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 OF ARIZONA'S REPLY BRIEF

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INTRODUCTION

The Supreme Court's unanimous, controlling decision in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), makes plain that Plaintiffs' boycott—like the *FAIR* boycott—is not inherently expressive. Much like *FAIR*, explanatory speech is necessary before any observer could perceive Plaintiffs' "message"—here derived from computer and printer purchases. Indeed, Plaintiffs have conceded as much below, Opening Br.26, and that unacknowledged-on-appeal concession is fatal here.

The threshold question here is whether the First Amendment guarantees the right to select a particular brand of printer or computer free from governmental regulation as "inherently expressive" conduct. Any response other than "yes" mandates reversal. And the answer is plainly "no"—unlike the choice of one's faith, counsel, or trial-by-jury, the Constitution is agnostic as to selection of a Lexmark printer over one made by Hewlett Packard ("HP"). Such supply decisions by commercial businesses are not "inherently expressive" and thus do not qualify for First Amendment protection.

FAIR thus squarely mandates reversal. Plaintiffs do not even *attempt* to defend the district court's solitary "larger call" distinction of *FAIR*, which is flagrant legal error. Instead, they struggle to avoid *FAIR* by throwing up an ever-growing series of distinctions that cannot withstand scrutiny.

Even if Plaintiffs' boycott were "inherently expressive," the State's compelling interest in prohibiting discrimination amply sustains the Act against constitutional challenge. Plaintiffs deputize themselves as the arbiters of what groups are truly worthy of protection by antidiscrimination laws, denying that intentional, targeted infliction of economic injury on *Israelis* could ever constitute discrimination *against Israelis*. That is positively Orwellian. Moreover, accepting Plaintiffs' arguments could fatally undermine numerous anti-discrimination laws, whose constitutionality would hang by an illusory thread: Plaintiffs' contention that their boycott is somehow uniquely more expressive than other proscribable discriminatory conduct, such as refusing to hire women or serve African-American customers.

And even if the State could not prohibit boycotts of Israel outright, the First Amendment does not demand state subsidization with public funds/contracts. Just as Congress can fairly refuse to subsidize organizations engaged in lobbying activities (which *undeniably* enjoys First Amendment protection), the State need not subsidize boycotts of Israel with public funds—especially where there is no conditioning of public funding on companies adopting an official State position as its own, or saying *anything* about Israel. The Act simply requires abstaining from certain *economic conduct* during the contract term.

The injunction must also be reversed for lack of irreparable harm. Plaintiffs do not deny that the injunction rests solely on "per se" irreparable harm, rather than any *actual* record evidence. That "per se" holding is legal error, and an affirmance would create a split with at least four other circuits.

The injunction is also demonstrably overbroad. Plaintiffs' defend its breadth principally by pointing to non-existent reasoning that is little more than unavailing advocate afterthought.

ARGUMENT

I. PLAINTIFFS' FIRST AMENDMENT CLAIM FAILS

A. Plaintiffs' Claim Fails Under *FAIR* And The First Amendment's "Inherently Expressive" Requirement For Expressive Conduct

1. Plaintiffs' Conduct Is Not Inherently Expressive

As explained previously, "inherent expressiveness" is a threshold requirement for *any* First Amendment protection of conduct. Opening Br.21-24. But Plaintiffs cannot satisfy it.

Plaintiffs put little effort into demonstrating how their economic boycott is "inherently expressive" as a practical/factual matter. They do not deny that their "purchases are uniquely unlikely to be expressive." Opening Br.23. And Plaintiffs cite no record evidence to support their scattered, conclusory assertions that their boycott is inherently expressive. Answering Br.12, 45-46. Nor do Plaintiffs meaningfully dispute that the "message" of their purchasing decisions could only

be perceived if accompanied by explanation. Opening Br.26. Indeed, Plaintiffs admitted as much below, Opening Br.26, and offer no argument why that eye-catching admission is not fatal on appeal.

Both the record evidence and common sense thus confirm that Plaintiffs' boycott is not "inherently expressive." But that hardly means all boycotts are. A consumer's steadfast refusal to eat meat and dairy to protest animal cruelty could potentially convey an inherently expressive message without explanatory speech. Indeed, highly repetitive acts (*e.g.*, eating) in the presence of many observers—and, even more so, specifically posted "store watchers," as in *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 903-04 (1982)—are capable of conveying messages. But one-off purchases of a particular brand of desktop computer in a private office are nothing of the sort.

2. *FAIR*

Plaintiffs' attempt to circumvent analysis of whether *their* actions are inherently expressive by contending that all "political boycotts" are inherently expressive *per se*. But that position is plainly irreconcilable with the landmark *FAIR* decision, Opening Br.26-27, which cannot be evaded here.

Plaintiffs notably offer no defense whatsoever for the district court's actual (and sole) distinction of *FAIR*—*i.e.*, its "larger call" rationale. Opening Br.28. The district court's entire basis for rejecting *FAIR* thus rests on conceded error.

Plaintiffs do now offer *three new* distinctions of *FAIR*. But these fare no better that the litany of their prior distinctions.

- ***New Distinctions***

Sixth Distinction. Plaintiffs now point (at 31-32) to the Act's "affirmative certif[ication]" requirement to distinguish *FAIR*. But the Solomon Amendment's implementing regulations *also* required universities to certify their compliance upon request. *See* 32 C.F.R. §216.4(d)(8) (requiring "declar[ation] in writing" of compliance upon request).

Seventh Distinction. Plaintiffs also now contend (at 32) that the Act is broader than the Solomon Amendment, reaching "all aspects of a contractor's participation in a boycott campaign." But the Solomon Amendment's reach was demonstrably broader: sweeping so broadly that even if only a university's law school boycotted the military, the federal government denied federal funding to the entire university. And the coercive power wielded was *far* greater: while innumerable businesses flourish without government contracts, few major U.S. universities can survive without any federal funding. *Grove City Coll. v. Bell*, 465 U.S. 555, 585 n.4 (1984).

