No. 20-2266

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SAQIB ALI,

Plaintiff-Appellant,

v.

LAWRENCE J. HOGAN, JR., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Maryland
(Catherine C. Blake, District Judge)

BRIEF OF APPELLEES

BRIAN E. FROSH
Attorney General of Maryland

ADAM D. SNYDER
Assistant Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
asnyder@oag.state.md.us
(410) 576-6398
(410) 576-6955 (facsimile)

Attorneys for Appellees

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JURISDICTIONAL STATEMENT

In this action under 42 U.S.C. § 1983 alleging violations of the First and Fourteenth Amendments to the Constitution, plaintiff Saqib Ali challenged an executive order issued by the Governor of Maryland that barred would-be state contractors from discriminating against Israeli vendors in the formation of bids on state contracts. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), except to the extent that the plaintiff lacked standing. On

October 26, 2020, the district court entered an order dismissing the case, and Mr. Ali filed a timely appeal on November 25, 2020. (J.A. 7.) This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment.

ISSUES PRESENTED FOR REVIEW

1. Did the district court properly conclude that Mr. Ali did not demonstrate an "injury in fact" sufficient to establish standing to challenge the constitutionality of the Governor's executive order barring would-be state contractors, in the formation of their bids, from discriminating against subcontractors, vendors, or suppliers based on their Israeli national origin, when he had not submitted a bid or been denied a contract, and when his personal advocacy against Israel would not disqualify him for contracts under the plain language of the order and the Governor's interpretation of it?

2. Does the Eleventh Amendment bar federal court jurisdiction over the Attorney General and the Governor, when neither official implements the agency procurement processes that Mr. Ali alleges were unavailable to him?

STATEMENT OF THE CASE

This case involves a plaintiff who claims standing to challenge the constitutionality of an executive order requiring a bidder on a state contract to certify that he does not, in the formation of his bid, discriminate against Israeli subcontractors, vendors, and suppliers based on their national origin, even though the plaintiff does not engage in such discrimination and his personal protests against Israel's policies toward Palestine are not implicated by the order.

Factual Background

Federal Restrictions on Boycotts on Foreign Countries

Israel has survived multiple wars since its founding in 1948, but it also has been the target of long-term economic pressure. To counter that pressure, Congress enacted the Export Administration Act of 1979 (the "EAA"), which, as currently codified, effectively prohibits Americans from "support[ing] any boycott fostered or imposed by any foreign country, against a country which is friendly to the United States." 50 U.S.C. § 4842(a)(1). The EAA has survived First Amendment challenges. *See, e.g.*, *Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307, 1317-19 (E.D. Wis. 1982), *aff'd*, 728 F.2d 915, 916 (7th Cir. 1984).

Since enactment of the EAA, a new type of boycott has emerged through the Boycott, Divestment, and Sanctions ("BDS") movement. The BDS movement "seeks to impose economic pressure on Israel" (J.A. 11 ¶ 15), by, among other

things, boycotting Israeli products. Because BDS boycotts are not fostered or imposed by a foreign country, they fall outside the EAA.

The Executive Order at Issue Here

States have taken steps to address boycotts of Israel that fall outside the EAA. (J.A. 11-12 ¶ 19.) The Maryland executive order at issue in this case—No. 01.01.2017.25, "Prohibiting Discriminatory Boycotts of Israel in State Procurement" ("Order")—provides in ¶ B that "Executive agencies may not execute a procurement contract with a business entity unless it certifies, in writing when the bid is submitted or the contract is renewed, that: (1) it is not engaging in a boycott of Israel; and (2) it will, for the duration of its contractual obligations, refrain from a boycott of Israel." (J.A. 185 ¶ B.) The term "boycott of Israel" is defined as:

> "Boycott of Israel" means the termination of 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. "Boycott of Israel" does not include actions taken:
>
> i. that are not commercial in nature;
>
> ii. for business or economic reasons;
>
> iii. because of the specific conduct of the person or entity;
>
> iv. against a public or governmental entity; or
>
> v. that are forbidden by the United States pursuant to 50 U.S.C. § 4607.[1]

[1] At the time the Order was issued, the EAA was codified at 50 U.S.C. § 4607. It was subsequently repealed and re-enacted as the Anti-Boycott Act of 2018, and is now codified at 50 U.S.C. § 4842. *See* Pub. L. No. 115-232, § 1773.

(J.A. 184 ¶ A.1.)

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. That language appears in ¶ C of the Order:

> All requests for bids or proposals issued for contracts with Executive agencies shall include the text of the following certification to be completed by the bidder: "The undersigned bidder hereby certifies and agrees that the following information is correct: In preparing its bid on this project, the bidder has considered all 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 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 bids 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 submitted by the bidder on this project, and terminate any contract awarded based on the bid.

(J.A. 185-86 ¶ C.) The ¶ C certification is the only part of the Order that is included within the bid/proposal affidavit that all bidders for state contracts are required to sign. (J.A. 192 ¶ M; *see also* J.A. 15 ¶ 36 (acknowledgement in amended complaint that ¶ B "is not included in the current government contract requests for bids"), J.A. 61.)

The Order states that it serves three principal purposes. First, it benefits the State's interests by furthering the objects of a "Declaration of Cooperation" between

Maryland and Israel "that has, for more than two decades, enabled the successful exchange of commerce, culture, technology, tourism, trade, economic development, scholarly inquiry, and academic research." (J.A. 183.) Second, the Order advances the State's interest in the efficient procurement of goods and services. Because "[t]he termination of or refusal to transact business activities with people or entities because of their Israeli national origin, or residence or incorporation in Israel and its territories, is not a commercial decision made for business or economic reasons" (J.A. 183), "[b]usiness entities that employ such unsound business practices" have "impaired commercial viability," "pose undue risks as contracting partners," and "may not provide the best possible products or services to the State" (J.A. 183-84). Finally, the Order advances Maryland's "longstanding and broad policy to refrain from contracting with business entities that unlawfully discriminate in the solicitation, selection, hiring, or commercial treatment of vendors, supplie[r]s, subcontractors, or commercial customers," so as not to become "a passive participant in private-sector commercial discrimination." (J.A. 184); *see* Md. Code Ann., State Fin. & Proc. §§ 19-101(a) (LexisNexis 2015) (declaring Maryland public policy of commercial non-discrimination), 19-102 (State policy of avoiding private sector commercial discrimination); *accord* 19 U.S.C. § 4452(b)(5) (federal policy declaring that official BDS boycotts "are contrary to principle of nondiscrimination" set forth in the General Agreement on Tariffs and Trade).

Mr. Ali's Personal Boycott of Israel

Mr. Ali is a computer software engineer and former Maryland legislator (J.A. 9 ¶ 6), who, in his personal capacity, "engages in and supports boycotts of businesses and organizations that contribute to the oppression of Palestinians" (J.A. 9 ¶ 4). *See* Appellant's Br. ("Br.") 3 ("Ali only boycotts Israel in his personal capacity"). For example, Mr. Ali alleges that he, "[p]ersonally," "refuses to purchase Sabra hummus or SodaStream products" because both companies "have ties to Israel and its occupation of Palestine." (J.A. 17 ¶ 48.) Mr. Ali also "advocates for others to join the BDS movement, and [he] monitors current events in order to identify and promote specific BDS actions." (J.A. 17 ¶ 48.)

Mr. Ali does not, however, discriminate against Israeli subcontractors, vendors, or suppliers in his professional capacity or in the formation of procurement bids. *See* Br. 19 (acknowledging that "none of [Mr. Ali's] 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.'" (quoting J.A. 52-53).) Mr. Ali nevertheless alleged that, although he would like to submit bids for government software contracts, he has not done so, because he believes that he "is barred from doing so due to the presence of mandatory 'No Boycott of Israel' clauses" in Maryland procurement solicitations. (J.A. 9 ¶ 4.)

Procedural Background

Mr. Ali filed suit on January 9, 2019. (J.A. 5.) He alleged that the Israel-specific commercial non-discrimination provision required under the Order was unconstitutionally vague and violated his First Amendment right to boycott Israel in protest of its treatment of Palestinians. He named the Governor as a defendant because the Governor had issued the Order, and he named the Attorney General, based on the allegation that the Attorney General is responsible for "supervising and directing the legal business of the State of Maryland and its executive agencies" and "enforcing and defending the constitutionality of Maryland law." (ECF 1 at 3 (¶ 8); J.A. 10 ¶ 8.) Mr. Ali sought a judgment declaring the Order unconstitutional and enjoining the Governor and the Attorney General from enforcing it.

