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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

American Encore, an Arizona non-profit corporation; Karen Glennon, an Arizona individual; America First Policy Institute, a non-profit corporation, Plaintiffs, vs. 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 or Arizona, Defendants.	Case No.: CV-24-01673-PHX-MTL **PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS AND REPLY IN SUPPORT OF THEIR MOTIONS FOR PRELIMINARY INJUNCTIONS** **Oral Argument Scheduled For September 12**

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INTRODUCTION

The Speech Restriction and Vote Nullification Provision are both patently unconstitutional and effectively indefensible. Defendants thus predictably respond largely by attempting to (1) twist the relevant texts into something more defensible and (2) avoid the merits altogether by raising various justiciability arguments, such as a putative lack of Article III standing. Both attempted evasions fail.

On interpretations, the text of the Speech Restriction simply cannot bear the contortions that the Attorney General engages in. Its plain text is plainly a general prohibition applicable to anyone that is a "person" (*i.e.*, everyone): it thus "prohibit[s]" "*any* activity by a person" that falls within its scope. EPM at 181 (emphasis added).

Defendants' effort to transform the Speech Restriction into purely non-binding guidance applicable only to poll workers is squarely contrary with the plain meaning of the words "prohibit" and "person"—particularly as modified by "any." In Defendants' view, however: (1) "prohibit" does not prohibit anything, (2) "person" means only "poll workers" and not other persons, and (3) "any" does not mean anything at all. Defendants' twisting of the meaning of words well past their breaking points calls to mind the infamous California court decision holding that a "bee" qualified as a "fish." *See Almond All. of Cal. v. Fish & Game Com.*, 79 Cal. App. 5th 337, 341 (3d Div. 2022) (holding that "the bumble bee, a terrestrial invertebrate, falls within the definition of fish"). But the meaning of words is not so infinitely malleable under Arizona law.

This plain-text reading—*i.e.*, that a "prohibit[ion]" applicable to "any … person" is a prohibition applicable to any person—is underscored by (1) the Secretary's *multiple* statements demonstrating his view that the Speech Restriction is a binding and enforceable prohibition applicable to everyone, (2) Defendants' request for a stay pending appeal in the State Case, implicitly advancing that same position, (3) Defendants' own brief here, which makes clear their view that the Speech Restriction's examples are sufficiently binding prohibitions that "law enforcement" could be called out to enforce them, and (4) the ease with which the Arizona superior court dispatched Defendants' equivalent arguments.

The Secretary's attempted textual evasions as to the Vote Nullification Provision fare no better. He erroneously reads statutory provisions that create a *duty to canvas* as imposing a *duty to disenfranchise* all voters in counties whose Boards of Supervisors have refused or otherwise failed to certify election results. But that clumsy sleight of hand fails because there are a multitude of ways in which canvasing can be accomplished without the need to disenfranchise affected voters *at all*—let alone *en masse*. Indeed, A.R.S. § 16-644 makes clear that the duty to canvas requires *counting* votes, not throwing them out.

That reading of the duty to canvas is confirmed by Arizona's 49 sister states. By all indications, *every* other state manages to discharge their respective duties to canvas results without the need—or resort—to disenfranchising voters (and the Secretary has identified no equivalent provisions *anywhere* in the United States). The Secretary's view that the duty to canvas necessarily includes a duty to disenfranchise is, to put it mildly, a lonely one.

Defendants' standing arguments fare no better than their state-law interpretive arguments, particularly as the former are overwhelmingly premised on the latter. In particular, Defendants do not dispute that Plaintiff America First Policy Institute ("AFPI") has incurred compliance costs as a result of the Speech Restriction. And their efforts to portray such costs as a "self-inflicted" overreaction fail both because they are premised on Defendants' untenable interpretive arguments and because they misapprehend standing precedents generally. In addition, the Secretary's refusal to disavow enforcement of that provision—and Defendants' multiple statements and actions demonstrating that they view it as a binding prohibition on *everyone*—make plain that Plaintiffs face a credible threat of enforcement.

For the Vote Nullification Provision, Plaintiffs have standing both based on (1) the ongoing harm of having their right to vote downgraded from being *unconditional* right (so long as applicable rules are followed) to one *conditional* based on how governmental officials discharge their duties and (2) the credible threat of future disenfranchisement. As to the former, Plaintiffs cited multiple lines of cases that recognize such injury. Defendants respond only with (1) facile contentions that those cases are somehow "different" without

engaging in the fundamental similarities in the nature of the injuries and (2) a bizarre and categorical contention that "the law does not recognize the alleged diminution of Plaintiff's right to vote as an … injury," SOS PI Opp. at 7—which conflicts with a legion of federal cases recognizing vote-dilution claims as establishing cognizable injury.

As to future injury, Plaintiffs face a credible threat of disenfranchisement based on the Secretary's refusal to disavow enforcement of the Vote Nullification Provision, the refusal of the Cochise Board of Supervisors to certify results in 2022, the recent flirtation of a Pinal County supervisor with not certifying 2024 primary results, and the growing trend throughout the U.S. of refusing to vote for certification of results.

On the constitutional merits, Defendants offer precious little in actual defense of the challenged provisions. For the Speech Restriction, virtually all of Defendants' limited arguments hinge on their erroneous view that the provision is purely non-binding and only applies to poll workers. Once that a-bee-is-actually-a-fish species of textual interpretation is rejected, there is very little in the way of defense of the provision as actually written. But what could they say? A regulation that purports to prohibit speech in the form of "insulting or offensive language" or even just "raising one's voice"—all without any proof of *mens rea*, and instead based on "effect" alone—is about as clearly unconstitutional as First Amendment violations come. And what little defense that Defendants offer is plainly insufficient.

As to the Vote Nullification Provision, it imposes a severe burden under *Anderson-Burdick*. Indeed, that burden is severe: *mass* and *complete* disenfranchisement of *all* voters in a county, who are faultless. Defendants tellingly fail to address *even one* of Plaintiffs' cases demonstrating that the burden here is severe. That issue is dispositive: if the burden is a severe one, strict scrutiny applies and Defendants offer no argument that the Vote Nullification Provision can survive it.

But even if the burden were not severe, it is at least significant/substantial. And the Secretary never explains why total disenfranchisement is necessary to accomplish the State's interest in obtaining election results—particularly where several other alternatives

such as seeking mandamus or declaratory relief from courts are readily available and do not require mass disenfranchisement.

Because the Secretary has failed to establish that complete disenfranchisement of all voters in affected counties is remotely necessary, the Vote Nullification Provision is unconstitutional under *Anderson-Burdick*'s ends-means test even if it did not impose a severe burden (and it does).

Finally, binding Ninth Circuit precedent makes plain that when a likely violation of Plaintiffs' First Amendment rights or right to vote are demonstrated, that injunctive relief is typically appropriate. This case presents no basis to depart from that default rule.

For all of these reasons, this Court should grant Plaintiffs' motions for preliminary injunctions and deny Defendants' motions to dismiss.

ARGUMENT

I. DEFENDANTS' THRESHOLD INTERPRETIVE ARGUMENTS LACK MERIT

Most of Defendants' jurisdictional arguments turn on their contentions that (1) the Speech Restriction is purely non-binding guidance for poll workers and does not prohibit any speech or conduct by members of the general public, and (2) other unchallenged statutory provisions providing for a duty to *canvas* independently mandate the *disenfranchisement* of votes cast in counties with uncertified election results, which the Vote Disqualification Provision purportedly only duplicates. Before turning to the specific jurisdictional arguments, it is therefore useful to explain why those interpretative arguments about Arizona law are incorrect—indeed, outright specious.

This Court owes *no deference* to Defendants' interpretation of EPM provisions. *See* A.R.S. § 12-910(F). And because Defendants' interpretations contort the operative texts beyond recognition, this Court is obliged to reject them under *de novo* review.

A. The Speech Restriction Imposes A Binding Prohibition On *Everyone*

The centerpiece of Defendants' defense of the Speech Restriction is an attempt to twist it into something it is not: *i.e.*, rather than the binding prohibition that applies to any "person," they contend that it is merely non-binding guidance for election workers and

does not prohibit speech and conduct from the public at large. AG MTD at 5–9; AG PI Opp. at 3–9. But the Speech Restriction's text cannot bear Defendants' contortions of it. Everything from (1) the plain text of the Speech Restriction, (2) the context of its adoption, (3) Defendants' repeated statements, (4) Defendants' litigation conduct, and (5) the state court's decision all demonstrate that the Speech Restriction is exactly what its text says it is: *i.e.,* a provision that makes "any activity by a person" that falls within its scope is "prohibited." EPM at 181.

1. Speech Restriction Is A Criminal Prohibition On Speech And Conduct

The EPM's enabling statute criminalizes violations of the EPM's rules. It provides: "A person who violates any rule adopted pursuant to this section [*i.e.*, any provision of the EPM] is guilty of a class 2 misdemeanor." A.R.S. § 16-452(C). And the Arizona Supreme Court has explained that, under A.R.S. § 16-452(C), "the EPM has the force of law; *any* violation of an EPM rule is punishable as a class two misdemeanor." *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (2020) (emphasis added).

The EPM's Speech Restriction is an EPM rule—which Defendants do not meaningfully contest—and, by its terms, is a prohibition on speech and conduct. It provides: "Any activity by a person with the intent or effect of threatening, harassing, intimidating, or coercing voters (or conspiring with others to do so) inside or outside the 75-foot limit at a voting location is prohibited." EPM at 181.

As explained in more detail in Plaintiffs' opposition to *Pullman* abstention, (ECF No. 41 at 9–12), the EPM's use of the word "prohibit" means exactly that; it is a prohibition. Indeed, "prohibit" unambiguously means "to forbid" or "officially refuse to allow something." *Prohibit*, Cambridge Dictionary https://dictionary.cambridge.org/us/dictionary/english/prohibit (last visited Aug. 23, 2024).

Moreover, the Speech Restriction's use of the modifier "any" before "activity" further elucidates the *broad* scope of the prohibition. The word "'any' has a well-established "expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"

Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008) (citation omitted)); *accord Babb v. Wilkie*, 140 S. Ct. 1168, 1174 n.3 (2020) ("We have repeatedly explained that 'the word 'any' has an expansive meaning."). Thus, the use of "any" confirms that "any activity" that falls within the Speech Restriction is "prohibited." EPM at 181. Defendants' arguments make *no* effort to account for the Speech Restriction's use of the word "any," however—simply treating it as if it is not there. But it is and it precludes their construction.

The Speech Restriction is thus, as its text says, a "prohibit[ion]." EPM at 181. And violations of the Speech Restriction are criminally prohibited. *See* A.R.S. § 16-452(C).

2. The Speech Restriction Applies To *Everyone*, Not Just Poll Workers

Defendants continue to labor under the erroneous belief that the Speech Restriction merely "guides election officials," and "does not regulate Plaintiffs." AG MTD at 1. To reach this conclusion, Defendants misread "person" to mean *only* elections workers.

