ARIZONA COURT OF APPEALS
DIVISION 1

ARIZONA REPUBLICAN PARTY; *et al.*; Appellants, v. KATIE HOBBS, *et al.*; Appellees. --- THE ARIZONA DEMOCRATIC PARTY; *et al.*; Defendants-in-Intervention Below.	No. 1 CA-CV-22-0388 Mohave County Superior Court No. CV-2022-00594

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Introduction

From 1925 to 1991, a zone of secrecy, secured by the watchful eyes of officials, protected civilian absentee voters by recreating the protections of the polling place. Arizona's no-excuse mail-in voting system, enacted in 1991, dispensed with this requirement. In doing so, it created a new type of voter—one who no longer receives these protections—and undermined the constitutional safeguards meant to protect the entire system.

Contrary to the opposition's strawmen, Appellants are not challenging all absentee voting, nor even all mail-in voting per se. Appellants do not contend that our state must conduct elections in slavish adherence to every jot and tittle of Arizona's eighteenth-century election laws. Rather, Appellants are critical of our current mail-in voting system because it lacks the safeguard of neutral officials to ensure secrecy in the casting of each vote. For the framers knew that secrecy is not preserved by words of prohibition alone. In an era devoted to addressing the abuses of the Gilded Age, its bosses and machines, its railroad tycoons and company towns, a zone of secrecy enforced by election officials was just common sense. Appellees fault the framers for not explaining what, to them, was too obvious to require explanation: "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). Not a good way, not the best way, not one of many potential ways, but the ***only*** way.

Secrecy in voting and limiting access to the area around the voter are one and the same.

To be sure, even the pre-1991 civilian absentee voting system was in tension with the constitution. Appellants expounded on this at length in their opening brief since, as Appellees correctly contend, a law may only be struck if it is clearly unconstitutional. That absentee voting itself already pushes the constitutional envelope serves to highlight the clear unconstitutionality of such laws once they completely dispense with the protections of the polling place.

Everyone agrees that Arizona's current system of no-excuse mail-in voting is exceptionally convenient and therefore popular. However, it is convenient for the same reason that it is unconstitutional—because it fails to preserve secrecy in voting. It is the function of the courts to prevent popular opinion from violating constitutional mandates.

As Appellants have previously explained, the Arizona Constitution requires the legislature to preserve secrecy in voting if it is to prescribe any method of voting that deviates from those our state originally used. 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."). In other words, the constitution categorically ***prohibits*** the legislature from enacting any method of voting that fails to preserve "secrecy."

The trial court correctly found that "the framers adopted the Australian Ballot System for elections," whereby voters "went to a polling place, were handed a ballot, filled it out in a private booth and folded it, and turned it back in…the same way voters do today ***if*** they go to their polling place on election day." [IR 63 at 2 (emphasis added).] The Secretary and Intervenors quibble a bit but concede, at least, that the framers "were clearly inspired by the Australian ballot system" and "understood" that "[i]f a voter can secretly choose [how to vote], then bad actors cannot ascertain whom…to reward and whom to punish." ADP Br. at 17 (citation omitted). *See also* Sec'y Br. at 1–6 (outlining history of the Australian ballot).

What the trial court and Appellees fail to grasp, however, is that voting at the polls preserves secrecy *because* it is monitored. A voter may thereafter leave the polls and tell others how he voted, but nobody can ever ask him to prove that he is telling the truth. Despite coercion, threats, or bribes, secrecy is always preserved—for the voter has no proof to give. Unmonitored voting that takes place away from the polls allows bad actors to find out for sure whether they got what they paid for. They can target voters who can provide proof and require their victims to vote in such a way that proof can be provided. But, now that the vast majority of people vote by mail in the absence of an official proctor, they hardly need to.

Appellees malign this interpretation of the constitution, but it is the correct one. Surely, however, even Appellees would concede that a postcard ballot (i.e., a

ballot that is mailed without a "secrecy" envelope) would not be a secret ballot. Thus, Appellees must also concede that courts are required to evaluate voting methods enacted by the legislature against the constitution's secrecy mandate, striking down any law that fails to preserve secrecy in voting. Accordingly, the debate seems to center on whether the constitution allows the legislature merely to prohibit showing one's ballot to others—which, in any event, is *not* prohibited any longer pursuant to A.R.S. § 16-1018(4))—or whether it must ensure that secrecy, as understood by the framers, is preserved. That is, secrecy, whereby the process itself makes it impossible (or nearly so) to see how any one person voted, thereby preventing coercion and ensuring free and equal voting. By its plain meaning, the constitution requires the latter and prohibits the former. In fact, the plain meaning of "secrecy in voting" was obvious not only to the framers who adopted it but also to the legislators who first enacted limited civilian absentee voting. This is why civilian absentee voting—all the way through 1991—required an election official (or other officer authorized by law to administer oaths) to proctor the absentee voting process to ensure that the voter was casting his vote freely (i.e., without being coerced to vote a certain way).

