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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA FREE ENTERPRISE CLUB, et al., Plaintiffs, v. ADRIAN FONTES, et al., Defendants.	No. CV2024-002760 **MOTION FOR LEAVE TO FILE AN AMENDED AMICUS BRIEF** (Assigned to the Honorable Jennifer Ryan-Touhill)

In light of Plaintiffs having filed an amended complaint, the League of Women Voters of Arizona, Protect Democracy Project, and Campaign Legal Center move for leave to file an amended amicus brief in support of Defendants' Motions to Dismiss. The proposed amended amicus brief is attached as **Exhibit A**. Plaintiffs do not oppose this motion for leave to file an amended amicus brief.

I. Arizona trial courts have the authority to accept amicus briefs.

"Courts have inherent power to do all things reasonably necessary for the administration of justice," *Schavey v. Roylston*, 8 Ariz. App. 574, 575 (1968), which includes the power to accept amicus briefs at the trial court level. Indeed, the Superior

Court routinely accepts amicus briefs in cases of public interest, such as this one. *See e.g.*, *Petersen v. Fontes*, CV2024-001942, (Mar. 3, 2024) (minute entry "granting Amici Curiae Democratic National Committee and Arizona Democratic Party's *Motion to File an Amicus Brief*."); *Home Builders Ass'n of Cent. Arizona v. City of Apache Junction*, 198 Ariz. 493, 496 n.4 (App. 2000).

II. Interests of the Amici.

The League of Women Voters of Arizona (the "League") is a domestic nonprofit corporation in Arizona. The League is a non-partisan, grassroots organization that encourages informed and active participation in the democratic process. It is an Arizona state affiliate of the national League of Women Voters. Voter intimidation is a vital issue of concern to League members because it imperils members' fundamental rights of speech, association, as well as "the right to cast a ballot in an election free from the taint of intimidation and fraud." *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality).

The Protect Democracy Project and Campaign Legal Center are nonpartisan, nonprofit organizations that believe that it is vital that elected officials represent "the free and uncorrupted choice of those who have the right to take part in that choice." *Ex Parte Yarbrough*, 110 US 651, 662 (1884). Both organizations have engaged in litigation and advocacy to prevent voter intimidation and protect the right to vote.

III. Accepting the amicus brief will assist the Court.

The League has worked to advance voting rights, including successfully obtaining a temporary restraining order to halt unlawful intimidation at Arizona ballot dropboxes in 2022, despite the First Amendment arguments made by the defendants in that case. The Protect Democracy Project represented the League in that litigation—litigation that the Secretary relied upon in giving examples of voter intimidation in the Election Procedures Manual.

Campaign Legal Center (CLC) has been counsel of record in multiple voting rights cases in Arizona, including *League of United Latin Am. Citizens v. Reagan*, No. CV-17-04102-PHX-DGC (D. Ariz.) and *Living United for Change in Ariz. v. Fontes*, No. CV-22-

00509-PHX-SRB (D. Ariz.). CLC also has expertise in voter intimidation claims. CLC, including through its affiliate CLC Action, has submitted amicus curiae briefs in numerous voter intimidation and political violence cases. *See, e.g., Cervini v. Cisneros*, No. 1:21-cv-565 (W.D. Tex. 2022); *LULAC v. Public Interest Legal Foundation*, No. 1:18-cv-00423 (E.D. Va. 2018); *Cockrum v. Donald J. Trump for President, Inc*., No. 3:18-cv-00484 (E.D. Va. 2019); *New York Immigr. Coal. v. Rensselaer Cty. Bd. of Elections*, No. 1:19-cv-920 (N.D.N.Y. 2019); *Blassingame v. Trump*, No. 2:21-cv-858 (D.D.C. 2021); *Thompson v. Trump*, No. 2.21-cv-400 (D.D.C. 2021); and *Swalwell v. Trump*, No. 2:21-cv-586 (D.D.C. 2021). CLC has a demonstrated interest in the interpretation of voter intimidation laws that protect voters and the proper functioning of democracy.

Accordingly, the League, Protect Democracy Project, and Campaign Legal Center are well-positioned to provide the Court with helpful analysis on voter intimidation and the First Amendment.

IV. Conclusion.

For the foregoing reasons, the League, Protect Democracy Project, and Campaign Legal Center request that the Court grant this motion for leave to file the accompanying amicus brief. A proposed order is submitted with this motion.

DATED this 7th day of June, 2024.

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Exhibit A

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA FREE ENTERPRISE CLUB, et al.,

Plaintiffs,

v.

ADRIAN FONTES, et al.,

Defendants.