Defendants' construction is untenable. By its plain text, the Speech Restriction explicitly applies to anyone that is a "person"—which means ordinary members of the public just as much as election officials. That is particularly true as person is modified by "any," which indicates that maximal breadth was intended. *Supra* § I.A.1.

That result is reinforced by the fact that the Speech Restriction purports to implement A.R.S. § 16-1013, which both (1) also uses the word "person" and (2) undeniably uses "person" as applying to *everyone*, poll workers and members of the general public alike. Defendants' pretense that "person" means one thing for § 16-1013 but another for the regulatory provision implementing it—even though the regulation, unlike the statutory provision, also includes the intensifier "any"—is contrary to basic principles of statutory interpretation. Indeed, "[t]o give the same words a different meaning for each [related provision] would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

Defendants rely (AG MTD at 5-6, 15) heavily on the premise that because the second sentence of the Speech Restriction refers to "the officer in charge," then "person" in the first sentence must just mean election workers. But the fact that the first sentence

uses "person" and the second refers to election workers *confirms* rather than disproves that the provision applies to members of the general public. Courts "usually 'presume differences in language like this convey differences in meaning.'" *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071–72 (2018). Indeed, "[a]textual judicial supplementation is particularly inappropriate when, as here, the [drafter] has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019). Defendants have shown the ability to distinguish between "person" and election officials throughout the EPM. Their use of "person" in the first sentence and "officer in charge" in the second demonstrates that a *different* meaning was intended for each, rather than silently swapping out the meaning of "person" from § 16-1013.

3. The Speech Restriction Contains A Limitless Geographical Scope And Provides No Temporal Limitations

In response to Plaintiffs' explanation that the Speech Restriction contains a limitless geographic and temporal scope, Defendants offer the following detailed analysis: "It does not," AG PI Opp. at 11, and that such a construction is "absurd[]," AG MTD at 6–7. But that is the only defensible way to read the Speech Restriction's actual text.

Take the geographic scope first. By its terms, the Speech Restriction explicitly applies both "*inside or outside* the 75-foot limit at a voting location." EPM at 181 (emphasis added). The combined universe of locations that are either "inside or outside the 75-foot limit" is the entire territory of Arizona's borders. That is not an absurd construction of the Speech Restriction's geographic scope; it is the only possible construction. Indeed, the Speech Restriction later uses the same "*inside or outside* the polling place" language *a second time* when providing examples of violations. *Id.* at 182 (emphasis added). This repetition of language expressly disavowing geographic limitations demonstrates that no such limitations exist.

Take next the temporal scope. The Speech Restriction is stated as a universal prohibition on conduct without any requirement that the "any activity … [that] is prohibited" be committed on election day itself. *Id.* at 181. And its explicit use of the word

"any" indicates the provision applies without temporal limitation. *Supra* at 5–6. "Any" necessarily means anywhere and on any day. Shoehorning in temporal and geographical limitations into the provision's actual text would de facto transform "any activity" into "only some activities, with implied limitations TBD."

Defendants are thus mistaken that the Speech Restriction contains implicit geographic and temporal restrictions. And their insistence that it does—contrary to its *explicit* text—is emblematic of the weaknesses in their interpretive arguments overall.

4. The Context Of The Speech Restriction's Adoption Reinforces That It Is A Binding Prohibition On Everybody

After the Secretary released the draft EPM, the President of the Senate and Speaker of the House voiced concerns about certain sections of the then-draft EPM. ECF No. 1-1 at 2. In particular, the leaders expressed specific concerns about the Speech Restriction, including that it "purport[ed] to criminalize wide swaths of speech and conduct that you speculate might be 'considered intimidation,'" including "'offensive language.'" *Id.*

The Secretary's response to these serious constitutional concerns from a coordinate branch of government? Nothing. He promulgated the Speech Restriction without any amendment from the draft EPM. *Compare* Third Declaration of Brennan A.R. Bowen (attached hereto as Ex. B), ¶4, Attachment 1 *with* EPM at 181–83. If the Secretary truly wished to promulgate non-binding guidance for poll workers, the appropriate response to the Legislature's concern would have been to amend the Speech Restrictions to clarify that it does not apply to any "person" who engages in "[a]ny activity" that the provision prohibits. There are many ways the Secretary could have achieved such an amendment, but he opted for none of them—leaving the language exactly as it was. A binding prohibition was thus *intended*.

5. Maricopa County Superior Court Already Held That The Speech Is A Binding, Criminal Prohibition On Everybody

Plaintiffs are not the only party unpersuaded by Defendants' construction of the Speech Restriction. Indeed, an Arizona court has already rejected it. Decisively. *See* ECF

No. 41-1 at 12–23. As the superior court explained, the Speech Restriction "serves 'as a universal prohibition on conduct.'" *Id.* at 22. And the "EPM's language has restricted what the Secretary finds acceptable regarding behavior, both speech and acts." *Id.* at 21. It further explained that it "applies to all Arizonans, not just those professionally involved with elections or volunteering to assist in election operations." *Id*. at 14.

That well-reasoned decision reinforces Plaintiffs' arguments here. And Defendants' contention (AG MTD at 7-8 n.3) that the superior court "disregarded the clear text" of the Speech Restriction is pure projection.

6. Secretary Fontes' Multiple Public Statements Confirm That The Speech Restriction Is A Binding Prohibition

After the superior court ruling, Secretary Fontes told the press that: "While we respect the court's decision to halt certain *speech restrictions*, implementing a preliminary injunction for the general election would be too far reaching." ECF No. 41-1 at 62 (emphasis added). Thus, even the Secretary believes that the Speech Restriction contains "speech restrictions"—*i.e.*, actual prohibitions on speech, rather than non-binding guidance.

Secretary Fontes also tweeted that one of the Plaintiffs here and in the State Case "*put non-protected harassment/intimidation speech* vs 1A right of voters to peaceably assemble." *Id.* at 41 (emphasis added) (emphasis added). Once again, the Secretary expressed his clear view that the Speech Restriction does—and should—prohibit "speech."

And a few days later, Secretary Fontes gave an interview where he broke his "habit" of not "discuss[ing] any pending lawsuits" because this one was "really, really personal to me." Ex. B, Attachment 2 at 5. He also made clear his view that the Speech Restriction's example of "disseminating false or misleading information" was a binding prohibition that was "blocked by the judge too," which "chipp[ed] away at our ability to … *regulate the behavior* during an election season." Ex. B, Atachment 9 at 1–2 (emphasis added).

Secretary Fontes went on to accuse one of the state-court plaintiffs, Arizona Free Enterprise Club (AZFEC) of "trying to create chaos at polling places," "want[ing] voters

to be taunted um using threating[,] insulting[,] or offensive language," and "want[ing] chaos and disorder." Ex. B, Attachment 2 at 6. He then added that AZFEC (and, presumably, its members) are "wackos" and that people should call AZFEC to pressure them to drop the suit. *See id.* at 7.

The Secretary's declaration that AZFEC wants chaos and disorder, and that this and the state lawsuit challenging the Speech Restriction will achieve that result, makes plain that he believes that the provision is a binding prohibition with actual legal operative effect. One cannot "create chaos" by enjoining a provision that never had any legal effect to begin with. Only an injunction against an operative provision could do that.

An additional interview from the Secretary, two days later, bolsters this point. On August 18, 2024, Secretary Fontes opined AZFEC "and their ilk" are attempting to create a scenario where their fellow citizens "can get yelled and screamed at by wackos," with the purported ultimate objective of "chaos and disorder" rather than "peace and harmony of our election systems." Ex. B, Attachment 3 at 1.

He also added that the EPM provides enforcement power against the public: "the marshals, the judges, and the inspectors, who are assigned polling places, are empowered by these guidelines to basically have some standard way of dealing with these sorts of things across the entire state." *Id.* at 1. He then went on to heap "shame on [AZFEC] for wanting disorder in our election systems," and to call for its members to defund it. *Id.* ("And I would say, if you're donating to the Free Enterprise Club, your money is going into this lawsuit as against the good order of our elections in Arizona.").

The Secretary's comments demonstrate that he believes the Speech Restriction is a binding prohibition on speech and expressive conduct that applies to everyone.

7. Defendants' Request For A Stay Pending Appeal Underscores That They Believe The Speech Restriction Is A Prohibition On Everyone

Defendants have sought a stay of the Maricopa County Superior Court decision enjoining the Speech Restriction. ECF No. 41-1 at 43–56. If defendant thought the Speech Restriction did nothing besides guide election workers, then there would be no immediate

need for a stay of the superior court's injunction. Put differently, Defendants cannot suffer irreparable injury from an injunction that prevents them from enforcing a provision that was never enforceable at all. Yet Defendants decry that they will be irreparably harmed by the injunction against the Speech Restriction. *See id.* at 49–51 ("The harm to Defendants (and to the public) is clear if the Court declines to stay the declaratory and injunctive relief granted to Plaintiffs"). That position is irreconcilable with their claim that the Speech Restriction prohibits nothing. Their inability to enforce it could only conceivably cause them harm if it actually prohibited something that the underlying statutes did not.

Specifically, Defendants contend that "[a]bsent a stay, election workers will be (understandably) confused about their responsibilities for preserving order and security at voting locations, which are outlined in chapter 9, section III." *Id.* at 49–50. They add that "[t]he probable effects of that confusion" are "increased voter intimidation, voter concern about intimidation, and voter disenfranchisement." It is evident from Defendants arguments that they believe (1) that the Speech Restriction contains prohibitions on speech and conduct, and (2) that those prohibitions apply to the public. Otherwise, what could poll workers be confused about enforcing? The underlying statutes still exist and can still be enforced. To the extent that there is any "confusion," it could only be because the Venn Diagram of conduct prohibited by the Speech Restriction encompasses *all* of the existing statutory prohibitions and then adds some *more* prohibitions.

Defendants' actions in seeking a stay thus belie their implicit—but inescapable—view that the Speech Restriction is a binding prohibition on the general public.

8. Defendant's Conflicting Arguments Here Also Demonstrate That They Believe The Speech Restriction Is A Binding Prohibition

Defendants also here add spurious insinuations about Plaintiffs' intent (AG MTD at 9 & n.4), which actually demonstrate that the Speech Restriction is a binding prohibition. Specifically, Defendants provide the following example when arguing how the Speech Restrictions might be constitutionally applied:

> For example, if a self-appointed poll observer tries to physically block a voter from voting, or points at a voter and shouts "Vote for Harris or I will bury

> you!", or screams in a voter's face "Vote for Trump you f---ing b--ch!", an election official may ask the poll observer to cut it out. And if the behavior persists, *the official may ask law enforcement to help handle the situation*.

AG PI Opp. at 9 (emphasis added). Defendants then suggest "that [it] is far from clear" that "Plaintiffs would agree" that the above examples are not unconstitutional applications of section III(D). *Id.* at n.4.

Defendants' arguments are notable for three reasons. *First*, Defendants' example illustrates Plaintiffs' point: Defendants believe that the Speech Restriction actually prohibits speech and conduct from the general public, not just election officials. The *reason* that Defendants believe that "law enforcement" can be called out to enforce that example from the Speech Restriction is that they believe that it creates *law that can be enforced*. One cannot call the police when someone violates non-binding guidance.