The Governor moved to dismiss the complaint under Rule 12(b)(1) and 12(b)(6) for lack of standing and for failure to state a claim. The Governor argued, in relevant part, that Mr. Ali lacked standing because he had not submitted a bid, much less had one rejected by operation of the Order, and thus had not suffered the "injury in fact" necessary to establish standing.[2]

[2] On the merits, the Governor argued that dismissal was appropriate because the purchasing decisions potentially affected by the Order involved conduct, not speech, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006), and because any incidental effect the Order may have on speech was justified by the State's compelling interest in combatting invidious discrimination based on national origin, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

The Attorney General, by separate motion, asked the district court to dismiss him from the suit on grounds of Eleventh Amendment immunity. Because the Attorney General does not oversee the bid-solicitation process for Executive Branch agencies, he does not have the "special relation" to the Order necessary for the suit to proceed against him under *Ex Parte Young*, 209 U.S 123 (1908). *See McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010). The Governor also moved to dismiss on immunity grounds. (ECF 9-1 at 6.)

The briefing and argument on the defendants' motions to dismiss Mr. Ali's initial complaint crystalized several aspects of how the Order applies. First, it was undisputed that the certification in ¶ C is the only part of the Order that appears in the bid/proposal affidavits that vendors must complete and submit to be considered for a state contract. (J.A. 36.) Second, the parties agreed that the Order, on its face, was an Israel-specific version of the more general antidiscrimination certification that has long appeared in state contracting materials and which separately prohibits discrimination on the basis of national-origin. (*See* J.A. 187 ¶ B; *see also* J.A. 134 (Mr. Ali conceding that the Order only "prohibits one form of national-origin discrimination: discrimination against Israel"); J.A. 104 (Governor's memorandum of law, stating that "[t]he Executive Order is a specific application of Maryland's more general commercial anti-discrimination policy").)

The District Court's October 1, 2019 Memorandum Opinion

On October 1, 2019, the district court granted the motions to dismiss on standing grounds without reaching either the merits or the defendants' immunity. (J.A. 32.) The court observed that ¶ B of the Order described the required certification in terms that were temporally broader than the certification set forth at ¶ C, because it addresses discrimination against Israeli subcontractors "at the time of bidding for, or during, a state procurement contract," whereas ¶ C prohibits only such discrimination "in the bid formation process." (J.A. 36.) The court observed that the ¶ C certification "largely mirrors the general prohibition against national-origin discrimination already contained in the required Maryland Bid/Proposal Affidavit," and that, "[s]tanding alone, it does not likely raise First Amendment concerns." (J.A. 37.)

The district court noted Mr. Ali's concern that, "certifications aside," enforcement actions "could be taken against a contractor on the basis of Section B alone" and that, because ¶ B "purports to bind state executive agencies, not just potential contractors," it "could expand the Order's effect and enforcement potential." (J.A. 38.) "At this stage, however," the court concluded, "it is far from evident that Mr. Ali's bid application would be futile, as the Governor likely has the prerogative to issue the authoritative construction of his own executive order, the text of the Order is limited enough to be susceptible to an interpretation that does

not prohibit Mr. Ali's proffered BDS activism . . . and counsel for the Governor and Attorney General has expressly disavowed enforcement of Section B against Mr. Ali." (J.A. 39-40.)

Considering the parties' positions, the district court concluded that "there is not a sufficient controversy to go forward on the basis of a direct injury incurred by Mr. Ali," "especially if there is a saving construction to be found in the Governor's interpretation of his own executive order." (J.A. 39.) The court dismissed the complaint without prejudice, leaving Mr. Ali two choices: "If Mr. Ali seeks to proceed on a direct injury theory, he should submit a bid. If he wishes to argue that First Amendment justiciability rules save his claims, he must file an amended complaint plausibly alleging that his First Amendment activities have been chilled or that despite the Governor's interpretation of the Order, 'it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights.'" (J.A. 41-42 (citation omitted).)

The First Amended Complaint

Rather than submit a bid and test the district court's statement that Mr. Ali "may well get the state contract" (J.A. 40), Mr. Ali filed an amended complaint seeking to establish standing on the theory that, despite the Governor's interpretation of it, the ¶ C certification nevertheless "chill[s]" his First Amendment rights. (J.A. 22 ¶ 75.) Mr. Ali described the chilling effect as follows: "Although Ali only

boycotts Israel in his personal capacity, signing this certification would be intimidating" (J.A. 16 ¶ 38), because, if the Governor's interpretation is subsequently "changed, or found invalid" (J.A. 14 ¶ 31), and "the 'other actions' clause [in ¶ C] is not limited by the 'in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier' clause" (J.A. 16 ¶ 38), Mr. Ali might be subject to "damages, d[e]barment, and even imprisonment" (J.A. 14 ¶ 32). He did not allege, however, that any of those outcomes had been threatened or were in any way imminent, or that the existence of the Order had caused him to curtail his boycotting activities: He has "not ceased boycotting Israel" (J.A. 16 ¶ 41), and he continues to "engage[] in and support[] boycotts of Israeli businesses and organizations that contribute to the oppression of Palestinians" (J.A. 9 ¶ 4).

Mr. Ali alleged in the amended complaint that, since he filed the action, there have been four additional bid proposals that he "would have liked to submit bids for" were it not for the Order. (J.A. 19 ¶ 57.) His amended allegations confirmed that each of those proposals required the ¶ C certification that all "Maryland executive agencies' solicitation and invitation for bids documents" must include (J.A. 15 ¶ 34; 19 ¶ 58), and that the certification described in ¶ B of the Order "is not included in current government contract requests for bids" (J.A. 15 ¶ 36).

The District Court's October 26, 2000 Order Dismissing the Amended Complaint with Prejudice

The Governor and the Attorney General again moved to dismiss on standing and immunity grounds, and the district court again granted the motion, this time with prejudice. (J.A. 63.) The court concluded that Mr. Ali had not established standing through a "direct injury" because he had not submitted a bid (J.A. 55 n.7), and when, based on the "plain text" of the Order and the Governor's interpretation of it, "the court cannot conclude that Mr. Ali is prohibited from bidding on a contract" (J.A. 53-54).

Nor had Mr. Ali established standing under the "more relaxed standards of a First Amendment pre-enforcement challenge." (J.A. 55.) Mr. Ali had not alleged a "credible threat of prosecution" when (a) the Order did not apply to his personal BDS advocacy; (b) no person had been threatened with prosecution under the Order for engaging in such advocacy; and (c) Mr. Ali had never even inquired with the State as to whether his advocacy would disqualify him under the Order. (J.A. 56.) Nor had Mr. Ali "sufficiently alleged that his speech has been chilled," or that the Order's "certification requirement would deter 'an individual of ordinary firmness' from boycotting Israel" (J.A. 61) when—in contrast to other States' orders—the Order here left him "free to continue his personal boycotts against Sabra and SodaStream," and he continued to do so (J.A. 61).

SUMMARY OF ARGUMENT

The district court properly concluded that Mr. Ali failed to establish standing through any of the means available to him for demonstrating "injury in fact." He has not suffered a "direct injury" because he has not submitted a bid or had one rejected under the Order, and because the Order's plain language establishes that the Order does not cover his personal BDS advocacy. As for the "relaxed" standards applicable when a plaintiff seeks pre-enforcement review of speech restrictions, the Order's inapplicability to Mr. Ali's conduct means that he did not face a "credible threat" of prosecution under the Order or otherwise suffer an objectively reasonable "chilling" of his First Amendment rights. And his efforts to recharacterize the Order as either vague or a "loyalty oath" are unsupported by the plain terms of the Order and, in any event, do not bear on his failure to establish "injury in fact."

The Eleventh Amendment bars this suit against the Attorney General and the Governor because neither has the necessary "special relation" to the implementation of the Order's procurement requirements. The Attorney General's general authority to enforce the laws of the State of Maryland does not suffice for that "special relation," and the Governor's issuance of the Order does not either, when both officials play roles that are far removed from the agency procurements that Mr. Ali alleges are unavailable to him.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

A dismissal under Rule 12(b)(1) for lack of standing is reviewed de novo. *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 361 (4th Cir. 2020), *petition for cert. filed on other grounds*, No. 20-855 (U.S. Dec. 21, 2020). Where, as here, dismissal is based on the face of the amended complaint, the plaintiff is "afforded the same procedural protection" as under Rule 12(b)(6), "wherein 'the facts alleged in the complaint are taken as true,'" and the district court's determination is based on whether "'the complaint alleges sufficient facts to invoke subject matter jurisdiction.'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (citation omitted).

II. THE DISTRICT COURT CORRECTLY HELD THAT MR. ALI HAS NOT SUFFERED AN "INJURY IN FACT" SUFFICIENT TO ESTABLISH ARTICLE III STANDING.

