No. 20-2266

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SAQIB ALI,

Plaintiff-Appellant,

v.

LAWRENCE HOGAN JR., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF APPELLANT SAQIB ALI

March 16, 2021

Lena F. Masri
Gadeir I. Abbas
Justin Sadowsky
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave. SE
Washington, DC 20003
(202) 742-6420

Counsel for Saqib Ali

Gadeir I. Abbas licensed to practice in Virginia only. Practice limited to federal matters

APPELLANT'S DISCLOSURE STATEMENT

Appellant Saqib Ali is a natural person with nothing to disclose.

Under Local Rule 26.1(a)(2)(B)-(C), no publicly held corporation, master limited partnership, real estate investment trust, or any other legal entity has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

Respectfully submitted,

Date: March 16, 2021

/s/ Lena F. Masri
Lena F. Masri
Gadeir I. Abbas
Justin Sadowsky
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave. SE
Washington, DC 20003
(202) 742-6420
Counsel for Saqib Ali

Gadeir I. Abbas licensed to practice in Virginia only. Practice limited to federal matters

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Rules

State Codes

Other

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case, a First Amendment challenge to Maryland's Anti-BDS Executive Order, under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Venue in the District of Maryland was proper under 28 U.S.C. § 1391 because Defendants-Appellees are the Governor and Attorney General of Maryland in their official capacity. The District Court entered a final judgment on October 26, 2020. Ali filed a notice of appeal on November 25, 2020. Appellate jurisdiction is thus proper under 28 U.S.C. § 1291 and Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF ISSUES

1. Ali who boycotts Israel and cannot certify that he does not boycott Israel. Must he bid on a government contract to have standing to challenge an Executive Order that prohibits bidding on or obtaining state government contracts without first certifying one does not boycott Israel?

2. Does Maryland's Anti-BDS Executive Order forbid boycotts of Israel?

INTRODUCTION

Saqib Ali, a software engineer and former Maryland state legislator, boycotts Israel due to its treatment of the Palestinian people. He is part of a movement called "Boycott, Divestment, and Sanctions," or BDS. The BDS movement encourages economic divestment from institutions that are not in compliance with established international law related to the Israeli occupation of Palestine, including through Boycotts.

Governor Larry Hogan attempted to push a bill through the Maryland state legislature that would bar those who boycotted Israel like Ali from being eligible for state government contracts. When that failed, he passed his law via Executive Order. As a result, Ali is ineligible to bid on government contracts. By law, any contract Ali would seek to bid on requires him to sign an Anti-BDS pledge contained in Section C of the Executive Order. And Section B of the Executive Order also requires a separate pledge before any government agency enters into a government contract.

But now that Ali has brought a First Amendment lawsuit against the Governor and the Attorney General, the Government claims the Executive Order does not do anything. Instead, it claims, Section C of the

Executive Order merely enacts a general prohibition against national origin discrimination, even though the Order mentions Israel by name a dozen times and no other country. And the Government now disclaims Section B, saying they will not enforce it.

The District Court agreed with the Government as to the meaning of Section C. In contrast, the District Court accepted that Section B is still valid and enforceable, but misreads Section B to only apply to boycotts in one's capacity as a government contractor. Because, as of now, Ali only boycotts Israel in his personal capacity, the Court dismissed Ali's claim for lack of standing.

But, in fact, both Section B and C do exactly what the Governor stated it did when he signed the Executive Order. Then, the Governor asserted that "[t]he shameful BDS movement seeks to undercut [] rights and freedoms, using economic discrimination and fear, by boycotting Israeli companies and prohibiting them from doing business in the United States."[1] The Executive Order punishes those who boycotts Israel by precluding state agencies from awarding BDS supporters state contracts.

[1] https://governor.maryland.gov/2017/10/23/governor-larry-hogan-signs-executive-order-strengthening-marylands-opposition-to-bds-movement-against-israel ("Press Release").

Even if this Court were to accept the Government's claim that Section B and C do not do so, the Executive Order is so vague as to what it does and does not prohibit that it is void for vagueness under First Amendment doctrine. And by compelling speech, it further constitutes a loyalty oath that violates the First Amendment even if it were not otherwise enforceable at all.

Ali has standing because he cannot—for moral, religious, and legal reasons—sign the Anti-BDS Pledge required by Section C. Even if he could, bidding would be futile because Section B separately makes him ineligible. Either way, Ali has standing. This Court should remand this case back to the District Court to determine whether the Executive Order violates the First Amendment.

STATEMENT OF THE CASE

A. The Governor issues the Anti-BDS Executive Order.

In 2017, after the Maryland Legislature declined to pass a statutory anti-BDS law, the Governor issued Executive Order 01.01.2017.25. J.A. 12 at ¶¶ 21-22); *see* SB 739 and HB 949. The introduction to the Executive Order made it clear that the purpose of the Executive Order were to oppose boycotts of Israel, because the Governor believed that "[b]oycotts

of people or entities because of their Israeli national origin…undermines the Declaration of Cooperation" that Maryland and Israel previously executed. J.A. 183-84.

