Andrew Gould (No. 013234)
Emily Gould (No. 036184)
Erica Leavitt (No. 032738)
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
2575 East Camelback Road, Suite 860
Phoenix, Arizona 85016
(602) 388-1262
agould@holtzmanvogel.com
egould@holtzmanvogel.com
eleavitt@holtzmanvogel.com
minuteentries@holtzmanvogel.com

Leigh Ann O'Neill (*pro hac vice forthcoming*)
Jessica H. Steinmann (*pro hac vice forthcoming*)
Patricia Nation *(pro hac vice forthcoming)*
AMERICA FIRST POLICY INSTITUTE
1001 Pennsylvania Ave., N.W., Suite 530
Washington, D.C. 2004
(813) 952-8882
loneill@americafirstpolicy.com
jsteinmann@americafirstpolicy.com
pnation@americafirstpolicy.com

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF ARIZONA

MARICOPA COUNTY

ARIZONA FREE ENTERPRISE CLUB, an Arizona non-profit corporation, PHILLIP TOWNSEND, an Arizona individual, AMERICA FIRST POLICY INSTITUTE, a non-profit corporation, Plaintiffs, vs. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, KRIS MAYES, in her official capacity as Arizona Attorney General, Defendants.	Case No.: CV2024-002760 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Jennifer Ryan-Touhill)

Plaintiffs Arizona Free Enterprise Club ("AZFEC"), Phillip Townsend, and America First Policy Institute ("AFPI") (collectively, "Plaintiffs") move for summary judgment as to the following provisions of the 2023 Elections Procedures Manual

("EPM"): (1) Ch. 9, § III.D, p. 181–82 ("Speech Restriction"); (2) Ch. 1, § IX.C.1.b, p. 42 ("Juror Questionnaire Provision"); and (3) Ch. 2, § 1.F, p. 70 ("UOCAVA Provision"). Based on the evidence presented at the July 29, 2024 Preliminary Injunction Hearing, as well as the full record in this case, Plaintiffs are entitled to summary judgment declaring the subject provisions unlawful, and an entry of final judgement permanently enjoining their enforcement.

INTRODUCTION

On July 29, 2024, after extensive briefing, this Court conducted a full-day preliminary injunction hearing, which included deposition testimony from Townsend and representatives from AZFEC and AFPI, as well as 44 exhibits. *See* Minute Entry dated July 29, 2024. After the hearing, the Court entered a Ruling ("Injunction Order") enjoining the Speech Restriction and denying Defendants' Motions to Dismiss regarding the Juror Questionnaire and UOCAVA Provisions.[1] Specifically, this Court held that: (1) Plaintiffs have standing to challenge the Speech Restriction and (2) the Speech Restriction is a binding, criminal prohibition that violates Arizona's Free Speech and Due Process Clauses. [SOF ¶ 8 (Injunction Order, at pp. 10-18)].

Here, although the Court is not bound by its Injunction Order, its findings regarding the Speech Restriction are persuasive because the legal issues are identical, and the factual issues are the same—nothing was missing from the factual record last August, and nothing has changed since then. Indeed, after the Injunction Order, a Federal Court in a parallel proceeding also enjoined the Speech Restriction on essentially the same grounds as this Court. *Am. Encore v. Fontes*, 2024 WL 4333202, *21-26 (Sep. 27, 2024).

As to the Juror Questionnaire Provision, this Court concluded that, when a voter indicates they have moved on a jury questionnaire, the EPM unlawfully directs county

[1] *See* Plaintiffs' Separate Statement of Facts ("SOF") ¶ 8, "Under Advisement Ruling filed August 6, 2024." This Court later clarified the Injunction Order, limiting the Speech Restriction injunction to Ch. 9, § III(C) of the EPM (*see* Order dated August 8, 2024 and Minute Entry Order dated August 13, 2024), and staying declaratory relief pending a permanent injunction hearing (*see* Minute Entry dated August 14, 2024).

recorders to place voters "*in inactive status*" in violation of A.R.S. § 16-165(A)(9), which requires recorders to *cancel* such registrations.

The law is the same now as it was then, and there is no material fact dispute. And, once again, after this Court's ruling, *another* court issued the same ruling, holding that the Juror Questionnaire Provision "is invalid and unenforceable" because it "directly conflicts" with § 16-165(A)(9).[2] [SOF ¶ 9, pp. 8-9].

And finally, this Court denied Defendants' motion to dismiss the UOCAVA, which unlawfully permits the Secretary to extend UOCAVA deadlines. [SOF ¶ 8, p. 31] Specifically, this Court determined that the UOCAVA Provision directly conflicts with the plain language of A.R.S. §§ 16-551(C), and -565(A), which does not give the Secretary the authority to extend UOCAVA deadlines. [SOF ¶ 8, pp. 30-31]. Simply put, the law has not changed since the Court issued this ruling.

