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18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF ARIZONA**

20 Mikkel Jordahl; Mikkel (Mik) Jordahl,
21 P.C.,

22 Plaintiffs,

23 vs.

24 Mark Brnovich, Arizona Attorney
25 General; Jim Driscoll, Coconino County
26 Sheriff; Matt Ryan, Coconino County
27 Board of Supervisors Chair; Lena
28 Fowler, Coconino County Board of
Supervisors Vice Chair; Elizabeth
Archuleta Coconino County Board of
Supervisors Member; Art Babbott,
Coconino County Board of Supervisors
Member; Jim Parks, Coconino County
Board of Supervisors Member; Sarah
Benatar, Coconino County Treasurer, all
in their official capacities,

Defendants.

Case No: 3:17-cv-08263-PCT-DJH

**STATE'S REPLY TO RESPONSE IN
SUPPORT OF ITS MOTION TO
DISMISS**

Oral Argument Requested

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1 implicating Israel, which illustrates how Plaintiffs’ boycott falls outside the Act. *Id.* at 9.

2 The statutory language is clear that Plaintiffs’ boycott does not fall within the
3 Act’s scope. But if there is any doubt, this Court should either certify that question or
4 abstain under *Pullman*—particularly given the importance of the issues and the lack of
5 any state court decision addressing the Act. *See, e.g., Lehman Bros. v. Schein*, 416 U.S.
6 386, 391 (1974) (certification is “particularly appropriate in view of the novelty of the
7 question and the great unsettlement of [state] law.”).

8 **II. PLAINTIFFS’ CONDUCT IS NOT “INHERENTLY EXPRESSIVE”**

9 Both Supreme Court and Ninth Circuit precedent make plain that “First
10 Amendment protection does not apply to conduct that is not ‘inherently expressive.’”
11 MTD at 19 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014)). Plaintiffs
12 never dispute this. Thus, if Plaintiffs’ conduct is not “inherently expressive,” virtually all
13 of Plaintiffs’ arguments fail on this threshold ground. And that is just the case.

14 *Rumsfeld v. FAIR* is perfectly clear that if (as here) someone has to explain with
15 speech the expressive message of the conduct at issue, that conduct is *not* inherently
16 expressive. In *FAIR*, the plaintiffs’ First Amendment expressive conduct claim failed
17 because the “actions [at issue] were expressive only because [plaintiffs] accompanied
18 their conduct with speech explaining it.” 547 U.S. at 66. That is even more true here
19 than in *FAIR*. Plaintiffs offer no explanation for how anyone would be likely to perceive
20 the expressive message of Plaintiffs’ purchase of an HP printer versus one from Canon or
21 Lexmark as relating to Israeli governmental policies. Indeed, *Plaintiffs effectively admit*
22 *as much*, explaining that: “***These decisions are expressive because Mr. Jordahl***
23 ***explicitly characterizes them*** as part of his participation in a BDS boycott.” *Opp.* at 16
24 (emphasis added). Plaintiffs’ admission is fatal under *FAIR*—because Plaintiffs’ conduct
25 is purportedly expressive only because of Plaintiffs’ own characterization and
26 explanatory speech, *FAIR* mandates dismissal. 547 U.S. at 66; MTD at 20-21.

27 Plaintiffs attempt to distinguish *FAIR* by contending that Plaintiffs’ boycott is a
28 “political boycott,” while *FAIR*’s was not. *Opp.* at 7 (“*Rumsfeld* is inapplicable here

1 because political boycotts, including BDS boycotts, are inherently expressive.”). That is
2 specious. The boycott in *FAIR* was patently political: the law schools disagreed
3 politically with the military’s “Don’t Ask, Don’t Tell” policy. That disagreement *about*
4 *governmental policy*—which led to boycotting all military on-campus recruiting—was a
5 “political boycott” under *any* reasonable understanding of that term. Nor does the
6 decision in *Koontz* provide any basis for disguising *FAIR*.² And aside from contending
7 that *FAIR* did not involve a “political boycott,” Plaintiffs do not offer *any* other argument
8 why *FAIR* does not apply here. It does, and is dispositive of Plaintiffs’ claims.

