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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

ARIZONA FREE ENTERPRISE CLUB, an Arizona non-profit corporation, Plaintiff, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, Defendant.	No. CV2024-002760 **SECRETARY OF STATE'S MOTION TO DISMISS AND RESPONSE TO APPLICATION FOR ORDER TO SHOW CAUSE** (Assigned to the Hon. Jennifer Ryan-Touhill)

Arizona Secretary of State Adrian Fontes moves to dismiss the Complaint for Declaratory Relief filed by plaintiff Arizona Free Enterprise Club pursuant to Ariz. R. Civ. P. 12(b)(1) and (6). In addition, the Secretary opposes Plaintiff's Application for Order to Show Cause. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Following a trio of recent cases in which the Arizona Supreme Court has considered whether a particular provision of the Arizona Elections Procedures Manual (the "EPM") should guide the court's resolution of a legal issue properly before the court, litigation over the EPM has exploded. *See, e.g., Leibsohn v. Hobbs*, 254 Ariz. 1 (2022); *Leach v. Hobbs*, 250 Ariz. 572 (2021); *McKenna v. Soto*, 250 Ariz. 469 (2021). Plaintiff has been at the forefront of that litigation boom, filing two lawsuits in Yavapai County challenging provisions in the 2019 EPM, and now this case challenging provisions in the 2023 EPM with which it disagrees. But Arizona's "rigorous standing requirement" requires more than a belief that the EPM is not consistent with the law to seek relief from this Court. *See Fernandez v. Takata Seat Belts, Inc*., 210 Ariz. 138, 140, ¶ 6 (2005). Indeed, Plaintiff must allege "a distinct and palpable injury." *Id*. And to obtain the declaratory relief it seeks, Plaintiff must allege "sufficient facts to establish that there is a justiciable controversy." *See Town of Wickenburg v. State*, 115 Ariz. 465, 468 (App. 1977). Plaintiff has done neither.

In this case, Plaintiff seeks to invalidate provisions in the EPM that provide guidance to poll workers concerning what constitutes electioneering in violation of A.R.S. § 16-515 and voter intimidation or harassment at drop boxes and polling places in violation of A.R.S. §§ 13-3102, 16-1013, and -1017. (*See* Compl. ¶¶ 54(a)-(h) (citing EPM, at 74 n.40, 180-82).) Contrary to Plaintiff's contention, the challenged EPM provisions do not create new criminal laws nor violate the free speech rights of Plaintiff

or its members. Instead, they merely help election workers—who do not have legal authority to investigate or prosecute crime—to identify conduct that may disrupt the peace of voters and election workers carrying out their important role in our democracy. *See Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (concluding that electioneering restrictions survived strict scrutiny review and did not violate the First Amendment).

In addition, Plaintiff complains that an EPM provision that explains the elections in which a federal-only voter is entitled to participate both conflicts with Arizona law and violates political parties' freedom of association. (*See* Compl. ¶¶ 67-75.) But the state law that Plaintiff alleges conflicts with the EPM is preempted by federal law. And Plaintiff does not have standing to assert the constitutional rights of Arizona's political parties.

In short, each of the challenged EPM provisions is within the Secretary's authority to promulgate and none of them contravenes the laws they help to implement. *See Leach*, 250 Ariz. at 576, ¶ 21 (holding that an EPM provision that exceeds the Secretary's statutory authority or "contravenes an election statute's purpose" does not have the force of law); *see also* A.R.S. § 16-452 (directing the creation of the EPM). To the extent that Plaintiff thinks its constitutional rights are at risk of being violated, it is the laws that the EPM helps implement, not the challenged EPM provisions, that Plaintiff should have challenged. But it did not do so, and Plaintiff's Complaint should be dismissed.

Argument

Dismissal under Rule 12(b)(1) "allows a trial court to dismiss an action for lack of subject matter jurisdiction." *Falcone Brothers & Assoc., Inc. v. City of Tucson*, 240 Ariz. 482, 487, ¶ 10 (App. 2016). Dismissal for failure to state a claim under Rule 12(b)(6) is appropriate when the plaintiff is not, under any interpretation of the facts that can be proven, entitled to relief. *Silverman v. Ariz. Health Care Cost Containment Sys.*, 255 Ariz. 387, ¶ 9 (App. 2023). "Even under liberal notice pleading rules, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Dube v. Likins*, 216 Ariz. 460, 424, ¶ 14 (App. 2007) (cleaned up). "When testing a motion to dismiss for failure to state a claim, well-pleaded material allegations of the Complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417 (App. 1989).