No. CV2024-002760

AMICUS BRIEF OF THE LEAGUE OF WOMEN VOTERS OF ARIZONA, THE PROTECT DEMOCRACY PROJECT, AND CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

(Assigned to the Honorable Jennifer Ryan-Touhill)

Interest of Amici[1]

The League of Women Voters of Arizona (the "League") is a domestic nonprofit corporation in Arizona. The League is a non-partisan, grassroots organization that encourages informed and active participation in the democratic process. It is an Arizona state affiliate of the national League of Women Voters. Voter intimidation is a vital issue of concern to League members because it imperils members' fundamental rights of speech, association, as well as "the right to cast a ballot in an election free from the taint of intimidation." *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality). The League has worked to address the threat of voter intimidation in Arizona, including participating in successful litigation to halt unlawful intimidation at ballot dropboxes in 2022.

The Protect Democracy Project and Campaign Legal Center are nonpartisan, nonprofit organizations that believe that elected officials should represent "the free and uncorrupted choice of those who have the right to take part in that choice." *Ex Parte Yarbrough*, 110 US 651, 662 (1884). Both organizations have engaged in litigation and advocacy to prevent voter intimidation and protect the right to vote; for example, Protect Democracy represented the League of Women Voters of Arizona in its 2022 litigation against dropbox intimidation, and Campaign Legal Center has been counsel of record in multiple voting rights cases in Arizona, including *League of United Latin Am. Citizens v. Reagan*, No. CV-17-04102-PHX-DGC (D. Ariz.) and *Living United for Change in Ariz. v. Fontes*, No. CV-22-00509-PHX-SRB (D. Ariz.).

Introduction and Summary of Argument

In the 2022 midterm elections, groups of vigilantes—inspired by a baseless, discredited, and debunked conspiracy theory from the film *2000 Mules*—organized a campaign to surveil drop boxes in Maricopa County. The vigilantes, sometimes armed and sometimes even wearing tactical gear, photographed voters, and threatened to dox any voter they deemed (without evidence) a "mule." The vigilantes also circulated

[1] No party or its counsel authored this brief in whole or in part. No person or entity—other than *amici*—contributed money that was intended to fund preparing this brief.

1 disinformation about Arizona election law wrongly suggesting that voters who were
2 engaged in *lawful conduct* were criminals. That continued until a federal district court
3 issued a temporary restraining order halting the ongoing violation of federal voter
4 intimidation laws. *See Ariz. All. for Retired Am. v. Clean Elections USA*, No. CV-22-
5 01823-PHX-MTL, 2022 WL 17088041, at *2 (D. Ariz. 2022) (Ex. 1). That resulting
6 guidance from a federal judge on how to enforce voter intimidation laws consistent with
7 the First Amendment was incorporated into the latest revision of the Secretary's Election
8 Procedures Manual ("EPM"). *See* EPM at 74 n.40.

9 Plaintiffs have filed an amended complaint that does not solve the fundamental
10 problem of their original complaint. They are not challenging the laws that bar their
11 conduct—calling the EPM a separate "Speech Restriction" does not make it so. Thus,
12 plaintiffs are still asking this Court to conclude that conduct a federal court enjoined as
13 unlawful is protected First Amendment activity. This Court should refuse and dismiss for
14 at least three reasons.

15 *First*, the amended complaint is procedurally defective on ripeness and standing
16 grounds. Counts I and II are not ripe; plaintiffs assert challenges against the EPM, FAC
17 ¶¶ 149–162, but do not set out the necessary concrete plan to engage in conduct discussed
18 by those EPM provisions. Standing is absent too because the supposed "injury" plaintiffs
19 claim is neither causally connected to the EPM nor redressable by the remedy sought.
20 Critically, the disputed EPM language does not create new crimes, and the Secretary has
21 never claimed otherwise. Instead, the EPM summarizes *examples* of the types of conduct
22 that can—depending on context—be prohibited by *other* bodies of law that are not
23 challenged in this case. Thus the EPM language plaintiffs challenge can never be enforced
24 against them because *it does not establish a crime*.

25 *Second*, plaintiffs are wrong that the EPM "changed criminal laws by broadening
26 the scope of conduct that would be criminal well beyond what is written in the statutes
27 related to election violations." FAC ¶ 156. The EPM describes conduct that courts have
28 found unlawful. And in some instances federal law *requires* elections officials to prevent

such conduct. *See* 42 U.S.C. § 1986. So the challenged EPM descriptions help ensure elections are managed with the "maximum degree of correctness, impartiality, uniformity and efficiency" as required by Arizona law. A.R.S. § 16-452(a).

