ARIZONA SUPREME COURT

ARIZONA REPUBLICIAN PARTY, a recognized political party; and YVONNE CAHILL, an officer and member of the Arizona Republican Party and Arizona voter and taxpayer, Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State; and STATE OF ARIZONA, a body politic, Respondents.	No. CV-22-0048-SA

BRIEF OF AMICUS CURIAE NORMAN ORNSTEIN

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INTEREST AND IDENTITY OF AMICUS

Norman Ornstein is an emeritus scholar at the American Enterprise Institute. He is a contributing editor and writer for The Atlantic. He was a political science professor at Johns Hopkins University and The Catholic University of America. He co-directed the AEI-Brookings Election Reform Project, and was a consultant to the Carter-Baker Commission on election reform.

Ornstein has dedicated much of his fifty-year career to the study and advancement of America's elections and voting systems. He is also Chairman of the Campaign Legal Center, which is a nonpartisan organization dedicated to advancing democracy through law at the national, state, and local levels.

Dr. Ornstein was a co-author of the article, John C. Fortier & Norman Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform,* 36 R. Mich. J. L. Reform 483 (2003) ("Fortier and Ornstein"). Petitioners cited this article repeatedly in their brief before this Court. Dr. Ornstein has an interest in this matter (1) because he believes that Petitioners' reliance on his article is misplaced and the Petition mischaracterizes the legal and policy issues set forth in the

article, and (2) because of his commitment to advancing each individual's ability to participate in democracy in accordance with the law.

INTRODUCTION

The Petition cites repeatedly to Fortier and Ornstein. That article presents extensive historical information regarding the origins of absentee voting in the various states. The article explains the evolution of absentee voting requirements from prior to the Civil War through the early 2000's when the article was published. The article addresses issues surrounding absentee ballots both from a legal and a policy perspective. *Id.* From a legal perspective, the article explains that the courts' treatment of challenges to absentee voting statutes have depended on the specific language in the various states' constitutions. *Id.* at 496-499, 508. Some state constitutions (unlike Arizona's) had specific language that courts found required only in-person voting. In these states, the courts struck down absentee voting statutes. *Id.* at 497-498. However, in states without explicit constitutional requirements for in-person voting (like Arizona's) the courts have rejected challenges and have left absentee voting requirements to the legislature. *Id.* at 499.

The Petition also discusses various policy concerns raised in the article. In the absence of restrictive constitutional provisions, courts have left those policy issues for legislatures – rather than the courts – to consider. That being said, in the almost 20 years that have elapsed since the Fortier and Ornstein article was published, absentee or mail-in voting has been used extensively throughout the United States, and there is no evidence pointing to any widespread problems. To the contrary, there have been far more documented problems with in-person voting, including long wait times, an inadequate number of polling places, difficulties with mobility for some voters, etc. Arizona has not been immune from these problems.[1] In the absence of a clear constitutional prohibition, the legislature has appropriately balanced the competing interests in allowing absentee voting.

[1] *See, e.g.,* Arizona Polling Places Overwhelmed With Long Lines On Primary Day**,** **https://www.npr.org/2016/03/25/471891525/arizona-polling-places-overwhelmed-with-long-lines-on-primary-day**.

ARGUMENT

I. The Arizona Constitution Does Not Contain the Type of Language that Courts have Found to be Inconsistent with Absentee Voting.

A. Courts reject challenges to absentee voting laws in the absence of explicit constitutional prohibitions.

As Petitioners note, Fortier and Ornstein's 2003 article discusses the origins of the Australian ballot system in the United States as well as the adoption of absentee and mail-in voting by almost all states. Indeed, as the article explains, many states originally adopted absentee voting statutes to allow deployed soldiers to vote during the Civil War, and several state courts considered whether these statutes were consistent with language in various state constitutions. By the time Arizona became a state, the issue of whether language in state constitutions would allow absentee voting statutes was well known. Also well known was the type of constitutional language that courts had interpreted as requiring only in-person voting.

For example, New York's Constitution stated that an elector "shall be entitled to vote at such election in the election district of which he shall at the time be a resident, *and not elsewhere*." N.Y Const. of 1846, art. II, § 1 (emphasis added), *cited in* Fortier and Ornstein at 497, n.69. In

Pennsylvania, a constitutional amendment had required voters to reside "in the election district *where he offers to vote* . . . ." Pa. Const. of 1838, art. III, § 1 (emphasis added), *cited in* Fortier and Ornstein at 497, n.73. Courts in jurisdictions with such explicit constitutional provisions held that absentee voting statutes could not be upheld absent a constitutional amendment. *See, e.g.,* Fortier and Ornstein at 508.

