No. 22-16490

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

ARIZONA ALLIANCE FOR RETIRED AMERICANS et al.,
Plaintiffs-Appellees,
*v.*
KRISTIN K. MAYES, in her official capacity as Arizona Attorney General,
Defendant-Appellant,
*and*
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellant,
*and*
ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,
Defendants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:22-cv-01374-GMS

# PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF


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## STATEMENT OF THE ISSUES

1. Whether any of the Plaintiff-Appellee organizations have established standing to challenge the so-called Cancellation Provision, ARIZ. REV. STAT. § 16-165(A)(11), (B), on either a theory of direct organizational standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), or a theory of associational standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

2. Whether this panel should certify to the Arizona Supreme Court an appropriate question concerning the meaning of the phrase "mechanism for voting" in ARIZ. REV. STAT. § 16-1016(12). *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 77–80 (1997); *see also Hayes v. Cont'l Ins. Co.*, 872 P.2d 668, 676–77 (Ariz. 1994) (en banc).

## ARGUMENT

### I. Plaintiffs have established both direct and associational standing to challenge the Cancellation Provision.

The Cancellation Provision would force county recorders to cancel voter registrations *without* requiring direct authorization from voters—thus violating the National Voter Registration Act ("NVRA"). *See* Pls. Br. 44–57. Taken together, Plaintiffs' operative complaint, their preliminary-injunction motion, and the accompanying declarations from the

leadership of each Plaintiff organization demonstrate that, if the Cancellation Provision were in effect, Plaintiffs would be compelled to "expend[] additional resources that they would not otherwise have expended, and in ways that they would not have expended them." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015). Moreover, because the cancellation of a voter's registration without their request or confirmation could cause disenfranchisement,[1] the Cancellation Provision also threatens the members and constituencies of Plaintiffs Arizona Alliance for Retired Americans (the "Arizona Alliance") and Voto Latino. Any one of these injuries is sufficient to establish

[1] In Arizona, while there is a statewide database of registered voters, the registration and cancellation processes occur at the county level, and each county maintains its own voter-registration list. This county-specific maintenance of the voter rolls has several relevant consequences. First, a voter who is not registered in the county where they attempt to vote *cannot* cast a provisional ballot. *See* A.R.S. § 16-120(A) (voter's "registration [must be] received by the county recorder . . . before midnight of the twenty-ninth day preceding the date of the election"); *id.* §§ 16-135, 16-584 (provisional ballot may only be cast in county where voter is already registered). Second, while a county may simply update a voter's address if they move *within* that county, *see* A.R.S. §§ 16-164(A), 16-166(B), under the Cancellation Provision, registering in a *different* county would result in the cancellation of any other voter registrations.

standing, and Plaintiffs have thus satisfied the requirements of Article III.[2]

### A. Legal Standard

To demonstrate standing, a plaintiff must show that (1) they have suffered a concrete and particularized injury to a cognizable interest that (2) is fairly traceable to the defendant's challenged action and (3) likely can be redressed by a favorable decision. *La Raza*, 800 F.3d at 1039; *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021) (parties have "personal stake in the outcome" when, "absent judicial review, they will suffer or have suffered some direct injury"). At

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[2] Defendants have not contested Plaintiffs' standing to challenge the Cancellation Provision in this appeal. Before the District Court, YCRC argued that Plaintiffs lacked standing to raise their as-applied due-process challenge to the Cancellation Provision, *see* 1-ER-106–08, but did not contest standing as to the NVRA claim, which provided the basis for the District Court's preliminary injunction, *see* 1-ER-015. Although the Attorney General challenged Plaintiffs' standing more generally, *see* 1-ER-198–200, this argument was premised on the mistaken belief that SB 1260 merely codified existing practices, *but see* Pls. Br. 50 n.11, 63. Moreover, even if the Cancellation Provision *did* codify existing practices, redressability under Article III would not be vitiated. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1156–59 (9th Cir. 2015) (explaining that "a litigant . . . 'need not eliminate any other contributing causes to establish its standing'" because "[t]he relevant inquiry is [] whether a favorable ruling could redress the *challenged* cause of the injury" (emphasis added) (quoting *Barnum Timber Co. v. U.S. EPA*, 633 F.3d 894, 901 (9th Cir. 2011))).

the preliminary-injunction stage, plaintiffs may satisfy these elements by "relying on the allegations in their complaint and whatever other evidence they submitted in support of their preliminary-injunction motion." *LA All. for Hum. Rts. v. County of Los Angeles*, 14 F.4th 947, 956–57 (9th Cir. 2021) (cleaned up).

