ARIZONA COURT OF APPEALS

DIVISION ONE

ARIZONA FREE ENTERPRISE CLUB, PHILIP TOWNSEND, and AMERICA FIRST POLICY INSTITUTE, Plaintiff/Appellant, vs. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, and KRIS MAYES, in her official capacity as Arizona Attorney General, Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 24-0667 Maricopa County Superior Court No. CV2024-002760

BRIEF OF *AMICI CURIAE* LEAGUE OF WOMEN VOTERS OF ARIZONA, PROTECT DEMOCRACY PROJECT, AND CAMPAIGN LEGAL CENTER SUPPORTING DEFENDANT ARIZONA SECRETARY OF STATE ADRIAN FONTES AND ARIZONA ATTORNEY GENERAL KRISTIN K. MAYES

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INTRODUCTION

The Election Procedures Manual (EPM) is first and foremost a regulatory document provided by the Secretary of State (the Secretary) to election officials to implement state and federal election law and ensure uniform administration of Arizona's elections. The EPM accomplishes this by both issuing rules that are binding *on election officials* (as distinct from the public at large) and providing advisory guidance, including by summarizing relevant federal and state election law to help educate officials. Both the EPM's rules and guidance are crucial in ensuring that election officials understand their roles and responsibilities under state and federal law so that every Arizona voter can effectuate their right to vote.

The superior court erred in broadly enjoining Chapter 9, Section III(D) (what it called "the restrictive speech provisions" and which amici refer to herein as Section III(D)). First, the trial court misconstrued Section III(D), incorrectly holding that it creates new legal obligations. To the contrary, Section III(D) does not create any new law whatsoever; rather, it accurately describes and summarizes well-established federal and state voter intimidation laws and goes on to provide *examples* of what *may*—in particular circumstances—violate those laws. As amici explain herein, these

voter intimidations laws have been upheld by numerous courts over constitutional challenges similar to Plaintiffs'. And those laws remain binding law notwithstanding the superior court's injunction and play a critical role in protecting Arizona voters.

Second, the superior court erred in holding that Section III(D) constitutes rule-making rather than guidance. As set forth below, the superior court failed to properly follow the Arizona Supreme Court's controlling decision in *McKenna v. Soto*, 250 Ariz. 469, 473, ¶ 20 (2021). Further, the court erred by concluding that Section III(D) applies to members of the public rather than to election officials. Had the superior court applied controlling precedent, it would have concluded that the challenged provisions constitute *guidance for election officials* as opposed to *new rules for the public at large.*

Finally, even assuming *arguendo* that certain portions of the EPM should have been enjoined, the superior court's injunction is nevertheless vague and overbroad and should be narrowed in order to comply with well-established remedies principles. Otherwise, the superior court's ambiguous opinion granting relief Plaintiffs never sought against provisions that pose

no constitutional issue whatsoever risks confusing Arizona's election officials and voters alike in the weeks before the 2024 general election.

For these reasons, Defendants' stay motion should be granted, and the superior court's decision should be reversed.

INTEREST OF AMICUS CURIAE[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 the 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' rights of speech, association, as well as their "right to cast a ballot in an election free from the taint of intimidation." *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion). The League has worked to address the threat of voter intimidation, including participating in successful litigation to halt unlawful intimidation at ballot

[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.

dropboxes in 2022. *See Ariz. All. for Retired Ams. v. Clean Elections USA*, No. 22-CV-1823, 2022 WL 17088041, at *2 (D. Ariz. Nov. 1, 2022).

The Protect Democracy Project and Campaign Legal Center are nonpartisan, nonprofit organizations that believe 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 U.S. 651, 662 (1884). Both organizations have engaged in litigation and advocacy to prevent voter intimidation and protect the right to vote.

ARGUMENT SUMMARY

Amici submit this brief to (1) explain that the EPM does nothing more than make accurate statements of both federal and state voter intimidation law, law that is both necessary and has been repeatedly upheld by courts, (2) clarify what is an enforceable rule (as opposed to guidance) under the EPM and who is bound by the EPM, and (3) show that well-established remedies principles preclude the overbroad relief Plaintiffs obtained below.

ARGUMENT

I. The challenged portions of the EPM are accurate summations of federal and state voter intimidation law, and that body of law has withstood constitutional scrutiny.

The superior court erred here by concluding that Section III(D) of the EPM creates new criminal prohibitions. Rather than representing brand-new binding rules, the *examples* of potential voter intimidation in Section III(D) are just that: *examples* of conduct that, in the words of the EPM, "may" under particular circumstances constitute unlawful voter intimidation under pre-existing state and federal law. They are not brand new criminal prohibitions on conduct and indeed *could not be* under well-established separation of powers principles.

A. The EPM accurately describes state and federal voter intimidation law.

The EPM accurately provides guidance about how and when Arizonans may be held civilly or criminally liable for violating state or federal voter intimidation law. EPM at 181-183. Providing such guidance helps ensure that election officials have a general awareness of what the law

is so that they do not turn a blind eye to potential voter intimidation and, in so doing, face federal liability for failing to respond to intimidation.[2]

State and federal voter intimidation laws prohibit conduct that intentionally intimidates voters or has the effect of doing so. For example, Section 11(b) of the federal Voting Rights Act prohibits conduct that has the effect of intimidating a voter and provides that "[n]o person . . . shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). Likewise, Arizona and federal law prohibit use of coercion, intimidation, force, threat, menace, bribery, or any other corrupt means for the purpose of influencing or hindering a voter. *See* A.R.S. §§ 16-1006 (prohibiting persons from attempting to influence electors "by force, threats, menaces, bribery or any

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[2] *See*, *e.g.*, *United States v. Clark*, 249 F. Supp. 720, 723-29 (S.D. Ala. 1965) (jurisdiction may not "abdicate its responsibilities" to provide police protection for those attempting to exercise the right to vote by "ignoring . . . or by . . . failing to discharge them"); *Hicks v. Knight*, Civ. No.15,727 (E.D. La.), 10 Race Rel. L. Rep. 1504, 1507-09 (1965) (finding that city failed to take reasonable measures to protect local voters' group from intimidation and issuing injunction); 42 U.S.C. § 1986 (imposing liability for knowingly failing to prevent conspiracies under 42 U.S.C. § 1985(3), which prohibits conspiracies to intimidate voters engaged in "support or advocacy" in federal elections).

corrupt means"), 16-1013 (prohibiting "coercion or intimidation of elector"), 16-1017 (listing additional "unlawful acts by voters with respect to voting"); *cf.* 52 U.S.C. § 10101(b) (prohibiting purposeful intimidation and attempted intimidation); 42 U.S.C. § 1985(3) (prohibiting conspiracies that use force, threat, or intimidation to prevent a voter from giving their "support or advocacy" for a federal candidate).

