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

February 15, 2023

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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

CAIR Legal Defense Fund

Lena F. Masri

Gadeir I. Abbas

Justin Sadowsky

Kimberly Noe-Lehenbauer (admission pending)

Hannah Mullen (admission pending)

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Christopher M. Carr, Attorney General

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Kathleen M. Pacious

District Court Judge

Mark H. Cohen

Plaintiff-Appellant Abby Martin is an individual person.

February 15, 2023 /s/ Lena F. Masri
Lena F. Masri

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INTRODUCTION

By conditioning Martin's keynote on a loyalty oath to Israel and a bar on participation in the Boycott, Divest, Sanctions movement, Defendants imposed a forced choice that violated the First and Fourteenth Amendments, namely whether to refrain from speech central to her work, or to accept an offer of contract employment from Georgia Southern University.

The district court correctly held that such a contract requirement is unconstitutional according to a pair of decades-old Supreme Court cases. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), made plain that the right to boycott—not just protest—is a fundamental part of the right to free speech. And *Cole v. Richardson*, 405 U.S. 676 (1972), one in a long line of the Supreme Court's legendary Oath Cases, mandated that state government cannot condition employment on loyalty oaths that impose duties of specific action or compel speech

Defendants ask to be excused from their clearly unconstitutional conduct based on qualified immunity. They first observe that the Court of Appeals has never held that this specific type of punishment for this specific type of boycott violates the Constitution, and likewise that the

Court has never ruled on this specific loyalty oath. But in the First Amendment context, qualified immunity does not apply so narrowly. Rather, when courts clearly establish a principle at a broader level of generality, the law is established at that broader generality. Second, Defendants point to an Eighth Circuit decision, issued after the facts of this case unfolded, that upheld a similar law.[1] But the Eighth Circuit's ruling was flawed, and its decisions are not binding on this Court. And Defendants, in unconstitutionally infringing upon Martin's constitutional rights, could hardly have mistakenly relied on a decision that had not yet been handed down.

ARGUMENT

I. Defendants knew what they were doing was illegal because they had actual notice.

A. Defendants flagged the certification clause for Martin because they knew it threatened her First Amendment rights.

Defendants suggest they could not have known that the statute they enforced against Martin would violate her First Amendment rights. Response at 15. But one week after sending the contract to Martin, on

[1] *See Arkansas Times v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (en banc), *petition for cert. pending* (No. 22-379, Oct. 24, 2022).

September 19, 2019, Defendants sent a second email to "draw [her] attention" to the anti-BDS certification in the document. App. 195. Defendants warned that the contract engagement would only move forward "[i]f this language is acceptable." *Id.* Predictably, Martin responded immediately: "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. Defendant Overstreet then forwarded Martin's response to event organizers saying only that Defendants would "await [their] response for the new Keynote." *Id.* at 212.

The same day, Dr. William Reynolds, Georgia Southern University professor and conference co-chair, drafted an email informing the committee that GSU refused to move forward with Martin's contract, describing Georgia's statute as "concerning censorship and academic freedom." *Id.* at 221. Reynolds canceled the conference because, "How can we have critical media literacy if the state is telling us who we can and can't listen to!" *Id.* Defendant Overstreet later reported to GSU administrators that the 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 would not have had reason to warn Martin about the anti-BDS certification if they did not know it would force her to disavow her work in favor of the BDS Movement and Palestine. Defendants' own conference organizers denounced the law as censorship. Defendants cannot now claim they had no knowledge that their actions violated Martin's First Amendment rights. And they cannot hide behind the legislature's passage of the statute to shield them from liability for unconstitutionally enforcing it.

B. In any event, operating under the color of state law is the first requirement for a Section 1983 claim, not an automatic grant of immunity for state officials.

Defendants suggest that because they were operating under color of state law, they deserve qualified immunity *per se*. Response Br. 16. This is a gross misunderstanding of Section 1983, which, as a precondition of imposing liability on a defendant, requires that the subject of suit be acting "under color of any statute" while subjecting the plaintiff to "the deprivation of any rights." 42 U.S.C. § 1983. Operating

under color of law is not, as Defendants suggest, a shield from liability for constitutional violations.