The first part of the Executive Order, Section A, defined a boycott of Israel. It did so without reference to government contracting:

> "Boycott of Israel" means the termination or refusal to transact business activities, or other actions intended to limit commercial relations, with a person or entity because of its Israeli national origin, or residence or incorporation in Israel and its territories.

Executive Order § A(1), J.A. 184. "Business entity" includes a "sole proprieter," that is, an individual, § A(2), J.A. 184, and "[c]ommercial relations" is defined broadly to include any covered entity's "conduct of business" with any other "business entity," § A3. J.A. 185. The definition of a Boycott of Israel then included 5 exceptions for actions that are (i) "not commercial," (ii) taken "for business or economic reasons," (iii) taken because "of the specific conduct of the person or entity," (iv) "against a public or governmental entity," or (v) in violation of 50 U.S.C. § 4607. § A(1), J.A. 184.

Section B then indicates that "Executive agencies may not execute a procurement contract with a business entity unless it certifies, in

writing" that "it is not engaging in a boycott of Israel" and it will not do so "for the duration of the contract." J.A. 185.

Section C (the "Anti-BDS Pledge) then covers the text of the certification to be attached to all bid applications. Section C states, in full:

> All requests for bids or proposals issued for contracts with Executive agencies shall include the text of the following certification be completed by the bidder: "In preparing its bid/proposal on this project, the Bidder/Offeror has considered all bid/proposals submitted from qualified, potential subcontractors and suppliers, and has not, in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier, refused to transact or terminated business activities, or taken other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories. The Bidder/Offeror also has not retaliated against any person or other entity for reporting such refusal, termination, or commercially limiting actions. Without limiting any other provision of the solicitation for bid/proposals for this project, it is understood and agreed that, if this certification is false, such false certification will constitute grounds for the State to reject the bid/proposal submitted by the Bidder/Offeror on this project, and terminate any contract awarded based on the bid/proposal.

Executive Order 01.01.2017.25(C), J.A. 183. Section C does not contain the phrase "boycott of Israel."

The Governor issued a Press Release upon signing the Executive Order. *See* n.1, above; *see also* J.A. 12 at ¶ 22. The Press Release stated that "Governor Larry Hogan today signed Executive Order

01.01.2017.25, prohibiting all executive branch agencies from entering into contracts or conducting official state business with any entity unless they certify that they will not engage in a boycott of Israel during the duration of the contract." *Id.* According to the press release, "[t]he executive order further strengthens Maryland's opposition to the Boycott, Divestment, and Sanctions (BDS) movement, a discriminatory campaign designed to undermine global trade with Israel." *Id.* The Press Release—again, issued by the Governor himself—also quoted an ally as stating the Executive Order "bann[ed] companies that participate in the anti-Semitic BDS movement from securing contracts with Maryland." *Id.*

B. Saqib Ali seeks to, but cannot, bid on Maryland contracts.

Ali seeks to bid on state contracts that match his qualifications as a software engineer. J.A. 18 at ¶ 52. Except for the prohibitions in the Executive Order, Ali was qualified to bid on two specific government contracts: one to create software to evaluate life insurance policies for the Chief Actuary, and one to support Medicaid services software for the Department of Aging. J.A. 18 at ¶ 53. Ali could not fill out the bid forms because of the "No Boycott of Israel" certification requirement added by Section C of the Executive Order. J.A. 18-19 at ¶¶ 54-55. After the

Complaint was filed, the Maryland Department of Information Technology, Maryland Port Administration, and Maryland Stadium Authority posted further requests for bidding on software services that Ali would also be qualified and interested in bidding on. *Ali v. Hogan*, No. 19-cv-00078 (D. Md. 2012. J.A. 18 at ¶¶ 57-58. But Ali cannot submit those bids because each bid requires him to file a certification with the language from the Anti-BDS Pledge. J.A. 18-19 at ¶¶ 54-55.

C. Ali brings suit and the District Court dismisses Ali's case.

Ali brought this case against the Governor and the Attorney General (collectively, the "Government"), challenging the constitutionality of the Anti-BDS Executive Order. J.A. 18. In seeking to Dismiss, the Government made several arguments. J.A. 68. Most strikingly, the Government argued that the Executive Order did not actually prohibit Ali or others who boycott Israel from bidding on government contracts. J.A. 90. In fact, the Government argued the Anti-BDS Law did nothing at all. J.A. 90. Instead, according to the Government, the Anti-BDS Pledge contained in Section C did no more than apply already-existing nondiscrimination-in-government-contracting law. J.A. 104. And Section B, which must be read in "harmony" with the Anti-BDS Pledge contained in

Section C, had no meaning at all. J.A. 104. Since the phrase "Boycott of Israel" is not a part of the the Anti-BDS Pledge, this would mean that when the Executive Order went out of its way to define "Boycott of Israel," and made several statements in its WHEREAS clauses suggesting the Executive Order was designed to penalize "Boycotts of Israel," it did so superfluously, without any legal import whatsoever. J.A. 183-184. Much like the Executive Order itself, supposedly.

