No. 22-12827

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

Abby Martin,

Plaintiff-Appellant,

v.

Chancellor for the Board of Regents of the University, et al,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF OF PLAINTIFF-APPELLANT

November 4, 2022

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following listed persons and entities, as described in 11th Cir. R. 26.1-1 and 2, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant

Abby Martin

Defendants-Appellees

Regents of the University System of Georgia

Steve Wrigley, Chancellor for the Board of Regents of the University System of Georgia

Georgia Southern University

Kyle Marrero, President of Georgia Southern University

Bonnie Overstreet, Conference Services Manager for Georgia Southern University

Michel Blitch, Conference Services Coordinator for Georgia Southern University

Sandra Lensch, Conference Services Specialist for Georgia Southern University

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Mark H. Cohen

Plaintiff-Appellant Abby Martin is an individual person.

November 4, 2022

/s/ Lena F. Masri
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant requests oral argument and believes it would significantly aid the Court. The issues presented in this appeal concern the application of the Court's "clearly established" doctrine to O.G.C.A. § 50-5-85. Among other benefits, oral argument would allow the Court to explore with counsel the meaning of the statute and case law, as well as the contents of the record.

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INTRODUCTION

State government employment—including contract employment—cannot be conditioned on the taking of oaths that impinge on a prospective employee's right to speech or expression, absent a significant public interest. And it's long been established by the Supreme Court that peaceful boycott-related activities are protected by the First Amendment.

Abby Martin is a renowned journalist with an award-winning portfolio of work covering Israel's occupation of Palestinian territories. Shortly after the release of her documentary *Gaza Fights for Freedom*, Martin was invited to serve as the keynote speaker at the annual International Critical Media Literacy Conference hosted by Georgia Southern University. Conference organizers chose and excitedly promoted Martin as the keynote because of her thought-provoking advocacy for the rights of Palestinians. Martin's advocacy prominently features her support for the Boycott, Divestment, Sanctions movement, an international nonviolent civil rights boycott and protest aimed at pressuring the Israeli government to change its policies with regard to Palestinians.

Martin was offered the opportunity to share her work at the conference in exchange for an honorarium of $1,000 and travel expenses. She immediately accepted. But Martin never got to present her work, keynote the conference, or earn the honorarium. In fact, the conference—a long-standing annual event—was cancelled altogether after Defendants enforced an "anti-BDS" clause in Martin's contract. That clause required Martin to sign an oath agreeing to abandon specific protected free speech activities, pledge allegiance to Israel, and agree not to engage in any expressive conduct supportive of the BDS movement, or she would be prohibited from the opportunity to keynote the conference and earn the $1,000 honorarium. In keeping with her principled political beliefs, Martin refused to sign the state-imposed oath.

That forced choice violated the First and Fourteenth Amendments. The district court correctly concluded that Defendants' contract requirement was—and is—unconstitutional. But the district court was wrong to hold that the unconstitutionality is not clearly established. In conditioning Martin's keynote on a loyalty oath to Israel and a bar on participation in the Boycott, Divest, Sanctions movement, Defendants

violated clearly established rules, and qualified immunity does not shield them from Martin's First and Fourteenth Amendment claims.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 42 U.S.C. § 1983. Dismissal was entered as to individual capacity Defendants Overstreet, Blitch, and Lensch on May 21, 2021. The district court entered dismissal as to all remaining claims on July 20, 2022. Martin timely filed a notice of appeal on August 19, 2022. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

A government official can be held liable in damages for violating a constitutional right if the right "was clearly established at the time the action occurred," such that "a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

The issue in this case is whether a reasonable state university official would have known that it was unconstitutional to prohibit Martin's speech or other expressive conduct in support of the boycott of a foreign government—whether on campus or off, for the duration of the contract—as a condition of employment when the protest involved an

issue of public concern and was the very issue she was invited to speak about on campus.

STATEMENT OF THE CASE

I. Legal background

A. The Boycott, Divest, Sanctions Movement seeks to influence Israeli policy towards Palestine.

The relationship between Israel and Palestine is a significant international political conflict. App at 17. At the center of that conflict is the way the Israeli government treats Palestinians. *Id*. The international "Boycott, Divestment, Sanctions" movement emerged from a call made by Palestinian civil society figures and organizations, representing not only people living in the West Bank and the Gaza Strip, but also Palestinian citizens of Israel as well as Palestinians, including those in the United States, who immigrated. BDS is a way for people concerned with the treatment of Palestinians to engage in collective nonviolent political expression and advocacy for civil rights, and, BDS advocates hope, get the Israeli government to change its approach to Palestinians. *Id* at 18.

B. O.C.G.A. § 50-5-85 attempts to restrict and punish free speech related to Israel and Palestine.

The Boycott, Divestment, Sanctions movement has attracted its fair share of political opponents. In recent years, local and state legislatures have considered more than one hundred bills and resolutions aimed at hindering the movement. *Id* at 143. Georgia is no exception. Former Governor Nathan Deal, who signed the bill at issue here into law, campaigned on his support for an anti-BDS law. While governor, Deal also signed onto an advocacy group's Governors United Against BDS initiative, which collected commitments from "all 50 U.S. states and the mayor of D.C. to condemn the boycott, divestment, and sanctions (BDS) movement." *Id* at 20. In signing on to this initiative, then-Governor Deal "strongly condemn[ed] the BDS movement as incompatible with the values of our states and our country." *Id.*

Then-Governor Deal signed the bill at issue here into law on April 26, 2016, and it was codified as O.C.G.A. § 50-5-85. That law forbade the state of Georgia to contract with individuals unless they agree to "a written certification that [they are] not currently engaged in, and agree[] for the duration of the contract not to engage in, a boycott of Israel." *Id* at 21. The law applies to Defendants as agents of the State of Georgia, and—at all times relevant to the claims in this case—to all contracts

other than those "with a total value less than $1,000." Ga. Code Ann. § 50-5-85 (amended July 1, 2022).

