IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAQIB ALI,	*	
Plaintiff,	*	
v.	*	No. 1:19-CV-00078-BPG
LAWRENCE HOGAN, *et al.*,	*	
Defendants.	*	

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

GOVERNOR HOGAN'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), and for the reasons stated in the accompanying memorandum, defendant Lawrence Hogan, Governor of Maryland, hereby moves to dismiss this matter for failure to state a claim.

Respectfully submitted,

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March 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, the foregoing document was filed with the Clerk of the Court and served on all counsel of record electronically through the Court's CM/ECF system.

/s/ Adam D. Snyder
Adam D. Snyder

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

MEMORANDUM IN SUPPORT OF
GOVERNOR HOGAN'S MOTION TO DISMISS

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MEMORANDUM IN SUPPORT OF GOVERNOR HOGAN'S MOTION TO DISMISS

This case involves a First Amendment challenge to a gubernatorial Executive Order prohibiting State agencies from contracting with "business entities" that engage in a boycott of Israel. It should be dismissed on any of three grounds. First, the plaintiff, Mr. Saqib Ali, lacks standing because he does not qualify as a "business entity" and thus is not subject to the order's provisions, and because he does not allege that he has submitted or been denied a bid or proposal that might be subject to the order. Second, Eleventh Amendment immunity bars this suit against the Governor because he does not have a "special relation" to enforcement of the executive order's procurement rules. Third, Mr. Ali's First Amendment claim should be dismissed on the merits because the decision not to contract with or buy the products of companies located in Israel does not involve speech, as a recent federal district court has concluded. *See Arkansas Times LP v. Waldrip*, No. 4:18-CV-00914 BSM, 2019 WL 580669 (E.D. Ark., Jan. 23, 2019). Finally, even if purchasing and contracting decisions involved constitutionally protected speech, the government's own procurement decisions do not violate the First Amendment even if they have an incidental effect on private speech.

STATEMENT OF FACTS

Although Israel has survived multiple wars since its founding in 1948, it has also been the target of economic pressure for decades. To counter that pressure, Congress enacted the Export Administration Act of 1979 (the "EAA"), which effectively prohibits Americans from "support[ing] any boycott fostered or imposed by a foreign country

against a [friendly] country." 50 U.S.C. § 2407(a)(1) (1979).[1] The EAA has survived First Amendment challenges. *See, e.g., Briggs & Stratton Corp. v. Baldridge*, 539 F. Supp. 1307, 1310 (E.D. Wis. 1982), *affirmed*, 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," Compl. (ECF 1) at 4 (¶15), by, among other things, boycotting all Israeli products. Because BDS boycotts are not led by foreign states, they fall outside of the EAA.

The Executive Order at Issue Here

Approximately twenty-five states, including Maryland, have taken legislative or executive action to restrict boycotts of Israel that fall outside the EAA. *See* Compl. at 5 (¶19). The executive order at issue in this case—No. 01.01.2017.25, "Prohibiting Discriminatory Boycotts of Israel in State Procurement" ("Executive Order" or "E.O."), attached hereto—provides 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." E.O. at 3 (¶B). The term "boycott of Israel" is defined as follows:

> "Boycott of Israel" means the termination of or refusal to transact business activities, or other actions intended to limit commercial relations, with a

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

> 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.

E.O. at 2 (¶A.1). Three aspects of the Executive Order make its reach narrower than many other states' enactments. First, unlike some of the other state anti-boycott enactments, the Executive Order applies only to "business entities," which is defined so as not to include individuals. *Id*. at 2 (¶A.2). Second, the Order does not encompass boycotts of Israel itself because boycotts "against a public or governmental entity" are excluded from the definition of "Boycott of Israel." Third, the Order does not reach decisions not to do business with a person or company "because of the specific conduct of the person or entity." Accordingly, it does not encompass a business entity's decision not to work with an Israeli company because the company publicly supports Israeli settlement policy or its treatment of Palestinians. That would constitute "specific conduct," which vendors are free to consider without consequence for their eligibility to bid on State procurements.

The Executive Order serves three principal purposes. First, it was intended to further 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." *Id*. at 1. Second, the Order advances the State's interest in the efficient

procurement of goods and services. It declares that, 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," *id.*, "[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." *Id*. at 1-2. Finally, the Executive 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, supplies, subcontractors, or commercial customers," *id*. at 2, so as not to become "a passive participant in private-sector commercial discrimination," *id*. *See also* Md. Code Ann., State Fin. & Proc. § 19-101(a) (declaring Maryland public policy of commercial non-discrimination); 19 U.S.C. § 4452(b)(5) (federal policy declaring that BDS boycotts "are contrary to principle of nondiscrimination").

Other Anti-Israel Boycott Litigation

Although approximately twenty-five states have laws or executive orders addressing anti-Israel boycotts, only three have resulted in published judicial decisions, in Kansas, Arizona, and Arkansas.

Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018). A school teacher challenged Kansas's anti-Israel boycott law, which applied to individuals as well as business entities. She had applied for various contractual teaching roles and, when she declined to execute the Kansas certification, was denied contracts. Ms. Koontz sued the

Kansas Commissioner of Education and sought a preliminary injunction, which the district court granted on February 16, 2018. The Kansas legislature then scaled back the law and the plaintiff voluntarily dismissed the suit.

Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018). An attorney and his law firm challenged the constitutionality of Arizona's law after a local correctional agency declined to pay the firm for work it had performed in providing legal advice to inmates. The plaintiffs sued local prison officials and the Attorney General. On September 27, 2018, the district court invalidated the Arizona law and the decision is now pending before the Ninth Circuit. *Jordahl v. Brnovich*, No. 18-16896 (filed Oct. 1, 2018).

Arkansas Times LP v. Waldrip, No. 4:18-CV-00914 BSM, 2019 WL 580669 (E.D. Ark., Jan. 23, 2019). In the most recent decision, a federal district court upheld the constitutionality of Arkansas's anti-Israel boycott law against a First Amendment challenge. The case had been brought by an Arkansas newspaper that objected to the certification requirement, refused to execute it, and so lost advertising contracts that it had previously maintained with a state university. The suit named as defendants the trustees of the University of Arkansas system. The case is currently on appeal before the Eighth Circuit. *Arkansas Times LP v. Waldrip*, No. 19-1378 (filed Feb. 25, 2019).