I. Plaintiff Lacks Standing to Bring this Action, Which Does Not State a Justiciable Controversy.

Arizona courts have "a rigorous standing requirement" that requires a plaintiff to "allege a distinct and palpable injury" before a case may be heard. *Fernandez*, 210 Ariz. at 140, ¶ 6. "An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). Although standing raises only "questions of prudential or judicial restraint," courts consider cases "without such an injury 'only in exceptional circumstances.'" *Fernandez,* 210 Ariz. at 140, ¶ 6 (citation omitted). This case does not present exceptional circumstances. In particular, "[t]o have standing to bring a constitutional challenge, . . . a plaintiff must allege injury resulting from the putatively illegal conduct." *Sears,* 192 Ariz. at 70, ¶ 23. Plaintiff has alleged no such injury either in its own right or as a representative of its members.

Moreover, a declaratory judgment is not available to any person who simply thinks a government official has misinterpreted a law or acted beyond the official's authority. Instead, "a plaintiff must show that its 'rights, status or other legal relations' are 'affected by'" the law at issue. *Arizona Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224, ¶ 16 (2022) (quoting A.R.S. § 12-1832). "[A] declaratory judgment must be based on an actual controversy which must be real and not theoretical." *Town of Wickenburg*, 115 Ariz. at 468. And "a plaintiff must have an actual or real interest in the matter for determination." *Ariz. Sch. Bds. Ass'n*, 252 Ariz. at 224, ¶ 16 (cleaned up).

For a case to be justiciable, a plaintiff must be "seeking judicial relief from actual or threatened injuries." *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 420, ¶ 11 (2022). When a plaintiff has not already incurred a "distinct and palpable" injury, the standing question is "whether an actual controversy [otherwise] exists" because the plaintiff has a "real and present need" to resolve the case to avoid imminent harm. *Id*. at 424-25, ¶¶ 29-30. A "speculative fear" does not merit declaratory relief. *See Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986). In this case, Plaintiff has identified no actual or threatened injury. Its alleged harm stems solely from its misinterpretation of the law set forth in the EPM.

A. Plaintiff Lacks Organizational Standing.

Plaintiff has not alleged any real or imminent harm that it as an organization will suffer as a result of the challenged 2023 EPM provisions. Instead, Plaintiff makes only general statements that it "must be able to engage with the public and other officials, and the EPM is having a direct chilling effect on these duties and obligations." (Compl. ¶ 46). But Plaintiff does not allege that it as an organization is even capable of engaging in the conduct that the challenged EPM provisions ostensibly regulate, *e.g.,* drop box and polling place monitoring or voting in the Presidential Preference Election ("PPE") or primary elections. Indeed, Arizona law does not provide a criminal penalty for an organization, as opposed to its individual members, that engages in voter intimidation. *See* A.R.S. § 16-1013(B) (identifying "[a] person whether acting in his individual capacity or as an officer or agent of a corporation" as the target of the criminal prohibition on voter intimidation).

Nor did Plaintiff allege that it will need to divert resources to address the effects of the challenged EPM provisions. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to the frustration of that purpose."). Indeed, as the Arizona Supreme Court

recently recognized, "to hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate standing doctrine's actual injury requirement." *Ariz. Sch. Bds. Ass'n.*, 252 Ariz. at 219, 224, ¶ 18 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). As such, Plaintiff cannot establish that it has standing to pursue the claims in its Complaint.

