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16 SUPERIOR COURT OF ARIZONA

17 MARICOPA COUNTY

18 ARIZONA FREE ENTERPRISE CLUB,

19 Plaintiff,

20 v.

21 ADRIAN FONTES,

22 Defendant.

No. CV2024-002760

**NOTICE OF LODGING PROPOSED
MOTION TO DISMISS**

(Assigned to the Hon. Jennifer Ryan-Touhill)

1 Proposed Intervenor-Defendants Democratic National Committee and Arizona Demo-
2 cratic Party hereby give notice of lodging their proposed Motion to Dismiss, attached hereto as
3 Exhibit A, the filing of which is contingent on resolution of their pending Motion to Intervene.
4

5 Dated: March 20, 2024

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6 By: /s/ Daniel A. Arellano

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Exhibit A

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16 SUPERIOR COURT OF ARIZONA

17 MARICOPA COUNTY

18 ARIZONA FREE ENTERPRISE CLUB,

19 Plaintiff,

20 v.

21 ADRIAN FONTES,

22 Defendant.

No. CV2024-002760

MOTION TO DISMISS

(Assigned to the Hon. Jennifer Ryan-Touhill)

1 Plaintiff Arizona Free Enterprise Club (“AFEC”) urges this Court to invalidate a handful
2 of rules (along with various non-rules) in Defendant Arizona Secretary of State’s 2023 Elections
3 Procedures Manual (“EPM”)¹. The provisions that AFEC challenges include certain prohibi-
4 tions, as well as guidance, related to behavior around ballot boxes and polling places, including
5 provisions related to “intimidating” and “threatening” voters. Compl. ¶ 54(a). They seek this
6 relief as part of their efforts to “convey[] a message to others that the drop boxes are being
7 watched and should be watched.” Compl. ¶ 38. And they express their concern about “election
8 integrity at drop boxes.” *Id.* ¶ 39.

9 But on its face, their Complaint fails to reveal any injury the EPM or any of its specific
10 provisions have caused to AFEC or to any of its members. For these reasons, AFEC both lacks
11 standing and its claims are not ripe. AFEC raises a variety of largely undefined constitutional
12 challenges. And this case simply lacks the “concrete adverseness which sharpens the presenta-
13 tion of issues upon which the court so largely depends for illumination of difficult constitutional
14 questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962).

15 Beyond this, AFEC’s constitutional challenges fail as a matter of law. They are either not
16 adequately pled, foreclosed as a matter of law, foreclosed by AFEC’s own admission, or all
17 three.

18 And even beyond that, AFEC’s meritless challenge to the lawful, reasonable provisions
19 included in the EPM, which are reflective of recent activity in the state and intended to prevent
20 voter intimidation at drop boxes and polling locations, can only be understood as an effort to
21 promote chaos and confusion during upcoming elections. As a result, the Democratic National
22 Committee (“DNC”) and Arizona Democratic Party (“ADP”) respectfully request that this Court
23

24 ¹ Ariz. Sec’y of State, 2023 Elections Procedure Manual (updated Jan. 11, 2024),
<https://azsos.gov/elections/about-elections/elections-procedures/elections-procedures-manual>.

1 dismiss this suit.

2 **Background**

3 As AFEC readily acknowledges, voter intimidation is illegal. Compl. ¶¶ 56–60. Under
4 Arizona law, for example, it is unlawful “to practice intimidation upon or against any person, in
5 order to induce or compel such person to vote or refrain from voting for a particular person or
6 measure at any election provided by law.” A.R.S. § 16-1013(A)(1).²

7 Arizonans rightly are concerned about voter intimidation as we head into the November
8 2024 presidential election. On the eve of the 2022 General Election, voters depositing their bal-
9 lots at drop boxes were filmed, photographed, and in some cases followed and accused of being
10 “mules.” *See Ariz. All. for Retired Ams. v. Clean Elections USA*, 638 F. Supp. 3d 1033, 1039 (D.
11 Ariz. 2022), *opinion vacated, appeal dismissed*, No. 22-16689, 2023 WL 1097766 (9th Cir. Jan.
12 26, 2023). Law enforcement officers were dispatched to one drop box in response to the presence
13 of “armed and masked observers wearing body armor.” *Id.*; *see also*:

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² This prohibition is consistent with federal law. *See* 52 U.S.C. § 10307(b) (“No person,
22 whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt
23 to intimidate, threaten, or coerce any person for voting or attempting to vote”); *see also* 42
24 U.S.C. § 1985(3) (prohibiting persons from “conspir[ing] to prevent by force, intimidation, or
threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal
manner, toward or in favor of the election of any lawfully qualified person as an elector for
President or Vice President”).



