ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA REPUBLICAN PARTY, et. al., Plaintiffs/Appellants, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State, et. al., Defendants/Appellees.	No. 1 CA-CV-22-0388 Mohave County Superior Court No. S8015CV202200594
ARIZONA DEMOCRATIC PARTY, et. al., Intervenors/Appellees.	

ANSWERING BRIEF OF DEFENDANT/APPELLEE ARIZONA SECRETARY OF STATE KATIE HOBBS

D. Andrew Gaona (028414)
agaona@cblawyers.com
Kristen Yost (034052)
kyost@cblawyers.com
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5478

Sambo (Bo) Dul (030313)
bo@statesuniteddemocracy.org
Christine Bass*
christinebass@statesuniteddemocracy.org
STATES UNITED DEMOCRACY CENTER
8205 South Priest Drive, #10312
Tempe, Arizona 85284
T: (480) 253-9651
* Application for Pro Hac Vice Forthcoming

Attorneys for Defendant/Appellant Arizona Secretary of State Katie Hobbs

Table of Contents

Introduction 1

Statement of the Issues 4

Statement of the Case & Statement of Facts 5

I. Historical Voting Practices and the Australian Ballot System. 5

II. Arizona's Early Election Procedures and Adoption of the Constitution. 6

III. Arizona's Long History of Mail-In Voting. 7

IV. Plaintiffs' Failed Lawsuits. 11

Argument 12

I. Plaintiffs Lack Standing. 12

II. Plaintiffs' Requests To Upend Early Voting Mid-Election Year Are Improper And Now Moot. 15

III. The Trial Court Correctly Held that Plaintiffs' Claims Fail on The Merits. 20

A. Article VII, Section 1 does not require in-person voting. 22

1. Section 1 authorizes the legislature to prescribe voting methods. 23

2. Arizona's early voting laws preserve "secrecy in voting." 26

B. Article IV, Part 1, Section 1 governs the people's legislative powers, not voting. 39

C. Article VII, Section 2 governs voter eligibility, not the manner of voting. 41

D. Article VII, Sections 4 and 5 do not dictate the manner of voting. 42

E. Plaintiffs' Requested Relief is Improper. 43

IV. Plaintiffs Cannot Show Any Other Injunction Factors. 45

A. Plaintiffs will suffer no injury if the Court denies their injunction. 46

B. The balance of hardships and public interest favor upholding Arizona's early voting system. 47

Conclusion 48

Table of Citations

Page(s)

Cases

Abbott v. Perez,
__ U.S. __, 138 S. Ct. 2305 (2018) 46

Ahwatukee Custom Ests. Mgmt. Ass'n, Inc. v. Turner,
196 Ariz. 631 (App. 2000) 47

All. Marana v. Groseclose,
191 Ariz. 287 (App. 1997) 13

Allen v. State,
14 Ariz. 458 (1913) 40

Ariz. Libertarian Party v. Reagan,
189 F. Supp. 3d 920 (D. Ariz. 2016) 18

Ariz. Pub. Integrity All. v. Fontes,
250 Ariz. 58 (2020) 13, 34, 45

Ariz. Sch. Boards Ass'n, Inc. v. State,
252 Ariz. 219 (Ariz. 2022) 14, 15

Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs,
249 Ariz. 396 (2020) 1, 16, 33

Bennett v. Napolitano,
206 Ariz. 520 (2003) 13, 14

Bourland v. Hildreth,
26 Cal. 161 (Cal. 1864) 30

Bowslaugh v. Bowslaugh,
126 Ariz. 517 (1979) 44

Burson v. Freeman,
504 U.S. 191 (1992) 5, 6, 31, 32

Cain v. Horne,
220 Ariz. 77 (2009) 22

Cardoso v. Soldo,
230 Ariz. 614 (App. 2012) 19

Cave Creek Unified Sch. Dist. v. Ducey,
233 Ariz. 1 (2013) 22

Clark v. Boyce,
20 Ariz. 544 (1919) 26, 31

Clark v. Nash,
192 Ky. 594 (1921) 31

Cohen v. State,
121 Ariz. 6 (1978) 44

Dail v. City of Phoenix,
128 Ariz. 199 (App. 1980) 14

Democratic Nat'l Comm. v. Wis. State Leg.,
141 S. Ct. 28 (2020) 48

Downs v. Pharis,
122 So. 2d 862 (La. Ct. App. 1960) 29

Fann v. State,
251 Ariz. 425 (2021) 45

Fay v. Merrill,
256 A.3d 622 (Conn. 2021) 17

Feldman v. Arizona Sec'y of State's Off.,
843 F.3d 366 (9th Cir. 2016) 36

Forszt v. Rodriguez,
212 Ariz. 263 (App. 2006) 13

Huggins v. Superior Ct. In & For Cty. of Navajo,
163 Ariz. 348 (1990) 38

Jenkins v. State Bd. of Elections of N.C.,
104 S.E. 346 (N.C. 1920) 38

Jones v. Samora,
318 P.3d 462 (Colo. 2014) 29

Korwin v. Cotton,
234 Ariz. 549 (App. 2014) 20

Kotterman v. Killian,
193 Ariz. 273 (1999) 24

State ex rel. La Prade v. Cox,
43 Ariz. 174 (1934) 23

Laird v. Sims,
16 Ariz. 521 (1915) 26

State ex rel. Lassen v. Harpham,
2 Ariz. App. 478 (1966) 44

League of United Latin Am. Citizens of Iowa v. Pate,
950 N.W.2d 204 (Iowa 2020) 17

Lubin v. Thomas,
213 Ariz. 496 (2006) 18

McLaughlin v. Bennett,
225 Ariz. 351 (2010) 24

McLinko v. Dep't of State,
___ A.3d ___, 2022 WL 3039295 (Pa. 2022) 25, 28, 41

McLinko v. Dep't of State,
2022 WL 257659 (Pa. Commw. Ct. Jan. 28, 2022) 28

In re MH 2008-002393,
223 Ariz. 240 (App. 2009) 3, 20

Miller v. Bd. of Sup'rs of Pinal Cty.,
175 Ariz. 296 (1993) 37

Miller v. Picacho Elementary Sch. Dist. No. 33,
179 Ariz. 178 (1994) 36

Moore v. Lee,
644 S.W.3d 59 (Tenn. 2022) 16

Oakland Trib., Inc. v. Chron. Pub. Co.,
762 F.2d 1374 (9th Cir. 1985) 47

Pedersen v. Bennett,
230 Ariz. 556 (2012) 17, 40

Peterson v. City of San Diego,
666 P.2d 975 (Cal. 1983) 28, 29

Phelps v. Firebird Raceway, Inc.,
210 Ariz. 403 (2005) 23

Purcell v. Gonzalez,
549 U.S. 1 (2006) ..... *passim*

Raines v. Byrd,
521 U.S. 811 (1997) 15

Rash v. Town of Mammoth,
233 Ariz. 577 (App. 2013) 15

Ruiz v. Hull,
191 Ariz. 441 (1998) 38, 42

Sawyer v. Chapman,
729 P.2d 1220 (Kan. 1986) 29

Sears v. Hull,
192 Ariz. 65 (1998) 15

Seisinger v. Siebel,
220 Ariz. 85 (2009) 22

Soules v. Kauaians for Nukolii Campaign Comm.,
849 F.2d 1176 (9th Cir. 1988) 36

State v. Arevalo,
249 Ariz. 370 (2020) 20, 21, 35, 37

State v. Mixton,
250 Ariz. 282 (2021) 27

State v. Tucker,
143 So. 754 (Fla. 1932) 38

Thompson v. Scheier,
57 P.2d 293 (N.M. 1936) 31

People ex rel. Twitchell v. Blodgett,
13 Mich. 127 (Mich. 1865) 30

Weber v. Shelley,
347 F.3d 1101 (9th Cir. 2003) 45

Wesberry v. Sanders,
376 U.S. 1 (1964) 37

Statutes

A.R.S. § 12-2021 ..... 14, 45

A.R.S. § 16-541 10

A.R.S. § 16-545(A) 33

A.R.S. § 16-545(B)(2) 10, 33

A.R.S. § 16-547(A) 44

A.R.S. § 16-547(D) 33

A.R.S. § 16-548(A) 10, 34, 44

A.R.S. § 16-552(F) 10, 34

A.R.S. § 16-1005 ..... 10, 35

A.R.S. § 16-1007 34

1918 Ariz. Sess. Laws ch. 11 7
1921 Ariz. Sess. Laws ch. 117 8
1925 Ariz. Sess. Laws ch. 75 9
1953 Ariz. Sess. Laws ch. 76 9
1955 Ariz. Sess. Laws ch. 59 9
1959 Ariz. Sess. Laws ch. 107 9
1968 Ariz. Sess. Laws ch. 17 9
1970 Ariz. Sess. Laws ch. 151 10
Mont. Code Ann. § 13-19-301 30
Wash. Rev. Code Ann. § 29A.40.010 30