Defendants proffer two cases to support the blanket statement that "GSU employees were entitled to assume the statute they were obliged to comply with was constitutional," and that this alone qualifies them for immunity. Response Br. 16. But Defendants overstate the holdings of the authorities they cite.

In *Michigan v. DeFillippo*, 433 U.S. 31 (1979), a Fourth Amendment case that did not even employ a qualified immunity analysis, is easily distinguishable and offers Defendants no help. There, the Court ruled that the ordinance allowing the arrest at issue was not "so grossly and flagrantly unconstitutional" that a reasonable officer would "be bound to see its flaws." *Id.* at 38. The ordinance—which allowed officers to "stop and question with reasonable cause to believe the individual's behavior warrants further investigation," and that made it "unlawful for any person to refuse to provide identification when stopped"—was later invalidated for vagueness. *Id.* at 34-35. But the Court found that it was worded very much like the probable cause standard, making it difficult for the officer to identify its flaws. *Id.* The statute at issue in this case

does not provide the State the same cover that the defendants in *DeFillippo* enjoyed. Here, Defendants clearly attempted to prohibit Martin from engaging in a politically motivated boycott of Israel while compelling her to say, in writing, that she did not and would not do so, in clear violation of the First Amendment.

Similarly, in *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), this Court held that qualified immunity applied to the defendant police officers who enforced an unconstitutional law because "[p]olice are charged to enforce laws until and unless they are declared unconstitutional." *Id.* at 1220. There, the statute in question had been amended once to cure constitutional defects, giving the officer reason to believe that his enforcement would not raise a constitutional issue. *Id.* That is not the case here. Defendants are administrative agents of the State, not officers of the law. And unlike in *Cooper*, the State of Georgia did not amend its statute to cure constitutional defects when challenged. It amended its statute only to moot Plaintiff's claims. Opening Br. 14. Neither of these cases apply to the facts at bar.

II. Defendants knew what they were doing was illegal because it had long been established.

Defendants contend, without support, that the certification required by Georgia's statute "does not require anyone to take a 'loyalty oath' or to refrain from protected speech" as a condition of employment. Response at 10. Defendants attempt to justify this statement with a bewildering argument that, while boycotts, by definition, include both speech and refusals to deal, Georgia's law singles out only refusals to deal, "irrespective of the reasons for the refusal." Response at 22-23. But Defendants mischaracterize their own statute, which clearly targets only refusals to deal "taken … in compliance or adherence to calls for a boycott of Israel," providing exceptions for refusals "founded on a valid business reason." O.C.G.A. § 50-5-85.

Decades of Supreme Court precedent clearly establish that compelling viewpoint based political speech on one hand, and prohibiting political speech-related activities on the other would run afoul of the First Amendment. Any reasonable university conference coordinator in Defendants' shoes would have been on notice in September 2019—as Defendants were—that the certification unconstitutionally required Martin to "***sign*** promising to not ***boycott*** Israel." App. 205 (emphasis

added). And yet, they refused to move forward with the contract without the unconstitutional certification clause.

Two elements of Georgia's Anti-BDS law are clearly unconstitutional. First, the law prohibits "refusals to deal with … Israel or … companies doing business in Israel …" ***only*** "when such actions are taken … in compliance … [with] calls for a boycott of Israel." *See* O.C.G.A. § 50-5-85(a). Second, it requires individuals who contract with the state of Georgia to attest that they are "not currently engaged in" and for the duration of the agreement would not engage in "a boycott of Israel." *Id.* § 50-5-85(b). Both provisions violated clearly established law when the Defendants enforced them against Martin, so they are liable in damages. *Valderrama v. Rousseau*, 780 F.3d 1108, 1112 (11th Cir. 2015).

A. *Claiborne Hardware* clearly established that a state cannot bar politically motivated boycott activity, including refusals to deal.

Claiborne clearly established that the government may not prohibit "nonviolent, politically motivated boycott[s] designed to force governmental and economic change." 458 U.S. at 914. The Defendants submit that, by definition, a boycott's central tenet is "engaging in a concerted refusal to have dealings with … an organization … to express

disapproval or force acceptance of certain conditions." Response Br. 23 n.7. Without these refusals to deal, a movement may be a protest, but it would not be a boycott.