Third, plaintiffs' challenge is based on an incorrect understanding of free speech law. Plaintiffs incorrectly suggest that only conduct that involves a true threat may be regulated as unlawful intimidation. FAC ¶ 10. Both conduct and words that intimidate voters can fall outside of free speech protections when they are not inherently expressive, fall into one of the well-recognized categorical exceptions to the First Amendment, or otherwise withstand First Amendment scrutiny. And plaintiffs provide no explanation of why the Arizona Constitution's free speech clause would require a different result. As a result, even if plaintiffs succeeded in establishing ripeness and standing, there would be still numerous grounds on which the challenged activity can be regulated consistent with the guarantees of free speech in the federal and state constitutions.

Argument

I. This case should be dismissed on prudential grounds.

Arizona courts "apply the doctrines of standing and ripeness as a matter of sound judicial policy." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279 ¶ 35 (2019) (cleaned up). Standing "sharpens the legal issues presented by ensuring that true adversaries are before the court and thereby assures that our courts do not issue mere advisory opinions." *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24 (1998). Ripeness "prevents a court from rendering a premature judgment or opinion on a situation that may never occur." *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). For both doctrines, Arizona courts consider federal case law "instructive" but not binding. *Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 405 ¶ 22 (2020) (cleaned up).

Here, plaintiffs fail both inquiries. This dispute is not ripe because plaintiffs' complaint does not allege a sufficiently concrete plan of conduct to allow this Court to determine whether that proposed conduct is constitutionally protected. And plaintiffs do not have standing because any prohibition on plaintiffs' conduct is traceable to federal and

state voter intimidation laws and not the EPM, so plaintiffs' injury is neither causally connected to the EPM nor redressable by the order plaintiffs seek.

A. Ripeness

Courts "determine ripeness by evaluating both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Phelps Dodge Corp. v. Az. Elec. Power Co-op.*, 207 Ariz. 95, 118 ¶ 94 (App. 2004) (cleaned up). The key ripeness issue here is whether this dispute is "fit" for adjudication. *See Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010).

"A question is fit for decision when it can be decided without considering contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Id.* (cleaned up). Thus, a claim "is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (cleaned up). Cases are *not* fit when "further factual development would significantly advance" a court's "ability to deal with the legal issues presented." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (cleaned up).

The amended complaint still does not allege sufficient facts to show a ripe dispute. Plaintiffs allege that they have "planned election integrity related activities," FAC ¶ 85, but plaintiffs offer no concrete explanation as to how exactly they plan to engage in conduct that would implicate the various parts of the EPM they challenge. The closest plaintiffs come is suggesting that they or their members "may" want to talk to voters returning ballots, that they "sometimes" raise their voices, and that they are "interested" in "observing activity at drop boxes" and "conveying a message to others that the drop boxes are being watched and should be watched." FAC ¶¶ 86, 95–96. But that falls well short of what the ripeness doctrine requires, which is "more than a hypothetical" that their actions may "violate the law" but rather a "concrete plan." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cleaned up*); see also Montana Env't Info. Ctr. v. Stone-Manning*, 766 F.3d 1184. 1190 (9th Cir. 2014) (a case

is not ripe if the injury "may never materialize"). That is why, for example, the Arizona Supreme Court limited its review in *Brush & Nib* (a case involving claims that Phoenix's Human Rights Ordinance unlawfully compelled speech in violation of the Arizona Constitution) to only claims involving custom wedding invitations materially similar to those on the record—that was the only claim for which the record was sufficiently developed, containing "detailed examples of Plaintiffs' words, drawings, paintings, and original artwork, and [Plaintiffs had] testified about their . . . custom invitations." 247 Ariz. at 280 ¶ 37.

Unlike *Brush & Nib*, however, plaintiffs here provide no such details. Plaintiffs "cannot specify when, . . . where, or under what circumstances," *Thomas*, 220 F.3d at 1139, they will engage in activity that could be considered voter intimidation as explained by the EPM. For example, plaintiffs claim they will monitor dropboxes, but there is no way for the Court to determine whether plaintiffs are proposing to engage in dropbox monitoring that runs afoul of the EPM's warnings. And, of course, even if plaintiffs were able to establish a sufficiently concrete dispute with respect to dropbox monitoring—and they presently do not—that still would fall short of establishing a ripe dispute as to the *other parts* of the EPM they challenge, such as engaging in "aggressive behavior" or "questioning" a poll worker in an "intimidating manner." FAC ¶ 93 (cleaned up). So, as in *Brush & Nib*, dismissal is required of at least those portions of plaintiffs' amended complaint, *see* 247 Ariz. at 281 ¶ 41, at least until plaintiffs amend to add sufficient allegations to establish a ripe dispute.