O.C.G.A. § 50-5-85 defines "boycott of Israel" as: "engaging in refusals to deal with, terminating business activities with, or other actions that are intended to limit commercial relations with Israel or individuals or companies doing business in Israel or in Israeli-controlled territories, when such actions are taken … in compliance or adherence to calls for a boycott of Israel … [or] in a manner that discriminates on the basis of nationality, national origin, religion, or other unreasonable basis that is not founded on a valid business reason." *Id* at 84. The statute does not specifically define "valid business reason."

On July 1, 2022, Georgia amended O.C.G.A. § 50-5-85 to exclude state contracts with individuals, companies with fewer than five employees, and contracts valued at less than $100,000. *Id* at 265. But, as explained below, the harm to Martin was already done.

II. Factual background

A. Georgia Southern University invites Martin to keynote a conference.

Abby Martin is a prominent journalist and advocate for the rights of Palestinians, including the Boycott, Divestment, Sanctions ("BDS")

movement, which calls for a political and economic boycott of Israel. *Id* at 162. Central to both Martin's work specifically and the BDS movement generally is the protest of the Israeli government's human rights violations against Palestinians in Gaza and other occupied territories *Id*. As the founder of *Media Roots* and creator of *The Empire Files*, an investigative documentary series critical of U.S. foreign policy with regard to Israel, *Id* at 164, Martin released the documentary *Gaza Fights for Freedom* in June 2019, including a strong call to support the BDS movement. *Id* at 179.

Soon after, on July 19, 2019, Georgia Southern University ("GSU") invited Martin to speak at the 2020 International Critical Media Literary Conference ("ICMLC"). *Id* at 82. The Conference is a long-standing event that GSU was hosting in Savannah in 2020. *Id* at 121. The gathering is "designed to aid current educational leaders, future teachers, youth, and other concerned citizens in their understanding of mass media and its impact on events that shape our daily lives." *Id.* In past years, the conference has brought together dozens of academics from across the country to "promote[] critical media literacy" among attendees and each other, which GSU conference organizers view as "essential in excavating

social inequalities and fostering participatory democracy during the 21st century." *Id* at 122.

The invitation provided details of the "speaker package" that Martin would receive if she served as the keynote speaker, including an honorarium and travel and lodging expenses. *Id* at 186. On July 22, 2019, Martin accepted the invitation by email. *Id* at 183. One week later, Dr. William Reynolds, GSU professor and conference co-chair, wrote to others on the conference committee, including professors from the University of Tennessee, Macalester College, University of Massachusetts, Oakland University, St. Louis Community College, Worcester State University, California State University, Seattle University and DePaul University, "We are excited that Abby Martin will be the Key Note Speaker at the 2020 ICML Conference. We will officially announce this soon but I thought I would give you all advanced notice," further referring to Martin as a "fantastic Key Note." *Id* at 189. Planning for the conference went forward including arranging contracts with local hotels, preparing a budget for the conference, development of marketing materials, creation of a registration portal and related matters. *Id* at 166.

B. Defendants block Martin from speaking at GSU because she refuses to sign a contract with an anti-BDS clause.

Defendants are three employees of Georgia Southern University: Bonnie Overstreet and Michel Blitch, both conference services managers, and Sandra Lensch, a conference services specialist. On September 11, 2019, Defendants sent Martin a contract for her keynote presentation, in exchange for which she would receive a $1,000 honorarium and travel expenses. *Id.* at 243. One week later, Defendants followed up with Martin to "draw [her] attention" to the anti-BDS clause written into the contract in compliance with O.C.G.A. § 50-5-85. The language read as follows:

> You certify that you are not currently engaged in, and agree for the duration of this agreement not to engage in, a boycott of Israel, as defined in O.C.G.A. Section 50-5-85.

Id. In this September 18, 2019 email, Defendants stated explicitly that they would honor their invitation to Martin only "[i]f this language is acceptable." *Id* at 195. Martin responded the same day, stating: "I'm sure you know, a lot of my work advocates the boycott of Israel, and my new film features that call to action. I cannot sign any form promising not to boycott Israel." *Id* at 200.

Defendants refused to contract with Martin because she was unwilling to sign the form agreeing to surrender her First Amendment rights to engage in a politically expressive boycott and advocate for the

BDS movement. *Id* at 45. Upon receiving Martin's response, Overstreet did not respond to her. Instead, she forwarded Martin's response to Dr. Reynolds stating: "This was Abby's reply. We will await your response for the new Keynote." *Id* at 212. Dr. Reynolds forwarded the email chain to the Conference co-chair and wrote, "Here is Abby's response looks like we need to look for another Keynote speaker." *Id* at 218.