For an organizational plaintiff, either direct or associational standing alone is sufficient to satisfy the mandates of Article III. *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021) ("An association or organization can sue based on injuries to itself *or* to its members." (emphasis added)). Moreover, only *one* plaintiff need establish standing for a suit to be proper. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017).

### B. Plaintiffs have established direct standing under *Havens Realty*.

Organizations have standing in their own right if they have "alleged such a personal stake in the outcome of the controversy as to warrant . . . invocation of federal-court jurisdiction." *Havens Realty*, 455 U.S. at 378–79 (cleaned up). Under *Havens Realty*, this can be accomplished "by showing that the challenged practices have perceptibly impaired their ability to provide the services they were formed to provide." *E. Bay*

*Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (cleaned up). Here, all three Plaintiff organizations have demonstrated standing in their own right.

*First*, each Plaintiff has made a clear showing of direct, cognizable injury. The Cancellation Provision would force the Arizona Alliance, as its president asserted, to divert resources and funds to "ensure that all of its members and prospective members are only registered to vote in one location, so that they are not removed from the voter registration roll . . . in the county in which they intend to vote." 2-ER-250. To accomplish this goal, the Arizona Alliance would need to "educate its members about the effects of the" Cancellation Provision, including how voters can be disenfranchised and how they can check and cancel old registrations to avoid this result. 2-ER-250–251; *see also* 2-ER-273 (Arizona Alliance will need to "divert resources from other mission-critical work to spending time educating its members and other voters about SB 1260 and how they can remain registered to vote"). The impact of these resource reallocations—directly caused by the Cancellation Provision—are particularly burdensome on the Arizona Alliance, which has "a limited budget and only two paid staff members who work part-time." 2-ER-248.

Similarly, a vice president of Voto Latino, whose core constituency consists of especially mobile populations of young and Latinx voters, explained that it would have to launch educational campaigns to inform community members about the need to check for the existence of multiple voter registrations that could lead to operative registrations being wrongly cancelled. 2-ER-257. Voto Latino also anticipates that its constituents would be more likely targeted by third parties coordinating efforts to purge Latinx voters and students from Arizona's voter rolls, which the Cancellation Provision would permit with no notice to affected voters. 2-ER-275. Voto Latino would need to allocate resources away from its traditional activity of helping voters register and toward helping voters navigate the complex process of cancelling their nonactive registrations. *Id.*

Lastly, the former chairman of Priorities USA attested that the Cancellation Provision would require it to shift grant funds from other programs "to in-state partner organizations so that they can provide education and training on the harms" of the law, "namely that significant numbers of voters could be purged from the registration rolls . . . without any notice or opportunity to contest their removal." 2-ER-264.

Each Plaintiff organization has demonstrated that its core mission will be impacted by the operation of the Cancellation Provision, requiring the diversion of resources to address and mitigate those harms. If not for the Cancellation Provision, the Arizona Alliance would instead spend its "time and money on . . . traditional voter registration and mobilization activities." 2-ER-251. Voto Latino would focus its resources on achieving its goal of increasing the Latinx voting share in Arizona. 2-ER-257. And Priorities USA would be able to expend its now-reallocated staff and monetary resources on analyzing data and reports on voting activities. 2-ER-264.

In short, because this Court "ha[s] read *Havens* to hold that an organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose," *E. Bay Sanctuary Covenant*, 993 F.3d at 663, it follows that all three Plaintiffs here have standing to raise claims against the Cancellation Provision, *see Havens Realty*, 455 U.S. at 379 (fair-housing organization had standing where defendants' allegedly racial steering practices frustrated its ability to ensure equal access to housing for its constituency and required it to

devote "significant resources" to counteract those practices); *La Raza*, 800 F.3d at 1040 (organizations suffered direct harm from NVRA violations due to consequent resources expenditures and reallocations).

*Second*, these harms are "fairly traceable" to Defendants because the time, money, and resources that Plaintiffs would have to redirect to new and different tasks result directly from Defendants' implementation of the Cancellation Provision. *See id.* at 1039–40 (Court had "no difficulty concluding that Plaintiffs have adequately alleged that the injury they suffer is attributable to the State" where plaintiffs had to allocate resources towards new activities to mitigate impact of NVRA violations).