The Court struggled to interpret the Anti-BDS Executive Order. J.A. 37-38. It could not figure out exactly what the Executive Order did and did not do. J.A. 37-38. As a result, it found "[t]he degree of gymnastics performed by the parties to digest (and litigate) this executive order provokes certain justiciability concerns." J.A. 38-39. The District Court suggested that to help things along, Ali "should submit a bid," either by signing the Anti-BDS Pledge despite his political beliefs or by submitting a bid with the Anti-BDS Pledge unsigned. J.A. 41-42. Maryland law, to be clear, would render any such bid without a signature incomplete and invalid, *see* Md. Code, State Fin. & Proc. § 13-206(a)(1)(i) ("A procurement officer shall reject a bid or proposal" that is "nonresponsive"), a point the Government at no time contested. Alternatively, the Court suggested

that if Ali wished to proceed on a "chilled speech" theory, he should amend his Complaint to so allege. J.A. 41-42. With those instructions, the District Court dismissed the Complaint without prejudice. J.A. 42, 43.

The problem with the District Court's first suggestion was that Ali could not submit a non-futile bid without signing the Anti-BDS Pledge, which he cannot do. *See* Argument § I, below. The problem with the District Court's second suggestion was that Ali's speech was not being chilled—he was committed to continuing to boycott Israel, though other less committed people would certainly be deterred. J.A. 16. Instead, as explained in more detail in Section I of the Argument, below, Ali was being prevented from submitting a bid. Ali does not claim he has a First Amendment right to submit government contract bid; he claims that he has a First Amendment right to engage in boycotts of Israel, which cannot be punished by revoking his ability to engage in government contract bids. J.A. 120.

So Ali—unable to sign the certification, firm in his belief he need not submit a futile bid—revised his Complaint attempting to make clear how he could not submit a bid without suffering direct injury in the form

of signing his name to an Anti-BDS Pledge that would be false, subject him to risk of penalty, and that he morally disagreed with. J.A. 16 at ¶ 38. Upon a subsequent Motion by the Government, J.A. 147, the District Court dismissed Ali's Amended Complaint with prejudice. J.A. 44. Ali now appeals. J.A. 64.

SUMMARY OF ARGUMENT

The District Court's determination that Ali does not have standing to challenge the Executive Order because he does not boycott Israel in his capacity as a government contractor was made in error. All that Ali needs to have sufficient standing to challenge the Executive Order is a reasonable belief that he cannot in good conscience sign the oath in question in Section C, or that Section B makes him ineligible for a government contract regardless of whether he can sign the Section C-mandated Anti BDS Pledge.

The Anti-BDS Pledge required by Section C, meanwhile, violates the First Amendment. Contrary to the Government and the District Court, it covers Ali's personal boycott of Israel and therefore he cannot sign it. Even if it does not, it is separately unconstitutional both due to its vagueness and because it acts as an unconstitutional loyalty oath.

Likewise, the separate oath mandated by Section B also violates the Constitution. The District Court's interpretation that it only applies to those who boycott Israel in their capacity as a government contractor is contrary to the plain text of the Executive Order and is in error. The Government's separate argument that it will not enforce Section B constitutes voluntary cessation insufficient to moot the case. And Section B suffers from the same vagueness and loyalty oath infirmities that the Section C Anti-BDS Pledge does.

STANDARD OF REVIEW

The standard of review on dismissal for lack of standing is de novo. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

ARGUMENT

I. Ali has standing because he cannot sign the Anti-BDS Pledge.

Ali has a First Amendment right to boycott Israel. *See generally Arkansas Times LP v. Waldrip*, --- F.3d ----, 19-1378, 2021 WL 520658, at *2 (8th Cir. Feb. 12, 2021). The Governor seeks to deter Ali and others from exercising that right by making all those who boycott Israel ineligible for government contracts. J.A. 183. The Governor does so by requiring all those individuals who seek to apply for a government contract to first

sign the Anti-BDS Pledge before submitting any government contract bid. J.A. 183.

Ali sincerely believes he cannot sign the Anti BDS Pledge for three reasons. ***First***, Ali has both a religious and moral belief that lying is wrong. J.A. 18 at ¶¶ 55-56; *see also, e.g.,* The Koran at Surah an-Nahl 105. ***Second***, lying on a Government contract bid is a crime, subject to civil and criminal penalties. *See* Md. Code, Fin. & Proc. § 11-205.1(a); Md. Code Ann., State Fin. & Proc. § 16-203(a)(12); and Md. Code, Gen. Prov. § 8-102(b). And ***third***, asking an individual who boycotts Israel to sign a pledge which, according to the Executive Order itself, represents that Ali "is not engaging in a boycott of Israel" and will not do so "for the duration of the contract" is offensive, the equivalent of a loyalty oath. *See* Section IV, below.