As they currently stand, however, the statutes that authorize mail-in voting do not preserve secrecy because they dispense with this requirement. This means that the only thing preventing a voter from being coerced to vote a certain way—the very

evil that the secret ballot was always intended to address—is the willingness of criminals to follow the law.

Arizona's system of mail-in voting allows a voter to mark his ballot anywhere without external safeguards to prevent others from looking over the voter's shoulder as he votes. This method fails to "preserve" secrecy, Ariz. Const. art. 7, § 1, and is therefore an unconstitutional method of voting.

There are only three ways to overcome the inconvenience of this constitutional provision: (1) the people can amend the constitution to allow an exception to secrecy for mail-in voting, (2) the legislature can provide a method of mail-in voting that preserves secrecy, or (3) Arizona courts—in contravention of their duty to uphold the constitution as written—can interpret (i.e., rewrite) the secrecy provision to mean something other than what the framers meant. The easiest option is the third, of course, but it is also the only one that is incompatible with democracy. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 83 (2012) ("Allowing laws to be rewritten by judges is a radical departure from our democratic system."). Setting aside the first and second options, "[t]he choice [regarding the third] is this: Give text the meaning it bore when it was adopted, or else let every judge decide for himself what it should mean today." *Id.* at 89.

Appellees argue in response that there are several problems with the obvious meaning of the constitution's mandate that "secrecy in voting shall be preserved." However, as Appellants argue below, none of the issues Appellees raise defeat the constitution's mandatory language in article 7, section 1.

First, Appellees focus only on the language that allows the legislature to prescribe methods of voting other than by ballot (a red herring, as Appellants do not disagree with this point), yet they fail to apply the plain meaning of the qualifying language mandating "that secrecy in voting shall be preserved" for any method other than voting by ballot at the polls. These words are mandatory under the Arizona Constitution. Ariz. Const. Art. 2, § 32 (constitutional provisions mandatory unless expressly declared otherwise). As Appellants explain below, applying the plain meaning of this qualifying language establishes that the legislature unconstitutionally amended the "absentee voting" laws in 1991, and the current system is thus facially unconstitutional.

Second, Appellees argue that, in any case, Arizona's mail-in voting statutes do indeed preserve secrecy. However, not one of the statutes Appellees cite facially preserves secrecy. To "preserve" secrecy, voters must not merely be punished afterward for showing their ballots to others but must also be *prevented* from doing so. Vote-selling and many forms of undue influence were criminalized even prior to

the Australian ballot reforms. Prohibition itself was not sufficient; that is why the reforms were enacted.

Third, Appellees argue that *Burson*, 504 U.S. 191, is entirely inapplicable to this case because the question presented there was whether anti-electioneering zones are constitutionally permissible, not whether a particular form of mail-in voting is. But what Appellees ignore is that, in order to answer that question, the Supreme Court exhaustively analyzed the meaning of secrecy in voting during the era the Arizona Constitution was framed. Thus, as Appellants argue below, *Burson* is both applicable and, at minimum, highly persuasive.

Fourth, Appellees argue that the constitution's "free and equal" clause supplants the constitution's mandate that the legislature preserve secrecy in voting, but this argument misstates the meaning of the "free and equal" clause, which in reality actually *supports* the plain meaning of secrecy in voting.

Fifth, Appellees attempt to discredit Appellants' arguments because (1) the Pennsylvania Supreme Court recently reversed the appellate court's holding that mail-in voting is unconstitutional and (2) one of the authors of a persuasive article on the Australian ballot wrote an amicus brief attempting to claw back his initial conclusion that mail-in voting is unconstitutional. These arguments are unavailing. The *McLinko* court relied on constitutional provisions that are not shared with Arizona, and the article says what it says despite efforts years later to disclaim it for

litigation purposes. They do not defeat the Arizona constitution's mandatory language.

Finally, Appellees argue that Appellants lack standing, that the *Purcell* doctrine and *laches* bar Appellants' claims, and that Appellants have failed to meet the standard for a preliminary injunction. As Appellants explain below, however, Appellees' attempts to distract the Court with these non-issues are non-starters. They do not aid the Court with the merits of Appellants' claims, the validity of which—after clearing away all the clutter and chaos—is apparent and thus requires this Court to strike down the 1991 changes under article 7, section 1 of the Arizona Constitution.

