

No. 20-2266

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IN THE  
**United States Court of Appeals**

FOR THE FOURTH CIRCUIT

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SAQIB ALI,

*Plaintiff-Appellant,*

v.

LAWRENCE HOGAN JR., ET AL.,

*Defendants-Appellees.*

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

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**REPLY BRIEF OF APPELLANT SAQIB ALI**

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June 4, 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.*

TABLE OF CONTENTS

INTRODUCTION..... 1

ARGUMENT ..... 2

    I. ALI HAS STANDING BECAUSE HE CANNOT SIGN THE ANTI-BDS PLEDGE, AND ANY BID WOULD BE FUTILE ANYWAY. .... 2

    II. SECTION C IS UNCONSTITUTIONALLY VAGUE..... 5

        A. The Court should reach vagueness merits as part of its standing analysis. .... 5

        B. The Executive Order is vague..... 7

    III. SECTIONS A AND B RENDER THE EXECUTIVE ORDER UNCONSTITUTIONAL. .... 9

        A. Sections A and B require a separate oath. .... 9

        B. The Government’s interpretation of Sections A and B only confirms the Executive Order is vague. .... 13

        C. The Government’s disavowal is worthless..... 14

    IV. THE LOYALTY OATH PRECEDENTS ONLY CONFIRM THE ANTI-BDS LAW IS UNCONSTITUTIONALLY VAGUE..... 18

    V. THE GOVERNMENT DOES NOT HAVE SOVEREIGN IMMUNITY FROM CONSTITUTIONAL CHALLENGES TO THE GOVERNOR’S EXECUTIVE ORDER.. 20

        A. The Governor is a proper party under Ex Parte Young..... 21

        B. The Attorney General is a proper party under Ex Parte Young. 22

CONCLUSION..... 25

CERTIFICATE OF COMPLIANCE..... 27

## TABLE OF AUTHORITIES

### Cases

<i>Adarand Constructors. v. Pena</i> , 515 U.S. 200 (1995) .....	4
<i>AFSCME Council 79 v. Scott</i> , 278 F.R.D. 664 (S.D. Fla. 2011) .....	21
<i>Amawi v. Pflugerville</i> , 373 F. Supp. 3d 717 (W.D. Tex. 2019) .....	7, 9, 11, 19, 20
<i>Appleyard</i> , 513 F.2d at 577 .....	13
<i>Blum v. Holder</i> , 744 F.3d 790 (1st Cir. 2014) .....	16
<i>Carney v. Adams</i> , 141 S. Ct. 493 (2020) .....	3, 4
<i>City of Bristol v. Earley</i> , 145 F. Supp. 2d 741 (W.D. Va. 2001) .....	25
<i>Cole v. Richardson</i> , 405 U.S. 676 (1972) .....	20
<i>Connor B. ex rel. Vigurs v. Patrick</i> , 771 F. Supp. 2d 142 (D. Mass. 2011) .....	21
<i>Cramp v. Bd. of Pub. Instr. of Orange County, Fla.</i> , 368 U.S. 278 (1961) .....	9, 16, 20
<i>Does 1-5 v. Cooper</i> , 40 F. Supp. 3d 657 (M.D.N.C. 2014) .....	25
<i>Duke Energy Trading &amp; Mktg., L.L.C. v. Davis</i> , 267 F.3d 1042 (9th Cir. 2001) .....	21
<i>Farm Labor Org. Comm. v. Stein</i> , No. 17-CV-1037, 2018 WL 3999638 (M.D.N.C. Aug. 21, 2018) .....	25
<i>I.C.C. v. Appleyard</i> , 513 F.2d 575 (4th Cir. 1975) .....	3, 4, 12
<i>Jordahl v. Brnovich</i> , 336 F. Supp. 3d 1016 (D. Ariz. 2018) .....	23
<i>Martin v. Wrigley</i> , --- F. Supp. 3d ---, 20-cv-596, 2021 WL 2068261 (N.D. Ga. May 21, 2021) .....	5
<i>Maryland Shall Issue, Inc. v. Hogan</i> , 963 F.3d 356 (4th Cir. 2020) ....	5, 6
<i>McBurney v. Cuccinelli</i> , 616 F.3d 393 (4th Cir. 2010) .....	23
<i>Mobil Oil Corp. v. Attorney Gen. of Com. of Va.</i> , 940 F.2d 73 (4th Cir. 1991) .....	22, 25
<i>NAACP v. Claiborne Hardware</i> , 458 U.S. 886 (1982) .....	6, 25
<i>Niz-Chavez v. Garland</i> , 141 S. Ct. 1474 (2021) .....	8
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986) .....	22
<i>S.C. Wildlife Fed’n v. Limehouse</i> , 549 F.3d 324 (4th Cir. 2008) .....	23
<i>Sea-Land Services v. I.C.C.</i> , 738 F.2d 1311 (D.C. Cir. 1984) .....	15

*Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383 (1988) ..... 11

*Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001)..... 21

Other

Catherine Traffis, *When to Use a Comma Before “Or,”* GRAMMARLY ..... 7

Eric Cox, *Hogan executive order denies contracts to firms that boycott Israel*, BALTIMORE SUN (Oct 23, 2017)..... 17

Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2070-71 (2015) ..... 15

State Codes

Md. Code Ann., State Fin. & Proc. § 19-114..... 16, 18

Md. Code, State Fin. & Proc. § 16-203(a)(12) ..... 22

Md. Code, State Gov’t § 3-302 ..... 21

## INTRODUCTION

The Executive Order is an enigma. What it does and does not do is a model of opacity. The Government claims it does nothing. Yet the text indicates otherwise. Even the District Court struggled with figuring out what it accomplishes.

But here, the Executive Order's vagueness is a feature instead of a flaw. The Governor touts his Anti-BDS Executive Order as banning BDS supporters from being eligible to apply for government contracts. Via the order, Governor Hogan now demands a loyalty oath for contract bidders, seeking to root out BDS supporters just as loyalty oaths from the past did the same to suspected communists. This creates a barrier for supporters of the BDS movement from applying to or receiving government contractors.

Yet, the Anti-BDS Executive Order has also allowed the Government to meekly come before courts and claim that the Anti-BDS Executive Order does nothing at all, and so Courts should not be concerned about the constitutional rights at stake.

The Government is boldly trying to turn the void-for-vagueness analysis on its head by saying the Order's inscrutability is grounds for it

being constitutional, or, at minimum, for nobody to have standing to challenge it. That is not how the void-for-vagueness doctrine works, and if the Court accepts the State of Maryland's arguments, this crucial First Amendment doctrine will be decimated.

### **ARGUMENT**

#### **I. Ali has standing because he cannot sign the Anti-BDS Pledge, and any bid would be futile anyway.**

As explained in Ali's opening brief (at 12-18 & 21), Ali has standing because (a) he cannot sign the Anti-BDS Pledge described in Section C of the Executive Order because it would be false for Ali to certify that he has not "refused to transact ... with a person or entity on the basis of Israeli national origin, or residence ... in Israel and its territories", *see* § II, *below*, and (b) because the certification in Section B of the Executive Order would render any bid futile. The Government, for the most part, agrees that if either Section C is open to interpretation in a way that covers Ali or that Section B applies and renders him unable to procure a contract, Ali would have standing.

Still, the Government misstates the futility test. It suggests (at 20) that the Government must "concede[] that the condition, on its face, renders the would-be-applicant ineligible," and that "a would-be vender"

must “show that he had previously bid on contracts and would do so again.” Not so. As *I.C.C. v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1975), proffered by the Government (at 18) states, the futility test merely demands that an applicant must show “that he cannot obtain a permit under the existing regulations.” No concession or previous bid is necessary.