Constitutions

Ariz. Const. art. II § 21 ..... 7, 21
Ariz. Const. art. IV, pt. 1 § 1 ..... 3, 39
Ariz. Const. art. VII § 1 ..... *passim*
Ariz. Const. art. VII § 2(A) 41
Cal. Const. art. II § 7 28
Mont. Const. art. IV § 1 30
Pa. Const. art. VII § 4 27
Wash. Const. art. VI § 6 30

Other Authorities

Ariz. R. Civ. P. 65(a)(2) 12
Ariz. R. Evid. 201(b)(2) 17

Citizens Clean Election Comm'n, *Past Arizona Elections* (2022) 17

J. Morris Richards, *History of the Arizona State Legislature 1912-1967*, vol. 5, pt. 2, 3rd Leg., 1st Spec. Sess. (Ariz. Leg. Coun. 1990) 7

John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483 (2003) 32

John S. Goff, *The Records of the Arizona Constitutional Convention of 1910* 7

Journal of the Senate, 3rd Leg., 1st Spec. Sess. (Ariz. 1918) 8

Journal of the Senate, 5th Leg., Reg. Sess. (Ariz. 1921) 8

Journal of the Senate, 7th Leg., Reg. Sess. (Ariz. 1925) 9

SB 1003, 43rd Leg. 2nd Spec. Sess. (Ariz. 1997) 10

SB 1320, 40th Leg., 1st Reg. Sess. (Ariz. 1991) 10

Introduction

After over a century of successful absentee voting and over three decades of no-excuse early voting in Arizona, Plaintiffs Arizona Republican Party ("ARP") and its Chair Kelli Ward now challenge the legality of Arizona's entire early voting system. Their ongoing attacks on our voting system undermine elections and threaten our democracy. Arizona Secretary of State Katie Hobbs ("Secretary") urges the Court to promptly affirm the trial court's denial of Plaintiffs' motion for preliminary injunction and dismissal of their complaint for any of several reasons.

First, Plaintiffs lack standing because their claims amount to generalized grievances about Arizona's voting methods, not cognizable injuries personal to Plaintiffs.

Second, their request to upend early voting this election year is way too late and the relief sought would prejudice all Arizonans. Plaintiffs' claims were already too late when they originally filed them in the supreme court, yet they waited another six weeks after the supreme court declined jurisdiction to refile the same case in superior court. Plaintiffs' claims seeking relief in 2022 and their request for a

preliminary injunction are barred under the laches and *Purcell* doctrines and are now moot.

Third, the trial court rightly held that Plaintiffs' constitutional challenge to early voting[1] fails as a matter of law. Plaintiffs cobble together cherry-picked words and phrases from various parts of the Arizona Constitution and urge the Court to infer that the framers intended to prohibit absentee voting. They ask the Court to invalidate and enjoin Arizona's entire "post 1990 system of no-excuse mail-in voting" (without even identifying the statutes they seek to invalidate), including "in the 2022 general election." The Court should affirm the trial court's rejection of Plaintiffs' half-hearted facial challenge to Arizona's longstanding vote-by-mail system.

For one thing, Article VII, Section 1 of the Arizona Constitution does not prohibit early voting. That provision provides that "[a]ll elections by the people shall be by ballot, or by such other method as may be prescribed by law; [p]rovided, that secrecy in voting shall be

[1] In general, the term "early voting" includes early in-person and mail-in voting. When using "early voting" in this brief, the Secretary intends the same broad meaning.

preserved." (Emphasis added). It ensures the right to a secret ballot, but leaves the precise methods of voting to the Legislature. The Legislature exercised that power by adopting early voting laws that preserve secrecy in voting.

Plaintiffs next rely on Article IV, Part 1, Section 1 of the Arizona Constitution. But that provision has nothing to do with the manner of voting at an election, and it doesn't limit the Legislature's authority under Article VII, Section I. Article IV reserves to the people the right of initiative and referendum. Plaintiffs' attempt to use a constitutional provision granting a fundamental right to implicitly restrict another fundamental right is unconvincing.

Plaintiffs' reliance on Article VII, Sections 2, 4, and 5 also fail—those provisions do not govern the manner of voting. Section 2 describes voter qualifications, and Sections 4 and 5 protect voters from arrest or military duty while voting on Election Day. None of these provisions mandate casting a vote in-person.[2]

[2] Plaintiffs also relied on Article VII, Section 11 in the trial court, but they abandoned that claim on appeal and thus waived it. *E.g.*, *In re MH 2008-002393*, 223 Ariz. 240, 243 ¶ 15 (App. 2009).

Arizona's early voting system is secure, efficient, and complies with the Arizona Constitution. Plaintiffs' claims to the contrary lack merit.

Finally, the Court should affirm because Plaintiffs' claims fail on the merits, but it can affirm for another reason: Plaintiffs establish no other injunction factors. Plaintiffs will suffer no injury (let alone an irreparable one) without an injunction, and the balance of hardships and public interest favor upholding Arizona's longstanding early voting system.

For all these reasons, the Court should affirm the trial court's dismissal of Plaintiffs' case in its entirety.

Statement of the Issues

1. Do Plaintiffs lack standing to raise generalized grievances about the methods of voting the Legislature adopted?

2. Are Plaintiffs' claims to invalidate longstanding election laws and regulations mid-election year barred by the laches and *Purcell* doctrines?

3. Has the Legislature violated Article IV or Article VII §§ 1, 2, 4, or 5 of the Arizona Constitution for several decades by authorizing early voting?

Statement of the Case & Statement of Facts

I. Historical Voting Practices and the Australian Ballot System.

The American colonies historically elected government officials using "the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe." *Burson v. Freeman*, 504 U.S. 191, 200 (1992). This method of voting was thus "an open, public decision, witnessed by all and improperly influenced by some." *Id.* Because of the potential for bribery and other abuses, a paper ballot system eventually replaced this *viva voce* system. *Id.*

Though paper ballots were an improvement, "the evils associated with the earlier *viva voce* system" still cropped up. *Id.* Political parties made ballots "with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance," and bad actors still engaged in bribery and intimidation. *Id.* at 200-01.

Other countries experienced similar problems and tried to find solutions. *Id.* at 202. "Some Australian provinces adopted a series of reforms intended to secure the secrecy of an elector's vote. The most famous feature of the Australian system was its provision for an official ballot, encompassing all candidates of all parties on the same ticket,"

along with other "measure[s] adopted to preserve the secrecy of the ballot." *Id.*

Many states began adopting the "Australian system" in the late 19th century. *Id.* at 203-04.

II. Arizona's Early Election Procedures and Adoption of the Constitution.

The Territory of Arizona adopted many features of the Australian system twenty-one years before statehood, including detailed procedures for ballot preparation, voting in a private voting booth, and preserving the secrecy of votes. Laws 1891, Territory of Ariz., 16th Leg. Assemb., No. 64 §§ 15-32 [Separate Appendix ("SA") 123-31].