Rather than creating new law or modifying existing law as the superior court held, Section III(D) of the EPM simply describes and summarizes these existing and well-established federal and state prohibitions. Its very first sentence accurately informs officials that "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." 2023 EPM at 181. This statement correctly and appropriately summarizes state and federal law. *See, e.g.,* A.R.S. § 16-1013

(criminalizing threats and intimidation); 52 U.S.C. § 10307(b) (prohibiting intimidation, threats, and coercion).[3]

Section III(D) goes on to instruct "the officer in charge of elections [to] publicize and/or implement the following guidelines as applicable" and lists examples of "potentially intimidating conduct." 2023 EPM at 182-83. Contrary to the superior court's holding, that list of examples does not create new law—rather, the list is drawn directly from Arizona and federal law. For example, "observers at voting locations should leave weapons at home," *id*. at 182, is included because an Arizona statute makes it unlawful to enter a polling place with a deadly weapon. A.R.S. § 13-3102(A)(11). The guidance that dissemination of false or misleading information may constitute intimidation, 2023 EPM at 182, is drawn from United States Department of Justice guidance outlining potential violations of federal voter intimidation

[3] In one portion of its ruling the superior court seemed to recognize that Section III(D) merely restates pre-existing law. *See* Ruling at 14-15. Yet the court appeared to simultaneously hold that (1) the EPM created new, binding rules in Section III(D) and (2) it was "impermissible" to promulgate any rule other than what is already contained in state law. *Id*. at 15 (concluding that Secretary lacked authority to "raise[] the burden" of proving voter intimidation). That contradiction provides another reason to stay the court's injunction.

law and a voter intimidation case from the most recent presidential election. *See* U.S. Dept. of Justice, *Federal Law Constraints on Post-Election "Audits"* (Apr. 2024) at 5–6 (listing "examples of the types of acts that may constitute intimidation," and including example of providing false information to voters) (hereinafter DOJ, *Federal Law Constraints*);[4] *accord Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 121 (S.D.N.Y. 2023).

The same is true of other items on Section III(D)'s list of examples. *See* DOJ, *Federal Law Constraints* at 6 (discussing photographing of voters); Complaint, *Daschle v. Thune*, No. Civ 04-4177, 2004 WL 3650153 (D.S.D. Nov. 1, 2004) (following a voter to and from a polling place or their car can be intimidating behavior); *United States v. Long Cnty., Ga.*, No. CV 206–040, 2006 WL 8458526, at *2 (S.D. Ga. Feb. 10, 2006) ("A challenger must have a legitimate non-discriminatory basis to challenge a voter. Challenges filed on the basis of race, color, or membership in a language-minority group are not legitimate bases for attacking a voter's eligibility.").

In sum, Section III(D) simply summarizes for election officials prevailing federal and state voter intimidation law and provides *examples* of

[4] *Available at* https://www.justice.gov/crt/media/1348586/dl?inline.

conduct that *could* under particular circumstances constitute unlawful voter intimidation, drawn directly from state and federal law.

B. Section 11(b) of the Voting Rights Act validly prohibits action that intimidates a reasonable person, regardless of intent.

The superior court was wrong to hold that Section III(D) contains constitutionally "problematic" provisions. Ruling at 9. To the contrary, federal voter intimidation law that provides the basis for Section III(D) has survived repeated constitutional challenge. That is because preventing voter intimidation is a compelling state interest. *See Burson*, 504 U.S. at 199-211; *Nat'l Coal.*, 661 F. Supp. 3d at 121 n.29.

As noted, Section 11(b) of the Voting Rights Act provides, that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. §10307(b). Drafted intentionally without a mens rea requirement, Section 11(b) prohibits voter intimidation *regardless* of whether the intimidator acts with intent to intimidate. *See Nat'l Coal.*, 661 F. Supp. 3d at 116 ("That no intent need be shown is evident not only in the statutory text but also in the VRA's legislative history."); *League of United Latin Am. Citizens-Richmond Region Council 4614 v. Pub. Interest Legal*

Found., No. 1:18-cv-423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) ("LULAC"); *see also* H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2462 ("The prohibited acts of intimidation need not be racially motivated; indeed, . . . no subjective purpose or intent need be shown.").[5] That's why the Department of Justice has advised the public that if they "believe they have been subjected to intimidation" to report it, with no mention of the mens rea of the intimidator. DOJ, *Federal Law Constraints* at 7.[6]

[5] Plaintiffs may cite *Olagues v. Russoniello*, 797 F.2d 1511, 1522 (9th Cir. 1986) (en banc) to argue Section 11(b) requires a showing of an intent. *Olagues* considered a claim under Section 131(b) of the Civil Rights Act of 1957, which requires a showing of intent, and concluded that Section 11(b) must also include an intent requirement. *See* 797 F.2d at 1522. But *Olagues* was subsequently *vacated*. *See* 484 U.S. 806 (1987). And *Olagues*'s reasoning—which conflates two textually distinct statutes, one of which was passed to eliminate the deficiencies of the other—is "unpersuasive," *LULAC*, 2018 WL 3848404, at *4.

[6] *Counterman v. Colorado*'s recognition that the true threats exception to the First Amendment requires a showing of recklessness, 600 U.S. 66, 73 & n.2 (2023), does not require Section 11(b) to have an intent element. "[T]hat speech is not categorically unprotected does not mean it is immune from regulation;" rather, "ordinary First Amendment scrutiny" applies. *United States v. Hansen*, 599 U.S. 762, 784 (2023). That is why electioneering bans can ban *political speech* to prevent intimidation. *See Burson*, 504 U.S. at 211. And as demonstrated *infra*, Section 11(b) can withstand any level of constitutional scrutiny when it is applied to prohibit intimidating speech.

