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8 *Attorneys for Amicus Curiae American Jewish Committee*

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Mikkell Jordahl; Mikkell (Mik) Jordahl, P.C.,

12 Plaintiffs,

13 v.

14 Mark Brnovich, Arizona Attorney General;
15 Jim Driscoll, Coconino County Sheriff; Matt
16 Ryan, Coconino County Board of Supervisors
17 Chair; Lena Fowler, Coconino County Board
of Supervisors Vice Chair; Elizabeth
18 Archuleta Coconino County Board of
Supervisors Member; Art Babbott, Coconino
19 County Board of Supervisors Member; Jim
Parks, Coconino County Board of
20 Supervisors Member; Sarah Benatar,
Coconino County Treasurer, all in their
official capacities,

21 Defendants.

NO. 3:17-CV-08263-DJH

**MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
AMERICAN JEWISH
COMMITTEE**

22
23 Proposed *amicus curiae*, the American Jewish Committee (“AJC”), by its
24 undersigned counsel, hereby respectfully moves the Court for leave to file *instanter* the
25 accompanying Brief of *Amicus Curiae* American Jewish Committee (the “Amicus
26 Brief”), a true and authentic copy of which is attached hereto as **Exhibit 1**. In support of
27 its motion, AJC submits the following incorporated Memorandum of Points and
28 Authorities:

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The American Jewish Committee (“AJC”) is a national organization dedicated to
 4 enhancing the well-being of Israel and the Jewish people worldwide and advancing
 5 human rights and democratic values in the United States and around the world. In
 6 accordance with its mission and values, AJC has spearheaded legislation and executive
 7 action to ensure that no unit of government is compelled to subsidize a contractor’s
 8 decision to boycott Israeli goods or services. To that end, AJC supports the certification
 9 requirement contained in House Bill 2617, A.R.S. § 35-393 et seq. (“HB 2617” or the
 10 “Act”), which the present lawsuit seeks to enjoin and declare unconstitutional. AJC
 11 moves in this case for *amicus curiae* status, to defend the Arizona Legislature’s
 12 enactment of HB 2617, and to demonstrate how the Act appropriately advances the
 13 State’s legitimate interest in protecting its commerce with Israel and not allowing public
 14 funds to be used to subsidize invidious or discriminatory boycotts, without infringing on
 15 private citizens’ First Amendment rights to free expression and association.

16 AJC can offer the Court important input on the legal and constitutional issues
 17 related to HB 2617, based on AJC’s extensive involvement in and support for this Act
 18 and similar statutes and executive orders in numerous other States. As *amicus*, AJC will
 19 work to avoid duplicative and excessive briefing of matters already addressed in the
 20 State’s Combined Response to Plaintiffs’ Motion for a Preliminary Injunction and
 21 Motion to Dismiss. (Dkt. No. 28). By participating as an *amicus*, AJC respectfully
 22 submits it can have a meaningful voice in this case of public importance, without
 23 unduly burdening the Court or parties. *See Silver v. Babbitt*, 166 F.R.D. 418, 435 (D.
 24 Az. 1994) (recognizing the sufficiency of *amicus* status to ensure that outside parties’
 25 concerns “are fully considered by this Court without adding unnecessary volume of
 26 pleadings or lengthening these proceedings”).

27 **II. INTEREST OF THE *AMICUS***

28 AJC is a national organization with more than 125,000 members and supporters

1 and 22 regional offices nationwide. It was founded in 1906 to protect the civil and
2 religious rights of American Jews. Its mission is to enhance the well-being of Israel and
3 the Jewish people worldwide, and to advance human rights and democratic values in the
4 United States and around the world. AJC frequently speaks out on issues of public
5 concern, including events in the Middle East, Israeli-Palestinian relations, and anti-
6 Semitism.

7 AJC opposes the use of public funds to support the so-called Boycott,
8 Divestment, and Sanctions (“BDS”) movement, which markets itself as a non-violent
9 movement to boycott, divest from, and sanction Israel with the putative goal of getting it
10 to withdraw to its pre-1967 borders, but whose leadership in fact seeks and has actively
11 promoted the elimination of Israel as a Jewish state. AJC has actively sought to rally
12 elected officials to reject the BDS movement, and has been a leader in supporting
13 legislation to ensure that no unit of government is compelled to subsidize invidious or
14 discriminatory boycotts of Israeli goods or services. AJC supports the HB 2617, and
15 opposed Plaintiffs’ efforts to enjoin that Act and declare it unconstitutional.

