No. 22-12827-AA

In the

United States Court of Appeals

for the Eleventh Circuit

Abby Martin,

Plaintiff/Appellant,

v.

Chancellor for the Board of Regents of the Univ. Sys. of Ga., et al.,

Defendants/Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-596 — Hon. Mark H. Cohen, *Judge*

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STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument in this case. The facts and legal arguments are adequately presented in the briefs, and the decisional process would not be significantly aided by oral argument.

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STATEMENT OF ISSUES

Georgia law prohibits the state from entering into certain contracts unless the contractor certifies that it is not engaged in, and will not for the duration of the contract engage in, a boycott of Israel. O.C.G.A. § 50-5-85(b). Plaintiff Abby Martin sought to enter into an agreement with Georgia Southern University, and Defendants Bonnie Overstreet, Michel Blitch, and Sandra Lensch, employees of the University, included in the agreement the certification language required by state law. Believing that the language violated her First Amendment rights, Martin refused to sign the agreement and sued the GSU employees for money damages. Did the district court correctly find that the GSU employees were entitled to qualified immunity with respect to such claim?

INTRODUCTION

Qualified immunity is a demanding standard in any Section 1983 case. It is particularly difficult to overcome when the First Amendment is at play, where it will be defeated only in an "extraordinary case." *Dartland v. Metropolitan Dade Cty.*, 866 F.2d 1321, 1323 (11th Cir. 1989). This is not such a case. The only thing clearly established here is the *absence* of law sufficient to put the constitutional question—whether including a state-required anti-boycott clause in a contract violates the First Amendment—beyond debate. The university employees are entitled to qualified immunity, as the district court held.

In 2016, the Georgia General Assembly joined what are now 35 states across the country by enacting legislation that aligns Georgia with the United States' long-standing policy of opposing commercial boycotts against, and promoting cooperation with, Israel. *See* O.C.G.A. § 50-5-85(a)(1)(A) (citing the federal Export Administration Act, which has banned foreign-led economic boycotts of Israel for over forty years). Under the law, state entities, including Georgia Southern University, are required to include in certain contracts a certification that the contractor will not boycott Israel for the duration of the contract.

Appellant Abby Martin, an advocate for an international consumer boycott of Israel known as the Boycott, Divestment, and Sanctions ("BDS") movement, sought to contract with GSU for a speaking engagement in 2019. Obliged to comply with state law, GSU employees Overstreet, Blitch, and Lensch included § 50-5-85's mandatory certification language in a draft agreement they sent to Martin for review. Martin refused to sign the agreement, claiming that doing so would violate her rights under the First Amendment. And then she filed suit, asserting First and Fourteenth Amendment claims for declaratory and injunctive relief against the President of GSU and the Chancellor of the Board of Regents of the University System of Georgia, and a First Amendment claim for damages against the three individual GSU employees who sent her the draft agreement.

The district court dismissed Martin's damages claim on qualified immunity grounds, finding it unreasonable to expect that the individual GSU employees would have been on notice that § 50-5-85 was unconstitutional. Martin challenges this holding on appeal, arguing that every reasonable official in their shoes would have understood that including § 50-5-85's certification language in the agreement, *as state law required*, was a violation of Martin's First Amendment rights. And, notably,

Martin takes this position despite the fact that federal courts have reached, and continue to reach, different conclusions on the constitutionality of virtually identical anti-boycott statutes. Indeed, the Eighth Circuit, sitting en banc, recently *upheld the constitutionality* of the very same certification provision that Martin contends is unconstitutional under "clearly established" Supreme Court case law. That cannot possibly be the case. The district court correctly granted qualified immunity, and this Court should affirm.

STATEMENT OF THE CASE

Martin filed suit alleging that O.C.G.A. § 50-5-85 violated the First and Fourteenth Amendments, both facially and as applied to her, by impermissibly infringing on her free speech, association, and due process rights. She named as defendants the Chancellor of the Board of Regents and the President of Georgia Southern University (GSU) in their official capacities, as well as three GSU employees—Blitch, Overstreet and Lensch—in their individual capacities. The district court dismissed Martin's claims against the individual-capacity defendants on qualified immunity grounds. Martin appeals that dismissal here.