Argument

Appellees use the terms "early voting" and "mail-in voting" interchangeably and seem to imply that Appellants are challenging all the early voting statutes and/or that they have not distinguished which statutes they are challenging. Thus, as a threshold matter, Appellants wish to clarify that they are not challenging the entirety of the early voting statutes; more specifically, they do not challenge early voting—or any voting—that occurs at the polling place in the presence of election officials. Rather, as explained in the introduction of their opening brief, they are challenging the legislature's elimination of the pre-1991 requirements—pursuant to A.R.S. § 16-547 (1990)—that (1) an official be present when absentee voters cast their ballots to

ensure that "neither [the official], nor any other person, was able to see the [voter] vote" (i.e., to secure a restricted area around the voter) and (2) that the official then watch the voter enclose and seal the ballot in an envelope. *See* AZGOP Br. at 6–7. Voters are now allowed to mail in or drop off their ballots without appearing before an official to verify that they filled out their ballots in secret, rendering these methods of voting unconstitutional, as explained below.

I. The plain meaning of article 7, section 1 of the Arizona Constitution establishes that mail-in voting is unconstitutional in its current form because it fails to preserve secrecy.

"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. These words very plainly establish that voting must either occur (1) by ballot or (2) via some other method the legislature establishes so long as that other method ***preserves secrecy*** in voting. As Appellants explained in the trial court and in their opening brief, to vote by "ballot" means to vote by Australian or secret ballot, which can only be voted at the polls because of the procedures required by that method of voting—for example, "the erection of polling booths (containing several voting compartments) open only to election officials, two 'scrutinees' for each candidate, and electors about to vote." *Burson*, 504 U.S. at 202. *See also* John

C. Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* 9 (2006)[1] (ballots only distributed by election officers at the polling place and arrangements such as curtains or private booths).

"Words must be read with the gloss of the experience of those who framed them." *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting). Because words can often "change meaning over time, and often in unpredictable ways," they "must be given the meaning they had when the text was adopted." Scalia & Garner, *supra* 78. As the trial court correctly held, and Appellees seem to concede, the word "ballot" has a specific and technical meaning that points back to the framers' adoption of the Australian ballot. "In common speech, the word 'ballot' is used to mean the ticket used in voting; the act of voting; the result of voting." *Voting by ballot*, Ballentine's Law Dictionary (3rd ed. 2010). However, "from earliest times 'voting by ballot' has been a term used to contradistinguish open, viva voce, or public voting, and ***secret*** voting. 'The material guaranty of the provision of the (state) constitution, that all elections by the people shall be by ballot, is ***inviolable secrecy*** as to the person for whom an elector shall vote.'" *Id.* (emphasis added). *See also State v. Jackson*, 102 Ohio St. 3d 380, 386 ¶ 37 (2004) ("cardinal feature" of Australian ballot system in every jurisdiction is "[a]n arrangement for

[1] Available at https://www.aei.org/wp-content/uploads/2014/06/-absentee-and-early-voting_155531845547.pdf.

polling by which *compulsory* secrecy of voting is ***secured***") (italics in original; bold emphasis added). The parties do not seem to disagree on this point (i.e., the meaning of "ballot").

However, the trial court did not construe the meaning of the words "preserve" and "secrecy," yet it is these words that render the current system of no-excuse mail-in voting unconstitutional, and they are mandatory under the Arizona Constitution. Ariz. Const. Art. 2, § 32 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."). As the Arizona Supreme Court explained the year our constitution was adopted:

> If directions are given [in the constitution] respecting the times or modes of proceeding in which a power ***should*** be exercised, the presumption is that the people designed that it should be exercised in ***that time and mode only***, and we would impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end.

State ex rel. Davis v. Osborne, 14 Ariz. 185, 205 (1912). To construe the secrecy in voting clause as providing only an option that legislators or voters are free to accept or discard at will, or conveying an indefinite meaning, does violence to article 2, section 32 because it strips the words of "useful purpose." *Id*. at 204. "The provisions of the constitution must be a limitation upon the legislative power, else they would not have been placed in the organic law." *Id*. at 191. "We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not

[intended] to control alike the government ***and the governed***." *Id*. at 192–93 (emphasis added; quotations omitted).

Thus, this Court should hold that these words mandate a method of voting that ensures ***inviolable and unwaivable secrecy*** rather than a method that merely provides some protections that may be waived by the voter.

To "preserve" something is "***to keep something as it is***, especially in order to prevent it from decaying or being damaged or destroyed." *Preserve*, Cambridge Dictionary (2022). It is "to keep safe from injury, harm, or destruction" (i.e., to "protect" something) or "to keep alive, intact, or free from decay" (i.e., to "maintain" something). *Preserve*, Merriam-Webster (2022).[2] Another definition provides that to "preserve" something is to "maintain (something) in its original or existing state" (e.g., "records of the past…zealously preserved"). *Preserve*, Oxford Languages Dictionary.[3] Compare these definitions with the meaning of "preserve" in 1910: "To keep from injury or destruction; to save from the use of decay by some preservative…." *Preserve*, Webster's Practical Dictionary 313 (1910).[4] *See also Preservation*, Black's Law Dictionary (2d ed. 1910) ("Keeping safe from harm;

[2] Available at https://www.merriam-webster.com/dictionary/preserve.
[3] Available via Google search for "preserve."
[4] Available at https://archive.org/details/webstherspractica00webs/page/312/mode/2up?ref=ol&view=theater&q=preserve.

avoiding injury, destruction, or decay. This term always presupposes a real or existing danger.").