Mr. Ali's Complaint

Based on the allegations of the complaint, Mr. Ali is a computer software engineer who "engages in and supports boycotts of businesses and organizations that contribute to the oppression of Palestinians." Compl. at 2 (¶4). For example, Mr. Ali "refuses to purchase Sabra hummus or SodaStream products" because both companies "have ties to

Israel and its occupation of Palestine." *Id.* at 7 (¶35). Mr. Ali alleges that he wishes to submit bids for government software contracts but believes that he "is barred from doing so due to the presence of mandatory 'No Boycott of Israel' clauses" in Maryland procurement solicitations. *Id.* at 2 (¶4). Mr. Ali does not allege that he owns a computer software engineering firm or that he intends to bid on State procurements through any corporation, partnership, or any other business entity. Nor does it contain any allegation that Mr. Ali has submitted a bid or had one rejected because of the Executive Order.

Mr. Ali seeks a judgment declaring the Executive Order unconstitutional and an order enjoining the Governor and the Attorney General from enforcing it. The Attorney General, by separate motion, asks the Court to dismiss the complaint against him on grounds of Eleventh Amendment immunity. Here, the Governor moves to dismiss the complaint on that and other grounds, namely, (1) for lack of standing, as the Executive Order applies only to "business entities" and not to individuals, like Mr. Ali, and because Mr. Ali has not submitted or been denied a bid or proposal, and (2) because the purchasing decisions affected by the Executive Order do not involve speech protected under the First Amendment, and because any incidental effect the Order may have on protected conduct is justified by the State's interest in combatting discrimination based on national origin.

ARGUMENT

I. STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim on which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)

(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Court is required to "take the facts in the light most favorable to the plaintiff," the Court "need not accept legal conclusions couched as facts." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (internal quotation marks omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

II. MR. ALI LACKS STANDING TO CHALLENGE THE EXECUTIVE ORDER.

Mr. Ali lacks standing for three reasons. First, he does not qualify as a "business entity," as that term is defined in the Executive Order, and thus is not subject to the order's provisions. Second, he does not allege that he has submitted a bid or proposal that might be subject to the order, and thus has not been denied the opportunity to bid on State procurements. And because there is no credible threat that the order will be enforced against him, Mr. Ali does not have standing to seek prospective relief either.

A. Mr. Ali Lacks Standing Because the Executive Order Applies Only to "Business Entities" and Not to Individuals.

The operative provision of the Executive Order applies only to "business entities." *See* E.O. at 3 (¶B ("Executive agencies may not execute a procurement contract with a business entity unless it certifies [that it is not participating in a boycott of Israel]."). The Executive Order defines the term "business entity" to include only corporations and other entities that are defined by the business role they play:

> "Business entity" means any receiver, trustee, guardian, representative, fiduciary, partnership, firm, association, corporation, sole proprietorship, or company, including any bank, credit union, broker, developer, consultant, contractor, supplier, or vendor, individually or in any combination, 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.

Id. at 2-3 (¶A.2). Conspicuously absent from this definition are the terms "person" or, more significantly, "individual."

When a statutory provision is intended to apply to natural persons (as opposed to corporations and other artificial entities), either the word "person" or "individual" is used. *See* Garner, Black's Law Dictionary at 1178 (8th Ed. 2004) (defining "person" as "[a] human being. — Also termed *natural person*"). When it comes to drafting legislation, "person" is broader than "individual"; by statute, it includes *both* natural persons and corporate entities. *See* Md. Code Ann., Gen. Prov. § 1-114 (defining the term "person" to include "an individual" as well as corporate entities). The term "individual," however, is limited to natural persons. *See* Department of Legislative Services, Maryland Style Manual for Statutory Law at 99 (Oct. 2018) (instructing legislative drafters to "[u]se 'person' to include human beings, corporations, and other entities," but "[i]f the reference is intended to apply only to human beings, use 'individual'.") *available at* http://mgaleg.maryland.gov/ess06-pubs/OPA/I/MdStyleManual_2018.pdf.

That the Executive Order does not apply to individuals is confirmed by comparing the Order's definition of the term "business entity" with that which appears in the statute that governs the procurement process more generally. That statute contains a commercial nondiscrimination policy that prohibits all business entities from discriminating on the basis of, among other things, national origin. *See* State Fin. & Proc. § 19-101. The term "business entity" is defined in that statute to include "any person, as defined in § 1-101(d)"

of the State Finance & Procurement Article. *Id.* § 19-103(c)(1). The definition of "person" in § 1-101(d), in turn, begins with "*an individual*, receiver, trustee, guardian . . . ." (Emphasis added.) That same phrase begins the definition of "business entity" in the Executive Order, but without the term "individual." The Governor's choice not to use the term "individual" or even the broader term "person" makes clear that the Executive Order applies only to business ventures, and not to individuals like Mr. Ali.

Because the Executive Order does not apply to individuals, Mr. Ali has not suffered an injury 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). 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).

Mr. Ali cannot carry this burden because the Executive Order does not apply to him. Courts routinely dismiss cases for lack of standing when the plaintiff seeks to challenge an enactment that does not apply to him. *See, 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); *PeTA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (no standing to challenge statute restricting "peaceful conduct of the

activities of any school" when term "school" was defined such that it did not apply to the junior high where group had been protesting).

Applying these principles, the Fourth Circuit concluded that the plaintiff gun owners in *Lane v. Holder* lacked standing to challenge a gun control measure that applied only to federally licensed firearms dealers because "the laws and regulations they challenge do not apply to them." 703 F.3d 668, 672 (4th Cir. 2012). In the absence of a direct effect on them, the only way the *Lane* plaintiffs could establish standing was if the regulations effectively prevented them from "obtaining the handguns they desire," which was not the case. *Id.* at 672-73. That same analysis yields the conclusion that Mr. Ali lacks standing to challenge the Executive Order. The Order does not apply to him, and nothing about how the Order restricts "business entities" has the potential to injure Mr. Ali personally.

