Andrew Gould (No. 013234)
Drew C. Ensign (No. 025463)
Dallin B. Holt (No. 037419)
Brennan A.R. Bowen (No. 036639)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
2575 East Camelback Road, Suite 860
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
densign@holtzmanvogel.com
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com
minuteentries@holtzmanvogel.com

Michael Berry (*pro hac vice*)
Richard P. Lawson (*pro hac vice*)
Jessica H. Steinmann (*pro hac vice*)
Patricia Nation *(pro hac vice)*
AMERICA FIRST POLICY INSTITUTE
1001 Pennsylvania Ave., N.W., Suite 530
Washington, D.C. 2004
(813) 952-8882
mberry@americafirstpolicy.com
rlawson@americafirstpolicy.com
jsteinmann@americafirstpolicy.com
pnation@americafirstpolicy.com
Attorneys for Plaintiffs

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' SUPPLEMENTAL BRIEF REGARDING *AARA V. MAYES*

(Hon. Michael T. Liburdi)

INTRODUCTION

Plaintiffs continue to have Article III standing to challenge the Speech Restriction and the Vote Nullification Provision after the Ninth Circuit's recent decision in *Arizona Alliance for Retired Americans v. Mayes ("AARA")*, __ F.4th __ (9th Cir. Sept. 20, 2024) (slip op.[1]). *AARA* substantially strengthens Plaintiffs' arguments that they have standing to bring a pre-enforcement challenge against the Speech Restriction because they satisfy the "'lowered threshold'" of merely showing a "'credible, not imaginary or speculative'" threat of enforcement. *Id.* at 30 (citation omitted). That is particularly true as *AARA* makes plain that a disavowal of enforcement by a state attorney general provides no basis for precluding standing where (as here) "the disavowal is a 'mere litigation position.'" *Id.* at 32 (citation omitted). Indeed, here the Attorney General's disavowal is not only a "mere litigation position," but one that she has effectively disowned in this litigation. And the Secretary *refused* to disavow enforcement of the Speech Restriction entirely—and instead has effectively promised to enforce it.

Here, Plaintiffs have readily established standing under the relaxed burden that *AARA* reiterates: *i.e.*, they "'need only demonstrate that a threat of potential enforcement will cause [them] to self-censor, and not follow through with [their] concrete plan to engage in protected conduct.'" *Id.* at 31-32 (citation omitted). That chilling effect is established here by Plaintiffs' evidence, which is uncontroverted by *any* evidence from Defendants.

AARA also does not affect Plaintiffs' arguments that they have standing to challenge the Speech Restriction based on (1) being the object of the regulation at issue, thereby supplying "self-evident" standing and (2) compliance costs. These continue to be independent bases that establish Article III standing here.

AARA admittedly does weaken Plaintiff American First Policy Institute's ("AFPI's") assertion of organizational standing. Plaintiffs' declarations were drafted without the benefit of the *AARA* decision, and are not geared towards satisfying the

[1] All citations to *AARA* refer to the pagination of the slip opinion.

standards it sets forth (which did not yet exist). Because Plaintiffs have plainly established Article III standing on multiple alternative bases, and to simplify this case, Plaintiffs hereby withdraw their assertion of organizational standing.

As to the Vote Nullification Provision, *AARA* does not affect Plaintiffs' arguments based on the present diminution of their and their members' right to vote. *See* ECF 26 at 9–13; 47 at 30–41. Plaintiffs did not rely on organizational standing for their Vote Nullification Provision claims, and instead relied on representational standing—which *AARA* does not affect whatsoever. And like the Speech Restriction, *AARA* strengths Plaintiffs' arguments that they have Article III standing to bring a pre-enforcement challenge.

ARGUMENT

I. *AARA* STRENGTHENS PLAINTIFFS' ARGUMENTS THAT THEY HAVE ARTICLE III STANDING TO BRING A PRE-ENFORCEMENT CHALLENGE

In holding that the *AARA* plaintiffs had established standing to challenge the Felony Provision, the Ninth Circuit bolstered Plaintiffs' arguments that they have standing to bring a pre-enforcement challenge to the Speech Restriction.