Two decades later, the Arizona Constitution's framers expressly preserved the right to a secret ballot, but left it to the Legislature to prescribe the precise "method" of voting in elections. Ariz. Const. art. VII § 1. During the Constitutional Convention, two delegates proposed striking Article VII, Section 1, but other delegates briefly noted that the provision was like a recent amendment to the California Constitution, that "several states" had recently used voting machines, and including this constitutional provision would preserve other voting methods such

as "use of the voting machine." John S. Goff, *The Records of the Arizona Constitutional Convention of 1910* [SA138-39].

Among other provisions governing "Suffrage and Elections," Article VII also dictates voting qualifications (§ 2), preserves the right of privilege from arrest while lawfully voting (§ 4), and excuses certain military personnel from duty on Election Day (§ 5).

Article II, Section 21 of the Constitution also protects the franchise through the Free and Equal Elections Clause, requiring that "[a]ll 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."

III. Arizona's Long History of Mail-In Voting.

Shortly after statehood, the Legislature established absentee voting for a select group of registered voters: active military personnel. It passed the Soldiers Voting Bill in 1918, which authorized all active military personnel to vote through registered mail in war or peace time. 1918 Ariz. Sess. Laws ch. 11 (1st Spec. Sess.) [SA147-57]. In the House, the bill "raised no special opposition in debate and when it came to a final vote, [and] it passed by a vote of 33 to 0, with two excused." J. Morris Richards, *History of the Arizona State Legislature 1912-1967*, vol. 5, pt.

2, 3rd Leg., 1st Spec. Sess. (Ariz. Leg. Coun. 1990) [SA161]. It passed 16 to 0 in the Senate, with three absent or excused. [SA162].

Four senators (Fred T. Colter, Alfred Kinney, C. M. Roberts, and Mulford Winsor) were also delegates of the Constitutional Convention eight years earlier. *Compare* [SA135], *with* J. of the Sen., 3rd Leg., 1st Spec. Sess. (Ariz. 1918) [SA169]. All four voted in favor of the bill. [SA170-73]. The bill was also signed into law by Governor George W. P. Hunt, who served as the president of the Constitutional Convention. [SA137]. When convening the Legislature for this special session, Governor Hunt's first stated purpose was "[t]o extend the franchise to electors of the State of Arizona in the military and naval establishments of the United States, wherever they may be stationed." [SA166]

After the passage of the 19th Amendment to the U.S. Constitution, the Legislature expanded mail-in voting to any eligible voter who was absent from their county on Election Day. 1921 Ariz. Sess. Laws ch. 117 (Reg. Sess.) [SA175-80]. Senator James Scott, who also served as a delegate of the Convention, voted in favor of the bill. *Compare* [SA135], *with* J. of the Sen., 5th Leg., Reg. Sess. (Ariz. 1921) [SA182-83].

Over time, the Legislature adopted more amendments to extend mail-in voting to even more electors.

In 1925, the State authorized eligible voters with a physical disability to vote by absentee ballot if they proved their disability with a doctor's note. Absentee ballots became known as the "Absent or Disabled Voter's ballot." 1925 Ariz. Sess. Laws ch. 75 (Reg. Sess.) [SA185-88]. Senators Colter, Kinney, and Winsor (all delegates of the Constitutional Convention who also voted in favor of the 1918 vote-by-mail law) voted in favor of this bill. J. of the Sen., 7th Leg., Reg. Sess. (Ariz. 1925) [SA192-93]. Governor Hunt also signed that bill. *Id.*; J. of the H., 7th Leg., Reg. Sess. (Ariz. 1925) [SA195-96].

After World War II, the Legislature expanded absentee voting to anyone who could not vote on Election Day "on account of the tenets of his religion." 1953 Ariz. Sess. Laws ch. 76 (1st Spec. Sess.) [SA198-201]. The Legislature made other changes to absentee voter qualifications between 1955 and 1970. *See* 1955 Ariz. Sess. Laws ch. 59 (1st Reg. Sess.) (removing doctor's note requirement for voters with disabilities) [SA203-05]; 1959 Ariz. Sess. Laws ch. 107 (1st Reg. Sess.) (adding merchant marines to military personnel who could vote by mail) [SA207-11]; 1968

Ariz. Sess. Laws ch. 17 (2nd Reg. Sess.) (authorizing voters with "visual defects" to vote absentee) [SA213-15]; 1970 Ariz. Sess. Laws ch. 151 (2nd Reg. Sess.) (extending absentee voting to voters 65 years and older, and to voters who live 15 or more miles from a polling place) [SA217-24].

And in 1991, the State amended the absentee voting laws to allow any qualified elector to vote by absentee ballot. SB 1320, 40th Leg., 1st Reg. Sess. (Ariz. 1991) (A.R.S. § 16-541).[3] The Legislature has also enacted many detailed procedures ensuring the secrecy of early ballots and preventing fraud and coercion. *E.g.*, A.R.S. § 16-545(B)(2) (early ballot envelopes must conceal the ballot and be tamper-evident when sealed); A.R.S. § 16-548(A) (requiring voters to conceal their votes and fold their voted early ballot so it cannot be seen); A.R.S. § 16-552(F) (requiring election officials to remove voted ballot from envelope without unfolding or reviewing it); A.R.S. § 16-1005 (criminalizing various conduct relating to early ballots).

For more than a century, our State preserved Arizonans' fundamental right to vote by offering some form of early voting. And early

[3] The Legislature changed the term "absentee voting" to "early voting" in 1997. SB 1003, 43rd Leg. 2nd Spec. Sess. (Ariz. 1997).

voting is extremely popular in Arizona, regardless of party affiliation: nearly 80 percent of voters voted early in 2020. Indeed, most of Plaintiff ARP's voters vote early, including its Chair, Kelli Ward, who voted early as recently as 2020.

IV. Plaintiffs' Failed Lawsuits.

In late February 2022, Plaintiffs first tried to challenge Arizona's early voting system through an original special action in the Arizona Supreme Court. The supreme court declined jurisdiction on April 5 "without prejudice to the parties' refiling this case in Superior Court." Yet Plaintiffs did nothing for weeks.

Over six weeks later, on May 17, Plaintiffs refiled almost the same lawsuit in the Mohave County Superior Court seeking a preliminary and permanent injunction. [SA001-51]. The trial court set an expedited briefing schedule and ordered Defendants to appear on June 3 to "Show Cause why the requested relief should not be awarded." [SA052-53]. The Secretary filed a combined motion to dismiss and response to Plaintiffs' motion for preliminary injunction. [SA093-252]. At the June 3 hearing, the trial court held oral argument. The court also admitted all exhibits

over Defendants' objections [Plaintiffs' OB App'x ("APP") 43-44], but noted that it "would give the exhibits the weight they deserve." [APP7]

The trial court entered an order on June 6 denying all relief. [SA253-57]. The trial court first briefly noted its threshold conclusions that Plaintiffs have standing, and the laches and *Purcell* doctrines "do[] not apply." [SA254]. On the merits, the trial court rejected all Plaintiffs' arguments:

> Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting? The answer is no.

[SA256] Because the trial court held that Plaintiffs' claims failed on the merits, it did not address the other injunction factors and consolidated the preliminary injunction hearing with the trial on the merits under Rule 65(a)(2), Ariz. R. Civ. P. [SA258-59].

Plaintiffs appealed and sought an emergency petition to transfer to the supreme court. The supreme court rejected the petition. Plaintiffs then moved for an expedited appeal. This Court rejected it.

Argument

I. Plaintiffs Lack Standing.

To begin, the Court can affirm the trial court's dismissal because

Plaintiffs lack standing. *Forszt v. Rodriguez*, 212 Ariz. 263, 265 ¶ 9 (App. 2006) ("We may affirm the trial court's ruling if it is correct for any reason apparent in the record"). Whether a party has "standing to sue is a question of law [this Court] review[s] *de novo*." *All. Marana v. Groseclose*, 191 Ariz. 287, 289 (App. 1997).

Neither Ward nor ARP claim that Arizona's early voting laws burden their (or in ARP's case, its members') right to cast a ballot or have their ballot counted. Instead, they allege only generalized grievances about methods of voting in Arizona.

