Case No. 24-6703

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN ENCORE, *et al.*,

Plaintiffs-Appellees,

v.

ADRIAN FONTES, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona

No. 2:24-cv-01673-MTL

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs failed to make a clear showing of their standing to obtain a preliminary injunction for both the Canvass Provision (Chapter 13, section II(B)) and the Voter Intimidation Guidance (Chapter 9, section III(D)). In their Answering Brief, Plaintiffs largely repeat arguments they made below based on their gross mischaracterizations of both EPM parts. But, as explained below, neither part means what Plaintiffs say it means. The district court erred when it adopted Plaintiffs' mischaracterizations without analysis and then awarded them the extraordinary remedy of a preliminary injunction based on their bare legal conclusions about the meaning of the Canvass Provision and Voter Intimidation Guidance.

Even if Plaintiffs had standing, their challenge to the Voter Intimidation Guidance fails on the merits, because the guidance is not the outrageously broad criminal prohibition that Plaintiffs allegedly fear, and even if there were ambiguity on that score, it would be "readily susceptible to a narrowing construction" to avoid that absurd result. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988).

This Court should vacate the preliminary injunctions.

ARGUMENT

I. Plaintiffs failed to make the clear showing of standing necessary to obtain a preliminary injunction as to the Canvass Provision.

Plaintiffs bear the burden of establishing each element of standing: that they have (1) suffered an injury in fact, (2) that is fairly traceable to the defendant's conduct, and (3) that is likely to be redressed by a decision in their favor. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citation omitted); *see also Lake v. Fontes*, 83 F.4th 1199, 1202-03 (9th Cir. 2023).

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). As such, Plaintiffs were required to do more than just allege standing; they were required to make a "clear showing" of their standing. *Lopez*, 630 F.3d at 785 (quoting *Winter*, 555 U.S. at 22). When the Canvass Provision is properly interpreted, Plaintiffs failed to make a clear showing on any of the three elements of standing, so the injunction against the Canvass Provision must be vacated. *See id.*

A. The Canvass Provision summarizes the Secretary's statutory canvassing duties.

Arizona law assigns to the Secretary the non-discretionary duty to canvass election results. A.R.S. §§ 16-642(B), -648(A)-(B) (directing that the

Secretary "shall canvass" on "the third Monday following a general election"). The Arizona Court of Appeals recently confirmed that the statutory duty to canvass election results is "not discretionary." *Crosby v. Fish*, 563 P.3d 143, 148 ¶ 16 (Ariz. App. 2024).

As explained in the Opening Brief, the Canvass Provision is a *summary* of the Secretary's non-discretionary, statutory duty to canvass election results by the Statewide Canvass Deadline. Dkt. 6.1 at 35-39. Here again is the full text:

> **2. Scope of Duty to Canvass**
>
> The Secretary of State may postpone the canvass on a day-to-day basis for up to three days if the results from any county are missing. A.R.S. § 16-648(C). All counties must transmit their canvasses to the Secretary of State, and the Secretary of State must conduct the statewide canvass, no later than 30 days after the election. A.R.S. § 16-648(C). If the official canvass of any county has not been received by this deadline, the Secretary of State must proceed with the state canvass without including the votes of the missing county (i.e., the Secretary of State is not permitted to use an unofficial vote count in lieu of the county's official canvass).
>
> The Secretary of State has a non-discretionary duty to canvass the returns as provided by the counties and has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order.

4-ER-405.

The Canvass Provision explains the Secretary's view that he must perform his statutory, non-discretionary duty to canvass by the Statewide Canvass Deadline unless a court orders otherwise. Dkt. 6.1 at 36-37. Put differently, the Canvass Provision explains the Secretary's belief that in the

hypothetical and unprecedented situation where a county both (1) fails to canvass by the County Canvass Deadline and (2) fails to canvass in time for the Secretary to meet the Statewide Canvass Deadline, *and* where the Secretary were also unable to secure some kind of judicial relief on or before the Statewide Canvass Deadline, he would be required by law to canvass the election and could not "use an unofficial vote count in lieu of [a] county's official canvass." *See id.*; 4-ER-405.

Plaintiffs double down on their misreading of the Canvass Provision, claiming that it "*requires* the Secretary to throw out votes if the exact same events occur as those from the 2022 general election." Dkt. 20.1 at 33 (emphasis original). The district court accepted this tortured reading without independent analysis and then relied upon that misinterpretation when assessing Plaintiffs' standing. 1-ER-009-010. This was clear error as explained below.

B. Plaintiffs made no clear showing of imminent harm.

Plaintiffs do not claim to have suffered an actual injury. Instead, they argue that they have satisfied the "injury in fact" requirement based on an "imminent" future harm. A plaintiff's injury must not be "conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation

omitted). To satisfy this requirement, a future harm must be "certainly impending," and a "possible future injury" is "not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (cleaned up).

