ARIZONA COURT OF APPEALS
DIVISION 1

No. 1 CA-CV-22-0388

Mohave County Superior Court
No. CV-2022-00594

ARIZONA REPUBLICAN PARTY,
a recognized political party; and
KELLI WARD, Chairwoman
of the Arizona Republican Party and an
Arizona voter and taxpayer;

Appellants,

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State; LARRY NOBLE, in his official capacity as RECORDER for COUNTY OF APACHE; DAVID W. STEVENS, in his official capacity as RECORDER for COUNTY OF COCHISE; PATTY HANSEN, in her official capacity as RECORDER for COUNTY OF COCONINO; SADIE JO BINGHAM, in her official capacity as RECORDER for COUNTY OF GILA; WENDY JOHN, in her official capacity as RECORDER for COUNTY OF GRAHAM; SHARIE MILHEIRO, in her official capacity as RECORDER for COUNTY OF GREENLEE; RICHARD GARCIA, in his official capacity as RECORDER for COUNTY OF LA PAZ; STEPHEN RICHER, in his official capacity as RECORDER for COUNTY OF MARICOPA; KRISTI BLAIR, in her official capacity as RECORDER for COUNTY OF MOHAVE; MICHAEL SAMPLE, his official capacity as RECORDER for COUNTY OF NAVAHO; GABRIELLA CAZARES- KELLY, in

Expedited Consideration Requested

her official capacity as RECORDER for the COUNTY OF PIMA; VIRGINIA ROSS, in her official capacity as RECORDER for COUNTY OF PINAL; Suzanne "SUZIE" SAINZ, in her official capacity as RECORDER for COUNTY OF SANTA CRUZ; LESLIE M. HOFFMAN, in her official capacity as RECORDER for COUNTY OF YAVAPAI; ROBYN STALLWORTH POUQUETTE in her official capacity as RECORDER, for the COUNTY OF YUMA;

Appellees.

THE ARIZONA DEMOCRATIC PARTY; DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; and DEMOCRATIC NATIONAL COMMITTEE;

Defendants-in-Intervention Below.

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Introduction

The Arizona Constitution prohibits the legislature from enacting laws that fail to preserve "secrecy in voting." *See* Ariz. Const. art. 7, § 1 ("All elections by the people shall be by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved.). "The ***only way*** to preserve the secrecy of the ballot is to limit access to the area around the voter." *Burson v. Freeman*, 504 U.S. 191, 207-08 (1992) (emphasis added). In 1991, the Arizona Legislature adopted a system of no-excuse mail-in voting that violates this requirement. In doing so, it exceeded its authority. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 823 (2015) ("Core aspects of the electoral process regulated by state constitutions include voting by 'ballot' or 'secret ballot[]'…. [T]he States' legislatures had no hand in making these laws and may not alter or amend them."). These laws, primarily codified at A.R.S. § 16-541 *et seq.* and titled "Early Voting," are unconstitutional and must be struck down.

As the trial court correctly held, "the framers adopted the Australian Ballot System [sometimes called the secret ballot] for elections." [IR 63 at 2] In doing so, they unequivocally prohibited the legislature from enacting any method of voting that does not preserve secrecy. Ariz. Const. art. 7, § 1. To understand why the legislature may never waive away secrecy—and to grasp that it did in fact do so in 1991—it is necessary to look back at the circumstances that prompted its adoption

in the first place and to realize that "secrecy" is not merely a private method of voting but is actually an entire system by which "***compulsory*** secrecy of voting ***is secured***." *Australian ballot system*, Ballentine's Law Dictionary (3rd ed. 2010) (emphasis added).

"Between 1888 and 1896, nearly every State adopted the secret ballot. Because voters now ***needed*** to mark their state-printed ballots ***on-site and in secret***, voting moved into a sequestered space where the voters could deliberate and make a decision in privacy." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1883 (2018) (cleaned up; emphasis added). This reform was also referred to as the "Australian ballot system." *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 356 (1997). *See also Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013) (stating that the "secret ballot" is "also known as the 'Australian ballot'" and noting that ballots cast by "voters at the polls" are classified as such).

The purpose of the Australian ballot system was to protect both voters and the election process from undue influence: "Commentators argued that it would diminish the growing evil of bribery by removing the knowledge of whether it had been successful. Another argument strongly urged in favor of the reform was that it would protect the weak and dependent against intimidation and coercion by employers and creditors." *Burson*, 504 U.S. at 203. Intimidation, coercion, or bribery

by political machines was also of concern to the Australian ballot reformers. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 488 ("City machines would often condition jobs on the submission of the proper ballot, or they might pay money for the confirmed deposit of the proper ballot.").

While "it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud," intimidation and fraud "are successful precisely because they are difficult to detect." *Burson*, 504 U.S. at 208. Thus, the U.S. Supreme Court has recognized that these reforms served an important public purpose even in the absence of empirical data on their effects. *Id*. And despite the limited direct evidence, "[f]or the most part, the Australian ballot is credited with delivering a blow against clientelism and ending direct bribery and intimidation." *Rideout v. Gardner*, 123 F. Supp. 3d 218, 225 (D.N.H. 2015) (cleaned up).

The "secret ballot" or "Australian ballot system" has four characteristics: "(1) ballots are printed and distributed at public expense; (2) ballots contain the names of all nominated candidates; (3) ballots are distributed only by election officers at the polling place; and (4) detailed provisions are made for physical arrangements to ensure secrecy when casting a vote." *Id.* at 224–25 (cleaned up). *See also Timmons*, 520 U.S. at 356 (stating the elements); *Walsh v. Operating Eng'rs, Local 12*, Civil No. 67-781-EC., 1967 U.S. Dist. LEXIS 7854, at *2 (C.D. Cal. July 24, 1967)

(distinguishing elections conducted by Australian ballot from those conducted by mail).

Some states adopted the secret ballot by statute, as did the Arizona Territory. *See* 1891 Ariz. Terr. Sess. Laws no. 64 (the "1891 Law").[1] That same year, Arizona's first constitutional convention was convened to draft a constitution (the "1891 Constitution") that would later become the basis for a failed statehood bill in Congress. Mark E. Pry, *Statehood Politics and Territorial Development: The Arizona Constitution of 1891*, 35 J. of Ariz. Hist. 397, 397 (1994).[2] The 1891 Constitution, however, gave future legislatures unfettered discretion to deviate from the requirements of the Australian or secret ballot, providing that "[t]he mode and manner of holding elections and making returns thereof shall be as they now are, or may hereafter be prescribed by law." 1891 Ariz. Const. art. 10, § 4.[3] Arizona eventually convened a new constitutional convention in 1910. The delegates to this convention adopted a new constitution (the "1912 Constitution" or "Arizona Constitution"). This statehood bid succeeded, and the 1912 Constitution became, and remains, Arizona's fundamental law.

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[1] Available at https://azmemory.azlibrary.gov/digital/collection/lawsession/id/2606/rec/2.
[2] Available at https://arizonahistoricalsociety.org/wp-content/uploads/2021/02/JAH-Statehood-Politics-and-Territorial-Development_Mark-E-Pry.pdf.
[3] Available at https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10181/.

To the permissive words of article 10, section 4 of the 1891 Constitution, the framers of the 1912 Constitution added an express restriction on legislative authority: "Provided, that secrecy in voting shall be preserved." Ariz. Const. art. 7, § 1. *See also* art. 4, pt. 1, § 1. By doing so, the framers made the elements of the Australian or secret ballot, which had been adopted by the territorial legislature in 1891, a constitutional requirement from which future legislatures would not be free to deviate. *See* John D. Leshy, *The Arizona State Constitution* 235 (2d ed. 2013) (noting that Ariz. Const. art. 7, § 1 "adopts what was known as the 'Australian' or secret ballot"). *See also* John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 68 (1988)[4] (specifying that it was the provisions of the 1891 Law that are codified in "the first section of the article on suffrage").

As the U.S. Supreme Court has stated, "the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The ***only way*** to ***preserve the secrecy of the ballot is to limit access to the area around the voter***." *Burson*, 504 U.S. at 207–08 (emphasis added). Further, to preserve secrecy in voting, this restricted zone "was open only to election officials, two 'scrutinees' for each candidate, and electors about to vote." *Id*. at 202.

Arizona eventually adopted a system of absentee voting which provided an

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[4] Available at https://repository.uchastings.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1374&context=faculty_scholarship.

alternative means by which the elderly, disabled, and others who would be absent from their precinct on election day could vote. *See, e.g.*, 1918 Ariz. Sess. Laws ch. 11 (1st Spec. Sess.)[5]; 1925 Ariz. Sess. Laws ch. 75, § 1 (Reg. Sess.)[6]. This, system, which was in place through 1991, did not clearly compromise "secrecy in voting" because it still provided for a restricted area around voters while they completed their ballots. Absentee voters were required to fill out their ballots in the presence of an election officer (or other officer authorized by law to administer oaths) who would have to sign an affidavit that they had secured such a restricted zone for the voter:

> I further certify that the affiant exhibited the enclosed ballot to me unmarked. Then, in my presence, the affiant personally and privately marked such ballot in such a manner that neither I, nor any other person, was able to see the affiant vote (or it was marked by me according to the affiant's instructions) and enclosed and sealed it in this envelope. The affiant was not solicited or advised by any person to vote for or against any candidate or measure.
>
> Signature and title of officer

A.R.S. § 16-547 (1990); 1991 Ariz. Sess. Laws vol. 1, ch. 51 § 3 (1st Reg. Sess.)[7] (in strikethrough). Thus, even though such ballots were still not cast "at the polls," it is difficult to say that this system was clearly unconstitutional given the decision in *Burson v. Freeman*.

[5] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/73.
[6] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/24.
[7] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/14/rec/4.

In contrast, Arizona's current system of no-excuse mail-in voting, first adopted in 1991, neither abides by the fourth requirement of the Australian ballot system (ballots distributed by public officials ***at polling places***) nor provides for the securing of a restricted zone around the voter by an election officer. It is therefore plainly and necessarily in conflict with the Arizona Constitution. However, though the trial court acknowledged that the 1912 Constitution "adopted the Australian Ballot System for elections" [IR at 2], it declined to hold that the post-1991 system was unconstitutional.

Arizona's post-1991 system of no-excuse mail-in voting not only fails to require voters to vote at designated polling places but also fails even to provide for the securing of a restricted zone around voters while they complete their ballots. Therefore, as a matter of law, no-excuse mail-in voting directly conflicts with the Australian ballot system and the Arizona Constitution. In holding otherwise, the trial court erred. This appeal from the denial of preliminary and permanent declaratory and injunctive relief follows.

Statement of the Case[8]

Earlier this year, the AZGOP petitioned the Arizona Supreme Court to accept original jurisdiction over a special action against the Arizona Secretary of State (the

[8] Appellants, as the parties taking this appeal, do not extensively address the rulings below in their favor. If they are challenged, Appellants will do so on reply.

"Secretary") and the State of Arizona. [IR 1 at 9 ¶ 24.] This petition raised the claim, among others, that Arizona's current system of no-excuse mail-in voting, adopted in 1991, is contrary to the requirements of the Arizona Constitution, including the directive that secrecy in voting be preserved. [*Id.*]

The Arizona Attorney General filed a response to the petition stating that "the Application raises important questions about the constitutionality of the early-voting system in Arizona" but claiming that relief could not be granted on the procedural grounds that the Arizona Supreme Court does not have original jurisdiction over the State. [*Id.* ¶ 25.] The Court agreed that it could not exercise original (as opposed to appellate) jurisdiction over the State and, on that ground alone, directed the AZGOP to refile its constitutional claim in Superior Court. [*Id.* at 9–10 ¶ 26.] Plaintiffs subsequently did so after refining their case by, among other things, (1) limiting their challenge to the post-1991 system and not all absentee voting, (2) naming the relevant election officials from every county, and (3) performing additional research which revealed that the Arizona Territorial Legislature defined secrecy in voting by statute in 1891 and that the framers of the Arizona Constitution intended to restrict the ability of future legislatures to deviate from the conception of "secrecy in voting" reflected in this statute.

Plaintiffs filed their Verified Complaint and Application for Order to Show Cause in Mohave County Superior Court on May 17, 2022, challenging Arizona's

"no-excuse mail-in system" of voting enacted by the legislature in 1991 and seeking (1) a declaration that Arizona's post-1991 system of voting is contrary to the Arizona Constitution, (2) preliminary and permanent injunctive relief enjoining Arizona election officials from executing unconstitutional voting provisions in the 2022 general election and all future elections, (3) alternative relief and other proper and just relief, and (4) attorney fees and costs. [IR 1 at 48:18–49:14.] Plaintiffs then filed a Motion for Preliminary Injunction on May 20, 2022, seeking to enjoin election officials from executing unconstitutional voting provisions in the upcoming 2022 general election. [IR 5.] On May 21, Plaintiffs and the State of Arizona entered into a Rule 80 Agreement whereby Plaintiffs agreed to dismiss the State of Arizona without prejudice, and the State of Arizona agreed to abide by the outcome of the litigation, including any appeal. [IR 9.] The Yavapai County Recorder filed a Notice of Appearance on May 24, 2022. [IR 11.] The Mohave County Recorder filed an Answer on May 25, 2022, declaring herself to be a nominal party. [IR 32.] The Maricopa County Attorney's Office filed a Notice of Appearance for the other thirteen county recorders on May 27, 2022, in which Recorders Noble, Stevens, John, Ross, Sainz, and Howard declared their intention not to take an active part in the defense and to participate in the action as nominal defendants only. [IR 43.] The

Secretary also filed her notice of appearance on May 27. [IR 44.][9]

After briefing, a hearing on Plaintiffs' Order to Show Cause was held on June 3, 2022. At the hearing, the trial court ruled that all evidence offered by all parties was admitted and would be considered. [*See* Tr. of Hearing on Order to Show Cause, June 3, 2022, at 15–16 ("OSC Tr.") (APP000001)]. On June 6, the trial court issued a Ruling in which it rejected all procedural defenses raised by Defendants. Particularly, the court found that Plaintiffs had standing to bring this challenge under the Arizona Declaratory Judgment Act, that *laches* did not apply because it was not "dilatory to bring this case to the Superior Court in late May of an election year" and that *Purcell* did not apply as this was a state court case. [IR 63 at 2.] The Court stated that there was only one issue in the case: "Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting?" (underscore in original). [*Id*.] However, despite finding that the framers of the 1912 Constitution "adopted the Australian Ballot System for elections" [*id.*], the court concluded that the legislature is not prohibited from enacting such laws [*id*. at 4]. In doing so, the trial court erred because no-excuse mail-in voting necessarily conflicts with the Australian ballot system as a matter of law.

[9] On May 26, the Arizona Democratic Party, Democratic Senatorial Campaign Committee, and Democratic National Committee filed a Motion to Intervene [IR 34] and a Proposed Answer-in-Intervention [IR 35]. The trial court granted the Motion to Intervene. [IR 46.]

Final judgment was entered on June 9, denying all preliminary and permanent relief requested by Plaintiffs [IR 65], and Plaintiffs filed their Notice of Appeal on June 15 [IR 66]. For the avoidance of doubt, this is an appeal from the denial of all forms of relief requested, both preliminary and permanent in nature.

Statement of the Issues

1. The trial court found that the framers of the Arizona Constitution "adopted the Australian Ballot System for elections." [IR 63 at 2.] The Australian ballot system requires that voting take place at the polls or, at the very least, that voters fill out their ballots in a restricted zone such that compulsory secrecy is preserved. Arizona's post-1991 system of no-excuse mail-in voting does not require either. Did the trial court therefore err in finding that Arizona's system of no-excuse mail-in voting is constitutional?
2. If no-excuse mail-in voting is unconstitutional, did the trial court err in failing to grant Plaintiffs' request for a preliminary injunction as well as the other forms of relief sought?

Statement of Facts

The framers of the Arizona Constitution "adopted the Australian Ballot System for elections." [IR 63 at 2.] The Australian ballot system requires voters to go to a polling pace, fill out their ballot in a private booth, and turn it back in "exactly the same way voters do today ***if they go to their polling place***." [*Id*. (emphasis

added).]

"No-excuse mail-in voting was approved by the Arizona legislature in 1991 and became effective on January 1, 1992." [*Id*. at 3.] "This process is codified in A.R.S. §§ 16-541*, et seq*." [*Id*. at 3.] "This change in law was approved by the legislature and signed by the Governor." [*Id*.] Early voting begins for the 2022 general election on October 12, 2022.[10] The timing of Appellants' suit is not dilatory. [*Id*. at 2.]

Prior to the adoption of no-excuse mail-in voting in 1991, in-person voting at the polls on election day remained the default. [IR 1 at 40 ¶ 166.][11] Now it is the rule, with 89% of Arizona voters casting ballots by mail in the most recent 2020 general election. [*Id.* ¶ 167. *See also* IR 63 at 4.]

Argument

I. The trial court erred because Arizona's current system of no-excuse mail-in voting does not preserve "secrecy in voting," which renders it unconstitutional.

A. The origins of the "Australian ballot"

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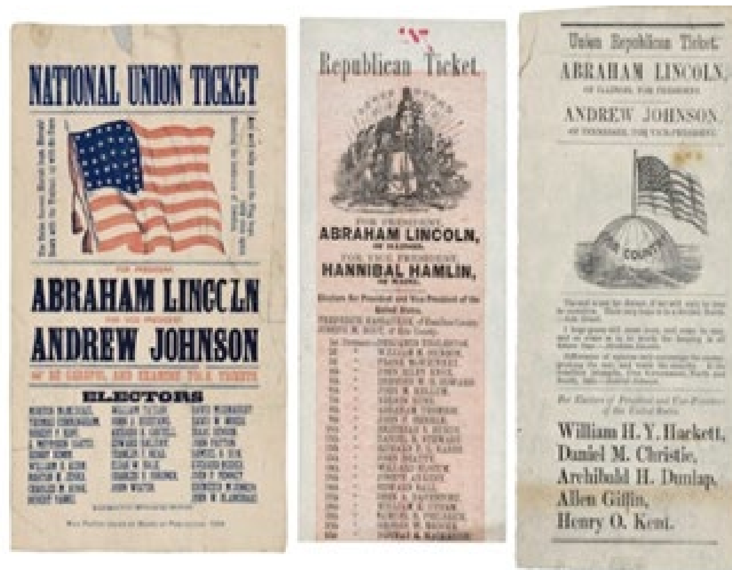
[10] *See* Ariz. Sec'y of State, *Elections Calendar & Upcoming Events, 2022 Elections*, https://azsos.gov/elections/elections-calendar-upcoming-events.

[11] *See also* John C. Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* (2006), available at https://www.aei.org/wp-content/uploads/2014/06/-absentee-and-early-voting_155531845547.pdf. Nationally, early voting has risen "from about 5 percent of votes cast in 1980 to over 20 percent in 2004." *Id.* at 63. In Arizona, most "early voting" is done by mail or by drop-off, *id.* at 87, and reached 40.8 percent by 2004, *id.* at 83, twelve years after the no-excuse mail-in voting statutes became effective in 1992.

Historically, voting in the U.S. was by voice or party ballots supplied by political parties. *See, e.g.*, *Burson*, 504 U.S. at 200–01. These practices were rife with opportunities for domination by others of the voters' free and unfettered decision-making—abuses that would inspire the reforms known as the "Australian ballot" adopted by the framers of the Arizona Constitution. Voice voting was vulnerable to targeted rewards for correct voting and credible threats of retaliation for "incorrect" voting because there was no secrecy or privacy to shield the voters' free choice from the prying eyes of others.

Party tickets had the same vulnerabilities as voice voting to rewards and retaliations corrupting the voters' individual, free choices. They were supplied by political parties and had contrasting colors so that it was simply a matter of observation to know which ballot the voter slipped in the box, as shown in the images



Party tickets for the Republican/National Union party and candidate Abraham Lincoln in the elections of 1860 and 1864.*(Library of Congress)*

from the elections of 1860 and 1864 involving Abraham Lincoln. There was no secrecy and thus ample opportunity for a voter's choices to be influenced by promises of rewards or fears of retaliation for voting deemed "incorrect" by others—employers, guilds, or trade associations.

Pressure for reform focused on adoption of the secret ballot and was widespread throughout the democratic world. In 1842 in England, the "Chartist" reform movement presented Parliament with the so-called "Peoples' Charter," a petition for reforms signed by an estimated 3.3 million working men and women (about a third of the adult population) that demanded (among other things) the right to vote in secret by a private ballot. Another 30 years would pass before the entrenched interests in Parliament would enact the Ballot Act of 1872 implementing that reform. J. Johnson, *Should Secret Voting Be Mandatory?*, ch. 2 (2020).

The United States also endured the same voting corruptions as its former mother country. Historians have vividly described the corruption that infested voting in the U.S. prior to the adoption of the Australian ballot reforms:

> For many men…the act of voting was a social transaction in which they handed in a party ticket in return for a glass of whiskey, a pair of boots, or a small amount of money…Other men came to the polls with friends and relatives…these friends and relatives pressured, cajoled, and otherwise persuaded these men to vote a particular ticket…In other cases, fathers and brothers threatened 'trouble in the family' if their sons and siblings voted wrong. In addition, men belonging to ethnic and religious communities monitored their fellow countrymen and coreligionists with social ostracism serving as the penalty for transgressing party lines. Some employers, particularly landlords and

> farmers, watched how their employees voted, exploiting the asymmetries in their economic relationship…The American polling place was thus a kind of sorcerer's workshop in which the minions of opposing parties turned money into whiskey and whiskey into votes. This alchemy transformed the great political economic interests of the nation, commanded by those with money, into the prevailing currency of the democratic masses. Whiskey, it seems, bought as many, and perhaps far more, votes than the planks in party platforms.