"[A]s a matter of sound judicial policy," Arizona courts "require[] persons seeking redress in the courts first to establish standing[.]" *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003). Though Arizona courts "are not constitutionally constrained to decline jurisdiction based on lack of standing," they will not consider the merits of a claim that fails to allege a "particularized injury," absent "exceptional circumstances." *Id.* at 527 ¶ 31. No exceptional circumstances exist here.

Plaintiff Ward claims [SA011 ¶ 38] she has standing to challenge any election law just because she is "an Arizona citizen and registered voter," citing *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 12

(2020). That case doesn't help Ward. There, the supreme court let the plaintiffs' claims proceed because courts apply "a more relaxed standard for standing in mandamus actions" brought under A.R.S. § 12-2021, which doesn't apply here. *Id.* ¶ 11. Ward also alleges [SA012 ¶ 38] she has standing "as a taxpayer since Arizona's no-excuse mail-in voting system requires the unlawful use of taxpayer funds." But to have standing under a "taxpayer" standing theory, "a taxpayer must be able to demonstrate a direct expenditure of funds that were generated through taxation, an increased levy of tax, or a pecuniary loss attributable to the challenged transaction[.]" *Dail v. City of Phoenix*, 128 Ariz. 199, 202 (App. 1980); *see also Bennett*, 206 Ariz. at 527 ¶ 30 (taxpayers did not have standing when they didn't challenge an illegal expenditure of taxpayer funds). Plaintiffs challenge Arizona's early voting laws, not a specific use of taxpayer funds. Ward's "citizen" and "taxpayer" theories [SA011-12] would "eviscerate standing doctrine's actual injury requirement." *See Ariz. Sch. Boards Ass'n, Inc. v. State*, 252 Ariz. 219, __ ¶ 18 (Ariz. 2022) (quotation omitted).

For its part, ARP alleges [SA012 ¶ 39] it has standing based on its "right and duty to monitor the early voting process against improprieties"

and its general interest [SA012-13 ¶ 44] in "protect[ing] the 'electoral process.'" This is precisely the type of "generalized harm that is shared alike by all" and cannot establish standing. *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998); *see also Raines v. Byrd*, 521 U.S. 811, 819 (1997) (a plaintiff must show he has "a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."). And ARP's concerns about potential "improprieties" and its interest in preserving the "electoral process" amount to "pure issue-advocacy," not a cognizable injury. *Ariz. Sch. Boards Ass'n*, 252 Ariz. ¶ 18.

II. Plaintiffs' Requests To Upend Early Voting Mid-Election Year Are Improper And Now Moot.

Even if Plaintiffs had standing (they don't), they brought their claims far too late to get relief this election year. The trial court found in passing that the laches and *Purcell* doctrines "do[] not apply" in this case. This Court reviews a laches ruling for abuse of discretion, deferring to the trial "court's factual findings unless clearly erroneous, but review[ing] de novo its legal conclusions." *Rash v. Town of Mammoth*, 233 Ariz. 577, 583 ¶ 17 (App. 2013).

Arizona has allowed early voting for more than a century, and it has allowed "no-excuse" early voting for over three decades. Yet Plaintiffs

waited until the middle of the 2022 election year to challenge Arizona's entire early voting system.[4] Plaintiffs waited until the eleventh hour and now seek [at 12, 53-54] preliminary injunctive relief before the 2022 general election. The Court should not overlook that Plaintiffs' claimed emergency is entirely of their own making, and in all events, now their request is moot.

First, the *Purcell* doctrine bars Plaintiffs' claims for relief in 2022. Courts generally should not alter election rules on the eve of an election. *E.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). This is because "[c]ourt orders affecting elections can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that only increases "[a]s an election draws closer." *Id.* at 4-5. That risk is even greater here, where Plaintiffs seek to overturn enduring election procedures that Arizonans have overwhelmingly relied on for decades.[5]

---

[4] Plaintiffs sued less than a month before early voting started in the August 2022 primary election, and early voting for the November 2022 general election will start in early October.

[5] The trial court noted that *Purcell* is a federal case, but the Arizona Supreme Court has cited *Purcell* with approval, *Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 417 ¶ 81 (2020), and many state supreme courts have applied the *Purcell* doctrine to reject efforts to change election procedures on the eve of an election. *E.g.*, *Moore*

Many counties have already administered local elections this year, *see* Citizens Clean Election Comm'n, *Past Arizona Elections* (2022), and all counties have administered the August primary election and are currently working to tabulate and canvass the official results. *See* Ariz. Sec'y of State, 2022 Primary Election, Ballot Progress. All counties have also planned for and are preparing to administer the November general election. *See, e.g.*, Maricopa Cnty. Elections Dep't, 2022 Elections Plan; Pima Cnty. Bd. of Supervisors, Agenda (May 3, 2022) (approving use of vote centers in 2022 primary and general elections); Pima Cnty. Bd. of Supervisors, Agenda (May 17, 2022) (designating early ballot drop-off sites in 2022 primary and general elections).[6] Arizona's largest county, for example, selected its vote center locations using detailed "forecast models to estimate turnout" on election day. Maricopa Cnty. Elections Dep't, 2022 Elections Plan at 12-15.

---

v. Lee, 644 S.W.3d 59, 67 (Tenn. 2022); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020); *Fay v. Merrill*, 256 A.3d 622, 638 (Conn. 2021).

[6] The Court can take judicial notice of these public records, the accuracy of which "cannot reasonably be questioned," Ariz. R. Evid. 201(b)(2); *Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012).

If the county were enjoined from using early voting in the 2022 general election, it would be forced to try to accommodate over a million more in-person voters on election day that it didn't budget or plan for. *Id.* Changing the rules this late in the game about how Arizonans can exercise their right to vote would be disastrous. Even if it were possible for election officials to redo Arizona's entire election system within weeks in an election year, it would cause mass voter confusion; the precise harm *Purcell* aims to prevent.

Second, laches precludes Plaintiffs' requested relief this election year. The laches doctrine prevents "dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006).

Plaintiffs' delay is no doubt unreasonable. When deciding whether delay is unreasonable, courts consider "the justification for the delay, the extent of the plaintiff's advance knowledge of the basis for the challenge, and whether the plaintiff exercised diligence[.]" *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016) (citation omitted). Plaintiffs have known about their claims for decades. Worse yet, they sat

on their hands and did nothing for six weeks after the supreme court dismissed their first iteration of this challenge. Plaintiffs' mid-election year request to invalidate early voting before the general election is inexcusable.

Plaintiffs' untimeliness prejudices the Secretary, Arizona's dedicated election officials, and above all else, Arizona voters who have come to rely on early voting – including the hundreds of thousands of Arizonans from many political parties who voted early in the 2022 primary election.

Third, Plaintiffs' request for relief this election year is moot. As a matter of "judicial restraint," this Court does not decide moot questions. *Cardoso v. Soldo*, 230 Ariz. 614, 617 ¶ 5 (App. 2012). An issue becomes moot on appeal when this Court's "action as a reviewing court will have no effect on the parties." *Id.* The August 2022 primary election came and went, and by the time the Court decides this appeal, early voting in the general election will be underway. A preliminary injunction for the 2022 elections would thus have no effect on the parties.

In sum, the timing of Plaintiffs' requests to upend early voting mid-election year is yet another reason why the Court should affirm the trial

court and deny preliminary injunctive relief.

III. The Trial Court Correctly Held that Plaintiffs' Claims Fail on The Merits.

Even if Plaintiffs had standing (they don't) and their claims were timely this election year (they're not), the trial court rightly rejected their claims on the merits.