Eighth Distinction. Plaintiffs' also now appear (at 32) to rely on the military context of *FAIR*, which *amici* argue explicitly. Doc. 72 at 11. But *FAIR*'s holding that the boycotting conduct was not "inherently expressive" is not unique

in any manner to the military context. Nor do Plaintiffs or *amici* address that *FAIR*—unlike here—involved academic freedom, where First Amendment protections are uniquely powerful. Opening Br.29.

- ***Prior Distinctions***

Plaintiffs offer no defense of the district court's actual *FAIR* distinction and abandon their prior contention that the *FAIR* boycott was not "political," Opening Br.27. But they do recycle three prior distinctions, which continue to lack merit.

Third Distinction. Plaintiffs (at 30-32) reiterate their consumer-versus-commercial-goods distinction, and deny that they are involved in a "commercial-supply boycott," even though it is undisputed that their boycott is of supplies/equipment by a *commercial business*. And the Supreme Court has refused to extend *Claiborne*'s protections to boycotting conduct by commercial businesses. Opening Br.29.

Plaintiffs' consumer-versus-commercial-goods distinction also makes little sense and would pose enormous judicial administrability problems. There is no sound reason Intel should have a First Amendment right to select a preferred brand of toilet paper but not its desired commercial-grade photocopier. Neither purchase is remotely expressive; nor should such distinctions be of constitutional dimension.

Nor could consumer-versus-commercial lines be drawn easily or coherently—what features (or price) of a desktop computer or printer make it a

commercial rather than consumer product? Is a printer that costs $250 a commercial or consumer good? $1,000? Instead, the commercial-business-versus-private-individuals line drawn in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507-08 (1988), should control. Opening Br.29.

Fourth Distinction. Plaintiffs also reiterate (at 31) their argument that "neither a citation to *Claiborne* nor the word 'boycott' appears anywhere in [*FAIR*]." But even Plaintiffs (at 32) acknowledge that the *FAIR* plaintiffs described themselves as being engaged in a "boycott," and Plaintiffs have no response to the State's demonstration that the dictionary definition of "boycott" plainly reaches the conduct in *FAIR*. Opening Br.29. And the Supreme Court's repeated use of the word "boycott" in *Longshoremen* to describe conduct not involving a square refusal to purchase goods underscores that "boycott" reaches a broad range of economic conduct. Plaintiffs' denial that *FAIR* involved a "boycott" is thus little more than semantic gameplaying.

Fifth Distinction. Plaintiffs' also try (at 32) to distinguish *FAIR* on the basis that the Act—purportedly unlike the Solomon Amendment—was "motivated by the impermissible desire to suppress boycott campaigns." But the Solomon Amendment was undeniably designed to suppress just one particular boycott campaign. Opening Br.30.

* * *

Plaintiffs' uniformly meritless distinctions of *FAIR* underscore the obvious: *FAIR* is controlling here and mandates reversal.[1]

B. Plaintiffs Fail To Address Other Controlling Case Law

1. *Longshoremen*

Plaintiffs continue to discount (at 29-30) *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982), as merely a labor case without the slightest relevance outside that context. That distinction fails. Opening Br.31-33. Indeed, as the Supreme Court itself aptly explained, the boycott in *Longshoremen* was "*not a labor dispute* with a primary employer *but a political dispute* with a foreign nation." 456 U.S. at 224 (emphasis added). Nor have Plaintiffs or the district court ever genuinely grappled with *Longshoremen*'s holding that "conduct designed not to communicate but to coerce merits still less consideration under the First Amendment." *Id.* at 226.

2. *Jaycees Concurrence*

Plaintiffs wholly ignore Justice O'Connor's concurrence in *Jaycees*, which emphatically rejects the central premise of Plaintiffs' claim: explaining that "[t]he Constitution does not guarantee a right to choose employees, customers, *suppliers,*

[1] Plaintiffs' notably do not address the State's argument that *FAIR* forecloses any expressive association claim, Opening Br.27, thereby conceding the issue.

or those with whom one engages in simple commercial transactions[.]" *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

If that is an accurate statement of governing law, Plaintiffs' First Amendment claim necessarily fails. And there is little reason to doubt that it is: during her tenure, Justice O'Connor's views were frequently controlling or ultimately vindicated, particularly on issues of discrimination. And Justice O'Connor had joined the *Claiborne* majority two years earlier, underscoring that *Claiborne* is nowhere near as broad as Plaintiffs wish.

3. *NAAAOM*

Plaintiffs do not meaningfully address *NAAAOM*, instead offering only a cursory dismissal (at 45) in a string-cite footnote, tagging *NAAAOM* as involving only regulation of "unexpressive conduct."

That is specious. *NAAAOM* involved a cable operator's freedom to select what channels—*i.e.*, *content*—to carry/express. Opening Br.47. If governments can constitutionally demand non-discrimination in selection of actual *content to broadcast*, they *a fortiori* can do so for selecting goods by commercial businesses.

4. *Briggs*

Plaintiffs attempt (at 34-35) to distinguish *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984), by mischaracterizing the EAA, which in Plaintiffs' telling merely "protect[s] American businesses from having to choose

sides in a foreign dispute[.]" But the EAA is *far* more intrusive than that: it *criminally* prohibits *truthful* speech about boycotting conduct. Opening Br.5-6, 34-35. Plaintiffs' recasting imprisonment of businesspeople as a form of "protection" for them underscores the magnitude of Plaintiffs' semantic gamesmanship (and its frequently Orwellian quality).

The constitutionality of the EAA—which is demonstrably more coercive and burdensome on speech—has gone unquestioned in the 35 years since *Briggs*. *A fortiori*, the Act does not violate the First Amendment.