Both the contemporary and historical definitions of "preserve" establish one meaning, and it is the obvious one: to maintain something in its current state, that is, to protect it from decay. Thus, the legislature is required to entirely preserve secrecy as the framers would have understood it. That is the definition of "preserve," and this language is mandatory. *See also Jackson*, 102 Ohio St. 3d at 386 ¶ 37 ("cardinal feature" of Australian ballot system is "[a]n arrangement for *polling* by which *compulsory* secrecy of voting is secured") (italics in original).

"Secrecy" is "the state of being secret or of keeping something secret." *Secrecy*, Cambridge Dictionary (2022).[5] A "secret" is "a piece of information that is only known by one person or a few people and should not be told to others." *Secret*, Cambridge Dictionary (2022).[6] Another definition provides that "secrecy" is "the condition of being hidden or concealed" or "the habit or practice of keeping secrets or maintaining privacy or concealment." *Secrecy*, Merriam-Webster (2022).[7] It is "the action of keeping something secret or the state of being kept secret." *Secrecy*, Oxford Languages Dictionary (2022).[8] And again, a "secret" is "not known or seen

[5] Available at https://dictionary.cambridge.org/us/dictionary/english/secrecy.
[6] Available at https://dictionary.cambridge.org/us/dictionary/english/secret.
[7] Available at https://www.merriam-webster.com/dictionary/secrecy.
[8] Available via Google search for "secrecy."

or not meant to be known or seen by others." *Secret*, Oxford Languages Dictionary (2022).[9]

Compare these definitions with the meaning of "secret" in 1910: "Separate; hid; concealed from general notice or knowledge; kept from general knowledge or solution; known only to one or to few; retired; unseen; unknown; private; recondite; latent; covert; clandestine; privy…Something studiously concealed; a thing kept from general knowledge, or not discovered; a mystery…**Se´crecy**… State of being secret; retirement; privacy; concealment; fidelity to a secret." *Secret*, Webster's Practical Dictionary 313 (1910).[10] See also *Secret*, Black's Law Dictionary (2d ed. 1910) ("Concealed; hidden; not made public; particularly, in law, kept from the knowledge or notice of persons liable to be affected by the act, transaction, deed, or other thing spoken of.").

As with the word "preserve," both the contemporary and historical definitions of "secrecy" or "secret" establish one meaning, and it is also the obvious one: concealed, hidden, etc. At the polling place, secrecy is preserved because it is impossible for anyone else to follow the voter into his private booth as he casts his ballot. Secrecy is not preserved with mail-in voting because it "leave[s] open the

[9] Available via Google search for "secret."
[10] Available at https://archive.org/details/webstherspractica00webs/page/370/mode/2up?ref=ol&view=theater&q=secret.

possibility of voter coercion." Fortier, *supra* 55. "[W]ithout the privacy protections of the voting booth, absentee [i.e., mail-in] voters could be subject to other parties pressuring them to vote a certain way." *Id.* Further, "as the ballot is potentially available for anyone to see, the perpetrator of coercion can ensure it is cast 'properly,' unlike at a polling place, where a voter can promise his associates he will vote one way but then go behind the privacy curtain and vote his conscience." *Id.*

Indeed, the primary reason mail-in ballots are susceptible to fraud and coercion "is the separation of both ballot and voter from the polling place, with all of its integrity and privacy protections," where "[n]o one can influence the voter while voting, nor see the completed ballot." *Id.* at 54. But mail-in ballots "have none of these protections," which is why "early reformers tried to address the problem by requiring that voters provide approved reasons to vote absentee and find a notary public who would attest to the fact that the ballot was cast freely." *Id.* As Appellants have maintained below and in their opening brief, the legislature removed the notary requirement in 1991, which in turn destroyed the only procedure by which to ensure that absentee voters cast their votes in secret.

In fact, many states "began to drop rules requiring witnesses and the use of a notary public to ensure that an absentee ballot had been cast in private without coercion or help from another" such that, by "the end of 1991 [the year Arizona dropped this requirement], only eight states required a notary public." *Id.* at 13. Prior

to these changes, however, many states "institute[ed] strict regulations to preserve secrecy as much as possible away from the polling place," often "involv[ing] procedures by which a voter would have to go to a notary public, show a blank ballot, and then fill out the ballot and seal it, so that the notary public could swear that no one had coerced the person's vote or filled out the ballot on the person's behalf." *Id.* at 10. Again, as Appellants have maintained, Arizona's absentee voting laws included these procedures prior to 1991 and also required voters to have valid reasons for voting away from the polling place. This is why Appellants do not challenge "absentee" voting as it existed prior to 1991.

