Case No. 24-6703

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN ENCORE, *et al.*,
Plaintiff-Appellees,
v.
ANDRIAN FONTES, et al.,
Defendant-Appellants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:24-cv-01673 MTL

PLAINTIFF-APPELLEES ANSWERING BRIEF

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Introduction

The 2023 Election Procedures Manual ("EPM") issued by Arizona's Secretary of State ("Secretary") contains two unconstitutional provisions: (1) the Vote Nullification Provision; and (2) the Speech Restriction. This Court should affirm the district court's order enjoining their enforcement.

The Vote Nullification Provision requires that "[i]f the official canvass of any county has not been received by [the] deadline" from the County Board of Supervisors, then the Secretary must proceed with the state canvass *without including the votes of the missing county.*" EPM Chp. 13, § II(B)(2). [4-ER-409]. Thus, the Vote Nullification Provision gives the Secretary *carte blanche* authority to *throw away* every vote in a county. The district court described this as a "nuclear bomb" and "probably unprecedented in the history of the United States." [ER-003; 2-ER-124]. Appellants cannot defend this "nuclear bomb" on the merits. Instead, they limit themselves to standing arguments, which fail.

In a breathtaking effort to censor protected speech under the First Amendment, the Speech Restriction criminalizes "*any* activity by *a person* with the intent *or effect* of threatening, harassing, intimidating, or coercing voters . . . *inside or outside* the 75-foot limit at a voting location." EPM Chp. 9 § III(D). [1-ER-123 (emphasis added)]. The Speech Restriction then lists examples of criminal speech and conduct, stating that "any activity" such as "raising one's voice" or using "insulting or offensive language to a voter or poll worker" "may also be considered intimidating conduct inside or outside the polling place." [1-ER-123–24]. In short, the Secretary has created a new strict liability speech crime that has no precedent under Arizona Law, (including the election-related crimes under Title 16), cannot survive strict scrutiny, and is overbroad and void for vagueness.

This Court must reject Appellants' convoluted efforts to characterize the Speech Restriction as simply "paraphras[ing]" existing crimes under Title 16. It does no such thing. Rather, it creates a completely new crime that:

- Prohibits speech and conduct subjectively *felt by others* as "offensive or insulting"—a broad prohibition that does not live in Title 16. By eliminating the requirement in A.R.S. § 16-1013 that the conduct be done "knowingly," the Speech Restriction creates crimes based on the "effect" speech has on the listener—i.e., *the feeling it elicits*.
- Removes from § 16-1013 the element that actions must be taken to "induce or compel" a person to vote, thereby eliminating any nexus to voting and restricting *all speech* deemed offensive to any person anywhere in Arizona.
- Adds a new category of "harassing" speech and conduct found nowhere else in A.R.S. §§ 16-1013, -1016 or -1017.

As such, the district court properly enjoined both the Vote Nullification Provision and the Speech Restriction. Further, it properly declined to abstain under the *Pullman* doctrine because this is a First Amendment case, and the *Pullman* factors were not met. *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989) (explaining that it is rarely appropriate for a federal court to abstain under *Pullman* in a First Amendment case).

Statement of Issues

1. Standing to challenge the Vote Nullification Provision requires that voter disenfranchisement is imminent, fairly traceable, and redressable (*i.e.* that it is *less likely* Appellees will be disenfranchised with an injunction). The Vote Nullification Provision requires disenfranchisement of every ballot cast by a voter in a county if a County Board of Supervisors refuses to certify election results—a scenario that occurred in Pinal County in 2022 and has been occurring throughout the country. Did Appellees satisfy their standing requirements?
2. Standing to bring a pre-enforcement challenge against the Speech Restriction requires only that Appellees intend to engage in speech protected by the First Amendment, but such speech is (a) prohibited by the Speech Restriction, and (b) is subject to a credible threat of enforcement. Here, the Attorney General "AG" cautioned that county attorneys could enforce the Speech Restriction and sent Appellees a purported "disavowal" that was facially erroneous, unreliable, and amounted to a mere recitation of its litigation position. Did Appellees satisfy their standing requirements?
3. Did the District Court properly exercise its discretion in declining to abstain under *Pullman* when presented with federal claims under the First Amendment and the appeal in the corollary state case has now been dismissed?
4. The Speech Restriction prohibits "*any* activity by *a person* with the intent *or effect of*," among other things, offending or intimidating voters *anywhere* in Arizona. No law in Title 16 criminalizes such actions. Did the District Court abuse its discretion in issuing a

preliminary injunction against this sweeping provision as violative of the First Amendment?

Statement of the Case

I. Legal Background.

A. The Speech Restriction and Vote Nullification Provision Carry the Force of Law.

The Secretary must "prescribe rules" for administering federal and state elections in Arizona, namely on "the procedures for . . . voting, and of producing, distributing, collecting, counting, tabulating[,] and storing ballots." A.R.S. § 16-452(A). These "rules" are set forth in the EPM. *Id.* § 16-452(B).

Appellants confuse "rules" and "guidance." [OB, pp. 1, 17–18]. Both the Vote Nullification Provision and Speech Restriction are "rules" that carry the force of law. § 16-452(C) ("A person who violates any **rule** adopted pursuant to this section is guilty of a class 2 misdemeanor." (emphasis added)); *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (2020) ("Once adopted, the EPM has the force of law; any violation of an **EPM rule** is punishable as a class two misdemeanor." (emphasis added)).

In contrast, "guidance" under the EPM is narrow; it applies only to "matters *outside* the[] specific topics" listed in § 16-452(A)—namely, topics that *do not* include voting, counting, and tabulating. *McKenna v. Soto*, 250 Ariz. 469, 473 ¶¶ 20–21 (2021) (explaining that the EPM provides "rules" and "*also* guidance," and explaining that "guidance" is limited to "matters outside the[] topics in § 16-452(A)," whereas rules under § 16-452(A) have the "force of law"). Both the Vote Nullification Provision and Speech Restriction are "rules" that plainly address "voting" and "counting" votes under § 16-452(A).

On July 31, 2023, the Secretary published the EPM, giving only 14 days for public comment (not thirty days for agency rule making under A.R.S. § 41-1023(B).) [SER-0006]. After receiving approval from the Attorney General "AG" and Governor on December 30, 2023, the Secretary published the final 2023 EPM that is the basis of this lawsuit. [1-ER-366–67].

B. The Vote Nullification Provision Gives the Secretary *Carte Blanche* Authority to Discard Every Vote in a County.

In Arizona, the officer in charge of elections for each county—typically a county recorder—tabulates votes and sends the unofficial counts to their respective county Board of Supervisors (the "Board"). A.R.S. §§ 16-621, -622, -624. Then, the Board must conduct the official "canvas" and certify the results as "official." A.R.S. §§ 11-251(3), 16-642, -645, -646(C), -647. Next, the Secretary certifies the statewide election results based on the Board's official certifications. A.R.S. §§ 16-642(A)(8), -643; -645, -648.

This process went awry in the 2022 general election. Certain members of the Cochise County Board refused to certify the unofficial election results, which delayed the Secretary's certification by three days. *Crosby v. Fish*, 139 Ariz. Cases Digest 21, 2024 WL 5250102, at *2 ¶¶ 6–7 (App. Dec. 31, 2024). After a court issued a writ of mandamus on December 1, 2022, the Cochise Board certified the results, and the Secretary's certification followed. *Id.* ¶¶ 17, 23. Those members of the Board who refused to certify the election results were indicted for conspiracy and election interference. *Id.* ¶ 8. [ER-153–54].

Counsel for the Secretary later agreed that the writ of mandamus was an "effective" procedure to correct the Cochise Board members'

failure to certify. [ER-061]. Nevertheless, the Secretary added the Vote Nullification Provision to the 2023 EPM, a modification almost certainly aimed at addressing the 2022 Cochise County debacle. The Vote Nullification Provision requires that "[i]f the official canvass of any county has not been received by [the] deadline" (as occurred in Cochise County), then the Secretary must proceed with the state canvass *without including the votes of the missing county.*" [4-ER-109 (emphasis added)]. Stated differently, all votes cast in a county will be thrown out—and every voter disenfranchised—if its Board cannot or will not certify the canvas election results. *Id.*

Maricopa County, for example, has over 2.4 million registered voters. [ER-063]. Its Board has only five members. [ER-063]. So, if three of them refuse (or are physically unable) to certify election results, the ballots of millions of voters will be thrown out under the Vote Nullification Provision. Such a draconian measure could not only change the course of an election in Arizona, but could also affect the results of a Presidential Election.

1) The Threat of Disenfranchisement is Imminent.

Disenfranchisement is not speculative under the Vote Nullification Provision. For the threat to be realized, all that needs to happen is *exactly* what occurred in Cochise County in 2022.

This was not an isolated incident. In the 2024 election cycle, a member of the Pinal County Board indicated he may not certify the 2024 primary results—eventually voting to certify despite his belief of evidence of "cheating." [SER-0021]. Across the country, election officials are threatening to withhold certification because of "election integrity." [SER-0030-31, -0050-51].

In short, Appellants are wrong that the Vote Nullification Provision applies to a situation that "has never occurred." [OB, pp. 3, 21].

2) The Secretary Had Better Options Available.

The Secretary had at least six more narrowly tailored remedies without resorting to disenfranchising voters under the Vote Nullification Provision. If Board members refuse to certify results, the EPM could call for the Secretary to pursue a mandamus action compelling the Board to certify results—*the exact remedy that worked in 2022*. *See* A.R.S. § 16-642(A)(1)(a)–(b). During oral argument below, the AG conceded that "mandamus is effective and has been effective in recent history" to address a Board's failure to certify an election. [ER-064]. When pressed by the district court, the AG admitted that "mandamus is the – this the way to solve this problem." [ER-124].