B. Mr. Ali Lacks Standing Because He Has Not Submitted, or Been Denied, a Bid or Proposal.

Even if the Executive Order applied to Mr. Ali, he would still not be able to establish standing because he appears not to have submitted a bid or proposal or had one rejected in a way that is traceable to the Order's provisions. Compl. at 8-9 (¶¶ 39, 42 (alleging that Mr. Ali "intends" to submit bids but "cannot certify in good faith" that he does not participate in a boycott of Israel). "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); *see also, e.g.*, *Baer-Stefanov v. White*, 773 F. Supp. 2d 755, 759 (N.D. Ill. 2011) (applying "the general rule that a plaintiff who does not apply for or request some

benefit or action lacks standing to challenge the procedures or standards governing such applications or requests" and collecting cases). The Fourth Circuit has added to that long line of cases, 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." *Southern Blasting Services, Inc. v. Wilkes County, North Carolina*, 288 F.3d 584, 595 (4th Cir. 2002). So too here. Because Mr. Ali has not had a bid rejected on the basis of the Executive Order, he "cannot demonstrate an actual injury," *id.*, sufficient to establish Article III standing.

C. Mr. Ali's Complaint Does Not Implicate the More Flexible Standing Test that Applies in First Amendment Cases.

Nor does Mr. Ali meet the "somewhat relaxed" standing requirements that apply in First Amendment cases. *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). A plaintiff has standing to bring a First Amendment challenge if he can show that, because of the statute he challenges, he has engaged in "'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Id.* (citation omitted). To qualify, "[a]ny chilling effect" that the plaintiff alleges "must be objectively reasonable." *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011). "Subjective or speculative accounts . . . are not sufficient," *id.*; plaintiffs must show "'specific present objective harm or a threat of specific future harm.'" *Cooksey*, 721 F.3d at 236 (citations omitted).

For three threshold reasons, this variant of the standing test does not apply here. First, as discussed above, there is no "specific present objective harm" here because the Executive Order does not apply to Mr. Ali. Second, and as discussed in greater detail

below, the anti-Israel boycott that Mr. Ali alleges he participates in does not involve expressive conduct that is protected under the First Amendment. Third, Mr. Ali has not alleged that the Order has actually chilled his speech, as he continues to "engage[] in and support[] boycotts of businesses and organizations that contribute to the oppression of Palestinians." Compl. at 2 (¶4). But even if there were some uncertainty about those reasons, Mr. Ali does not allege or show the "credible threat" of enforcement necessary to establish standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

The cases in which the Fourth Circuit has found standing on the basis of a credible threat of prosecution confirm that Mr. Ali does not have standing here. 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). And 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 because state enforcement officials had not "'disavowed enforcement' if Plaintiffs proceed[ed] with their plans." 737 F. App'x 122, 130-31 (4th Cir. 2018) (quoting *Susan B. Anthony List*, 573 U.S. at 165). Finally, 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 complaint to suggest that any State official has threatened Mr. Ali with enforcement of the Executive Order or indicated that, if he were to submit a bid or proposal, it would be denied. Particularly when the Order does not apply to individuals like Mr. Ali, and when he has not made an effort to test its applicability by submitting a bid or proposal without signing the certification, Mr. Ali has not established the "credible threat" that might cause "[a] person of ordinary firmness" to "feel a chilling effect." *Id*. at 237. In the absence of such a showing, Mr. Ali has not demonstrated an "injury-in-fact" sufficient for Article III standing.

III. MR. ALI'S CLAIM AGAINST THE GOVERNOR IS BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Eleventh Amendment bars this suit against the Governor unless it fits within the narrow exception recognized in *Ex parte Young*, 209 U.S. 123 (1908). As discussed in the Attorney General's motion to dismiss, the *Ex parte Young* exception permits suits only against officials who have a "special relation" to the enforcement of the challenged statute or government action, *id*. at 157, and "threaten and are about to commence proceedings" to enforce the law, *id*. at 155-56. Neither precondition is satisfied here.

Mr. Ali's complaint contains two allegations about the Governor's connection with the challenged Executive Order. First, he alleges that the Governor issued the Executive Order, which is true, but says nothing about how the Order is implemented and enforced. 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" is no substitute for the "specific duty" to enforce the challenged enactment that *Ex parte Young* requires. *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (dismissing Virginia Governor as a party); *see also McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (dismissing Attorney General because his "[g]eneral authority to enforce the laws of the state" is not sufficient under *Ex parte Young* (internal quotation marks omitted)).

Nor does the allegation that the "'No Boycott of Israel' boilerplate certifications contained in solicitations by Maryland agencies appear at the instruction of the Governor," Compl. at 8 (¶41), provide the "special relation" required under *Ex parte Young*. Although the Governor has the power to "instruct" Maryland agencies on the performance of their duties, that power is no different from his general supervisory role over the Executive Branch, which the Fourth Circuit declared insufficient for purposes of *Ex parte Young*.

And while the Governor issued the Executive Order at issue, 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 Hutto v. South Carolina Retirement System*, 773 F.3d 536, 550 (4th Cir. 2014). Instead, a proper defendant must be a state official with the power to implement and enforce the challenged enactment with respect to the conduct alleged in the complaint. Here, that would presumably have been the Chief Actuary for the Maryland Insurance Administration or the Secretary of the Department of Aging—i.e., the heads of the two State agencies that issued solicitations to which Mr. Ali alleged an

interest in responding, Compl. at 8 (¶40)—had Mr. Ali actually submitted a bid and had it rejected.

Finally, even if the Governor had a theoretical "special relation" to the Executive Order, this Court "cannot apply *Ex parte Young* because the [Governor] has not acted or threatened to act." *McBurney*, 616 F.3d at 402. The Supreme Court in *Ex parte Young* allowed a suit to proceed against the Minnesota Attorney General because he had already "commenced proceedings to enforce" the challenged statute. 209 U.S. at 160; *see also Harris v. McDonnell*, 988 F. Supp. 2d 603, 608 (W.D. Va. 2013) (noting the same). By contrast, the Fourth Circuit held in *McBurney* that *Ex parte Young* did not apply to the Virginia Attorney General 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 Executive Order] against [Mr. Ali], the *Ex parte Young* fiction cannot apply." *Id*.