9 It is equally clear that *Longshoremen* involved a “political boycott”—and, as here,
10 a secondary boycott. There the boycott’s sole basis was the union’s political dispute with

11
12 ² Plaintiffs rely on *Koontz v. Watson*, No. 17-4099-DDC-KGS, 2018 WL 617894 (D.
13 Kan. Jan. 30, 2018), in support of this distinction. But *Koontz* cannot save Plaintiffs’
14 claim. As an initial matter, Kansas’s brief in that case did not address the merits of the
15 First Amendment claim there, or indeed ever use the words “First Amendment”—as
16 Plaintiffs’ counsel gleefully has noted. See Brian Hauss, *Kansas Doesn’t Even Try to*
17 *Defend Its Israel Anti-Boycott Law* available at [https://www.aclu.org/blog/kansas-doesnt-](https://www.aclu.org/blog/kansas-doesnt-even-try-defend-its-israel-anti-boycott-law)
18 *even-try-defend-its-israel-anti-boycott-law* (last visited March 15, 2018). As Plaintiffs’
19 counsel aptly observed, “The state quite literally has no defense for the law’s First
20 Amendment [alleged] violations.” *Id.* Because the merits of the First Amendment claim
21 were not briefed, *Koontz* is thus best understood as being akin to a default judgment,
22 rather than any meaningful adjudication of the First Amendment merits.

23 In any event—and perhaps unsurprisingly given the completely one-sided nature of the
24 briefing—*Koontz* profoundly misapprehended the governing law. *Koontz* simply
25 asserted—without any explanation—that the political boycotts in *FAIR* and *Koontz* were
26 somehow different: “Because the Kansas Law regulates inherently expressive conduct
27 and forces plaintiff to accommodate Kansas’s message, it is unlike the law at issue in
28 *Rumsfeld*.” 2018 WL 617894, at *11. But the *Koontz* court did not identify any facets of
Koontz’s boycott that were any different from *FAIR*. Notably, both involved boycotts
and both were motivated by disagreements with governmental policy set forth by statute.
Koontz does not provide a single intelligible or principled basis for distinguishing
between the inherent expressiveness of political boycotts in *FAIR* and *Koontz*. Nor could
it. Moreover, *Koontz* also does not attempt to address *Longshoremen*, *FTC* or *Briggs*
(likely because none of those cases were brought to the court’s attention).

 In addition, the Kansas statute applied to all state contracts “with an individual or
company,” Kan. Stat. Ann. § 75–3740f(a), thus reaching *consumer* boycotts like *Koontz*’s.
In contrast, Arizona’s act only applies to “companies,” and thus commercial boycotts.

 It is also worth noting that even *Koontz* explained that “Conduct is inherently
expressive when someone understands that the conduct is expressing an idea without any
spoken or written explanation.” *Id.* Given Plaintiffs’ admission (at 16) that their boycott
is expressive precisely (and only) because of how Jordahl has “characterized” it with
speech, Plaintiffs’ boycott necessarily enjoys no protection even under *Koontz*.

1 the U.S.S.R.’s policy in Afghanistan. But the *Longshoremen* union’s political boycott
2 did not enjoy any First Amendment protection *at all*. 456 U.S. at 226-27. That was the
3 case even though the *Longshoremen*’s boycott involved actual picketing—*i.e.*, conduct
4 that is *far* more expressive than printer purchases and other business supply decisions.

5 Plaintiffs (at 6) half-heartedly try to distinguish *Longshoremen* on the sole basis
6 that “Plaintiffs are not engaged in a secondary labor boycott.” But Plaintiffs do not
7 acknowledge the untethered, unsupported premise underlying that skeletal assertion—
8 that unions somehow enjoy lesser First Amendment rights than Jordahl’s business entity.

