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ARIZONA COURT OF APPEALS

DIVISION ONE

ARIZONA FREE ENTERPRISE CLUB, PHILIP TOWNSEND, and AMERICA FIRST POLICY INSTITUTE Plaintiffs/Appellees, 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/Appellants.	Court of Appeals Division One No. 1 CA-CV 24-0667 Maricopa County Superior Court No. CV2024-002760 **MOTION FOR STAY PENDING APPEAL, OR, ALTERNATIVELY, TO EXPEDITE BRIEFING SCHEDULE (EXPEDITED CONSIDERATION REQUESTED)**

INTRODUCTION

The Elections Procedures Manual ("EPM") is a statutorily mandated document that provides guidance, instructions, and rules for "county, city, and town election officials throughout Arizona." APP224; *see* A.R.S. § 16-452(A)-(B).[1] Relevant here is Chapter 9, section III, subpart (D) of the 2023 EPM. Chapter 9 is titled "Conduct of Elections/Election Day Operations." APP285. Section III is titled "Preserving Order and Security at the Voting Location," and subpart (D) concerns "Preventing Voter Intimidation." APP291-294.

In short, section III(D) provides instructions and guidance to local election officials who must ensure that voters can safely and securely access the polls and train poll workers accordingly.

Plaintiffs are a voter and two corporations; they are not election officials, and they do not conduct elections. But Plaintiffs have nonetheless challenged discrete portions of Chapter 9, section III(D), under a novel theory that section III(D) regulates them and their speech, and thereby opens them up to criminal liability under A.R.S. § 16-452(C). For a host of reasons,

[1] Citations to "APP__" are to the Appendix filed concurrently with this Motion and Defendants' Opening Brief.

all set out in detail in Defendants' concurrently filed Opening Brief, Plaintiffs are flatly wrong.

As a matter of law, section III(D) simply does not regulate Plaintiffs or other members of the public—it provides guidance and instructions to election officials and poll workers regarding their duties to keep voting locations safe and secure. Under the plain language, context of the EPM, other binding law, and plain common sense, section III(D) and A.R.S. § 16-452(C) do not allow the prosecutions that Plaintiffs envision. Indeed, the EPM itself contains the express limitation that Plaintiffs say is lacking, providing yet another reason why their absurd reading of section III(D) as a vast speech prohibition is plainly wrong. *See* APP241 (stating, under a heading titled "Requirement to Allow Electioneering Outside 75-Foot Limit," that "electioneering and other political activity in public areas" is protected unless it "result[s] in voter intimidation").

What's more, the Attorney General and the Secretary of State have unequivocally and repeatedly disavowed the prosecutions Plaintiffs purport to fear and their erroneous interpretations of the EPM and § 16-452(C) that are necessary to allow such prosecutions. APP333-35. Indeed, the Attorney General's disavowal—with which the Secretary agreed—was precisely what

Plaintiffs had requested "[f]or avoidance of doubt" to address their alleged fears. APP330.

If all of that weren't enough, section III(D) has existed and been materially identical since it was first approved almost five years ago in the 2019 EPM. *See* APP336-38, 342-43; *see also* APP345-46. There is no evidence in the record of any prosecution—or even any threatened prosecution—of any voter under section III(D) in all that time, nor is there any evidence of any issue arising out of that section.

Despite all of this, the superior court here found that "the EPM applies to all Arizonans, not just those professionally involved with elections." APP017-18. The court further declared section III(D)) to be "unenforceable" and enjoined Defendants from "enforcing" it. APP009, 027. In doing so, the superior court adopted a strained interpretation of section III(D) that Plaintiffs and Defendants agree would exceed the Secretary's statutory authorization. APP053, 082, 333-35; *see also* APP014. In other words, the court adopted an a-textual, a-historical, and unlawful interpretation of section III(D) that has been disavowed by two of the constitutional officers who approve the EPM. And the court did so in order to address a legally and factually non-existent threat of enforcement against Plaintiffs.

At the same time, the superior court's erroneous Order—entered on the eve of an election—has real consequences for Defendants, election officials and poll workers, and Arizona voters.