IV. THE EXECUTIVE ORDER DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT DOES NOT RESTRICT PROTECTED SPEECH.

The Executive Order does not restrict speech. It does not prevent Mr. Ali or any "business entity" from speaking out in opposition to Israeli policies or banding together with other like-minded groups to amplify their voices. Nor does it punish those speech-related activities in any way; they fall entirely outside the Order's reach.

The Executive Order also does not prohibit or punish anti-Israel boycotts generally; it places no limits on how business entities choose to act in the private marketplace. And even vendors who wish to bid on State contracts are free to participate in boycotts of Israel itself, E.O. at 2 (¶A.1.iv), or boycotts of businesses or people who support Israeli policies through their "specific conduct," *id*. (¶A.1.iii). Instead, its reach is limited to commercial discrimination against Israelis and Israeli companies simply because they are Israeli. The Executive Order makes clear that Maryland will not allow itself, through its purchasing decisions, to subsidize and become a passive participant in a form of national-origin discrimination that offends longstanding Maryland public policy. *See* State Fin. & Proc. § 19-101(a).

A. The Decision Not to Purchase Goods or Services from Companies Located in Israel Does Not, By Itself, Involve Protected Conduct.

The First Amendment protects more than just traditional speech; it also protects "symbolic speech," *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968), and "expressive association," *Boy Scouts of American v. Dale*, 530 U.S. 640, 648 (2000). But the Executive Order restricts none of these facets of the First Amendment right. By its terms, the Executive Order plainly does not restrict pure speech because business entities and individuals remain free to speak out in opposition to Israeli policies without restriction. The only form of speech it could possibly affect is "expressive conduct" or associational rights, but two Supreme Court decisions—*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), and *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*, 456 U.S. 212 (1982)—demonstrate that

the purchasing decisions affected by the Executive Order do not constitute either expressive conduct or expressive association. Those two cases, and not *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), control this case.

1. *FAIR* Establishes that Boycotts Do Not Inherently Involve Constitutionally Protected Speech.

The Supreme Court in *FAIR* upheld the constitutionality of a congressional measure withholding educational funds from universities that engaged in a boycott of military recruiters. The case involved an association of law schools that excluded military recruiters from their campuses in protest of the military's "Don't Ask, Don't Tell" policy. 574 U.S. at 52. Congress responded by enacting the so-called "Solomon Amendment," which withheld certain federal funds from any college or university that "either prohibits, or in effect prevents" military recruiters from gaining access to their campuses "equal in quality and scope to that provided to other recruiters." *Id.* at 52-53. The law schools filed suit, alleging that "this forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association." *Id.* at 53. The Court rejected the schools' claim on all grounds, concluding that the Solomon Amendment did not abridge First Amendment rights of speech, expressive conduct, or association. Each conclusion bears on this case and supports dismissal.

As to speech, the Court upheld the Solomon Amendment because it "neither limits what law schools may say nor requires them to say anything." *Id.* at 60. "As a general matter," the Court observed, "the Solomon Amendment regulates conduct, not speech."

Id. So it is with the Executive Order, which neither compels speech nor restricts what business entities may say about Israel and its policies.

The Court's conclusions about expressive conduct also apply here. The Court held that the law schools' boycott of military recruiters was "expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 66. "Nothing about recruiting suggests that law schools agree with any speech by recruiters." *Id.* at 65. As the Court stated, "An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* at 66. The Court's point is even more apt here, where the decision to buy one product over another does not itself say anything about Israel or its policies toward Palestine. Only when accompanied by actual speech do such purchasing decisions begin to reflect expressive conduct. But because the Executive Order, like the Solomon Amendment, does not restrict that speech in any way, its regulation of non-expressive conduct does not violate the First Amendment.

FAIR also establishes that the Executive Order does not restrict associational rights. The Court concluded that a law school's associational rights were not violated because the military recruiters do not "become members of the school's expressive association" by virtue of being on its campus, and the access measure does not restrict the students' and faculty's freedom "to associate to voice their disapproval of the military's message." *Id.* at 69-70. The same is true for the Executive Order, which does not *require* vendors to

associate with, or purchase from, Israeli companies and does not prohibit vendors from associating with others to amplify their criticism of Israel and its policies.

Two of the three cases that have addressed anti-Israel boycott measures agree that *FAIR* requires dismissal here. In *Arkansas Times*, the Arkansas district court concluded that "the First Amendment does not protect the Arkansas Times's purchasing decisions or refusal to deal with Israel," 2019 WL 580669 *6, because "the decision to engage in a primary or secondary boycott of Israel is expressive only if it is accompanied by explanatory speech," *id*. at *5 (internal quotation marks omitted). In the absence of accompanying speech, "[i]t is highly unlikely that . . . an external observer would ever notice that a contractor is engaging in a primary or secondary boycott of Israel." *Id.* at *5. Common sense tells us that "[v]ery few people readily know which types of goods are Israeli, and even fewer are able to keep track of which businesses sell to Israel. Still fewer, if any, would be able to point to the fact that the absence of certain goods from a contractor's office mean that the contractor is engaged in a boycott of Israel." *Id*. Although a business entity might choose to communicate the significance of its purchasing decisions, "the fact that such conduct may be subsequently explained by speech does not mean that this conduct is, or can be, transformed into inherently expressive conduct." *Id.* at *6. In fact, the opposite is true; "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct . . . is not so inherently expressive that it warrants protection." *FAIR*, 547 U.S. at 66. And "conduct designed not to communicate but to coerce"—which, after all, is the ultimate goal of a boycott—"merits still less consideration under the First Amendment." *Int'l Longshoremen*, 456 U.S. at 226.

