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**ARIZONA SUPERIOR COURT**

**MARICOPA COUNTY**

16 RIZONA FREE ENTERPRISE CLUB,

17 Plaintiff,

18 v.

19 ADRIAN FONTES, in his official capacity as  
20 the Secretary of State of Arizona,

21 Defendant.

) No. CV2024-002760

) **NOTICE OF LODGING PROPOSED**  
) **INTERVENORS ARIZONA ALLIANCE**  
) **FOR RETIRED AMERICANS AND**  
) **VOTO LATINO'S MOTION TO**  
) **DISMISS AND OPPOSITION TO**  
) **APPLICATION FOR ORDER TO**  
) **SHOW CAUSE**

) (Assigned to the Hon. Jennifer Ryan-  
) Touhill)

1 Proposed Intervenor-Defendants the Arizona Alliance for Retired Americans and Voto  
2 Latino (the “Proposed Intervenors”) give notice of lodging their (1) Proposed Motion to Dismiss  
3 Plaintiffs’ Complaint for Declaratory Relief (attached as Exhibit 1), (2) Proposed Certification  
4 of Counsel Under Rules 7.1(h) and 12(j) (attached as Exhibit 2), and (3) Proposed Opposition to  
5 Application for Order to Show Cause (attached as Exhibit 3). In the spirit of “secur[ing] the just,  
6 speedy, and inexpensive determination” of this matter, Ariz. R. Civ. P. 1, Proposed Intervenors  
7 lodge these documents at the same time that Defendant will file a motion to dismiss for the  
8 expedient and efficient resolution of this case.

9 RESPECTFULLY SUBMITTED this 20th day of March, 2024.

10 **COPPERSMITH BROCKELMAN PLC**

11 By: /s/ D. Andrew Gaona

12 D. Andrew Gaona

13 Austin C. Yost

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21 *Latino*

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23 ORIGINAL e-filed and served via electronic  
24 means this 20th day of March, 2024, upon:

25 Honorable Jennifer Ryan-Touhill

26 c/o Eileen Hoyle

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/s/ Diana J. Hanson

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# **EXHIBIT 1**

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15 *Americans and Voto Latino*

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17 **ARIZONA SUPERIOR COURT**

18 **MARICOPA COUNTY**

19 ARIZONA FREE ENTERPRISE CLUB,

20 Plaintiff,

21 v.

22 ADRIAN FONTES, in his official capacity as  
23 the Secretary of State of Arizona,

24 Defendant.

No. CV2024-002760

25 **PROPOSED INTERVENORS**  
26 **ARIZONA ALLIANCE FOR**  
27 **RETIRED AMERICANS AND**  
28 **VOTO LATINO'S MOTION**  
**TO DISMISS**

(Assigned to the Hon. Jennifer Ryan-Touhill)

1 **INTRODUCTION**

2 In the middle of early voting for the 2022 general election, armed and masked  
3 vigilantes famously claimed a right to monitor, observe, and photograph voters at Arizona’s  
4 drop boxes, purportedly in the name of election integrity. The newspapers were filled with  
5 photographs of these intimidating figures gathered in tactical gear and carrying guns  
6 monitoring drop boxes. In some instances, these individuals confronted voters who were  
7 depositing their ballots, or followed them and intimidated them, taking photographs and  
8 posting pictures of voters who they claimed—without any basis—were voting illegally.  
9 Multiple lawsuits were filed, including by Proposed Intervenors the Arizona Alliance for  
10 Retired Americans and Voto Latino, seeking to protect voters from intimidation.  
11 Ultimately, a federal district court entered a temporary restraining order, which stopped this  
12 activity through the election cycle.

13 Against that backdrop, and ahead of the 2024 presidential election, the Secretary of  
14 State (“Secretary”) provided statutorily required guidance in the Election Procedures  
15 Manual (“EPM”) to county election officials who are tasked with preventing voter  
16 intimidation and harassment as to how they may best protect voters in their respective  
17 jurisdictions. The Secretary also updated the EPM to reflect a recent federal court judgment  
18 holding that federal-only voters may participate in presidential elections such as the  
19 Presidential Preference Election (“PPE”). These updates should not be controversial. But  
20 Plaintiff the Arizona Free Enterprise Club (“AFEC”) now seeks to pave the way for chaos  
21 in the upcoming 2024 elections by undermining the EPM.

22 Plaintiff’s attack on voters and election administration need not, indeed cannot, come  
23 to fruition. At the threshold, Plaintiff has a fatal problem: it alleges no actual, cognizable  
24 injury to itself or its purported members, nor does it allege that the relief sought will  
25 alleviate its hypothetical and generalized injuries. As a result, Plaintiff lacks standing and  
26 the Court should dismiss its complaint at the outset. On the merits, too, Plaintiff’s legal  
27 theories all fail as a matter of law because none of the challenged EPM provisions implicate  
28 cognizable constitutional rights or otherwise run afoul of the Arizona or federal

1 constitutions. The Court should dismiss Plaintiff’s complaint and reject its invitation to  
2 endorse voter intimidation, harassment, and exclusion.