Other cases, including *Carney v. Adams*, 141 S. Ct. 493, 503 (2020), also require a plaintiff to ultimately show they were “able and ready” to apply for a contract “in the imminent future.” That is a question of fact that the Court decided in *Carney* based on the “particular summary judgment record.” *Id.* But this case is still at the motion to dismiss stage, and so Ali’s allegations in the Complaint—which satisfy *Carney*—that he was ready and able to apply for the contracts in question are currently dispositive. JA 18-19.

The *Appleyard* eligibility rule makes sense, as this case illustrates. If Ali submitted a bid without certifying the Anti-BDS Pledge as required by Section C, or even if he submitted with the Anti-BDS Pledge signed, he would still not win the bid under any circumstances. That is because the Anti-BDS Executive Order renders him ineligible, and the Government is quite aware of Ali’s public boycott of Israel. See Opening Brief at

17. Under the Government's proposed test for standing, all the Government would need to do to insulate the Executive Order from any challenge is to simply not tell Ali why his bid was rejected. At minimum, the Government's test would require Ali to otherwise successfully bid before he would have standing, which no case—not *Carney*, not *Appleyard*, not *Adarand Constructors. v. Pena*, 515 U.S. 200, 211 (1995)—requires.

The Government further supports its argument that Ali needed to bid by pointing to other anti-BDS cases where—like here—plaintiffs had standing because they could not sign an Anti-BDS pledge. Government Brief at 19-20. The difference was, in those cases, no pledge was required until it was time to enter into a contract. Although, under the futility exception, Ali would have standing even if its Anti-BDS pledge only came later, the Court need not address that question, just as the courts in the other Anti-BDS cases had no need to address it either. Here, the Government demanded an anti-BDS loyalty oath from bidders up front by requiring it in the bid itself rather than simply as a part of the acceptance of an offered contract, and this loyalty oath requirement makes the State of Maryland's anti-BDS executive order just like such laws in other states. *See Martin v. Wrigley*, --- F. Supp. 3d ----, 20-cv-596, 2021 WL

2068261, at \*9 (N.D. Ga. May 21, 2021) (Georgia’s requirement that contractors certify “that one is not engaged in a boycott of Israel is no different than requiring a person to espouse certain political beliefs or to engage in certain political associations”).

## **II. Section C is unconstitutionally vague.**

Ali asserts (at 28-34) that Section C’s Anti-BDS Pledge is unconstitutionally vague. The Government disagrees. The Court is capable of reading the Anti-BDS Pledge on its own and making a determination. So only a few points need be said on reply.

### **A. The Court should reach vagueness merits as part of its standing analysis.**

There appears to be some confusion about the distinction between the issue of standing to challenge a statute as unconstitutionally vague and the merits of the vagueness challenge. As the case the Government itself proffers, *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356 (4th Cir. 2020), explains, the vagueness standing test is straightforward. An individual has standing to challenge a law as vague if the law is vague in a way that could “arguably” cover conduct the plaintiff takes (or, if the

case involves a chilling effect would like to take). *Id.* at 363-64.<sup>1</sup> In *Maryland Shall Issue*, the statute in question was not vague in a way that “arguably” covered the plaintiffs’ conduct, and so they lacked standing. *Id.* at 364.

This requires the Court reaching the merits of the vagueness claim, at least in an as-applied manner. There is no question here that Ali boycotts Israel in his personal capacity, and that he does so publicly and advocates for others to boycott Israel. JA 17-18 So when the Government claims (at 41) that it need not determine whether the Executive Order is vague because “these arguments ... do not bear on [Ali’s] standing,” the Government is mistaken. Because the Executive Order is vague in a way that “arguably” covers Ali and makes Ali’s refusal to bid or sign the Anti-BDS Pledge reasonable, then the two—standing on one hand and the merits of the vagueness claim on the other—are one and the same. *Maryland Shall Issue*, 963 F.3d at 364.

