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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

American Encore, an Arizona non-profit corporation; Karen Glennon, an Arizona individual; America First Policy Institute, a non-profit corporation,

Plaintiffs,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State; Kris Mayes, in her official capacity as Arizona Attorney General; Katie Hobbs, in her official capacity as Governor of Arizona,

Defendants.

No. CV-24-01673-PHX-MTL

ATTORNEY GENERAL'S MOTION TO DISMISS COUNT 2 OF THE COMPLAINT WITH PREJUDICE

In Count 2, Plaintiffs assert pre-enforcement First Amendment and Due Process challenges against portions of Chapter 9, section III(D) of the 2023 Elections Procedures Manual ("EPM"). That section provides instructions and guidance to election officials regarding "preventing voter intimidation" at the polls. Doc. 16-2 at 195-97.

Arizona law, like many federal statutes, prohibits voter intimidation. A.R.S. § 16-1013; *see also, e.g.*, A.R.S. §§ 16-1006 to 16-1017; 18 U.S.C. §§ 241, 594; 42 U.S.C. § 1985(3); 52 U.S.C. §§ 10101(b), 20511. Indeed, the right to vote securely and free from intimidation has long been a core value in this State. Ariz. Const. art. 7 § 1 (enshrining "secrecy in voting"); *City of Phoenix v. Super. Ct. in & for Maricopa Cnty.*, 101 Ariz. 265, 266 (1966) (discussing 50-foot restriction that was "designed … 'to prevent delay or intimidation of voters'" (citation omitted)).

Plaintiffs do not challenge the constitutionality of any specific "crimes involving elections and crimes against the elective franchise." A.R.S. § 16-1001. To the contrary, Plaintiffs necessarily concede those statutes are constitutional because their attack on section III(D) is premised on the belief that it "broadens the scope of conduct criminally prohibited under A.R.S. §§ 16-1013, 1017." Doc. 1 ¶ 67. Plaintiffs are wrong on that score, so Count 2 fails on the merits. But their claims fail long before that because section III(D) does not regulate Plaintiffs as members of the public. It simply instructs and guides election officials. For that reason, among others, Plaintiffs lack Article III standing and fail to state a claim. The Court should dismiss. *See* Fed. R. Civ. P. 12(b)(1), (b)(6).

BACKGROUND

The Secretary of State, after "consultation with each county board of supervisors or other officer in charge of elections," must "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" regarding "the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A). These rules are set forth in the EPM, which is "approved by the governor and the attorney general." A.R.S. § 16-452(B). The EPM's rules have the force of law when promulgated pursuant to statute,

such as A.R.S. § 16-452; rules that are not authorized by statute "act[] as guidance [only]." *McKenna v. Soto*, 281 P.3d 695, 699 ¶ 21 (2021).

Chapter 9 of the 2023 EPM provides instructions and guidance to local election officials about the "Conduct of Elections [and] Election Day Operations." *See generally* Doc. 16-2 at 188–99. Section III of Chapter 9 is titled "Preserving Order and Security at the Voting Location" and addresses four general topics related to the enforcement of various laws. Doc. 16-2 at 194-97. Plaintiffs challenge only section III(D), *see* Doc. 1. ¶¶ 3, 127, which is about "preventing voter intimidation" and has three parts.

First, section III(D) paraphrases (for lay election officials) the statutory prohibition on coercion or intimidation of voters and then explains which election official bears responsibility for relevant training and policies:

> Any activity by a person with the intent or effect of threatening, harassing, intimidating, or coercing voters (or conspiring with others to do so) inside or outside the 75-foot limit at a voting location is prohibited. A.R.S. § 16-1013. The officer in charge of elections has a responsibility to train poll workers and establish policies to prevent and promptly remedy any instances of voter intimidation.

Doc. 16-2 at 195.

Second, section III(D) directs the "officer in charge of elections" to publicize and implement certain requirements related to disturbances and intimidation, as applicable to the situation. Doc. 16-2 at 196. Among those mandates, the "inspector must utilize the marshal to preserve order and remove disruptive persons from the voting location," and they "must use sound judgment to decide whether to contact law enforcement." *Id.*

Finally, section III(D) states:

> In addition to the *potentially* intimidating conduct outlined above, the following *may* also be considered intimidating conduct inside or outside the polling place….

