Case No. 22-16490

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,

Plaintiffs-Appellees,

v.

KRISTIN K. MAYES, Attorney General,
in her official capacity as Attorney General of the State of Arizona;

Defendant-Appellant,

and

YUMA COUNTY REPUBLICAN COMMITTEE,

Intervenor-Defendant-Appellant,

and

KATIE HOBBS, in her official capacity as Arizona Secretary of State, et al.,

Defendants.

On Appeal from D.C. No. 2:22-cv-01374-GMS
U.S. District Court for Arizona, Phoenix

ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF

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Dated: June 6, 2023

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SUMMARY OF ARGUMENT

This Court directed the parties to file supplemental briefs addressing two questions. This brief addresses the question about the Felony Provision first, then addresses the question about the Cancellation Provision in two parts.

1. Plaintiffs failed to establish standing to challenge the Felony Provision. The panel can reach this conclusion without definitively resolving "questions of law of this state," A.R.S. § 12-1861, and therefore need not certify a question to the Arizona Supreme Court.

Specifically, Plaintiffs failed to establish pre-enforcement standing under the three-factor test in *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000) (en banc). This is because (1) Plaintiffs' planned activities will not "violate the law in question," (2) no enforcing authority has communicated any "warning or threat to initiate proceedings" against Plaintiffs (indeed, the Attorney General has interpreted the law as *not* applying to Plaintiffs), and (3) there is no "history of past prosecution or enforcement" of the law. *Thomas*, 220 F.3d at 1139; *see also Lopez v. Candaele*, 630 F.3d 775, 784–92 (9th Cir. 2010) (applying similar factors to pre-enforcement vagueness challenge).

However, if this panel desires more certainty about the first *Thomas* factor—whether Plaintiffs' planned activities will "violate the law in question"—the panel may wish to certify to the Arizona Supreme Court a limited question about the

meaning of the Felony Provision. That way the Arizona Supreme Court can confirm that the Felony Provision does not apply to Plaintiffs' planned activities.

Regardless, in no event should this panel *affirm* the district court's injunction of the Felony Provision without certifying a question to the Arizona Supreme Court. Federalism principles counsel strongly against a federal court enjoining a state law as vague based on an interpretation never adopted by any court of the state and disavowed by the state's attorney general, without giving the state's highest court a chance to weigh in. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79–80 (1997) (explaining that a federal court "risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court"); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 306–08 (1979) (holding that district court should have allowed state court review of statute that was "reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack").

2. Plaintiffs failed to establish direct organizational standing to challenge the Cancellation Provision under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Plaintiffs' standing theory rested on a mistaken interpretation of the Cancellation Provision, as explained in the Yuma County Republican Committee's ("the Committee's") supplemental brief.

Moreover, the Cancellation Provision was not in effect when Plaintiffs sued, so their standing theory consisted of nonspecific assertions about how they plan to react to the Cancellation Provision in the future. These general expressions of intended future activity did not establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Nor did Plaintiffs show that their intended future activity would significantly differ from their "business as usual." *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942 (9th Cir. 2021) (quoting *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019)).

3. Plaintiffs failed to establish associational standing to challenge the Cancellation Provision under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Again, Plaintiffs' standing theory rested on a mistaken interpretation of the Cancellation Provision, as the Committee explains.

Moreover, Plaintiffs did "not identify any affected members." *Associated Gen. Contractors of Am., San Diego Chapter, Inc.*, 713 F.3d 1187, 1194–95 (9th Cir. 2013). And Plaintiffs' fear that some members may unexpectedly lose current registration status is too speculative to support standing. *Lujan*, 504 U.S. at 560.

ARGUMENT

I. Standard of Review

Below, Plaintiffs had the burden of establishing standing as the party invoking federal jurisdiction. *Lopez*, 630 F.3d at 785. To obtain a preliminary injunction,

Plaintiffs needed to make a "clear showing" of standing. *Id.* (quoting *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7 (2008)). This court reviews standing de novo. *Id.* at 784–85.

II. Whether to Certify a Question about the Felony Provision

A. This panel should conclude, without certification, that Plaintiffs did not establish standing to challenge the Felony Provision.

Certification to the Arizona Supreme Court is limited to "questions of law of this state which may be determinative." A.R.S. § 12-1861. Here, the panel can and should conclude, without certifying a question, that Plaintiffs failed to establish pre-enforcement standing to challenge the Felony Provision.