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<sup>1</sup> Of course, if the law covers Ali’s conduct in a way that is not vague, then Ali has standing to challenge the constitutionality of the Anti-BDS Law on more traditional First Amendment grounds. See *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

## **B. The Executive Order is vague.**

Other Courts—much like the District Court below in its initial Order—have found language similar to the Anti-BDS Pledge to be word soup. So *Amawi v. Pflugerville* found the phrase “otherwise taking any action that is intended to penalize, inflict harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory,” to be unconstitutionally vague. 373 F. Supp. 3d 717, 756-57 (W.D. Tex. 2019). Potentially included within that phrase is “donating to a Palestinian organization, purchasing art at a Gaza liberation fair, donating to an organization like Jewish Voice for Peace that organizes BDS campaigns, or picketing outside Best Buy to urge shoppers not to buy HP products because of the company's relationship with the IDF.” *Id.*

The Government’s (at 22-23) and the District Court’s (at JA 54) primary response is that Section C’s phrase “other actions intended to limit commercial relations” is qualified by the phrase “in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier.” This is incorrect, grammatically speaking. By adding a comma in between “refused to transact or terminated business activities” and “or

taken other action intended to limit commercial relations,” the Governor has made the two clauses independent, severing the connection of the latter from the phrase “in the solicitation [etc.]”<sup>2</sup> So “other actions intended to limit commercial relations” is unqualified.

This is not to say the Court must always declare absolute meaning from a potentially errant comma, though a Court should only ignore a scrivener’s error in certain narrow contexts. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 n.1 (2021). Instead, this exercise shows the inherent vagueness of a poorly written 73-word oath with at least a half dozen separate subclauses. Any reasonable BDS supporter like Ali would see that certification and be reasonably worried that were they to sign it, they would be violating their personal belief in honesty as well as committing punishable perjury.

And even if “in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier,” unambiguously qualified “or taken other action intended to limit commercial relations,” the Anti-BDS Pledge remains vague. As noted above, “other actions” is so vague as to

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<sup>2</sup> See Catherine Traffis, *When to Use a Comma Before “Or,”* GRAMMARLY, available at <https://www.grammarly.com/blog/comma-before-or/>.

include any possible conduct. *See Amawi*, 373 F. Supp. 3d at 756-57. So, as Ali noted in his opening brief (at 21-22), his actions taken in his personal capacity may “limit commercial relations” in his capacity as a contractor. The Government (at 26) dismisses this as “lawyers’ arguments,” but “lawyers’ arguments” are exactly what are used to interpret a law. And the fact that “it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested,” that the law’s language would still cover that language only shows the law is unconstitutional. *Cramp v. Bd. of Pub. Instr. of Orange County, Fla.*, 368 U.S. 278, 286 (1961) (“The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language”).

**III. Sections A and B render the Executive Order unconstitutional.**

**A. Sections A and B require a separate oath.**

All that vagueness analysis in Section II above assumes that the Anti-BDS Pledge is independent of Sections A and B, which makes sense. Sections A and B do not refer to Section C, which describes the Anti-BDS Pledge, and Section C does not incorporate any of the definitions in Section A. But if so, then Section B requires a separate oath, which is either also unconstitutionally vague or just an unconstitutional speech

restriction. And, as explained above in Section I, because Ali could not sign a Section B oath, any bid he makes would be futile and he thus has standing to challenge the Executive Order. *See generally* Opening Brief at 22-25.

The Government responds (at 4-5) with an unusual interpretation of the Executive Order. It claims the definitions provided in Section A inform Section B, which requires government agencies under the Governor's authority to require a certification that a bidder is not, and will not in the future, engage in a "boycott of Israel" (a defined term). True. According to the Government, "Paragraph B of the Order, though it refers to a certification, does not specify the language of the certification that bidders must execute when submitting a bid." Also true. Yet the Government goes astray (at 5) when it then asserts that this "language appears in ¶ C of the Order." This cannot be. If the Anti-BDS Pledge listed in Section C provided the text of the only certification required by the Executive Order, then Section C would be the entirety of the Executive Order. Section B would do nothing at all, and Section A's definitions would be irrelevant.