Doc. 16-2 at 196 (emphases added). The EPM then provides a list of conduct and situations that "may" be intimidating. *Id.* at 196-97. In other words, these are non-binding examples to provide a practical point of reference for non-lawyers, whose job is to identify and address intimidating conduct.

The operative EPM was approved in December 2023. *See* Doc. 16-2 at 3-5. Chapter 9, section III(D) is not new, however, and has changed only minimally since it was originally approved by Governor Ducey, Attorney General Brnovich, and Secretary Hobbs in the 2019 EPM. *See* 2019 EPM at 180, & prefatory pages.[1] Those changes are not relevant here; indeed, the language Plaintiffs quote throughout their Complaint has not changed at all. *Compare id.*, *with* Doc. 1 ¶¶ 3-4, 65, 68, 70, 128-31, 135-37, 139.

Plaintiffs here are American Encore ("Encore"), America First Policy Institute ("AFPI"), and Karen Glennon. Doc. 1 ¶¶ 11, 19, 23. They claim that section III(D) is a "nearly unrestrained" prohibition on "a broad swath" of protected speech. *Id.* ¶¶ 4, 129-32. They say it applies to all "members of the public" within "every square inch of territory within Arizona's borders" and hundreds of thousands of people "widely dispersed throughout the United States." *Id.* ¶¶ 4, 29, 65. According to Plaintiffs, all the EPM's provisions apply to any person, anywhere, without qualification. *E.g.*, *id.* ¶¶ 1, 8, 65, 130. And so, they say, they can be prosecuted for a misdemeanor under A.R.S. § 16-452(C) for violating section III(D). Doc. 1 ¶ 8.

LEGAL STANDARD

District courts analyze a "facial attack" on the basis for subject matter jurisdiction under Rule 12(b)(1) in the same way as "a motion to dismiss under Rule 12(b)(6)," by "[a]ccepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Under Rule 12(b)(1), courts determine "whether the allegations are sufficient as a legal matter to

[1] Without converting this motion to one for summary judgment, the Court can take judicial notice of the existence of this EPM language and when it was approved because those are "matters of public record," are "available on government agency websites," and are cited simply to show that certain "actions … occurred on certain dates." *BBK Tobacco & Foods LLP v. Cent. Coast Agric. Inc.*, No. CV-19-05216-PHX-MTL, 2021 WL 1751134, at *12 (D. Ariz. May 4, 2021) (citing cases). For ease of reference, the cited pages of the 2019 EPM are attached as Exhibit A. The 2019 EPM is available in full at: https://apps.azsos.gov/election/files/epm/2019_elections_procedures_manual_approved.pdf.

invoke the court's jurisdiction," and under (b)(6), whether the complaint states a claim for relief. *Id.*; *see Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004) (Rule 12(b)(6) standard).

ARGUMENT

The crux of this case is a purely legal issue: whether section III(D) regulates Plaintiffs. That issue is integral to Plaintiffs' standing because, among other things, they must plausibly plead they face a credible threat of enforcement for conduct within the scope of that provision. And it is dispositive on the merits because Plaintiffs can have no First Amendment or Due Process claim against a provision that does not regulate them.

Accordingly, the Attorney General **(I)** will first explain what section III(D) means and why it plainly does not regulate Plaintiffs, then explain why **(II)** Plaintiffs lack standing and **(III)** fail to state a claim, and **(IV)** why amendment would be futile.

I. Section III(D) guides election officials; it does not regulate Plaintiffs.

Plaintiffs misconstrue the audience, purpose, and scope of section III(D) and the EPM more broadly. Their claims and arguments all sprout from that rotten root.

"The purpose of the … EPM is to ensure election practices are consistent and efficient throughout Arizona." *McKenna*, 481 P.3d at 699 ¶ 20. Accordingly, the Secretary "provide[d] ... the 2023 [EPM] to county, city, and town election officials" (Doc. 16-2 at 3), because those are the officials with control over "the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots," A.R.S. § 16-452(A); *see Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *4 (D. Ariz. Feb. 29, 2024) ("The EPM is binding on county recorders and 'ensures election practices are consistent and efficient throughout Arizona.'" (citation omitted)).

