IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABBY MARTIN, Plaintiff, v. TERESA MACCARTNEY, Acting Chancellor for the Board of Regents of the University System of Georgia, in his official capacity, *et al.*, Defendants.	Civil Action No. 1:20-cv-00596-MHC Hon. Judge Mark H. Cohen

PLAINTIFF ABBY MARTIN'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF SUMMARY JUDGMENT[1]

Defendants' curious choice in their Opposition and Motion for Summary Judgment to ignore, rather than reckon with, the Court's May 21, 2021 decision does not advance their cause. In their 39-page opposition, incorporated by reference into their affirmative motion, Defendants set aside this Court's opinion finding that Georgia's anti-BDS statute, O.C.D.A. § 50-5-85, is unconstitutional. Defendants present no changed legal or factual circumstances that

[1] Plaintiff has consolidated her Reply in Support of her Motion for Summary Judgment and her Opposition to Defendants' Motion to Dismiss into one brief for purposes of economy.

would warrant reconsideration of those findings. All that is left is for the Court to strike down the law.

I. The Court has already rejected Defendants' argument that "O.C.G.A. § 50-5-85 regulates only commercial conduct"

Defendants re-argue that "O.C.G.A. § 50-5-85 regulates only commercial conduct," Dkt. 66 at 5; *id. gen'ly* 5 – 8, previously argued on motion to dismiss, Dkt. 37 – 1 at 8 (arguing "[i]t regulates only commercial conduct"), *id. gen'ly* at 8 – 11, and properly rejected by the Court. Dkt. 53 at 21 (holding "O.C.G.A. § 50-5-85 prohibits inherently expressive [and associational] conduct protected by the First Amendment" and is unconstitutional); *Id. gen'ly* at 9 – 21; *Id.* at 21 – 22 (also holding the statute unconstitutionally compels speech).

As this Court already held, Dkt. 53 at 8 – 17, the statute does not merely regulate commercial conduct but squarely targets expressive conduct that is inherent in a political boycott movement. *See Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 743-45 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020) ("Plaintiffs' BDS boycotts are not only inherently expressive, but as a form of expression on a public issue, rest on the highest rung of the hierarchy of First Amendment values."); *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Ark. Times LP v. Waldrip*, 988 F.3d 453 (8th Cir. 2021); *Jordan v. Brnovich*, 336 F. Supp. 3d

1016, 1042-43 (D. Ariz. 2018), *vacated and remanded*, 789 F. App'x 589 (9th Cir. 2020); *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1022, 1024 (D. Kan. 2018).

To the extent O.C.G.A. § 50-5-85 regulates commercial conduct), it discriminates on the basis of political motivation, expression, and association. A refusal to deal is perfectly acceptable where motivated by "a valid business reason" but absolutely prohibited where motivated by a particular political belief or view as part of a boycott. *See* Dkt. 53 at 11 (citing O.C.G.A. § 50-5-85(a)(1)(B)). The law is facially content-based, not narrowly tailored to further a substantial state interest, and cannot survive strict scrutiny. Dkt. 53 at 17 – 21.

Defendants inaccurately represent that there is "no evidence" that the statute has ever been interpreted or applied as restricting *anyone* including specifically Ms. Martin in her pro-boycott First Amendment-protected advocacy or in the distribution of her documentary film, Dkt. 66 at 5 – 6. They even falsely claim that, under the statute, contractors "remain free to … even call [] for a boycott of Israel," *id.* at 2.

It is as if Defendants are looking at a different statute and different record. The undisputed facts reflect that this law, as this Court has interpreted it, sweeps broadly and that these very Defendants interpreted and applied it to violate Ms. Martin's rights. *See* Pl SUMF ¶¶ 12 – 14 (when provided the mandatory oath, Ms. Martin responded explaining "my work advocates the

boycott of Israel, and my new film features that call to action. I cannot sign any form promising to not boycott Israel, what do you advise I do?" Defendant Overstreet did not write Ms. Martin back to assure her that the oath in no way affected her abilities to advocate for the boycott or distribute her film. Instead her immediate response was to forward Ms. Martin's email response to Dr. Reynolds and instruct him to get a new keynote speaker: "This was Abby's reply. We will await your response **for the new Keynote**.") (emphasis added); SUMF ¶ 15 (same statement from Dr. Reynolds); SUMF ¶ 16 (referencing Ms. Martin's response, Dr. Reynolds writes "the legislation prohibits advancing ideas of boycotting or advocating divestment in Israel"); SUMF ¶ 18 (GSU's Marketing Associate wrote, referencing the anti-BDS law that "[g]iven some of her works, the conference chairs and committee have decided not to move forward with her"); SUMF ¶ 20 (Provost was advised conference was cancelled "due to Georgia's Israel Anti-Boycott Law" since Ms. Martin "stated she could not sign promising to not boycott Israel").