B. Plaintiff Lacks Standing as a Representative of Its Members

Plaintiff has also failed to establish that it has standing as a representative of its members. Indeed, while Plaintiff alleges that its "members include registered voters who are affected by unconstitutional laws set forth in the EPM," it provides no specific allegation as to how its members experience an injury, nor how any such injury is different from Arizona voters at large. (Compl. ¶ 10). "The test for representational standing in Arizona is 'whether, given all the circumstances in the case, the [organization] has a legitimate interest in an actual controversy involving its members and whether judicial economy and administration will be promoted by allowing representational appearance.'" *Arcadia Osborn Neighborhood Ass'n v. Clear Channel Outdoor, LLC*, 256 Ariz. 88, 95, ¶ 24 (App. 2023) (quoting *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svcs.*, 148 Ariz. 1, 6 (1985)). "A primary consideration in this test is whether the [organization's] members would have standing to sue in their own right." *Id*. Where a plaintiff seeking to establish representational standing "does not identify particularized harm, injury in fact, or damage peculiar to any specific member," it "cannot assert representational standing." *Id*. at 95, ¶ 25 (declining to recognize representational standing where organizational plaintiff "failed to establish standing on behalf of any of its members"). Here, Plaintiff has alleged no such harm.

Notably, Plaintiff does not even identify any members, let alone members who have allegedly been harmed, which by itself warrants dismissal. *Id.*; *Home Builders Ass'n of Cent. Arizona v. Kard*, 219 Ariz. 374, 379, ¶ 21 (App. 2008) ("[A]llowing the subject complaint to proceed on a representational basis, without an allegation either of

damage to [the organization] or to an identified member . . . would similarly eviscerate our standing requirement."). Concerning harm itself, Plaintiff fails to identify any real harm to its members that has either been inflicted or is imminent. Indeed, Plaintiff does not actually state that its members intend to participate in any of the activities described in the EPM provisions at issue.

Instead, Plaintiff makes broad, sweeping statements of how its "members include registered voters" who are "interested in observing activity at drop boxes" and "in conveying a message to others that the drop boxes are being watched and should be watched." (Compl. ¶¶ 10, 38). But nothing in the challenged EPM provisions prohibits drop box observation. And it is not enough for Plaintiff to have members who are "interested" in observing drop boxes. Instead, the law requires Plaintiff to "have articulated a 'concrete plan to violate the law in question.'" *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cited approvingly in *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280, ¶ 39 (2019)). Plaintiff has not done so, and so it lacks standing to bring this pre-enforcement challenge.[1]

II. EPM Provisions Providing Examples of Unlawful Electioneering, Intimidation, or Harassment Do Not Violate Plaintiff's Free Speech Rights.

A. The EPM Provisions Explain, But Do Not Expand, Arizona Laws Regarding Voter Harassment and Electioneering.

Plaintiff's Count I alleges that certain provisions in the 2023 EPM "criminalize" protected political speech in violation of their rights under the First Amendment and Arizona Constitution article 2, § 6. (Compl. ¶¶ 36-48, 54-55, 62, 64). But the challenged provisions of the 2023 EPM do not create new laws. Instead, they give additional guidance to election administrators who must carry out laws enacted by the legislature. *See* A.R.S. § 16-535(B) (requiring the election marshal to preserve order at the polls and permit no violation of election laws); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *4 (D. Ariz. Feb. 29, 2024) ("The EPM serves a 'gap-

[1] For the same reason, Plaintiff's claims are not ripe. *See id.* at 1138-39.

filling function' to address election matters not specifically addressed by statute."). Arizona statutes contain several restrictions on voter intimidation, harassment, and electioneering. But, Plaintiff's claims completely misunderstand the EPM provisions it challenges, complaining of free speech violations where none exist.

Plaintiff's claim that the EPM criminalizes specific political speech and thereby violates Plaintiff's First Amendment rights is disingenuous, as not only does Plaintiff acknowledge that the conduct it wants this Court to allow is already criminal under Arizona law, Plaintiff speaks with approval of those same criminal laws. (*See* Compl., ¶¶ 56, 61). In other words, Plaintiff finds no fault with the criminal statutes, but nevertheless accuses the Secretary of going beyond his authority merely because the EPM identifies specific examples of conduct election workers may encounter in carrying out their duties that may constitute illegal activity. The EPM provisions that Plaintiff identifies in Count I of its Complaint do not contravene those statutes or unconstitutionally expand prohibited conduct. *See Leach*, 250 Ariz. at 576, ¶ 21. Indeed, the "free speech rights" that Plaintiff asserts "conflict with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud." *Burson*, 504 U.S. at 211 (upholding 100-foot electioneering restriction because "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right").

