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8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 Brian Edward Malnes,  
12 Plaintiff,  
13 vs.  
14 State of Arizona; Michele Reagan,  
15 Defendants.

Case No: 3:16-cv-08008-GMS

**DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

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17 Defendants the State of Arizona and Arizona Secretary of State Michele Reagan  
18 ("the Secretary") respectfully request this Court deny Plaintiff Brian Edward Malnes'  
19 Motion for Temporary Restraining Order and Preliminary Injunction ("TRO") because  
20 Plaintiff fails to allege the facts required to support his allegations, and in any event,  
21 Plaintiff would fail to meet the standard required for injunctive relief. Thus, the Court  
22 should deny Plaintiff's TRO.

23 **I. BACKGROUND**

24 Plaintiff filed a Complaint against the State of Arizona and the Secretary on  
25 January 20, 2016. The Complaint alleges that A.R.S. § 16-101(A)(5), which prohibits  
26 felons from voting if their civil rights are not restored, violates the Fifteenth and Twenty-

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1 Sixth Amendments. In the lawsuit, Plaintiff seeks a permanent injunction against  
2 enforcement of A.R.S. § 16-101(A)(5) and \$10 million.

3 Defendants timely filed a Motion to Dismiss on February 16, 2016, arguing that  
4 the Eleventh Amendment disposes of the majority of Plaintiff's claims and that the  
5 remainder of his claims may be disposed of as a matter of law because felon  
6 disenfranchisement pursuant to A.R.S. § 16-101(A)(5) is constitutional. *See generally*  
7 *Defs' Mot. to Dismiss*. Plaintiff's Response argued, in essence, that all prisoners are  
8 slaves, and thus the Fifteenth Amendment's ban on discrimination based on "prior  
9 condition of servitude" renders felon disenfranchisement unconstitutional. Defendants  
10 filed a reply on March 3, 2016, refuting Plaintiff's claims.

11 Plaintiff filed the TRO on March 1, 2016. Plaintiff seeks a preliminary injunction  
12 finding that the Defendants are violating his Fifteenth Amendment right "in restricting  
13 franchise to ex-felons." P's Mem. in Support of TRO and Prelim. Inj. ("Mem.") at 1.  
14 Plaintiff also seeks a TRO finding that "the Defendants are violating 18 U.S.C.  
15 § 1512(b)—Obstruction by Intimidation, Threats, Persuasion, or Deception" and  
16 ordering the Defendants to not physically harm the Plaintiff and refrain from obstructing  
17 his federal campaign. *Id.* at 3-4.

18 To support his claim that Defendants are violating his civil rights, Plaintiff  
19 attaches email exchanges between him and members of the Attorney General's Office  
20 ("AGO") and the Secretary's Office from February 16 to February 26, 2016. Exh. 1 to  
21 Mem. The emails demonstrate that Plaintiff began accusing Defendants and the AGO of  
22 criminal civil rights violations shortly after receiving Defendants' Motion to Dismiss.  
23 Exh. 1 at 7. Despite the increasing aggressiveness of Plaintiff's communications with  
24 both the Secretary and the AGO, *see, e.g., id.* at p. 12 ("Bad way to end a 4 month  
25 employment, but maybe being a lawyer was not for you?"), Defendants acted with  
26 professionalism toward Plaintiff, *see, e.g., id.* at 13-14.

1           **II. Plaintiff Cannot Meet the High Showing Required to Support the**  
 2           **Extreme Remedy He Seeks.**

3           Although fashioned by Plaintiff in this case as two separate forms of relief, a  
 4 request for a preliminary injunction and a request for a temporary restraining order are  
 5 judged by the same standard. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S.  
 6 1345, 1347 n.2 (1977). Preliminary injunctive relief is generally disfavored because it is  
 7 an extreme remedy. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046,  
 8 1052 (9th Cir. 2009). Such relief should only be provided on a clear showing that the  
 9 movant is entitled to the requested relief. *Id.*

10           To obtain the relief he seeks, Plaintiff bears the burden of demonstrating to the  
 11 Court that he is likely to succeed on the merits of his claim, likely to suffer irreparable  
 12 harm if the relief he seeks is not immediately granted, the balance of equities tips in his  
 13 favor, and that the injunction is in the public interest. *Winter v. Natural Res. Def.*  
 14 *Council*, 555 U.S. 7, 20 (2008). Indeed, the *possibility* of irreparable harm is  
 15 insufficient; the plaintiff must prove that irreparable harm is *likely* to prevail. *Id.* at 22.

