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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**

17
18 American Encore, an Arizona non-profit
19 corporation; Karen Glennon, an Arizona
20 individual; America First Policy Institute, a
21 non-profit corporation,

22 Plaintiffs,

23 v.

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

Defendants.

No. CV-24-01673-PHX-MTL

**DEFENDANTS' REPLY IN
SUPPORT OF THEIR MOTION
TO ABSTAIN AS TO COUNT
TWO**

(Hon. Michael T. Liburdi)

Introduction

Defendants acknowledge that *Pullman* abstention is unusual for First Amendment claims. But it is also unusual for a First Amendment claim to (1) depend on how state courts will interpret state law and (2) be a near-identical copy of a claim previously filed (and already preliminarily decided) in a state court proceeding. Consider the similarities between Count Two here and the parallel claim in the State Case:

1. One of the Plaintiffs is the same, and Plaintiffs' counsel is the same.
2. Defendants are the same, and Defendants' counsel is the same.
3. The same EPM provision (section III(D)) is being challenged.
4. The nature of the free speech challenge is virtually identical.

Compare Doc. 1 (especially ¶¶ 150–156) with Doc. 27-1 (especially ¶¶ 150–157).

The main difference between Count Two in this case and the parallel claim in the State Case is that the State Case is much farther ahead. The state court has already ruled on the motion for a preliminary injunction, and appellate proceedings are underway.

In this sort of situation, courts often abstain under *Pullman*. Plaintiffs cite general principles about the rarity of *Pullman* abstention in First Amendment cases, but they ignore that the present situation is analogous to the exceptional cases in which courts have abstained. Tellingly, Plaintiffs cite no case denying abstention in such circumstances.

And abstention is eminently sensible here. The reason why Plaintiffs included Count Two in this case is so that, *if* Arizona's appellate courts ultimately interpret A.R.S. § 16-452 and the EPM more narrowly than Plaintiffs advocate in the State Case, Plaintiffs might still be able to convince a federal court to adopt their broad interpretation. But that is the exact opposite of how federalism and judicial economy should work. Rather, a federal court "ordinarily" should "refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case," especially "if there is already pending a state court action that is likely to resolve the state questions." Wright & Miller § 4242. That is precisely the situation that Plaintiffs and their counsel have created.

1 **I. *Pullman* Abstention for First Amendment Claims Is More Common than**
2 **Plaintiffs Suggest.**

3 Plaintiffs argue (at 3) that federal courts “almost never” abstain from considering
4 First Amendment claims. But “almost never” means “sometimes.” To illustrate, below
5 are some times when federal courts—including the Supreme Court—have approved
6 *Pullman* abstention for First Amendment claims in cases similar to this one:

- 7 1. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 307–12 (1979)
8 (holding that the “District Court should have postponed resolution” of a
9 challenge to an Arizona law when a state court interpretation could
10 “significantly alter the constitutional questions requiring resolution,” and
11 that the “District Court should have abstained” from deciding a challenge
12 to a related Arizona law when the law “might fairly be construed by an
13 Arizona court” more narrowly than challengers suggested).
- 14 2. *Almodovar v. Reiner*, 832 F.2d 1138, 1139–41 (9th Cir. 1987) (affirming
15 abstention when “constitutional claims would be moot if the state supreme
16 court decides that the statutes do not apply”).
- 17 3. *Lomma v. Connors*, 539 F. Supp. 3d 1094, 1099–1103 (D. Haw. 2021)
18 (abstaining under Ninth Circuit precedent when parties were involved in a
19 related state case that was farther along, “rendering abstention particularly
20 compelling”).
- 21 4. *Moore v. Hosemann*, 591 F.3d 741, 745–46 (5th Cir. 2009) (stating that
22 “*Pullman* abstention is appropriate” for claim that Secretary of State
23 violated First Amendment right to political participation, when claim was
24 “entirely contingent on an unresolved interpretation of [state] law”).
- 25 5. *Beavers v. Ark. State Bd. of Dental Exam’rs*, 151 F.3d 838, 840–41 (8th
26 Cir. 1998) (affirming abstention when issue was “fairly subject to” statutory
27 decision by state courts that could “obviate federal constitutional
28 inquiry”).