Beyond the writ of mandamus, several more narrowly tailored options exist. The Secretary could:

- Appoint an auditor or special master to review the election count by the county recorder and certify the correct results of a county;
- Include results tabulated by the county recorder but uncertified by the County Board (*i.e.* an "unofficial" count). *See* A.R.S. §§ 16-643 (requiring only that the Secretary "determin[e] the vote of the county"); -644 (providing that the Secretary must not reject a county's returns for lack of formality if it can "be clearly understood");
- Seek a court order to resolve disputes over vote counts through an emergency declaratory judgment as to the correct election results;

- Refer an offending County Board to the AG for prosecution. *See also* § 16-152(C);
- Seek a legislative change or petition for a rule change from the Arizona Supreme Court permitting a direct action to the Arizona Supreme Court for redress, as the district court pointed out during oral argument. [ER-125].

In short, the Vote Nullification Provision is not narrowly tailored to proper certification of votes.

C. The Speech Restriction Fundamentally Alters §§ 16-1013, -1016, and -1017.

The Speech Restriction criminalizes speech and nonverbal communication—including political speech that lies at the core of the First Amendment—based on listener's subjective interpretation and feelings about a person's message. Specifically, it provides: "*Any* activity by *a person* with the intent *or effect* of threatening, harassing, intimidating, or coercing voters . . . is prohibited." [4-ER-423 (emphasis added)]. The Speech Restriction further provides that any of the following may "be considered intimidating conduct *inside or outside* the polling place":

- "Aggressive behavior, *such as raising one's voice* or taunting a voter or poll worker";
- "Using threatening, *insulting, or offensive* language to a voter or poll worker";
- "Posting signs or communicating messages about penalties for 'voter fraud' in a *harassing* or *intimidating* manner."

[4-ER-423–24 (emphasis added)]. Appellants cast this language as a "summary" of existing "statutory prohibitions" in Title 16. [*E.g.*, OB pp.

1, 9, 10]. This is wrong. The above language in the Speech Restriction, by its terms, changed the exiting prohibitions in §§ 16-1013, -1016, and -1017 in the following three ways.

1) The Speech Restriction Eliminates the Required *Mens Rea* for §§ 16-1013 and -1017.

First, the Speech Restriction eliminates any *mens rea* by criminalizing speech and conduct that is based on whether another person deems it offensive. The scope and extent of this Speech Restriction is truly breathtaking; it criminalizes political speech based on the reaction it elicits from the listener. This change is unprecedented; no Arizona criminal statute criminalizes speech *or conduct* absent a *mens rea* requirement. Indeed, §§ 16-1013 and -1017 prohibit only acts that are taken "knowingly." § 16-1017 ("A voter *who knowingly commits* any of the following acts is guilty of a class 2 misdemeanor . . ." (emphasis added). Simply put, by criminalizing speech that has the "*effect of*" harassing, threatening, or intimidating another with no requisite mental state, the Secretary has created a new strict-liability speech crime.

2) The Speech Restriction Criminalizes Conduct Unrelated to Voting.

Criminal conduct under § 16-1013 is necessarily tied to voting. It prohibits only actions that are taken to compel someone: (1) "to vote or refrain from voting"; (2) "on account of such person *having voted or refrained from voting* at an election;" (3) "to impede, prevent or otherwise interfere with the *free exercise of the elective franchise* of any voter;" or (4) "to compel, induce or to prevail upon a voter either *to cast or refrain from casting his vote* at an election, *or to cast or refrain from casting his vote* for any particular person or measure at an election." All of the prohibitions of § 16-1013 involve voting.

Under the Speech Restriction, however, it is a crime to raise one's voice or use offensive or insulting language concerning *any subject anywhere* in the State. There is also no geographic limitation: it applies both "inside *or outside* the 75-foot limit [of electioneering activity] at ... voting location[s]." [4-ER-423 (emphasis added)]. And further, it does not require *any* nexus between the allegedly offending speech and voting.

3) The Speech Restriction Creates a New Category of Crime: Verbal Harassment.

Section 16-1013 prohibits only the actual (1) "use of force, violence or restraint," (2) "threaten[ing to] inflict[] ... injury, damage, harm or loss," (3) "intimidation," or (4) use of "abduction, duress or any forcible or fraudulent device or contrivance." Completely absent from §§ 16-1013 and -1017 is the term verbal "harassment." The Secretary simply made up this new category of speech crime.

4) The Secretary Ignored the Legislature's Constitutional Concerns About the Speech Restriction.

The Secretary permitted only a 14-day comment period for the EPM. [SER-0005]. Despite this, on August 14, 2023, Ben Toma, Speaker of the Arizona House of Representatives, and Warren Peterson, President of the Arizona Senate, submitted comments opposing the Speech Restriction as violative of Arizona statutory law, the First Amendment, and the Free Speech and Due Process Clauses of the Arizona Constitution. [SER-0010-11]. The Secretary ignored these concerns and left the Speech Restriction as drafted, clearly intending that it be enforced as written.

5) The Secretary Recognized That the Speech Restriction is a Binding Prohibition on Everyone—Rather Than Mere "Guidance" to Poll Workers.

In the parallel proceeding in Arizona superior court, the court enjoined the Secretary and AG from enforcing the Speech Restriction for the reasons set forth above. [3-ER-292, -309].

After the court issued the injunction, the Secretary repeatedly acknowledged to the press that the Speech Restriction is a binding restriction. For example, he stated that the court's injunction on the Speech Restriction "chipp[ed] away at our ability to . . . **regulate the behavior** during an election season." [SER-0049]. The Secretary also told the press that "While we respect the court's decision to halt certain *speech restrictions*, implementing a preliminary injunction for the general election would be too far-reaching," thereby acknowledging that the Speech Restriction is a general restriction. [SER-0059] (emphasis added)]. Thus, even the Secretary knows the Speech Restriction contains "speech restrictions"—*i.e.*, actual prohibitions on speech, rather than non-binding guidance. [*Id.*].

II. Procedural Background.

A. The Parties and the Litigation.

Appellees are: (1) America First Policy Institute ("AFPI"), a non-profit advocacy-organization focusing on ballot security legislation; and (2) Karen Glennon, an Arizona citizen registered to vote in Apache County.[1]

Fearing that the Secretary would disenfranchise voters, Appellees sent him a letter on June 18, 2024, asking him to disavow enforcement

[1] American Encore was dismissed for no representational standing. [ER-050].

of the Vote Nullification Provision. [2-ER-214]. By letter dated July 31, 2024, the Secretary said that he "cannot and will not" "disavow this nondiscretionary statutory duty." [2-ER-162–63].

By letters dated May 21, 2024, Appellees requested the Secretary and AG similarly disavow enforcement of the Speech Restriction via a "binding and unequivocal commitment to forego making any criminal referrals" under it. [2-ER-280–83]]. The Secretary refused. [2-ER-275–76].

The AG also failed to provide adequate assurances that she would not enforce the Speech Restriction. [2-ER-277–79]. Specifically, she stated that county attorneys *could* enforce the Speech Restriction, thereby recognizing that Appellees faced a credible threat of enforcement. [2-ER-279]. Additionally, she professedly disavowed *illegal* referrals under the Speech Restriction, but her disavowal was premised on her erroneous assertion that any violation of the Speech Restriction would be prosecuted only under Title 16 — *i.e.* that the Speech Restriction criminalized nothing new, and simply paraphrased existing election crimes under Title 16. [2-ER-278–79]. As said above, *supra* 8, based on the explicit terms of the Speech Restriction, that assertion is patently wrong and cannot be relied upon. Simply put, employing a blatant exercise of circular logic, the AG sidestepped the issue of enforcement under the Speech Restriction by claiming her litigation strategy and defense *in this lawsuit* would be successful, and, as a result, there would be no *lawful* grounds (e.g., the grounds Appellants assert here) to challenge her enforcement. A remarkable "disavowal" indeed.

Lacking a binding disavowal, Appellees filed their Complaint on July 8, 2021, contending that: (1) the Vote Nullification Provision

disenfranchises voters under the *Anderson/Burdick* test (Count I); and (2) the Speech Restriction violates the First Amendment and Due Process Clause of the Fourteenth Amendment (Count II). [2-ER-246–74]. Appellees then moved for a preliminary injunction prohibiting their enforcement. [ER-004–05].

Appellants moved the court to dismiss both counts for a lack of standing and abstain from hearing Count II as to the Speech Restriction under *Pullman*. [ER-005].

On September 27, 2024, the district court issued a fifty-page order that: (1) found Appellees—with the exception of one party, American Encore—had standing as to both Count I and II; (2) denied Appellant's Motions to Dismiss and Abstain; and (3) enjoining Appellants from enforcing the Vote Nullification Provision and Speech Restriction during the litigation. [ER-001–51].

B. The District Court Properly Found Standing as to the Vote Nullification Provision and Speech Restriction.

Appellants focus the bulk of their brief on standing, but none of their arguments are persuasive. [*See* OB, pp. 22–53].

1) Appellees Have Standing to Challenge the Vote Nullification Provision.

As recognized by the District Court, Appellees faced an "imminent harm" via "a credible threat" of disenfranchisement under the Vote Nullification Provisions. [ER-009]. The District Court reasoned: (1) the Vote Nullification Provision uses mandatory language *prohibiting* the Secretary from canvassing an election absent Board certification; (2) the Secretary refused to disavow enforcement; and (3) the same events—

Board members refusing to certify results—occurred during the 2022 election cycle in Arizona. [ER-010].