ARGUMENT

Summary judgment "shall" be granted "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment is proper in cases where the disputed issues are primarily legal rather than factual. *See*, *e.g.*, *Blanco v. Samuel*, 91 F. 4th 1061, 1070 (11th Cir. 2024) (statutory interpretation appropriate for summary judgment); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983) (stating that an evidentiary hearing was unnecessary to issue a permanent injunction where main issues were purely legal).

In ruling on Plaintiffs' motion, this Court may consider the entire record from the preliminary injunction hearing. Ariz. R. Civ. P. 65(a)(2). Although this Court is not bound by its findings in the Injunction Order (*Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279-81 (App. 1993)), it may consider those findings in entering a permanent injunction where, based on "the record as a whole," there is no genuine issue of material fact. *Commc'ns Maint., Inc. v. Motorola, Inc.,* 761 F.2d 1202, 1206 (7th Cir.

[2] Plaintiffs cite Judge Blaney's Order for its persuasive value. Ariz. R. Sup. Ct. 111(c).

1985); *see Chauvin Intern. Ltd. v. Goldwitz*, 927 F. Supp. 40, 46 (D. Conn. 1996) (holding that, "[s]ummary judgment may be an appropriate vehicle for granting a permanent injunction in cases, such as this, where all factual disputes were determined [at] the hearing on the preliminary injunction.")

I. The Speech Restriction is Unconstitutional and Should be Permanently Enjoined

A. Plaintiffs Have Standing to Challenge the Speech Restriction

In a pre-enforcement challenge, "[t]he "unique standing considerations" in the First Amendment context "tilt dramatically toward a finding of standing"." *Tingley v. Ferguson*, 47 F.4th 1055, 1066–67 (9th Cir. 2022). *Driehaus* set the general standard[3] for pre-enforcement standing, requiring a plaintiff to show: (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) the course of conduct is "proscribed by a statute," and (3) there exists a credible threat of prosecution thereunder." *Driehaus*, 573 U.S. at 159–61 (citation omitted).

Although all three Plaintiffs easily satisfy this standard, this Court need only find standing for one Plaintiff: standing for one is standing for all. *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47 n. 2 (2006) (explaining that standing for one plaintiff was sufficient to satisfy the Article III case and controversy requirement); *see also Oregon Advoc. Ctr v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003) (same); *see also City of Tucson v. Pima Cnty.*, 199 Ariz. 509, 514, ¶ 14 (App. 2001) ("[E]ven if [two of the plaintiffs] lack standing, there remain parties with unequivocal standing who offer the same arguments.").

Each of the *Driehaus* prongs supports standing here.

As to the first factor, the relevant "course of conduct" here is Plaintiffs' intention to engage in political speech protected by the Free Speech Clause of the Arizona Constitution—*i.e.,* "voter engagement," "electioneering," and communicating about

[3] Although *Driehaus* provides a helpful framework, it is not required in Arizona because standing under Arizona's Uniform Declaratory Judgments Act ("UDJA") is a broader and more relaxed standard. *Ariz. Creditors Bar Ass'n, Inc. v. State*, 257 Ariz. 406, 411, ¶ 15 (App. 2024). *See infra*, p.9. This Court did not cite *Driehaus* in its Injunction Order, but it applied the same factors.

"positions and policies [that] *might* offend people." *See Am. Encore*, 2024 WL 4333202, at *10. (emphasis added). [SOF ¶ 10 (Townsend); SOF ¶ 14 (AZFEC and AFPI)]. Indeed, both AZFEC and AFPI, as organizations, promote voting in elections, voter education, raise voter awareness on important political issues, engage in candidate and issue advocacy, and provide poll watcher training. [SOF, ¶ 14] In sum, Plaintiffs' intentions to engage in such protected speech are sufficient to satisfy this factor. *See Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 488 (9th Cir. 2024).

Under the second prong, this Court must accept as true Plaintiffs' construction of the Speech Restriction to determine whether it "prohibits" protected political speech. *Am. Encore*, 2024 WL 4333202, at *10 (determining that the same Speech Restriction prohibits protected speech) (citing *Ducey v. Yellen*, 615 F. Supp. 3d 1033, 1041 (D. Ariz. 2022)). The Speech Restriction, by its terms, prohibits otherwise lawful speech such as "raising one's voice," using "insulting or offensive language," and speaking with the "*effect* of offending someone." [SOF ¶ 8, p. 15-16]. This Court already determined that Plaintiffs' activities—electioneering, outreach, and advocacy—could have the "effect of" threatening, harassing, or intimidating someone. [*Id.*]. Thus, the Speech Restriction prohibits them. [*Id.*] Again, the Federal Court agreed. *Am. Encore*, 2024 WL 4333202, at *11. And while Defendants claim that the Speech Restriction does not prohibit Plaintiffs protected speech, as this Court held, their claim that Plaintiffs erroneously (in their view) misconstrue the Speech Restriction cannot be used to defeat standing. [SOF, ¶ 18, p. 13]; *see Toma v. Fontes*, 258 Ariz. 109, 118, ¶¶ 34-35 (App. 2024) (same).

