

James E. Barton II, AZ Bar No. 023888
BARTON MENDEZ SOTO PLLC
401 W. Baseline Road
Suite 205
Tempe, AZ 85283
T: (480) 418-0668
james@bartonmendezsoto.com

Lalitha D. Madduri*
Richard A. Medina*
Marisa A. O’Gara*
Julie A. Zuckerbrod*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, D.C. 20001
T: (202) 968-4330
lmadduri@elias.law
rmedina@elias.law
mogara@elias.law
jzuckerbrod@elias.law

Attorneys for Amici Curiae
Arizona Alliance for Retired Americans, Alfred Lomahquahu,
and Stephani Stephenson

**Admitted Pro Hac Vice*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

American Encore, an Arizona non-profit corporation; Karen Glennon, an Arizona individual; America First Policy Institute, a nonprofit corporation,

Plaintiffs,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State; Kris Mayes, in her official capacity as Arizona Attorney General; Katie Hobbs, in her official capacity as Governor of Arizona,

Defendant.

No. 2:24-cv-01673-MTL

BRIEF OF AMICI CURIAE

REMOVED FROM DEMOCRACYDOCKET.COM

STATEMENT OF INTEREST

1
2 The Arizona Alliance for Retired Americans (“Alliance”) is a nonprofit, nonpartisan
3 organization whose membership includes approximately 51,000 retirees from public and
4 private sector unions, community organizations, and individuals in every county in Arizona,
5 including nearly 25,000 members in Maricopa County alone. The Alliance’s mission is to
6 ensure social and economic justice and protect the civil rights of retirees after a lifetime of
7 work, including by ensuring that its members have access to the franchise and can
8 meaningfully participate in Arizona’s elections. In support of its mission, the Alliance invests
9 resources in voter education and mobilization programs throughout the state—including, for
10 example, by preparing and distributing materials that educate voters on the state’s election
11 procedures and providing direct assistance to members who have questions about how to
12 vote and ensure their vote is counted.
13
14

15
16 The Alliance has been involved in Arizona litigation to protect their members’ right
17 to vote, including as plaintiff in a 2022 case seeking emergency relief to enjoin exactly the
18 type of voter intimidation Plaintiffs seek to legitimize in this case. *See Ariz. All. for Retired*
19 *Ams. v. Clean Elections USA*, No. 2:22-cv-01823-MTL (D. Ariz.). The Alliance has also
20 recently intervened or participated as amicus to defend the validity of Arizona’s election
21 procedures in several cases, all of which threatened their members’ ability to successfully
22 cast a ballot in Arizona.¹ The Alliance also brought successful litigation to protect its
23
24

25 ¹ *RNC v. Fontes*, No. CV2024-050553 (Maricopa Cnty. Super. Ct.); *Strong Cmty. Found.*
26 *v. Yavapai Cnty.*, No. S1300CV202400175 (Yavapai Cnty. Super. Ct.); *Ariz. Free Enter.*
27 *Club v. Fontes*, No. S1300CV202300202 (Yavapai Cnty. Super. Ct.); *Ariz. Free Enter. Club*
28 *v. Fontes*, No. S1300CV202300872 (Yavapai Cnty. Super. Ct.); *see also Petersen v. Fontes*,
No. CV2024-001942 (Maricopa Cnty. Super. Ct.) (participating as amici); *American Free*

1 members' voting rights when county officials sought to delay and disrupt ballot counting
2 and the canvass of election results in Cochise County in 2022, *see Ariz. All. for Retired Ams.*
3 *v. Crosby*, No. S0200CV2022-00552 (Cochise Cnty. Super. Ct.); *Ariz. All. for Retired Ams.*
4 *v. Crosby*, No. CV2022-00518 (Cochise Cnty. Super. Ct.), and is an intervenor in a similar
5 suit in Mohave County this year, *see Gould v. Mayes*, No. CV2024-000815 (Maricopa Cnty.
6 Super. Ct.). The Alliance has a significant interest in this case because the challenged EPM
7 provisions protect its members across the state from the uncertainty that plagued Cochise
8 County's elections in 2022 and reduce the risk that they will face harassment and
9 intimidation when attempting to vote.
10
11

12 Stephani Stephenson is a registered voter in Cochise County. Ms. Stephenson has a
13 significant interest in preserving her right to vote and ensuring election officials perform
14 their mandatory duties, including timely canvassing elections, in compliance with the state's
15 election laws. Like the Alliance, Ms. Stephenson was a plaintiff in two successful lawsuits
16 preventing the Cochise County Board of Supervisors' attempt to conduct an unlawful hand
17 count audit of ballots, which would have delayed election results, and forcing the Board to
18 canvass the County's election returns in 2022.
19
20

21 Alfred Lomahquahu is a Hopi tribe member and the Registrar for the Hopi Tribal
22 Elections Office. Mr. Lomahquahu has extensive experience administering elections for tribe
23 members, who face unique challenges when voting and are particularly vulnerable to threats
24 like voter intimidation. As an election administrator and in his work to enfranchise members
25
26

27

Enter. Club v. Fontes, No. CV2024-002760 (Maricopa Cnty. Super. Ct.) (same); *Mussi v.*
28 *Fontes*, No. CV-24-01310-PHX-DWL (D. Ariz.) (same).

