No. 22-16490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiff-Appellees,
v.
KRISTIN K. MAYES, in her official capacity as Arizona Attorney General,
Defendant-Appellants,
and
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellants,
and
ADRIAN FONTES, in his official capacity as Arizona Secretary of State; et al.
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:22-CV-01374-GMS

INTERVENOR-DEFENDANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The answer to both questions posed by the Court in its May 23, 2023, supplemental briefing order is "**no**."

First, the three Plaintiff organizations all lack direct organizational standing or associational standing to challenge the Cancellation Provision. Both standing theories fail here because they are (a) premised on Plaintiffs' legally incorrect understanding of how the Cancellation Provision works; and (b) reliant on conjecture about future conduct. Plaintiffs' alleged harm is thus too speculative to establish an injury-in-fact as required by Article III. Moreover, Plaintiffs' complaint does not challenge (and the district court's order does not enjoin) the long-standing existing practices employed by the Secretary of State's Office and county recorders to cancel duplicate in-state registrations—which are codified by the Cancellation Provision, A.R.S. § 16-165(A)(11), and its interaction with A.R.S. §§ 16-164 and 16-166. As such, Plaintiffs' claimed injury is not redressable.

Second, although the Arizona Supreme Court has authority to answer a certified question on the meaning of "mechanism for voting" in the Felony Provision, certification is not necessary here because nothing

in the plain text of the Provision or surrounding statutory context supports Plaintiffs' position that the Provision criminalizes their voter registration or voter mobilization activities. However, if this Court deems certification appropriate to obtain guidance on this issue, this Court should narrowly cabin its certified question to whether "mechanism for voting" actually reaches those voter registration or mobilization activities.

ARGUMENT

I. Plaintiffs Do Not Have Direct Organizational Standing or Associational Standing.

To establish standing, a party must show: (1) it has suffered an "injury in fact" that is not "conjectural or hypothetical"; (2) the injury is fairly traceable to the challenged action; and (3) the injury is redressable by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). While a theory of direct organizational standing or associational standing may differ in who (or what) must sustain the injury, all three factors must be met under either theory. *See Nat'l Family Farm Coal. v. U.S. Envtl. Prot. Agency*, 966 F.3d 893, 908 (9th Cir. 2020) (applying traditional standing factors in an associational standing case); *La Asociacion de Trabajadores de Lake*

Forest v. City of Lake Forest, 624 F.3d 1083, 1087–88 (9th Cir. 2010) (applying traditional standing factors in a direct organizational standing case).

Here, Plaintiffs cannot identify any redressable injury-in-fact to either the organizations or to its members caused by the Cancellation Provision. Thus, standing is absent.

A. Plaintiffs Do Not Have Direct Organizational Standing.

The three Plaintiffs all base their theory of direct organizational standing on the flawed premise that the Cancellation Provision will result in cancellation of voters' *current* registrations. *See*, *e.g.*, 2-ER-275–78 ¶¶ 22–23, 25–26; 28. More specifically, Plaintiffs claim that, at some future point, they will need to divert organizational resources to educate voters about protecting their current registration by instructing them to cancel outdated, duplicate registrations. *See id*; *see also* 2-ER-231 ("Plaintiffs will now need to help voters identify and personally cancel any other voter registrations in other counties . . . because failing to do

so would risk the voter's registration being cancelled[.]" (internal citation omitted)); 2-ER-170 (similar).[1]

However, an organization cannot "establish standing under a diversion-of-resources theory . . . by inflicting harm on itself to address its members' fears of hypothetical future harm that is not certainly impending." *City of S. Miami v. Governor*, 65 F.4th 631, 638–39 (11th Cir. 2023) (internal quotations omitted). When the Cancellation Provision is read in conjunction with the surrounding statutory provisions, the Provision simply provides that a voter's *new* (*i.e.*, current) registration is maintained in the State's database, while the *old* duplicate registration is removed. *See* A.R.S. §§ 16-164(A) ("On receipt of a *new* registration form that effects a change of . . . address . . . the county recorder shall indicate electronically in the county voter registration database that the registration has been canceled . . ." (emphasis added)), 16-166(B) ("If the elector provides the county recorder with a *new* registration form or otherwise revises the elector's information, the county recorder shall

[1] Oral Arg., *Ariz. All. for Retired Ams. v. Mayes*, CV-22-16490, at 21:28–44 (May 16, 2023) https://www.ca9.uscourts.gov/media/video/?20230516/22-16490/ (arguing that Plaintiffs will "have to divert resources in order to inform their members that their registrations could be cancelled solely because they are registered to vote in another state.").

change the general register to reflect the changes indicated on the new registration."(emphasis added)). Indeed, the Secretary of State has explained that duplicate voter registrations cannot be maintained in the statewide voter database, so any time a voter re-registers to vote, that voter's old registration is replaced with the new registration. 2-ER-181–83 (explaining how the statewide voter database "AVID" merges the new registration into the voter's file).

