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

AMERICAN SUSTAINABLE BUSINESS COUNCIL, *Plaintiff*,	§	
v.	§	CIVIL ACTION NO. 1-24-CV-1010
GLENN HEGAR, in his official capacity as Texas Comptroller of Public Accounts; and KEN PAXTON, in his official capacity as Attorney General of Texas, *Defendants.*	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

RALPH MOLINA
Deputy First Assistant Attorney General

AUSTIN KINGHORN
Deputy Attorney General for Civil Litigation

KIMBERLY GDULA
Division Chief, General Litigation Division

WILLIAM H. FARRELL
Assistant Attorney General
Attorney-In-Charge
Texas Bar No. 00796531
Federal ID No. 21733
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 936-2650
Facsimile: (512) 320-0667

ATTORNEYS FOR DEFENDANTS,
GLENN HEGAR, in his official capacity as Texas Comptroller of Public Accounts, and KEN PAXTON, in his official capacity as Attorney General of Texas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

STATEMENT OF ISSUES TO BE DECIDED BY THE COURT

1. Does Plaintiff have Article III Standing to pursue its claims against Defendants?
2. Does the First Amendment apply to the non-expressive conduct proscribed by SB 13?

INTRODUCTION

Defendants' Response and the arguments set forth in support of their Cross-Motion for Summary Judgment are essentially the same as those set forth in their Motion to Dismiss Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief and Reply in Support of that motion, which remains pending. Dkt. 32 and Dkt. 38, respectively.

There is no disputing the economic impact of the petroleum industry on The State of Texas, the nation's leader in petroleum-based exports: it the industry employs hundreds of thousands of Texans and generates billions of dollars in wages and taxes. *Texas Oil and Natural Gas Industry Pays History-Making $26.3 Billion in State and Local Taxes, State Royalties*, TEXAS OIL & GAS ASSOCIATION (Jan. 30, 2024), http://www.txoga.org/2023eeir/ (TXOGA Report). Nor is it an exaggeration to claim the petroleum industry is essential to the continued prosperity of the State.

To further ensure such prosperity, the Texas Legislature enacted Senate Bill 13 (SB 13), which (1) prohibits state public entities from investing in and contracting with companies that boycott oil and natural gas companies and (2) requires prospective government contractors to verify they will abstain from boycotting oil and gas companies for the duration of the contract. SB 13 does not apply to business owners' activities; however, it ensures that these individuals can speak out against the oil and gas industry in their personal capacities. SB 13 also requires contracting entities to forego commercial decisions that, standing alone, have never been afforded First Amendment protections and only prohibits state public entities from investing in companies engaging in the same non-protected commercial decisions. Finally, the bill exempts minor

contracts (those under $100,000) and contractors (those with fewer than ten employees) from these requirements. This carefully crafted law ensures that Texas tax dollars are not conscripted into the service of boycotting the economic lifeblood of the State while respecting private parties' rights to hold and espouse opinions as they may deem appropriate.

Plaintiff, American Sustainable Business Council, a membership-based organization of companies opposed to the oil and gas industry, has challenged the constitutionality of SB 13 on the basis that it impermissibly infringes on the freedom of speech and association of its members. Yet, it has wholly failed to provide any evidence of any specific or impending injury to itself or any of its members. Absent any such evidence, Plaintiff's Motion for Summary Judgment fails as a matter of law, and conversely, Defendants remain entitled to dismissal or summary judgment on all of Plaintiff's claims.

BACKGROUND

The Texas Legislature enacted SB 13 to prevent government contracts and investments from becoming funding sources through which parties undermine the State's economy by boycotting the oil and natural gas industry (codified as Tex. Gov't Code §§ 2276.001, *et seq.,* and 809.001, *et seq.*). The law was passed by the Legislature with overwhelming *bipartisan* support in the House and Senate. *See* H.J. of Tex., 87th Leg. R.S. 1989, 1996 (2021) (discussing Tex. S.B. 13); S.J. of Tex., 87th Leg. R.S. 795, 801 (2021) (same).

Once a determination is made that a financial company is "boycott[ing] fossil-fuel based energy compan[ies]," as defined by Tex. Gov't Code § 809.001(1) (the "Divestment Provision"), then the respective state governmental entity, after giving notice to the financial company and within 90 days of providing the notice, shall "sell, redeem, divest, or withdraw all publicly traded securities of the financial company" unless that divestment would "likely result in a loss in value

or benchmark deviation." Tex. Gov't Code §§ 809.053, 809.054. Further, if a company is determined to be "boycott[ing] fossil-fuel-based energy companies" under Tex. Gov't Code § 809.001, then a vendor with 10 or more full-time employees seeking a contract in excess of $100,000.00 paid from the public funds of the governmental entity must verify that it will not boycott fossil-fuel based energy companies during the life of the contract. Tex. Gov't Code § 2276.001, *et seq.* (the "Procurement Provision").