On September 19, 2020, the co-chairs then drafted an email to be sent to the conference committee. A draft of the statement read:

> As you know we invited Abby Martin to be our Keynote speaker for the 2020 conference. A problem has arisen concerning the issue of Georgia's and 27 other states' ANTI BDS laws. You can find out the specifics of the legislation on line, but we conceive of it as an issue concerning censorship and academic freedom. Basically the legislation prohibits advancing ideas of boycotting or advocating divesting in Israel. It is troubling to say the least. … [we] think the best course of action is to make a statement concerning academic freedom and censorship and to cancel the 2020 Conference. As Derek wrote to me – how can we have a 'critical media literacy conference when free speech is prohibited. How can we have critical media literacy if the state is telling us who we can and can't listen to!'"

Id at 221.

On September 23, 2019, Michelle Norsworthy of the marketing department for GSU wrote to Megan Bouchillon in that department, copying Overstreet: "Abby Martin is a well-known journalist and war

correspondent. Since the International Critical Media Conference is politically-oriented, she fell within the realm of critical media and would have been a great draw as a keynote speaker. However, as the team worked through the MOA, Georgia's anti-BDS law was discovered. Given some of her works, the conference chairs and committee have decided not to move forward with her as a keynoter and have decided to cancel the Feb. 2020 conference." *Id* at 235.

In January 2020, Carl Reiber, GSU's Provost and Vice President of Academic Affairs, wrote to Diane Badakhsh and Amy Heaston, the Director of the Division of Continuing Education and Dean of the College of Education, "Can I get more details on the conference that was canceled due to the state law on Israel?" *Id* at 206. Overstreet responded, "The International Critical Media Literacy Conference was canceled due to Georgia's Israel Anti-Boycott Law…When Abby was informed of the law she stated she could not sign promising to not boycott Israel." *Id* at 205.

Defendants refused to move forward with the contract without the anti-BDS language, depriving Martin of the ability to speak on the GSU campus, to receive the honorarium, and to showcase her work. *Id.* at 84. 53-55. O.C.G.A. § 50-5-85 and the anti-BDS clause Defendants enforced

in the GSU contract are the only reasons why Martin did not sign the contract. *Id* at 173.

III. Procedural background

Martin sued Overstreet, Blitch, Lensch (collectively "Individual Defendants"), and other university officials for violating her rights under the First and Fourteenth Amendments by infringing on her right to free speech when they prohibited her from advocating for a boycott of Israel as a condition of employment. *Id* at 12. The Defendants moved to dismiss. *Id* at 39.

The District Court held that Martin had stated a claim that O.C.G.A. § 50-5-85 violated her First and Fourteenth Amendment rights to freedom of speech and assembly. *Id* at 88. The Court explained that "state government employment cannot be conditioned on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments," *id.* (quoting *Cole v. Richardson*, 405 U.S. 676, 680 (1972)) (cleaned up), and that anti-BDS statutes implicate state contractors' First Amendment rights. *Id.* The Court also noted that the statute's restrictions on contractors' speech are content-based "because the statute exempts boycotts of Israel that are 'founded on a valid business reason,'"

so "whether the state of Georgia will enter into an agreement with a contractor that refuses to engage in business with Israel is premised entirely upon the motive behind the contractor's decision." *Id.* at 98.

Because O.C.G.A. § 50-5-85 imposed content-based restrictions on speech, the Court subjected the law to strict scrutiny, which requires "the government [to] show that the statute serves a compelling governmental interest and that any burden on speech be essential and narrowly tailored to further than interest." *Id.* The law flunked that test because "[e]ven assuming that Georgia's interest in furthering foreign policy goals regarding relations with Israel is a substantial interest, Defendants fail to explain how Martin's advocacy of a boycott of Israel has any bearing on Georgia's ability to advance foreign policy goals with Israel." *Id.* at 99. Moreover, the law was not narrowly tailored to achieving that purported interest because it was both overinclusive and underinclusive. *Id.* Separately, the District Court also held that Martin stated a claim that O.C.G.A. § 50-5-85 violated the First and Fourteenth Amendments because it unconstitutionally compelled speech, *id* at 101, and that it was unconstitutionally vague under the Fourteenth Amendment. *Id* at 103.

Nonetheless, the District Court held that the Defendants are shielded from liability for damages in their individual capacities under the doctrine of qualified immunity. *Id.* at 104. According to the District Court, the illegality of O.C.G.A. § 50-5-85 was not clearly established, and it would be "unreasonable to expect that the Individual Defendants in this case would have been on notice that O.C.G.A. § 50-5-85 was unconstitutional." *Id.* at 107. Martin's remaining claims were rendered moot by a July 1, 2022, amendment of the statute that exempted individuals contracting for less than $100,000. *Id* at 269.

SUMMARY OF ARGUMENT

The Supreme Court's oath cases have long clearly established that the government cannot force an individual to swear not to engage in associational activities that are constitutionally protected. And Georgia's anti-BDS law does exactly that. It required Martin, among others, to agree not to participate in the global boycott against Israel. As both the facts and the Supreme Court's prior precedent in *NAACP v. Claiborne Hardware* show, boycotts are inherently associational, and as a result are constitutionally protected. And—just like in the oath cases themselves—the vagueness of the required oath and its resulting natural susception

to reach core protected activity such as speech independently clearly establish the oath's unconstitutionality.

Even apart from the unconstitutional certification, the anti-BDS's bar on participation in the boycott of Israel violates the constitution in a way that was clearly established by *Claiborne*. *Claiborne* makes clear that, while a boycott can be artificially segmented into expressive and nonexpressive elements, in practice, the expressive and nonexpressive components are inseparable. *Claiborne* remains constitutionally binding on Georgia, and so the anti-BDS law violates clearly established law for this reason as well.

