No. 18-16896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, P.C.,

Plaintiffs-Appellees,

v.

THE STATE OF ARIZONA and MARK BRNOVICH, ARIZONA ATTORNEY GENERAL,

Defendants-Appellants,

and JIM DRISCOLL, COCONINO COUNTY SHERIFF, *et al.*,

Defendants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 3:17-cv-08263

PLAINTIFFS-APPELLEES' SUPPLEMENTAL ANSWERING BRIEF REGARDING MOOTNESS

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INTRODUCTION

This appeal is not moot. Notwithstanding the Arizona legislature's intention to amend Arizona's anti-boycott law, A.R.S. §§ 35-393 *et seq.* (the "Act"), in the future, this case presents a live controversy as to which effective relief can and should be granted now.

After the district court entered the preliminary injunction against the Act, State Senator Paul Boyer introduced SB 1167. S.B. 1167, 54th Leg., 1st Reg. Sess. (Ariz. 2019). Among other things, SB 1167 amends the Act to exempt sole proprietors and small-businesses, such as the Plaintiffs in this case. In apparent reference to this lawsuit, Senator Boyer testified: "This bill before you is just a slight tweak to the original bill, the underlying bill, that just removes the small businesses, the sole proprietors. As a matter of good faith, we removed 'sole proprietor' from the original language. We didn't want to waste state resources on petty [litigation]."[1] Press reports on the bill commented that it "appears to attempt to circumvent the court injunction against the current anti-BDS law."[2] "Put simply," one article stated, "if the Boyer measure becomes law, the 2016 statute

[1] Statement of Arizona State Senator Paul Boyer before House State and International Affairs Committee (March 20, 2019), https://bit.ly/2Hj6E00 (timestamp 1:12:45). Sen. Boyer initially said "legislation" instead of "litigation," but later indicated that he misspoke. *Id.* (timestamp 1:15:45).

[2] Steven Hsieh, *Arizona Trying Again to Bar Israel Boycotts After Courts Defeated Previous Law*, Phoenix New Times, Jan. 30, 2019, https://bit.ly/2Jjec6f. *See also* Jerod Macdonal-Evoy, *Bill Tweaking Arizona's Anti-BDS Law Advances*, AZ Mirror, Mar. 26, 2019, https://bit.ly/2Q2fOBY.

that [the district court] found unconstitutional would no longer exist, leaving nothing for the appellate judges to consider and effectively forcing them to dismiss the case."[3] SB 1167 was signed into law by Governor Ducey on April 16, 2019. State Supp. Br. Addendum at 2.

Now—after this appeal has been fully briefed, including the submission of ten *amici curiae* briefs, and a month before oral argument—Defendants-Appellants State of Arizona and Arizona Attorney General Mark Brnovich (the "State") have filed a Suggestion of Potential Future Mootness, Dkt. 99. As the State's styling suggests, this appeal is not moot, because SB 1167 has not yet taken effect. It may yet be modified, repealed, or amended by the legislature, which remains in session. *Id.* at 2. Even absent any change to the legislation, SB 1167 will not take effect until ninety days after the Arizona legislature adjourns *sine die*. Nobody, including the State, knows when the legislature will adjourn, and right now it seems that adjournment is not imminent. Thus, the enjoined Act is guaranteed to remain in place for a minimum of three full months.

This case presents an issue that is indisputably live, and the parties' conflict remains acute at this time. Until SB 1167 takes effect, the preliminary injunction at issue in this appeal is the only thing standing between the Act and imminent irreparable harm to Plaintiffs' constitutional rights. Meanwhile, as the State argued

[3] Howard Fischer, *Bill Seeks to Replace Pro-Israel Law Found Unconstitutional*, Ariz. Capitol Times, Jan. 29, 2019, https://bit.ly/2LR16z8.

in its emergency motion to stay asking this Court to stay the preliminary injunction, it believes it "suffers *per se* irreparable harm whenever enforcement of the laws enacted by its democratically elected representatives is enjoined," and "[t]he quantity of that harm continues to increase the longer that the district court's preliminary injunction is in force." State's Emergency Stay Motion at iv, Dkt. 8-1; *see also* Order, Dkt. 26 (observing that "[e]ach side has made a strong claim to irreparable harm in the event that it prevails on the merits of the First Amendment challenge"). This Court should therefore exercise its jurisdiction to resolve this appeal by determining whether the district court abused its discretion in granting the preliminary injunction.