1 of this historically underserved community, he also has a strong interest in preserving the
2 EPM's guidance, which helps him and his colleagues who administer non-tribal elections
3 fulfill their duty to administer safe and secure elections. Mr. Lomahquahu is deeply
4 concerned that Plaintiffs' requested relief could cause harm to him, as a member of the Hopi
5 tribe, other members of his community, and local officials throughout Arizona.
6

7 For all of these reasons, Amici have a strong interest in supporting Defendants'
8 motion to dismiss and opposition to Plaintiffs' motions for preliminary injunction, and they
9 offer a helpful and unique perspective in this litigation. Amici submit this brief to aid in the
10 Court's adjudication of the pending motions.
11

12 **BACKGROUND**

13
14 During early voting in 2022, armed and masked vigilantes gathered to "monitor"
15 voters at Arizona's drop boxes. Some shouted at people depositing their ballots and
16 publicized information about voters who they baselessly claimed were voting illegally.
17 Multiple lawsuits were filed, including by the Alliance, to protect voters from this
18 intimidation. *See Ariz. All. for Retired Ams.*, No. 2:22-cv-01823-MTL. The Alliance's case
19 was consolidated with an action brought by the League of Women Voters, and this Court
20 ultimately entered a stipulated temporary restraining order to protect voters at drop boxes.
21 Stipulated TRO, *Ariz. All. for Retired Ams.*, No. 2:22-cv-01823-MTL (D. Ariz. Nov. 1,
22 2022), ECF No. 51.
23

24
25 Then, the Cochise County Board of Supervisors voted to conduct unauthorized hand
26 counts of ballots and delay its canvass of the County's election results to investigate baseless
27
28

1 claims that voting machines were improperly certified.² The Alliance and Cochise County
2 voter Ms. Stephenson successfully filed two lawsuits in state court to compel the Board to
3 lawfully count ballots and canvass and certify the results in accordance with statutory
4 procedures and the EPM. *See Ariz. All. for Retired Ams.*, No. CV2022-00518; *Ariz. All. for*
5 *Retired Ams.*, No. CV2022-00552. The Board complied with Arizona law and certified its
6 election results after a court ordered it to do so. Despite the Board’s initial refusal to certify
7 the county’s election results, as a result of the Alliance and Ms. Stephenson’s lawsuit, there
8 was no delay to the Secretary’s statewide canvass.
9

11 Against this backdrop, and ahead of the 2024 election, Defendant Secretary of State
12 Adrian Fontes issued the 2023 EPM in accordance with A.R.S. § 16-452(A)–(B), which
13 requires the Secretary to “prescribe rules to achieve and maintain the maximum degree of
14 correctness, impartiality, uniformity and efficiency on the procedures for early voting and
15 voting” in the EPM. Like past EPMs, the 2023 EPM contains guidance to election officials
16 to ensure that elections are administered consistently and lawfully across the state, on topics
17 ranging from preventing voter intimidation to voter registration to voting procedures to
18 election certification.³ *See* A.R.S. §§ 16-100 to -184, 16-400 to -711, 16-1001 to -1022. The
19 provisions that Plaintiffs challenge here were plainly added to prevent conduct that
20 threatened Arizona’s elections in 2022 and forced the Alliance and Stephenson to sue to
21 protect their rights. First, the EPM elaborates on previous voter intimidation guidance by
22
23
24

25
26 ² CochiseCountyAZ, *20221118 Special Meeting General Election Canvass* at 2:20:41–2:21:28, YouTube (Nov. 21, 2022), <https://www.youtube.com/watch?v=RvAxd054xoM>.

27 ³ *See State of Ariz. 2023 Elections Procedures Manual*, Ariz. Sec’y of State (Dec. 30, 2023),
28 https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf (hereinafter “EPM”).

1 providing examples of conduct that may be prohibited by Arizona law so that officials can
2 readily identify and deter it. *See* EPM ch. 9, § III(D). Second, it restates the Secretary's
3 mandatory duty to canvass the election results by the statutory deadline and underscores that
4 the Secretary has no discretion to extend that deadline. *See* EPM, ch. 13, § II(B)(2).