For nearly five years, election officials have used the guidance in section III(D) to inform their training and conduct in keeping the polls safe and secure. By enjoining and declaring unenforceable language that is plainly meant to provide guidance and instruction to election officials, the superior court has needlessly created confusion as counties prepare for the 2024 general election. *See* APP349 ¶¶ 6-9. Defendants do not know how to interpret or apply the superior court's overbroad injunction, which purports to apply even to parts of section III(D) that were not challenged. If Defendants do not know what the Order means, it is no stretch that lay election officials will be confused about the state of the law and the scope of their responsibilities.

Accordingly, and for the other reasons discussed herein and in the Opening Brief, Defendants respectfully ask the Court to stay the superior court's August 8 Order (including the August 5 Order it incorporated) pending resolution of Defendants' appeal of the preliminary injunction. *See* Ariz. R. Civ. App. P. 6, 7; Ariz. R. Civ. P. 62(g).

In the alternative, Defendants ask the Court to suspend the rules and set an expedited briefing schedule to ensure resolution of the preliminary injunction appeal before early voting starts on October 9. Ariz. R. Civ. App. P. 3; *see also Ariz. Assoc. of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12 ¶ 11 (App. 2009) (noting that court denied a stay pending appeal but set an expedited briefing schedule).[2]

ARGUMENT

I. Defendants are likely to succeed in showing that section III(D) does not regulate Plaintiffs, Plaintiffs lack standing, and their attack fails on the merits.

Arizona courts apply the same four-factor test to analyze a motion for a stay pending appeal as a motion for a preliminary injunction. *See Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021) (preliminary injunction); *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10 (2006) (stay).

[2] On August 14, 2024, pursuant to ARCAP 7(c), Defendants filed a motion asking the superior court to stay its Order. On August 28, 2024, the superior court granted the motion in part and denied it in part; the court stayed the improper declaratory relief it had awarded but denied Defendants' request to stay the preliminary injunction. APP005-07.

To avoid duplication of party and judicial resources, Defendants awaited resolution of that motion in the trial court before seeking relief with this Court. Plaintiffs oppose a stay and expedited briefing on appeal.

Defendants' Opening Brief explains in detail why the superior court's August 8 Order preliminarily enjoining section III(D) is wrong and must be reversed. For that reason, and in the interest of not burdening the Court with another brief that would be largely repetitive, Defendants ask the Court to consider those same arguments incorporated here. *Cf.* Ariz. R. Civ. App. P. 13(h) (allowing multiple parties in a case to "adopt by reference any part of the brief of another party" and encouraging parties to "make a good faith effort to adopt by reference the pertinent part of the previously filed brief of another party").

Specifically, among the other arguments set out in the Opening Brief and reiterated here, Defendants are likely to succeed in this appeal because:

- The superior court's interpretation of A.R.S. § 16-452 and section III(D) is egregiously wrong. Opening Br., Arg. § I
- Plaintiffs lack standing to challenge section III(D). Arg. § II, A.
- Plaintiffs' speech claim fails on the merits and is barred by laches. Arg. § II, B-C.
- Plaintiffs failed to show irreparable harm or satisfy the other preliminary injunction factors. Arg. § III, A-B.
- The superior court's injunction is overbroad. Arg. § IV, A.

In addition to those arguments, the following points support this motion.

II. The superior court's Order also violates the *Purcell* principle.

Pursuant to the "*Purcell* principle," the U.S. Supreme Court for nearly twenty years "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)); *see also Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring) ("[F]ederal courts ordinarily should not enjoin a state's election laws in the period close to an election.").

Although they haven't had occasion yet to apply it, Arizona courts have acknowledged the *Purcell* principle and the purposes it serves. *See Ariz. Republican Party v. Fontes*, No. 1 CA-CV 22-0388, 2023 WL 193620 at *3 ¶ 14 (Ariz. Ct. App. Jan. 17, 2023) ("[C]ourts generally do 'not alter the election rules on the eve of an election' to prevent 'judicially created confusion.'" (citation omitted)).[3] The considerations underlying the *Purcell* principle should carry great weight here.