In particular, section III(D) of the EPM provides important instructions and guidance to election officials who are charged with the responsibility to preserve order and security at the polls. *See* Doc. 16-2 at 194-97. That is why the section begins with an explanation of the relevant legal principles regarding voter intimidation and coercion,

but is paraphrased in a concise way that is easier for lay officials to understand than the multi-part text of A.R.S. § 16-1013 and other statutes. *Id.* at 195. That explanation is practically important, because the "officer in charge of elections" is responsible for training poll workers and establishing policies to address voter intimidation. *Id.* So, clearly, he needs to have a baseline understanding of the relevant law.

The next part of section III(D) is again addressed to "[t]he officer in charge of elections" and refers to the inspector's and marshal's duty "to preserve order and remove disruptive persons from the voting location." Doc. 16-2 at 196. Part of that role requires the inspector and marshal to "use sound judgment" about whether and when to elevate disruptive situations. *Id.* To that end, section III(D) describes non-binding examples of what "*may* … be considered intimidating conduct," depending on the circumstances. *Id.* at 196 (emphasis added). By stating that these examples "may ... be" intimidating, section III(D) does not announce a per se rule. Nor does section III(D) say that such "potentially intimidating conduct" constitutes a criminal act. *Id.* The illustrations simply provide a practical point of reference for busy officials who must make quick decisions about how to "prevent and promptly remedy any instances of voter intimidation." *Id.* at 195-96.

Section III(D) governs and guides officials who conduct elections and are charged with preserving order and security at the polls. It does not regulate members of the public like Plaintiffs.[2] Nor does section III(D) purport to create, or in fact create, any additional laws or penalties regarding speech for Plaintiffs or other members of the public. It merely summarizes existing law to help lay election officials who must understand when possible instances of voter intimidation merit action to protect voters. *See* Doc. 16-2 at 196.

The fact that section III(D) does not quote statutory language in full, including the

[2] When the legislature wants the Secretary to promulgate rules that will apply to non-election-official members of the public, the legislature says so clearly. For instance, A.R.S. § 19-118(A) "requires the Secretary to include in the [EPM] … 'a procedure for registering circulators, including circulator registration applications.'" *Leibsohn v. Hobbs*, 517 P.3d 45, 51 ¶ 22 (Ariz. 2022). And that statute specifies that anyone who "provides false information on a circulator registration application or who registers in violation of this section is guilty of a class 1 misdemeanor." A.R.S. § 19-118(H).

knowingly mens rea in A.R.S. § 16-1013, does not mean that it purports to amend or expand generally applicable criminal laws. *Contra* Doc. 1 ¶¶ 67-70. The point of section III(D) is to help educate non-lawyer election officials about the law regarding voter intimidation and how to identify and appropriately address security threats. The EPM would be of little help in that regard if all it did was regurgitate statutory language and list the legal "mens rea" of various crimes. Election officials are tasked with preserving order and safety, not identifying the elements of a crime and bringing prosecutions. If a person is screaming at voters or blocking the entrance to a polling location, election officials do not need to know the "mens rea" animating that conduct in order to determine whether it is actually intimidating or coercive and take appropriate action.

Relatedly, local election officials are not traveling throughout "every square inch of territory within Arizona's borders" (Doc. 1 ¶ 4), or hunting down interstate communications from "300,000 [AFPI] members … throughout the United States" (*id.* ¶ 29), in search of voter intimidation to refer to law enforcement. It should go without saying, but that is not their mandate. Nor is that the EPM's mandate, which is concerned only with the "correctness, impartiality, uniformity, and efficiency in *election procedures* across Arizona," (Doc. 16-2 at 3, emphasis added), as the EPM itself, statutes, and caselaw all make clear. The EPM is not a code of criminal laws for members of the public, and section III(D) is not the applicable law on voter intimidation for members of the public. If an issue arose at a polling place, and election officials contacted law enforcement and a prosecution ultimately ensued, the prosecutor would not charge the defendant with violating a section of the EPM that does not govern him. She would charge him under generally applicable criminal statutes in Title 13 or under one of the relevant crimes in Title 16, Chapter 7. *See generally* A.R.S. §§ 16-1001–16-1023.