Defendants again argue that the statute can be saved by a judicially-created limitation restrictively interpreting language referencing "other actions" as somehow not "prevent[ing] her [or any regulated person] from engaging in speech." Dkt. 66 at 5. That same argument was unsuccessfully advanced on motion to dismiss. Dkt. 37-1 at 11; *See also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (court should "not rewrite a state

law to conform it to constitutional requirements"); *U.S. v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29, 36 (1963) (canon of construction to avoid constitutional concerns is limited in the First Amendment context "because such vagueness may in itself deter constitutionally protected and socially desirable conduct.")

Such "canons are not mandatory rules . . . They are designed to help judges determine the Legislature's intent. . ." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); *United States v. Powell*, 423 U.S. 87, 91 (1975) ("The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words where there is uncertainty. . . it may not be used to defeat the obvious purpose of legislation.") (*quoting Gooch v. United States*, 297 U.S. 124, 128 (1936)).

The "obvious purpose" of O.C.G.A. § 50-5-85 is clear. As this Court has found, the statute unconstitutionally "focuses exclusively on the motive behind an individual's refusal to deal with Israel," Dkt. 53 at 11, constituting a content-based regulation that facially abridges First Amendment rights of expression and association across *all* of its specific provisions, *id.* at 8 – 17. The certification requirement, distinctively, forces "unconstitutional compelled speech." Dkt. 53 at 22.

Ejusdem generis is inapplicable. It applies only "when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics" with the function to ensure that the catchall not be expanded beyond the same class as

the specific exemplars. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Statutory Texts 199 – 200 (1st ed. 2012) (Where a list identified trucks, cars, motorcycles and "any other self-propelled vehicle," it would violate this canon if a court interprets the catch-all to include airplanes); *See also U.S. v. Baxter Intern., Inc.*, 345 F.3d 866, 906 (11th Cir. 2003); *City of Delray Beach v. Agricultural Ins. Co.,* 85 F.3d 1527, 1534 (11th Cir. 1996).

The structure of O.C.G.A. § 50-5-85 is not a list of certain specific examples from the same class, followed by and ending with a generic catch-all. *See e.g.*, *United States v. Buluc*, 930 F.3d 383, 390 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 544 (2019) (finding *ejusdem generis* does not apply to statutory language "connives or conspires, or takes any other action" because it is not a list of specifics followed by a generic catchall). Rather, the statute prohibits "refusals to deal with, terminating business activities with, or other actions that are intended to limit commercial relations with Israel or in Israeli-controlled territories, *when such actions are taken . . . in compliance with or adherence to calls for a boycott* of Israel . . ." O.C.G.A. § 50-5-85(a)(1)(A) (emphasis added).

This final, italicized clause applies to the entirety of the earlier terms, rendering the statute unsalvageable.

II. The Anti-BDS Law is unconstitutional.

Sections II, II (sic) and III of the government's Opposition—which take up the majority of its argument—merely rehash the arguments made in its Motion to Dismiss. The Court has already rejected these legal arguments and nothing has made Defendants' old arguments more persuasive now.

All of their arguments, like a house of cards with no adequate foundation, are built upon, and rely on, their meritless argument that the statute regulates only unprotected conduct and does not touch upon protected interests.

In the interests of economy, Plaintiff respectfully refers to her summary judgment motion, her opposition to Defendants' motion to dismiss, Dkt. 43, and the Court's May 21, 2021, opinion, Dkt. 53, all incorporated herein by reference.

They re-argue that a "substantial" (*not* compelling) state interest exists based on Georgia's interest in helping advance a long-standing federal foreign policy goal as reflected in the anti-boycott provisions of the Export Administration Act. This was argued before, Dkt. 37-1 at 23 – 24, and rejected by the Court, Dkt. 53 at 18 – 21 (noting the statute is content-based, subject to strict scrutiny, and even were it subject to intermediate scrutiny would *still* fail that test).