R. Bensel, *The American Ballot Box: Law, Identity, and the Polling Place in the Mid-Nineteenth Century*, 17 Stud. in Am. Pol. Dev. 1, 24 (Dec. 11, 2003).[12] *See also*, J. Johnson, *supra*.

In the mid-1850s, Australia adopted a mechanism to protect voters from domination by others in voting. The key centerpiece to protect voters from rewards or retaliation in exercising their right to vote was the secret ballot supplied by the public fisc and voted in private at polling places.

In *Burson v. Freeman*, the Supreme Court described voter privacy through secrecy as the means adopted historically to prevent voter fraud and coercion:

> [A]n examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a ***secret ballot secured in part by a restricted zone around the voting compartments***. We find that this widespread and time tested consensus demonstrates that some

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[12] Available at https://www.cambridge.org/core/journals/studies-in-american-political-development/article/abs/american-ballot-box-law-identity-and-the-polling-place-in-the-midnineteenth-century/2B09AD4E4C280D6D30CAB409D0F45F43.

> restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

504 U.S. at 206 (emphasis added).[13]

Voting in this country has long been subject to coercion from powerful interests—corruption that voter secrecy and private polling places were adopted in later years to prevent. Reportedly, in 1864, when Republican Senator Edwin D. Morgan of New York informed President Lincoln's Secretary of War, Edwin Stanton, that a number of quartermaster clerks had endorsed Gen. George B. McClellan for president, Stanton fired twenty of them. When one of the clerks protested, Stanton replied, "When a young man receives his pay from an administration and spends his evenings denouncing it in offensive terms, he cannot be surprised if the administration prefers a friend on the job." *See* Jonathan W. White, *How Lincoln Won the Soldier Vote*, N.Y. Times (Nov. 7, 2014).[14]

Things came to a head in the fall-out from the controversial presidential election of 1888, between Benjamin Harrison (R-Ind.), who lost the popular vote but prevailed in the College, and Grover Cleveland (D-N.Y.). During the runup to the voting, a certain Harrison operative, former U.S. Marshall William W. Dudley, then

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[13] In upholding a Tennessee statute requiring a 100-foot electioneering-free zone around polling places, the court held that securing the right to vote freely for candidates is a compelling interest of the state. *Id.* at 208.

[14] Available at http://opinionator.blogs.nytimes.com/2014/11/07/how-lincoln-won-the-soldier-vote/.

Treasurer of the Republican National Committee, started a massive vote-buying campaign focused on Indiana, a key state. Dudley issued a circular on Republican National Committee letterhead, instructing local leaders in Indiana, "Divide the floaters [persons known to sell their votes] into blocks of five, and put a trusted man with necessary funds in charge," to "make him responsible that none get away and all vote our ticket." Trevor Parry-Giles, *1888-Voter Tickets-Ryan Castle*, Presidential Campaign Rhetoric (Apr. 22, 2011).[15]

Leaks to the press followed galore. The hue and cry that followed resulted in widespread adoption of the Australian reforms. *See Timmons*, 520 U.S. at 356 ("[A]fter the 1888 presidential election, which was widely regarded as having been plagued by fraud, many States moved to the 'Australian ballot system.' Under that system, an official ballot, containing the names of all the candidates legally nominated by all the parties, was printed at public expense and distributed by public officials at polling places."). A primary purpose of these reforms was, simply put, to render bad actors unable to determine the effectiveness of bribery and intimidation. *Burson*, 504 U.S. at 203.

By 1896 almost all the states in the U.S. had adopted the Australian ballot. "It was precisely ***discontent over the non-secret nature of ballot voting***, and the abuses

[15] Available at https://campaignrhetoric.wordpress.com/2011/04/22/1888-voter-tickets-ryan-castle/.

that produced, which led to the States' adoption of the Australian secret ballot. New York and Massachusetts began that movement in 1888, and almost 90 percent of the States had followed suit by 1896." *Doe v. Reed*, 561 U.S. 186 (2010) (Scalia, J. concurring) (emphasis added).

Arizona, too, was caught up in the progressive political movement that swept the country in the early 1900s when Arizona's constitution was drafted and adopted. Popular sovereignty through the electoral process has been described as the "most constant thread running through the Arizona Constitution" with its "emphasis on democracy—popular control through the electoral process." Leshy, *Making*, *supra* 59. In the early 1900s, the commitment to democracy has been described as "semantic magic" in the sense that, "One argued for or against anything on the grounds that it did or did not represent the truly democratic way." *Id*. Accordingly, the Arizona Constitutional Convention adopted the "best known" of the progressive innovations: initiative, referendum, and recall, all intended to strengthen popular sovereignty by the electoral process. *Id*.

As described below, Arizona would adopt the Australian ballot system with the intent to guarantee voters would be free from outside influences in exercising electoral decision-making.

B. The framers of the Arizona Constitution, distrustful of corporate power and political machines, constitutionally mandate voting by Australian ballot.

The framers of Arizona's progressive-era constitution were deeply concerned

with limiting the political influence and power of corporations and political machines over the democratic process. *See Ariz. Corp. Comm'n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 290–92 (1992). *See also* Ariz. Const. art. 15 (establishing the Arizona Corporation Commission); Leshy, *supra* 356 (Arizona Constitution reflects a "pronounced, progressive-era concern with regulating corporations, a concern enhanced by the perceived dominance of large railroad and mining companies during the territorial era.").

One convention delegate "reflected the prevailing attitude" when he announced that he was "not opposed to anything that will restrict…corporations all we possibly can." Leshy, *Making*, *supra* 89. Another delegate, Michael Cunniff, opined that "in almost every state…corporations have altogether too much influence in the state's direction and control" and noted that Arizona had a poor national reputation stemming from what he saw as its overly light governance of corporations. *Id.* at 89–90. To make the point clear, the framers of the Arizona Constitution included a provision "broadly proscribing corporate influence on 'any election or official action.'" *Id.* at 91 (citing Ariz. Const. art. 14, § 18). They also enshrined direct primary elections into the Arizona Constitution to limit the influence of political machines. *Id.* at 62. Accordingly, the framers adopted safeguards in the Arizona Constitution requiring voters to cast their ballot in secret so that employers or "party machines" might not require or induce voters to show

them their ballots to ensure fidelity to corporate interests or the party line.

The Arizona Constitution is the carefully thought-out product of the national movement at the turn of the century—resulting in antitrust measures like the Sherman Act—that also sought to prevent large concentrations of wealth in big corporations and big trusts from exercising their disproportionate economic power to corrupt voting by dictating electoral choices to their thousands of employees. The solution embraced by Arizona, and a number of states and nations the world over like Australia, was to adopt constitutional requirements to guarantee voters' electoral choices of candidates would be unfettered by external influences like their employers' power to coerce outcomes.

The Australian system of voting contained four essential provisions: (a) ballots printed and distributed at public expense; (b) ballots containing the names of all the candidates duly nominated by law (a "blanket ballot"); (c) ballots distributed "only by election officers ***at the polling place***"; and (d) detailed provisions for "physical arrangements ***to ensure secrecy in casting the vote***." Fortier & Ornstein, *supra* 488 (emphasis added).

As early as 1887, the territorial legislature had made an early attempt to limit undue influence on voters "by making it illegal to furnish alcohol or any 'entertainment' whenever an election was in progress." Leshy, *Making*, *supra* 65. Two decades later, the legislature had passed a law that required a literacy test for

all voters. *Id.* at 20. Emphasizing that vote-buying was of significant concern in Arizona's final days as a territory, Senator Frazer noted that the legislature "doubtless" passed this law because of the fear that, otherwise, illiterate railroad workers "who are subject to the influences of money and other improper influences in elections…could be influenced by corrupt men to vote in the elections of Arizona." 45 Cong. Rec. 8232 (1910).[16]

In 1891, the Arizona voters ratified a draft constitution. Congress, however, rejected the document. Also in 1891, the territorial legislature adopted the Australian ballot for the first time with the passage of Arizona Territory Session Laws number 64 (the "1891 Law"). Leshy, *Making*, *supra* 68 (citing 1891 Ariz. Terr. Sess. Laws no. 64, §§ 26, 32 at 71, 73). *See also Timmons*, 520 U.S. 351 (widespread adoption of the Australian ballot system began after the 1888 presidential election). The 1891 Law, just like the Arizona Constitution would later do, prescribed a form of official ballot. Official ballots were to be prepared and distributed at public expense and obtainable by voters only at polling places only from election officers. 1891 Ariz. Terr. Sess. Laws no. 64, §§ 1, 15, 21, 25, 36.

Article 7, section 1 ("secrecy in voting") was meant to reflect that the essential provisions of the 1891 Law (i.e., the use of the Australian ballot system) were

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[16] Available at https://www.congress.gov/bound-congressional-record/1910/06/16/45/senate-section/article/8213-8246?s=5&r=93.

constitutionally required. *See* Leshy, *supra* 235 (Article 7, section 1 "adopts what was known as the 'Australian' or secret ballot…that had been approved by the territorial legislature…20 years before statehood."); Leshy, *Making*, *supra* 68 (specifying that it was the 1891 Law that the constitutional convention "made the first section of the article on suffrage.") The 1891 Law was entitled "An Act: To Promote Purity of Elections, ***Secure Secrecy of the Ballot*** and to Provide for the Printing and Distribution of Ballots at Public Expense." 1891 Ariz. Terr. Sess. Laws no. 64 (emphasis added).

What the 1891 Law meant by ballot secrecy was this. Election officials were to set up polling stations and private voting booths. *Id*. § 24. They were to erect guard rails around the voting booths that prevented any person from approaching within six feet of the booths or ballots. *Id*. Unvoted ballots were at all times to be within the clear view of the public. *Id*. § 25. Upon receiving their ballots, voters were to "forthwith and without leaving the polling place or going outside of said guard rail, retire alone to one of the booths or compartments not occupied by any other person" and vote. *Id*. § 26. Before leaving the voting booth, the voter was required to "fold his ballot lengthwise and crosswise, but in such a way that the contents of the ballot shall be concealed and the stub can be removed without exposing any of the contents of the ballot, and shall keep the same as folded until he has delivered the same to the election officers." Election officials were to ensure that spoiled ballots and ballots

not distributed to voters were "secured in sealed packages and returned to the Board of Supervisors, town, city or village Recorders or Clerks from whom originally received." *Id*. § 27.

Voters were not, on pain of criminal penalty, to show their ballots to any other person. *Id*. §§ 32, 36. And no person was to attempt to influence any voter's selection in any way within the polls themselves, on pain of criminal penalty. *Id*. § 32. No person, except an "inspector of election" was to receive from a voter a ballot prepared for voting. *Id*. § 36. Similarly, no voter was to "receive an official ballot from any person other than one of the ballot clerks having charge of the ballots," and no person "other than such ballot clerk" was to "deliver an official ballot to such voter." *Id*. § 74. And on one point, the 1891 Law was exceedingly clear: "***No person shall take or remove any ballot from the polling place before the close of the polls.***" *Id*. § 27 (emphasis added).

Arizona held another constitutional convention in 1910. The constitution resulting from that convention was ratified in 1912. Article 10, section 4 of the 1891 Constitution had provided that "The mode and manner of holding elections and making returns thereof shall be as they now are, or may hereafter be prescribed by law." To this provision, the 1912 Constitution adds the key qualifier "***Provided, that secrecy in voting shall be preserved***." Ariz. Const. art. 7, § 1 (emphasis added). In other words, the secrecy provisions of the 1891 Law—to "Secure Secrecy of the

Ballot," which enshrined the four requirements of the Australian ballot system into law—were not to be substantively deviated from by future legislatures.

Arizona's first state legislature, which met the year that our state constitution was ratified, demonstrated that concerns about voters being unduly influenced outside of the polls were still prevalent in 1912. *See, e.g.*, 1912 Ariz. Sess. Laws ch. 84, § 33 (Spec. Sess.)[17] (prohibiting the offering to voters of "any money, intoxicating liquor, or other thing of value, either to influence his vote or to be used, or under the pretense of being used, to procure the vote of any person or persons, or to be used at any polls, or other place prior to or on the day of a primary election."). *See also id.* at § 15 (prohibiting election officers from attempting to electioneerer or influence the votes of disabled voters whom they assisted in marking their ballots). Accordingly, the Arizona Constitution requires that voting take place at the polls—not at the voter's kitchen table at home before mailing, or anywhere else for that matter—unless a restricted zone is secured around the voter.

The Arizona Constitution requires expressly that ballots are to be provided "***at*** the next regular general election"[18] in "such manner that the electors may express ***at the polls*** their approval or disapproval of [a] measure." Ariz. Const. art. 4, §1(10)

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[17] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/42/rec/1.
[18] Therefore, as discussed more fully below, this provision applies to all general election ballots.

(emphasis added). The Arizona Constitution repeats its requirement that voting is to take place "at the polls" in three other places in article 4, section 1. *See id*. at (1), (3), & (15). Additional constitutional provisions, discussed more fully below, further support the proposition that in-person voting at the polls is currently the only constitutionally permissible manner of voting (given that secrecy is not preserved by the current "Early Voting" statutory scheme).

The Arizona Supreme Court found this to be obvious in 1913, the year after the constitution was ratified: "[The people] are entitled to be heard in the proper manner, time, and place. The manner in which they are to be heard is by their votes, ***the place is at the 'polls,'*** and the time is at the 'next regular general election.'" *Allen v. State*, 14 Ariz. 458, 460 (1913) (emphasis added). The Court then reiterated, "We thus find that the people, who are the source of all power, in a proper manner, by their votes, ***at a proper place, at the polls***, and at a proper time, a general election, have registered the public will…." *Id.* at 464 (emphasis added). And in 1917, the Arizona Supreme Court made clear that the Australian ballot meant that voters not only had the right but also the obligation to mark ballots secretly—voters could not be assisted by anyone without compromising the secrecy of their ballots, and thus the Australian ballot system itself, even if voters asked for such help. *Hunt v. Campbell*, 19 Ariz. 254, 282–83 (1917).

Remarkably, even after 131 years, Arizona's statutory provisions regarding

the conduct of voting at the polls, on election day, are still every bit as strict as they were in 1891—in some ways even stricter. For example, it remains a crime for voters to remove their own ballots from the polls and is now a crime for them even to photograph it, lest it be shown to others. A.R.S. §§ 16-1018 (2), (3), (9). Whereas in 1891 it was merely a crime to try to influence a voter within the polling place itself, it is now a crime to attempt to do so even within 75 feet of the polling place. A.R.S. § 16-515 (A), (F), (I).

Yet these restrictions are now vestigial in light of Arizona's implementation, and repeated expansion, of no-excuse mail-in voting. It is simply absurd to prohibit electioneering within seventy-five feet of a polling place while allowing it at the door of an early voter's home, to prevent voters from removing their own ballots from the polls while permitting early voters to fill out their ballots at a political rally. Though strictly enforced by election officials and the threat of incarceration in the vicinity of the polls, these prohibitions do little meaningful work to secure the voting process against undue influence when the vast majority of voting takes place elsewhere.

Courts weighing in on the issue around the time of statehood, of course, recognized the absurdity of construing the Australian ballot as something that could be waived by the voter. For example, in 1917, in examining the issue of whether the principles of the Australian ballot were discretionary or mandatory, the District

Court of Alaska inquired, "What was the cause of the legislation? What evil was there to be remedied? How was it sought to remedy it?" *Terr. ex rel. Sulzer v. Canvassing Bd.*, No. 1593-A, 1917 U.S. Dist. LEXIS 1509, *18 (D. Alaska, Mar. 20, 1917). The court then proceeded to answer:

> The system of voting which prevailed in this country before the introduction of the Australian ballot was fairly alive with opportunities for the grossest frauds, and those opportunities were too often improved by ardent partisans or skillful and designing manipulators…. All too often the political boss, the interested employer, the bribe giver, or others wielding sinister influence, were able to enforce their will upon weak or needy voters, and to easily ascertain whom among their henchmen or dependents to reward and whom to punish.

Id. at *18–19. The court went on to conclude, "These being the evils of the old system sought to be remedied…it is idle to say that [the Australian ballot system's] essential terms are not mandatory, but are only directory. ***The official ballot and the secret booth are the very essence of the system; they are the things that make the remedy truly a remedy; without them the evil sought to be remedied is not remedied***." *Id*. at *20 (emphasis added). The same year, our state supreme court adopted similar reasoning, stating "If the voter is not held to a substantial compliance with the directions of the [1891 Law] in the expression of his choice of candidates, the spirit of the Australian ballot system is ignored. We might as well return to the old system of haphazard voting in vogue before this innovation, and to remedy the many evils of which, the new system was inaugurated." *Hunt*, 19 Ariz. at 282.

Although litigants have challenged various mail-in voting statutes on other

grounds, the statutory scheme itself has never been directly challenged on state constitutional grounds or directly authorized by constitutional amendment. In this, Arizona is unlike many other states. *See, e.g.*, *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Chase v. Miller*, 41 Pa. 403 (1862); *Clark v. Nash*, 192 Ky. 594 (1921); *In re Contested Election*, 281 Pa. 131 (1924); *Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936); *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936) (successful constitutional challenges to absentee voting in other states). *See also* Fortier & Ornstein, *supra* at 496–500, 506–08 (explaining that several states amended their constitutions throughout the 1800s (before Arizona became a state in 1912) to expressly authorize mail-in voting, first for soldiers and again during the early 1900s in response to further constitutional challenges to expansions of absentee voting).

Indeed, just this year, a Pennsylvania appellate court struck down that state's no-excuse mail-in voting system under the Pennsylvania Constitution, though it, unlike Arizona's constitution, has been amended several times to authorize limited mail-in voting. *See McLinko v. Commonwealth*, 270 A.3d 1243 (Pa. Commw. Ct. 2022) (review pending). As further detailed below, the Arizona Constitution plainly provides that no-excuse mail-in voting as currently configured is unlawful and must be struck down.

C. Arizona's system of no-excuse mail-in voting is unconstitutional on its face.

Arizona's system of no-excuse mail-in voting is unconstitutional on its face because it directly conflicts with the express requirements of several provisions of the Arizona Constitution. States first attempted to utilize mail-in voting during the Civil War. Both then and afterwards, in states whose constitutions "explicitly or implicitly" required voting "at a local polling station," the courts struck down such legislation unless proponents of mail-in voting recognized the conflict and appropriately amended their state constitutions. Fortier & Ornstein, *supra* at 497–99, 506–08. State constitutions "explicitly" required voting in person if, among other things, they expressly provided for a "secret ballot." *Id.* at 506.

The Arizona Constitution explicitly requires voting in person because it requires that "official ballots" only be given to voters "at the polls" and expressly provides that "secrecy in voting" must be preserved. *See Terr. ex rel. Sulzer*, 1917 U.S. Dist. LEXIS 1509, at *20 ("The official ballot and the secret booth are the very essence of the [Australian ballot] system."). Several other sections of the Arizona Constitution further explicitly or implicitly recognize that voting is to be done in person.

Ariz. Const. art. 4, § 1

Article 4, section 1 of the Arizona Constitution is clear that voting rights are to be exercised "at the polls":

> "Official ballot. When any initiative or referendum…shall be filed…with the secretary of state, he shall cause to be

> printed on the official ballot ***at*** the next regular general election the title and number of said measure, together with the words 'yes' and 'no' ***in such manner that the electors may express at the polls*** their approval or disapproval of the measure."

Ariz. Const. art. 4, § 1(10) (emphasis added).

The provision that voting is exercised "at the polls" appears in three other places in article 4, section 1. *See id*. at (1) (reserving to people the "power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments ***at the polls***…and they also reserve…the power to approve or reject ***at the polls*** any" legislative act); *id.* at (3) ("Legislature, or five per cent of the qualified electors, may order the submission to the people ***at the polls*** of any measure…enacted by the Legislature[.]"); *id.* at (15) ("Nothing in this section shall be construed to deprive or limit the Legislature of the right to order the submission to the people ***at the polls*** of any measure, item, section, or part of any measure.") (Emphasis added for all.)

The applicable rule of construction is the plain meaning rule: "[I]f the constitutional language is clear, judicial construction is neither required nor proper." *Perini Land & Dev. Co. v. Pima Cty.*, 170 Ariz. 380, 383 (1992). At the time Arizona's constitution was ratified, it was obvious to the Arizona Supreme Court that the plain meaning of "the polls" did not include people's homes but rather meant designated polling places with voting booths and the like. *See Allen*, 14 Ariz. at 460–

62 (“That the votes of the electors were cast at the ‘polls’ in the manner provided by [article 4, section 1] is unquestioned,” as the electors “went to the polls and voted.”).

This meaning was also obvious to Arizona’s first state legislature, which, in enacting the state’s first primary election law, drew a clear distinction between polls and other places. *See* 1912 Ariz. Sess. Laws ch. 84, § 33 (Spec. Sess.) (“to be used at any polls, or other place prior to or on the day of a primary election”). *See also id.* § 11 (“At least five sample ballots printed on muslin or cloth shall be provided by the officers whose duty it is to print and distribute the official ballots for each precinct, and such officers shall cause the same to be posted in conspicuous places in each precinct before the opening of the polls at such primary election, one of which sample ballots shall be posted within the place where the said primary election is held, and one in some convenient place immediately outside.”).

