No. 18-16896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKKEL JORDAHL, ET AL.,

Plaintiffs-Appellees,

v.

MARK BRNOVICH, ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 3:17-cv-08263-DJH, The Honorable Diane J. Humetewa

BRIEF OF *AMICI CURIAE* THE STATES OF MISSOURI, NEVADA, TEXAS, GEORGIA, KANSAS, ARKANSAS, OHIO, WEST VIRGINIA, AND INDIANA IN SUPPORT OF APPELLANTS' MOTION FOR STAY PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Statutes (Continued) **Page(s)**

Statutes (Continued) **Page(s)**

Other Authorities **Page(s)**

Other Authorities (Continued) **Page(s)**

Regulations **Page(s)**

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the States of Missouri, Nevada, Texas, Georgia, Kansas, Arkansas, Ohio, West Virginia, and Indiana. *Amici* have all imposed certain conduct-based regulations on government contractors, and they all have a fundamental and compelling interest in preventing invidious discrimination. Moreover, in furtherance of this interest, many States—including some of *amici*—have enacted regulations similar to the Arizona statute challenged here.

ARGUMENT

Since its creation in 1948, the nation of Israel has faced a host of existential threats. Many have been military or national-security threats. But for more than sixty years, Israel has also faced the substantial economic threat of widespread, coordinated commercial boycotts targeting Israel and Israeli nationals. These boycotts have the potential to severely harm the Israeli economy and the livelihoods of ordinary Israelis, and they threaten to undermine Israel's ability to finance its national-security efforts. One study by the United States International Trade Commission found that the boycott organized by the Arab League costs Israel's economy more than $2 billion per year. *See* Constance A. Hamilton, U.S. Int'l Trade Comm'n, *Effects of the Arab League Boycott of Israel on U.S.*

[1] As States, *amici* need not obtain the consent of the parties or leave of the Court to submit this brief. 9th Cir. R. 29(a)(2). No party's counsel or other person authored this brief, in whole or in part.

Businesses, Investigation No. 332-349, Pub. No. 2827 (1994), at vi (available at https://goo.gl/dRm4w1).

The State of Arizona—like many other States and the Federal Government—has found that these anti-Israel boycotts conflict with important governmental interests and values. In particular, the Arizona Legislature found that anti-Israel boycotts arise from and reflect invidious discrimination on the basis of nationality and national origin. *See* Ariz. Session Laws 2016, Chapter 46 (H.B. 2617), § 2(C). In light of that conclusion, the Legislature enacted the statute at issue here, which prohibits the State and its political subdivisions from entering into procurement contracts with businesses that boycott Israel. *See* A.R.S. § 35-393.01(A).

The States have long imposed conduct-based restrictions on government contractors. While some of these restrictions protect the contracting process itself, many serve to implement substantive policy choices by the States. The States have a fundamental and compelling interest in preventing invidious discrimination, and they may use procurement-contract regulations as a means of implementing that anti-discrimination interest. Further, as the Supreme Court has repeatedly recognized, the States have a legitimate interest in avoiding the appearance and actuality of subsidizing the discriminatory policies of private entities with state funds. The Arizona statute challenged here—and the numerous similar statutes

enacted by other States—directly advances these compelling interests. The Court should stay the preliminary injunction granted by the district court pending appeal.

I. The Arizona Statute at Issue Here—and the Numerous Similar Statutes Enacted by Other States—Directly Advance the Compelling State Interests in Preventing Invidious Discrimination and Avoiding State Subsidization of Private Discrimination.

The States have compelling governmental interests in preventing invidious discrimination and in assuring that taxpayer funds do not subsidize discrimination by private parties. The Arizona statute at issue here directly advances both of these compelling state interests.

