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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendants.

No. CV-24-01673-PHX-MTL

DEFENDANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO COURT ORDER, DOC. 57

Arizona Alliance for Retired Americans v. Mayes ("*AARA*"), No. 22-16490, supports that America First Policy Institute ("AFPI") and American Encore ("Encore") lack Article III standing to challenge section III(D) under Count 2, and that all Plaintiffs lack standing to challenge the Canvass Provision under Count 1.

I. AFPI and Encore lack Article III standing to challenge section III(D).[1]

First, in *AARA*, the Ninth Circuit reaffirmed that "[o]rganizations can no longer spend their way to standing based on vague claims that a policy hampers their mission" or causes "frustration of a mission []or the diversion of resources." Slip Op. at 7; *see also id.* at 12-13, 21-22. Thus, here, AFPI and Encore "must do more than merely claim that [section III(D) has] caused them to spend money in response to it—they must show that Arizona's actions directly harmed already-existing activities." *Id.* at 13. This means "direct interference with [their] core *activities*," not "indirect impacts on [broadly stated] missions and goals." *Id.* at 17. They cannot do so.

Encore alleges that its core activities are "supporting and opposing political candidates, policies, and initiatives" through "electioneering communications," and it makes clear that it "will continue to engage in voter contact in Arizona for the upcoming 2024 election cycle and beyond." Doc. 1 at 4 ¶¶ 12, 14. Thus, Encore does not allege that section III(D) directly interferes with its activities, just the opposite. Nor could Encore allege otherwise—the EPM expressly recognizes that electioneering is protected and permitted "outside the 75-foot limit" of a polling location. Doc. 16-2 at 144, 194 (citing and discussing relevant statutes).

Instead, Encore alleges it has spent "costs beyond what it typically incurs" to "train [people] who will [help … ensure compliance with [section III(D)]." *Id.* at 4, ¶¶ 16-17. In other words, Encore is "complaining that [it] must now take it upon [itself] to develop training materials … in response to [section III(D)]." *AARA*, Slip Op. at 24. But the Ninth Circuit just reaffirmed that this kind of self-help standing of "spending money

[1] Individual Plaintiff Glennon does not allege any facts to support her standing to challenge section III(D). *See, e.g.*, Doc. 1 at 4-5, 28 ¶¶ 19, 22, 151-54.

voluntarily in response to a governmental policy" is insufficient as a matter of law, including by overruling a case on which Plaintiffs had relied (and citing the specific pages Plaintiffs had cited). *See id.* at 16-24, 28-29; Doc. 74 at 31 (citing *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015)).

The same is true as to AFPI's mission "to advance or oppose legislation" and core activities of "raising awareness of issues at elections," Doc. 1 at 5 ¶ 23, which—as the EPM expressly observes—are protected and permitted so long as they comply with other laws that Plaintiffs have not challenged. Doc. 16-2 at 144, 194. Indeed, AFPI alleges it has been engaging in those activities and can and will continue doing so. Doc. 1 at 5-6, ¶¶ 27-29. Thus, again, AFPI's alleged standing rests not on any alleged direct interference with its core activities, but rather voluntary costs "to design and conduct … training" about section III(D). Doc. 1 at 5 ¶ 26.[2]

In sum, Encore's and AFPI's "purported harm" is identical to the harm alleged in *AARA*. Slip Op. at 28. And just as in *AARA*, Plaintiffs' allegation that they "will spend resources on education in response to [section III(D)] … simply is not akin to 'a retailer who sues a manufacturer for selling defective goods to the retailer' or a group's core business activity being 'perceptibly impaired.'" Slip Op. at 29 (quoting *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 395 (2024)).