As to the third factor, courts assess whether authorities plan to enforce the challenged law. *Driehaus*, 573 U.S. at 159. But a specific threat or warning is not required. *Am. Encore*, 2024 WL 4333202, at *10; *Valle del Sol v. Whiting*, 732 F.3d 1006, 1015 n.5 (9th Cir. 2013) (explaining that a specific threat is not "necessary to demonstrate standing"). Generally, courts take "a broad view of this factor" and find there is a credible threat of enforcement when there is no specific warning. *Isaacson v. Mays*, 84 F.4th 1089, 1100 (9th Cir. 2023). Rather, in First Amendment cases, "the plaintiff need only demonstrate that a threat of *potential* enforcement will cause him to **self-censor** and not follow through with his

concrete plan to engage in protected conduct." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014) (emphasis added).

Here, examples of Plaintiffs' self-censorship caused by the Speech Restriction abound. As to Plaintiff Townsend alone, he testified that he regularly engages in political speech and election-related activities, such as candidate and issue advocacy, political discussions, and discussions about government and government officials. [SOF ¶ 10]. Townsend knew about the criminal prohibition in the Speech Restriction, and he feared that if he said or did something that violated it, he could be prosecuted. [SOF ¶ 11]. Further, based on the Speech Restriction, Townsend "provided specific examples" wherein he **self-censored** based on fear of prosecution, such as:

- "[C]onsciously" avoiding coming across as "frank and aggressive as [he] would have normally been," in "two television interviews" regarding "a local election and a specific candidate" [SOF ¶ 12(a)];
- Cautiously correcting a host at "a fundraiser . . . for a "Senate candidate" at the "Yuma Golf Country Club" where the host "went off topic," "mischaracterize[ed] a school board issue that ha[d] been politicized" and "criticiz[ed]" board members; [*Id.* ¶ 12(b)].
- "[C]urtail[ing] [his] speech . . . because [he was] concerned about being prosecuted,'" and "not [be] offensive . . . loud . . . [or] intimidating'" [*Id.* ¶ 12(c)];
- Not "speak[ing] loudly" or being "misconstrue[d] as . . . aggressive" when a "neighbor call[ed] [him] to ask about the primary elections." [*Id.* ¶ 12(d)].

These examples regarding Townsend establish standing for all Plaintiffs. *Rumsfeld*, 547 U.S. at 47 n. 2. This Court agreed. [SOF ¶ 8, p.13]. But AFPI and AZFEC also have associational standing on behalf of their members on the same essential grounds as Townsend.

1. Associational/Membership Standing: AZFEC and AFPI

"[W]here the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right [organization standing] or, alternatively, it can assert 'standing solely as the representative of its members [associational standing].'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2157 (2023) (citation omitted). For associational, or membership standing, AZFEC and AFPI must show: "(1) [the organization's] members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

As to the first factor, given AZFEC and AFPI's vast number of members and extensive electioneering activities, as well as the *enormous* breadth of the Speech Restriction—reaching such everyday activities as raising one's voice or using "offensive" or "insulting" language (intentionally left undefined, and thus presumably as judged by the most-sensitive ears one can encounter)—the risk that one or more of AZFEC and AFPI's members will be subject to enforcement by Defendants is manifest. [SOF ¶¶ 13-14].

And indeed, when AZFEC and AFPI's members learned about the Speech Restriction, they expressed concerns about it, including fear of prosecution and removal from polling locations by election officials. [SOF ¶ 15]. For example, their members were concerned about what they could and could not say in conversations about election issues, politics, and election-related contacts with voters. [SOF ¶ 16]. Additionally, members were concerned about the particular wording on materials they handed out, such as flyers and "collateral," as well as clothing and hats. [SOF ¶ 19]. As for AFPI, "the EPM's [speech] restrictions resulted in" AFPI's "unwillingness to sell or distribute merchandise to participants." [SOF ¶ 20(m)].

Scot Mussi testified that AZFEC's volunteers "common[ly] pass out flyers," which could "be subject to criminal prosecution." [SOF ¶ 19]. He also testified that AZFEC

members raised "a lot of concern once this new EPM came out in May 2023, about the impact associated with this and the potential speech restrictions and how this could be used against, you know, people wanting to go out and participate in the process." [SOF ¶ 18].