Georgia may point to the Eighth Circuit's recent decision in *Arkansas Times* upholding Arkansas's similar anti-BDS law. But that decision postdated both the passage of the anti-BDS law and GSU's enforcement of that law against Martin. So it could not have realistically given the Appellees in this case any harbor. And it was wrongly decided: the decision wrongfully held that the Supreme Court's unanimous decision in *Rumsfeld v. FAIR* silently overturned *Claiborne* without once mentioning the word "boycott." Not so. *FAIR* on its face only applies to requiring conduct regardless of the reasons a private entity would have

for abstaining. The anti-BDS law, on the other hand, not only requires conduct only when refusing to do so is based on participation in protected conduct, but separately requires compelled speech disavowing the protected conduct. By doing so, *Arkansas Times* failed to not only faithfully apply *Claiborne*, but the Supreme Court's oath cases as well.

STANDARD OF REVIEW

Courts of Appeal review de novo a district court's order of dismissal, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Mesa Valderrama v. U.S.*, 417 F.3d 1189, 1194 (11th Cir. 2005).

ARGUMENT

I. Qualified immunity does not shield the Defendants from liability for violating the First and Fourteenth Amendments.

To hold an official liable in damages for a constitutional violation, plaintiffs must show that the violation of a right occurred at a time when "this right was clearly established." *Valderrama v. Rousseau*, 780 F.3d 1108, 1112 (11th Cir. 2015). The "cornerstone" of qualified immunity is "fair and clear notice to government officials." *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1031 (11th Cir. 2001). Officials are on notice—and thus not shielded by qualified immunity—when (1) a "materially similar case

has already been decided;" (2) a "broader, clearly established principle [] should control the novel facts of the situation;" or (3) the conduct involved "so obviously violate[s] the constitution that prior case law is unnecessary." *Terrell v. Smith*, 668 F.3d 1244, 1255-56 (11th Cir. 2012). Here, all three of those versions of prior notice existed, rendering the illegality of the anti-BDS clause clearly established thrice over.

A. *Cole v. Richardson* is a materially similar case that provided university officials with notice of the unconstitutionality of the anti-BDS clause.

Government officials are not entitled to the protections of qualified immunity when "the facts of previous precedents" and "the facts that confronted the government official in the case before the court" are "materially similar." *Marsh*, 268 F.3d at 1032. To meet that bar, "every fact need not be identical." *Id.* Rather, a case must be "enough like the facts in the precedent that no reasonable, similarly-situated official" could believe their conduct to be lawful. *Id.* Here, *Cole v. Richardson*, 405 U.S. 676 (1972), upheld a Massachusetts employment oath because it required only that public employees agree to uphold the constitution and did not mandate specific action or speech, or prohibit any constitutionally protected expressive conduct. The case clearly laid out the contours of

constitutionally permissible employment contract oaths and should have put the Defendants on notice that enforcing Georgia's anti-BDS clause against Martin would be unconstitutional.

1. The Supreme Court's Oath cases clearly establishe that a state-imposed loyalty oath is unconstitutional if it requires oath-takers to take specific actions or refrain from constitutionally protected associational activities.

In *Cole*, the Supreme Court addressed a Massachusetts law that required all public employees to sign the following loyalty oath:

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any unconstitutional method.

Id. at 678 n.1. When Lucretia Richardson, a research sociologist hired by Boston State Hospital, refused to sign that oath, the hospital superintendent fired her. *Id.* at 677-78.

The Supreme Court analyzed the challenged oath in two parts. First, the Court held that the "uphold and defend" clause, like other loyalty oaths upheld by the Court in the past, was permissible because it merely "assure[d] that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system."

Id. at 679. Crucially, the Court explained that the clause did not require adherence to any particular viewpoint or political position. Nor did it prohibit any expressive conduct. Rather, it was merely "addressed to the future, promising constitutional support in broad terms." *Id.* at 680. Second, the Court upheld the "oppose overthrow" clause, reading the clause to simply reiterate the general "commitment to abide by our constitutional system." *Id.* at 684.

In upholding the oath, the Supreme Court interpreted the oath to be constitutionally permissible because it did not "impose obligations of specific, positive action on oath takers," noting that a contrary interpretation would raise constitutional vagueness issues under the Due Process Clause. *Id.* The Court also emphasized that the challenged oath did not require the prospective employee to swear "an oath denying past, or abjuring future, associational activities within constitutional protection"—rather, it required the oath-taker to foreswear only future violent overthrow of the government, which is not constitutionally protected. *Id.* at 680, 686-87. The Court explained that "[a]n underlying, seldom articulated concern" in its loyalty oath cases is that state laws may place "the government into the censorial business of investigating,

scrutinizing, interpreting, and the penalizing or approving the political viewpoints and past activities of individuals." *Id.* at 681 (quoting *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 192 (1971)) (quotation marks omitted).

The Court cited a litany of cases that, together, established that "neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments," "[n]or may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities" like "criticizing institutions of government." *Id.* at 680. Those cases include:

- *Cramp v. Bd. of Public Inst'n. of Orange Cnty., Fla.*, 368 U.S. 278 (1961), which held that a Florida statute requiring an employee to swear that "he has never lent his 'aid, support, advice, counsel or influence to the Communist Party'" was unconstitutionally vague and violated due process. *Id.* at 280 ("We think this case demonstrably falls within the compass of those decisions of the Court which hold that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence

must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") (cleaned up).