Mariopca County Elect...
@Mariopca010e
On Friday, 2 armed individuals dressed in tactical gear were onsite at our Mesa ballot drop box. After @mcs0az arrived, the individuals left.
@MariopcaCounty Chairman Gates & @RecordersOffice Recorder Richer said they condemn these actions.
Read more: content.govdelivery.com/accounts/AZMAR...
8:21 PM · Oct 22, 2022 · Twitter Web App
362 Retweets 66 Quote Tweets 636 Likes
Tweet your reply Reply

azfamily 3TV CBS 5
@azfamily

Tensions high after armed individuals reportedly watch ballot box in Mesa: bit.ly/3StqzvR

1:36 AM · Oct 23, 2022 · TweetDeck

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8 Compl. at 7–8 ¶ 18, *Ariz. All. for Retired Ams. v. Clean Elections USA*, No. 22-cv-1823 (D. Ariz.
9 Oct. 24, 2022), ECF No. 1. In the litigation arising from these incidents, the court would go on
10 to enter a stipulated temporary restraining order barring defendants from, among other things,
11 intentionally following voters delivering their ballots to drop boxes, openly carrying firearms or
12 body armor within 250 feet of a ballot drop box, and, notably, unprovokedly speaking to or
13 yelling at a voter depositing a ballot at a drop box if *the voter* was within 75 feet of the drop box.
14 See *Ariz. All. for Retired Ams. v. Clean Elections USA*, No. 22-cv-1823, 2022 WL 17088041, at
15 *1–2 (D. Ariz. Nov. 1, 2022). Protecting voters within the 75-foot limit from harassment ema-
16 nating from outside that limit is nothing new.

17 Against this background, the Secretary promulgated the most recent EPM. By statute,
18 every two years, the Secretary is required to prepare “an official instructions and procedures
19 manual” to “achieve and maintain the maximum degree of correctness, impartiality, uniformity
20 and efficiency on the procedures for early voting and voting, and of producing, distributing,
21 collecting, counting, tabulating and storing ballots.” A.R.S. § 16-452(A), (B). On December 30,
22 2023, the Secretary published the EPM after following the requisite statutory process.

23 AFEC commenced this suit on February 9, 2024. AFEC brings three claims. Count I
24 challenges the EPM’s provisions related to permissible conduct at ballot boxes and polling

1 places. *See* Compl. ¶¶ 52–65. Count II challenges the provision allowing “federal only voters”—
2 meaning, a voter who is eligible to vote only in races for federal office in Arizona—to vote in
3 the Presidential Preference Election (“PPE”), which has now ended. *See id.* ¶¶ 66–75. And Count
4 III challenges the criminal penalties related to the EPM rules challenged in Count I and II. *See*
5 *id.* ¶¶ 76–84.

6 **Legal Standard**

7 In deciding a motion to dismiss, the Court presumes the veracity of all well-pled allega-
8 tions. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008). But “mere conclusory
9 statements are insufficient.” *Id.* The court also does not accept as true “allegations consisting of
10 conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded
11 facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions
12 alleged as facts.” *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

13 **Argument**

14 **I. AFEC has not adequately alleged standing, and its claims are not ripe.**

15 **A. AFEC has not adequately alleged any injury sufficient to support direct or** 16 **representational standing.**

17 AFEC has failed to adequately allege standing and this alone warrants dismissal. “[A]
18 litigant seeking relief in the Arizona courts must first establish standing to sue,” as “a matter of
19 sound jurisprudence.” *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 19 (2003). This requires,
20 among other things, “a distinct and palpable injury” particular to the plaintiff. *Sears v. Hull*, 192
21 Ariz. 65, 69 ¶ 16 (1998). AFEC attempts to allege injury to two groups: (1) it as an organization,
22 and (2) its members. Both sets of allegations fall short.