Plaintiffs claim that Arizona's entire early voting system is facially unconstitutional.[7] Arizona courts apply a "strong presumption in favor of a statute's constitutionality," and "the challenging party bears the burden" of overcoming that presumption. *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020). If "there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional." *Id.* (quotation omitted). And "[a] party raising a facial

[7] Despite raising only a facial challenge in the Complaint, Plaintiffs made a passing claim below [SA056, 71] that "Arizona's no-excuse mail-in voting system is unconstitutional both facially and as applied." Yet they never explain how early voting is unconstitutional as applied to them. *Korwin v. Cotton*, 234 Ariz. 549, 559 ¶ 32 (App. 2014) ("An 'as-applied' challenge assumes the standard is otherwise constitutionally valid and enforceable, but argues it has been applied in an unconstitutional manner to a particular party."). Nor do they make this argument on appeal, and "[i]ssues not raised and argued in a party's appellate brief are waived." *In re MH 2008-002393*, 223 Ariz. at 243 ¶ 15.

challenge to a statute must establish that no set of circumstances exists under which the [statute] would be valid." *Id.* ¶ 10 (quotation omitted).

This heavy burden should apply with even greater force here, where Plaintiffs ask the Court to invalidate longstanding legislation that ensures Arizonans can effectively exercise their fundamental right to vote. Far from violating the implied constitutional prohibition Plaintiffs invent here, Arizona's early voting statutes reinforce the core guarantee in the Arizona Constitution that "[a]ll 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." Ariz. Const. art. II § 21. Arizona's early voting system furthers this constitutional goal by ensuring equal access to the franchise for all voters, including those who live far from their polling places, lack access to reliable transportation, or face other barriers to voting in-person on Election Day.

Plaintiffs fall far short of meeting their burden. None of the constitutional provisions they point to prohibit early voting, Arizona's early voting statutes preserve secrecy in voting, and Plaintiffs' strained interpretations cannot be squared with the Free and Equal Elections Clause.

A. Article VII, Section 1 does not require in-person voting.

"Our state constitution, unlike the federal constitution, does not grant power, but instead limits the exercise and scope of legislative authority." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶ 13 (2013) (emphasis added). That means courts don't look "to the constitution to determine whether the legislature is authorized to act"—the Legislature has full power to act unless the Constitution says otherwise. *Id.* (cleaned up); *see also, e.g.*, *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26 (2009). And when interpreting the Constitution, this Court's "primary purpose is to effectuate the intent of those who framed the provision." *Cain v. Horne*, 220 Ariz. 77, 80 ¶ 10 (2009) (quotation omitted). To do so, the Court "first examine[s] the plain language of the provision," and does not "depart from the language unless the framers' intent is unclear." *Id.* (citation omitted).

Article VII, Section 1 of the Arizona Constitution – the only constitutional provision governing the method of voting – states in full: "All elections by the people shall be by ballot, or by such other method as may be prescribed by law; [p]rovided, that secrecy in voting shall be

preserved." This language is clear. It ensures the right to a secret ballot but leaves the precise methods of voting to the Legislature.

Plaintiffs disregard the plain language of Section 1, immediately jump to the history of the Australian ballot system, cite out-of-context and irrelevant case law, and ask the Court to infer from the "secrecy in voting" clause that the framers implicitly intended to mandate in-person voting. These arguments fail at every step along their convoluted way.

1. Section 1 authorizes the legislature to prescribe voting methods.

The framers contemplated that voting methods may change over time. So long as voters have the right to secrecy, voting may take place by any "method as may be prescribed by law." Ariz. Const. art. VII § 1. This "clear, broad language" delegating lawmaking authority to the Legislature must be interpreted as written. *See Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 412 ¶ 39 (2005); *State ex rel. La Prade v. Cox*, 43 Ariz. 174, 177-78 (1934) (because constitutional language "lay[s] down broad general principles," it should "be construed liberally," not as "the expression of minute details of law").

Plaintiffs claim [at 36-37] that "the framers included the phrase 'such other method' to allow the Legislature to authorize voting machines

in lieu of paper ballots." But that's not what the Constitution says. Plaintiffs rely [at 37] on a reference to voting machines at the Constitutional Convention. Yet the discussion on Article VII, Section 1 at the Convention was "sparse," leaving much "speculation" about the framers' intent. *See Kotterman v. Killian*, 193 Ariz. 273, 288-89 ¶ 54 (1999) (noting skepticism about "'divining' the intent of language drafted almost 90 years ago and about which so little has been recorded or preserved"). That certain framers noted that the "other method as may be prescribed by law" clause would authorize voting machines doesn't mean they intended to ban every other method. Though the supreme court has noted in passing that the framers "fashioned Article 7, Section 1 to preserve the state's ability to adopt voting machines," *McLaughlin v. Bennett*, 225 Ariz. 351, 355 ¶ 16 (2010), the court did not suggest that voting machines are the sole other option; indeed, the Court expressly recognized the Legislature's power to adopt "other voting methods it might otherwise choose to prescribe by law, provided secrecy is preserved." *Id.* (cleaned up) (emphasis added).

In fact, one delegate's statement that the "such other method" clause would allow for voting machines "reveals that at the time, voting

by ballot and by machine were viewed as alternative methods of casting a vote." *McLinko v. Dep't of State*, ___ A.3d ___, 2022 WL 3039295, at *30 (Pa. 2022). This supports the conclusion that "method" as used in Section 1 "refers to the way a vote is cast." *Id.*; *see also* Merriam-Webster, *Method* ("a procedure or process for attaining an object: such as . . . a way, technique, or process of or for doing something"). The framers didn't "limit the methods of casting a vote to ballot or voting machine"; they left it to the Legislature to establish "such other method," "subject only to the requirement that the method preserve secrecy in voting." *Id.* If the framers meant to limit "such other method" solely to "voting machines," they would have said so.

If the Court has any residual doubts about the framers' intent, it need only look to absentee voting laws the Legislature passed shortly after statehood. [SA147, 175, 185]. If the framers implicitly meant to limit voting methods to only in-person voting using a ballot or voting machine, then several Convention delegates who also served in the early legislature wouldn't have passed – and Governor Hunt wouldn't have signed – multiple mail-in voting statutes. The Court can presume these legislators and Governor Hunt understood the framers' intent. *E.g.*,

Clark v. Boyce, 20 Ariz. 544, 554-55 (1919) (giving "great weight" to construction in laws passed by the early Legislature, where "[m]any of the members of the constitutional convention were members of the first and other sessions of the Legislature," and "[t]he president of the constitutional convention was the Governor of the state during the[se] sessions") (citing *Laird v. Sims*, 16 Ariz. 521, 528 (1915)).

The constitutional language is clear: it allows the precise "method" of voting to be "prescribed by law," which the Legislature has done. And as detailed below, Arizona's early voting laws are designed to ensure "secrecy in voting."

2. Arizona's early voting laws preserve "secrecy in voting."

The plain language of Section 1 requires only that the methods of voting prescribed by law preserve "secrecy in voting." Plaintiffs read this clause [at 37] to mean that any method of voting "must adhere to" the Australian ballot system, which Plaintiffs claim [at 3, 20] has four requirements: (1) ballots must "be printed and distributed at public expense"; (2) ballots must "contain the names of all duly nominated candidates"; (3) ballots must be distributed to voters "only by election officers at the polling place"; and (4) the system must contain "detailed

provisions to ensure secrecy in casting the vote." The trial court correctly rejected Plaintiffs' request to read this expansive list of requirements into three words in the Constitution. [SA254]

First, the right of "secrecy in voting" does not impose an unstated in-person voting requirement. Plaintiffs infer far too much from those words. To be sure, the history and evolution of voting practices and the adoption of the Australian ballot system (as detailed above) is helpful background on why many states, including Arizona, preserve the right of secrecy in voting. But Plaintiffs grossly misconstrue this historical context behind Arizona's "secrecy" clause as somehow mandating that all voting procedures must include every component of the original "Australian ballot system." [*E.g.*, OB at 5, 21, 24, 37]. This argument ignores the unambiguous text of the Constitution, the best evidence of the framers' intent. *E.g.*, *State v. Mixton*, 250 Ariz. 282, 289 ¶ 28 (2021).

