

No. 22-20047

---

**In the United States Court of Appeals for the Fifth Circuit**

---

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

v.

Ken Paxton, Attorney General of Texas,  
*Defendant - Appellant*

---

On Appeal from the United States District Court  
for the Southern District of Texas, Houston Division

---

**Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and  
Eugene Volokh as *Amici Curiae*  
in Support of Defendants-Appellants**

---

EUGENE VOLOKH  
UCLA School of Law  
385 Charles E. Young Dr. E  
Los Angeles, CA 90095  
(310) 206-3926  
volokh@law.ucla.edu

Counsel for *Amici Curiae*

## Certificate of Interested Persons

I certify that these persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case:

**Defendant-Appellant:**

Ken Paxton

**Counsel for Defendant-Appellant Ken Paxton:**

Ken Paxton

Brent Webster

Judd E. Stone II

Eric J. Hamilton

William Sumner Macdaniel

Benjamin Wallace Mendelson

**Plaintiff-Appellee:**

A & R Engineering and Testing, Inc.

**Counsel for Plaintiff-Appellee:**

Gadeir Ibrahim Abbas, Council on American-Islamic Relations (CAIR)

Lena F. Masri, CAIR

Justin Sadowsky, CAIR

John Thomas Floyd III

***Amici* signing this brief:**

Michael C. Dorf

Andrew M. Koppelman

Eugene Volokh (who is also counsel for the *amici*)

s/ Eugene Volokh  
Counsel of Record for  
*Amici Curiae*

## Table of Contents

Certificate of Interested Persons .....	i
Table of Contents .....	ii
Table of Authorities.....	iv
Interest of <i>Amici Curiae</i> .....	1
Summary of Argument.....	1
I. Refusals to deal are generally not protected by the First Amendment.....	4
A. <i>Rumsfeld v. FAIR</i> rejected a claimed First Amendment right to refuse to deal .....	4
B. <i>NAACP v. Claiborne Hardware Co.</i> protects speech advocating lawful boycotts—it does not protect discriminatory conduct.....	8
C. The Court’s other cases reaffirm that the First Amendment protects speech but does not protect refusals to deal (whether politically motivated or otherwise).....	12
D. These principles apply to the whole range of restrictions on refusals to deal, whether those restrictions are broad or narrow.....	16
II. Some refusals to deal may indeed be protected by the First Amendment, but those are rare exceptions that call for as-applied exemptions from the statute.....	21

III. The restriction on “otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations” should be read to cover economic actions, not advocacy .....	25
Conclusion .....	30
Certificate of Compliance .....	32
Certificate of Service .....	33

## Table of Authorities

### Cases

<i>303 Creative LLC v. Elenis</i> , 142 S. Ct. 1106 (2022).....	22
<i>Binkowski v. State</i> , 322 N.J. Super. 359 (App. Div. 1999) .....	30
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973) .....	24
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	27, 28
<i>Clancy v. Office of Foreign Assets Control of U.S. Dep’t of Treasury</i> , 559 F.3d 595 (7th Cir. 2009) .....	7
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005).....	29
<i>Claybrooks v. ABC</i> , 898 F. Supp. 2d 986 (M.D. Tenn. 2012).....	22, 24
<i>Dale v. Boy Scouts of Am.</i> , 530 U.S. 640 (2000).....	23, 24
<i>Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127 (1961).....	24
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &amp; Const. Trades Council</i> , 485 U.S. 568 (1988).....	29
<i>FTC v. Superior Court Trial Lawyers Ass’n</i> , 493 U.S. 411 (1990) .....	14, 15, 16, 24
<i>Hishon v. King &amp; Spalding</i> , 467 U.S. 69 (1984).....	19
<i>Hosanna-Tabor Evangelical Lutheran Church &amp; School v. EEOC</i> , 565 U.S. 171 (2012) .....	21, 24
<i>International Longshoremen’s Ass’n v. Allied International, Inc.</i> , 456 U.S. 212 (1982) .....	12, 13

