**No. 2026-50111**

# United States Court of Appeals
## for the
# Fifth Circuit

AMERICAN SUSTAINABLE BUSINESS COUNCIL,

*Plaintiff-Appellee*

— v. —

GLENN HEGAR, former Comptroller of Public Accounts, in his official capacity; KEN PAXTON, Attorney General, in his official capacity

*Defendants-Appellants*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS (AUSTIN)

NO: 1:24-CV-01010-ADA

## BRIEF FOR *AMICUS CURIAE* LIBERTY JUTICE CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS

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## Interest of Amicus Curiae

Amicus curiae Liberty Justice Center (LJC) is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights.

LJC submits this brief because the district court's ruling represents a fundamental threat to free speech, a value LJC is sworn to preserve.

## Summary of Argument

As caretaker of seven mandatory pension plans, the State of Texas engages in the open market by buying and selling corporate securities. *See* Texas Emps.' Ret. Sys., State of Texas Retirement (last visited Feb. 28, 2026)[1]. Not wanting the State to hold a financial interest in the sabotage of its own economy, the Legislature enacted a statute to "divest, or withdraw all publicly traded securities" from companies involved in the active boycott of the Texas energy industry. Tex. Gov't Code § 809.053(d).

[1] https://www.ers.texas.gov/Active-Employees/Retirement/State-of-Texas-Retirement.

Invoking the overbreadth and void-for-vagueness doctrines, and claiming Texas violated due process, the district court ruled Texas's action violated both the First and Fourteenth Amendments.

The district court is mistaken: the government has no obligation to subsidize companies engaged in corporate activism, referred to as environmental, social, and corporate governance (ESG) objectives. History and precedent, from the Founding to today, show there has never been a First Amendment right to government subsidies. The district court's ruling imperils the actual First Amendment, empowering foreign censors to control American speech.

Companies in Texas have the right to engage in ESG. But they have no First Amendment right to do so at the taxpayers' expense.

## Argument

### I. History and precedent, from the Founding to today, show there has never been a First Amendment right to government subsidies.

The vast discretion the state has over what it chooses to subsidize is visible in the distinction the Founding Era Congress made between public laws and private laws. A private law is "a bill for the relief of one or several specified persons, corporations, institutions, etc., and is distinguished from a public bill, which relates to public matters and

deals with individuals only by classes." *Hinds' Precedents of the House of Representatives of the United States*, vol. 4, § 3285, at 247 (U.S. Gov't Publ'g Off. 1907).

Via private laws, Congress in early America engaged in spending decisions far more subjective and ideological than anything in Texas's investment regulations. These private laws served two purposes. Firstly, before the era of sweeping appropriations, they were used to expense government officials for unforeseen necessities. For example, the Congress of 1792 voted to reimburse "Benjamin Hawkins and other Commissioners" $2,787.88 "for treating with the Southern Indians." Alexander Hamilton, *Report on the Balances Due on Certain Requisitions* (Feb. 23, 1792)[2]. Secondly, "the practice of securing a determination of the right to indemnity almost invariably entailed the submission of a petition to Congress for the adoption of private legislation." James E. Pfander & Jacob P. Hunt, *Public Wrongs and Private Bills*, 85 N.Y.U. L. Rev. 1862, 1866 (2010). In an era long before the Federal Tort Claims Act, when a state actor caused private injury,

[2] Available at Founders Online, Nat'l Archives, https://founders.archives.gov/documents/Hamilton/01-11-02-0230 (last visited Feb. 28, 2026).

private laws "protected [government workers] from ruinous liability, assured the victim of compensation, and overcame the doctrine of sovereign immunity by ensuring that, at the end of the day, the government paid for the losses its officials inflicted in the line of duty." *Id.* at 1876.