- *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967), which held that a statute barring from employment in public schools any person willfully advocating or teaching doctrine of forcible overthrow of government, and disqualifying a public school employee who advocated, taught, or embraced duty or propriety of adopting doctrine of government overthrow, was unconstitutionally vague and violated the First Amendment.
- *Baird v. State Bar of Ariz.,* 401 U.S. 1 (1971), which held that a state bar association's requirement that an applicant answer questions concerning whether she had ever been a member of the Communist Party or any organization that advocates the violent overthrow of the U.S. government violated the First Amendment and could not lead to rejection where her record was devoid of anything tending to show she was not morally and professionally fit.

- *Baggett v. Bullitt*, 377 U.S. 360 (1964), which held that a state employment oath requirement prohibiting "subversive" persons—any person who "commits, attempts to commit, aids in the commission, or advocates, abets, advises or teaches by any means" any person to engage in acts intended to overthrow, destroy, or alter the constitutional form of government—was unconstitutionally vague and violated the First Amendment.

2. The anti-BDS clause required Martin to take specific, positive action in order to secure employment with the state.

As just discussed, *Cole* upheld the challenged loyalty oath by refusing to interpret it "to impose obligations of specific, positive action on oath takers" because, in the Court's view, "[a]ny such construction would raise serious questions [about] whether the oath was so vague as to amount to a denial of due process." 405 U.S. at 684-85. No such generous interpretation of O.C.G.A. § 50-5-85 is plausibly available. The statute required Martin to affirmatively certify in writing—a specific, positive action—that she was "not currently engaged in" and would not become engaged in, for the duration of the contract, "a boycott of Israel." O.C.G.A. § 50-5-85. For a professional like Martin, the government's

attempt to compel her to disavow the BDS movement was offensive, both to her career and her convictions. The statute's definition of "a boycott of Israel" raises exactly the vagueness concerns alluded to in *Cole*: It includes "refusals to deal with, terminating business activities with, or ***other actions that are intended to limit commercial relations*** with Israel or individuals or companies doing business in Israel or in Israeli-controlled territories," when undertaken in support of a boycott of Israel, rather than for a "valid business purpose." *Id.* (emphasis added).

The statute does not define what "other actions that are intended to limit commercial relations" might include. Would it include factual journalistic reports that cast Israel in an unflattering light? What about choosing not to buy Israeli-owned brands at the grocery store? Martin couldn't be sure. It is likely, however, that the government's oath would have compelled her to alter her keynote address as her investigative work and docuseries supportive of the BDS movement would have been central to the speech. It is also likely that the government would have been in a position to hold her in breach of contract if she continued to promote or even distribute her documentary featuring a BDS call to action. Even the act of expressing verbal support for a boycott may be within the scope of

prohibitions. Such a vague requirement risks being "a trap for the innocent," *Cramp*, 368 U.S. at 281 (quoting *United States v. Cardiff*, 344 U.S. 174, 176 (1952)), and transgresses *Cole*'s clearly established framework for the legality of state-imposed loyalty oath clauses in employment contracts.

3. The anti-BDS clause required Martin to refrain from constitutionally-protected associational activities.

Moreover, the unconstitutionality of the Defendants' actions "is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." *Cramp*, 368 U.S. at 287. As *Cole* puts it, state employment may not "be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities," including "criticizing institutions of government." 405 U.S. at 680. The anti-BDS clause at issue here did just that: As a condition of the Defendants' offer to serve as a keynote speaker, the contract required Martin to forego participation in the Boycott, Divestment, Sanctions movement. Specifically, the contract required Martin to not engage in any "actions that are intended to limit commercial relations with Israel … in compliance or adherence to calls for a boycott of Israel." Martin would not have reasonably known if

promoting her documentary, which includes a call to boycott businesses supportive of Israeli occupation, or even talking about her work in Palestine would run afoul of the oath she was compelled to take in exchange for employment. Further, the certification permitted actions intended to limit commercial relations with Israel where motivated by "a valid business reason" rather than a political call to boycott. *See* O.C.G.A. § 50-5-85. *Cole* clearly establishes that such a condition is unconstitutional. Any reasonable public official would have known that, under *Cole*, the anti-BDS clause mandated by O.C.G.A. § 50-5-85 was unlawful.

B. *NAACP v. Claiborne Hardware Co.* clearly establishes that the First Amendment protects an individual's right to peacefully boycott.

The seminal case, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in addition to being materially similar also clearly established the law by setting out a "broader, clearly established principle that should control the novel facts of the situation." *Terrell*, 668 F.3d at 1255 (quoting *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005)) (cleaned up). "[A]n official action is not protected under qualified immunity simply because 'the very action in question' has not been held

unlawful before, but 'in light of pre-existing law the unlawfulness must be apparent.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Specifically, *Claiborne* clearly established that the Government may not prohibit "nonviolent, politically motivated boycott[s] designed to force governmental and economic change." *Claiborne*, 458 U.S. at 914; *see also Fla. Gulf Coast Bldg. and Const. Trades Council v. NLRB*, 796 F.2D 1328, 1332 (11th Cir. 1986) (*Claiborne* "held that the First Amendment protects a secondary boycott organized by a civil rights group."), *aff'd sub nom. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988); *Ray v. Edwards*, 725 F.2d 655, 660 (11th Cir. 1984) ("[T]he Supreme Court held that the boycott was political activity, protected by the first amendment."); *FTC v. Super. Ct. Tr. Lawyers Ass'n*, 493 U.S. 411, 449 (1990) (Brennan, J., concurring in part) (describing *Claiborne* as holding "that a civil rights boycott was political expression"). That principle alone makes clear that Georgia's anti-BDS law violates the First Amendment.