However, in states without such clear limiting language, courts have upheld the ability of the legislature to pass laws permitting absentee voting. For example, in *State ex rel. Chandler v. Main,* 16 Wis. 398 (1863), the court noted that its constitution did not have the same explicit restrictions found in the Pennsylvania Constitution. As the *Chandler* court explained, "[I]f the framers had intended to enact any general provision confining the right of voting to any particular place, it would naturally have been inserted as a distinct provision *in connection with the article on suffrage.*" *Id.* at 415-416 (emphasis added). In *Chandler,* as in the present case, the opponents of the absentee voting law tried to rely on Pennsylvania court decisions. The court rejected those attempts:

> [The Pennsylvania case] is based upon an express provision of their constitution, requiring a residence by the voter "in the election district where he offers to vote . . . ." We have no such clause in our constitution, and the decision is therefore inapplicable here.

Id. at 418.

Similarly, in *Lehman v. McBride,* 15 Ohio St. 573 (1863), the court rejected a challenge to that state's absentee voting law. Ohio's Constitution included many clauses similar to Arizona's constitution. *See id.* at 592-593. The challengers in *Lehman* raised concerns with the potential for the lack of secrecy, as well as fraud and coercion. *Id.* at 609. The court rejected the challenges, stating that even though such issues present serious considerations, those considerations are addressed "solely to legislative wisdom and discretion." *Id.* at 610. The court rejected the challengers' reliance on decisions from other states including Pennsylvania because Ohio's constitution did not contain the "offer to vote" language that other courts found determinative. *Id.* at 610-613.

In *Morrison v. Springer,* 15 Iowa 304, 340-342 (1863), the court rejected a challenge that relied heavily on cases from Pennsylvania, Connecticut, Louisiana, and Kentucky, holding that, in the absence of an explicit restriction such as the "offer to vote" language from Pennsylvania's constitution, the legislature has full power to enact

absentee voting legislation. The Court explained that by the time Iowa's constitution was adopted in 1857, many states had "express and clear language" prohibiting the use of absentee voting. *Id.* at 344. Because "our convention had the benefit of such provisions and rights, it is fair to presume that the same or similar language would have been used, if it had been intended to fix the same qualification." *Id.*

The same logic applies with even more force here. By the time Arizona adopted its Constitution, the type of limiting language that could be placed in state constitutions to preclude absentee voting statutes was well known. If the framers of the Arizona Constitution had intended to deny the legislature of the power to provide for absentee voting, they would have used "the same or similar language" in connection with the article on suffrage. *Id.*[2]

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[2] Citing Fortier and Ornstein, the Petition claims [at 5] that Arizona has never faced the question of the constitutionality of its absentee voting laws because of the timing of the adoption of the Arizona Constitution. To the contrary, it is much more reasonable to assume that Arizona courts have not had to directly face this question because the framers of the constitution intentionally did *not* include the type of language that courts had determined would limit the legislature's discretion to pass such laws.

B. The Arizona Constitution does not contain the type of language that precludes the legislature from enacting statutes permitting absentee voting.

Article VII of the Arizona Constitution specifically sets forth the rights and processes involved with suffrage and elections. This article has *none* of the type of language courts have found to be inconsistent with statutes permitting absentee voting.

The Secretary of State's Response Brief ably analyzes Article VII, § 1, and its clear grant of discretion to the legislature. This Amicus Brief will not repeat that analysis.

However, the Petition cites Fortier and Ornstein for the proposition that the reference to "secrecy" in Article VII, § 1 is equivalent to a command that all four elements of the Australian ballot system must be present in any statutes the legislature passes. Petition at 26-27. To the contrary, the Fortier and Ornstein article recognizes that legislatures have balanced the competing interests of expanding access to voting with issues such as secrecy. In the absence of clear language precluding absentee voting, the courts have deferred to the legislature in achieving that balance. *See* Section I(A), above, and Fortier and Ornstein at 499 & n.91.