"Any pre-enforcement analysis [of standing] starts with our en banc decision in *Thomas*." *Humanitarian L. Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1142 (9th Cir. 2009).[1]

Thomas involved a pre-enforcement First Amendment challenge to a state law. 220 F.3d at 1137–38. The court considered whether the challenge was ripe—that is, whether the plaintiffs had yet suffered an "injury in fact" for standing. *Id.* at 1138. The court identified three factors for analyzing standing in such cases: (1) whether the plaintiffs have articulated a concrete plan "to violate the law in

[1] The *Thomas* factors for pre-enforcement standing apply regardless of whether the plaintiff is an individual or an organization. *E.g.*, *Humanitarian L. Project*, 578 F.3d at 1142–44 (applying *Thomas* to evaluate organization's standing).

question," (2) whether the enforcing authorities have communicated a "specific warning or threat to initiate proceedings," and (3) the "history of past prosecution or enforcement under the challenged statute." *Id.* at 1139.[2]

Consider these factors in reverse order, starting with the third. Here, there is zero history of past enforcement of the Felony Provision. This is because Plaintiffs chose to sue weeks before the law was in effect. 2-ER-267 ¶ 1. Accordingly, this factor weighs against standing even more strongly than in *Thomas*, where the challenged law had been enforced several times previously. 220 F.3d at 1140–41.

Next consider the second factor. Here, no enforcing authority has communicated any warning or threat to initiate proceedings against Plaintiffs. Indeed, the only enforcing authority in this lawsuit (the Attorney General) has consistently interpreted the Felony Provision as *not* applying to Plaintiffs' planned activities. *See* 1-ER-006–007 (district court observing that Attorney General interprets "mechanism for voting" to mean "a ballot and a ballot affidavit envelope and nothing else"); Attorney General's Opening Brief at 7–8 (taking same position on appeal); Attorney General's Letter filed 5/8/23 (Dkt. 58) (confirming this position "remains the same" despite administration change). This factor, too, weighs against standing even more strongly than in *Thomas*, where there was no indication that the

[2] These factors apply to Plaintiffs' vagueness challenge to the Felony Provision. *See Lopez*, 630 F.3d at 784–92 (applying similar factors to pre-enforcement First Amendment overbreadth and vagueness challenge).

enforcing authorities interpreted the law as *not* applying to the plaintiffs. *See* 220 F.3d at 1140.

Finally consider the first factor: whether Plaintiffs have articulated a concrete plan to "violate the law in question." This factor depends on whether Plaintiffs' planned activities, such as handing out voter registration forms, violate the Felony Provision.[3] And *that* question depends, at least in part, on how the enforcing authority interprets the statute. *See Lopez*, 630 F.3d at 786 (considering "whether the challenged law is inapplicable to the plaintiffs, either by its terms *or as interpreted by the government*" (emphasis added)). For example, this court found no standing when "the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities." *Id.* at 788 (citing *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983)).[4] Here, this factor weighs against standing too. Again, the Attorney General has consistently interpreted the Felony Provision as *not* applying to Plaintiffs' planned activities such as handing out voter registration forms, because the term "mechanism for voting" does not include such forms.[5]

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[3] Alternatively, the inquiry may be phrased as whether Plaintiffs have shown that their planned activities "arguably" violate the Felony Provision. *See Lopez*, 630 F.3d at 788 (phrasing the inquiry this way).

[4] Whether Plaintiffs *think* their planned activities may violate the statute is not the question. *See Lopez*, 630 F.3d at 792 ("self-censorship alone is insufficient to show injury").

[5] The *Lopez* court stated that a government's disavowal "must be more than a mere litigation position." 630 F.3d at 788. But that statement, read in context, was

None of the above analysis requires input from the Arizona Supreme Court. Accordingly, this Court can and should conclude, without certifying any question, that Plaintiffs failed to establish standing to challenge the Felony Provision.

B. This panel may wish to certify a question to the Arizona Supreme Court if it desires more certainty about the first standing factor.

As explained above, the first *Thomas* factor is whether Plaintiffs have articulated a concrete plan to "violate the law in question," which requires evaluating whether Plaintiffs' planned activities, such as handing out voter registration forms, would actually (or arguably) violate the Felony Provision.

The answer is no, as explained above. But if this panel desires more certainty about whether Plaintiffs' planned activities would violate the Felony Provision, the panel may wish to certify to the Arizona Supreme Court a limited question about the meaning of the provision, such as whether the term "mechanism for voting" includes a voter registration form. That way the Arizona Supreme Court can confirm that the Felony Provision does not apply to Plaintiffs' planned activities, removing any doubt that Plaintiffs' challenge is "a case in search of a controversy." *Thomas*, 220 F.3d at 1137.

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referring to situations where the government engages in gamesmanship. *See id.* (citing example where government dropped charges against plaintiffs "four days before the district court hearing" and "was bringing similar charges" against other plaintiffs). Here, the Attorney General's position has been consistent.

C. In no event should this panel affirm the injunction of the Felony Provision without certifying a question.

Regardless of how the panel resolves standing, the panel should not *affirm* the district court's preliminary injunction of the Felony Provision without first certifying a question to the Arizona Supreme Court.