Law enforcement exists to enforce actual *laws*. Defendants' position that the Speech Restriction contains law to enforce thus concedes that it operates as a binding prohibition. And anything prohibited by the EPM is a crime to commit. A.R.S. § 16-452(C).

Second, Defendants' feigned ignorance as to Plaintiffs' position (that it is "far from clear") is disingenuous. Plaintiffs specifically communicated to Defendants' counsel—in request to their specific inquiry—that "[t]o the extent that any conduct is prohibited by the plain text of A.R.S. § 16-1013 alone—and not because of any gloss that the Speech Restriction applied to it—that would not be enjoined." Ex. B, Attachment 4 at 1. Defendants were thus amply aware of Plaintiffs' position that existing *statutes* could be enforced, and that Plaintiffs do not challenge their constitutionality—just the Speech Restriction's addition of *new* prohibitions on top of them. What Defendants claim is "far from clear" to them was in fact made amply clear to them.

Third, the reason that Plaintiffs sought (and obtained) an injunction against the whole Speech Restriction (§ III.D) is obvious: it is *all* premised on the central prohibition contained in its first sentence. Because *all* of the rest of the Speech Restriction applies that central prohibition, it necessarily falls when its foundation is knocked out from under it. To the extent that Defendants wish to promulgate guidance applying § 16-1013 *alone*—

and not the Speech Restriction's unconstitutional gloss on it—they are welcome to do so.

That examples applying an unconstitutional prohibition are properly enjoined with that unconstitutional prohibition itself is hardly a "shocking position," but rather an unexceptional one—and one hardly revealing of the nefarious intent as Defendants insinuate. AG PI Opp. at 9 n.4. Indeed, that "shocking position" is actually the *default rule* that federal courts apply when reviewing federal rules under the APA. *See*, *e.g.*, *National Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 501 (D.C. Cir. 2019) ("[V]acatur [of the entire rule] is the default remedy to correct defective agency action.") (citation omitted).

B. The Secretary's Statutory Duty To *Canvas* Results Includes No Parallel Mandate To *Disenfranchise* Voters

The Secretary's interpretive arguments about the Vote Nullification Provision rely on conflation of two *very* different concepts: in the Secretary's view, his duty to *canvas* election results includes a duty to *disenfranchise* voters in the process. But the duty to canvas is a mandate to *count* votes, not throw them out.

Defendants thus take pains to explain the detailed natures of election timelines, a County Board of Supervisors' duty canvas its county without delay, and the Secretary's concomitant duty to canvass the state results without delay. *See* SOS MTD at 3–6, 14; SOS PI Opp. at 5, 7. That is a red herring: Regardless of the tight statutory deadlines to canvass, the Secretary has a duty to canvass *the whole state* and not toss out the votes of an entire county because it is administratively convenient for him to do so. Nothing in state law imposes a duty of disenfranchisement.

Arizona's procedures for canvassing are codified at A.R.S. §§ 16-641 to -651. Section 642—on which Defendants extensively rely—merely provides that the "governing board of a county" and the "secretary of state" each "shall meet and canvass" the elections that they respectively oversee by certain deadlines after the general and primary elections. A.R.S. § 16-642(A)(1)– (2). Section 16-648—also cited by Defendants—imposes a similar duty on the Secretary for elections for statewide offices and ballot measures. A.R.S. § 16-648(A)–(B). In short, county boards canvass first, and the Secretary canvasses after

that, using the official canvasses from the counties. *Id.*

Much as Defendants make about deadlines for canvassing and the Legislature's recent amendment to those timelines, Plaintiffs do not challenge those timelines. And nowhere do §§ 16-642 or -648 mandate that the Secretary refuse to canvass the votes for an entire county. *See id.* Indeed, implicit in the Secretary's duty to canvass the state is his duty to canvass the *entire* state—not leave entire counties' votes uncounted. *See* A.R.S. 16-648(A)–(B) (mandating that the Secretary "canvass *all* [statewide] offices" and "canvass *all* proposed constitutional amendments and initiated or referred measures") (emphasis added). The duty to canvas "all" statewide votes means just that: rather than mandating that the Secretary simply throw out uncertified votes, he is obligated to find a way to include them in the final count. But the Vote Nullification Provision changes that, mandating disenfranchisement for all voters whose county results are not certified.

The Secretary appears to labor under the misimpression that statute statutory law mandates that without an official, timely canvass from a county board of supervisors, the Secretary cannot canvass that county. This is incorrect. It is true that the county must cavass election results, certify the winners, and send those official returns to the Secretary. A.R.S. §§ 16-645(A); 16-646. But state statutory law leaves multiple methods of resolving the issue of uncertified results that do *not* require disenfranchising all affected voters. For example, A.R.S. § 16-643 only requires that the Secretary "determin[e] the vote of the county." That does not require throwing out any votes.

Similarly, § 16-644 provides that if the canvasser—here, the Secretary—cannot determine the information that should be in the county's returns, he must not reject it for lack of formality. It thus provides "No list, tally, certificates or endorsement returned from any precinct shall be set aside or rejected for want of form, or for not being strictly in accordance with the explicit provisions of this title, if they can be clearly understood" and adds that "nor shall any declaration of result, commission or certificate be withheld or denied by reason of any defect or informality in making the returns of the election in any precinct, if the facts which the returns should disclose can be definitely ascertained."

Thus, if the Secretary can "definitely ascertain[]" the "facts which the returns should disclose," then he *must not "reject*" the information, but instead must fulfill his duty to canvass. A.R.S. § 16-644 (emphasis added).

In sum, Arizona statutory law imposes on the Secretary a duty to *canvass* the *entire* state. That does not include a duty or authorization to disenfranchise voters simply because their Board of Supervisors has refused or failed to certify results. But while statutory law includes no such mandate, the Vote Nullification Provision does. And that mandate imposes an unconstitutional burden on the right to vote, as described previously and below.

II. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFFS' CLAIMS

A. Plaintiffs Have Standing To Challenge The Speech Restriction

Plaintiffs have standing to challenge the Speech Restriction based on (1) their ongoing compliance costs and (2) the credible threat of enforcement of the provision against them.

1. Plaintiffs' Compliance Costs And Being The Object Of Regulation Establishes Standing

Defendants' arguments (AG MTD at 13–15) that Plaintiffs' compliance costs as one of the regulated parties fail to establish Article III standing are largely premised on (1) their erroneous interpretive arguments, *see supra* § I.A, and a (2) grave misunderstanding of federal standing precedents.

The Supreme Court has long made clear that when a "suit is one challenging the legality of government action or inaction" and "the plaintiff is himself an object of the action (or forgone action) at issue … there is ordinarily little question that the action or inaction has caused him injury and that a judgment preventing or requiring the action will redress it"—*i.e.*, that the plaintiff has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). Indeed, in that circumstance, "standing to seek review of administrative action is *self-evident*" indeed, so much so that they typically need not "supplement the record" with any actual standing declarations or other evidence. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (citing *Lujan*, 504 U.S. at 561–62) (emphasis added).

Defendants dispute that members of the general public are subject to the Speech Restriction—*i.e.*, that they are "object[s] of the action … at issue," *Lujan*, 555 U.S. at 562. But that fails for the reasons explained above. *Supra* § I.A. And Defendants' declarations make clear that they are engaged in the sort of election-related communications that are within the Speech Restriction's broad scope. *See* ECF No. 14-2 at 3–6; No. 14-3; No. 14-4.

Plaintiffs' object-of-the-action standing is thus "self-evident" here as without any need to "supplement the record" beyond showing that they are objects of the regulation. *Sierra Club v. EPA*, 292 F.3d at 900. But Plaintiffs have gone well beyond that and submitted specific evidence that they have incurred compliance costs as a direct result of the Speech Restriction's new mandates. *See* ECF No. 14-2 at 3, 5–6; No. 14-4. That alone establishes standing since "[a]n increased regulatory burden typically satisfies the injury in fact requirement." *Contender Farms, L.L.P. v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015). The Ninth Circuit has also repeatedly held that compliance costs establish standing to challenge a regulation.[1] Indeed, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022) (cleaned up).

Here, the Cypher and Noble declarations provide precisely the sort of supporting evidence that establishes standing. *See* ECF No. 14-2 at 3, 5–6 (detailing compliance costs such as legal fees and training expenses); No. 14-4 (providing at least $4,800 in compliance costs). Such training costs readily establish standing. Nor are the activities at issue purely lobbying or issue advocacy, but instead include activities like training volunteers and workers that readily establish standing. *See*, *e.g.*, *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 756–57 (10th Cir. 2010) (holding that "economic injuries in the form of implementation and training expenses" established standing).

[1] *See*, *e.g.*, *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 980 (9th Cir. 2013) ("The economic costs of complying with a licensing scheme can be sufficient for standing."); *Airline Serv. Providers Ass'n v. L.A. World Airports*, 873 F.3d 1074, 1078 (9th Cir. 2017) (same); *Association of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013) (same); *Cent. Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1538 (9th Cir. 1993) (same).

Defendants attempt to evade this well-established rule that objects of regulations have self-evident standing to challenge them by contending (AG MTD at 12-14) that Plaintiffs' compliance costs are "self-inflicted." Not so. Much of that argument is bound up with their position that the Speech Restriction is unenforceable because it prohibits nothing and hence Plaintiffs' compliance costs are the product of a self-inflicted overreaction. That is incorrect. *Supra* § I.A.

Defendants also contend (at 13-14) that compliance costs are not cognizable because the Speech Restriction was also contained in the 2019 EPM. But nothing prevents old regulations from causing ongoing compliance costs. Even 50-year-old EPA pollution-control regulations, for example, can easily cause ongoing compliance costs today as long as they are still in force. Similarly, EPA's and DOJ's decades-old regulations imposing disparate-impact liability under Title VI create ongoing compliance costs that established standing to challenge them. *See Louisiana v. EPA*, No. 2:23-CV-00692, 2024 U.S. Dist. LEXIS 12124, at *17-37 (W.D. La. Jan. 23, 2024). Here, Plaintiffs engage in communications in *every* election cycle. *See* ECF No. 14-2 at 3; No. 14-4 at 3. And there is nothing implausible that they would incur compliance costs in this cycle (or future ones).

Defendants' arguments are particularly ill-taken given that recent events in *this election cycle* have augmented Plaintiffs' well-founded fear of enforcement. The 2019 EPM's speech restriction appears to have flown under the radar in past cycles. But here the Arizona House Speaker and Senate President explicitly raised First Amendment concerns about the prohibition in the 2023 draft EPM. *See* ECF No. 14-2 at 15–16. Defendants responded by effectively telling the legislative leaders to pound sand—literally not changing a single word in response to the well-founded First Amendment objections raised to them. *See* ECF No. 16-1 at 2. By abjectly refusing to make any changes *whatsoever* to ameliorate those glaring First Amendment infirmities, Defendants created new reasons to fear that Defendants intended to trample First Amendment rights this election cycle. Such evidence did not exist previously.