<i>Jones v. Jones</i> , 2015 UT 84 .....	29
<i>Karpova v. Snow</i> , 497 F.3d 262 (2d Cir. 2007) .....	8
<i>Miami Herald Co. v. Tornillo</i> , 418 U.S. 241 (1974).....	23
<i>Nelson v. McClatchy Newspapers, Inc.</i> , 936 P.2d 1123 (Wash. 1997).....	22
<i>Norfolk &amp; W. Ry. Co. v. Am. Train Dispatchers Ass’n</i> , 499 U.S. 117 (1991) .....	27
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973) .....	19
<i>Princeton Taxi Owners’ Ass’n v. Mayor &amp; Council of Borough of Princeton</i> , 362 A.2d 42 (N.J. Super. Ct. App. Div. 1976).....	17
<i>Railway Mail Ass’n v. Corsi</i> , 326 U.S. 88 (1945) .....	19
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015) .....	20
<i>Rumsfeld v. FAIR</i> , 547 U.S. 47 (2006) .....	passim
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976) .....	12, 19
<i>United Mine Workers of Am. v. Pennington</i> , 381 U.S. 657 (1965) .....	24
<i>Washington State Dep’t of Soc. &amp; Health Servs. v. Guardianship Estate of Keffeler</i> , 537 U.S. 371 (2003) .....	28, 29
<i>Zemel v. Rusk</i> , 381 U.S. 1 (1965) .....	7
 <b>Statutes, Rules, and Executive Orders</b>	
38 U.S.C.A. § 4311.....	18

41 C.F.R. § 60-300.5 .....	18
8 U.S.C.A. § 1324b(a)(1)(B), (3).....	7, 18
Ark. Code Ann. § 25-1-503 .....	13, 15, 20
D.C. Code § 2-1402.31 .....	17
Equal Employment Opportunity, Exec. Order No. 11246 (Sept. 24, 1965).....	18
La. Rev. Stat. § 23:331 .....	18
N.Y. Work Comp. L. § 125-a.....	18
Tex. Gov. Code § 808.001(1).....	3, 25
Tex. Gov't. Code Ann. § 808.001 (West Supp. 2018).....	21
Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681-1688 .....	18
Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000d to 2000d-4a .....	18
Vietnam-Era Veterans Readjustment Assistance Act, 38 U.S.C.A. § 4212.....	18

**Other Authorities**

Anand Ghiridharadas, <i>Boycotts Minus the Pain</i> , N.Y. Times (Oct. 10, 2009).....	7
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 199 (2012) .....	27

Brief for Ass’n of Am. Law Schools as *Amicus Curiae* in  
Support of Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47  
(No. 04-1152), 2005 WL 2347173 ..... 5

Brief for Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006)  
(No. 04-1152), 2005 WL 2347175 ..... 5

Remarks by the President at Signing of Executive Order on  
LGBT Workplace Discrimination [Exec. Order No. 13672]  
(July 21, 2014) ..... 20



## **Interest of *Amici Curiae***<sup>1</sup>

Michael C. Dorf (Cornell Law School), Andrew M. Koppelman (Northwestern University Pritzker School of Law), and Eugene Volokh (UCLA School of Law) have all written extensively about First Amendment law. Their interest in this case is solely in offering an impartial analysis of the relevant First Amendment principles. They express no opinion in this brief on standing, sovereign immunity, or mootness.

### **Summary of Argument**

Decisions not to buy or sell goods or services are generally not protected by the First Amendment. That is the necessary implication of *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), and it is the foundation of the wide range of antidiscrimination laws, public accommodation laws, and common carrier laws throughout the nation.

---

<sup>1</sup> No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

Thus, for instance:

- A limousine driver has no First Amendment right to refuse to serve a same-sex wedding party, even if he describes this as a boycott of same-sex weddings (or part of a nationwide boycott of such weddings by like-minded citizens).
- A store has no First Amendment right to refuse to sell to Catholics, even if it describes this as a boycott of people who provide support for the Catholic Church.
- An employer in a jurisdiction that bans political affiliation discrimination has no First Amendment right to refuse to hire Democrats, even if it describes such discrimination as a boycott.
- An employer that is required to hire employees regardless of union membership has no First Amendment right to refuse to hire union members on the grounds that it is boycotting the union.
- A cab driver who is required to serve all passengers has no First Amendment right to refuse to take people who are visibly carrying Israeli merchandise.

Of course, all these people would have every right to speak out against same-sex weddings, Catholicism, the Democratic Party, unions, and Israel. That would be speech, which is indeed protected by the First Amendment. For this reason, this Court should interpret “otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations,” Tex. Gov. Code § 808.001(1), as covering only commercial conduct such as that listed in the preceding phrases (“refusing to deal with” and “terminating business activities with”), and not extending to advocacy.