Moreover, the issues presented by plaintiffs' complaint "are not purely legal," because in this case, the "First Amendment challenge . . . requires an adequately developed factual record." *Thomas*, 220 F.3d at 1142. Importantly, even political speech may be regulated when it meets constitutional scrutiny, *United States v. Hansen*, 599 U.S. 762, 784 (2023) (cleaned up), an inquiry that can turn on a plaintiff's or a defendant's "utterances." *Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 121 n.29 (S.D.N.Y. 2023). And "statements can . . . be punished if they [are] integral to

criminal conduct. *Counterman v. Colorado*, 600 U.S. 66, 84 (2023) (Sotomayor, J. and Gorsuch, J. concurring).

Here, plaintiffs allege that their members "sometimes use language that could be deemed 'insulting' or threatening" and that they "sometimes use 'offensive language.'" FAC ¶ 96. Plaintiffs' future observation of dropboxes or threatening use of language may constitute voter intimidation, and even criminal conduct,[2] but these vague allegations do not allow a court to determine whether such conduct by plaintiffs would be protected or proscribed. That provides a second basis for dismissing on ripeness grounds, as plaintiffs cannot "force[]" this Court "to decide constitutional questions in a vacuum." *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1991) (cleaned up). "[A] pre-enforcement challenge . . . without proper factual development is inappropriate." *Id.*

In short, plaintiffs ask this Court to adjudicate a dispute that is "too remote and abstract an inquiry for the proper exercise of the judicial function." *Texas v. United States*, 523 U.S. 296, 301 (1998) (Scalia, J.) (cleaned up). This Court should dismiss.

B. Standing

Standing provides a second basis to dismiss the amended complaint. To establish standing, a plaintiff should demonstrate—among other things—(1) "a causal nexus between the defendant's conduct and their injury" and (2) that the "requested relief would alleviate their alleged injury." *Arizonans for Second Chances*, 249 Ariz. at 405 ¶ 23 (cleaned up); *id.* at 406 ¶ 25. In this context, this means that plaintiffs must demonstrate that there is a credible threat of prosecution that results from the language of the EPM, and that the threat would be alleviated by this Court enjoining the EPM. Plaintiffs cannot make that showing. Their injury is traceable to federal and state voter intimidation laws rather than the EPM—and, for much the same reason, their requested relief would not alleviate plaintiffs' supposed "injury" in any way.

This unusual situation is due to plaintiffs' mischaracterization of the EPM.

[2] *See* A.R.S. § 16-1006.

Plaintiffs suggest that the challenged parts of the EPM create crimes. FAC ¶¶ 101, 135–45; 150–60. They then assert that because the Attorney General approved the EPM, and the EPM creates new crimes, "Plaintiffs' members face an actual threat of prosecution." FAC ¶¶ 151, 155, 160. That is wrong. Plaintiffs ignore that the Arizona Attorney General's Office itself, and through its representation of the Secretary in this matter, has made it clear that "the challenged provisions of the 2023 EPM do not create new laws." Secretary's Motion to Dismiss Original Complaint at 6. In fact, the provisions challenged are "not directed at voters or other members of the public." *Id.* at 10. The challenged parts merely provide election workers with illustrations of conduct that can—depending on context—violate existing law. Accordingly, plaintiffs do not face a credible threat of prosecution *that results from the EPM* and, therefore, lack standing to challenge something that imposes no legal restriction, obligation, or detriment on them whatsoever.[3]

With respect to the ballot dropbox portions of the EPM, the relevant provision is directed at the County Recorders and says that "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. But the language plaintiffs challenge, FAC ¶ 79, does not purport to articulate a new rule—rather, it accurately recounts the terms of a Temporary Restraining Order issued to halt ongoing violations of federal voter intimidation law. *Compare* EPM at 74 n.40 ("speaking to or yelling at an individual, without provocation, who that person knows is returning ballots to the drop box and who is within 75 feet of the drop box.") *with Ariz. All. for Retired Am.*, 2022 WL 17088041, at *2 (Ex. 1) ("Unless spoken to or yelled at first, speak to or yell at an individual who that Defendant knows is (i) returning ballots to the drop box, and (ii) who is within 75 feet of the drop box."). To boot, the EPM does not even say

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[3] This point is also fatal to the merits of plaintiffs' vagueness claim on the merits because the relevant portions of the EPM do not impose any legal restriction on plaintiffs' conduct—let alone one for which plaintiffs' lack fair notice.

that such conduct *always* constitutes voter intimidation—it merely notes that it *can.*[4]

So the quoted provisions of the EPM do not establish *new* crimes; they merely recount conduct that has been found to violate other laws. For example, photographing potential voters has long been recognized as a subtle, yet effective tactic of voter intimidation. As the U.S. Commission on Civil Rights explained in its study of why electoral participation in Mississippi remained low even after the passage of civil rights laws, the practice of photographing potential voters intimidated voters due to fear of retaliation:

> [Black voters] in rural counties who attempt to register cannot hope to remain anonymous. Any doubt that applicants will be identified has been removed by the legal requirement that their names will be published in local newspapers and by *practices such as the photographing of [Black] applicants* by public officials. In this climate a single incident . . . may be sufficient to deter many potential registrants.