Claiborne concerned a boycott of white-owned businesses in Mississippi, which "was launched at a meeting of a local branch of the

NAACP attended by several hundred persons." 458 U.S. at 907. The boycott's "acknowledged purpose was to secure compliance by both civil and business leaders with a lengthy list of demands for equality and racial justice," and the boycott "was supported by speeches and nonviolent picketing" by which "[p]articipants repeatedly encouraged others to join in its cause." *Id.* The white business owners sued the NAACP and its individual members under state tort law. *Id.* at 889.

The Supreme Court emphatically held that peaceful boycott-related activities—including "[t]he established elements of assembly, association, and petition,"—"are entitled to the protection of the First Amendment." *Id.* at 915. The Court explained that "band[ing] together and collectively express[ing] … dissatisfaction with a social structure" perceived to be unjust is a quintessential First Amendment activity, *id.* at 907, and looked to Justice Harlan's famous words in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958):

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

Id. at 908. And, although the Court recognized that states "have broad power to regulate economic activity," they do not have "a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. As such, the Court held that the protestors' peaceful boycott-related activities were protected by the First Amendment.

But central to the Court's ruling was First Amendment protection of the boycott itself.

> A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions…. [But] the right of the States to regulate economic activity could not justify a … prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.

Id. at 913-14. While "[s]peech itself also was used to further the aims of the boycott," the Court considered the economic decisions at the heart of the boycott—namely, refusals to deal with white-owned businesses until their demands were met. *Id.* at 909-10. In its analysis, the Court never differentiated those refusals to deal from the expressive conduct surrounding them. And it certainly never suggested that the government could regulated, penalized, or compel those decisions. *Id.* at 909-10. On

the contrary, the Court repudiated the state chancellor's original damages assessment against the boycotters for Claiborne's lost revenue, cautioning that state action, including state courts' imposition of liability under state tort law could not be applied to limit the expressive conduct at the heart of a political boycott. *Id.* at 918. "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*." *Id.* (emphasis added). The Court clearly held that "a nonviolent, politically motivated boycott"—not *just* the expressive conduct surrounding it—"is constitutionally protected." *Id.*

In *Claiborne*, then, the Supreme Court declared that states could not rely on their interests in regulating economic policy to enact a "prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. That Court articulated that clearly established rule in the context of a state tort law that infringed on boycotters' First Amendment rights, but it applies with no less force in the context of state contract law. In contract law, as in tort, "the application of state rules by … state courts in a manner alleged to

restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment." *Id.* at 916 n.51.

Here, Georgia did exactly what the Supreme Court held unconstitutional in *Claiborne*: enacted a "prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change." 458 U.S. 886, 915. O.C.G.A. § 50-5-85 required prospective contractors with the state to swear an oath affirming that they did not, and would not, advocate for or engage in a boycott of Israel. That effectively banned contractors from participating in the BDS movement, infringing on Martin's "exercise of [her] First Amendment rights, [by which she] sought to bring about political, social, and economic change." *Claiborne*, 458 U.S. at 911. Like *Claiborne*, the BDS movement advocates for the political boycott of only businesses that support the Israeli occupation of the West Bank and Gaza Strip until their demands are met—ending the Israeli occupation and its related human rights abuses. Any reasonable public official would have known that, in light of *Claiborne*, enforcement of the mandated contract provisions would be unconstitutional.

The lower court erred when it effectively held that, while this established constitutional case law applied, qualified immunity still applied because no binding decision had previously issued pertaining specifically to laws targeting boycotts of Israel. Dkt. 53 at 26-27. The applicable and binding Supreme Court precedent pertains to boycotts and loyalty oaths categorically. State actors cannot escape accountability with the argument that somehow the anti-BDS legislation is exceptional, nor can they rest on the particularities of any given loyalty oath. At core, it is prohibited for state actors to require citizen adhesion to, or disavowal of, protected political beliefs and activities. It is beyond debate that a state actor cannot demand that a government employee swear a loyalty oath to refrain from constitutionally protected actions if taken as part of a political boycott.

C. Defendants' conduct was so obviously unconstitutional that no specific case is needed to establish it.

Finally, even without *Cole* and *Claiborne*, Defendants' enforcement of the anti-BDS clause "so obviously violated the constitution that prior case law is unnecessary." *Terrell*, 668 F.3d at 1255 (quoting *Mercado*, 407 F.3d at 1159) (cleaned up). As the District Court held, O.G.C.A. § 50-5-85 was—and remains, even post-amendment—flatly unconstitutional and

violated Martin's rights to free speech, association, and due process under the First and Fourteenth Amendments. *See* Dkt. 53. Specifically, the statute is subject to strict scrutiny because its "valid business reason" exception renders its restrictions on speech content-based. *Id.* Under strict scrutiny, the statute was not narrowly tailored to advancing a compelling governmental interest because Defendants could not explain "how Martin's advocacy of a boycott of Israel has any bearing on Georgia's ability to advance foreign policy goals with Israel." *Id.*