Second, *AARA* confirms that this Court cannot merely assume Plaintiffs' interpretation of section III(D) is true in evaluating their standing. To start, in discussing how *Hippocratic Medicine* clarified the causation requirement, the Ninth Circuit noted the "obvious" point that "[i]f the party before the court seeks to challenge a law that does not *directly affect* it, the chain of causation will be longer and inferences will be necessary," and therefore courts "must *scrutinize* the harm an organization asserts to

[2] Without pleading any other facts, AFPI makes the conclusory allegation that it "had to alter how it conducts its operations and communications in Arizona." Doc. 1 at 6 ¶ 28. But that bare assertion simply confirms that AFPI has been able to "continue its core and ongoing business of [electioneering]," and that section III(D) admittedly "does not 'directly affect[] and interfere[]' with that pre-existing activity." Slip Op. at 29.

ensure that the organization has not tried to 'spend its way into standing.'" Slip Op. at 22 (emphases added). Part of that scrutiny involves whether an organization's responsive actions are reasonably tied to a plausible reading of the challenged law. *See id.* at 27 n.5.

The Ninth Circuit found that the organizations' theory of harm "rest[ed] on either an *implausible* reading of the [challenged] Cancellation Provision or pure speculation" about how it would apply. *Id.* at 24 (emphasis added). In rejecting plaintiffs' "misreading of the Cancellation Provision," the court looked at other relevant laws, "basic common sense," and practical realities about how the provision works. *Id.* at 25. "And in case there was any doubt remaining about what the law require[d]," the Ninth Circuit relied on the Attorney General's and the Secretary's explanations about the law's meaning, what election officials "would reasonably be expected to do," and their confirmation that it would not cause the result the plaintiffs feared. *Id.* at 25-26.

Similarly, here, this Court "must scrutinize" Plaintiffs' purported fear of enforcement and whether it is actually traceable to section III(D) as a matter of law. For all the reasons Defendants have explained, both injury and causation are lacking because Plaintiffs' "theory rests on … an implausible reading of [section III(D) and] pure speculation" about Defendants applying it in a way they have unequivocally disavowed. *See id.* Of course, the interpretation of section III(D) is an issue of law for the Court. But *AARA* supports that when interpreting the EPM, the Court should take seriously not only section III(D)'s text and context and "the [relevant] statutory language," but also "common sense, and [the bipartisan approval of the EPM and] statements from … state elected officials in charge of administering and enforcing Arizona's election laws." Slip Op. at 25-27 & n.5. All of which refute Plaintiffs' interpretation and theory.

AARA thus confirms exactly what Defendants have been arguing and citing from prior precedent: interpreting a challenged law in a standing analysis is not "addressing the merits of the claim" such that the Court must take as true Plaintiffs' reading. Slip Op. at 27 n.5. Courts "are not bound to accept an incorrect premise in determining whether a party has standing. Indeed, in determining whether a chain-of-causation is too speculative

… [courts] must look at whether a plaintiff is relying on a far-fetched speculation in assessing how a statute may be applied." *Id.*[3]

Here, Plaintiffs' theory is that a bipartisan group of five constitutional officers have collectively twice approved an EPM provision that purports to exceed the Secretary's statutory authority and rewrite criminal statutes to ban protected speech. And now, their theory goes, they and the public suddenly face misdemeanor prosecutions under A.R.S. § 16-542(C) for purported "violations" of section III(D) that Defendants have never initiated and have repeatedly disavowed. *E.g.*, Doc. 1 at 2-3, 11-13 ¶¶ 1, 3-4, 8, 63, 65-71. That "chimerical and speculative theory of harm" and "bizarre[]" interpretation of section III(D) are even more "far-fetched" than the ones rejected in *AARA*, and for all the reasons the Ninth Circuit found dispositive there. Slip Op. at 27 n.5.[4]

Third, *AARA* reiterates several other established principles relevant to standing and ripeness here. To start, "Plaintiffs may not 'rely on speculation about the unfettered choices made by independent actors not before the courts.'" *Id.* at 14 (citation omitted). Accordingly, they cannot create an Article III controversy with Defendants here based on speculation about what county attorneys—whom they chose not to sue—might do. (Notably, the *AARA* plaintiffs sued all "fifteen county recorders." *Id.* at 10.) And given the absence of any alleged prior enforcement and Defendants' unequivocal disavowals, one would have to impermissibly "assume that [county attorneys] will act in unpredictable or irrational ways" in order to envision the novel prosecutions Plaintiffs purport to fear. *Id.* at 15 (citations omitted).