While the Court noted that states have power to regulate economic activity, it left no doubt as to the robust First Amendment protection afforded politically motivated boycotts. "A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions." *Id.* at 913-14. 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.*

Defendants argue that *Claiborne* extended the First Amendment's protections to the speech associated with the boycott—but not to the refusals to deal that lay at the boycott's heart. Response Br. 26. But *Claiborne* discusses "boycotts," not "protests," in its clearly-worded opinion—and the Defendants themselves define boycotts as refusals to deal on the very next page of their brief, revealing that the two concepts cannot be logically separated. *See id.* at 27.

A close examination of *Claiborne* further illustrates that the Supreme Court plainly held that refusals to deal are First Amendment protected activity that governments may not constitutionally punish. *Claiborne* was a state tort action brought by white business owners who had lost revenue due to months of the boycotters' refusals to deal. The state court had awarded the plaintiffs damages for both property damage arising from violent outbursts ***and*** lost revenue. The Supreme Court unequivocally reversed this assessment. "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***"—that is, both boycotting and refusing to deal with a white-owned business. *Claiborne*, 458 U.S. at 918 (emphasis added).

Eleventh Circuit precedent likewise reinforces these firm principles. *See 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.").

The *Claiborne* court left open the question of whether a boycott "designed to secure aims that are themselves prohibited by a valid state law," such as anticompetitive conduct, would pass constitutional muster. *Id.* at 915 n.49. But that question was answered by *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411 (1990), in which the Court distinguished a boycott by trial lawyers from the *Claiborne* boycott because it sought "economic advantage for those who agreed to participate," unlike "[t]hose who joined the *Claiborne Hardware* boycott [who] sought no special advantage for themselves." *Id.* at 426. The *Claiborne* boycott did not intend "to destroy legitimate competition," but rather "to change a social order that had consistently treated them as second class citizens," the economic impact of the refusals to deal in that case were fully protected by the First Amendment. *Id.* at 426-27. The clear dividing line between protected and unprotected refusals to deal, then, is whether the refusals to deal are politically motivated to "change a social order," or "conducted by business competitors who stand to profit financially from a lessening of competition in the boycotted market." *Id.*

Georgia's law plainly falls on the unconstitutional side of that line, as it forbids protected politically-motivated refusals to deal. It takes no issue with refusals to deal "conducted by business competitors who stand to profit financially from a lessening of competition in the boycotted market"—that is, the kind of conduct that *Trial Lawyers* holds may be constitutionally forbidden—so long as the refusals to deal are motivated by a "valid business reason." O.C.G.A. § 50-5-85; *see also Superior Ct. Trial Lawyers Ass'n*, 493 U.S. at 427; Response Br. 23 n.7 (acknowledging that refusals to deal "for business reasons" do not constitute a boycott within the meaning of the statute). But, in a straightforward violation of *Claiborne*, the statute forbids "engaging in a concerted refusal to have dealings with … an organization … to express disapproval or force acceptance of certain conditions"—that is, for politically-motivated reasons. Response Br. 23 n.7.

Defendants fight that conclusion and insist that, under the law, though Martin would not have been free to refuse to deal with Israel for politically-motivated reasons, that restriction does not run afoul of the First Amendment because, "Martin would have been free to engage in all manner of speech in support of the BDS movement." *Id.* at 23. The State

tries and fails to thread the needle. On Defendants' own telling, a boycott is defined by "a concerted refusal to have dealings with" an organization, "usually to express disapproval or to force acceptance of certain conditions." *Id.* at n.7. And contractors can engage in "all manner of speech in support" of the BDS boycott. *Id.* But contractors cannot "engage in … a refusal to deal commercially with Israel," the defining characteristic of the BDS Movement, "irrespective of the reasons for the refusal," despite the statute's support of refusals to deal with Israel "for a valid business reason."

Defendants' logic falls apart under the slightest pressure. In their view, it would be perfectly constitutional for the law to force Martin to buy Israeli rather than Palestinian-made hummus at the grocery store or run afoul of the ban on politically motivated refusals to deal—so long as she remained free to tell other people not to buy it without penalty. That absurd interference with a contractor's personal purchasing decisions is made inevitable by the Defendants' insistence that *Claiborne* does not extend to protect politically-motivated boycotts and the refusals to deal at their core. This is the very "underlying, seldom articulated concern" the Supreme Court's oath cases warned against—that state

laws may unconstitutionally place "government into the censorial business of investigating, scrutinizing, interpreting, and penalizing or approving the political viewpoints and … activities of individuals." *Cole v. Richardson*, 405 U.S. 676, 681 (1972).