Similarly, the Secretary was asked to disavow enforcement of the Speech

Restriction and *refused to do so*. *See* ECF No. 1-3. That too is a recent development that underscores that Plaintiffs' compliance costs are prudently incurred, rather than a self-inflicted overreaction. More recently, (1) the Secretary has made multiple statements indicating that the provision imposes binding prohibitions on the public, (2) Defendants' own stay-pending-appeal request is premised on the same position, and (3) Defendants' own brief here takes the position that an example in the Speech Restriction is a binding prohibition for which law enforcement can be called out to enforce, AG PI Opp. at 9.

The confusion caused by Defendants' own inconsistent positions and actions *alone* creates ample basis for Plaintiffs to take steps to comply with the Speech Restriction, and thus incur non-self-inflicted compliance costs. Defendants' have-their-cake-and-eat-it-too approach as to the binding nature of the Speech Restriction and whether they will enforce it provides no basis to defeat Plaintiffs' standing.

Defendants' "self-inflicted" argument is also squarely refuted by *FEC v. Ted Cruz for Senate*, 596 U.S. 289 (2022)—another election-law case. There, Senator Cruz's campaign had, quite obviously, structured his compliance with FEC regulations such that he "purposely incur[red]" injury that would supply standing to challenge that regulation. *Id.* at 296. But the Supreme Court emphatically rejected the federal government's argument that the campaign's "injuries were 'self-inflicted,'" explaining that it " ha[d] never recognized a rule of this kind under Article III" and that instead it "ha[d] made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, *even if the injury could be described in some sense as willingly incurred.*" *Id.* at 296-97 (emphasis added). Senator Cruz's campaign thus had Article III standing to challenge the regulation at issue under the First Amendment. The same result should obtain here for Plaintiffs.

In any event, Defendants' arguments about the 2019 EPM have little application as to Plaintiff AFPI, which was not even founded until 2021 and has recently expanded its operations substantially for the 2024 election cycle. Ex. B, Attachment 5 at 25:17; 53:9–54:15. AFPI could not have incurred compliance costs in the 2020 election cycle or

challenged the 2019 EPM's speech restriction then because it *did not yet exist*. Defendants' attempted "gotcha" as to what Plaintiff AFPI supposedly should have been doing at a time when it was not yet in existence thus provides no basis for denying standing here.

For substantially similar reasons, the Maricopa County Superior Court had little difficulty in rejecting similar standing arguments raised by Defendants as explained above. *See supra* § I.A.5. It was also "unpersuaded" by Defendants' delay arguments as to standing, which were recycled here. *See* ECF No. 41-1 at 18. The Court explained that although "prior EPMs … contain[ed] the same or strikingly similar language"' that did "not mean that Plaintiffs (1) knew of the language or, pertaining to Plaintiff America First, (2) the organization existed when prior EPMs were issued." *Id.*

2. Plaintiffs Face A Credible Threat Of Enforcement

Separate from compliance costs, Plaintiffs independently have established standing and ripeness based on the credible threat of enforcement.

It is well-established that a defendants' "refusal to disavow enforcement of [the challenged legal provision] against [plaintiffs] during th[e] litigation is strong evidence that the state intends to enforce the law and that [plaintiff's] members face a credible threat" of enforcement that establishes standing. *California Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2020); *Arizona v. Yellen*, 34 F.4th 841, 850 (9th Cir. 2022) ("That [defendant] has not disavowed enforcement of the [law] is evidence of an intent to enforce it."). And, as explained previously, ECF No. 14 at 13–14, (1) the Secretary refused to disavow enforcement via criminal referrals and (2) the Attorney General's disavowal is premised on her erroneous interpretive arguments, which fail as explained above. *Supra* § I.A.

The credibility of the threat of enforcement has become even stronger since the preliminary injunction motion was filed. Since then: (1) the Secretary has made *multiple* statements following the superior court's decision that demonstrate that he believes the Speech Restriction is a binding prohibition applicable to everyone, and (2) Defendants have sought a stay pending appeal premised on the Speech Restriction's examples being binding prohibitions, which they also argue here. AG PI Opp. at 9; *supra* § I.A.6–7.

Courts evaluating whether a credible threat of enforcement exists consider whether Plaintiffs "(1) intend to engage in a course of conduct arguably affected with a constitutional interest (2) but proscribed by a statute and (3) there must be a credible threat of prosecution." *Yellen*, 34 F.4th at 849 (citing the *Driehaus* factors) (cleaned up). This test comes with at least a thumb—and perhaps more like an anvil—on the scale here: "[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry *tilts dramatically* toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (emphasis added). But that dramatic tilt is hardly necessary here.

First, Plaintiffs contentions about the first *Driehaus* factor are belied by the authority they cite: Plaintiffs have clearly alleged "an intent to do an act '*arguably affected*' by a constitutional interest." *Yellen*, 34 F.4th at 849 (emphasis added). As explained, Plaintiffs intent to act—*i.e.*, speak and express themselves through constitutionally protected conduct—are *at least* "arguably affected" by the First Amendment. Moreover, as *Yellen* explains, this Court must accept *Plaintiffs*' interpretation of the Speech Restriction for standing purposes: "the Supreme Court has cautioned that standing 'in no way depends on the merits'" and thus this Court must "[v]iew[]the [challenged provision] through [plaintiff's] eyes" in ascertaining standing. *Id.* (citation omitted). When the federal government tried in *Yellen* to argue that standing was lacking because there was no credible threat of enforcement under *its* construction of the challenged provision, the Ninth Circuit had no difficulty rejecting that contention. *Id.* The same result should obtain here.

Second, Plaintiffs' conduct is prescribed by the Speech Restriction. This factor requires a court to "first examine what conduct is proscribed by the [challenged provision] to evaluate whether [the plaintiff's] desired course of conduct falls under the provision's sweep." *Id.* In doing so, this Court must accept Plaintiffs' interpretation of that provision. *Id.* Under that interpretation, the Speech Restriction criminalizes such ubiquitous conduct as raising one's voice or using offensive language, and it does so with no *mens rea* requirement and no geographic or temporal limitations. Thus, the second *Driehaus* factor is met here too.

Seeking to avoid this result, Defendants effectively argue that Plaintiffs must confess to violating the law to establish standing: contending (AG MTD at 9) that Plaintiffs have failed to say "what specifically will Plaintiffs communicate … [that would] still fall within some interpretation of the EPM and violate the First Amendment." But "where threatened action by *government* is concerned, [federal courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). Federal courts do "not require … the plaintiff bet the farm, so to speak, by taking the violative action." *Id.* at 129. Plaintiffs thus need not confess that their actions will violate the Speech Restriction to challenge that provision. *See Yellen*, 34 F.4th at 850 ("[P]laintiffs need not . . . [provide] a confession that [they] will, in fact, violate the law.").

Third, as discussed above (§ I.A.4–8), Plaintiffs face a credible threat of enforcement based on (1) the Secretary's refusal to disavow enforcement, (2) the Attorney General's disavowal being premised on clear legal errors, (3) the Secretary's repeated view that the Speech Restriction is a binding prohibition on conduct and speech, and (4) the Secretary's clear and public animus for Plaintiffs here, and in the state EPM case. *See Yellen*, 34 F.4th at 850 ("That the federal government has not disavowed enforcement of the Offset Provision is evidence of an intent to enforce it.").

Thus, all three *Driehaus* factors are met, and Plaintiffs have standing to bring a pre-enforcement challenge.

B. Plaintiffs Have Standing To Challenge The Vote Nullification Provision

The Secretary advances a multitude of arguments that Plaintiffs lack Article III standing challenge to the Vote Nullification provision. But what those arguments possess in numerosity they lack in merit.

1. AFPI Can Assert The Rights of Its Members

The Secretary contends (PI Opp. at 3) that "AFPI cannot establish standing via members it does not name." That is contrary to binding Ninth Circuit precedent, which held—in an election case—that "[w]here 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 where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured," and it thus need not be provided. *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). This Court too has applied *Cegavske* specifically to hold that the plaintiffs "need not identify by name specific injured members" for election-law challenges like this one. *Arizona Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1085 (D. Ariz. 2020) *rev'd on other grounds* 18 F.4th 1179, 1193 (9th Cir. 2021).

Here identification of particular members also serves no purpose. All Arizona voters are clearly affected by the very same diminution of their right to vote: downgrading it from an unconditioned right to one conditional on how governmental officials exercise the authority. *See* PI at 4-8. And all voters in each county will suffer the *same* complete disenfranchisement if their Board of Supervisors fails or refuses to certify election results. *Cegavske* thus requires rejection of the Secretary's argument. Similarly, *Arizona Democratic Party v. Hobbs* was specifically cited to the Secretary in the State's motion, so he could not have been unaware of it. *See* PI at 7. He simply has no answer to it.

Moreover, the disclosure of individual members here is not only unnecessary but potentially dangerous. The Secretary has made clear his willingness to invite retaliation against those who sue him. *Supra* § I.A.6.

Given the Secretary's demonstrated willingness to call on members of the public to retaliate against plaintiffs for suing him, it would be particularly problematic to compel identification of AFPI members here. Indeed, it may even be unconstitutional under *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) and *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)

Thus, if this Court concludes that identification of particular members is appropriate here, it should permit Plaintiffs to file that membership information under a protective order that does not permit the Secretary to know the identity of those members

and requires destruction of that information after the end of this case.

2. The Vote Nullification Provision Is Inflicting Ongoing Injury

In their motion, Plaintiffs cited three lines of cases as establishing that they have ongoing cognizable injury that establishes standing: felony-disenfranchisement cases, signature-mismatch cases, and First Amendment permitting cases. *See* PI at 4-8. Curiously, the Secretary never addresses those cases in his standing arguments, but instead responds to them purely by arguing that Plaintiffs have not established irreparable harm. *See* PI Opp. at 7-8. Those misplaced arguments are unavailing.

The central and overriding infirmity in the Secretary's argument is manifest from his section title alone. He contends that "the law does not recognize the alleged diminution of Plaintiff's right to vote as an irreparable injury"—and thus presumably not cognizable Article III injury either. SOS PI Opp. at 7 (capitalization omitted). That argument is truly bizarre. Suppose, for example, that the Arizona Legislature were to pass a law that voters who (1) are members of particular racial groups, (2) live in particular neighborhoods, or (3) are below the age of 30, could only cast ballots that counted as one-tenth (10%) of a vote. Under the Secretary's categorical position, *none* of those affected voters could even bring suit to challenge such a patently unconstitutional law. After all, in the Secretary's view, "alleged diminution of plaintiff's right to vote" is somehow not cognizable injury at all, and hence a challenge to any such law effecting a 90% diminution of the affected voters' right to vote would not even be justiciable. That cannot possibly be the law. Indeed, does the Secretary really even believe that?