SB 13 does not apply to individuals. Thus, owners, managers, and employees of firms contracting with the State, or its subdivisions remain free to engage in economic boycotts in their personal capacities. At least eleven other states contain similar prohibitions akin to SB 13,[1] with several additional states currently considering similar provisions.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the movant satisfies its initial responsibility of showing "the absence of a material fact," the burden shifts to the non-movant to identify "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

The substantive law governing a plaintiff's claims determines which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Further, "a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Turner v. Baylor Richardson Med. Ctr.,* 476 F.3d 337, 343 (5th Cir. 2007) (internal quotation marks omitted).

[1] Ala. Code § 41-16-160; Ark. Code § 25-1-1001; Fla. Stat. § 280.02; Ida. Code § 67-2345; Kan. K.S.A. 2022 Supp. § 74-4921; Ky. Rev. Stat. § 41.010; N. Dak. Cen. Code § 54-44; Ok. Stat. § 12001; Tenn. Code Ann. § 9-4-107; Utah Code § 63G-27-102; W. Va. Code § 12-1C

ARGUMENT

I. Plaintiff Lacks Standing

Plaintiff erroneously contends it has associational standing to bring this lawsuit. However, Plaintiff lacks standing to sue in this capacity as it did not identify members who would have standing to challenge SB 13 in their own right. *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiff's claim to associational standing hinges on two of its members: Etho Capital LLC ("Etho") and Our Sphere, Inc. ("Sphere"). *See* Dkt. 28, ¶¶ 18, 26, 104–112. Yet, Plaintiff did not show that either Etho or Sphere has Article III standing to challenge SB 13.

To establish Article III standing, a plaintiff must show an injury, fairly traceable to the defendant's challenged actions, that is likely to be redressed by the requested relief. *Lujan v. Defs. of Wildlife,* 504 U.S 555, 560-61 (1992). The plaintiff bears the burden of establishing standing and must do so for every claim and every form of relief. *TransUnion LLC v. Ramirez,* 594 U.S. 413, 431 (2021). For several reasons, Plaintiff has not shown that Etho or Sphere would have standing in its own right. Notably, despite 248 pages of documents attached as Exhibit 5 to Plaintiff's Motion for Summary Judgment, Dkt. 39, *none* are related to either Etho or Sphere. Instead, Plaintiff attempts to rely on other company communications with Defendants without any evidence those companies – Blackrock, Credit Suisse, State Street Global Advisers, BNY Mellon, and Schroders—are members of Plaintiff or are even aware of the claims asserted by Plaintiff.

If the Comptroller determines that a financial company boycotts oil and natural gas companies, the Divestment Provisions require certain state governmental entities to (1) divest from that financial company and (2) not acquire securities of that financial company. Tex. Gov't Code §§ 809.053, 809.057. Plaintiff has not shown that any state entity would imminently have to divest

from Etho or Sphere due to SB 13; neither has it identified any plan, proposal, or request that a state entity would acquire securities in Etho or Sphere but for SB 13. Plaintiff has only a "speculative" and not "actual or imminent" injury. *See Shrimpers & Fishermen of RGV v. Tex. Comm. on Env't Quality,* 968 F.3d 419, 424 (5th Cir. 2020). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 409 (2013) (emphasis in original).

But even if Plaintiff had an injury, it cannot show that injury is fairly traceable to the Comptroller or the Attorney General or that an order preventing them from "enforcing" the Divestment provisions would offer them any relief. While Etho and Sphere provided declarations indicating that one of each of their respective funds was determined not to be a suitable investment for Texas retirement funds, the government entities themselves are solely responsible for purchasing or selling securities. The Comptroller cannot force the governmental entities to do so. And even though the Attorney General has the *discretionary* authority to enforce the statute under Tex. Gov't Code § 809.102, this Court has explained that for traceability, injury, and sovereign immunity purposes, it must be likely that he will do so. *See City of Austin v. Paxton,* 943 F.3d 993, 1002 (5th Cir. 2019); *see also Air Evac EMS, Inc. v. Texas,* 851 F.3d 507, 520 (5th Cir. 2017) ("[C]ourts recognize the significant overlap between Article III jurisdiction, *Ex parte Young,* and equitable relief.").

