No. 18-16896

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.
Plaintiff-Appellees,

v.

THE STATE OF ARIZONA and MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,
Defendant-Appellants,

and

JIM DRISCOLL, COCONINO COUNTY SHERIFF,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 3:17-cv-08263

STATE'S SUPPLEMENTAL BRIEF REGARDING MOOTNESS

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Dated: May 8, 2019

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Ariz. Const. art. IV, pt. 1 § 1 2

OTHER AUTHORITIES

Polletta, Maria *et al., A state budget fight is brewing at the Arizona Capitol — governor,Republican lawmakers* at odds (Apr. 23*, 2019) avai*lable athttps://www.azcentral.com/story/news/politics/arizona/2019/04/23/state-budgetwhat-doug-ducey-lawmakers-figh..... 3

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INTRODUCTION

Defendant-Appellants the State of Arizona and Mark Brnovich, Arizona Attorney General ("the State"), respectfully submit that this appeal will soon become moot due to the enactment of Arizona SB1167. S.B. 1167, 54th Leg., 1st Reg. Sess. (Ariz. 2019) (attached hereto as the Addendum). This bill amends A.R.S. §§35-393 *et seq*. (the "Act"), whose constitutionality is the core of this case. Specifically, SB 1167 amends the Act by, *inter alia*, limiting its scope to businesses with ten or more employees and contracts with a value of $100,000 or more (hereinafter, the "Amended Act"). *Id.* It is beyond dispute that the Amended Act will not apply to Plaintiffs (or their contracts), who will not fall within the new thresholds.

As a result, once the Amended Act becomes effective, the dispute between the parties about the constitutionality of the statutory provisions at issue will "no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). At that point, the "abstract dispute about the law, [will be] unlikely to affect these plaintiffs any more than it affects other [Arizona] citizens," and this case will become moot. And, *a fortiori*, this appeal—which involves only a preliminary injunction against the *original* Act—will be even more clearly moot. Plaintiffs will not suffer any irreparable harm from a statute that plainly does not apply to them.

PROCEDURAL BACKGROUND

Plaintiffs initiated this action in the District of Arizona on December 6, 2017, bringing a challenge to the original Act. E.R.318, 267-268. Plaintiffs are an individual and his wholly-owned law practice ("Jordahl P.C.") with fewer than 10 employees; Jordahl P.C. has a one-year contract with Coconino County that is worth approximately $18,000. E.R.187, 193.

The district court issued a preliminary injunction against Defendants' enforcement of the original Act on September 27, 2018, which the State quickly appealed to this Court. E.R.323.

During the pendency of this appeal, the Arizona Legislature passed, and Governor Ducey signed into law, SB1167. *See* Addendum. The sponsor of SB1167 explained that the purpose of the statute was to address "confusion [about the Act's potential impact] on a person's private conduct and public conduct. So this law clarifies that."[1]

Barring additional modification, repeal, or amendment by the Arizona Legislature, which is currently in session, SB1167 will become effective 90 days following the adjournment *sine die*. Ariz. Const. art. IV, pt. 1 § 1.

[1] Statement of Arizona State Senator Paul Boyer before House State and International Affairs Committee (March 20, 2019), *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=22574 (timestamp 1:13:06).

The Arizona Legislature does not sit full time, and usually adjourns annually in the late spring or early summer. The date of *sine die* adjournment for the Legislature for this session is presently unknown, however.[2] That adjournment is unlikely to occur before passage of an annual budget. Commentators have suggested that is not imminent,[3] although such predictions are obviously fraught with enormous uncertainty.

LEGAL STANDARD

Federal courts have limited jurisdiction, which is restricted to actual "Cases" or "Controversies." U.S. Const., Art. III, § 2. "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez*, 558 U.S. at 92 (quotation marks omitted). A case is moot "'when the issues presented are no longer live.'" *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (citation omitted).

"'The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.'" *Doe No. 1 v. Reed*, 697

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[2] *See* Polletta, Maria et al., *A state budget fight is brewing at the Arizona Capitol — governor, Republican lawmakers at odds* (Apr. 23, 2019) *available at* https://www.azcentral.com/story/news/politics/arizona/2019/04/23/state-budgetwhat-doug-ducey-lawmakers-fighting-over/3500961002/

[3] *See* Polletta, Maria et al., *Ducey, GOP lawmakers far apart on how they want to spend billions of tax dollars, budget documents show* (May 2, 2019) *available at* https://www.azcentral.com/story/news/politics/legislature/2019/05/02/arizona-budget-documents-show-gov-doug-ducey-senate-gop-lawmakers-not-close-deal/3647346002/

F.3d 1235, 1238 (9th Cir. 2012) (citation omitted).