Petitioners claim that *Miller v. Picacho Elementary Sch. Dist. No. 33,* 179 Ariz. 178, 180 (1994), supports their claim that mail-in ballots cannot be secret. But the case stands for the exact opposite proposition. There the court considered a challenge to an election after school district personnel violated mail-in voting statutes by hand delivering ballots to selected individuals' homes, and urging those selected residents to vote for an override. The court stated:

> Under the Arizona Constitution, voting is to be by secret ballot. Ariz. Const. art. VII, § 1. [*A.R.S.*] *Section 16-542(B) advances this constitutional goal by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation.*

Id. at 180 (citation omitted) (emphasis added). Thus, rather than supporting the notion that mail-in voting statutes *violate* Article VII, § 1, the court held that these statutes promote the very interest the Constitution seeks to protect. *See also Reyes v. Cuming,* 191 Ariz. 91, 93 (App. 1997) (Arizona's mail-in voting statutes "advance[] the constitutional goal of protecting a secret ballot" and "guarantee[] that the absentee ballots are being cast by the registered voters and prevent[] fraud and ballot tampering.") *citing* Ariz. Const. art. VII, § 12.

Petitioners also claim [at 34-35] that Article VII, § 2, is substantively identical to provisions in the constitutions of states, such

as Pennsylvania, that have struck down absentee voting statutes. In making this argument, Petitioners rely heavily on the word "at" in the first part of this section. *Id.* Reviewing the full text of the sentence upon which Petitioners rely reveals the paucity of this argument. Article VII, § 2(A), which deals with *the qualifications of voters rather than the method of voting,* states:

> No person shall be entitled to vote **at** any general election, or **for** any office that now is, or hereafter may be, elective by the people, or **upon** any question which may be submitted to a vote of the people, unless such person shall be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law . . . .

Ariz. Const. art VII, § 2(A) (emphasis added). Petitioners [at 34-35] provide dictionary definitions of the word "at" to mean the exact place and time. Yet it is clear from reading the entire first sentence that the prepositions "at," "for," and "upon" are all used interchangeably. Obviously, this section, read as a whole, imposes the same voter qualifications regardless of whether the voter is voting "at" a general election, "for" an elective office, and "upon" questions to be submitted to a vote of the people. The use of the word "at" simply does not support Petitioners' broad claims.

This is also made clear by looking at Arizona's first absentee voting law, passed soon after the Constitution was adopted. As the Secretary of State's Response Brief points out, Arizona adopted its first absentee voting statute in 1918. *See* 1918 Ariz. Sess. Laws ch. 11 (1st Spec. Sess.). That statute gave active military personnel the right to vote "**at such elections**" by using a mail-in ballot. *Id.* at Sections 1, 6 (emphasis added). Clearly, the legislature that drafted this statute shortly after Arizona became a state did not use the word "at" to denote an exact time and place, as Petitioners claim.[3]

Petitioners finally claim that a reference to "at the polls" in *Article IV* evidences an intent to preclude the legislature from adopting absentee or mail-in voting statutes. First, if the framers meant to preclude such legislation, one would expect that they would have limiting language in Article VII, which is the article of the constitution dealing with suffrage and elections. *See State ex rel. Chandler v. Main,* 16 Wis. at 415-16.

[3] Petitioners also claim that Article VII, § 4, which grants voters privilege from arrest while attending an election, evidences an intent to prevent the legislature from enacting vote by mail legislation. Courts have rejected similar challenges in states with substantively identical provisions. *See, e.g., Lehman,* 15 Ohio at 593.

Second, the reference in Article IV, § 1, states:

> (1) The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

It is clear that, in this section, "at the polls" is being used as a synonym for "in an election." That is, the people are reserving the rights to initiate legislation and to have the final say on statutes enacted by the legislature. There is no basis to conclude that this was meant to be a limitation on the legislature's power to control the manner in which elections are conducted. Indeed, common dictionary definitions of the word "poll" or "polls" show that the term can mean *either* an election *or* the place where people go to vote. *See, e.g.,* Collins Dictionary, available at https://www.collinsdictionary.com/us/dictionary/english/poll ("'The polls' means an election for a country's government, or the place where people go to vote in an election. *Incumbent officeholders are difficult to*

defeat at the polls. . . . .").[4] This reference to "the polls" in Article IV is far too flimsy a basis on which to invalidate a century of legislation defining the scope of absentee and mail-in voting in Arizona. *See State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020) (discussing presumption in favor of constitutionality and heavy burden that must be met before court will declare statute unconstitutional).