Additionally, the term "voting" in Section 11(b) includes "all action necessary to make a vote effective in any . . . election, including, but not limited to, registration . . . or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. § 10310(c)(1). Therefore, Section 11(b) applies whenever and wherever anyone intimidates a voter—regardless of intent—whether it be a polling place, a dropbox, or a voter's house.[7]

Recognizing that voter intimidation can take many forms, federal law prohibits more than just violence[8] and threats of violence. Section 11(b) has been applied to prohibit a wide range of potentially intimidating conduct, including providing false information about consequences of voting by mail,

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[7] The superior court also recognized that Arizona's voter intimidation laws "apply everywhere—a person cannot intimidate or threaten another voter, regardless of where the act occurs. Likewise, a person cannot harass another, regardless of where the act occurs." Ruling at 14.

[8] *E.g.*, *United States v. Robinson*, 813 F.3d 251, 258 (6th Cir. 2016) (threatening eviction from rental properties); *United States v. McLeod*, 385 F.2d 734, 740-41 (5th Cir. 1967) (threats of unwarranted criminal prosecution); *United States v. Bruce*, 353 F.2d 474, 476-77 (5th Cir. 1965) (invoking trespass law); *Andrews v. D'Souza*, 696 F. Supp. 3d 1332, 1348-49 (N.D. Ga. 2023) (posting image of voter and falsely accusing of being a "mule").

Nat'l Coal., 661 F. Supp. 3d at 112-13, "copy[ing] or "record[ing]" license plates of Native American voters approaching and leaving the polls, Temporary Restraining Order at 2, *Daschle*, 2004 WL 3650153, ECF No. 6 at 2, soliciting armed, uniformed guards to patrol the polls, *Council on American-Islamic Relations-Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 378-79 (D. Minn. 2020) ("*CAIR-Minn.*"), and falsely linking registrants to illegalities that could lead to harassment, *LULAC*, 2018 WL 3848404, at *4.

Just last election, a federal court in Arizona issued a temporary restraining order prohibiting vigilantes from spreading false information about voting laws and publishing photos of voters that they deemed (without evidence) to be ballot "mules." *See Ariz. All.*, 2022 WL 17088041, at *2. The Secretary included that TRO in the EPM to inform election officials of activities that "likely" constitute unlawful intimidation. 2023 EPM at 74 n.40. This kind of conduct does not receive First Amendment protection, *see, e.g., Nat'l Coal.*, 661 F. Supp. 3d at 119-21 & n.29, and indeed, the federal court entered the restraining order in *Arizona Alliance* over a constitutional objection. 2022 WL 17088041; Hearing Transcript, ECF 70 at 185–86.

The reason why Section 11(b) has been able to withstand any applicable level of constitutional scrutiny — including strict scrutiny — is that

preventing voter intimidation is a compelling state interest. *E.g.*, *Burson*, 504 U.S. at 199-211 (upholding Tennessee's electioneering perimeter around polling places enacted to prevent voter intimidation because "a government has such a compelling interest in securing the right to vote freely and effectively"); *Nat'l Coal*, 661 F. Supp. 3d at 121 n.29 (there is a "compelling government interest in preventing voter intimidation and protecting election processes"). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society" and "the heart of representative government," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), so protections against electoral intimidation are "essential to the successful working" of American government, *Ex Parte Yarbrough*, 110 U.S. at 666. Moreover, there are substantial First Amendment interests *furthered* by enforcement of voter intimidation laws. 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). And they also have a right "to associate for the advancement of political beliefs," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). All of those values are promoted by Section 11(b).

Likewise, contrary to the superior court's suggestion otherwise, Section 11(b) does not need a mens rea requirement to survive constitutional scrutiny. Under First Amendment analysis, Section 11(b) needs only to "be narrowly tailored, not . . . perfectly tailored," *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (cleaned up), as a requirement that a law be "perfectly tailored to deal with voter intimidation . . . would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Burson*, 504 U.S. at 209 (cleaned up). Thus, when passing Section 11(b), Congress did not need to "demonstrat[e] empirically the objective effects on political stability that" Section 11(b) would have. *Id.* at 208 (cleaned up).

Nonetheless, American history amply demonstrates that any narrower enactment—and particularly one with a mens rea requirement—would have failed to achieve the government's compelling interest in preventing voter intimidation. Congress eliminated the mens rea requirement for voter intimidation claims in Section 11(b) after a century-long legislative failure to prevent voter intimidation, starting with the Klan Act of 1871's prohibition of, among other things, conspiracies to intimidate voters in federal elections, 42 U.S.C. § 1985(3), followed by Section 131(b) of the Civil Rights Act of

1957's prohibition of intentional voter intimidation in federal elections, 52 U.S.C. § 10101(b), which was only then followed by Section 11(b) of the Voting Rights of 1965. The goal of Section 11(b) was to finally put an end to the scourge of voter intimidation. As Attorney General Katzenbach explained during the consideration of the Voting Rights Act:

> The litigated cases amply demonstrate the inadequacy of present statutes . . . . [P]erhaps the most serious inadequacy results from the practice . . . to require . . . proof of "purpose." Since many types of intimidation . . . involve subtle forms of pressure, this . . . requirement has rendered the [the Civil Rights Act of 1957] largely ineffective.

Hearing on the Voting Rights Act of 1965 Before the H. Judiciary Comm., 89th Cong. 12 (1965) (Statement of Nicholas Katzenbach, U.S. Attorney General).[9] Unsurprisingly then, voter registration numbers remained dismally low even after the passage of Section 131(b), *see, e.g.*, *id.* at 3-4, in no small part due to the success of subtler forms of voter intimidation, *see*, *e.g.*, U.S. Comm'n on Civil Rights, *Voting in Mississippi* 39 (1965); *see also id*. at 9-10, 22, 25, 32 (describing how Mississippi's practice of publishing names of voters and photographing them intimidated voters).

[9] *Available at* https://perma.cc/N9S4-KH2P.