A. *AARA* Reiterates And Emphasizes Precedents That Make Clear That Plaintiffs' Burden To Establish Standing Is "Dramatically" Relaxed

AARA reiterates that the Ninth Circuit has "*repeatedly* held that when a 'threatened enforcement effort implicates First Amendment rights, the inquiry *tilts dramatically toward a finding of standing*' to guard against chilling protected speech." *AARA* at 30 (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (emphasis added)). Despite Plaintiffs specifically citing *LSO*'s "dramatic tilt" previously, (ECF 47 at 20), Defendants have never addressed it or explained how their arguments can survive under it.

AARA also reiterates that Plaintiffs' burden of establishing that their "'intended speech *arguably* falls within the statute's reach'" is only a "low hurdle." *AARA* at 31 (citation omitted). Given the dubiousness of Defendants' interpretive arguments, Plaintiffs have readily cleared that "low hurdle." *Id.*

B. *AARA* Makes Clear That The Attorney General's Putative Disavowal Of Enforcement Does Not Preclude Standing

AARA's holding that the plaintiffs there had standing in the teeth of the Attorney General's specific disavowal of enforcement supports Plaintiffs' standing arguments here.

In *AARA*, as here, the Attorney General purported to disavow enforcement of the challenged provision. But the Ninth Circuit rejected that disavowal as irrelevant where that "disavowal [wa]s a 'mere litigation position'" and the Attorney General had "offered no official guidance limiting [the challenged provision's] reach, even though the state has been on notice that the provision is vague and potentially chilling speech." *AARA* at 32 (quoting *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010)). That is just so here: the Attorney General's disavowal is limited to a litigation-related letter exchange and has never been promulgated as "official guidance limiting [the Speech Restriction's] reach." *Id.*

Indeed, Article III standing exists here *a fortiori* because the Attorney General has effectively disavowed her disavowal. Her disavowal letter stated *categorically* that the Speech Restriction "d[id] not itself *restrict or criminalize anything*." ECF 1-4 (emphasis added)—*i.e.*, that it did not criminalize any speech *or otherwise restrict it with civil enforcement.* That is the only possible reading of her "*restrict or* criminalize" language.

But the Attorney General's position has now shifted to arguing that the Speech Restriction could be enforced civilly, by calling out law enforcement—who could even eject voters based *purely* on violations of the Speech Restriction. At the September 12 hearing, for example, her counsel openly admitted her view that the Speech Restriction could be enforced civilly, explaining that "a poll worker [would] not [be] enforcing Section III(D) [to] rely[] on an example [from it] to determine whether to contact law enforcement." 9/12 Tr. at 55:17-20. Her reply brief similarly claims that "*calling the police or asking disruptive people to desist or leave* is not election officials exercising 'enforcement power against the public.'" ECF 50 at 7 (emphasis added).

Similarly, the Attorney General's briefs in state court are replete with statements that reflect that view and implicitly recognize that she *intends* for the Speech Restriction

to be enforced civilly for the 2024 election.[2] Indeed, why else would she have sought a stay pending appeal *except* to enforce the Speech Restriction?

The Attorney General's position that civil enforcement does not count for purposes of the First Amendment is indefensible. *Minnesota Voters All. v. Mansky*, 585 U.S. 1 (2018)—a case that Plaintiffs have cited at virtually every turn and Defendants have never cited even *once*—is particularly instructive. There, the challenged restriction on speech was enforceable both criminally as a "petty misdemeanor" and also civilly by "issu[ance of] a reprimand or impos[tion of] a civil penalty." *Id.* at 8. The Supreme Court held that *all* enforcement of the challenged provision—not just criminal enforcement—was subject to the First Amendment, which the regulation violated. *Id.* at 13-23.