That the word “at” had a fixed locational meaning was clear to the framers of Arizona’s constitution. For example, the constitution also prescribes that “[t]he capital of the state of Arizona, until changed by the electors voting ***at an election*** provided for by the legislature for that purpose shall be ***at the city of Phoenix***.” Ariz. Const. art. 20, ord. 9. *See also* art. 5, § 1(C) (“The officers of the executive department during their terms of office shall reside ***at the seat of government***.).
The words “at an election” are used several other places in the Arizona Constitution. *See, e.g.*, art. 6, § 23 (“The clerk shall be elected by the qualified electors of his

county ***at the general election***."); *id.* § 37(B) ("Judges of the superior court shall be subject to retention or rejection by a vote of the qualified electors of the county from which they were appointed ***at the general election***.").[19]

Even today, the ordinary dictionary meaning of "polls" is "[o]ne of the places where the votes are cast at an election. The place of holding an election within a district, precinct, or other territorial unit." *Polls*, Ballentine's Law Dictionary (3rd ed. 2010). The plain meaning of "at the polls" in Arizona's present election law code is a place with voting booths and the like established specifically for electors to fill out and cast their ballots. *See* A.R.S. § 16-411(B) (polling places designated by county boards of supervisors); *id*. at (J) (secretary shall "provide for a method to reduce voter wait time ***at the polls***" in primary and general elections) (emphasis added); A.R.S. § 16-404 (polling places have "sufficient number of voting booths on which voters may conveniently mark their ballots screened from the observation of others"); A.R.S. § 16-515(A) (prohibiting electioneering "inside the seventy-five

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[19] *See also* Op. of Judges, 30 Conn. 591, 597–98 (1862):

> And then, in pursuance of one of their leading purposes, they directed, in as clear and explicit language as they could command, and specifically, and with repetition as to each of the officers, that they should be successively voted for and chosen 'at,' or 'in,' that electors' meeting. There the constitution directs that the votes of the electors shall be offered and received; that is the only place contemplated or in any way alluded to in that instrument where they may be offered and received; and there only, we are satisfied, they must be offered and received, or they can have no constitutional operation in the election for which they are cast.

foot limit while the polls are open”).

Mail-in voting does not occur at a specific place designated by county boards or a place with a sufficient number of voting booths, regardless of where mail-in votes are actually tallied, and wait times and electioneering are irrelevant at one’s own home. Because no-excuse mail-in voting is not exercised at the polls, it is unconstitutional under the plain meaning of the Arizona Constitution.

If the Court does not find that “at the polls” ordinarily and plainly means in-person voting at a specific polling place, it may apply principles of statutory construction. “In interpreting constitutional and statutory provisions, [courts] give words their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended. Accordingly, [courts] interpret statutory language in view of the entire text and consider the context” in which it was used. *Fann v. State*, 493 P.3d 246, 255 ¶ 25 (Ariz. 2021) (cleaned up).

Courts “also avoid interpreting a statute in a way that renders portions superfluous.” *Id.* “Each word, phrase, clause, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial.” *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949). “Constitutions, meant to endure, must be interpreted with an eye to syntax, ***history***, ***initial principle***, and ***extension of fundamental purpose***.” *Saban Rent-a-Car LLC v. Ariz. Dep’t of Revenue*, 246 Ariz. 89, 95 ¶ 21 (2019) (cleaned up; emphasis added). *See also Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 32

(App. 2009).

Moreover, "[s]tatutes that are *in pari materia*—those of the same subject or general purpose—should be read together and harmonized when possible." *David C. v. Alexis S.*, 240 Ariz. 53, 55 ¶ 9 (2016). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (Any word or phrase interpreted by a court "is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire *corpus juris*…. Hence laws dealing with the same subject…should if possible be interpreted harmoniously.").

Though the form of "official ballot" is prescribed in the section of the Arizona Constitution related to initiatives and referenda, reading these provisions as not prescribing the form of official ballot for all general elections results in an absurdity. *See State v. Walker*, 181 Ariz. 475, 480 (App. 1995) (courts decline interpretation that results in an absurdity).

For instance, although the "at the polls" provisions appear in article 4 (addressing the legislative department and reserving certain law-making powers to the people) rather than in article 7 (addressing suffrage and elections), the "at the polls" language is not limited to elections on referenda and initiatives for the simple reason that referenda and initiatives are always decided "at the next regular general election." Ariz. Const. art. 4, § 1(10). *See also See Dewey v. Jones*, 159 Ariz. 409,

410 (App. 1989) ("It is clear that this constitutional provision [Ariz. Const. art. 4, pt. 1, § 1(10)] precludes voting on statewide initiative and referendum petitions other than at general elections.").[20] Moreover, these referenda provisions were adopted contemporaneously with the provisions in article 7. *See The Records of the Arizona Constitutional Convention of 1910*, 1402–05 & 1416–17 (John S. Goff ed., 1990) (documenting constitution as originally adopted in 1910). Thus, the framers intended all voting to occur at the polls.

Having defined the term "official ballot" in article 4 as meaning a ballot distributed "at the polls," the Arizona Constitution then goes on to use the term in several other places. Article 7, for example, provides that fees are not required to be "placed on the official ballot for any election or primary." Ariz. Const. art. 7, § 14. By way of further example, article 7 also provides that this form of "official ballot" is to be used for advisory votes[21] on U.S. Senators. Ariz. Const. art. 7, § 9 ("[T]he Legislature shall provide for placing the names of candidates for United States Senator ***on the official ballot at the general election*** next preceding the election of a United States Senator.").

Article 6 provides that "[t]he name of any justice or judge whose declaration

[20] And were it otherwise, then the trial court erred by failing to provide declaratory and injunctive relief as to the use of no-excuse mail-in voting for initiatives and referenda. [IR 1 at 49:2-9.]

[21] At the time, states did not yet directly elect their senators.

is filed as provided in this section shall be placed on the appropriate ***official ballot at the next regular general election***." Ariz. Const. art. 6, § 38 (emphasis added). This form of official ballot is also to be used for recall elections. Ariz. Const. art. 8, pt. 1, § 3 ("***On*** the ballots ***at*** such election shall be printed the reasons as set forth in the petition for demanding his recall."); *id*. § 4. ("name shall be placed as a candidate on the ***official ballot*** without nomination"); *id*. § 6 ("The general election laws shall apply to recall elections in so far as applicable."). It is also worth noting that other foundational provisions relating to elections are not found in article 7. *See, e.g.*, Ariz. Const. art. 2, § 21 ("Free and Equal" clause).

Ariz. Const. art. 7, § 1

As explained above, article 7, section 1 of Arizona's constitution requires secrecy in voting. It provides: "All elections by the people shall be by ballot, or by such other method as may be prescribed by law; ***Provided, that secrecy in voting shall be preserved***." Ariz. Const. art. 7, § 1 (emphasis added).

"The ***only way*** to preserve the secrecy of the ballot is to limit access to the area around the voter." *Burson*, 504 U.S. at 207–08. Accordingly, the phrase "such other method as may be prescribed by law" is not a broad and general grant of authority allowing the legislature to deviate from the Australian ballot system. Rather, the framers included the phrase "such other method" to allow the legislature to authorize voting machines in lieu of paper ballots. *See McLaughlin v. Bennett*,

225 Ariz. 351, 355 ¶ 16 (2010) ("Arizona's framers…fashioned Article 7, Section 1 to preserve the state's ability to adopt voting machines."); *In re Contested Election*, 281 Pa. at 137–38 (stating that Pennsylvania's constitutional provision, substantially similar to article 7, section 1, was "likely added in view of the suggestion of the use of voting machines"); *People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909) (stating that New York's constitutional provision, substantially similar to article 7, section 1, was included 'to enable the substitution of voting machines, if found practicable"); Goff, *supra* 559–60 (documenting that Arizona's framers similarly fashioned article 7, section 1 to preserve the state's ability to adopt voting machines).

As set forth above, the phrase "[p]rovided, that secrecy in voting shall be preserved" was a material addition to prior drafts of the Arizona Constitution intended to limit the ability of the legislature to deviate from the essential provisions of the 1891 Law, which mandated the use of the Australian ballot. Thus, it is an express constraint on the legislature's ability to prescribe other methods of voting. The framers included the phrase "[p]rovided, that secrecy in voting shall be preserved" to clarify that voting machines, if used, must adhere to the four principles of the Australian ballot system (i.e., if machines were used in the future, they were to be paid for by the taxpayer and to include only duly nominated candidates, and voting would still need to be done in private and at the polls). The legislature has in

recent years provided for the adoption of electronic voting systems. The enabling legislation, in recognition of the fact that secrecy in voting is only preserved when a restricted zone around the voter is secured, expressly notes that they only "[p]rovide for voting in secrecy ***when used with voting booths***." A.R.S. § 16-446(B)(1) (emphasis added).

As noted above, a Pennsylvania appellate court recently struck down Pennsylvania's "no-excuse mail-in voting" system, which "created the opportunity for all Pennsylvania electors to vote by mail without having to demonstrate a valid reason for absence from their polling place on Election Day, i.e., a reason provided in the Pennsylvania Constitution." *McLinko*, 270 A.3d at 1248. Of note as well is that Pennsylvania has already expressly amended its constitution several times to allow some forms of early voting. The *McLinko* Court explained that the constitution's secrecy provision, adopted in 1901, derives from the Australian Ballot reforms, noting that the "1901 amendment guaranteed the secrecy of the ballot, ***both in its casting and in counting***. '[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control.'" *Id.* at 1256 (emphasis added).

But one need not look to historical sources or cases in other jurisdictions to recognize that secrecy in voting requires voting in private at the polls. *See, e.g.*, A.R.S. § 16-580(B) ("On receiving a ballot the voter shall promptly and without

leaving the voting area retire alone, except as provided in subsection E of this section, to one of the voting booths that is not occupied, prepare the ballot in secret and vote."). Stated simply, Arizona has never amended its constitution to enable the legislature to create methods of voting other than by paper ballots or voting machines at the polls.

Ariz. Const. art. 7, § 2

Article 7, section 2 provides: "No person shall be entitled to vote ***at any general election***…unless such person…shall have resided in the state for the period of time preceding such election…provided that qualifications for voters ***at a general election*** for the purpose of electing presidential electors shall be as prescribed by law." Ariz. Const. art. 7 § 2 (emphasis added). The meaning of the words "at any general election" or "at a general election" is plain. When referring to a location, the word is a preposition "used to show an exact position or particular place."[22]

No-excuse mail-in voting does not need to take place anywhere in particular. Therefore, to interpret the words "at a general election" to encompass mail-in voting is illogical.

Ariz. Const. art. 7, § 4

Article 7, section 4 provides: "Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their ***attendance*** at

[22] *Cambridge Dictionary,* https://dictionary.cambridge.org/us/dictionary/english/at.

any election, and in going ***thereto*** and returning ***therefrom***.” Ariz. Const. art. 7, § 4 (emphasis added).

“Attendance” is defined as “[p]hysical presence plus freedom to perform the duties of an attendant.” *Attendance*, Ballentine’s Law Dictionary (3rd ed. 2010). The plain meaning of “thereto” is “to the thing just mentioned.”[23] The plain meaning of “therefrom” is “from that or from there; from a thing or place that has been previously mentioned.”[24] Accordingly, the words “attendance at,” “thereto,” and “therefrom” in section 4 can be read thus: “Electors shall…be privileged from arrest during their ***physical presence*** at any election, and in going ***to any election*** and returning ***from any election***.”

As with article 7, section 2, it is illogical to interpret the words in section 4 to encompass mail-in voting because Arizona’s early voting statutes allow electors to fill their ballots anywhere and do not require physical presence at any election on a specific day, as discussed above. Because mail-in voting does not require physical attendance at the polls on election day, it is impossible for “[e]lectors…***in all cases***…[to] be privileged from arrest during their attendance at any election, and in going thereto and returning therefrom,” Ariz. Const. art. 7, § 4 (emphasis added), rendering this provision void, inert, or trivial. Yet “[e]ach word, phrase, and sentence

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[23] *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/thereto.
[24] *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/therefrom.

must be given meaning so that no part will be void, inert, redundant, or trivial." *Yates*, 69 Ariz. at 72.

Ariz. Const. art. 7, § 5

Article 7, section 5 provides: "No elector shall be obliged to perform military duty *on the day of* an election, except in time of war or public danger." Ariz. Const. art. 7, § 5 (emphasis added). If the constitution provided for no-excuses mail-in voting, it would render this provision without purpose. Courts avoid interpreting statutes and constitutional provisions "in a way that renders portions superfluous." *Fann*, 493 P.3d at 255 ¶ 25. "Each word, phrase, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." *Yates*, 69 Ariz. at 72. Importantly, Appellants are not challenging Arizona election statutes that implement the Uniformed and Overseas Citizens Absentee Voting Act.[25] However, this provision still serves to illuminate the framers' original intent in this regard.

D. The above constitutional provisions should be read together.

Article 7 of the Arizona Constitution establishes the supreme law of the state

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[25] This is because, among other reasons, UOCAVA voting is now mandated by federal laws, which were clearly within Congress's enumerated powers to enact. *See, e.g.*, U.S. Const. Art. I, Sec. 8, Cl. 14 (Congress shall have the power to "make Rules for the government and Regulation of the land and naval Forces."). UOCAVA voting also prevents military powers from interfering to prevent the free exercise of soldiers' right to suffrage. *See* Ariz. Const. art. 2, § 21 ("All elections shall be free and equal, and no power, civil or ***military***, shall at any time interfere to prevent the free exercise of the right of suffrage.").

regarding suffrage and elections. Sections 1, 4, and 5 of article 7—which have remained unchanged since they were first adopted in 1910—make it plain that the framers intended elections to be secure and in person at a specific voting location (at the polls) on a specific day every other year. The provisions in article 4, part 1, section 1 of the constitution, which require that voting be done "at the polls," further support this plain-meaning construction of the constitution.

Construing together *in pari materia* all the constitutional provisions of article 4 and article 7, the constitution makes it plain that elections are to be in person at the polls on a specific day. Elections held in this manner, in conformity with the initial principles underlying the Australian ballot system (the system the state adopted in 1912 when it ratified the constitution), protect the integrity of elections by preventing the possibility of coercion and fraud and by providing consistent privacy and security standards. Derek T. Muller, *Ballot Speech*, 58 Ariz. L. Rev. 693, 696–697 (2016).

E. The framers' concerns are relevant in the modern era.

Arizona's system of early voting is unconstitutional as a matter of law. Whether it is adequate to preserve "secrecy in voting" as we now understand the term is immaterial. The relevant policy considerations have already been weighed and decided by the framers of the Arizona Constitution. Nonetheless, Appellants give the recent examples below to illustrate that the problems the framers were

attempting to avoid with their strict safeguards on voting have become more likely with the abandonment of those safeguards.

Mail-in voting raises all the old problems with voters' free decision-making that the Australian ballot, which was adopted into Arizona's constitution, sought to stop—voters being unduly influenced by others. In 2005, a bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker found that "[a]bsentee balloting is vulnerable to abuse in several ways: Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Comm'n on Fed. Election Reform, *Building Confidence in U. S. Elections* 46 (Sept. 2005). *See also* Jessica A. Fay, *Note: Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 Elder L.J. 453, 462 (2005) ("Many elderly persons, especially those who reside in community living centers, use absentee ballots, 'which—unless supervised by election officials—are the type of voting most susceptible to fraud.'"). In 2021, the U.S. Supreme Court expressed its agreement with these findings by the Commission. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021).

Indeed, these harms began reoccurring almost immediately after the post-1991 system went into effect. In Picacho Elementary School District No. 33's

February 1992 budget override election, despite a statutory prohibition to the contrary, "District employees with a pecuniary interest in [an] override's passage delivered ballots to electors whom they knew," "urged them to vote for the override," and "stood beside them as they voted." *Miller v. Picacho Elementary Sch. Dist. No*. 33, 179 Ariz. 178, 180 (1994). The Arizona Supreme Court thus was forced to set aside the results of the election. *Id*.

Further, "[i]t has been widely documented that the process of absentee voting presents an increased risk of fraudulent interference when compared with in-person voting conducted at polling stations. 'Campaign workers tend to target people who are elderly [or] infirm' for coercive treatment, creating a 'psychology of almost fear and intimidation,' tainting the sanctity of the balloting process." Fay, *supra* 462–463 (citing sources).

That is exactly what has happened in Yuma County. A few days before oral argument in the trial court, the Attorney General made available as public records certain material related to its investigation into a ballot harvesting ring operated by a high-level elected official in Yuma. This investigation revealed that Guillermina Fuentes, the mayor of San Luis, ran a vote-buying scheme between 2016 and 2020. One witness who worked for Ms. Fuentes, Ms. Corral, told investigators that in 2016 alone, Ms. Fuentes paid cash to various voters in exchange for no fewer than 50 unsealed early ballot envelopes. [IR 71 at AG000047.] The investigators stated that

"Testimony of Monica Corral establishes a pattern and history of collecting ballots and in some cases providing monetary compensation for those ballots. Corral's statement also explains that Fuentes has continued to be allowed to engage in suspicious activity regarding ballots without question due to her 'powerful' position in the San Louis community." [*Id.* at AG000048.] The investigation also revealed that voters who were immigrants or who did not speak English were particular targets of the ring. [*See, e.g.*, *id.* at AG000069.] The County Recorder of Yuma County, Ms. Pouquette, told investigators that she had repeatedly made complaints to law enforcement over the years regarding this vote-buying ring. [*Id.* at AG000079.] However, despite the fact that all of this was occurring "openly" [*id.* at AG000079. *See also id.* at AG000046], it went on for years before the Attorney General's office opened its investigation. Ms. Fuentes recently plead guilty to various charges stemming from the investigation. Ariz. Att'y Gen., *Guillermina Fuentes Enters Guilty Plea in Yuma County Ballot Harvesting Case*, azag.gov (June 2, 2022).[26]

The trial court's ruling states, with respect to this evidence, "Plaintiffs show examples of bad actors violating no-excuse mail-in voting laws. These examples are concerning but they do not address the issue before the Court: the constitutionality

[26] Available at https://www.azag.gov/press-release/guillermina-fuentes-enters-guilty-plea-yuma-county-ballot-harvesting-case.

of the statutes in question. Furthermore, they do not show a pattern of conduct so egregious as to undermine the entire system of no-excuse mail-in voting as provided by the Arizona legislature." [IR 63 at 3.] In this the trial court is, in one sense, correct. No-excuse mail-in voting conflicts with secrecy in voting as a matter of law, and that would be so whether or not there was any evidence of an actual connection between the harms the framers sought to avoid and Arizona's abandonment of the constitutionally mandated Australian ballot system. And, while it is unclear what "pattern of conduct" would have been "egregious" enough to satisfy the trial court, "[v]oter intimidation and election fraud are successful precisely because they are difficult to detect…. It is therefore difficult to make specific findings about the effects of a voting regulation." *Burson v. Freeman*, 504 U.S. 191, 208–09. Further, despite the fact that "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," Comm'n on Fed. Election Reform, *supra* 46, the U.S. Supreme Court has already conclusively determined that "[f]raud is a real risk that accompanies mail-in voting." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. at 2348. So too is "pressure and intimidation." *Id.* at 2329.

Thus, in another more fundamental sense, the trial court erred. The U.S. Supreme Court has already examined the question as to whether statutes criminalizing voter intimidation are sufficient to secure secrecy in voting. It concluded that such laws "fall short" of doing so because even with such laws in

place "many acts of interference would go undetected." *Burson*, 504 U.S. at 206–07. Thus, both as a matter of law, and a matter of "common sense," the U.S. Supreme Court found that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter." *Id*. at 207–08. Thus, the trial court's reasoning that Appellants were required to demonstrate that interference actually occurs in a sufficient quantity to "undermine" our system of elections for secrecy in voting to be violated is wrong as a matter of law. It conflicts with U.S. Supreme Court precedent and is error.

In any event, as these present examples demonstrate, "[t]he absence of recent evidence of this kind of voter bribery or intimidation does not mean that the motivation to engage in such conduct no longer exists." *Silberberg v. Bd.* of Elections of N.Y., 216 F. Supp. 3d 411, 415 (S.D.N.Y. 2016). Regardless, Appellants are not required to empirically demonstrate the objective effects on political stability produced by the constitutionally mandated Australian-ballot system in order to seek its enforcement. *See Burson*, 504 U.S. at 208–09.

This is because, in the ultimate analysis, the question of which safeguards were adequate to preserve secrecy in voting was for the framers, not the courts, to decide. Postal voting was known to the framers of the Arizona Constitution. Indeed, as set forth above, it had been around since at least the Civil War. Further, Arizona's constitution was ratified during the "major wave of reform that introduced absentee

voting to civilians." Fortier & Ornstein, *supra* 493–93. During this period, despite "elaborate provisions to safeguard voter privacy and integrity of the ballot…Courts struck down a number of state laws [authorizing such absentee voting] for violating state constitutional provisions that protected the right to a secret ballot." *Id.* The Australian ballot reformers, including the framers of the Arizona Constitution, long ago decided that the Austrian ballot system must be adhered to if the state's election system is not to be undermined. Their determination is conclusive unless and until the Arizona Constitution is amended. Still, the above examples are illustrative of the harms they sought to prevent.