### 3 **BACKGROUND**

4 Arizona law charges the Secretary with “prescrib[ing] rules to achieve and maintain  
5 the maximum degree of correctness, impartiality, uniformity and efficiency on the  
6 procedures for early voting and voting . . . in an official instructions and procedures manual”  
7 known as the EPM. A.R.S. § 16-452(A)–(B). The 2023 EPM contains comprehensive  
8 guidelines that address how Arizona’s election laws should be implemented to ensure the  
9 2024 elections are administered fairly and consistently statewide.<sup>1</sup> These include Arizona  
10 laws prohibiting voter intimidation and harassment. To wit, it is a misdemeanor to: (1)  
11 directly or indirectly intimidate or threaten to intimidate another person to induce or compel  
12 a person to vote or refrain from voting, or (2) use a fraudulent device to impede, prevent,  
13 or otherwise interfere with the “free exercise of the elective franchise of any voter.” A.R.S.  
14 § 16-1013(A). It is also a misdemeanor to knowingly: (1) make a false statement as to a  
15 voter’s inability to mark a ballot, (2) interfere with any voter within 75 feet of a voting site,  
16 (3) electioneer within 75 feet of a polling place, or (4) hinder the vote of others. *See* A.R.S.  
17 § 16-1017; *see also* A.R.S. § 16-515(A).

18 The EPM provides guidance on several of these statutes. For example, it states that  
19 “[t]he officer in charge of elections has a responsibility to train poll workers and establish  
20 policies to prevent and promptly remedy any instances of voter intimidation.” EPM at 181–  
21 82. This includes at drop boxes, where the EPM makes clear that the county recorder or  
22 officer in charge of elections “may establish and implement additional local procedures for  
23 ballot drop-off locations to protect the security and efficient operation” of such locations,  
24 including “restrict[ing] activities that interfere with the ability of voters and/or staff to  
25 access the ballot drop-off location free from obstruction or harassment.” *Id.* at 73–74. To  
26 assist with election officials’ exercise of their responsibilities to prevent voter intimidation

27  
28 <sup>1</sup> *See* 2023 EPM, ARIZ. SEC’Y OF STATE (Dec. 2023), [https://apps.azsos.gov/election/files/epm/2023/EPM\\_20231231\\_Final\\_Edits\\_to\\_Cal\\_1\\_11\\_2024.pdf](https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf).

1 and harassment, the EPM provides examples of “potentially intimidating” conduct or  
2 conduct that “may [] be considered intimidating conduct,” *id.* at 182, as well as “examples  
3 of actions that likely constitute voter intimidation or harassment,” *id.* at 74 n.40. Count I of  
4 Plaintiff’s complaint challenges such examples, which are found in Chapter 9, Section III.D  
5 of the 2023 EPM, entitled “Preventing Voter Intimidation,” and Chapter 2, Section I.I,  
6 which addresses interference with voters’ access to ballot drop boxes and provides  
7 examples of what may be unlawful behavior at drop boxes *See* Compl. ¶ 54 (citing EPM at  
8 74 n.40, 181–183) (“EPM voter intimidation guidance”).

9 The EPM also provides guidance on voter eligibility requirements. Arizona law  
10 recognizes a subset of voters called “federal-only voters,” which are the product of a conflict  
11 between federal and Arizona law. The National Voter Registration Act (“NVRA”) requires  
12 states to accept the National Mail Voter Registration Form (the “federal form”) to register  
13 voters for federal elections. 52 U.S.C. § 20505(a)(1). The federal form does not require  
14 documentary proof of citizenship (“DPOC”), while Arizona law does. As a result, Arizona  
15 voters who register using the federal form and whose citizenship county recorders are  
16 unable to verify (“federal-only voters”) have the right to vote in federal elections under the  
17 NVRA but are barred by Arizona law from voting for Arizona state offices. *See Arizona v.*  
18 *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14–15 (2013); *see also Mi Familia Vota v.*  
19 *Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at \*12 (D. Ariz. Sept. 14, 2023)  
20 (recognizing prior Consent Decree, which requires Arizona “County Recorders to accept  
21 State Form applications submitted without DPOC . . . [and] to immediately register the  
22 applicants for federal elections, provided the applicant is otherwise qualified and the voter  
23 registration form is sufficiently complete.”) (quotation omitted).

24 The 2023 EPM provides that “[a] ‘federal-only’ voter is eligible to vote solely in  
25 races for federal office in Arizona (including the [PPE]).” EPM at 3. Count II of Plaintiff’s  
26 complaint challenges this line of the EPM. *See* Compl. ¶¶ 71–73. The challenge is based on  
27 A.R.S. § 16-127(A)(1), which was enacted in 2022 and states that voters who have not  
28 provided DPOC cannot vote in presidential elections. Compl. ¶ 72. Immediately after its

1 enactment, several lawsuits were filed in which the plaintiffs argued that the law is invalid  
2 because it is preempted by federal statute. Those cases were consolidated as *Mi Familia*  
3 *Vota v. Fontes*, which was heard by the U.S. District Court for the District of Arizona. That  
4 court agreed with plaintiffs, and held on summary judgment that federal law preempts this  
5 statute and requires Arizona to allow federal-only voters to participate in presidential  
6 elections. *See Mi Familia Vota*, 2023 WL 8181307, at \*6–7. As a result, the Secretary and  
7 each of the state’s county recorders—all of whom were defendants in that action—are  
8 prohibited from enforcing that law. The EPM reflects this reality.<sup>2</sup>

9 Plaintiff seeks declaratory judgment that these provisions of the 2023 EPM  
10 contradict or exceed statutory authority or violate the Arizona and U.S. Constitutions, and  
11 thus lack the force of law. *See Compl.* at 15–16 (Demand for Relief).