But as a general matter, a decision not to do business with someone, even when it is politically motivated (and even when it is part of a broader political movement), is not protected by the First Amendment. And though people might have the First Amendment right to discriminate (or boycott) in some unusual circumstances—for instance when they refuse to participate in distributing or creating speech they disapprove of—that is a basis for a narrow as-applied challenge, not a facial one. For this reason, Tex. Gov. Code § 2271 is constitutional, as are contracts based on that provision.

**I. Refusals to deal are generally not protected by the First Amendment**

**A. *Rumsfeld v. FAIR* rejected a claimed First Amendment right to refuse to deal**

In *Rumsfeld*, the Supreme Court rejected the argument that a law school had a First Amendment right to refuse to allow military recruiters on its property—which is to say, the Court rejected the argument that law schools could engage in a limited boycott of such recruiters.

Such a refusal to allow military recruiters, the Court held, “is not inherently expressive.” 547 U.S. at 64. Law schools’ “treating military recruiters differently from other recruiters” was “expressive only because the law schools accompanied their conduct with speech explaining it.” *Id.* at 66. “The expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it.” *Id.* Because of that, Congress could restrict such discrimination against military recruiters without violating the First Amendment. *Id.*

“[I]f an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income

taxes,” *id.*, that announcement offers no basis for applying First Amendment scrutiny to the nonpayment of taxes. Likewise, if a university announces that it is expressing disapproval of the military’s Don’t-Ask-Don’t-Tell policy by excluding the military from on-campus recruiting, that announcement offers no basis for applying First Amendment scrutiny to this exclusion. *Id.*

What the universities wanted to do in *Rumsfeld*—“restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military,” 547 U.S. at 52—was quite similar to boycotts of Israel: it consisted of refusing to deal with certain people or entities (the military and its recruiters) “because they object to the[ir] polic[ies],” *id.* Indeed, even FAIR itself characterized the universities’ actions as “a limited sort of boycott of any institution that discriminates.” Brief for Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347175, \*29; *see also* Brief for Ass’n of Am. Law Schools as *Amicus Curiae* in Support of Respondents, *Rumsfeld v. FAIR*, 547 U.S. 47 (No. 04-1152), 2005 WL 2347173, \*28 (“AALS and

its members have chosen to convey their message of tolerance and equality through a policy prohibiting discriminatory recruiting—in the time-honored tradition of ‘nonviolent, politically motivated boycott designed to force governmental and economic change’” (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982)). The *Rumsfeld* Court rejected this claimed First Amendment right.

The same applies to boycotts of Israel, as the District Court correctly recognized, ROA 18: An observer who sees a company dealing with a non-Israeli business, and not with an Israeli business, can only perceive a political message when the company accompanies its conduct with speech explaining it.

This simply reflects a well-established principle: The First Amendment does not generally protect liberty of contract, whether or not one’s choices about whom to deal with are political. “Boycott” is just another term for refusal to contract, at least when that is part of some organized movement. There are also “buycotts,” which are deliberate choices to contract with particular entities, and which are likewise not protected by the First Amendment, regardless of whether the contracting decision has a

political motivation.<sup>2</sup> Using such terms to refer to one's commercial choices does not create a First Amendment right to contract, or not to contract. People equally lack a First Amendment right, for instance,

- to illegally refuse to hire lawful permanent residents,<sup>3</sup> even if such a refusal is aimed at sending an anti-immigrant message;
- to illegally hire aliens who lack work authorization, even if such a refusal is aimed at sending a pro-open-borders message;
- to do business with North Korean entities (if a law forbids that), even if such dealing is aimed at sending what they see as a pro-peace message;<sup>4</sup>

---

<sup>2</sup> See, e.g., Anand Ghiridharadas, *Boycotts Minus the Pain*, N.Y. Times (Oct. 10, 2009), <http://www.nytimes.com/2009/10/11/weekinreview/11ghiridharadas.html> (“Political consumption is not new . . . . What is new is that boycotting is surrendering to buycotting, the sending of positive, not just negative, signals; and that it is practiced increasingly by mainstream shoppers, not just die-hard activists.”).

<sup>3</sup> Title 8 U.S.C.A. § 1324b(a)(1)(B), (3) bans such discrimination.