Every step of the District Court's analysis points to the oath's clearly established constitutional violations. First, the District Court relied on *Claiborne* to conclude that O.C.G.A. § 50-5-85 implicated activity protected by the First Amendment: Martin's advocacy of a boycott of Israel. Dkt. 53 at 8-17. Since *Claiborne*, a chorus of Supreme Court and this Court's decisions reemphasize *Claiborne*'s core holding: that peaceful boycott-related activity, including the underlying purchasing decisions, are expressive conduct protected by the First Amendment when they are intended to further political goals. In *FTC v. Superior Ct. Trial Lawyers Ass'n*, for example, the Supreme Court described *Claiborne* "involve[ing] a boycott" by which the "citizens of Port Gibson, Mississippi" sought

"equal respect and equal treatment." *FTC*, 493 U.S. at 427-28. *See also Ray*, 725 F.2d at 660 (describing the activists in *Claiborne* as "us[ing] an economic boycott to promote their demands for increased political participation and an end to their second-class citizenship"). Martin's participation in the BDS movement, too, was intended to further political goals, placing it in the heartland of the First Amendment's protection for expressive conduct.

Then, the District Court concluded that "the burden on speech imposed by O.C.G.A. § 50-5-85 is content-based" and, as a result, "is subject to strict scrutiny." Dkt. 53 at 18. Specifically, the District Court explained that the law "is content-based because the statute exempts boycotts of Israel that are 'founded on a valid business reason,'" so "whether the state of Georgia will enter into an agreement with a contractor that refuses to engage in business with Israel is premised entirely upon the motive behind the contractor's decision." *Id.* That conclusion is compelled by clearly established law: "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Here, the anti-BDS law

makes a "facial distinction based on a message" by "defining regulated speech by its function or purpose"—namely, whether the boycott is "founded on a valid business reason" or not. *Id. See also, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011). And it is also clearly established that content-based restrictions are subject to strict scrutiny. *See, e.g.*, *id.* (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)).

Proceeding from that blackletter premise, the District Court conducted the narrow tailoring analysis mandated by decades of Supreme Court precedent and held O.C.G.A. § 50-5-85 to be unconstitutional. *See id.* at 18-21 (citing *Reed*, 576 U.S. 164, 171; *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 469-70 (1995)).

The district court is not alone. Several anti-BDS state and local laws—similar to Georgia's here—have been passed in the last five years. Most of the legal challenges to these statutes have been mooted, as here, by states passing amendments targeted to exclude the plaintiffs in a cat and mouse game. Still, courts around the country have generally agreed that these laws are unconstitutional. *See Jardahl v. Brnovich*, 336 F.Supp. 3d 1016 (D.Ariz. 2018) ("A restriction of one's ability to

participate in collective calls to oppose Israel unquestionably burdens the protected expression of companies wishing to engage in such a boycott."); *see also Amawi v. Paxton*, 373 F.Supp. 3d 717 (W.D. Tex. 2019) ("H.B. 89's no-boycott provision applies by its express terms *only* to expressive conduct" that is protected by the First Amendment) (emphasis in original); *see also Koontz v. Watson*, 283 F.Supp. 3d 1007 (D.Kan. 2018) (granted preliminary injunction on grounds that "[f]orcing plaintiff to disown her boycott is akin to forcing plaintiff to accommodate Kansas's message of support for Israel").

D. *Arkansas Times v. Waldrip* erroneously applied the symbolic conduct test to an anti-BDS oath statute and should not undermine the clearly established law described above.

In *Arkansas Times v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (en banc), the en banc Eighth Circuit held that Arkansas's anti-BDS law—which is materially indistinguishable from the Georgia law at issue here— is constitutional. The Eighth Circuit went astray on two fronts: It interpreted *Claiborne* to exclude refusals to deal and, having inappropriately narrowed that case, instead applied *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006) to conclude that a politically motivated boycott is not expressive conduct

protected by the First Amendment. This out-of-circuit, clearly incorrect decision should not dissuade this Court from determining that Defendants violated clearly established law here.

First, the Eighth Circuit erred by reading *Claiborne* to "stop[] short of declaring that a 'boycott itself—that is, the refusal to purchase from a business—is protected by the First Amendment." *Arkansas Times*, 47 F.4th at 1392. The Court interpreted *Claiborne*'s determination that the First Amendment reached "peaceful political activity such as that found *in the boycott* in [*Claiborne*]" to mean that *Claiborne* "only discussed protecting expressive activities *accompanying* a boycott, rather than the purchase decisions at the heart of a boycott." *Id.* (emphasis in original). In other words, the Eighth Circuit believed that *Claiborne* held that the First Amendment protects the "speeches, picketing, marches, and pamphleteering" that accompanied the NAACP members' decisions not to purchase goods from white-owned businesses, but not the purchasing decisions themselves. *Id.*

That analytical leap is flatly wrong. *Claiborne* does not carve out the heart of a boycott—the actual economic purchasing decisions—from the First Amendment protections it conferred on the other speech and

expressive conduct that comes along with a boycott. As explained at length in Section I(B) above, *Claiborne* expressly discussed the purchasing decisions themselves, holding that although a boycott may "have a disruptive effect on local economic conditions," that fact "could not justify a … prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change." *Claiborne*, 458 U.S. at 913-14. Nowhere did *Claiborne* even hint at *Arkansas Times*' counterintuitive conclusion that the purchasing decisions inherent in a boycott should be considered nonexpressive conduct. Had the Court intended to so limit its holding, it certainly would have done so expressly—just as it did with the violent actions that accompanied the boycott. *Id.* at 933.