Moreover, vote dilution—*i.e.*, *diminution* of voting power—is one of two types of claims that can be brought under § 2 of the Voting Rights Act ("VRA"). *See*, *e.g.*, *Brnovich v. DNC*, 594 U.S. 647, 657–60 (2021) (recognizing that vote-denial and vote-dilution claims as two distinct types of VRA § 2 claims). But under the Secretary's position, vote-dilution claims should be *categorically* barred since "diminution of [the] right to vote" is supposedly not cognizable injury at all. Thus, *every* single federal court decision awarding relief in a § 2 vote-dilution claim would necessarily be wrongly decided. *But see*, *e.g.*,

Thornburg v. Gingles, 478 U.S. 30, 34 (1986) (holding that § 2 vote-dilution challenge was meritorious and considering Article III standing too obvious to warrant discussion).

That too cannot possibly be—and is not—the law. And it is more than a little ironic that the Secretary—who fancies himself a champion of the right to vote, *see*, *e.g.*, Ex. B, Attachments 2 & 3—would take the position that state officials could inflict all manner of "diminution[s] of [the] right to vote" with near-absolute impunity, since federal courts would purportedly be powerless to stop any "diminution of [the] right to vote." SOS PI Opp. at 7 (capitalization omitted).

The Secretary's categorical position that diminution of the right to vote is not cognizable injury is thus meritless. Equally unavailing are the Secretary's attempts to distinguish the multiple lines of cases cited by Plaintiffs.

Felony Disenfranchisement Precedents. The Secretary never grapples with the fundamental similarity here: the challenged laws at issue downgraded a citizen's right to vote from being *unconditional*, as long as they followed applicable rules, to one *conditional* on how governmental officials perform their duties. *That* was the injury recognized in *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982) and *El-Amin v. McDonnell*, No. 3:12-cv-00538-JAG, 2013 U.S. Dist. LEXIS 40461 (E.D. Va. Mar. 22, 2013). And *that* too is the injury that the Vote Nullification Provision inflicts on all voters in Arizona.

Rather than even trying to explain how the logic of *Williams* and *El-Amin* would not establish standing here, the Secretary offers (PI Opp. at 7) only a facile distinction: those cases supposedly "concern voters who were actually barred from voting due to felony convictions." That is both incorrect and irrelevant.

Incorrect because standing in neither case turned on plaintiffs being "actually barred" from voting in any particular election. Plaintiffs in those two cases thus did not challenge any concrete act of being turned away at polling stations on election day, but rather the abstract diminution of their right to vote going forward. Nor were those plaintiffs necessarily barred from voting as factual matter: had they applied for restoration of their voting rights, the applicable Governors could have granted those requests in time for the

next election.

The Secretary's distinction is also irrelevant because neither court insisted that the plaintiffs apply for restoration of voting rights before challenging the statutes causing the relevant vote diminution: instead, it was enough for purposes of Article III standing that the felony-disenfranchisement statutes rendered their voting rights contingent on how the governors would exercise their authority. Here too the Vote Nullification Provision renders Plaintiffs' and their members right to vote contingent on how their respective Board of Supervisors exercise their authority. Plaintiffs here thus have standing for the same reasons that plaintiffs in *Williams* and *El-Amin* did.

Signature Mismatch Precedents. The Secretary also never grapples with the common nature of the injury here and the signature mismatch cases. When a procedure, such as matching signatures, "subjects … electors to the risk of disenfranchisement" by the actions of governmental officials, that creates cognizable injury. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019). Just as signature matching creates the potential for wrongful disenfranchisement based on how the matching is conducted, the Vote Nullification Provision subjects voters to the risk of wrongful disenfranchisement based on how Boards of Supervisors conduct (or don't conduct) their duties in certifying results.

The Secretary responds (PI Opp. at 7) by contending that signature-matching cases are "wholly dissimilar to this action, as those cases address situations in which the laws at issue inherently allow injury to occur." The "wholly dissimilar" contention is wholly conclusory, refusing to engage with Plaintiffs' actual reasoning. And the Secretary's "inherently allow[s] injury to occur" putative distinction applies here too: but for the Vote Nullification Provision, Boards of Supervisors have no assurance that their refusal or failure to certify votes will succeed in having votes thrown out. But that provision effectively guarantees that they will be. The Vote Nullification Provision thus "inherently allows injury to occur."

The Secretary further contends (at 8) that the Vote Nullification Provision is

distinguishable because Arizona "laws provide safeguards to ensure that all votes are canvassed." But whether those safeguards are adequate is a *merits* question, which does not defeat standing. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits."); *supra* § II.A.2. It is also incorrect: the effect of the Vote Nullification Provision is that relevant votes are *thrown out*—not "canvassed" *at all*.

First Amendment Permitting Precedents. The Secretary's response here too conflates standing with the merits. The Secretary thus contends (PI Opp. at 8) the First Amendment permitting cases are distinguishable because the "officials' discretion to issue or deny permits was standardless." But whether there were sufficient constraints on governmental discretion was a First Amendment *merits* question. Being subject to the permit requirement *at all* was the *injury* sufficient to confer Article III standing to challenge whether the First Amendment was violated by standardless discretion. Plaintiffs there were not required to prove the constitutional violation in order to establish standing.

Here too, making voters' right to vote contingent on how governmental officials will exercise their discretion *by itself* inflicts cognizable injury, which establishes Article III injury. Whether putative "safeguards" mitigate that risk is a *merits* question under *Anderson-Burdick* doctrine—not a jurisdictional issue that can be resolved by the Secretary's simple say-so that safeguards are adequate.

In any event, the Secretary's reliance (PI Opp. at 7) on an official's putative lack of discretion is misplaced. Even though Boards of Supervisors might not have the legal right to refuse to certify election results, they indisputably have the *power* to do so. Indeed, the lack of discretion did not prevent the Cochise Board of Supervisors from refusing to certify results for a time in 2022. And even the Vote Nullification Provision was insufficient to prevent a member of the Pinal County Board of Supervisors from openly flirting with voting against certification of the 2024 primary results. Ex. B, Attachment 6. Moreover, refusals to vote to certify results have become *prolific* in neighboring Colorado, and have also occurred in "Georgia, … Michigan, Nevada, and Pennsylvania." Ex. B, Attachments 7, 10. That trend could easily (further) spread here. *Id.* at 6–7. Indeed, the DNC has judged

the risk of refusal to certify to be sufficiently great that it filed suit in Georgia just two days ago. Ex. B, Attachment 8.

Indeed, if other laws were sufficient to ensure that Boards of Supervisors would *never* refuse or fail to certify results, there would be no need—or justification—for the Vote Nullification Provision. Yet the Secretary contends that the provision is *necessary* to discharge his duty to canvas. ECF No. 26-3. In doing so, his merits arguments fatally undermine his standing contentions.

* * *

The Secretary never meaningfully engages with the similarities in the nature of the injury here and a multitude of cases in *three* other contexts that routinely found standing based on equivalent harms. Instead, he offers only facile distinctions that cannot withstand scrutiny, which also frequently conflate the merits with standing.

Plaintiffs thus have cognizable injury based on the ongoing diminution of their and their members' right to vote, which the Vote Nullification Requirement degrades from unconditional to conditioned on how officials choose to discharge their duties. Nor is there anything conjectural or speculative about that injury: it exists *now* with absolute certainty.

3. Plaintiffs Face A Credible Threat Of Disenfranchisement Under The Vote Nullification Provision

Plaintiffs also have standing because there is a credible threat that the Vote Nullification Provision will be enforced in a manner that disenfranchises them. Here it is undisputed that Plaintiffs and their members intend to vote—an activity protected by the Constitution—and that by doing so they are subject to the potential injury of disenfranchisement under the Vote Nullification Provision. And there is at least a credible threat of such enforcement here.

The Secretary has refused to disavow enforcement of that provision. ECF No. 26-3. That alone provides strong "evidence of an intent to enforce it." *Bonta*, 996 F.3d at 653.

Indeed, the Secretary not only refused to disavow enforcement but also purports to be mystified as to how he could possibly do otherwise. *See* SOS PI Opp. at 9 (contending

that Plaintiffs have "no explanation" and "no answer" as to how the Secretary could disavow enforcement). But the answer is simple: he swore an oath to "support the Constitution of the United States … [and] bear true faith and allegiance to the same." A.R.S. § 38-321. If the Vote Nullification Provision is unconstitutional, he would be duty-bound not to enforce it. The Secretary's apparent inability to comprehend this elementary principle of our constitutional system underscores the threat of enforcement here.

Indeed, the Secretary did not merely refuse to disavow enforcement but further doubled down by concocting a bizarre (and meritless) argument that his statutory duty to *canvas* votes *compels* him to disenfranchise voters. *But see supra* § I.B.

There is thus no doubt that if a county board refuses or fails to certify the election results, he *will* enforce the provision to disenfranchise voters. And there is a very real risk that will occur again, just as it did in 2022. *See supra* at 26–27. Indeed, the Attorney General's *criminal prosecution* for that non-certification demonstrates her obvious belief that deterrence of future similar actions is necessary. ECF No 26-1 at 3 ¶¶5–6.

That risk is further demonstrated by the flirtation with non-certification—which likely would have been an outright refusal if the supervisor could have drawn another vote—in *this cycle* already in Pinal County. Ex. B, Attachment 6. And the practice of refusing to vote to certify results is already pervasive throughout the United States and on the upswing. *Supra* at 26.

Moreover, the *entire point* of the Vote Nullification Provision was to address this risk, and the Secretary's defense on the merits contends that it is necessary to do so—implicitly conceding that the risk is material. Why else would the Secretary have gone to the trouble of crafting this apparent-first-in-the-nation provision other than because he judged the risk of recurrence in 2024 to be substantial?

For all of these reasons, Plaintiffs face a credible threat of disenfranchisement under the Vote Nullification Provision and thus have Article III standing to challenge it.

4. Plaintiffs' Injuries Are Fairly Traceable To The Vote Nullification Provision

The Secretary further contends (PI Opp. at 8-9) that even if Plaintiffs have cognizable injury, that injury "is not traceable to the Secretary." Not so: the Secretary's arguments badly misapprehend the traceability requirement for standing.

As an initial matter, "Article III 'requires no more than *de facto* causality.'" *Department of Commerce v. New York* ("*Census*"), 139 S. Ct. 2551, 2566 (2019) (citation omitted). "Proximate causation is not a requirement of Article III standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). It also "requires *less of a causal connection than tort law*." *Environment Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 368 (5th Cir. 2020) (emphasis added).

Here, Plaintiffs' harms are readily traceable to the Vote Nullification Provision under this standard. The diminution of the right to vote and credible threat of outright disenfranchisement that result by operation of the Vote Nullification Provision are fairly traceable to it. "*De facto* causality" is thus readily satisfied.

Even though proximate cause is *not* a traceability requirement, the Secretary's traceability arguments appear to rely on the wrongful acts of third parties as breaking the causal chain: the Secretary thus contends (at 8-9) that Plaintiffs harms result "from potential illegal actions of the Apache County Board of Supervisors or some unidentified on-governmental bad actors who block the Board from carrying out its statutory duty."