ARGUMENT

I. ONCE SB1167 BECOMES EFFECTIVE, THIS APPEAL WILL BE MOOT

Upon the effective date of the Amended Act, this appeal and the underlying case will both plainly become moot. Not only will the Amended Act supersede the original Act, but it will plainly eliminate any personal stake that Plaintiffs have as to its constitutionality. As such, no effective relief could be granted and no "case or controversy" will remain.

A. Enactment Of A Superseding Statute Moots Cases Arising From The Prior One

This case will become moot on the effective date of SB1167. It is a basic principle of justiciability than enactment of a new statutory scheme represents an intervening factual event that moots a challenge to the original statute. *See*, *e.g.* *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166 (9th Cir. 2011) ("[W]e have routinely deemed cases moot where 'a new law is enacted during the pendency of an appeal and resolves the parties' dispute.'" (citation omitted)); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("A statutory change, however, is usually enough to render a case moot[.]"); *Chem. Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006)

(same); *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019) (same).

Additionally, statutory amendments are not considered voluntary cessation for purposes of mootness as this Court presumes the legitimacy of the government's legislative action. *Log Cabin Republicans*, 658 F.3d at 1166 (amendment of a statute ordinarily renders moot a case challenging it, regardless of the government's power to re-enact it); *America Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("[U]nlike in the case of a private party, we presume the government is acting in good faith."); *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (same). Indeed, "[t]he exceptions to this general line of holdings are rare and typically involve situations where it is *virtually certain that the repealed law will be reenacted*." *Blatchford*, 38 F.3d at 1510 (emphasis added). No such "virtual certainty" exists here.

Thus, by superseding the original Act whose enforcement was enjoined, the Amended Act will necessarily moot the preliminary injunction against that no-longer-in-force statutory provision.

B. SB1167 Eliminates Plaintiffs' Personal Stake In The Case

The Amended Act, once effective, will also eliminate completely Plaintiffs' personal stake in this case, depriving federal courts of Article III jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). "To test whether subsequent

developments have mooted a suit, we ask whether the claim could have been brought 'in light of the ... statute as it now stands.'" *Rocky Mountain Farmers*, 913 F.3d at 949 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)). Because the Amended Act plainly does not apply to Plaintiffs, this test requires dismissal for mootness.

Under SB1167, the Amended Act applies only to companies with ten or more full-time employees and only to contracts with a value greater than $100,000. Addendum at 1. Both requirements render the Amended Act inapplicable to Plaintiffs: Jordahl P.C. has but one employee (Jordahl), and the contract in question is worth $18,000 per year. E.R.187, 193.[4]

The Amended Act thus plainly will not apply to Plaintiffs and will not cause them any conceivable injury. As such, federal courts will not be able to provide Plaintiffs with any effective relief from the Amended Act, because it will not apply to them at all. Plaintiffs simply do not require any relief from a statute that will not apply to them. And while Plaintiffs may continue to disagree about the constitutionality of the Amended Act, at that point the disagreement will be no more than an "abstract dispute about the law," which is "abstracted from any concrete actual or threatened harm, [and thus] falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Alvarez*, 558 U.S. at 93.

[4] Even if considered as a four-year contract, $18,000 multiplied by four is obviously less than $100,000. (The contract is bid out roughly every four years, but the individual contracts are for one year at a time, with presumptive renewals during the four-year period. E.R.190, 287)

C. SB1167 Will Alter The Underlying Constitutional Merits

The amendments made by SB1167 not only affect justiciability but the merits of Plaintiff's First Amendment claim as well—further underscoring that the district court's preliminary injunction against the original Act will be moot.

For example, SB1167 removes the language referencing "compliance with or adherence to calls for a boycott of Israel" in the Act's definition of "boycott," which was one of Plaintiffs' main constitutional complaints. Answering Br.16-17, 44-45, 62-63. And it was similarly central to the district court's sole (and undefended) rationale for distinguishing *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). Opening Br.28; Reply Br.4-5. That change makes even clearer that the focus of the statute is on conduct, and not on messaging or affiliation. Addendum at 1.

SB1167's changes similarly lend additional support to the State's anti-subsidization arguments. Opening Br.49-54; Reply Br.23-27. As the State has explained, Arizona is not attempting to ban boycotts through the Act, but merely to avoid subsidizing them with public funds. Opening Br. 58-62. The $100,000 contract value requirement added by SB1167 provides clear evidence of this objective, which the district court inexplicably doubted. Opening Br.53-54.