16           **A. Plaintiff Is Unlikely to Succeed on the Merits.**

17           Not only is Plaintiff unlikely to succeed in his Fifteenth and Twenty-Sixth  
 18 Amendment claims, he fails to raise a claim in his Amended Complaint upon which  
 19 relief can be granted. For reasons fully explained in Defendants' Motion to Dismiss, and  
 20 incorporated herein by this reference, Plaintiff has raised a claim seeking the Court's  
 21 protection of a right that Plaintiff does not possess. Defs' Mot. to Dismiss at 10 (citing  
 22 *e.g., Harvey v. Brewer*, 605 F. 3d 1067, 1079 (9th Cir. 2010) (explaining that felons do  
 23 not have a constitutionally protected right to vote)). Because Plaintiff—an admitted  
 24 convicted felon—does not possess a constitutional right to vote, he cannot succeed on  
 25 the merits of the claim in his Amended Complaint. Thus, his request for a TRO barring  
 26 enforcement of A.R.S. § 16-101(A)(5) should fail on this basis alone.

1 As to the claims accusing the Secretary and the AGO of violating criminal  
 2 statutes, Plaintiff is equally likely to fail. He not only has not amended his Amended  
 3 Complaint to allege facts to support his claims of criminal violations, neither his  
 4 Memorandum nor the attached exhibit demonstrate facts that would support his claims of  
 5 criminal violations.<sup>1</sup>

6 To support his criminal allegations, Plaintiff primarily relies on an article that  
 7 reports that Matt Roberts, the Secretary's spokesman, stated that "[a]ccording to state  
 8 law, a person must be a 'qualified elector' to run for office, which means he must be  
 9 eligible to register to vote, and must be registered to vote." Mem. at 2-3 (quoting Andrea  
 10 Kelly, *1st Congressional District Candidate Might Not Qualify*, ARIZ. PUB. MEDIA (Feb.  
 11 16, 2016) [https://news.azpm.org/p/arizona-news/2016/2/16/82127-independent-](https://news.azpm.org/p/arizona-news/2016/2/16/82127-independent-candidate-in-azs-first-congressional-district-might-not-qualify/)  
 12 [candidate-in-azs-first-congressional-district-might-not-qualify/](https://news.azpm.org/p/arizona-news/2016/2/16/82127-independent-candidate-in-azs-first-congressional-district-might-not-qualify/)). Plaintiff also notes that  
 13 the article explains that the Secretary's Office does not investigate candidate eligibility  
 14 unless another person files a challenge and that Plaintiff has acknowledged that he is not  
 15 registered to vote. *Id.*<sup>2</sup> Plaintiff also relies on the email exchanges attached in exhibit 1.

16 Plaintiff asserts that Defendants violated 18 U.S.C. § 241. Mem. at 4. To prove a  
 17 conspiracy under 18 U.S.C. § 241, the Plaintiff must demonstrate that Defendants agreed  
 18 to accomplish an illegal objective and had the requisite intent necessary to commit the  
 19 underlying offense. *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003) (upholding  
 20

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21 <sup>1</sup> Plaintiff has no civil remedy for the criminal violations he alleges. *Aldabe v. Aldabe*, 616 F. 2d  
 22 1089, 1092 (9th Cir. 1980) (upholding dismissal of civil claims of violations of 18 U.S.C.  
 23 §§ 241, 242 because the criminal statutes "provide no basis for civil liability"); *Cooley v.*  
 24 *Keisling*, 45 F.Supp. 2d 818, 820 (D. Ore. 1999) (refusing to allow civil claims for alleged  
 violations of 18 U.S.C. § 245); *Rowland v. Prudential Fin. Inc.*, 362 F.App'x. 596, 596-97 (9th  
 25 Cir. 2010) (mem.) (affirming decision dismissing 18 U.S.C. § 1512 claims for failure to state a  
 26 proper basis for civil liability).

25 <sup>2</sup> As part of his request for relief, Plaintiff correctly cites *Schaefer v. Townsend*, 215 F.3d 1031  
 26 (9th Cir. 2000) for the proposition that the substantive requirements for a congressional  
 27 candidate are limited to the requirements found in the U.S. Constitution. Mem. at 3. However,  
 28 Plaintiff has not claimed that the Arizona law requiring candidates for federal office to be  
 qualified electors is unconstitutional. Because Plaintiff has no claim regarding this request,  
 Defendants do not substantively address it here. Nevertheless, because Defendant's attorneys  
 have a duty of candor to the Court, they acknowledge Plaintiff is not barred from federal  
 candidacy solely due to his status as a convicted felon.