U.S. Comm'n on Civil Rights, *Voting in Mississippi* 39 (1965) (emphasis added) (Ex. 2).

Those intimidation tactics worked. *See King v. Cook*, 298 F. Supp. 584, 587 (N.D. Miss. 1969). Unsurprisingly, then, such conduct was understood to run afoul of federal voter intimidation law long before the *Arizona Alliance* TRO. *E.g.*, *Daschle v. Thune*, No. 04-4177, Dkt. 6, at 2 (D.S.D. Nov. 2, 2004) (TRO prohibiting defendants from, among other things, "copy[ing] or "record[ing]" license plates of Native American voters) (Ex. 3). And it has continued to after, as well. *E.g.*, *Andrews v. D'Souza,* No. CV-22-04259-SDG, 2023 WL 6456517, at *2-5, 9, 14 (N.D. Ga. 2023) (Ex. 4). Indeed, the U.S. Department of Justice has previously raised a near identical caution to the one raised in the EPM,

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[4] The Department of Justice has similarly relied upon the Temporary Restraining Order issued in *Ariz. All. for Retired Am.* to provide "a few examples of the types of acts that may constitute intimidation." U.S. Dep't of Justice, *Federal Law Constrains on Post-Election "Audits,"* at 5–6 (2024), *available at* https://www.justice.gov/crt/media/1348586/dl?inline (Ex. 6).

warning individuals that "photographing or videotaping" voters "under the pretext that these are actions to uncover illegal voting[] may violate federal voting rights law."[5]

That is fatal to plaintiffs' challenge to the EPM's language regarding voter intimidation at ballot dropboxes. Because the challenged EPM language does not create a new prohibition on voter intimidation, but merely restates prohibitions originating from federal and state criminal and civil law,[6] *those* federal and state laws—and not the EPM—are the cause of any change to plaintiffs' conduct. That means plaintiffs lack standing to challenge the EPM because their injury is not "fairly traceable" to the EPM. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 7 (2005) (cleaned up).

It also means that plaintiff's injury would not be "redressed by a favorable decision." *Karbal v. Ariz. Dep't of Rev.*, 215 Ariz. 114, 118 ¶ 19 (App. 2007). For example, Plaintiffs assert that they "will incur compliance costs in training members to comply with the unlawful requirements of the EPM" and must "alter how [they] conduct[] [their] operations and communications." FAC ¶ 161; *see also id.* at ¶ 44. But Plaintiffs regularly hold training sessions and already plan to hold such sessions in 2024. FAC ¶ 41, 44. Moreover, as already stated, the EPM does not alter existing state and federal laws on voter intimidation. Thus, even if plaintiffs obtained their requested relief, plaintiffs would still have to train on and would be "still bound" by, the provisions of federal and state law described by the EPM, which have "not been challenged." *In re MS2008-000007*, No. CA-MH 23-0073 SP, 2024 WL 121882, at *2 ¶ 9 (App. 2024) (unpublished) (Ex. 7). Accordingly, "any potential injury . . . is not redressable" and plaintiffs "lack[] standing." *Id.*

The same is true of plaintiffs' challenge to the parts of the EPM discussing

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[5] U.S. Attorney's Office, Northern District of Alabama, *District Elections Officers Available Nov. 8 to Receive Complaints of Election Fraud or Voting Rights Abuse*s, October 21, 2016, https://www.justice.gov/usao-ndal/pr/district-elections-officers-available-nov-8-receive-complaints-election-fraud-or-voting (Ex. 5).

[6] *E.g.*, 18 U.S.C. §§ 241, 594; 42 U.S.C. § 1985(3); 52 U.S.C. §§ 10101(b), 10307(b), 20511(1); A.R.S. §§ 16-1006, 1013, 1017.

intimidation at polling places. Here too, the challenged parts of the EPM do not create new crimes. In relevant part, the EPM states: "Any activity by a person with the intent or effect of threatening, harassing, intimidating, or coercing voters (or conspiring with others to do so) inside or outside the 75-foot limit at a voting location is prohibited." EPM at 181. It then notes, the "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," *id.*, provides a set of guidelines to enforce at the polls (such as a prohibition on firearms inside polling places),[7] *id.*at 182, and then goes on to set out examples of conduct that "may also be considered intimidating," *id.* at 183.

