

1 John S. Bullock, No. 034950  
2 Brandon T. Delgado, No. 035924  
3 **OSBORN MALEDON, P.A.**  
4 2929 North Central Avenue, Suite 2000  
5 Phoenix, Arizona 85012-2793  
6 (602) 640-9000  
7 [jbullock@omlaw.com](mailto:jbullock@omlaw.com)  
8 [bdelgado@omlaw.com](mailto:bdelgado@omlaw.com)

9 *Attorneys for Amici Curiae*  
10 *League of Women Voters of Arizona*  
11 *Protect Democracy Project and*  
12 *Campaign Legal Center*

13 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

14 IN AND FOR THE COUNTY OF MARICOPA

15 ARIZONA FREE ENTERPRISE CLUB,  
16 an Arizona non-profit corporation,

17 Plaintiff,

18 v.

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

21 Defendant.

No. CV2024-002760

**AMICUS BRIEF OF THE LEAGUE OF  
WOMEN VOTERS OF ARIZONA,  
THE PROTECT DEMOCRACY  
PROJECT, AND CAMPAIGN LEGAL  
CENTER IN OPPOSITION TO  
PLAINTIFF'S MOTION TO SHOW  
CAUSE AND IN SUPPORT OF  
DEFENDANT'S MOTION TO  
DISMISS**

(Assigned to the Honorable  
Jennifer Ryan-Touhill)

1 **Interest of Amici**<sup>1</sup>

2 The League of Women Voters of Arizona is a domestic nonprofit corporation in  
3 Arizona. The League is a non-partisan, grassroots organization that encourages informed  
4 and active participation in the democratic process. It is an affiliate of the League of  
5 Women Voters of the United States. Voter intimidation is a vital issue of concern to  
6 League members because it imperils members’ fundamental rights of speech, association,  
7 as well as “the right to cast a ballot in an election free from the taint of intimidation.”  
8 *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality). The League has worked to  
9 address the threat of voter intimidation in Arizona, including participating in successful  
10 litigation to halt unlawful intimidation at ballot dropboxes in 2022.

11 The Protect Democracy Project and Campaign Legal Center are nonpartisan,  
12 nonprofit organizations that believe that it is vital that elected officials represent “the free  
13 and uncorrupted choice of those who have the right to take part in that choice.” *Ex Parte*  
14 *Yarbrough*, 110 US 651, 662 (1884). Both organizations have engaged in litigation and  
15 advocacy to prevent voter intimidation and protect the right to vote; for example, Protect  
16 Democracy represented the League of Women Voters of Arizona in its 2022 litigation  
17 against dropbox intimidation, and Campaign Legal Center has been counsel of record in  
18 multiple voting rights cases in Arizona, including *League of United Latin Am. Citizens v.*  
19 *Reagan*, No. CV-17-04102-PHX-DGC (D. Ariz.) and *Living United for Change in Ariz.*  
20 *v. Fontes*, No. CV-22-00509-PHX-SRB (D. Ariz.).

21 **Introduction and Summary of Argument**

22 In the 2022 midterm elections, groups of vigilantes—inspired by a baseless,  
23 discredited, and debunked conspiracy theory from the film *2000 Mules*—organized a  
24 campaign to surveil drop boxes in Maricopa County. The vigilantes, sometimes armed  
25 and sometimes even wearing tactical gear, photographed voters, and threatened to dox any  
26 voter they deemed (without evidence) a “mule.” The vigilantes also circulated

27 \_\_\_\_\_  
28 <sup>1</sup> No party or its counsel authored this brief in whole or in part. No person or entity—  
other than *amici*—contributed money that was intended to fund preparing this brief.

1 disinformation about Arizona election law that wrongly suggested that voters who were  
2 engaged in *lawful conduct* were criminals. That continued until a federal district court  
3 issued a temporary restraining order halting the ongoing violation of federal voter  
4 intimidation laws. *See Az. All. for Retired Am. v. Clean Elections USA*, No. CV-22-01823-  
5 PHX-MTL, 2022 WL 17088041, at \*2 (D. Ariz. 2022) (Ex. 1). That resulting guidance  
6 from a federal judge as to how to enforce voter intimidation laws consistent with the First  
7 Amendment was incorporated into the latest revision of the Secretary’s Election  
8 Procedures Manual (“EPM”). *See* EPM at 74 n.40.

9 Now, however, plaintiff asks this Court to conclude that conduct that a federal court  
10 enjoined as unlawful *must* be protected First Amendment activity. This Court should  
11 refuse, deny the show cause application, and dismiss for at least three reasons.<sup>2</sup>

12 *First*, the complaint is procedurally defective on ripeness and standing grounds.  
13 Claim 1 is not ripe; it asserts challenges against the EPM, Compl. ¶ 54, but does not set  
14 out the necessary concrete plan by the plaintiff to engage in conduct discussed by those  
15 EPM provisions. Standing is absent too because the supposed “injury” plaintiff claims is  
16 neither causally connected to the EPM nor redressable by the remedy sought. Critically,  
17 the disputed EPM language does not create new crimes. Instead, the EPM summarizes  
18 *examples* of the types of conduct that can—depending on context—be prohibited by *other*  
19 bodies of law that are not challenged in this case.