The District Court also found disenfranchisement redressable. [Elt-010–12]. The Opening Brief makes much of H.B. 2785, but it has no impact on redressability. Although Arizona law previously allowed the Secretary to postpone the statewide canvass if the official canvass of any county was not received, those extension allowances were recently removed. *See* H.B. 2785, 56th Leg., 2nd Reg. Sess. (Ariz. 2024); A.R.S. §§ 16-642, -648 (now setting the Secretary's "Canvass Deadline" as the third Monday in November). Thus, Appellants submitted that Title 16 requires the Secretary to canvass by a certain date and *requires* the Secretary to certify results anyway—even without the Vote Nullification Provision—creating the same disenfranchisement. [Elt-011].

The District Court rejected this argument. [ER-011–12]. The new deadline in H.B. 2785 does not require—or even allow—the Secretary to discard votes from a county that fails to meet the canvass deadline. *See id.* (removing allowances for postponing a canvass in A.R.S. §§ 16-642, -648). The law, as amended, speaks to "*when* the Secretary must canvass, but not *how*." [ER-012]. As stated above, *supra* p. 7, the Secretary can, at minimum, canvass *unofficial results* to comply with H.B. 2785. §§ 16-643 and -644. H.B. 2785 changes nothing.

2) Appellees Have Standing to Challenge the Speech Restriction.

As to the Speech Restriction, the District Court summarily rejected the notion that it applies only to poll workers and found Appellees were "regulated part[ies]." [ER-015 (citing Doc. 16-2)]. It emphasized that the Speech Restriction applies to "*anyone*" who, among other things, "vais[es] one's voice" or uses "offensive" or "insulting language." [*Id.*].

The District Court then found Appellees had standing based on a credible threat of enforcement under the pre-enforcement factors: (1) "intention to engage" in "conduct arguably affected with a constitutional interest"; (2) "but proscribed by [the challenged] statute"; and (3) with a credible threat of enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014). [ER-017]. Because the District Court correctly determined it must follow *Appellee's* construction of the Speech Restriction under *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022), the Court held that all *Driehaus* factors were met: (1) Appellees wanted to engage in "protected speech"; (2) it was prohibited under the Speech Restriction; and (3) it could be enforced against them. [ER-018–22].

C. The District Court Correctly Declined to Abstain and Issued Both Injunctions.

The Arizona superior court preliminarily enjoined enforcement of the Speech Restriction on August 5, 2024. [3-ER-292, -309]. On September 10, 2024, Appellants moved the Arizona Court of Appeals to stay the injunction. [SER-0061]. The Court of Appeals ordered the response and reply to be filed on September 18 and 23, respectively. *Id.* While preparing its order (dated September 27, 2024), the District Court did not know whether the Court of Appeals would stay the superior court's injunction. [ER-028–29]. Indeed, the Arizona Court of Appeals partially stayed the injunction on the same day the district court released its order. [3-ER-285–86]. Thus, if the district court *had abstained*, significant speech would be chilled while Appellees waited months—or years—for final resolution.

Appellants later voluntarily dismissed their appeal on January 14, 2025. [SER-0063]. As a result, the injunction is no longer "pending"

before an Arizona appellate court, and the District Court correctly declined to abstain. [ER-027].

The District Court also properly denied Appellants' motions for dismissal under Fed. R. Civ. P. 12(b)(6) in most respects,[7] and enjoined the Vote Nullification Provision and Speech Restriction, finding the preliminary injunction factors satisfied. [ER-029–30, 032, 040, 049]. This appeal followed.

[7] The District Court, dismissed the AG as a defendant from Count I, reasoning that the AG has no authority to enforce the Vote Nullification Provision. [ER-029–30].

Standard of Review

This Court reviews the grant of a preliminary injunction for an abuse of discretion. *Col. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 475 (9th Cir. 2022). "If the trial court identified the correct legal rule," in issuing the preliminary injunction, this Court will simply assess whether the trial court's application was: "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (quoting *United States v. Hinkson*, 585 F.3d 1247, 1259, 1261-62 (9th Cir. 2009)); *see also Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 817 (9th Cir. 2013) ("As long as the district court 'got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011))).

This Court is deferential of injunctions granted to protect the First Amendment. "[W]hen a district court grants a preliminary injunction protecting First Amendment rights, '[i]f the underlying constitutional question is close . . . we should uphold the injunction and remand for trial on the merits.'" *Valle Del Sol Inc.*, 709 F.3d at 817 (quoting *Thalheimer*, 645 F.3d at 1128).

Findings of standing are reviewed *de novo*. *Arakaki v. Lingle*, 477 F.3d 1048, 1056 (9th Cir. 2007).

As to *Pullman* abstention, this Court follows a "modified" abuse of discretion standard. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 782 (9th Cir. 2014) (holding abstention inappropriate in a First Amendment case). The *Pullman* requirements are reviewed *de novo*, and, if met, this Court reviews the district court's decision to abstain under an abuse of discretion standard. *Id.*

Summary of the Argument

First, this Court should affirm the preliminary injunction against the Vote Nullification Provision because Appellees have established all standing requirements, namely the threat of disenfranchisement is concrete, particularized, imminent, traceable, and redressable. Disenfranchisement hangs imminent under the Vote Nullification; it is activated in the precise situation that occurred in 2022 in Cochise County. Appellants waived defense of the Vote Nullification Provision on the merits because it is constitutionally indefensible and not even remotely tailored to ensuring finality of election results.

Second, this Court should affirm the preliminary injunction as to the Speech Restriction because Appellees have established that it criminalizes, among other things, speech that offends or intimidates anyone in Arizona. Appellees fear a credible threat of enforcement, which Appellants have ignored and not legitimately disavowed. Appellants have demonstrated a likelihood of success on the merits in establishing this broad prohibition violates the First Amendment, and other requirements relief.

Finally, this Court should affirm the district court's discretion in refraining from *Pullman* abstention because this is a First Amendment case involving chilling of speech through self-censorship, and it involves different parties and separate federal causes of action than the Arizona state litigation. Moreover, the appeal in the Arizona litigation has been dismissed, meaning this case has now progressed farther than the state case.

I. The District Court Properly Enjoined the Secretary from Enforcing the Vote Nullification Provision.

A. Appellees Have Standing to Challenge the Vote Nullification Provision.

With ease, Appellees satisfy the three standing requirements as to the Vote Nullification Provision. *First*, they have suffered an injury in fact that is "actual or imminent," because the Vote Nullification Provision *requires* the Secretary to throw out votes if the exact same events occur as those from the 2022 general election. [4-ER-109]. *Second*, their injury is traceable to the Vote Nullification Provision. *Third*, disenfranchisement is redressed by the injunction, which need only make it less "likely" that Appellees will be harmed.

1) Appellees Established an Injury in Fact That is "Actual or Imminent."

Appellants established the "injury in fact" – *i.e.* an invasion of a legally protected interest in their right to have their vote counted. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). Here, disenfranchisement is: (1) concrete and particularized; (2) imminent; and (3) not conjectural or hypothetical. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Appellants fail to meaningfully argue against the "concrete and particularized" prong.[3] [OB, pp 24–25]. Instead, they only contest a finding of an "imminent" and non-hypothetical injury by claiming that the Vote Nullification Provisions is "based on a "long chain of hypothetical contingencies." [OB, pp. 22–23 (quoting *Lake v. Fontes*, 83 F.4th 1199, 1204 (9th Cir. 2023)]. However, their "hypothetical"

[3] This concession make sense. General statewide voting restrictions impose particularized injuries if the plaintiff shows they are personally affected. *Burdick v. Takushi*, 937 F.2d 415, 418 (9th Cir. 1991).

argument turns a blind eye to the political reality of elections, and events from Cochise County in 2022.

a. Disenfranchisement is Imminent and Realistic.

A "credible threat" of harm can exist in the future if a plaintiff is at risk of sustaining harm because of the challenged conduct. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002); *Driehaus*, 573 U.S. at 158. An increased probability of injury resulting from the challenged act can also provide standing. *Sierra Club v. United States EPA*, 774 F.3d 383, 392 (7th Cir. 2014).

The District Court correctly found Appellees met this standard, and disenfranchisement is imminent for three reasons. *First*, the Vote Nullification Provision's mandatory language *requires* the Secretary throw out votes if the Board's inaction will cause the Secretary to miss the deadline. [ER-011]. The Secretary has no discretion in the matter. *Second*, the Secretary refused to disavow its enforcement. [*Id.*]. Most importantly, the *same events* occurred in Cochise County in 2022. [SER-0020-22]. The threat of refusal to certify elections results is on the rise in the United States. [SER-0030-31, -0045-46]. *Last year* a Pinal Board member threatened not to certify. [SER-0036]. In short, certification refusal should be expected.

Appellants exclusively rely on *Lake* to establish that disenfranchisement is "hypothetical" under the Vote Nullification Provision. [OB, p. 28]. But *Lake* gets them nowhere. In *Lake*, the central issue was whether the appellant had standing to challenge the use of electronic tabulation systems in elections that *might* be hacked by non-governmental actors who *might* compromise the integrity of the vote. 83 F.4th at 1202. This claim was too abstract to establish standing, as it

relied on a chain of hypothetical and speculative contingencies, namely "1) the specific voting equipment used in Arizona must have 'security failures' that allow a malicious actor to manipulate vote totals; (2) such an actor must actually manipulate an election; (3) Arizona's specific procedural safeguards must fail to detect the manipulation; and (4) the manipulation must change the outcome of the election." *Id.* at 1203.

