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19  
 20 **IN THE UNITED STATES DISTRICT COURT**  
 21 **FOR THE DISTRICT OF ARIZONA**

22 Mikkell Jordahl, et al.,  
 23 Plaintiffs,  
 24 v.  
 25 Mark Brnovich, Arizona Attorney  
 General, et al.,  
 26 Defendants.  
 27

Case No. 3:17-cv-08263-PCT-DJH  
**MOTION FOR LEAVE TO FILE  
 BRIEF AS AMICI CURIAE IN  
 SUPPORT OF DEFENDANTS  
 AND MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT THEREOF**

1 The States of Texas and Nevada, by and through counsel, and pursuant  
2 to Federal Rule of Civil Procedure 7 and L.R. Civ. 7.2, move for leave to file  
3 the attached Proposed Brief as amici curiae in support of Defendants. This  
4 motion is supported by the following memorandum of points and authorities.

5  
6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7  
8 **ARGUMENT**

9 Although the Court does not have specific rules governing briefs of amici  
10 curiae, Federal Rule of Appellate Procedure 29(b) provides an appropriate  
11 analogy. First, Rule 29(a) gives states an absolute right to file an amicus  
12 curiae brief without the consent of the parties or leave of court. *See Fed. R.*  
13 *App. P. 29(a)* (“a state may file an amicus-curiae brief without the consent of  
14 the parties or leave of court.”). Here, Amici sought the consent of the parties,  
15 and Defendants consent to the filing of this brief, and Plaintiffs take no  
16 position. Given the potentially far-reaching implications of this Court’s  
17 decisions in this case, the Court should exercise its discretion to permit Texas  
18 and Nevada to serve as amici curiae.

19 Potential amicus curiae who are not a State must seek leave of Court to  
20 file a brief. Texas and Nevada satisfy this standard as well. Under Rule 29(b),  
21 a potential amicus curiae must (1) explain its interest, (2) the reason why an  
22 amicus brief is desirable, and (3) why the matters asserted are relevant to the  
23 case. The Court possesses discretion to grant leave, regardless of the parties’  
24 positions. The term “amicus curiae” means “friend of the court”—one who can  
25 “aid the court in resolving doubtful issues of law.” *United States v. Michigan*,  
26 940 F.2d 143, 165 (6th Cir. 1991). But “there is no rule that amici must be  
27 totally disinterested.” *Funbus Sys., Inc. v. Cal. Pub. Util. Comm’n*, 801 F.2d  
28 1120, 1125 (9th Cir. 1986). And here, Texas and Nevada “fulfill[] the classic

1 role of amicus curiae by assisting in a case of general public interest,  
2 supplementing the efforts of counsel, and drawing the court's attention to law  
3 that [may] escape[] consideration." *Miller-Wohl Co. v. Comm'r of Labor &*  
4 *Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982)

5 As set forth below, proposed amici curiae will assist the Court in  
6 understanding why nearly half the States have laws similar to Arizona's  
7 A.R.S. § 35-393, and why such laws do not offend the constitutional rights of  
8 state-government contractors. With respect to laws of such importance to so  
9 many states, and given the magnitude of the constitutional questions, the  
10 Court should receive the fullest possible briefing.

#### 11 **I. Interest of Amici Curiae**

12 Amici Curiae are the States of Texas and Nevada. Both States, like  
13 Arizona, are among twenty-four total States that have laws restricting  
14 government contractors from boycotting Israel or Israelis. Defs.' Combined  
15 Resp. to Pls.' Mot. for Prelim. Inj. & Mot. to Dismiss, App. A, ECF No. 28.  
16 Texas enacted H.B. 89 in 2017 by wide, bipartisan margins (unanimously in  
17 the Texas House of Representatives, and 26 yeas to 5 nays in the Texas  
18 Senate). Similarly, Nevada enacted S.B. 26 in 2017, also by wide, bipartisan  
19 margins (unanimously in the Nevada Assembly, and 19 yeas to 2 nays in the  
20 Nevada Senate). In the United States, Texas is Israel's largest trading  
21 partner, and Nevada is the tenth largest. These States' desire to maintain  
22 close economic and diplomatic ties to one of the United States' closest allies,  
23 and their interest in laws that prohibit state contractors from nationality-  
24 based boycotts, give them a strong interest in the outcome of this case.

#### 25 **II. Amici's Proposed Brief Provides Context for Arizona's Law, and** 26 **Similar Laws in Nearly Half the States.**

27 As noted by Defendants, since 2015, twenty-four states passed laws  
28 prohibiting government contractors from boycotting Israel or Israelis on

1 certain grounds. *See* Defs.’ Resp., App. A. Amici’s proposed brief details that  
2 laws requiring or prohibiting state government contractors from engaging in  
3 different types of conduct are widespread, well established, and  
4 constitutional. In particular, government may prohibit businesses from  
5 contracting to perform state functions if those businesses discriminate on the  
6 basis of protected characteristics like nationality. *See, e.g.*, Exec. Order No.  
7 11246 (“Nondiscrimination in Employment by Government Contractors and  
8 Subcontractors”), 1965 WL 98356; NRS 338.017. States also prefer potential  
9 contractors who are in-state residents, Tex. Gov. Code § 2252.002; A.B. 280, §  
10 5, 2017 Leg., 79th Sess. (Nev. 2017), and historically underutilized businesses  
11 operated by women, veterans, and racial minorities, *id.* § 2161.001–.003.  
12 (These twenty-four state laws are new and may vary in scope or application;  
13 Amici should be understood to be arguing in reference to laws materially like  
14 Arizona’s, as the analogue laws in Amici States are.)

15 **III. Amici’s Proposed Brief Discusses Why Arizona’s Law Advances**  
16 **the State’s Power to Place Requirements and Restrictions on**  
17 **Government Contracts and Furthers its Anti-Discrimination**  
18 **Interests.**

19 Amici’s proposed brief argues that Arizona’s refusal to spend its  
20 money in ways that countenance nationality-based boycotts is simply an  
21 application of two well-established doctrines. First, States can place conduct-  
22 based conditions or qualifications on independent contractors who seek to  
23 obtain the discretionary business of those States. And second, States, among  
24 these restrictions, may disallow contractors from engaging in discrimination  
25 on the basis of certain well-defined protected characteristics. For these  
26 reasons, the Court should uphold Arizona’s law.  
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**CONCLUSION**

For the foregoing reasons, Texas and Nevada respectfully request that the Court grant them leave to file a brief as amici curiae and order the Clerk of Court to file the attached proposed brief on the docket.

Respectfully submitted this 8th day of February, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2018, I filed the foregoing document with the Clerk of the Court via CM/ECF, which automatically sends notice of the filing to all counsel of record.

*/s/ David J. Hacker*  
DAVID J. HACKER