II. The trial court erred in relying on *Miller*.

The trial court cited *Miller* for the proposition that statutory prohibitions on ballot tampering preserve secrecy in voting. [IR 63 at 3.] Contrary to Intervenors' assertions below, *Miller* was simply not a case about the constitutionality of no-excuse mail-in voting. *See Smith v. City of Phx.*, 175 Ariz. 509, 512 (App. 1992) (appellate court "will not determine constitutional issues unless they are squarely presented in a justiciable controversy, or unless a decision is absolutely necessary in order to determine the merits of the suit") (cleaned up). Rather, it was a case about whether the results of an election should be set aside because "[d]istrict employees with a pecuniary interest in [an] override's passage delivered ballots to electors whom they knew….urged them to vote and even encouraged them to vote for the

override." *Miller*, 179 Ariz. at 180.

In its opinion, the Arizona Supreme Court made the offhand remark that A.R.S. § 16-542(B), which prohibited anyone but the voter from being in possession of an unvoted mail-in ballot was important because it "advance[d] the constitutional goal" of secrecy in voting by "setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation." *Id*. at 179–180. As the trial court acknowledged, this was dicta. [IR 63 at 3.] Further, it is dicta that says nothing about whether such procedural safeguards are themselves ***sufficient*** to ***fulfill*** the constitutional requirement of secrecy in voting (rather than simply advance the goals of that requirement). And even had the Arizona Supreme Court said otherwise, such dicta would contravene the binding U.S. Supreme Court precedent set forth in *Burson v. Freeman*. There, the U.S. Supreme Court held that statutory safeguards were insufficient as a matter of law to "secure the State's compelling interest" in preserving secrecy in voting and that the "only way" to do so was to limit access to the area around the voter. 504 U.S. at 206–08. *See State v. Soto-Fong*, 250 Ariz. 1, 9 at ¶ 32 (2020) ("This Court, of course, is bound to follow applicable holdings of United States Supreme Court decisions."). Indeed, *Miller* itself proves the point since, there, statutory safeguards proved wholly inadequate.

III. The trial court erred in failing to grant Plaintiffs' request for a preliminary injunction.

When public officials seek to exceed their legal authority in how they conduct

elections, the typical multi-factor standard for preliminary injunctive relief need not be satisfied. Rather, plaintiffs in cases such as these are entitled to preliminary injunctive relief by showing that they are likely to prevail on their claim that defendants have acted unlawfully. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 64 ¶ 26 (2020) ("Because Plaintiffs have shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority, they need not satisfy the standard for injunctive relief."). Thus, if plaintiffs establish the likelihood of success on the merits (as is the case here), then irreparable harm, balance of hardships, and public policy in the movant's favor are presumed, and the requisite injury is shown by demonstrating that the movant is "beneficially interested" in compelling the public officials to perform their legal duties. *Id*. at 64 ¶¶ 26–27. As the trial court correctly concluded, the only issue relevant to whether Plaintiffs were entitled to a preliminary injunction was probability of success on the merits. [IR 63 at 2.][27]

A trial court's order denying a preliminary injunction is typically reviewed for abuse of discretion. *See Fontes*, 250 Ariz. at 61–62 ¶ 8. However, issues of pure statutory and constitutional construction are reviewed de novo. *Id*. Because the trial

[27] The trial court Ruling mentions the *Shoen* factors before concluding that the only issue before the court was success on the merits. To the extent, however, that the trial court Ruling is construed as deviating from *Fontes*, Appellants preserve the right to argue on reply that the trial court erred in applying the traditional preliminary injunctive factors (or that the traditional factors are satisfied).

court erred in finding that the Arizona Constitution does not prohibit the legislature from adopting or expanding Arizona's post-1991 system of no-excuse mail-in voting, it necessarily erred in failing to grant the preliminary relief requested in Plaintiffs' Application for an Order to Show Cause.

Similarly, the trial court errored in failing to grant permanent injunctive relief as to future elections and declaratory relief.

Conclusion

While it may be "regretted that so convenient, useful and popular legislation should be found in conflict with our basic law," as the Kentucky Supreme Court remarked when striking down that state's mail-in voting system as unconstitutional under Kentucky's constitution, "[t]he only remedy is an amendment to the Constitution, which the people can have, if they wish." *Clark*, 192 Ky. at 597–98 (1921) (interpreting in-person provision[28] of state constitution). Kentuckians later ratified a constitutional amendment to allow for mail-in voting, and Arizonans may do the same.

The Arizona Constitution was groundbreaking in many ways, including how easy the framers made it to amend. The people may propose amendments of their own initiative and pass them by simple majority. If the Arizona Constitution's

[28] "All elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls and then and there deposited." Ky. Const. § 147.

constraints no longer suit Arizonans, we may easily dispense with them, just as citizens of some of our sister states have done.

Thus, this appeal is not about what is the best form of voting as a matter of policy. Reasonable people can, and do, disagree about how our elections should be conducted. Those debates can be had in the context of public debate over a constitutional amendment. Then the people can decide for themselves whether to revisit the balance that our framers drew between security and convenience.

Indeed, there is increasing public appetite for such a debate. While no-excuse mail-in voting may have once enjoyed widespread support among all segments of the electorate, that is no longer the case. A 2021 Pew Research Center Poll revealed that "62 percent of Republicans and Republican leaners" believed that "voters should be allowed to cast their ballots early only "if they have a documented reason for not voting in person on Election Day." William Saletan, *Early Voting is Secure. So Why Are Republicans Against it?*, Slate (July 9, 2021)[29] And several Economist/YouGov polls from last year revealed the startling finding that, when asked whether voting in elections should be easier or harder than it is currently, "[b]y margins of 40 to 50 percentage points," Republicans "consistently said it should be harder." *Id.* But when "in-person" early voting is specified, opposition among

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[29] Available at https://slate.com/news-and-politics/2021/07/republican-early-voting-opposition-not-fraud-suppression.html.

Republicans is cut in half. Indeed, even in deep blue New York, whose constitution also provides that elections "shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved," NY CLS Const art. 2, § 7, voters just last year rejected a constitutional amendment that would have authorized no-excuse mail-in voting. Ryan Finnerty, *New Yorkers vote against a potential expansion of ballot access for the state*, NPR (Nov. 3, 2021).[30]

And regardless of the outcome of a debate over a constitutional amendment, such a process can only increase public confidence in our elections because any new provisions that are put in place regarding the form and manner of voting will have the buy-in and support of the people of Arizona. Until then, the balance struck by our framers must be respected—and the constitution they bequeathed to us enforced. Arizona's post-1991 system of no-excuse mail-in voting should be declared unconstitutional, Appellees preliminarily and permanently enjoined from utilizing it, and the pre-1991 system restored.

WHEREFORE Appellants pray that the trial court be REVERSED and that Plaintiffs be granted the declaratory and injunctive relief requested in their Verified Complaint [IR 1 at 48:18–49:2, 10–13] and Motion for Preliminary Injunction [IR

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[30] Available at https://www.npr.org/2021/11/03/1052198559/new-yorkers-vote-against-a-potential-expansion-of-ballot-access-for-the-state. Unlike Arizona's constitution, the New York Constitution has already been amended to provide for limited forms of absentee voting. *See* NY CLS Const. art 2, § 2.

5] or alternatively that the trial court be REVERSED and that Appellants be granted the relief requested in their Verified Complaint [IR 1 at 49:2–9, 14] and Motion for Preliminary Injunction.

Attorney Fees

Appellants request attorney fees and costs below and on appeal pursuant to Ariz. R. Civ. App. P. 21, A.R.S. §§ 12-348, 12-2030, the private attorney general doctrine, *see Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991), and other applicable law.

RESPECTFULLY SUBMITTED this 28th day of June 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the opening brief is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and contains 13,206 words according to the word-count function of Microsoft Word.

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Appendix

1 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
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3 **FOR THE COUNTY OF MOHAVE**
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6 **ARIZONA REPUBLICAN PARTY, etc.,**
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Plaintiffs,
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vs. **CV-2022-00594**
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10 **KATIE HOBBS, etc.,**
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Defendants.
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ORDER TO SHOW CAUSE
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JUNE 3, 2022
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KINGMAN, ARIZONA
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21 **BEFORE THE HONORABLE LEE JANTZEN, JUDGE**
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18 **FOR THE INTERVENORS ADP, DCCC, DSCC, and DNC:**

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20 **DANIEL A. ARELLANO, ESQUIRE**
JULLIAN L. ANDREWS, ESQURE via zoom

21 **BE IT REMEMBERED that the foregoing**
22 **captioned case came on for hearing before the Honorable**
23 **Lee Jantzen, Judge, Mohave County Superior Court, on June**
24 **3, 2022, beginning at the hour of 1:30 p.m., at the**
25 **Mohave County Courthouse, Kingman, Arizona, as follows:**

1 **P R O C E E D I N G S**
2
3 **THE COURT: Thank you. Please be seated.**
4 **Good afternoon, Everyone. All right.**
5 **This is CR-2022-00594, in the matter of**
6 **the Arizona Republican Party, plaintiffs, versus Katie,**
7 **Hobbs et cetera, defendants.**
8 **Can we get introductions, please.**
9 **Plaintiffs' attorney.**
10 **MR. KOLODIN: Good morning, your Honor.**
11 **THE COURT: Good afternoon. Got that one**
12 **wrong already.**
13 **MR. KOLODIN: I swear. Well, hopefully the**
14 **rest of the day goes a little bit better.**
15 **Good afternoon, your Honor. I'm Alexander**
16 **Kolodin. Joining me is Veronica Lucero, my associate,**
17 **Arno Naeckel here in the courtroom.**
18 **Via zoom link, we have Michael Kielsky,**
19 **another one of our colleagues. We also have**
20 **Mr. Dershowitz, who has not been admitted pro hoc yet.**
21 **He is still awaiting his original certificate of good**
22 **standing.**
23 **We have our client individually named**
24 **plaintiff and client representative for plaintiff Arizona**
25 **Republican Party, Dr. Kelli Ward, on the zoom link as**

1 well. She is in a wedding out of state. So that's why she
2 joins us via zoom. But she has blocked out this time for
3 our hearing so that she could be present and attend.
4 THE COURT: All right. And Mr. Kolodin, are
5 you going to be doing all the speaking today, then? Is
6 that the plan?
7 MR. KOLODIN: Your Honor, begging the court's
8 indulgence, I would also like my associate, Veronica
9 Lucero, to be able to participate. I know that's a little
10 bit uncommon, but given the number of attorneys on the
11 other side. I'm quick on my feet, but maybe
12 (indiscernible), right.
13 THE COURT: All right. Well, certainly as
14 long as we can -- we'll try to talk about time limits and
15 situations here in the next few minutes but exactly what
16 we're doing.
17 So we'll go ahead on the courtroom on the
18 other side.
19 MR. ARELLANO: Good afternoon, your Honor.
20 Daniel Arellano on behalf of intervenor defendants, the
21 Arizona Democratic Party, DSCC, DCCC, and the Democratic
22 National Committee. And with me on the zoom link is my
23 colleague, Roy Herrera and Julian Andrews.
24 THE COURT: All right. Thank you.
25 And then for Secretary Hobbs?

1 MS. DESAI: Good afternoon, your Honor.
2 Roopali Desai, Kristin Yost, and Sambo Dul, representing
3 Katie Hobbs, Arizona Secretary of State.
4 THE COURT: And you're going to be doing the
5 talking, Ms. Desai?
6 MS. DESAI: Yes, your Honor. Depending on
7 where we go this afternoon, I may ask my colleague,
8 Ms. Yost, to argue some of the issues. But as you said,
9 we'll be happy to talk about that in a moment.
10 THE COURT: All right. I did get another
11 response from the Maricopa County Attorney's Office.
12 MR. LaRUE: Correct. Joe LaRue, your Honor.
13 Deputy County Attorney. With me, Karen Hartman-Tellez,
14 Deputy County Attorney. We represent the thirteen counties
15 other than Yavapai and Mohave. And also with us is Emily
16 Craiger of the Burgess Law Group. She represents the
17 Maricopa County Recorder with us.
18 THE COURT: All right. And Mr. LaRue, you're
19 you going to be doing the speaking?
20 MR. LaRUE: Your Honor, it depends on what
21 the court wants today, what the court orders us to do. But
22 there might be all three of us speaking, depending on what
23 the court decides.
24 THE COURT: Well, I might decide that won't
25 work, but let's see if we can figure out as we go forward.

1 Mr. Esplin, you're appearing for Mohave
2 County?
3 MR. ESPLIN: That's correct, Mohave County
4 Recorder. We are taking a nominal position. So we don't
5 anticipate asking any questions. But we're here if
6 necessary if you have any questions for us.
7 THE COURT: And I'm wondering about the
8 questions' portion of it.
9 Is there somebody from Yavapai County just
10 nominally as well or?
11 MS. CONNOR: Yes, your Honor. Colleen Connor
12 with the Yavapai County Attorney's Office representing
13 Leslie Austin, the Yavapai County Recorder.
14 THE COURT: Thank you. And you guys, you
15 take a nominal position as well, the same as Mohave County?
16 MR. CONNOR: Yes, your Honor.
17 THE COURT: All right. So what I, when I was
18 looking at this, this is a request by the plaintiff for a
19 preliminary injunction. They've asked an order to show
20 cause today. They are I think wanting to argue the
21 verified complaint, the additions to the verified
22 complaint.
23 And I'm thinking it might be more like an
24 oral argument today, hearing from all sides with the
25 plaintiff going first and then eventually last.

1 I would be inclined to admit any exhibits
2 that both parties have, all parties have into the record.
3 I would give the exhibits the weight they deserve. I have
4 scheduled this case to go until 5:00 o'clock today.
5 We would have to take at least one break
6 during the day because the court reporter works harder than
7 we do during these processes and would be a break at some
8 point.
9 I would try to limit that to five or ten
10 minutes. But every time you do that, it's always longer
11 than whatever you limit it to. And so we'll try to get that
12 done.
13 I don't know if we get things done today if
14 that's the schedule, especially if multiple people want to
15 speak on each side. I was thinking, you know, an hour and
16 a half to the plaintiffs and an hour and a half to all the
17 defendants. I think maybe that should be shorter than
18 that.
19 Mr. Kolodin, do you think your presentation,
20 like an opening presentation, would be more than and hour?
21 MR. KOLODIN: No, your Honor.
22 THE COURT: Okay. So maybe we can finished
23 today. The break I anticipate would be around 3:10, 3:15,
24 whatever is convenient based on who's speaking at that
25 particular point.

1 If we reserve some time at the end of the
2 day, I'll talk about where we are. But I guess does
3 anybody not think that that's the -- we're here about the
4 preliminary injunction, the order to show cause. This is
5 about the November election only. It's not about the
6 August primary election.
7 The injunction specifically is for the
8 November general election. So we don't need to address
9 that.
10 I do find that the plaintiffs have standing
11 to bring this case. I don't want to spend any time on
12 that. They are voters in Arizona. There doesn't have to
13 be a specific harm.
14 I think under the act, The Arizona
15 Declaratory Judgment Act, they have standing to bring this.
16 I don't think the Purcell, the Federal Court Rule, applies.
17 This isn't too close to the election. That's a federal
18 court getting involved in enjoining a state election. So
19 I'm making those rulings.
20 The latches that was brought up in some of
21 the pleadings, that doesn't apply in this case. The fact
22 that this is a 30 year old law that they now are saying is
23 unconstitutional, I think one of the documents I read,
24 maybe it was the most recent one is why it's standing out,
25 perhaps the most recent election as made what they believe

1 the problems with the law come out to it's fore. So that's
2 just something I read today. I'm just trying to read that.
3 But I'm just saying latches doesn't apply. I don't want to
4 spend much time on those.
5 This case is not about election fraud or
6 about other things. It's about whether or not the law that
7 was passed in 1991 to expand mail in voting to be no
8 excuses mail in voting from what it had been since 1918
9 until 1991 is unconstitutional, whether it's
10 unconstitutional under the Arizona Constitution, not any
11 other, not the United States Constitution but the Arizona
12 Constitution.
13 So we're looking at that issue and that issue
14 only today and whether or not a preliminary injunction is
15 necessary to preclude any irreparable harm, whether there
16 is a likelihood of success on the merits and whether public
17 policy, all of those things I'll be addressing in the
18 ruling that I have to make at the end of the day.
19 So that's the only issue. And maybe if we
20 can save some time by just focusing on those things today,
21 we'll do that.
22 Do any of the parties, and I'll start with
23 Mr. Kolodin, you didn't object to every exhibit that's been
24 proffered being admitted?
25 MR. KOLODIN: No. I have no objection, your

1 Honor.
2 THE COURT: Ms. Desai, do you object to that?
3 MS. DESAI: Your Honor, I do object to the
4 plaintiffs' exhibits. I'm happy to walk through those.
5 But before I do that, your Honor, I have a procedural
6 threshold issue on my range before.
7 I'm not sure whether or not the plaintiffs in
8 this case complied with the saltatorial requirement to
9 provide notice to the legislature about their pleading as
10 to constitutionality.
11 The statute, which is 12-1841, which requires
12 that a notice be served of the proceedings prior to any
13 proceedings taking place. And it's possible that the
14 plaintiffs did that but didn't provide copies to
15 defendants. But if they have not received notice, I have
16 court cases that indicate that this proceeding can't
17 proceed without that notice being properly served.
18 THE COURT: Mr. Kolodin.
19 MR. KOLODIN: Your Honor, in order to
20 expedite this, I will state that we indeed served the
21 notice of claim about constitutionality on the required
22 parties via process server. We did not file those
23 certificates of service because they are not required to be
24 made parties. And the notice of claim of
25 unconstitutionality hasn't made them parties. But we still

1 complied with the statutory requirements to serve them.
2 THE COURT: All right. And obviously at some
3 point, you can provide that proof to Ms. Desai.
4 MR. KOLODIN: Yeah.
5 THE COURT: All right. Sounds like they did
6 that. And this was originally brought before the Supreme
7 Court back in March is the impression I got from the
8 pleadings. So this isn't the first time this issue had
9 come up.
10 Ms. Desai, what I was going to do is admit
11 the exhibits and let you address any objections you have to
12 admission of the exhibits. I'll give the exhibits the
13 weight they deserve. But that's the impression I have. I
14 certainly don't mind you making a record of what you object
15 to when it's your chance to speak on it.
16 MS. DESAI: So your Honor, do you want me to
17 state my objections to, my (indiscernible) objections to
18 the exhibits on the record right now?
19 THE COURT: Not -- I guess what I'm saying is
20 I would like to hear them. I would like them to be in the
21 record. But I'm going to admit the exhibits anyway. And
22 then we'll address that, that point. All right. And I'm
23 going to give them, again, the weight they deserve. And
24 I'll into consideration your position. But I think you
25 should be able to make those objections. And I'm just

1 looking at time factors.

2 I was talking to my JA. If we can't get done
3 today, I could probably come back Wednesday or Thursday
4 afternoon based on my calendar. I would have to move some
5 things around. But I don't want to do that if we can move
6 forward.

7 MS. DESAI: And your Honor, the only other
8 issue that I would like to note for the court since you
9 were asking about what we're doing today, it is our
10 understanding from looking at the court's orders that we're
11 here on an OSC application, that at least from Secretary's
12 standpoint, we had not intended to have a preliminary
13 injunction hearing because the court did not set a
14 preliminary injunction hearing.

15 We, of course, would be available next week
16 if the court wants to reconvene for a PI hearing. But
17 to the extent the court wants to hear argument, we're
18 certainly prepared to make argument on the PI issues.

19 This case is a pure legal issues case. I
20 don't think there's necessarily presentation of evidence
21 from testimony. I wanted to make sure that I'm stating for
22 the record our objection to any proceeding on a PI which
23 wasn't specifically ordered for today. Thank you.