#### 12 **LEGAL STANDARD**

13 Dismissal under Rule 12(b)(1) is proper when the court lacks subject matter  
14 jurisdiction. *See State v. Maldonado*, 223 Ariz. 309, 311 ¶ 14 (2010) (en banc). To properly  
15 invoke jurisdiction, a plaintiff must allege facts sufficient to show that the defendants’  
16 actions threaten particularized harm sufficient to confer standing. *See Arcadia Osborn*  
17 *Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88 ¶ 8 (App. 2023).

18 Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate where “as a  
19 matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts  
20 susceptible of proof.” *Fid. Sec. Life Ins. Co. v. State Dep’t of Ins.*, 191 Ariz. 222, 224 ¶ 4  
21 (1998). Although “courts must assume the truth of all well-pleaded factual allegations and  
22 indulge all reasonable inferences from those facts,” *Coleman v. City of Mesa*, 230 Ariz. 352,  
23 356 ¶ 9 (2012) (en banc), they “do not accept as true allegations consisting of conclusions  
24 of law, inferences or deductions that are not necessarily implied by well-pleaded facts,  
25 unreasonable inferences or unsupported conclusions from such facts, or legal conclusions  
26 alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

27  
28 <sup>2</sup>Count III of Plaintiff’s complaint challenges the same EPM guidance underlying Counts I and II.

1 ARGUMENT

2 Plaintiff seeks the Court’s blessing to harass and intimidate voters at drop boxes and  
3 polling places and exclude lawful voters from the PPE, but its complaint must be dismissed  
4 at the outset because Plaintiff lacks standing to assert any of its claims. For Count I, Plaintiff  
5 identifies no injury at all because the 2023 EPM does not newly criminalize any action not  
6 already prohibited under state law—laws that Plaintiff admits are constitutional. With  
7 regard to Count II, Plaintiff’s allegations amount to nothing more than generalized  
8 grievances shared by all citizens alike and are insufficient to confer standing. Count III also  
9 fails at the outset because it depends on the alleged injuries inflicted in Counts I and II. But  
10 even if Plaintiff had asserted cognizable injuries, they would not be redressed by the  
11 requested relief. The complaint also must be dismissed on the merits because the challenged  
12 provisions do not infringe on any constitutional rights and their inclusion in the EPM is well  
13 within the Secretary’s statutory authority.

14 **I. Plaintiff lacks standing to bring its claims.**

15 Arizona employs “a rigorous standing requirement,” *Fernandez v. Takata Seat Belts,*  
16 *Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005) (en banc), and Plaintiff falls far short of meeting it. A  
17 plaintiff bears the burden of establishing that it has standing at the threshold, a question that  
18 must be resolved before reaching the merits. *See Sears v. Hull*, 192 Ariz. 65, 68 ¶ 9 (1998).  
19 To this end, a plaintiff must show: (1) “a distinct and palpable injury giving [it] a personal  
20 stake in the controversy’s outcome,” *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406  
21 ¶ 8 (App. 2008) (citation omitted); (2) “a causal nexus between the defendant’s conduct and  
22 their injury,” *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz.  
23 396, 405 ¶ 23 (2020) (cleaned up); and (3) “that their requested relief would alleviate their  
24 alleged injury,” *id.* at 406 ¶ 25. The same principles apply in declaratory judgment actions:  
25 courts lack “jurisdiction to render a judgment” unless the complaint “set[s] forth sufficient  
26 facts to establish that there is a justiciable controversy.” *Planned Parenthood Ctr. of*  
27 *Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972); *see also Dail v. City of Phoenix*, 128  
28 Ariz. 199, 201 (App. 1980) (refusing to interpret Declaratory Judgments Act “to create

1 standing where standing did not otherwise exist”). Thus, in seeking declaratory relief, a  
2 plaintiff must show both that its “rights, status or other legal relations” are “affected by a  
3 statute,” *Arizona Sch. Bds. Assn., Inc. v. State*, 252 Ariz. 219, 224 ¶ 16 (2022) (quoting  
4 A.R.S. § 12-1832), and “that there [is] an actual controversy ripe for adjudication,” *Bd. of*  
5 *Sup’rs of Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 380 (1978). Here, Plaintiff fails on  
6 several grounds.

7 **A. Plaintiff fails to identify any cognizable injury.**

8 None of the injuries Plaintiff alleges are sufficient to confer standing. As to Count I,  
9 Plaintiff’s assertion that it is injured because its members must abide by the 2023 EPM is  
10 both too vague to assert a particularized harm and constitutes a generalized grievance that  
11 would be shared by all Arizonans. And any allegation of injury inflicted by the EPM’s voter  
12 intimidation guidance is a red herring: the guidance either does not regulate the general  
13 public at all or does so only in ways already encompassed by unchallenged state law. As  
14 for Count II, Plaintiff’s allegations are even more deficient, amounting to nothing more than  
15 “opposition” to some voters participating in the PPE. Because Count III is premised only  
16 on conduct challenged in Counts I and II, it too must be dismissed for the same reasons.