If SB 1167 takes effect before this Court issues its decision in this appeal, Plaintiffs acknowledge that they would no longer face imminent irreparable harm, and would therefore not oppose the State's request to dismiss the appeal and vacate the preliminary injunction. *See* State Supp. Br. at 8. However, Plaintiffs would oppose the State's request that this Court remand the case to the district court with instructions to dismiss this entire action for lack of subject matter jurisdiction. The State's interlocutory appeal of the preliminary injunction order did not divest the district court of original jurisdiction over the underlying lawsuit, including Plaintiffs' claim for declaratory relief, and the district court should be allowed to address arguments regarding mootness and voluntary cessation in the first instance.

Moreover, the district court indisputably retains ancillary jurisdiction over Plaintiffs' request for attorneys' fees under 42 U.S.C. § 1988(b).

This Court should therefore reject the attempt to thwart its jurisdiction and instead decide this appeal before SB 1167 takes effect. If it does not, the Court should dismiss the appeal as moot and vacate the preliminary injunction, without further opining on the underlying lawsuit in the district court.

ARGUMENT

I. This appeal is not moot.

Plaintiffs-Appellees Mikkel Jordahl and Mikkel (Mik) Jordahl, P.C. do not dispute that, once SB 1167 becomes law, the State will no longer be able to require them to sign the State's anti-boycott certification. *See* State Supp. Br. at 6, Dkt. 103. SB 1167 has not yet taken effect, however, and it will not for more than three months. *See* Ariz. Const. art. IV, pt. 1 § 1(3) (providing that bills cannot take effect until 90 days after the Arizona legislature's adjournment *sine die*). Even if the legislature adjourned today, SB 1167 would not take effect until August 13. Moreover, the date of the legislature's *sine die* adjournment is "presently unknown," and "[c]ommentators have suggested that is not imminent," as the State candidly acknowledges. State Supp. Br. at 3, Dkt. 103. Unless and until SB 1167 goes into effect, the district court's preliminary injunction is the only thing preventing the Act's enforcement against Plaintiffs. The State's interlocutory

appeal of the preliminary injunction thus continues to present a live dispute between the parties.

This Court is "not required to dismiss a live controversy as moot merely because it may become moot in the near future." *Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1142 (9th Cir. 2009). Indeed, courts frequently decide cases that may or will shortly become moot, even when those cases may moot within days of the decision. In *League of United Latin-American Citizens v. Bredesen*, for instance, the Sixth Circuit addressed a constitutional challenge to a Tennessee law, which was amended to repeal the challenged provisions while the appeal was pending. 500 F.3d 523, 530 n.5 (6th Cir. 2007). The court held that the state's suggestion of mootness was premature and issued a decision 34 days before the amended law was scheduled to take effect. *Id.*; *see also, e.g.*, *Lewis v. BT Inv. Managers Inc*., 447 U.S. 27, 53 n.15 (1980) (21 days between decision and mooting event); *Muniz v. Sabol*, 517 F.3d 29, 34 (1st Cir. 2008) (same); *United States v. Ripinsky*, 20 F.3d 359, 362 (9th Cir. 1994) (one to two months between decision and mooting event).

This Court should not dismiss this case as moot and should instead reach the live merits presented. The constitutional question at the bottom of this appeal—whether the First Amendment protects the right to boycott—is a matter of great public importance. State governments throughout the country have enacted anti-

boycott statutes similar to the one challenged here, and federal legislation has been introduced to encourage these measures. *See* Appendix to Opening Br.; Strengthening America's Security in the Middle East Act of 2019, S.1, 116th Cong. (2019). Several lawsuits have been brought challenging these measures, and there are probably more to come. *See Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018); *Amawi v. Pflugerville Indep. Sch. Dist.*, --- F. Supp. 3d ----, 1:18-CV-1091-RP, 2019 WL 1865288 (W.D. Tex. 2019), *appeal pending*, No. 19-50384 (5th Cir.); *Arkansas Times v. Waldrip*, 362 F. Supp. 3d 617 (E.D. Ark. 2019), *appeal pending*, No. 19-1378 (8th Cir.). The public has also taken a significant interest in the issue.[4] A decision from this Court will provide important guidance to legislators, courts, and members of the public regarding the constitutionality of these anti-boycott laws.