24 THE COURT: Thank you, Ms. Desai.

25 Mr. LaRue.

1 MR. LARUE: Thank you, your Honor. I agree
2 with what Ms. Desai said. I, too, want to raise objections
3 to most of the exhibits. Some of them we don't have any
4 objection to. I would be happy to do that now or do it
5 whenever your Honor directs. But I would like that on the
6 record.
7 THE COURT: All right. I'm going to give you
8 that opportunity when it's that time. All right.
9 MR. LARUE: Okay.
10 THE COURT: Thank you, Mr. LaRue, when it's
11 your time.
12 MR. LARUE: Thank you, your Honor. And
13 furthermore, we agree with Ms. Desai. We would like for
14 the preliminary injunction hearing to be put off and
15 scheduled for a full day as opposed to the limited amount
16 of time that the court has been able to offer.
17 We understand you have a busy schedule. But
18 in order to evaluate the preliminary injunction, one of the
19 platitudes for the court is the balance of hardships. And
20 if we're going to talk about the affect of granting this PI
21 on the counties that are active defendants in this lawsuit,
22 we need to be able to put on witness testimony to prove
23 what the affect will actually be so that court can weight
24 those hardships and make the correct balance and rule.
25 THE COURT: Yeah, the order to show cause is

1 about this particular statute and the law. That's what
2 we're going to be discussing today. They filed along with
3 it a motion for preliminary injunction. If we need to take
4 evidence on that, if we discover that at the end of the
5 day, we'll go forward from there.
6 But that's is my position, is we're going
7 forward with the order to show cause today. That's what I
8 set on the calendar. I think it does kind of include those
9 issues of whether a preliminary injunction is part of it.
10 But we'll talk about that as we hear the arguments.
11 Mr. Kolodin, you're standing up.
12 MR. KOLODIN: If I may briefly, I want to
13 decomplicate the procedure a little bit. Rule 7.3, which
14 governs orders to show cause, states that a show cause
15 hearing is a hearing on whether the persons requesting the
16 OSC should have the relief that they requested in their
17 application.
18 We requested a preliminary injunction in the
19 application. We filed a motion for preliminary injunction
20 along side it just as a procedural matter to check every
21 box. But very clearly, the OSC under Rule 7.3 is about that
22 preliminary relief.
23 THE COURT: And that's what I understood it
24 to be as well. We can argue that as we get done.
25 Mr. Arellano, did you -- and I might as well

1 make a record. I will probably give you the least time if
2 we are getting short on time, Mr. Arellano, when it's your
3 time to speak. And you are intervenor in this case, not a
4 named party. I think the plaintiff didn't object to you
5 being an intervenor. But I just want to make sure you know
6 that.
7 So what is your position on the exhibits?
8 MR. ARELLANO: I understand, your Honor.
9 And I'm mindful of that. I will do my best to not be
10 redundant with the other parties.
11 We would join the objections of the
12 Secretary of State and Maricopa County both to the exhibits
13 and to holding a hearing today on the PI motion.
14 The only thing that I'll add is that the
15 application did ask for relief on the terms of the verified
16 complaint and the verified complaint alone. So, you know,
17 we do think it's improper to have all these exhibits
18 without witnesses when really we're just here about the
19 terms of the verified complaint and whether the plaintiffs
20 on the terms of that complaint are entitled to relief.
21 THE COURT: All right. And I understand
22 that. And we can address the specifics. But it is ordered
23 admitting all of the exhibits that have been proffered by
24 both sides. And it sounds like they have only been
25 proffered by one side. But all exhibits are admitted for

1 the purposes of today's hearing.
2 This court will address and allow all sides
3 to make any specific objections to those exhibits as we
4 process today.
5 I guess it's time to get started,
6 Mr. Kolodin. Are you ready to go?
7 MR. KOLODIN: Yes, your Honor.
8 So I think I'm going to be far briefer than
9 an hour because I hope to reserve the balance of my time
10 for rebuttal because the court has read our verified
11 complaint and our motion for preliminary injunction.
12 Obviously the verified complaint is extremely extensive.
13 And so I don't feel the need to rehash any but the highest
14 points.
15 To begin with, I want to put this case into
16 the appropriate constitutional framework. There are many
17 things that the framers of the Arizona Constitution
18 entrusted to the political branches of government. In
19 fact, probably more in some ways than almost any other
20 state had at the time.
21 For example, the Arizona Constitution allows
22 for the unprecedented powers of initiative and referendum,
23 and even as your Honor is aware, has certain powers over to
24 elect judges.
25 And commensurate with these constitutional

1 powers, the framers of the Arizona Constitution put in
2 safeguards because if they were going to give the people
3 the unprecedented powers that the Arizona Constitution
4 gives them, they wanted to make sure that those powers were
5 exercised in a manner free of undue influence.
6 So why did they want to do that? Well, there
7 is a couple of reasons. There is Arizona's territorial
8 history. Arizona, of course, being sparsely populated
9 during the territorial days, was a place of mining, place
10 of railroads, a place where the corporate interests and
11 political machines had a relatively disproportionate power
12 over the population.
13 And they exercised that power in the
14 territorial days to twist the arms of their employees, to
15 twist the arms of citizens to either apply influence or
16 outright buy votes. And so this was something that the
17 framers of the constitution were deeply concerned with.
18 And so the plaintiffs have noted in the
19 briefing very capably prepared by Ms. Desai and others, who
20 it is always a pleasure to litigate against, that Arizona's
21 current system of no excuses mail in voting is very
22 popular. And it is. Plaintiffs acknowledge it is a very
23 popular system. And it's a very convenient system.
24 But mail in and postal voting was known to
25 the framers of the Arizona Constitution. And they had

1 known about its popularity. And they had known about its
2 convenience because it had been around since the civil war.
3 And they still decided to restrict it.
4 Because they knew of its popularity, they did not want to
5 entrust that decision to the political branches of
6 government because they viewed it as a systemic risk.
7 Now, another thing that's also very popular
8 is security in elections. And when voters are asked, you
9 know, which they prefer, security in elections or
10 convenience, come voters typically down in polls on the
11 side of security.
12 Why is that relevant here? Because there is
13 one political branch in Arizona's government that is
14 entrusted with the power to change the terms of Arizona's
15 Constitution. And again in unprecedented fashion, the
16 framers of that constitution made it very easy. And it is
17 the citizens, themselves.
18 If the citizens wish to have a system of no
19 excuses mail in voting, they may certainly do so. Any
20 citizen may initiate an initiative or referendum on that
21 issue. I'm sorry. Referendum on that issue. Raise the
22 required number of signatures and pass it by simple
23 majority. That is possible. But the public would be
24 permitted to have that debate among themselves just as the
25 framers intended.

1 Until then, constitutions are constitutions
2 and not statutes. Because they are supposed to be a
3 reflection of eternal truths of human nature and human
4 rights. And so therefore, I'm going to begin at the
5 beginning because by beginning at the beginning, I also
6 begin with Arizona's present history.
7 The Australian ballot came about during the
8 contested presidential election of 1888. Then, as now,
9 there were allegations of plenty that the results of the
10 election had been skewed by external forces. Right.
11 And of course, the courts never found that to
12 be the case in 1888. And the results of the election were
13 unchanged and upheld. But still, there was that level of
14 public concern then, as there was now.
15 And regardless of the merits of those issues,
16 what the framers of the Arizona Constitution realized and
17 what the proponents of the Australian ballot in 1888
18 realized was that the system, itself, was too volnerable to
19 the influence of large actors, large corporations, large
20 unions, large political machines and that it needed to be
21 secured against even the appearance of impropriety or even
22 the potential of impropriety in a systemic and structural
23 way.
24 And that is why after the 1888 presidential
25 election, there was a movement that began across the

1 country called the Australian ballot movement. And as your
2 Honor will note from the briefs, it had four components.
3 The ones most at issue today are that ballots
4 were delivered directly to ballots at the poling place by
5 official election officials, so by those who were actually
6 recognized by the government as election's officials. They
7 would then be there along with political party observers,
8 of course, like those my client, the Arizona Republican
9 Party, to provides to oversee the voting process, not just
10 to make sure that it was administered properly but also to
11 make sure that even the influences that would be perfectly
12 appropriate to apply to voters outside of the polling place
13 were not present when the voter was actually making that
14 decision to fill out their ballots. Right.
15 That nobody also could ever really know how a
16 voter had voted. Right. That a voter could go out of that
17 polling place and tell their employer or the union or their
18 spouse or a political party organizer or maybe of their
19 party that they had voted the preferred way.
20 But at the end of the day, the only person
21 who would ever know that in the entire world was the voter.
22 It makes vote buying impossible because you can never
23 verify that you got what you paid for. And it makes the
24 pressure and influence on voters while they are in the
25 process of filling out their ballots impossible as well.

1 And it also makes it impossible to violate the
2 secrecy of voting by looking at the choices.
3 So right after the presidential election of
4 1888, which was the trigger for this Australian ballot
5 movement, Arizona in fact ratified as a state a draft
6 constitution, the 1891 constitution, which Congress never
7 accepted but which was ratified by the voters of the state.
8 And the 1891 constitution says exactly what
9 Ms. Desai says that the 1912 constitution says, which is
10 that the means and method of voting are pretty much
11 entirely up to the legislature. I'm paraphrasing, but
12 that's what it says, shall be as provided by law.
13 Also in 1891, of course, the legislature for the
14 first time defines secrecy in voting. They define it
15 statutorily when the pass a law that is entitled an Act, I
16 won't give the rest of the title, but an act to secure
17 secrecy in voting.
18 And we know that the framers of the Arizona
19 Constitution met the four essential elements of the
20 Australian ballot system when they later said secrecy in
21 voting because that 1891 law defines it in exactly the same
22 way. It defines it in exactly the same way.
23 So fast forward to 1912, Arizona has now lived
24 with this 1891 statute for approximately 20 years. And the
25 proponents of the 1912 constitution, who met in 1910, they

1 realized, you know what, this 1891 law as worked very well.
2 We want it to be unchanging for all time unless the
3 constitution, itself, is changed, we want to actually
4 enshrine that into the constitution.
5 So to the words of the 1891 constitution
6 passed the same year as this 1891 law that said, you know,
7 means of voting shall be as prescribed by law, they then
8 added a second phrase. And that phrase was provided
9 secrecy in voting is preserved.
10 Now, the central question of this case is
11 what work do those words do. To accept defendants'
12 contentions, those words are meaningless. They're
13 superfluous. They do nothing. The legislature can still
14 make whatever laws that it wishes regarding the means and
15 method of voting.
16 But fundamental tenet of constitutional
17 construction is that constitutions are to be construed in
18 such a way that no phrase, clause or word is rendered
19 meaningless or superfluous. And so the question remains,
20 what work do those words do?
21 Now, a second argument that has been raised
22 is that secrecy in voting is a right of the voter only,
23 that it can be waived. There is a couple problems with
24 this argument.
25 First, if secrecy in voting can be waived, it

1 can't possibly have the affect that the framers intended of
2 stopping the abuses of the gilded age regarding vote buying
3 and pressure by political machines.
4 And the reason for that, among others, is
5 vote buying is voluntary. Of course, I want to show you my
6 ballot so that I can receive the money. If you make that
7 right waivable, it becomes nonsensical.
8 And the early Supreme Court in 1913, I
9 believe, recognized this, recognized that the Australian
10 ballot system was not a right of the voter only but rather
11 also an obligation of the voter to themselves to do their
12 part to keep their ballots secret.
13 And we can still see this today in some of
14 the vestigial laws that relate back to statutes governing
15 voting at the time of statehood that really make no sense
16 at all if one doesn't view them in this paradyne because
17 surprisingly the laws governing election day voting at the
18 polls that are on the books in the Arizona Revised Statutes
19 these days, they haven't changed much since 1891. They are
20 very similar.
21 And they say things, in fact, they sort of
22 have been updated to take modern technology, they go so far
23 as to criminalize a voter taking a picture of their own
24 ballot in the voting booth.
25 What sense does that make if the voter can

1 just request an early ballot and show that ballot to
2 whomever? In fact, there's a law on the books that if you
3 vote early as opposed to at the polls, you can post a
4 picture of your ballot on the internet. There is actually
5 a statute that says that. But at the polls if you do it,
6 you get thrown in jail.
7 Again, it makes no sense if you consider
8 these laws outside of the context of the Australian ballot
9 system. And in fact, Maricopa County, as they're well
10 aware, recently in the past couple of years implemented an
11 electronic voting system.
12 And the statutes that allows them to
13 implement that electronic voting system, it's very
14 self-conscious because it says, the statutory mandate from
15 the legislature is an electronic voting system must
16 preserve secrecy in voting provided its use in conjunction
17 with the voting booth, for instance.
18 So in other words, we understand that it
19 doesn't preserve secrecy in voting when it is used outside
20 of the polls. And to clarify a little bit what the
21 electronic voting system is and how it can be used outside
22 of the polls, it's all very similar. There is still paper
23 ballots employed in Maricopa County, right, but they are
24 simply tabulated by a different sort of system. So it can
25 be used outside of the polls.

1 Now, another argument that the defense brings
2 up is well, what about the 1981 soldier's voting bill.
3 Ms. Desai, of course, is very excellent at making
4 originalist arguments. And she points out, again quite
5 intelligently, that there were several delegates to the
6 constitutional convention, including Governor Hunt, who was
7 the chair of the constitutional convention that actually
8 either voted for in the legislature or as Governor ratified
9 the 1918 soldier's voting bill.
10 How can we possibly explain this if by
11 secrecy in voting, those same framers, and again, they
12 weren't all who were in the legislature, but there were
13 some, those same framers then voted for a statutory
14 authorization of a system to allow for postal voting for
15 uniformed members of the armed services. How can that be?
16 Well, it's very simple. The Arizona
17 legislature in 1918 did exactly what a court is supposed to
18 do when confronted with a clash between two opposing
19 constitutional provisions that in a certain application
20 cannot both be fully and completely satisfied because there
21 is another part of the Arizona Constitution that came into
22 play when it came to the 18 -- or the 1918 soldier's voting
23 bill.
24 And in fact, it's referenced in the title of
25 that bill, which is an -- sorry. So an act, a paraphrase

1 but basically, an act to ensure that, you know, free and
2 equal right of suffrage, you know, is preserved. Again,
3 I'm paraphrasing. It's not the exact quote, but that's the
4 gist of it.
5 Because there is a provision of the Arizona
6 Constitution called the free and equal clause as well. And
7 what the free and equal clause says is no power, civil or
8 military, shall interfere to prevent the right of
9 suffrage.
10 And to avoid that from happening, the framers
11 of the Arizona Constitution thought they had a clever way
12 to avoid that from happening, which was to prohibit the
13 State from requiring voters to perform military services in
14 the armed forces on the day of an election. But 1918 was
15 in the middle of World War I.
16 And World War I was not a war the State had any
17 control over. Right. This was a National Guard that was
18 called up by the federal government and was a federal army.
19 Right. The State had no say in soldiers going off to war.
20 And so the 1918 soldier's voting bill basically
21 aimed to do the minimum degree of violence to the
22 fundamental tenets of the Australian ballot system that was
23 possible without wholly violating the free and equal clause
24 because obviously if you're off and serving in Europe
25 during an election, it is impossible for you to vote.

1 There is no way. You can't do it unless you can vote
2 postally.
3 So how did they try to preserve these
4 essential elements? Well, in the 1918 bill, ballots were
5 still provided at public expense. In the 1918 bill,
6 ballots were still to be sent and received by elections
7 officials. Fine. Easy.
8 In the 1918 bill, voters were still commanded
9 to vote in private. Even if they were serving in the
10 trenches, they were not allowed to vote in the presence of
11 any other person. The State of Arizona reached across the
12 sea with its statute to go, yeah, we know we have to mail
13 you a ballot.
14 But you better go leave your buddies while
15 you're voting. And you better vote in private. And
16 instead of an elections official, which the State of
17 Arizona couldn't send to the trenches of Europe, either,
18 they had a soldier's commanding officer take the necessary
19 affidavits to ensure chain of custody for the ballots.
20 So again, the very minimum violation of the
21 Australian ballot system that was necessary to ensure that
22 the right of soldiers to vote was not polling impacted.
23 That is how they resolved the constitutional conflict. And
24 they were aware of it.
25 Now, I want to discuss very briefly the

1 preliminary injunctive standard. There is a fairly recent
2 Arizona Supreme Court decision from 2020 called Arizona
3 Public Integrity Alliance versus Fontes. And in this case,
4 the Arizona Supreme Court abolished the traditional four
5 factor standard for preliminary injunctions institute by
6 seeking to remediate the unlawful act or unconstitutional
7 act of an elections official.
8 Now, as Ms. Desai notes in her briefing, the
9 Arizona Supreme Court then after abolishing the standard
10 and say we don't have to apply it, the only thing that
11 matters is probability of success on the merits in these
12 kind of cases.
13 They go on to then apply the four factors in
14 the alternative, the Arizona Supreme Court doing it in the
15 alternative. But the reason they do that is to demonstrate
16 that it makes no difference because probability of success
17 on the merits gets you the other three factors
18 automatically. And that is what the Supreme Court says.
19 For example, they say if you got an
20 unconstitutional act by an elections official, then
21 irreparable harm is assumed. Okay. Well, great. We got
22 that factor.
23 If you have a voter who is going to have
24 vote, you know, under an unlawful or unconstitutional set
25 of procedures, why then as long as it is possible for an

1 elections official to comply with our ruling, then the
2 balance of hardship is satisfied. It's a good opinion,
3 very well worth a read.
4 And again, they use that word possible, as
5 long as it's possible to comply, then there is no balancing
6 of hardships to take place. And the reason for that is
7 look, it's always hard to change the procedures for an
8 election.
9 And if you look at the arguments that
10 Maricopa County has advanced in the briefing, they state
11 that they begin preparing for an election a year before the
12 primary. Well, a year before the primary is about six
13 months after the last general. So there is a very brief
14 window of time in which they are not engaged in the process
15 for preparing for an election.
16 And yet the legislature also meets every
17 year. And the legislature usually changes election laws
18 every year and at least somewhat. And of course, the most
19 noteworthy way they changed in recent years since '91 is to
20 continue to expand the time period for early voting to now
21 where it reaches 27 days before election day.
22 Now, let's talk about the relevance of facts to
23 this case. There was an issue we danced around in the
24 preliminary matter.
25 So there are two components to the plaintiffs'

1 challenge. The first is a facial challenge to the
2 constitutionality of the post '91 system that by its very
3 definition, postal voting violates the definition of
4 secrecy laid down by the framers. You don't need more.
5 Right.
6 When they said secrecy in voting, they meant
7 voting at polls under the lawful gaze of election officials
8 who are there to make sure nobody was looking over your
9 shoulder. That is just how they defined it. They did not
10 have a lay person, certainly not a 21st century lay person
11 definition of the term secrecy. It meant something very
12 specific. And they told us what they meant in the 1891
13 law.
14 And of course, we know this, know that they
15 told what they meant in the 1891 law because probably the
16 seminal source on Arizona constitutional history and
17 seminal work on Arizona constitutional history, the Arizona
18 State Constitution, says this is what the records
19 demonstrate, the records of the convention demonstrate,
20 that there was this 1891 law. They were incorporated.
21 And we provided those citations in the
22 briefing. So to the as applied challenges, facts are not
23 particularly relevant because -- or sorry. To the facial
24 challenge, the facts are not particularly relevant.
25 And we know as well that the '91 system or the

1 pre-'91 system, that it passed constitutional mustard
2 because the courts have never said to what generally under
3 the federal system, states have fairly plenary power to
4 regulate their elections however they see fit.
5 Then, of course, there is also other provisions
6 of the Arizona Constitution or perhaps the federal
7 constitution, though the courts have never said so, you
8 know, that might pose a restriction on that.
9 For instance, if you were trying to regulate
10 your election in a way that required both tests for that,
11 American voter's law, the courts would have something to
12 say about that. Right.
13 But the 1991 and pre-'91 system, it was clearly
14 constitutional because there were means for voters who are
15 old or sick or they had religious conflicts that prevented
16 them from going to the polls on elections day, there were
17 provisions for those voters, who again if they had to
18 travel to the polls on election day and they just simply
19 could not do it, right, there might be a free and equal
20 clause violation or other violations, there was provision
21 that allowed them to do it.
22 But again, just as the legislature had way
23 back when in 1918, these accommodations were made in such a
24 way that it was the minimum possible violation of the
25 tenets of the Australian ballot system.

1 What do I mean? Well, nobody mailed an
2 absentee voter a ballot in 1991. That's not the way the
3 statute was written. Of course, your Honor has in evidence
4 the 1991 changes, which clearly demonstrate what those
5 changes were and the state of the law pre-1991.
6 But a voter was actually brought a ballot,
7 right, a voter who was entitled to vote absentee again
8 because they were old or sick or had a religious conflict
9 was actually brought a ballot to their home by elections
10 officials.
11 So you have the same hand delivery of a
12 ballot from an elections official that you have at the
13 polls. Right. And you have an elections official standing
14 there waiting while you vote to make sure there is no
15 impropriety. And then the elections official takes the
16 ballot from you and brings it back. That is the way the
17 pre-'91 statute is written to offer.
18 And at that point, you know, because
19 defendants have brought out well, why didn't you challenge
20 the pre-'91 system. Well, we wanted to confine this case
21 to challenge the laws that are clearly unconstitutional.
22 Right.
23 And we acknowledge, right, that there could
24 be arguments raised if you abolished any means for somebody
25 to vote from home even they were prevented by physical

1 infirmity from getting out of bed.

2 We acknowledge, right, that it wouldn't be
3 clear, right, that that accommodation, that deviation from
4 the Arizona Constitution, would not be crystal clear that
5 it was not required. And we didn't want to litigate over a
6 grey area. We wanted to litigate over the clearly
7 unconstitutional post-'91 changes.

8 So again, facially as a matter of law that
9 the facts there are not relevant. They are not relevant
10 for another reason as well, which is the Arizona, or I'm
11 sorry, the U.S. Supreme Court just recently in Brnovich
12 versus DNC made it clear, right, that the level of burden
13 if there is a constitutional requirement, if there is some
14 constitution requirement to provide a means of voting for,
15 you know, old, disabled, whatever, the level of burden
16 required for that is extremely high before any
17 constitutional requirement is implicated.

18 And what the U.S. Supreme Court specifically
19 said in Brnovich versus DNC is that having to travel to
20 one's own polling place and cast a ballot there does not
21 exceed the normal burdens of voting and that voters were
22 expected to tolerate the normal burdens of voting.