23 AFEC has not alleged that it has suffered “a distinct and palpable injury” particular to it.
24 *Id.* There are no allegations, for instance, that any of the challenged provisions have impaired

1 the organization’s conduct. At most, AFEC alleges (Compl. ¶ 9) its interest in this lawsuit is “in
2 ensuring that . . . the Secretary abides by the limitations imposed on him by the federal and state
3 constitutions in his promulgation of the 2023 EPM.” And, even then, it does not directly allege
4 that this interest is impaired by the Secretary’s conduct. But even assuming it did, such “gener-
5 alized harm [is] insufficient to confer standing.” *Ariz. Sch. Bds. Ass’n, Inc. v. State*, 252 Ariz.
6 219, 224 ¶ 18 (2022) (citing *Sears*, 192 Ariz. at 69–70 ¶¶ 16–17). This is particularly the case
7 where, as here, the only potential harm alleged to be “impaired is pure issue-advocacy.” *Id.*
8 (quoting *Equal Means Equal v. Ferriero*, 3 F.4th 24, 30 (1st Cir. 2021)); see Compl. ¶ 39
9 (“AFEC and its members are just as concerned about election integrity at drop boxes as they are
10 about raising the public’s awareness of election integrity in general.”); see also *Spokeo, Inc. v.*
11 *Robins*, 578 U.S. 330, 346 (2016) (a plaintiff who sues “to require an executive agency to follow
12 the law” must “prove that he has sustained or is immediately in danger of sustaining a direct
13 injury as a result of that challenged action and it is not sufficient that he has merely a general
14 interest common to all members of the public” (cleaned up)).

15 Nor has AFEC alleged that it “has a legitimate interest in an actual controversy involving
16 its members and [that] judicial economy and administration will be promoted by allowing rep-
17 resentational appearance.” *Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256
18 Ariz. 88, ¶ 24 (App. 2023) (quoting *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Svcs.*,
19 148 Ariz. 1, 6 (1985)). A “primary consideration” for representational standing “is whether the
20 association’s members would have standing to sue in their own right.” *Id.* Here, the Complaint
21 is devoid of allegations that AFEC’s members have been injured in any specific way that would
22 support any of them suing individually.

23 AFEC makes only two relevant allegations, neither of which suffice to establish AFEC’s
24 representational standing. First it alleges, without explanation, that its members are “registered

1 voters who are affected” by the EPM provisions. Compl. ¶ 10. Second, it alleges that its members
2 “are concerned with election integrity and . . . must abide by the 2023 EPM rules for this election
3 cycle.” *Id.* ¶ 24. There are no allegations identifying any specific member or any specific uncon-
4 stitutional effect on members because of the EPM. As a result, these allegations “do[] not iden-
5 tify,” as they must, “particularized harm, injury in fact, or damage peculiar to any specific mem-
6 ber.” *Arcadia Osborn Neighborhood*, 256 Ariz. at 88 ¶ 25. And because AFEC “has failed to
7 establish individual standing on behalf of any of its members, it cannot assert representational
8 standing.” *Id.*

9 **B. AFEC’s Complaint is also unripe.**

10 The ripeness requirement “prevents a court from rendering a premature judgment or opin-
11 ion on a situation that may never occur.” *In re Est. of Stewart*, 230 Ariz. 480, 484 ¶12 (App.
12 2012) (quoting *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997)). In practice, the “injury-in-
13 fact prong of the standing inquiry” is “synonymous” with the “constitutional component of ripe-
14 ness.” *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022) (citation omitted); *see also*
15 *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279–80 ¶ 35 (2019) (“Because in this
16 case the underlying concerns for standing and ripeness are the same, we simply use the term
17 ‘ripeness’ to apply to both doctrines . . .”).

18 AFEC’s failure to allege an individualized injury, as detailed above, is also fatal for pur-
19 poses of the ripeness analysis. Absent a “personal stake in the outcome of the controversy,” there
20 can be no “concrete adverseness which sharpens the presentation of issues upon which the court
21 so largely depends for illumination of difficult constitutional questions.” *Baker*, 369 U.S. at 204.
22 Here, AFEC makes various sweeping and undefined facial constitutional challenges to statutes,
23 the nature of which are difficult to discern given the lack of actual controversy. *See, e.g.*, Compl.
24 ¶ 79 (presenting various theories). Which aspects of which provisions does AFEC claim are

1 unconstitutional and why? *See, e.g., id.* ¶¶ 54, 55 (citing provisions with bolding and italiciza-
2 tion). The Complaint does not make this clear. Beyond this, and as discussed in greater detail
3 below, the Complaint takes issue with provisions of the EPM that provide examples of what
4 “may also be,” EPM 182, or “likely constitute,” *id.* at 74 n.40, prohibited conduct. These exem-
5 plars have not been applied to any conduct. Challenges to an exemplar of prohibited conduct, to
6 the extent it is actionable at all, is particularly premature where the exemplar has not been applied
7 to any particular facts.