The Divestment Provision requires the specific governmental entities defined in Tex. Gov't Code § 809.001(7), state employee retirement systems and the permanent school fund, to divest assets from companies that violate Tex. Gov't Code Chapter 809. The only enforcement language within Chapter 809 provides that "the attorney general *may* bring any action necessary to enforce

this chapter." Tex. Gov't Code § 809.012. Since only state governmental entities are required to comply with Chapter 809, the enforcement provision can only contemplate an action to force compliance by an offending governmental entity. Because Plaintiff has not alleged that the Attorney General intends to sue another state agency—his own client—to force them to sell securities the State does not even own, it cannot show standing. It is the Plaintiff's burden to show that the Attorney General intends to do so. *Clapper,* 568 U.S. at 441, n.4. "Traceability is particularly difficult to show where the proffered chain of causation turns on the government's speculative future decisions regarding whether and to what extent it will bring enforcement actions in hypothetical cases." *A&R Engineering v. Scott*, 72 F.4th 685, 690 (5th Cir. 2023).

The Procurement Provisions state that certain governmental entities generally "may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that it: (1) does not boycott energy companies, and (2) will not boycott energy companies during the term of the contract." Tex. Gov't Code § 2276.002(b). Plaintiff did not allege that Etho or Sphere ever have, or ever will, enter into a governmental contract for goods or services that would fall under § 2276.002's ambit. As such, the Procurement Provisions do not injure Etho or Sphere in any meaningful way. "'Allegations of *possible* future injury' are not sufficient" to establish Article III standing. *Clapper,* 568 U.S. at 409 (emphasis in original). Even if they had, the Fifth Circuit has already held that a plaintiff lacks standing to sue the Attorney General based on a materially identical statute. *See A&R Engineering,* 72 F.4th at 690.

Further, the "Attorney General hasn't taken any action to suggest he might enforce the provision against Plaintiff even if he has such power. The Supreme Court has instructed courts "to reject the mere potential for enforcement as a 'highly attenuated' speculative chain of possibilities

that cannot trace an injury to the government." *Id.* at 690. That the Legislature gave the Attorney General express enforcement power as to the Divestment provisions, but was silent as to the Procurement provisions, poses a traceability problem for Plaintiff. Similarly, the Legislature did not even mention the Comptroller in the Procurement provisions, nor did it grant him any power to enforce even so much as the Divestment provisions, which creates an even greater problem for the Plaintiff. Absent any evidence that the Comptroller or Attorney General has actually enforced or threatened enforcement against a *state retirement system*, Plaintiff's standing claim fails as a matter of law.

In *A&R Engineering,* plaintiff was the owner of A&R Engineering and Testing, Inc. and was facing the loss of an *existing* contract with the City of Houston due to the restrictions of Texas Government Code §2271.001, *et seq.,* (the "boycott Israel" statute). The Fifth Circuit determined that plaintiff lacked standing to pursue his claims against the Attorney General due to traceability problems and enforcement issues. *Id.* at 690-91. More specifically, the boycott Israel statute "failed to provide a way for the Attorney General to enforce the requirements," and the "City's conduct sever[ed] any links between A&R's economic injury and the Attorney General." *Id.* Same here. SB 13's materially identical text fails to provide a way for the Attorney General to enforce the requirements of the Divestment Provision, and the state retirement plans' conduct, if any, would sever any link between Plaintiff's potential or hypothetical harm alleged by Plaintiff.

Moreover, the Divestment provision is not absolute, as the Texas Legislature notably built safeguards into § 809 that provide several relevant exceptions. *See Abdullah v. Paxton,* 65 F.4th 204, 209 (5th Cir. 2023). State governmental entities may cease divesting in listed financial companies if: (1) the entity has suffered or will suffer a loss in the hypothetical value of all assets under management; (2) an individual portfolio that uses a benchmark aware strategy would be

subject to an aggregate expected deviation from its benchmark, and (3) it is necessary to ensure the entity does not suffer a loss in value or deviate from its benchmark. Tex. Gov't Code § 809.056.

Plaintiff's lack of standing eliminates the need for any further analysis and requires judgment in favor of Defendants; nonetheless, Defendants address the merits of each of Plaintiff's claims below.