The situation Plaintiffs purportedly fear—the exclusion of a county's votes from the statewide canvass—would require a "long chain of hypothetical contingencies." *Lake*, 83 F.4th at 1202-04 (cleaned up). Specifically, a county would have to first refuse or fail to canvass by the County Canvass Deadline. Then, the Secretary would either have to refuse to seek judicial relief (contradicting his express commitment, *see* Doc. 26-3) or be unable to obtain some form of judicial relief by the Statewide Canvass Deadline (which is unlikely given the remedies available and the commitment of Arizona courts to prioritize election judicial proceedings, *see* Admin. Order No. 2024-199, Supreme Court of Arizona (Oct. 15, 2024)).

That situation has "never occurred in Arizona," *Lake*, 83 F.4th at 1202-04, as no Arizona county has failed to provide certified results by the Statewide Canvass Deadline. Indeed, the *one time* in Arizona history that a county failed to canvass by the County Canvass Deadline, the Secretary

immediately sought and obtained judicial relief within two days.[1] *Crosby*, 563 P.3d at 146-47 ¶¶ 6-7. Moreover, even if that situation had occurred in Arizona, Plaintiffs would have to show that it is likely to happen again, to them, and imminently so. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (a plaintiff who "has made no showing that he is realistically threatened by a repetition of his experience" has "not met the requirements for seeking an injunction in a federal court"). Plaintiffs have made no such showing. Accordingly, Plaintiffs' claimed injury relies on "the kind of speculation that stretches the concept of imminence 'beyond its purpose.'" *Lake*, 83 F.4th at 1204 (citation omitted).

The Opening Brief explained in detail the district court's and Plaintiffs' misunderstanding of the relevant deadlines and how that misunderstanding

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[1] Plaintiffs claim that the failure of county boards to certify election results "should be expected." Dkt. 20-1 at 34. But courts must presume that county officials follow the law, especially when there may be criminal liability for failure to certify. *See, e.g.*, *Hebrard v. Nofziger*, 90 F.4th 1000, 1009 (9th Cir. 2024) (applying presumption of regularity to state official's compliance with state law); *Crosby*, 563 P.3d at 146-47. And even if multiple counties missed the County Canvass Deadline, there is no basis to conclude that the Secretary would be either unwilling or unable to obtain judicial relief before the Statewide Canvass Deadline.

dooms the court's conclusion that Plaintiffs' alleged injury was concrete. *See* Dkt. 6.1 at 35-39. Plaintiffs miss the point of this explanation, claiming that there is "no meaningful difference" between the County Canvass Deadline and the Statewide Canvass Deadline. Dkt. 20.1 at 36. That is wrong for at least two reasons.

First, the Canvass Provision does not, itself, require or authorize the Secretary to do anything. But even if it did, the Canvass Provision refers to a county's failure to provide certified results by the *Statewide* Canvass Deadline, which is not what occurred in Cochise County following the 2022 election. Again, *no* Arizona county has ever failed to provide certified results by the Statewide Canvass Deadline.

Second, the Secretary has never taken the position that Arizona law either authorizes or requires him to exclude votes of a county that does not canvass election results by the earlier *County* Canvass Deadline. To the contrary, it is the Secretary's position that if a county misses the County Canvass Deadline, he will nevertheless do everything in his power to include the county's certified results in the statewide canvass. Doc. 26-3 ("[T]he Secretary is committed to enfranchising all Arizona voters and intends to use all lawful means to do so as the circumstances require,

including seeking judicial remedies if a county fails to timely carry out its duty to canvass.").

The district court erred by concluding that Plaintiffs' speculative fear was sufficiently concrete and imminent.

C. Plaintiffs failed to show injury that is fairly traceable to the Secretary's conduct.

Plaintiffs cannot show that their speculative future injury would be traceable to the *Secretary*'s inclusion of the Canvass Provision in the EPM, as opposed to the *county*'s failure to comply with statutory canvassing duties. Dkt. 6.1 at 39-40.

Plaintiffs say that traceability "does not demand direct causation," only that "the harm arises from the defendant's actions in a way that is more than speculative." Dkt. 20.1 at 37 (emphasis original). They rely on *Mecinas v. Hobbs*, 30 F.4th 890, 900 (9th Cir. 2022), but that case is unhelpful.

There, Arizona's Secretary of State argued that she was not the correct defendant for a lawsuit challenging a statute because the statute directed "the board of supervisors in Arizona's counties" to take certain action and did not mention the Secretary. *Id.* This Court rejected that argument on the ground that county boards were "bound to follow the Statute *and* the

[EPM]," which "expressly *requires* counties to order candidates' names on ballots in accordance with" statute. *Id.* (emphasis added). Importantly, the Secretary did "not dispute" that the EPM itself imposed a mandate, which counties had "no choice but to follow." *Id.*

Here, the Canvass Provision is not an independent mandate, but merely a summary of the Secretary's statutory duties. Thus, Plaintiffs' real dispute is with the underlying statutes. Moreover, the hypothetical injury that Plaintiffs fear would necessarily arise from the failure of a county to comply with canvassing statutes and is therefore "the result of the independent action of some third party not before the court." *Id.* at 899. A county's hypothetical failure to comply with the law and carry out its independent duty to canvass is not traceable to the Secretary.