<sup>4</sup> See *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (rejecting First Amendment challenge to a ban on passports for travel to Cuba); *Clancy v. Office of Foreign Assets Control of U.S. Dep’t of Treasury*, 559 F.3d 595, 605 (7th Cir. 2009) (rejecting First Amendment challenge to sanctions on travel to Iraq during Saddam Hussein’s rule, even when the challenger “maintains

- to refuse to do business with Israeli entities (if a law forbids that), even if such a refusal is aimed at sending a pro-Palestinian-rights message.

**B. *NAACP v. Claiborne Hardware Co.* protects speech advocating lawful boycotts—it does not protect discriminatory conduct**

Of course, boycotts are usually accompanied by speech—people urging others to join the boycott or organizing in groups that promote the boycott. Like other advocacy, advocacy of boycotts is generally constitutionally protected: *NAACP v. Claiborne Hardware Co.* made that clear, in noting that “peaceful picketing,” “marches,” “urg[ing others] to join the common cause,” “support[ing the boycott] by speeches,” “threats of social ostracism,” and gathering and publishing the names of those who refuse

---

he traveled to Iraq to express his belief in peace and his protest against government action that would harm innocent Iraqi citizens”); *Karpova v. Snow*, 497 F.3d 262, 266, 272 (2d Cir. 2007) (likewise, as to person who traveled to Iraq to “act as [a] human shield[]” and thus help “bring attention to the fact that the United States allegedly had bombed civilian infrastructure in Iraq during the 1990 Gulf War”). These cases concluded that the restrictions targeted action, not speech, so the courts saw no need to apply heightened scrutiny.



to join were all “safeguarded by the First Amendment.” 458 U.S. 886, 907, 909, 910, 933 (1982).

But *Claiborne Hardware* had no occasion to decide whether a person’s not dealing with someone based on that someone’s race was itself protected by the First Amendment, because it was clear that Mississippi law did not prohibit such private choices not to deal. Under Mississippi law, whites could generally refuse to deal with blacks, and blacks could refuse to deal with whites. Nor was the boycott banned by general prohibitions on “concerted refusal to deal,” “secondary boycotts,” or “restraint[s] of trade.” *Id.* at 891 n.7, 894, 915.

Indeed, *Claiborne Hardware* expressly reserved the question whether a boycott “designed to secure aims that are themselves prohibited by a valid state law” is constitutionally protected. *Id.* at 915 n.49. It follows that the question whether a boycott that involved refusals to deal that were themselves prohibited by a valid state law—a law that targeted conduct rather than speech—was also not resolved by *Claiborne Hardware*. And in *Rumsfeld*, the Court did resolve the issue: a boycott by universities of military recruiters could be outlawed outright, 547 U.S. at 60, and

certainly could be penalized by withdrawal of government funds as well, *id.*

To be sure, the statement in *Claiborne Hardware* that “Petitioners withheld their patronage from the white establishment of Claiborne County,” 458 U.S. at 918, was followed by the statement that, “While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.” *Id.* But the focus of this discussion in *Claiborne Hardware* was on requiring that a tort verdict allegedly based on violent actions was indeed based solely on violent actions; the only “unlawful conduct” at issue in the case was violent conduct, because discriminatory purchasing decisions were not unlawful in 1960s Mississippi. The *Claiborne Hardware* Court did not purport to hold that race-based “with[holding of] patronage” is constitutionally protected—and of course antidiscrimination law routinely and constitutionally forbids withholding business relations based on race, religion, sexual orientation, national origin, and more.

Nor can such normal antidiscrimination laws be distinguished from other boycotts on the grounds that they bar discrimination in selling goods and services rather than in buying goods and services. There is no real economic difference between a purchase and a sale (or, for that matter, barter): Both involve economic transactions that trade something for something else.

There is likewise no First Amendment difference between discrimination in buying and selling. An employer's decision to discriminate in hiring is not protected by the First Amendment, for instance, even though the employer is a "consumer" of labor, paying money for labor the way that consumers pay money for other services. There may be good policy reasons not to apply antidiscrimination laws to certain transactions (such as a person's decisions whether to buy goods and nonlabor services); but they are not First Amendment reasons.