Unlike *Lake*, the risk of disenfranchisement here is far less attenuated. The triggering event has already occurred in 2022 and threatened last year. [ER-009–10]. In fact, Appellants concede that disenfranchisement will occur if:

- A County Board fails to meet the County Canvass Deadline and the Statewide Canvass Deadline (three days later);
- The Secretary is unable to obtain the writ of mandamus.

[OB, pp. 26–27]. This sequence mirrors the exact chain of events that occurred in 2022. [ER-009–10]. When Cochise County refused to certify its election results and threatened to prevent the Secretary from complying with his statutory duties he *did* obtain mandamus relief. [ER-010]. Hence, the district court referred to the Vote Nullification Provision as a "nuclear bomb" that is "totally unnecessary when mandamus is available and effective." [2-ER-124]

Had the Vote Nullification Provisions been in place in 2022, broad disenfranchisement would very likely have occurred.

b. The Vote Nullification Provision Does Not Summarize the Canvass Deadline in Title 16; H.B. 2785 Cannot Change This.

Appellants also claim that the Vote Nullification Provision simply explains that the Secretary must timely canvass by the Canvass Deadline. [OB, p. 26]. That argument is wrong. This point is refreshingly

simple: The Canvass Deadline does *not* require disenfranchisement because it allows the Secretary to use unofficial results. §§ 16-643; -644. But the Vote Nullification Provision requires disenfranchisement. The two are not synonymous.

Recognizing the Cochise County events work against them, Appellants attempt to paint Cochise County as irrelevant. They claim that H.B. 2785 changes the deadlines and the Secretary's mandatory duty, such that the district court "misunderst[ood] the deadlines," which *differ from those in 2022*. [OB, p. 27]. Not so. H.B. 2785 simply requires the Board canvass by the third Thursday of November and Secretary to canvass by the third Monday—without extension. [OB, p. 25]. As the District Court found, H.B. 2785 simply sets the firm date by which the Secretary must complete his canvass; it does not authorize the Secretary to exclude votes from counties that fail to meet the deadline. [ER-012].

Instead, §§ 16-643 and -644 allow the Secretary to include results *uncertified* by the County Board (*i.e.* an "unofficial" count tabulated by the county recorder) to comply with H.B. 2785 if the County Board fails to do their job. *See* A.R.S. §§ 16-643 (requiring only that the Secretary "determin[e] the vote of the county"); -644 (providing that the Secretary must not reject a county's returns for lack of formality if it can "be clearly understood"). Complementary statutes must be read in harmony. *Love v. United States*, 944 F.2d 632, 637 (9th Cir. 1991).

Appellants also attempt to distinguish the Cochise County event by claiming that there is a separate County Canvass Deadline and Statewide Canvass Deadline (for the Secretary). [OB, p. 28]. There is no meaningful difference here. The two deadlines fall three days apart—from Thursday to Monday. The delay in Cochise County also lasted three days in 2022. *See Crosby*, 2024 WL 5250102, at *2 ¶¶ 6–7.

In sum, Appellants have failed to identify *any* statute that requires, or permits, the Secretary to throw out ballots should a county fail to certify. This omission makes sense; after diligent review, the undersigned has not found such statute either.

2) Appellees' Injury is Fairly Traceable to Appellants:

Appellants attempt to defeat traceability by contending the County Board's failure to canvass would cause disenfranchisement (rather than disenfranchisement caused by the Vote Nullification Provision). [OB, pp. 29–30]. Their contention ignores Ninth Circuit caselaw and artificially cabins traceability into direct causation.

The traceability requirement does not demand direct causation. Instead, "traceability" requires only that the harm arises from the defendant's actions in a way that is more than speculative – regardless of the length in the chain of causation. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 (2014); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (providing that traceability can be found when a "chain of causation has more than one link" and "what matters is not the 'length in the chain of causation' but rather the 'plausibility of the links that comprise the chain'" (quoting *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)00; *see also Dep't of Com. v. New York*, 588 U.S. 752, 767–68, 70–71 (2019) (affirming standing even when the harm was caused by third parties—specifically, the failure of individuals to respond to the census, and that the harm was still traceable to the federal government's actions).

In 2022, this Court rejected a near-identical argument. There, the plaintiffs alleged that Arizona's ballot-ordering statute required the County Board to unconstitutionally list candidates in a preferential order

on ballots. *See Mecinas v. Hobbs*, 30 F.4th 890, 900 (9th Cir. 2022). Attempting to defeat traceability, as the Secretary does here, Arizona's then-Secretary argued that the Boards' independent third-party actions defeated traceability. *Id.* This Court disagreed. *Id.* ("[We] rely[] on the Secretary's role in 'promulgat[ing] rules . . . applicable to and mandatory for the statewide . . . elections,' [and] have previously held that a challenged Arizona election law was traceable to the Secretary." (quoting *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003))).

Here too, it does not matter that the County Boards play *some* role in the chain of causation. The Secretary need not be the *only cause* for the injury to be traceable. Therefore, disenfranchisement is "traceable" to the Vote Nullification Provision.

3) Disenfranchisement is Redressed by the Injunction.

Redressability does not require a complete remedy. It needs only a showing that a favorable ruling will result in a "change in legal status" that significantly increases the likelihood of obtaining relief. *Bennett v. Spear*, 520 U.S. 154, 171 (1997); *Utah v. Evans*, 536 U.S. 452, 464 (2002); *see also Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) ("The redressability inquiry focuses on whether a favorable decision will meaningfully address the injury."); *Mecinas*, 30 F.4th at 900 (holding that an injury was redressable by alteration of the EPM because the injunction "significantly increased" the likelihood of relief, despite the fact that the other government actors could "stym[y]" the relief).

Appellants argue that there is no redressability because Appellees did not challenge the underlying statutes in Title 16 setting the firm Canvass Deadline, §§ 16-642(A) and -648 (amended by H.B. 2785). [OB.

p. 36]. As a result, Appellants argue that the Canvass Deadline requires disenfranchisement even without the Vote Nullification Provision – i.e. suggesting that the Secretary's compliance with the Canvass Deadline requires throwing out all votes failed to be certified by the Board. [OB, pp. 31–32].

This is not true. As stated above, the Secretary *can* comply with the Canvass Deadline *without discarding votes* under §§ 16-643 and -644.[1] Recall that the Secretary can canvass the tabulated votes by the County Recorder, which are **already counted** (simply not "certified" by the Board). And as conceded by Appellants, the Secretary has several other *constitutional* options available to him to meet his statutory deadline. [ER-025].

Relatedly, Appellants contend the Vote Nullification Provision does not "expressly direct[] the Secretary to inflict" disenfranchisement. [OB, p. 48]. But the plain text disagrees: "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." [4-ER-409]. "Must" is a mandatory, not a permissive term.

The district court's injunction decreases the likelihood of disenfranchisement. Redressability is satisfied.

B. Appellees Have Standing to Bring a Pre-Enforcement Challenge Against the Speech Restriction.

Pre-enforcement challenges exist so that a party is not forced to wait until they have been harmed by an unconstitutional law. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). This "hold your tongue and challenge

[1] The deadline is not unconstitutional; thus, Appellants have not challenged § 16-648 or HB 2785.

now" doctrine ensures that citizens can contest unconstitutional restrictions before they are forced to endure their consequences. *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), including prosecution.

The parties agree the *Driehaus* factors apply. [OB, p. 39]. The district court correctly found the three elements of a pre-enforcement challenge were met: (1) an intention to engage in constitutionally protected conduct; (2) that such conduct is prohibited by the challenged law; and (3) a credible threat of enforcement. *Driehaus*, 573 U.S. at 159.

1) Appellees Intend to Engage in Constitutionally Protected Speech

The standard for establishing intent is not nearly as rigid as Appellants suggest. Appellees need not specify their intent to engage in any exact "prohibited" conduct. [OB, p. 40]. Instead, Appellees need only show "an intention to engage in a *course* of conduct *arguably affected* with a constitutional interest." *Driehaus*, 573 U.S. at 161 (emphasis added); *see also Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 488 (9th Cir. 2024). "This court has repeatedly held that, [in the context of the *Driehaus* factors], when a 'threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing' to guard against chilling protected speech." *Ariz. All. for Retired Ams. ("AARA") v. Mayes*, 117 F.4th 1165, 1181 (9th Cir. 2024) (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000)).

AARA is analogous. *See* 117 F.4 at 1181. There, this Court found all three *Driehaus* factors satisfied where plaintiffs intended to contact people to register new voters—despite an Arizona law that criminalized any "mechanism" to allow a person to vote if registered in another state. *Id.* at 1181. This Court held plaintiffs had "concrete plans to engage in

[the] constitutionally protected activities—voter outreach and registration—simply because [the activities] 'arguably f[ell] within the statute's reach,'" which was a "low hurdle" to clear. *Id. (emphasis added)* (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003)). There, the "phrase 'mechanism for voting' could be read to encompass voter registration." *AARA*, 117 F.4 at 1181. Applying that logic here, discussions of "politic[s] . . . and many government-related topics" can easily be "offensive" to some. [ER-019–20].

Indeed, Appellee Glennon attested:

- "Regularly discuss[es] politics, voting, and many government-related topics," and "intend[s] to continue to have these discussions surrounding the 2024 elections, including during early voting and on Election Day" and the Speech Restriction would cause her to self-censor speech she would otherwise feel comfortable expressing "for fear of offending someone and subjecting [herself] to possible criminal prosecution." [ER-019–20 (citing 2-ER-240 ¶¶ 5, 8)].
- Frequently discusses political and voting issues, including volunteer efforts to encourage people to "vote in a certain way." [2-ER-240, ¶ 6].
- Would censor her speech for fear of prosecution as a result of the Speech Restriction. [2-ER-240].