*Third*, Plaintiffs' injuries will be redressed by the relief they seek in this litigation. Enjoining the Cancellation Provision eliminates the legal authority for county recorders to cancel voter registrations in violation of federal law. Indeed, as the District Court correctly concluded, "[e]njoining the Cancellation Provisions will not leave the Plaintiffs with the same injury that they would suffer if the provision took effect because the provision is not 'entirely redundant' of the EPM procedures." 1-ER-012 (quoting *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1158 (9th Cir. 2015)). Thus, Plaintiffs have made a clear showing that

their injuries can be redressed by a favorable decision. *See La Raza*, 800 F.3d at 1039.

Because the Arizona Alliance, Voto Latino, and Priorities USA has each made a "clear showing of each element of standing," they have more than sufficiently demonstrated at the preliminary-injunction stage that they have direct standing to challenge the Cancellation Provision. *LA All. for Hum. Rts.*, 14 F.4th at 956 (quoting *Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020)).

### C. Plaintiffs have established associational standing under *Hunt*.

The U.S. Supreme Court articulated the test for associational standing in *Hunt*, holding that

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. The *Hunt* Court emphasized that associational claims do not necessarily "require[] individualized proof" and can thus be "properly resolved in a group context." *Id.* at 344. Following that dictate, this Court has recognized that there is "no purpose to be served by

requiring an organization to identify by name the member or members injured" where "it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action" and "the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury." *La Raza*, 800 F.3d at 1041; *see also, e.g.*, *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 269–71 (2015) (specifically identified members not needed to establish associational standing where "the common sense inference [that such members exist] is strong" and nothing "in the record . . . suggests the contrary"); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) ("Plaintiff need not identify *specific* aspiring eligible voters who intend to register as Democrats and who will be barred from voting; it is sufficient that some inevitably will.").[3]

[3] In *La Raza*, this Court further explained that, even if organizations were required to "always identify by name individual members who have been or will be injured in order to satisfy Article III," then an opportunity to amend rather than outright dismissal would be the appropriate recourse. 800 F.3d at 1041–42; *see also Ala. Legis. Black Caucus*, 575 U.S. at 270–71 ("[E]lementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the [plaintiff] an opportunity to provide evidence of member residence.").

Here, the Arizona Alliance clearly satisfies *Hunt*'s requirements for associational standing. As alleged in Plaintiffs' amended complaint and confirmed by the organization's president, "the Arizona Alliance's membership includes approximately 50,000 retirees from public and private sector unions, community organizations, and individual activists in every county in Arizona," including "many members that have moved from other states or counties where they were previously registered to vote, and who have not affirmatively canceled their previous voter registrations." 2-ER-272, 2-ER-274; *see also* 2-ER-246, 2-ER-250–51. These members would have standing to sue if their voter registrations were improperly cancelled, and even "a concrete *risk* of harm . . . is sufficient for injury in fact." *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004) (emphasis added). Safeguarding the right to vote and ensuring the civil rights of its members is part of the Arizona Alliance's mission, which it "accomplishes . . . by ensuring that its members are able to register to vote and meaningfully participate in Arizona's elections." 2-ER-272; *see also* 2-ER-247. And the participation of individual members is not needed to secure Plaintiffs' requested relief—especially not as to their NVRA challenge, which presents a primarily legal question and for

which Plaintiffs seek only declaratory and injunctive relief. *See Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001). Nor, for that matter, do Defendants "need [to] know the identity of a particular member to understand and respond to" the Arizona Alliance's "claim of injury," *La Raza*, 800 F.3d at 1041—namely, the risk of cancelled voter registrations in violation of federal law.

Voto Latino also has associational standing. Although it is not a traditional membership organization, *Hunt* recognized that an organization need not have individual "members" to assert associational standing if it represents a constituency and provides the means by which its constituents "express their collective views and protect their collective interests." 432 U.S. at 344–45. Indeed, this Court has cautioned against an "overly formalistic" approach to the "membership" issue; in *Oregon Advocacy Center v. Mink*, for example, it determined that an organization representing persons with mental illnesses could sue on its constituency's behalf because, as a "specialized segment of Oregon's community" and the primary beneficiaries of the organization's activities, these constituents were "the functional equivalent of members for purposes of associational standing"—even though they were not "members" of the

organization and could not actually control its finances and activities. 322 F.3d 1101, 1110–11 (9th Cir. 2003); *see also Am. Unites for Kids*, 985 F.3d at 1096–97 (similar).

