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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

ARIZONA FREE ENTERPRISE CLUB, PHILIP TOWNSEND, and AMERICA FIRST POLICY INSTITUTE, Plaintiffs, v. ADRIAN FONTES, in his official capacity as the Secretary of State of Arizona, and KRIS MAYES, in her official capacity as Arizona Attorney General, Defendants.	No. CV2024-002760 **NOTICE OF LODGING PROPOSED INTERVENORS ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** (Assigned to the Hon. Jennifer Ryan-Touhill)

Proposed Intervenor-Defendants the Arizona Alliance for Retired Americans and Voto Latino (the "Proposed Intervenors") give notice of lodging their Proposed Motion to Dismiss Plaintiffs' First Amended Complaint. In the spirit of "secur[ing] the just, speedy, and inexpensive determination" of this matter, Ariz. R. Civ. P. 1, the Proposed Intervenors lodge this document at the same time that Defendants will file their motions to dismiss for the expedient and efficient resolution of this case.

RESPECTFULLY SUBMITTED this 31st day of May, 2024.

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By: /s/ D. Andrew Gaona
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INTRODUCTION AND BACKGROUND

In the middle of early voting for the 2022 general election, armed and masked vigilantes claimed a right to monitor, observe, and photograph voters at Arizona's drop boxes, purportedly in the name of election integrity. The newspapers were filled with photographs of these intimidating figures gathered in tactical gear and carrying guns near drop boxes. In some instances, they confronted voters who were depositing their ballots, or followed them and intimidated them, taking photographs and posting pictures of voters who they claimed—without any basis—were voting illegally. Multiple lawsuits were filed, including by Proposed Intervenors the Arizona Alliance for Retired Americans and Voto Latino, seeking to protect voters from intimidation. A federal district court ultimately enjoined this activity through that election cycle, the 2022 election was safely administered, and the results have been repeatedly affirmed.

Against this backdrop, and ahead of the 2024 election, Defendant Secretary of State issued the 2023 Election Procedures Manual ("EPM"). Arizona law requires the Secretary to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting" in the EPM. A.R.S. § 16-452(A)–(B). And the 2023 EPM (like past EPMs), contains guidance to election officials to ensure that elections are administered consistently and fairly across the state, on topics ranging from prohibiting voter intimidation to voter registration to voting procedures to election certification.[1] *See generally* A.R.S. §§ 16-100 to -184, 16-400 to -711, 16-1001 to -1022. Most of the guidance in the 2023 EPM has appeared in past EPMs and should be uncontroversial. But Plaintiffs—the Arizona Free Enterprise Club ("AFEC"), America First Policy Institute ("America First"), and voter Philip Townsend—nevertheless take aim at several provisions, cherry-picking language out of context and mischaracterizing them as restrictions that violate Arizona's guarantee of freedom of speech and due process (Counts I and II), or as conflicting with state election statutes (Count II).

[1] *See State of Ariz. 2023 Elections Procedures Manual*, Ariz. Sec'y of State (Dec. 30, 2023), https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf.

Plaintiffs' amended complaint should be dismissed at the outset because Plaintiffs fail to identify any way in which the EPM's guidance injures Plaintiffs or their members, rendering them without standing to bring their challenge. On the merits, too, Plaintiffs' claims fail. The voter intimidation guidance challenged in Counts I and II expressly does nothing more than provide examples of the type of behavior that could amount to unlawful voter intimidation under existing Arizona statutes—it is not in conflict and does not in and of itself prohibit anything. *See* EPM at 73–74 & n.40, 182–183 (hereinafter "voter intimidation guidance"); First Am. Compl. ¶¶ 78–79, 90–93 ("FAC" or "complaint") (quoting challenged provisions). And the slew of provisions challenged in Count II, which Plaintiffs object to based on a hodgepodge of policy preferences and otherwise unsupported—and at times, unexplained—claims, are either fully consistent with state law or accurately track instances in which state law is preempted by federal law.[2] Plaintiffs clearly dislike the EPM, but because they cannot identify any cognizable conflicts between the EPM and enforceable state statutes or any constitutional violations, their complaint must be dismissed.