Similarly, Appellee AFPI:

- "[W]orks in Arizona on issues related to legislation and public policy . . . and voter awareness on important issues, including issues that are on the ballot for any given election." [2-ER-222 ¶ 3].
- "Regularly engages in the sort of voter engagement and election integrity activities that could easily run afoul of the Speech Restriction's breathtaking scope. [ER-016].

- Has members that sometimes wear clothing that might be deemed offensive or insulting to individuals with differing political views (i.e "All Lives Matter" or "Vote to Protect Unborn Children" or "Never forget October 7th"). [2-ER-221 ¶ 14].
- "[C]ommunicate[s] with voters" and tries to avoid expressing "offensive" ideas, and, as a result, AFPI would censor its speech based on the Speech Restriction. [2-ER-225 ¶¶ 18, 19].

This conduct is sufficient to trigger the broad reach of the Speech Restriction.

Appellants' reliance on *Lopez* is misplaced. [OB pp. 12–13]. There, the plaintiff wanted to share his Christian views "on politics, morality, social issues, [and] religion," and "his beliefs about Christianity . . . and how it guides his views," none of which could conceivably fall under a sexual harassment policy limited to "sexual advances, requests for sexual favors," and other "conduct of a sexual nature." 630 F.3d at 781, 790. Here, by contrast, Appellees have testified they want to discuss politics, government, and elections, which *easily* falls under the category of "offensive" or "insulting" under the Speech Restriction.

At bottom, Appellees cannot specify the precise conduct that will run afoul of the Speech Restriction because Appellees cannot know what *every person* (with varying sensitivities) will find offensive or insulting. Appellees have, however, alleged ample facts to establish their intent to engage in the "course of conduct arguably affected" by the Speech Restriction. *Driehaus*, 573 U.S. at 161

2) The Speech Restriction is a Broad Prohibition on Everyone—Including Appellees.

The broad language of the Speech Provision covers Appellees' intended speech activities under *Driehaus*. The Speech Restriction

broadly applies to "any activity" by "a person." By its terms, it prohibits "*[a]ny activity* by *a person* with the *intent or effect* of threatening, harassing, intimidating, or coercing voters" anywhere in Arizona. [4-ER-123 (emphasis added)]. Nevertheless, contending that the Speech Restriction is inapplicable to Appellees, Appellants argue, again, that this sentence is only a "mere|| paraphrase|| (for lay election officials)." [OB. p. 43–44]. There are two problems with this argument.

First, under *Yellen*, analysis of the *Driehaus* factors requires that the district court view the Speech Restriction "through [Appellee]'s eyes, [and] accept—for standing purposes—its allegations that the [Speech Restriction] is unconstitutional[.]" 34 F.4th 841, 849. Thus, for present purposes, the Court must assume Appellees are correct that the Speech Restriction applies to them. Appellants fail to refute *Yellen*. [OB p. 47].

Second, as this Court is aware, Appellants' contention is untenable under the plain language of the Speech Restriction. The Speech Restriction adds the vague new word of "harassing," eliminates the "knowing" *mens rea* requirement in §§ 16-1013 and -1017 and removes the essential element from § 16-1013 that actions must be taken to "induce or compel" a person to vote, allowing any conduct deemed offensive *anywhere in Arizona*.

In short, the Speech Restriction is *not* a paraphrase, creates a new crime, and easily covers Appellees' protected speech under the second *Driehaus* factor.

3) Appellees Face a Credible Threat of Enforcement.

A credible threat requires only that government actions "will cause [a plaintiff] to self-censor and not follow through with his concrete plan

to engage in protected conduct." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014); *see also Yingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022) (providing that a plaintiff need not show a specific threat if the general specter of liability will cause her to self-censor). The record on this point is uncontroverted. Appellees have and will continue to censor their speech because of the Speech Restriction. [2-ER-221–24 ¶¶ 4–14; 2-ER-239–40 ¶¶ 5–9].

Appellants exaggerate the standard for a "credible" threat of prosecution. This Court has "never held that a *specific* threat is necessary to demonstrate standing." *Valle del Sol v. Whiting*, 732 F.3d 1006, 1016 n. 5 (9th Cir. 2013) (emphasis added). Instead, it has consistently "taken a broad view of this factor." *Isaacson v. Mayes*, 84 F.4th 1089, 1100 (9th Cir. 2023).

Refusal to disavow enforcement is itself sufficient to establish a credible threat. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021). Here, *both* Appellants simply restated their litigation position in this case and refused to provide binding and reliable disavowals. [2-ER-162–63 (where the Secretary stated he "cannot and will not" disavow his statutory duty)]; [2-ER-278 79 (where the AG confirmed that county attorneys could enforce the Speech Restriction and only disavowed purported *illegal* referrals)].

> a. *A facially erroneous and legally unreliable letter from the AG—even if cast as a "purported" disavowal—is insufficient.*

Appellants characterize the AG's response letter as a "disavowal." [OB, p. 49–51]. A purported, but unreliable, "disavowal," will not negate threat of enforcement. *MARA*, 117 F.4th at 1181; *Isaacson*, 84 F.4th at 1101.

This letter is facially untrustworthy; it is replete with legal errors and, unironically, purports to only disallow *illegal* referrals. The AG avoided the issue of enforcement under the Speech Restriction by essentially claiming that her litigation strategy and defense *in this lawsuit* would be successful, and therefore Appellants would have no lawful grounds to challenge her enforcement of the Restriction. But this case exists because the parties disagree about what constitutes "lawful" and "illegal" prosecution under the Speech Restriction. In short, the circular reasoning and verbal semantics in the AG's letter gets us nowhere.

MARA is again on point. There, the AG was sued for a criminal prohibition on certain "voting mechanisms" that could apply to those registering people to vote, but she expressly "rejected any interpretation . . . that would criminalize ordinary voter outreach." *See* 117 F.4th at 1181. This Court found the disavowal insufficient to negate the credible threat of enforcement. *Id.* Explaining it "has held that officials cannot inoculate laws from review if the disavowal is a 'mere litigation position.'" *Id.* (quoting *Lopez*, 630 F.3d at 788); *Isaacson*, 84 F.4th at 1101 (to same effect). The exact same circumstances are present here.

Moreover, here, the AG confirmed that county attorneys *can* prosecute under the Speech Restriction. [2-ER-278–79]. As the district court observed, the Speech Restriction could still be enforced by "election officials and poll workers at voting locations."[8] [ER-023]. Such civil enforcement counts and the threat of investigation by either "civil or

[8] Removal of a voter from a voting location by election officials and poll workers based on the Speech Restriction is, by itself, an imminent harm to voting and free speech rights.

criminal authorities is sufficient to establish imminent harm." *Isaacson*, 84 F.4th at 1101.

Appellants' attempt to disregard *Isaacson* falls flat. [OB, p. 52–53]. There, obstetrician-gynecologists challenged an Arizona law criminalizing abortions based solely on genetic abnormalities. 84 F.4th at 1094. Despite the AG's express disavowal of enforcement, the court found a credible threat remained in part because county attorneys and Arizona Department of Health Services and Medical Boards—who were not bound by the disavowal—could still enforce the law. *Id.* at 1100–01. This Court briefly commented that *one* county attorney expressed an interest in a law banning all abortions, but this was tangential to this Court's reasoning. *Id.* at 1100. Here, Appellees do not know whether specific county attorneys *want* to enforce the Speech Restriction. But according to the AG, county attorneys certainly can. [2-ER-279–81].

Finally, this Court should disregard Appellants' argument that Appellees failed to show a history of prosecution. This Court has been clear that a historical absence of prosecution does not undermine standing. *LAEA*, 117 F.4th at 1182 (expressly dismissing a lack of prosecution history as irrelevant); *LSO, Ltd.*, 205 F.3d at 1155 ("Courts have found standing where no one had ever been prosecuted under the challenged provision."); *Libertarian Party*, 351 F.3d at 1280 (to same effect).

Therefore, Appellees have satisfied the *Driehaus* factors to establish a standing to bring a pre-enforcement challenge against the Speech Restriction.

II. *Pullman* Abstention is Unsuitable in this First Amendment Case Raising Federal Constitutional Questions.

Appellants claim that the State Case—involving different parties and different claims—warrants *Pullman* abstention because the state court proceeding also challenges the constitutionality of the ETM. Appellants offer two flawed reasons for why the district court should have abstained. First, they assert that the State Case is "farther along" and will determine whether Appellees' interpretation of the Speech Restriction is correct. [OB, p. 31] ECF No. 6.1. Second, they claim abstention is warranted because this case meets the three-factor *Pullman* test. Both arguments fail.

A. Pullam Abstention is Particularly Narrow in the Constitutional Context.

Pullman abstention "is an extraordinary and narrow exception" to a federal court's obligation to hear cases properly before it. *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974). Federal courts have a "virtually unflagging" obligation to resolve cases in their jurisdiction. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Because litigants have a fundamental right to seek a federal forum for federal constitutional claims, *Pullman* abstention should be "rarely applied" in such cases. *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003). Time and again, this Court has affirmed a district court should not abstain from hearing constitutional claims because "'the guarantee of free expression is always an area of particular federal concern.'" *Porter*, 319 F.3d at 492 (quoting *Ripplinger*, 868 F.2d at 1048; *see also, e.g., J–R Distribs., Inc. v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984)

("[A]bstention by federal courts in first amendment cases could often result in the suppression of free speech that is meant to be protected by the Constitution." *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983) (citations omitted) ("[T]he Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, racial equality, and first amendments rights of expression."); *Cinema Arts, Inc. v. Clark Cnty.*, 722 F.2d 579, 580 (9th Cir.1983) (to same effect); *see also* 42 U.S.C. § 1983 (ensuring that federal courts serve as guardians of constitutional rights).