II. The First Amendment Does Not Apply to SB 13

The Procurement provision begins by prohibiting "refusing to deal" or "terminating business activities" with fossil-fuel-based energy companies. Tex. Gov't Code § 2276.001. Neither refusing to deal with a counterparty nor terminating business activities are expressive conduct protected by the First Amendment. *See A&R Eng. and Testing, Inc. v. City of Houston,* 582 F.Supp.3d 415, 431 (S.D. Tex. 2022) ("In short, the Court agrees that the mere refusal to engage in a commercial/economic relationship with Israel or entities doing business in Israel is not 'inherently expressive' and therefore does not find shelter under the protection of the First Amendment.") *rev'd and remanded sub nom. A&R Eng'g & Testing, Inc. v. Scott,* 72 F.4th 685 (5th Cir. 2023) (reversed due to lack of standing to pursue claims against the Attorney General).

The First Amendment's Speech Clause protects both speech and "conduct that is inherently expressive." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 66 (2006) (*FAIR*); *see also, Ark. Times LP v. Waldrip as Tr. of Univ. of Ark Bd. of Trs.,* 37 F.4th 1386 (8th Cir. 2022). If explanatory speech is needed to explain the "message" of conduct, the conduct is not *inherently* expressive. *Id.* at 65-66 (emphasis added). Nor does conduct gain First Amendment protection just because it is accompanied by speech. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* at 66. Plaintiff must prove that its conduct is inherently

expressive to gain First Amendment protection. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 797 (1985). And it cannot do so.

Just as the anti-boycott statute prevents economic discrimination against oil and natural gas companies, Tex. Gov't Code § 2276.002, the statute at issue in *FAIR*, the Solomon Amendment, prevented discrimination against military recruiters by universities receiving federal funds, 547 U.S. at 55. Several law schools objected to the Amendment, seeking instead to "restrict[] the access of military recruiters to their students because of disagreement" with a former military policy barring openly gay persons from military service. *Id.* at 51-52 & n.1.

While rejecting the schools' argument, the Supreme Court explained the law "affect[ed] what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60 (emphasis in original). "Law schools remain free under the statute to express whatever views they may have" on the military's policies without losing federal funding. *Id.* The Court also held that this refusal to deal with military recruiters was not protected expressive conduct because "First Amendment protection [extends] only to conduct that is inherently expressive" like "flag burning." *Id.* at 66. Excluding military recruiters "is not 'overwhelmingly apparent'" because "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military." *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

An entity's "refusing to deal" or "terminating business activities" with fossil-fuel-based energy companies is no more expressive than refusing military recruiters. Tex. Gov't Code § 809.001(1). It is highly unlikely that, absent any explanatory speech, an external observer would ever notice that a contractor is engaging in a primary or secondary boycott of energy companies. *Ark. Times LP,* 37 F.4th at 1392 (citing *FAIR,* 547 U.S. at 66). "An observer . . . has no

way of knowing whether" the firm "is expressing its disapproval" of those companies or purchased competitors' products "for reasons of their own." *FAIR*, 547 U.S. at 66. "If combining speech and conduct were enough to create expressive conduct,"—such as announcing disapproval of the IRS and then refusing to pay income taxes—"a regulated party could always transform conduct into 'speech' by simply talking about it." *Id.* Under *FAIR,* the anti-boycott statute's proscriptions against "refusing to deal" and "terminating business activities" do not ban speech. Tex. Gov't Code § 809.001(1). Nor do they bar "conduct that is inherently expressive." *FAIR,* 547 U.S. at 66.

Finally, federal law has long barred participation in certain economic boycotts.[2] The 8th Circuit, sitting en banc, is the only federal appellate court to consider whether a "refusal to deal" or "terminating business activities" violates the First Amendment, and they held "[a] factual disclosure of this kind, aimed at verifying compliance with unexpressive conduct-based regulations, is not the kind of compelled speech prohibited by the First Amendment." *Ark. Times LP,* 37 F.4th at 1394. The First Amendment simply does not give Plaintiff a wholly unfettered right to participate in the State's contracting process while participating in economic discrimination that undermines its economy.

III. SB 13 is Neither Overbroad Nor Vague

Where a plaintiff asserts both vagueness and overbreadth, the "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 755 (5th Cir. 2010) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). "If it does not, then the overbreadth challenge must fail." *Id.* (quoting *Hoffman Estates*, 455 U.S. at 494). "If the

[2] *See* John S. McCain, National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232 §§ 1771-74, 132 Stat. 1636, 2234-38 (2108); Export Administration Act of 1979, Pub. L. 96-72 § 8, 93 Stat. 503, 521 (1979).

ordinance passes the overbreadth test, the court moves to 'examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in *all* of its applications.'" *Id.* at 755-56 (quoting *Hoffman Estates*, 455 U.S. at 494-95) (emphasis added).