[4] *See, e.g.*, David von Drehle, *Anti-BDS Laws Are Popular. That Doesn't Mean They're Constitutional*, Wash. Post, Dec. 18, 2018, https://wapo.st/2VCSfpq; Editorial, *Want to Boycott Israel? The 1st Amendment Allows It—But Texas Doesn't*, L.A. Times, Dec. 22, 2018, https://lat.ms/2UYXnQG; Marco Rubio, *The Truth About B.D.S. and the Lies About My Bill*, N.Y. Times, Feb. 5, 2019, https://nyti.ms/2HWY1ff; Noah Feldman, *Is the Anti-BDS Bill Constitutional? Yes, But…*, Bloomberg Opinion, Feb. 6, 2019, https://bloom.bg/2Eck5ho; Mitch McConnell & Kevin McCarthy, *The House Must Stand Against the Toxic BDS Movement*, Wash. Post, May 14, 2019, https://wapo.st/30l8Uwp.

II. If SB 1167 takes effect while this appeal is pending, this Court should vacate the preliminary injunction and dismiss the appeal without further opining on the merits.

Plaintiffs acknowledge that once SB 1167 takes effect, Plaintiffs will not be subject to the Act's certification requirement. The imminent irreparable harm to Plaintiffs' constitutional rights, which the preliminary injunction currently prevents, will therefore abate. *See In Def. of Animals v. U.S. Dep't of Interior*, 648 F.3d 1012, 1013 (9th Cir. 2011) (holding that the appeal from the denial of a preliminary injunction was moot where the action that threatened irreparable harm occurred while the appeal was pending). Thus, if SB 1167 goes into effect before the Court issues a decision in this appeal, Plaintiffs would not oppose the State's request to dismiss the appeal as moot and dissolve the preliminary injunction. State Supp. Br. at 8, Dkt. 103.

But the State asks the Court to go further, requesting "remand to the district court with instructions to dismiss the entire action for lack of subject matter jurisdiction." *Id.* The Court should reject the State's invitation to comment on matters not directly before it. *See In Def. of Animals*, 648 F.3d at 1013 (after concluding that the preliminary injunction appeal was moot, the court "express[ed] no opinion" regarding "whether the entire action [was] moot," because the case "remain[ed] pending before the district court").

A. The district court retains original jurisdiction over the underlying litigation, including Plaintiffs' claim for declaratory relief.

Even if this preliminary injunction appeal becomes moot due to absence of irreparable harm, the district court retains original jurisdiction over the case as a whole. The question on appeal is whether the district court abused its discretion in issuing the preliminary injunction. This is a "limited form of review," and does not encompass "the searching review that the Defendants invite [the Court] to undertake, as such review should be had only after the district court enters a final judgment." *Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012).

This Court has emphasized the importance of "restraint in reviewing on interlocutory appeal otherwise non-appealable [issues]." *Id.* at 997 (alteration in original) (quoting *Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir. 2003), *as amended* 326 F.3d 1030 (9th Cir. 2003)). The parameters for conducting that review are clear: An appellate court has pendent appellate jurisdiction over "any 'otherwise non-appealable ruling [that] is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' the order properly before [it] is on interlocutory appeal.'" *Id.* (alteration in original) (quoting *Meredith*, 321 F.3d at 813). This standard requires "much more than a tangential relationship" to the order on appeal. *Id.* (quoting *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004)). "Rather, the issues must rely on legal theories that are 'so intertwined that [the Court] must decide the pendent issue in order to review the claims

properly raised on interlocutory appeal,' or 'resolution of the issue properly raised on interlocutory appeal [must] necessarily resolve [] the pendent issue." *United States v. Decinces*, 808 F.3d 785, 792 (9th Cir. 2015) (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)). "Unsurprisingly, the exercise of pendent appellate jurisdiction is a rare event." *Id.*

Undoubtedly, an issue is "necessary to ensure meaningful review" when it "calls into question the district court's '*authority to rule* on a party's motion for a preliminary injunction.'" *Hendricks v. Bank of Am.*, 408 F.3d 1127, 1134 (9th Cir. 2005) (quoting *Meredith*, 321 F.3d at 816); *accord Melendres*, 695 F.3d at 996. For instance, this Court may address the district court's subject matter jurisdiction over the lawsuit at the time the interlocutory order was issued, since the absence of such jurisdiction would necessarily resolve the appeal. *See Meredith*, 321 F.3d at 816.