23 And the free and equal clause says much the
24 same. The free and equal clause has been a bit of a
25 Batanor in the briefing in this action. The courts have

1 defined the free and equal clause. And actually, the
2 definition of the free and equal clause supports what
3 plaintiffs are seeking, right, because the definition of
4 the free and equal clause that the courts have provided,
5 both the Arizona Court of Appeals as well as the District
6 Court that reviewed Yazzi versus Hobbs was that a free and
7 equal election is one in which a voter is not again wholly
8 prevented from voting by power, civil or military, but more
9 importantly one in which the voter is not pressured to vote
10 a certain way, does not have their arm twisted to vote a
11 certain way, right, is not subject to that influence.
12 It tracts with the intent, the original
13 intent of the framers of the Arizona Constitution. And
14 unless you have a total depravation of the right to vote or
15 something very close to it, the free and equal clause is
16 not violated. The case law is clear on that.
17 So any sort of factual consideration about
18 hardships to voters that the new system would pose versus
19 the old system is simply an opposite, right, an opposite.
20 The framers have already struck the balance between secrecy
21 in elections and convenience in voting, right. They struck
22 that balance for us. And it's not the place of the courts
23 or the legislature to revisit it. Only the people may do
24 that.
25 What about, though, the relevance to

1 plaintiffs' claim in the alternative, right, that the
2 current system is unconstitutional as defined, right.
3 Let's assume for a second that it would be proper to adopt
4 some sort of modern notion of the definition of the term
5 secrecy in voting.
6 Let's assume that that was proper instead of
7 applying the framework the framers gave us, which is not.
8 The Arizona Supreme Court has said that the motive
9 interpretation of the Arizona Constitution is the original
10 (indiscernible). Unlike perhaps, I believe unlike the U.S.
11 Supreme Court, the Arizona Supreme Court has explicitly
12 adopted the doctrine of originalism and textualism.
13 So it would not be appropriate to use that
14 definition. But if we were to use it, then that might be
15 relevant to an as apply challenge. And this has some
16 bearing on the exhibits that were admitted, which were
17 totally unavailable to the public until two days ago.
18 The Associated Press had put in a request, a
19 public records request to the Attorney General's Office, a
20 further investigation into a vote buying and pressure ring
21 out of Yuma County, of which the Yuma County Recorder that
22 Mr. LaRue represents apparently was very instrumental in
23 helping take down that ring.
24 And the Attorney General's Office finally
25 released those records two days ago, first to the

1 Associated Press. As soon as we saw it, we put in a public
2 records request and got the records yesterday.
3 And what these records demonstrate -- well,
4 let's talk to the relevance of these records. It's not
5 relevant whether these records demonstrate that this
6 problem is some sort of, you know, phenomena that some
7 massive change in a presidential election or anything like
8 that. Right. It's not relevant.
9 And frankly, as the bipartisan commission on
10 election reform noted in its report, which we also cite in
11 our brief, it's kind of an unknowable question. The
12 fundamental thing about mail in voting is that it's
13 virtually impossible to catch bad actors.
14 And the reason that the ring in Yuma was
15 unraveled was simply that they were just being very stupid
16 about it. They were being very blatant about it. They
17 were doing it in broad daylight in front of a ballot
18 dropoff point. And so they got caught that way.
19 But it's very difficult for more sophisticated
20 actors to be caught when they do so. The magnitude of the
21 issue is not really the relevant factual consideration
22 here. The relevant factual consideration, if this court
23 were to reach the as apply challenge, which again should
24 not, is does the setup of our current no excuses mail in
25 voting system, does that setup make it so that that is

1 possible, that it is possible to run the very influence and
2 pressure and vote buying operation that the framers were
3 specifically intended or specifically intending to prevent
4 when applying the principles of the Australian system into
5 law.
6 Does the fact that our current system allows for
7 that to happen, does that violate the intent of the
8 framers. In that case, were the court to reach an as apply
9 challenge, then facts might become more relevant.
10 So before I reserve the rest of my time for
11 rebuttal, I just want to emphasize, right, this is not a
12 policy question. It's not a question of the desirability
13 of early voting, whether it's good, whether it's bad,
14 whether it's popular. Right.
15 It's those are determinations that the framers
16 of the constitution have already made for us. Our question
17 here today is simply what do they intend, what do they
18 intend by adding the words provided secrecy in voting was
19 preserved. Was this prohibited, Arizona's post-1991 system
20 of no excuses mail in voting or systems like that, simple
21 as that. The answer is yes.
22 Preserve the remainder of our time for rebuttal.
23 THE COURT: Thank you, Mr. Kolodin.
24 Ms. Desai.
25 MS. DESAI: Thank you, your Honor. Can you

1 hear me okay?
2 THE COURT: Yes.
3 MS. DESAI: Okay. I'm having difficulty
4 hearing the speakers in the courtroom. So I want to make
5 sure you could hear me.
6 THE COURT: Well, that's because our speakers
7 are at the main table. And then when you move away from it
8 in the middle of the courtroom, which I like to do, that's
9 the least catching the mics in the courtroom. So the
10 parties can be heard better from the tables.
11 Go ahead, Ms. Desai.
12 MS. DESAI: Okay. And your Honor, I may
13 interrupt any time if I can't hear if I could ask the court
14 to pause if I can't hear some of the other speakers in the
15 courtroom.
16 I want to start with I know your Honor has
17 set forth his preliminary thoughts and views. But I do
18 want to make my record (indiscernible) on short
19 (indiscernible) on the procedural issues.
20 So what we have here today, plaintiffs'
21 verified complaint, an OSC application that claims that its
22 supporting affidavit is a verified complaint.
23 That is what the OSC application says. It
24 refers to an affidavit, the verified complaint and nothing
25 else. And then there is separately a PI motion that was

1 filed, which must establish the PI parameters. And I will
2 talk about that in a moment.
3 So we're here today based on the court's
4 order for that OSC application only. I want to -- I know I
5 said this earlier, your Honor, but I want to make sure I
6 make my record, that the plaintiffs cannot get a PI under
7 its OSC application.
8 At best, theoretically plaintiff can have
9 this court consider its legal arguments as to why certain
10 laws are unconstitutional. But then plaintiffs have
11 separately made a preliminary injunction order after a
12 preliminary injunction hearing to stop early voting for the
13 2022 election.
14 One, a ruling on the constitutionality does
15 not automatically provide an injunction unless, of course,
16 the defendants in the case take leave to accept the court's
17 ruling on the legal argument as an injunction, which my
18 client, the Secretary of State, is not willing to do.
19 And as I said here earlier, the fact that the
20 voter in intent factors require filling of hardship,
21 injuries and things other than selected consent on the
22 merits, there is more work that needs to be done before
23 this court ever enjoins early voting for this
24 (indiscernible) election.
25 I'll now turn to the Secretary's argument on

1 the actual OSC application and why the court relief that is
2 being sought. As a very preliminary threshold issue, I
3 would like to have the court consider what it has before
4 it.
5 There is a 48 page complaint where there is
6 not a single cause of action clearly identified. There is
7 no short and clean statement of the claim as required by
8 Rule 8A2. That rule very clearly requires notice to the
9 defendants about what specific claim is being brought.
10 And I think we're hearing today is very mesh
11 mash and confusing declaratory action and injunctive relief
12 and mandamus and constitutionality issues. And yet there
13 is nothing in the complaint that tells the court this is
14 the cause of action, this is the claim that we have brought
15 under this particular statute and these are the statutes
16 that we are asking the court to declare unconstitutional.
17 They vaguely state that the constitution has
18 been violated. But they don't delineate any of those
19 statutes that they seek to enjoin in full or in part.
20 They vaguely request a declaration that
21 Arizona's post-1990 system of no excuse mail in voting is
22 contrary to the Arizona Constitution. And after requesting
23 a broad injunction with the system in its entirety, the
24 plaintiffs carve out summary voting like the uniformed and
25 overseas absentee voting, which is required under federal

1 law.

2 So even if the court were to grant some broad
3 relief that the laws, the post-1990 system of no excuse
4 mail in voting is contrary to Arizona Constitution, the
5 defendants are entitled to know what specific statute is
6 the court enjoining, which statutes is the court enjoining
7 in whole or in part, election administrators and voters in
8 this state need to understand which pieces are proceeding,
9 which are not.

10 And as I mentioned, some of these laws are
11 required and covered by federal law. We must give our
12 uniformed service men and women ballots to vote and
13 absentee ballots overseas. That is clearly part of the
14 post-1990 system of voting in which the plaintiff on the
15 one hand asked to have enjoined in its entirety and on the
16 other hand say that they are willing to carve out.

17 I want to turn briefly to the issue of the
18 facial challenge versus something else. Your Honor, these
19 are very specific legal terms of art whether there is a
20 facial constitutional challenge versus an as applied
21 challenge. Plaintiffs' counsel throws these terms around
22 as if they mean the same thing. They don't.

23 The only claims that have been asserted that
24 I can tell, and like I said, there is no actual claim
25 asserted in this 48 page, 49 page complaint. But if you

1 look to the specific request for relief at the bottom of
2 page 48 and the top of page 49, there is only a request
3 that the Arizona post-1990 system of no excuse mail in
4 voting is contrary to Arizona Constitution. That's the
5 facial challenge that Mr. Kolodin refers to.
6 There is no as applied challenge. There is
7 no argument. And there are no allegations in all of these
8 paragraphs in the verified complaint that any particular
9 conduct specifically or even generally as applied violates
10 the constitution.
11 And your Honor, that's why in large part I
12 will in moment express my objections to many of the
13 exhibits that have been set forth by the plaintiffs and
14 admitted by this court but not even relied on in
15 Mr. Kolodin's argument.
16 In short, it's impossible to make heads or
17 tails of what the plaintiffs' allegations are. And from
18 looking at these proposed exhibits, Mr. Kolodin says, you
19 know, the contents of a lot of these exhibits are not
20 relevant, the facts are not relevant and yet he wants the
21 court to review them and somehow consider his I guess
22 testimony interpretations about what these records, public
23 records mean and say for purposes of interpreting the
24 Arizona Constitution.
25 I think this would be a good point, your Honor,

1 to turn to the objections. And I'm just going to state
2 them on the record for the court. Obviously you have
3 admitted them, and you will decide what you are going to
4 take into account. But I would like for the record to just
5 assert my objections.
6 With respect to Plaintiffs' Exhibit 1, I
7 object on relevance and hearsay grounds. With respect to
8 Exhibit 2, I object on relevance and hearsay grounds.
9 I have no objection to Plaintiffs' Exhibits 3,
10 4, and 5. Those are documents that are, historical
11 documents that are in public records. The court can
12 consider them with no objection.
13 Exhibits 6 through 12, your Honor, I object on
14 relevance grounds, on hearsay grounds. They are incomplete
15 and are highly prejudicial. These are documents that have
16 been cherry picked from an entire production of public
17 records.
18 They are unsworn records and statements. They
19 are untested. They are partial. And they are prejudicial
20 to an ongoing criminal case that is pending in a different
21 county that relates to human beings that are the subject of
22 these records who don't have an opportunity to come in to
23 this proceeding and to provide any context for these
24 unsworn, untested hearsay statements.
25 I don't know what Exhibit 13 is, your Honor.

1 Counsel did not talk about it, utilize it, admit it for
2 purposes of any argument. So I'll reserve any objection
3 with respect to Exhibit 13 since I can't tell what it is or
4 what its relevance is.
5 And with respect to Exhibit 14, I would state
6 the same objections that I had for Exhibits 6 through 12,
7 relevance, hearsay, they are incomplete and highly
8 prejudicial.
9 Your Honor, briefly on the standing argument, I
10 want to make sure the court understands here like the
11 facial and as applied in terms of argument that's going
12 around, the plaintiffs kind of goes back and forth, and I
13 think this is because they don't allege a cause of action,
14 there is no (indiscernible) being brought, but they say
15 that there is a relaxed standard for the PI actually
16 brought. There is not anything like that.
17 It is an OSC application seeking to declare some
18 laws that are not identified as unconstitutional. So this
19 relaxed standard that they prey to does not apply. And the
20 plaintiffs can conveniently make this whatever they decide
21 to make it. They filed a complaint with no clear cause of
22 action. The consequences are theirs to bare.
23 The case also, the complaint also does not seek
24 declaratory relief. There is no declaratory action pled in
25 the complaint. There is a very specific statutory

1 provision that you must cite when you're bringing a DEC
2 action. It is not cited in the complaint.
3 So the arguments with respect to
4 (indiscernible) don't hold water. The generalized
5 statement and grievances are not acceptable under Arizona
6 law and appear to be from the Arizona School Board
7 Association's v. State case. And your Honor, the cite is
8 252 Arizona 219. That was an Arizona Supreme Court case
9 decided this year.
10 The court expressed the issue of standing and
11 rejected the exact arguments the plaintiffs make here for
12 general party standing and individualized standing on a
13 taxpayer basis.
14 I'll move, your Honor, to the latches and
15 Purcell argument also very briefly only to make a record.
16 The real issue for the latches today, we can talk more,
17 when a court, if a court is going to consider an actual
18 preliminary injunction order, I don't want to go too much
19 into that today because I don't know if that is what we're
20 doing.
21 But I do want to touch on the prejudice issue.
22 Purcell and latches talk about when confusion and
23 prejudice. It's a very significant component of these
24 offerings.
25 And I do not think of a more confusing and

1 prejudicial thing to Arizona voters to tell them that in
2 the same election cycle, they can early vote in one
3 election, that being potentially the primary election that
4 is basically underway but not the next part of the '22
5 election, which is the general election.
6 That is what it appears plaintiffs are asking
7 this court to do, which is to impose a different standard
8 on not just elections administrators but on voters, on
9 citizens across the State who have for many years utilized
10 a facilitory voting who understand that they going to, the
11 ones who have requested their early ballots who will be
12 participating in the election and to be able to utilize
13 that system in a primary but not the general could not be
14 further from what the courts have permitted to proceed this
15 late in the stage of litigation with respect to voting.
16 And now, your Honor, I'll turn to the
17 injunction factor. I'm going to turn it over to my
18 colleague, Ms. Yost, to argue with respect to the length of
19 it on the merits.
20 I really want to be very clear to address
21 Mr. Kolodin's comments about the fact that there is an
22 opposing integrity alliance, the case that he cited in
23 2020. He indicated there is a very recent case from 2020
24 that is underway with (indiscernible) factors with the
25 plaintiffs bringing constitutional challenge.

1 And he said, well, in that case, you know, the
2 alternative he cited had factors. But they didn't have to.
3 They just did. Well, putting aside entirely what the court
4 did in the alternative or otherwise, and I don't concede
5 that, your Honor, that it was done in the alternative, I
6 think the court went through that exercise as a necessary
7 analysis the court must undergo to issue an injunction.
8 But a year later, so (indiscernible) public
9 integrity alliance in Van v. State, the cite, your honor,
10 for that case is 251 Arizona 425, a 2001 case, in that
11 case, the court very clearly and unequivocally stated that
12 a party seeking a preliminary injunction on a
13 (indiscernible) constitutional challenge must show one, a
14 strong likelihood of success on the merits;
15 Two, the possibility of irreparable harm if the
16 relief is not granted;
17 Three, the balance of hardships favoring the
18 party in the injunctive relief;
19 And four, public policy arguments favoring
20 granting the injunctive relief.
21 Plaintiffs must, and they have not in any way,
22 shown that these factors under the preliminary injunction
23 standards have been met. And in fact plaintiffs will
24 suffer no injury if the court denies their request for an
25 injunction.

1 Their request is to make voting more difficult,
2 to limit voting, to make it so that less people have
3 opportunity to vote. They are not arguing in any way that
4 there are members who are harmed and not able to vote
5 because of these early voting laws. And the balance of
6 hardship and public interest clearly favor upholding the
7 Arizona early voting system.
8 Your Honor, I will turn the camera over to my
9 colleague, Ms. Yost, to address the merits of the facial
10 constitutionality.
11 THE COURT: Go ahead, Ms. Yost.
12 MS. YOST: Hello, your Honor. Can you hear
13 me?
14 THE COURT: Yes.
15 MS. YOST: Plaintiffs are not entitled to any
16 relief in this case because they cannot succeed on the
17 merits of their complaint. They made a fairly legal
18 challenge to the constitutionality of Arizona's vote by
19 mail system from what we can tell from the complaint.
20 They are claiming as a matter of law.
21 Plaintiffs' claim primarily rests on Article 7, Section 1,
22 of the Arizona Constitution. And we heard argument today
23 that never talks about the actual type of constitutional
24 provision. That provision is secrecy in voting.
25 For those three words, secrecy in voting,

1 plaintiffs claim that the framers meant that all voting
2 must occur in person on election day and adhere to pages
3 and pages of specific procedures that were adopted by the
4 Territorial legislature 19 days post (indiscernible).
5 Plaintiffs couldn't be more wrong. That is not what the
6 constitution says.
7 And in fact, it confirms that the framers
8 decided to, did not intend what plaintiffs claim they
9 meant. In 1918, some of the very same constitutional
10 delegates who passed Arizona's first absentee voting laws,
11 it allowed election officials to mail the ballots to
12 voters, who then voted the ballots in private, sealed them
13 in the sealed envelop, signed an affidavit and mailed the
14 envelop back.
15 That's exactly what happened today under our
16 vote by mail system in Arizona. We can infer that those
17 legislators who passed that first law went over the
18 details, knew what the framers intended. They were there.
19 And we cited the Clark Voyt case, your Honor, under that
20 point.
21 Today's plaintiffs are arguing that the 1918
22 bill was okay under their version of what the constitution
23 says because (indiscernible) not to appear in person. But
24 their entire argument assumed that voting in person and
25 voting in private, they ignore what Article 7, Section 1,

1 actually says.

2 Having an excuse or reason to vote early has
3 no bearing on the issues. They didn't pass the burden in
4 here of proving that there is no present circumstances
5 under which Arizona's early voting statutes are
6 unconstitutional. They don't even reference the relevant
7 statutes, let alone proving the statutes are
8 unconstitutional in all their applications.

9 Plaintiffs today, Plaintiffs' counsel argued
10 that their as applied (indiscernible) and not asserted in
11 the complaint raised the question it's possible that early
12 voting can result in the (indiscernible). That is the
13 opposite of what the legal standard is. They have the
14 burden of proving that the law is unconstitutional in all
15 applications.

16 In reality, Arizona's statutes have
17 significant safeguards in place to preserve integrity. And
18 your Honor, the plaintiffs purport to many statutes cited
19 in our brief, pages 13 to 14, about how early voting
20 actually worked and preserve the integrity of early voting.
21 The short of the matter is if the framers wanted to require
22 in person voting at the polls on election day (they would
23 have said so.

24 The plaintiffs' own authority they rely on in
25 their papers proves this point. They base their

1 (indiscernible) court case, Clark v. Nash, relied on
2 constitutional provisions that required ballots be
3 furnished at the poll to the voter marked in private at the
4 poll. And then they are disposited.
5 That is language that our framers would have
6 included if they intended to to require something other
7 than preserving legal (indiscernible) voting.
8 Plaintiffs argue that other mandamus
9 provisions in words in the constitution explicitly require
10 in person voting on election day. They point to Article 4,
11 part 1, part 1 of the constitution, which preserves in
12 whole the fundamental rights of the Michigan referendum.
13 They use the words at the poll to describe the right of the
14 people to make law directly at an election instead of
15 through your legislative representative.
16 they said nothing about the manner of voting
17 in elections. That is in Article 7, Section 1.
18 They also point to other provisions of
19 Article 7, none of which govern how a person may cast their
20 votes. Article 7, Section 2 decides who is qualified to
21 vote at an election. Article 7, Section 4 and 5, protects
22 voters from (indiscernible) or military service while they
23 are voting or on election day.
24 And Section 11 makes the first Tuesday in
25 November election day. That's an unconvertible statement.

1 All agree that that is election day. But many people
2 (indiscernible) that election day, that all voting must
3 occur on election day. The election is (indiscernible) on
4 that day. And the Arizona Supreme Court (indiscernible).
5 Your Honor, early voting is secure in its
6 system and is widely used in Arizona and has been around
7 for over a century. Nothing in the constitution disallows
8 it.
9 THE COURT: Thank you.
10 Ms. Desai, is your presentation done, then?
11 Ms. Desai? Is your presentation done?
12 MS. DESAI: Yes, your Honor. We don't have
13 anything further, but we reserve the right to
14 (indiscernible) when you get defendants done, I don't know
15 what is happening next.
16 THE COURT: I don't think we are having any
17 witnesses today.
18 Mr. LaRue, you were next. Are you or
19 somebody else going to speak?
20 MS. HARTMAN-TELLEZ: Your Honor, Karen
21 Hartman-Tellez on behalf of seven counties.
22 THE COURT: What is the name again?
23 MS. HARTMAN-TELLEZ: Karen Hartman-Tellez.
24 THE COURT: Ms. Hartman-Tellez. All right.
25 Go ahead, Ms. Hartman-Tellez.

1 MS. HARTMAN-TELLEZ: Thank you, your honor.
2 I won't spend too much time repeating what
3 the counsel for the Secretary of State has said. We join
4 in their objections to the evidence that has been, exhibits
5 that have been submitted to the court.
6 And we join their argument on the legal
7 grounds on standing and latches and Purcell. And I would
8 also I won't belabor it actually, but I did want to make a
9 bit more of a record about the harm to voting election
10 systems and what the administrators and to the public if
11 injunctive relief that is requested is granted.
12 We (indiscernible) in our papers. But on the
13 question of voter confusion, I wanted to add that Arizona
14 law requires election officials, recorders, to send what we
15 call a 90 day notice in advance of a primary election to
16 those voters who are on the active early voter list, which
17 is somewhere around 75 percent of Arizona voters.
18 That notice tells the voters that they will
19 be receiving their early ballots both for the primary and
20 for the general election. So even if the court doesn't
21 grant relief with respect to the primary that has early
22 voting starting on July 6th, if relief is granted for the
23 general election, voters would have already received
24 information that they will be getting an early ballot in
25 the mail.