- 1 6. *Presbytery of N.J. of the Orthodox Presbyterian Church v. Whitman*, 99
2 F.3d 101, 106–07 (3d Cir. 1996) (affirming abstention when it was “quite
3 possible” that state courts “would construe the challenged language so as to
4 avoid reaching the type of conduct in which [plaintiffs] engage”).
- 5 7. *Def. Distributed v. Grewal*, 368 F. Supp. 3d 1087, 1090–93 (W.D. Tex.
6 2018) (abstaining when state law was “fairly susceptible to” interpretation
7 that would not hinder plaintiffs and observing that “the Supreme Court has
8 ruled that abstention is appropriate, even in the context of First Amendment
9 challenges, when the interpretation of a state law ‘turns upon the choice
10 between one or several alternative meanings of [the] state statute’” (quoting
11 *Babbitt*, 442 U.S. at 307–09)).
- 12 8. *Caldera v. City of Boulder*, 341 F. Supp. 3d 1241, 1243–1248 (D. Colo.
13 2018) (abstaining when state law question could be “entirely dispositive”
14 of federal constitutional issues and observing that “the factors that
15 sometimes lead the Supreme Court to assert that free expression cases
16 generally are not suitable for *Pullman* abstention are not present here”),
17 *aff’d sub nom. Caldara v. City of Boulders*, 955 F.4d 1175 (10th Cir. 2020).
- 18 9. *Supreme v. Kan. State Elections Bd.*, No. 18-CV-1182-EFM, 2018 WL
19 3329864, at *3–5 (D. Kan. July 6, 2018) (finding abstention “likely” when
20 First Amendment claim “rests entirely upon the meaning of [state] election
21 laws”).
- 22 10. *Gordon v. E. Goshen Twp.*, 592 F. Supp. 2d 828, 845–49 (E.D. Pa. 2009)
23 (abstaining when state court resolution of state-law question “would
24 eliminate the need for, or substantially narrow the scope of, this Court’s
25 constitutional ruling” and explaining that “the Supreme Court has
26 concluded that even a facial First Amendment challenge does not
27 automatically render abstention inappropriate” (citing *Babbitt*, 442 U.S. at
28 308)).

1 These cases should guide the Court here. For example, the question of how to interpret
2 A.R.S. § 16-452(C) and EPM section III(D) “can be adjudicated in a single state court
3 proceeding,” and the parties “need not undergo the expense or delay of a full state court
4 litigation” because the question is already being litigated in a state appellate court.
5 *Almodovar*, 832 F.2d at 1140.

6 Inexplicably, Plaintiffs try to minimize *Almodovar* by asserting (at 4) that “the
7 Ninth Circuit does not appear to have approved of *Pullman* abstention in the last 35
8 years.” This is a blatant falsehood. Here are some examples of recent published opinions:

- 9 • *Gearing v. City of Half Moon Bay*, 54 F.4th 1144, 1146–51 (9th Cir. 2022)
10 (affirming *Pullman* abstention);
- 11 • *Courtney v. Goltz*, 736 F.3d 1152, 1162–65 (9th Cir. 2013) (affirming *Pullman*
12 abstention);
- 13 • *Smelt v. Cnty. of Orange*, 447 F.3d 673, 678–82 (9th Cir. 2006) (affirming
14 *Pullman* abstention);
- 15 • *Columbia Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 801–07 (9th
16 Cir. 2001) (*reversing* district court’s decision to reach the merits and instead
17 directing district court to abstain under *Pullman*);
- 18 • *San Remo Hotel v. City & Cnty. of San Francisco*, 145 F.3d 1095, 1104–05
19 (9th Cir. 1998) (directing district court to abstain under *Pullman*);
- 20 • *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622–26
21 (9th Cir. 1993) (holding that district court abused its discretion in *failing* to
22 abstain under *Pullman*).

23 While these cases did not involve First Amendment claims, they show that the Ninth
24 Circuit continues to regard *Pullman* abstention as important.¹

25 Plaintiffs also try to minimize *Almodovar* by observing (at 4) that the state-law
26 question in that case had already made its way to the state supreme court. This
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28 ¹ The two most recent of these published opinions were cited in Defendants’ motion to
abstain. It is hard to understand how Plaintiffs missed them.

1 observation is true, but irrelevant. Nothing in the *Almodovar* opinion suggests the Ninth
2 Circuit would have come out differently had the state-law question been in the state
3 intermediate appellate court (as it is here). The point being made by the Ninth Circuit in
4 *Almodovar* was that abstention would not force the parties to “undergo the expense or
5 delay of a *full* state court litigation” because there was already “a pending state court
6 litigation.” 832 F.2d at 1140 (emphasis added). That point is equally applicable here.