1 conspiracy conviction of a non-member of the Ku Klux Klan when co-conspirator was  
2 seen wielding a weapon and searching a park with other KKK members and yelling  
3 racial slurs at minorities found in the park); *United States v. Skillman*, 922 F.2d 1370,  
4 1373 (9th Cir. 1990) (finding a conspiracy when defendant built a cross, rode on a  
5 bicycle with a co-conspirator to the home of an African-American family, lit the cross  
6 and watched it burn in the family's front yard). Plaintiff does not demonstrate that  
7 Defendants agreed to intentionally accomplish an illegal objective or that Defendants  
8 willfully sought to deprive him of his rights. Indeed, the exhibit Plaintiff attached to the  
9 Memorandum demonstrates that Defendants have treated Plaintiff fairly, with due regard  
10 to his rights.

11 Plaintiff also asserts that Defendants violated 18 U.S.C § 242, a claim that  
12 Plaintiff cannot support. Section 242 allows for criminal charges to be brought against a  
13 Defendant who, under color of law, "willfully subjects any person . . . to the deprivation  
14 of any rights . . . by reason of his color, or race." *See, e.g., Reitman v. Mulkey*, 387 U.S.  
15 369, 380-81 (1967) (regarding a state law authorizing racial discrimination in the  
16 housing market). This criminal statute does not provide any relief to Plaintiff, a private  
17 litigant. *Allen v. Gold Country Casino*, 464 F.3d 1033, 1048 (9th Cir. 2006) (affirming  
18 the dismissal of a § 242 claim because it is a criminal statute, not an avenue to enforce  
19 civil liability). Moreover, Plaintiff has not submitted any fact supporting a claim that his  
20 rights are being willfully violated by any of the Defendants. At best, Plaintiff has  
21 demonstrated that Roberts made a single statement summarizing Arizona law requiring  
22 candidates to be qualified electors to the press, along with an explanation that no  
23 enforcement activity can be independently brought by the Secretary. This simply does  
24 not rise to the level of a willful, criminal violation of Plaintiff's civil rights. *See, e.g.,*  
25 *Koon v. United States*, 518 U.S. 81, 86-87 (1996) (reviewing sentencing of officers  
26 convicted of § 242 charges for beating Rodney King, continuing to stomp on King's  
27 back and neck after he lay prone and unresponsive); *United States v. Reese*, 2 F.3d 870,

1 878 (9th Cir. 1993) (outlining various offenses by arresting officers, including planting  
 2 cocaine on a suspect, taking money recovered during arrests, and choking multiple  
 3 suspects without provocation).

4 Plaintiff also asserts that Defendants violated 18 U.S.C. § 245(b)(1)(A), which  
 5 requires the Plaintiff to show that Defendants acted by “force or threat of force.” *See,*  
 6 *e.g., United States v. Allen*, 341 F.3d 870, 896 (9th Cir. 2003). But Plaintiff does not  
 7 allege any force or threat of force was used against him. Rather, the exhibit Plaintiff  
 8 attached to his memorandum demonstrates the exact opposite; that he was consistently  
 9 treated with respect and courtesy by Defendants while he continued to make unfounded  
 10 allegations, demand resignations, and insist on special treatment. Plaintiff does not  
 11 allege any facts that show that any of the Defendants willfully engaged in force or the  
 12 threat of force to injure or intimidate him out of exercising any rights. Other than  
 13 Plaintiff’s self-serving claims of “again, a threat” (Exh. 1, p. 22) in response to an email  
 14 that explicitly stated “no one at this office or the Secretary’s office has threatened you in  
 15 any way,” *id.*, he provides no facts to show that anyone acting under the Defendants’  
 16 authority threatened him in any way. Indeed, they did not.

17 Finally, Plaintiff’s claim of a violation of 18 U.S.C. § 1512(b) is frivolous.  
 18 Although Plaintiff fashions this as “Obstruction by Intimidation, Threats, Persuasion, or  
 19 Deception,” it is a witness-tampering statute. Specifically, the law states:

20 (b) Whoever knowingly uses intimidation, threatens, or corruptly  
 21 persuades another person, or attempts to do so, or engages in misleading  
 22 conduct toward another person, with intent to—(1) influence, delay, or  
 23 prevent the testimony of any person in an official proceeding; . . . .