B. *Cole* clearly established that state employment contracts cannot compel speech or prohibit vague categories of conduct without definition.

Claiborne alone is enough to clearly establish the unconstitutionality of Georgia's Anti-BDS law, but the Supreme Court's cases offer even more evidence that a reasonable official should have known that enforcing the law was unconstitutional. *Cole*, 405 U.S. 676, plainly established the parameters of constitutionally-valid contract oaths that states may require their employees to agree to. Specifically: "neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments." *Id.* at 680. "Nor 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"—like, for example, the Israeli government. *Id.*

Defendants argue that *Cole* is distinguishable because, there, the Court held that the contract oath at issue did not violate the Constitution. *See* Response Br. 21. In *Cole*¸ the oath at issue was worded vaguely. The Court based its analysis on a narrow interpretation of the oath's requirements that did not "impose obligations of specific, positive action on oath takers," because "[a]ny such construction would raise serious questions [about] whether the oath was so vague as to amount to a denial of due process." *Id.* at 684-85.

Here, by contrast, the oath required Martin to certify in writing 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. It therefore "impose[d] obligations of specific, positive action" on Martin, *see Cole*, 405 U.S. at 684-85, and clearly violated the First Amendment right to free speech. *See also Riley v. National Federation for the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) (holding that compelled speech and compelled silence violates the First Amendment guarantee of "freedom of speech"); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that "the right to speak and the right to refrain from speaking are complimentary components of … individual freedom of

mind") (cleaned up). Defendants do not even address the fact that the oath compelled Martin to swear in writing that she did not support any boycott of Israel, let alone attempt to square that requirement with *Cole*'s analysis.

To make matters worse, Georgia's statute also prohibits "other actions that are intended to limit commercial relations" with Israel. O.C.G.A. § 50-5-85. The law does not include any explanation of what "other actions" might include. Supreme Court case law clearly forbids this kind of vague statutory language that would allow the government to censor viewpoints at will, particularly as a requirement for state employment. *See Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 192 (1971) (explaining that state laws may not be so vague as to place government "into the censorial business of investigating, scrutinizing, interpreting, and penalizing or approving the political viewpoints … of individuals"); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (holding unconstitutionally vague a state employment oath denouncing "subversive" persons—one who "commits, attempts to commit, aids in the commission, or advocates, abets, advises or teaches by any means" acts intended to overthrow the government).

Though Defendants now, four years later, claim that speech-related activity supportive of the BDS Movement was always permitted under the law, the statute's plain text "forbids … an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Cramp v. Bd. of Public Inst'n. of Orange Cnty., Fla.,* 368 U.S. 278, 280 (1961). The oath at issue in *Cramp* required an employee to attest that he had never lent his "aid, support, advice, counsel or influence to the Communist Party." *Id.* Like the "other actions" prohibited by Georgia's statute, Florida's unconstitutionally vague law risked being "a trap for the innocent." *Id.* at 281 (quoting *United States v. Cardiff*, 344 U.S. 174, 176 (1952)). Defendants cannot now explain away the unconstitutional elements of the still-effective law and sidestep liability for violating Martin's clearly established rights.

C. Defendants cannot obtain qualified immunity by applying clearly established law at a microscopic level of generality.

Defendants offer a variety of Fourth Amendment cases for the proposition that *Claiborne*, *Cole*, and the other Supreme Court cases discussed above do not clearly establish Martin's rights here. Response Br. 16-19. But qualified immunity doctrine demands a higher level of specificity in the Fourth Amendment context than for other

constitutional rights. In determining what the clearly established law is, Courts must balance the need for "the vindication of citizens' constitutional rights" that § 1983 provides for, and "public officials' effective performance of their duties." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 640. But "in the light of pre-existing law the unlawfulness must be apparent. *Id.*

Specifically, in qualified immunity cases involving split-second decisions to use force by officers in the field, courts have stressed the necessity of narrow, fact bound interpretations of clearly established cases. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). When an officer confronts a volatile, fast-moving situation on the ground, "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). So Fourth Amendment cases, like those offered by the State to suggest Plaintiff's rights were not established clearly enough, require "more particularized" contours, such that a reasonable officer would understand, even in a

tense encounter, that his specific conduct "was unlawful in the situation he confronted." *Id.* at 202.