Here, Voto Latino "is sufficiently identified with and subject to the influence of those it seeks to represent as to have a personal stake in the outcome of the controversy." *Or. Advoc. Ctr.*, 322 F.3d at 1111 (cleaned up). As Plaintiffs alleged and its vice president attested, "Voto Latino is dedicated to growing political engagement in historically underrepresented communities, specifically young and Latinx voters." 2-ER-274; *see also* 2-ER-254. It

> spends significant resources on voter education and mobilization initiatives, including efforts to encourage voters to vote, remind them to update their voter registrations, and inform them about available means of voting, such as early voting and voting by mail. These initiatives take the form of voter registration drives, email and social media campaigns, and text banking.

2-ER-255; *see also* 2-ER-274. Voto Latino's core constituency is particularly at risk as a consequence of the Cancellation Provision, since "its constituents are more likely to be targeted by coordinated efforts by third parties to purge Latinx voters and students from Arizona's voter registration rolls and early voting lists." 2-ER-275; *see also* 2-ER-257.

Protecting the franchise is indisputably germane to Voto Latino's mission. And, as with the Arizona Alliance's members, Voto Latino's constituents would have standing to sue in their own right, and their direct participation is not needed in order to grant the relief requested in this case. Voto Latino therefore has associational standing to challenge the Cancellation Provision.

## II. This panel should not certify the meaning of "mechanism for voting" to the Arizona Supreme Court.

The Felony Provision, which punishes anyone who "knowingly provides a mechanism for voting to another person who is registered in another state, including by forwarding an early ballot addressed to the other person," A.R.S. § 16-1016(12), is unconstitutionally vague because it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and "encourage[s] arbitrary and discriminatory enforcement," *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see also Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000) (noting that "vagueness review is even more exacting" "[i]f a statute subjects transgressors to criminal penalties").

Certification of the meaning of the phrase "mechanism for voting" would not cure this vagueness. The Felony Provision cannot be salvaged

without effectively—and impermissibly—rewriting the statute. Nor would certification otherwise serve the interests of efficiency or economy, as this Court and the District Court have already expended significant time and resources and are in no worse position to analyze this issue. Because the Arizona Supreme Court cannot answer the proposed certified question in a way that would simplify or resolve *this* Court's adjudication of this appeal, "the additional cost and delay that would be incurred were the Court to certify cannot be justified." *Marler v. Aspen Am. Ins. Co.*, No. 2:20-cv-00616-BJR, 2021 WL 1599193, at *5 (W.D. Wash. Apr. 23, 2021).

### A. Legal Standard

"As the Ninth Circuit has pointed out, 'the certification process' should only be invoked 'after careful consideration' and the court should 'not do so lightly.'" *Van v. LLR, Inc.*, 562 F. Supp. 3d 1, 4 (D. Alaska 2021) (quoting *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003)). Certification is never "obligatory"; rather, "[i]ts use in a given case rests in the sound discretion of the federal court." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). "The certifying court [] should consider the possible delays involved and whether the legal issue can be framed to

produce a helpful response by the state." *In re McLinn*, 744 F.2d 677, 681 (9th Cir. 1984). Where certifying a question to the state court "would simply 'impose expense and long delay upon the litigants without hope of its bearing fruit,'" certification is not required; "to the contrary, under such circumstances, 'it is the duty of a federal court to decide the federal question [] presented to it.'" *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 889–90 (9th Cir. 2011) (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 (1967)); *see also U.S. Bank, N.A. v. White Horse Ests. Homeowners Ass'n*, 987 F.3d 858, 867 (9th Cir. 2021) ("[W]e regularly decide issues of state law without certifying questions to the state's highest court.").[4]

### B. The Felony Provision is not fairly susceptible to a narrowing construction by this panel or the Arizona Supreme Court.

Certification would not assist the Court's analysis of the Felony Provision's constitutionality because the Arizona Supreme Court cannot

[4] The Court considers other factors as part of the certification inquiry—for example, whether the state-law questions implicate "important public policy ramifications" and "have not yet been resolved by the state courts." *Kremen*, 325 F.3d at 1037. But no one consideration is dispositive, and here, as discussed below, certification is neither required nor appropriate.

interpret the phrase "mechanism for voting" in a way that would cure its unconstitutional vagueness without impermissibly rewriting the statute.