A. Factual and Procedural Background

1. Statutory Scheme

In 2016, the State of Georgia enacted 2016 Ga. Laws Act 378, which was codified at O.C.G.A. § 50-5-85. Like similar laws in close to three dozen states, the statute regulates commercial conduct in an effort to align Georgia with the United States' long-standing policy of opposing discriminatory boycotts against, and promoting cooperation with, Israel. It does so by prohibiting the state from entering into certain contracts unless the contractor certifies that it is not currently engaged in, and agrees for the duration of the contract not to engage in, a "boycott of Israel." O.C.G.A. § 50-5-85(b). The statute defines "boycott of Israel" to include "refusals to deal" and "terminating business activities" with Israel-related entities, and "other actions that are intended to limit commercial relations with Israel or individuals or companies doing business in Israel or in Israeli-controlled territories." O.C.G.A. § 50-5-85(a)(1). Under the version of the law in effect in 2019, state agencies were required to include such contractor certifications in all contracts for products or services valued at $1,000 or more.

On July 1, 2022, amendments to § 50-5-85 took effect which limit its scope to companies with five or more employees and to

contracts valued at $100,000 or more. *See* 2021 Ga. H.B. 383. Under the statute as amended, individuals and sole proprietors are completely and explicitly eliminated from the statute's coverage. *Id.*

2. Factual Background

Martin describes herself as a journalist, filmmaker and a supporter of the BDS movement. *See* Doc. 26, ¶¶ 4, 9, 21. In 2019, she sought to enter into an agreement with Georgia Southern University pursuant to which she was to receive an honorarium of $1,000 and limited travel expenses to act as keynote speaker at an academic conference to be hosted by GSU. *Id.*, ¶ 5, 38-39. Overstreet, Blitch, and Lensch, all employees of GSU at the time ("the GSU employees"), were involved in coordinating the conference. *Id.*, ¶¶ 12-14. In that capacity, they emailed Martin a draft agreement for her review and signature. *Id.*, ¶¶ 42-44. Because GSU is a state entity, the GSU employees were required by § 50-5-85 to include in the agreement language certifying that Martin was not engaged in, and for the duration of the agreement would not engage in, a boycott of Israel. *Id.,* ¶¶ 5, 42-43; O.C.G.A. § 50-5-85(b).

Martin refused to sign the agreement because of the inclusion of the certification language. Doc. 26, ¶ 45. As a result, GSU did not enter into the contract with her, as doing so without the certification language would be a violation of Georgia law. *Id.*, ¶¶ 5, 44-45, 47. The conference was later cancelled by its organizers. *Id.*, ¶¶ 6-7, 49-50.

3. Proceedings Below

Martin filed suit under 42 U.S.C. § 1983, asserting First and Fourteenth Amendment claims. Doc. 26. Specifically, she filed a facial challenge to § 50-5-85, claiming the law restricts protected speech and expression, compels speech, and is unconstitutionally vague, and seeking injunctive and declaratory relief against Steve Wrigley and Kyle Marrero in their official capacities.[1] *Id.* And she filed an as-applied challenge against the individual GSU employees, claiming she suffered a loss of First Amendment rights

[1] At the time the suit was filed, Steve Wrigley was the Chancellor of the University System of Georgia, and Kyle Marrero was President of GSU. During the pendency of the case in district court, Sonny Purdue replaced Steve Wrigley as Chancellor of the University System of Georgia. He was therefore automatically substituted as a party, and the case caption was amended accordingly. *See* Fed. R. Civ. P. 25(d).

by the inclusion of § 50-5-85's mandatory certification language in the draft agreement and seeking damages. *Id.*, ¶¶ 66, 86.

The defendants moved to dismiss, arguing that Martin failed to state a claim under the First or Fourteenth Amendment and that the GSU employees were entitled to qualified immunity, regardless. Doc. 53. The defendants argued, in particular, that because § 50-5-85 regulates only commercial conduct—i.e., refusals to deal commercially with Israel—and neither restricts nor compels speech or inherently expressive conduct, Martin's First Amendment claim fails. *Id.* at 5-31. And the defendants argued that Martin's due process challenge failed because the statute is not impermissibly vague in all of its applications and, regardless, it provides adequate notice of what it prohibits. *Id.* at 31-33. As to qualified immunity, the defendants pointed out the absence of clearly established law that could have placed the GSU employees on notice that including the statutorily-required certification language in a draft agreement would result in a violation of Martin's constitutional rights. *Id.* at 33-35.

In May 2021, the district court granted in part and denied in part the defendants' motion, permitting Martin's First and Fourteenth Amendment official-capacity claims for equitable relief

to proceed but dismissing Martin's claim for damages against the GSU employees on qualified immunity grounds. *Id*. at 29.