17 **1. Plaintiff’s general disagreements with the contents of the 2023 EPM**  
18 **are not cognizable injuries.**

19 Plaintiff makes several vague and generalized claims that because its members must  
20 allegedly abide by the 2023 EPM’s requirements, Compl. ¶¶ 10, 24, they are injured by the  
21 EPM, *id.* ¶¶ 10, 28, 45–46, 75, 86. Such allegations are “much too amorphous and  
22 imprecise” to establish a justiciable controversy. *Land Dep’t v. O’Toole*, 154 Ariz. 43, 47  
23 (App. 1987). While Plaintiff claims broad interests in election integrity and ensuring the  
24 Secretary abides by the federal and state constitution, Compl. ¶¶ 8–9, 24, 38, 75, these are  
25 interests ostensibly held by virtually everyone; Plaintiff fails to explain how any of its *own*  
26 personally-held rights are actually impacted. *See, e.g., Sears*, 192 Ariz. at 69 ¶ 16 (holding  
27 generalized harms, “shared alike by all or a large class of citizens,” are insufficient to confer  
28 standing); *see also Lance v. Coffman*, 549 U.S. 437, 442 (2007) (holding that a claim the

1 law “has not been followed” is “precisely the kind of undifferentiated, generalized  
2 grievance about the conduct of government that we have refused to countenance in the  
3 past”).

4 Simply put, none of these vague, generalized interests give rise to a “palpable” *or*  
5 “personal” injury sufficient to confer standing. *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶  
6 16 (2003) (en banc). “For a justiciable controversy to exist, a complaint must” contain “an  
7 assertion of the denial of [a right] by the other party.” *Land Dep’t*, 154 Ariz. at 47 (emphasis  
8 omitted). Thus, as the Arizona Supreme Court has held, a plaintiff cannot satisfy standing  
9 “by merely asserting an interest” in a government policy, as this would “eviscerat[e] the  
10 standing requirement[.]” *Arizona Sch. Bds. Ass’n*, 252 Ariz. at 224 ¶ 18. Plaintiff’s vague  
11 contention that it is “concerned with election integrity” and “must abide by the 2023 EPM,”  
12 Compl. ¶ 24, thus fails to demonstrate any injury at all, let alone a “distinct and palpable”  
13 one, as is necessary for standing purposes. *Fernandez*, 210 Ariz. at 140 ¶ 6 (quoting *Sears*,  
14 192 Ariz. at 69 ¶ 16).

## 15 **2. Plaintiff alleges no injury from the EPM voter intimidation guidance.**

16 Plaintiff also fails to allege any cognizable injury suffered as a result of the EPM  
17 voter intimidation guidance, and Count I should be dismissed on this basis.

18 At the outset, Plaintiff has not adequately pled an actual intention to engage in any  
19 allegedly unlawful conduct. Plaintiff claims that due to the challenged EPM provisions,  
20 “AFEC and its members are acting under a credible threat of prosecution for engaging in  
21 political speech.” Compl. ¶ 45. When considering the genuineness of a claimed threat of  
22 prosecution, courts consider whether the plaintiff has “articulated a ‘concrete plan’ to  
23 violate the law in question” and “the history of past prosecution or enforcement under the  
24 challenged statute.” *Thomas v. Anchorage Equal Rts. Comm’n*, 220 F.3d 1134, 1139 (9th  
25 Cir. 2000). Plaintiff’s allegations fail to meet these requirements, only vaguely noting that  
26 the EPM mentions activities that Plaintiff is “interested in” such as observing or  
27 photographing activities at drop boxes. *See, e.g.*, Compl. ¶¶ 36–41, 45–47.

28 The complaint stops short of alleging that Plaintiff or its members actually *would*

1 engage in any specific conduct but for the challenged provisions. *See, e.g.*, Compl. ¶ 38  
2 (asserting “interest[]” in observing activity at drop boxes). Such an abstract “interest” is  
3 insufficient to establish the “concrete plan” necessary to confer standing. *See Thomas*, 220  
4 F.3d at 1139; *Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986) (requiring plaintiff to  
5 “demonstrate some actual, concrete harm . . . not merely some speculative fear of  
6 infringement”). In some instances, Plaintiff does not even allege an *interest*, challenging  
7 EPM provisions related to electioneering without alleging any intention to engage in such  
8 activities. *See* Compl. ¶¶ 54(b), 60, 64. Plaintiff also does not (and as explained below,  
9 cannot) allege any instances of past prosecution of violations of the challenged EPM  
10 guidance. As a result, Count I should be dismissed.

11 More fundamentally, most of the challenged EPM voter intimidation guidance does  
12 not purport to create any rules regulating individuals such that their enforcement could  
13 inflict any injury or chill any conduct. While the EPM generally has the force of law,  
14 *Arizona Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (2020), not every word carries  
15 such weight—as Plaintiff concedes, some provisions are “advisory only.” Compl. ¶ 79.  
16 Here, the challenged provisions expressly provide election officials with examples of what  
17 might constitute voter intimidation or harassment that could violate statutes that Plaintiff  
18 concedes are constitutional. *See* Compl. ¶ 61. For instance, the 2023 EPM provides several  
19 illustrations of conduct that “*may* also be considered intimidating conduct inside or outside  
20 the polling place,” EPM at 182, Compl. ¶ 54(c)–(g) (citing EPM at 182), which is prohibited  
21 by A.R.S. §§ 16-1013(A) and 16-1017. With regards to drop boxes, the EPM provides  
22 “examples of actions that *likely* constitute voter intimidation or harassment,” under those  
23 same statutes, including repeatedly entering within 75 feet of a drop box, intentionally  
24 following voters delivering ballots to the drop box, speaking or yelling at a voter returning  
25 ballots within 75 feet of a drop box, and openly carrying firearms within 250 feet of a drop  
26 box. EPM at 74 & n.40 (emphasis added); Compl. ¶ 34. For the two provisions that are  
27 phrased as mandatory, the EPM does not create any new rule; it simply restates prohibitions  
28 found in existing anti-intimidation and anti-electioneering statutes, which, again, Plaintiff

1 admits are constitutional. *See* A.R.S. §§ 16-1013(A), 16-1017, 16-515(A).