5. *Incidental Burden Cases*

Plaintiffs (at 33) distinguish the State's incidental-burden-doctrine cases based on the purported magnitude of the burden here. But the best evidence that Plaintiffs offered for prospective harm to their actual expression was the *meager possibility*—not even Plaintiffs know for sure—that the Act *might* affect what computer Plaintiffs place in their private office, seen by no client, *ever*. Opening Br.60-62. If that is not a merely "incidental burden" on expression, nothing is.

C. *Arkansas Times* Provides Directly Analogous Authority

The Eastern District of Arkansas recently applied *FAIR* to uphold an Arkansas law much like the Act—and challenged by the same core counsel—explaining that "the decision to engage in a primary or secondary boycott of Israel is 'expressive only if it is accompanied by explanatory speech.'" *Arkansas Times*

LP v. Waldrip, No. 18-CV-914, 2019 WL 580669, at *5 (E.D. Ark. Jan. 23, 2019). It further rejected plaintiff's argument that *Claiborne* "creates an unfettered, black-letter right to engage in political boycotts." *Id.* at *6.

Arkansas Times's well-reasoned resolution of essentially identical legal issues should be followed here.

D. Reversal Is Required Because *O'Brien* Scrutiny Applies

This appeal can also be readily resolved on another simple ground: Plaintiffs do not offer any argument that they could prevail if the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367, 384 (1968) applies. And it does for two reasons.

First, *FAIR* makes that plain: *FAIR*'s alternative holding expressly applied *O'Brien* scrutiny to boycotting conduct. 547 U.S. at 65-68. That controls here. *See also NAAAOM v. Charter Communications, Inc.*, 915 F.3d 617 (9th Cir. 2019) (superseding opinion) (applying *O'Brien* to anti-discrimination statute regulating expressive conduct).

Second, the Act is not content- or viewpoint-based regulation of speech, as discussed below. *Infra* Section II.E. Plaintiffs' premise for applying strict scrutiny thus fails.

E. The Act Is Neither A Content- Nor Viewpoint-Based Regulation Of Speech

Plaintiffs' Answering Brief is heavily premised on Plaintiffs' contention that the Act is a content- or viewpoint-based regulation of speech. That contention is ultimately irrelevant because Plaintiffs' conduct is not "inherently expressive." Opening Br.22; *supra* at 3-4. But even if that were otherwise, Plaintiffs' content/viewpoint-based arguments fail for five reasons.

First, the Act here no more "expressly targets political boycotts" (Answering Br.49 n.13) than in *FAIR*. Opening Br.30; *supra* at 7. And despite Congress's obvious targeting there, the Solomon Amendment was a "'neutral regulation.'" *FAIR*, 547 U.S. at 67; *accord Burt v. Gates*, 502 F.3d 183, 187 (2d Cir. 2007). So too is the Act.

Second, the Act applies to all boycotts of Israel, and is agnostic as to underlying motivation—*i.e.*, viewpoint. The Act thus applies to boycotts, like Plaintiffs', designed to protest Israel's settlement policies as too tough, as well as to those boycotting Israel as being too soft in promoting settlement expansion. And it further applies to those merely seeking to curry favor with anti-Semitic customers. The Act does not care *what message* a boycotter is trying to send—only what the boycott's *economic substance* is.

Third, it is similarly well-established that anti-discrimination statutes "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). Instead, "federal and state antidiscrimination laws … [are] *permissible content-neutral regulation[s]* of conduct." *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (emphasis added). Indeed, this Court has recently reiterated that even for a cable operator selecting what content to carry—undeniably expressive activity—mandating editorial decisions "free of discriminatory intent … has no connection to the viewpoint or content." *NAAAOM*, 915 F.3d at 629-30; *accord Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 801 (9th Cir. 2011).

Plaintiffs tellingly do not address meaningfully any of *Rotary Club, Wisconsin v. Mitchell*, or *NAAAOM*, and thereby concede this bedrock principle under which anti-discrimination measures are almost invariably constitutional.

Plaintiffs attempt (at 25) to escape this virtually unbroken line of precedents by pointing to the Act "appl[ying] only to boycotts of Israel," and not other countries. But anti-discrimination laws have never been constitutionally suspect because they ban only a subset of discrimination. Congress may, for example, ban age discrimination only against the old but not the young in the Age Discrimination in Employment Act ("ADEA"). *See* 29 U.S.C. §621. And the ADEA has repeatedly survived constitutional challenge. *See*, *e.g.*, *EEOC v. Wyoming*, 460 U.S. 226 (1983). So too should the Act. And while the State has repeatedly raised this age-discrimination/ADEA point, E.R. 122, 153, Opening

Br.45, Plaintiffs have *never* addressed it—or explained how the ADEA could survive accepting their arguments.

Indeed, it is doubtful any anti-discrimination act can survive if Plaintiffs' "targeting" position is accepted and applied faithfully. The legislative histories of the Civil Rights Act of 1964 and Fair Housing Act of 1968, for example, are replete with condemnation of particular types of discrimination—principally discrimination against African-Americans in the Jim Crow South. *See*, *e.g.*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 608-11 (2004) (Thomas, J., dissenting) (Congressional "motivation" was to "prevent invidious discrimination against racial minorities, especially blacks."). But that hardly renders those landmark statutes unconstitutional.