20 *Second*, plaintiff is wrong that the EPM “sweep[s] far beyond” existing legal  
21 protections for voter intimidation. Compl. ¶ 62. The EPM describes conduct that courts  
22 have found unlawful. And in some instances federal law *requires* elections officials to  
23 prevent such conduct. *See* 42 U.S.C. § 1986. So the challenged EPM descriptions help  
24 ensure elections are managed with the “maximum degree of correctness, impartiality,  
25 uniformity and efficiency” as required by Arizona law. A.R.S. § 16-452(a).

26 *Third*, plaintiff’s challenge is based on an incorrect understanding of First  
27

---

28 <sup>2</sup> *Amici* focus on Claim 1, but agree with the Secretary that this lawsuit should be dismissed.

1 Amendment law. It is not true that “only speech that is directed to inciting or producing  
2 imminent lawless action and is likely to incite or produce such action can carry a criminal  
3 sanction.” Compl. ¶ 42 (cleaned up). Both conduct and words that intimidate voters can  
4 fall outside of free speech protections when they are not inherently expressive, fall into  
5 one of the well-recognized categorical exceptions to the First Amendment, or otherwise  
6 withstand First Amendment scrutiny. As a result, even if plaintiff eventually succeeds in  
7 establishing ripeness and standing, there would be still numerous grounds on which such  
8 conduct can be regulated consistent with the First Amendment.

### 9 Argument

#### 10 **I. This case should be dismissed on prudential grounds.**

11 Arizona courts “apply the doctrines of standing and ripeness as a matter of sound  
12 judicial policy.” *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 279 ¶ 35 (2019)  
13 (cleaned up). Standing “sharpens the legal issues presented by ensuring that true  
14 adversaries are before the court and thereby assures that our courts do not issue mere  
15 advisory opinions.” *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24 (1998). Ripeness “prevents a court  
16 from rendering a premature judgment or opinion on a situation that may never occur.”  
17 *Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997). For both doctrines, Arizona courts  
18 consider federal case law “instructive” but not binding. *Arizonans for Second Chances v.*  
19 *Hobbs*, 249 Ariz. 396, 405 ¶ 22 (2020) (cleaned up).

20 Here, plaintiff fails both inquiries. This dispute is not ripe because plaintiff’s  
21 complaint does not allege a sufficiently concrete plan of conduct to allow this Court to  
22 determine whether that proposed conduct is constitutionally protected. And plaintiff does  
23 not have standing because any prohibition on plaintiff’s conduct is traceable to federal and  
24 state voter intimidation laws and not the EPM, so plaintiff’s injury is neither causally  
25 connected to the EPM nor redressable by the order plaintiff seeks.

#### 26 **A. Ripeness**

27 Courts “determine ripeness by evaluating both the fitness of the issues for judicial  
28 decision and the hardship to the parties of withholding court consideration.” *Phelps Dodge*

1 *Corp. v. Az. Elec. Power Co-op.*, 207 Ariz. 95, 118 ¶ 94 (App. 2004) (cleaned up). The  
2 key ripeness issue here is whether this dispute is “fit” for adjudication. *See Addington v.*  
3 *U.S. Airline Pilots Ass’n*, 606 F.3d 1174, 1179 (9th Cir. 2010).

4 “A question is fit for decision when it can be decided without considering  
5 contingent future events that may or may not occur as anticipated, or indeed may not occur  
6 at all.” *Id.* (cleaned up). Thus, a claim “is fit for decision if the issues raised are primarily  
7 legal, do not require further factual development, and the challenged action is final.”  
8 *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (cleaned up). Cases are *not* fit  
9 when “further factual development would significantly advance” a court’s “ability to deal  
10 with the legal issues presented.” *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803,  
11 812 (2003) (cleaned up).

12 The complaint does not allege sufficient facts to show a ripe dispute. Claim 1  
13 purports to challenge the EPM, Compl. ¶ 54, but plaintiff offers no concrete explanation  
14 or plan as to how exactly it plans to engage in conduct that would implicate the various  
15 parts of the EPM it challenges. The closest plaintiff comes is suggesting that it wants to  
16 “observ[e] activity at drop boxes” and “convey[] a message to others that the drop boxes  
17 are being watched and should be watched.” Compl. ¶ 38; *see also* Mussi Decl. ¶ 8. But  
18 that falls well short of what the ripeness doctrine requires, which is “more than a  
19 hypothetical” stated “intent to violate the law” but rather a “concrete plan.” *Thomas v.*  
20 *Anchorage Equal Rts. Comm’n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cleaned  
21 up). That is why, for example, the Arizona Supreme Court limited its review in *Brush &*  
22 *Nib* (a case involving claims that Phoenix’s Human Rights Ordinance unlawfully  
23 compelled speech in violation of the Arizona Constitution) to only claims involving  
24 custom wedding invitations materially similar to those on the record—that was the only  
25 claim for which the record was sufficiently developed, containing “detailed examples of  
26 Plaintiffs’ words, drawings, paintings, and original artwork, and [Plaintiffs had] testified  
27 about their . . . custom invitations.” 247 Ariz. at 280 ¶ 37.