In any event, the Government's interpretation is belied by the inconsistency between the language of Section B and Section C. Section B requires a certification that a bidder not only has in the past not took certain actions but will also refrain from doing so in the future. Section C's Anti-BDS Pledge has no such requirement and is exclusively retrospective. The Government suggests (at 25) this distinction is immaterial because Ali does not intend to change his behavior in the future, but this misses the point. The point is not whether Section B's temporal distinction is vague. It is that the two certifications are different. *See Amawi*, 373 F. Supp. 3d at 739 ("because the plain text of [the anti-BDS law] is clear and is not susceptible to Texas's construction, the Court will not 'rewrite' it to conform to constitutional requirements") (citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

There are other contradictions between Section B's oath and the Anti-BDS Pledge. Section B applies only to "procurement contract[s]" while the Anti-BDS Pledge applies to all contracts. Section B's "boycott of Israel" certification has a number of exceptions (via the Section A definitions) not listed anywhere in Section C's text. Section B's "boycott of Israel" also incorporates certain conduct (conduct with "other business

entit[ies],” and “business activities” as apart from “commercial relations”), which are, at minimum, significantly broader than the Anti-BDS Pledge if one accepted the Government’s and the District Court’s interpretation of Section C.

And since there are two separate certifications, as Ali explained in his opening brief (at 21), then Ali would be ineligible for a contract even if he could sign the Section C Anti-BDS Pledge. Ali, as a sole proprietorship, is a “business entity” that refuses to “transact business activities” with “business entities” in Israel. *See* Opening Brief at 5; JA 184-85. Then, for the reasons explained in Ali’s opening brief and in Section I, above, any bid by Ali would be futile and therefore excused for standing purposes. *See Appleyard*, 513 F.2d at 577.

The Government responds (at 24-25) that there cannot be two certifications because Section B says the certification must occur “in writing when the bid is submitted or the contract is renewed.” But this additional wrinkle does nothing to address the various differences between Section B and the Anti-BDS Pledge. In any event, the Section B requirement that the certification occur at the time of submission could be satisfied by a communication (like the equal employment opportunity questionnaires

often sent when individuals apply for jobs) in response to the submission or at the time a contract was set to renew. And if it were not, then the conclusion would not be that the certification is therefore excused. It is instead that the “[e]xecutive agenc[y] may not execute” the contract. Ali would remain ineligible. *Appleyard*, 513 F.2d at 577.

**B. The Government’s interpretation of Sections A and B only confirms the Executive Order is vague.**

If the Government were right and Section B and Section C were the same, this at minimum would require—as the text does anyway given the additional comma—that the restrictions in Section C on “other action intended to limit commercial relations” to go beyond the selection of bidders, and cover Ali. This is the only possible interpretation that would cover the broader conduct covered by the plain language of Sections A and B, which extend beyond the bid selection process. And if not limited to the bid selection process, there is no real dispute that Ali takes “other action intended to limit commercial relations” with entities on the basis of their incorporation in Israel.

So, Ali would have standing to challenge the Anti-BDS Executive Order if the Government were correct that there was only one certification. Even then, the temporal distinction between Section B and the Anti-

BDS Pledge would remain a mystery for the ages. *See generally* Opening Brief at 22-25.

The District Court (but not the Government) suggests that Ali's personal boycotts are not covered by the "commercial relations" clause, JA 53, but it is hard to see why not. Ali, as a sole proprietorship, is a business entity, and so are the companies he boycotts. *See* Executive Order at § A(3) (defining commercial relations as "a business entity's conduct of business .... with a ... business entity"); *see also id.* at § A(2) (defining business entity). *See* Opening Brief at 25-28.

### **C. The Government's disavowal is worthless.**

The Government attempts to untangle Section B's Gordian Knot by disavowing any reliance on Section B and then asserting that its own interpretation of Section B (and presumably Section C) is conclusive, solving any ambiguity. This is incorrect. Were it correct, then no law could be ambiguous. It would mean instead whatever the government claimed it meant. *But see* Opening Brief at 32-33 (explaining neither the canon of constitutional avoidance nor the government's authority to interpret the law can save a law from vagueness).