In July 2022, amendments to § 50-5-85 took effect which rendered the statute inapplicable to Martin. *See* 2021 Ga. H.B. 383. As a result, the district court dismissed her remaining claims for equitable relief for lack of standing and on mootness grounds. Doc. 76.

B. Standard of Review

A district court's grant of a motion to dismiss based on qualified immunity is reviewed de novo. *Paez v. Mulvey*, 915 F.3d 1276, 1284 (11th Cir. 2019).

SUMMARY OF ARGUMENT

Because Martin abandoned any challenge to the dismissal of her claims for equitable relief as moot, the only question properly before this Court is whether the district court correctly dismissed Martin's First Amendment claim for damages against the GSU employees on qualified immunity grounds. The answer to that question is yes, for several reasons.

First, the GSU employees were complying with a valid state law when engaging in the conduct Martin challenges. And, as the law of this circuit makes clear, they were entitled to assume that

the statute they were charged with implementing was free of constitutional flaws.

Second, Martin has not identified a "materially similar" case that puts the constitutionality of the defendants' conduct beyond debate. Nor could she, as none exists. Martin contends *Cole v. Richardson* is such a case, but she tellingly points only to differences, rather than any similarities, between this case and the facts in *Cole*. Regardless, the Supreme Court upheld the employment oath at issue in *Cole*, and § 50-5-85 does not require anyone to take a "loyalty oath" or to refrain from protected speech as a condition of employment with the state, characteristics *Cole* suggested could pose constitutional issues. *Cole* is not "materially similar" for qualified immunity purposes and does not clearly establish the law at issue here.

Third, Martin cannot demonstrate that this is a rare "obvious clarity" case in which a materially similar case is unnecessary to clearly establish the unlawfulness of the conduct at issue. Martin contends that *NAACP v. Claiborne* clearly established the broad principle that the "refusal to do business" aspect of a political boycott is inherently expressive conduct protected by the First Amendment and that this principle controls the novel facts of this case. But this assertion is belied not only by *Claiborne* itself,

which contains no such holding, but by the fact that federal courts addressing challenges to virtually identical anti-boycott laws have reached differing conclusions on the applicability of *Claiborne* and on the constitutionality of such statutes. These cases alone demonstrate that there is disagreement, not clarity, over whether and to what extent anti-boycott laws like § 50-5-85 run afoul of the First Amendment. The GSU employees did not violate clearly established law.

ARGUMENT[2]

I. The district court correctly concluded that qualified immunity bars Martin's First Amendment claim against the GSU employees.

The defense of qualified immunity "completely protects" government officials performing discretionary functions[3] from suit in their individual capacities "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U. S. 658, 664 (2012)). *See also Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014). A holding that

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[2] Although, in her notice of appeal, Martin purports to appeal from the dismissal of her damages claim *and* her claims for equitable relief, she appears to concede that the district court was correct in holding that her claims for equitable relief "were rendered moot by [the] July 1, 2022, amendment of the statute that exempted individuals contracting for less than $100,000." App. Br. at 22. Regardless, she has abandoned such claims by failing to advance any argument or discussion pertaining to them. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 n. 8 (11th Cir. 2014); *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (en banc) (holding that issues not raised in an initial brief are deemed forfeited and will not be addressed absent extraordinary circumstances).

[3] Martin does not contest that the GSU employees were acting within their discretionary authority when undertaking the challenged conduct.

the official's conduct does not violate clearly established law is alone sufficient grounds on which to grant qualified immunity. *See Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

With respect to the "clearly established" prong of a qualified immunity analysis, "the dispositive question is whether the law at the time of the challenged conduct gave the government official fair warning that his conduct was unconstitutional." *Wade v. United States*, 13 F.4th 1217, 1225 (11th Cir. 2021). This requires that the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *Id*. (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Preexisting law must "'dictate[], that is, truly compel[], the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiffs' federal rights in the circumstances.'" *Wade*, 13 F.4th at 1225 (quoting *Evans v. Stephens*, 407 F.3d 1272, 1282 (11th Cir. 2005) (en banc)). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (quoting *Malley v. Briggs*, 475 U. S. 335, 341 (1986)).