Overbreadth challenges "can succeed only [if] overbreadth is substantial in relation to the statute's legitimate reach." *Hersh v. United States ex rel. Mukasey,* 553 F.3d 743, 762 (5th Cir. 2008). Put differently, "[t]here must be a significant imbalance between the protected speech the statute should not punish and the unprotected speech it legitimately reaches." *Id.* SB 13 prohibitions are strictly limited to non-expressive boycott activities without regard to any speech. "The fact that a court can hypothesize situations in which the statute will impact protected speech is not alone sufficient." *Id*. "The party challenging the statute must demonstrate a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court before a statute will be struck down as facially overbroad." *Id.*

"Facial challenges to the constitutionality of statutes should be granted 'sparingly.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). "They . . . 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.'" *Id.* at 763 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)). The anti-boycott statute does not encompass *any* protected expression, supra pp._, and clearly does not include a "substantial amount" of overbreadth, *Fairchild*, 597 F.3d at 755. The statute only prohibits economic discrimination against an essential state industry. Tex. Gov't Code § 809.001(1). The Legislature's

precision in specifying "refusing to deal" and "terminating business relations" belies the Plaintiff's expansive interpretation.

The doctrine of constitutional avoidance also supports this interpretation. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the Legislature]." *Hersh*, 553 F.3d at 753-54 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).[3] Relatedly, the Texas Legislature has provided that when interpreting Texas law, it is "presumed that [] compliance with the constitution [] of ... the United States is intended." Tex. Gov't Code §311.021(1). Accordingly, the Texas Supreme Court has "narrowly construed" statutes "to avoid vagueness and overbreadth concerns." *King St. Patriots v. Tex. Dem. Party*, 521 S.W.3d 729, 736 (Tex. 2017) (citing *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000)). Thus, any overbreadth in the statute should be resolved in favor of the law's constitutionality.

The statute's residual clause, prohibiting "otherwise taking any action," only prohibits economic discrimination. Tex. Gov't Code § 809.001. With the required intent, the clause covers conduct such as charging higher fees, setting unattainable standards exceeding currently applicable law, restricting investment, or having policies restricting investment. Though not a flat "refus[al] to deal" or "terminat[ion] [of] business activities," such conduct nonetheless constitutes economic discrimination. It "is clear" that "[t]he provision is a catch-all for commercial activities that do not fit the main two categories but have the same purpose—to reduce the company's business

[3] The Supreme Court has rejected the notion that the avoidance canon "has less force in the context of an overbreadth challenge," finding "no support for th[is] proposition." *United States v. Hansen*, 599 U.S. 762, 781 n.3 (2023).

interactions with oil and natural gas companies in a discriminatory way. *Arkansas Times LP v. Waldrip,* 988 F.3d 453, 467 (8th Cir. 2021) (Kobes, J., dissenting).

The residual clause covers neither speech nor expressive conduct. The statute's general reference to "otherwise taking any action" is interpreted as *ejusdem generis,* or "of the same kind," as "refusing to deal" and "terminating business activities." *United States v. Kaluza,* 780 F.3d 647, 657 n.29 (5th Cir. 2015) (quoting 2A Norman Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 47:17 (7th ed. 2014)). As a rule, the clause's invocation of "or otherwise" triggers the canon's application. *Ala. Educ. Ass'n v. State Sup. of Educ.,* 746 F.3d 1135, 1148 (11th Cir. 2014). *Ejusdem generis* "limits the scope of . . . catchall language to the same class or category as the specific items that precede its use." *In re Millwork,* 631 S.W.3d 706, 712 (Tex. 2021) (per curiam).[4]

The statute is also not vague, and Plaintiff lacks standing to press such a challenge. "[P]laintiffs can seek judicial review of state laws and regulations *only* insofar as they show a plaintiff was (or imminently will be) *actually* injured by a particular legal provision." *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) (per curiam) (emphasis in original). Plaintiff cannot bootstrap a vagueness argument to create standing to challenge other aspects of the law.