Thus, the Cancellation Provision does not impact a voter's *current* registration as feared by Plaintiffs, but rather only serves to procedurally cancel outdated, duplicate registrations. If Plaintiffs decide to expend resources to address their fears about a "hypothetical future harm that is not certainly impending," that is a self-imposed injury and cannot sustain standing. *City of S. Miami*, 65 F.4th at 638–39.[2]

Plaintiffs have attempted to get around this problem by speculating that separate county recorders *might*, by accident, "each cancel a voter's

[2] Plaintiffs do not allege that any diversion-of-resources has actually transpired, but instead assert they will need to divert resources sometime in the *undefined future* to combat the Cancellation Provisions' claimed effects. *See* 2-ER-275–78 ¶¶ 22, 25, 28. Typically, anticipation that a future diversion of funds may be necessary does not establish standing. *Fair Hous. Council of Oregon v. Travelers Home & Marine Ins. Co.*, 3:15-cv-00925-SB, 2016 WL 7423414, at *7–8 (D. Or. Dec. 2, 2016).

registration . . . in their respective counties . . .” 2-ER-230. But that hypothetical merely heaps more unsupported speculation on an already flawed standing theory. Government workers are presumed to carry out their duties competently. *See, e.g.*, *Nat’l Archives & Records Admin v. Favish*, 541 U.S. 157, 174 (2004).

Regardless, enjoining the Cancellation Provision does not redress Plaintiffs’ claimed fear that current registrations might be accidentally cancelled. That is because Plaintiffs’ challenge, and the district court’s preliminary injunction, does not reach the preexisting procedures and practices that the Cancellation Provision later codified. 2-ER-044 (email from Secretary of State’s Office advising counties that they “**need not and should not make any changes to our existing procedures**” in part because “the court **did not** expressly enjoin any existing procedures.” (emphasis in original)); 2-ER-077 (filing from Secretary stating that the “PI Order . . . does not enjoin Arizona’s existing voter registration list maintenance procedures”); 2-ER-181–83 (stating the Secretary’s position that the Cancellation provision “simply codif[ies] existing voter registration procedures, which have been in place for numerous election cycles” which “is the process that is already followed

by all counties"); 2-ER-215 (describing the Maricopa County Recorder's existing process for cancelling duplicate in-state registrations). Because procedures identical to the Cancellation Procedure remain intact, maintaining the injunction provides Plaintiffs with no relief from their alleged organizational harms.

B. Plaintiffs Do Not Have Associational Standing.

Of the three Plaintiff organizations, only one claims to have associational standing. Specifically, the Arizona Alliance for Retired Americans ("AARA") purports to challenge the Cancellation Provision on behalf of its members on the grounds that the Provision places AARA members "at risk of having their [current] registrations cancelled[.]" 2-ER-275–76 ¶ 24. There is no claim that any AARA member—or any other voter—has actually had a current registration cancelled due to the Cancellation Provision. Oral Arg., *Ariz. All. for Retired Ams. v. Mayes*, CV-22-16490, at 20:26–21:04 (May 16, 2023),[3] (when asked whether Plaintiffs had identified any voters who had actually been dropped from the rolls or unable to vote, Plaintiffs conceded "we did not").

[3] https://www.ca9.uscourts.gov/media/video/?20230516/22-16490/.

Just as Plaintiffs' conjecture and fears are insufficient to establish direct organizational standing, so too are they insufficient to establish association standing on behalf of AARA members. The Cancellation Provision does not provide for cancellation of the *current* registration of AARA members (or any other voter), and Plaintiffs cannot create standing by speculating that election officials might err in their application of the Cancellation Provision. Moreover, because Plaintiffs did not challenge the preexisting practices and procedures that are equivalent to and codified by the Cancellation Provision, enjoining the Provision does not address the claimed harm to AARA members.

For all these reasons, Plaintiffs lack standing to challenge the Cancellation Provision under either a theory of direct organizational or associational standing.