Ali's personal reasons for refusing to sign the pledge for these reasons alone creates standing. *See also Arkansas Times,* 2021 WL 520658, at *2 (8th Cir. Feb. 12, 2021) (refusal to sign pledge confers standing to challenge Anti-BDS law), *reversing on other grounds* 362 F. Supp. 3d 617, 621 (E.D. Ark. 2019) (Arkansas Times "does not have to allege that it intends to boycott Israel or that it would have boycotted Israel but for Act

710"). He has been directly harmed by the Anti-BDS Pledge as, due to his inability to sign the pledge, he cannot bid on government contracts. No more is required. After all, none of the oath cases discussed in *Cole v. Richardson*, 405 U.S. 676 (1972), or *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971), required that the individuals take the challenged oath and be prosecuted for violating it to have standing.

The Court's conclusion to the contrary is mistaken for three reasons.

First, and foremost, under the District Court's interpretation of the Anti-BDS Pledge, nothing regarding the pledge prevents Ali from signing it merely because he boycotts Israel in his personal capacity. Rather, according to the District Court, all the Anti-BDS Pledge demands is a statement Ali did not discriminate against Israel and Israeli entities in preparing the bid. J.A. 53-54. What Ali does outside the confines of the contract, according to the Court, is its own affair. But the District Court does not dispute that Ali genuinely believes he cannot morally and truthfully sign the Anti-BDS pledge. This is a dispute over the meaning of the Anti-BDS pledge, which goes to the merits. *See, e.g., Connell v. Higginbotham*, 305 F. Supp. 445, 449 (M.D. Fla. 1969) (three judge panel) ("[i]f the

statute in question is unconstitutional, then plaintiff is injured by the defendants' refusal to employ her based on her failure to execute the oath"), *rev'd in part on other grounds*, 403 U.S. 207 (1971); *Cramp v. Bd. of Pub. Instr. of Orange County, Fla.*, 368 U.S. 278, 284 (1961) (all standing requires to challenge loyalty oath as unconstitutionally vague is a belief that one cannot sign the oath).

And, for the reasons explained below in Sections II-IV, it is wrong.

Second, the District Court attempts to shoehorn Ali's claim into chilled speech doctrine and whether there is a credible threat of prosecution. But this conflates negative-speech First Amendment law with the law governing First Amendment law when the Government affirmatively requires speech. Under *Cramp* and *Connell*, the requirement of the speech, and the punishment for failure to speak, alone creates standing. The mere fact that Ali must sign a statement potentially subjecting him to liability that he is unable to sign is enough to satisfy any requirement of a credible threat of prosecution. *Cramp*, 368 U.S. at 283-84 ("These are dangers to which all who are compelled to execute an unconstitutionally vague and indefinite oath may be exposed."). And by refusing to sign the Anti-BDS Pledge, Ali has already been punished, by being unable to bid

on contracts. *See Arkansas Times*, 362 F. Supp. 3d at 621-22 (noting that fear of prosecution and chilled speech doctrines are two methods of obtaining standing when an individual has yet been harmed by a First Amendment violation, but an individual who suffers consequences because of their inability to sign an Anti-BDS pledge has already been harmed and has standing for that reason alone).

Third, the District Court looked to *Jordahl v. Brnovich,* 336 F. Supp. 3d 1016 (D. Ariz. 2018*),* and *Arkansas Times*, 362 F. Supp. 3d 617, two cases where the plaintiffs had standing after they were awarded contracts because they refused to sign an anti-BDS oath, and held that those cases showed one needed to otherwise be a successful bidder to have standing to challenge anti-BDS laws. J.A. 51-52. But just because the plaintiffs in *Jordahl* and *Arkansas Times* did have standing does not mean Ali does not. And, critically, Arizona's law in *Jordahl* and Arkansas's law in *Arkansas Times* worked differently so that the parties there were otherwise ready to enter into contracts (without bids, in either case) before being asked to sign the Anti-BDS oath. *Jordahl*, 336 F. Supp. 3d at 1029; *Arkansas Times*, 362 F. Supp. 3d at 620. But here, Ali cannot even submit a bid without signing the Anti-BDS Pledge. Either way, the

harm that creates standing is the same here as it is in *Jordahl* and *Arkansas Times*, that is, the inability to sign an Anti-BDS pledge and the consequent punishment by way of ineligibility that results.

And, although the Court did not ultimately rely on such a potential anyway, Ali was also not required to submit a bid with the Anti-BDS Pledge left unsigned. Such a failure to sign would render any bid incomplete, despite the cost and burden of otherwise putting together a bid. Md. Code, State Fin. & Proc. § 13-206(a)(1)(i) ("A procurement officer shall reject a bid or proposal" that is "nonresponsive"). Hornbook law says that a prospective government contractor does not have to engage in futile bids to challenge an unlawful prohibition on bidding. *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1201 (2d Cir. 1977) (no requirement to bid for standing if bidding would be futile); *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005) ("strict adherence to the standing doctrine may be excused when a policy's flat prohibition would render submission futile"). And for good reason. If Ali did submit a bid, the agency may very well be instructed to reject Ali's bid without proffering a reason (or by proffering an alternative or false reason), thus blocking any challenge to the unconstitutional Anti-BDS Executive Order. *See generally Koontz v. Watson*,

283 F. Supp. 3d 1007, 1017 (D. Kan. 2018) (plaintiffs required to sign anti-BDS pledge need not "apply[] for" exception in order to have standing).