D. Plaintiffs failed to show injury that is redressable by their requested injunction because they did not challenge the underlying canvassing statutes.

Plaintiffs' hypothetical injury is also not redressable by an injunction because Plaintiffs failed to challenge the underlying canvassing statutes. Dkt. 6.1 at 41–48.

Plaintiffs do not dispute that unchallenged statutes impose a non-discretionary duty on the Secretary to canvass general election results on the

third Monday after the general election. A.R.S. §§ 16-642(B), 16-648. Perplexingly, Plaintiffs argue that A.R.S. §§ 16-643 and 16-644 "allow the Secretary to include results *uncertified* by the County Board … if the County Board fails to do their job." Dkt. 20.1 at 36. But neither statute says anything about the use of uncertified county election results for the statewide canvass. Indeed, reading all of the canvassing statutes in context, it is clear that they progress chronologically and A.R.S. §§ 16-643 and -644 relate solely to counties' canvassing duties. As a result, they provide no authority for the Secretary to usurp counties' role in the process. *See* A.R.S. §§ 16-643 (requiring opening election returns in public and determining the vote of the county by precinct), -644 (relating to form of information received from precincts); *see also* A.R.S. § 16-646(A)-(C) (describing the items that counties must include in the official canvass that they transmit to the Secretary).

In short, an injunction against the Canvass Provision does not help Plaintiffs because the unchallenged statutes lead to the same result—the Secretary must canvass by the statutory deadline. The district court erred in

concluding that Plaintiffs had made a clear showing of standing to obtain a preliminary injunction as to the Canvass Provision.[2]

II. Plaintiffs failed to make a clear showing of standing necessary to obtain a preliminary injunction against the Voter Intimidation Guidance.

To have standing to "bring a pre-enforcement challenge to a law," a plaintiff must (1) intend "to engage in a course of conduct arguably affected with a constitutional interest," (2) the intended conduct must be "proscribed by" the law, and (3) "there must be 'a credible threat of prosecution'" under the law. *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

Plaintiffs failed to make a clear showing as to each factor.

A. Plaintiffs did not specify the conduct in which they intended to engage.

Plaintiffs neither alleged nor provided evidence of specific conduct in which they intended to engage. *See* Dkt. 6.1 at 50-51. The district court erred in excusing them from this specificity requirement. *Id.* at 51-53.

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[2] As noted in the Opening Brief, the Arizona superior court has also enjoined the Canvass Provision. Dkt. 6.1 at 9 n.3. That ruling has now been incorporated into a final judgment, which the Secretary has appealed. *See Petersen v. Fontes*, No. 1 CA-CV 25-0219 (Ariz. App.).

Plaintiffs argue that they were not required to "specify their intent to engage in any exact 'prohibited' conduct" and that their general vague allegations were sufficient. Dkt. 20.1 at 40-42.[3] Here is a summary of the conduct in which Plaintiffs said they intended to engage:

Glennon:

- "discuss politics, voting, and many government related topics with people … surrounding the 2024 elections," 2-ER-240 ¶ 5;
- "canvass and volunteer for various candidates and groups in encouraging people to vote a certain way … in the upcoming 2024 elections," *id.* ¶ 6.

AFPI:

- Work "in Arizona on issues related to legislation and public policy; promoting voting in elections; and raising voter awareness on important issues," 2-ER-222 ¶ 3;
- "[H]old workshops with voters, and communicate with voters," 2-ER-225 ¶ 18.

Although AFPI claims (Dkt. 20.1 at 42) that it has "members that sometimes wear clothing that might be deemed offensive or insulting," the cited declaration does not support this assertion. *See* 2-ER-224 ¶ 14 (stating

[3] To support their arguments, Plaintiffs relied on *Ariz. All. For Retired Ams. v. Mayes ("AARA")*, 117 F.4th 1165, 1181 (9th Cir. 2024). Defendants and the district court also cited that case. *E.g.*, Dkt. 6.1 at 33; 1-ER-017. This Court recently vacated that opinion and granted rehearing en banc. 130 F.4th 1177 (Mem) (9th Cir. 2025).

that "it is virtually impossible for AFPI to know what statements or speech will have the 'effect' of insulting or offending someone," and listing "examples of language that AFPI is concerned might have the effect of offending someone").[4]

Vague assertions of intent to "discuss politics" and "communicate with voters" do not "satisfy the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact." *Lopez*, 630 F.3d at 785 (citation and quotation marks omitted). Rather, plaintiffs must "articulate a concrete plan to violate the law in question by giving details about their future speech such as when, to whom, where, or under what circumstances." *Id.* at 787 (cleaned up, citation omitted). A plaintiff's "allegations must be specific enough so that a court need not speculate as to the kinds of political activity the plaintiffs desire to engage in or as to the contents of their proposed public statements." *Id.* (cleaned up, citation omitted).