This Court has held that "[a] plaintiff can show that the contours of a right were clearly established in one of three ways." *Wade*, 13 F.4th at 1226. "First, a plaintiff can point to a

'materially similar case that has already been decided.'"[4] *Id.* (quoting *Echols v. Lawton*, 913 F.3d 1313, 1324 (11th Cir. 2019)). Second, a plaintiff can point to "a broader, clearly established principle that should control the novel facts of the situation." *Id.* "And third, a plaintiff can show that 'the conduct involved in the case may so obviously violate the Constitution that prior case law is unnecessary.'" *Id.* "The second and third methods are known as 'obvious clarity' cases," and they constitute a very "narrow exception" to qualified immunity. *King v. Pridmore*, 961 F.3d 1135, 1146 (11th Cir. 2020) (citing *Gaines v. Wardynski*, 871 F.3d 1203, 1209 (11th Cir. 2017)). Obvious clarity cases "are rare and don't arise often." *Id.*

"Notwithstanding the availability of these three independent showings, … 'if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.'" *Corbitt v. Vickers*, 929 F.3d 1304, 1311-12 (11th Cir. 2019) (quoting *Oliver v. Fiorino*, 586 F.3d 1304, 1311-12 (11th Cir. 2000)). This is especially true in the First Amendment context where, as this Court has repeatedly observed, qualified immunity

[4] The Supreme Court merely "assum[es]" without deciding "that Circuit precedent can clearly establish law for purposes of §1983." *Rivas-Villegas v. Cortesluna*, 142S.Ct. 4, 8 (2021).

is particularly "difficult to overcome." *Gaines*, 871 F.3d at 1210. *See also Maggio v. Sipple*, 211 F.3d 1346, 1354 (11th Cir. 2000) ("a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful"); *Hansen v. Soldenwagner*, 19 F.3d 573, 576 (11th Cir. 1994) (stating that decisions in the First Amendment context "tilt strongly in favor of immunity"); *Dartland v. Metro. Dade Cty.*, 866 F.2d 1321, 1323 (11th Cir. 1989) (noting that only "the extraordinary case" will survive qualified immunity in the First Amendment context).

Martin falls far short of overcoming this high hurdle. To begin with, when engaging in the challenged conduct, the GSU employees were complying with a validly enacted state law that is not "grossly and flagrantly unconstitutional," and they were entitled to assume the statute was constitutional. Regardless, Martin cannot show by any method that the law provided the GSU employees with fair warning that complying with § 50-5-85's certification requirement was unconstitutional. Indeed, federal district and circuit courts that have recently addressed *the same* constitutional challenge to *virtually identical* anti-boycott statutes containing *the same* certification requirement have reached different conclusions. *See, e.g., Ark. Times LP v. Waldrip*, 37 F.4th 1386 (8th Cir. 2022) (en banc), *cert. petition filed*, No. 22-379 (Oct.

24, 2022); *Ark. Times LP v. Waldrip*, 362 F. Supp. 3d. 617 (E.D. Ark. 2019); *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018); *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 756 (W.D. Tex. 2019), *vacated as moot*, 956 F.3d 816 (5th Cir. Tex. 2020). This alone demonstrates the absence of clearly established law. The GSU employees are entitled to qualified immunity.

A. The GSU employees were entitled to assume the statute they were obliged to comply with was constitutional and, accordingly, qualified immunity applies.

As Martin does not dispute, the GSU employees were following state law when engaging in the conduct she challenges. They were, in particular, including in a draft agreement the certification language that § 50-5-85 required them to include. As the law of this circuit makes clear, the GSU employees were entitled to assume the law they were implementing was constitutional.

In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the Supreme Court considered the question of whether, under the Fourth Amendment, "an arrest made in good-faith reliance on an ordinance, which at the time had not been declared

unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality." 443 U.S. at 33. Undertaking an "objective reasonableness" inquiry similar to the one undertaken in a qualified immunity context, the Court rejected DeFillippo's contention that the arresting officer should have known the ordinance he was enforcing, which was valid at the time, would later be found unconstitutional. *Id.* at 37-38. It held instead that "[t]he enactment of a law forecloses speculation by enforcement officials concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38.