The Government's only response (at 23-24) to this flaw in its argument is that executive orders are special. It claims that executive orders, unlike statutes, may be conclusively resolved by the Governor's interpretation. Yet the sole case the Government cites does not support that proposition. *Sea-Land Services v. I.C.C.* only talked about "presidential intent" in terms of finding that the President had inherent authority to make a particular act retroactive, regardless of whether Congress intended to delegate such. 738 F.2d 1311, 1314 (D.C. Cir. 1984) (rejecting the argument that because Congress did not intend to make the challenged law retroactive, "the President was without power to do so on his own"); see also Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2070-71 (2015) (explaining *Sea-Land*: "when interpreting an executive order that drew on statutory authority, the court's source of 'law' lay in the President's inherent **constitutional** powers rather than in his delegated **statutory** ones") (emphasis original). And the very sentence of Ms. Newland's student note quoted by the Government in support of its argument instead makes clear that the only difference between statutes and executive orders is who issues the law and thus whose intent matter: "But while courts often seek to effectuate (some version of) congressional

intent when interpreting statutes,<sup>180</sup> their guiding principle when interpreting executive orders--including Article I executive orders—has generally been to give effect to ***presidential*** intent” (emphasis original). 124 YALE L.J. at 2069. The Government attempts to change the meaning by simply lopping off the beginning of the sentence.

The Government elsewhere (at 27-28) cites *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014), for the proposition that a statute was not vague because “the government has disavowed” the plaintiffs’ “proffered interpretations.” But the First Circuit only considered the disavowal as a factor in potential prosecution, not deference. *Id.* at 798. This is an issue that is all but irrelevant here. Ali is not claiming his speech changed in response to the Anti-BDS Executive Order. *See* Opening Brief at 10, 15-16; *compare with* Government Brief at 30-40. And Ali’s grounds for refusing to sign an oath that he does not participate in BDS includes his personal belief in honesty and against lying, which goes beyond mere fear of prosecution. JA 19, 125; *see also Cramp*, 368 U.S. at 286 (“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”).

If the Governor really believed that Section B does nothing, it could simply repeal Sections A and B (that he now claims does nothing) and revise Section C to make it unambiguous. *See also* JA 42 (District Court suggesting same). Or, since the Government here claims Section C simply repeats already-existing antidiscrimination law, it could just repeal the whole thing. *See* JA 37, 165; *see also* Md. Code Ann., State Fin. & Proc. § 19-114. And if the Governor will not do so—because, for instance, he likes the impression he has put forth to the public that he has outlawed BDS supporters from applying for government contracts—the judiciary should do it for him.

The judiciary should strike Sections A and B as being constitutionally vague; no harm to the Governor, who claims they do nothing anyway. And the judiciary can likewise strike Section C for being, at minimum, constitutionally vague as well, requiring the Governor to try again at a law whose import is understandable to the public. What the judiciary should not do is bless what the Governor seeks to do here, which is to

convince the public a law means one thing, while telling the courts it means something else.<sup>3</sup>

**IV. The loyalty oath precedents only confirm the Anti-BDS law is unconstitutionally vague.**

The Government's arguments to this point have been curious. It aggressively defends the constitutionality of the Executive Order while simultaneously arguing it does nothing. Even in its new modest interpretation of prohibiting mere discrimination against Israeli vendors and subcontractors and the like, it—according to the Government itself—merely mirrors preexisting law prohibiting national origin discrimination. JA 37, 165; *see also* Md. Code Ann., State Fin. & Proc. § 19-114.

But if the law does nothing, why does it need defending? As explained in Section III, above, part of this is because the Governor's representations to the Court as to what the Executive Order does (nothing) is contrary to the marked language the Governor uses when representing

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<sup>3</sup> *See* Eric Cox, *Hogan executive order denies contracts to firms that boycott Israel*, BALTIMORE SUN (Oct 23, 2017) ("Cox Article") ("Hogan said all future state contracts would require companies to certify they will not economically discriminate against Israel, and that if any current state contractors refuse to agree, 'they would be terminated'.... There is no place in our state for boycotts and threats,' Hogan said.").

his Executive Order to the public. To the public, the Executive Order strikes a blow against those who would boycott Israel.