28 Unlike *Brush & Nib*, however, plaintiff here provides no such details. Plaintiff

1 “cannot specify when, . . . where, or under what circumstances,” *Thomas*, 220 F.3d at  
2 1139, it will monitor dropboxes, and there is no way to for the Court to determine whether  
3 plaintiff is proposing to engage in dropbox monitoring that runs afoul of the EPM’s  
4 warnings. And, of course, even if plaintiff were able to establish a sufficiently concrete  
5 dispute with respect to dropbox monitoring—and it presently does not—that still would  
6 fall short of establishing a ripe dispute as to the *other parts* of the EPM it challenges, such  
7 as “disseminating false or misleading information at a voting location,” or “questioning”  
8 a pollworker in an “intimidating manner,” Compl. ¶ 54(e)-(f) (cleaned up), to name just a  
9 few. So, as in *Brush & Nib*, dismissal is required of at least those portions of plaintiff’s  
10 complaint, *see* 247 Ariz. at 281 ¶ 41, at least until plaintiff amends to add sufficient  
11 allegations to establish a ripe dispute.

12         Moreover, the issues presented by plaintiff’s complaint “are not purely legal,”  
13 because in this case, the “First Amendment challenge . . . requires an adequately developed  
14 factual record.” *Thomas*, 220 F.3d at 1142. Importantly, even speech protected by the First  
15 Amendment may be regulated when it survives “ordinary First Amendment scrutiny,”  
16 *United States v. Hansen*, 599 U.S. 762, 784 (2023) (cleaned up), an inquiry that can turn  
17 on a plaintiff’s or a defendant’s “utterances.” *Nat’l Coal. on Black Civic Participation v.*  
18 *Wohl*, 661 F. Supp. 3d 78, 121 n.29 (S.D.N.Y. 2023). Plaintiff’s future observation of  
19 dropboxes may constitute voter intimidation, but there is nothing in the Complaint or  
20 Application for Order to Show Cause that would allow a court to determine whether such  
21 conduct by plaintiff would be protected or proscribable. That provides a second basis for  
22 dismissing on ripeness grounds, as plaintiff cannot “force[]” this Court “to decide  
23 constitutional questions in a vacuum.” *Am.-Arab Anti-Discrimination Comm. v.*  
24 *Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1991) (cleaned up). “[A] pre-enforcement  
25 challenge . . . without proper factual development is inappropriate.” *Id.*

26         In short, plaintiff asks this Court to adjudicate a dispute that is “too remote and  
27 abstract an inquiry for the proper exercise of the judicial function.” *Texas v. United States*,  
28 523 U.S. 296, 301 (1998) (Scalia, J.) (cleaned up). This Court should dismiss.

1           **B.     Standing**

2           Standing provides a second basis to dismiss Claim 1. To establish standing, a  
3 plaintiff should demonstrate—among other things—(1) “a causal nexus between the  
4 defendant’s conduct and their injury” and (2) that the “requested relief would alleviate  
5 their alleged injury.” *Arizonans for Second Chances*, 249 Ariz. at 405 ¶ 23 (cleaned up);  
6 *id.* at 406 ¶ 25. Plaintiff can make neither showing. Its injury is traceable to federal and  
7 state voter intimidation laws rather than the EPM—and, for much the same reason, its  
8 requested relief would not alleviate plaintiff’s supposed “injury” in any way.

9           This unusual situation is due to plaintiff’s mischaracterization of the EPM. Plaintiff  
10 suggests that the challenged parts of the EPM create crimes. Compl. ¶¶ 32–33; 54–55.  
11 That is wrong. The challenged parts merely provide election workers with illustrations of  
12 conduct that can—depending on context—violate existing law.

13           With respect to the ballot dropbox portions of the EPM, the relevant provision is  
14 directed at the County Recorders and says that “the County Recorder or officer in charge  
15 of elections may restrict activities that interfere with the ability of voters and/or staff to  
16 access the ballot drop-off location free from obstruction or harassment.” EPM at 73–74.  
17 But the language plaintiff challenges, Compl. ¶ 54(h), does not purport to articulate a new  
18 rule—rather, it accurately recounts the terms of a Temporary Restraining Order issued to  
19 halt ongoing violations of federal voter intimidation law. EPM at 74 n.40; *see Az. All. for*  
20 *Retired Am.*, 2022 WL 17088041, at \*2 (Ex. 1). To boot, the EPM does not even say that  
21 such conduct *always* constitutes voter intimidation—it merely notes that it *can*.