Courts around the country hold that early voting laws do not violate state constitutional provisions assuring "secrecy" in voting. Just last week, for example, the Pennsylvania Supreme Court held that "nothing in" Pennsylvania's near-identical constitutional "secrecy in voting" provision (Pa. Const. art. VII § 4) "requires a qualified elector to deliver

a vote in person." *McLinko*, ___ A.3d ___, 2022 WL 3039295, at *32.[8]

The California Supreme Court has likewise held that "the secrecy provision" in its constitution "was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting." *Peterson v. City of San Diego*, 666 P.2d 975, 978 (Cal. 1983). The court refused to assume that the secrecy clause "was designed to serve a purpose other than its obvious one of protecting the voter's right to act in secret," particularly when accepting the challengers' argument "would impair rather than facilitate exercise of the fundamental right." *Id.*

In *Peterson*, the California court interpreted Article II, section 7 of the California Constitution, which states: "Voting shall be secret." But the court also found that its construction of this provision was "supported

[8] Plaintiffs rely [28, 38] on the lower court's decision in that case, *McLinko v. Dep't of State*, 2022 WL 257659 (Pa. Commw. Ct. Jan. 28, 2022), but never mention that the Pennsylvania Supreme Court stayed that ruling pending review. The Pennsylvania Supreme Court has now reversed that decision, but even so, it was never helpful to Plaintiffs. The court's holding hinged on the "offer to vote" clause in the Pennsylvania Constitution that is nothing like Arizona's constitutional language, and it did not hold, as Plaintiffs suggest [at 38], that Pennsylvania's "secrecy" clause mandates in-person voting.

by the history of the constitutional provisions governing voting," including a prior version of the secrecy provision identical to Article VII, Section 1 of the Arizona Constitution. *Id.* The court explained that a "provision for absentee voting and the secrecy provision were both in the Constitution" for many years, "with neither stated as an exception or limitation on the other." *Id.* When the constitution was amended in 1972 to "simplify the language" of article II, the absentee voting provision was removed "not in order to prevent mail voting but because provision for absentee balloting should be regulated by the Legislature, reflecting the belief that there was nothing inconsistent with absentee balloting and the retained secrecy provision." *Id.* at 976, 978 (emphasis added).

Many courts have held the same. *See, e.g.*, *Downs v. Pharis*, 122 So. 2d 862, 865 (La. Ct. App. 1960) (mail-in voting law did not violate constitutional provision that guaranteed voters the right to "prepare their ballots in [s]ecrecy at the polls"); *Sawyer v. Chapman*, 729 P.2d 1220, 1224 (Kan. 1986) (even if there's potential for fraud or loss of "secrecy" with mail-in voting, the legislature lawfully weighed that risk against "the compelling state interest in increased participation in the election process"); *Jones v. Samora*, 318 P.3d 462, 470 (Colo. 2014)

(election officials' violation of a statutory procedure for processing absentee ballots did not violate "secrecy" provision in Colorado constitution, where the officials inadvertently failed to remove ballot number tabs but there was no evidence that any voters were identified through ballot numbers). Indeed, other states with constitutional provisions much like Article VII, Section 1 have been using mail-in voting for decades. *E.g.*, Wash. Const. art. VI § 6 ("All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."); Wash. Rev. Code Ann. § 29A.40.010 ("Ballots by mail"); Mont. Const. art. IV § 1 ("All elections by the people shall be by secret ballot."); Mont. Code Ann. § 13-19-301 ("Voting mail ballots").

Plaintiffs hang their hats on cases from other jurisdictions that don't help them. They cite several century-old cases holding that absentee voting laws were unconstitutional under state constitutions with language nothing like Arizona's. [OB at 28, citing, *e.g.*, *Bourland v. Hildreth*, 26 Cal. 161, 174–75 (Cal. 1864) (provision dictating the county in which a person "claims his vote"); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 144 (Mich. 1865) (provision requiring that voters "offer to

vote" in a particular township or ward); *Thompson v. Scheier*, 57 P.2d 293, 304 (N.M. 1936) (requirement for voting "in the precinct in which he offers to vote")]. One case Plaintiffs rely on [at 28, 51] held that mail-in voting violated this Kentucky constitutional provision: "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." *Clark v. Nash*, 192 Ky. 594 (1921) (emphasis added). The Arizona Constitution has none of this language after the secrecy clause requiring ballots to be "furnished," "marked," and "there deposited" at the polls. If anything, *Clark* illustrates language the framers of our Constitution could have included if they wanted to mandate in-person voting.

Plaintiffs also repeatedly pluck a quote from *Burson* [at 1, 5, 36, 47, 49] saying that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter." 504 U.S. at 207-08. But Plaintiffs misrepresent what *Burson* "held." There, the Court weighed a restriction on political speech against Tennessee's compelling interests in preventing voter intimidation and fraud and in preserving secrecy. It explained that the state could prohibit electioneering in a certain zone in

polling places because doing so preserves secrecy for voters while they vote at a polling location (among other state interests), and rejected an argument that less restrictive measures would secure those interests. *Id.* Contrary to Plaintiff's incorrect claim [at 49] that *Burson* is "binding U.S. Supreme Court precedent" on "the constitutional requirement of secrecy in voting," that First Amendment case says nothing about whether a state's constitutional "secrecy in voting" clause prohibits voting by mail.

Even more baffling is Plaintiffs' continued reliance [at 28, 29] on a 19-year-old article by John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483 (2003). Dr. Ornstein filed an amicus brief in Plaintiffs' initial case in the supreme court explaining that Plaintiffs grossly mischaracterize his article. [SA234]. He explained that the Arizona Constitution "has *none* of the type of language courts have found to be inconsistent with statutes permitting absentee voting," [SA241], and that "in the almost 20 years that have elapsed since [his] article was published, absentee or mail-in voting has been used extensively throughout the United States, and there is no evidence pointing to any widespread problems." [SA236].

All told, Plaintiffs' authorities tell us nothing about what the Arizona Constitution means. No provision in Arizona's constitution prohibits mail-in voting, and Plaintiffs point to no case holding that a constitutional requirement of "secrecy" equates to a wholesale ban on mail-in voting.

Second, the trial court correctly found [SA255] that Arizona's early voting laws include detailed procedures that ensure "secrecy in voting." Early ballots are "identical" to other ballots except that the word "early" is printed on them. A.R.S. § 16-545(A). County recorders send these ballots to early voters along with a self-addressed return envelope with a ballot affidavit.[9] Ballot return envelopes must be "of a type that does not reveal the voter's selections or political party affiliation and that is tamper evident when properly sealed." A.R.S. § 16-545(B)(2). The voter then follows these procedures:

> The early voter shall make and sign the affidavit and shall then mark his ballot in such a manner that his vote cannot be seen. The early voter shall fold the ballot, if a paper ballot, so as to conceal the vote and deposit the voted ballot in the envelope provided for that purpose, which shall be securely

[9] Early voters also receive instructions that include this statement: "WARNING--It is a felony to offer or receive any compensation for a ballot." A.R.S. § 16-547(D).

> sealed and, together with the affidavit, delivered or mailed to the county recorder or other officer in charge of elections. . . .

A.R.S. § 16-548(A) (emphasis added).

After verifying the signature on the ballot affidavit and confirming that the ballot will be counted, election officials "open the envelope containing the ballot in such a manner that the affidavit thereon is not destroyed, take out the ballot without unfolding it or permitting it to be opened or examined and show by the records of the election that the elector has voted." A.R.S. § 16-552(F) (emphasis added). The voted early ballot and the empty affidavit envelope are then placed in separate stacks for further processing and tabulation. Elections Procedures Manual ("EPM") Ch. 2 § VI(B)(3); *see also Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16 ("the EPM has the force of law"). In fact, it is a crime for election officials to "attempt[] to find out for whom the elector has voted," open or examine a voter's "folded ballot" when it is delivered, mark "a folded ballot with the intent to ascertain for whom any elector has voted," or disclose how an elector voted "[w]ithout consent of the elector." A.R.S. § 16-1007.