Notably, voter intimidation persisted in Arizona during the 1950s and 1960s. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1021 (9th Cir. 2020), *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021) (discussing how voter intimidation prevented Native American, Latino, and African American voters from casting a ballot); *see also* Adela de la Torre, *Arizona Redistricting: Issues Surrounding Hispanic Voter Representation*, 6 Tex. Hispanic J.L. & Pol'y 163, 166 (2001). Thus, Congress's choice in Section 11(b) to eliminate the subjective intent requirement after watching Section 131(b)'s narrower prohibition on voter intimidation fail was an appropriately tailored response to its continued failure to protect the right to vote; indeed, if anything, enduring years of failure was more than Congress had to do to survive strict scrutiny. *See Burson*, 504 U.S. at 209 (courts should not require a "political system" to "sustain some level of damage before the legislature could take corrective action" to prevent voter intimidation under strict scrutiny analysis).

This history of federal voter intimation laws demonstrates that prohibitions found in both federal and state law, and summarized and described in Section III(D), stand on firm constitutional ground, in direct contradiction to the superior court's ruling. Indeed, much of the potentially

intimidating conduct described by Section III(D) of the EPM implicates no First Amendment right at all. For example, voters can be intimidated through assaults and batteries, and such acts do not constitute "expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Voters can also be intimidated by the open carrying of firearms near polling places and dropboxes. *E.g.*, *Atlas Aegis*, 497 F. Supp. 3d at 378-79. But again, the EPM's caution against carrying firearms near polling places, 2023 EPM at 182, does not implicate the First Amendment, as the open carrying of firearms is not "inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights ("FAIR")*, 547 U.S. 47, 65-66 (2006). For the exact same reason, the EPM's guidance concerning obstruction of access to the polls, 2023 EPM at 182, does not implicate any First Amendment values either.

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In sum, Section III(D) contains guidance for election officials consisting of accurate statements of federal and state law, and those laws are both constitutional and vital to protecting Arizona voters.

II. The relevant provisions of the EPM constitute guidance for election officials, not binding rules for the public.

The superior court also erred by incorrectly concluding that Section III(D) of the EPM constitutes *a binding rule* that *creates new crimes* and *applies to the public at large*. That is wrong for two reasons. First, the Secretary of State's authorizing statutes do not give him authority to create new crimes relating to voter intimidation; instead they only allow him to publish rules relating to election *procedures*. Thus, the material in Section III(D) does not have the force of law. Second, the EPM applies to election officials, and does not regulate the public at large. The Court should therefore stay the injunction below on either or both of these grounds.

A. The EPM provides binding rules adopted pursuant to statute, and other guidance for election officials.

As the superior court recognized, the EPM contains both guidance and binding rules. Ruling at 2 (The Secretary has the authority to prescribe rules to "ensure election practices are consistent and efficient throughout Arizona" and "the EPM also contains guidance on matters outside these specific topics.").

Under A.R.S. § 16-452, the Secretary shall "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity

and efficiency on the procedures early voting and voting." *Id.* at § 16-452(A).[10] Rules that are adopted under this section are binding on election officials, and violation of them by election officials is punishable as a class 2 misdemeanor. A.R.S. § 16-452(C); *see Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 64, ¶ 24 (2020).

One example of a binding rule is the instruction directing election officials how to respond to incomplete mail ballot requests. 2023 EPM at 58. Arizona law mandates that if an elector's early ballot is incomplete but otherwise accurate, "the county recorder or other officer in charge of elections shall attempt to notify the elector of the deficiency of the request," A.R.S. § 16-542(E). The EPM implements this requirement by directing the county recorder to "notify the voter (by mail, telephone, text, and/or email) within a reasonable period if the County Recorder has sufficient contact information to do so. [And] if the ballot-by-mail request form does not

[10] Arizona law also requires the Secretary to promulgate rules concerning "producing, distributing, collecting, counting, tabulating and storing ballots" and create "a procedure for registering [petition] circulators" to be included in the EPM. A.R.S. §§ 16-452(A), 16-315 (D).

contain contact information, the County Recorder must check the registrant's record for contact information." 2023 EPM at 58.

In addition to rules adopted under § 16-452(A), "the EPM also contains guidance on matters outside th[o]se specific topics . . . ." *McKenna v. Soto*, 250 Ariz. 469, 473, ¶ 20 (2021); Def. Opening Br. at 20, 26. Topics that are included in the EPM that fall outside of the EPM authorizing statute and do not have any other basis in Arizona law are *not* adopted pursuant to § 16-452 and therefore "do[] not have the force of law and simply act[] as guidance." *McKenna*, 250 Ariz. at 473, ¶ 20; *see also Leach v. Hobbs*, 250 Ariz. 572, 576, ¶ 21 (2021) ("[A]n EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law.").

Examples of guidance can be found throughout the EPM. For example, the EPM summarizes the requirements of Section 203 of the Voting Rights Act, which provides "[w]henever any State or political subdivision [covered by the section] provides [election related materials], it shall provide them in the language of the applicable minority group as well as in the English language." 52 U.S.C. § 10503(C); EPM at 134 (citing Section 203). The EPM summarizes this provision, and advises *election officials* how to comply with

the requirements of Section 203, noting that "[j]urisdictions covered under the language minority provisions under Section 203 of the Voting Rights Act should appoint bilingual poll workers and/or ensure access to on-site or remote interpretation services in the covered language(s) to provide language assistance to voters who need it." 2023 EPM at 134. Similarly, the EPM summarizes other provisions of federal law: for example, it notes that "[the Help America Vote Act] requires identity to be proven in one of the following ways for a first-time voter to vote by mail . . .". *Id.* at 28. And of course, Section III(D) summarizes applicable state and federal voter intimidation law.

The key authority here is *McKenna*, where the Arizona Supreme Court analyzed whether a provision of the EPM had the force of law. There, the plaintiff maintained that a candidate for the Arizona House of Representatives had not gathered enough valid signatures on his nominating petitions, because some of those signatures were accompanied by an incomplete date. The plaintiff relied on a portion of the 2019 EPM, which "direct[ed] county recorders to reject signatures" with an incomplete date. *McKenna*, 250 Ariz. at 471. The Court rejected that argument, concluding that the directive to reject such signatures was only guidance. *Id.*

at 473. That was because A.R.S. § 16-452 only directs the Secretary to prescribe rules on specific topics—such as early voting and voting—but not on candidate nomination petitions. *Id.* And because there was no other statutory basis for the rule on candidate nomination petitions, any EPM topic on that directive did not have the force of law. *Id.*; *see also Leach*, 250 Ariz. at 576, ¶ 21 ("[A]n EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law.").