24 Defendants have not used intimidation or threats to influence or otherwise  
 25 improperly interfere with any official proceeding. Rather, Plaintiff seems to  
 26 believe that Roberts’ single statement to the press, accurately describing state  
 27 law, is a violation of a federal witness-tampering statute; it is not. For these  
 28 reasons, Plaintiff cannot demonstrate that he is likely to succeed on the merits,

1 and his request for a preliminary injunction and temporary restraining order  
2 should be denied.

3 **B. Plaintiff Has Not Demonstrated a Likelihood of Irreparable Harm.**

4 Plaintiff's inability to demonstrate any cognizable harm arising from his inability  
5 to vote is linked to his inability to succeed on the merits. Because a felon has no  
6 constitutional right to vote, Plaintiff does not demonstrate a redressable harm. *See, e.g.,*  
7 *Harvey*, 605 F.3d at 1079 ("[Felon re-enfranchisement] is not a fundamental right; it is a  
8 mere benefit that (as plaintiffs admit) Arizona can choose to withhold entirely.").  
9 Instead, Plaintiff seeks the assistance of this Court to rewrite state laws barring felons  
10 from voting that have been consistently upheld by courts across the country, rather than  
11 seeking to restore his civil rights pursuant to A.R.S. § 13-909.

12 Plaintiff has not demonstrated that Defendants have interfered with his right to  
13 run as a federal candidate, assuming he meets the three requirements provided by the  
14 Constitution and the procedural requirements required of every other federal candidate in  
15 the State. As explained in the very article that Plaintiff complains about, the Secretary  
16 does not review nomination petitions, but is included in any qualification challenge  
17 raised by other candidates once nominating petitions are filed. Mem. at 3. Plaintiff has  
18 not alleged that there has been any challenge to his qualifications for office. Indeed, the  
19 first day that Plaintiff can file nomination papers with the Secretary's office is May 2,  
20 2016, and the last day is June 1, 2016. A.R.S. § 16-311(A) (requiring filing of a  
21 nomination paper "not less than ninety nor more than one hundred twenty days before  
22 the primary election."). In other words, Defendants have not taken any steps to harm  
23 Plaintiff's federal campaign, much less taken any steps that would irreparably harm his  
24 ability to run. "Speculative injury does not constitute irreparable injury sufficient to  
25 warrant granting a preliminary injunction." *Caribbean Marine Servs. Co., Inc. v.*  
26 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

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1           **C. The Balance of Equities Tips Against Plaintiff.**

2           The Court must analyze the potential for harm all parties face if the injunction is  
3 or is not granted. In this case, Plaintiff has no right to vote, and thus faces no cognizable  
4 harm. On the other hand, “a state suffers irreparable injury whenever an enactment of its  
5 people or their representatives is enjoined.” *Coal. For Econ. Equity v. Wilson*, 122 F.3d  
6 718, 719 (9th Cir. 1997). Plaintiff’s request to enjoin A.R.S. § 16-101(A)(5) shortly  
7 before an election could disrupt election procedures and therefore the balance of equities  
8 tips in favor of the State.

9           The relief Plaintiff seeks regarding the alleged criminal violations likewise tips  
10 sharply against him. Plaintiff seeks a TRO that will function as a *de facto* declaratory  
11 judgment that the Defendants have engaged in a concerted effort to deny his civil rights  
12 and are violating criminal statutes. *See* (Purposed) (*sic*) Temporary Restraining Order,  
13 Doc. 18-1. Moreover, Plaintiff’s requested relief would effectively prevent the AGO  
14 from defending the State and the Secretary, despite the AGO’s statutory and  
15 constitutional role as the attorney for both entities. A.R.S. § 41-192(A) (stating that the  
16 Attorney General serves as the chief legal officer of the State and State agencies). These  
17 are strong remedies that are simply not available as a preliminary matter when Plaintiff  
18 has not provided any evidence of witness tampering (18 U.S.C. § 1512(b)), conspiracy  
19 (18 U.S.C. § 241), or use of force to infringe upon Plaintiff’s civil rights (18 U.S.C.  
20 § 245(b)). *See Winter*, 555 U.S. at 376 (“A preliminary injunction is an extraordinary  
21 remedy never awarded as of right.”).