This Court relied on the reasoning in *DeFillippo* to find that a public employee was entitled to qualified immunity for implementing a statute later invalidated under the First Amendment. In *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005), the plaintiff, a reporter, challenged the constitutionality of a Florida statute which made it a misdemeanor to disclose information obtained pursuant to an internal investigation of a law enforcement officer before it became public record. 403 F.3d at 1211. After holding the statute to be "an unconstitutional abridgement of core First Amendment rights," the Court turned to

the plaintiff's First, Fourth, and Fourteenth Amendment claims against the officer who enforced the statute against him. *Id*. at 1219. Citing *DeFillippo*, it held that qualified immunity applied, reasoning that "it could not have been apparent" to the officer that he was violating the reporter's constitutional rights because, "[a]t the time of [the] arrest, the statute had not been declared unconstitutional" and it was not "'so grossly and flagrantly unconstitutional' that [the officer] should have known it was unconstitutional." *Id.* at 1220 (quoting *DiFillippo*, 443 U.S. at 38). The officer was, the Court held, "entitled to assume that the current version [of the statute] was free of constitutional flaws." *Id*.[5]

The same is true here. When engaging in the challenged conduct, the GSU employees were implementing a statute that no court has invalidated. They were required by state law to include

[5] *Accord Cowart v. Enrique*, 311 F. App'x 210, 215-16 (11th Cir. 2009) ("The Deputies enforced a statute as it was enacted and therefore had no 'fair warning' that strict adherence to the Florida statutes would have them run afoul of the Constitution."); *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437 (6th Cir. 2016) ("When public officials implement validly enacted state laws that no court has invalidated, their conduct typically satisfies the core inquiry—the 'objective reasonableness of an official's conduct'—that the immunity doctrine was designed to test.").

the certification language in the draft agreement sent to Martin, and so they did. And, as perhaps best illustrated by the Eighth Circuit's recent *rejection* of a First Amendment challenge to a law Martin concedes is "materially indistinguishable from the Georgia law at issue here," § 50-5-85 is not "so grossly and flagrantly unconstitutional" that the GSU employees should have known they were violating Martin's rights by implementing it. *See Waldrip*, 37 F.4th 1386 (affirming the district court's holding that Arkansas' law requiring public contracts to include a certification that the contractor will not "boycott" Israel does not violate the First Amendment). The GSU employees were entitled to assume the law they were required to implement was constitutional and, accordingly, they are entitled to qualified immunity.

B. No controlling and materially similar case clearly establishes that § 50-5-85's certification requirement violates the First Amendment.

To demonstrate that a constitutional violation was clearly established by a "materially similar" case, "[a] close factual fit between the pre-existing case and the present one is essential." *Cantu v. City of Dothan*, 974 F.3d 1217, 1232 (11th Cir. 2020). "General propositions from earlier decisions will not do." *Id*. Rather, the facts of the prior case must be close enough to the

facts facing the official "to have put 'the statutory or constitutional question beyond debate.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Stated differently, the pre-existing case must "make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law." *Id.* (quoting *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)). As this Court has made clear, "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009).

No materially similar case, and no "bright line," exists here. It is not surprising, then, that federal courts considering the constitutionality of nearly identical anti-boycott statutes have reached different conclusions. *Compare Waldrip*, 37 F.4th 1386 (upholding Arkansas' anti-boycott statute), *with Jordahl*, 336 F. Supp. 3d 1016 (finding the plaintiff likely to succeed on the merits of a First Amendment challenge to Arizona's anti-boycott statute). Surely this would not be the case if, as Martin contends, Supreme Court precedent had clearly established the unconstitutionality of such statutes, either by a materially similar case or otherwise. *See Waldrip*, 37 F.4th at 1394 (stating that it was "not aware of any cases where a court has held that a certification requirement

concerning unprotected, nondiscriminatory conduct is unconstitutionally compelled speech").[6] As the district court correctly put it, "the analysis undertaken in the cases previously decided involving 'anti-BDS' laws indicates that determination of whether Georgia's law is unconstitutional is *not* 'clearly established.'" Doc. 53 at 27 (emphasis added).

Undeterred, Martin contends that *Cole v. Richardson*, 405 U.S. 676 (1972), is so factually similar to this case that it puts the constitutionality of anti-boycott statutes like § 50-5-85 beyond debate. It does no such thing—indeed, *Cole* upheld a state statute; it did not invalidate it. In *Cole*, the Supreme Court considered a requirement that, as a condition of employment with Massachusetts, employees swear that they will "uphold and defend" the state and federal constitutions and "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or

[6] Martin spends pages explaining the basis for her disagreement with the Eighth Circuit's analysis and conclusion in *Waldrip*, claiming the decision is "clearly incorrect" and "flatly wrong" and urging this Court not to be persuaded by it. Martin misses the point. Whether the Eighth Circuit got it right or wrong (Appellees submit that the decision is correct), the opinion illustrates the absence of clearly established Supreme Court law governing anti-boycott statutes like § 50-5-85.

unconstitutional method." 405 U.S. at 677. Reviewing several of its prior "oath cases," the Court set forth the general principle that the government may not condition employment on oaths that impinge on protected speech activities. *Id*. at 680. It went on to hold that the Massachusetts oath passed constitutional muster because the words "uphold," "defend," and "oppose" merely represented a willingness to commit to abide by the constitutional system rather than obligations to take specific expressive action. *Id*. at 684.