LEGAL STANDARD

A complaint must be dismissed if it fails to allege particularized harm sufficient to confer standing or fails to state a claim upon which relief can be granted. *See Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88 ¶ 8 (App. 2023); *Stauffer v. Premier Serv. Mortg., LLC*, 240 Ariz. 575, 577–78 ¶ 9 (App. 2016). Although the court "must assume the truth of all of the complaint's material allegations," *Stauffer*, 240 Ariz. at 577 ¶ 9, it cannot "accept as true allegations consisting of conclusions of law,

[2] Plaintiffs' requested relief includes a declaration that the EPM violates Article II, section 26 of the Arizona Constitution, *see* FAC 28, which protects the right to bear arms—a claim that is not discussed anywhere else in complaint. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 6 (2008) (en banc) (pleading must "give the opponent fair notice of the nature and basis of the claim"); *see also* Ariz. R. Civ. P. 8(a). Plaintiffs also request mandamus relief, *see* FAC 29, but "[m]andamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Sears v. Hull*, 192 Ariz. 65, 68 ¶ 11 (1998) (en banc) (quotation omitted). Here, the Secretary has complied with his statutory duty to promulgate an EPM, and thus no mandamus action lies.

inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

ARGUMENT

I. Plaintiffs lack standing.

The complaint must be dismissed at the threshold because Plaintiffs fail to meet Arizona's "rigorous standing requirement." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). Standing must be resolved before reaching the merits. *See Sears*, 192 Ariz. at 68 ¶ 9. To establish standing, a plaintiff must show (1) "a distinct and palpable injury giving [them] a personal stake in the controversy's outcome," *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 ¶ 8 (App. 2008) (citation omitted); (2) "a causal nexus between the defendant's conduct and their injury"; and (3) "that their requested relief would alleviate their alleged injury," *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405–06 ¶¶ 23, 25 (2020) (cleaned up).[3] Here, Plaintiffs fail to satisfy these necessary prerequisites.

A. Philip Townsend has not alleged a cognizable injury.

The complaint includes only a single sentence about Townsend, which notes that he is "domiciled in Yuma County, Arizona, registered to vote, and [] plans on voting in the 2024 elections." FAC ¶ 38. Those unremarkable facts demonstrate no injury Townsend has or will incur because of any of the challenged EPM provisions. The FAC later vaguely alleges that unspecified "statutory problems" create "issues of diluting" votes, *id.* ¶ 162, but "courts have routinely explained [that] vote dilution is a very specific claim that involves votes being weighed differently." *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. 2020).[4] Plaintiffs nowhere suggest that any challenged provision will result in votes being

[3] The same principles apply to obtain declaratory relief. *See, e.g.*, *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310 (1972); *Dail v. City of Phoenix*, 128 Ariz. 199, 201 (App. 1980).

[4] "[D]espite [the] differences between federal and state standing requirements," the Arizona Supreme Court finds "federal case law instructive." *Arizonans for Second Chances*, 249 Ariz. at 405 ¶ 22 (quoting *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 22 (2003)).

given different weight. Moreover, such a broad notion of vote dilution would only—at best—amount to "generalized harm that is shared alike by all" voters that "is not sufficient to confer standing." *Sears*, 192 Ariz. at 69 ¶ 16; *see also, e.g.*, *Citizens for Fair Representation v. Padilla*, 815 F. App'x 120, 123 (9th Cir. 2020). Townsend thus lacks standing.

B. Organizational Plaintiffs have not alleged a cognizable injury.

AFEC and America First also each fail to allege a cognizable injury resulting from the challenged provisions, either to them as organizations or to their purported members.

1. Organizational Plaintiffs fail to allege harm to themselves.

While an organization may establish standing by showing that a challenged act has distinctly and palpably impacted its activities, the Arizona Supreme Court has been clear that it is not enough to simply assert that the organization disagrees with a policy or that it will affect "pure issue-advocacy." *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224 ¶ 18 (2022) (quotation omitted). Plaintiffs, organizations that purportedly focus on election administration and integrity, rely on only this kind of generalized assertion, which does not confer standing.

More specifically, AFEC and America First fail to allege that the challenged provisions cause them any harm. Instead, they rely on broad assertions about run-of-the mill activities that they would necessarily undertake regardless of what the EPM says. For example, AFEC alleges that it "trains workers and volunteers to watch polls, polling locations, and drop boxes," and that "the 2023 EPM will require AFEC to train its workers to avoid violations of the 2023 EPM." FAC ¶¶ 84–85. America First similarly complains of "compliance costs to train its workers to comply with the requirements" of the EPM. *Id.* ¶¶ 42, 44, 88, 100, 161. Absent more specific allegations about what organizational activities would be curtailed as a result of the challenged provisions, or what exactly the organizations have had to divert in terms of resources as a result of the challenged provisions and how that harms their ability to advance their missions, Plaintiffs have not pled allegations sufficient to distinguish their alleged injury from a generalized grievance shared by any

advocacy group that believes different policy decisions should have been made. *See Ariz. Sch. Bds.*, 252 Ariz. at 224 ¶ 18.