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[3] The "merits" here are First Amendment and vagueness theories. Doc. 1 at 28-29. Standing precedes the merits. Plaintiffs' standing theory rests on a novel and incorrect legal premise: that section III(D) is a *new standalone* prohibition on members of the public and not, as Defendants insist, a *description* of existing statutory laws to provide non-binding guidance to elections officials.

[4] AFPI makes no factual allegations on this point, but to the extent it purports to assert standing on behalf of its "300,000 members, who are widely dispersed through the United States," Doc. 1 at 6 ¶ 29, those "arguments rest on the same unduly speculative theory of causation" and injury and likewise fail, Slip Op. at 26-27. Encore does not allege standing on behalf of any members (or even that it has members). Doc. 1 at 4.

In addition, "plaintiffs must show a sufficiently close and predictable link between the challenged action and their injury-in-fact." *Id.* at 15. Count 2 relies solely on a theory of criminal prosecution under A.R.S. § 16-452(C) for "violating" section III(D). As the briefs have discussed, there is no "sufficiently close and predictable link" whatsoever between section III(D)—which has existed nearly verbatim for five years without incident—and the prosecutions Plaintiffs suddenly claim to fear.

To the extent Plaintiffs are now pivoting to the new and wholly unpleaded theory of harm that section III(D) could result in voters being asked to leave the polls before they can cast their ballot, that theory is even more speculative and dependent on hypothetical conduct by third parties. To find standing on that new basis in *this* case, the Court would have to sua sponte assume a host of unpleaded events: At a minimum, a voter whom Plaintiffs can theoretically represent (which could only be Plaintiff Glennon or a specific AFPI member) would have to go to the polls and engage in such disruptive or inappropriate conduct that they would be asked to leave or the police called.

Further, to find redressability in that case, the Court has to imagine an extremely specific hypothetical that Plaintiffs have never alleged, where (1) an election official considered section III(D)'s guidance to inform their actions or call law enforcement, (2) but the voter's instigating conduct was not otherwise prohibited[5] and (3) the official's actions not otherwise permitted (or required)[6] by one of the many statutes that Plaintiffs have not challenged and have conceded are constitutional. Otherwise, attacking section

[5] *E.g.*, A.R.S. § 16-515(A) (prohibiting "electioneering … within the seventy-five foot limit" of polling location and requiring voters to "cast their ballots [and] promptly move outside the seventy-five foot limit"); § 16-1013 (prohibiting voter intimidation and coercion); § 16-1006 (unlawful or fraudulent voter influence and inducement); § 16-1017(2)-(6) (prohibiting voter interference or inducement "within the seventy-five foot limit," defacing or removing voter instructions, removing or destroying supplies, and "[h]inder[ing] the voting of others"); § 13-2921 (prohibiting criminal harassment).

[6] *E.g.*, A.R.S. § 16-535(B) (election marshal must "preserve order at the polls and permit no violation of the election laws from the opening of the polls until the count of the ballots is completed"); § 16-1009 (misdemeanor for "[a] public officer upon whom a duty is imposed by this title" to "fail[] or refuse[] to perform that duty").

III(D) could not redress the alleged injury, which would flow instead from distinct statutes. Thus, that hypothetical and unpleaded theory is just as speculative and futile.