6 Plaintiffs' lawsuit is part of a broader effort to use the judiciary to remake Arizona's
7 election procedures—no fewer than ten lawsuits have been filed in Arizona state and federal
8 courts challenging state and local election procedures, with at least eight filed this year alone.
9 Many were brought by these same Plaintiffs or their attorneys. They include:

- 11 • A lawsuit filed by America First (a plaintiff here) and others in state court, represented
12 by many of the same counsel as in this case, targeting the same EPM voter
13 intimidation guidance challenged here, as well as a slew of election procedures from
14 voter registration to early voting to certain ballot-receipt deadlines. *Ariz. Free Enter.
Club v. Fontes*, No. CV2024-002760 (Maricopa Cnty. Super. Ct.).⁴
- 15 • A challenge to the EPM's signature matching procedures. The Alliance intervened as
16 a defendant, and the court granted their and other defendants' motions for summary
17 judgment. *See* Order, *Ariz. Free Enter. Club v. Fontes*, No. S1300CV202300202
(Yavapai Cnty. Super. Ct. Apr. 25, 2024). Plaintiffs have appealed.
- 18 • A challenge to an EPM provision authorizing the use of ballot drop boxes. *Ariz. Free
19 Enter. Club v. Fontes*, No. S1300CV202300872 (Yavapai Cnty. Super. Ct.). The
20 Alliance intervened as a defendant, and the court granted their and other defendants'
21 motions for summary judgment in an order that was consolidated with the April 15,
2024 order in the signature matching case described above. Plaintiffs appealed, but
22 the court deemed the appeal abandoned after Plaintiffs failed to pay a filing fee.
- 23 • A lawsuit by Mohave County Supervisor Ron Gould against the Attorney General
24 seeking permission to conduct a full hand count of all ballots. *See Gould v. Mayes*,
25 No. CV2024-000815 (Maricopa Cnty. Super. Ct.). The Alliance intervened as a

26 ⁴ The state court issued a preliminary injunction against the voter intimidation guidance,
27 Ruling at 7-18 (Maricopa Cnty. Super. Ct., Aug. 5, 2024), but as the Attorney General
28 explains, the court mistakenly disregarded the clear text, audience, and purpose of the
challenged provisions of the EPM. *See* ECF No. 31 at 7 n. 3; *see also infra* n. 7.

1 defendant, and they and the Attorney General have moved to dismiss the complaint.
2 Briefing on the motions is ongoing.

- 3 • A lawsuit by state legislators challenging multiple EPM provisions related to
4 Arizona's Active Early Voter List, registration cancellation procedures, petition
5 circulator requirements, and limits on the canvassing authority of county boards.
6 *Petersen v. Fontes*, No. CV2024-001942 (Maricopa Cnty. Super. Ct.). The Secretary
7 has moved to dismiss the complaint, and a hearing on that motion was consolidated
8 with a final merits hearing; judgment is pending. The Alliance filed an amicus brief
9 in support of defendant.
- 10 • A challenge to the EPM in its entirety and in the alternative, numerous individual
11 EPM provisions. The Alliance intervened, and the Secretary along with other
12 intervenor-defendants moved to dismiss. On May 10, 2024, the court dismissed the
13 case. *See Minute Order, RNC v. Fontes*, CV2024-050553 (Maricopa Cnty. Super. Ct.
14 May 10, 2024). Plaintiffs have appealed.
- 15 • A challenge to a dozen election administration practices against multiple counties,
16 including the use of drop boxes, ballot chain of custody practices and reconciliation
17 procedures, and early ballot signature verification processes. *See Strong Cmty's*
18 *Found. v. Yavapai Cnty.*, No. S1300CV202400175 (Yavapai Cnty. Super. Ct.). The
19 Alliance intervened, and they along with other defendants moved to dismiss the case.
20 The case was stayed pending resolution of an appeal involving a venue dispute that
21 was resolved against the plaintiffs. *Maricopa County v. Ainley*, No. CA-SA 24-0086,
22 2024 WL 2783782, at *1 (Ariz. Ct. App. May 30, 2024).
- 23 • A lawsuit filed by the same counsel representing the plaintiffs in this case, seeking to
24 compel purges of the voter rolls based on the claim that the Secretary's list
25 maintenance protocols are not sufficient under Section 8 of the National Voter
26 Registration Act ("NVRA"). *See Mussi v. Fontes*, No. 24-CV-01310-PHX-DWL (D.
27 Ariz.). The Secretary has moved to dismiss the complaint. The Alliance filed an
28 amicus brief in support of defendant.
- A challenge to Maricopa County's practices for verifying registered voters'
citizenship through federal databases. *See Strong Cmty's Found. v. Richer*, No.
CV2024-020835 (Maricopa Cnty. Super. Ct.).

Plaintiffs' present lawsuit largely borrows claims from the above cases and asks the
Court to invalidate key provisions of the EPM that help election officials protect voters from
illegal intimidation and ensure the fair and orderly administration of Arizona's elections. In
Count I, Plaintiffs seek relief that would embolden counties to ignore their mandatory

1 deadline to canvass election results. *Cf. Petersen*, No. CV2024-001942 (challenging same
2 EPM provision). In Count II, Plaintiffs attempt to erase the EPM provisions providing
3 important guidance to help election officials protect Arizonans from voter intimidation—
4 conduct prohibited by Arizona law. *Cf. Ariz. Free Enter. Club*, No. CV2024-002760
5 (bringing same claim under state law).
6