That, too, is an accurate summary of federal and state voter intimidation law. Arizona law prohibits intentional acts of voter intimidation. *See, e.g.*, A.R.S. §§ 16-1006, 1013, 1017. As does federal law. *See, e.g.*, 18 U.S.C. §§ 241, 594; 42 U.S.C. § 1985(3); 52 U.S.C. §§ 10101(b), 20511. One federal statute prohibits voter intimidation *even when* "no subjective purpose or intent" to intimidate is "shown."[8] 52 U.S.C. § 10307(b) (Section 11(b) of the Voting Rights Act); H.R. Rep. No. 89-439, at 30 (1965) (Ex. 8); *see also Nat'l Coal*, 661 F. Supp. 3d at 116; *Colo. Mont. Wy. State Area Conf. of NAACP v. U.S. Elec. Integrity Plan,* 653 F. Supp. 3d 861, 870 (D. Colo. 2023); *League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 18-cv-00423, 2018 WL 3848404, at *4 (E.D. Va. 2018) (Ex. 9). Thus, unlawful voter intimidation can occur regardless of whether there is an intent to intimidate. And the EPM accurately warns

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[7] The firearm prohibition is not challenged in this case, presumably because a prohibition on private parties bringing firearms to polls is consistent with both federal law, *see, e.g.*, *Council on Am.-Islamic Relations—Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 378–79 (D. Minn. 2020), and the Second Amendment, *see, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 30 (2022).

[8] Plaintiffs assert that the EPM eliminates the mens rea requirement of A.R.S. §§ 16-1013, -1017. FAC ¶ 4–5, 140. But that portion of the EPM does not provide guidance on those Arizona statutes; it is based on Section 11(b) of the Voting Rights Act (52 U.S.C. § 10307(b)), which has no mens rea requirement. This is clear from the fact that the EPM cites *Ariz. All. for Retired Am.*—a case that involved a Section 11(b) claim, not a claim under Arizona law. *See* EPM at 74 n.40.

about the types of conduct that have resulted in past violations of the law. *E.g.*, *Nat'l Coal*, 661 F. Supp. 3d at 112–21 (false statements about consequences of voting violate voter intimidation law).

Thus, plaintiffs cannot demonstrate either (1) a causal connection between plaintiffs' injury and the challenged portions of the EPM or (2) redressability. The EPM language plaintiffs challenge does not create new crimes; it instead explains the boundaries of laws found elsewhere. So, plaintiffs do not have standing because the complaint does not challenge the underlying legal provisions restricting plaintiffs' conduct, and any court order would not even partially remedy plaintiffs' alleged injury.

* * *

Lastly, this Court should not waive the ripeness and standing requirements. Waiver of both doctrines' prudential limitations on judicial power should be the "exception, not the rule." *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 16 (2005). Here there is good reason *not* to. Plaintiffs' right of free speech "does not embrace a right to snuff out" the constitutional rights of others, *Red Lion Broad. v. FCC*, 395 U.S. 367, 387 (1969), and prohibitions on voter intimidation serve to protect fundamental rights of speech and association as well as "the right to cast a ballot in an election free from the taint of intimidation." *Burson*, 504 U.S. at 211. Those protections are "essential to the successful working" of American government. *Ex Parte Yarbrough*, 110 U.S. at 666. Thus, a judicial advisory opinion rendered on the basis of an incomplete and potentially inaccurate record could *also* prematurely license conduct that imperils other Arizonans' constitutional rights. The Court should dismiss.

II. The EPM language at issue accurately summarizes the prohibitions of federal and state law and was appropriately included in the EPM.

For the reasons noted above, the portions of the EPM challenged in the amended complaint accurately recount the sort of conduct that either "likely" or "may" constitute a violation of *other* bodies of law. EPM at 74 n.40; 182. So even if plaintiffs could show that this case is justiciable, their claim would fail on the merits. Because the EPM's

description accurately reflects the type of conduct that can—depending on context—give rise to violations of state and federal law, those descriptions are important to ensuring that Arizona elections officials manage elections with the "maximum degree of correctness, impartiality, uniformity and efficiency."[9] A.R.S. § 16-452(a). Prohibiting voter intimidation serves compelling governmental interests. *See Burson*, 504 U.S. at 199, 208–11. Thus, plaintiffs cannot show on the merits that the challenged portions of the EPM "broaden[] the scope of conduct that would be criminal well beyond what is written in the statutes related to election violations." FAC ¶ 156.