Plaintiffs try to distinguish *Lopez* by arguing that "none" of Lopez's intended speech "could conceivably fall under [the] sexual harassment

[4] Plaintiffs do not mention any conduct American Encore intends to engage in, apparently conceding that it alleged none. Dkt. 20.1 at 41–42.

policy" at issue in the case. Dkt. 20.1 at 42. But the problem in *Lopez* was that the plaintiff gave "few details about his intended future speech," so he "ha[d] not shown how his past or intended speech would violate the challenged policy." 630 F.3d at 790-91. The same is true here.

Plaintiffs argue that they "cannot specify the precise conduct that will run afoul of the [Voter Intimidation Guidance] because [they] cannot know what *every person* (with varying sensitivities) will find offensive or insulting." Dkt. 20.1 at 42. But Plaintiffs can at least specify what *they* intend to say. *See Driehaus*, 573 U.S. at 161 (observing that plaintiffs "pleaded specific statements they intend to make"); *Lopez*, 630 F.3d at 787 (explaining that plaintiffs must specify "contents of their proposed public statements"). Plaintiffs failed to do even that bare minimum.

B. Plaintiffs did not show that the Voter Intimidation Guidance arguably proscribes their intended conduct.

In a pre-enforcement challenge, courts examine whether a plaintiff's intended conduct is *arguably* proscribed by the challenged law. *Driehaus*, 573 U.S. at 162. This requires at least some evaluation of the plaintiff's interpretation of a law. *See Christian Healthcare Ctrs., Inc. v. Nessel*, 117 F.4th 826, 843 (6th Cir. 2024) ("Conduct is arguably proscribed by a statutory

provision if, on 'a *plausible* interpretation of the statute,' the conduct is forbidden." (citation omitted, emphasis original)); *Picard v. Magliano*, 42 F.4th 89, 98 (2d Cir. 2022) (noting that "the Supreme Court's opinion in [*Driehaus*] makes clear that courts are to consider whether the plaintiff's intended conduct is '*arguably* proscribed' by the challenged statute" (citation omitted)).

Here, the district court did no evaluation of the plausibility of Plaintiffs' interpretation of the Voter Intimidation Guidance. The district court concluded that it "must accept as true Plaintiffs' construction" of the EPM for standing purposes, reasoning that "standing in no way depends on the merits," and that "differences in what the challenged provision means and how it may be enforced go to the merits of the plaintiff's claims and not to whether a court has jurisdiction." 1-ER-018 (cleaned up) (quoting *Yellen*, 34 F.4th at 849). That is wrong.

To be sure, a litigant's standing does not depend on the merits of his claim, and courts must "take as true all material allegations in the complaint and construe the complaint in favor of the plaintiff." *Yellen*, 34 F.4th at 849. This does not mean, however, that courts must adopt a plaintiff's proffered interpretation of a statute or regulation no matter how erroneous or absurd.

After all, when a plaintiff tells a court what he thinks a law means, he is offering a legal conclusion, and courts do not credit legal conclusions. *E.g.*, *Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011) (courts credit a plaintiff's "factual assertions" but not "legal conclusions"). Contrary to what the district court did here, courts can and should engage in legal interpretation when assessing standing.

Consider a hypothetical. Suppose Arizona lawmakers, concerned about the spread of animal pathogens, enact a statute called the "No Bats in Homes Act," located in Title 17 (Game and Fish), Chapter 3 (Taking and Handling of Wildlife) of the Arizona Revised Statutes. The Act makes it a misdemeanor to "knowingly keep bats on residential property," and directs the Game and Fish Department to "seize and destroy any bats kept in violation of this statute," but does not define "bats."

Carey Harry, an avid baseball memorabilia collector who keeps 250 valuable baseball bats at his home, brings a pre-enforcement facial challenge seeking to enjoin enforcement of the Act. He argues that the Act "criminalizes" his possession of baseball bats, that he is afraid he will be prosecuted and his collection will be seized and destroyed, and that such seizure would be unconstitutional.

According to Plaintiffs and the district court, a court would be required to accept Mr. Harry's interpretation of the Act when evaluating his standing, even though it is plainly wrong. That view would require courts to waste resources, and Plaintiffs identify no case holding that courts must adopt a plaintiff's legal interpretation, even if clearly erroneous or absurd, when assessing standing. In fact, courts have suggested the opposite. *Nessel*, 117 F.4th at 843 (plaintiff's interpretation must be "plausible"); *Picard*, 42 F.4th at 98 (plaintiff's interpretation must be "arguable" or "reasonable").

When considering Mr. Harry's lawsuit, the court can use principles of statutory construction to determine whether the Act covers baseball bats. That threshold inquiry is not an adjudication of the merits (i.e., the constitutional claim). Courts can and should decide what a law means, and doing so is fundamentally different from determining the *effect* of a law or its application to particular facts. The interpretive question of whether the Act covers baseball bats is distinct from the question of whether the seizure of bats pursuant to the Act would be constitutional. Deciding the former does not decide the latter.