They argue that the statute advanced a content-neutral substantial state interest as an anti-discrimination law. They made the same unsuccessful

argument on motion to dismiss, Dkt. 37-1 at 21 – 22; Dkt. 43 at 18 – 20 (Pl's opposition). The law is not content-neutral, the interests served regulate inherently expressive conduct, and the statute fails strict scrutiny. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984) (a content-neutral anti-discrimination law must advance a compelling interest, not aim at the suppression of speech, and not be based on viewpoint); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 573 (1995) (even content-neutral anti-discrimination law may not prohibit certain expressive conduct); *United State v. O'Brien*, 391 U.S. 367, 383-84 (1968) (under intermediate scrutiny, "the governmental interest [must be] unrelated to the suppression of free speech").

Defendants argue, yet again, *see* Dkt. 37-1 at 26 – 31, that Georgia may impose conditions on persons receiving state funds. They cite cases in the subsidy context, for example, where the NEA was permitted to choose which artists to subsidize based on aesthetics. In *Nat'l Endownment for the Arts v. Finley*, 524 U.S. 569, 583 (1998), the Court was clear that the NEA regulations "do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face."

Defendants err by relying so extensively on subsidy cases and ignoring the more analogous contracting cases. When the government makes a contracting decision, the First Amendment applies in full, *see* Dkt. 43 at 31-33,

especially where (as here), the government is not funding Ms. Martin's pro-boycott advocacy. Instead, Defendants prohibit her from engaging in protected expressive and associational activity in her personal life and career. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715 (1996) (independent contractors cannot be sanctioned for the exercise of rights of political association or expression); *Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996) (First Amendment applies in full to contracting decisions). Even referencing general spending cases such as *Rust v. Sullivan*, 500 U.S. 173 (1991), does not protect Georgia's statute from the First Amendment. *See Agency for Int'l Dev. V. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 206 (2013); *Jordahl*, 336 F. Supp.3d at 1046 n.9.

Disregarding the record, Defendants argue that the "duration" of the boycott prohibition was "one day or perhaps just hours" and diminish Ms. Martin's injury as simply interfering with her choice to buy or not buy a certain brand of hummus for that brief period. Dkt. 66 at 11. That is not what the facts are. The agreement was sent to Martin in September 2019; the terms required execution "within seven days"; the requested certification required her to pledge "that you are **not currently engaged in**, and agree **for the duration of this agreement not to engage in**, a boycott of Israel" (emphasis added). *Id.* at 11; SUMF ¶ 8, Ex. S. The keynote presentation was to take place on February 28, 2020.

To contract with Defendants to be the keynote, Martin first had to "certify that [she was] not currently engaged in" a boycott of Israel in September 2019. SUMF ¶ 9 and Dkt. 61-10 at 1. So it is not true that the contract merely required her to abandon her boycott for some short period of time. Second, Martin does not merely refuse to buy "certain hummus" but engages in a boycott by declining to do any business with Israel, as well as openly advocating for others to do the same in speeches, filmmaking and other activities. SUMF ¶¶ 2-3, 9-12. Applied to a journalist, the prohibition encompasses mere factual reporting, broadcasting, and the dissemination of others' statements in support of boycotting Israel. SUMF ¶ 2, Ex. A (Martin Affidavit) ¶ 12. Third, Martin had to certify that she will continue to not engage in a boycott of Israel from the point of signing the contract (September, 2019) for the "duration of this agreement," which would last at least through February 2020. *Id.* at SOF ¶¶ 4, 7, 8-9. So rather than hours or a day, the duration of the contract would have been over five months.

In any event, the state's demand that Ms. Martin relinquish her First Amendment freedoms, and sign an oath disavowing and promising to cease First-Amendment protected beliefs and activities for any period of time, even 15 minutes, is unconstitutional. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

III. The Anti-BDS Law is facially unconstitutional.

As set forth in Plaintiff's opening brief, and in her prior opposition to Defendants' Motion to Dismiss, the law is unconstitutionally vague. The government re-argues again, Dkt. 37-1 at 31-33, its meritless arguments, Dkt. 43 at 26-27, that the statute is not subject to a facial challenge. Defendants' arguments are premised on their already rejected contention, contrary to *Arkansas Times, Amawi, Jordache, Koontz*, to common understanding and to reality, that a boycott does not involve expression, association, collective action, or anything remotely approaching political free speech and associational activity.