The district court was correct that—in the absence of having sought and been denied the opportunity to submit a bid—Mr. Ali's disagreement with Governor Hogan's policies does not constitute an "injury in fact" for purposes of Article III standing. To establish standing, Mr. Ali must be able to show that "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely

speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000); *see also Overbey v. City of Baltimore*, 930 F.3d 215, 226-27 (4th Cir. 2019). These three elements make up the "irreducible constitutional minimum" that Mr. Ali "bears the burden of establishing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish "injury in fact," Mr. Ali must do more than rely on his sincere objection to the Governor's policies, for the "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). "'[N]o matter how sincere' or 'deeply committed' a plaintiff is" to the issues he raises, *Carney v. Adams*, 141 S. Ct. 493, 499 (2020), "a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact,'" *id*. at 498. As the district court observed, "'[S]tanding is not to be placed in the hands of concerned bystanders,' as they may 'use it simply as a vehicle for the vindication of value interests.'" (J.A. 49 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013)).)

The requirement to show direct injury-in-fact is "'somewhat relaxed in First Amendment cases,'" *Davison v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019), *as amended* (Jan. 9, 2019) (citation omitted), and plaintiffs may seek pre-enforcement

review of a challenged restriction in one of two ways. First, the plaintiff may allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Second, a plaintiff may allege "'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (citation omitted). Either way, however, a plaintiff who challenges a statute must demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. And as the district court noted, "[T]he Supreme Court has emphasized that '[its] standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of . . . Government was unconstitutional.'" (J.A. 55 (quoting *Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398, 408 (2013)).)

As discussed below, the district court correctly concluded that Mr. Ali failed to establish standing under any of these grounds.

A. Mr. Ali Has Not Established a Direct Injury Because He Has Not Submitted a Bid, and the Order's Plain Text and the Governor's Interpretation of It Do Not Restrict His Personal BDS Advocacy.

Mr. Ali has not established standing on the basis of a direct injury because he has not submitted a bid, much less had one denied. "There is a long line of cases . . . that hold that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit." *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992). This Court has contributed to that long line of cases. *See Southern Blasting Servs., Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 595 (4th Cir. 2002) (holding that plaintiffs lacked standing to challenge the constitutionality of a permitting ordinance when they "have never even applied for a permit, much less been denied one"); *I.C.C. v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1975) (no standing where "the record does not show that Appleyard has ever been or would be refused an operating permit, or indeed that he has ever applied for one"). Because Mr. Ali concedes that he has not attempted to submit a bid, much less had one rejected, he has not shown a direct injury sufficient to establish standing under the three traditional standing criteria.

Unlike here, in the cases involving other States' similar, though broader, efforts to limit their contracting with vendors that discriminate against Israelis, the plaintiffs established their standing through direct injury in the form of lost contracts and rejected bids. For example, in *Koontz v. Watson*, a schoolteacher was offered

various contractual teaching roles and, when she declined to execute the required certification, she was denied contracts. 283 F. Supp. 3d 1007, 1014 (D. Kan. 2018). In *Jordahl v. Brnovich*, an attorney and his law firm had standing to challenge Arizona's certification requirement because, when he refused to sign, a local correctional agency declined to pay his firm for work it had already performed in providing legal advice to inmates. 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018), *vacated as moot*, 789 F. App'x 589 (9th Cir. 2020). In *Amawi v. Pflugerville Independent School District*, two of the plaintiffs did not submit contract proposals, 373 F. Supp. 3d 717, 738 n.3 (W.D. Tex. 2019), *vacated as moot, Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020), but both suffered concrete injuries: one "already lost income" from having had to decline an affirmative "offer[]" to work as a paid debate judge, *id.* at 733, and the other was "not paid" for work that he had already performed, *id.* at 734. And in *Arkansas Times LP v. Waldrip*, an Arkansas newspaper that refused to sign that State's certification lost recurring advertising contracts that it had previously maintained with a state university. 362 F. Supp. 3d 617, 620 (E.D. Ark. 2019), *rev'd on other grounds*, 988 F.3d 453 (8th Cir. 2021); *see also id*. at 621 (concluding that the newspaper had standing "because it suffered

an injury in fact when it lost a government contract").[3] Mr. Ali has suffered no such injury.

Of course, a plaintiff need not submit a bid or application to have standing to challenge an eligibility condition if it is conceded that the condition, on its face, renders the would-be applicant ineligible such that the submission of an application would be futile. *See Nyquist v. Mauclet*, 432 U.S. 1, 6 n.7 (1977) (plaintiff had standing to challenge alienage restriction on receipt of student loan where the defendant "conceded . . . that any application . . . would be refused because of [the challenged restriction]"). Under those circumstances, a would-be vendor need only show that he has previously bid on contracts and would do so again, were it not for the challenged condition. *See Carney*, 141 S. Ct. at 502 (discussing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993)). But that exception does not apply here, where it is anything but conceded that Mr. Ali's personal BDS advocacy outside of the procurement context is prohibited by the ¶ C certification. To the contrary, the district court specifically found that Mr. Ali had

[3] The enactments at issue in *Koontz*, *Jordahl*, *Amawi*, and *Arkansas Times* were broader than the Order at issue here, because the bid-certifications they required rendered a would-be vendor ineligible for state contracts even if he engaged in BDS advocacy or personal boycotts *outside* the procurement process. (*See, e.g.*, J.A. 61 (discussing *Amawi* and other cases).)

not alleged that "he intends to participate in any activities that would be covered under the Executive Order" and, as a result, he had not established that he "is prohibited from bidding on a contract." (J.A. 54.)

Mr. Ali nevertheless contends that he cannot submit a bid because he "sincerely" and "genuinely" *believes* that he cannot sign the ¶ C certification, Br. 13-14, but the test for injury-in-fact is an objective test—it evaluates the *reasonableness* of the plaintiff's beliefs, not his sincerity of dedication to the issues he raises:

> It is evident that [plaintiffs] are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[T]hat concrete adverseness which sharpens the presentation of issues," . . . is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982) (citation omitted). That objective test is necessary to prevent plaintiffs from establishing standing on the ground that they merely "disagree with a government policy," *Moss v. Spartanburg County Sch. Dist. Seven*, 683 F.3d 599, 604 (4th Cir. 2012), and this Court "guard[s] against" efforts to do so, even where the disagreement is "passionate" and "premised on [the First Amendment]," *id.* at 605.

However sincere Mr. Ali's belief that he cannot truthfully sign the ¶ C certification, that belief is not objectively reasonable given the plain language of the Order and the allegations of the amended complaint. Paragraph C of the Order, sets forth the only certification that bidders must execute:

> The undersigned bidder hereby certifies and agrees that the following information is correct: *In preparing its bid on this project*, the bidder has considered all 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 also has not retaliated against any person or other entity for reporting such refusal, termination, or commercially limiting actions.

(J.A. 185 ¶ C (emphasis added).) Mr. Ali fears that the phrase "other actions intended to limit commercial relations" is broad enough to include his personal BDS advocacy, but that phrase is subject to two prefatory provisions—italicized above—that together limit it to the bid-preparation process and the bidder's treatment of subcontractors, vendors, and suppliers. As the district court correctly concluded, "the plain language of the Executive Order" establishes that Mr. Ali does not have an "'actual and well-founded fear'" that the Order would be enforced against him. (J.A. 61 (citation omitted)); *see Maryland Shall Issue*, 963 F.3d at 363-64 (no standing where conduct plaintiff engages in is not "arguably" covered by the challenged enactment).

Moreover, the Governor has confirmed that the district court's reading of the Order's plain language is the right one. The Governor has disavowed the expansive application of the Order that Mr. Ali postulates as the basis for his fear that his personal BDS advocacy is prohibited under ¶ C. As the district court observed in its initial ruling, the Governor's interpretation of his own Order limits its effect to "prohibit[ing] national origin discrimination in the bid formation process," and that, "in its effect," the Order "is but an Israel-specific reiteration of the general prohibition against national origin discrimination." (J.A. 37.) That interpretation, the court subsequently confirmed, "is the most reasonable" and "is consistent with the plain text of the Executive Order." (J.A. 53.)

Mr. Ali alleged that "the Government's interpretation of its own authority is not decisive" (J.A. 13 ¶ 27), and that might be true for statutes, which require consideration of legislative history and the competing and often conflicting views of the legislators involved. But the interpretation of the executive order requires only the views of the Governor. *See Sea-Land Serv., Inc. v. I.C.C.*, 738 F.2d 1311, 1314 (D.C. Cir. 1984) ("The 'law' at issue in this instance is an Executive Order promulgated by the President, and it is to his intent that we must turn for guidance . . . ."); Erica Newland, *Executive Orders in Court*, 124 Yale L.J. 2026, 2069-70 (2015) (The courts' "guiding principle when interpreting executive orders . . . has generally been to give effect to *presidential* intent[.]" (emphasis in

original)); *Hamilton v. Verdow*, 287 Md. 544, 556 (1980) (stating that "the Governor bears the same relation to this State as does the President to the United States"). Thus, as the district court observed, the Governor's construction of the directives he issues to the Executive Branch agencies that report to him is "authoritative."[4] (J.A. 39.)