2 Because the EPM voter intimidation guidance does not prohibit any conduct beyond  
3 statutes unchallenged here, it cannot inflict any cognizable injury on Plaintiff, and Count I  
4 should be dismissed.

5 **3. Plaintiff has not alleged *any* injury at all as to its PPE claim.**

6 Plaintiff also fails to allege any injury from the EPM rule governing the PPE.  
7 Plaintiff simply alleges that it “opposes” allowing federal-only voters to participate in the  
8 PPE. Compl. ¶ 75. But mere disagreement with the law does not create an injury. *See*  
9 *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (noting “[t]he presence of a disagreement,  
10 however sharp and acrimonious it may be, is insufficient by itself” for standing (quoting  
11 *Diamond v. Charles*, 476 U.S. 54, 62 (1986))). Plaintiff also lacks standing to assert that  
12 the EPM violates the associational rights of Arizona political parties because it is not a  
13 political party and does not participate in the PPE. Plaintiff has utterly failed to establish  
14 any injury sufficient to confer standing with respect to Count II, and it should be dismissed.<sup>3</sup>

15 **B. Plaintiff’s alleged injuries will not be redressed by the requested relief.**

16 Plaintiff also lacks standing as to Count I and Count III (to the extent it alleges  
17 injuries inflicted by the EPM voter intimidation guidance) because its alleged injuries  
18 cannot be redressed by Plaintiff’s requested relief. *See In re MS2008-000007*, No. 1 CA-  
19 MH 23-0073 SP, 2024 WL 121882, at \*2 (Ariz. Ct. App. Jan. 11, 2024) (stating “injury  
20 must be redressable to avoid issuing advisory opinions”).

21 Even if Plaintiff successfully obtains a declaration that the challenged EPM guidance  
22 does not have the force of law, such relief cannot alleviate Plaintiff’s alleged injuries for  
23 the same reasons they impose no injury in the first place: The challenged guidance does not  
24 create any rules regulating individual conduct beyond concededly constitutional statutes.  
25 As explained *supra*, most of the EPM voter intimidation guidance merely offers election

26 \_\_\_\_\_  
27 <sup>3</sup> Count III does not allege any injury to Plaintiff at all. *See* Compl. ¶ 79 (alleging only  
28 possible poll worker or voter confusion). To the extent Plaintiff incorporates other  
allegations by reference, *see* Compl. ¶ 76, those allegations are insufficient to establish  
standing for all the reasons already discussed.

1 officials examples to help them determine what may constitute unlawful conduct so they  
2 may uniformly and consistently enforce Arizona law. A declaration that this type of  
3 nonbinding guidance is unlawful would not redress Plaintiff’s alleged injuries because it  
4 would not affect any party’s rights. *See California v. Texas*, 593 U.S. 659, 673 (2021)  
5 (finding that Plaintiff lacked standing to pursue declaratory judgment against unenforceable  
6 statute because remedy would not affect parties’ rights).

7 Moreover, none of the challenged voter intimidation guidance goes beyond Arizona  
8 statutes that Plaintiff concedes are constitutional, *see* Compl. ¶¶ 56–61, so even if the EPM  
9 guidance was eliminated, the conduct Plaintiff alleges an “interest” in could remain  
10 violative of Arizona statutes. Thus, a judgment in Plaintiff’s favor would not prevent its  
11 members from being held criminally liable under pre-existing statutes for engaging in voter  
12 intimidation. *See* Compl. ¶¶ 36–41; *compare* EPM at 74 n.40 (listing examples of activities  
13 that could constitute voter intimidation and harassment), *and id.* at 181–82 (listing examples  
14 of conduct that may fall under anti-intimidation and anti-electioneering statutes), *with e.g.*,  
15 A.R.S. § 16-1013(A) (prohibiting voter intimidation and harassment), *and id.* at § 16-1017  
16 (prohibiting activities interfering with or hindering voting). The two remaining mandatory  
17 provisions are simply restatements of activities that are—and will remain—prohibited  
18 under state law, regardless of the outcome of Plaintiff’s suit. *Compare* EPM at 181–82, *with*  
19 A.R.S. §§ 16-1013(A), 16-515(A). *See also Arizonans for Fair Elections v. Hobbs*, 454 F.  
20 Supp. 3d 910, 917 (D. Ariz. 2020) (dismissing case for lack of standing where plaintiffs  
21 failed to also challenge related laws that “by and large, impose the same requirements” such  
22 that “Plaintiffs’ injury would not be redressed” regardless of outcome of suit).

23 As for Counts II and III (to the extent it alleges injuries inflicted by federal-only  
24 voters participating in the PPE), the EPM’s guidance merely duplicates a binding federal  
25 court order, so no purported harm would be remedied by such a declaration. *Id.*

26 Plaintiff has thus failed to sufficiently allege that the relief it seeks will alleviate the  
27 injuries it claims to suffer as a result of the challenged EPM provisions. Plaintiff therefore  
28 lacks standing to prosecute this case, and the complaint should be dismissed.

1 **II. Plaintiff fails to state a claim.**

2 The complaint also fails as a matter of law and if not dismissed on standing should  
3 be dismissed for failure to state a claim.