Contrary to Plaintiff's assertions, it is well within the Secretary's authority in issuing the EPM to provide instruction on how to address conduct at polling places and drop boxes that may interfere with voters and election workers. *See* A.R.S. §§ 16-452(A)-(B), -535(B) ("The election marshal shall preserve order at the polls and permit no violation of the election laws from the opening of the polls until the count of the ballots is completed."). This is particularly true because the conduct Plaintiff champions here is not protected speech. *See State v. Brown*, 207 Ariz. 231, 234, ¶ 8 (App. 2004) ("Although [the harassment statute] prohibits certain kinds of 'communication,' it is well

established that resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act raises no question under that instrument.") (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940) (cleaned up); *see also* Ariz. Const. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, *being responsible for the abuse of that right*.") (emphasis added). "It is inconceivable that the First Amendment grants to anyone an 'inalienable right' to wilfully and maliciously traverse the peace and quiet of his fellow citizens, by conduct" that is loud, offensive, threatening, violent, or abusive. *State v. Starsky*, 106 Ariz. 329, 332 (1970). Such actions "are not an exercise of rights but rather are an abuse of rights and entails a gross lack of understanding—or calloused indifference—to the simple fact that the offended parties also have certain rights under the same Constitution." *Id*.

Each EPM provision that Plaintiff challenges in Count I cites or references the statutes that prohibit the described conduct. In particular, the EPM provisions give guidance on A.R.S. §§ 13-3102, 16-515, -1013, -1017, and 26-170. *See* EPM, at 180-83. Indeed, unlike the EPM provisions at issue in cases like *Leach* and *Arizona Alliance for Retired Americans v. Crosby*, 537 P.3d 818 (Ariz. App. 2023), complying with the guidance Plaintiff challenges will not result in a violation of the statutes the provisions interpret.

Plaintiff breaks its challenge in Count I into eight separate paragraphs addressing one footnote in the EPM section regarding rules for drop boxes and the guidance in EPM chapter 9, section III regarding "Preserving Order and Security at the Voting Location." (Compl. ¶ 54); EPM at 74. n.40, 180-82. These provisions can be understood as addressing conduct that (a) has the intent or effect of threatening, harassing, intimidating, or coercing voters (Compl. ¶ 54(a)); (b) electioneering audible within the 75-foot limit (*id.* ¶ 54(b)); and (c) examples of conduct that may constitute "potentially intimidating conduct" or "likely" voter intimidation or harassment (*id.* ¶¶ 54(c)-(h)). Yet Plaintiff

then gives only two examples of where the EPM goes too far: the provision describing aggressive behavior, "such as raising one's voice or taunting a voter or poll worker;" and the provision prohibiting electioneering "outside the 75-foot limit if [it] is audible from a location inside the door to the voting location." (Compl. ¶¶ 54(b)-(c), 63-64 (citing EPM, at 180, 182)). Plaintiff claims that "it is highly unclear what might constitute 'insulting' a poll worker, 'aggressive behavior,' or 'raising one's voice.'" (Compl. ¶ 64). These provisions, however, are wholly consistent with the statutes that they help explain to election workers.

Indeed, it is criminal to threaten, harass, intimidate, or coerce a voter. A.R.S. §§ 13-2921, -1202, 16-1013. Harassment is "conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed, humiliated or mentally distressed and the conduct in fact seriously alarms, annoys, humiliates or mentally distresses the person." A.R.S. § 13-2921(E). Also, for poll workers, "[a] person who at any election knowingly interferes in any manner with an officer of such election in the discharge of the officer's duty . . . is guilty of a class 5 felony." A.R.S. § 16-1004(A). Insulting a poll worker, engaging in aggressive behavior toward a poll worker, or even raising one's voice inside a polling place may constitute such interference and the EPM does not go too far when listing these examples.