**C. The Court’s other cases reaffirm that the First Amendment protects speech but does not protect refusals to deal (whether politically motivated or otherwise)**

The holding of *Claiborne* is thus consistent with the principle set forth just six years before in *Runyon v. McCrary*: Though people and institutions have a right to advocate for discrimination—to “promote the belief that racial segregation is desirable”—“it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.” 427 U.S. 160, 176 (1976). Likewise, though people have a right to urge a boycott of white-owned stores, as in *Claiborne*, it does not follow that the practice of refusing to deal with an entity based on the owners’ race (whether black or white) is also protected by the same principle. And though people have an indubitable right to urge a boycott of Israeli companies, it does not follow that the practice of refusing to deal with such companies based on the owners’ nationality is also protected by the same principle.

We see the same in *International Longshoremen’s Ass’n v. Allied International, Inc.*, 456 U.S. 212 (1982), where union members engaged in a purely politically motivated boycott of cargoes shipped from the USSR

(engaged in as a protest of the invasion of Afghanistan). The Court noted that even outright speech—secondary picketing—in support of refusals to deal might sometimes be properly restricted notwithstanding the First Amendment (a controversial position, but one the Court had settled on in earlier cases). *Id.* at 226. And, the Court noted, if even picketing supporting a boycott could be restricted, “[i]t would seem even clearer that conduct designed not to communicate but to coerce” (there, a refusal to unload ships) “merits still less consideration under the First Amendment.” *Id.* Of course, the refusal to unload ships was obviously a part of a broader plan that included communication. But the refusal to deal was itself not treated as communication entitled to First Amendment protection.

The Court also added that, “There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others.” *Id.* That too fits perfectly with the Texas law in this case, which leaves opponents of Israel with many ways to express their opposition to Israel without engaging in discriminatory refusals to deal with Israeli companies.

To be sure, *FTC v. Superior Court Trial Lawyers Ass’n*, while holding that the First Amendment did not protect “a group of lawyers [who] agreed not to represent indigent criminal defendants . . . until the . . . government increased the lawyers’ compensation,” 493 U.S. 411, 414 (1990), distinguished *Claiborne* on the grounds that the lawyers’ boycott was primarily economically motivated while the *Claiborne* boycott was political. And there is language in *Claiborne* suggesting (but not holding) that a political boycott, such as “an organized refusal to ride on [city] buses,” might be constitutionally protected, 458 U.S. at 914 & n.48; it is thus possible to read *Claiborne* as saying that boycotts are inherently expressive.

But the far better reading of that case, and the one most consistent with the other precedents, is that *many but not all elements* of political boycotts are expressive. The *Claiborne* Court says that the political “boycott clearly involved constitutionally protected activity,” 458 U.S. at 911, and then identifies those elements as “speech, assembly, association, and petition,” *id.*, notably not including commercial dealing or nondealing in the list. The Court in *Superior Court Trial Lawyers Ass’n* likewise did not

hold that the refusal to deal would itself be protected had it been politically motivated. And in *Rumsfeld*, the Court expressly rejected any such position.

Indeed, much of the reasoning in *Superior Court Trial Lawyers Ass'n* is squarely on point here. “Every concerted refusal to do business with a potential customer or supplier has an expressive component,” the Court noted. *Id.* at 431. Yet that does not itself make refusals to deal constitutionally protected speech. *Id.* at 430. Nor does the publicity generated by the boycott: “[T]o the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters’ ideas. But this level of expression is not an element of the boycott. Publicity may be generated by any other activity that is sufficiently newsworthy.” *Id.* at 431.

The same applies to the boycotting behavior to which Texas law applies: The concerted refusal to do business with Israeli companies may have a political motivation, may help spread political ideas, and may even be understood as political by people who are told about the boycotters’ motivations. But this does not make such speech protected.

And to the extent that *Superior Court Trial Lawyers Ass’n* might have been seen as implying a different result for purely un-self-interested boycotts, *Rumsfeld* rebuts any such reading. “[A] group’s effort to use market power to coerce the government through economic means may subject the participants to antitrust liability,” even Justice Brennan’s *Superior Court Trial Lawyers Ass’n* dissent acknowledged, *id.* at 438 (Brennan, J., dissenting). A university’s effort to use control over its property to coerce the government into changing its policies may subject the university to the loss of funds. *Rumsfeld*, 457 U.S. at 60. Likewise, an effort to use economic power to coerce a foreign government through economic means may subject the participants to loss of state government contracts.