Plaintiffs urge a remarkable alternative reading. Despite all context and law to the contrary, they say section III(D) is actually "a broad curtailment of speech"—a "nearly unrestrained" criminal prohibition that applies to anyone in the country. Doc. 1 ¶¶ 3-4, 29, 154. According to Plaintiffs, for the last five years, elected officials of both political

parties—Governor Ducey, Attorney General Brnovich, then-Secretary, now-Governor Hobbs, Secretary Fontes, and Attorney General Mayes—have collectively twice approved a massive ban on speech and unauthorized expansion of statutory criminal liability, which they then hid from unsuspecting Arizonans in the middle of a nearly four-hundred-page document addressed to election officials. And, luckily, Plaintiffs have only just discovered it.

"The absurdity of such a result is sufficient by itself to foreclose that construction." *United States v. Jackson*, 24 F.4th 1308, 1311 (9th Cir. 2022) (citation omitted). Indeed, the EPM expressly recognizes that "electioneering and other political activity in public areas" is protected, unless it "result[s] in voter intimidation." Doc. 16-2 at 144. Further, it is well established that "an EPM regulation that either exceeds its statutory authority or contradicts statutory requirements does not have the force of law." *Ariz. All. for Retired Ams., Inc. v. Crosby*, 537 P.3d 818, 823 ¶ 18 (Ariz. Ct. App. 2023) (quoting *Leibsohn*, 517 P.3d at 51 ¶ 22). Yet, Plaintiffs urge an interpretation of section III(D) that would present a blatant violation by purporting to amend criminal statutes. That's nonsense. Courts normally "avoid absurd results" like the ones that flow from Plaintiffs' novel theory, *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 670 (9th Cir. 2021), especially when "alternative interpretations consistent with the legislative purpose are available," *Tovar v. Sessions*, 882 F.3d 895, 904 (9th Cir. 2018).

Not only is there a readily available construction of section III(D) "by which [Plaintiffs' constitutional concerns] may be avoided," *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013), but that construction is the only one consistent with the EPM and statutory text, the purpose of the EPM, and common sense. That simple interpretation, which no one has doubted for several years, is that section III(D) provides guidance and instruction to election officials. It is not a prohibition, criminal or otherwise, on Plaintiffs' speech or other members of the public.[3]

[3] In the parallel state court case, *Arizona Free Enterprise Club v. Fontes* (CV2024-002760), the superior court adopted the erroneous interpretation of section III(D) that

II. Plaintiffs' allegations fail to establish Article III standing as to Count 2.

To establish standing "at the pleading stage, the plaintiff must 'clearly allege facts demonstrating'" that he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

The Complaint asserts standing based on a threat of enforcement (all Plaintiffs) and monetary harm (Encore and AFPI). Encore and AFPI (purportedly on behalf of their members too) and Ms. Glennon assert that because of "the current 2023 EPM," they "face an actual threat of prosecution from the Attorney General for actions that are otherwise lawful." Doc. 1 ¶¶ 154-55; *see id.* ¶¶ 22, 29. And Encore and AFPI allege "compliance costs" related to their respective electioneering and poll-watcher training activities that they "would not have had to otherwise incur" but for the 2023 EPM. *Id.* ¶¶ 15-17, 25-28. As to both theories, Plaintiffs have no Article III injury traceable to section III(D).

A. As a matter of law, Plaintiffs have no injury and cannot establish traceability because no credible threat of enforcement exists.

When a plaintiff asserts standing based on a future harm, the Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that 'allegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphases in original). Accordingly, to show an imminent injury in a pre-enforcement challenge, a plaintiff must (1) intend "to engage in a course of conduct arguably affected with a constitutional interest" (2) "but proscribed by a statute" and (3) "there must be 'a credible threat of prosecution.'" *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). Plaintiffs fail to satisfy each factor.

Planned Conduct. Plaintiffs' generalized allegations do not specify what they

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Plaintiffs (some of whom are parties there) urge. Ruling at 7-18 (Maricopa Cnty. Super. Ct., Aug. 5, 2024). Respectfully, the court mistakenly disregarded the clear text, audience, and purpose of section III(D), thus rejecting a reading that aligns with the statutory mandate, context, and that presents no constitutional problem.

intend to do with any "degree of concrete detail." *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010). And their "general intent to violate [the challenged provision] at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc).