Indeed, informing elections officials as to the potential breadth of federal voter intimidation law is important because federal law can impose affirmative duties on elections officials to prevent intimidation in federal elections. In particular, the support-or-advocacy clauses of 42 U.S.C. § 1985 make it unlawful to conspire to intimidate *or* injure eligible voters from participating in support or advocacy in federal elections. *See* 42 U.S.C. § 1985(3). And 42 U.S.C. § 1986—which was passed to address a failure by certain states to adequately address political intimidation and violence, *see* 42 Cong. Globe, 42d Cong., 1st Sess. 805 (1871) (Ex. 10)—imposes an affirmative duty on state officials to act with reasonable care to prevent conspiracies prohibited by 42 U.S.C. § 1985. *See Park v. City of Atlanta*, 120 F.3d 1157, 1160–61 (11th Cir. 1997). Thus, the EPM's warning remains both appropriate and wise, as a failure to adequately respond can lead to monetary liability for both officials and jurisdictions. *See* Carl Smith, *Tools to Combat Voter Intimidation, from the 19th Century and Today*, Governing (Dec. 13, 2023), https://www.governing.com/politics/tools-to-combat-voter-intimidation-from-the-19th-century-and-today (Ex. 11).

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[9] Plaintiffs mistakenly claim that voter intimidation as defined by the EPM does not require an "actual nexus to voting itself." FAC ¶ 6. However, the EPM describes voter intimidation as conduct inside or outside a polling place, not "anywhere in the State." EPM at 182; FAC ¶ 6. Additionally, the Arizona and federal voter intimidation statutes the EPM relies on require a nexus to voting. *See e.g.*, A.R.S. § 16-1013(A); A.R.S. § 16-1017; 52 U.S.C. § 10307(b) ("No person . . . shall intimidate . . . any person for voting or attempting to vote.").

III. There is no constitutional right to engage in voter intimidation.

In the original complaint, plaintiffs suggested that only "speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action can carry a criminal sanction." Original Compl. ¶ 42 (cleaned up). This proposition was wrong because incitement is merely one example of a categorical exception where speech may be regulated. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

Plaintiffs commit the same error with a different categorical exception in their amended complaint. They suggest that their speech has to be a true threat to be regulated as unlawful intimidation. FAC ¶ 10. Like incitement, however, a "true threat" is simply one "category of expression" the government may regulate. *See Virginia v. Black*, 538 U.S. 343, 358–59 (2003) (cleaned up). Speech may be regulated for many other reasons, such as when it (1) fits within one of the other recognized categorical exceptions to the First Amendment, *see Stevens*, 559 U.S. at 468–69, or (2) withstands "ordinary First Amendment scrutiny," *Hansen*, 599 U.S. at 784 (cleaned up). Further, conduct may be regulated when it is not "inherently expressive." *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("FAIR"). And the same principles should be equally fatal to plaintiffs' claim under the Arizona Constitution.

While it is true that the free speech guarantees in the Arizona Constitution and the United States Constitution are textually distinct, the Arizona Supreme Court has "rarely explored the contours of" those differences. *Brush & Nib*, 247 Ariz. at 282. Indeed, the Arizona Supreme Court "often relies on federal case law in addressing free speech claims under the Arizona Constitution." *Id.* (cleaned up). Under that case law, there are multiple ways in which voter intimidation may be regulated consistent with the constitutional protections for free speech found in both the federal and state constitutions.

Not Expressive Conduct. The U.S. Supreme Court has "rejected the view that conduct can be labeled speech whenever the person . . . intends . . . to express an idea." *FAIR*, 547 U.S. at 65–66 (cleaned up). Constitutional protection extends "only to conduct that is inherently expressive." *Id.* at 66. Thus, there are plenty of ways to engage in an

"activity" that "intimidat[es]" voters, FAC ¶ 90, without engaging in constitutionally protected expressive activity. Assaults can be unlawful voter intimidation, *e.g.*, *Allen v. City of Graham*, No. 20-CV-997, 2021 WL 2223772, at *7 (M.D.N.C. 2021) (Ex. 12), and do not constitute "expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Obstructing access to the polls is also unprotected. *Cf. Singleton v. Darby*, 609 F. App'x 190, 193 (5th Cir. 2015) (unpublished) (Ex. 13) ("The First Amendment does not entitle a citizen to obstruct traffic or create hazards for others."). The "constitutionally protected nature of the end" of an intent to communicate a message does not shield the "use of unlawful, unprotected means." *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); *id.* at 471 (Alito, J, dissenting) (same).

Categorical Exclusions. "From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few . . . historic and traditional categories." *Stevens*, 559 U.S. at 468 (cleaned up). Those categories include fraud, defamation, incitement, and speech incidental to criminal or tortious conduct. *See id.*; *Counterman*, 600 U.S. at 73–74; *FAIR*, 547 U.S. at 62. And when speech falls into one of the exceptions, its "prevention and punishment" has "never been thought to raise any Constitutional problem." *Stevens*, 559 U.S. at 469 (cleaned up). So while speech can be involved in many variations of voter intimidation, it can nonetheless fit into a categorical exception and fall outside of any constitutional protection regardless of whether it is a true threat.[10] Furthermore, activities do not need to fall within multiple categorical exceptions before they can be regulated. *See United States v. Williams*, 553 U.S. 285, 299 (2008) (activities that fit within multiple categorical exceptions are "doubly excluded from the First Amendment").