22           **D. The Injunction Is Not in the Public’s Best Interest.**

23           In allowing felon disenfranchisement, the Arizona Legislature has provided a  
24 clear expression of public interest—felons should be granted the right to participate in  
25 the electoral franchise under narrowly prescribed circumstances. “[T]he public clearly  
26 has an interest in the enforcement of its statutes.” *Enyart v. Nat’l Conf. of Bar Exam’rs,*  
27 *Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011); *see also Golden Gate Rest. Ass’n v. Cnty. of*  
28



1 *San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (“The public interest may be  
 2 declared in the form of a statute.”); *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943)  
 3 (“[I]t is in the public interest that federal courts of equity should exercise their  
 4 discretionary power with proper regard for the rightful independence of state  
 5 governments in carrying out their domestic policy.”). Although restrictions on the right  
 6 to vote may fairly be viewed with skepticism under certain circumstances, those  
 7 circumstances are not present here. Rather, Plaintiff seeks to litigate whether he should  
 8 be granted the right the right to vote despite his admitted status as a convicted felon, a  
 9 proposition that the Supreme Court has stated is an “obvious example” of a factor that  
 10 the State may legitimately consider in determining voter qualification. *Lassiter v.*  
 11 *Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50 (1959).

12 When a party seeks an injunction that will adversely affect the public interest,  
 13 “the court may in public interest withhold relief until a final determination of the rights  
 14 of the parties, though the postponement may be burdensome to the plaintiff.”  
 15 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (internal quotation marks  
 16 omitted). The Legislature has stated the public’s interest, and it excludes convicted  
 17 felons from re-enfranchisement unless the felon takes specific steps to qualify to vote  
 18 (which Plaintiff has not done).

19 Plaintiff’s accusations of federal criminal actions are similarly antithetical to the  
 20 public’s best interest. Plaintiff’s allegations of criminal conduct and demands for a  
 21 preliminary injunction prohibiting state action against him seeks to undermine the  
 22 electoral process and punish state employees from taking steps to carry out their duties.

23 If we expect to attract talented and well-motivated lawyers to serve the  
 24 public interest, we cannot allow them to be subject to frivolous and  
 25 vexatious litigation. Not only will these lawyers look elsewhere for  
 26 employment, but the enforcement of state laws will suffer because of  
 27 the chilling effect that such litigations will have upon those charged  
 28 with enforcement. Although this court will not hesitate to condemn  
 “overreaching” on the part of administrative agencies, we likewise will  
 not close our eyes to blatant efforts at frustrating legitimate enforcement  
 proceedings.

1 *Challenge, Inc. v. State ex rel. Corbin*, 673 P.2d 944, 950 (Ariz. App. 1983) (internal  
2 citations omitted).

3  
4 This case is not indicative of any “overreaching” on the part of the State, the  
5 Secretary, or the AGO. Rather, when faced with a frivolous lawsuit, Defendants  
6 protected the State’s interest and moved to have Plaintiff’s suit dismissed pursuant to the  
7 rules of civil procedure. In the performance of his duties, the Secretary’s spokesperson  
8 made an accurate statement of Arizona state law to the press. This is the factual  
9 foundation from which Plaintiff conjures a criminal conspiracy to obstruct his  
10 congressional run. But Plaintiff cannot point to a single action demonstrating an actual  
11 conspiracy or concrete steps taken to undermine his ability to run, because there simply  
12 are none. The preliminary relief that Plaintiff seeks would harm the public’s best interest  
13 and militate in favor of denying his request for early relief.

### 14 **III. CONCLUSION**

15 Plaintiff has not articulated any facts to reach the high bar required for  
16 preliminary equitable relief. Therefore, the Court should deny Plaintiff’s Motion for  
17 Temporary Restraining Order and Preliminary Injunctions.

18 Respectfully submitted this 17th day of March, 2016.

19 Mark Brnovich  
20 Attorney General

21 s/ Kara M. Karlson  
22 James Driscoll-MacEachron  
23 Kara M. Karlson  
24 Assistants Attorney General  
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1  
2 I certify that I electronically transmitted the attached document to the Clerk's  
3 Office using the CM/ECF System for filing and transmittal of a Notice of Electronic  
4 Filing to the following, if CM/ECF registrants, and mailed a copy of same if non-  
registrants, this 17th day of March, 2016:

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Plaintiff pro per

7 s/ Maureen Riordan

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