For example, the Complaint speaks generically of Ms. Glennon's "protected political speech," (Doc. 1 ¶ 22); how AFPI "regularly communicates" with Arizonans and that its "members routinely advocate for governmental policies" (*id.* ¶¶ 28-29); and how Encore "regularly speaks with voters through advertising and person-to-person contact" and that it "will continue to engage in voter contact in Arizona" (*id.* ¶¶ 13-14). But what specifically will Plaintiffs communicate? Where? And in what manner? The Complaint contains no facts plausibly showing that Plaintiffs' conduct would be protected speech and not violate any statute prohibiting voter intimidation, but still fall within some interpretation of the EPM and violate the First Amendment. With such non-descript statements about what Plaintiffs actually want to do, any "alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Id.* at 1138-39.

Proscribed by Law. Under "the second *Driehaus* factor, [the Court] must determine whether [Plaintiffs'] intended future conduct is proscribed by" the challenged portions of section III(D). *Yellen*, 34 F.4th at 849. As explained, it is not. And Plaintiffs cannot "rely on a bare legal conclusion [about what they think the EPM means] to assert injury-in-fact" because courts do not "credit legal conclusions" on a motion to dismiss, only "factual assertions." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067-68 (9th Cir. 2011).

Credible Threat. The "third *Driehaus* factor, concerning whether there is a credible threat of enforcement," proves the utter lack of any actual controversy here. *Yellen*, 34 F.4th at 850; *see Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) ("Even in the First Amendment context, a plaintiff must show a *credible* threat of enforcement."). To start, section III(D) is not new. It has been a part of the EPM since December 2019—more than four and a half years by the time Plaintiffs brought this case. Doc. 1; *see supra* note 1. As a result, "the history of past enforcement" is highly relevant.

See Yellen, 34 F.4th at 850. But Plaintiffs allege no prior prosecutions under A.R.S. § 16-452(C) for violations of *any* provision of the EPM, let alone for violations of section III(D).

The lack of such allegations is particularly telling because Plaintiffs have been engaging in the same conduct even before the 2023 EPM was approved. The Complaint is clear about this. Encore "is based in Arizona," has been "regularly involved in election-related activity in Arizona," and "regularly speaks with voters through advertising and person-to-person contact." Doc. 1 ¶ 11, 13. AFPI "has conducted poll-worker training sessions" and "grassroots workshops about election related issues in Arizona in the past." *Id.* ¶¶ 25, 27. And Ms. Glennon has been "domiciled in Apache County." *Id.* ¶ 19. Given that the challenged language in section III(D) has existed for several years, Plaintiffs' " protected political speech is [not] now subject to [any] criminal penalty" under the 2023 EPM's section III(D) that would not have also applied under the 2019 EPM's nearly-identical section. *Id.* ¶ 22. And yet, they identify no prior threats.

Indeed, Plaintiffs cannot plausibly allege any threat of enforcement by the Attorney General because she has unequivocally disavowed the sort of prosecution Plaintiffs claim to fear. Doc. 1-4 at 2-3; *Lopez*, 630 F.3d at 788 ("[W]e have held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities."); *Clapper*, 568 U.S. at 419 (plaintiffs cannot "establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part").

Before Plaintiffs sued, they sought a disavowal from the Attorney General in connection with the parallel state court proceeding. Doc. 1 ¶ 56; Doc. 1-2 at 2. In response, the Attorney General's Office explained that section III(D) "does not itself restrict or criminalize anything"; does not "broaden[] the scope of conduct criminally prohibited under A.R.S. §§ 16-1013, 1017 or relevant and applicable criminal statutes"; and simply provides instructions and guidance "for the benefit of local elections

officials." Doc. 1-4 at 2-3. Further, the Attorney General confirmed that her office "would not prosecute" conduct "outside the scope of a criminal statute," and reiterated that any such prosecutions would proceed under Title 16 or 13, "not under A.R.S. § 16-452(C) for alleged violations of" section III(D). Doc. 1-4 at 3.

The Ninth Circuit has recognized that "claims of future harm lack credibility when the challenged [provision] by its terms is not applicable to the plaintiffs, or the enforcing authority has disavowed the applicability of the challenged [provision] to the plaintiffs." *Lopez*, 630 F.3d at 788. Here, both are true. Doc. 1-4 at 2. That should be dispositive.[4]

Although Plaintiffs received the exact disavowal from the Attorney General that they had requested, however, they now ignore it as unpersuasive and urge their own interpretations of section III(D) that would allow the prosecutions they claim to fear (Doc. 1 ¶¶ 60-66). These assertions are unavailing.