A law in violation of the First Amendment, like the one here, is facially unconstitutional in two situations. First, like laws that violate other constitutional provisions, it is unconstitutional "when no set of circumstances exists under which" the law "would be valid, or that the statute lacks any plainly legitimate sweep," *U.S. v. Stevens*, 559 U.S. 460, 472 (2010) (citations and internal quotation marks omitted). Second, a law in violation of the First Amendment is facially invalid if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (cleaned up). This is true even when the law is facially invalid merely because it is unconstitutionally vague, as vagueness and overbreadth are related concepts. *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

Here, there is no "plainly legitimate sweep" because the law's very essence prohibits boycotts and related activity that are done for political purposes. This is protected activity under *Claiborne*. Indeed, as the law attempts to exclude from its reach refusals to deal for ordinary business reasons, it is hard to discern any activity, other than that protected by the First Amendment, prohibited by the Anti-BDS Law. But even if the law had some lawful application, there would still be a "substantial number" of applications that are unconstitutional, leading to facial invalidity.

Defendants reference *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982), for the proposition that a facial challenge lies only when a statute is impermissible in all of its applications. The Supreme Court was clear: its ruling applies only to "vagueness challenges to statutes which do not involve First Amendment freedoms." *Id.*, at 495 n.7. Defendants reference *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164 (11th Cir. 2018), in which the Court found the alleged First Amendment connection "trivial."

The law's chilling effect renders it facially unconstitutional. The social cost and threat posed by the enforcement of O.C.G.A. § 50-5-85 "deters people from engaging in constitutionally protected speech" and inhibits "the free exchange of ideas." *United States v. Williams*, 553 U.S. 285, 292 (2008).

IV. A permanent injunction is appropriate.

As the Motion for Summary Judgment explained, Martin meets the four elements of a permanent injunction: irreparable injury, no inadequate remedy of law, the balance of hardships (in particular in light of the government having no interest in enforcing an unconstitutional law), and granting relief is in the public interest. Dkt. 61-1 at 12-17. Other than by arguing the law is not unconstitutional, *id.* at 37-38, the government does not attempt to address these factors.

Instead, the government argues, *id.* at 38, that even if this Court rules that the law is unconstitutional (and presumably issues a declaratory judgment to that effect), it should not issue an injunction against the law in favor of anyone other than Martin herself. Again, this is contrary to the other decisions adjudicating anti-BDS laws. *See Amawi*, 373 F. Supp. 3d at 764; *Jordahl*, 336 F. Supp. 3d at 1050-51, *Koontz*, 283 F. Supp. 3d at 1027. And again, it is wrong as a matter of law. "A plaintiff who has established constitutional injury under a provision of a statute as applied to his set of facts may also bring a facial challenge, under the overbreadth doctrine, to vindicate the rights of others not before the court under that provision." *CAMP Leg. Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1271 (11th Cir. 2006). So in *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261 (11th Cir. 2006), the Eleventh Circuit, relying on *CAMP*, permitted one plaintiff challenging a sign ordinance

in violation of the First Amendment to secure a permanent injunction against enforcement of the unconstitutional law, which protected not just the plaintiff but everyone else as well. *Id.* at 1263-64, 1267-68.

The government also suggests, Dkt. 61-1 at 34-35, that a permanent injunction invalidating the whole law is inappropriate because Martin's contract "fell near the minimum amount needed to trigger the application of the statute, the duration was for one day or perhaps only for a matter of hours, and the described extent of the limitation on her commercial activity is that she was prohibited from refusing to purchase certain hummus for that limited time period." As discussed *supra*, this reasoning, as well as factual recitation, is incorrect, but even if Defendant were accurate in its presentation, its legal conclusion that the government may suppress and extinguish First Amendment freedoms for minimal periods of time is not.

And even if Martin did not boycott Israel at all, requiring her to certify that she does not and will not violates the First Amendment all the same. *See Arkansas Times*, 362 F. Supp. 3d at 622 (company that does not boycott but who refuses as a matter of principle to promise not to in the future has standing to bring a boycott-restriction claim, including to redress the rights and injuries of others).

CONCLUSION

Martin respectfully requests the Court grant her motion for summary judgment and issue a declaratory judgment that O.C.G.A. § 50-5-85 is unconstitutional as well as an Order permanently enjoining enforcement of O.C.G.A. § 50-5-85.

Dated: October 29, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing **OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF SUMMARY JUDGMENT** has been prepared in compliance with Local Rule 5.1(B) in 13-point Century Schoolbook typeface.

Dated: October 29, 2021

/s/ Mara Verheyden-Hilliard
Mara Verheyden-Hilliard

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record in this case.

This 29th day of October, 2021.

/s/ Mara Verheyden-Hilliard
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