The Secretary discusses the resolution of this question in other cherry-picked, jurisdictions that either support this argument or are easily distinguishable. For example, she acknowledges that the meaning of the California constitution's secret voting provision was interpreted in light of a history of express constitutional authorization for absentee voting. Sec'y Br. at 29. What is more, in the California Constitution, the provision that "voting shall be secret" is not found in the portion of the constitution authorizing the legislature to enact laws governing the conduct of elections and so is not so clearly a limitation on that power. *See* Cal. Const. art. 2, § 3 ("The Legislature shall define residence and provide for registration and free elections."). Finally, in interpreting a statute requiring that secrecy actually be "preserved," at least one California court has acknowledged the

"clear...impossibility" of reconciling such a requirement with that state's system of mail-in voting. *Fair v. Hernandez*, 138 Cal. App. 3d 578, 582 (1982).

The secretary also urges this Court to look to the example of Kansas. Sec'y Br. at 29. Very well, let's talk about Kansas. As the Kansas Supreme Court has said, "the requirement of article 4, section 1 of our constitution is that 'all elections by the people shall be by ballot,' *and not by secret ballot*." *Lemons v. Noller*, 144 Kan. 813, 828 (1936) (italics in original). Convenient for the Kansas legislature as that court also recognized that a voter who casts a ballot by mail "has waived his right of secrecy." *Id*. at 832. In Arizona, however, as discussed herein, secrecy may not be waived; it must be preserved.

And what about Louisiana? Sec'y Br. at 29. Well, that state's constitution also expressly authorizes absentee voting and contrasts such voting with voting in secrecy at the polls. *See Downs v. Pharis*, 122 So. 2d 862, 864 (La. Ct. App. 1960).[11] Appellants could go on. But suffice it to say that the cases the Secretary has selected are from jurisdictions with very different constitutional texts and histories.

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[11] That case provides:

> The Constitution of 1921 authorizes the Legislature to provide a method by which absentee voting may be permitted. Article 8, Section 22, LSA. It further provides that, "The Legislature shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates." Article 8, Section 4, Article 8, Section 15, of the constitution provides that, "The Legislature shall provide some plan by which the voters may prepare their ballots in *secrecy* at the polls."

Id. (italics added to constitution in original case).

Given that the framers of the Arizona Constitution adopted the Australian or secret ballot, to be used at the polls, and ***required*** the secrecy of this method to be ***preserved*** for all other methods of voting, logically they would not have intended voting away from the polls to be less secure or secret than voting at the polls. Otherwise, there is simply no point in discussing the legislative authority to adopt other methods of voting so long as secrecy is preserved by making reference to voting by ballot, but this is what article 7, section 2 does. The framers could well have removed the reference to voting by ballot and simply said, "All elections shall be by such method as may be prescribed by law; Provided that secrecy in voting is preserved." But the framers did not do so because the secrecy features of ballots marked at the polls are what the framers are telling future legislatures that they must preserve. *See also Osborne*, 14 Ariz. at 205 ("If directions are given [in the constitution] respecting the times or modes of proceeding in which a power ***should*** be exercised, the presumption is that the people designed that it should be exercised in that time and mode ***only***.") (Emphasis added.) Therefore, assuming *arguendo* that voting by secret ballot is a different method of voting than voting by mail, as the Counties seem to imply, Cnty. Br. at 19, the legislature in adopting this other method was required to preserve secrecy in the same way it was preserved at the polls—by

making provisions to secure a restricted zone around absentee voters.[12] But Arizona's current mail-in voting system does not do this and is therefore unconstitutional.

II. The statutes that supposedly preserve secrecy do *not*—on their face—preserve secrecy.

The trial court pointed to various prohibitions on vote buying, intimidation, or showing one's ballot to others as proof that Arizona's post-1991 system preserves secrecy. But prohibitions alone are, as a matter of law, insufficient to preserve secrecy. Voting from home is almost as old as the Republic. Within 20 years of the formation of the union, individual voters were making their own handwritten ballots, marking them at home, and then bringing them to the polls for counting. *Burson,* 504 U.S. at 200. Laws that prohibited bribing or intimidating such voters of course existed, but "***the failure of the law to secure secrecy*** opened the door to bribery and intimidation" nonetheless and led to the Australian ballot reforms. *Id*. at 200–201 (emphasis supplied). These laws failed to preserve secrecy because they did not prevent bad actors from intercepting voters on the way to the polling place with ballot in hand. *Id*.

[12] The Counties make a distinction between the Kentucky Constitution and the Arizona Constitution, claiming that the Kentucky Constitution contains more specific language about voting at the polls. Cnty. Br. at 13. But Arizona's constitution also contains such language in article 4, part 1, section 10. As set forth above, these provisions were intended to be construed as mandatory.