9 Faced with the fact that the content of their boycott is not inherently expressive,
10 Plaintiffs retreat to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Under
11 *Claiborne*, Plaintiffs argue that *all* conduct that is part of a “political boycott” is *always*
12 inherently expressive as a matter of law, even where it is obvious (as here) that the
13 conduct is not inherently—or even modestly—expressive as a matter of fact. *Claiborne*
14 cannot bear the weight Plaintiffs put upon it for four reasons.

15 *First*, Plaintiffs’ position that any conduct connected to “political boycotts” is
16 inherently expressive is contrary to *FAIR* and would lead to absurd results. For example,
17 Plaintiffs apparently contend that Plaintiffs’ purchase of an HP desktop computer that
18 would be exclusively used in Jordahl’s personal office is “inherently expressive” even
19 though no client has ever set foot in that office, Dep. 80:12-15, 47:2-48:11—and thus no
20 one could even conceivably perceive whatever message the computer purports to convey.
21 That is specious. Under that view, Plaintiffs’ continued use of an HP printer would
22 similarly be “inherently expressive” even if the HP decal had fallen off or become
23 illegible. But such a decal-less printer is not expressive *at all*, let alone *inherently*
24 expressive. Similarly, by contending that all acts constituting a “political boycott” are
25 inherently expressive as a matter of law, Plaintiffs’ position would presumably extend
26 constitutional protection to acts like speeding on the way to a boycott meeting. While
27 such an act lacks any expressive value, Plaintiffs’ position offers no basis for avoiding
28 this absurd outcome.

1 *FAIR* rejected such bootstrapping and judged whether each relevant act was
2 inherently expressive. 547 U.S. at 64-66. Plaintiffs cannot simply cry “political boycott”
3 and thereby hand-wave off any analysis of how expressive the acts in question truly are.

4 *Second, Claiborne* addressed a consumer boycott by individuals, rather than a
5 commercial boycott by businesses. See MTD at 28. Plaintiffs contend (at 4) that the
6 commercial nature of the regulated boycotts is irrelevant. But Plaintiffs themselves
7 attempt to distinguish *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984),
8 on the commercial nature of the conduct at issue there. Opp. at 6-7. Moreover, the
9 Supreme Court’s decision in *FTC v. Superior Court Trial Lawyers Ass’n* specifically
10 declined to extend protection to a political boycott because of the commercial nature and
11 interest of the boycott and its participants. 493 U.S. 411, 426 (1990).

12 *Third, the Claiborne* boycott “sought only the equal respect and equal treatment to
13 which [the African-American boycotters] were constitutionally entitled.” *FTC*, 493 U.S.
14 at 426. Contrary to Plaintiffs’ suggestion (at 5), this distinction was not invented by the
15 State but is rather a direct quotation from the Court’s decision in *FTC*—which
16 substantially relied on the fact that the *Claiborne* boycott sought *only* to vindicate
17 constitutional rights in holding that the *political boycott* in *FTC* was not protected under
18 the First Amendment. 493 U.S. at 426-27.

19 *Fourth, Longshoremen* is *far* closer to the present circumstances than *Claiborne*:
20 involving a commercial boycott aimed against a foreign nation due to disagreements with
21 its policies, rather than a domestic consumer boycott aimed at securing constitutional
22 rights to which the boycotters were already entitled.

23 **III. PLAINTIFFS’ FIRST AMENDMENT CHALLENGES FAIL**

24 Even if Plaintiffs’ conduct were inherently expressive, Plaintiffs’ First
25 Amendment claim would still fail.

26 **A. The State’s Powerful Interests Overwhelm Any First Amendment** 27 **Interest Asserted Here**

28 Plaintiffs make the categorical and absolutist claim (at 10) that “Political boycotts

1 cannot be regulated.” That is demonstrably false. The outcomes of *FAIR*, *FTC*, and
2 *Longshoremen*—all of which involved political boycotts—alone demonstrate that there is
3 nothing talismanic about the characterization “political boycott.” Political boycotts have
4 actually fared poorly in federal courts. Indeed, aside from *Koontz*—effectively a default
5 judgment on the First Amendment issues, *supra* at 4 n.2—Plaintiffs have cited no case
6 that has *ever* applied *Claiborne* to strike state regulation of a political boycott.