A. States routinely use conduct-based restrictions on government contractors to advance substantive policy choices.

"[G]overnmental entities make a wide range of decisions in the course of contracting for goods and services. The Constitution accords government officials a large measure of freedom as they exercise the discretion inherent in making those decisions." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724-25 (1996). Consistent with that "large measure of freedom," the States have long imposed a wide variety of conduct-based restrictions on government contracting and government contractors. Indeed, as Justice Scalia noted, "examples of federal, state, and local statutes, codes, ordinances, and regulations [regarding government contracts] could be multiplied to fill many volumes. They are the way in which government contracts have been regulated, and the way in which public policy

problems that arise in the area have been addressed, since the founding of the Republic." *Bd. of Cty. Commissioners v. Umbehr*, 518 U.S. 668, 693-94 (1996) (Scalia, J., dissenting).

Some of these restrictions focus principally on preserving the integrity of the contracting process, such as by preventing conflicts of interest or bribery. For example, Missouri law prohibits the official principally in charge of state procurement from accepting gifts or benefits from any person seeking a state contract. Mo. Rev. Stat. § 34.160. Nevada law prohibits bidders for state contracts from offering future employment or business opportunities to the governing body offering the contract. Nev. Rev. Stat. § 332.810. And Texas law prohibits state agencies from entering into certain contracts with former or retired employees of the agency for one year after leaving the agency. Tex. Gov't Code § 2252.901.

Many state contracting rules also seek to advance substantive policy choices. "Although the government's primary interest in procuring goods and services is to obtain them on a competitive, best value basis, the government has also implemented through the procurement process policies to ensure that various basic socioeconomic objectives are met." STEVEN W. FELDMAN, GOVERNMENT CONTRACTS GUIDEBOOK § 8:1 (4th ed. 2018). For example, many States advance the policy of supporting intrastate economic development by giving preferences in contracting to businesses based in the State. *See, e.g.*, Mo. Rev. Stat. § 34.073;

Tex. Gov't Code § 2252.002. And many States seek to implement labor policies by giving preferences to contractors who pay "prevailing wages." *See, e.g.*, Tex. Gov't Code § 2258.023. The lure of securing procurement contracts with the state provides a strong incentive for many businesses to accede to these requirements. As a result, these requirements provide a powerful tool for States to implement social and economic policy choices. Moreover, because they do not expressly mandate or prohibit any conduct—but instead simply provide a financial incentive for voluntary action—they provide a less invasive means for States to implement these policy choices. Any person who does not wish to support a policy reflected in a state procurement law can do so simply by declining to sell goods or services to the state. Finally, all these regulations prevent both the appearance and actuality of state financial support for third-party conduct that is antithetical to state policy goals.

B. States have a compelling interest in preventing invidious discrimination, and they may use procurement regulations to advance that compelling interest.

There can be no serious dispute that the States have a legitimate and compelling interest in preventing invidious discrimination. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).[2] To that end, the States have enacted anti-discrimination statutes that prohibit invidious discrimination in a variety of

[2] By characterizing this interest as "compelling," *amici* do not suggest that strict scrutiny applies in this case.

contexts, including employment, housing, and other economic relationships. For example, the Missouri Human Rights Act prohibits discrimination on the basis of race, color, religion, national origin, ancestry, and sex in housing, employment, and public accommodations. *See* Mo. Rev. Stat. §§ 213.040, 213.055, 213.065.

The States need not rely exclusively on outright prohibitions to achieve their interest in preventing invidious discrimination. They may also seek to use the "carrot" of government contracting to encourage businesses to abstain from discriminatory conduct. Such procurement regulations advance compelling—and constitutionally permissible—state interests. Not only do they provide an additional means to prevent invidious discrimination, but they also avoid the public perception that the State is subsidizing or even endorsing the discriminatory practices of its contractors. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality op. of O'Connor, J.). "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455, 463 (1973). To advance their compelling interest in preventing invidious discrimination and their equally compelling interest in avoiding state financial support for invidious

discrimination by private parties, the States may condition eligibility to obtain government contracts on an agreement not to engage in discriminatory conduct.