Finally, Mr. Ali argues that the district court erred by focusing on ¶ C, instead of ¶ B, which he argues could apply to bidders in one of two ways: (1) the seeming breadth of ¶ B must be "inherent" in ¶ C, such that ¶ C covers boycotts undertaken outside of the bid-preparation process, Br. 20; or (2) ¶ B actually constitutes a "separate" certification that comes later on in the procurement process, when the agency goes to execute the final contract, Br. 20-21, 25. There is certainly no basis for the latter theory; ¶ B specifically states that the certification it describes—like the ¶ C certification that bidders are *actually* required to execute—comes "when the bid is submitted," not when the contract is executed. (J.A. 185 ¶ B.) Mr. Ali quotes ¶ B several times, and each time he omits that important language. *See, e.g.*, Br. 22,

[4] Mr. Ali urges this Court to ignore the Governor's interpretation of his own Order, because it "came up during litigation" and thus is "an attempt at voluntary cessation" that does not meet the requirements for establishing mootness. Br. 23. But the Governor is not arguing that this case is moot; the question here is what the Order *means*. And the Governor has not changed his reading of the terms of his Order from the initial briefing before the district court, well before the filing of the operative amended complaint.

25 (quoting J.A. 185). As for reading the other provisions of the Order into ¶ C, that interpretive exercise ignores that—as conceded by Mr. Ali—the ¶ C certification is the only certification that bidders are required to execute. (J.A. 15 ¶ 36 (Mr. Ali acknowledging that ¶ B "is not included in the current government contract requests for bids").)

But even if that were not the case and the certification described in ¶ B of the Order controlled, that provision still would not prohibit Mr. Ali's conduct. As the district court observed, when the defined terms "Boycott of Israel" and "commercial relations" are inserted into it, ¶ B effectively encompasses only a bidder's "[termination of or refusal to transact business activities, or other actions intended to limit [a business entity's conduct of business, and the terms and conditions by which business is transacted . . .], with a person or entity because of its Israeli national origin, or residence or incorporation in Israel and its territories]." (J.A. 53.) Although, as the district court observed, "Section C is past oriented, while Section B prohibits present and future conduct" (J.A. 38), that temporal difference does not expand ¶ B—let alone ¶ C—to the purchasing decisions that Mr. Ali makes in his personal capacity. Thus, even under Mr. Ali's construction, the Order plainly does not disqualify Mr. Ali from bidding.

Nor does Mr. Ali's speculation about how Israeli subcontractors might react to his "very public" advocacy, Br. 21, give rise to an actual and well-founded fear

that the Order covers his conduct. Mr. Ali argues that Israeli "[s]ubcontractors, vendors, and suppliers will likely be aware of Ali's boycott of Israel" and thus "may not do business with Ali." Br. 21-22. If so, Mr. Ali argues, that must mean that *he* has "taken 'other actions intended to limit commercial relations' [with Israelis] that would apply 'in preparing' the 'bid on the project.'" Br. 22. But in that hypothetical scenario, it would be the Israeli suppliers and subcontractors who are boycotting Mr. Ali and not the other way around. Given that the Order specifically exempts actions taken "because of the specific conduct" of an Israeli business (J.A. 184 ¶ A.1.iii), it is simply not plausible to suggest that an Israeli supplier's decision not to do business with Mr. Ali would disqualify *Mr. Ali* under the Order, particularly when the public BDS advocacy that Mr. Ali posits as the basis for that reverse-boycott comes outside the bid-preparation process.

These are lawyers' arguments, not the reasoning of a "person of ordinary firmness," and they raise a question as to whether Mr. Ali is actually "'able and ready' to apply" for state contracts. *Carney*, 141 S. Ct. at 500 (citations omitted). Here, where both the Governor and the district court have told Mr. Ali that his personal BDS-advocacy does not disqualify him from bidding, his failure to do so suggests that his interest here is a "generalized grievance" about the Governor's policy on Israeli-Maryland relations, "not an actual desire to [bid on contracts]." *Id.* at 501 (no injury in fact when plaintiff who challenged requirement that applicants

for judgeships belong to a major political party had switched his affiliation to "Independent" because it "made it possible for him to vindicate his view of the law").

But even if Mr. Ali were willing and able to bid, this Court's precedents establish that it is not obligated to accept Mr. Ali's postulated "expansive interpretation" of ¶ C to establish standing. In *Maryland Shall Issue, Inc. v. Hogan*, for example, plaintiff gun-owners sought to establish standing to challenge, on vagueness grounds, Maryland's ban on bump stocks and other "rapid fire trigger activators" by arguing that the statute's operative definition could potentially be read broadly to encompass bipods and other devices that increase a firearm's "rate of fire." 963 F.3d at 363-64. This Court rejected standing because the plaintiffs had not "stated an intent to engage in conduct *arguably* proscribed by a statute," *id*. at 363 (emphasis in original), when the devices they feared might be proscribed did not increase the firearm's rate of fire, but merely enabled "the *shooter* to fire again more quickly," *id.* at 364 (emphasis in original). Because the statute did not apply to their conduct, plaintiffs had not "shown a credible threat that [the statute] would be enforced in [the] manner" that they feared. *Id.*

Other circuits follow the same approach. The First Circuit, for example, rejected similar efforts to establish standing based on a broad interpretation that the government had disavowed. In *Blum v. Holder*, animal rights activists challenged the Animal Enterprise Terrorism Act on the grounds that three of its prohibitions

could be read to encompass the peaceful protests that plaintiffs engaged in. 744 F.3d 790 (1st Cir.), *cert. denied*, 135 S. Ct. 477 (2014). In each instance, the court rejected "their proffered interpretations of the provisions of the statute" on the grounds that the plain text did not support them, and the government had disavowed them:

> In sum, "[plaintiffs] in the present case present no concrete evidence to substantiate their fears, but instead rest on mere conjecture about possible governmental actions." . . . In particular, plaintiffs' fear of prosecution under AETA is based on speculation that the Government will enforce the Act pursuant to interpretations it has never adopted and now explicitly rejects. Such unsubstantiated and speculative fear is not a basis for standing under Article III.

Id. at 803 (quoting *Clapper*, 568 U.S. at 420, citation and footnotes omitted).

The district court put it plainly: "If Mr. Ali seeks to proceed on a direct injury theory, he should submit a bid." (J.A. 41.) Requiring the submission of a bid would put to the test Mr. Ali's fear that—despite the plain language of the Order and the Governor's and district court's interpretation of it—his personal BDS advocacy might disqualify him from bidding. As the district court noted, Mr. Ali "may well get the state contract" (J.A. 40), but, if he did not, the denial would provide the "distilled dispute" (J.A. 33) that Article III requires.

Generating that "distilled dispute" would not expose Mr. Ali to potential criminal prosecution, as is commonly the case where the need to establish direct injury is excused, *see* Section II.B.1 below, because ¶ C expressly provides that the remedy for a false certification is that the bid may be "reject[ed]" (J.A. 186). And

if Mr. Ali "sincerely believes" that he cannot sign the certification, Br. 13, he could cross it out, and disclose his personal BDS advocacy. Through any of these means, Mr. Ali would have to do no more than what plaintiffs in the other Israel boycott cases have done. *See Koontz*, 283 F. Supp. 3d at 1014; *Jordahl*, 336 F. Supp. 3d at 1029; *Arkansas Times*, 362 F. Supp. 3d at 620; *Amawi*, 373 F. Supp. 3d at 731-35.[5] Because the Order does not prohibit Mr. Ali's conduct, and because he has several options for bidding on a contract, the district court properly concluded that his submission of a bid would not be "futile." (J.A. 50 n.4 (concluding that Mr. Ali's futility argument "lacks merit" when, unlike in *Hamilton v. Palozzi*, 848 F.3d 614, 620-21 (4th Cir. 2017), *cert. denied*, 186 S. Ct. 500 (2017), Mr. Ali has not "'been told already that [his bid] will be rejected'").