Then, having set aside *Claiborne* on its incorrect understanding of its holding, the Eighth Circuit turned to *FAIR* to guide its inquiry into "whether the First Amendment protects nonexpressive conduct." *Arkansas Times*, 37 F.4th at 1392. In *FAIR*, law schools challenged the Solomon Amendment, a federal law that mandated that educational institutions allow military recruiters equal access to on-campus recruiting, on pain of losing federal funding. *FAIR*, 547 U.S. at 55. The

Court held that, because the law regulated nonexpressive conduct—providing campus access to army recruiters—it did not trigger heightened scrutiny under the First Amendment. *Id.* at 65-66. Although the law schools' attempt to bar the recruiters was politically motivated (in protest of the military's "don't ask, don't tell" policy), the Court reasoned that the political motivation would not be readily apparent to observers without explanation. *Id.* at 66. The need for accompanying explanatory speech is "strong evidence that the conduct at issue … is not so inherently expressive that it warrants protection." *Id.* Otherwise, "a regulated party could always transform conduct into 'speech' simply by talking about it." *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

The Eighth Circuit applied that logic to hold that politically motivated consumer boycotts are not protected expressive conduct "[b]ecause those commercial decisions are invisible to observers unless explained." *Arkansas Times*, 37 4th at 1394. But the Court mistakenly disregarded decades of post-*Claiborne* case law that holds exactly the opposite, reaffirming the expressive nature (and protected status) of consumer boycotts. *See, e.g.*, *FTC*, 493 U.S. at 424-25 (distinguishing a

consumer boycott, protected under *Claiborne*, from a self-serving price-fixing scheme). The Eighth Circuit viewed an individual purchasing decision in a vacuum and reasoned that it could not be expressive unless speech accompanied it. But it ignored the attestation—compelled speech—that the Arkansas Times was expected to sign, disavowing any engagement with the BDS movement. The Court also ignored the content- and viewpoint-based nature of a certification that only bans activity based on motive: activities in support of the BDS movement are banned, and identical actions taken for any other reason are permitted.

The Eighth Circuit described the certification in this case as a "factual disclosure" that was "incidental" to actual speech, but this ignores the heart of what an anti-BDS certification does. It does not bar conduct, but motivation, and so directly targets political beliefs and speech, not facts.

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 385 (1992), further illustrates why the Eighth Circuit's holding must be wrong. There, the Court held that while expressive conduct—there, flag burning—can be banned because of the action it entails, the state may not ban that expressive conduct to suppress the ideas it expresses. So too here. At

bottom, the Eighth Circuit upheld a statute that requires the state of Arkansas to determine whether an individual's purchasing decisions are based on support for the BDS movement or not—and to disfavor individuals whose purchasing decisions it determines evince that support. That misapprehends *Claiborne* and makes a mockery of the First Amendment's protections.

E. The doctrine of qualified immunity should be reconsidered and overruled or, at the very least, applied narrowly in the First Amendment context.

Proceeding from first principles, the constitutional violations identified by the District Court should be enough to hold the Defendants liable in damages. The judicially-created doctrine of qualified immunity, which operates to shield government officials from liability unless the constitutional or statutory rights they violated are "clearly established," is at odds with both the text and history of Section 1983. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018); Alex Reinert, *Qualified Immunity's Flawed Foundation*, Cal. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179628; *see also*

Hoggard v. Rhodes, 141 S.Ct. 2421, 2421 (2021) (Thomas, J. statement re: denial of cert) ("[O]ur qualified immunity jurisprudence stands on shaky ground … [the "clearly established"] test cannot be located in § 1983's text and may have little basis in history".). Martin preserves the argument, embraced by a growing chorus of legal scholars and jurists, that qualified immunity should be reconsidered and overruled. *See, e.g.*, *McKinney v. City of Middletown*, 49 F.4th 730, 756 (2d Cir. 2022) (appendix to the opinion of Calabresi, J., dissenting) (collecting sources supporting the proposition that "[a]s scholars have made clear, and more and more judges have come to recognize, qualified immunity cannot withstand scrutiny").

And even in light of arguments that some version of qualified immunity should be retained, the First and Fourteenth Amendment claims in this case fall far outside the doctrine's heartland. The leeway afforded by qualified immunity to government officials is primarily justified in situations that call for "split-second judgments," "in circumstances that are tense, uncertain, and rapidly evolving." *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). "By contrast, when public officials make the deliberate and considered decision to trample on

a citizen's constitutional rights, they deserve to be held accountable." *Wearry v. Foster*, 2022 WL 15208074 *1 (5th Cir. Oct. 27, 2022) (Judge Ho concurring in denial of rehearing en banc). Unlike many police officers in Fourth Amendment excessive-force cases where qualified immunity has been upheld, the Defendants here had ample time to evaluate and consider their (unconstitutional) actions before choosing to undertake them. Indeed, "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Hoggard*, 141 S.Ct. 2422. Defendants were on notice that their actions inhibited "academic freedom and censorship," when the university canceled the conference altogether in protest. As GSU professor Dr. William Reynolds wrote to conference planners: "[H]ow can we have a critical media literacy conference when free speech is prohibited[?] How can we have critical media literacy if the state is telling us who we can and can't listen to!" App. at 169. Qualified immunity should not shield them from liability in damages for the knowing violations of Martin's First and Fourteenth Amendment rights.

CONCLUSION

This Court should reverse the district court's dismissal and remand for further proceedings.

Date: November 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** has been prepared in compliance with Local Rule 5.1(B) in 14-point Century Schoolbook typeface and contains 8,366 words.

Dated: November 4, 2022

/s/ Lena F. Masri
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