In the Founding Era, private laws were a significant portion of the government's spending decisions, even after the state had decided to create government entitlement programs like pensions. *See* Gwen Sinclair, *Public Lessons from Private Wrongs*, 45 Documents to the People 20, 25 (2017). Prior to the creation of the Court of Claims in 1855, war pension "claimants had to apply to the Treasury Department for relief and, if a claim was not settled" would immediately "petition Congress." *Id.* at 22. In other words, whether or not someone's already-appropriated pension was approved depended on the whims and proclivities of congressional representatives, who could vote or not vote to grant the claim for any reason. *See* U.S. Const. art. I § 6. This was not challenged under the First Amendment.

If anything, the government's ability to control its own spending decisions was even more absolute during the Second Founding Era,

when the Fourteenth Amendment was ratified and the First Amendment was incorporated against Texas. "Under an act of July 17, 1862, all persons prosecuting claims with the government" for pre-Civil War pensions "had to swear an oath of allegiance." Claire Prechtel-Kluskens, *A Reasonable Degree of Promptitude: Civil War Pension Application Processing, 1861–1885*, 42 Prologue Mag. (Spring 2010), Nat'l Archives[3]. "The pension office suspended payments to" War of 1812 veterans and widows "about whom 'credible and responsible information going to prove their active participation or avowed sympathy with the southern insurrection' had been received" (but not verified). *Id.* This law remained in effect until 1874—long after the Civil War concluded. *Id.*

Subjectivity in private law spending decisions was not limited to Civil War related issues. The Anti-Pinkerton Act—first enacted at the federal level in 1892, made permanent a year later, and still in effect today—holds that "[a]n individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of

[3] https://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html

Columbia." 5 U.S.C. § 3108; *see also* U.S. Gov't Accountability Off., B-139965.1 (June 7, 1978)[4]. The law followed years of furious debate in both state and federal legislatures over the tactics of private security groups like the Pinkerton corporation. Ward Churchill, F*rom the Pinkertons to the PATRIOT Act: The Trajectory of Political Policing in the United States, 1870 to the Present*, 4 CR: The New Centennial Rev. 1, 22–27 (Spring 2004). Notably absent from these concerns was the idea that barring the government from hiring Pinkerton agents was itself a First Amendment violation. *See id.*

The argument advanced in the present case—that the pulling of government subsidies is somehow a form of censorship—does not appear to have even been broached in court before the mid-20th century. When it was, it met an immediate frosty reception at the Supreme Court, which declared "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

[4] https://www.gao.gov/products/b-139965-1.

Since then, the Court has—without fail—held that "the Government [does] not discriminat[e] on the basis of viewpoint" when it "[chooses] to fund one activity to the exclusion of another," *Rust v. Sullivan*, 500 U.S. 173, 192–193 (1991), as "[t]he First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009), quoting U.S. Const. amend. I. The Supreme Court held that the government could subsidize reproductive healthcare without subsidizing consultations that discuss abortion. *Id.* at 179; *see also Maher*, 432 U.S. at 475 (earlier case on a similar subject with the identical holding). It held that the government could subsidize private universities without subsidizing private universities that exclude military recruiters. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006). It held that the government could subsidize public libraries without subsidizing public libraries that did not include child-safety software on their computers. *United States v. Am. Library Ass'n*, 539 U.S. 194, 199 (2003). It held that the government could subsidize union activities without subsidizing union *political* activities.

*Ysursa*, 555 U.S. at 359. It held that the government could subsidize art without subsidizing art it found demeaning. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585–586 (1998).

To be clear, under Supreme Court precedent, the state may not "plac[e] a condition on the *recipient* of the subsidy rather than on a particular government program or service," as this would "effectively prohibi[t] the recipient from engaging in the protected conduct outside of the scope of the [government] funded program." *Rust*, 500 U.S. at 197. In other words, the Court turned to the same public law/private law distinction that had defined the early Congress: public laws raised First Amendment concerns, but private laws for individualized spending gave the government far more discretion. A government may not, for example, condition access to generally-applicable student activity printing costs on the disavowal of God, as that would be a public law. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831–832 (1995) (note this is a free speech, not free exercise, case). Under a private law, however, it could choose not to subsidize art projects that spoke about God, even as it subsidized other works of art.