II. The Policy Fears Discussed in the Article Have Not Come to Fruition.

For all the reasons discussed above, in the absence of an explicit constitutional ban, courts have left it to the legislatures to balance the increased convenience and participation that comes with mail-in voting against competing policy concerns such as reduced secrecy. Since statehood, the Arizona legislatures have made that balance and adjusted

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[4] *See also* Lexico.com, powered by the Oxford English Dictionary available at https://www.lexico.com/en/definition/poll (defining "poll (often the polls)" as "The process of voting at an election. *The country went to the polls on March 10",* as the first definition, and the "places where votes are cast" as an alternative definition); Legal Information Institute, available at https://www.law.cornell.edu/wex/poll#:~:text=Primary%20tabs,the%20result%20of%20the%20voting (defining "poll" as follows: "In the legal and colloquial sense, poll is frequently used in the context of elections. In this context, poll refers to either 1) the process of voting, 2) the place where the voting is conducted, or 3) the result of the voting.").

the absentee and mail-in voting process numerous times without challenge.

The Petition cites Fortier and Ornstein numerous times regarding the concerns that must be weighed when expanding absentee and mail-in voting systems. Thus, Dr. Ornstein wishes to point out that much has changed since his article was published in 2003.[5]

First, in the past 20 years mail-in voting has been used extensively throughout much of the country. Notwithstanding the multitude of elections since that time, there is no evidence of widespread fraud with the use of such systems. Indeed, despite numerous investigations and many court cases, significant problems with mail-in voting have been exceedingly rare. In sum, the fears raised regarding coercion, fraud, and lack of secrecy have not materialized.

On the other hand, problems with in-person voting have been well documented. There have been numerous, significant instances in which voting at the polls has been difficult or impossible for some voters due to a combination of barriers such as (1) a reduction in the number of voting

[5] Indeed, Fortier and Ornstein acknowledged that at the time their article was published "there is not enough data to make definitive judgments about vote by mail." 36 R. Mich. J. L. Reform at 511.

centers or poll workers that led to extremely long lines;[6] (2) the inability to vote on a Tuesday for many working people; (3) impaired mobility; and (4) other factors having to do with health, jobs, or family that make getting to the voting centers or standing in line for hours impractical or impossible.

The question of whether expanding mail-in voting is good policy is different than the legal question of whether the Arizona Constitution allows it. To the extent that Petitioners rely on his 2003 article to raise policy concerns, Dr. Ornstein feels compelled to explain that – in light of all the evidence that has emerged over the past 20 years – it is clear that mail-in voting has led to significant positive effects without any significant negative consequences.

CONCLUSION

Dr. Ornstein respectfully urges the Court to deny the relief sought in the Petition.

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[6] *See, e.g.,* Arizona Polling Places Overwhelmed With Long Lines On Primary Day, https://www.npr.org/2016/03/25/471891525/arizona-polling-places-overwhelmed-with-long-lines-on-primary-day; *'I Refuse Not to Be Heard': Georgia in Uproar Over Voting Meltdown,* https://www.nytimes.com/2020/06/09/us/politics/atlanta-voting-georgia-primary.html.

RESPECTFULLY SUBMITTED this 16th day of March, 2022.

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

By /s/ Daniel J. Adelman
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From: Veronica Lucero
To: Danny Adelman; Alexander Kolodin; Jennifer.Wright@azag.gov; bdul@azsos.gov; Michael.Catlett@azag.gov
Subject: Re: Blanket consent for amici - AZ GOP v Hobbs
Date: Friday, March 11, 2022 11:39:13 AM

That is correct.

Kind regards,

Veronica Lucero
Attorney

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From: Danny Adelman <danny@aclpi.org>
Sent: Thursday, March 10, 2022 10:53 AM
To: Veronica Lucero <vlucero@davillierlawgroup.com>; Alexander Kolodin <akolodin@davillierlawgroup.com>; Jennifer.Wright@azag.gov <Jennifer.Wright@azag.gov>; bdul@azsos.gov <bdul@azsos.gov>; Michael.Catlett@azag.gov <Michael.Catlett@azag.gov>
Subject: Blanket consent for amici - AZ GOP v Hobbs

Hello counsel,

I received the emails below, and it seems clear to me that there is a blanket consent for amici. I just want to confirm that is the case, because Veronica had responded that Petitioners were amenable to blanket consent as long as opposing counsel is. I see from the emails below that all opposing counsel have agreed. Veronica, from the email string, am I right that you are also now good with blanket consent?