8 In the end, because AFEC does not allege any particular injury arising from any particular
9 part of the EPM, and because it instead presents only “hypothetical or abstract questions” its
10 claims are unripe. *Mills v. Arizona Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 24 (2022).³

11 **II. Plaintiff’s claims fail as a matter of law.**

12 AFEC brings three claims: (1) a First Amendment challenge to EPM provisions related
13 to voter intimidation and electioneering, (2) a First Amendment freedom of association chal-
14 lenge to a provision related to voting eligibility, (3) a vagueness challenge to those same provi-
15 sions. Each claim is a facial challenge. “[A] statute is facially unconstitutional if ‘no set of cir-
16 cumstances exists under which the [statute] would be valid.’” *Morgan v. Dickerson In & For*
17 *Cnty. of Cochise*, 253 Ariz. 207, 209 ¶ 6 (2022) (second alteration in original) (quoting *State v.*
18 *Wein*, 244 Ariz. 22, 31 ¶ 34 (2018)). “As the challenging party,” AFEC “‘bears the ‘heavy

19
20 ³ For the same reasons, AFEC has failed to establish that a justiciable controversy exists,
21 as it must do to be entitled to declaratory relief: it alleges no *present* or imminent acts by it or its
22 members that would be affected by the EPM provisions they challenge. *See Hunt v. Richardson*,
23 216 Ariz. 114, 125 ¶ 38 (App. 2007) (the Declaratory Judgment Act “justifies a declaration of
24 rights upon an existing state of facts, not one upon a state of facts which may or may not arise
in the future. Nor will future rights be determined in anticipation of an event that may never
happen.” (cleaned up)); *Polaris Int’l Metals Corp. v. Ariz. Corp. Comm’n*, 133 Ariz. 500, 506
(1982) (“The declaratory judgment statutes cannot be used to make the courts a fountain of ad-
vice for the future conduct of our citizens.”).

1 burden' of demonstrating that” the challenged provisions are unconstitutional. *Id.* (quoting
2 *Wein*, 244 Ariz. at 26 ¶ 10); *see also id.* (considering facial First Amendment claim). AFEC has
3 not succeeded in that “admittedly difficult feat.” *Wein*, 244 Ariz. at 31 ¶ 34.

4 **A. Plaintiff’s First Amendment challenge to the voter intimidation and elec-**
5 **tioning provisions fail as a matter of law.**

6 AFEC alleges that two categories of EPM provisions violate the First Amendment of the
7 U.S. Constitution, as well as the free speech protections of the Arizona Constitution⁴: provisions
8 related to (1) voter intimidation, Compl. ¶¶ 54(a), (c)–(h), and (2) electioneering, *id.* ¶ 54(b).
9 Both sets of allegations fail as a matter of law.⁵

10 **1. Any First Amendment challenge to the EPM’s provisions related to**
11 **voter intimidation must be dismissed.**

12 With little explanation, the Complaint first alleges that the EPM’s summary of A.R.S.
13 § 16-1013, which prohibits the intimidation of electors, violates the First Amendment. Compl.
14 ¶ 54(a). It then challenges the EPM’s description of exemplars of what “may” constitute voter
15 intimidation on the same ground. *Id.* ¶¶ 54(c)–(h). AFEC’s own allegations doom their claims.

16 a. Arizona’s voter intimidation statute. States have a “compelling interest[] in pre-
17 venting voter intimidation.” *Burson v. Freeman*, 504 U.S. 191, 206 (1992). Beyond this,
18 “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat.”
19 *Virginia v. Black*, 538 U.S. 343, 360 (2003). “As such, it may be regulated by the state without
20 running afoul of the First Amendment.” *United States v. Tan Duc Nguyen*, 673 F.3d 1259, 1266

21 ⁴ Because AFEC does not explain how the free-speech guarantees of the Arizona Consti-
22 tution, article 2, sections 5 to 6 “afford them greater protection than the Federal Constitution,
23 [the Court should] not address them here.” *Arizonans for Second Chances, Rehabilitation, &*
24 *Pub. Safety v. Hobbs*, 249 Ariz. 396, 421 ¶ 100 (2020).