Further, the record shows that based on the Speech Restriction, AZFEC and AFPI's members did not engage in certain speech or activities they otherwise would have, e.g., they engaged in self-censorship. [SOF ¶ 20] Specific examples include:

- Wearing particular apparel to polling locations, such as a red hat, a 1776 cap, a t-shirt with a political message, or more controversial items like NRA gear. [SOF, ¶ 20(a)].
- Participating in volunteer activities such as canvassing due to concerns that recipients might feel intimidated, offended, or harassed. [*Id*. ¶ 20(b)].
- Engaging with voters at or around polling locations, and distributing collateral near polling locations, particularly if the materials contained politically charged information, which resulted in threats against a member of AFEC. [*Id*. ¶¶ 20 (c), (d)].
- Avoiding animated speech or a loud tone out of fear that it would be perceived as aggressive. [*Id*. ¶ 20(e)].
- Refraining from placing politically charged items, such as magnet stickers, on vehicles or distributing them. [*Id*. ¶ 20(f)].
- Avoiding wearing or handing out pins, even those with innocuous messages like "America First," based on the concern that such items could be deemed intimidating. [*Id*. ¶ 20(g)].
- Fearing that distributing booklets and wearing shirts or hats with logos could violate the Speech Restriction. [*Id*. ¶¶ 20(h), (i)].
- Even minor actions, such as placing a "Trump" toupee on a dog, raised fears of offending others. [*Id*. ¶ 20(j)].
- Handing out religious materials or wearing a cross, out of concern that even these could be deemed offensive. [*Id*. ¶ 20(k)].

- Placing political or election-related signs that could potentially be considered offensive. [*Id*. ¶ 20(l)].

Clearly, AZFEC and AFPI have associational standing. The Federal Court agreed. *Am. Encore*, 2024 WL 4333202, at *10 (citing AFPI's "voter engagement and election integrity activities" and "self-censorship").

Additionally, as this Court held, "it does not matter whether someone was prosecuted in the past or if one law enforcement official has promised not to prosecute in the future; the threat of prosecution remains and argument during a contested court case is no guarantee of future (in)action." [SOF ¶ 8, p. 15]. *See AARA*, 117 F.4th at 1182 (expressly dismissing a lack of prosecution history as irrelevant); *LSO, Ltd.*, 205 F.3d at 1155 ("Courts have found standing where no one had ever been prosecuted under the challenged provision."); *Libertarian Party*, 351 F.3d at 1280 (to same effect). Again, the Federal Court agreed. *Am. Encore*, 2024 WL 4333202, at *10.

Moreover, "Defendants failed to modify [III(D)] after members of the Arizona Legislature commented that the rule violates the First Amendment during the 14-day public comment period." *Am. Encore*, 2024 WL 4333202, at *11. Specifically, in July 2023, the Secretary, pursuant to A.R.S. § 16-452(B), published a draft EPM for public comment. [SOF ¶ 1] Thereafter, members of the Legislature expressed concerns about the Speech Restriction, claiming that it violated the Free Speech and Due Process Clauses of the Arizona Constitution. [SOF ¶ 2] Despite these concerns, the Secretary did not change the Speech Restriction, and the Governor and the Attorney General provided their assent to the 2023 EPM. [SOF ¶¶ 3,4] In short, as the Federal Court noted, if the Speech Restriction "does not regulate speech, as Defendants contend, then the Secretary could have modified the language to reflect that." *Am. Encore*, 2024 WL 4333202, at *11.

Finally, the threat of enforcement is "bolstered" by the likelihood that the Speech Restriction will be enforced by election officials and poll workers at voting locations. *Am. Encore*, 2024 WL 4333202, at *11 ("[C]ivil enforcement by private parties or state agencies is nonetheless enforcement[.]" (quoting *Isaacson*, 84 F. 4th at 1101)).

Representatives for AFPI and AZFEC testified that their members expressed concerns on this issue. [SOF ¶¶ 10, 14]

As to the second factor—the interests at stake are germane to the organization's purpose—that factor is also satisfied here. Both AZFEC and AFPI define the purpose of their organizations as promoting voting in elections, voter education, and raising voter awareness on important issues. [SOF ¶ 14] This includes voter registration, candidate and issue advocacy, extensive voter contact, and providing poll watchers and poll watcher training. [*Id*.]

And third and finally, AZFEC and AFPI need not show any specific members have been harmed by the Speech Restriction, because their claims and the relief requested do not require individualized proof—specifically, they seek declaratory and injunctive relief, not monetary damages. *See Alaska Fish & Wildlife Fed'n v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987) (allowing standing "because the [organization] seeks declaratory and prospective relief rather than money damages [and thus] its members need not participate directly in the litigation").

Thus, all three Plaintiffs have standing to bring this pre-enforcement challenge.