Finally, *AARA*'s reasoning as to the threat of enforcement under the Felony Provision is not on point. Unlike here, there was no dispute in that case that the Felony Provision could apply to the plaintiff organizations, only whether it applied to certain activities. *See* Slip Op. at 30-31. So, it was enough that the plaintiffs' activities might arguably fall within the meaning of "mechanism for voting." *Id.* at 31. This case is not about the definition of a discrete statutory term; it is about the fundamental meaning and scope of the EPM in general and section III(D) in particular. Moreover, in *AARA*, the provision had been "enjoined the day after it took effect, so Arizona never had a genuine opportunity to enforce it." *Id.* at 32. By contrast here, after nearly five years of the EPM containing a virtually identical section III(D), the lack of prior enforcement—or anyone reading the EPM in remotely the same way that Plaintiffs do—is highly relevant.

Regardless, the rest of the Ninth Circuit's reasoning about the Felony Provision supports Defendants. *Id.* at 33-39. The court interpreted the term at issue in light of the full statutory context and "[c]onsistent with the other … neighboring provisions," just as Defendants have repeatedly urged here. *Id.* at 33-38. Importantly, the court's interpretation was guided by the goal "to avoid constitutional problems" because the provision was "readily susceptible to a narrowing construction." *Id.* at 38-39. Likewise, Defendants' interpretation of section III(D) avoids any constitutional concerns and fully addresses Plaintiffs' purported fears of prosecution under A.R.S. § 16-452(C). The Court should apply those principles when construing section III(D) at the standing stage. But in all events, those constitutional avoidance principles resolve this case on the merits.

II. Plaintiffs lack standing to challenge the Canvass Provision.

AARA also supports dismissal of Count 1. Plaintiffs allege that the Canvass Provision "inflicts cognizable injury upon Plaintiff Glennon as a voter," AFPI's and Encore's "supporters and/or sympathetic voters," and "AFPI's members." Doc. 1 at 19 ¶ 97. Even assuming AFPI and Encore can represent such interests, *AARA* counsels that

these unspecified and generalized sympathies about "abstract political and societal goals" cannot confer standing. Slip Op. at 13, 17, 21. Further, as to all Plaintiffs, this theory necessarily relies on "speculation about the unfettered choices [of] independent actors not before the courts" and an assumption that "third parties will act in unpredictable or irrational ways," Slip Op. at 14-15 (citation omitted), because it requires that county boards first act illegally by not canvassing election results by the statutory deadline, *e.g.*, Doc. 1 ¶ 10. Underscoring that speculation and lack of a "sufficiently close and predictable link" (Slip Op. at 15), the Complaint contains no allegations that the board for Apache County (where Glennon is registered) is likely to act illegally, nor any other board for a county with so-called "supporters and/or sympathetic voters."

If nothing else, Plaintiffs have an insurmountable redressability hurdle because they challenged only the Canvass Provision in the EPM but not the *statutes* containing the mandatory deadlines. *See* Slip Op. at 15-16. The legislature has fixed the deadlines for canvassing and certifying election results ***in statute***. A.R.S. §§ 16-642, 16-648. And "[e]xcept when prescribed by a court," it is a class 6 felony for any "officer or agent of this state [or] a political subdivision … ***to modify or agree to modify any deadline*** … ***or other election-related date*** that is provided for in statute." A.R.S. § 16-407.03.

In other words, absent a court order or further legislation, the Secretary has zero power to modify or ignore the deadlines set by statute—the EPM has nothing to do with it. The challenged portion of the Canvass Provision does not require or prohibit anything that the statutes do not require or prohibit; it simply *describes* the consequences of the legislature's mandates and what the Secretary is required to do if the counties fail to meet their statutory deadline. If the Canvass Provision did not exist, the statutory deadlines would remain and "the requested remedy would not cure [Plaintiffs' alleged] injury." Slip Op. at 16. To repeat, even putting aside the other ripeness issues with Count 1, even if the Court enjoined the Canvass Provision, the statutes that Plaintiffs have not challenged would still require the Secretary to perform his non-discretionary duties by the mandatory statutory deadlines. As a matter of law, there is no standing under these circumstances.

RESPECTFULLY SUBMITTED this 23rd day of September, 2024.

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