22           So the quoted provisions of the EPM do not establish *new* crimes; they merely  
23 recount conduct that has been found to violate other laws. For example, photographing  
24 potential voters has long been recognized as a subtle, yet effective tactic of voter  
25 intimidation. As the U.S. Commission on Civil Rights explained in its study of why  
26 electoral participation in Mississippi remained low even after the passage of civil rights  
27 laws, the practice of photographing potential voters—conduct similar to what plaintiff  
28 may be proposing here (*see* Compl. ¶ 40)—intimidated voters due to fear of retaliation:

1 [Black voters] in rural counties who attempt to register cannot  
2 hope to remain anonymous. Any doubt that applicants will be  
3 identified has been removed by the legal requirement that  
4 their names will be published in local newspapers and by  
5 *practices such as the photographing of [Black] applicants* by  
6 public officials. In this climate a single incident . . . may be  
7 sufficient to deter many potential registrants.

8 U.S. Comm’n on Civil Rights, *Voting in Mississippi* 39 (1965) (emphasis added) (Ex. 2).

9 Those intimidation tactics worked. *See King v. Cook*, 298 F. Supp. 584, 587 (N.D.  
10 Miss. 1969). Unsurprisingly, then, such conduct was understood to run afoul of federal  
11 voter intimidation law long before the *Arizona Alliance* TRO. *E.g., Daschle v. Thune*, No.  
12 04-4177, Dkt. 6, at 2 (D.S.D. Nov. 2, 2004) (TRO prohibiting defendants from, among  
13 other things, “copy[ing] or “record[ing]” license plates of Native American voters) (Ex. 3).  
14 And it has continued to after, as well. *E.g., Andrews v. D’Souza*, No. CV-22-04259-SDG,  
15 2023 WL 6456517, at \*2-5, 9, 14 (N.D. Ga. 2023) (Ex. 4). Indeed, the U.S. Department  
16 of Justice has previously raised a near identical caution to the one raised in the EPM,  
17 warning individuals that “photographing or videotaping” voters “under the pretext that  
18 these are actions to uncover illegal voting[] may violate federal voting rights law.”<sup>3</sup>

19 That should be fatal to plaintiff’s challenge to the EPM’s language regarding voter  
20 intimidation at ballot dropboxes. Because the challenged EPM language does not create a  
21 new prohibition on voter intimidation, but merely restates prohibitions originating from  
22 federal and state criminal and civil law,<sup>4</sup> *those* federal and state laws—and not the EPM—

---

23 <sup>3</sup> U.S. Attorney’s Office, Northern District of Alabama, *District Elections Officers*  
24 *Available Nov. 8 to Receive Complaints of Election Fraud or Voting Rights Abuses*,  
25 October 21, 2016, [https://www.justice.gov/usao-ndal/pr/district-elections-officers-](https://www.justice.gov/usao-ndal/pr/district-elections-officers-available-nov-8-receive-complaints-election-fraud-or-voting)  
26 [available-nov-8-receive-complaints-election-fraud-or-voting](https://www.justice.gov/usao-ndal/pr/district-elections-officers-available-nov-8-receive-complaints-election-fraud-or-voting) (Ex. 5); *see also* U.S. Dep’t  
27 of Justice, *Federal Law Constrains on Post-Election “Audits,”* at 6 (2021) (cautioning,  
28 among other things, against the recording of license plates of individuals voting or  
attending voter registration meetings), *available at* [https://www.justice.gov/opa/press-](https://www.justice.gov/opa/press-release/file/1417796/dl?inline)  
[release/file/1417796/dl?inline](https://www.justice.gov/opa/press-release/file/1417796/dl?inline) (Ex. 6).

<sup>4</sup> *E.g.*, 18 U.S.C. §§ 241, 594; 42 U.S.C. § 1985(3); 52 U.S.C. §§ 10101(b), 10307(b),  
20511(1); A.R.S. §§ 16-1006, 1013, 1017.

1 are the cause of any change to plaintiff’s conduct. That means plaintiff lacks standing  
2 because its injury is not “fairly traceable” to the EPM. *Fernandez v. Takata Seat Belts,*  
3 *Inc.*, 210 Ariz. 138, 140 ¶ 7 (2005) (cleaned up). It also means that the plaintiff’s injury  
4 would not be “redressed by a favorable decision.” *Karbal v. Ariz. Dep’t of Rev.*, 215 Ariz.  
5 114, 118 ¶ 19 (App. 2007). Even if plaintiff obtained its requested relief, plaintiff would  
6 be “still bound” by the provisions of federal and state law described by the EPM, which  
7 have “not been challenged.” *In re MS2008-000007*, No. CA-MH 23-0073 SP, 2024 WL  
8 121882, at \*2 ¶ 9 (App. 2024) (unpublished) (Ex. 7). Accordingly, “any potential  
9 injury . . . is not redressable” and plaintiff “lacks standing.” *Id.*

10 The same is also true of plaintiff’s challenge to the parts of the EPM discussing  
11 intimidation at polling places. Here too, the challenged parts of the EPM do not create new  
12 crimes. In relevant part, the EPM states: “Any activity by a person with the intent or effect  
13 of threatening, harassing, intimidating, or coercing voters (or conspiring with others to do  
14 so) inside or outside the 75-foot limit at a voting location is prohibited.” EPM at 181. It  
15 then notes, the “officer in charge of elections has a responsibility to train poll workers and  
16 establish policies to prevent and promptly remedy any instances of voter intimidation,”  
17 *id.*, provides a set of guidelines to enforce at the polls (such as a prohibition on firearms  
18 inside polling places<sup>5</sup>), *id.* at 182, and then goes on to set out potentials examples of  
19 conduct that “may also be considered intimidating,” *id.* at 183.