⁵ The introduction of the Complaint contains various allegations that certain, unidentified
EPM provisions “contradict statutory requirements established by the legislature.” Compl. ¶ 3;
see also id. ¶¶ 5, 6. But the Complaint and its claims do not identify any purported conflict.

1 (9th Cir. 2012). And so, courts have upheld state laws prohibiting “intentional acts of voter in-
2 timidation.” *See id.* In Arizona, that law is A.R.S. § 16-1013. That statute makes it illegal “to
3 practice intimidation upon or against any person, in order to induce or compel such person to
4 vote or refrain from voting for a particular person or measure at any election provided by law.”
5 A.R.S. § 16-1013(A)(1). Unsurprisingly, AFEC doesn’t challenge that law. *See* Compl. ¶ 61.

6 AFEC, however, does challenge the constitutionality of the EPM’s summary of that stat-
7 ute. AFEC takes issue with the EPM’s provision that: “*Any activity* by a person with the intent
8 or effect of threatening, harassing, intimidating, or coercing voters (or conspiring with others to
9 do so) inside or outside the 75-foot limit[.]” Compl. ¶ 54(a) (quoting in part EPM at 181 (em-
10 phasis in Complaint)). As a threshold matter, beyond italicizing the words “any activity,” the
11 basis of AFEC’s challenge to this provision is entirely unclear. And this alone warrants dismis-
12 sal. *See Cullen*, 218 Ariz. at 419 ¶ 6 (requiring complaint to give “fair notice of the nature and
13 basis of the claim” (citation omitted)).

14 In any event, the EPM provision is consistent with the statutory provision. As noted
15 above, the EPM provision (in a section titled “Preventing Voter Intimidation”) prohibits “any
16 instances of voter intimidation”: “Any activity by a person with the intent or effect of threaten-
17 ing, harassing, intimidating, or coercing voters (or conspiring with others to do so) inside or
18 outside the 75-foot limit at a voting location is prohibited. A.R.S. § 16-1013.” EPM at 181; *ac-*
19 *cord* Compl. ¶ 54(a). That is consistent with A.R.S. § 16-1013(A), which makes it unlawful “in
20 any manner to practice intimidation upon or against any person, in order to induce or compel
21 such person to vote or refrain from voting [in a particular manner].” AFEC does not identify any
22 purported inconsistency. Though AFEC emphasizes the EPM’s use of “any activity,” Compl.
23 ¶ 54(a), that language essentially comes from the statute itself: “It is unlawful . . . *in any manner*
24 to practice intimidation upon or against any [voter].” A.R.S. § 16-1013(A) (emphasis added).

1 Regardless of the activity or the manner in which it is done, “the First Amendment [] permits a
2 State to ban a ‘true threat.’” *Black*, 538 U.S. at 359 (quoting *Watts v. United States*, 394 U.S.
3 705, 708 (1969) (per curiam)). That is what was done here. And because A.R.S. § 16-1013(A)
4 satisfies the First Amendment—as AFEC concedes, Compl. ¶¶ 58, 61—this EPM provision does
5 as well. *See Tan Duc Nguyen*, 673 F.3d at 1266 (“California’s prohibition on intentional acts of
6 voter intimidation is therefore consistent with the state’s power to regulate true threats.”).⁶

7 b. Examples of prohibited conduct. Beyond this, the Complaint alleges that parts of
8 two sets of exemplars of such conduct are unconstitutional. Compl. ¶¶ 54(c)–(h). But both sets
9 are simply exemplars; neither is a criminal prohibition in and of itself.