II. This Panel Should Not Certify to the Arizona Supreme Court a Question on the Meaning of the Felony Provision.

The certification issue raised by this Court implicates two sub-questions: (1) does the Arizona Supreme Court have authority to answer a certified question on the meaning of "mechanism for voting" in the Felony Provision, and (2) if so, should this Panel ask the Arizona

Supreme Court to exercise that authority? The answer to the first question is "yes," but the answer to the second question is "no."

Under A.R.S. § 12-1861, the Arizona Supreme Court can answer a certified question of Arizona law if the question "may be determinative of the cause then pending in the certifying court," and "it appears to the certifying court there is no controlling precedent" from the Arizona appellate courts.

Both conditions are satisfied here. The Arizona Supreme Court's interpretation of "mechanism for voting" could be determinative of Plaintiffs' claims against the Felony Provision because all three Plaintiffs are associations that claim that the Provision hinders them from assisting voters in registering or mobilizing voters to turn out at the polls.[4] *See* Answering Br. at 43–44 & n.10; *see also* 2-ER-148, -163, -231, -234, -283–284 ¶¶ 56–58. If the Arizona Supreme Court concludes that "mechanism for voting" does *not* extend to voter registration forms, voter education materials, or other items relating to an association's voter

[4] Plaintiffs' registration activities include things like registration drives, while their "mobilization" activities include things like phone banking or providing general education to voters on where and how to vote. 2-ER-163, -231, -236.

registration or voter mobilization efforts, then Plaintiffs' entire theory of harm falls away. This Court cannot rely on existing precedent to answer this question, as no Arizona appellate court has addressed the meaning of "mechanism for voting."

Although certification is available, the Yuma County Republican Committee ("YCRC") respectfully submits that this Court should not pursue certification here. Plaintiffs' theory that "mechanism for voting" criminalizes an association's voter registration or mobilization activities is so soundly rejected by the Felony Provision's plain language and the surrounding statutory context that Arizona Supreme Court input is not needed on this issue. *See* YCRC Opening Br. at 26–29 (prerequisites for voting do not fall within statutory text, and neither the illustrative example in the Felony Provision nor the list of prohibited acts in A.R.S. § 16-1016 concern registration).

Rather, certification is only appropriate if this Panel has any uncertainty about whether the Felony Provision extends to Plaintiffs' associational activities. The federal courts should not continue to enjoin a duly enacted Arizona criminal statute without the Arizona Supreme Court providing guidance on a determinative issue of Arizona law. *See*

Benson v. Casa de Capri Enterprises, LLC, 980 F.3d 1328, 1332 (9th Cir. 2020) (certifying issues to Arizona Supreme Court "out of respect for Arizona courts and their preeminent role in interpreting Arizona law . . ."); *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 540 (9th Cir. 2011) (certifying questions that "involve[d] important public policy decisions for" Arizona).

In other instances, federal courts have sought state court guidance to interpret a state statute in the context of a constitutional vagueness challenge. *See Dream Defs. v. Governor of the State of Florida*, 57 F.4th 879, 893 (11th Cir. 2023) (certifying question to Florida Supreme Court "to determine precisely what conduct [a statutory] definition prohibits" when state statute was challenged as vague and overbroad); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("We have concluded that we should not attempt to decide the constitutional issues presented without first having the Virginia Supreme Court's interpretation of key provisions of the statute."); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal

risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.").

Lastly, if this Panel does pursue certification, it need not ask the Arizona Supreme Court to catalogue every single type of "mechanism for voting," particularly given the myriad ways in which Arizonans vote.[5] The Arizona Supreme Court need only determine whether mechanism for voting reaches voter registration or mobilization activities—*i.e.*, the actual associational activities engaged in by Plaintiffs that are supposedly impeded by the Felony Provision.

CONCLUSION

For all these reasons, Plaintiffs lack standing, and this Court should vacate the district court's injunction of SB 1260.

[5] For instance, voting in Arizona can include early voting by mail, "traditional" voting on a polling place on election day, voting through a special election board for voters with illnesses or disability, voting with assistance from election officials or by using accessible voting devices, or curbside voting. *See* A.R.S. §§ 16-541, -549, -580, -581.

Respectfully submitted this 6th day of June, 2023.

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UNITED STATES COURT OF APPEALS
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I certify that this brief complies with the word limit set by the Court's Order.

Signature *Brett W. Johnson* **Date** June 6, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2023, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

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