Similarly, the instruction concerning electioneering activity that can be heard inside a polling place is not improper. Electioneering is "when an individual knowingly, intentionally, by verbal expression and in order to induce or compel another person to vote in a particular manner or to refrain from voting expresses" support or opposition to a candidate or ballot measure. A.R.S. § 16-515(I). The statute provides that a person shall not engage in electioneering within seventy-five feet of a voting location. A.R.S. §§ 16-515(A), -1018(1). But under Plaintiff's argument, a person would be allowed to stand seventy-six feet outside of a voting location and make enough noise to disturb voters within the voting location. This is an absurd result. The EPM's approach that a person

not make themselves audible within the voting location and thereby disturb voters is perfectly reasonable. *See State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 101 (2014) ("Statutes should be construed sensibly to avoid reaching an absurd conclusion."); *State v. Robles*, 88 Ariz. 253, 256 (1960) (upholding predecessor electioneering statute, the purpose of which was "to prevent interference with the efficient handling of the voters by the election board and to prevent delay or intimidation of voters").

Indeed, electioneering that is so loud it can be heard from over 75 feet away by voters inside a voting location also qualifies as interfering or impeding their voting, and potentially intimidating voters. It violates Arizona law to "in any manner . . . practice intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting for a particular person or measure . . . or otherwise interfere with the free exercise of the elective franchise of any voter." A.R.S. § 16-1013(A)(1)-(2). It is also criminal for a voter to knowingly "[h]inder[] the voting of others." A.R.S. § 16-1017(6). The sensible EPM provisions regarding electioneering help implement these laws, which Plaintiff expressly approves.

B. The Challenged EPM Instructions Are Guidance for Election Administrators, Not Plaintiff.

Plaintiff's allegations that the Secretary is going beyond his authority to create criminal laws stem from the language of A.R.S. § 16-452(C)—that "[a] person who violates" any EPM rule is guilty of a misdemeanor. But the EPM provisions Plaintiff challenges are not directed at voters or other members of the public. Instead, the EPM provisions at issue explicitly apply to improving "procedures for early voting and voting," making clear that these instructions are for those people involved in running elections. A.R.S. § 16-452(A).

The first provision Plaintiff challenges relates to drop box observation. (*See* Compl. ¶¶ 34(a), 54(h)). The EPM begins with the unobjectionable statement that:

> The County Recorder or officer in charge of elections may establish and implement additional local procedures for ballot drop-off locations to

> protect the security and efficient operation of the ballot drop-off location. For example, the County Recorder or officer in charge of elections may restrict activities that interfere with the ability of voters and/or staff to access the ballot drop-off location free from obstruction or harassment.

EPM at 73-74. The EPM then lists, in a footnote, "[*s]ome examples* of actions that likely constitute voter intimidation or harassment." *Id.* at 74 n.40 (emphasis added). Plaintiff's real disagreement appears to be with this footnote. But as the context shows, this footnote merely provides guidance to the "County Recorder or officer in charge of elections" related to what activities they "may restrict." *Id.* at 73-74. It does not impose a standard of criminal liability on Plaintiff or anyone else.

The second provision that Plaintiff challenges in Count I relates to preventing voter intimidation at polling places. (*See* Compl. ¶¶ 34(b), 54(a)-(g)). The EPM provides that "[t]he officer in charge of elections has a responsibility to train poll workers and establish policies to prevent and promptly remedy any instances of voter intimidation." EPM at 181. The EPM then lists examples of conduct that "may also be considered intimidating conduct." EPM at 182-183. It is this list to which Plaintiff objects. (*See* Compl. ¶¶ 34(b), 54(a)-(g)). But any fair reading of the EPM makes clear that this list is meant to inform how the officer in charge of elections exercises his responsibility to prevent and promptly remedy voter intimidation. *See* EPM at 181; A.R.S. § 16-535(A). It does not impose a new duty on Plaintiff or anyone else.

In reality, despite its claims to the contrary, Plaintiff has tried to raise a constitutional challenge to certain Arizona criminal laws. But instead of suing the party charged with enforcing such laws and following the necessary procedures to make such a constitutional challenge, it has conjured a claim against the Secretary that does not hold up to scrutiny. *See* A.R.S. § 16-1021 (entrusting enforcement authority to the attorney general and county attorneys); A.R.S. § 12-1841 (requiring service of complaint alleging that a "state statute . . . or rule is . . . unconstitutional" on the attorney general, the speaker of the house, and the president of the senate). The Secretary's guidance to election workers neither conflicts with the statutes that Plaintiff cites nor unconstitutionally

infringes Plaintiff's speech. Instead, it protects voters' "right to cast a ballot in an election free from the taint of intimidation and fraud" by giving guidance to counties to efficiently and consistently maintain the "restricted zone around polling places [that] is necessary to protect [the] fundamental right" to vote. *Burson*, 504 U.S. at 211.