1 So that will cause confusion. And then
2 (indiscernible) of driving force of the papers in the
3 Purcell case which arose out of an Arizona election law.
4 With respect to the legal argument regarding
5 the constitutionality of early voting, I just want to make
6 a few points about our constitutional structure. The
7 Arizona legislature is granted power to make laws by the
8 constitution. It's only restrained from making laws if the
9 constitution expressly prohibits.
10 And nothing in the Arizona Constitution
11 prohibits the legislature from making laws permitting early
12 voting. Indeed, early Arizona legislators, many of whom
13 were also participants in the Arizona constitutional
14 convention, enacted absentee voter laws.
15 And in interpreting of very similar
16 constitutional privileges, the California Supreme Court
17 specifically held that the secret voting requirements in
18 the California constitution do not bar mail in ballots,
19 early ballots or absentee ballots.
20 And indeed, the Secretary's counsel already
21 mentioned this, but there are many laws in place relating
22 to secret early ballots. The legislature has followed the
23 constitutional requirement of making, of protecting secrecy
24 in voting while still making early voting laws.
25 And then just a couple more points. I mentioned

1 the confusion to voters. And should we get to the point
2 where the court is considering taking evidence regarding a
3 preliminary injunction, the county recorders can provide
4 testimony about the extreme problems that will be caused if
5 early voting is enjoined.
6 The election planning up to a year before an
7 election, the county recorders have to secure the building
8 locations. Those voting locations must be AEA compliant.
9 They must hire a sufficient number of poll workers to staff
10 those locations.
11 They must have equipment sufficient to supply
12 those locations. They will likely be unable to do so if
13 they need to do so for six times or more as many locations
14 as they have now.
15 They have some difficulty even now securing
16 enough poll workers. Getting many times over as many will
17 be impossible. Election officials are fantastic problem
18 solvers. But they are not magicians. They cannot conjure
19 polling places or poll workers our of (indiscernible.)
20 I think that for now I am (indiscernible).
21 So if the court has any questions, I can answer them.
22 THE COURT: All right. That's it from the
23 Maricopa County, then?
24 MS. HARTMAN-TELLEZ: Your Honor, on behalf of
25 Maricopa County and all of the other six counties that we

1 are actively defending (indiscernible).
2 THE COURT: Right. Thank you. I don't have
3 any questions.
4 I guess I'll give Mr. Arellano some time. So
5 go ahead.
6 MR. ARELLANO: Thank you, your Honor. And
7 given the issues with the audio, do you prefer I argue from
8 counsel table or from the podium?
9 THE COURT: Counsel table.
10 MR. ARELLANO: Okay.
11 So your Honor, I would begin as Mr. Kolodin
12 did with the nature of the legislative power. And it's a
13 point that Ms. Hartman-Tellez has touched on, which it
14 appears in the constitution doesn't grant power to the
15 legislature.
16 We don't look for grants of power in Arizona
17 as we do say with the federal constitution. We don't look
18 to see if the Congress allows this, if the spending clause
19 allows this. What we look to instead is whether the
20 constitution prohibits a particular practice.
21 And the standard on this, especially clear in
22 Arizona and has been since at least 1947 when the Earhart
23 v. Bromiller case which we cited in the papers.
24 The standard for judgment in the Arizona
25 Supreme Court says it's clear we espine that an as

1 challenge is clearly prohibited, not that it just might be
2 prohibited, not just you piece, you know, little word here,
3 a word there and a word there and gather to maybe prohibit
4 it. You need a clear prohibition for an act of a
5 legislature to be unconstitutional.
6 And in doing that analysis, you have to, the
7 courts have to entertain the presumption that the
8 legislature acts constitutionally and it must give the
9 statute a reading that is constitutional if possible. That
10 is the standard. That is the framework from which we
11 begin.
12 So I join fully in the Secretary of State and
13 the Maricopa County, all the counties who have appeared
14 today who have appeared today on the procedural issues we
15 have discussed today.
16 And I'll add only with respect to Exhibit 2,
17 which is the declaration, we would also object on Rule 702
18 and Dalbert, and that's represented by to have the right of
19 opinion testimony. But putting that aside, I want to turn
20 now to the merit.
21 And as I think plaintiffs' counsel made clear
22 today, this case turns, at least according to them,
23 entirely on the latter clause of Article 7, Section 1 of
24 the State Constitution that provides that secrecy in voting
25 shall be preserved. That's really what this case turns on.

1 Your Honor, Arizona preserves secrecy in
2 voting. To begin, the distinction between this pre-'91
3 system versus post-'91 system, it's really not a temple
4 one. You know, I go wholeheartedly with Ms. Yost's point,
5 but whether someone had a reason or an excuse to obtain an
6 early ballot or absentee ballot as it was called then has
7 no bearing whatsoever on secrecy.
8 As I think your Honor but your Honor and the
9 plaintiffs have acknowledged, this case is not about
10 security. It's not about fraud. It's not about, you know,
11 ballot collection is something we should allow or not.
12 It's simply about whether Arizona preserves secrecy in
13 voting. And they plainly do.
14 One procedural point I do want to touch on
15 quickly is this distinction between a facial and an as
16 applied challenge. As Ms. Desai mentioned, those are legal
17 terms of art that have particular concrete standards to
18 them. And plaintiffs failed to talk either.
19 A facial challenge, when the plaintiffs
20 challenge the laws are constitutional facially, they have
21 to show that there are no set of facts under which the
22 statute can be constitutional. Plaintiffs don't even
23 allege that, let alone try to show it.
24 What they would have to allege and show is that
25 early voting in every single instance would be

1 unconstitutional because it would be impossible to vote
2 early and private. And that's simply not the case.
3 People regularly vote in early ballots in
4 private all the time. And they don't allege to the
5 contrary.
6 For the as applied challenge, what that means
7 is that the statute has to be unconstitutional as applied
8 to them, as applied to plaintiffs specifically. And no
9 plaintiff alleges that either they personally or any of the
10 party's members have been unable to vote in secret by early
11 ballot.
12 In the papers I mentioned, plaintiff Ward
13 herself had voted early. There has been no reputation of
14 that. And neither Ms. Ward nor the party have alleged that
15 they or their members have been unable to vote in secret.
16 Now, as I mentioned, Arizona preserves secrecy
17 in voting. Nobody is forced to vote in early ballot.
18 Quite the contrary, a voter has to tender a request for an
19 early ballot in order to receive one.
20 And in preparing that ballot -- and that's ARS
21 16-542A. In preparing a ballot, an early ballot envelope,
22 the election officials have to make sure that the envelopes
23 are a type that do not reveal the voter's selections or
24 political party affiliation and it is tamper evident when
25 properly sealed. There is secrecy.

1 Once the voter casts the ballot, only the
2 elector may be in the possession of that elector's unvoted
3 early ballot. ARS 16-542D, secrecy. The voter, quote,
4 must mark his ballot in such manner that his vote cannot be
5 seen. He must fold the ballot so as to conceal the vote.
6 And finally, he must put the ballot in the
7 specially provided again tamper evident envelope, which
8 shall be securely sealed. That's ARS 16-548A.
9 Finally when elections officials receive that
10 voter early ballot, they have to first confirm the voter's
11 eligibility, that they confirm it is a registered voter,
12 that they have to do a signature comparison and other
13 indicia that matches this person is in fact who submitted
14 this early ballot as well as the ballot, itself, is it a
15 valid envelope with indicia of authenticity.
16 But once they go through that process, there
17 is still additional steps of privacy or secrecy. The
18 election worker must take out the ballot without unfolding
19 it or permitting it to be opened or examined before
20 submitting that ballot for tabulation. So to satisfy
21 clearly and robustly protects secrecy.
22 I want to talk briefly on a case that
23 plaintiffs have cited in the papers and I actually think
24 hurts them quite severely. It's the Miller v. Picacho
25 case. It's 179 AZ 178. Your Honor, we believe that case is

1 one where the Arizona Supreme Court blessed early voting
2 quite explicitly with reference to the secrecy in voting
3 provision, Article 7, Section 1.
4 The court said, and I quote, under the Arizona
5 Constitution, voting is to be by secret ballot. They then
6 quote Article 7, Section 1. They go on to say, Section
7 16.543B, which is the early ballot section that we still
8 have in effect today, advances this constitutional goal by
9 setting forth procedural safeguards to prevent undue
10 influence, fraud, ballot tampering and voter intimidation.
11 Again, we have statutes in place to protect
12 precisely against the thing that plaintiffs allege, again
13 without any support, are happening.
14 So your Honor, Arizona Constitution does not
15 prohibit early voting, let alone clearly so. To the
16 contrary, it explicitly grants the legislature to prescribe
17 by law the method of voting. And it leaves to the
18 legislature the prerogative to determine how best to ensure
19 secrecy in voting. And that is something the legislature
20 has done quite well.
21 Finally, your Honor, I just want to touch on
22 the free and equal election clause that I know plaintiffs'
23 counsel touched on. The issue is not simply is it a burden
24 to have to go to one's polling place as opposed to voting
25 an early ballot. The issue is would that voter have a

1 poling place to go to at all.
2 The Maricopa defendants have alleged, have
3 stated in their papers this isn't the thing you can just
4 flip on a switch and then just switch the millions of
5 voters who have voted early to that vote in person. There
6 is infrastructure that goes into that that simply can't be
7 done, can't be turned on a dime.
8 You have to secure both a poll location as
9 determined AEA compliant. You have to do that months, if
10 not years, in advance. You have to do so, you know,
11 Maricopa County, Pima County or really any part of the
12 state, you're talking about thousands of polling locations.
13 It's not just a matter of oh, can you
14 accommodate the absentee ballots, no excuse early ballots.
15 You have to ask will voters have a place to vote. And as I
16 think the election officials have shown here, many voters
17 won't. And that would be a violation of the free and equal
18 election process.
19 THE COURT: All right. Thank you.
20 I guess I was planning on taking a break
21 around now. But I think we are close. I don't know how
22 much more you have.
23 MR. KOLODIN: We have rebuttal, your Honor.
24 THE COURT: I know. How much time do you
25 think it will take?

1 MR. KOLODIN: Probably -- how much time do I
2 have remaining, your Honor?
3 THE COURT: You have time. I'm not saying
4 unlimited. It's only 3:00 o'clock. Let's take a five
5 minute, a five or ten minute break and give the court
6 reporter a break. And then you have the time to argue
7 whatever you want. We'll be back.
8 (Recess 2:57 to 3:14)
9 THE CLERK: All rise.
10 THE COURT: Thank you. Please be seated.
11 Back on the record in CV-2022-00594. I don't
12 know if the attorneys that were talking earlier just
13 decided to go off video because we don't see them. I don't
14 know. But there are --
15 UNIDENTIFIED SPEAKER: You are still muted.
16 THE COURT: Well, I'm still muted. I'm still
17 muted when I come back in. I always forget that. All
18 right.
19 We're back on the record in CV-2022-00594.
20 Show the presence of the parties and counsel. We have
21 everybody I think now that I need to go forward.
22 Mr. Kolodin.
23 MR. KOLODIN: Thank you, your Honor.
24 THE COURT: And again, if you want everybody
25 to hear you, maybe standing over there is better. I don't

1 mind coming up here. But the audio is better on the zoom.
2 MR. KOLODIN: Oh, the folks on zoom, did any
3 of you have difficulty hearing me, I got a pretty loud
4 voice, before?
5 MS. DESAI: You're better at the table.
6 THE COURT: Ms. Desai says she was going to
7 interrupt you the next time is the impression I got. So
8 she wanted to ask some questions the first time. But she
9 got the gist of it.
10 And I'm just saying if you want to bring the
11 podium back so you're more comfortable. Just standing by
12 the edge is even better than being out in the middle of the
13 courtroom.
14 MR. KOLODIN: I'll do that, your Honor.
15 THE COURT: All right.
16 MS. DESAI: Thank you.
17 THE COURT: For all of our new courthouse
18 technology, the middle of the courtroom. We used to have
19 that big old thing in the middle of the courtroom. And it
20 didn't work.
21 MR. KOLODIN: Oh, there we go. See, this is
22 what happens when some of your colleagues are former
23 engineers.
24 THE COURT: That sounds like it's better.
25 All right.

1 Go ahead, Mr Kolodin.
2 MR. KOLODIN: Thank you, Your Honor.
3 So I will start out by just addressing the
4 arguments of each counsel that I'll be responding to. I'll
5 take it by counsel organized by Ms. Desai, as I could, with
6 you made one argument. If I messed that up, I apologize.
7 I'll start with the arguments of Ms. Desai.
8 So Ms. Desai made the argument that a ruling on a
9 declaratory judgment action doesn't enjoin anyone. So this
10 is also related to her argument that there were no specific
11 claims in the complaint, which is incorrect.
12 And the reason that both of these claims are
13 incorrect are things Ms. Desai note, because we actually
14 modeled our complaint in this action on her quite
15 successful complaint in Arizona School Board Association
16 versus Hobbs. As I said, I have great respect for
17 Ms. Desai as an attorney. Studied her work closely.
18 And in Arizona School Board Association versus
19 Hobbs, Ms. Desai sued the State of Arizona. She requested
20 both declaratory and injunctive relief, seeking to enjoin
21 certain statutes as unconstitutional and have them declared
22 to be unconstitutional, certain statutes that the
23 legislature had just passed during that budgetary session.
24 And what the court said in that action was
25 well, because she had sued only the State of Arizona,

1 injunctive relief couldn't issue because injunctive relief
2 couldn't issue against the State but that the court was
3 issuing declaratory judgment and it was expected that the
4 appropriate state officials would comply with the
5 declaration.
6 And if they did not comply with the
7 declaration, then injunctive relief would be available to
8 issue against those particular state officials. And of
9 course, the Arizona Supreme Court affirmed that ruling.
10 Here in contrast, we do have the appropriate
11 state officials before the court. We have the Secretary
12 and the applicable elections official from each county.
13 And so therefore injunctive relief is also available.
14 Now, on the issue of the specific claim, very
15 similarly to the work that Ms. Desai did in Arizona School
16 Board Association, we cite the applicable statutes in
17 paragraph 35, perhaps elsewhere but I was doing a quick
18 search.
19 We cite paragraph 35, the Arizona Uniform
20 Declaratory Judgment's Act as well as the mandamus statute
21 based for this court's jurisdiction.
22 And then as Ms. Desai did in the School Board
23 Association complaint, we simply discussed the separate
24 constitutional provisions. The one thing that she did
25 which we did not is she in her complaint put the words

1 Count 1 before the provision that was being discussed.
2 So for instance, in Ms. Desai's complaint in
3 the Arizona School Board Association, she says Count 1,
4 declaratory judgment, violation of title requirements.
5 Your Honor, we posited. It's equally clear either way.
6 On the issue of delineation of statutes,
7 Ms. Desai seems to posit that there is a requirement that
8 the plaintiffs delineate each and every statute that would
9 be rendered unconstitutional by the court's decision.
10 There is no such thing.
11 And in fact, courts rarely do that when they
12 issue their orders. And for example, your Honor will
13 certainly be aware what the decision in Roe versus Wade,
14 very seminal U.S. Supreme Court case, which invalidated
15 scores of statutes in 15 different states related to
16 abortion.
17 The Supreme Court's opinion in Roe versus
18 Wade does not delineate all those statutes. There is a
19 certain point in which it becomes unwieldy. It is expected,
20 as in Arizona School Board Association, that elections
21 officials will review the ruling and comply.
22 And it may also be that a statute deals
23 partially with early voting and partially with in person
24 voting. And so the clear way is to simply render a
25 decision on the constitutionality of the post-'91 system,

1 which is what we ask this court to do.
2 Ms. Desai also brings up the example of Uocava
3 to support this argument that there is a necessity to
4 delineate each statute. Important for this court to know,
5 Uocava operates on a totally different system than Arizona
6 system notes of mail in voting.
7 In fact, it's not postal in nature at all.
8 Uocava ballots are emailed sometimes to service members
9 overseas. Sometimes they are faxed. Sometimes they faxed
10 back. Sometimes they are emailed back.
11 And there are specific federal statutes that say
12 the State has to, it has to allow for these procedures.
13 And there is actually federal law that lays out these
14 procedures. So it runs on a totally different track than
15 no excuses mail in voting.
16 And again, Uocava just like the 1918 soldier's
17 voting bill, even if it was being looked at purely within
18 the framework of the Arizona free and equal clause and then
19 also the framework of the federal, the power to regulate
20 the conduct of the armed forces and Congress's power over
21 the federal military as well, even if you just looked at it
22 in the purely Arizona state law context as the same issue
23 as the 1918 soldier voting law where without a system like
24 Uocava, you have a power, military or a civil war military,
25 it's military, right, that is preventing the free and equal

1 exercise and the right of suffrage body deploying our
2 service members and or be ready to be deployed on pretty
3 much instant basis. Like I said, a totally different
4 animal.
5 I also want to address for the record the set
6 of objections one, to preserve my own record; but two, more
7 importantly to explain to the court why it really is quite
8 appropriate for them to be considered.
9 Exhibit 1 is simply the Attorney General's
10 Office's email where they note they are filling our
11 response of public records request. And it's hard to see
12 how an email from an official government body could qualify
13 as hearsay.
14 It's a public record. And the record of that
15 email is public record. And there is no reason to doubt
16 that an email sent from an official account with the
17 Attorney General's Office would be inauthentic. So I
18 struggle to understand those objections.
19 Exhibit 2 is objected to relevance and hearsay.
20 That is the declaration of Senator Kelly Townsend, who is
21 the highest ranking member of the Arizona Senate that deals
22 with elections issues, explaining that it is feasible for
23 the court to grant the relief that is requested, that it is
24 possible for elections officials to comply.
25 Of course, in her declaration, Senator Townsend

1 lays out before she was the highest ranking member of the
2 Arizona State Senate dealing with elections, she was the
3 second highest ranking member of the Arizona House dealing
4 with elections on the committee that dealt with elections,
5 vice-chair.
6 And so she has ample experience in this
7 regard, and her testimony is relevant. And she is allowed
8 to submit that testimony via declaration whether under the
9 rules applicable to a show cause hearing or under the rules
10 applicable to preliminary injunction hearing.
11 Either of those rules allows for the
12 submission of testimony via declaration. And so it is
13 submitted in this form.
14 Numbers 3, 4 and 5, Ms. Desai has no
15 objection.
16 Exhibits 6 through 12. Exhibits 6 through 12
17 and also 14, which we sort of put in at the end, so these
18 are all either police reports or a declaration from law
19 enforcement or reports of the investigators at the Attorney
20 General's Office.
21 So these are an express exemption from the
22 hearsay rule. And it specifically -- specifically I'll
23 pull up my notes because I figured to be at issue -- is
24 specifically under Rule 803.8.
25 Rule 803 of the Arizona Rules of Evidence

1 provides the following are not excluded by the rule against
2 hearsay regardless of whether the declarant is available as
3 a witness.
4 And go down to 8, public records. A record
5 of statement of a public office if it sets out A iii in a
6 civil case or against the government in a criminal case
7 factual findings from a legally authorized investigation
8 and also ii, a matter observed while under a legal duty to
9 report but not including any criminal case a matter
10 observed by law enforcement personnel.
11 So in other words, a matter observed while
12 service somebody engaged by the state in the practice of
13 the profession of law enforcement is an exemption from the
14 rule against hearsay in a civil case but not a criminal
15 matter.
16 And I know that one of opposing counsel had
17 mentioned, you know, that there was a parallel criminal
18 case in Yuma. And this special against those individuals
19 or whatever, it's a completely different evidentiary
20 standard. In a criminal case, it's hearsay, it's
21 excludable.
22 In a civil case, it's not hearsay. And it is
23 to be considered. And this is a civil case. So I wanted
24 to make that note clear.
25 On the relevance, there is also an objection,

1 of course, to Exhibit 6 through 12 on relevance, right.
2 And the relevance beyond what is stated in my opening is
3 that the target of this investigation, the court has the
4 documents, I won't read through them, the target of this
5 investigation was an elected official in Yuma, was an
6 elected official in Yuma for many years, that was the
7 leader of this ring according to the police reports and
8 declarations and investigator reports.
9 MS. DESAI: Your Honor, I object to the
10 direct by Mr. Kolodin testifying about that that are not
11 evidence.
12 MR. ARELLANO.
13 THE COURT: Objection the form --
14 MS. DESAI: It is inappropriate for him to be
15 testifying about things.
16 THE COURT: The objection is overruled. He
17 is just telling me what he wants to tell me. It's argument
18 home at this point. Objection is overruled.
19 MR. KOLODIN: I want to be very, very clear
20 that I'm not testifying from personal knowledge, that I'm
21 just discussing and summarizing the contents of Exhibit 6
22 through 12 and 14.
23 So there is an elected official working
24 political NGOs, right, non-governmental organizations, to
25 facilitate and run this vote buying and pressure ring. And

1 there is even items in the investigator's report about,
2 this is Exhibit 14, about individual appearing, that this
3 person running the ring was so powerful that she feared for
4 her life or feared that she would be destroyed if she spoke
5 out against it.
6 Again, I highlight these things because,
7 again, the genes of the Australian ballot system was to
8 protect the elections process, itself, from the undue
9 influence of political machines engaged in these kind of
10 machinations. That's why it exists. That's why it was put
11 into the Arizona Constitution.
12 And we see a clear, relevant and very, very
13 recent discovery of its violation, a violation that has
14 been stretched back to at least 2016 but one that the AGs
15 office just made public a day and a half ago.
16 Again, as Mr. Arellano pointed out very
17 aptly, a facial challenge is a challenge that the
18 challenged law unconstitutional under our circumstances is
19 our position.
20 And we maintain the position that this is
21 only relevant if the court decides that secrecy in voting
22 was not defined by the framers of the Arizona Constitution
23 as a matter of law, which they did. So to the extent that
24 she objects on relevance in terms of plaintiffs' primary
25 argument, we would agree. It's not relevant there.