16 Plaintiffs misconstrue and mischaracterize HB 2617 as a restraint on personal
17 boycotts, as well as related acts of expression and association. That is not the Act’s
18 scope or effect. Though AJC vocally and vigorously opposes the BDS movement, it
19 fully supports each citizen’s right to engage in personal boycotts as an expression of his
20 or her individual social, political, religious, or moral beliefs. The Act is not intended to
21 reach, and should not reasonably be construed to reach, such personal conduct. Rather,
22 the Act expresses the State’s legitimate interest in ensuring that public funds are not
23 used to subsidize a contractor’s engagement in boycotts or other BDS activities that
24 either impair the State’s commerce with Israel or are carried out in a manner that
25 discriminates on the basis of nationality, national origin or religion and that is not based
26 on a valid business reason. The State is not obliged to expend public resources to
27 subsidize such activities.

28 HB 2617 protects the State’s legitimate government interest by requiring State

1 contractors to certify that they are not participating in such boycotts of Israel with
 2 respect to the contracted goods or services they are supplying. Protecting this interest
 3 need not and does not impede individual expression or association. The Act cannot be
 4 construed to prevent individuals from participating in boycotts in their personal
 5 capacities. And it cannot be construed to prevent individuals from expressing their
 6 personal views regarding boycotts or associating with others who share their views.
 7 AJC therefore respectfully requests leave to submit its *Amicus* Brief to clarify the
 8 legitimate and constitutional scope of the Act.

9 **III. ARGUMENT**

10 **A. This Court Has the Authority to Permit *Amicus* Participation**

11 The Federal Rules of Civil Procedure are silent on the subject of *amicus curiae*
 12 briefs at the district court level. *Cf.* Fed. R. App. P. 29 (governing filing of amicus briefs
 13 at the appellate level). Nonetheless, the Ninth Circuit has acknowledged this Court’s
 14 inherent discretionary authority to appoint *amici* and receive *amicus* briefs. *See Fisher*
 15 *v. Arizona*, 594 Fed. Appx. 917, 919 (9th Cir. 2014); *All. of Nonprofits for Ins., Risk*
 16 *Retention Grp. v. Kipper*, 712 F.3d 1316, 1328 (9th Cir. 2013); *Hoptowit v. Ray*, 682
 17 F.2d 1237, 1290 (9th Cir. 1982), *abrogated in part on other grounds by Sandin v.*
 18 *Connor*, 515 U.S. 472 (1995). “District courts have broad discretion to appoint or reject
 19 *amici curiae*.” *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, 2010 WL
 20 11452277, at *19 n.15 (D. Ariz. Oct. 8, 2010) (citing *Hoptowit*). “*Amici* may properly
 21 ‘take a legal position and present legal arguments in support of it.’” *Id.* (quoting *Funbus*
 22 *Sys., Inc. v. Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (internal
 23 citation omitted)). Indeed, “[d]istrict courts frequently welcome amicus briefs from non-
 24 parties concerning legal issues that have potential ramifications beyond the parties
 25 directly involved or if the amicus has ‘unique information or perspective that can help
 26 the court beyond the help that the lawyers for the parties are able to provide.’” *NGV*
 27 *Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal.
 28 2005), *disapproved on other grounds in later proceedings sub nom. Guidiville Band of*

1 *Pomo Indians v. NGV Gaming Ltd.*, No. C 04-3955-SC, 2005 WL 5503031 (N.D. Cal.
2 Oct. 19, 2005), *rev'd in part, vacated in part*, 531 F.3d 767 (9th Cir. 2008).

3 This Court has repeatedly granted *amicus* status to allow an interested outside
4 party to express its views on questions of public importance by means short of
5 intervention. *See, e.g., WildEarth Guardians v. Provencio*, No. CV-16-08010-PCT-
6 SMM, 2017 WL 4286189, at *1 (D. Ariz. Sept. 26, 2017); *Peters v. LifeLock Inc.*, No.
7 CV-14-00576-PHX-ROS, 2014 WL 12544495, at *8 (D. Ariz. Sept. 19, 2014); *Harris*
8 *v. Arizona Indep. Redistricting Comm'n*, No. CV-12-0894-PHX-ROS, 2012 WL
9 5835336, at *7 (D. Ariz. Nov. 16, 2012); *Grand Canyon Tr. v. U.S. Bureau of*
10 *Reclamation*, No. CV-07-8164-PHX-DGC, 2010 WL 2643537, at *31 (D. Ariz. June
11 29, 2010), *aff'd in part, appeal dismissed in part*, 691 F.3d 1008 (9th Cir. 2012), *as*
12 *amended* (Sept. 17, 2012). An *amicus* is not required to be disinterested in the outcome
13 of a case. *Funbus Systems, Inc. v. California Public Utilities Com.*, 801 F.2d 1120,
14 1124-25 (9th Cir.1986). To the contrary, it is “perfectly permissible” for an *amicus* to
15 “take a legal position and present legal arguments in support of it[.]” *Id.* at 1125. *See*
16 *also Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir.
17 1982). *Amici* help the Court by “assisting in a case of general public interest,
18 supplementing the efforts of counsel and drawing the court’s attention to law that might
19 otherwise escape consideration.” *Funbus Systems*, 801 F.2d at 1125.