III. The EPM Provision Regarding Federal-Only Voters Does Not Violate Associational Rights—of Plaintiff or Anyone Else.

Count II of the Complaint does not state a claim for relief, and must be dismissed. It is not clear whether Plaintiff challenges the provision of the EPM stating that "[a] 'federal-only' voter is eligible to vote solely in races for federal office in Arizona (including the Presidential Preference Election (PPE))" only as to the PPE or if it also challenges that provision as it affects the primary election. 2023 EPM, at 3; (*compare* Compl. ¶ 74 (referring to the PPE), *with* ¶ 75 (referring to "Arizona primaries")).[2] Regardless of whether Plaintiff meant to confine its claim to the PPE or more broadly challenges the foregoing EPM provision as it relates to the primary election, too, it is subject to dismissal as a matter of law.

Of course, Plaintiff's claim is moot as to the 2024 PPE, and would be barred by laches even if the PPE had not already occurred. Plaintiff filed this action too late to obtain relief for the March 19, 2024 PPE. While Plaintiff filed an Application for Order to Show Cause on February 13, 2024, it failed to take any other steps to seek expedited consideration of Count II. Moreover, by the time Plaintiff filed its Complaint, PPE ballots had already been mailed to some voters, and the early voting period was less than two weeks away. Accordingly, Count II must be dismissed as it relates to the 2024 PPE. As for future PPEs in 2028 and beyond, they will be governed by EPMs issued in 2027 or later.

[2] The PPE is the mechanism used to determine delegates to the presidential nominating conventions. *See* A.R.S. § 16-241. The primary election, on the other hand, is the election through which all other partisan candidates compete to be their party's nominee for the November general election. *See* Ariz. Const. art. 7, §10.

Count II is also subject to dismissal because federal law preempts the Arizona statute concerning federal-only voters with which Plaintiff alleges the EPM conflicts. (*See* Compl. ¶¶ 72-73.) Plaintiff asserts that the challenged EPM provision "exceeds and contradicts" A.R.S. § 16-127(A)(1), which provides that "[n]otwithstanding any other law" a registered voter "who has not provided satisfactory evidence of citizenship as prescribed by section 16-166 is not eligible to vote in presidential elections." (Compl. ¶ 73.) But federal law preempts A.R.S. § 16-127, and it therefore cannot support Plaintiff's argument that the challenged EPM provision is inconsistent with Arizona law.

After the Supreme Court decided *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013) ("*ITCA*"), which held that the National Voter Registration Act ("NVRA") requires Arizona to accept voter registrations submitted without documentary proof of citizenship ("DPOC"), the state instituted a bifurcated voter registration system. 2023 EPM, at 3. A registrant who submits DPOC with their voter registration is treated as a "full-ballot" voter and is eligible to vote for federal, state, and local candidates and issues. *See Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *1 (D. Ariz. Feb. 29, 2024); 2023 EPM, at 3. A registrant who does not submit DPOC but attests under oath that the registrant is a United States citizen is considered a "federal-only" voter, and will receive a ballot containing only federal offices. *Mi Familia Vota*, 2024 WL 862406, at *1; 2023 EPM, at 8.

A.R.S. § 16-127(A)(1) purports to bar federal-only voters from voting in presidential elections. The statute, however, is preempted by the NVRA. *See Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at *5-8, *18 (D. Ariz. Sept. 14, 2023) (granting summary judgment for plaintiffs on claim that the NVRA preempts A.R.S. § 16-127(A)). In holding that A.R.S. § 16-127 is preempted by federal law, the district court properly concluded that it was required to do so based on the decision in *ITCA* and the consent decree in *League of United Latin American Citizens v.*

Reagan, No. CV-17-04102-PHX-DGC, Doc. 37 (D. Ariz. June 18, 2018). *See Mi Familia Vota*, 2023 WL 8181307, at *5-8.