Constitutional Scrutiny. Even political speech can be regulated when it withstands "ordinary First Amendment scrutiny." *Hansen*, 599 U.S. at 784 (cleaned up). And many

[10] *E.g.*, *Andrews*, 2023 WL 6456517, at *9, 14 (defamation) (Ex. 4); *Nat'l Coal.*, 661 F. Supp. 3d at 132-33 (fraud); *United States v. Butler*, No. 14,700, 25 F. Cas. 213, 217-23 (C.C.D.S.C. 1877) (conduct incidental to criminal conduct) (Ex. 14).

restrictions on voter intimidation can withstand any applicable level of scrutiny—up to and including strict scrutiny—because preventing voter intimidation is undoubtedly a compelling state interest. *E.g.*, *Burson*, 504 U.S. at 199–211 (upholding restriction on voter intimidation under strict scrutiny analysis); *Nat'l Coal*, 661 F. Supp. 3d at 119–21 & n.29 (upholding prohibition on voter intimidation under intermediate scrutiny, but noting the prohibition would also survive under strict scrutiny). Protections against electoral intimidation are "essential to the successful working" of American government, *Ex Parte Yarbrough*, 110 U.S. at 666, and can survive even under a strict scrutiny analysis because regulations must only be "be narrowly tailored, not . . . perfectly tailored." *Williams-Yulee v. Fla. Bar*, 575 US 433, 454 (2015) (cleaned up).

Indeed, there are substantial constitutional interests furthered by enforcement of voter intimidation laws. After all, the First Amendment includes the right of voters "to associate for the advancement of political beliefs"—a right that ranks "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *e.g.*, Armand Derfner & J. Gerald Herbert, *Voting is Speech*, 34 Yale L. & Pol. Rev. 471, 485-91 (2016). Voters have a fundamental interest in "express[ing] their own political preferences," *Norman v. Reed*, 502 U.S. 279, 288 (1992), and casting a ballot, *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). Thus, voter intimidation and political violence can deny Americans the ability to exercise their constitutional rights.

As recently as the last federal election, Arizona voters and members of the League were intimidated by vigilante ballot dropbox monitoring operations. Compl. ¶¶ 54-63, *League of Women Voters of Ariz. v. Lions of Liberty LLC*, No. CV-22-08196-PCT-MTL (Oct. 25, 2022) (Ex. 15). It was only through enforcement of voter intimidation laws by the League and others that Arizonans were able to safely cast their ballots without fear of intimidation or harassment, thereby enabling all Arizonans to exercise their constitutional rights free from fear of intimidation, harassment, or worse. The same protections are required for future elections, and the challenged provisions of the EPM are necessary to assist county election officials in effectively enforcing those protections.

These assorted First Amendment doctrines have two implications:

First, they again demonstrate why plaintiffs' claims are not ripe. Plaintiffs cannot find shelter in the First Amendment simply because they claim they will not engage in incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) or a true threat under *Counterman*, 660 U.S. at 82–83. Instead, there are several First Amendment doctrines that could justify regulation of plaintiffs' actions, and in any event, plaintiffs must to express an intent to engage in a defined course of action before either the State or the Court knows which are potentially applicable.

Second, a facial challenge would not be appropriate here. While the plaintiffs claim that the EPM has a chilling effect, FAC ¶¶ 99, 161, the First Amendment's "concern with chilling protected speech attenuates" when a law regulates more than just "pure speech" but "conduct" as well. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (cleaned up). Thus, "[r]arely, if ever" will a concern about chilling invalidate "a law or regulation that is not specifically addressed to speech," *id.*, because "prohibiting all enforcement of that law—particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct" imposes "substantial social costs," *Id.* at 119 (cleaned up). Thus, complaints about a potential chill have no purchase here, as voter intimidation can occur via (1) a wide swath of conduct involving no speech at all and (2) speech that may be regulated, either due to the categorical exceptions or passing First Amendment scrutiny. So here, as elsewhere, courts should handle potentially unconstitutional applications of voter intimidation laws as they "usually do—case-by-case." *Hansen*, 599 U.S. at 770. In other words, "as-applied challenges can take it from here," *id.* at 785, *once* a plaintiff alleges a justiciable dispute.

Conclusion

This Court should grant the motions to dismiss.

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DATED this 7th day of June, 2024.

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