[5] As these other cases demonstrate, requiring the submission of a bid would have the added advantage of identifying the state officials who—unlike the Governor and the Attorney General here, *see* Section IV below—have the "special relation" to implementation of the Order's provisions necessary to invoke the *Ex parte Young* exception to the bar of sovereign immunity. *See Koontz*, 283 F. Supp. 3d at 1014 n.3 (Kansas Commissioner of Education); *Arkansas Times LP v. Waldrip*, 988 F.3d 453, 458 (8th Cir. 2021) (trustees of the University of Arkansas system); *Amawi*, 373 F. Supp. 3d at 730 (boards of regents of two university systems and the trustees of two school districts); *Jordahl*, 336 F. Supp. 3d at 1029 (local sheriff and "various members of the Coconino County Jail District Board").

B. Mr. Ali Has Not Satisfied the Relaxed First Amendment Standing Requirements Because the Plain Language of the Order Does Not Apply to Mr. Ali's Personal Boycott of Israel Outside of the Procurement Process.

Because Mr. Ali has not established a direct injury, he must attempt to establish standing on the basis of the more "relaxed" principles applicable in the First Amendment context. Those principles would provide for standing if Mr. Ali alleges either (1) "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder,'" *Driehaus*, 573 U.S. at 159 (citation omitted), or (2) "'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression,'" *Cooksey*, 721 F.3d at 235 (citation omitted).

Mr. Ali argued below that he had sufficiently alleged standing under these principles (*see, e.g.*, J.A. 22 ¶ 75), but here he appears to disavow both avenues to standing. *See* Br. 15 (arguing that the district court "attempts to shoehorn Ali's claim into chilled speech doctrine and whether there is a credible threat of prosecution"). To the extent that he continues to assert standing under those theories, however, the amended complaint does not allege a basis for standing under either.

1. Mr. Ali Has Not Alleged a Credible Threat of Prosecution Sufficient to Establish Standing Under the First Amendment.

For several reasons, Mr. Ali has not established a credible threat that the Order will be enforced against him in the manner that he fears. Primarily, as discussed

above, the Order does not apply to the conduct that Mr. Ali engages in. As the district court found, both the "plain text" of the Order and the Governor's "most reasonable" interpretation of it yield the conclusion that the Order does not disqualify Mr. Ali from bidding because of his personal BDS advocacy. (J.A. 53-54.) And because the Order does not apply to his conduct, Mr. Ali has not "shown a credible threat that [it] would be enforced in [the] manner" that he fears. *Maryland Shall Issue*, 963 F.3d at 364.

Mr. Ali acknowledged this in the amended complaint. He alleged that he "only boycotts Israel in his personal capacity" (J.A. 16 ¶ 38), whereas the Order, as interpreted by the Governor, "'prohibits only national-origin discrimination against Israelis in the formation of a bid for a state contract, leaving Mr. Ali and other potential state contractors free to boycott Israel and Israeli companies outside the bid formation process'" (J.A. 13 ¶ 27 (quoting J.A. 32)). Mr. Ali disagrees with that interpretation (J.A. 13 ¶ 29), however, and alleges that the Governor's interpretation might at some point in the future be "changed, or found invalid" (J.A. 14 ¶ 31). He alleges that, if that were to happen—"[i]f the 'other actions' clause is not limited by the 'in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier' clause"—*then* he might be exposed to potential enforcement. (J.A. 16 ¶ 38.)

For several reasons, however, that future possibility is "wholly speculative" and thus cannot supply the "credible" threat of prosecution necessary to establish standing. *Maryland Shall Issue*, 963 F.3d at 363.

Although Article III standing principles speak in terms of "enforcement" and a credible threat of "prosecution," the ¶ C certification, on its face, identifies more limited remedies, namely, for the agency involved to "reject the bid" and "terminate any contract awarded based on the bid." (J.A. 185-86.) Consequently, "[t]his [is not] a case where Plaintiffs would be exposed to criminal prosecution or civil penalties if they were . . . presented . . . with a state contracting opportunity conditioned on their execution of a no-boycott clause and refused to execute it." *American Muslims for Palestine v. Arizona State Univ.*, No. CV-18-00670-PHX-DWL, 2018 WL 6250474, at *8 (D. Ariz. Nov. 29, 2018). Instead, "if [Mr. Ali] were denied the contract, [he] could simply file another lawsuit" at that point. *Id.*

Nor is there any "credible threat" that Mr. Ali could submit a bid or be awarded a contract—consistent with the Governor's construction of the Order—and later be "subject to damages, d[e]barment, and even imprisonment" if that construction subsequently changes. (J.A. 14 ¶ 32.) The only potential liability that Mr. Ali could face from the Order would arise if he submitted a *false* certification (J.A. 185-86), which would not be the case under the scenario that Mr. Ali postulates as his "credible threat."

Finally, even if Mr. Ali's fears came to pass and, at some point in the future, the Governor or a reviewing court were to adopt a construction of ¶ C that prohibits would-be vendors from speaking out against commercial relations with Israelis, that might provide standing then, but not now. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 n.2 (4th Cir. 2011) (even if statutory requirement "did some day in the future interfere with" the plaintiff's interests, "it would not *now* provide . . . standing"). Such hypothetical future injuries never suffice to establish standing, for if they could, *any* plaintiff could challenge *any* law on the theory that it might be changed at some point in the future. Instead, a threatened future injury must be "actual or imminent" to support Article III standing. *Lujan*, 504 U.S. at 560.

Federal courts "look to a variety of factors to determine whether the plaintiff's decision to forego certain activity is truly motivated by a well-founded fear that engaging in the activity will lead to prosecution under the challenged statute." *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997). Those factors include "the history of enforcement of the challenged statute to like facts" and "any threats of enforcement." *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 160 (D.D.C. 2014). And when considering those factors, "[p]articular weight must be given to the Government disavowal of any intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of plaintiffs' interpretation as unreasonable." *Blum*, 744 F.3d at 798. All these factors weigh

against Mr. Ali's standing here, given that the Order does not even apply to his conduct to begin with.

The speculative threat of prosecution that Mr. Ali alleges goes well beyond the circumstances in which this Court, applying these factors, has found a "credible threat" sufficient to establish standing. For example, in *Kenny v. Wilson*, students had standing to challenge South Carolina's laws against disorderly conduct in the public school system because they had been "prosecuted under the laws in the past" and the defendants had "not disavowed enforcement if plaintiffs engage in similar conduct in the future." 885 F.3d 280, 289 (4th Cir. 2018). In *People for the Ethical Treatment of Animals, Inc. v. Stein*, plaintiff animal rights activists had standing to challenge the constitutionality of a North Carolina commercial espionage statute because the law "specifically targeted" organizations like it, and state enforcement officials had not "'disavowed enforcement' if Plaintiffs proceed[ed] with their plans." 737 F. App'x 122, 130-31 (4th Cir. 2018) (citation omitted). And in *Cooksey*, plaintiff had standing to challenge a North Carolina law barring the unlicensed practice of dietetics because the board charged with enforcing the law had threatened to sue him if he "did not bring his website in line with the Act's proscriptions." 721 F.3d at 236.

None of this describes Mr. Ali. There is nothing in the amended complaint to suggest that Mr. Ali has previously been sanctioned for submitting a bid despite his

personal BDS advocacy. There is no allegation that any state official has ever threatened Mr. Ali with enforcement of the Order or indicated that, if he were to submit a bid or proposal, it would be denied. Nor is there any allegation that a state official has ever suggested that Mr. Ali might—at some point in the future—be subject to "damages, d[e]barment, [or] . . . imprisonment" for submitting a certification that was truthful when made. (J.A. 14 ¶ 32.) *And* the Governor has disavowed the Order's applicability to people, like Mr. Ali, who choose to boycott Israeli goods and services as a personal matter outside the context of a state procurement.

To establish a credible threat of prosecution, Mr. Ali must allege "'fears of state prosecution'" that are not "'imaginary or speculative,'" *Babbitt*, 442 U.S. at 298 (citation omitted) , and are "actual and well-founded" enough to establish that the statute will be enforced against him, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). *See Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 217 (4th Cir. 2020), *as amended* (Aug. 31, 2020). The absence of past enforcement and the disavowal of future enforcement underscores that Mr. Ali has not established the credible threat that might cause a person of ordinary firmness to decline to submit a bid.

2. The Allegations of the First Amended Complaint Do Not Establish First Amendment Standing Under a "Chilling" Theory.

For many of the same reasons, neither do the allegations of the amended complaint establish that Mr. Ali has engaged in "'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Cooksey*, 721 F.3d at 235 (citation omitted). Although Mr. Ali need not establish that he has "'ceased [his boycotting] activities altogether,'" *Benham v. City of Charlotte, N.C.*, 635 F.3d 129, 135 (4th Cir. 2011) (citation omitted), he has to allege *some* objectively reasonable chilling of First Amendment rights to demonstrate injury in fact. Mr. Ali alleges precisely the opposite, at least with respect to his own actions. He continues to "engage[] in and support[] boycotts of Israeli businesses and organizations" (J.A. 9 ¶ 4), and he continues to do so "only . . . in his personal capacity" (J.A. 16 ¶ 38). In other words, Mr. Ali alleges both that he *does not* boycott Israel in his commercial software business decisions—which is the only thing the Order restricts—and that he *continues* to boycott Israel in his personal capacity.