[3] Defendants cite this unpublished memorandum decision consistent with Supreme Court Rule 111(c)(1)(C). That decision is available here: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2023/1%20CA-CV%2022-0388%20AZ%20Republican%20Party.pdf.

As discussed in Defendants' Opening Brief, section III(D) has been in place since 2019. For nearly five years, section III(D) has been part of the status quo of elections operations—without posing any threat of enforcement that Plaintiffs purport to fear. For example, Plaintiff Townsend could not remember reading the 2019 EPM and did not believe he was subject to prosecution under the 2019 EPM. APP372. And neither AZFEC's nor AFPI's representative was aware of any member who was threatened with prosecution. APP411, 506.

Nonetheless, on the eve of an election, the superior court changed the rules of the road. About two months before the start of early voting in the 2024 general election, the superior court enjoined section III(D), adopting a radical construction of the EPM generally and section III(D) specifically. The court gave short shrift to the timeline and realities here, but this Court should not.

III. The injunction is likely to cause confusion and irreparable harm.

The issues with the timing and substance of the superior court's Order are not academic. The court's overbroad preliminary injunction is confusing and poses a meaningful risk of leading to disruption or worse at the polls.

The U.S. Supreme Court has recognized that a state "indisputably has a compelling interest in preserving the integrity of its election process," and that states have "compelling interests in preventing voter intimidation." *Burson v. Freeman*, 504 U.S. 191, 199, 206 (1992). Courts have also recognized that states "have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes," in "avoiding voter confusion," and "preventing 'misrepresentation.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-65 (1997) (collecting cases).

The Secretary and the Attorney General are charged with carrying out these important and compelling government interests and that is why they are seeking a stay pending appeal here—to ensure that election officials can consider the important guidance and instructions in section III(D) in order to fulfil their duties to keep voting locations safe and secure for voters.

Plaintiffs argued below that Defendants' stay request conflicts with Defendants' argument that section III(D) does not regulate Plaintiffs but rather provides guidance and instructions to lay election workers only. If section III(D) doesn't criminalize anything, Plaintiffs say, then why is it a problem for it to be enjoined? In other words, Plaintiffs erroneously believe that section III(D) either regulates everyone in Arizona all of the time, under

threat of misdemeanor prosecution pursuant to A.R.S. § 16-452(C), or it does nothing at all. For the reasons explained in the Opening Brief, neither of those interpretations is legally plausible or even possible, and that incorrect binary ignores the important purposes that section III(D) serves.

Even putting aside the superior court's legal errors to reach the contrary conclusion, the court failed to distinguish between the permissible interpretations and applications of section III(D) and the interpretation Plaintiffs urged and challenged.

The court was required to craft an injunction aimed at preventing the specific "harm" Plaintiffs identified in their complaint. *See Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (an injunction "must be tailored to remedy the specific harm alleged"); *see also, e.g.*, *City and Cnty. of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020) ("[A]n injunction 'should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court.'" (citation omitted)). Accordingly, the court should have simply enjoined the Attorney General from initiating any prosecutions pursuant to section III(D) and enjoined the Secretary from making any referrals for prosecution pursuant to section

III(D)— those were the only actions Plaintiffs purported to fear and asserted standing to challenge.

Instead, the superior court wrote that "Defendants are enjoined from enforcing [section III(D)]" but provided no detail about the specific acts restrained and the unchallenged acts that remain permissible. *See* Ariz. R. Civ. P. 65(d)(1)(C) ("Every order granting an injunction … must … describe in reasonable detail … the act or acts restrained or required."). By failing to do so, the superior court granted injunctive relief beyond Plaintiffs' complaint and opened the door for chaos and confusion.

For example, imagine the following scenarios:

- An elections officer sees a man just "outside the 75-foot limit at a voting location" shaking a woman's shoulders and saying, "you better vote for him, or else."
- A heated group of supporters for a particular candidate forms a large circle around the voting location just outside the 75-foot limit, with only a couple of feet of space between each person for voters to pass.
- A person stands at the door to a polling place and screams obscenities at people attempting to vote.