7 8 **ARGUMENT**

9 The Court should reject Plaintiffs' continuing efforts to use the judiciary to force
10 Arizona's election officials and executive officers to conduct elections to Plaintiffs' liking.
11 The complaint should be dismissed at the outset because Plaintiffs fail to identify any way
12 in which the challenged provisions threaten imminent injury to Plaintiffs or their members.
13 Count I of the complaint rests entirely on a series of hypotheticals, contingent on unlawful
14 acts of third parties not before the Court. The voter intimidation guidance challenged in
15 Count II does not criminalize any conduct; it merely provides examples of the type of
16 behavior that could amount to unlawful voter intimidation under existing, unchallenged
17 Arizona statutes. *See EPM* at 73–74 & n. 40, 182–183 (hereinafter “voter intimidation
18 guidance”). Plaintiffs fare no better on the merits. The canvassing provision does not burden
19 anyone's right to vote, and any supposed regulation of interference with voters at polling
20 locations is well within constitutional limits.
21
22
23

24 Plaintiffs' request for a preliminary injunction should also be denied. In addition to
25 lacking standing and being unlikely to succeed on the merits of their claims, Plaintiffs do not
26 sufficiently establish that they will suffer irreparable harm absent an injunction, that the
27
28

1 balance of harms tips in their favor, or that an injunction is in the public interest. Each of
2 these equitable factors weighs against the injunctive relief Plaintiffs seek, which would
3 heighten the risk of voter intimidation and electoral chaos in elections already underway.
4 Plaintiffs' claims fail as a matter of both law and equity and should be dismissed.
5

6 **I. Count I should be dismissed for lack of standing and failure to state a claim.**

7 **A. Plaintiffs lack standing to bring Count I.**

8 As Secretary Fontes has ably explained, Plaintiffs' challenge to the EPM's canvassing
9 provision fails at each step of the standing analysis. ECF No. 33 at 6–9. Their purported
10 injuries are not traceable to the challenged provision and will not be redressed by the relief
11 that they seek. Most significantly, any purported injury depends on an entirely speculative
12 chain of contingencies, including the unlawful acts of third parties not before the Court.⁵
13

14 In addition to the multiple, independently fatal deficiencies identified by Secretary
15 Fontes, Plaintiffs' theory of injury requires the Court to *assume* that counties will *violate*
16 *Arizona law* and refuse to certify their election results by the statutory deadline. But the Court
17 is required to do just the opposite: “[I]n the absence of clear evidence to the contrary, courts
18 [are to] presume that [public officials] have properly discharged their official duties.”
19 *Hebrard v. Nofziger*, 90 F.4th 1000, 1009 (9th Cir. 2024) (alterations in original) (quoting
20 *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926)). “This presumption of regularity
21 applies equally to a state official’s compliance with state law.” *Id.* (citing *Nieves v. Bartlett*,
22
23
24
25

26 ⁵ Although Secretary Fontes focuses on Plaintiff Glennon’s standing because no other
27 Plaintiff has even attempted to plead standing to bring Count I, the speculative nature of the
28 claim raised in Count I equally dooms each Plaintiff’s standing, even if they could satisfy
the other requirements of Article III.

1 587 U.S. 391, 400 (2019)). To manufacture an injury, Plaintiffs mischaracterize Arizona law
2 by asserting that the challenged EPM provision grants counties “discretion,” Compl. ¶ 20, to
3 canvass results. That is simply wrong. As the EPM makes clear, and as Plaintiffs elsewhere
4 acknowledge, counties have a mandatory, non-discretionary duty under Arizona law to
5 canvass results by the statutory deadline and lack any authority to reject election results or
6 delay certifying results. *Id.* ¶ 79 (citing EPM ch. 13, § II(A)(2)); *see also* ECF No. 26 at 3. It
7 is therefore entirely speculative to assert that county elections officials will choose to break
8 the law, ignore their mandatory duty to timely canvass, and subject themselves to criminal
9 prosecution.
10

11
12 The fact that Cochise County officials refused to certify their election results by the
13 statutory deadline in 2022 does not make Plaintiffs’ purported injury any less speculative—
14 to the contrary, that experience confirms that even when a county board attempts to thwart
15 the law, mechanisms exist to ensure that all counties’ election results are included in the
16 statewide canvass. In the unlikely event that rogue county officials do decide to violate
17 Arizona election law, the proper recourse is to file a mandamus action in state court, like the
18 Alliance and Ms. Stephenson did in Cochise County in 2022. *See* Minute Entry, *Ariz. All.*
19 *for Retired Ams*, No. CV-2022-00552 (Cochise Cnty. Super. Ct. Dec. 1, 2022) (ordering
20 board of supervisors to meet and canvass its election results that day). Indeed, the Secretary
21 has already stated his intention to bring his own such action should that scenario arise. *See*
22 ECF No. 33 at 7. Simply put, the Court should not indulge Plaintiffs’ request for an improper
23 advisory opinion concerning the Secretary’s hypothetical response to hypothetical future
24 violations of state law by hypothetical third parties.
25
26
27
28

1 **B. Plaintiffs fail to plausibly allege that the canvassing deadline burdens the**
2 **right to vote.**

3 Plaintiffs' claim that the canvassing deadline burdens the right to vote fails. Alleged
4 violations of the right to vote are reviewed under the *Anderson-Burdick* test. *See Short v.*
5 *Brown*, 893 F.3d 671, 676 (9th Cir. 2018). The first step in that framework is to determine
6 whether the right to vote has been impacted at all. The canvassing deadline, when read in
7 the context of other provisions of the EPM and Arizona election law, "does not burden
8 anyone's right to vote," *id.* at 677, and therefore need only pass rational-basis review, *see*
9 *Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020).