4 **A. The EPM voter intimidation guidance does not infringe any**  
5 **constitutional free speech rights.**

6 As explained above, the fundamental flaw with Plaintiff’s Count I is that most of the  
7 voter intimidation guidance does not actually “purport[] to criminalize” any conduct at all.  
8 Compl. ¶ 54. Five of the eight allegedly unconstitutional provisions are expressly examples  
9 of conduct that “*may* also be considered intimidating conduct.” *Compare* Compl. ¶ 54(c)–  
10 (g), *with* EPM at 181–82. Another appears in a list of “examples of actions that *likely*  
11 constitute voter intimidation or harassment.” *Compare* Compl. ¶ 54(h), *with* EPM at 74  
12 n.40. None of these provisions in the EPM claim to create “rules” that could give rise to  
13 criminal charges under A.R.S. § 16-452(C) (it is a misdemeanor for “[a] person” to  
14 “violate[ ] any rule adopted” in the EPM).

15 Instead, the EPM offers examples of conduct that could potentially violate statutes  
16 that Plaintiff concedes are constitutional. Compl. ¶ 61; *see* A.R.S. § 16-1013(A) (it is  
17 unlawful for any person knowingly “in any manner to practice intimidation upon or against  
18 any person” in an effort to influence their voting behavior); A.R.S. § 16-1017 (it is unlawful  
19 to “[h]inder[] the voting of others”). The EPM explains that aggressive behavior, insulting  
20 language, the dissemination of false information at a voting location, confronting poll  
21 workers, posting messages about penalties for voter fraud, or loitering near drop boxes  
22 *could* constitute unlawful behavior under these statutes. There is no legitimate basis upon  
23 which to challenge the EPM for providing non-binding guidance as to conduct that *may*—  
24 but does not necessarily—violate statutes that Plaintiff admits are “narrowly tailored to  
25 achieve a compelling governmental interest,” Compl. ¶ 61, and thus are constitutional.  
26 Because this EPM guidance does not actually restrict anything, it cannot “constitute  
27 restrictions on political speech.” Compl. ¶ 55.

28 The two remaining provisions challenged in Count I simply restate or clarify

1 concededly constitutional statutes. Citing Section 16-1013, the EPM states that “[a]ny  
2 activity by a person with the intent or effect of threatening, harassing, intimidating, or  
3 coercing voters (or conspiring with others to do so) inside or outside the 75-foot limit at a  
4 voting location is prohibited.” EPM at 181. The EPM’s language is no broader than the  
5 statute it describes, which includes a blanket prohibition on “[d]irectly or indirectly... in  
6 any manner . . . practic[ing] intimidation upon or against any person, in order to induce or  
7 compel such person to vote or refrain from voting . . . or on account of such person having  
8 voted or refrained from voting at an election.” A.R.S. § 16-1013(A). Likewise, the  
9 challenged prohibition against electioneering “outside the 75-foot limit if [it] is audible  
10 from a location inside the door to the voting location,” EPM at 180, is a common-sense  
11 application of Section 16-515’s requirement that “no electioneering may occur within the  
12 seventy-five-foot limit.” That statutory—and as Plaintiff concedes, constitutional—  
13 requirement would lose much of its effect if electioneering could be conducted at a volume  
14 loud enough to be heard from inside the polling place. Because neither provision  
15 meaningfully changes the scope of the underlying statutes that Plaintiff concedes are  
16 constitutional, they too must be constitutional. The same is true of the remainder of the  
17 challenged EPM voter intimidation guidance—even if they did carry the force of law, none  
18 of the examples go beyond the scope of the underlying statutes that Plaintiff admits are  
19 constitutional.<sup>4</sup>

20 Even if the EPM voter intimidation guidance actually prohibited any conduct, it  
21 would not run afoul of any constitutional requirements because it permissibly regulates  
22 conduct in and around polling locations. A party alleging a chilling effect on speech rights  
23 must demonstrate that the law in question “punishes a ‘substantial’ amount of protected free  
24 speech, ‘judged in relation to the [law’s] plainly legitimate sweep.’” *Virginia v. Hicks*, 539  
25 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The  
26 EPM’s guidance serves to describe and implement existing Arizona statutes which Plaintiff

27 \_\_\_\_\_  
28 <sup>4</sup> For the same reason, Plaintiff fails to allege that these provisions directly “contradict” any  
Arizona law or that the Secretary has exceeded his authority in enacting them. *See* Compl.  
¶¶ 62, 84; *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022).

1 *agrees* are constitutional, such as the prohibition against “the threatened use of violence or  
2 coercion or the use of fraud . . . within the 75-foot limit.” Compl. ¶ 61. Plaintiff’s concession  
3 that these provisions have a plainly constitutional sweep is fatal to its facial challenge. *See*  
4 *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J. concurring in  
5 judgment) (finding of “‘plainly legitimate sweep’ . . . provides a sufficient justification for  
6 rejecting respondents’ facial challenge”).