Although standing requirements are relaxed in the First Amendment context, they still require Mr. Ali to establish that the Order "'would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights.'" *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017) (quoting *Constantine v. Rectors & Visitors of*

George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005)). That Mr. Ali has not altered his BDS advocacy, though not dispositive, nevertheless is "evidence" that a person of ordinary firmness would not be deterred by the Order, *Constantine*, 411 F.3d at 500, particularly when the Governor has made clear, and the district court agreed, that the Order does not cover such advocacy.

It was for similar reasons that the Tenth Circuit found that the plaintiffs in *Citizen Center v. Gessler* had failed to allege "chilling" sufficient to challenge the constitutionality of an election agency's use of traceable ballots when they stated in their amended complaint that they intended to vote *despite* the possibility that their votes might be traceable:

> This [chilling] requirement is missing here because Citizen Center does not provide plausible allegations that members intend to refrain from voting because of the possibility that their ballots might be traced. Instead, the members indicate in the amended complaint that they *do* intend to vote despite the possibility of tracing. . . . There Citizen Center alleges that its members include electors who "intend to freely vote their conscience in the 2012 primary and general, special district, municipal and coordinated elections, and elections held thereafter in their respective counties."

770 F.3d 900, 913 (10th Cir. 2014) (record citation omitted). Because the plaintiffs had not altered their protected behavior, their "alleged chill [wa]s too conjectural to establish an injury in fact." *Id.* (citing *Laird v. Tatum*, 408 U.S. 1, 13-14 n.7 (1972)). So too here, where the amended complaint alleges that Mr. Ali—who considers himself among those who would be "'most sensitive'" to a certification like that at

issue here, Br. 30-31 (citation omitted)—has not altered his boycotting activities in response to the Order.

The only activity that Mr. Ali alleges that he *has* refrained from is bidding on contracts. (J.A. 18-19 ¶¶ 53-58.) But even assuming that submitting a bid involves sufficient expressive activity to make the decision not to do so self-censorship, Mr. Ali's decision to forgo those opportunities is not the effect of the Order, at least not as it is interpreted by the Governor and the district court. Instead, the "intimidat[ion]" that Mr. Ali alleges that he feels would arise only "*[i]f* the 'other actions' clause is not limited by the 'in the solicitation, selection, or commercial treatment of any subcontractor, vendor, or supplier' clause." (J.A. 16 ¶ 38 (emphasis added).) For the reasons discussed in Section A above, that potential—that the Governor might someday "change[]" his interpretation of the order or that a reviewing court might find it "invalid" (J.A. 14 ¶ 31), *and* that the Attorney General or some other official would prosecute him for having made a certification that was truthful at the time made—is far "too conjectural to establish an injury in fact," *Citizen Ctr.*, 770 F.3d at 913.

With respect to the Order as it *currently* reads, Mr. Ali has not established standing under a "chilling" theory because the chilling he asserts is not "'objectively reasonable,'" *Benham*, 635 F.3d at 135 (quoting *Zanders v. Swanson*, 573 F.3d 591, 593-94 (8th Cir. 2009)), when his conduct "is not the target of the statute's

prohibition," *Zanders*, 573 F.3d at 594; *see also, e.g.*, *Schirmer v. Nagode*, 621 F.3d 581 (7th Cir. 2010) (no standing to seek prospective invalidation of disorderly conduct ordinance when the activity plaintiffs wished to perform—peacefully handing out leaflets and talking to people—did not constitute disorderly conduct). Because Mr. Ali's personal boycott and his BDS advocacy is not prohibited by the ¶ C certification, not even Mr. Ali's fervent conviction or his "sincere fear suffices to prove an unconstitutional chilling effect." *Zanders*, 573 F.3d at 594 (plaintiffs' "sincere fear" that law prohibiting the filing of knowingly false reports of police misconduct might be applied to criminalize truthful reports does not constitute injury in fact).

Finally, even if Mr. Ali's sincere belief controlled, redressability would be an obstacle to standing. That is because the standard bid/proposal affidavit—which all bidders on state contracts have long been required to sign—already requires each bidder to certify that, "[i]n 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 engaged in 'discrimination' as defined in § 19-103 of the State Finance and Procurement Article of the Annotated Code of Maryland." (J.A. 187 ¶ B); Md. Code Ann., State Fin. & Proc. § 19-103(j)(1) (LexisNexis 2015) (defining "discrimination" to include discrimination based on "race, color, religion, ancestry or national origin"). If Mr. Ali cannot certify

compliance with the Israel-specific application of this nondiscrimination clause, he presumably cannot truthfully certify compliance with the larger commercial nondiscrimination clause of which it is a subset. Accordingly, even under Mr. Ali's theory of standing, if he were to obtain the relief he seeks—"an injunction striking the 'No Boycott of Israel' certification from any bid proposal he submits to a Maryland agency governed by Executive Order 01.01.2017.25" (J.A. 25 ¶ C)—he still would not be able to bid on state projects.

III. MR. ALI'S CHARACTERIZATION OF THE EXECUTIVE ORDER AS "VAGUE" OR A "LOYALTY OATH" DO NOT ESTABLISH STANDING.

As discussed above, the Order's "plain text" and the Governor's "most reasonable" interpretation of his Order (J.A. 53) demonstrate that Mr. Ali's fear that the Order will be applied against him is not sufficiently "actual and well-founded" to establish injury-in-fact. Nor do the other two grounds he gives establish his standing—that ¶ C is "vague, and it is not fair to require [him] to sign it under the potential that he is not properly interpreting the clause," and that, "by singling out Israel of all countries, the clause acts as a loyalty oath." Br. 21.

The government, even when it enacts generally applicable laws, need not express itself with absolute precision, as "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Instead, the Governor's direction need only be sufficient to give bidders "'a reasonable opportunity'" to know what is

expected of them. *Master Printers of Am. v. Donovan*, 751 F.2d 700, 710 (4th Cir. 1984). Accordingly, a state enactment is unconstitutionally vague under the Due Process Clause only if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

The Order is not vague for several reasons. As discussed above, the district court concluded that the Order's plain text does not encompass Mr. Ali's conduct; that the Governor's interpretation to the same effect was the "most reasonable" of the Order; and, if any doubt remained, that his authoritative interpretation provided the "narrowing construction that would make it constitutional." *American Booksellers*, 484 U.S. at 397; *see also Martin v. Lloyd*, 700 F.3d at 136 (court "must 'consider any limiting construction that a state court or enforcement agency has proffered'" (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494 n.5 (1982))); (J.A. 40 (concluding that the language of the Order was "limited enough to be susceptible to an interpretation that does not prohibit Mr. Ali's proffered BDS activism").

But these arguments go to the merits of Mr. Ali's vagueness claim; they do not bear on his standing. As this Court observed in *Benham*, "It is axiomatic that the Article III standing requirements apply to all actions in the federal courts; the fact

that the claimant may assert facial vagueness and overbreadth challenges does not alter this aspect of federal jurisprudence." 635 F.3d at 135.

Nor is there any merit to Mr. Ali's contention that the ¶ C certification, "by singling out Israel of all countries," acts as a "loyalty oath" even if it is not otherwise meaningfully different from the standard commercial nondiscrimination provision. Br. 21. Loyalty oaths were common in the 1950s and 1960's; they typically required one to swear allegiance to the United States, deny membership in the Communist Party, and disavow certain beliefs. The two cases on which Mr. Ali relies most heavily—*Cramp v. Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278 (1961), and *Connell v. Higginbotham*, 403 U.S. 207 (1971)—both involved loyalty oaths, and neither bears any resemblance to the ¶ C certification at issue here.

In *Cramp*, a school teacher challenged a requirement that he "swear that, among other things, he has never lent his 'aid, support, advice, counsel or influence to the Communist Party.'" 368 U.S. at 279 (quoting oath). The Court held that the plaintiff had standing to challenge the constitutionality of the oath, even though he did not believe that he violated it, because the "extraordinary ambiguity" of the terms "'aid,' or 'support,' or 'advice,' or 'counsel' or 'influence'" was such that they were not "susceptible of objective measurement." *Id.* at 286 ("What do these phrases mean?"); *see Dalack v. Village of Tequesta, Fla.*, 434 F. Supp. 2d 1336, 1340 (S.D. Fla. 2006), *aff'd*, 223 F. App'x 885 (11th Cir. 2007) ("The Court [in *Cramp*]

concluded that there was no objective way for an individual to measure whether he had lent 'aid,' 'support,' 'advice,' or 'counsel' to the Communist party."). *Connell* involved the very same oath, revised after *Cramp*, to require Florida state employees to swear, in relevant part, that they "do not believe in the overthrow of the Government of the United States or of the State of Florida be force or violence." 403 U.S. at 208. The Supreme Court invalidated that aspect of the oath because—as Justice Marshall explained in his concurring opinion—it unconstitutionally conditioned public employment on the applicant's "beliefs." *Id.* at 209.