11 Plaintiffs wrongly claim that their right to vote is burdened by the canvassing deadline
12 because it "downgrad[es] voters' right to vote from (1) an unqualified right as long as the
13 applicable rules are followed to (2) a conditional right, subject to potential disqualification
14 by the actions of elected officials." ECF No. 26 at 5. But the EPM does no such thing. As
15 Plaintiffs acknowledge elsewhere, the EPM "imposes on County Boards of Supervisors 'a
16 nondiscretionary duty to canvass the returns as provided by the County Recorder or other
17 officer in charge of elections' and removes from County Boards any 'authority to change
18 vote totals, reject the election results, or delay certifying results without express statutory
19 authority or court order.'" *Id.* at 3 (quoting EPM ch. 13, § II(A)(2)). The challenged EPM
20 provision simply states the consequences of a non-party *County Board's* failure to comply
21 with mandatory provisions of Arizona law—which likewise do not permit the Secretary any
22 discretion to delay the statewide canvass. *See* A.R.S. §§ 16-642(A)(1)(b)-(2)(b) (mandating
23 that the Secretary canvass the primary election results no later than the third Thursday after
24 25
26
27
28

1 the election, and the general election results by the third Monday after the election). Rather
2 than imposing any burden on Plaintiffs' voting rights, both the EPM and Arizona statutes
3 expressly foreclose the hypothetical burden that Plaintiffs allege by requiring that county
4 boards timely canvass their election results. *See* EPM ch. 13, § II(B)(2); A.R.S. § 16-642(A).
5 Plaintiffs cannot contrive a burden on the right to vote by presuming non-parties will break
6 Arizona law.
7

8 Accordingly, the challenged EPM provision does not burden Plaintiffs' voting rights
9 at all and rational basis review applies. *See Short*, 893 F.3d at 676 (citing *Anderson v.*
10 *Celebrezze*, 460 U.S. 780, 788 (1983)). And even if the challenged provision could be
11 considered to impose any restriction on the right to vote, the provision serves "important
12 [state] regulatory interests," *Anderson*, 460 U.S. at 788, in avoiding mass
13 disenfranchisement, *see Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964), "preventing
14 confusion, deception, and frustration in the general election process," *Rubin v. City of Santa*
15 *Monica*, 308 F.3d 1008, 1017 (9th Cir. 2002) (collecting cases), and ensuring "political
16 stability," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997), in the
17 hypothetical predicament where election officials have refused to canvass election results
18 and no other recourse exists to ensure that a county's votes are counted—a wildly speculative
19 scenario that has never come to pass.
20
21
22
23

24 **II. Count II should be dismissed.**⁶

25
26 ⁶ Amici agree with the State Defendants, *see* ECF No. 27, that this Court should abstain
27 from resolving Plaintiffs' claims against the voter intimidation guidance under the Pullman
28 abstention doctrine, *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941),

1 **A. Plaintiffs lack standing to challenge the voter intimidation guidance.**

2 Plaintiffs fail to establish Article III standing with respect to Count II as well. As
3 Attorney General Mayes has thoroughly explained, Plaintiffs have not established a concrete
4 injury traceable to Defendants’ conduct because they are not regulated by the EPM and thus
5 cannot face any “compliance costs,” ECF No. 31 at 12–14; ECF No. 32 at 3–5, and they do
6 not face any credible threat of prosecution under the voter intimidation guidance, ECF No.
7 31 at 8–12; ECF No. 32 at 5–8. In addition to each of these incurable deficiencies, Plaintiffs
8 also lack standing because the EPM guidance does not proscribe any conduct independent
9 of existing Arizona state statutes. The challenged guidance, which is addressed to local
10 election officials for consideration when developing local procedures and enforcing
11 Arizona’s voter intimidation statutes, provide mere examples of what could be unlawful, in
12 the context of describing what existing laws—which Plaintiffs do not challenge—prohibit.
13 *See* EPM at 74, 181–83 (citing A.R.S. §§ 16-1013(A), 16-1017). The challenged EPM
14 guidance therefore cannot give rise to prosecution at all, as the Attorney General has
15 confirmed. *See* ECF No. 1-4.

16
17
18
19
20 Plaintiffs also lack standing because the challenged voter intimidation guidance does
21 not criminalize any conduct beyond the statutes it expressly references (which, again
22 Plaintiffs do not challenge), and therefore any hypothetical injuries cannot be redressed by
23 the requested relief. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (“If . . . a

24
25
26
27
28

particularly considering that an Arizona state court recently issued a preliminary injunction against the voter intimidation guidance. *See* Ruling at 18, *Ariz. Free Enter. Club*, No. CV2024-002760 (Maricopa Cnty. Super. Ct. Aug. 5, 2024). In the alternative, Plaintiffs’ challenge against the voter intimidation guidance fails for lack of standing and failure to state a claim.