For Plaintiff to have standing to make a vagueness challenge, its "injury must be traceable to the allegedly vague provision." *Freedom Path, Inc. v. I.R.S.*, 913 F.3d 503, 507 (5th Cir. 2019); *cf. United States v. Clark*, 582 F.3d 607, 613 (5th Cir. 2009) ("[A] [party] who engages in

[4] The related canon of *noscitur a sociis* illuminates the meaning of "intended to penalize, inflict economic harm on, or limit commercial relations." Tex. Gov't Code § 809.001(1). Under that canon, "a word is known by the company it keeps." *Gustafson v. Alloyd Co., Inc.,* 513 U.S. 561, 575 (1995). Statutes are read to "avoid ascribing to one word a meaning so broad that it is inconsistent with accompanying words, thus giving 'unintended breadth to' [the statute]." *Id.* at 575 (citation omitted). Applied to the residual clause, this canon confirms that "penalize" has an economic character like "inflict[ing] economic harm" and "limit[ing] commercial relations." Tex. Gov't Code § 809.001(1).

some conduct that is *clearly* proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). Listed financial companies have committed to meeting environmental standards beyond currently applicable law, restricting investment in fossil fuel companies and/or having a policy restricting such investment. Such conduct falls squarely within the "refusing to deal with" provisions of the statute. Tex. Gov't Code § 809.001(1).

In fact, both Etho and Sphere have specifically admitted their respective boycotts of the fossil fuel industry. Ms. Amberjae Freeman, the Chairperson and Chief Executive Officer of Etho Capital, verified the "Etho Index screens out fossil fuel companies," and "Etho Capital avoids investing in companies that explore and produce fossil-fuel based energy and does not include fossil fuel companies in the Etho Index." Dkt. 39-2, ¶¶ 1, 10, 27. Ms. Alex Wright-Gladstein, Chief Executive Officer of Sphere, similarly verified "[t]he Sphere fund does not invest in fossil fuel companies." Dkt. 39-3, ¶¶ 1, 6. Despite both companies' specific admission of their boycott of the fossil fuel industry, each claim that it is "unable to determine what actions it could take to come into compliance." Dkt. 39-2, ¶ 29, Dkt. 39-3, ¶ 23. Neither Etho nor Sphere can complain of vagueness when their conduct falls squarely within the bounds of Tex. Gov't Code § 809.001(1).

Per the canons of construction referenced herein, *ejusdem generis, noscitur a sociis*, and the avoidance canon, "any action" clearly means taking action to restrict investment in energy companies that is not protected First Amendment activity-- which is precisely what Etho and Sphere have admittedly done. The Fifth Circuit has "rejected that a law 'must delineate the exact actions a [person] would have to take to avoid liability.'" *Doe I v. Landry*, 909 F.3d 99, 118 (5th Cir. 2018) (quoting *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552 (5th Cir. 2008)). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict

expressive activity." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (internal quotations omitted).

While Plaintiff claims it is "unable to determine which actions or expression will constitute a 'boycott' of fossil fuels," the Supreme Court does not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960)). If the Plaintiff and/or its members are taking action to restrict investment in energy companies, then such conduct falls within the purview of SB 13.

Finally, should the Court find any infirmity in the residual clause, the clause should be severed from the statute. "Whether unconstitutional provisions of a state statute are severable is 'of course a matter of state law.'" *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott,* 647 F.3d 202, 210 (5th Cir. 2011) (quoting *Virginia v. Hicks,* 539 U.S. 113, 121 (2003)). Under Texas law, unless the statute provides otherwise, an invalid "provision" in a statute "[is] severable" if "the invalidity does not affect other provisions or application." Tex. Gov't Code § 311.032(c). "Thus, the proper inquiry under Texas law focuses on whether, if one provision of statute is invalid, the remaining provisions can still be given effect in the absence of an invalid provision." *Nat' Fed'n of the Blind,* 647 F.3d at 211. Even if the anti-boycott statute only prohibits "refusing to deal" and "terminating business activities," the law will continue to have a meaningful effect. Tex. Gov't Code § 809.001(1). Therefore, if it is invalid, the residual clause is severable.

IV. SB 13 Does Not Compel Speech

In addition to its boycotting allegations, Plaintiff alleges that SB 13 compels speech in violation of the First Amendment due to the requirement of contractors to verify that they do not, and will not, boycott fossil fuel energy companies. Dkt. 28, ¶¶ 128, 140. The "verification

requirement" does not run afoul of the Supreme Court's guidance with respect to compelled speech. *See* Tex. Gov't Code § 2276.002(2)(b).