10 The Complaint first claims that the “EPM purports to criminalize the following conduct,”
11 listing various examples of “[a]ggressive,” “threatening,” “false or misleading,” or “harassing or
12 intimidating” conduct. Compl. ¶ 54(c)–(g).⁷ But the specific EPM language that AFEC cites does
13 not “purport to criminalize” that conduct, as AFEC asserts (at ¶ 54). Rather, as the EPM states,
14 these examples “*may also be considered* intimidating conduct” “[i]n addition to the *potentially*
15 intimidating conduct outlined above” in the EPM. EPM 182 (emphases added). And these

16 ⁶ Because the nature of AFEC’s First Amendment challenge is not clear, it is not possible
17 to analyze the merits of their arguments. But even assuming the provisions they aim at regulate
18 protected speech, the state’s “compelling interest[] in preventing voter intimidation” justifies
significant restriction. *Burson*, 504 U.S. at 206.

19 ⁷ The Complaint targets (¶¶ 54(c)–(g)) the EPM’s language that “the following” types of
20 conduct “may also be considered intimidating conduct inside or outside the polling place,”:
21 (1) “Aggressive behavior, such as raising one’s voice or taunting a voter or poll worker;”
22 (2) “Using threatening, insulting, or offensive language to a voter or poll worker;” (3) “Inten-
23 tionally disseminating false or misleading information at a voting location, such as flyers or
24 communications that misstate the date of the election, hours of operation for voting locations,
addresses for voting locations, or similar efforts intended to disenfranchise voters;” (4) “Directly
confronting, questioning, photographing, or videotaping voters or poll workers in a harassing or
intimidating manner, including when the voter or poll worker is coming to or leaving the polling
location;” or (5) “Posting signs or communicating messages about penalties for ‘voter fraud’ in
a harassing or Intimidating manner.” EPM at 183–84.

1 exemplars of *potentially* intimidating conduct are for the benefit of county election officials as
2 *they* determine how to train poll workers and implement their own policies to address voter in-
3 timidation. *See* EPM at 181 (“The officer in charge of elections has a responsibility to train poll
4 workers and establish policies to prevent and promptly remedy any instances of voter intima-
5 tion.”).

6 Notably, the Complaint omits this quoted language. The Complaint separately takes issue
7 (at ¶ 54(h)) with the EPM’s “examples of actions that *likely* constitute voter intimidation or har-
8 assment,” listed in a footnote, EPM at 74 n.40 (emphasis added).

9 These sections of the EPM, however, are not outright prohibitions on this conduct, subject
10 to constitutional scrutiny. *See, e.g., Frank v. Lee*, 84 F.4th 1119, 1140 (10th Cir. 2023) (exam-
11 ining whether “chosen restriction” is appropriately tailored). These provisions in the EPM are
12 examples for the *counties* to consider in setting their own training and policies, and they are
13 examples that, depending on the facts and circumstances, “may” or “likely” constitute prohibited
14 conduct. Indeed, “may” is “a possibility.” *May*, BLACK’S LAW DICTIONARY (11th ed. 2019).

15 As set forth in the EPM, and as AFEC nowhere disputes, “[t]he officer in charge of elec-
16 tions has a responsibility to train poll workers and establish policies to prevent and promptly
17 remedy any instances of voter intimidation.” EPM at 181. To aid election officials in carrying
18 out this duty, the EPM’s exemplars provide guidance to election officials as to what conduct
19 might be intimidating against which they must be aware of, depending on the circumstances,

20 ⁸ In particular, the Complaint targets (¶¶ 54(h)) the EPM’s language that: “Some examples
21 of actions that likely constitute voter intimidation or harassment are: (1) repeatedly entering or
22 staying within 75 feet of a ballot drop box or the entrance to a building where a drop box is
23 located for the purpose of watching or monitoring individuals who are delivering ballots; (2)
24 intentionally following individuals delivering ballots to the drop box when such individuals are
not within 75 feet of a drop box; [and] (3) speaking to or yelling at an individual, without prov-
ocation, who that person knows is returning ballots to the drop box and who is within 75 feet of
the drop box. . . .” EPM at 74 n.40.

1 based on the Secretary’s experience. *Id.* at 182. Indeed, some of the listed conduct was specifi-
2 cally enjoined by a federal district court during the 2022 election as potentially unlawful. *See*
3 EPM at 74 n.40 (citing *Ariz. All. for Retired Ams.*, 2022 WL 17088041, at *1–2 (D. Ariz. Nov.
4 1, 2022)). At a minimum, any challenge to the exemplars must await a concrete circumstance in
5 which they have actually been relied upon and applied.