B. The State Case is not "Farther Along" Than This Case.

Appellants voluntarily dismissed their appeal in the State case. [SER-0063]. Thus, this case—not the State Case—is now "farther along."

The State Case was filed five months before this case was filed. [3-ER-332; 5-ER-428]. On August 5, 2024, the state superior court entered a preliminary injunction against Section III(D) of the EPM, including the Speech Restrictions. [3-ER-309]. On January 14, 2025—eight days after Appellants filed their Opening Brief in this Court—the Arizona Court of Appeals dismissed the appeal of the State Case. [SER-0063]. Thus, to the extent the State Case was ever "farther along" than this case, that is no longer true.

Additionally, the State Case involved *different parties*, raised *different claims* under the Arizona Constitution, and did not include a challenge to the Vote Nullification Provision. While AFPI is a plaintiff in both cases, the State Case includes two additional plaintiffs not part of this case. [3-ER-332; 5-ER-428]. Moreover, the State Case raised claims solely under the Arizona Constitution—specifically, the free expression and free association provisions (Ariz. Const. art. 2, §§ 5-6). [3-ER358].

The State Case did not include claims under the U.S. Constitution or a challenge to the Vote Nullification Provision. [3-ER-358–59].

C. The District Court Properly Applied the *Pullman* Test.

Pullman requires: (1) "a sensitive area of social policy upon which the federal courts ought not to enter"; (2) a situation in which a "definitive ruling on a state-law issue could resolve the controversy"; and (3) that the "possibly determinative issue of state law [are] doubtful." *J R Distribs., Inc.*, 725 F.2d at 487. "The absence of any one of these three factors is sufficient to prevent the application of *Pullman* abstention." *Porter*, 319 F.3d at 492.

1) This Court has Squarely Held that *Pullman* Abstention is Inappropriate in First Amendment Election Cases Under the "Social Policy" Prong

Appellants argue that the first *Pullman* factor is met because "elections are widely considered a sensitive area of social policy." [OB, p. 56]. However, this Court expressly rejected that argument in the context of First Amendment election cases, as present here. In *Porter*, plaintiffs used websites to discuss strategic voting methods. 319 F.3d at 486. After the California Secretary of State sent a cease-and-desist letter, they sued under the First Amendment. *Id.* This Court unequivocally held that in *election-related First Amendment* cases, "the first *Pullman* factor was not present," *Id.* at 492.

This holding is well-established in both this Circuit and the Supreme Court. In fact, "[i]n First Amendment cases, the first of [the *Pullman*] factors will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Ripplinger*, 868 F.2d at 1048 (emphasis added); *see also Chula Vista*

Citizens v. Norris, 782 F.3d 520, 528 (9th Cir. 2015) (*Pullman* abstention "is strongly disfavored in First Amendment cases."); *A-B Distribs., Inc.*, 725 F.2d at 487 ("[C]onstitutional challenges based on the First Amendment right of free expression are the kind of cases that federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when First Amendment rights are at stake."). The Supreme Court echoed this principle, holding that "'abstention is inappropriate for cases where statutes are justifiably attacked on their face as abridging free expression.'" *Houston v. Hill*, 482 U.S. 451, 467 (1987) (quoting *Dombrowski*, 380 U.S. at 489-90.)

This Court rejects *Pullman* in First Amendment cases because the delay it causes can itself chill protected speech. *Porter*, 319 F.3d at 492-93. That is exactly what would happen here. The uncontroverted evidence shows that Appellees engage in extensive speech activities both inside and outside polling locations, and the severe criminal penalties imposed by the Speech Restriction create a chilling effect on their speech. [2-ER-221–24 ¶¶ 4–14; 2-ER-239–40 ¶¶ 5–9]. As the district court rightly found, "[i]f this Court abstained, as Defendants request, there is a risk that protected speech would be chilled...." [ER-028]. That finding should not be disturbed.

Appellants' reliance on *Almodovar v. Reiner*, 832 F.2d 1138, 1139-41 (9th Cir. 1987) is misplaced. [OB, p. 69]. Unlike this case, *Almodovar* involved an "unusual procedural setting; the issue in question was already before the state supreme court." *Porter*, 319 F.3d at 493–94. Where that "unique circumstance–[adjudication before the state supreme court] [wa]s absent . . . abstention was inappropriate." *Id.* at 494. That unique factor is missing here too; the State Case is not pending before the Arizona Supreme Court, or any other Arizona appellate court, and

may not arrive in any state appellate court for years. As this Court has recognized, *Almodovar* "was procedurally aberrational." *Courthouse News Serv.*, 750 F.3d at 784, making it inapplicable here too.

Appellants fare no better under *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 306 (1979). *Babbitt* expressly cabined its application of *Pullman* "to statutory provisions that are patently ambiguous on their face," *Id.* at 312. Here, the Speech Restriction is not "patently ambiguous." As the district court found, these restrictions "blanketly prohibit controversial speech at polling places or, perhaps, everywhere else in Arizona[,]" with specific examples listed. [ER-002]. The same is true for the Vote Nullification Provision, which clearly give the Secretary broad discretion to disenfranchise voters who properly cast their ballots. [*Id.*]. Because the Speech Restrictions and Vote Nullification Provision here are "pointedly clear," the district court correctly determined that the first *Pullman* factor was missing. *Babbitt*, 442 U.S. at 306.

Worse still, *Babbitt* did not abstain from addressing "the provision governing election procedures" at issue in there. *Id.* ("[W]e perceive no basis for declining to decide appellees' challenge to the election procedures. . ."). The Court proceeded to examine the First Amendment implications of those provisions despite the absence of prior state-court adjudication.

2) The Constitutional Questions in This Case Cannot be Avoided by a State Court Ruling.

Appellants next argue that the constitutional questions in this case could be "avoided or narrowed by a definitive ruling in the State Case." [OB, p. 66]. This argument fails for three reasons.

First, the State Case is no longer on appeal, making this Court the first appellate court to address any constitutional question.

Second, the State Case did not involve any claims related to the Vote Nullification Provision. [3-ER-358–59].

Third, as to the Speech Restriction, the State Case raised only *state* constitutional issues and did not address any claims under the U.S. Constitution. [3-ER-358–59]. Arizona courts have consistently held that the protections provided by the Arizona Constitution's free speech provisions are broader than those guaranteed by the First Amendment. *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 (2019) ("The Arizona Constitution provides broader protections for free speech than the First Amendment."); *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354 (1989) (providing that Ariz. Const. art. 2 § 6 offers "greater scope than the First Amendment"). As such, "[o]ur federalist system allows [Arizona courts] to interpret our state constitution differently than the U.S. Supreme Court interprets the national Constitution." *State v. Jean*, 243 Ariz. 331, 353 (2018).

Thus, even if there were a pending appellate action in state court, it could resolve the Speech Restriction solely on *state* constitutional grounds, bypassing the federal First Amendment issue entirely. It would not address the Vote Nullification Provision at all. As a result, this case cannot be "mooted or narrowed by a definitive ruling on the state law issues." *See San Remo Hotel v. City & Cnty. of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). The second *Pullman* factor is absent.

3) The invalidity of the Speech Restriction under the First Amendment is clear.

The third *Pullman* factor could only be satisfied if the Speech Restriction was "*capable* of a construction that could avoid the

constitutional issues." *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 137 (9th Cir. 1980) (emphasis added). Here, Appellants contend that the Speech Restriction does not actually prohibit anything and is instead only non-binding guidance for election officials. But the Speech Restriction is simply not capable of such a construction.

The Speech Restriction is not merely guidance to election officials, but includes criminal prohibitions for "*any person*" who violates its terms. "Any" qualifies "person" to include *everyone*. [4-ER-423]. There is no ambiguity here. Its invalidity under the First Amendment is neither "uncertain," *Pearl Inv. Co. v. City & Cnty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985), nor "*capable* of a construction that could avoid the constitutional issues." *Spokane Arcades, Inc.*, 631 F.2d at 137.

In short, neither Appellees nor the courts would benefit by deferring interpretation of the central *federal* constitutional questions to a *non-existent* state court appeal.

III. The Preliminary Injunctions Should be Affirmed.

Appellants spend little time defending the constitutionality of the challenged EPM provisions. This gaping hole shows that the subject EPM provisions are indefensible.

Regarding the Speech Restriction, Appellants again rely on their misconception that it only "summarize[s] criminal prohibitions." [OB, p. 72]. This is wrong. As the district court found, this characterization ignores the clear language of the EPM, which prohibits "*[a]ny* activity by *a person* . . . inside or outside . . . a voting location." [ER-11–14]. When properly understood as a sweeping and punitive restriction, the Speech Restriction is unconstitutional because it: (1) lacks a *mens rea*

requirement; (2) regulates speech based on both content and viewpoint; (3) is facially overbroad; and (4) is void for vagueness.

As for the Vote Nullification Provision, Appellants do not even try to defend it. Thus, Appellants waived any argument that the preliminary injunction against the Vote Nullification Provision should be reversed on the merits. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived.").

This Court is aware of the *Winter* factors for assessing a preliminary injunction, which need not be repeated here. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *see also Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (merging the last two factors when the nonmovant is the government). In constitutional cases, the first factor is "the most important." *Id.* A likelihood of success in a constitutional case generally demonstrates that plaintiffs are suffering irreparable harm, regardless of how brief the violation. *Id.*; *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("[C]onstitutional violation[s] . . . generally constitute irreparable harm."). If the first factor is satisfied in a constitutional case, this "also tips the public interest sharply in his favor because it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (citation omitted).