And therein lies the rub. There is no vague certification or pledge that one must not discriminate against the French, or the Nepalese, or the Canadians. Instead, the certification only elicits promises requiring one to not participate in the BDS movement. *See Amawi*, 373 F. Supp. 3d at 755 (“the only interest distinctly served by H.B. 89’s content-and viewpoint-based discrimination is displaying Texas’s special hostility to the BDS movement”). While the Section C certification itself carefully avoids the specific words “boycott of Israel,” or BDS, the Anti-BDS law itself, the Governor’s press release, and the Governor’s public comments all make clear what this is about. *See* Anti-BDS Law at § A (defining “Boycott of Israel”); § B (prohibiting “Boycott of Israel”), Press Release (““The 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”); *see also* Cox Article at n.3, above; *Amawi*, 373 F. Supp. 3d at 755 (“the fact that H.B. 89 is referred to by its sponsor, the governor, and news media as the ‘anti-BDS bill,’ the certification that one does not and will not ‘boycott Israel’

is a ‘political or ideological message’ the First Amendment prevents Texas from compelling”).

And so, despite the Government’s protestations, the Anti-BDS Pledge raises the same problems as the loyalty oath in *Cramp* did. 368 U.S. at 286; *see also Amawi*, 373 F. Supp. 3d at 754 (“the State may not condition employment ‘on an oath denying past, or abjuring future,’ protected speech and associational activities”) (quoting *Cole v. Richardson*, 405 U.S. 676, 680 (1972)).

Yes, the *Cramp* oaths—which, like here, targeted vague actions, not beliefs—is not exactly the same as the oath here. The supposed threat of Communism is different than the supposed threat of BDS. But the crux is the same—to punish the disfavored group’s supporters by making them ineligible for certain government jobs or contracts. Both oaths were defended on the basis that they purported to do nothing. And for both oaths, the vagueness was a feature, not a flaw.

**V. The Government does not have sovereign immunity from constitutional challenges to the Governor’s executive order.**

Finally, both the Attorney General and the Governor claim they should be immune from challenge under *Ex Parte Young*.

**A. The Governor is a proper party under *Ex Parte Young*.**

Contrary to the Government's assertions (48-49), the Governor has a "special relationship" with his own Executive Order, making him a proper defendant. Courts consistently hold that the Governor is a proper party under *Ex Parte Young* when a plaintiff seeks to challenge an executive order. See *AFSCME Council 79 v. Scott*, 278 F.R.D. 664, 670-71 (S.D. Fla. 2011); *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1053-54 (9th Cir. 2001); *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 159 (D. Mass. 2011).

The Governor issued, and may unilaterally revoke, the Anti-BDS Executive Order. This alone makes him a proper party. For this reason, the Government's reliance (at 49) on *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) is misplaced. That case holds that a governor might not to be a proper party under *Ex Parte Young* when plaintiffs are challenging an unconstitutional statute passed by the legislature. It does not apply to Executive Orders such as the one here.

The Governor is separately a proper defendant because he directly oversees the affected acquisition policies and practices of the agencies.

*Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986); *see also* Md. Code, State Gov't § 3-302.

The Governor has already acted by mandating the “No Boycott of Israel” certification requirement which prevents Ali from bidding on a Maryland government contract. So, the Government’s claims (at 49) that he is not a proper party because he has not “acted or threatened to act” is simply wrong. Even absent the certification requirement, the recency of the Executive Order constitutes sufficient likelihood of its enforcement for *Ex Parte Young* purposes. *See Mobil Oil Corp. v. Attorney Gen. of Com. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991) (“We see no reason to assume that the Virginia legislature enacted this statute without intending it to be enforced.”) (citing *American Booksellers*, 484 U.S. at 393).