**D. These principles apply to the whole range of restrictions on refusals to deal, whether those restrictions are broad or narrow**

Of course, different laws banning refusals to deal operate differently:



1. Some categorically require people to do business with all eligible people or organizations—common carrier obligations, such as those imposed on taxicabs, are one example.<sup>5</sup>
2. Some ban discrimination based on a particular trait that has been the basis of massive and often debilitating discrimination, such as race.
3. Some ban discrimination for less pressing reasons, for instance bans on discrimination based on marital status, “personal appearance,” “matriculation,” “political affiliation,” “source of income,” or “place of residence or business.”<sup>6</sup>
4. Some ban discrimination only against particular groups or organizations, such as bans on discrimination against military recruiters,

---

<sup>5</sup> See, e.g., *Princeton Taxi Owners’ Ass’n v. Mayor & Council of Borough of Princeton*, 362 A.2d 42 (N.J. Super. Ct. App. Div. 1976).

<sup>6</sup> See, e.g., D.C. Code § 2-1402.31.

Israeli companies, military members,<sup>7</sup> or permanent resident aliens.<sup>8</sup> While such selectivity might in rare situations violate the Equal Protection Clause (for instance, if a law banned discrimination against Hispanics but not against Asians), it does not violate the First Amendment.

5. Some categorically ban discrimination, and some ban discrimination only in government funding.<sup>9</sup>

But these laws all have an important feature in common: They ban refusal to deal, which is to say the conduct of not doing business with

---

<sup>7</sup> See, e.g., 38 U.S.C.A. § 4311; N.Y. Work Comp. L. § 125-a; La. Rev. Stat. § 23:331.

<sup>8</sup> 8 U.S.C.A. § 1324b(a)(1)(B), (3).

<sup>9</sup> For examples of the latter, see, e.g., the Solomon Amendment, upheld in *Rumsfeld*; Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000d to 2000d-4a; Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681-1688; Equal Employment Opportunity, Exec. Order No. 11246 (Sept. 24, 1965); the Vietnam-Era Veterans Readjustment Assistance Act, 38 U.S.C.A. § 4212, as implemented by 41 C.F.R. § 60-300.5; and Exec. Order No. 13672 (July 21, 2014) (banning discrimination based on sexual orientation and gender identity by federal government contractors).

some person or organization, rather than banning speech. Because of this, none of them is generally viewed as subject to heightened scrutiny: Antidiscrimination laws, for instance, are constitutional precisely because they do not inherently burden First Amendment rights, not because they burden First Amendment rights but pass strict scrutiny. (Indeed, many applications of antidiscrimination laws might well not pass strict scrutiny; consider, for instance, the bans on public accommodation discrimination based on marital status or political affiliation.)

When the Court concluded that, “There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union,” *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (citing *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *Runyon*, 427 U.S. 160; and *Railway Mail Ass’n v. Corsi*, 326 U.S. 88, 93-94 (1945)), it did so because such discrimination is simply not treated as symbolic expression for First Amendment purposes—not because bans on such discrimination pass heightened scrutiny. The same applies to discriminating in the selection of those with whom one enters into other business arrangements.

Of course, the Texas anti-BDS statute may well have been motivated not just by purely economic considerations, but also by the Legislature’s desire to send a message that a certain basis for refusing to deal is improper. But that too is a similarity between this statute and many of the other laws mentioned above: Those laws also aim to send a message about equality and fairness.<sup>10</sup> The important point is that they send a message by banning conduct—refusal to do business—not by targeting constitutionally protected speech; the same is true of the anti-BDS statute.<sup>11</sup>

---

<sup>10</sup> See, e.g., Remarks by the President at Signing of Executive Order [No. 13672] on LGBT Workplace Discrimination (July 21, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination>.

<sup>11</sup> If the statute’s purpose were to suppress a message conveyed by boycotters of Israel, that might make it unconstitutional even though its nominal target is conduct. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But there is no basis in this record to conclude this: The law appears to be aimed at the conduct of refusals to deal with Israel and Israeli companies, and not at any message expressed by that conduct—indeed, it applies even to people’s silent refusals to deal that are unknown to the public and thus do not convey any message. Nor is the law somehow limited only to action intended to express a viewpoint: The law applies to all “refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on,

## II. Some refusals to deal may indeed be protected by the First Amendment, but those are rare exceptions that call for as-applied exemptions from the statute

To be sure, some refusal to deal may indeed be protected by the First Amendment, when the underlying transaction itself involves First-Amendment-protected activity. For instance:

- A church’s refusal to hire someone as clergy may be categorically protected by the Free Exercise Clause, even if it violates an antidiscrimination statute. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).
- A filmmaker’s decision to cast actors from a particular group in a particular role may be categorically protected by the Free Speech

---

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’t. Code Ann. § 808.001 (West Supp. 2018), whether expressive or nonexpressive, as opposed to “action made for ordinary business purposes.” *Id.* In this respect, the law is like antidiscrimination laws more generally; they too apply only to refusing to deal with someone specifically because of certain characteristics (such as race, citizenship status, national origin, and the like) and not for ordinary business reasons unconnected to those characteristics (such as credit history, work quality, and the like).