7 **II. The State Case Addresses Plaintiffs’ Concerns about the Upcoming Election.**

8 Plaintiffs next argue (at 5) that *Pullman* abstention would grant Defendants
9 “victory through non-adjudication with respect to the 2024 elections.” But this argument
10 ignores reality. Plaintiffs have *already* achieved a preliminary victory regarding the 2024
11 elections, via a preliminary injunction in the State Case.

12 Plaintiffs are apparently worried that the Arizona Court of Appeals will stay the
13 preliminary injunction in the State Case. This worry is understandable given that
14 Plaintiffs’ broad interpretations of A.R.S. § 16-452(C) and EPM section III(D) are
15 unlikely to pass appellate scrutiny. But even assuming the Arizona Court of Appeals
16 disagrees with Plaintiffs’ broad interpretation and stays the preliminary injunction, *that is*
17 *what should happen* in our federalist judicial system. As the Supreme Court has
18 explained, abstention is appropriate when a state law “might fairly be construed by an
19 Arizona court” more narrowly than the challengers suggest. *Babbitt*, 442 U.S. at 308–09.

20 Plaintiffs also suggest (at 5) that evaluating whether Plaintiffs have met the
21 jurisdictional prerequisite of standing *before* deciding whether to abstain would be
22 “asymmetric and inequitable.” But this asymmetry is not inequitable; it is the direct
23 consequence of the fact that Article III limits federal courts to cases and controversies.
24 “Since abstention presupposes that jurisdiction exists, the court ought not consider
25 whether to abstain until it has satisfied itself that it has jurisdiction of the case.” Wright
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1 & Miller § 4243 (citing, among other cases, *City of S. Lake Tahoe v. California Tahoe*
2 *Reg'l Plan. Agency*, 625 F.2d 231, 233 (9th Cir. 1980)).²

3 **III. The Three *Pullman* Abstention Factors Are Satisfied.**

4 *Pullman* abstention is appropriate when “(1) the federal constitutional claim
5 ‘touches a sensitive area of social policy,’ (2) ‘constitutional adjudication plainly can be
6 avoided or narrowed by a definitive ruling’ by a state court, and (3) a ‘possibly
7 determinative issue of state law is doubtful.’” *Gearing*, 54 F.4th at 1147 (citation
8 omitted). Plaintiffs argue (at 6) that the first and third factors are “lacking” and the second
9 is “marginal.” This is incorrect.

10 **A. Count Two touches a sensitive area of social policy.**

11 Although Count Two is directed at behavior during elections, Plaintiffs argue (at
12 6–7) that this is not a sensitive area of social policy, citing *Porter v. Jones*, 319 F.3d 483
13 (9th Cir. 2003). But in *Porter*, the Ninth Circuit was driven by “special concern” that
14 “the delay that comes from abstention may itself chill the First Amendment rights at
15 issue.” *Id.* at 492–93. The Ninth Circuit reasoned that “the parties have already been
16 litigating the case in federal court for over two years, and it is far from clear that the case
17 would be resolved prior to the 2004 election if Plaintiffs were sent to state court.” *Id.* at
18 494. Here, as explained above, these concerns are absent because (1) the federal case has
19 barely started, (2) a nearly identical claim was previously brought in the State Case and
20 is already being considered in Arizona’s appellate courts, and (3) Plaintiffs have *achieved*
21 a preliminary injunction in the State Case prior to the upcoming election.

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24 ² Plaintiffs also suggest (at 6) that this Court should certify state-law questions to the
25 Arizona Supreme Court. But there is no need to do so because the Arizona Court of
26 Appeals will be considering the questions soon. Once the Arizona Court of Appeals
27 decides, the Arizona Supreme Court can choose whether to grant review. *See, e.g.,*
28 *Caldara v. City of Boulder*, 955 F.3d 1175, 1183 (10th Cir. 2020) (declining certification
because “there is a case involving substantially identical issues pending in state court”).
If Plaintiffs wish to hasten consideration of the issue by the Arizona Supreme Court, they
can file a petition to transfer the State Case. *See* Ariz. R. Civ. App. P. 19.