The district court in *Jordahl* agreed that "the decision not to buy a particular brand of printer to show support for a political position . . . may not be deserving of First Amendment protections on the grounds that such action is typically only expressive when explanatory speech accompanies it." 336 F. Supp. 3d at 1042. Still, the Arizona court ultimately distinguished *FAIR*, but only because the Arizona statute specifically targeted boycotts undertaken "in response to larger calls to action." *Id.*; *see also* A.R.S. § 35-393(1) (prohibiting boycotts undertaken "[i]n compliance with or adherence to calls for a boycott of Israel"). In fact, the court specifically held that "the collective element of the actions that are prohibited" by the Arizona law "is what distinguishes this Act from those statutes that lawfully prohibit conduct that is not inherently expressive." 336 F. Supp. 3d at 1042. Because the Executive Order does not include a similar provision, the reasoning of *Jordahl* indicates that *FAIR* requires dismissal here.[2]

2. *Claiborne* Does Not Control Because the Civil Rights-Era Boycott at Issue There Involved Speeches, Picketing, and Other Constitutionally Protected Speech.

Mr. Ali appears to base his complaint squarely on *NAACP v. Claiborne Hardware Co.*, which he alleges establishes that "non-violent boycotts" constitute speech or expressive conduct. *See* Compl. at 9 (¶48). But *Claiborne* is a very different case from this one and has not been extended beyond the unique civil rights context in which it arose.

[2] The Kansas district court in *Koontz* also distinguished *FAIR*, observing that the Kansas Law—which contains the same language that the Arizona court found problematic in *Jordahl*—regulates "inherently expressive" conduct. *Koontz*, 283 F. Supp. 3d at 1024. The court went on to suggest more broadly that "boycotts—like parades—have an expressive quality," *id.*, but that aspect of the court's decision is inconsistent with *FAIR*, which expressly distinguished parades from the law schools' boycott. 547 U.S. at 64.

Claiborne involved a broad movement protesting racial discrimination that African-Americans were suffering at the hands of the businesses and local government officials of Port Gibson, Mississippi, in the late 1960s. The movement included a boycott of white-owned businesses and was accompanied by "speeches and nonviolent picketing," efforts to "encourage[] others to join in its cause," 458 U.S. at 907, and efforts to discourage those who would break ranks, *id.* at 903-04. When the boycott had its intended effect, white businessmen sued the participants in the boycott and the civil rights activists who had organized it—a total of 148 defendants, *id.* at 889—and recovered lost earnings and attorneys' fees amounting to more than a million dollars, *id.* at 893. After the Mississippi appellate courts upheld the judgment, the Supreme Court reversed, concluding that "[t]he use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award." *Id.* at 933.

In reaching its conclusion, the Court noted that protesters "did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy"; "[o]ther elements of the boycott . . . also involved activities ordinarily safeguarded by the First Amendment." *Id.* at 909. The court described those activities as speeches urging nonparticipants "to join the common cause," "personal solicitation," and publishing the names of "boycott violators," both at meetings and in the "local black newspaper." *Id.* In light of this pure speech, the Court concluded that the boycott that gave rise to the damages award "clearly involved constitutionally protected activity." *Id.* at 911.

Claiborne deserves its place among the important civil rights cases of the past 50 years, but it does not control this case, which does not involve the "elements of speech,

assembly, association, and petition" that the Court found "inseparable" from the boycott at issue in the case. *Id.* Instead, *FAIR* controls, because there the Court addressed a boycott *by itself*, separated from associated speech, and concluded that it did not involve conduct protected by the First Amendment.

Subsequent Supreme Court decisions have rejected efforts to extend the holding of *Claiborne* to economic boycotts outside of the civil rights context. For example, in *FTC v. Superior Court Trial Lawyers Association*, the Court declined to apply *Claiborne* in a case challenging an FTC order prohibiting a boycott seeking fair compensation for court-appointed counsel. 493 U.S. 411, 426-27 (1990). Despite the petitioners' "altruistic" motives, *id.* at 427, and the fact that their "boycott sought to vindicate the Sixth Amendment rights of indigent defendants," *id.* n. 11, the Court upheld the FTC order, observing that "*Claiborne Hardware* . . . does not protect every boycott having a constitutional dimension," *id.* So too, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, where the Supreme Court declined to extend *Claiborne* to boycotts that involve "commercial activity with a political impact." 486 U.S. 492, 507 (1988).

Two other aspects of *Claiborne* distinguish it from this case. First, *Claiborne* involved a *primary* boycott focused on the business-owners who were responsible for the unconstitutional discrimination, many of whom were also local government officials. 458 U.S. at 889 n. 3. The Executive Order, by contrast, only affects *secondary* boycotts of Israeli people and businesses, leaving vendors free to engage in primary boycotts of the Israeli Government, i.e., the source of the objectionable policies. Second, *Claiborne* addressed efforts to "vindicate rights of equality and freedom that lie at the heart of the

Fourteenth Amendment itself," *id.* at 914, and not efforts to exert economic pressure on a foreign government to alter its policies, as we have here. But when the Supreme Court *did* address a boycott with these two characteristics in *Int'l Longshoremen's Association v. Allied International*, it found little difficulty in concluding that the outright prohibition of the boycott did not implicate the First Amendment.

3. *Int'l Longshoremen* Establishes that Secondary Boycotts of a Foreign State Do Not Implicate the First Amendment.

Int'l Longshoremen held that a labor union's boycott of Soviet goods was not protected by the First Amendment. As in this case, the boycott at issue in *Int'l Longshoremen* was a secondary boycott; it blocked the off-loading of Soviet goods from privately owned ships and took no action against the Soviet Union itself. And like this case, the boycott at issue in *Int'l Longshoremen* was "a political dispute with a foreign nation." 456 U.S. at 224. Whereas Mr. Ali objects to Israel's "practices and policies regarding Palestinians," Compl. at 4 (¶15), the ultimate target of the boycott in *Int'l Longshoremen* was "the foreign and military policy of the Soviet Union," specifically, the Soviet Union's invasion of Afghanistan, 456 U.S. at 223. The Court in *Int'l Longshoremen* unanimously rejected the argument that Mr. Ali makes here, holding that a prohibition of the boycott did "not infringe upon the First Amendment rights of the [union] and its members." *Id.* at 226.