7 Even if Plaintiffs’ boycotting conduct were inherently expressive, the State has
8 explained how its powerful interests in regulating commerce and eliminating invidious,
9 status-based discrimination in the buying and selling of goods are more than sufficient to
10 justify any burden on Plaintiffs’ First Amendment rights. MTD at 22-25.

11 Plaintiffs offer a smattering of skeletal reasons why the State’s interests are
12 insufficient here, but none of them withstands scrutiny. *First*, Plaintiffs argue (at 22) that
13 subsection (A) of the statute shows that the statute is not a valid anti-discrimination
14 statute because subsection (B) already addresses discrimination. But subsection (B) only
15 addresses specific discriminatory intent, while subsection (A) address conduct that is
16 likely to be discriminatory in effect. Statutes banning discriminatory effect have been
17 widely upheld against constitutional challenge.³ *Second*, Plaintiffs argue anti-
18 discrimination statutes must yield to the First Amendment, citing *Hurley v. Irish-Am.*
19 *Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995).⁴ But *Hurley*
20 involved forced inclusion into an inherently expressive gathering (a parade), and did not
21 involve regulation of commercial conduct *at all*.⁵

22 Plaintiffs conclude (at 23) with a parade of horrors under which the State

23 ³ For example, the Americans with Disabilities Act (“ADA”) prohibits both intentional
24 discrimination *and* discriminatory effect. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1483-
25 84 (9th Cir. 1996). But that hardly renders the ADA an unconstitutional anti-
discrimination statute. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).

26 ⁴ Plaintiffs also argue the Act’s anti-discrimination provisions are impermissibly content-
or viewpoint-based, which fails for the reasons discussed next. *See infra* at 8-9.

27 ⁵ Plaintiffs contend (at 20-21) that the Act is not narrowly tailored. That argument
28 appeared in neither their initial motion nor their Complaint, and is thus waived. It further
fails because strict scrutiny does not apply. To the extent that strict scrutiny or *O’Brien*
would apply, the applicable requirements are satisfied. *See* MTD at 25.

1 supposedly “could have invoked its antidiscrimination interests to suppress the campaign
2 to boycott apartheid South Africa.” But Plaintiffs ignore that their arguments would
3 necessarily mean the State would have been powerless to *require* that government
4 contractors boycott apartheid South Africa (as numerous states did).⁶ Nor do Plaintiffs
5 answer the State’s argument that Plaintiffs’ position could effectively unravel all
6 sanctions laws on First Amendment grounds. *See* MTD at 28-29 n.19. Plaintiffs thus
7 never genuinely grapple with the obvious consequences of accepting their arguments.

8 **B. The Act Is A Valid Viewpoint-Neutral, Anti-Discrimination Statute**

9 Plaintiffs also contend the Act is impermissible content-based or viewpoint-based
10 regulation of speech. That argument fails as an initial matter because Plaintiffs’ conduct
11 is not inherently expressive. But even if that were otherwise, it is well-established that
12 anti-discrimination laws “make[] no distinctions on the basis of the organization’s
13 viewpoint.” *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549
14 (1987). Indeed, “[F]ederal and state antidiscrimination laws ... [are] *permissible content-*
15 *neutral regulation[s] of conduct.*” *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993)
16 (emphasis added). That result follows inexorably from the fact that discrimination is
17 banned regardless of the underlying viewpoint (*e.g.*, actual discriminatory motive or
18 trying to curry favor with bigoted customers). *See* MTD at 24 & n.13. The Act here, for
19 example, would apply equally to a Jewish individual originally from Israel who is
20 boycotting Israel because he believes the Israeli governmental policy has been too soft
21 and that Israel should never have withdrawn its occupation of Gaza.