1 Plaintiffs also belittle (at 7) Defendants’ citation of *Arizona Alliance for Retired*
2 *Americans v. Clean Elections USA*, No. CV-22-01823-PHX-MTL, 2022 WL 17088041
3 (D. Ariz. Nov. 1, 2022). But Defendants cited that case to highlight the Court’s own
4 experience with this sensitive area of social policy. The fact that that case involved
5 federal judicial action (in a context where parties did not urge abstention) does not
6 somehow mean that behavior during elections is *not* a sensitive area of social policy.

7 Indeed, the fact that there are state laws governing behavior during elections, *e.g.*,
8 A.R.S. § 16-1013, as well as an EPM provision on the subject (drafted by the Secretary
9 of State and approved by the Governor and Attorney General) demonstrates that this is a
10 sensitive and important subject in Arizona. *Accord, e.g., Moore*, 591 F.3d at 745 (stating
11 that “*Pullman* abstention is appropriate” for claim that Secretary of State violated First
12 Amendment right to political participation); *Supreme*, No. 18-CV-1182-EFM, 2018 WL
13 3329864, at *3–5 (finding abstention “likely” when First Amendment claim “rests
14 entirely upon the meaning of [state] election laws” and explaining that the State has a
15 “significant interest” in an “orderly election process”).

16 **B. Plaintiffs’ interpretation of A.R.S. § 16-452 and the EPM is doubtful**
17 **(at best).**

18 Skipping to the third *Pullman* factor, Plaintiffs argue (at 8–11) that their
19 interpretation of A.R.S. § 16-452(C) and EPM section III(D) is so obvious that it cannot
20 be “doubtful” for purposes of abstention. Of course, Defendants strongly disagree with
21 Plaintiffs’ interpretation, as explained at length in the Attorney General’s Motion to
22 Dismiss Count Two (Doc. 31), the Attorney General’s Response to Plaintiffs’ Motion for
23 Preliminary Injunction as to Count Two (Doc. 32), the Secretary’s joinder in both filings
24 (Doc. 33 at 1), and the Attorney General’s Reply in Support of her Motion to Dismiss
25 Count Two (filed concurrently with the present Reply).

26 Defendants will not burden the Court by repeating arguments in those briefs.
27 Suffice it to say, Plaintiffs’ expansive interpretation of criminal liability is unprecedented.
28 At a minimum, Defendants’ interpretation of A.R.S. § 16-452(C) and EPM section III(D)

1 renders Plaintiffs' broad interpretation doubtful. After all, Defendants are the enforcer of
2 A.R.S. § 16-452(C) (the Attorney General) and the drafter of the EPM (the Secretary),
3 and they have unequivocally and repeatedly disavowed the interpretations, applications,
4 and prosecutions that Plaintiffs advance.

5 Insofar as Plaintiffs rely (at 10–11) on the Secretary's public statements after the
6 superior court's decision in the State Case, that reliance is misplaced. The *superior court*
7 had (mis)interpreted EPM section III(D) as directly restricting speech of members of the
8 public, having been convinced by the plaintiffs. That is why the Secretary referred, for
9 example, to "the *court's decision* to halt certain speech restrictions." Doc. 41-1 at 3 ¶ 6
10 (emphasis added). The Secretary was not expressing agreement with the superior court's
11 interpretation. He was explaining the State Case and issues to lay members of the public.
12 It is common for elected officials to comment on court rulings to educate the public,
13 including to express disagreement about those rulings when they fear for the implications
14 on important statewide matters like safety and security in voting.

15 The Secretary's comments to the lay public are consistent with his litigation
16 positions on the legal issues, as expressed through his counsel and the Attorney General
17 in this Court. Indeed, some of the Secretary's comments reflect the broad, undefined, and
18 confusing nature of the superior court's preliminary injunction. The Secretary's
19 comments also make sense in light of the actual meaning of EPM section III(D), as
20 opposed to Plaintiffs' erroneous reading. His overarching point was to convey how the
21 superior court's misreading and overbroad preliminary relief evidently prevents poll
22 workers from considering the EPM's guidance as they perform their duties to keep voting
23 locations secure from (unprotected) intimidation, coercion, harassment, and disruptive or
24 dangerous conduct, which would threaten Arizonans' ability to freely and safely vote.

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RESPECTFULLY SUBMITTED this 5th day of September, 2024.

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