The two district court cases that have addressed the interplay between *Claiborne* and *Int'l Longshoremen* come to different conclusions about its applicability in cases like this one. In *Arkansas Times*, the court concluded that *Int'l Longshoremen*—the first of the

two decisions—announced the broadly applicable rule and that *Claiborne* "created a narrow exception to this rule based on particular facts that are not present" in the anti-Israel boycott context. 2019 WL 580669 at *7. By contrast, the court in *Jordahl* concluded that *Int'l Longshoremen* is limited to "the labor union context" and that *Claiborne* announced the broadly applicable rule. 336 F. Supp. 3d at 1041.[3] For several reasons, the Arkansas district court has the better of the argument.

First, the factual context of this case shares more with *Int'l Longshoremen* than *Claiborne.* As in *Int'l Longshoremen*, the boycott at issue here is a secondary boycott directed at protesting a foreign government's policies. As the district court in *Arkansas Times* put it, "If one simply substitutes the words 'labor union,' 'Soviet,' 'U.S.S.R.,' and 'Afghanistan' with 'newspaper,' 'Israeli,' 'Israel,' and 'West Bank,' then it becomes clear that *International Longshoremen's Association* is largely the same case as the Times's." 2019 WL 580669 at *7. By contrast, *Claiborne* involved a *primary* boycott against the town officials and businesses that were unconstitutionally discriminating against those participating in the boycott. The boycott thus was designed "to effectuate rights guaranteed by the Constitution itself," 458 U.S. at 914, which is not the case here.

[3] The Supreme Court in *Claiborne* cited *Int'l Longshoremen* as an example of "the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association." 458 U.S. at 912-13 ("Secondary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" (citation omitted)).

Second, the larger context of the two cases suggests that *Int'l Longshoremen* controls here. The labor laws at issue in *Int'l Longshoremen* share far more with the procurement restrictions at issue here than do the constitutional provisions at issue in *Claiborne*. Under the civil rights guarantees of the Fourteenth Amendment, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion). Labor laws, by contrast, are a species of economic regulation, where the states enjoy "great regulatory latitude," *American Entertainers, L.L.C. v. City of Rocky Mount, N. Carolina*, 888 F.3d 707, 723 (4th Cir. 2018), and where the limits of permissible governmental action are defined by a balancing of interests, *Int'l Longshoremen*, 456 U.S. at 226. The states enjoy even greater latitude in the procurement context, where the government enjoys comparatively "unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

Third, *Int'l Longshoremen* involved an economic restriction that left union members free to speak out in opposition to Soviet foreign policy, just as the Executive Order leaves business entities free to speak out about Israel and its policies toward Palestinians. As the Supreme Court observed, § 8(b)(4) of the National Labor Relations Act left "many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others." 456 U.S. at 227. By contrast, *Claiborne* involved a suit brought by Mississippi businesses and local government officials seeking to hold boycotters liable for the effects of *all* of the activities involved in their

boycott, including the speeches, assembly, and petitioning that the Court found "inseparable" from the boycott. 458 U.S. at 911.

Finally, the district court's conclusion in *Jordahl* that claims like Mr. Ali's were "not foreclosed by *Int'l Longshoremen*," 336 F. Supp. 3d at 1043, was based on the fact, discussed above, that the Arizona measure expressly targeted boycotts carried out "[i]n compliance with or adherence to calls for a boycott of Israel" and thus "necessarily contemplates" the type of collective speech at issue in *Clairborne*, *id.* at 1042. Because the Executive Order does not target boycotts in response to larger calls for action, but is instead focused entirely on a business entity's individual, discriminatory purchasing decisions, Mr. Ali's claim here *is* foreclosed by *Int'l Longshoremen*, as the Arkansas federal court concluded.

B. Maryland's Interest In Prohibiting Discrimination Based On Ethnicity or National Origin Justifies Any Incidental Burden on a Vendor's First Amendment Rights.

Even if purchasing decisions involved expressive conduct, Mr. Ali's First Amendment claim would fail for two reasons. First, economic regulations that impose only incidental burdens on expressive conduct do not violate the First Amendment. Second, the Executive Order advances multiple compelling state interests—prohibiting discrimination on the basis of ethnicity or national origin, regulating intra-state commerce—that justify any incidental effect the Order may have on any speech-related component of Mr. Ali's business decisions. Finally, the states are not constitutionally obligated to subsidize speech, and the First Amendment places no limits on the government's own speech.

1. States May Regulate Commerce Even If the Regulation Has an Incidental Burden on First Amendment Rights.

"[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The Supreme Court has thus "distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose 'incidental burdens' on expression." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1741 (2018).

The Executive Order, if it affects protected speech at all, affects only expressive conduct; as discussed above, business entities are free to speak out in opposition to Israeli policies in any way they want. And while the Order does restrict potential vendors from discriminating against Israeli suppliers, "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring). The burden the Executive Order imposes—if it imposes one at all—is incidental to the State's interests in, among other things, combatting discrimination on the basis of national origin, ethnicity, or religion.

Incidental burdens on expressive conduct are subject to scrutiny under the *O'Brien* standard. *FAIR*, 547 U.S. at 67. Under that standard, an incidental burden on speech is permissible "'so long as the neutral regulation promotes a substantial government interest

that would be achieved less effectively absent the regulation.'" *Id*. (citations omitted).[4] The Executive Order is constitutional under the *O'Brien* standard for the same reasons that the Solomon Act was constitutional under *FAIR*'s alternative holding.

The governmental interest at issue in *FAIR* was providing for an adequately staffed armed forces, and the question the Court asked "[wa]s not whether other means of raising an army and providing for a navy might be adequate," but whether "the means chosen by Congress add to the effectiveness of military recruitment." *Id*. To withstand scrutiny under *O'Brien*, the Governor need not prove that the Executive Order is narrowly tailored or even the most effective way of advancing the State's interests. It is enough that the State's interests "would be achieved less effectively," *id.*, if the State were forced to contract with vendors that boycott Israeli suppliers and subcontractors. As discussed below, the Order advances two separate state interests: (1) prohibiting discrimination, and (2) regulating the commercial process by which the State procures goods and services.

a. Maryland Has a Compelling Interest in Prohibiting Discrimination Based on National Origin.