B. Applying *McKenna*, the challenged portions of the EPM are guidance, not binding rules.

Applying *McKenna* here leads to the unmistakable conclusion that the challenged portions of the EPM are *not* adopted rules pursuant to A.R.S. § 16-452 (or any other statute) and therefore are mere guidance. That is because the relevant language does not create rules to "achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting" or ballot handling and counting. A.R.S. § 16-452(A).

First, Section III(D) does not concern the "procedures" for voting. A "procedure" is "a specific method or course of action."

Law Dictionary (12th ed. 2024). But Section III(D) does not set out specific methods or courses of action, but instead explains what "may" constitute intimidation. This is especially apparent on page 182, where the EPM lists actions that "may also be considered intimidating"—those descriptions of intimidating action cannot even arguably be depicted as "procedures" concerning voting. However, other parts of the EPM contain plenty of rules concerning the "procedure" of voting. *See* Part II.A. *supra*.

Nor does Section III(D) seek to "achieve . . . correctness, impartiality, uniformity, and efficiency" of the voting process. A.R.S. § 16-452. Rather than relating to uniformity or efficiency, Section III(D) addresses a substantive concern: preventing violence or intimidation that prevents or discourages voting.

By contrast, many other parts of the EPM clearly do concern correctness, impartiality, uniformity, and efficiency. For instance, the previous EPM included a requirement that election officials must provide instructions to voters who cast mail ballots explaining that overvotes would not be counted, and if a voter overvoted, to contact their County Recorder's Office and request a new ballot. 2019 EPM at 56. But for the 2020 Election, the Maricopa County Recorder issued a different overvote instruction in

contradiction to the 2019 EPM, and that new instruction was later invalidated because it violated the EPM. *Arizona Pub. Integrity All.*, 250 Ariz. at 61, ¶ 6. While a rule about overvoting unquestionably concerns uniformity of the voting process, a list of conduct that may be considered intimidating clearly does not.

Crucially, even if the EPM sets out a rule regarding a "specific method or course of action" for early voting, voting, or handling and counting ballots, it still cannot "exceed[] its statutory authority or contradict[] statutory requirements." *Arizona All. for Ret. Ams., Inc. v. Crosby*, 256 Ariz. 297, 302, ¶ 18 (App. 2023). For example, during the 2022 election, the Cochise County Board of Supervisors, in reliance on a sentence in the 2019 EPM, voted to mandate the County Recorder conduct a full hand-count audit of every early ballot, which violated state statue. *Id.* at 300–01, ¶ 18. Because the line in the EPM relied upon by Cochise County contradicted state statute, the EPM could not authorize a full hand count audit. *Id.* at 302–03, ¶¶ 18–19. Therefore, even if Section III(D) contained sanctioned rules under A.R.S. § 16-452 or another Arizona statute, those rules could not contravene federal and state voter intimidation law.

C. In addition, Section III(D) regulates local election officials, not the public.

The EPM does not impose liability on Plaintiffs or other members of the public, because the EPM is binding only on election officials. *See* 2023 EPM Introduction ("I am pleased to provide you with the 2023 Elections Procedures Manual to county, city, and town election officials throughout Arizona."); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *4 (D. Ariz. Feb. 29, 2024) ("[T]he EPM is binding on county recorders . . . ."); *Democratic Nat'l Comm. v. Arizona Sec'y of State's Off.*, No. CV-16-01065-PHX-DLR, 2017 WL 840693, at *4 (D. Ariz. Mar. 3, 2017) ("county officials . . . [are] bound by law to follow" the procedures in the EPM); Def. Opening Br. at 20, 23-26 (explaining that the "EPM provides guidance to election officials about *their* responsibilities"). Therefore, election officials are the only "persons" that can be subject to misdemeanor charges for violation of a rule promulgated by the EPM. A.R.S. § 16-452(C);

Def. Opening Br. at 28 ("'person' means the people who are regulated—i.e., election officials—and not anyone else").[11]

This is apparent when considering A.R.S. § 16-452 "as a whole." *City of Phoenix v. Orbitz Worldwide Inc.*, 247 Ariz. 234, 239, ¶ 16 (2019) (when interpreting statutes the Court must "look to the Code as a whole and attempt to give meaning 'to every word and provision so that no word or provision is rendered superfluous.'") (citations omitted). The "whole" of A.R.S. § 16-452, makes clear that it is a statute authorizing Arizona's chief election official to regulate Arizona's primary election officials. *Id.*; A.R.S. §§ 16-142 (the Secretary of State is Arizona's chief election officer), 16-407 (the Secretary of State is responsible for training local election officers); 2023 EPM at 49 ("Each County Recorder must report to the Secretary of State and the officer in charge of elections the number of active and inactive county registrants as of the following dates . . . "); *id.* at 70 ("A County Recorder may

[11] Unlike members of the public, governmental officials do not have a First Amendment right "to use official powers for expressive purposes." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). Indeed, "[t]he authority of the state to regulate the conduct of public employees is unquestioned, even though the first amendment might prohibit the same regulation if imposed upon the general public." *Barlow v. Blackburn*, 165 Ariz. 351, 357 (App. 1990).

issue replacement ballots-by-mail to a voter upon request and may limit the total number of ballots-by-mail to three per voter per election."); *id.* at 91 ("The officer in charge of elections must test all accessible voting equipment prior to an election.").

D. The superior court's reasoning fails in light of *McKenna* and other case law.

The superior court held that Section III(D) "contains . . . speech restrictions in violation of our Arizona Constitution" in part because it "fails to identify any distinction between guidance and legal mandates." Ruling at 9. But that reasoning and conclusion are both wrong. The reasoning is wrong because in *McKenna*, the Supreme Court had no issue concluding that the relevant provision of the EPM was guidance even though the EPM did not distinguish between the two. In addition, as explained above, applying the analysis that is required by *McKenna* clearly demonstrates that Section III(D) contains only guidance, not binding rules. *See* Def. Opening Br. at 7 ("Chapter 9 of the EPM provides instructions and guidance to local election officials"). Section III(D) therefore does not contain "speech restrictions" and does not violate the Constitution.