Out of concern that they were witnessing possible "instances of voter intimidation," threats, or harassment within the meaning of Arizona's statutes, the inspector or marshal might very well "use [their] sound

judgment … to contact law enforcement" in those situations, pursuant to the guidance set out in section III(D). APP293. For any of these or other examples, calling the police or asking disruptive people to desist or leave is not election officials exercising *enforcement* power against the public. Those officials would simply be fulfilling their duty that the EPM imposes on them: they are charged with preserving order and safety.

But at least one Plaintiff—America First Policy Institute ("AFPI")—seems to think that an election worker *contacting law enforcement* to report a disruption at a polling place would be impermissibly "enforcing" section III(D). *See Am. Encore et al. v. Fontes*, Case No. CV-24-01673-PHX-MTL (D. Ariz.), Doc. 47 at 21 ("One cannot call the police when someone violates non-binding guidance."); *id.* at 45 ("[L]aw enforcement cannot be called when there is no law to enforce."). Of course, that's not how laws work—a citizen contacting law enforcement is not "enforcing" the law.[4] Indeed, laws that

[4] Importantly too, that example is not related to Plaintiffs' claims; Plaintiffs haven't challenged Arizona's authority to regulate speech and conduct at a polling place. Nor could they. *See generally Burson*, 504 U.S. 191 (recognizing compelling government interest in preventing voter intimidation and preserving election integrity and upholding law regulating speech near polling places).

Plaintiffs did not challenge give election workers the authority to "preserve order at the polls and permit no violation of the election laws." A.R.S. § 16-535(B) (defining the duties of the election marshal).

In these situations, however, Plaintiffs seem to think that lay election workers cannot consider the guidance in section III(D) in determining whether to call law enforcement for help—or perhaps Plaintiffs believe that calling law enforcement is altogether unlawful. What, exactly, Plaintiffs and the superior court intend is not at all clear. And that's really the critical issue—election workers need clarity about what they can and cannot do, but the superior court's preliminary injunction provides none. The Order does not distinguish between unquestionably constitutional applications of section III(D) (i.e., providing instructions and guidance to poll workers), and potentially unconstitutional applications.

Although Plaintiffs brush aside Defendants' concerns, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). The People of Arizona, through their elected representatives, have charged the Secretary with prescribing "rules … on the

procedures for early voting and voting," and required him to issue "an official instructions and procedures manual" every "odd-numbered year." A.R.S. § 16-452(A), (B). By indiscriminately enjoining an entire subsection of the EPM rather than distinguishing between constitutional and potentially unconstitutional applications of section III(D), the superior court is preventing the Secretary from fulfilling his responsibility under A.R.S. § 16-452 to provide "instructions and procedures" to election officials. That harm is not remediable by money damages and is therefore irreparable. *Maryland*, 567 U.S. at 1303; *see also cf. City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 805 (9th Cir. 2019) (concluding that federal agency had "carried its burden" to show likely irreparable injury by arguing that the injunction would require it to grant lawful-permanent-resident status to aliens whom would otherwise be ineligible).

At a minimum, the superior court should have clarified the scope of its preliminary injunction when asked to do so, but it declined. *See, e.g.*, APP006 ("It is not this Court's duty to parcel [sic] through the EPM to analyze every phrase that does or does not comply with hypotheticals propounded by Defendants."). To ensure that Arizonans can vote safely and securely, this Court should step in and reinstate the status quo.

IV. Public policy and the balance of hardships strongly support a stay, especially given Plaintiffs' delay and Defendants' disavowals.

Even putting aside the last five years—during which no prosecutions of the sort Plaintiffs purport to fear have occurred—Plaintiffs' delay during this litigation speaks volumes about the lack of any risk to them should this Court grant a stay pending appeal.