II. The Executive Order bars Ali from Bidding on Contracts.

A. The conduct covered by the Anti-BDS Pledge includes conduct Ali performs.

Section C requires Ali to sign the following Anti-BDS Pledge:

> In preparing its bid/proposal on this project, the Bidder/Offeror has considered all bid/proposals submitted from qualified, potential subcontractors and suppliers, and has not, in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier, refused to transact or terminated business activities, or taken other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories. The Bidder/Offeror also has not retaliated against any person or other entity for reporting such refusal, termination, or commercially limiting actions. Without limiting any other provision of the solicitation for bid/proposals for this project, it is understood and agreed that, if this certification is false, such false certification will constitute grounds for the State to reject the bid/proposal submitted by the Bidder/Offeror on this project, and terminate any contract awarded based on the bid/proposal.

Executive Order 01.01.2017.25(C), J.A. 183. Ali has "taken other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories." Specifically, Ali not only boycotts Israel in his personal

capacity, but he has actively boycotted others. Neither the Government nor the District Court disputes this.

The District Court found that Ali may still sign the certification because none of his boycotting activities have taken place "in preparing" the "bid on the project" and "in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier." J.A. 52-53. But given the convoluted language of the Anti-BDS Pledge, it is not clear that this language modifies the "other action" clause, or whether the former just applies to the "the bidder has considered" clause while the latter just applies to the "refused to transact or terminated business activities" clause.

That ambiguity must be read in light of the Executive Order and its other sections. After all, it is the Government's position that Section C must be read in harmony with Sections A and B as referring to a single pledge. J.A. 158.

Section A defines a boycott of Israel as any refusal to conduct business with Israel except when, among other reason, the refusal is "not commercial in nature." J.A. 184. Such an exception would be unnecessary if "Boycotts of Israel" only applied for boycotts performed in the

preparation of bids. Meanwhile, the language in Section C does not include any of the other exceptions listed in the "Boycott of Israel" definition, including refusals to contract business "for business or economic reasons," "because of the specific conduct of the person or entity," when "against a public or governmental entity," or when "forbidden" by 50 U.S.C. § 4607. J.A. 184; J.A. 185.

Section B, meanwhile, requires an assertion that the bidder "is not engaging in a boycott of Israel," in the past tense. J.A. 185. It also requires a certification that the bidder "will, for the duration of its contractual obligation, refrain from a boycott of Israel." J.A. 185.

The Executive Order only has two possible interpretations.

First, there is a single certification, with the language of Section C, which is intended to cover prohibited conduct defined in Section A and listed in Section B. If so, the scope of Section A must be inherent in the broad language used in the Section C Anti-BDS Pledge. As a result, the only way to harmonize Section C with the rest of the Executive Order is to find that "in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier" does not modify the "other action" clause. Rather, the "other action" clause is defined by the broad language

in Section A, covering Ali's conduct. And thus, Ali cannot sign the Anti-BDS Pledge, and therefore cannot bid on any contracts.

Or ***second***, Section B and Section C are two separate certifications, both of which Ali must be able to sign before entering into any government contract. Since Ali would not be able to sign the Section B certification, *see* Section II(B), below, he is equally disqualified from seeking any government contract. This would render any bid futile for that separate reason. *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1201 (2d Cir. 1977) (no requirement to bid for standing if bidding would be futile); *Image Carrier*, 567 F.2d at 1201 *LeClerc*, 419 F.3d at 413. Either way, Ali is not required to submit a contract to challenge the Executive Order.

And even if Section C does not include a certification that Ali does not engage in conduct covered by Section B, Ali still cannot sign the provision. ***First***, the Section is vague, and it is not fair to require Ali to sign it under the potential that he is not properly interpreting the clause. *See* § III, below. ***Second***, by singling out Israel of all countries, the clause acts as a loyalty oath even if it is not otherwise enforceable in any meaningful way. *See* § IV, below. And ***third***, Ali's boycott of Israel is very public. J.A. 18 at ¶ 50. Subcontractors, vendors, and suppliers will likely be

aware of Ali's boycott of Israel. And if they are Israeli, or aligned with Israel, then regardless of whether Ali boycotts those subcontractors, vendors, or suppliers, those subcontractors, vendors, or suppliers may not do business with Ali. So Ali has taken "other actions intended to limit commercial relations" that would apply "in preparing" the "bid on the project" and in the "in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier."

So, for multiple reasons, given the breadth and ambiguity of the convoluted Anti-BDS Pledge, Ali cannot sign it.

B. Section B is unconstitutional, and the Government's disavowal does not eliminate standing.

As noted above, even if Section C was perfectly legal, Ali still is ineligible to bid on Government contracts due to Section B. J.A. 185. Section B prohibits executive agencies from "execut[ing] a procurement contract with a business entity unless it certifies, in writing" that "it is not engaging in a boycott of Israel" and it will not do so "for the duration of the contract." J.A. 185. Section B is, in a real sense, the meat of the Anti-BDS Executive Order, as it is the specific provision that prohibits bidders who are engage or have engaged in a "boycott of Israel," which is

extensively defined in Section A. J.A. 185. In contrast, Section C does not use the term "boycott of Israel" at all. J.A. 185-186.