The trial court cites A.R.S. §§ 16-545(B)(2) and 16-548(A) in support of its ruling that "Secrecy in voting being preserved is as [sic] an element of the no-excuse mail-in ballot voting statutes approved in Arizona in 1991." [IR 63 at 3.] Defendants also cite these statutes for the same proposition. Sec'y Br. at 33–34; ADP Br. at 12; Cnty. Br. at 13 and 14. Neither of these statutes preserves secrecy.

A.R.S. § 16-545(B)(2) requires that "ballot return envelopes are of a type that does not reveal the voter's selections or political party affiliation and that is tamper evident when properly sealed." Although ballot return envelopes—when used properly—conceal voters' ballots and make tampering difficult after they are sealed, ballot return envelopes do not and cannot ensure voters have cast their ballots in secret. This is because voters can be coerced to show their ballots to others prior to placing them inside the envelopes.

As an example, Mrs. Jones can threaten to divorce her husband if he votes for the wrong candidate, and she can ensure that he votes properly by standing at the kitchen table with him as he marks his ballot. Afterward, she can confirm that he places his ballot in the envelope, seals it, and mails it. Although this statute protects the ballot from the mailman's view, thereby providing a degree of *privacy*, it does not preserve *secrecy* because it fails to provide a procedure that *requires* the voter to mark his ballot in secret. In the example above, the pre-1991 absentee law would have *prevented* Mrs. Jones from coercing her husband by requiring him to mark his

ballot in the presence (but not the view) of an election official or notary. Again, article 7, section 1 of the constitution mandates that any method of voting that deviates from the Australian ballot (which is voted at the polls) *must preserve secrecy*.

The second statute the trial court cites also fails to preserve secrecy. **A.R.S. § 16-548(A)** provides:

> 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 sealed and, together with the affidavit, delivered or mailed to the county recorder or other officer in charge of elections…or deposited by the voter or the voter's agent at any polling place in the county.

This statute fails to preserve secrecy because it does not provide a procedure by which the voter has no choice but to mark his ballot in secret, as he would be required to do in the presence of an official witness. Although the statute *directs* the voter to mark his ballot in secret, the statute lacks a procedure to *ensure* the voter follows the directive. This is the role that election officials serve at the polling place. As the law now stands, there is no one to enforce this provision other than the voter himself, but unfortunately many voters are incapable of protecting themselves from coercion, hence why the secret or Australian ballot requires "detailed provisions…for ***physical***

arrangements to ***ensure*** secrecy when casting a vote." AZGOP Br. at 3 (citations omitted).

The example above is illustrative, but consider that many voters live in abusive environments. For instance, a woman who is domestically abused and coerced to vote for her abuser's preferred candidate cannot vote in secret if she lives with her abuser, who can receive her mail and force her—with the threat of violence—to ignore the directive of A.R.S. § 16-548(A). A company can insist employees vote a certain way and threaten to fire them if they don't bring in their ballots to prove how they voted. At the polling place, or under the pre-1991 system, these people can always vote their conscience because an election official prevents their ballots from being shown to anyone else, thus preserving the secrecy of their votes.

Other examples of voters who are incapable of protecting themselves from coercion outside of the polling place abound. *See, e.g.*, Fortier, *supra* 61 ("The separation of absentee ballots from the polling place raises apprehensions about the forging of signatures, the manipulation of elderly voters, and the handling of ballots by third parties, including the political parties. Absentee voters can be pressured by their spouses, unions, companies, friends, or social groups."). *See also Jackson*, 102 Ohio St. 3d 380 (defendant charged with five counts of vote tampering while assisting disabled voters completing their ballots).

A.R.S. § 16-548(A), like the first statute the trial court cites, simply fails to provide a procedure by which the voter is guaranteed secrecy in voting (i.e., a procedure that ensures secrecy is preserved). Further, A.R.S. § 16-1018(4) allows mail-in voters to post pictures of their ballots on the internet, rendering section 16-548(A) even more meaningless. It is absurd to assert that requiring a mail-in voter to mark his ballot in a manner in which it cannot be seen, even if scrupulously adhered to, does any work when, after marking his ballot, the voter can simply post a picture of it on Facebook.

In addition to the statutes the trial court cites, each of the Appellees also cites **A.R.S. § 16-552(F)** for the proposition that Arizona's mail-in voting statutes preserve secrecy. Sec'y Br. at 34; ADP Br. at 12; Cnty. Br. at 14. That statute provides that, if a "vote is allowed, the [early election] board shall 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."

Like the statutes discussed above, however, this one also fails to preserve secrecy because it does nothing to ensure that voters cast their ballots in secret prior to election officials opening their ballot envelopes. The preservation of secrecy *during* the casting of the ballot is what matters most in the Australian ballot system.

