held that a university's decision to bar the military from campus is expressive only when "accompanied . . . with speech" that explains the decision. *FAIR*, 547 U.S. at 66.

Unlike the Solomon Amendment, however, H.B. 89 is not facially neutral. It withholds contracts only from those whose business decisions are "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." Tex. Gov. Code § 808.001(1). It does not apply to actions taken for "ordinary business purposes," i.e., for non-political reasons. *Id.* Put differently, a breach-of-contract claim based on H.B. 89 could not proceed without proof of the politically expressive nature of a contractor's actions. A neutral version of H.B. 89 would simply (if outlandishly) require state contractors to do business in Israel, denying contracts to companies that lack business there for completely apolitical reasons. For example, a small Texas company that does business only domestically might be unable to obtain a state contract under a neutral version of H.B 89. The absurdity of such an alternative policy underscores that H.B. 89 is no evenhanded measure to promote business with Israel but, rather, a policy intended to penalize expressive activism concerning the Israeli-Palestinian conflict. Because of the salient differences between the Solomon Amendment and H.B. 89, *FAIR* is inapposite.

B. Boycotts Are a Protected Form of Collective Action.

Appellants' analysis of H.B. 89 also misses the mark by atomizing boycotts—a type of *collective* action—into "*individual* purchasing decisions." State

Appellants' Br. 32 (emphasis added); *see also* Sch. Dist. Appellants' Br. 61 ("[Appellees'] economic choices concerning whether to purchase one product or another online or at a checkout counter do not convey to anyone that they, among millions of people making online or checkout counter purchases, are engaging in expressive conduct."). By characterizing boycotts at the molecular level, Appellants attempt to elide their expressive value.

Boycotts are similar to parades in that the communicative power of both can be detected only by viewing them in the aggregate. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court held that parades are expressive conduct protected by the First Amendment. *Id.* at 568–69. "Parades are . . . a form of expression," the Court stated, "not just motion," because they are comprised of "marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568. Even if an individual marcher also engages in expressive conduct, a parade's "collective point" might not be discernible by focusing on that isolated marcher. Similarly, a boycott's expressive message is not conveyed fully by a single purchasing decision. By analyzing consumer boycotts through too narrow of a lens, Appellants obscure boycotts' expressive power at the collective level—a power recognized by the Supreme Court's boycott jurisprudence.

First Amendment limitations on campaign-finance regulations flow from a similar recognition that group association amplifies expression that might be less powerful by itself. Through campaign contributions, "like-minded persons [can] pool their resources in furtherance of common political goals" and "aggregate large sums of money to promote effective advocacy." *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam). The "value" of campaign contributions "is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control / Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981). Boycotts are, in effect, the mirror image of campaign financing. Instead of pooling their resources to support a candidate or political cause, boycott participants coordinate the withholding of resources that would otherwise flow to and support a company's activities. The communicative power of boycotts is no less impactful because they deny resources to companies that participants oppose rather than giving them to entities that they support.

The impact of H.B. 89 on collective expression is evident from the stories of the plaintiffs who have come forward to challenge it. Appellee Bahia Amawi is a U.S. citizen whose family members live in the Palestinian territories. *Amawi*, 373 F. Supp. 3d at 731. She "participate[s] in the BDS movement" by, among other things, buying Palestinian olive oil and refusing to buy Sabra brand hummus because of its connections to Israel. *Id.* For nine years, Amawi worked as a speech

pathologist in the Pflugerville Independent School District, but she has been forced to terminate her contractual relationship with the District because of her refusal to sign a contract with H.B. 89's anti-boycott provision. *Id.*

Zachary Abdelhadi is a Palestinian-American enrolled as a student at Texas State University in San Marcos, Texas. *Id.* at 733. He is an "active participant in the BDS movement," boycotting PepsiCo, Hewlett Packard, and Strauss Group products because of those companies' alleged support of the Israeli Defense Forces (IDF) and also by boycotting vacation-rental websites that list homes in Israeli settlements in the West Bank. *Id.* Abdelhadi has forgone a paid opportunity to judge debate tournaments for his home school district to preserve his ability to continue participating in BDS activities. *Id.*

Appellee George Hale is a radio reporter with Texas A&M's NPR station. *Id.* at 734. Prior to joining the station, he reported on the Israeli-Palestinian conflict for eight years, living in the Palestinian territories, an experience that led him to feel solidarity with the Palestinian cause and to align himself with the Global BDS movement. Until the enactment of H.B. 89, Hale boycotted the cosmetic company Ahava because of its operations in the West Bank and the technology company Hewlett Packard, because it provides Israel with technology that Hale believes is used to violate Palestinians' rights. *Id.* After attempting to sign under protest an employment contract with an H.B. 89 anti-boycott provision by notating his

objection, Hale was threatened with termination if he would not sign a clean copy of the contract. *Id.* at 734–35. Hale acquiesced and has stopped participating in the Global BDS movement in order to meet his contractual obligations. *Id.* at 735.

Amawi, Abdelhadi, and Hale are but three examples of individuals whom anti-BDS laws inhibit from joining in collective expressive activity. The First Amendment is incompatible with laws that force individuals like Amawi, Abdelhadi, and Hale to stand on the sidelines while the groups with which they associate engage in collective action. As Justice Louis Brandeis (who was also a Zionist leader) wrote, "the remedy to be applied" to disfavored speech "is more speech, not enforced silence." *California v. Whitney*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Texas is free to express its opposition to boycotts against Israel, but it may not constitutionally penalize state contractors for participating in them.

CONCLUSION

For all of the foregoing reasons, amici respectfully urge this Court to affirm the order of the district court.

Dated: December 3, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jonathan L. Backer, hereby certify that the foregoing Brief of T'ruah and J Street as Amici Curiae in Support of Plaintiff-Appellant and Reversal complies with type-volume limits because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, the brief contains 5,789 words, and is proportionately spaced using a roman style typeface of 14-point.

/s/ Jonathan L. Backer
Jonathan L. Backer

Dated: December 3, 2019

CERTIFICATE OF SERVICE

I, Jonathan L. Backer, hereby certify that on December 3, 2019, I electronically filed the foregoing Brief of T'ruah and J Street as Amici Curiae in Support of Plaintiff-Appellant and Reversal with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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