Plaintiffs' allegations that they face a threat of enforcement from the Attorney General (*e.g.*, ¶¶ 22, 29, 151) are belied by the Attorney General's express disavowal of such enforcement, which the Complaint extensively references and attached as an exhibit. Doc. 1-4 at 2-3; *e.g.*, Doc. 1 ¶¶ 55-66. This Court "need not [and should not] accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) (citing cases); *see also, e.g.*, *Gamble v. GMAC Mortg. Corp.*, No. C-08-05532 RMW, 2009 WL 400359, at *3 (N.D. Cal. Feb. 18, 2009) ("Where an exhibit to a pleading is inconsistent with the pleading, the exhibit controls." (citing cases)).

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[4] Plaintiffs' conclusory statements that the Secretary will make criminal referrals to the Attorney General about something she has expressly said does not regulate Plaintiffs and would not support a prosecution against them likewise fails. *See* Doc. 1 ¶¶ 56-58. No facts support that assertion in the Complaint, which is based on the same flawed legal premise in all events. Similarly, Plaintiffs' speculative allegation that "County Attorneys could still enforce [section III(D)]" is irrelevant. Doc. 1 ¶ 60. Plaintiffs have not sued the county attorneys or pleaded any facts demonstrating a threat of prosecution from them, and they cannot create a controversy with the Attorney General based on speculation about what nonparties might do, which hypothetical injury (or threat thereof) is not fairly traceable to defendants here.

Plaintiffs might have strong views about the wisdom or meaning of section III(D), and they might feel they have to change their behavior as a result. But even if genuine, a plaintiff's alleged "self-censorship alone is insufficient to show injury" because an "injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced against them." *Lopez*, 630 F.3d at 792; *see also Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 394 (2024) ("Like an individual, an organization may not establish standing simply … because of strong opposition to the government's conduct …." (citation omitted)); *see also Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1210 (9th Cir. 2022) (requiring "a *genuine* threat of *imminent* prosecution" (citation omitted).

Plaintiffs face no credible threat of enforcement (and Ms. Glennon asserts no other injury). Encore and AFPI cannot assert this theory on behalf of their members because in order to show associational standing, their "members would otherwise [need to] have standing to sue in their own right" based on a credible threat of enforcement (among other showings). *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).[5]

B. Plaintiffs' "compliance costs" are self-inflicted and not traceable to any credible threat of enforcement.

Encore and AFPI also assert financial injury from "additional legal and other costs to ensure compliance with the 2023 EPM." Doc. 1 ¶¶ 15, 26. Encore alleges that these costs would not have been necessary "[i]f the 2023 EPM had not included" section III(D). *Id.* ¶ 16. AFPI similarly asserts that because of the 2023 EPM, it "will incur compliance costs as a result" of being "forced to" develop new "EPM-specific training" about "how

[5] The Complaint does not even allege an actual threat of enforcement as to AFPI's "300,000 members ... widely dispersed throughout the United States," only that they "face a *risk* of enforcement." Doc. 1 ¶ 29 (emphasis added). And, even if it were legally possible, the Complaint pleads no facts that make that allegation factually plausible. This theory is even more speculative and unripe given the chain of events that would need to occur for any interstate member to conceivably be in peril, including local, resource-limited law enforcement in Arizona investigating activity around the country, bringing charges, and those members being brought into Arizona for prosecution.

to comply with the EPM's speech provisions." *Id.* ¶¶ 24-26. To be sure, monetary loss can be a cognizable injury. But to confer standing, "there must be a causal connection between the injury and the conduct complained of." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). And here, Encore and AFPI have not pleaded a causal connection with a true injury because their alleged costs are self-inflicted and not fairly traceable to the 2023 EPM. *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020) ("A self-inflicted injury, by definition, is not traceable to anyone but the plaintiff.").