20 That too is an accurate summary of federal and state voter intimidation law. Arizona  
21 law prohibits intentional acts of voter intimidation. *See, e.g.*, A.R.S. §§ 16-1006, 1013,  
22 1017. As does federal law. *See, e.g.*, 18 U.S.C. §§ 241, 594; 42 U.S.C. § 1985(3); 52  
23 U.S.C. §§ 10101(b), 20511. Indeed, Section 11(b) of the Voting Rights Act (52 U.S.C. §  
24 10307(b)) prohibits voter intimidation *even when* “no subjective purpose or intent” to  
25

---

26 <sup>5</sup> This prohibition is not challenged in this case, presumably because a prohibition on  
27 private parties bringing firearms to polls is consistent with both federal law, *see, e.g.*,  
28 *Council on Am.-Islamic Relations—Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 378–  
79 (D. Minn. 2020), and the Second Amendment, *see, e.g.*, *N.Y. State Rifle & Pistol Ass’n*  
*v. Bruen*, 597 U.S. 1, 30 (2022).

1 intimidate is “shown.” H.R. Rep. No. 89-439, at 30 (1965) (Ex. 8); *see also Nat’l Coal,*  
2 *661 F. Supp. 3d at 116; Colo. Mont. Wy. State Area Conf. of NAACP v. U.S. Elec. Integrity*  
3 *Plan,* 653 F. Supp. 3d 861, 870 (D. Colo. 2023); *League of United Latin Am. Citizens -*  
4 *Richmond Region Council 4614 v. Pub. Int. Legal Found.,* No. 18-cv-00423, 2018 WL  
5 3848404, at \*4 (E.D. Va. 2018) (Ex. 9). And the EPM correctly warns about the types of  
6 conduct that has resulted in past violations of the law. *E.g., Nat’l Coal,* 661 F. Supp. 3d at  
7 112–21 (false statements about consequences of voting violate voter intimidation law).

8 Thus, here too plaintiff cannot demonstrate either (1) a causal connection between  
9 plaintiff’s injury and the challenged portions of the EPM or (2) redressability. The EPM  
10 language plaintiff challenges does not create new crimes; it instead explains the  
11 boundaries of laws found elsewhere. So, plaintiff does not have standing because the  
12 complaint does not challenge the underlying legal provisions restricting plaintiff’s  
13 conduct, and any court order would not even partially remedy plaintiff’s alleged injury.

14 \* \* \*

15 Lastly, this Court should not waive the ripeness and standing requirements. Waiver  
16 of both doctrines’ prudential limitations on judicial power should be the “exception, not  
17 the rule.” *Bennett v. Brownlow,* 211 Ariz. 193, 196 ¶ 16 (2005). Here there is good reason  
18 *not* to. Plaintiff’s right of free speech “does not embrace a right to snuff out” the  
19 constitutional rights of others, *Red Lion Broad. v. FCC,* 395 U.S. 367, 387 (1969), and  
20 prohibitions on voter intimidation serve to protect fundamental rights of speech and  
21 association as well as “the right to cast a ballot in an election free from the taint of  
22 intimidation.” *Burson,* 504 U.S. at 211. Those protections are “essential to the successful  
23 working” of American government. *Ex Parte Yarbrough,* 110 U.S. at 666. Thus, a judicial  
24 advisory opinion rendered on the basis of an incomplete and potentially inaccurate record  
25 could *also* prematurely license conduct that imperils other Arizonans’ constitutional  
26 rights. The Court should dismiss.

1 **II. The EPM language at issue accurately summarizes the prohibitions of federal**  
2 **and state law and was appropriately included in the EPM.**

3 For the reasons noted above, the portions of the EPM challenged in Claim 1  
4 accurately recount the sort of conduct that either “likely” or “may” constitute a violation  
5 of *other* bodies of law. EPM at 74 n.40; 182. So even if plaintiff could show that this case  
6 is justiciable, its claim would fail on the merits: because the EPM’s description accurately  
7 reflects the type of conduct that can—depending on context—give rise to violations of  
8 state and federal law, those descriptions are important to ensuring that Arizona elections  
9 officials manage elections with the “maximum degree of correctness, impartiality,  
10 uniformity and efficiency.” A.R.S. § 16-452(a). Prohibiting voter intimidation serves  
11 compelling governmental interests. *See Burson*, 504 U.S. at 199, 208–11. Thus, plaintiff  
12 cannot show on the merits that the challenged portions of the EPM “sweep far beyond”  
13 existing legal protections. Compl. ¶ 62.