The Secretary's arguments are directly contrary to the Supreme Court's *unanimous* standing holding in the *Census* case. There, the federal government argued that New York lacked Article III standing because its harms "depend[ed] on the independent action of third parties choosing to violate their legal duty to respond to the census." 139 S. Ct. at 2565. Notably, it was *illegal* for individuals to fail to complete census forms. *See* 13 U.S.C. § 221. But New York still had standing even though its harms necessarily depended on being traced through third parties committing unlawful acts. 139 S. Ct. at 2567–68. Under the *Census* case, the fact that Plaintiffs' harms might be traced through the unlawful actions

of Boards of Supervisors thus does not defeat traceability.

In addition, the Secretary's arguments ignore that the Vote Nullification Provision could disenfranchise voters *without any wrongful conduct* to break the causal chain. Suppose, for example, that three members of the Maricopa Board of Supervisors are driving in a car together in late November 2024 and get into a fatal crash. The resulting lack of a quorum able to certify results would likely mean that *every single voter in Maricopa County* would be disenfranchised under the Vote Nullification Provision—roughly 2.75 million voters if the 2024 turnout mirrors the turnout in 2020.

In that circumstance, or any other circumstance preventing a quorum, who exactly does the Secretary suggest that Plaintiffs should sue to have their ballots counted if the Secretary/Vote Nullification Provision are purportedly beyond the jurisdiction of federal courts? Should they file suit against the estates of the deceased supervisors? Or the driver of the other car that was another but-for cause of their disenfranchisement? Anyone, apparently, save the Secretary who authored the provision that is the but-for cause of their votes being thrown out completely.

5. Defendants' Redressability Arguments Lack Merit

Not content to let any aspect of Article III standing go unargued, the Secretary contests redressability too. That redressability argument is the worst of the bunch.

The Secretary's argument appears to be (at 9) that under other statutes, the Secretary lacks "discretion not to canvass on the date set by Arizona law." But, as explained above, the Secretary's duty to *canvas* is not a duty to *disenfranchise*. *Supra* § I.B. Indeed, A.R.S. §16-644 provides otherwise.

In addition, as explained above, there are a myriad of ways in which the Secretary could discharge his duty to *canvas* without resorting to the draconian penalty of disenfranchising all voters in an affected county who are *faultless*. *See* ECF No. 26 at 17–19. The Secretary's arguments thus rely on a sleight of hand: while the Secretary may have a duty to *canvas*, he has no resulting duty—or authority—to *disenfranchise* to accomplish that canvassing. Indeed, the act of canvasing presupposes that all valid votes are *counted*—

not thrown out because might it be inconvenient/require additional work to count them.

In any event, even if the Secretary were correct that other statutes *mandated* that he disqualify all votes in counties where the Board of Supervisors refused or failed to certify results, that still would not defeat redressability. Plaintiffs have challenged the *unconstitutional burden* of disenfranchisement in those circumstances. This Court could thus simply enjoin those other statutes too if the Secretary were correct that they mandate disenfranchisement to accomplish canvasing. Because Plaintiffs' claim asserts a right under the *federal* constitution, even 100 state statutes mandating disenfranchisement to accomplish canvasing would not prevent redressability. This Court could simply enjoin all of them on the same basis of imposing the same unconstitutional burden.

6. Plaintiffs' Claims Are Ripe

Finally, the Secretary's ripeness arguments fail. As explained above, Plaintiffs have ongoing injury *now*, which is an accomplished fact. Plaintiffs cite no precedents where present injury is unripe for adjudication.

Similarly, in so far as Plaintiffs' standing turns on the credible threat of future enforcement, the ripeness inquiry largely duplicates the standing inquiry for prospective relief. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong."); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (Article III standing and ripeness issues typically "boil down to the same question"). The Secretary's ripeness arguments thus fail for the same reasons as his standing arguments.

Defendants also might be attempting to raise prudential ripeness concerns by making a conclusory contention that Plaintiffs' claim "'is not fit for adjudication.'" SOS MTD at 9 (citation omitted). But here prudential concerns strongly support resolving this issue *now*: in this posture, courts can resolve the issue without either (1) the incredibly-short-trigger deadlines that arise post-election or (2) knowledge of how its ruling will affect electoral outcomes, which would invariably color perceptions of the court decides the

issue. This issue is thus far more fit for review now.

In any event, the constitutionality of the Vote Nullification Provision is presented here as pure question of law—particularly given Defendants' forfeitures and failure to address critical issues. *See infra* § IV. And claims are typically ripe/fit for review where the "issue presented … is purely legal, and will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985).

C. Defendants Lack Sovereign Immunity Under *Ex parte Young*

The Secretary also advances a baseless argument that he enjoys sovereign immunity for his constitutional violations in crafting and enforcing the Vote Nullification Provision. *See* SOS MTD at 10-11. Not so.

The Secretary wrongly asserts that Plaintiffs are asserting *state-law* claims masquerading as federal claims. But even a cursory review of the Complaint shows that Plaintiffs are asserting violations of the *U.S. Constitution* under the *Anderson-Burdick* doctrine. *See*, *e.g.*, Compl. ¶¶ 108–10, 113–14, 126–27, 134, 136–38, 141. The Secretary cannot wishcast Plaintiffs' Complaint into something he would enjoy immunity from.

As to federal claims, under the doctrine of *Ex parte Young*, state officials may be sued in federal court in "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law" so long as the state officer has "*some connection* with enforcement of the act." *Coalition To Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (quoting *Ex parte Young*, 209 U.S. at 157) (emphasis added). In addition, "the plaintiff must [only] allege—not prove—an ongoing violation of federal law for which she seeks prospective injunctive relief." *Koala v. Khosla*, 931 F.3d 887, 895 (9th Cir. 2019).

Plaintiffs have easily met that standard: Plaintiffs' complaint alleges that the Vote Nullification Provision violates the U.S. Constitution and that the Secretary is responsible for enforcing it. EPM at 252. *Ex parte Young* requires nothing more.

Constitutional violations routinely serve as the basis for a "federal claim" under *Ex parte Young*, even if state law considerations are also at play. *E.g., Arizona Students' Ass'n*

v. Arizona Bd. of Regents, 824 F.3d 858, 865 (9th Cir. 2016); *Klein v. Arizona State Univ.*, 2020 WL 7404564, at *2 (D. Ariz. Dec. 17, 2020) ("[*Ex parte Young*] applies to ongoing violations of a plaintiff's First Amendment rights.").

Contrary to Secretary's contention (MTD at 10–11), Plaintiffs have not "cloaked" state claims in federal claims. Notably absent from the Secretary's "cloak" theory is *which state law claims are hidden under Plaintiffs' federal claims*. The Secretary does not say. To be sure, Plaintiffs cite certain Arizona statutes calling for the EPM's promulgation and explaining that the EPM exceeds provisions of Title 16. But these brief references give this Court context to the EPM and do not support any state claim.

The Secretary rests on inapposite cases to support his argument that Plaintiffs "cloaked" state claims as federal claims. But unlike the cases cited by the Secretary, Plaintiffs are not asserting that the Secretary violated state law in adopting and enforcing the Vote Nullification Provision. Rather, Plaintiffs assert that by *following* state law in the form of that EPM provision, the Secretary is violating the *federal* Constitution. That is precisely the sort of claim that *Ex parte Young* permits Plaintiffs to bring in federal court.

D. The Secretary's Skeletal, Footnote-Only Request for *Pullman* Abstention is Specious

Doubling down on Defendants' prior meritless request for *Pullman* abstention on Plaintiffs' First Amendment claims, the Secretary now asks for *Pullman* abstention as to the Vote Nullification Provision as well. *See* SOS MTD at 11 n.8. That argument is undeveloped, advanced purely in a footnote, and does not address even *one* of the three *Pullman* factors. *See id.* That request is outright frivolous and merits decisive rejection.

As set forth in Defendants' own prior request for *Pullman* abstention, any request for *Pullman* abstention *must* satisfy *three* requirements: "(1) the federal constitutional claim 'touches a sensitive area of social policy,' (2) 'constitutional adjudication plainly can be avoided or narrowed by a definitive ruling' by a state court, and (3) a 'possibly determinative issue of state law is doubtful.'" ECF No. 27 at 4–5 (quoting *Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1147 (9th Cir. 2022)).

Defendants do not even *attempt* to argue that Count I involves any "sensitive area of social policy," which is a singularly fatal omission. Indeed, because elections for federal offices (including President) are imminent, there are important *federal interests* at play.

Defendants also fail to identify what the relevant state-law question that is debatable and could avoid adjudication here is. All they say is that "Plaintiffs' claims about how the canvass is conducted turns on questions of state law." SOS MTD at 11 n.8.

That does not suffice. The parties *agree* that the Vote Nullification Provision requires throwing out all affected votes when it is triggered. There is nothing "doubtful" about that. Nor does the Secretary's footnote ever explain how resolution of state-law issues could avoid adjudication here, since the question of whether the Secretary can, under the *Anderson-Burdick* doctrine, disenfranchise all voters in affected counties will remain a live issue in all scenarios. *See supra* § II.B.2–6.

The Secretary's reliance (MTD at 11 n.8) on *Porter v. Jones*, 319 F.3d 483 (9th Cir. 2003) is particularly revealing of the weakness of the Secretary's arguments. That case *rejected Pullman* abstention in an election case mainly because it was "far from clear that the case would be resolved prior to the [upcoming] election if Plaintiffs were sent to state court." *Porter*, 319 F.3d at 494. Here the Secretary does not even attempt to argue that state courts would not resolve the purportedly dispositive—yet undefined—issues of state law before the 2024 election.

III. THE SPEECH RESTRICTION VIOLATES THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE

In contrast to their *extensive* efforts to duck the constitutional merits, Defendants spend precious little ink attempting to defend the Speech Restriction's constitutionality: less than 5 pages in total. *See* AG MTD at 15-16; AG PI Opp. at 8-10. And what little they say is overwhelmingly premised on their erroneous interpretation of the Speech Restriction as being purely non-binding guidance that applies only to poll workers.

Only a tiny sliver of their arguments thus address the true merits issue here: *i.e.*, if the Speech Restriction operates as a binding prohibition on the public, does it comport with

the First Amendment? And what little they offer provides no meaningful defense.

A. The Lack Of A *Mens Rea* Requirement Is Unconstitutional

Defendants never deny that if the Speech Restriction is a binding prohibition that lacks a *mens rea* requirement that it would violate the First Amendment. *See* PI at 10. It plainly is: by permitting liability based on "intent *or effect*," EPM at 181 (emphasis added)—*i.e.*, it authorizes liability based on *effect alone*, which is expressly an *alternative* to proving *mens rea* (*i.e.*, intent).

Defendants' counter-arguments (AG MTD at 6-7) rely overwhelmingly on the supposed (and unstated) purpose of the restriction, which *never* engages with the *actual* "or effect" *text*. This Court "must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). But even if the Speech Restriction actually had a relevant statement revealing its specific purpose—and it doesn't—that wouldn't matter: "Statements of purpose by their nature cannot override a statute's operative language.'" *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (cleaned up).