2. Organizational Plaintiffs fail to allege credible harm to members.

AFEC and America First fare no better on their theory that the EPM's voter intimidation guidance puts their purported members at risk of criminal penalty. *See, e.g.,* FAC ¶¶ 36, 45–46, 69, 85, 98, 151, 155, 160. Nor do they adequately allege any other injury that would allow them to pursue this action on behalf of harm to their members.

In support of their challenges to the EPM guidance addressing voter intimidation, the best that they can offer is that they have members who "*may*" or "*might*" be "*interested in*" engaging in the voter intimidation that they claim is prohibited by the challenged guidance. *See id.* ¶¶ 35–36, 45, 85–86, 95, 98, 154–55, 162 (emphases added). More is required. Plaintiffs do not allege who these members are, that they actually intend to engage in any particular conduct, or when they may or might engage in such conduct. *See generally id.*; *see also id*. ¶¶ 95–96 (alleging some members America First are "*interested in*" observational activities and conveying messages to voters that Plaintiffs believe could fall within the EPM guidance (emphasis added)); *id.* ¶¶ 35, 86 ("AFEC *may* at times wish to speak to voters returning ballots" and members "*may* use language" that "*might* be considered 'threatening, insulting, or offensive' and that language *may* be directed" at voters (emphases added)).[5]

Although Plaintiffs make conclusory reference to "planned election-integrity related activities," they claim would allegedly give rise to possible prosecution, *e.g.*, *id.* ¶¶ 85, 88, the only "plan" the complaint identifies is that AFEC "encourages" individuals to "watch polls, polling locations, and drop boxes," *id.* ¶ 84. But AFEC's mere "encouragement" of unidentified members who may or may not be moved by that encouragement to "watch" voters in some unidentified manner does not plead an intention to engage in conduct even

[5] The complaint never even squarely alleges that either organization has members in Arizona. *See* FAC ¶¶ 33–34 (alleging AFEC advocates for policy solutions in Arizona and its membership "include[s] registered voters," but not specifying where such voters are registered); *id.* ¶ 45 (alleging America First "has about 300,000 members, who are widely dispersed throughout the United States").

arguably prohibited by the challenged provisions, as is necessary for standing. *Cf. Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986) (holding plaintiff lacks standing where he "has not only failed to show that he was affected . . . but he has also failed to show that he ever would be").

Plaintiffs' remaining allegations raise absurd hypotheticals that cannot give rise to any injury. For example, Plaintiffs allege that their members "occasionally raise their voice[s]," when "engag[ing] in heated discussions about sports," but they cannot plausibly claim a credible fear that they will be prosecuted under the EPM for discussing sports. FAC ¶¶ 35, 96; *see id.* ¶ 87 (Plaintiffs claim saying "'hello' to a neighbor or work colleague . . . returning a ballot" would be a crime). The absurdity of these allegations is underscored by Plaintiffs' admission that their interpretation of EPM guidance would mean conduct in which "virtually every U.S. citizen" engages would be a criminal offense. *See id.* ¶ 35; *see also id.* ¶¶ 96–97. Because courts "will not credit [an interpretation] that leads to absurd results," the Court should reject Plaintiffs' irrational complaints. *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, 13 ¶ 28 (2022); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (holding "self-inflicted injuries" based on "subjective fear" not sufficient for standing).

Plaintiffs' purported fear of prosecution is entirely too speculative. The EPM guidelines do not alone create binding rules regulating individual conduct independent of otherwise existing Arizona state statutes. The challenged provisions, which are addressed to local election officials for consideration when developing local procedures and enforcing Arizona voter intimidation statutes, by their plain terms provide mere *examples* of what *could* be unlawful, in the context of describing what *existing* laws—which Plaintiffs do not challenge—prohibit. *See* EPM at 74, 181–83 (citing A.R.S. §§ 16-1013(A), 16-1017); *see also* FAC ¶¶ 1, 78–79, 150. Only *if* a local election official created procedures as authorized by the EPM and *if* those procedures prohibited the behavior identified as examples in the EPM and *if* they purported to prohibit politely speaking to a voter, could Plaintiffs plausibly claim that planning to engage in such behavior might give rise to standing. But that is way

too many ifs to support a facial constitutional challenge to the EPM.