*See NEA*, 524 U.S. at 585–586 (note this is also a free speech, not free exercise, case).

The public law/private law distinction was best distinguished in the lengthy litigation between the Agency for International Development and the Alliance for Open Society International. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 440 (2020) (Thomas, J. concurring) (osummarizing the long-running dispute). In *AOSI I*, a divided Court held that the First Amendment prohibited conditioning reimbursements for HIV-prevention services on condemnation of prostitution. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218–219 (2013) ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'"). In *AOSI II*, however, the Court refused to apply its holdings to the same plaintiff's foreign affiliates, as the funding of foreign organizations—unlike domestic policy—could imply the U.S.'s endorsement of that organization's "values." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 436 (2020) (majority opinion). This fit with the

longstanding precedent recognizing "the State's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics." *Ysursa*, 555 U.S. at 355.

Here, the district court is not telling Texas it needs to reimburse expenses or open up a grant program. It is instead ordering the state to *purchase securities* in ESG-practicing companies, and explicitly link the retirement benefits of Texas citizens to those companies' economic performance. It is difficult to imagine something that creates more "entanglement" than that.[5] *See Ysursa*, 555 U.S. at 355.

The district court gestures at the Court's anti-retaliation precedent by claiming the law it enjoins "permits the State to penalize companies for all manner of protected expression concerning fossil fuels." *Am. Sustainable Bus. Council v. Hegar*, 2026 U.S. Dist. LEXIS 22918, *10 (W.D. Tex. 2026). But this type of argument has been rejected by the Supreme Court, which has repeatedly held that "'[a] refusal to fund protected activity, without more, cannot be equated with the imposition

[5] Note that this logic may not apply to other, non-securities-related provisions of Texas Senate Bill 13, which were not discussed in the district court's ruling. *See* Tex. S.B. 13, 87th Leg., Reg. Sess. (2021).

of a 'penalty' on that activity.'" *Rust*, 500 U.S. at 193 (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

To paraphrase the Court, Texas "does not 'penalize'" corporations "that choose not to" invest in fossil fuel industries; "[r]ather," its statute "simply reflects [the Legislature]'s decision not to subsidize their doing so." *ALA*, 539 U.S. at 212. "To the extent that [corporations] wish to" engage in ESG practices, "they are free to do so without [state] assistance." *Id.*

In summary, longstanding history and precedent show that there is no First Amendment right to government subsidies, and the state has every right to avoid entanglement with partisan affairs when it chooses how to spend (or not spend) taxpayer money.

## II. The lower court ruling imperils the actual First Amendment, empowering foreign censors to control American speech.

The district court's ruling is particularly disturbing because, if allowed to stand, it will imperil *actual* First Amendment rights and empower foreign governments to silence American speech.

As the Supreme Court said: the "command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that

constitutionally guaranteed freedom." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). For this reason, the Court has been vigilant in rejecting the all-to-common requests that they use the First and Fourteenth Amendments to limit the government's ability to *protect* fundamental rights. It famously rejected the idea of a due process right to avoid anti-discrimination law. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259–60 (1964). It rejected the idea that the First Amendment exempted media monopolies from antitrust law. *Lorain J. Co. v. United States*, 342 U.S. 143, 155–56 (1951). Recognizing the Constitution did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution," it rejected the contention that the Fourteenth Amendment prohibited laws guaranteeing speech protections in public accommodations. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980). It later used the same logic to unanimously reject a First Amendment challenge to Texas regulations barring private censorship in certain online spaces, such as email inboxes and rideshare services. *Moody v. NetChoice, LLC*, 603 U.S. 707, 725 (2024). It similarly upheld

federal regulations requiring common carriage principles on cable companies, as "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict. . . . the free flow of information and ideas." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 657 (1994). And, after some equivocation, it held that it was "egregiously wrong" to claim the Fourteenth Amendment prohibited Texas from protecting the right to life prior to birth. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (condemning a previous decision enjoining a Texas anti-abortion law).