1 But if the court decides to start considering
2 issues that defendants diverge as to whether current law is
3 really, you know, sufficient to preserve secrecy in voting
4 under a modern lay definition, then it could potentially
5 become relevant. So we have it, and it is submitted for
6 the court's consideration.
7 Ms. Desai and her team also contend that the
8 relaxed standard on standing on mandamus actions does not
9 apply here. I want to point one thing out about that. And
10 she is essentially talking Fontes. And I want to point one
11 thing out on Fontes. And I will discuss it in a little
12 more detail a little bit later.
13 But Fontes makes, abolishes the preliminary
14 injunction relief factors as to all claims of unlawfulness
15 or unconstitutionality as to the acts of elections
16 officials. So those holdings are not limited to mandamus
17 actions.
18 They expressly limit their holding regarding
19 the relaxed standings standard to mandamus actions, to
20 which that case was. But as this court has already said,
21 plaintiffs have satisfied the requirements of standing
22 under the declaratory judgment act.
23 And so whether they also satisfy the
24 requirements of standing under the relaxed mandamus
25 standards is just simply irrelevant.

1 Ms. Desai points out or argues that the
2 Arizona Supreme Court rejected similar standing arguments
3 in the Arizona School Board Association case with respect
4 to the declaratory judgment act. That's not what they did
5 at all.
6 In fact, quite the opposite. They had a very
7 broad conceptions standing. They basically said that, for
8 example, every citizen in a particular city was injured by
9 unlawful act of a particular elections official.
10 And they pointed out that declaratory
11 judgment access, any person interested or whose rights or
12 legal relations may be affected by the challenged statute
13 had standing.
14 And they pointed out in the Arizona School
15 Board Association that that can mean both the natural
16 person or an organization very similar to the case except
17 the difference here is that plaintiffs have much stronger
18 claim presented than even that.
19 The Arizona Republican Party conducts party
20 primaries under Arizona's post-'91 system of no excuses
21 mail in voting. We have to. It's statutory. But it's
22 unconstitutional. And if that is not a sufficiently direct
23 relationship to confer standing, I am very unsure what is.
24 In addition, the Arizona Republican Party
25 supplies, by statute observers, ballot challengers,

1 signature challengers to both the early voting and in the
2 person election day components of Arizona's election
3 system.
4 And obviously the necessity to supply those
5 challengers and what those challengers are actually able to
6 observe of they system is highly affected by Arizona's
7 post-'91 system of no excuses mail in voting.
8 Challengers, for example, the Attorney
9 General has noted in a recent report that with respect to
10 absentee voters, there has been insufficient access by
11 party observers to the signature verfication process.
12 Again, you know, the Declaratory Judgment Act
13 as the Supreme Court self noted explicitly in a quote set a
14 low bar. And we quoted that in our complaint. But we
15 certainly hurdled over that bar and probably hurdled over a
16 a much higher bar.
17 There is no need to go on in terms of the
18 standing issue. In fact, Mr. Arellano sitting right there
19 is quite proof of that.
20 So Ms. Desai and her team also make this
21 argument that they reject that the Arizona Supreme Court
22 said that she didn't have to satisfy the preliminary
23 injunctive relief elements in Fontes. And I don't know how
24 they at put it had it been any clearer about that that's
25 exactly what they were doing.

1 They say because plaintiffs have shown that
2 the recorder has acted unlawfully and exceeded his
3 constitutional and statutory authority, they do not satisfy
4 the standard for injunctive relief. It's about as plain of
5 English as it gets.
6 And it's almost as parallel to this case as
7 it gets where the plaintiffs, we are in this court to
8 demonstrate that the defendants are exceeding their
9 constitutional authority. And therefore, we need not
10 satisfy the standard of injunctive relief.
11 But let's talk about when they applied it
12 anyway to demonstrate how it was a little bit of a potato,
13 potato scenario, that how, you know, how they supported
14 that.
15 For example, they say, you know, they say in
16 Arizona Public Integrity Alliance versus Fontes because the
17 recorder had no authority to include the new instruction
18 with mail in ballots, plaintiffs are likely to succeed on
19 the merits. Okay. Simple enough.
20 Nevertheless, we conclude that plaintiffs
21 have satisfied the standard for injunctive relief because
22 the recorder had no authority to include the new
23 instruction with mail in ballots, plaintiffs are likely to
24 succeed on the merits.
25 Likewise, 'cause the recorder's actions do

1 not comply with Arizona law, public policy and the public
2 interests are ensured by enjoining his unlaw action.
3 And in the context of their mandamus action,
4 plaintiffs have established a requisite injury by showing
5 their beneficial interest in having the county recorder
6 performing his legal duty.
7 We also conclude the (indiscernible) favors
8 plaintiffs. The county claims that because plaintiffs
9 unreasonably delayed in filing their action, it's too late
10 for the county to order new instructions and meet the
11 statutory mailing deadlines for mailing ballots.
12 THE COURT: Mr. Kolodin, you're reading, so
13 you're going much faster than you normally do.
14 MR. KOLODIN: Oh, I'm so sorry. I will slow
15 down, your Honor.
16 THE COURT: It's not for me. It's for the
17 reporter.
18 MR. KOLODIN: Oh, and I apologize.
19 So with respect to this latches argument, the
20 Arizona Supreme Court said we disagree because the county
21 was able to meet the deadlines for early ballots and
22 suffered no prejudice. And more importantly, plaintiffs'
23 delay does not excuse the county from its duty to comply
24 with the law.
25 So again, the analysis is exactly the same

1 whether you treat the preliminary injunctive relief
2 standard as being abolished or you treat it as still
3 containing the same factors because what the Arizona
4 Supreme Court explained in Fontes is that those factors are
5 not (indiscernible), those are the only relevant factor, is
6 probably of success on the merits.
7 Ms. Desai and her team cite the example of
8 Fann vs. the State as somehow overruling the standard, set
9 aside that would be extremely odd for the Arizona Supreme
10 Court to overrule a standard that they had just put in
11 place a year or two prior, especially without expressly
12 noting that that's what they were doing.
13 Fann versus State was not the type of suit,
14 Fann versus State was not a suit by citizens seeking to
15 enjoin the unconstitutional acts of an elections official.
16 Fann versus State was a suit between the legislature and
17 the State, not a citizen and the State.
18 And it was not an elections case. It was a
19 wholly different type of case. And plaintiffs do not
20 contend that in Fontes, the Arizona Supreme Court abolished
21 the four factor preliminary injunctive tests for all cases.
22 Certainly it remains in other cases.
23 It's simply when citizens and voters are
24 challenging unlawful acts of an elections official or the
25 unconstitutional acts of an elections official that that

1 abolition applies.

2 I think Ms. Desai's team also made the point
3 that if the framers intended ballots be cast at the polls,
4 they would have said so. That is the entire thrust of this
5 case, is that they did say so. They had a -- the
6 legislature very clearly defined secrecy in voting to mean
7 the voting at the polls in 1819.

8 And the framers very clearly incorporated
9 that 1891 law being to the Arizona Constitution when they
10 added the words provided secrecy in voting shall be
11 preserved and that the other portions of the Arizona
12 Constitution support that analysis because many of them are
13 rendered superfluous if that analysis is not so.

14 An example, the portion about voters being
15 privileged from arrest on day of election. All right.
16 Makes no sense if early voting is contemplated. The portion
17 about voters being privileged from attending military
18 service on the day of election makes no sense if a 27 day
19 period of no excuses mail in voting is contemplated.

20 The provision about official ballots, the
21 secretary taking care of official ballots being distributed
22 at polls to voters, it makes no sense if it's contemplated
23 that there will be early voting.

24 And the Secretary or the Secretary's
25 attorneys, they also raise the argument free and equal

1 clauses in Article 7. Of course, they raise the argument
2 that the form of the official ballot isn't prescribed in
3 Article 7.
4 And we would point out the free and equal
5 clause is also not in Article 7, that they clearly intended
6 that it is relevant to this question. It made perfect
7 sense for the framers to prescribe a form of official
8 ballot in Article 4 because once they defined what an
9 official ballot is and how it's distributed, then to go on
10 to use that term in several other articles of the
11 constitution.
12 So they defined it in the first instance so
13 that they could use it later, a very logical manner of
14 drafting. There is another reason it's very logical for
15 that portion to be included in Article 4.
16 And I'll point out, too, that providing
17 secrecy in voting language, provide secrecy in voting is
18 preserved language. That is in Article 7. Right.
19 Article 4 is prescribing the form of official
20 ballot as being distributed on election day by election
21 works at the polls. But there is another good reason
22 that's in Article 4, is Article 4 of the Arizona
23 Constitution is probably the most important and most
24 heavily related part of the Arizona Constitution. Right.
25 Placing something in Article 4, by placing in

1 **Article 4, the framers were giving it a private place. And**
2 **that's because Article 4 establishes the initiative and**
3 **referendum powers.**
4 **And so again, the framers are recognizing**
5 **we're granting voters some precedent power, and here's how**
6 **we're going to safeguard that power.**
7 **We're going to require that the official**
8 **ballots for the exercise of that power be distributed at**
9 **that poll. So again, they reiterate in Article 7. And**
10 **that's what they do. They do that.**
11 **And there is a bit of slight of hand going on**
12 **in the briefs with respect to that article for provision**
13 **for this argument oh, well, this only applies to**
14 **initiatives and referenda. The same provisions of Article**
15 **4 make very clear on issues of referenda always occur at**
16 **the general election.**
17 **And so if it applies to issues of referenda**
18 **ballots, it applies to ballots for the general election**
19 **because those are general election ballots. And there are**
20 **many, many other sections of the Arizona Constitution of**
21 **subsequent that talk about the use of these official**
22 **ballots and what elections they are to be used at and all**
23 **of that.**
24 **And they are fairly clear which side to go**
25 **again, that they are to be used in general elections and**

1 later primary elections. So again, that placement argument
2 is visibly in opposite.
3 Argument about Sherman versus Tempe, I think
4 we're on to Mr. Arellano. Or no, I think it was -- it
5 might have been discussed by both in that this somehow was
6 the Arizona Supreme Court authorizing and expressly giving
7 their blessing I think, as Mr. Arellano said, to election
8 day.
9 A couple -- to, of course, to the argument
10 that early voting is expressly authorized. A couple of
11 problems with this argument. One, if that were true, then
12 that's what the Arizona Supreme Court did, they wouldn't
13 have declined jurisdiction over the constitutional claim
14 just on the basis that they did not have original
15 jurisdiction over the state, which contrary to Maricopa
16 County's assertion in the briefs is why they declined to
17 review on that particular item.
18 Again, we have the order from the Supreme
19 Court in evidence. The court can review it for itself and
20 see what it says. The Arizona Supreme only noted that
21 evidentiary issues were relevant to arguments not before
22 this court.
23 So one, they would have just declined review
24 and say, we already decided this issue. Actually, you
25 plaintiffs, you're just wrong that we have never decided

1 the issue, because we have.
2 So the second problem with the argument is
3 Sherman versus City of Tempe wasn't a challenge about
4 whether mail in voting was constitutional. It was an
5 election challenge as to -- and I'll let the court speak
6 for itself on what that case is about.
7 We granted review to determine whether
8 election as used in section 19-141 refers to election day
9 or the day early ballots are distributed to consider
10 whether the amendment constitutes a special law under the
11 Arizona Constitution. After hearing oral argument, we
12 answered our proposition, our upholding Proposition 100 and
13 stating that this opinion would follow up.
14 And so in other words, one, it's about
15 whether the word election is used in the statute refers to
16 election day or day early ballots are distributed. This
17 case tangentially with respect to one statutory provision,
18 one constitutional provision plaintiffs have cited is an
19 argument related to whether the term election day in the
20 Arizona Constitution as opposed to statute means one fixed
21 day. It's apples and oranges.
22 Now, also, any sort of discussion of the
23 Arizona Constitution in this case is, if it's given
24 treatment at all, is to hide it dicta and hired gun because
25 this is a case as to whether the results of an election

1 should be invalidated.
2 The question presented to the Supreme Court
3 was simply not about whether early voting is
4 constitutional. So it's not precedential or persuasive
5 value here.
6 The arguments that -- and actually in Sherman
7 versus City of Tempe, as I cited in the brief, the Arizona
8 Supreme Court with respect to the constitutional provision
9 concerning election day seems to come down firmly on
10 plaintiffs' side because the reason that they entered the
11 ruling that they did was because they found election day
12 refers to one particular day when it's used in the Arizona
13 Constitution, so for the court's consideration.
14 There was also discussion by Ms. Desai's team
15 about the case they cited in their briefs of a California
16 court interpreting the California constitution. Perhaps
17 the most glaring difference between the California
18 constitution in that case at the time that case was decided
19 and the Arizona Constitution today is that at the time that
20 case was decided as the California court expressly notes,
21 the California constitution has an expressed provision
22 authorizing early voting. And so again, apples and hand
23 grenades in that case.
24 In addition, of course, they proffered no
25 sources to reach the conclusion that California's

1 constitutional history is anything like Arizona's
2 constitution. Right.
3 The plaintiffs have laid out the very
4 expressed arguments regarding why Arizona's constitutional
5 history mandates this interpretation that plaintiffs are
6 offering this court.
7 And I have cited a variety of sources. I
8 think Mr. LaRue notes that our plaintiffs plain language
9 about as short and plain as we can make it while still
10 providing this court with the needed constitutional
11 context, right, because our constitutional history in
12 Arizona especially is distinct. We have a very unique
13 state constitution.
14 It doesn't seem that defendants in this case
15 have proffered any argument, certainly no evidence, that it
16 is impossible to grant the relief requested. And they say
17 it will be quite difficult. I'm sure that is likely true.
18 As that is the argument they made in Fontes.
19 But again, the Arizona Supreme Court said the
20 standard can be done, and again, as our declaration from
21 Sara Townsend supports. And this makes logical sense
22 because again, the state legislature meets. The State
23 legislature is still in session.
24 The state legislature is still considering
25 election bills, including one that is actually much more

1 radical than the relief plaintiffs request here that would
2 abolish all forms of early and absentee voting.
3 Clearly if the legislature were to pass that
4 law and if the governor were to sign it, elections
5 officials would be expected to comply no less so than a
6 ruling of this court on the constitutionality of the
7 current statutory scheme.
8 Moving to Mr. Arellano's arguments,
9 Mr. Arellano argues that the Arizona Constitution does not
10 grant power to the legislature but restricts legislature
11 power. Yes, that is a correct statement of law.
12 And the entire thrust of this case is whether
13 the framers of the Arizona Constitution imposed such a
14 restriction with respect to the adoption of a system of no
15 excuses mail in voting. And plaintiffs will not repeat
16 again the constitutional arguments advanced in this regard,
17 but plaintiffs point to several specific constitutional
18 provisions that support that interpretation as extensive,
19 extensive legislative again constitutional related history.
20 Oh, and I think it was Mr. Arellano who points
21 to Miller versus Picacho, the case that was decided fairly
22 soon after Arizona adopted its post-91 system no excuses
23 mail in voting as expressly blessing the use of no excuses
24 mail in voting.
25 Miller versus Picacho was a, corporately a fraud

1 case or case about the lawfulness of a statute, a criminal
2 statute that penalized Val Harmstein, not a direct
3 challenge to the constitutionality, no excuses mail in
4 voting.
5 And the statute promoted the goals of secrecy
6 in voting as an off-hand remark. And dicta does not, it's
7 not part of the core holding of the case, not part of the
8 issues that the Arizona Supreme Court was considering. The
9 Arizona Supreme Court was considering totally different
10 constitutional issues.
11 Again, we have for months, there was months of
12 litigation in this case where we consistently asserted that
13 the Arizona Supreme Court has never taken up these issues
14 of the constitutionality of no excuse mail in voting.
15 We have actually cited sources, academic sources
16 that have similarly reviewed the case law in Arizona and
17 have made similar notes of that. It never has been taken
18 up here.
19 It has been taken up in many other states. And
20 there is still litigation on this in other states. It's a
21 civil war. And in many of those states, suit was
22 successful.
23 In most of those states, voters eventually
24 amended their constitution to authorize some form of no
25 excuses in mail in voting, sometimes not for many decades

1 afterwards, sometimes very quickly.
2 But in all cases, either the voters or the
3 legislature the state constitution provided got to the end.
4 Of course, here in Arizona, it's the voters who get weigh
5 in on something like that and a public debate that needs to
6 be had.
7 And I think it's time for our state to have
8 that debate and voters to get to decide for themselves what
9 sort of system of absentee voting they are comfortable with
10 and what sort of tradeoffs they are willing to make and for
11 them to hear the arguments on both sides, which could only
12 happen in the process of constitutional amendment. And
13 ultimately the people will decide.
14 Mr. Arellano also confuses secrecy and
15 privacy. These are terms with some relation but for
16 different things. Privacy, and I'm not sure what he means
17 by privacy. As we have offered the arguments, secrecy in
18 voting has a defined meaning.
19 It means voting, you know, at the polls on
20 election day and set up to allow detailed provisions for
21 the voter to make sure that the voter casts his ballot
22 without anybody to being able to see how he or she is
23 voting and that has elections officials there to observe to
24 make sure that those restrictions, that restricted zone
25 around the voting booth is respected.

1 That is what the framers meant secrecy in
2 voting. That is what the 1891 law provides in terms of a
3 secret voting system. That is what the proponents of the
4 Australian ballot system meant. That's what the framers of
5 the Arizona Constitution meant.
6 This argument, of course, about tamper
7 resistant envelopes is likewise sort of in opposite because
8 one of the primary things the framers was concerned about
9 is tampering before the ballot is filled out or while the
10 ballot is being filled out. Once it's included in the
11 envelope, that's very well and good.
12 In addition, as the Yuma County investigation
13 documents reveal, there were voters who were being asked to
14 please bring us your ballot in an unsealed envelope.
15 Please sign it. We will seal it later. That is how that
16 operation proceeded. So the tamper evidence is not
17 particularly useful in that sort of item.
18 But again, the most relevant or the more
19 relevant thing is not that. The more relevant thing is,
20 you know, there is no chain of custody when a ballot is
21 mailed. I can't go on to the postal service's website.
22 They figure out everybody who handled a
23 ballot, and it passes through many hands, versus when a
24 ballot is cast at the polls, as Mr. LaRue I'm sure can tell
25 you, his office keeps great detail chain of custody of

1 exactly who has handled that ballot. And they are very
2 meticulous about it.
3 And more than that, postal workers are not
4 election officials, right. The Arizona Constitution when
5 it says secrecy in voting, it means the voters receive
6 their ballots from an elections official. And they hand it
7 back to an elections official. That is constitutional
8 requirement. That is what is violated by no excuses mail
9 in voting.
10 So just to wrap up, then, one thing that we
11 have not really heard advanced today is we have heard a
12 sort of a lot of side arguments, but what we haven't heard
13 advanced by the defense is argument as to why the
14 provisions of the Arizona Constitution Claims Society don't
15 mean what plaintiffs have contended they mean and don't
16 provide the restriction that plaintiffs contend they
17 provide.
18 They have offered no significant rebuttal to
19 that argument. Their argument is the court of case. Their
20 argument is the court v analysis of probability of success
21 on the merits.
22 And we would contend that plaintiffs have
23 established that a probability exists and that a
24 preliminary injunction should be entered so that the
25 elections officials at least have some knowledge of where

1 the court is going can begin their preparation process and
2 don't lose any more time to get this system set up and
3 configured constitutionally.
4 Thank you.
5 THE COURT: Is that the end of your argument?
6 Ms. Lucero, you get a chance.
7 MS. LUCERO: I have nothing else.
8 THE COURT: All right. As you guys know,
9 this is a case that is pretty new to the court. I accepted
10 this quickly 'cause it was an order to show cause, a couple
11 of weeks.
12 I set some deadlines for briefing. I
13 received briefing on Wednesday from the opposing parties.
14 And then I received a reply today. And I was reading that
15 probably right before the hearing today. I read as much of
16 it as I could. There was exhibits attached to that.
17 My intention is to get a written ruling out
18 by Monday at noon. And I'm going to spend my weekend
19 writing my ruling so it's explaining my ruling. I have
20 some thoughts. I just want to have that done.
21 Because of the time limits of this matter and
22 whether or not we going any further depending on what I
23 rule, I want to have that done by Monday at noon.
24 We'll stand at recess. Thank you for
25 everybody's cooperation and participation.

1 (Adjourned 3:53 p.m.)

2 *******

3 C E R T I F I C A T E

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5

6 BE IT REMEMBERED that the foregoing hearing took
7 place at the time and place mentioned in the caption above;
8 that I, STEVE L. GARWOOD, CR# 50172, an Arizona Certified
9 Court Reporter, took down by stenographic means and digital
10 means said hearing, that the foregoing transcript of
11 proceedings contains a true transcription of my
12 stenographic notes and digital recording; and that I am not
13 of counsel, related to any party, nor otherwise interested
14 in the outcome of this action, signed this 8th day of June,
15 2022.

16

17 /s/

18 ______________________________

19 Steve L. Garwood, CR# 50172

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