Further, Plaintiffs' claims are ripe. "[A]s a general matter, if the plaintiff has incurred an injury, the case is ripe." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280, ¶ 36 (2019). "A case is also ripe if there is an actual controversy between the parties." *Id*.

An injury, as well as a case and controversy, exist here because the Speech Restriction has already chilled Plaintiffs' speech, and has caused them to self-censor to avoid the threat of criminal prosecution as well as removal from voting locations. *Supra*, pp. 5-7. Indeed, this Court already held that Plaintiffs' claims are ripe for essentially the same reason: "Because the EPM has the force of law, because the EPM went into effect at the end of December 2023, and because it affects Plaintiffs..." [SOF ¶ 8, p. 13]

2. Plaintiffs Also Have Standing under the UDJA

Because Plaintiffs also seek a declaratory judgment under A.R.S. §§ 12-1831 and 12-1832—declaring that the Speech Restriction violates the Arizona Constitution and is therefore void—they also have standing under the UDJA.

Under the UDJA, specifically, A.R.S. § 12-1832, "[a]ny person . . . whose rights, status or other legal relations are *affected by* a statute . . . may have determined any question of construction or validity arising under the [statute] and obtain a declaration of rights, status or other legal relations thereunder." (emphasis added). In determining whether a person is "affected by" a law for standing purposes, there must "be an actual controversy ripe for adjudication" and "parties with a real interest in the questions to be resolved." *Bd. of Supervisors of Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 380 (1978). However, unlike in federal standing, actual injury is not required. *Mills*, 253 Ariz. at 424, ¶ 29; *see also Ariz. Creditors Bar Ass'n, Inc.*, 257 Ariz. at 411, ¶ 16 (same).

This Court already held: "[A]n actual controversy exists . . . because the Plaintiffs' rights are affected by the EPM's rules that allegedly conflict with the statute." [SOF ¶ 8, p. 20 (emphasis added)]. Nothing has changed on this point.

3. Plaintiffs Have Mandamus Standing

Plaintiffs also have standing because they seek mandamus relief. In mandamus actions, Arizona courts "apply a more relaxed standard for standing," holding standing exists for any "'party beneficially interested' in an action to compel a public official to perform an act imposed by law." *Fontes*, 250 Ariz. at 62 ¶ 11. (citation omitted); *see* A.R.S. § 12-2021. This relaxed standard "'reflects the Legislature's desire to broadly afford standing to members of the public to bring lawsuits to compel officials to perform their public duties.'" *Fontes,* 250 Ariz. at 62 ¶ 11. (citation omitted).

Here, Plaintiffs, as Arizona voters, have a beneficial interest in seeking to compel the Secretary to perform his non-discretionary duty to promulgate and enforce an EPM that complies with the Arizona Constitution. *Fontes*, 250 Ariz. at 62 ¶ 12.

II. The Speech Restriction Creates A New Crime and Violates Arizona's Free Speech and Due Process Clauses.

This Court already held that the Speech Restriction contradicts Title 16 and violates Arizona's Free Speech and Due Process Clauses. [SOF ¶ 8, p. 13-16]. The Federal Court agreed. *Am. Encore*, 2024 WL 4333202, at *8–9. The words of the Speech Restriction and Title 16 are the same as when this Court entered its Injunction Order. This Court's statutory construction should be unchanged.

A. The Speech Restriction is a Binding Prohibition That Contradicts Arizona Law and Creates Strict-Liability "Speech" Crimes.

Under § 16-452(A), "any violation of an EPM **rule** [as defined by § 16-452(A)] is punishable as a class two misdemeanor." *Fontes*, 250 Ariz. at 63 ¶ 16; § 16-452(C). Here, this Court has already determined that the Speech Restriction is a binding criminal prohibition on Plaintiffs. [SOF ¶ 8, pp. 15-17]. The Federal Court agreed. *Am. Encore*, 2024 WL 4333202, at *8–9.

The plain language of the Speech Restriction supports this conclusion. *Cf. Premier Physician's Grp., PLLC v. Navarro*, 240 Ariz. 193, 195 ¶ 9 (2016) ("when the language [of a statute] is clear, we apply it unless an absurd or unconstitutional result would follow."). The Speech Restriction states that "*any* activity by a person with the intent or effect of threatening, harassing, intimidating, or coercing voters...is *prohibited*." (emphasis added) [SOF ¶ 3]. "Prohibit" means "To forbid by law, or "[t]o prevent, preclude, or severely hinder." PROHIBIT, Black's Law Dictionary (12th ed. 2024). Additionally, "any" expresses a lack of restriction— *all* or *every* activity by *a person* is covered by the Speech Restriction. *City of Phoenix v. Glenayre Elect., Inc.*, 242 Ariz. 139, 144 ¶¶ 16-18 (2017) (stating the word "any" is "broadly inclusive" and has an expansive meaning); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (same).