Appellees have shown a strong likelihood of prevailing on the merits and satisfy the other preliminary injunction factors.

A. Appellees Are Likely to Prevail on the Merits of Their First Amendment Claims Regarding the Speech Restriction.

1) The Speech Restriction is an Independent Criminal Prohibition.

Appellants contend, again, that the Speech Restriction "does not proscribe *any* speech," and instead merely "summarize[s] criminal prohibitions created by the Legislature." [OB, p. 53–54]. As stated above, this ignores the plain language and standalone criminal liability that exists for violations of the EPM in § 16-452(A),(C).

a. The text of the Speech Restriction applies to broad new criminal prohibitions.

Again, the Speech Restriction prohibits "any activity by a person with the intent or effect of threatening, harassing, intimidating, or coercing voters . . . inside or outside the 75-foot limit." [4-ER-423–24]. The sentence, by its terms, states that specific activities are "prohibited." "Prohibit" means "To forbid by law, or "[t]o prevent, preclude, or severely hinder. PROHIBIT, Black's Law Dictionary (12th ed. 2024); *United States v. Banks*, 556 F.3d 967, 978 (9th Cir. 2009) ("[D]ictionary definitions are cognizable" tools for statutory interpretation.). This prohibition applies to "[a]ny activity by a person," covering a range of activities and applies to a "person," not merely "lay election officials," as Appellants suggest. [OB p. 14]. "Any" means just that—*any* activity that falls within the prohibition of the Speech Restriction. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citation omitted). The words "prohibited," "person," and "any" must be "accorded [their] ordinary meaning." *Banks*, 556 F.3d at 978. As the district court found, applying the ordinary meanings of these words to the Speech Restriction means that applies *to all* persons, and constitutes a "broad prohibition on

activities, including speech and other expressive conduct occurring anywhere and at any time."[6] [ER-042–43].

b. The Speech Restriction removes key elements of criminal misconduct under state law, including the mens rea requirement, and creates broad new offenses that have no basis in state law.

Nor can the Speech Restriction be read as merely summarizing existing statutory criminal prohibitions, because the provision includes activities that are broader than those prohibited by §§ 16-1013, -1016, and -1017. [OB, p. 54].

Section 16-1013 expressly requires a *mens rea* element of "knowing" conduct, while the Speech Restriction prohibits speech that has an "*effect*" on the listener. *See United States v. U.S. Dist. Ct. for Cent. Dist. of California, Los Angeles, Cal.*, 858 F.2d 534, 540 (9th Cir. 1988) ("[T]he first amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech."). *See also Counterman v. Colorado*, 600 U.S. 66, 69 (2023) (holding that criminal liability can only apply to allegedly threatening or intimidating speech if the person has a subjective *mens rea* of at least recklessness).

[6]Appellants fail present arguments regarding the constitutionality of the Speech Restriction in relation to Public and Non-Public Forums, thus waiving this defense. *Smith*, 194 F.3d at 1052. If the Court addresses this distinction, the Speech Restriction is unconstitutional in both settings. First, the Speech Restriction regulates and criminalizes speech across a broad range of public forums. Because it is viewpoint-based, overly broad, and fails to "leave open ample channels for communication," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), it is unconstitutional in public forums. Second, even for the 75-foot non-public forum around polling stations, the Speech Restriction is also unconstitutional because "it is not reasonable in light of the purpose served by the forum: voting." *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 2 (2018).

Additionally, the Speech Restriction introduces the term "harassing," encompassing a broad range of subjective speech activities that are not included in § 16-1013. In effect, it creates a completely new category of speech—one that is criminalized—which does not exist under state law.

The Speech Restriction also removes a key element from § 16-1013: the requirement that speech must "induce or compel... [a] person to vote or refrain from voting." Thus, on its face, the Speech Restriction is not connected to voting and therefore applies broadly to all speech and conduct. The Secretary easily could have rectified this. But he did not.

Additionally, the specific examples of "prohibited" conduct—"raising one's voice," or "using...insulting or offensive language," or "posting signs or communicating messages about penalties for 'voter fraud,'"—do not exist *at all* in § 16-1013. Appellants quip that these examples are not crimes because the Speech Restriction only *says* that such activity "*may* also be considered intimidating conduct..." [OB p. 75].

However, these examples *are* listed as types of speech that can violate Speech Restriction, and the fact that they "may" or "may not" constitute a criminal offense offers little reassurance to speakers who, under the threat of criminal prosecution, fear that their words may be perceived as "insulting or offensive" by the listener. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("[T]he alleged danger of this statute is, in large measure, one of self censorship; a harm that can be realized even without an actual prosecution."); *Johnson v. Texas*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) ("[T]he

Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

Appellants cite *Deitrick v. Greaney*, 309 U.S. 190 (1940), a 1940 Supreme Court decision, to claim that the Speech Restriction summarizes criminal conduct rather than creating new conduct. [OB p. 73]. However, *Deitrick* is not relevant. *Deitrick* dealt with a provision in the National Bank Act that prohibited banks from purchasing their own stock. 309 U.S. at 194. Clearly, the court in *Deitrick* interpreted the specific terms of the prohibitions under the National Bank Act in making that finding — and not the text of the Speech Restriction at issue here. In contrast, here, the Secretary was not merely interpreting or summarizing state law when he promulgated the Speech Restriction. He was adding to it and expanding the scope of its application. Had the Secretary wanted to promulgate non-binding guidance, he easily could have done so: by using a word such as "discouraged." Instead, he chose the term "prohibit"—which unambiguously means "[t]o forbid by law." PROHIBIT, Black's Law Dictionary (12th ed. 2024).

The Speech Restriction is neither a summary nor guidance; it creates law.[7]

[7] Appellants claim they have no interest in enforcing the Speech Restrictions in the EPM. [OB, p. 75]. But that offers little reassurance to Appellees, who regularly engage in speech activities both inside and outside polling locations. *See* Doc. 14, Ex. B, ¶¶ 4-14; Ex. C, ¶¶ 5-9; Ex. D, ¶¶ 3-12. Moreover, an official's mere promise not to enforce a law is insufficient to eliminate the reasonable fear of future enforcement. In a free-speech pre-enforcement challenge, all that is required is a *credible* threat of enforcement. *See Tingley*, 47 F.4th at 1068 ("[I]n the context of pre-enforcement challenges to laws on First Amendment grounds, a plaintiff 'need only demonstrate that a threat of potential enforcement will cause [her] to self-censor.'" (citation omitted)).

c. The doctrine of constitutional avoidance should not be applied when the text of the Speech Restrictions is clear.

In a final attempt to defend the Speech Restriction, Appellants urge this Court to apply the doctrine of constitutional avoidance. [OB p. 73]. However, "that canon of construction applies only when ambiguity exists." *Iancu v. Brunetti*, 588 U.S. 388, 397 (2019). The Speech Restriction cannot be reinterpreted as merely summarizing existing law.

Constitutional avoidance does not permit courts to rewrite laws to make them constitutional. *See United States v. Stevens*, 559 U.S. 460, 481 (2010) ("[C]ourts will not rewrite a law to conform it to constitutional requirements.") (internal quotation marks and alterations omitted). Appellants' recharacterization of the Speech Restriction finds no support in its text, and, as a result, the district court correctly declined to apply constitutional avoidance.

2) The Speech Restriction is View-Point Based and Cannot Survive Strict Scrutiny.

In *Matal v. Tam*, the Supreme Court struck down the Lanham Act's disparagement clause, which barred trademarks that "disparage or bring into contempt or disrepute" any person, institution, or group. 582 U.S. 218, 247 (2017). The Court unanimously held that this provision constituted viewpoint discrimination because it "singled out a subset of messages for disfavor based on the views expressed." *Id.* at 218. In other words, the government cannot restrict speech simply because the speaker's message may be offensive, as "[g]iving offense is a viewpoint." *Id.* at 220.

The Speech Restriction does exactly that. It targets speech deemed "harassing" and prohibits "insulting or offensive language." [4-ER-423]. But as the Supreme Court made clear, "[i]t is firmly settled that under

our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). Thus, strict scrutiny applies.

a. Appellants have alleged no compelling interest.

Government regulations like the Speech Restriction are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015). The burden rests on the State to satisfy strict scrutiny—something it failed to do.

Appellants' justification for the Speech Restriction is unclear, but it asserts a "strong interest[] not only in protecting speech, but also [in] protecting the ability of voters to vote safely and securely, free from intimidation." [OB p. 78]. However, this is precisely the kind of vague and amorphous rationale that the Supreme Court has held does not satisfy strict scrutiny. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation."); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) ("Appellants must "show a direct causal link" between its interest in preventing "harm to minors" and its restriction on "violent video games... [A]mbiguous proof will not suffice.").

While ensuring safe and secure elections is an important goal, a compelling government interest must be concrete, specific, and supported by clear evidence. *Id.* It cannot be speculative, vague, or merely hypothesized. Appellants' claimed interest here is precisely the kind of broad public welfare justification that courts have repeatedly rejected as insufficient to satisfy strict scrutiny. *Id.*; *see also Grutter v. Bollinger*,

539 U.S. 306, 356 (2003) (holding that vague assertions of "diversity" and improving legal education do not qualify as compelling government interests).

b. The Speech Restriction is not narrowly tailored.

Even if Appellants could articulate a compelling government interest, Appellants would need concrete evidence showing how banning "offensive" and "insulting" speech is narrowly tailored to ensuring election security. It has not—and cannot—do so.