Despite characterizing *Cole* as a materially similar case, Martin highlights only what she describes as *differences*, rather than similarities, between the oath in *Cole* and the certification required by § 50-5-85. Indeed, she does not even attempt to show that the facts in *Cole* closely track those faced by the GSU employees. *See Cantu*, 974 F.3d at 1232. Nor could she—*Cole* involved a wholly different statute. It cannot clearly establish the invalidity of Georgia's anti-boycott statute.

In an effort to drum up similarity where not exists, Martin contends that the certification would have required her to "disavow the BDS movement" and alter her speech in support of the movement, but that is irrelevant, not to mention wrong. What matters for purposes of Martin's "materially similar" argument is

that *Cole* involved no such facts. There is no "close factual fit" between *Cole* and the circumstances facing the GSU employees. *See Cantu*, 974 F.3d at 1232 (describing a close factual fit as an "essential" characteristic of a materially similar case). Moreover, not that it matters, but the statute here requires only that contractors certify they will not engage in certain economic conduct—a refusal to deal commercially with Israel—irrespective of the reasons for the refusal.[7] Martin would have been free to engage in all manner of speech in support of the BDS movement.[8]

Ultimately, Martin appears to rely on *Cole* (and the four other oath cases for which she provides parentheticals but no real

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[7] Contractors may, of course, refuse to deal with Israel for valid business reasons under the statute. *See* O.C.G.A. § 50-5-85(a)(1)(B). Martin characterizes this an "exception" which has the effect of favoring some boycotts over others. Not so. The law prohibits all boycotts of Israel, no matter the motivation for the boycott. *Id*. A refusal to deal for business reasons is not, by definition, a "boycott." *See Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/boycott (defining boycott as "engag[ing] in a concerted refusal to have dealings with (a person, a store, an organization, etc.) usually to express disapproval or to force acceptance of certain conditions").

[8] *See Waldrip* (holding that the certification requirement in Arkansas' nearly identical anti-boycott statute "targets the noncommunicative aspect of the contractors' conduct—unexpressive commercial choices").

discussion) not as "close factual fits" (which they clearly are not), but for the general proposition that the government may not condition employment contracts on an oath that infringes on protected speech or association. *Cole*, 405 U.S. at 680. But as this Court has made very clear, when determining whether the law is clearly established for qualified immunity purposes, "[g]eneral propositions from earlier decisions will not do." *Cantu*, 974 F.3d at 1232. Clearly established law "must be 'particularized' to the facts of the case" and "should not be defined at a high level of generality." *White v. Purdy*, 137 S. Ct. 548, 552 (2017). This makes sense, because defining clearly established law by means of a general proposition "avoids the crucial question [of] whether the official acted reasonably *in the particular circumstances that he or she faced*"—something the Supreme Court has "repeatedly" warned against. *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (emphasis added); *see also Wesby*, 138 S. Ct. at 589-90.

State officials and employees "are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Fortson v. City of Elberton*, 592 F. App'x 819, 822 (11th Cir. 2014). And they are certainly not required to draw analogies and conclusions from case law that even federal courts faced with the same facts and the same legal issues have failed to draw. Yet that

is precisely what Martin asks of the GSU employees in this case. The law does not require it of them.

C. The district court correctly held that this is not one of the rare cases which fits within the narrow "obvious clarity" exception to qualified immunity.

Where, as here, no past decision is "materially similar," a plaintiff must show that the state official's conduct "lies so obviously at the core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the [official], notwithstanding the lack of fact-specific case law." *J.W. v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1260 (11th Cir. 2018). To demonstrate that this narrow and rare "obvious clarity" exception applies, a plaintiff must show that a broad, clearly established principle controls the novel facts of the situation or that the conduct involved in the case so obviously violates the Constitution that prior case law is unnecessary. *Wade*, 13 F.4th at 1226. Martin can do neither.