6 **2. Any First Amendment challenge to the EPM’s electioneering provi-**
7 **sion must be dismissed.**

8 Next, the Complaint takes aim at an EPM provision prohibiting electioneering. Compl.
9 ¶ 54(b). The EPM provides, and AFEC does not challenge, that “[n]o electioneering may take
10 place within the 75-foot limit of a voting location.” EPM at 180; *see also* A.R.S. § 16-515(A).
11 AFEC instead challenges the EPM’s further statement that: “[N]o electioneering may take place
12 outside the 75-foot limit if it is audible from a location inside the door to the voting location.”
13 EPM at 180; *see* Compl. ¶ 54(b). Any First Amendment challenge to this provision also fails as
14 a matter of law.

15 AFEC concedes that Arizona’s electioneering statute is constitutional. Compl. ¶¶ 60-61.
16 That statute, like the EPM, provides that “no electioneering may occur within the 75-foot limit.”
17 A.R.S. § 16-515(A). The statute’s prohibition is not limited to electioneering by individuals
18 physically within the buffer zone. *See id.* Rather, for the buffer zone to serve any meaningful
19 purpose, the statute’s prohibition must extend to any electioneering that significantly interferes
20 with a voter’s right to cast his or her vote at the polls within a zone free from confusion, undue
21 influence, or fraud. *See Burson*, 504 U.S. at 199. Electioneering that can be heard “from inside
22 the door to a voting location” is inherently “within” the seventy-five foot buffer and thus
23 prohibited by Arizona law. *See* EPM at 180. Because the EPM provision accurately states the
24 law that AFEC concedes is constitutional—prohibition of electioneering “within the seventy-

1 five foot limit”—any claim based on this provision must be dismissed.

2 Regardless, the EPM’s restriction against electioneering that is audible within the interior
3 of a polling place is constitutional because it is a reasonable, viewpoint-neutral regulation of a
4 nonpublic forum. There is no question that a polling place, as a “government-controlled property
5 set aside for the sole purpose of voting,” qualifies as a nonpublic forum. *Minnesota Voters All.
6 v. Mansky*, 585 U.S. 1, 12 (2018). And this restriction “is ‘reasonable in light of the purpose
7 served by the forum’: voting.” *Id.* at 13 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund,
8 Inc.*, 473 U.S. 788, 806 (1985)).

9 The EPM is reasonable: it is crafted narrowly to prevent “intentional[]” and “knowing[]”
10 electioneering within the seventy-five-foot buffer zone, as well as any attempts to circumvent
11 the buffer through the use of, for example, megaphones, loud electronic equipment, or group
12 protests. EPM at 180 (quoting A.R.S. § 16-515(I)). In short, it seeks to ensure that the buffer
13 zone’s protection against electioneering at the polls is not rendered meaningless. *See Mansky*,
14 585 U.S. at 15 (“[Casting a vote] is a time for choosing, not campaigning. The State may rea-
15 sonably decide that the interior of the polling place should reflect that distinction.”). AFEC has
16 not alleged any specific facts demonstrating that this restriction discriminates based on viewpoint
17 or that it is unreasonable. *See Compl.* ¶ 64. As such, AFEC’s challenge must be dismissed.⁹

18
19 ⁹ But even if a higher level of scrutiny were to apply here, the EPM satisfies this test, too.
20 There is no question that Arizona has “a compelling interest in protecting voters from confusion
21 and undue influence” and “preserving the integrity of its election process.” *Burson*, 504 U.S.
22 at 199 (citation omitted). An electioneering buffer zone designed to address these compelling
23 interests is constitutionally permissible so long as it is “reasonable and does not *significantly*
24 *impinge* on constitutionally protected rights.” *Frank*, 84 F.4th at 1142 (quoting *Burson*, 504 U.S.
at 209). Again, AFEC has not alleged any facts demonstrating why this provision, which seeks
to create “an island of calm in which voters can peacefully contemplate their choices,” is unrea-
sonable. *Mansky*, 585 U.S. at 15. Nor have they alleged any concrete, *significant* impingement
on their constitutional rights.

1 **B. Plaintiff’s First Amendment free association claim fails as a matter of law.**

2 Next, AFEC challenges the EPM provision that provides that “A ‘federal-only’ voter is
3 eligible to vote solely in races for federal office in Arizona (including the Presidential Preference
4 Election (PPE)).” EPM at 3; Compl. ¶ 71. They challenge this provision on two grounds: (1) that
5 this provision is contrary to state law, Compl. ¶ 72, and (2) that it somehow violates the First
6 Amendment Free Association provisions, *id.* ¶ 74. Both claims fail as a matter of law.