The same result should obtain here: *any* enforcement of the Speech Restriction, whether through criminal prosecution or civil enforcement, is subject to the First Amendment. That is particularly true as the Attorney General *admits* that violation of the Speech Restriction could result in a voter being "ask[ed] …. [to] leave" poll stations, ECF 50 at 7—where they otherwise have a lawful right to be and *often need to be* in order to exercise their constitutional right to vote.

The Attorney General thus effectively admits that she believes the Speech Restriction could validly be enforced in a manner that not only ejects voters from polling places, but effectively disenfranchises them to boot. Her view that this causes no cognizable injury and is perfectly constitutional is one that neither Article III, nor the First

[2] *See, e.g.*, ECF Nos. 58-2 at 11 (explaining that the Speech Restriction empowers poll workers to "fulfil their duties to *keep* voting locations safe" (emphasis added)); *id.* at 13–14 (arguing that the provision imbues poll workers with the power to "contact law enforcement" in the face of voter intimidation or "harassment"); *id.* at 14 (detailing how poll workers should ask "disruptive people to desist or leave ... [as] fulfilling their duty that the EPM imposes on them: they are charged with preserving order and safety"); 58-1 at 13 ("[O]fficials ... must make in-the-moment decisions to keep voters safe, including by identifying and addressing voter intimidation [under the Speech Restriction]."); *id.* at 29–30 ("[Section III(D)] regulates election officials to guide and instruct them in keeping the polls safe."); *id.* at 32 (explain that an inspector judges "whether and when to elevate disruptive situations, e.g., by asking a person who is intimidating voters to leave or by calling law enforcement").

Amendment indulges. Indeed, the implications of that civil-enforcement-doesn't count premise are disturbing: the government could, for example, suspend citizens' drivers' licenses, revoke their professional licenses, or eject them from poll places and thereby preventing them from voting based *purely* on the basis of their speech. That is not the law.

In addition, the disavowal in *AARA* was not expressly predicated on erroneous propositions of law. Indeed, while holding that the *AARA* plaintiffs had standing, the Ninth Circuit ultimately *agreed* with General Brnovich's interpretation of the Felony Provision as not reaching ordinary "activities such as voter registration." *AARA* at 34. In doing so, the Ninth Circuit made plain that Plaintiffs are correct that, for purposes of standing, this Court must "[v]iew[]the [challenged provision] through [plaintiff's] eyes." *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022). That is precisely what the Ninth Circuit did for *standing* purposes in *AARA*, before then rejecting Plaintiffs' interpretation on the merits. Moreover, unlike *AARA*, the Attorney General's disavowal is *expressly* predicated on legal propositions that are manifestly wrong.

C. The Secretary Refused To Disavow Enforcement and Instead Openly Declared His Intent To See the Speech Restriction Enforced

Unlike the Attorney General, the Secretary *refused* to disavow enforcement of the Speech Restriction when Plaintiffs asked him to do so. *See* ECF 1-2, 1-3. And his subsequent statements have made amply clear that he intends to see it enforced for the upcoming election if there are not injunctions in place. *See, e.g.*, ECF No. 47 at 18–19.

Despite this refusal, the Secretary has at times, however, characterized himself as "hav[ing] *unequivocally* and repeatedly disavowed the prosecutions Plaintiffs purport to fear," ECF No. 58-2 at 4 (emphasis added), even though he actually *refused* to disavowal criminal referrals when *specifically* asked to do so. *See* ECF 1-2, 1-3. The Secretary's willingness to contend that his *non-disavowal* actually constituted an *unequivocal* disavowal (in a brief co-signed by the Attorney General) further underscores that Plaintiffs cannot rely on Defendants' disavowals. Where Defendants are willing to play such extensive word games that the Secretary's intentional and specific non-disavowal

somehow constitutes an "unequivocal … disavow[al]," their disavowals are simply not worth the paper they are printed on.