No Arizona court has adopted the broad interpretation of the Felony Provision that Plaintiffs fear. The Attorney General has disavowed such an interpretation, as explained above. So has the bill's primary sponsor in the Arizona legislature. *See* 2-ER-125. Even the district court did not actually adopt a broad interpretation of the Felony Provision. The court merely reasoned that the statutory text "fails to foreclose the possibility" that the term "mechanism for voting" includes voter registration forms. 1-ER-005.

In this circumstance, affirming the district court's injunction without giving Arizona's own courts an opportunity to weigh in would contravene the "respect for the place of the States in our federal system." *Arizonans for Off. Eng.*, 520 U.S. at 75. A federal court "risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79. In *Babbitt*, for example, the Supreme Court held that a district court should have allowed state court review before deeming an Arizona statute unconstitutionally vague, because the statute was "reasonably susceptible of constructions that might undercut or modify [the] vagueness attack." 442 U.S. at 306–08.

In sum, this panel should conclude, without certifying any question, that Plaintiffs failed to establish standing to challenge the Felony Provision. But if the panel desires more certainty about the first factor in the standing analysis, the panel may wish to certify to the Arizona Supreme Court a limited question about the meaning of the Felony Provision. And regardless, in no event should the panel affirm the district court's injunction without certifying a question to the Arizona Supreme Court.

III. Whether Plaintiffs Established Direct Organizational Standing to Challenge the Cancellation Provision

To establish direct organizational standing to challenge the Cancellation Provision, Plaintiffs "needed to show [1] that the challenged conduct frustrated their organizational missions and [2] that they diverted resources to combat that conduct." *Friends of the Earth*, 992 F.3d at 942. They did not make this showing.

Plaintiffs' standing theory rested on a mistaken interpretation of the Cancellation Provision, as explained in the Committee's supplemental brief. The Attorney General joins the Committee's argument and offers two additional reasons why Plaintiffs failed to establish standing.

First, Plaintiffs had a timing problem. They filed their complaint on August 15, 2022 and their amended complaint on September 2, 2022—weeks before the Cancellation Provision took effect. *See* 2-ER-267 ¶ 1.

But a plaintiff must have standing at the time the complaint is filed. *E.g.*, *LA All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 949, 959 n.6 (9th Cir. 2021). And standing requires concrete and particularized injury that is actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560; *see also La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (explaining that *Lujan* requirements apply to organizational standing).

Accordingly, courts often reject theories of organizational standing that are based on predictions that an organization's mission *will* be frustrated and that the organization *will* divert resources. *See, e.g.*, *Friends of the Earth*, 992 F.3d at 942–43 (explaining that organization's "activities undertaken after suit was filed," such as litigation expenses and publicity, do not confer standing); *Equal Rts. Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1141–42 (D.C. Cir. 2011) (rejecting organizational standing where organization failed to show "at the time it began this litigation it had suffered an injury in fact"); *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1425, 1430–31 (D.C. Cir. 1996) (holding that organization's challenge to law not yet in effect was unripe and drawing contrast with *Havens* where the allegedly unlawful act "had already occurred by the time suit was brought").

Here, Plaintiffs sued before the Cancellation Provision was in effect, so their standing theory rested on nonspecific assertions about how they planned to react to the Cancellation Provision in the future. They told the district court that they "will"

divert resources in response to the Cancellation Provision in various ways, such as ensuring that voters are registered in only one location, but they did not include details as basic as an estimated timeline for their anticipated efforts. *See* 2-ER-250–251 ¶¶ 25–27 (declaration of Arizona Alliance for Retired Americans president); 2-ER-257 ¶¶ 19–21 (declaration of Voto Latino vice president of programs); 2-ER-264 ¶¶ 15–16, 18 (declaration of Priorities USA chairman); *see also* 2-ER-273–276 ¶¶ 22, 25, 28 (allegations in amended complaint).

These general expressions of intended future activity were "simply not enough" for standing. *Lujan*, 504 U.S. at 564.

Second, even accepting Plaintiffs' future-looking perspective, Plaintiffs did not show that the Cancellation Provision would cause them to spend resources significantly *beyond* the sorts of things they already do.

To establish direct organizational standing, an organization's mission must be not just slightly frustrated, but "perceptibly impaired," and the consequent diversion of resources must be more than just "a setback to the organization's abstract social interests." *Havens*, 455 U.S. at 379. It is not enough for an organization to spend resources in a way that is "business as usual." *Friends of the Earth*, 992 F.3d at 942 (quoting *Am. Diabetes Ass'n*, 938 F.3d at 1154).