Beyond that, Arizona law criminalizes fraud or other abuses related to early ballots, including "knowingly mark[ing] a voted or unvoted ballot

or ballot envelope with the intent to fix an election"; "offer[ing] or provid[ing] any consideration to acquire a voted or unvoted early ballot"; "receiv[ing] or agree[ing] to receive any consideration in exchange for a voted or unvoted ballot"; possessing someone's "voted or unvoted ballot with intent to sell"; "knowingly solicit[ing] the collection of voted or unvoted ballots by misrepresenting [one's self] as an election official [or] serv[ing] as a ballot drop off site, other than those established and staffed by election officials"; and "knowingly collect[ing] voted or unvoted ballots" and not turning those ballots in. A.R.S. §§ 16-1005(A)-(F). And the Legislature went a step further in 2016, criminalizing even non-fraudulent third-party ballot collection. A.R.S. § 16-1005(H).

All these laws preserve secrecy when voting an early ballot. Plaintiffs conclude [at 46] that "statutes criminalizing voter intimidation" aren't "sufficient to preserve secrecy in voting." Yet they don't even try to grapple with any of the specific statutory safeguards that preserve the secrecy of mail-in ballots in Arizona, let alone prove "that no set of circumstances exists under which" early ballots can be secret. *Arevalo*, 249 Ariz. at 373 ¶ 10.

Plaintiffs quarrel with [at 48-49] the trial court's use of *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994), a case Plaintiffs inaccurately relied on below. As the trial court acknowledged [SA255], *Miller* found that statutory "procedural safeguards" in an absentee voting statute "advance[] [the] constitutional goal" of secrecy in voting by "prevent[ing] undue influence, fraud, ballot tampering, and voter intimidation." *Id.* (emphasis added); *see also Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 372 (9th Cir. 2016) ("[R]egulations on the distribution of absentee and early ballots advance Arizona's constitutional interest in secret voting"). Here, the procedural safeguards detailed above – which Plaintiffs never address – preserve secrecy in early voting. *See id.*; *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1183 (9th Cir. 1988) (Hawaii's absentee ballot laws, which "go into great detail in their elaboration of procedures to prevent tampering with the ballots," adequately protected "secrecy" of ballots).

Third, even if mail-in voting has potential for less secrecy than in-person voting, that is not a basis to read an implied ban on early voting into the Constitution. Plaintiffs suggest [at 43-44] that voters are at greater risk of coercion or vote-buying (a felony) if they vote early. Not

only is this rank speculation, but it also ignores the many safeguards built into Arizona's early voting system.[10]

And interpreting the "secrecy" provision in the constitution to restrict access to voting would undermine a fundamental right; one that "constitutes the essence of American democracy." *Miller v. Bd. of Sup'rs of Pinal Cty.*, 175 Ariz. 296, 301 (1993); *see also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). Such an interpretation would violate the Free and Equal Elections Clause, and this Court must read constitutional

[10] Plaintiffs cite [at 44-46] unsworn, untested hearsay statements in one-sided "reports" in an ongoing criminal investigation involving a nonparty. They point to allegations of "suspicious activity" and alleged "vote-buying" by one individual who then "plead[ed] guilty to various charges stemming from the investigation." In reality, this individual collected four mail-in ballots, none of the ballots were found to be suspect, and all four ballots were accepted, verified, and counted by the county recorder. In other words, she pleaded guilty to nothing other than returning the voted ballots of four individuals whose ballots were verified and lawfully voted. The trial court erred in admitting these "reports" into evidence over the Defendants' objections, but in the end it doesn't matter. Plaintiffs raise a facial challenge; one-off anecdotal "evidence" about a nonparty doesn't prove that "no set of circumstances exists under which" Arizona's early voting statutes can preserve secrecy. *Arevalo*, 249 Ariz. at 373 ¶ 10.

provisions "in harmony with other portions of the Arizona Constitution." *Ruiz v. Hull*, 191 Ariz. 441, 448 ¶ 24 (1998).

What's more, the "secrecy in voting" provision confers a right to secrecy that a voter may waive. Courts consistently hold that the assurance of "secrecy" in voting is a right personal to the voter. *See State v. Tucker*, 143 So. 754, 756 (Fla. 1932) (Florida constitution guarantees that an "elector cannot be compelled to violate the right of secrecy of his ballot," but this is "a personal privilege which may be waived"); *Jenkins v. State Bd. of Elections of N.C.*, 104 S.E. 346, 347-48 (N.C. 1920) (the "privilege of voting a secret ballot [is] entirely a personal one . . . for the protection of the voter and for the preservation of his independence, in the exercise of this most important franchise," but "he has the right to waive his privilege and testify to the contents of his ballot"). The Arizona Supreme Court has also interpreted Article VII, Section 1 in a way that suggests it confers a right personal to the voter. *Huggins v. Superior Ct. In & For Cty. of Navajo*, 163 Ariz. 348, 351 (1990) (noting that compelling a voter's testimony about their vote in an election contest "strikes a responsive chord in Arizona, where our constitution explicitly assures secrecy in voting," and thus exploring "alternative solutions that permit

[the Court] to avoid compulsion so offensive to democratic sensibilities and assumptions"). Just as any Arizona voter may choose to vote in-person or by mail, any Arizona voter – whether they vote in-person or by mail – always has the choice to waive the secrecy of their vote.

B. Article IV, Part 1, Section 1 governs the people's legislative powers, not voting.

Plaintiffs next point to the phrase "at the polls" in various parts of Article IV, pt. 1 § 1. They string together [at 30, 33-34] several canons of statutory construction, concluding: "Thus, the framers intended all voting to occur at the polls." This argument is baseless.

Article IV, pt. 1, § 1 reserves to the people the right of initiative and referendum. It authorizes the people to pass laws "at the polls, independently of the legislature," and authorizes the Legislature to send laws to the people to decide "at the polls." That is, it grants legislative power to the people to exercise directly at an election, instead of through their representatives. Article IV has nothing to do with how people may cast their ballots at an election. That's what Article VII ("Suffrage and Elections"), Section 1 ("Method of voting; secrecy") is for.

Plaintiffs ask the Court to interpret a constitutional provision granting a fundamental right – one this Court "liberally" construes,

Pedersen, 230 Ariz. at 558 ¶ 7 – as somehow impliedly restricting the methods of exercising a different fundamental right. Their argument finds no basis in the text or structure of the Constitution, and they cite no authority supporting this novel interpretation.

At best, Plaintiffs cite *Allen v. State*, 14 Ariz. 458, 459 (1913), claiming [at 25, 30] the supreme court "found [it] obvious" that "in-person voting at the polls on a fixed date is the only constitutionally permissible manner of voting." Not even close. In *Allen*, a defendant was convicted of violating a statute that had been the subject of a referendum petition. *Id.* The defendant appealed his conviction, claiming the statute was invalid because it was not submitted to the people "at a proper or legal election." *Id.* at 461. The court affirmed the conviction, finding that the people properly approved the measure at the polls in "the next regular general election" as required under Article IV. *Id.* at 464. Nothing in that case even remotely suggests that Article IV restricts the "manner of voting" in an election.

The Court should reject Plaintiffs' request to use Article IV to limit the Legislature's power to dictate voting methods under Article VII, Section 1.

C. Article VII, Section 2 governs voter eligibility, not the manner of voting.

Next, Plaintiffs argue that Article VII, Section 2 somehow prohibits early voting because it describes who is qualified to vote "at any general election." According to Plaintiffs [at 39], the Constitution's use of the preposition "at" requires voting at "an exact position or particular place" at a "particular time." Wrong.

As its title informs, Article VII, Section 2 addresses only the "[q]ualifications of voters" eligible to vote in Arizona. Plaintiffs rely on Subsection A:

> No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, 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. VII § 2(A). The plain language of this provision describes who is qualified to vote in an election; it says nothing about how a person may cast their vote. *See McLinko*, ___ A.3d ___ 2022 WL 3039295, at *27 (constitutional provision that "does no more than identify the district in which the elector is eligible to vote" doesn't dictate "the manner in which

a vote must be cast") (emphasis added).

D. Article VII, Sections 4 and 5 do not dictate the manner of voting.

Finally, Plaintiffs point [at 39-41] to two more sections in Article VII, which they say require voters' "attendance" at the polls on election day. Wrong again.