Plaintiffs' standing allegations with respect to the remaining EPM provisions challenged in Count II of the complaint are even more threadbare. To the extent that the organizations purport to establish standing on behalf of their members as to Count II based on a vote dilution theory, *see id.* ¶¶ 34, 120, 162, those allegations fail for the same reason that they fail for Townsend—a complete lack of any alleged injury, *see supra* I.A. Plaintiffs do not otherwise attempt to allege any injury to themselves or their members as a result of these provisions. As such, Plaintiffs lack standing to challenge the EPM provisions discussed in paragraphs 109 to 148 and any corresponding claims should be dismissed.[6]

C. Plaintiffs' alleged injuries cannot be redressed by the relief requested.

Plaintiffs further fail to establish standing because none of the challenged voter intimidation guidance criminalizes any conduct beyond the statutes it expressly references (which, again Plaintiffs do not challenge), and therefore any hypothetical injuries cannot be redressed by the requested relief. *See In re MS2008-000007*, No. 1 CA-MH 23-0073 SP, 2024 WL 121882, at *2 ¶ 9 (Ariz. Ct. App. Jan. 11, 2024) (holding plaintiff lacked standing where unchallenged restriction imposed same limits on speech and association); *see also* FAC ¶¶ 1, 78–79, 150–57. In other words, even if the EPM guidance was eliminated, the conduct Plaintiffs claim is prohibited would remain violative of Arizona statutes, and a judgment in Plaintiffs' favor would not prevent liability for the same conduct under existing law. *See Arizonans for Fair Elections v. Hobbs*, 454 F. Supp. 3d 910, 917 (D. Ariz. 2020) (dismissing case for lack of standing because plaintiffs failed to challenge related laws that "by and large, impose the same requirements" such that "Plaintiffs' injury would not be redressed").

II. Plaintiffs fail to state a claim.

The complaint also fails as a matter of law and, if not dismissed based on standing,

[6] Plaintiffs have dismissed claims related to allegations in ¶¶ 114–116, 126–128, and 146–148, so their standing to challenge the EPM provisions discussed in those paragraphs is no longer at issue.

should be dismissed for failure to state a claim.

A. The voter intimidation guidance does not run afoul of any Arizona law.

The EPM voter intimidation provisions provide guidance to election officials through examples and restatements of the law that are fully consistent with the unchallenged underlying statutes. They do not criminalize protected free speech for the simple reason that they do not criminalize any conduct at all. And, to the extent the underlying statutes prohibit behavior interfering with voting near polling locations, such regulation is well within constitutional limits. Plaintiffs' implausible interpretation of the EPM should be dismissed along with their challenges to the EPM's voter intimidation guidance.

1. The EPM's voter intimidation guidance does not criminalize protected speech.

The fundamental flaw with Count I is that none of the provisions actually "purport[] to criminalize" any conduct beyond the underlying statutes they implement. FAC ¶ 1. Rather, most of the provisions that Plaintiffs challenge are *expressly* stated as guidance to election officials regarding examples of conduct that *may* constitute voter intimidation. None of the voter intimidation guidance claims to create "rules" that could give rise to criminal charges under A.R.S. § 16-452(C), which establishes only that it is a misdemeanor for "[a] person" to "violate[ ] any *rule* adopted" in the EPM. *Id*. (emphasis added). As quoted by Plaintiffs themselves, the EPM at 73–74 (the section Plaintiffs call the "Harassment Provision") states simply that local election officials "*may* establish and implement additional local procedures for ballot drop-off locations to protect the security and efficient operation of the ballot drop-off location" and "*may* restrict activities that interfere with the ability of voters and/or staff to access the ballot drop-off location free from obstruction or harassment." FAC ¶ 78 (emphasis added) (quoting EPM at 73–74). Plaintiffs do not challenge the Secretary's authority to allow local election officials to establish security procedures for ballot drop-off locations or allege that they have established unconstitutional procedures. Rather, Plaintiffs implausibly claim that a footnote with "examples of actions that likely constitute voter intimidation or harassment," *id.* ¶ 79

(citing EPM at 74 n.40), somehow "bans *all* attempts to speak to voters returning ballots no matter how polite/non-harassing the speech might be," *id.* ¶ 86, (it does not). Similarly, the guidance found at page 182 of the EPM (which Plaintiffs call the "Speech Restriction") simply provides examples of conduct that "may also be considered intimidating conduct." FAC ¶ 93 (citing EPM at 182). Because none of the challenged EPM guidance actually restricts anything, it cannot "criminalize speech." *Id.* ¶ 11.