Here, the trial court did not apply the analysis required by *McKenna*. Instead, it concluded that because the EPM did not "delineate" which portions of Chapter 9 were "guidance," the challenged portions should be construed as binding rules. Ruling at 16. But whether a certain portion of the EPM is guidance or a binding rule has never hinged on whether that portion is "delineated" as one or the other. Indeed, the portions of the EPM the *McKenna* Court held were guidance had no such designation. *See McKenna*, 250 Ariz. at 473, ¶ 20; 2019 EPM at 107-23.[12] Rather, the proper question is whether the relevant portion of the EPM was adopted "pursuant to § 16-452." *McKenna*, 250 Ariz. at 473, ¶ 20; *see also Leach*, 250 Ariz. at 576, ¶ 21. But the court below never asked that question.

The superior court's analysis was also flawed because it incorrectly concluded that "the EPM applies to all Arizonans, not just" election officials. Ruling at 9. Indeed, neither the superior court nor Plaintiffs have identified a portion of the EPM that regulates the public—the parts of the EPM relied

[12] Even under the trial court's framework—asking whether a portion of the EPM is "delineated" as either a rule or guidance—its conclusion was flawed as to a significant portion of Section III(D). Part of that section lists "guidelines" for election officials. 2023 EPM at 182.

upon by the superior court to find that the EPM applied to the public in fact clearly demonstrate the EPM is a document that speaks to, and only to, election officials. *See* Ruling at 8. For example, though the superior court noted that page 175 of the EPM has a section entitled "Instructions to Voters and Election Officers," that section simply reproduces the text of a sign that election officials are required to post at voting locations. *See* 2023 EPM at 175; *see also* Def. Opening Br. at 24-25. The words of the sign are printed in the EPM so election officials know what the sign should say, not to create a binding rule for members of the public. The same is true of the other examples cited by the court. *See* Ruling at 8. Further, the pages relied upon by the superior court to reach its conclusion—pages 175, 177 and 178, *see* Ruling at 8—are not located within Section III(D); they are in other parts of Chapter 9.

Even if the superior court were correct that *some* rules in the EPM could be used to prosecute members of the public, Section III(D) is unquestionably directed *only* at election officials. That section provides that "*[t]he officer in charge of elections has the responsibility to* . . . to train poll workers and establish policies to prevent and promptly remedy any instances of voter intimidation." 2023 EPM at 181 (emphasis added); *see also id*. at 182 ("The

officer in charge of elections should publicize and/or implement the following guidelines . . . ."). By contrast, Section III(D) includes no language creating "a responsibility" for the public; the language largely explains what "*may*" constitute intimidation by providing a non-exclusive set of examples and directly cites Arizona statutes, making clear that such descriptions are explanatory. *See* 2023 EPM at 181-83 (emphasis added).[13]

* * *

Because the EPM is binding only on election officials and Section III(D) merely provides guidance for what constitutes voter intimidation under federal and state law, this Court should reverse the trial court's order. And as explained in Part III, *infra*, even if the trial court were correct that Section III(D) creates binding rules, a better-tailored remedy could have solved the problem—instead of enjoining the entire section, the court should have held that it may only operate as guidance for election officials.

[13] Plaintiffs' vagueness claim also fails because the relevant portions of the EPM would not impose any legal restriction on Plaintiffs' conduct—let alone one for which they lack fair notice.

III. Well-established remedies principles preclude the broad relief the court granted to Plaintiffs.

The superior court should have dismissed Plaintiffs' complaint because the challenged provisions of the EPM are only guidance that restates federal and state law. But even if the superior court's view was correct that Section III(D) contained new rules binding on the public, its injunction was still unlawfully broad. First, the more appropriate remedy would have been for the court to declare that Section III(D) constitutes only guidance (rather than completely enjoining the section's enforcement); along with issuing that more appropriate and narrowly tailored declaratory relief, the court could have resolved any confusion by requiring the Secretary to inform election officials of that clarification. Second, even assuming that an injunction were appropriate for particular subcomponents of the challenged section, the superior court should have limited its injunction to these particular Plaintiffs because they did not meet the standard for facial relief. Third, the court improperly enjoined portions of the EPM that were not challenged by Plaintiffs, and are constitutional. Finally, as touched on above, the superior court's injunction was overbroad because it enjoined the EPM's application

to public officials—who simply do not enjoy the same First Amendment rights as the public at large because they are public officials.

When confronting a constitutional question, Arizona courts must "construe[] statutory language narrowly to avoid constitutional difficulties." *Wicks v. Motor Vehicle Div., Dep't of Transp., State of Ariz.*, 184 Ariz. 307, 309 n.5 (App. 1995). If constitutional issues cannot be avoided, a court issuing declaratory relief should "try not to nullify more . . . than is necessary." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). In other words, before declaring a law "unconstitutional, [courts] must apply the rule of severability." *Cohen v. State*, 121 Ariz. 6, 9 (1978) (cleaned up). Under that rule, a law in its entirety must not be declared as "unconstitutional if the constitutional portions can be separated." *State v. Book-Cellar, Inc.*, 139 Ariz. 525, 533 (App. 1984).

Similarly, Arizona courts reviewing injunctions have asked if the remedy is "appropriately tailored." *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 422, ¶ 38 (1999); *see also ArborCraft LLC v. Ariz. Urb. Arborist, LLC*, No. 1 CA-CV 23-0384, 2023 WL 6439844, at *6, ¶ 36 (Ariz. Ct. App. Oct. 3, 2023) (asking whether superior court "tailored the injunction appropriately"); *see also Stormans, Inc. v.*

Selecky, 586 F.3d 1109, 1140 (9th Cir. 2009) ("Injunctive relief . . . must be tailored to remedy the specific harm alleged.") (quotation marks omitted).

A. The superior court should have narrowly construed Section III(D) or invalidated it only to the extent that it creates binding rules for the public.

Here, the superior court made no effort to narrowly construe Section III(D) or appropriately tailor its injunction. Aside from enjoining parts of the EPM that were not even challenged, *see* Part III.C., *infra*,[14] the court's decision to "declare [Section III(D)] unenforceable," Ruling at 18, was overbroad and inappropriate. While the court entered its injunction based on its conclusion that Section III(D) contains "prohibition[s] on conduct" that "appl[y] to all Arizonans," Ruling at 9, 17, it never considered, as it should have, whether it could solve that problem without completely invalidating Section III(D). *See Stormans*, 586 F.3d at 1140 (district court abused discretion by completely enjoining rules rather than enjoining enforcement as to specific plaintiffs).