22 Plaintiffs do not appear to challenge this general and deep-rooted principle of the
23 constitutionality and viewpoint-neutrality of anti-discrimination laws. But they argue the
24 Act should be the first anti-discrimination statute *ever* struck down as impermissibly
25 content- or viewpoint-based because the Act “applies to boycotts of only one country.”
26 *Opp.* at 2. Anti-discrimination laws, however, have *never* been constitutionally suspect

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28 ⁶ Moreover, because any such law would obviously target just one country, Plaintiffs would apparently condemn it on that basis as well. *Opp.* at 2.

1 for banning only certain types of discrimination. The federal government may, for
2 example, permissibly ban discrimination against race but not height. That might
3 conceivably be content-based regulation of discrimination, but that has *never* presented a
4 First Amendment concern. *See, e.g., Mitchell*, 508 U.S. at 487.

5 Indeed, Congress has only prohibited some *types* of age discrimination: *i.e.*,
6 discrimination against the old but not the young. *See* 29 U.S.C. § 621. In doing so, the
7 Act might be considered viewpoint-based: endorsing the “viewpoint” that discrimination
8 against the old is bad but discrimination against the young is fine. But the ADEA has
9 repeatedly survived constitutional challenge. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226
10 (1983). The same result should obtain here: the Act’s focus on prohibiting discrimination
11 against Israelis and not other nationalities raises no First Amendment concerns.

12 Even more closely on point, the statute in *FAIR* could easily be characterized as
13 content- or viewpoint-based. It was quite obviously targeted at a single viewpoint: those
14 opposing the military’s policy of excluding gay service-members. 547 U.S. at 51. But
15 that argument—which Plaintiffs’ counsel specifically made in *FAIR*⁷—obviously did not
16 carry the day, or even secure the vote of a *single* Justice.

17 **C. The Act’s Certification Requirement Does Not Mandate Speech**

18 Plaintiffs also now assert that the mere act of signing a certification under the Act
19 constitutes compelled speech. *Opp.* at 11-17. Not so.

20 The act of signing a certification is merely incidental to the regulation of conduct
21 by the Act. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“[T]he State does
22 not lose its power to regulate commercial activity ... whenever speech is a component of
23 that activity.”). *FAIR* makes that much clear: “Congress, for example, can prohibit
24 employers from discriminating in hiring on the basis of race. The fact that this will
25 require an employer to take down a sign reading ‘White Applicants Only’ hardly”
26 presents a constitutional issue. 547 U.S. at 62. Plaintiffs’ signature on the certification is

27 _____
28 ⁷ *See* Brief of ACLU et. al, *FAIR*, 2005 WL 2376813, at *15 (Sept. 21, 2005) (“[T]he
Solomon Amendment ... regulates speech ... in a viewpoint discriminatory manner.”).

1 even more attenuated from actual speech than the “White Applicants Only” sign.

2 More generally, the government constantly and permissibly requires similar
3 certifications. Indeed, “Innumerable federal and state regulatory programs require the
4 disclosure of ... commercial information.” *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d
5 104, 116 (2d Cir. 2001). Individuals, for example, must file tax return that “compel”
6 them to state their income, but that hardly makes a compelled speech claim. *Cf. Todd v.*
7 *United States*, 849 F.2d 365, 370 (9th Cir. 1988). Nor do tax returns compel taxpayers to
8 endorse the underlying tax policy, rates and equities; only to certify the statements in the
9 tax return are truthful. So too with Plaintiffs’ concern (at 16) that signing the certification
10 “require[s] Mr. Jordahl to endorse the State’s message of opposition to BDS.”

11 Similarly, the federal and state governments regularly require recipients of public
12 funds to certify that they do not discriminate on the basis of race, gender, etc. *See, e.g.,*
13 *Exec. Order No. 11,246 § 203* (1965). Such certifications neither compel any speech nor
14 impermissibly require government contractors to endorse the government’s position that
15 discrimination should be prohibited. They merely (as here) require a certification of what
16 conduct contractors are engaged in. Accepting Plaintiffs’ arguments here could thus
17 severely hamper governments’ ability to enforce their anti-discrimination laws and to
18 prevent public funds from being spent on companies engaged in invidious discrimination.