To contrive a constitutional infirmity, Plaintiffs ask the Court to adopt an absurd interpretation of the language in the EPM, claiming that it contains "no temporal limitation," "no geographic limitation," and eliminates any "nexus to voting." FAC ¶¶ 2, 6. But both the plain language and its context dispense with Plaintiffs' hyperbole. As Plaintiffs concede, by its terms, the guidance only relates to conduct "at a voting location," *id.* ¶ 92 (citing EPM at 182), which by definition only exists while voting is ongoing. Indeed, all the EPM's examples of what "may" be "intimidating conduct" explicitly reference "voter[s]" and "voting." *See* EPM at 182–83 (for example, it "may" be "intimidating conduct" to use "threatening, insulting, or offensive language to a voter"). Moreover, the language Plaintiffs challenge is found in Chapter 9, Section III of the *Elections* Procedures Manual; Chapter 9 provides guidance to election officials on "Conduct of Elections/Election Day Operations," and Section III covers "Preserving Order and Security at the Voting Location." *Id.* at 180. Based on the plain language and context of the EPM, the temporal limitation is during voting, the geographic limitation is the voting location, and the nexus to voting is self-evident. Plaintiffs' request that this specific and narrow guidance be read to criminalize arguments about sports anywhere in Arizona strains credulity far beyond the breaking point and should be dismissed out of hand. *See Ariz. Bd. of Regents*, 253 Ariz. at 13 ¶ 18.

2. The EPM's voter intimidation guidance does not conflict with or expand upon the underlying statute.

Plaintiffs also claim that the EPM "unlawfully amends A.R.S. § 16-1013" by removing a mens rea requirement and prohibiting "harassment," which Plaintiffs appear to claim is allowed under Arizona law. *See* FAC ¶ 102. Both assertions fail.

First, as explained, the challenged EPM provisions do not criminalize any conduct at all. The *statutes* criminalize conduct; the EPM provides guidance to election officials on how to recognize statutorily-prohibited conduct. Any voter-intimidation prosecution would be brought under the underlying statute, A.R.S. § 16-1013, which includes a mens rea requirement. And as noted, the complaint lacks any allegation that anyone has ever been charged with voter intimidation in violation of the EPM itself—a telling omission, given that much of the language Plaintiffs complain of has been in the EPM since at least 2019. *See* 2019 EPM at 180.[7] The EPM thus does not and cannot eliminate mens rea requirements.

Plaintiffs' contention that the Secretary has impermissibly banned harassing voters goes nowhere: even if the EPM criminalized conduct not covered by Section 16-1013 (which it does not), Arizona separately criminalizes harassment, defined as "conduct . . . that would cause a reasonable person to be seriously alarmed, annoyed, humiliated or mentally distressed" and "in fact seriously alarms, annoys, humiliates or mentally distresses the person." A.R.S. § 13-2921(E); *see also id.* § 13-2921(A)(2)-(3). And besides being unlawful in and of itself, harassing conduct could certainly fall within Section 16-1013's prohibition of "any manner" of voter intimidation. Again, the EPM goes no farther than the underlying statutes, which Plaintiffs do not challenge.

3. The EPM's voter intimidation guidance does not violate speech rights.

Even if the EPM's guidance actually prohibited any conduct, it would not run afoul of any constitutional requirements because it permissibly regulates conduct in and around polling locations. A party bringing a pre-enforcement challenge alleging a chilling effect on speech rights must demonstrate that the law "punishes a 'substantial' amount of protected free speech, 'judged in relation to the [law's] plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Here, the legitimate sweep of a prohibition on voter intimidation is clearly broad enough to encompass the EPM.

[7] *State of Ariz. 2019 Elections Procedures Manual*, Ariz. Sec'y of State (Dec. 20, 2019), https://apps.azsos.gov/election/files/epm/2019_elections_procedures_manual_approved.pdf.

States can regulate conduct in the vicinity of polling places to prevent undue influence on voters, which necessarily includes voter intimidation. *See Burson v. Freeman*, 504 U.S. 191, 210 (1992) (upholding a strict ban on electioneering within 100 feet of polling places). Measures to prevent voter intimidation in and around polling places remain constitutional even if they go further both physically and figuratively than the purported prohibitions here. For example, the statute at issue in *Burson* was in every conceivable way more burdensome on speech than the EPM provisions Plaintiff challenge: it was a mandatory criminal statute that directly regulated individual conduct and plainly restricted "the right to engage in political discourse," *id.* at 198, "an area in which the importance of First Amendment protections is 'at its zenith,'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quotation omitted). The EPM's straightforward guidance on the application of Arizona's voter intimidation prohibitions serves the same interests in a far less burdensome manner; thus, it would be constitutional even if it did regulate speech (which, again, it does not).