Here, the district court abdicated its responsibility, stating that it "accepts as true" Plaintiffs' construction of the Voter Intimidation Guidance,

specifically that the guidance "restricts otherwise lawful forms of speech such as 'raising one's voice,' and 'using insulting, or offensive language' anywhere in Arizona." 1-ER-020 (cleaned up). This was grave error. Basic legal interpretation principles show that the Voter Intimidation Guidance does not mean what Plaintiffs say.

Because Arizona courts have held that the EPM contains both rules and guidance, the district court should have first analyzed whether the Voter Intimidation Guidance is a rule at all, rather than guidance for election officials. As set forth in the Opening Brief, the EPM contains a mixture of *rules* directed at election officials and *guidance* for election officials. Dkt. 6.1 at 14-16. The Secretary has authority to promulgate election-related rules pursuant to several statutes. *Id.* at 15 (collecting citations). This includes rules on "procedures for early voting and voting." A.R.S. § 16-452(A). But that does not mean every sentence in the EPM that somehow relates to voting is a rule that binds election officials, much less the general public. The Arizona Supreme Court has made clear, for example, that to the extent the EPM deals with topics that "do not have any … basis in statute," the EPM "simply acts as guidance." *McKenna v. Soto*, 481 P.3d 695, 699-700 ¶¶ 20-21 (Ariz. 2021).

A review of the Voter Intimidation Guidance and the preceding EPM subsections makes clear that EPM Chapter 9, Section III largely *summarizes* statutes that regulate behavior *at voting locations*. *See* 4-ER-383 (EPM Chapter 9, Sections III(A) and (B), summarizing statutes prohibiting electioneering and photography); 4-ER-384 (EPM Chapter 9, Section III(C), summarizing statutes governing access to voting locations). It defies logic to conclude that the Secretary would summarize statutes in Sections III(A)-(C) but then create a rule expanding criminal liability for members of the public in Section III(D).

Moreover, the Voter Intimidation Guidance cannot be reasonably interpreted as applying "anywhere in Arizona", every day of the year. Context proves the absurdity of that interpretation. Section III is titled "Preserving Order and Security *at the Voting Location*," a clear indication that Section III is about voting locations. 4-ER-383 (emphasis added). The first sentence of the Voter Intimidation Guidance also includes the phrase "at a voting location." 4-ER-384. Even if that sentence could be reasonably read as a binding rule, its application would be clearly cabined to the "voting location." As discussed in Argument § II(A) above, Plaintiffs made no allegations regarding an intent to engage in any conduct at a voting location.

Further, as Plaintiffs acknowledge, any EPM rule must derive from statutory rulemaking authority. *McKenna*, 481 P.3d at 699-700 ¶¶ 20-21. Plaintiffs point to no part of § 16-452 that would allow the Secretary to expand criminal statutes. Nor does the Secretary claim such authority. At the preliminary injunction hearing, defense counsel explained that the Secretary neither has "the authority to promulgate a criminal restriction that applies everywhere in Arizona all the time every day of the year," nor "the authority to amend or expand criminal statutes." 2-ER-118:17-19, 22-24.

Finally, Plaintiffs' interpretation of the Voter Intimidation Guidance flies in the face of constitutional avoidance principles and should have been rejected as implausible on that basis. Argument § IV(A), below.

At a minimum, the district court should have considered whether Plaintiffs' interpretation of the Voter Intimidation Guidance was plausible before evaluating standing. Because the Voter Intimidation Guidance is plainly not the broad criminal prohibition that Plaintiffs fear, the district court erred in concluding that Plaintiffs made a clear showing of standing.

C. Plaintiffs did not show a credible threat that the Voter Intimidation Guidance would be enforced against them.

As explained in the Opening Brief, Dkt. 6.1 at 58-64, Plaintiffs face no threatened enforcement from the Voter Intimidation Guidance in the way they fear. To the contrary, Defendants disavowed Plaintiffs' interpretation of the Voter Intimidation Guidance. And there is no allegation or evidence that the Attorney General (or any other prosecuting agency) has ever threatened to prosecute any Plaintiff (or anyone else) under the Voter Intimidation Guidance.

To distract from this critical weakness, Plaintiffs bend over backwards to assert that Defendants' disavowal is not good enough. Plaintiffs argue that the Attorney General "avoided the issue of enforcement under the [Voter Intimidation Guidance] by essentially claiming that her litigation strategy and defense *in this lawsuit* would be successful," and that Defendants "simply restated their litigation position in this case and refused to provide binding and reliable disavowals." Dkt. 20.1 at 44.

But Defendants' disavowal letters were sent on May 31, 2024, 2-ER-275-79, five weeks before this case was filed on July 8, 2024, 2-ER-246. Defendants' interpretation of the Voter Intimidation Guidance cannot be a

"restate[ment] of their litigation position in this case" when it pre-dates "*this lawsuit*" by more than a month. And if Plaintiffs thought that Defendants' disavowals were not "binding and reliable," they could have asked for clarification. They did not.