1 favorable judicial decision would not require the defendant to redress the plaintiff's claimed
2 injury, the plaintiff cannot demonstrate redressability"). Put differently, even if the EPM
3 guidance was eliminated, the conduct Plaintiffs claim is prohibited would remain violative
4 of Arizona statutes, and a judgment in Plaintiffs' favor would not prevent liability for the
5 same conduct under existing law. *See Arizonans for Fair Elections v. Hobbs*, 454 F. Supp.
6 3d 910, 917 (D. Ariz. 2020) (dismissing case for lack of standing because plaintiffs failed to
7 challenge related laws that "by and large, impose the same requirements" such that
8 "Plaintiffs' injury would not be redressed").
9
10

11 **B. The voter intimidation guidance is constitutional.**

12 The EPM's voter intimidation provisions provide guidance to election officials
13 through examples and restatements of the law that are consistent with the unchallenged
14 underlying statutes.⁷ They do not criminalize protected free speech for the simple reason that
15 they do not criminalize anything at all; the voter intimidation guidance is not enforceable
16 against members of the public, and it does not prohibit any conduct beyond what is already
17 proscribed by statute. And even if the challenged guidance did independently proscribe any
18 conduct, it still would not run afoul of any constitutional limits. Because Plaintiffs' challenge
19
20
21

22 _____
23 ⁷ This Court need not and should not follow the state court's conclusion—which the state
24 has appealed—that plaintiffs in that case were likely to succeed on their claim that the voter
25 intimidation guidance violates the Arizona Constitution. Because Plaintiffs here bring their
26 claim under the U.S. Constitution, this Court is not bound by the state court's decision
27 interpreting state law. Indeed, the state court's ruling is premised on its conclusion that "the
28 Arizona Constitution provides broader protections for free speech than the First
Amendment." Ruling at 16, *Ariz. Free Enterprise Club*, No. CV 2024-002760 (Maricopa
Cnty. Super. Ct. Aug. 5, 2024). In any event, the state court misinterpreted the EPM's
examples of conduct that *may* be voter intimidation as standalone prohibitions on protected
speech. As discussed herein, the voter intimidation guidance does not prohibit any conduct
not already prohibited by Arizona statutes.

1 to the EPM’s voter intimidation guidance fails on every level, it should be dismissed.

2 For the same reason Plaintiffs lack standing to challenge the voter intimidation
3 guidance—none of the provisions actually “purport[] to criminalize” any conduct beyond
4 the underlying statutes they implement, Compl. ¶ 3—it cannot acquire “criminal teeth”
5 through A.R.S. § 16-452(C). ECF No. 14 at 4. Rather, most of the provisions that Plaintiffs
6 challenge are *expressly* stated as guidance to election officials providing examples of conduct
7 that *may* constitute voter intimidation. *See* EPM at 73–74 & n.40 (listing “[s]ome examples
8 of actions that likely constitute voter intimidation”); *id.* at 181–82 (providing examples of
9 conduct that “*may* also be considered intimidating conduct”) (emphases added). Tellingly,
10 Plaintiffs have not identified a single instance of criminal prosecution under A.R.S. § 16-
11 452(C)—much less a prosecution for violation of the challenged guidance, which appeared
12 in substantially similar form in the 2019 EPM.
13
14
15

16 Even if the EPM’s guidance actually prohibited any conduct, it would not run afoul
17 of the First Amendment because it permissibly regulates conduct that Arizona may
18 constitutionally manage in and around polling locations. The U.S. Supreme Court has been
19 clear that states can regulate conduct in the vicinity of polling places to prevent undue
20 influence on voters, which necessarily includes voter intimidation. *See Burson v. Freeman*,
21 504 U.S. 191, 210 (1992) (upholding a strict ban on electioneering within 100 feet of polling
22 places).⁸ Measures to prevent voter intimidation in and around polling places remain
23
24

25 _____
26 ⁸ The four-Justice plurality in *Burson* and Justice Scalia’s concurrence in the judgment
27 parted ways over whether the public sidewalks and streets *surrounding* a polling place
28 qualify as a nonpublic forum. *See* 504 U.S., at 196–97 & n. 2 (plurality opinion); *id.*, at 214–
16 (Scalia, J., concurring). The plurality applied strict scrutiny to the electioneering buffer

1 constitutional even if they go further both physically and figuratively than the purported
2 prohibitions here. For example, the statute at issue in *Burson* was far more burdensome on
3 speech than the EPM provisions Plaintiff challenge: it was a mandatory criminal statute that
4 directly regulated individual conduct and plainly restricted “the right to engage in political
5 discourse,” *id.* at 198, “an area in which the importance of First Amendment protections is
6 ‘at its zenith,’” *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quotation omitted). Still, the
7 Supreme Court found that the 100-foot boundary was within the bounds of constitutional
8 limits. *Burson*, 504 U.S. at 211. The EPM’s straightforward guidance on the application of
9 Arizona’s voter intimidation prohibitions serves similar interests in a far less burdensome
10 manner; thus, it would be constitutional even if it did regulate speech (which, again, it does
11 not).

