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 REPLY BRIEF REGARDING MOOTNESS

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ARGUMENT

Plaintiffs notably "agree that this appeal will become moot if and when SB 1167 goes into effect." Plaintiffs' Supp. Br. at 11. Given this agreement between the parties that this appeal will become moot in the foreseeable future, and the current trajectory of the Arizona legislative session ending in the coming days, this Court may wish to consider cancelling the upcoming June 6 oral argument and deferring submission of this appeal until it soon becomes dismissible based on mootness.

To be sure, the State stands ready, willing, and able to defend the constitutionality of the original Act if this Court elects to reach the merits. The Arizona Legislature's independent decision to amend the original Act does not diminish the confidence of Arizona's Attorney General that the statute does not violate the First Amendment and that the preliminary injunction entered by the district court suffers from numerous patent legal defects. Indeed, the State of Arizona *voluntarily* intervened in this action so that it could defend its statute vigorously on the merits.

The State therefore emphatically disagrees that it is engaged in an "attempt to thwart [this Court's] jurisdiction." Plaintiffs' Supp. Br. at 4. Counsel for the State has simply discharged their duty of candor to this Court to inform it of a development that may affect its jurisdiction. Any suggestion that this satisfaction

of applicable ethical duties is somehow nefarious is unfounded. And if Plaintiffs' counsel are correct that this appeal involves a "matter of great public importance," (at 5), they should have little trouble finding and joining a new plaintiff with Article III standing. Their inability or unwillingness to do so underscores that the Act is unobjectionable to the vast majority of businesses that it regulates.

The State therefore submits this information so that this Court can decide whether and how it wishes to proceed with full awareness of the relevant (and largely uncontested) facts. That decision is obviously committed to this Court's sound discretion, and if this Court elects to proceed with oral argument, the State will defend its original Act vigorously.

The parties do apparently disagree about whether the underlying action is moot. *See* Plaintiffs' Supp. Br. at 10-11.[1] But given the parties' agreement that

[1] This Court's has repeatedly held that when a statutory amendment eliminates plaintiff's ability to bring a suit under the "'statute as it now stands,'" the resultant lack of controversy moots the whole case, including claims for declaratory relief. *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)) (and citing *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994) ("Declaratory relief is unavailable where [a] claim is otherwise moot ...."); *Chem. Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006); State Supp. Br. at 4-5. Plaintiffs cite an outlier case, *Bd. of Trustees of Glazing Health & Welfare Trust v. Chambers*, 903 F.3d 829, 838–45 (9th Cir. 2018), to highlight a potential—yet not fully formed—argument about voluntary cessation, but that case lacks both progeny and antecedents and violates this Circuit's edict that subsequent panels are bound by all parts of a prior panel's decision. *Barapind v. Enomoto*, 400 F.3d 744, 750–51 (9th Cir. 2005); Plaintiffs' Supp. Br. at 10. And Plaintiffs concede the "admittedly murky" nature of the precedents underlying their legislative mootness arguments.

this appeal will become moot once SB1167 becomes effective, the State agrees that the district court can consider mootness of the entire action in the first instance on remand.[2]

CONCLUSION

This appeal will become moot 90 days from when the Arizona Legislature adjourns *sine die*. That much is undisputed. How this Court wishes to proceed in light of this undisputed fact is up to its discretion. If this Court wishes to proceed with oral argument, the State stands prepared to defend the constitutionality of its statute fully.

Plaintiffs' Supp. Br. at 11. Given the lack of a dispute concerning whether the preliminary injunction issues are moot once the Amended Act becomes effective, however, there is no need for this Court to reach those issues in this appeal.

[2] The State disagrees with Plaintiffs' suggestion (at 8-10) that this Court's jurisdiction to decide the mootness of the underlying action is in any way doubtful. One entirely permissible (and reasonable) ground to dismiss an appeal would be a conclusion that entire action is moot. Nothing in 28 U.S.C. § 1292(a) would preclude this Court from adopting that ground as a basis for resolving an entire appeal. Nor would such a decision be an extraordinary use of "pendent appellate jurisdiction." It simply would be deciding the appeal on one of the many issues directly presented. The State agrees, however, that this Court need not address this issue in the first instance despite its clear jurisdiction to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing State's Supplemental Reply Brief Regarding Mootness 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 22, 2019, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
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