4. The EPM's voter intimidation guidance does not violate due process.

Plaintiffs also fail to state a claim for due process. First, these arguments fail at the threshold because as already explained, the challenged guidance imposes no freestanding criminal penalties nor alters the scope of criminal liability in the statutes. *See supra* II.A. As such, it "cannot be unconstitutionally vague" because it "does not define the elements of an offense, fix any mandatory penalty, or threaten people with punishment." *United States v. Christie*, 825 F.3d 1048, 1064–65 (9th Cir. 2016). Because the EPM provisions on their face provide non-mandatory guidance to county recorders and do not "regulate[] . . . registered voters," at all, they "'impose[] neither regulation of nor sanction for conduct,'" *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at *17 (D. Ariz. Sept. 14, 2023) (emphasis omitted) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), and are not subject to the vagueness doctrine.

But even if the Court were to humor Plaintiffs' belief that the provisions somehow impose criminal liability, the challenged provisions are constitutional unless they "do[] not give persons of ordinary intelligence a reasonable opportunity to learn what [they] prohibit"

or "provide explicit standards for those who will apply it." *State v. McLamb*, 188 Ariz. 1, 5 (App. 1996) (quotation omitted) (collecting cases). Neither is true here. To the contrary, the challenged provisions outline what is proscribed by statute and provide examples about conduct and circumstances that may give rise to a violation. *See* EPM at 73–74 & n.40, 181–82. These examples themselves defeat Plaintiffs' vagueness charge, offering ample explanation to election officials and individuals alike, well beyond the constitutional minimum. For the same reasons, the EPM provisions provide more than "fair notice" as to what conduct is proscribed in clear compliance with due process requirements. *See State v. Angelo*, 166 Ariz. 24, 28 (App. 1990) (due process requires only that definitions be sufficiently precise and definite so that the statute provides "fair notice that engaging in the proscribed conduct risks criminal penalties" (collecting cases)).

In sum, the EPM's voter intimidation guidance does not criminalize any behavior beyond that prohibited by statute, and even if it did, it would be well within constitutional parameters, so Plaintiffs' challenges should be dismissed because they fail on the merits.

B. Count II fails because the challenged provisions comport with governing law.

Each of Plaintiffs' remaining claims obscures a critical legal reality: It is squarely within the Secretary's authority to prescribe rules related to voter registration and elections in the EPM. "Once adopted, the EPM has the force of law." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 ¶ 16 (2020). An EPM provision is invalid only in the rare instance where it directly "contradicts" state law or exceeds the scope of the Secretary's statutory authorization. *Leibsohn v. Hobbs*, 254 Ariz. 1, 7 ¶ 22 (2022); *Leach v. Hobbs*, 250 Ariz. 572, 576 ¶ 21 (2021); *see also Ariz. All. for Retired Ams., Inc. v. Crosby*, 256 Ariz. 297, ¶18 (App. 2023) (EPM "void" where it "directly conflicts with the express and mandatory procedures" of statute). This is not that rare case, and Count II accordingly fails to state a claim.[8]

[8] This section addresses Proposed Intervenor-Defendants' merits arguments to dismiss Count II and the related allegations in ¶¶ 110–113, 117–125, and 129–131. Plaintiffs have dismissed claims related to allegations in ¶¶ 114–116, 126–128, and 146–148, so Proposed Intervenors do not address those allegations. Proposed Intervenors take no position on the merits of the allegations in ¶¶ 132–134.

1. Voter Registration Chapter. Plaintiffs, in a single paragraph, seek to invalidate the entire chapter of the EPM—54 pages—dedicated to voter registration (*see* EPM Chapter 1 at 1–54), claiming that no Arizona law authorizes the Secretary to issue rules relating to voter registration. *See* FAC ¶ 110 (citing *Leach*, 250 Ariz. at 576 ¶ 21). But it is plainly within the Secretary's authority to issue rules about voter registration under Section 16-452, which requires the Secretary to issue rules for "procedures for early voting and voting." That Section 16-452 does not use the precise word "registration" is irrelevant; obviously "voting" includes registration, without which no one can vote. *See* A.R.S. §§ 16-101, 16-120; *see also Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *6 (D. Ariz. Nov. 3, 2016) (noting Secretary's "authority to promulgate rules and procedures for elections, such as voter registration" (citing A.R.S. § 16-452(A)).