Plaintiffs have taken their time. AZFEC filed its original complaint in early February 2024. Plaintiffs waited more than two months before filing an amended complaint that joined AFPI and Mr. Townsend as additional plaintiffs and the Attorney General as another defendant. After that, it was another six weeks before they got around to filing a motion for a preliminary injunction. Under existing caselaw, those lengths of time are enough to undermine any assertion of irreparable harm. *See* Opening Br., Arg. § III, A. That is especially true when the status quo with section III(D) has been entirely static for nearly five years. *See Democratic Nat'l Comm. v. Reagan*, No. CV-16-01065-PHX-DLR, 2018 WL 10455189, at *4 (D. Ariz. May 25, 2018) (plaintiffs failed to show "a likelihood of irreparable harm or a sharply favorable tip in the balance of hardships" where "their requested relief would upend rather than preserve the status quo").

Contrast Plaintiffs' delay with what's at stake on the other side of the scale for Defendants, election officials and poll workers, and Arizona voters.

Arizona has a clear public policy of protecting safety, security, and secrecy in voting. That policy is reflected in Arizona's Constitution, criminal statutes prohibiting voter intimidation, harassment, and coercion, and in the legislature's mandates to the Secretary regarding the EPM. *See, e.g.*, Ariz. Const. art. 7 § 1 (enshrining "secrecy in voting"); A.R.S. §§ 13-2921, 16-452, 16-1006 to 16-1017. Absent a stay, the superior court's ambiguous and overbroad Order will continue to undermine those state policies. Election workers will be justifiably confused about their responsibilities for preserving order and security at voting locations and how they can or must fulfil those responsibilities. Defendants will continue to struggle with providing necessary advice and guidance. And voters may very likely pay the price by having to confront disruptive and intimidating situations when exercising the franchise in just a few months.

The Order fails to distinguish between the provisions that Plaintiffs actually challenged and the rest of section III(D), providing none of this necessary clarity on a compressed timeline. When Defendants cannot make heads or tails of the meaning and scope of the injunction, then lay election

workers—who are hired by the counties and are not parties or agents of parties in this action—surely cannot know. Indeed, lay election officials could very well be confused about why their duties to preserve order and the underlying statutes are still in place and constitutional, but the non-binding guidance that helped them do their jobs is suddenly unconstitutional and cannot be considered. Uncertainty and confusion among election workers makes voter disenfranchisement, intimidation, and harassment more likely, especially in this polarized political climate.

V. The Court need not be convinced of the merits at this early stage in the appeal in order to recognize the considerations weighing in favor of a stay.

Finally, even if the Court presently believes there are only serious questions on the merits, a stay is appropriate.

"The relationship between probable success on the merits and the possibility of irreparable harm is inversely proportionate: 'The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger.'" *City of Flagstaff v. Ariz. Dep't of Admin.*, 526 P.3d 152, 157 ¶ 17 (Ariz. App. 2023) (citation omitted).

Obviously, Defendants believe they are correct regarding the proper interpretation of section III(D) and the rest of the legal issues in the case. But this Court need not be immediately convinced of that in order to grant a stay pending appeal, nor does the Court's decision either way bind it as to the ultimate disposition of the appeal.

Although Defendants' appeal challenging the preliminary injunction and this motion are analyzed using the same four factors, the nature of those factors will be slightly different (although no less important or strong) if analyzed before the election versus after. It would be entirely proper for the Court to stay the superior court's Order now in light of the harm and hardships at issue, and doing so would not lock the Court in to any view of the merits. *Cf. e.g.*, *Allen v. Milligan*, 599 U.S. 1, 10, 17 (2023) (noting that Court had "stayed the District Court's [preliminary injunction] pending further review" on appeal and subsequently affirming preliminary injunctions).

For these reasons, Defendants believe the weighty public policies and harm at issue justify a stay pending appeal in all events.

CONCLUSION

Defendants respectfully ask the Court to stay the superior court's August 8 Order (including the August 5 Order it incorporated) regarding section III(D) for the duration of the preliminary injunction appeal.

Alternatively, the Court should set an expedited briefing schedule that allows for a final decision before early voting starts on October 9.

RESPECTFULLY SUBMITTED this 10th day of September, 2024.

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