Fourth, Plaintiffs' position would likely doom sanctions law, which typically target individual nations specifically. Not to worry, Plaintiffs say (at 54-55), because sanctions "overwhelmingly regulate non-expressive commercial transactions." But that is quite doubtful if this Court holds Plaintiffs' commercial transactions are "inherently expressive." Nor do Plaintiffs deny that "intentionally buying a product with a 'Made in North Korea' label is, after all, a lot more expressive than buying a printer with a 'Lexmark' decal." Opening Br.59-60.[2]

[2] Plaintiffs protest (at 48) that "[u]nder the State's logic, the government could have suppressed … boycott campaigns targeting … apartheid South Africa." But Plaintiffs ignore that accepting their arguments would necessarily leave states

Fifth, Plaintiffs' attempt (at 26) to rely on the certification requirement to bolster their viewpoint-based arguments fails. The certification is incidental to the regulation of conduct, much as was removal of the hypothetical "'White Applicants Only'" sign in *FAIR*. 547 U.S. at 62. Indeed, "Innumerable federal and state regulatory programs require the disclosure of ... commercial information," *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001). For example, government contractors must *certify* their non-discrimination in employment, Exec. Order No. 11,246 § 203 (1965)—which no court has found constitutionally problematic. Nor are the certifications under the Act.

F. *Claiborne* Cannot Bear The Weight Plaintiffs Place Upon It

Against a mountain of contrary and controlling authority, Plaintiffs place overwhelming reliance on *Claiborne*. But *Claiborne* is simply not as broad as Plaintiffs contend. Plaintiffs' reliance on *Claiborne* fails for four reasons.

First, contrary to Plaintiffs' apparent premise (at 20), *Claiborne* did not hold that all political boycotts are *per se* inherently expressive no matter their actual expressive content. Indeed, the words "inherently expressive" do not appear *anywhere* in the decision. And *FAIR* rejects any such bootstrapping/shortcutting.

Second, the Supreme Court has explicitly explained that *Claiborne*'s boycott holding was dependent on the *Claiborne* boycotters "s[eeking] only the

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powerless to *require* that governmental contractors boycott the apartheid state (as numerous states did).

equal respect and equal treatment to which they were constitutionally entitled." *FTC*, 493 U.S. at 426; Opening Br.37. And it has twice refused to extend *Claiborne* to boycotts by commercial businesses. Opening Br.29, 37. The Supreme Court's post-*Claiborne* jurisprudence is thus squarely at odds with Plaintiffs' claim.

Third, the Second Circuit has refused to extend *Claiborne* to discriminatory conduct—which Plaintiffs' boycott is. Opening Br.37, 43-46; *infra* at 17-20. This Court should too.

Fourth, a page of *Claiborne*'s history is worth a volume of argument here. *Claiborne* was decided nearly *37 years* ago, and has *never* been read as broadly as Plaintiffs urge. Indeed, Cass Sunstein's quip about the non-delegation doctrine—that it "has had one good year, and 211 bad ones (and counting)"[3]—is equally apt for First Amendment protection of boycotts. Opening Br.36. Plaintiffs' arguments that *Claiborne* extends essentially absolute protection for boycotting conduct are belied by the 37 years of post-decision history. In contrast, *Claiborne*'s actual core holding—barring monetary liability for *pure speech*, Opening Br.36—has enjoyed one good year after another.

[3]https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5059&context=uclrev.

G. The State's Compelling Interests Sustain The Act

Even if Plaintiffs' boycott were protected under the First Amendment, the State's compelling interests in prohibiting discrimination and regulating commerce sustain the Act.

1. Selectively Boycotting Israelis Is Textbook Discrimination Against Israelis

Plaintiffs struggle mightily (at 42-49) to escape what is intuitively obvious, indeed virtually self-evident: targeting a particular group (and those associating with them) for the intentional infliction of economic harm *is discrimination*, *by definition*. Opening Br.43-46. Cloaking themselves in self-professed political virtue, Plaintiffs attempt to cast their highly selective meting out of financial pain as something other than discrimination. That effort fails as a matter of logic and precedent.

Plaintiffs do not appear to dispute that a business's refusal to hire African Americans (*i.e.*, a hiring boycott) is textbook discrimination. Answering Br.33, 45. But suppose instead the business refuses to purchase products from businesses owned by African Americans. Plaintiffs appear (at 45-46) to suggest that this is not discriminatory because it merely involves suppliers (rather than public accommodations or employment). But that merely changes the *target* of the discrimination, not its *discriminatory character*. *See*, *e.g.*, *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 769-70 (9th Cir. 2005) (holding disparate treatment

against Sikh-owned company in commercial transactions was actionable discrimination under 42 U.S.C. §1981).

Now substitute "Mexican and Mexican-Americans" for "African Americans." That again merely changes the category of discrimination (nationality and ethnicity, instead of race), not the fundamental discriminatory character. *Lamarr-Arruz v. CVS Pharmacy, Inc.*, 271 F. Supp. 3d 646, 657 (S.D.N.Y. 2017) (maltreatment based on ethnicity and national ancestry is actionable discrimination under §1981). And, for most BDS boycotters, that is effectively what their boycotts are: *blanket and categorical* refusals to deal with *all Israelis*, based on nationality/national origin. E.R.177-80, 183-84 (Plaintiffs' admission that "the regular BDS boycott [is] of all of Israel"), 218 (calling for "boycott of all Israeli products"). Most BDS boycotters crudely select targets based solely on membership in a particular group (*i.e.*, Israelis), and nothing more. *Id.* The quintessential nature of those boycotts is *discriminatory*, despite Plaintiffs' obfuscation. And the State may properly proscribe—or at least refuse to subsidize—such discrimination. Opening Br.46-47, 49-53.[4]

[4] Indeed, Plaintiffs' lead counsel recently admitted that "[w]hen a business discriminates against people based on who they are … those discriminatory business decisions are not entitled to First Amendment protection." *See* https://www.aclu.org/blog/free-speech/laws-suppressing-boycotts-israel-dont-prevent-discrimination-they-violate-civil (Feb. 22, 2019). And most BDS boycotts boycott *all* Israelis as *Israelis* (*i.e.*, "who they are").