14 Indeed, informing elections officials as to the potential breadth of federal voter  
15 intimidation law is important because federal law can impose affirmative duties on  
16 elections officials to prevent intimidation in federal elections. In particular, the support-  
17 or-advocacy clauses of 42 U.S.C. § 1985 make it unlawful to conspire to intimidate *or*  
18 injure eligible voters from participating in support or advocacy in federal elections. *See* 42  
19 U.S.C. § 1985(3). And 42 U.S.C. § 1986—which was passed to address a failure by certain  
20 states to adequately address political intimidation and violence, *see* 42 Cong. Globe, 42d  
21 Cong., 1<sup>st</sup> Sess. 805 (1871) (Ex. 10)—imposes an affirmative duty on state officials to act  
22 with reasonable care to prevent conspiracies prohibited by 42 U.S.C. § 1985. *See Park v.*  
23 *City of Atlanta*, 120 F.3d 1157, 1160–61 (11th Cir. 1997). Thus, the EPM’s warning  
24 remains both appropriate and wise, as a failure to adequately respond can lead to monetary  
25 liability for both officials and jurisdictions. *See* Carl Smith, *Tools to Combat Voter*  
26 *Intimidation, from the 19<sup>th</sup> Century and Today*, *Governing* (Dec. 13, 2023),  
27 [https://www.governing.com/politics/tools-to-combat-voter-intimidation-from-the-19<sup>th</sup>-](https://www.governing.com/politics/tools-to-combat-voter-intimidation-from-the-19th-century-and-today)  
28 [century-and-today](https://www.governing.com/politics/tools-to-combat-voter-intimidation-from-the-19th-century-and-today) (Ex. 11).

1 **III. There is no First Amendment right to engage in voter intimidation.**

2 Defendants are plainly wrong that only “speech that is directed to inciting or  
3 producing imminent lawless action and is likely to incite or produce such action can carry  
4 a criminal sanction.” Compl. ¶ 42 (cleaned up). Speech may be regulated when it (1) fits  
5 within one of the recognized categorical exceptions to the First Amendment (which  
6 include, but are not limited to, incitement), *see United States v. Stevens*, 559 U.S. 460,  
7 468–69 (2010), or (2) withstands “ordinary First Amendment scrutiny,” *Hansen*, 599 U.S.  
8 at 784 (cleaned up). Further, conduct may be regulated when it is not “inherently  
9 expressive.” *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 66  
10 (2006) (“FAIR”). Therefore, there are multiple ways in which voter intimidation may be  
11 regulated consistent with the First Amendment.

12 *Not Expressive Conduct.* The U.S. Supreme Court has “rejected the view that  
13 conduct can be labeled speech whenever the person . . . intends . . . to express an idea.”  
14 *FAIR*, 547 U.S. at 65–66 (cleaned up). First Amendment protection extends “only to  
15 conduct that is inherently expressive.” *Id.* at 66. Thus, there are plenty of ways to engage  
16 in an “activity” that “intimidate[es]” voters, Compl. ¶ 54(a), without engaging in First  
17 Amendment protected activity. Assaults can be unlawful voter intimidation, *e.g., Allen v.*  
18 *City of Graham*, No. 20-CV-997, 2021 WL 2223772, at \*7 (M.D.N.C. 2021) (Ex. 12), and  
19 do not constitute “expressive conduct protected by the First Amendment.” *Wisconsin v.*  
20 *Mitchell*, 508 U.S. 476, 484 (1993). Obstructing access to the polls would also be  
21 unprotected too. *Cf. Singleton v. Darby*, 609 F. App’x 190, 193 (5th Cir. 2015)  
22 (unpublished) (Ex. 13) (“The First Amendment does not entitle a citizen to obstruct traffic  
23 or create hazards for others.”). The “constitutionally protected nature of the end” of an  
24 intent to communicate a message does not shield the “use of unlawful, unprotected  
25 means.” *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); *id.* at 471  
26 (Alito, J, dissenting) (same).

27 *Categorical Exclusions.* “From 1791 to the present . . . the First Amendment has  
28 permitted restrictions upon the content of speech in a few . . . historic and traditional

1 categories.” *Stevens*, 559 U.S. at 468 (cleaned up). Those categories include fraud,  
2 defamation, true threats, and speech incidental to criminal or tortious conduct. *See id.*;  
3 *Counterman v. Colorado*, 600 U.S. 66, 73–74 (2023); *FAIR*, 547 U.S. at 62. And when  
4 speech falls into one of the exceptions, its “prevention and punishment” has “never been  
5 thought to raise any Constitutional problem.” *Stevens*, 559 U.S. at 469 (cleaned up). So  
6 while speech can be involved in many variations of voter intimidation, it can nonetheless  
7 fit into a categorical exception and fall outside of any constitutional protection.<sup>6</sup>

8 *Constitutional Scrutiny*. Even political speech can be regulated when it withstands  
9 “ordinary First Amendment scrutiny.” *Hansen*, 599 U.S. at 784 (cleaned up). And many  
10 restrictions on voter intimidation can withstand any applicable level of scrutiny—up to  
11 and including strict scrutiny—because preventing voter intimidation is undoubtedly a  
12 compelling state interest. *E.g.*, *Burson*, 504 U.S. at 199–211 (upholding restriction on  
13 voter intimidation under strict scrutiny analysis); *Nat’l Coal*, 661 F. Supp. 3d at 119–21  
14 & n.29 (upholding prohibition on voter intimidation under intermediate scrutiny, but  
15 noting the prohibition would also survive under strict scrutiny). Protections against  
16 electoral intimidation are “essential to the successful working” of American government,  
17 *Ex Parte Yarbrough*, 110 U.S. at 666, and can survive even under a strict scrutiny analysis  
18 because regulations must only be “be narrowly tailored, not . . . perfectly tailored.”  
19 *Williams-Yulee v. Fla. Bar*, 575 US 433, 454 (2015) (cleaned up).