The voter is most vulnerable at that time, not *after* he has already mailed his vote and is no longer subject to coercion.

The Secretary cites six other statutes she contends preserve secrecy in mail-in voting. Sec'y Br. at 33 (citing A.R.S. § 16-545(A)); *id.* n.9 (citing A.R.S. § 16-547(D)); 34 (citing Elections Procedures Manual ("EPM") at ch. 2 § VI(B)(3)); 34 (citing A.R.S. § 16-1007); 35 (citing A.R.S. §§ 16–1005(A)–(F) and A.R.S. § 16-1005(H)). However, as with the statutes discussed above, these statutes also do nothing to preserve secrecy.

A.R.S. § 16-545(A) provides that the "[early] ballot shall be identical with the regular official ballots, except that it shall have printed or stamped on it 'early.'" It should be very obvious that this statute also does *nothing* to ensure that mail-in voters cast their ballots in secret. And although mail-in ballots are supposedly identical to those used at the polling place, they are not in fact identical for the simple reason that they are divorced from the physical protections the polling place provides, that is, the protections that preserve secrecy.

A.R.S. § 16-547(D) provides that the "county recorder or other officer in charge of elections shall supply printed instructions to early voters that include…the following statement:…WARNING-It is a felony to offer or receive any compensation for a ballot." As with the other statutes, this one also fails to provide a method that ensures voters cast their ballots in secret. Warning voters that they are

subject to felony charges if they offer or receive compensation for a ballot does not preserve secrecy in mail-in voting because punishment *after* the crime is committed—*if* the crime is ever even discovered—is not a method of preserving secrecy.

As set forth above, a system of voting that relies on criminals to comply with the law fails, as a matter of law, to preserve secrecy; this was the entire reason for the Australian Ballot reforms. In other words, punishment does not preserve secrecy but instead addresses what happens when secrecy is *not* preserved and someone gets caught. *See Burson*, 504 U.S. at 206–207 (explaining that "[i]ntimidation and interference laws fall short of serving a State's compelling interests [in preserving secrecy] because they 'deal with only the most blatant and specific attempts' to impede elections[.]"). The Secretary cites *Soules v. Kauaians for Nukolii Campaign Comm*. 849 F.2d 1176, 1183 (9th Cir. 1988) for the contrary proposition. Sec'y Br. at 36. However, that case was decided before *Burson* and is inapplicable because it fails to apply the *Burson* standard for secrecy.[13]

[13] The Secretary also states that *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994), found that the procedural safeguards in the statutes would "advance [] [the] constitutional goal" of secrecy in voting. Sec'y Br. at 36. *Advancing* the goal of secrecy, however, is not the same as preserving secrecy as the framers would have understood it. Rather, the constitution requires a result—the preservation of secrecy as required by section 7, and *Burson* further holds that mere advances are not enough absent a restricted area around the voter. In any event, this offhand remark is dicta. The case, a challenge to an election on the basis of

The Secretary next cites the **Elections Procedures Manual**, which merely outlines the procedures the early election board must follow when processing accepted early ballots. Specifically, the Secretary points out that the "voted early ballot and the empty affidavit envelope are then placed in separate stacks for further processing and tabulation." Sec'y Br. at 34 (quoting EPM at 70–71, ch. 2 § VI(B)(3)). It should be obvious to the Court by now that any procedures election officials employ *after* the casting of mail-in ballots do nothing to ensure that voters in fact voted their ballots in secret. Thus, such procedures do not preserve secrecy during the casting of votes. But preserving secrecy *during* the casting of ballots is the crux of the Australian ballot system ,.Fortier, *supra* 9, and also the purpose of the secrecy provision.

The Secretary next cites **A.R.S. § 16-1007**, which provides that it is a misdemeanor for an election official 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

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improprieties, hardly turned on the question of what the framers meant by secrecy in voting. Similarly, the Secretary also relies on *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 372 (9th Cir. 2016), for the notion that regulations "on the distribution of absentee and early ballots advance Arizona's constitutional interest in secret voting." *Id*. In this, the 9th Circuit was simply quoting from *Miller* for the narrow purpose of showing one of the state's interests in the challenged laws. *Id*. Like *Miller*, *Feldman* was hardly a case about the meaning of secrecy in voting. Constitutional construction is not done so casually.

how an elector voted "[w]ithout consent of the elector." But so what? Again, these provisions—as explained above regarding punishment for events that occur *after* voters have already cast their ballots—do *nothing* to ensure that voters are able to cast their ballots in secret and therefore freely.

The Secretary also cites **A.R.S. §§ 16-1005(A)–(F)**, which criminalizes fraud or other abuses related to mail-in ballots, but—as explained above—these provisions do not preserve secrecy because they do nothing to ensure that voters are *required* to cast their votes in secret or that they are *able* to do so.