To use a real-world example, AirBnB refuses to do business with Israelis (but not Palestinians) in the West Bank, viewing it as occupied territory.[5] It will, however, freely rent in Kashmir, Northern Cyprus, Western Sahara, and many other disputed/occupied territories.[6] But even though AirBnB expressly singles out Israelis for distinctly disfavored treatment, Plaintiffs blink reality by denying any discriminatory effect to that uniquely anti-Israeli policy. *See*, *e.g.*, *Dawson v. Steager*, 2019 WL 691579, at *4 (U.S. 2019) ("[D]iscrimination [is] something we've often described as treating similarly situated persons differently." (cleaned up)).

To be sure, Plaintiffs' boycott is more unique and more limited, targeting only some Israelis and those doing business with them for economic harm. E.R.177-84. But discrimination is not immunized simply because it is not carried out to its furthest ends. If, for example, a business refused to hire women of Hispanic descent, but freely hired anyone else, that discriminatory boycott would still violate Title VII despite being less-than-complete discrimination against either all women or Hispanics. So too with Plaintiffs' singling out of some Israelis for disfavored treatment.

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[5] *See* https://www.nbcnews.com/news/world/airbnb-plans-remove-listings-israeli-west-bank-settlements-n938146.

[6] *Id.*

Plaintiffs also try (at 43-44) to confound the issue by pointing to federal definitions of "nationality" and "national origin." But nothing about the First Amendment compels the states to mirror the federal definitions as the exclusive categories of discrimination. Moreover, federal law recognizes that discrimination against Israelis/Jews takes on elements of race, nationality, and religion. Opening Br.44-45; *Magana v. Commonwealth*, 107 F.3d 1436, 1446 (9th Cir. 1997). But that blurring (and aggregation) of biases hardly immunizes them from regulation.

2. The Act Constitutionally Regulates Discriminatory Conduct

Because the boycotts regulated by the Act are thus discriminatory in nature, the Act falls comfortably within a long line of anti-discrimination measures that have been challenged under the First Amendment—and nearly uniformly upheld. Opening Br.46-47.

Plaintiffs rely (at 48-49) on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) in response, but those cases offer little support. Both were forced inclusion cases with *far* more obvious interference with much more expressive conduct. *Jaycees*, 468 U.S. at 623 ("There can be no clearer … intrusion[.]").

Plaintiffs' comparison to cases involving parades (*Hurley*) and flag burning merely accentuates the chasm between the expressiveness of the conduct at issue in those cases, and the printer/computer purchases at issue here. Moreover, *Hurley*

and *Dale* only recognized as-applied exceptions under the First Amendment, not facial invalidation. Opening Br.47 n.3.

Aside from *Dale* and *Hurley*, Plaintiffs do not cite any binding authority striking down an anti-discrimination measure on an as-applied basis, let alone facially. Instead, courts have broadly recognized that such laws are constitutional—a nearly unbroken history that solidly refutes Plaintiffs' suggestion (at 48-49, 62-63) that anti-discrimination laws readily yield to the First Amendment at the first hint of tension.

3. Plaintiffs' Concession That Governments May Condition Contracting On Non-Discrimination Is Fatal

Plaintiffs notably concede that governments may constitutionally require non-discrimination in employment by government contractors, because "[d]iscrimination in employment and … public accommodation is unexpressive conduct." Answering Br. 33, 45, 53 n.14. Plaintiffs are correct about that result, but wrong about the reason. And their concession is fatal to their claims here.

If Walmart, for example, refused to hire any African Americans to express a message of white supremacy, or Apple refused to sell iPhones to women to express male superiority, those messages would be as expressive as they are repugnant. And *readily* perceptible. In contrast, observers would plainly struggle to perceive that Jordahl's purchase of a printer or computer has any connection to Israeli governmental policy. Plaintiffs' expressiveness distinction thus fails.

Ultimately, Plaintiffs appear to be conflating virtue with expressiveness. While racist boycotts of black employees and sexist boycotts of female customers are virtueless (and abhorrent), they do not suffer from a lack of expressiveness. Far from it. Indeed, by Plaintiffs' reasoning even federal laws criminalizing lynching (but not murder generally) would only be constitutional because they purportedly regulate "non-expressive conduct." But lynching is no such thing: It is terrorism, whose very purpose is to send a highly *expressive* message of intimidation in the course of also violating state murder statutes.

Plaintiffs also ignore that 42 U.S.C. Sections 1981 and 1982 both impose certain anti-discrimination mandates on a wide variety of purchasing and contracting decisions by businesses, and courts have not found such transactions uniquely more expressive than those regulated by employment and public accommodations laws—thereby implicitly rejecting Plaintiffs' premise. *See*, *e.g.*, *NAAAOM*, 915 F.3d at 628-31 (rejecting First Amendment challenge to §1981 claim).

In sum, courts have almost uniformly upheld the constitutionality of anti-discrimination measures not discrimination is usually unexpressive, but instead because (1) such measures primarily regulate *conduct*, and (2) the governmental anti-discrimination interest overwhelms any incidental burden on expression. Those same principles are controlling here.

4. The State's Interest In Regulating Commerce Sustains The Act

Plaintiffs offer two arguments in opposition to the State's commerce/police-power arguments. *First,* they discount (at 49) the State's interest by arguing that it "is an impermissible content- and viewpoint-based justification." But the Act is both content- and viewpoint-neutral. *Supra* at 12-15. *Second*, they rely (at 50) on *United States v. NTEU*, 513 U.S. 454 (1995) to heighten the State's burden. But *NTEU*'s standard only applies where a regulation is a "wholesale deterrent to a broad category of expression." *Id.* at 467. But here the Act is only a *narrow* regulation of certain types of *commercial conduct*. Indeed, even Plaintiffs admit (at 33) that "most commercial transactions are not expressive." *NTEU*'s exacting standard is thus plainly inapplicable here.

H. The First Amendment Does Not Compel The State To Subsidize Plaintiffs' Boycotts

Even assuming *arguendo* that the State could not prohibit boycotts of Israel outright, the First Amendment does not demand that the State subsidize such boycotts with public funds.