**B. The Attorney General is a proper party under *Ex Parte Young*.**

Although the claim against the Governor is enough to move this constitutional challenge to the Executive Order forward, the Attorney General too is a proper party. As the Government concedes (at 47), he “has the authority to seek debarment of vendors who violate Maryland’s procurement laws.” *See* Md. Code, State Fin. & Proc. § 16-203(a)(12). This

specific authority is all that is needed for a “special relation to makes him a proper party for purposes of *Ex Parte Young*.”

As the Fourth Circuit has explained, any “***proximity to*** and ***responsibility for*** the challenged state action” gives rise to a special relationship. *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008) (emphasis original). In *McBurney v. Cuccinelli*, 616 F.3d 393, 400 (4th Cir. 2010), relied on by the Government, the Fourth Circuit explained *Limehouse* as it applied to Attorneys General. There, an Attorney General was not a proper party because he did not have specified authority to enforce the challenged law. Instead, it was the Commonwealth’s Attorneys—a different set of government officials—who had enforcement authority. *Id.* Here, the Government specifically concedes (at 47) that the Attorney General has specific authority to enforce the Executive Order under Md. Code, State Fin. & Proc. § 16-203(a)(12).

Indeed, the same jurisdictional arguments made on behalf of the Attorney General were also made by the Arizona Attorney General in *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1035-36 (D. Ariz. 2018), *vacated on other grounds*, 789 F. App’x 589 (9th Cir. 2020) (unpublished). The *Jordahl* Court rejected these arguments based on the Arizona

Attorney General's parallel statutory enforcement duty in that state. *Id.* at 1035. As explained by *Jordahl*, "the lack of direct enforcement authority does not necessarily mean that the Attorney General's authority is unconnected." *Id.* Instead, *Ex Parte Young* applies when "there is a sufficient connection between the official's responsibilities and the injury that Plaintiffs might suffer," *Id.* In *Jordahl*, the Court held that "a sufficient connection exists between the Attorney General's authority to prosecute persons illegally paying public contractors and Plaintiffs' injuries." *Id.* The same result is proper here given the Attorney General's role in disbarment and criminal prosecution for violation of the Executive Order and its "No Boycott of Israel" certification requirement.

Like with the Governor, the Government again claims (at 48) that even if a special relationship exists, they should be dismissed under *Ex Parte Young* because the Attorney General has "not acted or threatened to act." But the Fourth Circuit has held that when an Attorney General otherwise has statutory authority to enforce a challenged law (as he does here), the Attorney General's obligation to enforce the threat constitutes a threat to act, at least when the Attorney General has not expressly "disclaimed any intention of exercising her enforcement authority," *Mobil*

*Oil Corp.*, 940 F.2d at 76.<sup>4</sup> Since the Attorney General has not expressly disclaimed using his authority to enforce the Anti-BDS Executive Order, he is a proper defendant.

## CONCLUSION

The Court of Appeals should vacate the District Court's dismissal and remand to either declare the Executive Order unconstitutionally vague or to rule on whether or not the Executive Order violates the First Amendment under *NAACP v. Claiborne*.

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<sup>4</sup> See also *Farm Labor Org. Comm. v. Stein*, No. 17-CV-1037, 2018 WL 3999638, at \*13 (M.D.N.C. Aug. 21, 2018), *report and recommendation adopted*, 2018 WL 4518696 (M.D.N.C. Sept. 20, 2018) (Attorney General proper *Ex Parte Young* party under *Mobil Oil* despite lack of threat); see also *Does 1-5 v. Cooper*, 40 F. Supp. 3d 657, 674 (M.D.N.C. 2014) (Attorney General proper *Ex Parte Young* party under *Mobil Oil*, despite disclaiming authority to enforce the statute); *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 746 (W.D. Va. 2001) (Attorney General proper *Ex Parte Young* party under *Mobil Oil*, despite no mention of any threat of prosecution).

Respectfully submitted,

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/s/ Lena 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.*

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Lena F. Masri

*Counsel for Saqib Ali*