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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIKKEL JORDAHL and MIKKEL (MIK) JORDAHL, PC,

Plaintiffs-Appellees,

v.

MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General,

Defendant-Appellant,

STATE OF ARIZONA,

Intervenor-Defendant-Appellant,

and

JIM DRISCOLL, in his official capacity as Coconino County Sheriff; et al.,

Defendants.

No. 18-16896

D.C. No. 3:17-cv-08263-DJH
District of Arizona,
Prescott

ORDER

Before: O'SCANNLAIN, BERZON, and IKUTA, Circuit Judges.

The State of Arizona and Arizona Attorney General (collectively, "Arizona") appeal from the district court's grant of a preliminary injunction, enjoining the enforcement of A.R.S. § 35-393.01(A) ("the Act"), which prevents state entities from entering into a procurement contract with any business engaged

in a "boycott of Israel." Arizona has moved for a stay of the injunction pending appeal.

We consider four factors when presented with a motion for a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.

Golden Gate Restaurant v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). To satisfy steps (1) and (2), we accept proof either that the applicant has shown "a strong likelihood of success on the merits [and] … a possibility of irreparable injury to the [applicant]," or "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id*. at 1115-16 (citations omitted). We have described these alternative formulations as "'two interrelated legal tests' that 'represent the outer reaches of a single continuum.'" *Id*. at 1115 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)).

Even if Arizona has raised serious legal questions, it has not shown a strong likelihood of success on the merits of its claim that the district court abused its discretion in granting the preliminary injunction. *See FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211-12 (9th Cir. 2004) (district court's decision

regarding preliminary injunction should be reversed only if it abused its discretion or based its decision on an erroneous legal standard or clearly erroneous findings of fact).

Each side has made a strong claim to irreparable harm in the event that it prevails on the merits of the First Amendment challenge. Arizona has failed to show that the balance of hardships during the pendency of this appeal "tips sharply in its favor." *Golden Gate Restaurant*, 512 F.3d at 1115.

Accordingly, Arizona's motion to stay the district court's September 27, 2018 order pending appeal (Docket Entry No. 8) is denied. The briefing schedule established previously remains in effect.

IKUTA, Circuit Judge, dissenting:

Mikkel Jordahl is a solo practitioner who is employed as an outside contractor by an Arizona state entity. Jordahl personally avoids purchasing from companies such as Hewlett-Packard, Airbnb, and Sodastream, which he understands are doing business in Israel. He would like his law firm to engage in the same boycott, but an Arizona statute prevents state entities from entering into a procurement contract with any company "unless the contract includes a written certification that the company is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel." Ariz. Rev. Stat. § 35-393.01.[1] Rather than have his law firm sign the certification required to serve as a state contractor, Jordahl brought a lawsuit challenging the Arizona statute as violating his First Amendment rights. Relying on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the district court enjoined Arizona from implementing its statute.

The district court's decision is contrary to binding Supreme Court precedent. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65–66 (2006)

[1] A "boycott" is defined as refusing to deal, ending business activities, or otherwise taking action intended to limit commercial relations with Israel or with entities doing business in Israel if those activities are taken "in compliance with or adherence to calls for a boycott of Israel" or "[i]n a manner that discriminates on the basis of nationality, national origin or religion and that is not based on a valid business reason." Ariz. Rev. Stat. § 35-393(1).

(*FAIR*). In *FAIR*, an association of law schools decided to restrict military recruiting on their campuses to express their opposition to the military's "Don't Ask Don't Tell" policy. *Id.* at 51. After Congress passed the Solomon Amendment, which deprived the law schools of certain federal funds unless they provided equal access to military recruiters, the schools sued the government, claiming the Solomon Amendment violated their First Amendment rights. *Id.* The Court rejected this claim, holding that the conduct regulated by the Solomon Amendment was "not inherently expressive." *Id.* at 66. Rather, the law schools' actions "were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.*

FAIR controls this case. Like the law schools' decision to exclude military recruiters from their campuses, Jordahl's decision not to purchase from Hewlett-Packard and Sodastream is expressive only if it is accompanied by explanatory speech. Until Jordahl explains that he is engaged in a boycott, his private purchasing decisions do not communicate his opinions to the public. Because purchasing decisions are not "inherently expressive," they are not entitled to First Amendment protection. *Id.*

The district court erred in relying on *Claiborne*, which did not address purchasing decisions or other non-expressive conduct. In *Claiborne*, the Court held that participants in a boycott of white-owned businesses were entitled to First

Amendment protection from state tort liability. 458 U.S. at 894–95. The Court reasoned that the boycott involved meetings, speeches, and non-violent picketing, and concluded that "[e]ach of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* The Court did not hold that the boycotters' refusal to purchase from white-owned businesses was protected by the First Amendment, or even address the issue. Therefore, *Claiborne*'s reasoning is not applicable to Jordahl's claim. Jordahl may, of course, engage in meetings, speeches, and picketing about his disagreement with Israel's policies without any interference from Arizona.

Because we are bound by *FAIR*, Arizona is likely to succeed on its claim that its statute does not violate the First Amendment. And because there is no First Amendment violation, Jordahl will not suffer any irreparable injury if the district court's preliminary injunction is stayed. By contrast, Arizona will suffer irreparable harm if it is enjoined from enforcing its laws. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."). The balance of hardships during the pendency of the appeal thus "tips sharply" in Arizona's favor. *Golden Gate Restaurant v. City and County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (quoting *Lopez v.*

Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983)). Therefore, I dissent from the majority's failure to stay the district court's injunction pending Arizona's appeal.