The Federal Court reached the same conclusion, holding that the plain meaning of the Speech Restriction imposes "a broad prohibition on activities, including speech or other expressive conduct occurring anywhere and at any time, so long as it is done with

the intent or effect of threatening, harassing, intimidating, or coercing a voter." *Am. Encore*, 2024 WL 4333202, at *22.

The Speech Restriction is also a new criminal prohibition, and not simply a summary or paraphrase of §§ 16-1013, -1016 or -1017. As an initial matter, the Speech Restriction prohibits speech and conduct subjectively *felt by others* as "offensive or insulting"—a prohibition that does not live anywhere in Title 16. By eliminating the requirement in § 16-1013 that the conduct be done "knowingly," the Speech Restriction creates crimes based on the "effect" speech has on the listener—i.e., *the feeling it elicits*. As this Court held in its Injunction Order, the Speech Restriction impermissibly "changes the mens rea" and "inserts a subjective impression (i.e., or effect)." [SOF ¶ 8, p.14–15].

The Speech Restriction also removes from § 16-1013 the element that actions must be taken to "induce or compel" a person to vote, thereby eliminating any nexus to voting. It thus restricts all speech deemed offensive or insulting to any person anywhere in Arizona. Additionally, it adds a new category of "harassing" speech and conduct found nowhere else in §§ 16-1013, -1016 or -1017, which this Court explained has a "very specific legal (criminal) definition" under § 13-2921. [SOF ¶ 8, p. 14].

B. The Speech Restriction Violates Free Speech and Due Process

This Court held that the Speech Restriction is a "speech restriction in violation of our Arizona Constitution," and reasoned that it is unconstitutional because its "restrictions *are* greater than necessary, vague, overbroad, and serves as a universal prohibition on conduct." [SOF ¶ 8, pp. 9, 17]. Similarly, the Federal Court determined that under the First Amendment, the Speech Restriction is unconstitutional because it: (1) contains no *mens rea*; (2) bans speech for being offensive; (3) restricts speech based on content and viewpoint; (4) restricts public and non-public forum speech; and (5) cannot survive strict scrutiny. *Am. Encore v. Fontes*, 2024 WL 4333202, at *23-25. The Federal Court's holding bears particular persuasive weight here, because, as this Court recognized, Arizona's "Constitution provides broader protections for free speech than the First Amendment," and, as a result, a law violative of the First Amendment also violates

Arizona's Free Speech Clause. [SOF ¶ 8, p. 16 (citing *Brush & Nib*, 247 Ariz. at 281, ¶ 45].

Neither the text of the Speech Restriction nor the Arizona Constitution has changed since the Injunction Order. However, to the extent this Court may find it helpful, Plaintiffs briefly address the separate constitutional violations below.

1. The Lack of Mens Rea Is Unconstitutional.

The Supreme Court has squarely held that liability for allegedly threatening or intimidating speech requires proof of a *mens rea* of at least recklessness. *See Counterman v. Colorado*, 600 U.S. 66, 69 (2023); *United States v. U.S. Dist. Ct. for Cent. Dist. of California, Los Angeles, Cal.*, 858 F.2d 534, 540 (9th Cir. 1988) (same).

Here, the Speech Restriction prohibits speech with the "intent *or effect*" of offending—*i.e., the feeling elicited in the listener*. Because a *mens rea* is lacking, it violates Arizona's Free Speech Clause. This Court already agreed. [SOF ¶ 8, pp. 14-15, 18].

2. The Ban on Offensive Speech Is Unconstitutional.

The Speech Restriction also violates the Free Speech Clause because it criminalizes speech according to "offensiveness." [SOF ¶ 8, pp. 15-16, 18]. For more than a half century, the Supreme Court has held that putative offensiveness is *not* a permissible basis to criminalize speech. *Cohen v. California*, 403 U.S. 15, 25 (1971); *see also United States v. Williams*, 553 U.S. 285, 306 (2008) (same); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (same); *see also Snyder v. Phelps*, 562 U.S. 443 (2011) (to same effect). As the Supreme Court has repeatedly held, criminalizing speech merely because some find it offensive is unconstitutional.

The Speech Restriction imposes criminal liability for all uses of "offensive language to a voter or poll worker." This too violates Arizona's Free Speech Clause.

3. It Is Also a Content and Viewpoint-Based Regulation.

Likewise, the Speech Restriction's attempt to criminalize speech based on its potential to offend, or "insult" others is unconstitutional as content and viewpoint-based discrimination. *Matal v. Tam*, 582 U.S. 218, 249 (2017) (holding that when a restriction

"reflects the Government's disapproval of a subset of messages it finds offensive . . . [it] is the essence of viewpoint discrimination"). Indeed, "[g]iving offense is a viewpoint." *Id.* at 243.