A U.S. Supreme Court decision from last term is instructive. In *Alliance for Hippocratic Medicine*, several medical associations claimed that they had standing to challenge the FDA's approval of the drug mifepristone "based on their incurring costs to oppose [the] FDA's actions." 602 U.S. at 394. According to the associations, the FDA "'caused' [them] to conduct their own studies on mifepristone so [they could] better inform their members and the public" about the drug, and "forced" them to spend resources engaging with the FDA and public "to the detriment of other spending priorities." *Id.* The Court disagreed, stating: "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way." *Id.*

Encore and AFPI "cannot manufacture [their] own standing in that way" either. *Id.* "Because [Plaintiffs] do not face a threat of certainly impending [enforcement], the costs that they have incurred … are simply the product of their fear" alone, which "is insufficient to create standing." *Clapper*, 568 U.S. at 417. They cannot "spend [their] way into standing simply by expending money" to address unfounded fears about a non-existent threat. *Alliance*, 602 U.S. at 394; *see Clapper*, 568 U.S. at 402 ("[R]espondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.").

Underscoring the implausibility of Plaintiffs' assertions and lack of causal connection to any actual threat of prosecution is the timing of when Encore and AFPI

were allegedly "forced" to begin spending money. Encore and AFPI repeatedly identify the 2023 EPM as the but-for cause requiring these alleged compliance costs. *E.g.*, Doc. 1 ¶¶ 15-17, 28-30, 151, 154. But the source of the alleged prohibition that they purport to fear—language in section III(D)—is close to five years old, and the challenged language in section III(D) did not change between the 2019 EPM and the 2023 EPM.

In other words, nothing has newly and suddenly required AFPI "to alter how it conducts its operations and communications in Arizona" or caused Encore to incur "additional compliance costs beyond what it typically incurs." Doc. 1 ¶¶ 16, 28. Their purported decision in 2024 to start incurring "compliance costs" is not traceable to section III(D) when the EPM language they cite as purportedly affecting their operations has existed verbatim since December 2019. The only thing that changed, evidently, is Encore's and AFPI's new awareness of this "years-old" language in section III(D), from which they have never faced any threat of enforcement before. *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459-60 (6th Cir. 2014) ("That [plaintiff's training] placards and supplemental materials failed to contain a full and accurate description of the years-old late jailed electors issue is not an Article III injury, and even if it were, it is not fairly traceable to the State, only to [plaintiff's] ignorance of the law.").

Section III(D) "is unenforceable" against Plaintiffs, and therefore, with respect to their alleged injury—feared future prosecution under A.R.S. § 16-452(C)—"[t]here is no one, and nothing, to enjoin." *California v. Texas*, 593 U.S. 659, 673 (2021). "To find standing here to attack an unenforceable [EPM] provision would allow a federal court to issue what would amount to 'an advisory opinion without the possibility of any judicial relief.'" *Id.* This Court must dismiss under Rule 12(b)(1).

III. Count 2 fails to state a claim.

Count 2 fails in light of the legal principles above, which is even more plain given the heavy burden in a facial challenge to plead that section III(D) is "unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S.

442, 449 n.6 (2008) (citation omitted).[6]

First Amendment Claim. Count 2 alleges that section III(D) "purports to ban speech based purely on alleged offensiveness," is "a viewpoint-based restriction on speech," and "is overboard [sic], containing a limitless geographic and temporal scope." Doc. 1 ¶ 156. Plaintiffs' First Amendment claim is based on several flawed premises. They mistakenly insist that the "2023 EPM criminalizes otherwise protected free speech [by anyone anywhere] through [section III(D)]," and that "[a]ny violation of a provision of the EPM by any person is a class-two misdemeanor." Doc. 1 ¶¶ 1, 150. But, as explained, section III(D) does not itself criminalize anything—let alone broad swaths of protected free speech—or regulate members of the public like Plaintiffs.

Plaintiffs' reading of A.R.S. § 16-452(C) is similarly wrong. That statute says: "A person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor." But one can only violate a rule that regulates him, and only a "person" whom a rule regulates could be prosecuted for violating it. *Cf. State v. Ewer*, 523 P.3d 393, 396-97 ¶¶ 12-14 (Ariz. 2023) (interpreting the word "person" based on "the context of [the statute at issue] and related statutes on the same subject to properly discern the statutory definition"). Plaintiffs are not election officials charged with "preserving order and security at the voting location." Doc. 16-2 at 194-97. They cannot be prosecuted under A.R.S. § 16-452(C) for violating section III(D), because section III(D) does not regulate them. Accordingly, their First Amendment challenge fails.