C. The Arizona statute at issue here—and the numerous similar statutes enacted by other States—directly advance compelling anti-discrimination interests.

The Arizona statute at issue here presents a clear example of conduct-based procurement laws that advance a state's compelling interests in preventing invidious discrimination and avoiding state financial support of private-party discrimination. As relevant here, Arizona law prohibits the State and its political subdivisions from "enter[ing] into a contract with a company . . . unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." A.R.S. § 35-393.01(A). When enacting this provision, the Arizona Legislature expressly found that companies that engage in economic boycotts against Israel "make discriminatory decisions on the basis of national origin." Ariz. Session Laws 2016, Chapter 46 (H.B. 2617), § 2(C). This conclusion accords with the federal "congressional hearings on the anti-boycott provisions of the Export Administration Act, [during which] numerous legislators and experts testified to the racist and discriminatory origins and intentions of boycotts targeting Israel." Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS*

Movement Boycotts, 2016 CARDOZO L. REV. DE NOVO 112, 124; *see also id.* at 125 n.41 (collecting sources).

Economic boycotts against Israel do not merely raise the specter of invidious discrimination. They also impose substantial and concrete harms on Israeli nationals. For example, in 1994, the United States International Trade Commission found that the boycott by the Arab League cost Israel's economy more than $2 billion per year. *See* Constance A. Hamilton, U.S. Int'l Trade Comm'n, *Effects of the Arab League Boycott of Israel on U.S. Businesses*, Investigation No. 332-349, Pub. No. 2827 (1994), at vi (available at https://goo.gl/dRm4w1). In addition to inflicting economic hardship on ordinary Israelis, such economic damage undermines Israel's ability to finance its ongoing national-security efforts. A coordinated and broad-based boycott of this sort, structured along the lines of nationality or national origin, poses substantial risks to both the nation of Israel and ordinary Israelis.

In recognition of the discriminatory nature of anti-Israel boycotts and the severe economic consequences that flow from them, Arizona prohibited the State and its subdivisions from entering into procurement contracts with businesses engaged in boycotts against Israel. A.R.S. § 35-393.01(A). Consistent with the Legislature's findings, the statute expressly includes those boycotts conducted "[i]n a manner that discriminates on the basis of nationality, national origin or

religion and that is not based on a valid business reason." A.R.S. § 35-393.1(b). Thus, both the statute's plain text and its legislative history indicate that it advances the State's fundamental interest in preventing invidious discrimination. *See Roberts*, 468 U.S. at 623.

Arizona is far from alone in its decision not to contract with businesses that discriminatorily boycott Israel. Numerous States have similarly prohibited or limited government contracts with entities that boycott Israel. *See, e.g.*, Ark. Code § 25-1-503; Fla. Stat. § 287.135; Ga. Code § 50-5-85; Iowa Code § 12J.6; Kan. Stat. Ann. §§ 75-3740e, 75-3740f (2018 Supp.); Minn. Stat. § 16C.053; Nev. Rev. Stat. § 333.338; N.C. Gen. Stat. § 147-86.82; Ohio Rev. Code § 9.76; 62 Pa. Stat. § 3604; S.C. Code § 11-35-5300; Tex. Gov't Code § 2270.002. "In every state legislative body that had a roll call taken, [these provisions] passed by decisive if not overwhelming margins." Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH L. REV. 207, 213 (2018). More States may soon enact similar statutes. For example, in Missouri, an analogous anti-boycott provision received broad bipartisan support during the last legislative session. *See* Mo. H.B. 2179 (99th General Assembly, 2nd Regular Session); Mo. S.B. 849 (99th General Assembly, 2nd Regular Session). And other States have enacted similar anti-boycott policies

through gubernatorial executive orders. *See, e.g.*, Wisc. Executive Order No. 261 (Oct. 17, 2017).