In determining whether a statute is constitutional, courts must "first ascertain whether a construction is fairly possible that will contain the statute within constitutional bounds." *Arizonans for Off. Eng.*, 520 U.S. at 78 (cleaned up); *accord Hayes*, 872 P.2d at 676 ("*[I]f possible* [the Arizona Supreme Court] construes statutes to avoid rendering them unconstitutional." (emphasis added)). "The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; [courts] will not rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). Accordingly, this Court has consistently held that if there is "no possible narrowing construction of the statute that would avoid the vagueness issue . . . short of rewriting it," then the matter is "unsuitable for certification." *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025 n.2 (9th Cir.), *as amended*, 193 F.3d 1042 (9th Cir. 1999); *see also, e.g.*, *ACLU of Nev. v. Heller*, 378 F.3d 979, 986 (9th Cir. 2004) (similar); *Dorman v. Satti*, 862 F.2d 432, 435–36 (2d Cir. 1988) (denying motion to certify question of state law where request "would be

tantamount to asking the [state supreme] court 'if it would care in effect to rewrite [the] statute'" (second alteration in original) (quoting *City of Houston v. Hill*, 482 U.S. 451, 471 (1987))); *cf. Potrero Hills Landfill*, 657 F.3d at 889 ("[W]here there is 'no apparent saving construction' on the face of the state law, abstention is unwarranted." (quoting *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987))).

Here, no party "has proffered [a] possible narrowing construction of the statute that would avoid the vagueness issue" and thus render the Felony Provision constitutional, *Planned Parenthood of S. Ariz.*, 180 F.3d at 1025 n.2—instead, *rewriting* the statute is the only way to save it. YCRC, for example, claims that "mechanism for voting" "refers only to the fundamental steps necessary to cast a vote in each election," YCRC Br. 27, or "the processes involved in casting a vote," YCRC Reply 1, and therefore does *not* include "a pre-requisite for voting" such as voter registration, YCRC Br. 27, which would implicate political activity protected by the First Amendment. But nothing in the Felony Provision's text supports this unjustifiably narrow interpretation; as the District Court concluded, "the ordinary meaning of 'mechanism for voting' could include any necessary items involved in the process of voting." 1-ER-005;

*see also ACLU of Nev.*, 378 F.3d at 986 (rejecting limiting interpretation of statutory language that "is not 'readily apparent' from the statute itself" (quoting *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000))). Given the plainly ambiguous and expansive language of the Felony Provision, the only way to salvage it would be to rewrite the phrase "mechanism for voting." This is an unacceptable result that militates against certification.

### C. Certification will not simplify the ultimate adjudication of Plaintiffs' claims.

Setting aside the Felony Provision's unsalvageable language, a primary purpose of certification to a state supreme court is to "greatly simplify an ultimate adjudication in federal court." *Arizonans for Off. Eng.*, 520 U.S. at 79 (cleaned up). Here, no such simplification is possible.

When a statute is "not 'open to one or a few interpretations, but to an indefinite number,'" nothing less than "extensive adjudications, under the impact of a variety of factual situations" can bring the statute "within the bounds of permissible constitutional certainty." *Jews for Jesus*, 482 U.S. at 575–76 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964)). Such is the result when a statute is challenged as being "excessively vague on its face"; in these circumstances, "the state court is unlikely to be able to

give [the statute] an interpretation that will prevent *any* of these possible misapplications," so certification would not be helpful. *Waldron v. McAtee*, 723 F.2d 1348, 1354–55 (7th Cir. 1983) (citing *Steffel v. Thompson*, 415 U.S. 452, 474 n.21 (1974)); *cf. Procunier v. Martinez*, 416 U.S. 396, 401 n.5 (1974) ("Where, . . . as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required."), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

This is exactly the case here. The phrase "mechanism for voting" is challenged as being excessively vague on its face and open to myriad interpretations, Pls. Br. 29–44; 1-ER-004–07—as evidenced by Defendants' ever-shifting definitions of the term, *see* Pls. Br. 31–32. That Defendants (including the Attorney General, the "chief legal officer of the state," A.R.S. § 41-192(A)) cannot agree on a precise definition demonstrates that it is exceedingly unlikely that the Arizona Supreme Court will be able to provide an interpretation that resolves the fatal vagueness issue Plaintiffs identified—at least without impermissibly

rewriting the statutory text, *see supra* at 16–19. And, as the District Court correctly noted, even if the Arizona Supreme Court could interpret the Felony Provision as having "some valid application," that would not cure the vagueness problem or end the Court's inquiry. 1-ER-004; *see also Forbes v. Napolitano*, 247 F.3d 903, 904 (9th Cir. 2000) ("[W]here a statute criminalizes conduct, the law may be invalidated on vagueness grounds even if it could conceivably have some valid application."). Instead, the Court would be left in the same position it is in now: assessing whether the Felony Provision is vague in violation of the U.S. Constitution.