Due Process Claim. Count 2 also claims that section III(D) "requires no proof of mens rea for criminal conduct" and "is so vague as to not provide proper notice of the conduct that it criminalizes." Doc. 1 ¶ 156. As explained, section III(D) is not a prohibition on Plaintiffs, and it does not restrict any speech. And therefore, Plaintiffs'

[6] To the extent Plaintiffs raise a First Amendment overbreadth challenge, *see* Doc. 1 ¶ 156, they must show that a "substantial number" of applications of section III(D) are unconstitutional, judged in relation to its "plainly legitimate sweep." *Id.* n.6. The result is the same: section III(D) does not regulate Plaintiffs as members of the public, and therefore has zero applications *to them* through a prosecution under A.R.S. § 16-452(C).

due process theory based on those premises fails. *Cf. Diamond S.J. Enter., Inc. v. City of San Jose*, 100 F.4th 1059, 1068 (9th Cir. 2024) ("Because we reject [the] facial attack on the [challenged provisions] as prior restraints, we also reject the overbreadth and vagueness challenges."). To the extent certain provisions of section III(D) are compulsory, they are compulsory only for election officials, not Plaintiffs. They thus have no due process claim because there is "no need for legislation to give fair warning except to those potentially subject to it." Wayne R. LaFave, 1 Substantive Criminal Law § 2.3(b) (3d ed., Westlaw, Oct. 2023 update).

Because section III(D) does not regulate Plaintiffs, their constitutional claims in Count 2 fail as a matter of law. *Cf. State v. Soto*, 241 P.3d 896, 896 ¶ 5 (Ariz. 2010) ("Based on the State's concession that [the statute] does not apply to Soto, we decline to rule on any constitutional ... issues this case might have presented.").

IV. Dismissal should be with prejudice because amendment would be futile.

Amendment would be futile to correct these legal deficiencies. It would also be futile as to another theory the Complaint does not identify, but which Plaintiffs might attempt to inject now or plead in the future. Plaintiffs might posit that, conceivably, they could still be affected by section III(D)—even if they acknowledge they cannot be prosecuted under A.R.S. § 16-542(C) for violating it—if an election official told them to stop speaking at a voting location based on that official's interpretation of section III(D) as applied to Plaintiffs' conduct. That theory would likewise fail as a matter of law.

The lack of standing would be just as stark in that case, where any such claim would still depend on a series of speculative events happening, including actions by non-parties, before there would be a case and controversy. Plaintiffs would need to plausibly allege: specific conduct that they intend to engage in at a voting location; that such conduct would be aggressive, threatening, or so offensive, etc., that it would likely attract the attention and action of an election official based on that official's interpretation of section III(D); and that such action would result in Plaintiffs' speech being unconstitutionally restricted. Those speculative allegations might never happen,

illustrating why pre-enforcement challenges are so disfavored, and why that un-pleaded claim is now, and will remain, unripe.

That claim would also doubly fail on standing and the merits to the extent any such conduct fell within the scope of Arizona's criminal statutes, which Plaintiffs have not challenged. Thus, any injury would not be caused by an official's interpretation of section III(D), but rather existing criminal prohibitions. And as for the merits of that hypothetical First Amendment claim, there are plainly a vast number of circumstances where a poll worker could constitutionally consider factors like a person's "aggressive behavior," "disrupting voting lines," or "[]intentionally disseminating false or misleading information," etc., (Doc. 16-2 at 196) when determining whether that person is engaging in intimidation for purposes of contacting law enforcement or taking other action. *Cf., e.g.*, *Burson v. Freeman*, 504 U.S. 191, 206, 210-11 (1992) (discussing why "some restricted zone [in and around polling places] is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud").

CONCLUSION

The Court should dismiss Count 2 with prejudice under Rule 12(b)(1) or, in the alternative, Rule 12(b)(6).[7]

RESPECTFULLY SUBMITTED this 9th day of August, 2024.

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ATTORNEY GENERAL

By /s/ Luci D. Davis
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[7] The Attorney General moves only on Count 2 because Plaintiffs appear to assert Count 1 against the Secretary only. To the extent Count 1 could be read to pertain to the Attorney General, it also should be dismissed as well, including because Plaintiffs do not allege the Attorney General has any enforcement authority as to Chapter 13, section II(B)(2) of the EPM.

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