By contrast, the ¶ C certification addresses *actions*—the hiring of subcontractors, vendors, and suppliers—not beliefs. It regulates how a would-be contractor prepares his bid; it does not require Mr. Ali to pledge a "loyalty oath to Israel," "'confess . . . [his] faith'" in a "pro-Israel orthodoxy," or profess any belief whatsoever. Br. 35 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Although Mr. Ali characterizes it as such—repeatedly referring to ¶ C as the "anti-BDS Pledge," Br. 6—the Governor has made clear throughout this litigation that ¶ C only prohibits discrimination against Israelis in the selection of subcontractors for state contracts and that Mr. Ali is free to engage in BDS advocacy outside that context.

Despite the many differences between "loyalty oaths" and procurement certifications, Mr. Ali argues that, "by singling out Israel of all countries," the ¶ C

certification "acts as" a loyalty oath, even when it does not go beyond the traditional—and indisputably constitutional—nondiscrimination provision "in any meaningful way." Br. 21. But the Supreme Court has rejected the notion that a measure's focus on one aspect of a larger problem renders it unconstitutional. Anti-discrimination provisions "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

"'States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.'" *McCullen v. Coakley*, 573 U.S. 464, 481-82 (2014) (quoting *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality opinion)). Just as the Massachusetts Legislature did not violate the First Amendment by acting "in response to a problem that was, in its experience, limited to abortion clinics," *id.* at 482, the Governor's procurement directive does not become a loyalty oath by addressing a particular form of national-origin discrimination that, through the efforts of the BDS movement, has gained notoriety. It defies common sense that calling out one form of prohibited discrimination—whether it be on the basis of a particular race, gender, ethnicity, or national origin—turns what is otherwise merely a "specific reiteration of the general

prohibition against national origin discrimination" (J.A. 37) into an unconstitutional "loyalty oath."

IV. MR. ALI'S CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Mr. Ali's claim against the Attorney General and the Governor should be dismissed because neither state official has the "special relation" to the procurement process that would make them susceptible to suit in federal court.[6]

The State and its agencies and officials are not susceptible to suit in federal court without a valid waiver or abrogation of its sovereign immunity. *See* U.S. Const. amend. XI; *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Pennhurst State Sch. & Hosp. v. Haldeman*, 465 U.S. 89, 100 (1984) (agencies); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (officials). Because the State of Maryland has not waived its Eleventh Amendment immunity or the immunity of its agencies, officials, and employees, Md. Code Ann., State Gov't § 12-103(2)); *In re Creative Goldsmiths*, 119 F.3d 1140, 1149 (4th Cir. 1997), Mr. Ali's claims against the Attorney General and the Governor may proceed only

[6] Although the district court dismissed the amended complaint without reaching the Eleventh Amendment immunity issue (J.A. 50 n.3), this Court will consider the issue "'at any time, even *sua sponte*.'" *McCray v. Maryland Dep't of Transp., Maryland Transit Admin.*, 741 F.3d 480, 483 (4th Cir. 2014) (citation omitted).

if they fall within the exception to Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908).

The *Ex parte Young* exception is "narrow," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1996), and authorizes a private suit against a state official only if the official has a "special relation" to the enforcement of the challenged enactment. *Ex parte Young*, 209 U.S. at 157 (citation omitted); *McBurney*, 616 F.3d at 399. And even officials who have a "special relation" to enforcement of the challenged law are not subject to suit under *Ex parte Young* unless they "threaten and are about to commence proceedings" to enforce the law. *Ex parte Young*, 209 U.S. at 155-56; *see also McBurney*, 616 F.3d at 402. Neither part of the *Ex parte Young* inquiry is met here.

A. The Attorney General's Authority to Enforce the Laws of State Does Not Constitute a "Special Relation" to the Order.

The amended complaint contains two allegations about the Attorney General's connection to the Order, neither of which justifies the application of *Ex parte Young*. First, Mr. Ali alleges that the Attorney General has general responsibility for "supervising and directing the legal business of the State of Maryland and its executive agencies" and "enforcing and defending the constitutionality of Maryland law." (J.A. 10 ¶ 8.) This Court has made clear, however, that a suit may not proceed under *Ex parte Young* "when an official merely possesses '[g]eneral authority to enforce the laws of the state.'" *McBurney*, 616 F.3d

at 399 (quoting *South Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 331 (4th Cir. 2008)). That is why, in *McBurney*, this Court upheld the application of Eleventh Amendment immunity to the Attorney General of Virginia despite allegations about his duties that are almost identical to those that Mr. Ali makes here: "'providing legal advice and representation to the Governor and executive agencies, state boards and commissions, and institutions of higher education; defending the constitutionality of state laws when they are challenged in court; and enforcing state laws that protect businesses and consumers.'" 616 F.3d at 399.

Nor is it enough that the Attorney General's general authority to enforce state laws includes, in some instances, Maryland procurement law. Although the Attorney General has the authority to seek debarment of vendors who violate Maryland's procurement laws in certain ways—including those who violate the State's Commercial Nondiscrimination Policy, *see* Md. Code Ann., State Fin. & Proc. § 16-203(a)(12)[7]—his authority there is simply a specific application of his general authority to defend and enforce the laws of the State, which is not sufficient to provide this Court with jurisdiction under *Ex parte Young*. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) ("'General authority to

[7] The State's Commercial Nondiscrimination Policy prohibits vendors from discriminating on the basis of, among other things, "religion, ancestry or national origin." State Fin. & Proc. § 19-101(a).

enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.'" (quoting *Children's Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996)).

Even if the Attorney General *had* a theoretical "special relation" to the Order, this Court "cannot apply *Ex parte Young* because the Attorney General has not acted or threatened to act." *McBurney*, 616 F.3d at 402; *see also Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) ("The requirement that there be some actual or threatened enforcement action before *Young* applies has been repeatedly applied by the federal courts."). Mr. Ali has not alleged that the Attorney General has enforced the terms of the Order against him or threatened to do so. "Because the Attorney General has not enforced, threatened to enforce, or advised other agencies to enforce [the Order] against [Mr. Ali], the *Ex parte Young* fiction cannot apply." *McBurney*, 616 F.3d at 402.

B. The Governor Does Not Have a "Special Relation" to the Administration of the Agency Procurement Processes That Mr. Ali Challenges.

Nor does the Governor have a "special relation" to agency procurement processes such that he would be a proper defendant under the narrow exception recognized in *Ex parte Young*. Mr. Ali's complaint contains two allegations about the Governor's connection with the challenged Order. First, he alleges that the Governor issued the Order (J.A. 12 ¶ 21), which is true, but the power to enact the

challenged measure is no substitute for the specific enforcement role that *Ex parte Young* requires. If it were, plaintiffs in every case would presumably be able to sue the State's legislature for having enacted a statute, or sue the Governor for having signed it, neither of which is supported by the case law. *See Ex parte Young*, 209 U.S. at 157; *Hutto v. South Carolina Ret. Sys.*, 773 F.3d 536, 550 (4th Cir. 2014).

And while the Governor, as the "head of the Executive Branch," has the power to "supervise and direct the officers and units in that Branch," Md. Code Ann., State Gov't § 3-302, that "general duty to enforce the laws of [Maryland] by virtue of his position as the top official of the state's executive branch" does not amount to the "specific duty" to enforce the challenged enactment that *Ex parte Young* requires. *Waste Mgmt.*, 252 F.3d at 331 (dismissing Virginia Governor as a party).

And even if the Governor had a "special relation" to the implementation of the Order, this Court "cannot apply *Ex parte Young* because the [Governor] has not acted or threatened to act." *McBurney*, 616 F.3d at 402. This Court held in *McBurney* that *Ex parte Young* did not apply to the Attorney General of Virginia because he had not "personally denied" the appellant's public records requests or "advised any other agencies to do so." 616 F.3d at 402. Similarly, Mr. Ali does not allege that the Governor has rejected any of Mr. Ali's bids or proposals or threatened to do so, or even instructed state agencies to do so. "Because the [Governor] has not

enforced, threatened to enforce, or advised other agencies to enforce [the Order] against [Mr. Ali], the *Ex parte Young* fiction cannot apply." *Id*.