But, even if SB 1167 takes effect, it will not be necessary to determine whether Plaintiffs' claims have evaporated in order to conclude that the preliminary injunction and this appeal have become moot. Nor would a finding of mootness on a preliminary injunction appeal necessarily deprive the district court of jurisdiction to award other forms of relief. A plaintiff may lose standing for injunctive relief due to the absence of imminent irreparable harm, and nevertheless possess standing to seek monetary or declaratory relief. *See Penny Saver Publ'ns,*

Inc. v. Village of Hazel Crest, 905 F.2d 150, 153 (7th Cir. 1990) (holding that a plaintiff's request for injunctive relief was mooted by superseding legislative amendment, but that the amendment did not moot the plaintiff's claim for either declaratory or monetary relief (citing *Black v. Brown*, 513 F.2d 652 (7th Cir. 1975)); *see also Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121 (1974); *Am. Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1407–08 (9th Cir. 1995).

Here, even if SB 1167 takes effect, the district court could well conclude that SB 1167 does not moot Plaintiffs' request for declaratory relief. The State asserts that "[i]t is a basic principle of justiciability [that] enactment of a new statutory scheme represents an intervening factual event that moots a challenge to the original statute," and that "statutory amendments are not considered voluntary cessation for purposes of mootness as this Court presumes the legitimacy of the government's legislative action." State Supp. Br at 4, 5 (collecting cases), Dkt. 103. Just last year, however, this Court held that statutory amendments enacted in response to an adverse judicial ruling generally *do* fall under the voluntary cessation exception to mootness. *Bd. of Trustees of Glazing Health & Welfare Trust v. Chambers*, 903 F.3d 829, 838–45 (9th Cir. 2018), *pet. for en banc reh'g pending*, No. 16-15588.

Chambers stated:

> [I]n cases involving the amendment or repeal of a statute or ordinance, mootness is a matter relating to the exercise rather than the existence of

> judicial power. In that situation, [courts] may continue to exercise authority over a purportedly moot case where the balance of interests favors such continued authority. The party moving for dismissal on mootness grounds bears a heavy burden. Where, as here, the legislature repealed a law in response to an adverse judicial ruling, that burden may be insurmountable.

Id. at 839 (citations and internal quotation marks omitted) (quoting *Coral Constr. Co. v. King Cty.*, 941 F.2d 910, 927–28 (9th Cir. 1991)). Although a state could meet this standard by demonstrating that the amended law "completely resolves the issues" with the original statute, SB 1167's tweak to the State's anti-BDS law does not meet "this demanding standard." *Id.* at 844. For instance, SB 1167 would still be "unconstitutionally over-inclusive" because it would still "includ[e] politically-motivated boycotts of Israel within the activity that is prohibited." ER 34.

The precedents on mootness due to legislative change are "admittedly murky" and factbound. *Chambers*, 908 F.3d at 843; *see also id.* at 861 (Wallace, J., dissenting); *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003). But this Court need not, and should not, plumb those depths to resolve this interlocutory appeal. The parties agree that this appeal is not currently moot. The parties also agree that this appeal will become moot if and when SB 1167 goes into effect. If the appeal becomes moot, this Court should accept the State's alternative request to dismiss the appeal without expressing an opinion as to mootness of the underlying action, allowing the district court to address that issue in the first instance. State Supp. Br. at 8, Dkt. 103; *see also In Def. of Animals*, 648 F.3d at 1013.

B. The district court retains ancillary jurisdiction over Plaintiffs' request for attorneys' fees.

Moreover, the district court indisputably retains ancillary jurisdiction over Plaintiffs' request for attorneys' fees under 42 U.S.C. § 1988(b). ER 277. *See Fed. Savs. & Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1041 (9th Cir. 2004) (collecting cases); *cf. Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980) (holding that the plaintiffs were prevailing parties entitled to § 1988 attorneys' fees after obtaining a preliminary injunction that became moot while the appeal was pending); *accord Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013) ("We have previously held that when a plaintiff wins a preliminary injunction and the case is rendered moot before final judgment, either by the passage of time or other circumstances beyond the parties' control, the plaintiff is a prevailing party eligible for a fee award."). Thus, even if the district court concluded that Plaintiffs' merits claims were moot, it would retain jurisdiction to address the fees issue.

CONCLUSION

This Court should not dismiss this case as moot and should instead reach the live controversy presented. If SB 1167 goes into effect before a decision issues, however, the Court should dismiss the appeal as moot and vacate the preliminary injunction without expressing an opinion as to mootness of the underlying action.

Respectfully submitted,

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Dated: May 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I electronically filed the foregoing and attachments with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Brian Hauss
Brian Hauss

Dated: May 15, 2019