Section 4 grants voters a privilege from arrest (except for certain crimes) "during their attendance at any election, and in going thereto and returning therefrom." Section 5 excuses voters from "perform[ing] military duty on the day of an election, except in time of war or public danger." Nothing in these provisions requires in-person attendance at an election; they merely protect voters who are exercising their right to vote. Construing a constitutional provision protecting the franchise as somehow implicitly limiting voters' ability to exercise a fundamental right – as Plaintiffs urge here – would undermine the Free and Equal Elections Clause. *See Ruiz*, 191 Ariz. at 448 ¶ 24 (this Court reads constitutional provisions "in harmony with other portions of the Arizona Constitution").

In the end, Plaintiffs identify no constitutional provision that mandates in-person voting on election day. Article VII, Section I gives the

State broad authority to adopt election laws prescribing the "method" of voting, as long as it ensures "secrecy in voting." Arizona's early voting statutes do exactly that.

E. Plaintiffs' Requested Relief is Improper.

Plaintiffs argue (incorrectly) that the Arizona Constitution implicitly mandates in-person voting on election day. Yet they ask the Court to invalidate and enjoin only post-1990 "no-excuse" early voting statutes. There are two problems with this absurd request.

For one thing, Plaintiffs don't (because they can't) explain why the Constitution somehow prohibits only "no-excuse" early voting. They argue [at 6] that the 1990 version of the absentee voting laws "did not clearly compromise 'secrecy in voting'" because they required a witness. Yet Plaintiffs ignore that the first absentee ballot law passed in 1918 required an elector to sign an affidavit confirming his identity before casting his ballot [SA152] and prohibited an elector from "mark[ing] his ballot in the presence of anyone unless he is physically unable to mark his ballot." [SA155]. This provides no greater protection than the current no-excuse early voting laws. An early voter still must "mark his ballot in

such a manner that his vote cannot be seen," A.R.S. § 16-548(A), and sign a ballot affidavit declaring under penalty of perjury:

> I am a registered voter in _____ county Arizona, I have not voted and will not vote in this election in any other county or state, I understand that knowingly voting more than once in any election is a class 5 felony and I voted the enclosed ballot and signed this affidavit personally unless noted below [in an affidavit by a person who assisted the voter "because the voter was physically unable to mark the ballot solely due to illness, injury or physical limitation"].

A.R.S. § 16-547(A). Having an "excuse" or "reason" to vote early does not affect secrecy, and nothing in the Constitution requires a witness to ensure secrecy.

Second, and more to the point, this Court "cannot judicially legislate" by reinstating certain pre-1991 statutes that Plaintiffs like better. *State ex rel. Lassen v. Harpham*, 2 Ariz. App. 478, 487 (1966). That's not how constitutional challenges work. *E.g.*, *Cohen v. State*, 121 Ariz. 6, 9 (1978) ("[A] court should avoid legislating a particular result by judicial construction."); *Bowslaugh v. Bowslaugh*, 126 Ariz. 517, 519 (1979) (changing the law "by judicial fiat" would be "an infringement upon the province of the legislature."). Plaintiffs may have a policy preference for a witness requirement or other early voting procedures, but it "is the job of democratically-elected representatives to weigh the

pros and cons" of voting methods. *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003). The Legislature lawfully chose to allow mail-in voting as a "method" of voting under Section 1 with procedural safeguards to preserve secrecy. That decision "is free from judicial second-guessing." *Id.*

IV. Plaintiffs Cannot Show Any Other Injunction Factors.

Because Plaintiffs' claims fail on the merits for all the reasons above, the trial court correctly found that no injunction is warranted. But even more, Plaintiffs fail to show an irreparable injury or that the balance of hardships and public interest favor them.

Plaintiffs ignore these elements and instead try [at 50] to sidestep their burden of proof. They rely on *Ariz. Pub. Integrity All.* to argue that they aren't required to establish any of the other injunction factors. But again, that case doesn't apply here because it involved a mandamus action under A.R.S. § 12-2021.

That case did not, as Plaintiffs suggest, suddenly eliminate every other injunction factor when a plaintiff brings a constitutional claim. To the contrary, the Arizona Supreme Court employed the four factor injunction test just a year later in a facial constitutional challenge. *See Fann v. State*, 251 Ariz. 425, 432 ¶ 16 (2021) ("A party seeking a

preliminary injunction must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief.").

A. Plaintiffs will suffer no injury if the Court denies their injunction.

Plaintiffs don't even state a claim for a constitutional violation (as detailed above), and granting an injunction would irreparably harm the State, not Plaintiffs. *Abbott v. Perez*, __ U.S. __, 138 S. Ct. 2305, 2324 (2018) (enjoining the State's "duly enacted" election statutes "would seriously and irreparably harm the State").

Plaintiffs claimed below [SA067] that Plaintiff Ward "will be deprived of the right to cast her vote in an election conducted under constitutional principles that safeguard against the possibility of undue influence," and that "ARP's members and candidates will be deprived of the right to participate in an election conducted under constitutional principles." That is not sufficient. They offer no facts to explain how Ward will be deprived of the right to vote without "undue influence," or how early voting will injure any of ARP's unnamed "members and candidates." If early voting harmed ARP's members, then why did it urge

them to vote by mail in the August 2022 primary election? *See* Republican Party of Arizona, Twitter (July 6, 2022) ("Mail-In Ballots are Available Today! Click the link below to request a ballot by mail.").

If that weren't enough, Plaintiffs' long delay in challenging a decades-old statute "implies a lack of urgency and irreparable harm." *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Ahwatukee Custom Ests. Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635 ¶ 9 (App. 2000) ("delay on the part of the plaintiff" is an "equitable consideration" when deciding whether to grant injunctive relief). Arizona has allowed no-excuse early voting since 1991, yet Plaintiffs waited until the middle of 2022 (an election) year to sue.

B. The balance of hardships and public interest favor upholding Arizona's early voting system.

Enjoining early voting for the 2022 general election would also impose extreme hardship on Arizona's election administrators. Revealing their ignorance about how election administration works, Plaintiffs made the bald claim below [SA068] that "Defendants will not be impermissibly burdened if the injunction is granted." They posit [SA068-69] that "there is sufficient time" to redo Arizona's entire election system before the 2022 general election because election officials "used the pre-1991 system for

decades." Plaintiffs are wrong. Holding a statewide election requires months of planning. [SA251 ¶ 2]. Election officials are deep in their preparations for the August and November elections, including budgeting, staffing, educating voters, and finalizing polling locations. [SA251 ¶¶ 2-3]; *see also, e.g.*, Maricopa Cnty. Elections Dep't, 2022 Elections Plan. Upending Arizona's early voting system right before early voting starts would be highly disruptive if not impossible, and could disenfranchise millions of Arizonans. [SA251-52 ¶¶ 4-5].

Worse yet, enjoining early voting would also harm the public interest. The vast majority of Arizona voters rely on early voting [SA252 ¶ 4], and the Court should avoid changing longstanding rules at the last minute that would cause mass voter confusion. *Purcell*, 549 U.S. at 4-5; *Democratic Nat'l Comm. v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (*Purcell* is an "important principle of judicial restraint" to prevent confusion and "protect[] the State's interest in running an orderly, efficient election.").

Conclusion

Arizona's early voting system is secure, efficient, and widely used, including by many of ARP's voters. The State has adopted detailed

procedures governing early voting that comply with Arizona law and preserve the right to "secrecy in voting." Plaintiffs' attacks on early voting are unfounded, and the Court should affirm the dismissal of this case.

RESPECTFULLY SUBMITTED this 8th day of August, 2022.

COPPERSMITH BROCKELMAN PLC

By: /s/ Kristen Yost
D. Andrew Gaona
Kristen Yost

STATES UNITED DEMOCRACY CENTER
Sambo (Bo) Dul
Christine Bass*

*Application for Pro Hac Vice Forthcoming

Attorneys for Defendant/Appellant Arizona Secretary of State Katie Hobbs