Not only has the Secretary refused to disavow enforcement of the Speech Restriction, but he has also made *multiple* statements confirming his view that it is a binding prohibition that he *intends* to enforce it, at least civilly (and potentially by criminal referrals too). *See* ECF 47 at 18–19 .

D. Plaintiffs Have Article III Standing Based On Their Chilled Speech And That Of Their Members

AARA makes plain that to establish standing "'the plaintiff[s] need only demonstrate that a threat of potential enforcement will cause [them] to self-censor, and not follow through with his concrete plan to engage in protected conduct.'" *AARA* at 31-32 (citation omitted). Here, Plaintiffs have offered *uncontroverted* evidence that is the case here. For example, in her deposition, Catharine Cypher detailed how the Speech Restriction has required AFPI to alter the training that it provides to poll workers as AFPI has self-censored because of the Speech Restriction. ECF 47-1 at 359–63. She similarly testified that AFPI previous sold or distributed merchandise with the motto "easy to vote, hard to cheat," but has stopped doing so for fear that it violates the Speech Restriction and could lead to AFPI, or its members, being subject to enforcement of the Speech Restriction. ECF No. 47-1 at 363:3–25. This is enough for Article III standing. *See AARA*, at 31-32 .

II. *AARA* DOES NOT AFFECT PLAINTIFFS' OTHER BASES FOR STANDING TO CHALLENGE THE SPEECH RESTRICTION

AARA does not affect in any way Plaintiffs' (1) self-evident standing as the object of regulation and (2) standing based on compliance costs.

A. Plaintiffs Have Self-Evident Standing As Objects Of Regulation

AARA does not alter the venerable principle that the "objects" of regulations have "self-evident" standing to challenge them. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). Defendants have never disputed that principle in the past and *AARA* gives them no basis to do so now. Instead, Defendants have relied solely on the proposition that

the Speech Restriction does not regulate them, which both (1) relies on untenable interpretative arguments and (2) is contradicted by Defendants' belief that the Speech Restriction can be enforced civilly against Plaintiffs.

B. Plaintiffs Have Article III Standing Based On Compliance Costs

Although AARA substantially tightens standing requirements for expenditures that are alleged to be *resource diversions* supporting organizational standing, it does not change *whatsoever* the bedrock principle that expenditures for *compliance costs* establish Article III standing. ECF No. 47 at 24–28. Plaintiffs have readily established that they have incur (and will continue to incur) such compliance costs. 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). Plaintiffs continue to have standing on that ground.

III. *AARA* AUGMENTS PLAINTIFFS' STANDING TO CHALLENGE THE VOTE NULLIFICATION PROVISION

AARA does not alter Plaintiffs' arguments that they have standing based on present diminution of their right to vote. *See* ECF 26 at 9–13; 47 at 32–36. It also does not affect AFPI's ability to assert representational standing based on the rights of its members (as opposed to organizational standing). *See* ECF 26 at 9–13; 47 at 30–32.

And *AARA* affirmatively strengthens Plaintiffs' standing based on risk of future enforcement. In *AARA*, the only defendant capable of enforcing the Felony Provision *disavowed* enforcement of it—yet plaintiffs *still* had standing even though the risk of actual enforcement was demonstrably remote. Here, however, the Secretary *promises* to enforce the Vote Nullification Provision if it is ever triggered, despite acknowledging that doing so would be unconstitutional, ECF 51 at 11. Plaintiffs here have standing *a fortiori*.

CONCLUSION

AARA strengthens Plaintiffs' arguments that they have Article III standing based on a threat of future enforcement and does not alter Plaintiffs' other bases for standing, with the exception of organizational standing (which Plaintiffs now withdraw given that they have plainly established standing on other independent grounds).

Dated this 23rd day of September, 2024.

HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC

By: */s/ Andrew Gould*

Andrew Gould
Drew C. Ensign
Dallin B. Holt
Brennan A.R. Bowen
2575 E. Camelback Road, Suite 860
Phoenix, AZ 85016
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 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
Attorney for Plaintiffs