As an initial matter, this Court should apply the unconstitutional-conditions doctrine here, rather than *Pickering*. That is what the Supreme Court applied in *FAIR* to boycotting conduct, 547 U.S. at 58-60, and the universities at issue undoubtedly held numerous contracts with the federal government, making them

government contractors in addition to fund recipients. Indeed, Plaintiffs themselves were the first to suggest below that the unconstitutional-conditions doctrine applies. E.R.157; FER.6-7. Nor have Plaintiffs cited a single prior case applying *Pickering* to boycotting conduct, rather than *actual speech*.

But the distinction is ultimately irrelevant here—Plaintiffs' claim fails under either standard.

1. Unconstitutional Conditions Doctrine

Plaintiffs only minimally respond (at 51) to the Supreme Court's landmark decision in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983); and this Court's application of it in *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998), relying almost exclusively on *Agency for Int'l Dev. v. All. for Open Society Int'l, Inc.*, 570 U.S. 205 (2013) to escape their controlling effect. That is unavailing.

Open Society notably reiterates that "if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds. This remains true when the objection is … its First Amendment rights." *Id.* at 214. And unlike *Open Society*, the Act does not "requir[e] [government fund] recipients to profess a specific belief" or "adopt—as their own—the Government's view on an issue of public concern." *Id.* at 218. Instead, Plaintiffs remain utterly free to express

whatever views they wish and only the entity contracting with the government is bound by certain *conduct* restrictions. Opening Br.22.[7]

Plaintiffs also notably do not offer any response to the State's demonstration that its interest in "deny[ing] public subsidies is uniquely powerful when discrimination is at issue," Opening Br. 50-52—ignoring *four* separate cases cited to that effect. And for such non-discriminatory measures, the Supreme Court has specifically "distinguished between policies that require action and those that withhold benefits." *Christian Legal Society v. Martinez*, 561 U.S. 661, 682 (2010) (*citing Bell*, 465 U.S. at 575-576 and *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-604 (1983)). But Plaintiffs' arguments annihilate that distinction.

Just as the United States may demand non-discrimination against women as a condition of universities receiving federal funds, *Bell*, 465 U.S. at 575, the State may demand non-discrimination against Israelis as a condition of receiving State contracting dollars.

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[7] Moreover, Plaintiffs may create affiliates to boycott Israel outside of their government contracts, as explained in official guidance that is owed deference. E.R.81-82; *Ruiz v. Hull*, 191 Ariz. 441, 449 (1998). In any event, if the definition of "affiliate" were constitutionally problematic, it is readily severable. Plaintiffs' suggestion that constitutional issues would persist even after severance squarely contravenes *Regan*'s *explicit endorsement* of affiliate arrangements. Opening Br.51.

2. *Pickering*

Even assuming *Pickering* applies, Plaintiffs' argument still fails. As an initial matter, any message conveyed by the purchasing/non-purchasing of goods in the course of *performing government contracts* is speech properly attributable to the government—*i.e.*, *government speech*. Opening Br.56. Plaintiffs respond (at 40-41) with a citation only to Black's Law Dictionary about the typical independence contractors enjoy. But the First Amendment hardly mandates such contractor autonomy as a constitutional matter. Instead, courts have broadly recognized governments' freedom to impose conditions on contracting. State Amicus Br. (Doc. 32) at 3-7.

Moreover, Plaintiffs do not identify *any* appellate court that has ever extended "speech on a matter of public concern" to *boycotting conduct*. The Supreme Court's exclusive use of "speech"—*i.e.*, not including purportedly expressive economic conduct—in describing *Pickering*'s trigger is controlling here. Indeed, the last time this Court attempted to stretch *Pickering* to reach allegedly expressive economic conduct (there selling videotapes) the Supreme Court reversed—*summarily* and *unanimously*. *San Diego v. Roe*, 543 U.S. 77, 80 (2004).

And even assuming *Pickering*'s first-stage, speech-on-a-matter-of-public-concern requirement is satisfied, the government's compelling interests are more

than sufficient to sustain the Act at *Pickering*'s second stage. Opening Br.57. Moreover, Plaintiffs' reliance on *NTEU* to amplify the State's burden fails. *Supra* at 23.

I. An Affirmance Could Upend First Amendment And Anti-Discrimination Law

The collateral damage an affirmance here would wreak is substantial. As an initial matter, it would render the governing law as to what conduct is (and is not) "inherently expressive" effectively incoherent. Under Plaintiffs' and the district court's position, Plaintiffs' purchase of an HP printer or placement of a Dell computer in Plaintiffs' private office is purportedly *more* expressive than all of the following:

- A Jim-Crow-inspired refusal to hire African-American employees;
- Flagrantly refusing to sell products to racial minorities and women;
- Wearing clothing with conspicuous "Made in North Korea" tags;
- The selection of cable channels (*i.e.*, content) to broadcast;
- Posting a "White Applicants Only" sign;
- Banishing military recruiters from campus year-after-year.

Supra at 5-6, 9, 14-17, 21.

It is difficult to conceive of any of these examples as being less expressive than Plaintiffs' boycott, let alone all of them. In the wake of any affirmance, district courts would be in the unenviable position of reconciling this incoherence.

But doctrinal confusion on inherent expressiveness is not the only collateral damage from an affirmance. To the extent that courts conclude that any of these activities are *at least* as expressive as Plaintiffs' boycott, established precedent as to the constitutionality of anti-discrimination and sanctions laws may no longer be viable. That is particularly true given Plaintiffs' absolute position that no quantity of discriminatory animus could ever justify regulation of a political boycott (and, by extension, any conduct at least as expressive). Plaintiffs' arguments, if accepted, thus represent dire threats to the cornerstones of modern anti-discrimination law.