Clause. *See Claybrooks v. ABC*, 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012).

- A newspaper’s decision not to continue employing reporters who engage in political activity may be categorically protected by the Free Press Clause, even in those states where employers generally may not dismiss employees for their political activity. *See Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1133 (Wash. 1997).
- A photographer’s decision not to photograph same-sex weddings—or, for instance, Scientology events—might possibly be protected by the compelled speech doctrine, even if it would otherwise violate a ban on sexual orientation discrimination or religious discrimination in a public accommodation, though the signatories of this brief disagree with each other on that score. *See 303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (granting review as to “[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause”).

- A nonprofit organization’s decision not to contract with spokespeople whose publicly known sexual orientation or religion would undermine the organization’s ability to spread its message may be categorically protected by the Free Speech Clause. *See Dale v. Boy Scouts of Am.*, 530 U.S. 640 (2000) (so holding as to volunteers).
- Indeed, Texas newspapers may well have the right to refuse to, for instance, publish op-eds by Israeli citizens or political advertisements submitted by Israeli companies, *see Miami Herald Co. v. Tornillo*, 418 U.S. 241 (1974).

But these special cases simply reflect the reality that a wide range of laws that regulate conduct, and that are constitutional on their face, may sometimes require First Amendment exceptions as applied. The remedy in such situations is to grant as-applied exceptions from the laws, not to invalidate them on their face. “[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real [for the law to be facially invalidated], but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v.*

*Oklahoma*, 413 U.S. 601, 615 (1973). If the overbreadth is not substantial, “whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Id.* at 615-16.

*Hosanna-Tabor*, after all, did not facially invalidate the Americans with Disabilities Act, even though some applications of the Act violate the First Amendment. The same is true for *Claybrooks* as to Title VII and *Dale* as to New Jersey’s ban on discrimination in places of public accommodation. Similarly, *Claiborne Hardware* did not facially invalidate the tort of interference with business relations but just held that it could not be applied to constitutionally protected speech. The Sherman Act is likewise generally constitutional but may not be applied to anticompetitive conduct that takes the form of lobbying or nonfrivolous litigation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144-45 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 659-61, 670 (1965); *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 424 (noting that, though the *Noerr* Court was purporting just to interpret the Sherman Act, it was doing so “in the light of the First Amendment[]”).



Similarly, if a government required contractors to pledge that they do not discriminate in employment based on, say, race, religion, sex, sexual orientation, or marital status, that requirement would not be facially unconstitutional—even though some contractors may in rare situations have a First Amendment right to so discriminate (for instance, in choice of clergy). If the Catholic Church, for instance, was otherwise eligible for the contract, it could sign this pledge with a reservation noting that it of course discriminates based on sex, marital status, and religion in choice of clergy. If the government then chose to disqualify the Church because of that reservation, the Church would likely have a strong as-applied challenge. But because the pledge would not be substantially overbroad, the as-applied challenge would be the only one available.

**III. The restriction on “otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations” should be read to cover economic actions, not advocacy**

Tex. Gov. Code § 808.001(1) defines “[b]oycott[ing] 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,” though excluding “an action made for ordinary business purposes.” Under the canons of *ejusdem generis* and constitutional avoidance, the “otherwise taking any action” language should be read to refer to economic decisions akin to “refusing to deal with” or “terminating business activities with”—for instance, charging higher prices, imposing additional contractual conditions, or refusing to deal with entities that deal with third-party entities that do business in Israel.

The “otherwise taking any action” language should thus not be understood as covering mere advocacy of boycotts or other constitutionally protected speech. But if this Court disagrees, and thinks “otherwise taking any action” can only be interpreted in a way that covers a substantial amount of constitutionally protected speech, then this clause should simply be severed, with the “refusing to deal with” and “terminating business activities with” language remaining in effect.