Thank you,

Danny

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From: **Catlett, Michael** <Michael.Catlett@azag.gov>
Date: Mon, Mar 7, 2022 at 6:19 PM
Subject: RE: Arizona Republican Party v. Hobbs, CV-22-0048-SA
To: Veronica Lucero <vlucero@davillierlawgroup.com>, Jon Sherman <jsherman@fairelectionscenter.org>
Cc: Arno Naeckel <anaeckel@davillierlawgroup.com>, Yuka Bacchus <ybacchus@davillierlawgroup.com>, apappas@azleg.gov <apappas@azleg.gov>, gjernigan@azleg.gov <gjernigan@azleg.gov>, Wright, Jennifer <Jennifer.Wright@azag.gov>, Dul, Sambo <bdul@azsos.gov>, Roger Strassburg <rstrassburg@davillierlawgroup.com>, Alexander Kolodin <akolodin@davillierlawgroup.com>

The State is fine with a blanket consent as well.

--------- Forwarded message ---------
From: **Bo Dul** <bdul@azsos.gov>
Date: Mon, Mar 7, 2022 at 6:55 PM
Subject: Re: Arizona Republican Party v. Hobbs, CV-22-0048-SA
To: Veronica Lucero <vlucero@davillierlawgroup.com>, Jon Sherman <jsherman@fairelectionscenter.org>, Alexander Kolodin <akolodin@davillierlawgroup.com>, Roger Strassburg <rstrassburg@davillierlawgroup.com>, Arno Naeckel <anaeckel@davillierlawgroup.com>, Yuka Bacchus <ybacchus@davillierlawgroup.com>, Jennifer.Wright@azag.gov <Jennifer.Wright@azag.gov>, gjernigan@azleg.gov <gjernigan@azleg.gov>, apappas@azleg.gov <apappas@azleg.gov>

The Secretary of State will agree to a blanket consent for all amici. Thanks, Bo

Bo Dul
Arizona Secretary of State's Office

Bo Dul
Arizona Secretary of State's Office

From: Veronica Lucero <vlucero@davillierlawgroup.com>
Sent: Monday, March 7, 2022 3:47:39 PM
To: Jon Sherman <jsherman@fairelectionscenter.org>; Alexander Kolodin

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Subject: Re: Arizona Republican Party v. Hobbs, CV-22-0048-SA

We're amenable to a blanket consent if opposing counsel is...

From: Jon Sherman <jsherman@fairelectionscenter.org>
Sent: Monday, March 7, 2022 3:42 PM
To: Alexander Kolodin <akolodin@davillierlawgroup.com>; Veronica Lucero <vlucero@davillierlawgroup.com>; Roger Strassburg <rstrassburg@davillierlawgroup.com>; Arno Naeckel <anaeckel@davillierlawgroup.com>; Yuka Bacchus <ybacchus@davillierlawgroup.com>; Dul, Sambo <bdul@azsos.gov>; Jennifer.Wright@azag.gov <Jennifer.Wright@azag.gov>; gjernigan@azleg.gov <gjernigan@azleg.gov>; apappas@azleg.gov <apappas@azleg.gov>
Subject: Re: Arizona Republican Party v. Hobbs, CV-22-0048-SA

I should have added: If there is no such agreement in place, do we have your consent to file an amicus brief? Alternatively, we could draft an agreement to provide blanket consent. Thanks.

On Mon, Mar 7, 2022 at 3:28 PM Jon Sherman <jsherman@fairelectionscenter.org> wrote:
Counsel,

We represent the League of Women Voters of Arizona, which intends to file an amicus brief in opposition to the petition for special action. Have the parties reached an agreement to afford blanket consent to all amici, or do we need to file a motion?

Thank you.

Sincerely,
Jon Sherman

--
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ARIZONA SUPREME COURT

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CERTIFICATE OF SERVICE

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I hereby certify that on March 15, 2022, Amicus Curiae, Norman Ornstein filed Brief of Amicus Curiae Norman Ornstein and served a copy of the same, via TurboCourt and email, on the following persons:

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RESPECTFULLY SUBMITTED: March 15, 2022

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

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ARIZONA SUPREME COURT

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 7(e), Ariz. R. P. Spec. Act., undersigned counsel certifies that the Brief of Amicus Curiae Norman Ornstein contains double-spaced, proportionately spaced typeface, was prepared in Century Schoolbook 14 point font, and contains 3,048 words (according to the word count feature of counsel's word processing system), and thus complies with the requirements of Rule 7(e).

RESPECTFULLY SUBMITTED this 15th day of March, 2022.

ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST

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