The Speech Restriction is overinclusive, sweeping too broadly by prohibiting speech a listener subjectively *feels* is "harassing," "insulting or offensive," including when the listener takes offense from "rais[ed] . . . voice[s]." [4-ER-423–24]. There is no evidence in the record that raised voices or *feelings* of offense are a security threat. As the Supreme Court has held, criminalizing speech merely because some find it offensive is unconstitutional. *See Johnson*, 491 U.S. at 414; *Snyder*, 562 U.S. at 459; *United States v. Williams*, 553 U.S. 285, 306 (2008) (striking down statutes that "tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"). As the Court has made clear, "the fact that society may find speech offensive is not sufficient reason for suppressing it." *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978).

Moreover, the Speech Restriction is not narrowly tailored because it lacks any temporal or geographic limitation. It applies to "any activity...[that] is prohibited," with no restrictions on when or where it applies. [4-ER-423–24]. It extends beyond the 75-foot limit at voting locations to both public and private spaces. *Id.* It also applies to all speech

directed at citizens or poll workers—effectively covering nearly every Arizonan. *Id.*

3. The Speech Restriction is Overbroad.

The Speech Restriction is also unconstitutional under the overbreadth doctrine. A regulation is overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. To assess overbreadth, courts first determine the law's legitimate scope and then evaluate whether it criminalizes a substantial amount of protected speech. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1208 (9th Cir. 2010).

Appellants offer no defense against this challenge, thereby waiving any such argument. *Smith*, 194 F.3d 1045, 1052. To the extent this Court may find it helpful, however, Appellees briefly address the issue. Specifically, while § 16-1013 lawfully prohibits violence, threats, and intimidation, the Speech Restriction's vague prohibitions on "harassing," "insulting" or "offensive" speech do not. As the district court found, the Speech Restriction empowers election officials to *remove* voters for "offensive" or "insulting" speech. [ER-045]. While preventing voter intimidation is a legitimate interest, the Restriction goes far beyond that interest by sweeping in a broad range of protected speech that includes speech that *effects* another's *feelings* (i.e. *offense*) unrelated to voter intimidation.[8]

1. The Speech Restriction is Void for Vagueness.

[8] The overbreadth doctrine also provides another reason these Appellees have standing. *Stevens*, 559 U.S. at 480–81 ("Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.").

The Speech Restriction is also void for vagueness under the Fourteenth Amendment's Due Process Clause.[5] Again, Appellants waive any defense on Fourteenth Amendment grounds, *Smith*, 194 F.3d at 1052, but Appellees briefly address the issue for this Court.

Laws must be specific enough to give fair notice of what actions are prohibited and permissible. Thus, a law or regulation is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages discriminatory enforcement." *Williams*, 553 U.S. at 304. "When speech is involved, rigorous adherence to these requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012).

Here, the Speech Restriction provides no guidance on what constitutes "harassing," "insulting," or "offensive language." The average, reasonable person cannot know what speech is lawful because he cannot know how surrounding people *will feel* about his words or volume. How can he guess at their sensitivities?

The Speech Restriction's meaning and enforcement are left to the discretion of public officials (including volunteers) on the scene. This approach "necessarily entrusts lawmaking to the moment-to-moment judgment" of enforcement officials. *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999).

B. Appellees Are Likely to Prevail on the Merits of Their Claim on the Vote Nullification Provision.

Appellants failed to defend, and have waived, any defense for the constitutionality of the Vote Nullification Provision. *Smith*, 194 F.3d at 1052.

Should the Court address the merits of the Vote Nullification Provision, it should affirm the district court's finding that the provision "is utterly without precedent" and unconstitutional under the Equal Protection Clause. [ER-035, 44].

The Vote Nullification Provision imposes the most extreme burden on voting rights: total disenfranchisement. The scale of this disenfranchisement is unprecedented, as the actions of a single official could nullify millions of votes. The Supreme Court has held that "A state law or practice that unduly burdens or restricts…[the] fundamental right [to vote] violates the Equal Protection Clause." *Election Integrity Project Cal., Inc. v. Weber*, 113 F.4th 1072, 1082 (9th Cir. 2024). Courts analyze such unequal burdens on the right to vote under the *Anderson-Burdick* framework, which applies a sliding scale of scrutiny based on the severity of the burden. *Tedards v. Ducey*, 951 F.3d 1041, 1066 (9th Cir. 2020). Severe restrictions require strict scrutiny, while lesser restrictions are subject to a less exacting review. The Vote Nullification Provision fails both tests.

The district court found, "it is hard to understand how the burden could be any more severe than throwing out all affected votes entirely." [ER-040]. Courts have repeatedly found that even disenfranchising thousands of votes is a severe burden. *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006); *Ne. Ohio Coal. v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012); *Democratic Exec. Comm. Of Florida v. Lee*, 915 F.3d 1312, 1319–22 (9th Cir. 2019). Here, as few as three county supervisors could disenfranchise millions of votes. This burden is particularly egregious

because voters can comply with all legal requirements for voting, yet their ballots may be discarded due to the nonfeasance or malfeasance of a few public officials.

Below, Appellants argued that the Vote Nullification Provision was justified by its interest in ensuring the finality of election results. [ER-037]. But Appellants never demonstrated that disenfranchisement is necessary to achieve that goal. As the district court found, there are several less restrictive alternatives, such as seeking mandamus relief, allowing the Secretary to certify the canvass, or appointing a special master to certify vote totals. Since the Vote Nullification Provision is not narrowly tailored, it is unconstitutional.

C. Appellees Satisfied the Remaining Preliminary Injunction Factors.

1) The Deprivation of Constitutional Rights is Irreparable Injury.

As this Court has found, "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Baird*, 81 F.4th at 1042 (collecting cases); *see also Cal. Chamber of Com.*, 29 F.4th at 482 ("Irreparable harm is relatively easy to establish in a First Amendment case" because the plaintiff "need only demonstrate the existence of a colorable First Amendment claim.").

Appellants argue Appellees are not irreparably harmed due to their "purported delay in bringing the lawsuit," [OB p. 76]. However, there is little evidence of any delay given the timeframe in which Appellees filed this case and sought preliminary injunctive relief. The final 2023 EPM was published on January 11, 2024, and Appellees filed suit less than six months later, on July 8, 2024. [ER-001; 2-ER-274]. They promptly moved for preliminary injunctive relief—on the Speech Restriction on July 18,

2024, and on the Vote Nullification Provision on August 2, 2024. [SER-0065, -0088]. These actions occurred well before the election, as the threat of speech suppression and vote nullification became more imminent.

Appellants also argue that Appellees are not suffering irreparable harm because the Speech Restriction has not been enforced against them. [OB, p. 77]. This argument misunderstands the standard for pre-enforcement First Amendment challenges. With a credible threat of enforcement, a plaintiff "need only demonstrate that a threat of potential enforcement will cause [her] to self-censor." *Tingley*, 47 F.4th at 1068. Given the uncontroverted evidence regarding self-censorship, the threatened enforcement of these restrictions constitutes irreparable harm.

2) The balance of harms and the public interest support injunctive relief.

The suppression of core political speech or the disenfranchisement of all voters in an entire county cannot serve the public interest. *Baird*, 81 F.4th at 1042 ("A plaintiff's likelihood of success on the merits of a constitutional claim also tips the merged third and fourth factors decisively in his favor"). In fact, "it is always in the public interest to prevent the violation of a party's constitutional rights." *De Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up). Appellants "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). Thus, Appellants cannot present any harms to balance against the public's significant interest in free expression and enfranchisement.

Appellants contend they have an interest in "protecting the ability of voters to vote safely and securely." [OB, p. 68]. However, they have not shown how those interests are harmed by the injunction. Appellants' interest in safe and secure elections can be satisfied through less restrictive means than criminalizing broad categories of core political speech or disenfranchising voters on a large scale. Moreover, Appellants can provide whatever guidance they deem necessary to "help election officials identify and address potential instances of intimidation," *id.*, without creating new criminal conduct not grounded in state statute.

Appellants claim the existence of the injunction in the State case weighs against an injunction here. However, the State case involves different parties and different claims. Notably, it includes no federal constitutional claims. Moreover, Appellees have a fundamental right to seek the proper forum for their claims that the Speech Restriction and Vote Nullification Provision violate the federal constitution. *Porter*, 319 F.3d at 492 (providing that federal courts must "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims").

Finally, Appellants argue that Appellees' purported "eleventh-hour injunction...violated the *Purcell* doctrine." [OB, p. 79]. But Appellees did not file their injunction in the "eleventh hour." Both injunctions were filed within fifteen days of filing suit. [SER-0065, -0088]. In any event, *Purcell* involved "factual disputes" that required more time to resolve. 549 U.S. at 6. The pure legal questions in this case involve no such factual complexities.

The public interest and balance of harms strongly favor enjoining Appellants' patently unconstitutional restrictions on free speech and the right to vote.

Conclusion

Appellees have shown standing and entitlement to injunctions for both the Vote Nullification Provision and Speech Restriction. They have likewise shown that *Pullman* abstention is inappropriate. The district court's order should be affirmed.

Dated this 7th day of March 2025.

/s/ Andrew Gould

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(c) and Ninth Circuit rule 32-1, this brief is proportionally spaced with a typespace of 14 with 13,997 words.

Dated: March 7, 2025

/s/ Andrew Gould

CERTIFICATE OF SERVICE

I certify I electronically filed RESPONDENTS BRIEF with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF electronic filing system on PACER.

I certify all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: March 7, 2025

/s/ Andrew Gould