Even if purchasing decisions involved expressive conduct, Maryland's interest in prohibiting discrimination on the basis of ethnicity and national origin is sufficient to

[4] It is well-established that anti-discrimination laws like the Executive Order—which applies to *all* boycotts of Israeli companies, regardless of the reason—"make[] no distinctions on the basis of the organization's viewpoint." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (observing that "federal and state antidiscrimination laws" are "permissible content-neutral regulation[s] of conduct").

justify any burden on that conduct. The Executive Order expressly declares its anti-discriminatory purpose:

> The State has a longstanding and broad policy to refrain from contracting with business entities that unlawfully discriminate in the solicitation, selection, hiring, or commercial treatment of vendors, supplies, subcontractors, or commercial customers;
>
> Boycotts based on religion, national origin, ethnicity, or residence are discriminatory[.]

E.O. at 2. The Order's anti-discriminatory purpose is entirely consistent with Maryland's longstanding public policy "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[.]" State Fin. & Proc. § 19-101(a); *see also* 19 U.S.C. § 4452(b)(4), (5) (declaring U.S. policy to oppose boycotts Israel as "contrary to principle of nondiscrimination").

The Supreme Court has repeatedly upheld the constitutionality of non-discrimination policies, like Maryland's, that prohibit commercial discrimination on the basis of race, national origin, and other immutable characteristics. *See, e.g.*, *Jaycees*, 468 U.S at 615, 623 (upholding Minnesota law forbidding discrimination based on "race, color, creed, religion, disability, national origin or sex"). As the Court explained in *Jaycees*, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Id.* at 628; *see also Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be

characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (same).

The Executive Order is a specific application of Maryland's more general commercial anti-discrimination policy. Like that more general policy, the Executive Order prohibits agencies from contracting with business entities that discriminate "on the basis of Israeli national origin." E.O. at 2 (¶A.1 (defining "Boycott of Israel"), ¶C (certification language)). And while the Executive Order also prohibits discrimination on the basis of "residence or incorporation in Israel and its territories," *id.*, it expressly removes from its reach discrimination "because of the specific conduct of the person or entity," *id.* (¶A.1.iii). As a result, a business entity would not be barred from contracting with the State if it elected not to subcontract with companies that, for example, participate in the construction of Israeli settlements that the entity found objectionable. That would constitute "specific conduct" excluded from the Executive Order.

By contrast, that same business entity would be barred from bidding on government contracts under the Executive Order if it discriminated against a person who just happens to reside in Israel or against a company that just happens to be incorporated there. To refuse to do business with someone based on their nationality is to discriminate based national origin. *See, e.g.*, *Sinai v. New England Telephone & Telegraph Co.*, 3 F.3d 471 (1st Cir. 1993) (affirming trial court in Title VII case finding discrimination based on Israeli national origin). Boycotts against Israelis and Israeli companies are national-origin discrimination under any reasonable construction of that term, and it is precisely the type

of discrimination that has long been prohibited under Maryland's commercial antidiscrimination policy. The State's interest in combatting that type of discrimination is "unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order." *Jaycees*, 468 U.S. at 624.

b. The Executive Order Is a Permissible Exercise of the State's Power to Regulate Commerce and the Process by Which it Procures Goods and Services.

It is "beyond dispute" that even those engaged in inherently expressive activities, such as publishing newspapers, may still be subject "to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983). The Order is a species of economic regulation, designed to align the State's procurement with its larger public policy.

In addition to Maryland's antidiscrimination policy, Maryland also has a commercial policy of advancing economic cooperation with Israel. A 1988 "Declaration of Cooperation" between Maryland and Israel has "helped generate millions of dollars of investment and substantial job creation in the State" and "produced notable achievements in medicine, healthcare, and biotechnology that have benefitted the State." E.O. at 1. More recently, Maryland and Israel established the Maryland/Israel Development Center to "promote[] bi-lateral trade and economic development" between the two governments. *See* https://marylandisrael.org/. Contracting with vendors that discriminate against Israeli companies obviously would contravene the State's policy of fostering economic relations with a valued trading partner.

The Executive Order also advances Maryland's interest in ensuring that it procures goods and services through a competitive process that results in the most efficient use of state tax dollars. As the Order declares, the decision to engage in boycotts of Israel "is not a commercial decision made for business or economic reasons." E.O. at 1. If it were, the decision would fall outside the Order, as it specifically excludes "actions taken . . . for business or economic reasons." *Id.* at 2 (¶A.1.ii). And a company's non-economic decision to deliberately limit its choice of suppliers and subcontractors is, in the State's view, an "unsound business practice" that results in "impaired commercial viability," poses "undue risks as contracting partners," and ultimately does not "provide the best possible products or services to the State." *Id.* at 1-2. Prohibiting such anti-competitive behavior advances the State's policy of maximizing the value it obtains through its procurement process. The State's dual interests in resisting commercial discrimination and furthering favorable trade relations justify any incidental effect that the Order might have on expressive conduct.

2. The First Amendment Does Not Compel the State to Subsidize Anti-Israel Boycotts.

The Supreme Court has long made clear that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983); *accord Rust v. Sullivan*, 500 U.S. 173, 193 (1991) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."). For that reason, governments may impose criteria "that would be impermissible were direct regulation of speech or a criminal penalty at stake." *National Endowment for the Arts v. Finley*, 524

U.S. 569, 587-88 (1998). For example, government may permissibly condition libraries' receipt of public funds on their installing internet filters, even if it could not impose such a requirement directly without violating the First Amendment. *See United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003); *see also Regan*, 461 U.S. at 543-45 (upholding condition that prohibited use of federal funds for lobbying); *Rust*, 500 U.S. 173 (prohibiting use of federal funds for abortion counseling).

The government's prerogative to deny public subsidies is particularly powerful when discrimination is at issue. *See Bob Jones Univ. v U.S.*, 461 U.S. 574, 604 (1983) (upholding federal provision denying tax benefits to private school that racially discriminated based on religious doctrine). "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Norwood*, 413 U.S. at 463. Courts have repeatedly upheld against constitutional attack the government's right to require recipients of public monies to accept non-discrimination policies. *See, e.g., Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (Congress could require universities to provide equal treatment to women as a condition of receiving federal funds); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170 (D.C. Cir. 2004) (same for non-discrimination based on disability). There is no legitimate reason why Congress may compel recipients of public funding not to discriminate based on sex or disability, but the State cannot condition receipt of state funds on not discriminating based on ethnicity, national origin, or religion.