Also, labeling Defendants' interpretation of the Voter Intimidation Guidance as a mere "litigation position" is disingenuous. Defendants have clearly expressed a willingness to be bound by their interpretation of the EPM: they even offered (despite Plaintiffs' lack of standing) to *stipulate* that the Voter Intimidation Guidance "cannot and does not regulate the plaintiffs or ordinary voters or member[s] of the public" and does not "expand or amend criminal statutes." 2-ER-085.

Plaintiffs also point to *Isaacson v. Mayes*, 84 F.4th 1089 (9th Cir. 2023), but that case is inapposite. In *Isaacson* there was evidence that (1) "at least one county attorney" (who was a defendant) "intends to enforce" the law, (2) state health agencies (who were also defendants) announced that they "comply with the laws that are in effect and will continue to do so," and (3) the law included a "private right of action" so any number of private parties could sue. *Id.* at 1100–01. It was the "*combination* of these potential threats"—from "the county attorneys, the Arizona health agencies, and

private parties"—that sufficed for "imminent future injury." *Id.* at 1101 (emphasis added). Not even one such threat exists here.

Rather than offer evidence of the position of any county attorney as to the Voter Intimidation Guidance, Plaintiffs argue that there is a credible threat of enforcement because the Attorney General "confirmed that county attorneys *can* prosecute under the [Voter Intimidation Guidance]." Dkt. 20.1 at 46. That is false—the Attorney General said nothing of the sort. Rather, counsel for the Attorney General noted "that county attorneys may also enforce *provisions of Title 16 and Title 13* [criminal statutes] as they relate to voting and elections." 2-ER-279 (emphasis added).

Even so, the speculative possibility that a county attorney could adopt Plaintiffs' bizarre interpretation of the Voter Intimidation Guidance does not confer standing to sue *the Attorney General or the Secretary*. If Plaintiffs were concerned about possible enforcement by a county attorney, they could have sued that county attorney (or sued all county attorneys like the plaintiffs in *Isaacson*). They did not. Their failure to obtain the positions of county attorneys cannot be used to create a controversy with these Defendants.

Plaintiffs thus failed to make a clear showing of each *Yellen/Driehaus* factor, and the district court erred in concluding that Plaintiffs established a credible threat of enforcement.

III. Alternatively, the district court should have abstained from reviewing the Voter Intimidation Guidance in light of the parallel State Case.

The district court should have abstained from consideration of Plaintiffs' claim involving the Voter Intimidation Guidance because each of the *Pullman* factors favors abstention. Dkt. 6.1 at 64-70 (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)). First, state election procedures are a sensitive area of social policy. *Id.* at 66. Second, constitutional adjudication can be avoided or narrowed by a definitive ruling in the parallel State Case. *Id.* And third, a determinative issue of state law—whether Plaintiffs are correctly interpreting the Voter Intimidation Guidance—is very much in doubt. *Id.* at 66-67.

Plaintiffs' arguments to the contrary are unavailing.[5] Plaintiffs claim that this Court has held that the first *Pullman* factor is not present "in *election-*

[5] Contrary to Plaintiffs' misunderstanding, Defendants asked the district court to abstain as to the Voter Intimidation Guidance, not the Canvass Provision. *See* Doc. 27.

related First Amendment cases." Dkt. 20.1 at 49 (emphasis original) (citing *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003)). But *Porter* does not proclaim a broad rule about abstention in election cases. Rather, *Porter* noted the general principle that in First Amendment cases, "the first *Pullman* factor 'will almost never be present because the guarantee of free expression is always an area of particular federal concern,'" 319 F.3d at 492 (citation omitted), and then found that the first factor was not satisfied because "the parties ha[d] already been litigating the case in federal court for over two years" and a resolution of free speech concerns may be further delayed "if Plaintiffs were sent to state court," *id.* at 493-94. *Porter* does not control the result here.

It is true that abstention is rare in First Amendment cases. But this is the rare case where abstention is warranted because there is no concern that a delay by the federal judiciary would chill protected speech. Both Defendants were already enjoined by a state court from "enforcing" the Voter Intimidation Guidance when the district court entered its preliminary injunction. 3-ER-289-325 (State Case injunction).

Plaintiffs try to distinguish the State Case, arguing that it involves different parties and different claims, but their attempts fail. The defendants

are the same in both cases: the Attorney General and the Secretary. AFPI is a plaintiff in both cases. Counsel for plaintiffs is the same in both cases. Both cases involve free speech challenges to the Voter Intimidation Guidance and nearly identical arguments about its meaning and effect. *See* Dkt. 6.1 at 24-25. Indeed, the letters Plaintiffs cite to argue that Defendants have not disavowed enforcement of the Voter Intimidation Guidance were sent by their counsel in connection with the State Case. 2-ER-275-83.