As money is fungible, a contract over $100,000 in value would invariably result in some marginal dollars that a contractor could spend on other activities (such as boycotting), which would otherwise not be available. Nor is the State

aware of any instance in which a court has held that receipt of a six-digit-dollar amount of public funds did not implicate the government's legitimate interests in denying public subsidies to actions contrary to governmental policy.

II. THIS COURT SHOULD VACATE THE PRELIMINARY INJUNCTION AS MOOT AND DIRECT THE DISTRICT COURT TO DISMISS THE UNDERLYING ACTION ON REMAND

Both the preliminary injunction on appeal and this entire action will thus soon become moot. Once the Amended Act becomes effective, this Court should vacate the preliminary injunction as moot and remand to the district court with instructions to dismiss the entire action for lack of subject matter jurisdiction. At a bare minimum, this Court should vacate the preliminary injunction and remand to the district court to consider mootness of the entire action (and, if necessary, the First Amendment merits with respect to the Amended Act) in the first instance. *See Maldonado v. Morales*, 556 F.3d 1037, 1042 (9th Cir. 2009) (a claim seeking injunctive relief becomes moot as to any features of a challenged law that are removed by amendment).

CONCLUSION

Once the Amended Act becomes effective, this Court should vacate the preliminary injunction as moot and remand with instructions to dismiss the entire action for lack of subject matter jurisdiction.

Respectfully submitted,

MARK BRNOVICH
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CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

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I am the attorney or self-represented party.

This brief contains 1,776 words and is 8 pages long, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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Signature: s/ Drew C. Ensign **Dated:** May 8, 2019

CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing State of Arizona's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 8, 2019, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign

ADDENDUM

State of Arizona
Senate
Fifty-fourth Legislature
First Regular Session
2019

CHAPTER 94

SENATE BILL 1167

AN ACT

AMENDING SECTIONS 35-393, 35-393.01 AND 35-393.03, ARIZONA REVISED STATUTES; RELATING TO ISRAEL BOYCOTT DIVESTMENTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 35-393, Arizona Revised Statutes, is amended to read:

35-393. Definitions

In this article, unless the context otherwise requires:

1. "Boycott" means engaging in a refusal to deal, terminating business activities or performing other actions that are intended to limit commercial relations with ~~Israel or with persons or~~ entities doing business in Israel or in territories controlled by Israel, if those actions are taken either:

(a) ~~In compliance with or adherence to calls for a boycott of Israel other than those boycotts to which 50 United States Code section 4607(c) applies.~~ BASED IN PART ON THE FACT THAT THE ENTITY DOES BUSINESS IN ISRAEL OR IN TERRITORIES CONTROLLED BY ISRAEL.

(b) In a manner that discriminates on the basis of nationality, national origin or religion and that is not based on a valid business reason.

2. "Company" means ~~a sole proprietorship,~~ AN organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company or other entity or business association, ~~and includes~~ INCLUDING a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate, THAT ENGAGES IN FOR-PROFIT ACTIVITY AND THAT HAS TEN OR MORE FULL-TIME EMPLOYEES.

3. "Direct holdings" means all publicly traded securities of a company that are held directly by the state treasurer or a retirement system in an actively managed account or fund in which the retirement system owns all shares or interests.

4. "Indirect holdings" means all securities of a company that are held in an account or fund, including a mutual fund, that is managed by one or more persons who are not employed by the state treasurer or a retirement system, if the state treasurer or retirement system owns shares or interests either:

(a) Together with other investors that are not subject to this section.

(b) That are held in an index fund.

5. "Public entity" means this state, a political subdivision of this state or an agency, board, commission or department of this state or a political subdivision of this state.

6. "Public fund" means the state treasurer or a retirement system.

7. "Restricted companies" means companies that boycott Israel.

8. "Retirement system" means a retirement plan or system that is established by or pursuant to title 38.

Sec. 2. Section 35-393.01, Arizona Revised Statutes, is amended to read:

35-393.01. Contracting; procurement; investment; prohibitions

A. A public entity may not enter into a contract WITH A VALUE OF $100,000 OR MORE with a company to acquire or dispose of services, supplies, information technology or construction unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of GOODS OR SERVICES FROM Israel.

B. A public entity may not adopt a procurement, investment or other policy that has the effect of inducing or requiring a person or company to boycott Israel.

Sec. 3. Section 35-393.03, Arizona Revised Statutes, is amended to read:

35-393.03. Applicability; severability

A. THIS ARTICLE DOES NOT APPLY TO A BOYCOTT PROHIBITED BY 50 UNITED STATES CODE SECTION 4842 OR A REGULATION ISSUED PURSUANT TO THAT SECTION.

B. If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect any other provision or application of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

APPROVED BY THE GOVERNOR APRIL 16, 2019.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 16, 2019.