It is doubtful that Plaintiffs actually intend as much, however. Instead, Plaintiffs appear to propose a rule of law that would seemingly apply only to boycotts of Israelis/Jews, and no one else. But accepting that position is effectively to enshrine anti-Semitism into the First Amendment. Jurisprudence that has one rule for discrimination against Israelis/Jews and another for all other minority groups is unworthy of our venerable Constitution.

II. THE DISTRICT COURT'S IRREPARABLE HARM FINDING RESTS ON LEGAL ERROR

A. The District Court Erred By Ignoring Record Evidence And Presuming Irreparable Harm

It is undisputed that the district court did not examine the record evidence *whatsoever* in reaching its irreparable harm finding. Opening Br.62-63. Plaintiffs,

like the district court, instead rely entirely on a First Amendment violation being "irreparable [harm] per se." E.R.35, Answering Br.55-57. Indeed, Plaintiffs' irreparable-harm section tellingly cites no record evidence at all. *See* Answering Br.55-57. But the district court's *legal* holding—subject to *de novo* review—is plainly wrong.

The district court relied entirely on the plurality opinion *Elrod v. Burns*, 427 U.S. 347, 373 (1976) to support its "irreparable per se" finding. E.R.35. But the *Elrod* plurality notably predicated the irreparable harm there on an actual "*loss* of First Amendment freedoms"—explicitly threatened loss of employment. 427 U.S. at 373-74 (emphasis added). It did not endorse *per se* irreparable harm where—as here—that loss is entirely conjectural and unsupported by any record evidence. Put simply, because it is no more than speculation that the Act actually interferes with any purchasing/non-purchasing decision *by Plaintiffs*, Opening Br.60-62, there is no likely "loss" that could trigger *Elrod*.

Plaintiffs also rely (at 56) on *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). But that case actually reiterates that plaintiffs *cannot* bootstrap the requisite irreparable-harm finding: "Even where a plaintiff has demonstrated a likelihood of success on the merits of a First Amendment claim, *he 'must also demonstrate* that he is likely to suffer irreparable injury'" and "these elements [do not] 'collapse into the merits.'" *Id.* at 582-83 (emphasis added).

In addition, affirmance would create a square and stark split with at least four other circuits. Opening Br.62-63. Plaintiffs offer only a half-hearted footnote in response, contending that those four circuit's precedents "collectively acknowledge that an *imminent threat to free expression* interests justifies a finding of irreparable harm." Answering Br.57 n.15 (emphasis added). But that is precisely the State's point: those four circuits all hold that irreparable harm cannot be presumed based on a First Amendment violation, and instead must be proven with record evidence of an actual "imminent threat to free expression."

Plaintiffs' apparent *agreement* that the D.C., Second, Third and Fifth Circuits would all insist upon actual record evidence of imminent harm merely confirms the square circuit split an affirmance would necessarily occasion.

B. Plaintiffs' "Disavow" Theory Cannot Sustain The Injunction

Plaintiffs also appear to argue that they have sustained irreparable harm because the Act's certification requirement forces them to "disavow" participation in their desired boycott, a term they reiterate no less than a dozen times. That argument is unavailing for three reasons.

First, this purported "disavowal" is a compelled-speech theory, which the district court notably did not decide. E.R.1-36. Plaintiffs cannot rely on alleged harms from unadjudicated claims to support the injunction.

Second, requiring certifications of *conduct* is a ubiquitous method of enforcing statutes, which raises no constitutional issues. *Supra* at 15. A certification of the Act no more compels Plaintiffs to "disavow" their boycott than a certification of non-discrimination in employment by government contractors unconstitutionally compels them to "disavow" whatever racist or sexist views they wish to espouse.

Third, despite Plaintiffs' incessant reiteration of the word "disavow," the certification does no such thing. The State does not require anyone to speak as to the *merits* of Israeli governmental policy or boycotts of Israel. It merely requires a truthful statement about *what* conduct the person is engaged in/will engage in. It does *not* require them to say that their past participation in boycotts of Israel was wrong, immoral, discriminatory, etc.—*i.e.*, actually "disavow" the boycott.

III. THE DISTRICT COURT'S INJUNCTION IS OVERBROAD

The blanket, statewide injunction here rests on clear legal error and is an abuse of discretion. Opening Br.63-71.

A. The Complete Lack Of Scope Analysis Is Fatal

Plaintiffs tellingly do not deny that "[t]he district court notably did not offer a single word to justify the scope of its injunction." Opening Br.5, 66-68. That complete absence of reasoning alone requires reversal.

Plaintiffs attempt (at 14) to defend the non-existent reasoning by contending that "[b]ecause the district court concluded that the Act is facially invalid, facial relief … was appropriate." But that *ipse dixit* pronouncement is plain legal error. And it was little more than an afterthought: it appears only once, lacks even a word of supporting reasoning, and is found in a section addressing an injunction bond sought by no one. E.R.35-36.

As explained previously, there are two—and *only* two—ways to hold a statute facially invalid: either under (1) the *Salerno* "no set of circumstances" standard or (2) the First Amendment overbreadth standard. Opening Br.58. And the district court did not purport to apply either. *Id.* Nor do Plaintiffs argue overbreadth on appeal. The district court's facial holding is thus unsupported by (1) any reasoning below or (2) any overbreadth argument on appeal.

Plaintiffs attempt to evade these obvious deficiencies through sophistry and transparently putting words in the district court's mouth. Plaintiffs thus contend (at 54) that "as the District Court recognized, ER 29, the *NTEU* analysis is inherently facial[.]"

But the district court "recognized" no such thing. *None* of the words "facial," "as applied," or "overbreadth" appear anywhere on the page Plaintiffs' cite (E.R.29). Moreover, Plaintiffs did not advance their instant facial-and-as-applied-standards-merge argument below. Plaintiffs' *entire* scope defense thus

relies on the district court's *non-existent acceptance* of their *then-non-existent argument*.