20 **B. AJC Should Be Granted Leave to File Its Proposed *Amicus* Brief**

21 AJC has an interest in this litigation that aligns with, but differs in some respects
22 from, the interests of the State of Arizona and the other state and local parties. As a
23 vocal opponent of the BDS movement, and a strong supporter of HB 2617 and other
24 statutes and executive orders pursuing similar aims across the country, AJC supports the
25 Act’s constitutionality and enforcement. At the same time, as an advocate of the civil
26 and religious rights of American Jews, as well as human rights and democratic values in
27 the United States and around the world, AJC has a strong interest in the exercise of free
28 expression and association in support of one’s personal political, religious, or moral

1 beliefs. AJC fundamentally disagrees with Plaintiffs’ premise that HB 2617 impairs or
2 impedes Plaintiffs’ exercise of their expressive or associational rights, and respectfully
3 seek leave to show this Court why the Act—and its statutory and executive counterparts
4 in twenty-three other States—is not at odds with the First Amendment rights of free
5 expression and free association.

6 AJC’s proposed *Amicus* Brief takes the legal position and presents legal
7 arguments that HB 2617 is constitutional as written and applied, and that it does not
8 and, properly construed, cannot chill Plaintiffs’ First Amendment rights in the manner
9 asserted in their pleadings and moving papers. AJC respectfully submits that Plaintiffs
10 have misconstrued and mischaracterized HB 2617 as applied to each Plaintiff, and that
11 their fears about it are consequently misplaced. With respect to the individual named
12 Plaintiff Mikkel Jordahl (“Mr. Jordahl”), AJC would show that he is correct in his
13 acknowledged view that the Act does not apply to his personal participation in a
14 political boycott, nor does it restrain or limit his activities of expression or association
15 relating to his personal participation in such a boycott. Accordingly, his fears about his
16 personal, vocal advocacy are ill-founded; he is free to continue to express himself. With
17 respect to the law firm Plaintiff Mikkel (Mik) Jordahl, P.C. (the “Firm”), AJC would
18 show that it is incorrect in its view that the Act in any way limits its expressive or
19 associative activities. The Act only requires that a government contractor, in its capacity
20 as a contractor, certify that it is not currently engaged in a boycott that impairs the
21 State’s commerce with Israel or is carried out in an unlawfully discriminatory manner.
22 The State has the right to seek such a certification in furtherance of its legitimate
23 interest in ensuring that it is not forced to subsidize invidious or discriminatory political
24 boycotts at taxpayer expense. The enforcement of this legitimate interest does not
25 prevent contractors from continuing to express their political views or to associate with
26 organizations sharing their political views. The Firm remains free to express itself and
27 to associate itself politically with other organizations.

28 For these reasons, AJC would show this Court that this lawsuit is not grounded in

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1 the text, purpose, or scope of HB 2617 or any genuine restrictions it imposes, but rather
2 in Plaintiffs' misreading of the Act and unnecessary self-imposed restraints that the Act
3 neither sought nor required. To grant preliminary injunctive relief under these
4 circumstances, where a plain text reading of the Act is sufficient to avoid constitutional
5 concerns, is injudicious. Moreover, a hasty ruling by this Court granting such injunctive
6 relief would impact not only the legitimate aims advanced by HB 2617, but could also
7 serve as adverse precedent with respect to the laws of the twenty-three other States that
8 have adopted legislation or executive orders toward the same end of protecting the
9 States' commerce with Israel and preventing governmental subsidies of discriminatory
10 boycotts. (Dkt. No. 28, App. A).

11 AJC believes these legal arguments and its supporting authorities would be
12 helpful to the Court in its review, analysis, and disposition of Plaintiffs' pending motion
13 for preliminary injunction. No party and no counsel for a party (a) authored the *Amicus*
14 Brief in whole or in part, (b) requested or solicited AJC's involvement or the *Amicus*
15 Brief, or (c) made any monetary contribution intended to fund the preparation or
16 submission of the *Amicus* Brief. AJC therefore requests leave to file its *Amicus* Brief
17 with the Court.

18 WHEREFORE, AJC respectfully requests that the Court (1) grant AJC leave to
19 file its *Amicus* Brief, *instanter*; and (2) grant such other and further relief as the Court
20 deems necessary or appropriate.

21 DATED this 2nd day of February, 2018.

22 GREENBERG TRAUIG, LLP

23
24 By: /s/ Brian J. Schulman
25 Brian J. Schulman
26 Gregory E. Ostfeld
(*pro hac vice* application forthcoming)

27 *Counsel for Amicus Curiae*
28 *American Jewish Committee*

CERTIFICATE OF SERVICE

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I hereby certify that on February 2, 2018, I electronically transmitted the attached document to the Clerk’s Office using CM/ECF System for filing and distribution to all registered participants of the CM/ECF System:

By: /s/ Amy L. Hershberger
Employee, Greenberg Traurig, LLP

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