The legislature enacting the Anti-BDS Law was not making a split-second decision, nor were the Defendants in enforcing it. Those Fourth Amendment cases are inapplicable and the ordinary rule applies: where binding precedent clearly establishes the law such that a reasonable officer would know that his actions were illegal, qualified immunity does not apply. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (citing *U.S. v. Lanier*, 520 U.S. 259, 263 (1997)). When an earlier precedent "expressly leaves open whether a general rule applies to the particular type of conduct at issue," a high degree of factual particularity may be necessary to determine if the law was clearly established. *Lanier*, 520 U.S. 270-71. But, as relevant here, a "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," even where "the very action in question has not previously been held unlawful." *Id.* So "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. 741.

As already discussed at length above, the Supreme Court has established in sweeping language the general principles that the Anti-BDS law, and the Defendants enforcing it, violated here.

Defendants argue that this Court should apply that clearly-established law, if at all, as narrowly as fact-bound Fourth Amendment qualified immunity cases do. Response Br. 16-19. But Defendants cannot place these clearly-established fundamental rights back into debate simply because the underlying facts are not precisely identical. *Marsh*, 268 F.3d at 1032. After all, *Claiborne* did not turn on the narrow particularities of the way the Government directly attempted to punish political expression by punishing a political boycott. *Claiborne*, 458 U.S. 918; *see also supra* § I(A)(1). Likewise, *Cramp* and *Cole* make clear that the government cannot condition benefits or contracts on vague oaths aimed at politically protected activity and beliefs. *Cole*, 405 U.S. 680; *see also supra* § I(A)(2).

Defendants were on notice for decades that they could not bar politically motivated refusals to deal or compel contractors to say they would not support this particular boycott, or any boycott. Yet Defendants enforced a law that did just that. They were not faced with facts so novel

or a high-pressure situation that required split-second decision making such that further specificity was required. Qualified immunity does not apply.

III. *Waldrip's* error does not mandate qualified immunity here.

Defendants rely solely on *Arkansas Times v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (en banc), to stand for the premise that, because some other court somewhere can later interpret the merits of a similar certification requirement differently, Martin's rights as of September 2019 must not have been clearly established. This is wrong for two main reasons.

A. The Eighth Circuit applied the wrong standard in *Waldrip*.

In *Waldrip*, the Eighth Circuit incorrectly reasoned that *Claiborne* "stopped short of declaring that … the refusal to purchase from a business is protected by the First Amendment." 47 F.4th at 1392. But as discussed at length in section II(a) above, the *Claiborne* Court boldly proclaimed First Amendment protection for all actions related to a peaceful boycott, including the refusals to deal that lie at its heart. Not only did the Court not distinguish refusals to deal as an unprotected activity, but it reversed the lower court's assessment of damages for lost

revenue due to the refusals to deal at issue there. *Claiborne*, 458 U.S. at 915 (calling lost revenue due to politically motivated refusals to deal "the consequences of ***nonviolent protected activity***") (emphasis added).

Having disposed of *Claiborne* erroneously, the en banc *Waldrip* court then treated the targeted refusals to deal in the anit-BDS law at issue as nonexpressive conduct and turned to *FAIR* as its standard. *Waldrip*, 37 F.4th at 1392. In *FAIR*, a public law school denied military recruiters equal access to on-campus recruiting events in protest of the military's "don't ask, don't tell" policy. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 55, 65-66 (2006). The Supreme Court ruled that, because denying campus access to military recruiters was not inherently expressive conduct and would not be seen as such without accompanying speech, it did not trigger First Amendment protection. *Id.* at 66.

The en banc Eighth Circuit mistakenly disregarded decades of post-*Claiborne* case law reaffirming the expressive nature and protected status of politically motivated consumer boycotts, specifically associated refusals to deal. The Eleventh Circuit cannot repeat the same mistake. In 1990, the Supreme Court even more clearly distinguished a consumer

boycott, protected under *Claiborne*, from a self-serving, anti-competitive price fixing scheme. *Trial Lawyers*, 493 U.S. at 454-25. Ironically, Georgia's law protects anti-competitive refusals to deal as long as they are carried out for a "business reason." O.C.G.E. § 50-5-85.