Accordingly, courts have rejected organizational standing where the organization merely spends resources in a manner consistent with, or not

significantly beyond, how it previously operated. *See, e.g.*, *Am. Diabetes Ass'n*, 938 F.3d at 1155 (holding that organization staff's time spent on a call with a parent about challenged policy did not establish standing because such calls were already part of staff's duties); *Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1130 (Fed. Cir. 2021) (holding that organizational expenditures on educational programs about challenged regulations did not establish standing because such programs were "part of the ordinary course" of organization operations); *Tenth St. Residential Ass'n v. City of Dallas, Texas*, 968 F.3d 492, 500 (5th Cir. 2020) (stating that time spent attending meeting and intervening as interested party did not amount to "significant resources" for standing purposes); *Fair Elections Ohio v. Husted*, 770 F.3d 459, 459–60 (6th Cir. 2014) (stating that "it is not an injury to instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already").

Here, Plaintiffs claimed that the Cancellation Provision would cause them to take a variety of actions, such as providing education and training about the new law and ensuring that voters are registered in only one location. *See* 2-ER-250–251 ¶¶ 25–27 (declaration of Arizona Alliance for Retired Americans president); 2-ER-257 ¶¶ 19–21 (declaration of Voto Latino vice president of programs); 2-ER-264 ¶¶ 15–16, 18 (declaration of Priorities USA chairman); *see also* 2-ER-273–276 ¶¶ 22, 25, 28 (allegations in amended complaint).

But Plaintiffs did not show that these anticipated actions would be significantly beyond what they already do. Indeed, such actions are in line with how Plaintiffs describe their missions of educating individuals and ensuring voters are properly registered. *See* 2-ER-246–247 ¶¶ 4–11 (declaration of Arizona Alliance for Retired Americans president); 2-ER-254–255 ¶¶ 3–8 (declaration of Voto Latino vice president of programs); 2-ER-261–262 ¶¶ 3–5 (declaration of Priorities USA chairman); *see also* 2-ER-273–276 ¶¶ 22, 25, 28 (allegations in amended complaint).

Plaintiffs therefore did not show that the Cancellation Provision would cause a significant shift from "business as usual." *Friends of the Earth*, 992 F.3d at 942 (quoting *Am. Diabetes Ass'n*, 938 F.3d at 1154).[6]

For these reasons, Plaintiffs failed to make a "clear showing" of direct organizational standing necessary for a preliminary injunction. *Lopez*, 630 F.3d at 785.

[6] Admittedly, this court has found organizational standing where an organization, in response to challenged conduct, spends resources developing a public awareness or outreach campaign consistent with its mission. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 879–80 (9th Cir. 2022); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012). But here, Plaintiffs' standing theory was that the Cancellation Provision will, at some unspecified time in the future, cause them to do a bit more of the kinds of things they already do. That is not enough for a case or controversy.

IV. Whether Plaintiffs Established Associational Standing to Challenge the Cancellation Provision

To establish associational standing, Plaintiffs needed to show that (1) their members would otherwise have standing to sue in their own right, (2) the interests they seek to protect are germane to their organizational purpose, and (3) participation of individual members in the lawsuit is not required. *Associated Gen. Contractors of Am.*, 713 F.3d at 1194.

Plaintiffs did not show the first factor: that their members would have standing to sue in their own right.

As with direct organizational standing, Plaintiffs' theory of associational standing rested on a mistaken interpretation of the Cancellation Provision, as explained in the Committee's supplemental brief. As before, the Attorney General joins the Committee's argument and offers two additional reasons why Plaintiffs failed to establish standing.

First, although Plaintiffs expressed a fear that the Cancellation Provision could result in unexpected registration cancellation for voters registered in more than one place, *see, e.g.*, 2-ER-250 ¶ 25, Plaintiffs did not identify any specific member who would be affected. This failure alone is fatal to associational standing. *See Associated Gen. Contractors of Am.*, 713 F.3d at 1194–95 (explaining that organization must identify at least one affected member for associational standing).

Second, any claimed injury to members must be concrete, particularized, and actual or imminent. *Lujan*, 504 U.S. at 560. The mere risk that the Cancellation Provision could be (mis-)applied in a way that unexpectedly cancels a voter's current registration is too speculative for this purpose. *See, e.g.*, *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 387 (6th Cir. 2020) (rejecting claim that human error would cause rejection of unknown number of ballots as insufficient for "actual, concrete, particularized, and imminent threat of harm"); *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 367 (5th Cir. 1999) (rejecting claim that members were in danger of losing voter registration status as "much too speculative and hypothetical to constitute a sufficient Article III injury").

For these reasons, Plaintiffs failed to make a "clear showing" of associational standing necessary for a preliminary injunction. *Lopez*, 630 F.3d at 785.

RESPECTFULLY SUBMITTED this 6th day of June, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I presented the above and foregoing for filing and uploading to the CM/ECF system which will send electronic notification of such filing to all counsel of record.

Dated this 6th day of June, 2023.

/s/ Joshua M. Whitaker

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