Plaintiffs further try to distinguish the State Case on the ground that it raises "only *state* constitutional issues" and that the "Arizona Constitution's free speech provisions are broader than" the First Amendment. Dkt. 20.1 at 52 (emphasis original). But they do not explain how that difference in free speech doctrine matters to the abstention question. After all, since Arizona's free speech provision is more protective (albeit in ways that Arizona courts have rarely specified), then if Plaintiffs were to fail in state court, they should necessary fail in federal court too. And if they obtained a preliminary injunction in state court (as they did), they would have no need for a duplicative federal injunction. In fact, the difference in free speech provisions is likely irrelevant to the outcomes here, because the heart of dispute in these cases is over the meaning of the Guidance, not any modest

differences in free speech principles—plus, Arizona courts regularly apply "First Amendment jurisprudence" to free speech claims arising out of the Arizona Constitution. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 903 ¶ 47 (Ariz. 2019).

The injunction in the State Case sufficed to protect Plaintiffs' First Amendment rights, and a duplicative federal injunction was unnecessary. The district court referenced the possibility that the injunction in the State Case could be stayed by the Arizona Court of Appeals. 1-ER-028. But if the Arizona Court of Appeals had stayed the injunction and explained that Plaintiffs' outlandish interpretation of the Voter Intimidation Guidance is wrong, then Plaintiffs would know that their fears of prosecution were unfounded. Moreover, the decision to abstain is not absolute—abstention is not dismissal. Had the district court abstained from consideration of Count Two, it could have promptly lifted the stay if a change in circumstances warranted.

Regarding the second and third *Pullman* factors, Plaintiffs' interpretation of the Voter Intimidation Guidance is clearly in doubt as explained in Argument §§ I(B) and III(B) above. The meaning of the Voter Intimidation Guidance is squarely at issue in the State Case, so a definitive

state court decision could obviate the need for constitutional adjudication here.

Plaintiffs claim that the State case is not "farther along" than this case, but it is not clear what they mean. Dkt. 20.1 at 48. The State Case was objectively farther along at the time the abstention motion was decided—the state court had entered a preliminary injunction after a full-day evidentiary hearing and appeal of that injunction was pending in the Arizona Court of Appeals—and the State Case is now *much* farther along. Although Defendants voluntarily dismissed their interlocutory appeal of the preliminary injunction in the State Case in the interest of conserving resources, the parties there, which include both Defendants and Plaintiff AFPI, are nearing the end of discovery and gearing up to file summary judgment motions. *See* Modified Scheduling Order, *Ariz. Free Enter. Club et. al v. Fontes*, No. CV2024-002760 (Ariz. Super. Ct. Apr. 17, 2025) (dispositive motion deadline of June 9, 2025). Here, although this interlocutory appeal remains pending, discovery has not begun. Thus, the State Case is much closer to a decision on the merits than this case.

For these reasons, if this Court does not vacate the preliminary injunction against the Voter Intimidation Guidance for lack of standing, this

Court should still vacate the preliminary injunction pursuant to *Pullman* abstention and instruct the district court to stay proceedings until the State Case is resolved.

IV. The district court should have denied the preliminary injunction because Plaintiffs failed to satisfy the traditional four-factor test.

Even if Plaintiffs had made a clear showing of standing, and even if *Pullman* abstention is unwarranted, this Court should still vacate the preliminary injunction against the Voter Intimidation Guidance because Plaintiffs failed to satisfy the *Winter* factors.

A. The doctrine of constitutional avoidance forecloses Plaintiffs' likelihood of success on the merits.

Plaintiffs acknowledge that the first *Winter* factor—likelihood of success on the merits—is the "most important." Dkt. 20.1 at 54 (citation omitted). For this reason, Plaintiffs double down on their novel view that (contrary to their own interests) the Voter Intimidation Guidance creates sweeping criminal liability for speech by members of the public. *Id.* at 55-58.

This view is false, as explained in the Opening Brief (Dkt. 6.1 at 53-58, 61-65) and above (Argument § II.B). Plaintiffs ignore the basic problem with their view: When the Secretary of State informs election officials that certain activity "is prohibited" and immediately cites a statute, the Secretary is

summarizing what the Legislature prohibited, not creating an independent source of expanded criminal liability. Everyone (except Plaintiffs) has understood this about the Voter Intimidation Guidance since it appeared in the 2019 EPM.

But, critically, even if this Court concludes that the well-established historical understanding of the Voter Intimidation Guidance is not the *most natural* interpretation, it is certainly a *possible* interpretation. In other words, the Voter Intimidation Guidance is "readily susceptible" to a "narrowing construction" as opposed to Plaintiffs' sweeping view. *Virginia*, 484 U.S. at 397. Thus, the doctrine of constitutional avoidance requires adopting this narrow construction so that the guidance can be upheld. *Id.*

Plaintiffs do not dispute the well-established doctrine of constitutional avoidance. Instead they argue that the doctrine does not apply because there is no "ambiguity" in the Voter Intimidation Guidance. Dkt. 20.1 at 59 (citation omitted). In other words, Plaintiffs argue that the straightforward interpretation offered by the Secretary of State and Attorney General (both of whom were involved in drafting the language), which has been widely accepted for years and which no one has disputed until the present pre-

enforcement challenge, is *so unambiguously wrong* that it is not even possible. That argument refutes itself.