[14] The court initially declared "chapter 9, section (III)(A)-(D)" of the EPM unenforceable, much more than Plaintiffs challenged. Ruling at 18. And even its amended order, which enjoined enforcement of all of Section III(D), was overbroad because "Plaintiffs challenged only *select portions*" of Section III(D). *See* Part III.B., *infra*; Def. Opening Br. at 66-67.

Better-tailored options were readily available—the court could have narrowly construed the challenged portions of the EPM, holding that Section III(D) operates only as guidance and cannot create a basis for liability. *See*, *e.g.*, *Wicks*, 184 Ariz. at 309 n.5 (resolving case "as a matter of statutory interpretation" due to court's obligation to "construe[] statutory language narrowly to avoid constitutional difficulties"); *see also* Def. Opening Br. at 32.

Even if the court believed that such a narrowing construction of Section III(D) was inappropriate, it could have modified the section through an injunction, holding that Section III(D) may operate only as guidance for election officials, and may not itself operate as a prohibition on the conduct of Arizonans who are not election officials. *See* Def. Opening Br. at 65-66. Indeed, courts regularly narrow laws or rules in this manner. *See*, *e.g.*, *Ayotte*, 546 U.S. at 328-29 (noting Supreme Court's practices of enjoining "only the unconstitutional applications of a statute"). The court could have even gone one step further and ordered the Secretary to inform all election officials that Section III(D) constitutes guidance, not a set of binding rules. *See*, *e.g.*, *LULAC v. Reagan*, No. 2:17-cv-04102, Doc. 37 at 8 (D. Ariz. Jun. 18, 2018)

(ordering Secretary to provide guidance to county recorders concerning acceptance of certain voter registration applications).[15]

B. The superior court erred by enjoining the EPM because Plaintiffs failed to meet the standards for a facial or overbreadth challenge.

Plaintiffs asserted both a facial and overbreadth challenge to Section III(D) in the superior court. Motion for PI at 14–15. To obtain facial relief, Plaintiffs needed to demonstrate that "[t]he Rules are unconstitutional on their face" which means that "they cannot be applied *under any circumstances* without violating [the constitution]." *Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, 109, ¶ 46 (App. 2004) (emphasis added); *see also Fann v. State*, 251 Ariz. 425, 433, ¶ 18 (2021) ("A facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exists under which the statute would be valid."). "Otherwise, their

[15] Separately, the court could have invalidated only the provisions of Section III(D) that could conceivably be directed at the public. But the court struck the entire section, including the provisions providing that 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," 2023 EPM at 181, and that the "inspector must utilize the marshal to preserve order and remove disruptive persons from the voting location." *Id.* at 182. There is no basis on which to conclude that those provisions should be included in the court's injunction.

constitutionality can only be attacked as applied in particular circumstances." *Phelps Dodge*, 207 Ariz. at 109-110, ¶ 46. In other words, even if there are *some* unlawful applications of Section III(D), that "does not invalidate [Section III(D)] in its entirety, as the superior court ruled." *Id*. at 110, ¶ 47.

Plaintiffs asserted that Section III(D) is facially unconstitutional because it lacks "statutory authorization" and eliminates the "*mens rea* requirement" in Arizona's voter intimidation statute. Motion for PI at 14–15. Plaintiffs therefore claimed that the EPM facially violates the First Amendment. Motion for PI at 9, 14–15.

The superior court properly characterized this argument as an assertion that the "Secretary has violated the separation of powers by rewriting this law," not the First Amendment. Ruling at 3. But even if this argument was properly framed as a facial challenge on First Amendment grounds, Plaintiffs and superior court never applied the correct legal standard by showing that "no set of circumstances exist under which" Section III(D) would be valid. *Fann*, 251 Ariz. at 433, ¶ 18. Plaintiffs simply cannot meet that high burden. For example, the prohibitions on bringing a firearm into a polling place are plainly lawful. *See* Part III.C.2., *infra*. Further,

as discussed above, courts have found that the Voting Right Act, which has no *mens rea* requirement, is narrowly tailored to serve a compelling interest. *See* Part I.B., *supra*.

Plaintiffs also raised a First Amendment overbreadth challenge. Overbreadth challenges are "unusual" and are not to be "casually employed." *United States v. Hansen*, 599 U.S. 762, 769–70 (2023) (citation omitted). To succeed on such a challenge, Plaintiffs must show that the EPM "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Hansen*, 599 U.S. at 770 (internal quotation marks omitted); *see also AZ Petition Partners LLC v. Thompson in & for County of Maricopa*, 255 Ariz. 254, ¶ 18 (2023) (plaintiff must show a "substantial number of the law's applications are unconstitutional" (cleaned up))

Thus, courts consider both constitutional and unconstitutional applications of a challenged law and weigh them against each other. *See Hansen*, 599 U.S. at 782–785 (comparing in detail the statute's "valid reach" with "the other side of the ledger"). This means that "first, the courts must assess the state laws' scope; and second, the courts must decide which of the laws' applications violate the First Amendment, and . . . measure them against the rest." *NetChoice, LLC v. Bonta*, No. 23-2969, 2024 WL 3838423, ---

F.4th ----, *8 (9th Cir. 2024). "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Hansen*, 599 U.S. at 770.

In this case, the superior court held that Section III(D) is overbroad, Ruling at 17, but did not conduct the required analysis into whether Section III(D) prohibits a substantial amount of protected speech relative to its plainly legitimate sweep. Nowhere in its ruling did the superior court compare the constitutional applications of the EPM to its allegedly unconstitutional applications. *See also*, Def. Opening Br. at 54 ("the court failed to even consider how any purported impact on voters' speech measured up against the broad, undisputedly constitutional application of section III(D) as to its intended audience of election officials."). Nor did it find a lopsided ratio. Indeed, the superior court did not even cite the relevant overbreadth principles mentioned above.