Within the context of the procurement processes affected by the Order, the state agencies that seek to procure goods and services are the ones to initially enforce the Order's terms by "reject[ing]" the bid, not the Governor himself. (J.A. 186 ¶ C.) Depending on how Mr. Ali proceeded with respect to the submission of his bids, the Chief Actuary for the Maryland Insurance Administration or the Secretary of the Department of Aging—i.e., the heads of two state agencies that issued solicitations in which Mr. Ali alleged an interest (J.A. 18 ¶ 53)—ultimately might have a sufficiently "special" enforcement role to justify a suit against them under *Ex parte Young*. The Governor, however, does not.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Adam D. Snyder
ADAM D. SNYDER
Assistant Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
asnyder@oag.state.md.us
(410) 576-6398
(410) 576-6955 (facsimile)

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,802 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

/s/ Adam D. Snyder
Adam D. Snyder

TEXT OF PERTINENT PROVISIONS

United States Code

50 U.S.C § 4842. Foreign boycotts.

(a) Prohibitions and exceptions

(1) Prohibitions. For the purpose of implementing the policies set forth in section 4841 of this title, the President shall issue regulations prohibiting any United States person, with respect to that person's activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by any foreign country, against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.

(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country,

with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this subparagraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.

(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

(2) Exceptions. Regulations issued pursuant to paragraph (1) shall provide exceptions for-

(A) complying or agreeing to comply with requirements-

(i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country; or

(ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipment as may be permitted by such regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and

(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his own use, including the performance of contractual services within that country, as may be defined by such regulations.

(3) Special rules. Regulations issued pursuant to paragraphs (2)(C) and (2)(F) shall not provide exceptions from paragraphs (1)(B) and (1)(C).

(4) Rule of construction. Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

(5) Application. This section shall apply to any transaction or activity undertaken, by or through a United States person or any other person, with intent to evade the provisions of this section as implemented by the regulations issued pursuant to this subsection, and such regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expressed or implied by a course of conduct, including a

pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.

(b) Foreign policy controls

(1) In general. In addition to the regulations issued pursuant to subsection (a), regulations issued under subchapter I to carry out the policies set forth in section 4811(2)(D) 1 shall implement the policies set forth in this section.

(2) Requirements. Such regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or the taking of any other action referred to in subsection (a) shall report that fact to the Secretary, together with such other information concerning such request as the Secretary may require for such action as the Secretary considers appropriate for carrying out the policies of that section. Such person shall also report to the Secretary whether such person intends to comply and whether such person has complied with such request. Any report filed pursuant to this paragraph shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any goods or technology to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the United States person involved at a competitive disadvantage. The Secretary shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary, considers appropriate for carrying out the policies set forth in section 4841 of this title.

(c) Preemption. The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States.

Annotated Code of Maryland, State Finance and Procurement Article (LexisNexis 2015)

§ 19-101. Legislative intent; avoiding businesses which discriminate

(a) It is the policy of the State not to enter into a contract with any business entity that has discriminated in the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or any otherwise unlawful use of characteristics regarding the vendor's, supplier's, or commercial customer's employees or owners.

(b) Nothing in this title shall be construed to prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the marketplace.

(c) A complaint of discrimination shall be filed within 4 years after the date the cause of action accrues.

§ 19-102. Legislative intent; avoiding private sector commercial discrimination

It is the intent of the State to avoid becoming a passive participant in private sector commercial discrimination by refusing to procure goods and services from business entities that discriminate in the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination by providing a procedure for receiving, investigating, and resolving complaints of discrimination filed against business entities that:

(1) have submitted a bid or proposal; or

(2) have been selected to engage in, or are engaged in, providing goods or services to the State.

§ 19-103. Definitions

(a) In this title the following words have the meanings indicated.

(b) "Administrative law judge" means the individual assigned by the Office of Administrative Hearings to conduct a hearing under this title.

(c) (1) "Business entity" means any person, as defined in § 1-101(d) of this article, firm, sole proprietorship, partnership, corporation, limited liability company, or other business entity or a combination of any of these entities, including any financial institution, developer, consultant, prime contractor, subcontractor, supplier, or vendor, that has submitted a bid or proposal for, has been selected to engage in, or is engaged in providing goods or services to the State.

(2) "Business entity" does not include another governmental entity that is subject to Title VI of the Civil Rights Act of 1964.

(d) "Commercial customer" means a business entity that procured or attempted to procure goods or services from a business entity for business as opposed to personal, family, or household use.

(e) "Commercial Nondiscrimination Policy" means the provisions contained under this title and any regulations or documentation requirements adopted by the Commission on Civil Rights in accordance with this title.

(f) (1) "Commercial treatment" means the treatment of a vendor, supplier, subcontractor, or commercial customer by a business entity that affects the conduct of business and the terms and conditions under which business is transacted between two or more business entities.

(2) "Commercial treatment" does not mean treatment that is unrelated to a business transaction or the conduct of business.

(g) "Commission" means the Commission on Civil Rights.

(h) "Commission staff" means employees of the Commission on Civil Rights designated by the Commission to process, investigate, and pursue complaints filed under this title.

(i) "Contract" means an agreement with a business entity that is let by or on behalf of the State for that business entity to sell or lease supplies or goods, or to provide construction, real estate development, financial, insurance, professional, or other services to the State in return for a fee or any other form of compensation to be paid or provided by the State.

(j) (1) "Discrimination" means any disadvantage, difference, distinction, or preference in the solicitation, selection, hiring, or commercial treatment of a vendor, supplier, subcontractor, or commercial customer on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or any otherwise unlawful use of characteristics regarding the vendor's, supplier's, or commercial customer's employees or owners.

(2) "Discrimination" does not include lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the marketplace.

(k) "Economic development project" means a real estate development, construction, or renovation project for which the State provides:

(1) funding or other financial assistance, other than payments in exchange for goods or services;

(2) land;

(3) road improvements;

(4) tax credits; or

(5) a below market purchase price.

(l) (1) "Financial institution" means a person:

(i) engaged in the business of lending money, guaranteeing loans, extending credit, securing bonds, or providing venture or equity capital; or

(ii) that offers financial services in connection with State projects or the administration of State government.

(2) "Financial institution" includes banks, savings and loans, venture capital companies, insurance companies, bonding companies, mortgage companies, credit unions, and brokers.

(m) "Party" means:

(1) the person who has filed a complaint under this title;

(2) the respondent business entity that has been alleged to have violated this title; and

(3) the Commission that is responsible for investigating the complaint and rendering the initial findings.

(n) "Retaliate" means to take any action that has a material negative effect against any person, business or other entity for reporting any incident of discrimination, testifying as a witness at a hearing, or providing requested assistance to Commission staff in any investigation of an incident of discrimination under this title.

(o) "Services" includes construction, real estate development, financial, insurance, professional, and other services.

(p) "State subcontract" means an agreement for the provision of goods or the performance of a particular portion of work to be performed under a contract with the State, where:

(1) the party providing the goods or services is on reasonable notice that the work is to be performed under a State contract; and

(2) the amount to be paid for such goods and services is material with respect to the overall amount of the contract.

(q) "State subcontractor" means the party providing goods or services under a State subcontract.

Annotated Code of Maryland, State Government Article (LexisNexis 2014)

§ 12-103. Scope of Subtitle

This subtitle does not:

(1) limit any other law that:

(i) waives the sovereign immunity of the State or the units of the State government in tort; or

(ii) authorizes the State or its units to have insurance for tortious conduct;

(2) waive any right or defense of the State or its units, officials, or employees in an action in a court of the United States or any other state, including any defense that is available under the 11th Amendment to the United States Constitution; or

(3) apply to or waive any immunity of a bicounty unit, county, municipal corporation, or other political subdivision or any unit, official, or employee of any of those agencies or subdivisions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SAQIB ALI,	*	
Plaintiff-Appellant,	*	
v.	*	No. 20-2266
LAWRENCE J. HOGAN, JR., *et al*.,	*	
Defendants-Appellees.	*	

* * * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I certify that, on this 15th day of April, 2021, the Brief of Appellees was filed electronically and served on counsel of record, all of whom are registered CM/ECF users.

Justin Sadowsky, Esq.
453 New Jersey Avenue
Washington, District of Columbia 20003
jsadowsky@cair.com

Lena F. Masri, Esq.
453 New Jersey Avenue SE
Washington, District of Columbia 20003
lmasri@cair.com

Gadeir I. Abbas, Esq.
453 New Jersey Avenue SE
Washington, District of Columbia 20003
gabbas@cair.com

/s/ Adam D. Snyder
Adam D. Snyder