7 Furthermore, courts, including the U.S. Supreme Court, have recognized that states  
8 have authority to regulate conduct in the vicinity of polling places to prevent undue  
9 influence on voters, which necessarily includes voter intimidation. That was the conclusion  
10 in *Burson v. Freeman*, 504 U.S. 191, 210 (1992), in which a plurality of the U.S. Supreme  
11 Court upheld a strict ban on electioneering within 100 feet of polling places. The statute in  
12 *Burson* was in every conceivable way more burdensome on speech than the EPM provisions  
13 Plaintiff challenges: it was a mandatory criminal statute that directly regulated individual  
14 conduct and plainly prohibited constitutionally protected speech. A plurality of the Court  
15 upheld the statute because “the States’ compelling interests in preventing voter intimidation  
16 and election fraud” were so significant that it could survive even strict scrutiny. *Id.* at 206,  
17 211.<sup>5</sup> *Burson* and related decisions establish that measures to prevent voter intimidation in  
18 and around polling places remain constitutional even if they go further both physically and  
19 figuratively than the purported prohibitions at issue here. *See id.* at 210 (“It is sufficient to  
20 say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the  
21 line.”); *see also Frank v. Lee*, 84 F.4th 1119, 1150 (10th Cir. 2023) (upholding Wyoming’s  
22 300-foot electioneering prohibition); *Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993)  
23 (upholding Louisiana’s 600-foot exclusion zone after finding 300-foot exclusion zone did  
24 not sufficiently deter voter intimidation). The EPM’s straightforward interpretation of  
25 admittedly constitutional laws serves the same compelling interests in a far less burdensome

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26 <sup>5</sup> Justice Scalia concurred in the judgment only because he disagreed with the Court’s  
27 characterization of the streets around polling places as a “public forum” and would have  
28 instead upheld the restriction as “a reasonable, viewpoint-neutral regulation of a nonpublic  
forum.” *Burson*, 504 U.S. at 214 (Scalia, J., concurring in judgment). That rationale, too,  
supports the EPM’s constitutionality.

1 manner than upheld in other cases; thus, the EPM voter intimidation guidance would be  
2 constitutional even if it did regulate speech.

3 Because Plaintiff has not identified any way in which the EPM criminalizes conduct  
4 not already prohibited by concededly constitutional statutes, and because the state has an  
5 obvious and compelling interest in preventing voter intimidation at polling places, the EPM  
6 voter intimidation guidance has a sufficient legitimate sweep to survive any level of  
7 scrutiny. As a result, Count I fails to state a claim upon which relief can be granted, and  
8 should be dismissed.

9 **B. Count II does not allege a violation of the Constitution or any enforceable**  
10 **statute.**

11 Plaintiff alleges that Chapter I, Section II.A. of the EPM is unlawful because it  
12 exceeds the Secretary’s statutory authority and violates the right to free association by  
13 allowing “federal-only” voters to vote in the PPE. Compl. ¶ 71. Both arguments fail, and  
14 Count II should be dismissed.

15 First, Plaintiff fails to state a claim that the EPM conflicts with A.R.S. Section 16-  
16 127, Compl. ¶¶ 71-73, not least of all because that statutory provision is no longer  
17 enforceable as a matter of law. Last fall a federal court held that A.R.S. Section 16-127 is  
18 preempted because it violates the NVRA. *See Mi Familia Vota*, 2023 WL 8181307, at \*7.  
19 Arizona enacted A.R.S. Section 16-127 in 2022. Several civil rights organizations—  
20 including Voto Latino—immediately challenged it in the U.S. District Court for the District  
21 of Arizona. On summary judgment, the court held that Section 16-127 is preempted by the  
22 NVRA, prohibiting its enforcement. *See id.* Specifically, because “[t]he plain language of  
23 the NVRA reflects an intent to regulate all elections for “[f]ederal office,”” *id.* at \*6 (second  
24 alteration in original) (citation omitted), and presidential elections including the PPE, are  
25 elections for federal office, the NVRA requires states to allow federal-only voters to  
26 participate in them. As a result, Section 16-127(A)(1)’s “restriction on Federal Form users  
27 voting in presidential elections is expressly preempted by [the NVRA].” *Id.* at \*7.

28 Accordingly, and far from “creating Arizona law from whole cloth” to allow federal-

1 only voters to participate in the PPE, Compl. ¶ 71, the EPM explains that it does not enforce  
2 Section 16-127 because “a federal court has declared these provisions preempted by the  
3 NVRA” and therefore “they may not be enforced.” EPM at 14 n.11 (citing *Mi Familia*  
4 *Vota*). The NVRA requires Arizona to allow federal-only voters to vote in all federal  
5 elections, which the PPE obviously is, and the Secretary is bound by both the NVRA and  
6 the *Mi Familia Vota* decision to effectuate that requirement. *See* A.R.S. § 16-142(A)(1)  
7 (identifying Secretary as responsible for implementation of NVRA).

8 The complaint also fails to state a claim that the EPM violates the associational rights  
9 of Arizona political parties. First, Plaintiff lacks standing to assert this claim, as it is not a  
10 political party committee. But, in any event, political parties do not have a constitutional  
11 right to exclude voters based on the grounds Plaintiff seeks—i.e., for failure to show DPOC.  
12 Such an argument is analogous to the attempt by political parties to exclude nonwhite voters  
13 from primaries in the 1940s and 50s, but the Supreme Court did not hesitate to strike those  
14 procedures down as unconstitutional. *See Smith v. Allwright*, 321 U.S. 649, 664–65 (1944);  
15 *see also Terry v. Adams*, 345 U.S. 461, 469 (1953). Though no political party is claiming a  
16 right to exclude federal-only voters from its primary in this litigation, none could do so  
17 because that would violate the NVRA, as explained above.

18 Even in an alternate universe where political parties had such a right, Plaintiff has  
19 not identified *any* political party in Arizona that prohibits federal-only voters from voting  
20 in its presidential primary. *See Washington State Grange v. Washington State Republican*  
21 *Party*, 552 U.S. 442, 453 (2008) (holding that state primary system did not burden First  
22 Amendment because it did not implicate a party’s choice of nominee). Because Plaintiff’s  
23 claim fails as a matter of law on every level, Count II should be dismissed.