"[W]hen federal and state law conflict, federal law prevails and state law is preempted." *Knox v. Brnovich*, 907 F.3d 1167, 1173 (9th Cir. 2018). This is particularly important when Congress acts under the Elections Clause, "which empowers Congress to 'make or alter' state election regulations." *See Ariz. All. for Retired Ams. v. Hobbs*, 630 F. Supp. 3d 1180, 1193 (D. Ariz. 2022) (citing U.S. Const. Art. I, § 4, cl. 1 and quoting *ITCA*, 570 U.S. at 14). As such, the EPM's instruction that "[a] federal-only voter is eligible to vote solely in races for federal office in Arizona (including the Presidential Preference Election (PPE))" is a correct statement of the law and Plaintiff cannot succeed on Count II. 2023 EPM, at 3, 215.

In an attempt to transform the EPM's appropriate recognition of the NVRA's preemption of A.R.S. § 16-127(A)(1) into an infringement of its First Amendment rights, Plaintiff makes up a new category of voters—"state-party voters." (Compl. ¶ 74.) Plaintiff's argument, however, conflates two disparate things—eligibility to vote for federal candidates and political party membership. Nothing in Arizona law creates a thing called a "state-party voter," and the EPM provision recognizing that federal-only voters are permitted to vote for federal candidates in all elections in which they appear—including the PPE and primary—does not infringe the associational rights of political parties.[3]

It is difficult to discern exactly what Plaintiff means when it alleges that the EPM "requires Arizona political parties to allow voters who are not registered as state-party voters to vote in the PPE." (*Id.*) To the extent that Plaintiff alleges that the challenged

[3] Notably, the Republican Party of Arizona, LLC has filed its own lawsuit challenging certain EPM provisions, including the one identified in Count II. *See Republican Nat'l Comm. v. Fontes*, No. CV2024-050553, Compl. ¶¶ 57-61 (Ariz. Super. Ct. Maricopa Cnty.). The Party, however, did not assert a First Amendment violation. If a political party does not allege that its associational rights are injured by this provision, *a fortiori* Plaintiff—"a private organization that advocates for public policy solutions"—cannot demonstrate an injury to its associational rights. (Compl. ¶ 8.)

EPM provision permits federal-only voters who are not registered members of a political party that is participating in the PPE to vote in the PPE, Plaintiff has misread the EPM. Indeed, the EPM makes it abundantly clear how party registration affects eligibility to vote in the PPE: "Only qualified electors registered with the political parties participating in the PPE may vote in the PPE. Independent voters or voters with no party preference and voters affiliated with a political party that is not participating in the PPE may not participate." 2023 EPM, at 121 (citing A.R.S. § 16-241(A) and Ariz. Atty. Gen. Opinion I99-025 (1999)).

If Plaintiff is arguing that a political party can choose which of its registered members are eligible to vote in the PPE or primary elections, the right to freedom of association does not allow a political party to exclude otherwise eligible voters from voting in the PPE or primary. *See Smith v. Allwright*, 329 U.S. 649, 665-66 (1948) (concluding that the Texas Democratic Party could not exclude eligible Black citizens from participating in the Democratic Primary). Under federal law, Arizona must permit federal-only voters to vote for federal candidates in all elections in which those candidates appear on the ballot. *See Mi Familia Vota*, 2023 WL 8181307, at *6; *see also* Ariz. Const. art. 7, § 10. Plaintiff's right to freedom of association is not implicated by the EPM's recognition of controlling law.

IV. The EPM Provisions Are Not Void Due to Vagueness.

In Count III, Plaintiff claims the Secretary "do[es] not define the offenses he seeks to criminalize" with enough particularity to satisfy due process, identifying provisions challenged in Counts I and II as the vague language. (Compl. ¶¶ 78, 84). But as explained above, by providing elections officials with examples of conduct that the legislature has already prohibited, the Secretary is not criminalizing anything.

Moreover, a criminal law is unconstitutionally vague if it does not "define the criminal offense" with "sufficient definiteness" and in a way that "does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-

03 (2010) (cleaned up). Here, the EPM's examples provide more explanation of conduct prohibited by the legislature, not less.

Indeed, the EPM provisions challenged in Count I lay out clear examples of potentially harassing or intimidating conduct and voter interference that election workers should watch out for. As for Count II, there is only a single sentence at issue, and this sentence is clear: federal-only voters are limited to federal elections, including PPEs. For neither of these counts is there any indefiniteness or arbitrariness such that those to whom the EPM provisions at issue apply–namely, election workers–would suffer confusion. In short, instead of injecting vagueness, the EPM helps clarify the existing criminal statutes.