B. Clearly established rights are not disestablished by an outside court subsequently applying a different standard.

Defendants insist that because the Eighth Circuit applied a different standard and got a different result in *Waldrip* in 2022, the rights at issue here could not have been clearly established in 2019. Response Br. 15-16. That is wrong for two reasons.

First, in conducting the clearly-established inquiry, this Court considers only Supreme Court and Eleventh Circuit case law that was on the books in September 2019, when the Defendants enforced the Anti-BDS law against Martin. *Terrell v. Smith*, 668 F.3d 1244, 1255-56 (11th Cir. 2012). An Eighth Circuit case decided three years after the events in question is simply irrelevant to a qualified-immunity analysis performed in this Court.

Second, even if *Waldrip* had any precedential force here, it is easily distinguishable. *Waldrip* addressed the merits of the plaintiff's constitutional claims—not the distinct qualified immunity "clearly

established" inquiry. *See Saucier*, 533 U.S. at 205-06. Here, this Court must determine whether Defendants were on notice in September 2019 that enforcement of Georgia's loyalty oath would violate Martin's rights, as clearly established in the Eleventh Circuit. *Marsh*, 268 F.3d at 1032. Georgia's Anti-BDS law forbade politically motivated refusals to deal and compelled loyalty oaths, both of which have been clearly established constitutional violations, according to the Supreme Court, for decades. So qualified immunity cannot apply.

IV. Even if qualified immunity applies, this Court should clearly establish that the Anti-BDS law violates the First Amendment.

There is no dispute that anti-BDS laws have swept the country over the past five years, with 35 state legislatures having passed similar viewpoint-based restrictions against certain state employees and contractors. Nearly every court that has considered a challenge to these laws, including the lower court in this case, found that they posed serious constitutional problems. *See* Lower Court Opinion on MTD, App. 97 (holding that anti-BDS statutes implicate state contractors' First Amendment rights by conditioning employment on oaths that impinge on those rights, and that Georgia's content-based restrictions cannot pass

strict scrutiny); *see also Jordahl v. Brnovich*, 2018 WL 6422179, *2 (9th Cir. 2018) (finding "the Certification requirement is an unconstitutional condition on government contractors."); *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"); *see also Arkansas Times LP v. Waldrip*, 988 F.3d 453 (8th Cir. 2021) (reversed by en banc 8th Cir. 2022, cert. petition pending) (holding that the state law's contract oath requirement violated contractors' First Amendment rights).

But none of these cases has yet reached final judgment on the merits because, like Georgia, state legislatures facing facial challenges to their oath requirements amend the statutes just enough to moot the plaintiffs' claims. *See Amawi*, 373 F.Supp. 3d 717; *see also Jordahl*, 2018 WL 6422179. Despite the clarity with which the courts have articulated the unconstitutionality of these loyalty oath requirements, qualified immunity then blocks accountability by foreclosing Section 1983

damages claims against the state officials who enforced the laws. States like Georgia are gaming the system to restrict speech they disagree with. The State is violating the First Amendment with impunity. And it is working.

But even qualified immunity cases can clearly establish rights that future plaintiffs can point to. "[C]ourts may exercise their sound discretion in deciding which of the two prongs"—whether the facts make out a violation of a constitutional right, and whether that right was clearly established at the time—"should be addressed first in light of circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Even if this Court finds that qualified immunity should release the State from litigation and liability in this case, the Court has the power to define the clearly established rights at issue with particularity for the next contractor to rely upon.

This is an important First Amendment issue that will continue to generate judicial challenges as states enforce anti-BDS laws. It is particularly appropriate and important in this case to unequivocally and clearly establish these rights, to put future officials on notice that they cannot continue to violate contractors' fundamental rights.

CONCLUSION

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

Date: February 15, 2023

Respectfully submitted,

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** Licensed in VA, not in D.C.*
Practice limited to federal matters
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Practice limited to federal matters

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** has been prepared in compliance with Local Rule 5.1(B) in 14-point Century Schoolbook typeface and contains 5,090 words.

Dated: February 15, 2023

/s/ Lena F. Masri
Lena F. Masri