20 Indeed, there are substantial First Amendment interests furthered by enforcement  
21 of voter intimidation laws. After all, the First Amendment includes the right of voters “to  
22 associate for the advancement of political beliefs”—a right that ranks “among our most  
23 precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *e.g.*, Armand Derfner &  
24 J. Gerald Herbert, *Voting is Speech*, 34 Yale L. & Pol. Rev. 471, 485-91 (2016). Voters  
25 have a fundamental interest in “express[ing] their own political preferences,” *Norman v.*

---

26  
27 <sup>6</sup> *E.g.*, *Paynes v. Lee*, 377 F.2d 61, 63 (5th Cir. 1967) (true threats); *Andrews*, 2023 WL  
28 6456517, at \*9, 14 (defamation) (Ex. 4); *Nat’l Coal.*, 661 F. Supp. 3d at 132-33 (fraud);  
*United States v. Butler*, No. 14,700, 25 F. Cas. 213, 217-23 (C.C.D.S.C. 1877) (conduct  
incidental to criminal conduct) (Ex. 14).

1 *Reed*, 502 U.S. 279, 288 (1992) and casting a ballot, *Anderson v. Celebrezze*, 460 U.S.  
2 780, 806 (1983). Thus, voter intimidation and political violence can deny Americans the  
3 ability to exercise their constitutional rights.

4 As recently as the last federal election, Arizona voters and members of the League  
5 were intimidated by vigilante ballot dropbox monitoring operations. Compl. ¶¶ 54-63,  
6 *League of Women Voters of Ariz. v. Lions of Liberty LLC*, No. CV-22-08196-PCT-MTL  
7 (Oct. 25, 2022) (Ex. 15). It was only through enforcement of voter intimidation laws by  
8 the League and others that Arizonans were able to safely cast their ballots without fear of  
9 intimidation or harassment, thereby enabling all Arizonans to exercise their constitutional  
10 rights free from fear of intimidation, harassment, or worse. The same protections are  
11 required for future elections, and the challenged provisions of the EPM are necessary to  
12 assist county election officials to effectively enforce those protections.

13 These assorted First Amendment doctrines have three implications:

14 *First*, they again demonstrate why Claim 1 is not ripe. Plaintiff cannot find shelter  
15 in the First Amendment simply because it does not intend to engage in incitement under  
16 *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Instead, there are several First Amendment  
17 doctrines that could justify regulation of plaintiff’s actions, and plaintiff actually needs to  
18 express an intent to engage in a defined course of action before either the State or the Court  
19 knows which are potentially applicable.

20 *Second*, a facial challenge would not be appropriate here. While the plaintiff claims  
21 that the EPM has a chilling effect, Compl. ¶ 46–47, the First Amendment’s “concern with  
22 chilling protected speech attenuates” when a law regulates more than just “pure speech”  
23 but “conduct” as well. *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) (cleaned up). Thus,  
24 “[r]arely, if ever” will a concern about chilling invalidate “a law or regulation that is not  
25 specifically addressed to speech,” *id.*, because “prohibiting all enforcement of that law—  
26 particularly a law that reflects legitimate state interests in maintaining comprehensive  
27 controls over harmful, constitutionally unprotected conduct” imposes “substantial social  
28 costs,” *Id.* at 119 (cleaned up). Thus, complaints about a potential chill have no purchase

1 here, as voter intimidation can occur via (1) a wide swath of conduct involving no speech  
2 at all and (2) speech that may be regulated, either due to the categorical exceptions or  
3 passing First Amendment scrutiny. So here, as is elsewhere, courts should handle  
4 potentially unconstitutional applications of voter intimidation laws as they “usually do—  
5 case-by-case.” *Hansen*, 599 U.S. at 770. In other words, “as-applied challenges can take  
6 it from here,” *id.* at 785, *once* a plaintiff alleges a justiciable dispute.

7 *Finally*, plaintiff cannot recast Claim 1 to be about freedom of association. “[A]ny  
8 burden on plaintiff[’s] freedom of association” would be “justified for the same reasons  
9 that” any burdens on speech are justified. *Holder v. Humanitarian L. Project*, 561 U.S. 1,  
10 40 (2010). “[I]t would be anomalous for a restriction on speech to survive . . . under”  
11 freedom of speech principles “only to be invalidated as an impermissible infringement”  
12 on association. *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 681 (2010).