The Government does not defend the constitutionality of Section B. Instead, the Government's solution to Section B is to "expressly disavow[] enforcement." J.A. 157-158. This disavowal came up during litigation and is thus an attempt at voluntary cessation. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Defendants cannot carry their heavy burden of demonstrating this case is moot. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Aladdin's Castle*, 455 U.S. at 289; *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot"). To that end, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see generally Porter v. Clarke,* 852 F.3d 358, 364 (4th Cir. 2017).

The Government claims it has ceased enforcement of Section B of the Executive Order, but it has not repealed the statute. J.A. 158. This voluntary cessation of enforcing Section B is not enough. Absolute clarity sufficient to show voluntary cessation typically requires a formal legislative change in the form of the expiration, repeal, or material amendment of a statute. *See Bell v. City of Boise*, 709 F.3d 890, 898-99 (9th Cir. 2013); *see also N. Carolina Right to Life Political Action Comm. v. Leake*, 872 F. Supp. 2d 466, 471 (E.D.N.C. 2012). Likewise, mootness is not found when the government withdraws enforcement yet "maintain[s] that the legal position" of the challenged conduct, as here where the Governor refuses to admit that Section B is unconstitutional. *Am. Whitewater v. Tidwell*, 09-cv-02665, 2010 WL 5019879, at *5 (D.S.C. Dec. 2, 2010).

If the Governor truly wants to disclaim Section B, he could do the obvious thing, and repeal it. Absent that—and unlike the representations his attorneys have made here to the Court[2]—Section B remains binding on state agencies. It also continues to act as a disincentive for any

[2] *See, e.g., Baltimore & Ohio R. Co. v. Kuchta*, 76 Md. App. 1, 6, 543 A.2d 371, 374 (1988); *United States v. Winstar Corp.*, 518 U.S. 839, 875 n.20 (1996) (citing *Stone v. Mississippi*, 101 U.S. 814 (1880)) (other citations omitted).

prospective government contractor who boycotts Israel. Such potential contractor would be foolish to invest any money or time to in either bidding on contracts or even building out the ability to do so, knowing their ineligibility. After all, the language of Section B is neither permissive nor requires any enforcement. J.A. 185. Instead, "[e]xecutive agencies agencies "may not execute a procurement contract with a business entity unless it certifies, in writing" that "it is not engaging in a boycott of Israel" and it will not do so "for the duration of the contract." J.A. 185. An individual who boycotts Israel who seeks a government contract is not simply relying on the Governor not to enforce a law but is relying on executive agencies to expressly ignore their own legal duties.

C. Section B Applies to Ali.

The District Court, for its part, did not rely on the Governor's disclaimer of any intent to enforce Section B. Instead, according to the District Court, "a boycott of Israel requires a boycott in one's business decisions," and Ali cannot show that he boycotts Israel in his "business decisions." J.A. 53.

The District Court's interpretation is incorrect. The District Court arrives at its conclusion by noting that "commercial relations" is defined

as only covering a "business entity's conduct of business." But the "boycott of Israel" definition does not apply to mere "commercial relations," but instead applies directly to "the termination or refusal to transact business activities," without defining "business activities" or limiting that clause to only the bidder's "business activities." J.A. 53, 184. When Ali "refuses to purchase Sabra hummus or SodaStream products, which have ties to Israel and its occupation of Palestine," J.A. 17, he is declining to engage in a business activity—Sabra's or SodaStream's sale of a product. If the District Court's interpretation were correct that Ali would have to boycott Israel in his business capacity only, it would render the exception (decisions that are not "commercial in nature") in Section A, J.A. 52-53, a nullity.

And even if this were not the case, it would still be the case that Ali could not sign any certification required by Section B. Such a certification would require Ali to swear he would not "for the duration" of any contract boycott Israel. Nothing in the definition of "commercial relations" limits its definition to Ali's "conduct of business" as a government contractor. Ali may in the future engage in all sorts of private business activities, some of which may require him to decide between transacting business

with Israeli-related entities and adhering to his boycott of Israel. After all, Arkansas Times does not actually boycott Israel, but merely refused to swear that it would continue to refrain from doing so in the future. 362 F. Supp. 3d at 620-21. The government cannot compel state contractors to disavow participation in past or future expressive activity and association, including a political boycott. *See Arkansas Times, id.*; *see also Cole v. Richardson*, 405 U.S. 676, 680 (1972) (public employment may not be conditioned on an oath "denying past, or abjuring future" expressive or associational activities). Section B, and its future-facing certification requirement, is even clearer an unconstitutional loyalty oath than Section C. *See* § IV, below.