19 **D. The Act Merely Denies A Subsidy To Plaintiffs’ Conduct And Is**
20 **Therefore Not An Unconstitutional Condition**

21 Even if the State could not directly prohibit boycotts against Israel, the First
22 Amendment does not compel the State to subsidize such boycotts with public funds.
23 Indeed, even if engaging in political boycotts were a fundamental right, “a legislature’s
24 decision not to subsidize the exercise of a fundamental right does not infringe the right.”
25 *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983).

26 Notably, Plaintiffs’ themselves admit (at 25-26 n.10) that “[f]unding conditions
27 requiring an entity to comply with antidiscrimination laws primarily regulate unprotected
28 conduct,” and thus do not violate the First Amendment. Plaintiffs appear to contend that

1 the Act is somehow not an “antidiscrimination law,” but it plainly is. And just as
2 requiring government contractors not to discriminate on the basis of race and gender does
3 not interfere with contractors’ ability to express their views about whether such
4 discrimination is bad or good, the Act similarly does not “requir[e] contractors to
5 accommodate a government message or disavow protected expression.” Opp. at 26 n.10.

6 Plaintiffs’ reliance on *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133
7 S. Ct. 2321, 2328 (2013), is misplaced. As previously explained, the Act (unlike the
8 *Open Society* statute) does not require anyone to adopt the State’s policy position as its
9 own official position; it merely restricts commercial conduct. See MTD at 30. Similarly,
10 Plaintiffs reliance on *FCC v. League of Women Voters*, 468 U.S. 364 (1984), is misplaced
11 because (1) the Act does not prevent Plaintiffs from actually speaking about *any* topic
12 (unlike *FCC*, where the government imposed a blanket ban on *all editorializing*) and (2)
13 because Plaintiffs could simply form another business entity performing Plaintiffs’ non-
14 governmental contracts, which could boycott Israel.⁸

15 **IV. THE ATTORNEY GENERAL MUST BE DISMISSED**

16 Plaintiffs notably do not offer *any* answer to the State’s arguments that claims
17 asserted against Defendant Brnovich are unripe and lack Article III standing; nor that
18 Plaintiffs have not alleged any basis for liability against him. Compare MTD at 33 with
19 Opp. at 28. Those concessions alone mandate dismissal against the Attorney General.⁹

20 **CONCLUSION**

21 For the foregoing reasons, the State’s Motion to Dismiss should be granted.

22
23 ⁸ Contrary to Plaintiffs’ contention (at 26 n.11), “affiliate” can simply mean
24 “subsidiary,” *Webster’s Third New International Dictionary* (3d ed. 1993), thus
25 permitting Jordahl to establish a new PC for his non-governmental contracts, which
26 would not be an “affiliate”/subsidiary of Mikkel (Mik) Jordahl, P.C. But even if that
27 were otherwise, this Court could sever that “affiliate” provision—and that provision
28 alone—to the extent that it could somehow create an unconstitutional condition.

⁹ The Attorney General is also immune because even the hypothetical actions he could
take would not be directed against Plaintiffs. Complaint ¶ 8. And because *Ex parte*
Young only strips state officials of immunity when the officer “acts unconstitutionally,”
and the Attorney General has not taken *any* relevant action, the *Ex parte Young* exception
does not apply. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984).

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Respectfully submitted this 15th day of March, 2018.

MARK BRNOVICH
ATTORNEY GENERAL

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Proposed Intervenor-Defendant State of
Arizona*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 15th day of March, 2018, I caused the foregoing
3 document to be electronically transmitted to the Clerk’s Office using the CM/ECF
4 System for Filing and transmittal of a Notice of Electronic Filing to the following
5 CM/ECF registrants:

6
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26 ACLU Foundation

27 s/ Drew C. Ensign
28 *Attorneys for Defendant Mark Brnovich in his official capacity as Attorney General and
Proposed Intervenor-Defendant State of Arizona*