As explained below, *infra* p. 14-15, the Speech Restriction as a content-based restriction cannot survive strict scrutiny. It thus violates Arizona's Free Speech Clause.

4. The Speech Restriction Is Unconstitutional as to Public Forums.

Because it applies to all of Arizona's territory, the Speech Restriction regulates—and criminalizes—speech in a wide variety of public forums, such as "[p]ublic streets and parks." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). Even the 75-foot buffer is certain to extend to public forums like public streets, sidewalks, and parks. As set forth above, it is a content-based (indeed, viewpoint-based) regulation, which is unconstitutional as to public forums. *See Korwin v. Cotton*, 234 Ariz. 549, 555 ¶ 14 (App. 2014) ("In traditional forum analysis . . . content-based restrictions on speech must serve a compelling state interest and be narrowly drawn."). As set forth below, *infra* p. 15, the Speech Restriction is not narrowly tailored.

The Speech Restriction also fails to "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Indeed, given its lack of any temporal or geographical limitations, it does not leave open *any* alternative channels anywhere in the State. That cannot possibly suffice under the Free Speech Clause. *See Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 614 (9th Cir. 1993) ("Like the First Amendment, Arizona's free speech provision allows for reasonable time, place, and manner restrictions," but such restrictions must be content neutral, and drawn with "narrow specificity").

5. It Is Unconstitutional Even For Non-Public Forums.

The Speech Restriction also fails as to the 75-foot polling station radius that constitutes a non-public forum, because it is both viewpoint-based and because it is not "capable of reasoned application." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 23 (2018) (striking down law failing to define "political" as lacking a reasoned basis). It must be

reasonable "in light of the purpose served by the forum: voting." *Id.* at 13 (cleaned up). Although it need not be narrowly tailored, there must be "some sensible basis for distinguishing what may come in from what must stay out." *Id.* at 16. But the Speech Restriction provides no meaningful guidance —"sensible" or otherwise—as to what it prohibits. It is "self-evident that an indeterminate prohibition carries with it the opportunity for abuse, especially where it has received a virtually open-ended interpretation." *Id.* at 21 (cleaned up). So too with the Speech Restriction.

6. The Speech Restriction Fails Strict Scrutiny.

Content-based laws like the Speech Restriction are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But there is certainly no *compelling* state interest here. Although safety for voters and poll workers is crucial, a compelling government interest must be concrete, specific, and supported by clear evidence. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Here, Defendants cannot show that banning "offensive" or "insulting" speech ensures safety for voters.

Likewise, the Speech Restriction is not narrowly tailored. It lacks any nexus to voting, and contains no temporal or geographic limitation. It also applies to *all speech* directed at *every Arizonan* at *any time*. And it is overinclusive, sweeping in a grossly disproportionate amount of protected speech that is unnecessary to promote its purported interest of preventing voter intimidation. *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105, 121, 123 (1993) (holding an overinclusive law was not narrowly tailored).

The Speech Restriction is overinclusive and not narrowly tailored. This Court already agreed. [SOF ¶ 8, Injunction Order, p. 17)].

7. It Is Also Void for Vagueness.

The Speech Restriction is also unconstitutionally vague. A law is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice of what is prohibited" or if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). "When speech is

involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox TV Stations, Inc.,* 567 U.S. 239, 253–54 (2012).

The Speech Restriction lacks notice and provides election officials with virtually unbridled discretion in enforcement. The terms "offensive" and "insulting" are broad and undefined. Further, the EPM provides no guidance as to how loud a person may raise their voice without violating the Speech Restriction. As a result, public officials will make on-the-spot judgments to enforce the Speech Restriction. This is unconstitutional. It "entrusts lawmaking"—here, defining offensive speech—"to the moment-to-moment judgment of the" enforcing official. *City of Chi. v. Morales*, 527 U.S. 41, 60 (1999). This Court already agreed. [SOF ¶ 8, Injunction Order, p. 17].

8. It is Unconstitutionally Overbroad.

A regulation is overbroad where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up); *AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 258 ¶ 18 (2023). To assess overbreadth, courts: (1) determine the law's legitimate scope; and (2) evaluate whether it restricts a substantial amount of protected speech. *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1208 (9th Cir. 2010).

Here, a significant amount of speech/conduct that is *legal* under §§ 16-1013, -1017 is *illegal* under the Speech Restriction: *i.e.*, speech producing hurt feelings, offense, or speech that is loud or rude, none of which inherently creates a security threat. This Court already agreed. [SOF ¶ 8, Injunction Order, p. 17].