Under the *ejusdem generis* canon, “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by

the preceding specific words.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (cleaned up); *see also Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

Consider, for instance, the Federal Arbitration Act’s exemption for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” That could be read, if one is interpreting the words “any other” in the abstract, as covering “all [employment] contracts within the Congress’ commerce power,” *Circuit City*, 532 U.S. at 114, or at least any workers engaged more directly in foreign or interstate commerce, such as workers at hotels, people who do telephone sales, and the like. But the Supreme Court instead applied *eiusdem generis* to read “any other class of workers” as covering only employment contracts of *transportation* workers, by analogy to the preceding terms (“seamen” and “railroad employees”):

The wording of [the statute] calls for the application of the maxim *eiusdem generis* . . . . Under this rule of construction the residual

clause should be read to give effect to the terms “seamen” and “railroad employees,” and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent [as a catch-all covering all employees engaged in interstate or foreign commerce writ large] fails to produce these results.

*Id.* at 109, 114-15.

Likewise, consider *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, which interpreted a statute protecting Social Security benefits from “execution, levy, attachment, garnishment, or other legal process.” 537 U.S. 371, 375 (2003). The Court reasoned,

[T]he case boils down to whether the department’s manner of gaining control of the federal funds involves “other legal process,” as the statute uses that term. . . . [I]n the abstract the department does use legal process as the avenue to reimbursement: by a federal legal process the Commissioner appoints the department a representative payee, and by a state legal process the department makes claims against the accounts kept by the state treasurer.

The statute, however, uses the term “other legal process” far more restrictively, for under the established interpretative canons of *noscitur a sociis* and *eiusdem generis*, “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” Thus, “other legal process” should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism . . . .

*Id.* at 383-85 (citations omitted, paragraph break added).

“Otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations” in § 808.001, then, should not be read “in the abstract” as simply referring to anything that is intended to indirectly harm (for instance, through praise of a boycott). Rather, it should be read as applying to economic actions that are “similar in nature” to “refusing to deal with, terminating business activities with.”

And this is especially so because of the canon of constitutional avoidance. “[S]tatutes should be interpreted to avoid constitutional doubts,” *Clark v. Martinez*, 543 U.S. 371, 379 (2005). *Ejusdem generis* here offers a sensible way of accomplishing that result. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 579, 588 (1988) (reading statute narrowly to avoid covering likely constitutionally protected speech, even when the government had characterized that speech as “an attempt to inflict economic harm” (cleaned up)); cf. *Jones v. Jones*, 2015 UT 84, ¶ 40 (“The operative statutory provision encompasses not only those who ‘acted as the grandchild’s custodian or caregiver,’ but also grandparents who ‘otherwise . . . had a substantial

relationship with the grandchild.’ Not every grandparental relationship counts as ‘substantial’ under this provision, however. Under the *ejusdem generis* canon of construction, and in light of the doctrine of constitutional avoidance, we give a limiting construction to this provision.”) (citation omitted); *Binkowski v. State*, 322 N.J. Super. 359, 383-84 (App. Div. 1999) (“We assume that the Legislature did not intend to expose a person to liability under subsection (g) [of the Hunter Harassment statute] for engaging in conduct unless the conduct was similar to that which is proscribed [elsewhere] in the statute. In so construing the language of the catchall provision [‘any other similar action or activity’], we perceive no constitutional infirmity here.”).

### **Conclusion**

Banning discrimination against Israel and Israeli companies—whether in general, or just for government contractors—is a controversial policy. Perhaps it is unwise, especially when applied to small service providers. Perhaps people should be generally free to choose whom they will do business with, unless such choice risks creating a truly pressing social problem.

But such decisions are a matter for the political process, not for courts. So long as a law leaves people free to say what they want, it may generally restrict people's decisions about whom to do business with—which are generally regulable conduct, not constitutionally protected speech.

Respectfully Submitted,

s/ Eugene Volokh

*Attorney for Amici Curiae*  
UCLA School of Law  
385 Charles E. Young Dr. E  
Los Angeles, CA 90095  
(310) 206-3926  
volokh@law.ucla.edu

April 18, 2022

## Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,707 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office 365 Word in 14-point Century Schoolbook.

s/ Eugene Volokh

*Attorney for Amici Curiae*



## Certificate of Service

On April 18, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of FireEye Endpoint Security and is free of viruses.

s/ Eugene Volokh

*Attorney for Amici Curiae*