Because the Speech Restriction permits liability for speech without any proof of *mens rea*, it is unconstitutional. *See Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

B. The Speech Restriction Violates The First Amendment Because It Bans Speech Based On It Being "Offensive" And Is Viewpoint-Based Discrimination

Defendants similarly never deny that attempting to ban speech based on it being "offensive" or "insulting" would violate the First Amendment and constitute impermissible content/viewpoint-based discrimination of speech. *See* ECF No. 14 at 15–16; *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Matal v. Tam*, 582 U.S. 218, 249 (2017). Their only real response (AG MTD at 15) seems to be recycling their contention that the Speech Restriction "does not itself criminalize anything." That argument fails. *Supra* § I.A.

Indeed, the Speech Restriction explicitly includes as an example of a violation using "insulting or offensive language to a voter or poll worker." EPM at 182 (comma omitted). And Defendants' own preliminary injunction response make clear that they believe that

violation of a different example in the Speech Restriction would justify calling "law enforcement to help handle the situation" if the "behavior persist[ed]." AG PI Opp. at 9. But law enforcement cannot be called when there is no law to enforce—thus demonstrating that Defendants regard the Speech Restriction's examples, such as its "insulting or offensive language" example, as *binding* prohibitions.

C. The Speech Restriction Is Unconstitutional For Both Public And Non-Public Forums

Defendants make almost no effort to address Plaintiffs' arguments that the Speech Restriction is unconstitutional for both public and non-public forums. *See* ECF No. 14 at 15–17. Indeed, Defendants only address that argument (and use the word "forum") in a *single bullet point* and only with this *ipse dixit*: "It does not." AG PI Opp. at 10. That conclusory denial concedes constitutional violation as to both public and non-public forms.

Defendants' forfeitures as to polling locations, which are non-public forums, are particularly noteworthy. No restrictions on speech at polling locations would comport with the First Amendment unless they are "capable of *reasoned application*." *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 23 (2018) (emphasis added). But Defendants do not even *acknowledge* this "capable of reasoned application" standard, *let alone attempt* to argue that the Speech Restriction satisfies it. Nor do Defendants cite *Mansky* even once. These omissions alone concede that *any* regulation of speech by the Speech Restriction at voting locations is unconstitutional under *Mansky*'s ignored legal standard.

D. Defendants Have Conceded That the Speech Restriction Cannot Survive Strict Scrutiny

Defendants also do not even attempt to respond to Plaintiffs' argument that the Speech Restriction fails under strict scrutiny. *See* PI (ECF No. 14) at 13-14. Indeed, none of the phrases "strict scrutiny," "compelling interest," or "narrow tailoring" can be found *anywhere* in Defendants' Speech Restriction briefs. Defendants have thus completely conceded that the Speech Restriction fails under strict scrutiny if that applies. Which it does, because the Speech Restriction regulates speech on the basis of offensiveness and

content/viewpoint, and transgresses limitations on public forums.

E. The Speech Restriction Is Facially Unconstitutional Under Overbreadth Doctrine

Defendants' reliance (AG MTD at 14-15) on the all-its-applications facial standard is inapposite because Plaintiffs are asserting a First Amendment claim, and thus can rely on overbreadth doctrine to establish facial invalidity—as Defendants begrudgingly acknowledge in a footnote (at 15 n.5). And Defendants' only defense under overbreadth doctrine rehashes their mistaken textual interpretation: *i.e.*, that the Speech Restriction "does not regulate Plaintiffs as members of the public, and therefore has zero applications *to them*." AG MTD at 15 n.5.

Because Defendants offer no other defense on overbreadth doctrine, the Speech Restriction is facially unconstitutional if it operates as a prohibition on "members of the public." Which it does. *Supra* § I.A.

F. The Speech Restriction Violates The Due Process Clause

With apologies for the broken-record repetition, Defendants' only defense to Plaintiffs' due process claim merely recycles their argument that the Speech Restriction "is not a prohibition on Plaintiffs and it does not restrict any speech." Not so. *Supra* § I.A.

In addition, Defendants' shifting and contradictory positions as to whether the Speech Restriction prohibits speech within its ambit illustrates the lack of fair notice here. Indeed, Defendants simultaneously (1) claim that the Speech Restriction "does not restrict any speech" (AG MTD at 15) and (2) then give two examples of *pure speech* that they believe it would permissibly prohibit as "[]constitutional applications of section III(D) [*i.e.*, the Speech Restriction]," AG PI Opp. at 9.

The Speech Restriction's demonstrated inability to maintain a consistent, discernable meaning even within in the confines of Defendants' own briefs is powerful evidence that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008).

IV. THE VOTE NULLIFICATION PROVISION IS UNCONSTITUTIONAL UNDER *ANDERSON-BURDICK* DOCTRINE

A. The Attorney General Is A Proper Defendant For Count I

The Attorney General appears to assume that (1) she was not named as a Defendant to for I and (2) could not be named. Both assumptions are incorrect. *See* AG MTD at 17 n.7. Count I does not limit itself to the Secretary. And the July 19 status conference made unambiguously clear Plaintiffs' position that the Governor was a proper defendant because her approval of the 2023 EPM was a but-for cause of the Vote Nullification Provision being adopted, which was a wrongful and unconstitutional act creating liability under § 1983. 7/19 Tr. at 22:12-15. That same logic applies equally to the Attorney General.

But despite specific knowledge as to this basis on which she was named as a defendant, the Attorney General makes no effort to explain why her approval of the 2023 EPM adding the Vote Nullification Provision does not suffice to make her a proper defendant under § 1983. Her feigned belief that she was not named under Count I is thus misplaced and belied by her inability to answer that issue.

The Attorney General is also properly nameable as a defendant because she "has '*some connection* with enforcement of the act.'" *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) (citation omitted) (emphasis added). If the Secretary or any other relevant official refused to enforce the Vote Nullification Provision—*i.e.*, refused to disenfranchise votes—they would be "guilty of a class 2 misdemeanor." A.R.S. § 16-452(C). And she could prosecute that violation, *id.* § 16-1021, thus supplying the requisite nexus to enforcement. Nor does the Attorney General attempt to explain why her authority to enforce A.R.S. § 16-452(C) would not suffice to make her a proper defendant.

The Attorney General also tellingly has not disavowed such enforcement. Nor has she expressed any doubts as to the Vote Nullification Provision's constitutionality that might suggest that she would not enforce that provision if a Board of Supervisors refused or failed to certify results. Indeed, her approval of the 2023 EPM presumably conveys her view that the Vote Nullification Provision is constitutional.

B. The Vote Nullification Provision Imposes a Severe Burden

The burden imposed by the Vote Nullification Provision on the right to vote is "severe" by any measure. Indeed, it is the most severe burden possible: complete disenfranchisement. Indeed, it is hard to understand how the burden could be any more severe than *throwing out all affected votes entirely*.

The industrial scale of the disenfranchisement also shows that the burden is severe. The Vote Nullification Provision is likely *peerless* in terms of the scale of disenfranchisement: for example, the non- or malfeasance of as few as three supervisors could disenfranchise *over two million votes*. *Supra* at 30. Plaintiffs cited *four* separate cases recognizing that disenfranchising even *thousands* of votes was a severe or serious burden. *See* PI at 10-11 (citing (1) *Florida Democratic Party v. Detzner*, No. 16-cv-607, 2016 U.S. Dist. LEXIS 143620, at *18 (N.D. Fla. Oct. 16, 2016); (2) *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006); (3) *Northeast Ohio Coal. v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012); and (4) *Lee*, 915 F.3d at 1319–22). *See* PI at 10-11.

Tellingly, the Secretary does not address or cite even a single one of these cases. That striking refusal to engage with *all* relevant case law evaluating the severity of the burden in the *Anderson-Burdick* context should tell this Court all that it needs to know.

The Secretary's arguments as to the severity of the burden overwhelmingly just recycle his Article III traceability arguments. ECF No. 34 at 3–4. Those arguments fail as set forth above. In addition, the Secretary does not cite *any* precedents providing that the severity of the burden for purposes of *Anderson-Burdick* turns on who is imposing it.

Moreover, the Secretary's traceability arguments are overwhelmingly premised on the burdens at issue being imposed by *wrongful* actions. Unfortunately for the Secretary, *Anderson-Burdick* doctrine is *particularly* concerned with disenfranchising blameless voters by the wrongful actions of governmental officials. After all, "[i]t is one thing to fault a voter if she fails to follow instructions…. But it is quite another to blame a voter when she may have done nothing wrong[.]" *Lee*, 915 F.3d at 1324–25. The Secretary's position that *complete disenfranchisement* imposed on *blameless* voters that complied with all

applicable requirements is not a severe burden is contrary to each of the four precedents that he has ignored entirely.

Rather than addressing *any* of the extensive precedents cited by Plaintiffs, the Secretary the Secretary reaches thousands of miles outside of Arizona and decades into the past for *any* supporting precedent on the question of burden. The Secretary thus twice cites *Dodge v. Meyer*, 444 P.3d 159 (Alaska 2019), which in turn relied on the 64-year-old decision in *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960). Neither is an *Anderson-Burdick* case. Instead, *Gallego* addressed the presumption of regularity in a wildly divergent context (there, chain-of-custody for a criminal case). 276 F.2d at 917. And more generally, the presumption of regularity is an *administrative law* concept. *Id.*

That presumption of regularity does not apply in the *Anderson-Burdick* context—or, generally speaking, individual rights cases. For example, Defendants' putative presumption would presume that election workers would properly ascertain whether a signature matched the one on file—and thereby would preclude signature-matching requirements from imposing any material burdens under *Anderson-Burdick* doctrine if it were correct. But a legion of signature-matching cases make clear it is not.

Moreover, even accepting the dubious premise that the Alaska Supreme Court's holding in *Dodge* is relevant authority here, it makes clear that "the presumption of regularity" only applies "'[w]here *no evidence* indicating otherwise is produced.'" *Dodge*, 444 P.3d at 164 n.21 (citation omitted) (emphasis added); *accord Gallego*, 276 F.2d at 917 (same). But here Plaintiffs have produced such evidence: including the Cochise Board of Supervisor's refusal to certify results in 2022 as well as the recent flirtation with refusing to certify primary results by a member of the Pinal County Board as recently as this month. Ex. A, Attachment 6; ECF No. 26–1 at 3 ¶3–4.

Moreover, the very premise of the Vote Nullification Provision is that there is a risk of recurrence of that irregular conduct. That provision would *only* apply when officials have *not* discharged their duty. Presuming regularity in a context that would *only arise* where highly irregular conduct by governmental officials has already occurred is a

contradiction in terms, and offered by the Secretary without any supporting case law.

C. The Vote Nullification Provision Is Not Narrowly Tailored

The Secretary does not even *attempt* to argue that the Vote Nullification Provision can survive strict scrutiny. His brief does not use the word "tailor" once, let alone attempt to argue that the provision satisfies narrow tailoring. The burden issue is thus dispositive: if the burden is severe, the Secretary offers no defense that could save it from invalidation under *Anderson-Burdick* doctrine. As explained above and previously, it is.