III. This Court Should Permanently Enjoin the Juror Questionnaire Provision

As this Court already found, Plaintiffs have standing under the UDJA to bring this claim, because "an actual controversy exists between the parties because Plaintiffs' rights **are affected by** the EPM's rules that allegedly conflict with [§ 16-165(A)(9)]." [SOF ¶ 8, p. 20].

Further, as to the Juror Questionnaire Provision, this Court concluded that, when a voter states in writing on a jury questionnaire that they have moved, the EPM unlawfully

directs county recorders to place voters "*in inactive status*" in violation of A.R.S. § 16-165(A)(9), which requires recorders to *cancel* such registrations. [SOF ¶ 8, pp. 19-20]. Critically, an "inactive" voter retains the rights of a qualified elector. *See* A.R.S. § 16-583. To borrow this Court's phrasing, the EPM has "changed a mandatory cancellation" to a "discretionary inactive status." [SOF ¶ 8, p. 20]. Judge Blaney agreed. [SOF ¶ 9, pp.7-9]. Nothing has changed since the Injunction Order.

Before the preliminary injunction hearing, Defendants essentially conceded that the Juror Questionnaire Provision conflicts with § 16-165(A)(9). Instead, Defendants claimed that § 16-165(A)(9) is preempted by the National Voter Registration Act ("NVRA") (52 U.S.C. § 20507(d)). [SOF ¶ 8, p.20].

Defendants are wrong. The NVRA provides that registrants may be removed "from the official list of eligible voters in elections for Federal office" if the registrant *either* (1) "confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction"; *or* (2) "has failed to respond to a notice described in paragraph (2)." 52 U.S.C. § 20507(d)(1)(A)–(B). Paragraph 1 permits the exact type of notice-based removal set forth in § 16-165(A)(9): confirmation in writing provided when a juror fills out a juror questionnaire. Paragraph 1 expressly authorizes removal; there is no conflict.

Again, Judge Blaney agreed with this Court, holding that § 16-165(A)(9) is not preempted by the NVRA. [SOF ¶ 9, pp. 7-9].

IV. This Court Should Permanantly Enjoin the UOCAVA Provision

As to the UOCAVA Provision, because Plaintiffs seek a declaratory judgment, standing exists under the UDJA because there is "an actual controversy" between the parties and their rights are "affected by" the unlawful UOCAVA Provision. *See* A.R.S. § 12-1832; *supra*, p.9. Additionally, because Plaintiffs also seek mandamus relief, they satisfy the "more relaxed standard for standing." *Fontes*, 250 Ariz. at 62 ¶ 11. Specifically, Plaintiffs, as Arizona voters, have a beneficial interest in compelling the Secretary to follow the law and perform his non-discretionary duty to follow the statutes he is charged with implementing— here, §§ 16-543 and -547. *Fontes*, 250 Ariz. at 62 ¶ 12.

Here, the UOCAVA Provision unlawfully expands the Secretary's authority by authorizing him to "continue **or lengthen** the early voting process" for UOCAVA voters in the event of a "national or local emergency" that makes "substantial compliance with UOCAVA statute impracticable." [SOF ¶ 4, p. 70]. To "**lengthen**" the voting process plainly authorizes the Secretary to extend deadlines. But this is not permitted by statute. Section 16-543(C) states that the Secretary shall provide *only* for "**emergency procedures** regarding the early balloting process for persons who are subject to [UOCAVA]," which may be implemented "only on the occurrence of a national or local emergency that makes substantial compliance with the [UOCAVA] impracticable."

The deadline is set by statute as "7:00 p.m. on Election Day." § 16-547(D); *see also* § 16-551(C) (imposing same deadline for processing early ballots). The Secretary is not authorized to extend the deadline by administrative fiat. Indeed, the Court already ruled against Defendants on this purely legal issue. [SOF ¶ 8, pp. 29-32]. The Court's statutory analysis is correct. Nothing has changed. Because the UOCAVA Provision is illegal, it should be enjoined.

Conclusion

For the reasons set forth above, Plaintiffs move this Court to enter summary judgment in their favor.

Dated this 27th day of June 2025.

HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC

By: */s/ Andrew W. Gould*
Andrew W. Gould
Emily Gould
Erica Leavitt
2555 E. Camelback Road, Suite 700
Phoenix, AZ 85016
Attorneys for Plaintiff

ORIGINAL of the foregoing electronically filed this 27th day of June, 2025.

COPY of the foregoing emailed this
27th day of June, 2025, to:

Kara Marie Karlson
Karen J. Hartman-Tellez
Kyle Cummings
Joshua Whitaker
Nathan Arrowsmith

OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004-1592
Kara.karlson@azag.gov
Karen.hartman@azag.gov
Kyle.cummings@azag.gov
Joshua.Whitaker@azag.gov
Nathan.Arrowsmith@azag.gov

Attorneys for Defendants

/s/ Lisa F. Charette