Here we have another "egregiously wrong" perversion of the Fourteenth Amendment, using a Constitutional provision meant to guarantee fundamental rights to instead dismantle statutory efforts to protect them. *See id.* By choosing not to tie its pensions to the success of companies employing ESG, Texas was utilizing one of its only tools to combat foreign influence.

In Texas, "the impetus for" the "increased corporate focus" on fossil fuel divestment "has been driven by the advent of many ESG-related laws and regulations enacted by the EU." James S. Gkonos, *An ESG*

*Update for Insurers: Pumping the Brakes* (last updated December 15, 2025), Practical Guidance (Saul Ewing Arnstein & Lehr LLP). The E.U.'s ESG mandates, especially on fossil fuels, "reach beyond EU borders to companies around the world." Jonathan Artigues, *Who Wins? Analyzing Global ESG Reporting Through the EU's Corporate Sustainability Reporting Directive and the Evolving U.S. Scheme*, 32 Tul. J. Int'l & Comp. L. 143, 152 (2024). "Incentive-flavoured regulation" by the E.U. is considered "'market-shaping,' a core role of a financial regulator" that, when imposed on multinational corporations in the multinational securities market, inevitably regulates Texas just as it regulates Germany and France. Daniel Harris, *A pox on the Pax ESG?*, 7 JIBFL 485, 485 (2021).

Unfortunately, though Texas's statute was specific to fossil fuel-related ESG policies, the district court's holding is not. If the ruling is left intact, Texas (and any states bound by the precedent) will be prohibited from divesting from companies colluding with European authorities to target core Constitutional liberties.

Under the Digital Services Act, the E.U. requires tech platforms (including social media and search engines) to censor speech based on

nebulous, subjective categories such as "hate," "disinformation," and "cyber violence." E.U. 2022/2065, art. 34; E.U. 2022/2065, art. 35; E.U. 2022/2065, art. 84. European authorities have boasted about taking down content not just in their countries, but platform—and thus world—wide. *See, e.g.,* Clara Chappaz (@ClaraChappaz), *'Skinnytok c'est TERMINE!*, X (June 4, 2025), https://x.com/ClaraChappaz (French digital minister boasting about getting anti-obesity hashtags removed from TikTok). Platforms that resist this censorship face draconian penalties, such as the €120 million fine imposed on X. Press Release, X, X Files Appeal Against €120M Fine Under Digital Services Act (Feb. 20, 2026)[6]; Press Release, European Commission, Commission fines X €120 million under the Digital Services Act (Dec. 4, 2025)[7]. In accordance with ESG-principles, some companies have joined European authorities and, in likely violation of antitrust laws, coordinated their advertising spending to pressure platforms to adapt their censorship policies to match those of Europe. *X Corp v. World Fed'n of Advert.*, Compl. ¶ 3–5, Case No. 7:24-cv-00114-O (N.D. Tex. August 6, 2024).

[6] https://x.com/GlobalAffairs/status/2024803983093629298.
[7] https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2934.

There are very few ways for American states to combat corporations colluding with European authorities to censor Americans. One of the few tools they have left is to *not use their citizens' pension funds to finance these censorship efforts*. *See* Tex. Gov't Code § 809.053(d).

It would be the most twisted of ironies if judicial activism perverted the First and Fourteenth Amendments, of all things, as a tool to prevent states from combatting foreign censorship. The district court ruling imperils *actual* First Amendment rights by empowering foreign governments to silence American speech.

## Conclusion

The government has no obligation to finance private companies' ESG policies with taxpayer money. History and precedent, from the Founding to today, show there has never been a First Amendment right to government subsidies. The district court ruling imperils the actual First Amendment, empowering foreign censors to control American speech. For these reasons, *amicus* the State of Texas and urges this court to reverse the district court's decision.

Dated: March 25, 2026

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tim Kilcullen

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## CERTIFICATE OF COMPLIANCE

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

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font size 14.

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