Plaintiffs further (at 54) distort the district court's opinion by contending that it "[a]ppl[ied] that [inherently-facial *NTEU*] test … [to] conclude[] that the Act 'violates the First Amendment on its face.' E.R.36." But that purported application of *NTEU* is found in a wholly different section *seven pages* later—with multiple intervening sections, case citations, and holdings. *Compare* E.R.29 *with* E.R.36. That is an utterly bizarre place to apply that purported "recognition."

In any event, Plaintiffs' *NTEU*-"inherently facial"-analysis-automatically-justifies-blanket-injunctions premise is belied by *NTEU*'s actual holding—which "reversed" the injunction there vis-à-vis non-parties as overbroad and reiterated that courts "neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." 513 U.S. at 477-80. Thus, far from supporting the injunction's scope here, *NTEU* fairly mandates a narrowing.

B. The District Court Failed To Balance The Equities

Reversal is also warranted because the district court failed to conduct any meaningful balancing of equities in setting the injunction's scope. Opening Br.64-66. The district court did not *acknowledge*—let alone *meaningfully weigh*: (1) the irreparable harm to the State, (2) the expressly declared public policy of the United

States and Arizona, and (3) the exceedingly low number of other affected/objecting parties. *Id.*

Plaintiffs attempt (at 57-58) to argue that the district court *could* have discounted the irreparable harm to the State. But it did no such thing. And Plaintiffs' *post hoc* reasoning cannot substitute for actual equitable balancing *by the district court*.

Plaintiffs also attempt to defend the wholesale ignoring of the public policy declarations of Congress and the Arizona Legislature with a throwaway footnote (at 58 n.16) citing *Marbury v. Madison*, 5 U.S. 137 (1803). That is facile. Just as it is the "duty of the judicial department to say what the law is," *id.* at 177, it is equally, emphatically the duty of Congress to declare what U.S. public policy/public interest is. Ignoring those declarations entirely is legal error. Opening Br.65-66. And Plaintiffs' slapdash aphorism cannot obscure it.

Plaintiffs also do not meaningfully address the extremely low number of other objectors, which should have militated in favor of a narrower injunction. Opening Br.65-66. That silence concedes error.

C. The Injunction Should Be Narrowed.

The district court also should have tailored its injunction so that it did not reach boycotts that were (1) solely commercial or (2) where there is clear evidence of animus. Opening Br.67-68.

Plaintiffs do not directly address the first point, only contending (at 63) that it would not be permissible severance because "[t]he court cannot rewrite the Act." But the district court is of course free to write its *own injunction*. Enjoining concededly constitutional applications of the Act is textbook overbreadth. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1141 (9th Cir. 2009).

As to boycotts with clear discriminatory animus, Plaintiffs unmask just how extreme their position is. Plaintiffs argue (at 62-63) the State cannot prohibit—or even decline to subsidize—any political boycott, no matter the evidence of discriminatory animus, *unless* it is a boycott of employees or customers. Those the State is apparently "free" to prohibit—but only because those latter boycotts are purportedly "unexpressive conduct" (supposedly unlike printer and computer purchases). Answering Br.45.

Under Plaintiffs' reading, Congress would have been powerless to deny public funds or government contracts to avowed Jim-Crow segregationists who openly declared their intent to boycott purchasing all goods from African Americans, *specifically* because of alleged racial inferiority and sub-humanness. No volume of unambiguous evidence of racial animus, nor magnitude of pernicious economic harm, would permit the State even to deny the boycotts *public subsidies*. And, following Plaintiffs' logic, if courts ever conclude that decisions as to what employees to hire and customers to serve are as expressive as the

computer in Plaintiffs' private office, virtually *every* discriminatory boycott would enjoy absolute First Amendment protection.

That is a truly radical result that no appellate court has ever endorsed. And it flies in the face of federal courts' nearly unbroken history of upholding anti-discrimination measures against First Amendment challenges. Opening Br.46-47. This Court should refuse to endorse Plaintiffs' extremist position.

This overbreadth has important real-world implications: many BDS boycotters are not remotely shy about their anti-Semitic animus. *See* Agudath Israel Amicus Br. (Doc. 33-1) at 7-8. Particularly where discriminatory animus is undeniably clear, the State should be permitted to enforce the Act.

D. The District Court Erred By Failing To Analyze Severability

Vacatur is further warranted because: (1) the State expressly asked the district court to analyze severability, (2) it was required to do so, (3) it did not. Opening Br.16, 69-71; Answering Br.61-63. This Court should therefore vacate and remand for conducting that severability analysis in the first instance. *See Long Beach Area Peace Network v. Long Beach*, 574 F.3d 1011, 1044 (9th Cir. 2009).

Plaintiffs do half-heartedly argue (at 61-62) that the district court actually "did sever the statute" by not enjoining certain provisions. But Plaintiffs *conceded* below that those sections were "not at issue," FER.4 n.1, and sought no injunction for them. Nor did the district court ever use the word "sever." E.R.1-36.

Plaintiffs' other severability arguments also fail. They are largely premised (at 63) on a faux modesty of not having courts "rewrite the Act … [to] contravene the legislature's intent." But that concern is irrelevant where the Arizona Legislature enacted a maximalist severance provision, A.R.S. §35-393.03, thereby inviting all rewriting that would save any part of the Act. Opening Br.69-71. And Plaintiffs—like the district court—do not acknowledge *or even cite* this express severance provision. That is judicial activism, not modesty.

Moreover, severing the word "affiliate" or subsection 35-393(1)(a) are clean, easy cuts. Opening Br.69-71.

CONCLUSION

The district court's issuance of a preliminary injunction should be reversed.

Respectfully submitted,

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I, Drew C. Ensign, hereby certify that I electronically filed the foregoing State of Arizona's Reply 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 February 28, 2019, which will send notice of such filing to all registered CM/ECF users.

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