7 *First*, AFEC alleges the EPM conflicts with A.R.S. § 16-127(A)(1), which provides that
8 “[a] person who has registered to vote and who has not provided satisfactory evidence of
9 citizenship as prescribed by section 16-166 is not eligible to vote in presidential elections.”

10 But a federal court recently held that this statute is unlawful. As that court recognized,
11 the National Voter Registration Act (“NVRA”) applies to presidential elections. *Mi Familia Vota*
12 *v. Fontes*, No. CV-22-00509-PHX, 2023 WL 8181307, at *6 (D. Ariz. Sept. 14, 2023) (“The
13 plain language of the NVRA reflects an intent to regulate all elections for ‘[f]ederal office,’
14 including for ‘President or Vice President.’”). Moreover, just as Arizona law treats the PPE in
15 the same manner as primary elections, *see* A.R.S. § 16-241(C), so too does the NVRA. *See* 52
16 U.S.C. § 20507(a) (governing the “administration of voter registration for elections for Federal
17 office”); *id.* § 30101(1)(D) (defining “election” to include “a primary election held for the
18 expression of a preference for the nomination of individuals for election to the office of
19 President.”). The court thus held A.R.S. § 16-127(A)(1)’s “restriction on Federal Form users
20 voting in presidential elections is expressly preempted by Section 6” of the NVRA. *Mi Familia*
21 *Vota*, 2023 WL 8181307, at *6.

22 Accordingly, the NVRA preempts A.R.S. § 16-127(A)(1). As A.R.S. § 16-127(A)(1) is
23 unenforceable, the EPM is a valid expression of the law: that voters without documentary proof
24 of citizenship may vote in Arizona’s PPE. No conflict exists.

1 *Second*, AFEC makes the conclusory allegation that “[b]ecause this provision also re-
2 quires Arizona political parties to allow voters who are not registered as state-party voters to
3 vote in the PPE, it violates the First Amendment.” Compl. ¶ 74. But AFEC is not a political
4 party, and it does not allege that *its* associational rights, somehow, have been harmed in any way.
5 Not only does AFEC lack any injury (and therefore) standing, as to this claim, *see* Section I
6 *supra*, but it simply has not alleged any associational interest of its own in *another* party’s mem-
7 bership or primary participation.

8 **C. Plaintiff’s due process claim fails as a matter of law.**

9 Separately, in Count III, AFEC appears to make a facial due process vagueness challenge
10 to, at a minimum, the EPM provisions listed above to the extent that they impose criminal pen-
11 alties in Count III. Compl. ¶¶ 76–84. Again, this claim must be dismissed because it is not ripe
12 for the reasons set forth above.

13 But beyond this, the claim must be dismissed for the fundamental additional reason that
14 the nature of AFEC’s due process challenge is exceedingly difficult to discern. In some regards,
15 AFEC seems to allege that the EPM provisions themselves do not adequately “define the of-
16 fenses” with the “required degree of particularity.” *Id.* ¶ 78. But, even then, the Complaint does
17 not explain which aspects of the provisions are unclear. On the other hand, the Complaint also
18 seems to simultaneously base its due process claim on an unexplained theory that otherwise
19 unconstitutional provisions somehow violate due process. *Id.* ¶ 79. The Complaint simply does
20 not explain the nature of AFEC’s due process claims; and this alone requires dismissal. *See Cul-*
21 *len*, 218 Ariz. at 419 ¶ 6 (requiring complaint to give “fair notice of the nature and basis of the
22 claim” (citation omitted)). AFEC’s due process challenge should be dismissed for this additional
23 reason.

24

1 **Conclusion**

2 For the foregoing reasons, the Court should dismiss AFEC's Complaint.

3
4 Dated: March 20, 2024

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1 **GOOD FAITH CONSULTATION CERTIFICATE**

2 Pursuant to Rules 12(j) and 7.1(h) of the Arizona Rules of Civil Procedure, undersigned
3 counsel certify that they attempted in good faith to resolve the issues raised in this Motion to
4 Dismiss by conferring with counsel for Plaintiffs but were unable to reach resolution.

5
6 Dated: March 20, 2024

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