The State has "significantly greater leeway" still when the subsidization at issue comes not within a statutory funding program, but in the process by which the State—

acting in its proprietary capacity—procures goods and services. *See Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 598 (2008) (noting "crucial difference, with respect to constitutional analysis," between the government's regulatory powers and its powers "as proprietor"). "[G]overnment enjoys a broad freedom to deal with whom it chooses on such terms as it chooses; no one has a 'right' to sell to the government that which the government does not wish to buy." *Coyne-Delany Co. v. Capital Dev. Bd.*, 616 F.2d 341, 342 (7th Cir. 1980); *see also Perkins*, 310 U.S. at 127. Within the procurement context, "States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." *Reeves v. Stake*, 447 U.S. 429, 438 n.10 (1980). The State's power to set the conditions on which it contracts is thus even greater than the power to condition the receipt of public funding upheld in *Regan*, *Rust*, and *American Library Association*.

3. If a Commercial Boycott is Protected Speech, the State's Boycott of that Boycott Must Constitute Government Speech, Which is Not Constrained by the First Amendment.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). "[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2246 (2015). "'[I]t is entitled to say what it wishes,' and to select the views that it wants to express." *Pleasant Grove*, 555 U.S. at 467-

68 (citations omitted); *see also Finley*, 524 U.S. at 598 (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view . . . .").

Mr. Ali's complaint is based on the premise that engaging in a boycott—without more—is itself speech protected by the First Amendment. As discussed above, *FAIR* and *Int'l Longshoremen* say otherwise. But if Mr. Ali's decision to boycott Israeli companies were protected speech, Maryland's reciprocal decision to boycott the boycotters must itself constitute *government* speech. And because government speech is "not restricted by the Free Speech Clause," *Pleasant Grove*, 555 U.S. at 469, Mr. Ali's complaint fails to state a claim under any formulation of the right he asserts.

CONCLUSION

Mr. Ali's complaint should be dismissed.

Respectfully submitted,

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The State of Maryland

Executive Department

EXECUTIVE ORDER
01.01.2017.25

Prohibiting Discriminatory Boycotts of Israel in State Procurement

WHEREAS, The State of Maryland and Israel have executed a Declaration of Cooperation that has, for more than two decades, enabled the successful exchange of commerce, culture, technology, tourism, trade, economic development, scholarly inquiry, and academic research;

WHEREAS, These accomplishments have helped generate millions of dollars of investment and substantial job creation in the State;

WHEREAS, The cooperation between Israel and the State has produced notable achievements in medicine, healthcare, and biotechnology that have benefitted the State;

WHEREAS, The collaboration between Israel and the State has produced important enhancements to the cyber, homeland, and national security of the State;

WHEREAS, Boycotts of people or entities because of their Israeli national origin, or residence or incorporation in Israel and its territories, undermines the Declaration of Cooperation;

WHEREAS, It is the public policy of the United States, as enshrined in several federal laws, to oppose certain boycotts of Israel;

WHEREAS, The 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;

WHEREAS, Business entities that employ such unsound business practices therefore have impaired commercial viability and provide less job security to their employees;

WHEREAS, Such business entities pose undue risks as contracting partners and may not provide the best possible products or services to the State;

WHEREAS, The State has a longstanding and broad policy to refrain from contracting with business entities that unlawfully discriminate in the solicitation, selection, hiring, or commercial treatment of vendors, supplies, subcontractors, or commercial customers;

WHEREAS, Boycotts based on religion, national origin, ethnicity, or residence are discriminatory; and

WHEREAS, Contracting with business entities that discriminate makes the State a passive participant in private-sector commercial discrimination;

NOW, THEREFORE, I, LAWRENCE J. HOGAN, JR., GOVERNOR OF THE STATE OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE CONSTITUTION AND LAWS OF MARYLAND, HEREBY PROCLAIM THE FOLLOWING EXECUTIVE ORDER, EFFECTIVE IMMEDIATELY:

A. The following words have the meanings indicated:

1. "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.

2. "Business entity" means any receiver, trustee, guardian, representative, fiduciary, partnership, firm, association, corporation, sole proprietorship, or company, including any bank, credit union, broker, developer, consultant, contractor, supplier, or vendor, individually or in any combination, 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.

3. "Commercial relations" means a business entity's conduct of business, and the terms and conditions by which business is transacted, with a vendor, supplier, subcontractor, or other business entity.

4. "Contract" means an agreement by or on behalf of the State for a business entity to sell or lease supplies or goods, or to provide services, to the State in return for a fee, or any other form of compensation to be paid or provided by the State.

5. "Executive agency" means a State department, agency, authority, board, or instrumentality that is controlled by the Governor.

6. "Services" includes construction, real-estate development, financial management, insurance, and professional support.

B. 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.

C. 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."

D. All Executive agencies shall implement this Executive Order in a manner consistent with the important public policy favoring advancement of women- and minority-owned businesses as set forth in Title 14, Subtitle 3, of the State Finance & Procurement Article of the Code of Maryland and related regulations.

E. All Executive agencies shall implement this Executive Order in a manner that is consistent with all applicable statutes and regulations. Nothing in this Executive Order shall operate to contravene any State or federal law or to affect the State's receipt of federal funding.

F. If any provision of this Executive Order or its application to any person, entity, or circumstance is held invalid by any court of competent jurisdiction, all other provisions or applications of the Executive Order shall remain in effect to the extent possible without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are severable.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 23rd Day of October 2017.

Lawrence J. Hogan, Jr.
Governor

ATTEST:

John C. Wobensmith
Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAQIB ALI,	*	
Plaintiff,	*	
v.	*	No. 1:19-CV-00078-BPG
LAWRENCE HOGAN, *et al.*,	*	
Defendants.	*	

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ORDER

The Court having considered the motion to dismiss filed by Lawrence Hogan, Governor of Maryland, and all responses and replies thereto, it is this ____ day of _____, 2019, hereby **ORDERED** that the motion to dismiss is **GRANTED**; and it is further

ORDERED that this matter is **DISMISSED**.

_____
Beth P. Gesner
Chief Magistrate Judge