2. Non-Residency of Juror Questionnaire. Plaintiffs' claim regarding cancellation of registration based on juror questionnaires doubly fails: Plaintiffs fail to allege a conflict between the EPM and state law, and their proposed interpretation would violate federal law. *See* FAC ¶¶ 111–13. The statutory provision Plaintiffs cite provides that county recorders "shall cancel a registration" after receiving a summary report indicating that a registered voter has moved outside the county and after sending a notice that not correcting the issue within 35 days will result in registration cancellation. A.R.S. § 16-165(A)(9). Plaintiffs appear to assert that county recorders must *immediately* cancel registrations if a voter fails to respond to the notice within 35 days, *see* FAC ¶¶ 111–13, so they claim that the EPM's instruction that the notices sent to voters "shall inform the person that failure to return the form within thirty-five days will result in the person's registration *being put into inactive status* and may ultimately lead to cancelation of their voter registration," *id.* ¶ 111 (citing EPM at 41), conflicts with the statute. But the statute does not impose a mandatory duty to cancel the registration immediately or at any specific time; accordingly, a system that puts a voter into inactive status before "ultimately" being cancelled is consistent with the statutory requirement.

Moreover, the procedure Plaintiffs desire would violate the National Voter

Registration Act ("NVRA"), which provides that a state may not remove someone from the list of eligible voters for federal elections based on a change of residence unless they have "failed to respond to a notice" *and* "not voted or appeared to vote . . . in" two consecutive federal election cycles. 52 U.S.C. § 20507(d)(1). By notifying voters who fail to respond to a notice within 35 days that they will be put on inactive status prior to later cancellation of their registration, the EPM harmonizes Arizona law with the NVRA. Indeed, the Secretary is required by Arizona law to "provide for maintenance of the [voter registration] database, including provisions regarding removal of ineligible voters that are consistent with the [NVRA]." A.R.S. § 16-168(J); *see* A.R.S. § 16-142(A)(1) (stating the Secretary of State "is responsible for coordination of state responsibilities under the [NVRA]"). The EPM thus ensures compliance with both state law and the NVRA.

3. Active Early Voter List (AEVL). Plaintiffs next take issue with list-maintenance and out-of-state ballot provisions related to the AEVL—but both arguments fail to state a claim. First, Plaintiffs' assertion that AEVL maintenance must commence on January 15, 2025—and thus that the EPM unlawfully mandates that the process begin on January 15, 2027, FAC ¶¶ 117–20 (citing EPM at 61 n.34)—fails because it misinterprets Section 16-544(L). AEVL removal notices can be sent only to voters who did not cast early ballots in all elections for two consecutive two-year periods beginning on January 1 in the year after a general election. S.B. 1485, which amended Section 16-544 to add the AEVL removal process, took effect on September 29, 2021. *See* S.B. 1485, 55th Leg., 1st Reg. Sess. (Ariz. 2021). As the EPM itself explains, the statute does not apply retroactively. *See, e.g.*, *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 470 ¶ 10 (2000) ("Statutes must contain an express statement of retroactive intent before retroactive application may occur."). Accordingly, the first full "election cycle" as contemplated by A.R.S. § 16-544(L) began on January 1, 2023, and the second will begin on January 1, 2025—meaning that, as the EPM correctly reflects, AEVL notices can be sent out at the earliest after the conclusion of the 2025–2026 election cycle, in January 2027.

Plaintiffs also fail to show that EPM guidance confirming that voters on the AEVL

can make one-off requests to have their ballots mailed outside of Arizona conflicts with statute, FAC ¶¶ 121–22 (citing EPM at 59), because voters on the AEVL (like all Arizonans) possess such a right. *See* A.R.S. § 16-542(E). While AEVL applicants "shall not list a mailing address that is outside of this state for the purpose of the active early voting list," A.R.S. § 16-544(B), all voters may request to have their ballots sent out of state for a particular election, A.R.S. § 16-542(E) (an elector may submit a "request that an early ballot be mailed to the elector's residence or temporary address"). There is no conflict because making a one-off request for a ballot to be sent out of state is not listing an out-of-state address for purposes of the AEVL. Indeed, a sister court recently rejected an identical claim. *See* Minute Entry, *Republican Nat'l Comm. v. Fontes*, No. CV2024-050553 (Maricopa Cnty. Super. Ct. May 14, 2024) (rejecting plaintiffs' claim that "'one-time requests'" made by AEVL voters "providing a temporary address for a specific election" violates Arizona law because "that provision is consistent with § 16-542(A)").