Indeed, for this reason, Arizona's governing statute would seemingly not allow certification of this issue. The Arizona Supreme Court "may answer questions of law . . . when requested by the certifying court if there are involved in any proceedings before the certifying court questions of law of this state *which may be determinative of the cause then pending in the certifying court*." A.R.S. § 12-1861 (emphasis added). Because the Felony Provision is not susceptible to a fairly narrowing interpretation that would cure the facial vagueness issue, the Arizona

Supreme Court could not resolve this issue in a way that would be determinative of Plaintiffs' claims.

### D. The Arizona Supreme Court is in no better position than this Court to interpret the Felony Provision.

"Certification is not appropriate where the state court is in no better position than the federal court to interpret the state statute." *Micomonaco v. Washington*, 45 F.3d 316, 322 (9th Cir. 1995); *see also McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law." (quoting *Lehman Brothers*, 416 U.S. at 391)). Here, the Arizona Supreme Court is no better positioned than this Court to interpret the Felony Provision's plain text and whether it violates Plaintiffs' *federal* constitutional rights. Indeed, the lack of any state-law claim leaves no "pending issue of Arizona law," which is a "basic prerequisite for a court to certify a question to the Arizona Supreme Court." *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1068 (D. Ariz. 2014) (per curiam) (three-judge court), *aff'd*, 578 U.S. 253 (2016); *cf. Hayes*, 872 P.2d at 676–77 (interpreting state statute against *state* constitutional requirements).

Moreover, the parties in this case and the federal courts that have heard it have already invested significant resources adjudicating the Felony Provision's constitutionality. Recognizing that certification "entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court," *Lehman Brothers*, 416 U.S. at 394 (Rehnquist, J., concurring), a relevant consideration in deciding whether to certify a question is whether the parties and court have already "devoted substantial time and resources" to the disputed issue, *Van*, 562 F. Supp. 3d at 4. Here, whether the phrase "mechanism for voting" (and the Felony Provision more generally) is unconstitutionally vague has been extensively briefed by the parties before both the District Court and this Court over the past nine months. *See, e.g.*, 2-ER-059–61; 2-ER-108–10; 2-ER-112–13; 2-ER-154–60; 2-ER-231–33; 2-ER-286–88. Both courts have heard oral argument on the issue, and the District Court analyzed and provided written opinions on the issue on two separate occasions. *See* 1-ER-004–07; 2-ER-025. To say that the federal judiciary—not to mention the parties—have devoted substantial time and resources to this issue would be an understatement.

* * *

Ultimately, "[m]ere difficulty in ascertaining local law" alone is insufficient to justify certification. *Riordan v. State Farm Auto Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009) (quoting *Lehman Brothers*, 416 U.S. at 390). Certification at this stage will not save "time, energy, and resources [or] help build a cooperative judicial federalism." *Arizonans for Off. Eng.*, 520 U.S. at 77 (cleaned up). Nor is there any "compelling reason[]" to give Defendants a second chance at prevailing on the issue, given the District Court's reasonable interpretation of the Felony Provision. *McLinn*, 744 F.2d at 681. And, for the reasons discussed above, *see supra* at 16–19, "mechanism for voting" is not readily susceptible to a narrowing construction that would make the Felony Provision constitutional. Under these circumstances, certification is not appropriate.[5]

[5] Even if the Court decides to certify a question to the Arizona Supreme Court, the preliminary injunction should remain in place "to protect [Plaintiffs] in the interim." *Frazier v. Boomsma*, No. CV 07-08040-PHX-NVW, 2007 WL 2808559, at *20 (D. Ariz. Sept. 27, 2007) (collecting cases).

Respectfully submitted this 6th day of June, 2023.

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**9th Cir. Case Number(s)** 22-16490

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 6, 2023.

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