12
13
14
15 Plaintiffs fail to acknowledge *Burson* at all, despite its clear applicability here.
16 Instead, they attempt to contrive a constitutional infirmity by asking the Court to read the
17 voter intimidation guidance in absurd ways. Plaintiffs insist that it is a restriction that has no
18 “no temporal or geographic limitation,” and eliminates any “nexus to voting.” Compl. ¶¶ 4,
19 70, 129, 156; ECF No. 14 at 12. But the guidance relates to conduct “at a voting location,”
20 *id.* ¶ 128, 130, 136 (citing EPM at 182), which by definition only exists while voting is
21 ongoing. And all of the EPM’s examples of what “may” be “intimidating conduct” explicitly
22 reference “voter[s]” and “voting.” *See* EPM at 182–83. Moreover, the language Plaintiffs
23 challenge appears in Chapter 9, Section III of the *Election Procedures Manual*; Chapter 9

24
25
26
27 _____
zone, and even under that more exacting standard, found that the state law was permissible
under the First Amendment. *See* 504 U.S. at 211.

1 provides guidance to election officials on “Conduct of Elections/Election Day Operations,”
2 and Section III covers “Preserving Order and Security *at the Voting Location.*” *Id.* at 180
3 (emphases added). Based on the plain language and context of the EPM, the temporal
4 limitation is during voting, the geographic limitation is the voting location, and the nexus to
5 voting is self-evident. *See Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It
6 is a fundamental canon of statutory construction that the words of a statute must be read in
7 their context and with a view to their place in the overall statutory scheme.”).

8
9 Nor does the guidance, as Plaintiffs argue, prohibit speech that merely “give[s]
10 offense.” *See* ECF No. 14 at 10–11 (citing *Matal v. Tam*, 582 U.S. 218, 249 (2017)). Rather,
11 the guidance states that “threatening, harassing, intimidating, or coercing voters” is
12 prohibited, and provides examples of conduct that “*may* also be considered intimidating
13 conduct,” including “[u]sing threatening, insulting, or offensive language to a voter or poll
14 worker.” EPM at 181–82. Thus, “offensive language” is only prohibited if it rises to the level
15 of an illegal threat, harassment, or intimidation.
16
17

18 Plaintiffs cite an array of First Amendment cases that have little to no relevance to the
19 issues presented here. In both *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *United*
20 *States v. Williams*, 553 U.S. 285, 299 (2008), the Supreme Court reaffirmed the
21 government’s power to restrict certain speech under the First Amendment, and in both cases,
22 *upheld* the restrictions at issue. And the conduct covered by the EPM guidance is not merely
23 a “distasteful mode of expression,” like the speech at issue in *Cohen v. California*, 403 U.S.
24 15, 21 (1971). The EPM guidance refers to intimidating conduct directed at voters while
25 exercising their right to vote, which may be regulated without violating First Amendment
26
27
28

1 speech rights. *See Burson*, 504 U.S. at 211. And the question in *Counterman v. Colorado*,
2 600 U.S. 66 (2023), was whether the defendant was lawfully *prosecuted* for “true threats”
3 under an objective standard. But as Plaintiffs acknowledge, the Attorney General confirmed
4 that *no one* will be prosecuted under the voter intimidation guidance, under any standard.
5 ECF No. 14 at 9. In any event, because *Counterman* was a post-prosecution challenge, the
6 Supreme Court said nothing about the facial constitutionality of a regulation implementing
7 an unchallenged statute.
8

9
10 Plaintiffs’ due process claim also lacks merit. Even if the challenged provisions
11 somehow imposed criminal liability (they do not), Plaintiffs would still have to show that
12 they do not “give [a] person of ordinary intelligence a reasonable opportunity to know what
13 is prohibited,” or “provide explicit standards for those who apply them.” *Edge v. City of*
14 *Everett*, 929 F.3d 657, 664-65 (9th Cir. 2019). Neither is true here. The challenged provisions
15 outline what is proscribed by statute and provide examples of conduct that may give rise to
16 a violation. *See EPM* at 73–74 & n.40, 181–82. These examples themselves defeat Plaintiffs’
17 vagueness challenge, offering ample explanation to election officials and individuals alike,
18 well beyond the constitutional minimum. For the same reasons, the EPM provisions provide
19 more than “fair notice” as to what conduct is proscribed. *See Edge*, 929 F.3d at 664.
20
21

22 In sum, because the EPM’s voter intimidation guidance does not criminalize any
23 behavior at all, and even if it did, it would be well within constitutional parameters, Plaintiffs’
24 claims should be rejected.
25

26 **III. The equities and the public interest weigh against injunctive relief.**

27 For all the foregoing reasons, both of Plaintiffs’ claims should be dismissed and the
28

1 Court need not reach Plaintiffs’ request for injunctive relief. In any event, all equitable
2 considerations weigh heavily against an injunction.