The Supreme Court has previously identified two possible categories of compelled speech that violate the First Amendment—(1) "forcing an individual, through his speech, to affirm a 'religious, political [or] ideological cause []' that the individual did not believe in," and, (2) "forcing 'an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *United States v. Arnold,* 740 F.3d 1032, 1034 (5th Cir. 2014) (quoting *Wooley v. Maynard,* 430 U.S. 705, 714-15 (1977). The second category refers to compelled speech that "requir[es] the individual to be a 'mobile billboard' for the state's message," such as forcing a driver to display the State's motto on a license plate. *Id.* at 1034, n.7. The verification requirement at issue does not equate to a violation of either category.

The Fourth Circuit recently considered a similar verification requirement in *Ali v. Hogan*, which required contractors to "certif[y] and agree[]" that they had not "refused to transact or terminated business activities, or taken other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories." 26 F.4th 587, 591 (4th Cir. 2022). The Court noted nothing in the certification required the plaintiff to "pledge any loyalty to Israel or profess any other beliefs." *Id.* at 600. As such, the Fourth Circuit held the plaintiff lacked the compelled-speech Article III injury in fact. *Id.* at 599-600. "Certification requirements for obtaining government benefits, including employment or contracts, that merely elicit information about an applicant generally do not run afoul of the First Amendment." *Arkansas Times LP v. Waldrip,* 362 F.Supp.3d 617, 622, *rev'd on other grounds, Ark. Times LP,* 988 F.3d at 453; *see also Grove City Coll. v. Bell,* 465 U.S. 555, 575-76 (1984), *superseded by statute on other grounds, NCAA v. Smith,* 525 U.S. 459, 466 n.4 (1999)

(rejecting the argument that conditioning federal assistance on compliance with Title IX's prohibition on gender discrimination violated the First Amendment). The verification requirement of SB 13 simply seeks a company's statement on its present and future activity, which does not compel protected speech.

The Divestment provision does not implicate the First Amendment, as the State is simply acting as a market participant in buying and selling financial securities. The First Amendment does not give any company a right to have the government buy or sell its stock. Further, the federal government currently imposes sanctions and requires divestments in several countries because the United States government disfavors them.[5] Plaintiff's claim cannot be viable without undermining international sanction laws regarding what the federal government is or is not allowed to purchase.

The Procurement provision does not compel anyone to say anything. Tex. Gov't Code § 2276.002. It provides that any contractor wishing to contract with a state governmental entity for an amount exceeding $100,000.00 must answer certain questions before bidding on the contract. *See Book People, Inc. v. Wong,* 98 F.4th 657, 660 (5th Cir. 2024) (Ho, C., dissenting from denial of rehearing en banc). Similar to the READER Act at issue in *Book People,* financial companies can decline to respond, and the consumer can decline to purchase. "That's not compelled speech—that's consumer speech." *Id.* Not a single case holds the compelled speech doctrine applies when the government is asking questions as a potential consumer—rather than compelling speech as a regulator armed with the coercive powers of the state." *Id.* Under the Divestment provision, the State is simply a customer deciding if and/or when to buy and sell financial securities. Such decisions do not implicate First Amendment protections.

[5] *See* 50 U.S.C. § 1702; *see also, e.g.,* Exec. Order No. 14,071, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, 87 Fed. Reg. 20999 (April 6, 2022); Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, 124 Stat. 1312, July 1, 2010).

V. SB 13 Remains Constitutional under *O'Brien*

SB 13 is constitutional under the *United States v. O'Brien* test for neutral regulations promoting substantial government interests. 391 U.S. 367 (1968). The Fifth Circuit explained that the test sustains a statute's validity: [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Doe I,* 909 F.3d at 108 (quoting *O'Brien,* 391 U.S. at 377) (alterations in original).

The first element of the *O'Brien* test is clearly met as the Texas Legislature exercised settled constitutional authority when adopting the law. Secondly, the anti-boycott statute furthers at least two important or substantial government interests: limiting the extent to which tax dollars may support, directly or indirectly, government contractors' boycotts and strengthening Texas' interest in its economic partnership with the fossil fuel industry, which is a vital participant in Texas' economy. *See* TXOGA Report. Third, none of these interests is related to the suppression of free expression. "[A] regulation satisfies this criterion . . . if it can be 'justified without reference to the content of the regulated speech.'" *J&B Ent. v. City of Jackson,* 152 F.3d 362, 376 (5th Cir. 1998) (quoting *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 586 (1991) (Souter, J., concurring)). As more fully set forth *supra* at II, p. 7, SB 13 does not even target speech – only conduct. Finally, any incidental regulation of alleged First Amendment freedoms is no greater than essential to further the interest. The fourth element of the *O'Brien* test is met if the "substantial government interest . . . would be achieved less effectively absent the regulation." *LLEH, Inc. v. Wichita County,* 289 F.3d 358, 367 (5th Cir. 2002) (emphasis omitted). A statute is not "invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* SB 13 is aimed at

proscribing conduct in furtherance of a legitimate state interest without regard to any speech or espoused viewpoints.