***4. UOCAVA Deadlines*.** Plaintiffs next challenge Chapter 2, Section I.F of the EPM, which notes that the Secretary may under A.R.S. § 16-543(C) take steps to "continue or lengthen the early voting process for UOCAVA voters," s*ee* FAC ¶¶ 123–125 (citing EPM at 70), if there is a natural disaster or emergency that makes it "impracticable" to comply with the UOCAVA statute, A.R.S. § 16-543(C). Plaintiffs' allegation that this provision conflicts with statutory deadlines for the receipt of ballots and the close of polls, *see* A.R.S. §§ 16-551(C), 16-565(A), fails because, as Plaintiffs concede, the Secretary *must* "create 'emergency procedures regarding the early balloting process for persons who are subject to [UOCAVA]," FAC ¶ 124 (citing A.R.S. § 16-543(C)), to ensure that UOCAVA voters can cast ballots when a disaster makes the normal UOCAVA process "impracticable," A.R.S. § 16-543(C). Section 16-543(C)—and the EPM, consistent with the statute—authorizes the Secretary to implement "emergency procedures," which necessarily includes steps sufficient to ensure that UOCAVA voters can have their votes counted.[9] Plaintiffs'

[9] The fundamental right to vote demands that deadlines not be enforced to allow

argument appears to be that the Secretary may only adopt "emergency procedures" that are fully consistent with the usual procedures, an interpretation that would render Section 16-543(C) meaningless. *See Ariz. Bd. of Regents*, 253 Ariz. at 13 ¶ 25 (rejecting "counterintuitive" interpretation of statute that would limit Attorney General's authority to address problem identified by legislature). True, Section 16-543(C) does not *specifically* mention UOCAVA deadlines—but it also does not specify any particular "emergency procedures," for the obvious reason that it is impossible to foresee what procedures will be necessary in unforeseen emergency circumstances. Plaintiffs' argument thus fails.

5. Early In-Person Signature Matching. Plaintiffs' attempt to manufacture a conflict between A.R.S. § 16-550(A)'s requirement that county recorders conduct signature verification for early ballots and an EPM provision that states that "early ballots cast in-person should not be invalidated based solely on an allegedly inconsistent signature absent other evidence that the signatures were not made by the same person" fails. EPM at 83–84; *see* FAC ¶¶ 129–30. Rather than conflicting, the EPM implements Section 16-550(A)'s directive that all early ballots undergo signature review. *See* EPM at 83 ("All early ballots, including ballots-by-mail and those cast in-person at an on-site early voting location . . . must be signature-verified."). The EPM makes clear that an early in-person ballot should not be rejected solely based on an inconsistent signature. This is fully consistent with the statute, which requires "confirm[ing] the inconsistent signature," A.R.S. § 16-550(A); *see* FAC ¶ 130, because anyone who votes early-in-person has already "show[n] identification prior to receiving [their] ballot," EPM at 84, thus verifying their identity. Nothing in the statute prohibits the Secretary from instructing election officials that a voter who provides proper identification immediately before casting an early vote cannot be disqualified because of a purported signature mismatch. Because Plaintiffs fail to identify any conflict,

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circumstances outside of voters' control to disenfranchise them. *See, e.g.*, *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (holding that "Florida's statutory framework completely disenfranchises thousands of voters, and amounts to a severe burden on the right to vote" unless extended during Hurricane Matthew); *Ga. Coal. for the Peoples' Agenda v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (similar); *In re Holmes*, 788 A.2d 291, 295 (N.J. Sup. Ct. 2002) (allowing ballots received after election day to be counted due to anthrax attacks).

this challenge, too, should be dismissed.

CONCLUSION

For these reasons, the First Amended Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 31st day of May, 2024.

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Certificate of Good Faith Consultation

Pursuant to Ariz. R. Civ. P. 7.1(h) and 12(j), undersigned counsel hereby certifies that counsel for Proposed Intervenors attempted to confer with counsel for Plaintiffs regarding this motion, but Plaintiffs' counsel took the position that Proposed Intervenors are not currently parties and consequently do not have the right to file a motion to dismiss at this time. Plaintiffs' counsel stated that they would be willing to consult under Rules 7.1(h) and 12(j) should Proposed Intervenors be granted intervention or leave to file a motion to dismiss.

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