The Texas definition of "boycott of Israel" at issue in *Amawi v. Pflugerville ISD*, 373 F. Supp. 3d 717 (W.D. Tex. 2019), was similarly "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel …" Tex. Gov't Code Ann. § 808.001(1). Amawi, a speech pathologist, does not boycott Israel in her capacity as a speech pathologist any more than Ali does in his capacity as a computer programmer. 373 F. Supp. 3d at 731-72. The District Court

here recognized that Texas's law was no different than Section B, stating that the fundamental difference between Ali and Amawi was that "[u]nlike the plaintiffs in *Amawi*, who had to sign a certification with language similar to the language in Section B of Governor Hogan's Executive Order, Mr. Ali would only have to sign Section C of the Executive Order and therefore he is not confronted with such a broad certification requirement." J.A. 61. But Ali would ultimately also have to sign a Section B certification before becoming eligible to obtain a government contract. J.A. 185, 187. As explained above (in Section II(B)), the Executive Order mandates any executive agency demand such a certification prior to entering into a contract regardless of whether the Governor or the Attorney General enforces the provision, as they now claim they do not do. The fact that Ali has not yet had to sign a future pledge of engaging in Israel is of no moment under *Image Carrier*, *LeClerc*, *Aladdin's Castle*, and *Friends of the Earth*.

III. The Executive Order is unconstitutionally vague.

A. The Anti-BDS Pledge is unconstitutionally vague.

"While 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,' [the]

'government may regulate in the area' of First Amendment freedoms 'only with narrow specificity.'" *Brown v. Ent't Merchants Ass'n*, 564 U.S. 786, 807. (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989), and *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (other citation omitted).

Once again, this is the Anti-BDS Pledge required by Section C:

> In preparing its bid/proposal on this project, the Bidder/Offeror has considered all bid/proposals submitted from qualified, potential subcontractors and suppliers, and has not, in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier, refused to transact or terminated business activities, or taken other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories. The Bidder/Offeror also has not retaliated against any person or other entity for reporting such refusal, termination, or commercially limiting actions. Without limiting any other provision of the solicitation for bid/proposals for this project, it is understood and agreed that, if this certification is false, such false certification will constitute grounds for the State to reject the bid/proposal submitted by the Bidder/Offeror on this project, and terminate any contract awarded based on the bid/proposal.

J.A. 185-86. Executive Order 01.01.2017.25(C).

This language is vague and confusing. As discussed above in II(A), Section C prohibits the "refus[al] to transact" or the "terminat[ion of] business activities" done "in the solicitation, selection, or commercial

treatment of any subcontractor, vendor, or supplier." It also prohibits an individual from "tak[ing] other actions intended to limit commercial relations, with a person or entity on the basis of Israeli national origin, or residence or incorporation in Israel and its territories." But it is unclear whether this provision is limited by the condition that the "other actions" be performed "in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier." The vagueness is made worse both by the existence of Section B, and by the Government's argument, J.A. 158, that despite their facial incongruence, Section B and Section C must be read in harmony as requiring a single certification.

Vagueness in oaths create a particularized constitutional concern. "With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive." *Cramp*, 368 U.S. at 286. When an oath is vague, and particularly a politically-oriented oath such as Section C's, "it requires no strain of the imagination to envision the possibility of prosecution for … guiltless knowing behavior." *Id.* Even if the oath required by Section C ultimately only covered activity already illegal under general discrimination laws—which it does not—it is

specifically designed to give pause to individuals like Ali and make them choose between their constitutional right to boycott and their constitutional right to compete for government contracts on equal terms. The vagueness does not create a constitutional standing defense for the Governor. It makes the Executive Order unconstitutional.

Indeed, the District Court has all but already recognized that the Anti-BDS Pledge did not meet the "narrow specificity" requirement of *Brown*. The District Court previously held that "[t]he vagueness of what the Order actually prohibits, and the First Amendment territory in which it resides, have prompted the parties to take markedly different stances as to its effect." J.A. 37. "The degree of interpretive gymnastics performed by the parties to digest (and litigate) this executive order provokes certain justiciability concerns." J.A. 38. The interpretation of the statute is "a moving target, especially if there is a saving construction to be found in the Governor's interpretation of his executive order that the language of Section C is not broadened in any way by Section B or the transposition of any clause from the Boycott of Israel definition into the certification text itself." J.A. 39. At most, the Order is simply "limited enough to be

susceptible to an interpretation that does not prohibit Mr. Ali's proffered BDS activism." J.A. 40.

Section C is impenetrable on its own. J.A. 40. It is even more indecipherable when the Government's claim that it disavows an enforcement of Section B ia taken into account because Section C is the sole mechanism for enforcing Section B. J.A. 180. This would require Section C to be interpreted in light of Section B, broadening its otherwise plain meaning.