Instead, the superior court merely questioned what the EPM reaches, but then summarily concluded that "many of the prohibitions listed in the EPM are free speech and protected." Ruling at 17. The superior court then found that the EPM is overbroad. *Id.* Because the superior court applied the incorrect legal standard, this Court should stay the injunction. *See Hart v.*

Hart, 220 Ariz. 183, 188, ¶ 19 (App. 2009) (vacating and remanding because "the wrong standard was applied").

Moreover, "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *AZ Petition Partners LLC*, 255 Ariz. at 260, ¶ 27. Courts are therefore encouraged to place limiting constructions on enforceable law. *E.g., id.* (clarifying the statute and noting that "[o]ur clarification also means that the statute is not vague on its face").

Here, the superior court recognized that "Chapter 9 contains law, rules, guidance and instructions." Ruling at 8. As already demonstrated, (*see* Part II., *supra*), the provisions of the EPM that the superior court enjoined and declared unlawful are guidance because they clearly provide that the listed examples "potentially" or "may" be voter intimidation. Contrary to Plaintiffs' arguments and the superior court's holding, Section III(D) simply does not say that the examples are always voter intimidation. Again, federal and state law control. Accordingly, the superior court erred by not limiting its construction of these provisions as guidance on federal and state voter intimidation law.

C. The superior court erred by invalidating Section III(D)'s provision relating to firearms, which was not challenged by Plaintiffs.

1. The superior court's injunction on the firearm portions of the EPM violated the party presentation principle.

Below, the superior court declared the entirety of Section III(D) unconstitutional. But that section includes guidance explaining that that "[p]rivate citizens are prohibited from bringing weapons into a polling (including the 75-foot limit)." 2023 EPM at 182. Because Plaintiffs never challenged that provision, the superior court's injunction must be modified to preserve this provision.

"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* The violation of the party presentation principle may result in vacatur of the decision below. *See, e.g., United States v. Sineneng-Smith*, 590 U.S. 371, 380 (2020) (vacating and remanding decision where court violated party presentation principle).

Plaintiffs never argued that this provision violates the First Amendment or presented evidence of expressive First Amendment activity in connection with firearms.[16] Because the injunction extends beyond what Plaintiffs challenged, it violates the party presentation principle, *see Sineneng-Smith*, 590 U.S. at 380, and must be modified to preserve the unchallenged portion of the law, which can easily "be separated" from the remainder of Section III(D). *Book-Cellar, Inc.*, 139 Ariz. at 533.

2. The EPM provisions observing that firearms are prohibited near polling places are constitutional.

Even if a court were permitted to invalidate a provision of law that was not challenged, it would have been incorrect to invalidate the portion of Section III(D) that provides guidance on firearms, because that provision is constitutional. At least five courts "have held that gun possession alone is unlikely to convey a particular message that would be understood by those who witnessed it." *Chesney v. City of Jackson*, 171 F. Supp. 3d 605, 617 (E.D. Mich. 2016) (collecting cases and noting the lack of "evidence that Plaintiff

[16] Plaintiffs also did not argue that this provision violates the Second Amendment. Such an attempt would have failed. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022) (reaffirming that "polling places" were "sensitive places" at which "arms carrying could be prohibited consistent with the Second Amendment").

acted with the requisite intent to convey a particularized message" when "carrying a firearm").

Even if Plaintiffs had presented evidence that they intended to carry a gun with a particularized message, carrying guns in conjunction with speech that conveys a message does not create expressive conduct because it is only through explanatory speech that any such conduct would be understood to carry some other message. And that's not good enough to qualify for First Amendment protection.

As the Supreme Court explained in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. ("FAIR")*, plaintiffs are not allowed to characterize their entire course of conduct as expressive conduct protected by the First Amendment simply because some of their activities may be entitled to a modicum of First Amendment protection. *See* 547 U.S. 47, 65–66 (2006). The "expressive component" of Plaintiffs' actions "is not created by the conduct itself but by the speech that accompanies it," and that is "strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection." *Id.* at 66.

Moreover, even if the decision to carry guns near a polling place conveys an expressive message, a narrow restriction on carrying guns into

or within 75-feet of a polling location is narrowly tailored to serve the government's compelling interest in preventing voter intimidation. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 486 n.29 (S.D.N.Y. 2020) (noting that any "content-based speech restrictions imposed by" Section 11(b) "are narrowly tailored to advance compelling government interests"); *see also Burson*, 504 U.S. at 206 (preventing voter intimidation is a compelling governmental interest).

In sum, the provision restricting firearms near polling places is constitutional, and it is certainly so under the evidence presented in this case. Accordingly, the superior court should have left the provision intact, because it can rationally and independently operate without the other allegedly unconstitutional provisions. *See Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 522, ¶ 23 (2000) (noting that courts "ask whether the valid portion can operate without the unconstitutional provision and, if so, we will uphold it unless the result is so absurd or irrational that one would not have been adopted without the other").

D. The superior court's injunction was overbroad because it wrongly enjoined the EPM as it applies to public officials.

Finally, the Court's injunction is overbroad because unlike members of the public, governmental officials do not have a First Amendment right "to use official powers for expressive purposes." *Carrigan*, 564 U.S. at 127. Indeed, "[t]he authority of the state to regulate the conduct of public employees is unquestioned, even though the first amendment might prohibit the same regulation if imposed upon the general public." *Barlow*, 165 Ariz. at 357. Here, the superior court's injunction is overbroad because it enjoins the EPM's regulation of election officials—who are public officials and do not have the same first amendment rights as the general public. Thus, even if the superior court were correct in enjoining Section III(D)'s application to the public at large, the injunction is inappropriate as applied to public officials.

* * *

The court's failure to apply overbreadth analysis, narrowly construe Section III(D), or appropriately tailor its remedy is fatal to the injunction. If its decision is not reversed in full, this Court should direct that the injunction be modified such that it is properly tailored by one or more of the following

methods (1) declare that Section III(D) is guidance, not a binding rule; (2) limit the scope of the injunction to only apply to these particular Plaintiffs; (3) limit the scope of the injunction to only the provisions of Section III(D) challenged by these Plaintiffs, and (4) clarify that the injunction protects only members of the public at large, not election officials.

CONCLUSION

For these reasons, Defendants' stay motion should be granted, and the superior court's decision should be reversed.

RESPECTFULLY SUBMITTED 17th this day of September, 2024.

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