For a broad, clearly established principle to clearly control the facts of the case such that qualified immunity does not apply, the principle must be established with such obvious clarity that "every objectively reasonable government official facing the circumstances would know that the official's conduct did violate

federal law when the official acted." *Loftus v. Clark-Moore*, 690 F.3d 1200, 1204-1205 (11th Cir. 2012) (internal quotations omitted). The broad legal principle must, in other words, "clearly prohibit the officer's conduct in the particular circumstances before him." *Dist. Of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018).

Martin contends that *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), which involved a consumer boycott of white-owned businesses in Mississippi, established such a principle. She argues that *Claiborne* "clearly held" that all aspects of a politically-motivated boycott, including the "refusal to deal" aspect and "not just the expressive conduct surrounding it," amount to constitutionally protected speech. But *Claiborne* did no such thing. Indeed, the Court did not address whether the boycotters' refusal to purchase from white merchants was a constitutionally protected element of the boycott, because such conduct was not unlawful under Mississippi law.[9] It likewise had no occasion to address the question of whether the government may restrict the

[9] The Court, in fact, expressly reserved the question of whether a boycott "designed to secure aims that are themselves prohibited by a valid state law" is constitutionally protected. *Id.* at 915 n. 49.

"refusal to deal" conduct which underlies a boycott while leaving untouched the accompanying protected speech activity (as § 50-5-85 does).

Regardless, at a minimum, *Claiborne* certainly did not clearly answer such questions. If it had, there would not be disagreement among courts and jurists on this very issue. *Compare Waldrip*, 37 F.4th at 1392 (holding that the Court in *Claiborne* "stopped short of declaring that a 'boycott' itself—that is, the refusal to purchase from a business—is protected by the First Amendment" and "acknowledged that 'States have broad power to regulate economic activity'") *and Jordahl v. Brnovich*, 2018 U.S. App. LEXIS 31057, at *5 (9th Cir. Oct. 31, 2018) (Ikuta, J., dissenting from denial of stay pending appeal) ("The district court erred in relying on *Claiborne*, which did not address purchasing decisions or other non-expressive conduct."), *with Jordahl*, 336 F. Supp. 3d at 1041 (holding that *Claiborne* extended First Amendment protection even to the commercial aspect of a political boycott).

What *is* clear when it comes to *Claiborne* is that disagreement exits over the scope of the holding and its applicability to the facts in this case. And, for purposes of qualified immunity and "obvious clarity," this alone is fatal to Martin's argument. Surely if reasonable jurists disagree on *Claiborne*'s applicability to anti-

boycott statutes, the case did not provide GSU employees with "fair warning" of anything.[10]

This Court has observed that, "[i]n light of the rarity of obvious clarity cases, if a plaintiff cannot show that the law at issue was clearly established under the first (materially similar case on point) method, that usually means qualified immunity is appropriate." *King v. Pridmore*, 961 F.3d 1135, 1146 (11th Cir. 2020). Such is the case here. The GSU employees are entitled to qualified immunity, and the district court's dismissal should be affirmed.[11]

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[10] Martin's contention that the conduct she challenges here "so obviously violates [the] constitution that prior case law is unnecessary," *see Corbitt*, 929 F.3d at 1311-12, warrants little in the way of response. The litigation over anti-boycott statutes in other jurisdictions alone illustrates the fallacy of her contention. Notably, the only support to which she points for this far-fetched proposition—the district court's July 2021 dismissal order—held that "this is not an 'obvious clarity' case where case law is not necessary to establish the unlawfulness of Defendants' actions." Doc. 53 at 27. The order, in other words, undermines rather than supports Martin's position.

[11] Martin's request that this Court reconsider or overrule the doctrine of qualified immunity makes no sense. This Court is bound Supreme Court precedent unless and "until it is overruled, receded from, or in some other way altered by the Supreme Court." *United States v. Henco Holding Corp.*, 985 F.3d 1290, 1302 (11th Cir. 2021). *See also Hohn v. United States*, 524 U.S.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the district court.

Respectfully submitted.

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236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). That precedent, some of which is discussed *infra*, recognizes qualified immunity and sets forth the analysis this Court is bound to follow and apply. If Martin wishes to take up this issue, she must do so with the Supreme Court or Congress.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 5,734 words as counted by the word-processing system used to prepare the document.

/s/ *Deborah Nolan Gore*
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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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