24 **C. The EPM clarifies Arizona law and is not vague.**

25 Plaintiff also fails to state a claim as to Count III. The EPM voter intimidation  
26 guidance is the opposite of vague: it provides specific examples and guidance about conduct  
27 that may violate Arizona voter intimidation statutes.

28 As a threshold matter, the vagueness doctrine does not properly apply to EPM

1 sections that are not penal in nature. Such provisions simply “cannot be unconstitutionally  
2 vague” because they “do[ ] not define the elements of an offense, fix any mandatory penalty,  
3 or threaten people with punishment.” *United States v. Christie*, 825 F.3d 1048, 1064–65  
4 (9th Cir. 2016); *see supra* II.A. Because all but two of the EPM provisions on their face  
5 provide non-mandatory guidance to county recorders and do not “regulate[] . . . registered  
6 voters,” at all, these instructions ““impose[] neither regulation of nor sanction for conduct,””  
7 *Mi Familia Vota*, 2023 WL 8181307, at \*17 (emphasis omitted) (quoting *Boutilier v. INS*,  
8 387 U.S. 118, 123 (1967)), and are not subject to the vagueness doctrine.

9 In any event, each challenged provision is constitutional unless “so vague that it fails  
10 to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites  
11 arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). Neither is true  
12 in this case. Compl. ¶ 61. The EPM’s voter intimidation guidance provides more than “fair  
13 notice” of the conduct that could violate Arizona law (which Plaintiff concedes is  
14 constitutional, *see* Compl. ¶ 61). For instance, the EPM language Plaintiff objects to most  
15 stridently—concerning aggressive behavior, offensive language, and harassing poll  
16 workers, Compl. ¶ 63—appears in examples offered to flesh out the contours of Arizona’s  
17 voter intimidation statutes, providing *more* clarity, not less. These examples themselves  
18 defeat Plaintiff’s vagueness charge, as they offer ample explanation to election officials and  
19 individuals alike, well beyond the constitutional minimum.

20 At bottom, Plaintiff’s Count III amounts to a claim that otherwise constitutional  
21 statutes are rendered unconstitutionally vague because state officials have provided  
22 *additional* information on the situations in which they may apply. As a matter of law,  
23 Plaintiff has not adequately alleged that the EPM is improperly vague, and its Count III  
24 should be dismissed.<sup>6</sup>

## 25 CONCLUSION

26 For these reasons, the complaint should be dismissed.

27  
28 <sup>6</sup>It is unclear whether Plaintiff alleges that the PPE provision is vague, but in any event it is not, as it clearly states that federal-only voters are eligible to vote in the PPE. EPM at 3.

1 RESPECTFULLY SUBMITTED this 20th day of March, 2024.

2 **COPPERSMITH BROCKELMAN PLC**

3 By: /s/ D. Andrew Gaona

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15 **ARIZONA SUPERIOR COURT**

16 **MARICOPA COUNTY**

17 ARIZONA FREE ENTERPRISE CLUB, ) No. CV2024-002760  
18 )  
Plaintiff, ) **[PROPOSED] CERTIFICATION OF**  
19 ) **COUNSEL UNDER RULES 7.1(H) AND**  
v. ) **12(J)**  
20 ) (Assigned to the Hon. Jennifer Ryan-  
ADRIAN FONTES, in his official capacity as )  
21 the Secretary of State of Arizona, )  
22 )  
Defendant. )  
23 )

24 Under Arizona Rules of Civil Procedure 7.1(h) and 12(j), D. Andrew Gaona declares and  
25 certifies as follows:

- 26 1. I am an attorney in the law firm of Coppersmith Brockelman PLC.



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17 **ARIZONA SUPERIOR COURT**

18 **MARICOPA COUNTY**

19 ARIZONA FREE ENTERPRISE CLUB,

20 Plaintiff,

21 v.

22 ADRIAN FONTES, in his official capacity as  
23 the Secretary of State of Arizona,

24 Defendant.

No. CV2024-002760

25 **PROPOSED INTERVENORS'**  
26 **PROPOSED RESPONSE TO**  
27 **APPLICATION FOR ORDER TO**  
28 **SHOW CAUSE**

(Assigned to the Hon. Jennifer Ryan-Touhill)

1 This Court should deny Plaintiff's application for order to show cause. As explained  
2 in the Arizona Alliance for Retired Americans and Voto Latino's (together, "Proposed  
3 Intervenors") proposed motion to dismiss, Plaintiff's complaint for declaratory relief must  
4 be dismissed because Plaintiff lacks standing and the complaint fails to state a claim under  
5 Arizona Rule of Civil Procedure 12(b)(6). *See generally* Proposed Intervenors' Proposed  
6 Motion to Dismiss. Because the complaint fails as a matter of law, it cannot provide the  
7 basis for expedited relief. Further, because all three of the election deadlines that Plaintiff  
8 identified as "immediately imminent," Appl. at 2—February 20, March 12, and March 19—  
9 have already elapsed, Plaintiff's request for expedited relief is moot, especially insofar as  
10 the requested relief concerns the 2024 Presidential Preference Election held on March 19.

11 For these reasons, the Court should deny Plaintiff's application for order to show  
12 cause and any expedited relief in this case.

13 RESPECTFULLY SUBMITTED this 20th day of March, 2024.

14 **COPPERSMITH BROCKELMAN PLC**

15 By: /s/ D. Andrew Gaona

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/s/ Diana J. Hanson

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