As *Johnson v. United States*, 576 U.S. 591, 601 (2015), explained, when courts have "trouble making sense" of a regulation, that indicates the regulation is likely void for vagueness. "[P]ervasive disagreement about the nature of the inquiry" does not mean that a case is non-justiciable, but rather that the regulation is void. *Id*. The Government is left with arguing that if Section B and Section C mean literally nothing, but instead simply reiterate what the non-discrimination law already is, then the Executive Order is constitutional. But the canon of constitutional avoidance does not apply in vagueness cases. *United States v. Simms*, 914 F.3d 229, 251 (4th Cir. 2019), *cert. denied*, No. 18-1338, 2019 WL 4923463 (U.S. Oct. 7, 2019). If it did, the canon would defeat the vagueness rule, as the canon would require some particular interpretation of the statute,

and then, assuming that interpretation, the statute would no longer be vague. "Due process requires [the government] to speak in definite terms, particularly where the consequences for individual liberties are steep." *Simms*, 229 F.3d at 251. "For similar reasons, although courts must interpret statutes under the presumption that [their enactors] do not intend to violate the Constitution, judges cannot revise invalid [laws]." *Id.* "[W]hile the grave remedy of striking down a statute as unconstitutional lies within the judicial province, rewriting it is a task solely for the elected legislature." *Id.*

Substitute executive orders for statutes, and Governors for legislatures, and the result is no different. In fact, given the far lower barriers of re-enacting an Executive Order vis-à-vis a statute, the purposes of the canon of constitutional avoidance are even less served here.

The District Court separately noted that the "Governor likely has the prerogative to issue the authoritative construction of his own executive order." J.A. 39-40. Respectfully, the District Court is wrong for the same reasons provided in *Simms*—such claims of restraint (which are not binding on the government anyway[3]) do not mitigate the chilling aspects

[3] *See* n.3, above.

of a vague law potentially reaching conduct protected by the First Amendment. "A vague and overbroad condition 'cannot be 'saved' merely because the government promises to enforce it in a narrow manner." *United States v. Begay*, 831 F. App'x 870, 871 (9th Cir. 2020) (unpublished) (quoting *United States v. Soltero*, 510 F.3d 858, 867 n.10 (9th Cir. 2007) (per curiam)); *see also Bence v. Breier*, 501 F.2d 1185, 1189 n.2 (7th Cir. 1974) ("vague regulation cannot be saved through prospective 'proper application' simply because the rule contains no objective criteria for determining precisely what constitutes a 'proper application'").

IV. Both the Anti-BDS Pledge and Section B are unconstitutional loyalty oaths.

The Anti-BDS Pledge is unconstitutional loyalty test to the Governor's preferred policies because it names Israel and not any other country. Ali is a citizen and former legislator and has no problem complying with those laws of this country and state that are constitutionally proper. J.A. 9. But—aside from being too vague to permit Ali to sign the provision without fear that doing so violates both the law and Ali's sincerely-held religious beliefs against lying, see § I, above—the Certification language of Section C is designed to humiliate, embarrass, and deter Ali and all

others who oppose Israel and its occupation from seeking government contracts. J.A. 16.

This loyalty oath to Israel specifically violates what the Supreme Court has called a "fixed star in our constitutional constellation." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). It does so by "prescrib[ing] what shall be orthodox in politics" and forcing Ali to sign a loyalty oath compelling him "to confess by word or act [his] faith" in that pro-Israel orthodoxy. See id.

The government is constitutionally prohibited from requiring contractors to pledge allegiance to its preferred policies. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220–21 (2013). State governments cannot condition employment "on an oath that one has not engaged, or will not engage, in protected speech activities." *Cole*, 405 U.S. at 680 (collecting cases). Oaths may not be used "to penalize political beliefs." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 54 (1961); *see also Baird*, 401 U.S. at 6 (government may not "exclude[e] a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs").

So as the district court in *Amawi* explained, a certification requirement such as the one required by Section C is not a mere generic request that the signer verify that they will follow the law. 373 F. Supp. 3d at 754-55. Rather, it is an invasive attempt "to make inquiries about a person's beliefs or associations," *id.* at 754 (quoting *Baird*, 401 U.S. at 6), "solely for the purpose of withholding a right or benefit because of what he believes," 373 F. Supp. at 755 (quoting *Baird*, 401 U.S. at 7). It is separately and independently unconstitutional even if the Executive Order can otherwise be read to do nothing at all.

And, to the extent Section B requires an oath separate from Section C, *see* §§ II(B)-(C), above, it is an unconstitutional loyalty oath as well.

CONCLUSION

The Court of Appeals should vacate the District Court's dismissal and remand to rule on whether or not the Executive Order violates the First Amendment.

APPELLANT REQUESTS ORAL ARGUMENT.

Respectfully submitted,

March 16, 2021

/s/ Lena F. Masri

Lena F. Masri
Gadeir I. Abbas
Justin Sadowsky
CAIR LEGAL DEFENSE FUND
453 New Jersey Ave. SE
Washington, DC 20003
(202) 742-6420
Counsel for Saqib Ali

Gadeir I. Abbas licensed to practice in Virginia only. Practice limited to federal matters.

CERTIFICATE OF COMPLIANCE

This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, adden-dum, attachments), this brief or other document contains 7,560 words.

This complies with the typeface and type style requirements because this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Lena F. Masri
Lena F. Masri

Counsel for Saqib Ali