Similarly, many States have prohibited the investment of some or all state funds in companies engaged in boycotts of Israel. *See, e.g.*, Ark. Code § 25-1-504; Cal. Gov. Code § 16649.83; Colo. Rev. Stat. § 24-54.8-202; Fla. Stat. § 215.4725; 40 ILCS 5/1-110.16; Indiana Code § 5-10.2-11-12; N.C. Gen. Stat. § 147-86.81; N.J. Stat. § 52:18a-89.14; *see also* N.Y. Executive Order No. 157 (June 5, 2016). Arizona has a similar statute, which has not been challenged in this case. *See* A.R.S. § 35-393.02. Like the government-procurement statute at issue here, these statutes advance the States' fundamental interest in preventing invidious discrimination based on nationality and national origin. *See Roberts*, 468 U.S. at 623. And they advance the States' fundamental interest in preventing state financial support for discrimination by private parties.

Importantly, none of these state anti-boycott statutes prohibits any person from expressing anti-Israel views, or even anti-Semitic views. Indeed, the statutes do not even prohibit engaging in anti-Israel economic boycotts. Under these statutes, a company may boycott Israel, Israeli businesses, and those who do business with Israel. The company simply cannot conduct such a discriminatory boycott while receiving taxpayer funds pursuant to a government procurement contract. The First Amendment does not require the States to subsidize these

boycotts. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

II. A Preliminary Injunction That Implicates State Procurement Laws Imposes an Irreparable Injury That Warrants a Stay Pending Appeal.

Among the factors that the Court considers when determining whether to grant a stay pending appeal is whether "there is a probability of irreparable injury if the stay is not granted." *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (brackets omitted). Thus, the district court's injunction against § 35-393.01 necessarily imposes irreparable harm on the State of Arizona. *Id.* Moreover, several additional factors further demonstrate that the district court's preliminary injunction will impose irreparable harm on the State of Arizona.

First, the preliminary injunction threatens to throw the State's procurement programs into disarray. Most States—including Arizona—have imposed complex requirements for the government-contracting process to ensure both that prospective contractors are treated fairly and that the taxpayers receive the lowest possible price. For example, in Missouri, a single regulation setting forth

procedures for the competitive-bidding process stretches to nearly 10,000 words—or more than three times the length of this brief. *See* 1 Mo. CSR 40-1.050. That figure does not include the dozens of statutes governing other aspects of the procurement process. *See generally* Mo. Rev. Stat. Chapter 34. Given the complexity of this regime, it often can take agencies several months merely to issue a request for proposals ("RFP"), and months more to award a contract.

An injunction against a portion of this complex statutory system imposes serious harm on the State. Agencies that already have invested substantial time and effort to issue RFPs under the pre-injunction regime may well have to repeat this cumbersome process in the wake of the preliminary injunction, perhaps preventing them from obtaining critical goods or services in a timely manner. Other agencies may delay issuing RFPs or awarding contracts during the pendency of this appeal out of concern that the Court's resolution of the case may call into question the validity of the agencies' actions. In short, an injunction against portions of the state procurement process "could throw a previously stable system into chaos." *Lair*, 697 F.3d at 1214. This effect constitutes irreparable injury warranting a stay pending appeal. *Id.*

Second, the district court's injunction may require Arizona to award procurement contracts that amount to state subsidization of private discrimination. As described above, the States have a compelling interest in avoiding taxpayer

subsidization of discrimination by private parties. *See Norwood*, 413 U.S. at 463. If the district court's preliminary injunction remains in place during the pendency of this appeal, however, it may force the State of Arizona to award procurement contracts to contractors who invidiously discriminate against Israelis based on their national origin. Requiring the State to subsidize private discrimination during the pendency of this appeal also imposes irreparable harm on the State. *Cf. id.*

CONCLUSION

For the reasons stated above, the Court should stay the preliminary injunction entered by the district court pending appeal.

October 12, 2018

Respectfully Submitted,

/s/ D. John Sauer

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,856 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 October 12, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ D. John Sauer