D. The Vote Nullification Provision Is Unconstitutional Even If Less-Strict Scrutiny Applies

Even if the Vote Nullification Provision did not impose a severe burden, it is still unconstitutional. Because mandatory and complete disenfranchisement is unnecessary for the State to obtain election results, the burden it imposes on the right to vote is unconstitutional under *Anderson-Burdick* doctrine.

Notably, even a small risk of wrongful disenfranchisement imposes a serious burden under *Anderson-Burdick* doctrine. *Lee* is instructive: that case challenged a signature-matching requirement in Florida. 915 F.3d at 1315. The requirement affected "only about 4,000 ballots … less than 5 hundredths of a percent of the more than 9 million total ballots cast in Florida for the 2016 general election." *Id.* at 1322. So the maximum error rate was well under 1%.[2] But despite the tiny risk of error, the *Lee* plaintiffs not only had standing but the Eleventh Circuit had no difficulty in concluding that the matching requirement and its limited cure opportunities "impose[d] at least a serious burden on the right to vote." *Id.* at 1321. Similarly, the Sixth Circuit held that where "poll-worker error causes thousands of qualified voters to cast wrong-precinct" ballot that were disqualified, which were less

[2] Notably, "[o]f those 4,000 ballots, not all were cast by eligible voters." *Id.* Evidence from the Florida Secretary of State cited by the Eleventh Circuit indicated that the number of voters who cast a ballot by mail, and thus were subject to the signature matching requirement, was 2,758,617. *Id.* (citing Fla. Dep't of State, Div. of Elections, Voting Activity by Ballot Type for 2016 General Election (last updated Mar. 24, 2017), https://dos.myflorida.com/media/697842/2016-ge-summaries-ballots-by-type-activity.pdf).

than 1% of the vote, that imposed a "substantial burden." *Husted*, 696 F.3d at 597.

While the Secretary *does* dispute that the burden here is severe, he does not even attempt to argue that the applicable burden is only "minimal"—the lowest tier under *Anderson-Burdick*. Indeed, the word "minimal" does not appear in either of his briefs. He thus provides scant-to-no basis for concluding that the relevant burden is not "at least a serious burden." *Lee*, 915 F.3d at 1321.

Under *Anderson-Burdick*, this Court must weigh "'the character and magnitude of the asserted injury to the right[] [to vote] … against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests *make it necessary to burden the plaintiff's rights.*'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted) (cleaned up).

Here, the Vote Nullification Provision fails under any means-ends testing—particularly as the burden is *at least* serious/significant. The provision's fatal flaw is that the Secretary never adequately explains why the *other* alternatives identified by Plaintiffs (PI at 12-14) would not be sufficient to advance the State's interest in ascertaining election results and why the EPM instead resorts to total disenfranchisement. Indeed, the Secretary's brief even makes the errant admission that "the appropriate remedy for a recalcitrant county's failure to carry out its statutory duties is a mandamus action in state court." PI Opp. at 2.

Mandamus—not mass disenfranchisement—is thus the "appropriate remedy" for a county board's refusal or failure to certify results. The availability of that "appropriate remedy" makes it wholly *un*necessary "to burden the plaintiff's rights,'" *Burdick*, 504 U.S. at 434 (citation omitted)—particularly as the burden imposed would be *complete disenfranchisement*. The Vote Nullification Provision reaches for disenfranchisement as a *mandatory first* resort, rather than last resort—never requiring exhaustion of other alternative means before its mandatory throw-out-all-affect-votes dictate kicks in. In doing so, it violates the First and Fourteenth Amendments.

The Secretary's tailoring arguments are also gravely undermined by his failure to

identify a *remotely* equivalent provision in any of the other 49 states. Somehow *all other states* appear to be able to discharge their duties to canvas results without resorting to the expedient of automatic and complete disenfranchisement of all votes that are not certified. The Secretary *never* explains why Arizona, apparently alone among all of her sister states, requires the Vote Nullification Provision to ensure certification of election results.

That "silence is most eloquent." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979). It concedes that it is entirely possible to canvas results without disenfranchising votes.

Moreover, even if all other means of obtaining officials results (such as from a court) failed, the Secretary never explains why he should not simply use the unofficial results, rather than disenfranchising *all* affected voters.

Because the Secretary fails to explain why that *mass* disenfranchisement is anything other than gratuitous, the Vote Nullification Provision imposes an unconstitutional burden under *Anderson-Burdick*.

V. THE REMAINING REQUIREMENTS FOR INJUNCTIVE RELIEF ARE SATISFIED

A. Plaintiffs Are Likely To Suffer Irreparable Harm Absent An Injunction

1. Irreparable Harm Of The Speech Restriction

Mirroring much of the rest of their brief, Defendants claim that Plaintiffs are not injured because (1) the Speech Restriction does not harm Plaintiffs as it is supposedly non-binding guidance for election workers, (2) Plaintiffs' self-censorship is not an injury here, (3) AFPI and American Encore have not demonstrated compliance costs sufficient to constitute injury, (4) there is an existing preliminary injunction against the Speech Restriction, and (5) that federal law independently prohibits activities that the Speech Restriction also prohibits. *See* AG PI Opp. at 10–14. Most of those recycled-as-irreparable-harm arguments fail as explained above. The remainder fair no better.

First, Defendants' construction of the Speech Restriction cannot bear the weight that they place on it. *See supra* § I.A. It undoubtedly prohibits speech and applies to Plaintiffs. *Id.* This fact is compounded by the reality that "[i]rreparable harm is *relatively*

easy to establish in a First Amendment case" because the plaintiff "*need only demonstrate the existence of a colorable First Amendment claim*." *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022) (quotation marks omitted) (emphasis added). Plaintiffs have easily satisfied that "relatively easy" burden here.

Second, Plaintiffs speech has been chilled by Defendants' credible threat of enforcement, which constitutes irreparably injury. *Supra* § II.A.2.

Third, Plaintiffs have sufficiently proved compliance costs. *Supra* § II.A.1. And "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Louisiana v. Biden*, 55 F.4th at 1034.

Fourth, Defendants are incorrect that the state court's injunction precludes a parallel injunction here while that action is still pending. Indeed, "courts *routinely grant follow-on injunctions against the Government*, even in instances when an earlier nationwide injunction has already provided plaintiffs in the later action with their desired relief." *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 60 (D.D.C. 2020) (collecting cases) (emphasis added). This is because "even a temporary lag between the lifting of that [previous] injunction … and entry of an injunction by this Court would likely entail some irreparable harm to Plaintiffs." *Id.* at 59–60. This is especially true here, where Defendants are at this very moment attempting to stay the state-court injunction.

Fifth, Defendants are doubly mistaken that "Plaintiffs face no irreparable harm from [the Speech Restriction] because federal law already prohibits intimidating conduct in the same way." AG PI Opp. at 13. To start, this is yet another implicit acknowledgment that the Speech Restriction does, in fact, prohibit speech and conduct.

Moreover, Defendants make no attempt to demonstrate that federal law is *anywhere near* as broad as the Speech Restriction—such as its lack of a *mens rea* requirement, which would be unconstitutional if a federal law were so lacking. *See Counterman*, 600 U.S. at 69. Indeed, the examples provided by Defendants contain a *mens rea* requirement—unlike the Speech Restrictions—because attempt-based crimes, by their nature, require a mental state. *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 405 (1980) ("Another such example

is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.").

2. The Vote Nullification Provision Inflicts Irreparable Harm

The Secretary's irreparable harm arguments overwhelmingly recapitulate their standing arguments, which fail as explained above. What's more, Defendants themselves admitted in the State Case "*any voter disenfranchisement is irreparable harm*." ECF No. 41 1 at 51 (citing *Arizona All. for Retired Americans v. Hobbs*, 630 F. Supp. 3d 1180, 1197–98 (D. Ariz. 2022) ("The denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.")) (citation omitted) (emphasis added). That admission is controlling here.

B. Defendants' Delay Arguments Lack Merit And Are Belied By Defendants' Own Actions

Defendants also argue that Plaintiffs cannot show irreparable harm as to the Speech Restriction due to putative delay in bringing this suit. Not so.

To begin with, Defendants both simultaneously claim that (1) Plaintiffs' pre-enforcement claim is *too early* (*i.e.*, is hypothetical and unripe) and (2) that it is also *too late.* But that Catch-22 is not one that this Court should indulge.

Defendants are also hardly in a position to complain about delay. They are presently seeking to have this Court abstain under *Pullman* doctrine—which would delay this case for *many* years. *See* ECF No. 27. Defendants cannot credibly complain of delays that are supposedly prejudicial and then simultaneously demand that this Court inflict years-more delay upon them. Defendants' arguments call to mind the "old joke, [Defendants] found the food terrible and the portions small." *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1073 n.3 (9th Cir. 2005) (McKeown, dissenting). "This delay is intolerable … and I demand more of it!" is not the convincing argument that Defendants believe it to be.

In any event, Plaintiffs did not unreasonably delay this action, particularly as it was only Defendants' actions in the seven months preceding suit that laid bare the risks of enforcement that violated the First Amendment. The potential risk was first made

obvious—though still denied by Defendants to this day—when Defendants refused to change so much as a comma in response to the legislative leaders' well-founded warnings that the draft Speech Restriction violated the First Amendment multiple times over. *Supra* at 8. That risk became even more manifest when the Secretary refused to disavow enforcement of the Speech Restriction on May 31, ECF No. 1-3—which the Attorney General never denies but unconvincingly attempts to elide, in a footnote. *See* AG MTD at 11 n.4.

Those critical actions sharpened and clarified the risk of enforcement and harm to free speech here. And they rendered Plaintiffs' suit, which that was filed within 7 months and 6 weeks of them, respectively, timely.

Nor is there any prejudice here. If the Speech Restriction is non-building guidance that does nothing but paraphrase statutes—as Defendants contend it is—then even a late-breaking injunction changes nothing for the State. An injunction against something that purportedly prohibits nothing inflicts no harm.

C. The Balance Of Harms And Public Interest Support Injunctive Relief

Aside reasserting their merits arguments, Defendants do not meaningfully explain why acquiescing in an unconstitutional infringement of core political speech, or disenfranchisement of all voters in an entire county, is in the public interest. Instead, the third and fourth factors weigh heavily in Plaintiffs' favor here. *Baird*, 81 F.4th at 1042 ("A plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor.").

Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *De Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up). And the State "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). Defendants thus cannot even place any harms upon the scales to balance.

CONCLUSION

The Court should (1) deny Defendants' motions to dismiss and (2) grant a preliminary injunction prohibiting Defendants from implementing or enforcing the Speech Restriction and Vote Nullification Provision and directing them to promulgate an updated EPM that eliminates the constitutional infirmities.

Respectfully submitted this 28th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for parties that are registered CM/ECF users will be served by the CM/ECF system pursuant to the notice of electronic filing.

s/ Andrew Gould
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