3
4 For the same reasons that Plaintiffs lack standing to pursue their claims, they cannot
5 satisfy the higher burden of demonstrating an immediate risk of irreparable harm—the EPM
6 provisions Plaintiffs seek to enjoin do not impose any restrictions on them at all. *See Poder*
7 *in Action v. City of Phoenix*, 506 F. Supp. 3d 725, 729–30 (D. Ariz. 2020). On the flipside,
8 Plaintiffs’ requested relief would inflict grave harm to the public interest and sow confusion
9 and chaos among election officials and voters alike, just weeks before in-person voting
10 begins for 2024 general election. Plaintiffs’ requested relief on the canvassing deadline
11 would embolden counties to shirk their duty under Arizona law to timely certify election
12 results, endangering the voting rights of Arizonans across the state. The challenged provision
13 is meant to protect against widespread disenfranchisement of Arizonans in the unlikely
14 scenario that a county fails to timely canvass its election results and no other recourse exists.
15 *See* A.R.S. § 16-642(A)(1)(b) (mandating that counties canvass their general election results
16 no later than the third Thursday after the election); *see also id.* § 16-642(A)(2)(b) (requiring
17 Secretary to canvass the election results after the counties’ canvass). Although Plaintiffs cast
18 their lawsuit as an effort to *protect* voters from disenfranchisement, the relief they seek
19 would have the opposite effect, encouraging county officials to promote their own political
20 agendas by unilaterally delaying statewide certification, disenfranchising voters not just in
21 their county but *across the state*. *See Reynolds*, 377 U.S. at 555 n.29 (“The right to vote
22
23
24
25
26
27
28

1 includes the right to have the ballot counted.” (quotation marks omitted)).⁹ The EPM simply
2 underscores the legal reality that the Secretary must timely fulfill his nondiscretionary duty
3 to canvass the state’s election results, making clear that if counties break the law by failing
4 to canvass by November 25, the Secretary lacks any ability to delay the statewide canvass to
5 accommodate their intransigence.
6

7 As for the voter intimidation guidance, Plaintiffs’ requested relief would frustrate
8 election officials’ ability to prevent the kind of voter intimidation that plagued Arizona’s
9 2022 election, inviting a repeat of armed, masked vigilantes intimidating lawful voters
10 attempting to return their ballots, threatening to deter voters from casting their ballots. *See*
11 *Ariz. All. for Retired Ams. v. Clean Elections USA*, 638 F. Supp. 3d 1033, 1045 (D. Ariz.
12 2022) (recognizing that intimidation that could dissuade voters from using drop boxes
13 constitutes irreparable harm), *op. vacated on other grounds*, No. 22-16689, 2023 WL
14 1097766 (9th Cir. Jan. 26, 2023). Such a result would undermine the strong public interest
15 in “permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697
16 F.3d 423, 437 (6th Cir. 2012). And among the voters most endangered by such threats are
17 those in Arizona’s marginalized populations, including Amici’s members and constituents
18
19
20
21

22 ⁹ The canvassing deadline is especially critical to ensure that Arizona voters’ votes in the
23 presidential election are given effect. Federal law requires that each state issue a certificate
24 of ascertainment of appointment of presidential electors “[n]ot later than the date that is 6
25 days before the time fixed for the meeting of the electors,” 3 U.S.C. § 5(a)(1). This year,
26 that deadline is December 11. The Secretary cannot issue certificates of ascertainment until
27 the statewide canvass is complete. A.R.S. § 16-212(B). Requiring the Secretary to delay the
28 statewide canvass in the event a county fails to timely canvass its results would seriously
threaten his ability to meet this federal deadline, creating the intolerable risk that *all* of
Arizona’s votes are excluded in determining the next president of the United States.

1 in the state’s underserved Native community and elderly voters who are uniquely vulnerable
2 to burdens on the right to vote.

3
4 **CONCLUSION**

5 For all of these reasons, Plaintiffs’ complaint should be dismissed.

6 RESPECTFULLY SUBMITTED this 16th day of August, 2024.

7 **BARTON MENDEZ SOTO PLLC**

8 By: /s/ James E. Barton II
9 James E. Barton II, AZ Bar No. 023888
10 401 W. Baseline Road, Suite 205
11 Tempe, AZ 85283
james@bartonmendezsoto.com

12 **Elias Law Group LLP**

13 Lalitha D. Madduri*
14 Richard A. Medina*
15 Marisa A. O’Gara*
16 Julie A. Zuckerbrod*
17 250 Massachusetts Ave NW, Suite 400
18 Washington, D.C. 20001
lmadduri@elias.law
19 rmedina@elias.law
mogara@elias.law
jzuckerbrod@elias.law
20 *Admitted Pro Hac Vice

21 *Attorneys for Amici Curiae Arizona Alliance*
22 *for Retired Americans, Alfred Lomahquahu*
23 *and Stephani Stephenson*
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that, on this 16th day of August, 2024, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and that all parties and persons requiring notice were served through the CM/ECF system.

/s/ James E. Barton II

RETRIEVED FROM DEMOCRACYDOCKET.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28