VI. SB 13 Does Not Infringe on Freedom of Association

"While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition." *Baird v. State Bar of Arizona,* 401 U.S. 1, 6 (1971). As clearly shown herein, SB 13 does not aim at the suppression of speech, does not license enforcement authorities to administer the statute based on constitutionally impermissible criteria, nor does Plaintiff contend SB 13 has been applied for the purpose of hampering the organization's ability to express its views. *See Roberts v. U.S. Jaycees,* 468 U.S. 609, 623-24 (1984). In fact, the Comptroller has publicly indicated that a company's commitment to Climate Action 100 or Net Zero is not sufficient for listing under Tex. Gov't Code 809.051 when he explained, "the review of verification responses indicated the financial companies consider the level of commitment to being a signatory to these lists differently. As such, the Comptroller's office sought additional data to help inform the final listing." *See* Comptroller of Public Accounts, List of Financial Companies that Boycott Energy Companies, Frequently Asked Questions, at https://web.archive.org/web/20221109184338/ https://comptroller.texas.gov/purchasing/docs/divest-energy.pdf.

Furthermore, "[t]he right to associate for expressive purposes is not, however, absolute." *Roberts,* 468 U.S. at 263. "Infringements on that right may be justified by compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (internal cite omitted). SB 13 is specifically directed at companies determined to be boycotting the oil and gas industry, which is not protected conduct, and was enacted to protect compelling state interests similar to the federal government's enacted

sanction laws. Similarly, the State remains free to not associate with companies it chooses not to. Plaintiff and its members also remain free to engage in any association and express their views however they deem appropriate. Plaintiff's freedom of association fails as a matter of law, and Defendants should be granted summary judgment on such claims.

VII. SB 13 Does Not Violate Plaintiff's Right to Access Courts

Plaintiff claims the First Amendment prevents the State from failing to provide a private cause of action for every regulatory statute it passes. Plaintiff's novel claim would most certainly impose a massive federal takeover of state law as it would require states to have private causes of action for everything without any limiting principles. This claim cannot be valid. Even assuming Plaintiff can show some alleged injury—which it cannot—"[t]he fact that a person has suffered harm from the violation of a statute does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago,* 441 U.S. 677, 688 (1979).

Plaintiff further alleges the fee-shifting provision "chills persons from exercising their right to access the courts by imposing monetary penalty for bringing suit," but Plaintiff has failed to allege any actual injury related to Tex. Gov't Code § 809.004(a) for which it seeks redress and therefore lacks standing. Dkt. 28, ¶ 150. "However, unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Christopher v. Harbury,* 536 U.S. 403, 415 (2002). Without any actual injury, Plaintiff's court access claim fails, and Defendants are entitled to summary judgment as a matter of law.

Finally, Plaintiff argues SB 13 prevents it "from filing a lawsuit challenging any implementation or consequences of SB 13." Dkt. 28, ¶ 148. Yet, that is precisely what Plaintiff has done. Accordingly, Plaintiff lacks any standing to pursue such a claim.

CONCLUSION

As a matter of law, Plaintiff has not demonstrated standing to bring the claims asserted herein against Defendants. Further, Plaintiff has not presented any viable evidence to support its First Amendment claims, and its Motion for Summary Judgment fails as a matter of law. Alternatively, the laws of this State conclusively show that Defendants are entitled to summary judgment on all of Plaintiff's claim. For the foregoing reasons, Defendants, Glenn Hegar, in his official capacity as Texas Comptroller of Public Accounts, and Ken Paxton, in his official capacity as Attorney General of Texas, respectfully request this Court grant summary judgment for Defendants on all of Plaintiff's claims.

CERTIFICATE OF SERVICE

I, William H. Farrell, hereby certify that I electronically filed the foregoing the Defendants' Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment with the Clerk of the Court for the United States District Court for the Western District of Texas, Austin Division, by using the appellate CM/ECF system on February 28, 2025 which will send notice of such filing to all registered CM/ECF users.

/s/ William H. Farrell
WILLIAM H. FARRELL
Assistant Attorney General