13 **Conclusion**

14 This Court should deny the order to show cause and grant the motion to dismiss.

15 DATED this 22nd day of March, 2024.

16  
17 OSBORN MALEDON, P.A.

18 By: /s/Brandon T. Delgado

19 John S. Bullock, Esq.

20 Brandon T. Delgado, Esq.

21 2929 North Central Avenue, Suite 2000

22 Phoenix, Arizona 85012-2793

23 *Attorneys for Amici Curiae*

24 *League of Women Voters of Arizona*

25 *Protect Democracy Project and*

26 *Campaign Legal Center*

1 ORIGINAL e-filed and served  
2 via electronic service  
3 this 22<sup>nd</sup> day of March, 2024, upon:

4 Honorable Jennifer Ryan-Touhill  
5 c/o Eileen Hoyle  
6 [Eileen.hoyle@jbazmc.maricopa.gov](mailto:Eileen.hoyle@jbazmc.maricopa.gov)

7 Veronica Lucero  
8 **Davillier Law Group LLC**  
9 4105 N. 20th St. Ste. 110  
10 Phoenix, Arizona 85016  
11 [Vlucero@davillierlawgroup.com](mailto:Vlucero@davillierlawgroup.com)  
12 [PhxAdmin@davillierlawgroup.com](mailto:PhxAdmin@davillierlawgroup.com)

13 Timothy A. La Sota  
14 **Grand Canyon Legal Center**  
15 1835 E. Elliot Road Ste. 102  
16 Tempe, Arizona 85284-1747  
17 [tim@timlasota.com](mailto:tim@timlasota.com)

18 Richard P. Lawson  
19 Jessica H. Steinmann  
20 **America First Policy Institute**  
21 1001 Pennsylvania Ave., NW, Suite 530  
22 Washington, DC 20004  
23 [rlawson@americafirstpolicy.com](mailto:rlawson@americafirstpolicy.com)  
24 [jsteinmann@americafirstpolicy.com](mailto:jsteinmann@americafirstpolicy.com)  
25 *Attorneys for the Plaintiff*

26 Kara Karlson  
27 Karen J. Hartman-Tellez  
28 Kyle Cummings  
29 **Office of the Arizona Attorney General**  
30 2005 N. Central Avenue  
31 Phoenix Arizona 85004-2926  
32 [kara.karlson@azag.gov](mailto:kara.karlson@azag.gov)  
33 [karen.hartman@azag.gov](mailto:karen.hartman@azag.gov)  
34 [kyle.cummings@azag.gov](mailto:kyle.cummings@azag.gov)  
35 *Attorneys for Secretary of State Adrian Fontes*

1 D. Andrew Gaona  
2 Austin C. Yost  
3 **Coppersmith Brockelman PLC**  
4 2800 North Central Avenue, Suite 1900  
5 Phoenix, Arizona 85004  
6 [agaona@cblawyers.com](mailto:agaona@cblawyers.com)  
7 [ayost@cblawyers.com](mailto:ayost@cblawyers.com)  
8  
9 Lalitha D. Madduri  
10 Justin Baxenberg  
11 Tina Meng Morrison  
12 Ian U. Baize  
13 **Elias Law Group LLP**  
14 250 Massachusetts Ave NW, Suite 400  
15 Washington, D.C. 20001  
16 [lmadduri@elias.law](mailto:lmadduri@elias.law)  
17 [jbaxenberg@elias.law](mailto:jbaxenberg@elias.law)  
18 [tmengmorrison@elias.law](mailto:tmengmorrison@elias.law)  
19 [ibaize@elias.law](mailto:ibaize@elias.law)  
20 *Pro Hac Vice Attorneys for Intervenor*  
21 *Defendants Arizona Alliance for Retired Americans*  
22 *and Voto Latino*  
23  
24 Roy Herrera  
25 Daniel A. Arellano  
26 Jillian L. Andrews  
27 Austin T. Marshall  
28 **Herrera Arellano LLP**  
1001 North Central Avenue, Suite 404  
Phoenix, AZ 85004  
[roy@ha-firm.com](mailto:roy@ha-firm.com)  
[daniel@ha-firm.com](mailto:daniel@ha-firm.com)  
[jillian@ha-firm.com](mailto:jillian@ha-firm.com)  
[austin@ha-firm.com](mailto:austin@ha-firm.com)  
  
Alexis E. Danneman  
Matt Koerner  
**Perkins Coie LLP**  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
[ADanneman@perkinscoie.com](mailto:ADanneman@perkinscoie.com)  
[MKoerner@perkinscoie.com](mailto:MKoerner@perkinscoie.com)  
*Attorneys for Democratic National Committee*  
*and Arizona Democratic Party*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

John M. Devaney  
**Perkins Coie** LLP  
700 Thirteenth Street NW, Suite 600  
Washington, C 20005  
[JDevaney@perkinscoie.com](mailto:JDevaney@perkinscoie.com)  
*Attorneys for Intervenor-Defendants Democratic  
National Committee and Arizona Democratic Party*

*/s/ C. Buxton* \_\_\_\_\_