If nothing else, the district court should have recognized that Plaintiffs' unprecedented interpretation of the Voter Intimidation Guidance was not the only possible one and, thus, the doctrine of constitutional avoidance prevents Plaintiffs from succeeding on the merits.

B. Plaintiffs did not establish the other preliminary injunction factors.

Because Plaintiffs acknowledge that likelihood of success on the merits is the most important *Winter* factor, and because Plaintiffs failed to establish that factor, discussion of other factors—likelihood of irreparable harm, equities, and public interest—is unnecessary. But the Opening Brief explained why Plaintiffs failed on those factors too. Dkt. 6.1 at 76-79.

Plaintiffs' counter-arguments fail. First, the Opening Brief explained why Plaintiffs' years-long delay in challenging the Voter Intimidation Guidance—which has been in the EPM since 2019—belies their assertion that an injunction is needed to prevent irreparable harm. Dkt. 6.1 at 65-66. In response, Plaintiffs move the goalposts, focusing on the issuance of the 2023 EPM instead of the 2019 EPM. They argue that the 2023 EPM was issued (in

final form) in January 2024, so their delay in seeking a preliminary injunction was only six months. Dkt. 20.1 at 23-24. But the better comparator is the 2019 EPM because the Voter Intimidation Guidance has been part of the EPM since then. *See* 1-ER-003 n.1. And regardless, a delay of "even only a few months . . . militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).

Second, the Opening Brief explained that the Voter Intimidation Guidance helps election officials identify *potential* instances of intimidation. Dkt. 6.1 at 68. In response, Plaintiffs just repeat their merits position, arguing that Arizona's interest in securing elections "can be satisfied through less restrictive means than *criminalizing broad categories of core political speech*." Dkt. 20.1 at 67 (emphasis added). Here again, Plaintiffs assign to the Voter Intimidation Guidance a meaning it does not have.

Third, the Opening Brief explained that the public interest is not served by a duplicative federal injunction on top of a state court injunction. Dkt. 6.1 at 78. In response, Plaintiffs say that the State Case involves "different parties and different claims." Dkt. 20.1 at 67. But that reductionist view ignores the overwhelming similarities between the cases, including several identical parties and allegations. Dkt. 6.1 at 24-25 (describing similarities).

Fourth, the Opening Brief explained that the timing of the district court's injunction—on the eve of an election—was not in the public interest. Dkt. 6.1 at 78-79. In response, Plaintiffs emphasize that they sought an injunction "within fifteen days of filing suit." Dkt. 20.1 at 67. But the point is that they could have *filed suit* much earlier, not right before a major election.

For these reasons, Plaintiffs failed to establish not only their likelihood of success on the merits, but the other *Winter* factors too. This Court should vacate the preliminary injunction as to the Voter Intimidation Guidance.

V. Some or all of this case may become moot later this year.

Defendants would like the Court to reach the substance of this appeal and reverse the preliminary injunction. But in the interests of candor, Defendants note that some or all of this case may become moot later this year. The Secretary's office is in the process of creating the 2025 EPM pursuant to A.R.S. § 16-452. So far, this process has included updating the Voter Intimidation Guidance. Although the process is still underway, the Secretary intends to revise the Voter Intimidation Guidance to make it extra, extra clear, beyond even the most absurd dispute, that it is guidance for elections officials, and not new criminal liability, consistent with

Defendants' position on the current language throughout this litigation. For example, the first sentences of the current working draft of the Voter Intimidation Guidance are as follows:

> State law prohibits voter intimidation, threats, and coercion. A.R.S. § 16-1013; *see also* A.R.S. §§ 16-1006, -1017. In addition, federal law prohibits voter intimidation, threats, and coercion. 18 U.S.C. § 594; 52 U.S.C. §§ 10101(b), 10307(b), 20511; *see also* 18 U.S.C. § 241; 42 U.S.C. § 1985(3).

If these revised sentences (or something like them) become part of the final 2025 EPM, they will make even clearer that the Voter Intimidation Guidance is not the broad criminal prohibition that Plaintiffs fear.

The Secretary intends to make the draft 2025 EPM available for public comment on August 1, 2025. The statutory deadline for the Secretary to provide a copy of the 2025 EPM to the Governor and Attorney General is October 1, 2025. A.R.S. § 16-452(B). The statutory deadline for final publication is December 31, 2025. *Id.* Defendants will keep the Court apprised. *See* Fed. R. App. P. 28(j) (authorizing supplemental letters for "pertinent and significant authorities" that "come to a party's attention after the party's brief has been filed").

CONCLUSION

This Court should vacate the district court's preliminary injunctions.

Respectfully submitted this 18th day of April, 2025.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 6,997 words, including text appearing in screenshots, according to the word-processing system used to prepare the brief.

2. This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Book Antiqua type style.

Dated this 18th day of April, 2025.

By */s/ Nathan T. Arrowsmith*

CERTIFICATE OF SERVICE

I certify that I presented the above and foregoing for filing and uploading to the ACMS system which will send electronic notification of such filing to all counsel of record.

Dated this 18th day of April, 2025.

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