V. Plaintiff Has Not Established it Is Entitled to Expedited Relief.

Four days after filing its Complaint, Plaintiff filed a brief Application for Order to Show Cause in which it alleged that impending election deadlines—all of which are now past—required expedited relief. (App. for Order to Show Cause, at 2). Moreover, an application for order to show cause must be "supported by affidavit showing sufficient cause." Ariz. R. Civ. P. 7.3(a). But the affidavit attached to Plaintiff's Application, is nothing more than a rote recitation of election dates and the vague allegations in the Complaint about the desires, but not concrete plans, of Plaintiff's members with respect to drop box and polling place observation. (*See* Aff. of S. Mussi, ¶¶ 3-10). It does not support expedited relief.

Plaintiff's delay in seeking declaratory relief regarding the challenged EPM provisions belies their need for emergency relief now. In the context of fast-approaching elections, a party must not ask the "court to decide a difficult question of Arizona constitutional law . . . when such a question could have been presented much earlier." *Mathieu v. Mahoney*, 174 Ariz. 456, 460 (1993); *see also Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D. Ariz. Dec. 9, 2020) ("Laches can bar untimely claims for relief in election cases, even when the claims are framed as constitutional

challenges."). "Courts should not be forced to make hasty legal decisions in such important areas" when the election is looming and the plaintiffs could have brought their lawsuit earlier. *Mathieu*, 174 Ariz. at 460. "Unreasonable delay can prejudice the administration of justice by compelling the court to steamroll through . . . delicate legal issues." *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (9th Cir. 2016) (cleaned up). Indeed, a plaintiff's dilatory conduct in bringing a claim that affects preparation for elections, such as training poll workers, warrants dismissal on laches grounds. *Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 15 (1998).

Here, while Plaintiff cannot be said to have unreasonably delayed challenging any new provision in the 2023 EPM, most of the 2023 EPM provisions at issue are identical to those in the 2019 EPM.[4] In fact, the only fully new provision challenged is the list of examples that "likely constitute voter intimidation or harassment" cited in a footnote of the EPM section regarding drop boxes. (Compl. ¶ 54(h) (citing 2023 EPM, at 74 n.40). Notably, in one of the other lawsuits that Plaintiff filed and remains pending in Yavapai County, Plaintiff challenged the drop box rules in the 2019 EPM. When the Secretary provided the 2023 EPM's version of the drop box rules to the Court in early January 2024, Plaintiff did not argue that the new footnote violated its rights.[5]

Finally, while Plaintiff sought expedited relief regarding a March 12, 2024 election and the March 19, 2024 PPE, those dates have since passed, mooting the need for expedited consideration regarding these elections. (Compl. ¶ 22).

Conclusion

For the foregoing reasons, Plaintiff's Complaint should be dismissed for lack of standing and failure to state a claim upon which relief can be granted. In addition, Plaintiff's request for expedited consideration should be denied.

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[4] *See* 2019 EPM, at 3, 178, 180-81, available at: https://apps.azsos.gov/election/files/epm/2019_elections_procedures_manual_approved.pdf.

[5] *See Ariz. Free Enterprise Club v. Fontes,* No. S1300CV2023-00872, Pls.' Resp. to Sec. of State's Not. of Supp. Authority (Ariz. Super. Ct. Yavapai Cnty. Jan. 17, 2024).

RESPECTFULLY SUBMITTED this 20th day of March, 2024:

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Certificate of Good Faith Consultation

Pursuant to Ariz. R. Civ. P. 7.1(h) and 12(j), undersigned counsel hereby certifies that on March 19, 2024, counsel for Secretary of State Adrian Fontes participated in a videoconference with counsel for Plaintiff, as well as counsel for Proposed Intervenors Arizona Alliance for Retired Americans, Voto Latino, the Democratic National Committee, and the Arizona Democratic Party. During the videoconference the parties discussed whether the issues identified in the foregoing Motion to Dismiss could be resolved by an amendment to the Complaint. The parties were unable to come to an agreement during the conference.

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