Finally, the Secretary also cites **A.R.S. § 16-1005(H)**, arguing that "the Legislature went a step further in 2016, criminalizing even non-fraudulent third-party ballot collection." Sec'y Br. at 35. A provision regarding the collection of completed ballots has little to do with preserving secrecy of the voting process itself before the ballot is submitted. Like the other statutes discussed here, it does not and cannot—on its face—render mail-in voting constitutional.

Appellees argue that, though the framers "constitutionalized a commitment to secrecy, they did not bind future legislatures" to their own methods for securing that secrecy. ADP Br. at 17. Restated, they accuse Appellants of confusing history with necessity. The Supreme Court has an answer to that: "the dissent argues that we confuse history with necessity. Yet the dissent concedes that a secret ballot was necessary to cure electoral abuses. Contrary to the dissent's contention, the link

between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense." *Burson,* 504 U.S. at 207–08.

It is farcical to believe that laws prohibiting acts that were already criminal at the time the Arizona Constitution was ratified somehow "render bad actors unable to determine the effectiveness of bribery through secrecy." ADP Br. at 17 (quoting AZGOP Br. at 17). Yet, as Intervenors acknowledge, this was the purpose of article 7, section 1. ADP Br. at 17. When the constitution was ratified, it was common sense that the only way to actually do this was to secure a restricted area around voters while they were voting. It was common sense in "all 50 States" and "numerous other western democracies." *Burson*, 504 U.S. at 206. It is common sense even now. Appellees argue that "[i]f the framers had intended that system, they would have said so." Cnty. Br. at 13. They did. They were talking to people with common sense.

Mail-in voting, in its current form and facially, does not preserve secrecy. That was not always the case. Prior to 1991, the law required an election official or other officer authorized by law to administer oaths to witness that voters had cast their ballots in secret. *See* AZGOP Br. at 6 (quoting A.R.S. § 16-547 (1990); 1991 Ariz. Sess. Laws vol. 1, ch. 51 § 3 (1st Reg. Sess.) (in strikethrough)). The witness requirement—by emulating the secrecy protections of in-person voting at the polls (i.e., securing a *Burson* private zone around voters proctored by a neutral official to ensure secrecy *during* casting of the vote)—ensured that absentee voting, as then

practiced, preserved secrecy. In the absence of this safeguard, Arizona's current system of no-excuse mail in voting is clearly unconstitutional. This Court should strike down the removal of the proctoring requirement.

The Secretary invites this Court to focus on the broadening of the classes of persons entitled to vote absentee over the past century. Sec'y Br. at 7–10. Such expansion certainly increases the risks of departing from the constitutional scheme. The real issue here, however, is the post-1990 devolution of safeguards ensuring secrecy *during* the casting of ballots. The 1991 law (SB 1320) abolished the witness requirement by a neutral election official or other official authorized to administer oaths (i.e., *Burson*'s "restricted zone around the voter") ensuring that voters in fact cast their ballots in secret. SB 1320 violated the secrecy provision of the Arizona Constitution (and *Burson*) by switching from excusable absentee voting—which was monitored by an election official or notary who provided a secure zone around the voter to ensure secrecy during casting of the vote—to no-excuse mail-in voting based on the "honor" system.

The Secretary criticizes Appellants for not setting forth in detail the provisions of the 1991 amendments that are unconstitutional. Sec'y Br. at 2. As set forth in the opening brief, however, the unconstitutional change was the legislature's elimination of the requirements that (1) an official be present during absentee voting to ensure that voters marked their ballots "in such a manner that neither [the election

official,] nor any other person, was able to see the [voter] vote" (i.e., the requirement of a restricted area around the voter) and (2) that the official then watch the voter enclose and seal the ballot in an envelope. *See* AZGOP Br. at 6–7. *See also* A.R.S § 16-548(A) (1990) (restating these requirements). These requirements remained unchanged, virtually word for word, since Arizona first authorized civilian absentee voting in 1921. [*See* IR 50 at 6–7.]

Arguably, the pre-1991 absentee voting laws were constitutionally questionable, conflicting as they did with the constitution's "at the polls" language. But, as Appellants explained in their opening brief, "it is difficult to say that this system was ***clearly*** unconstitutional" given *Burson*'s holding that secrecy within the meaning of the Australian ballot system is preserved so long as a restricted area around the voter is secured. AZGOP Br. at 6. Functionally, it is difficult to say there is a meaningful enough distinction between a polling place staffed by election officials who ensure voters cast their ballots in secret and any other place where an official provides the same safeguards such that the former is constitutional but the latter is clearly unconstitutional. Accordingly, the legislature crossed the line—by eliminating the witness requirement in 1991—from a debatably constitutional system to a clearly unconstitutional one. The Secretary's extensive discussion of pre-1991 civilian absentee voting legislation, none of which Appellants challenge, is therefore irrelevant. Sec'y Br. at. 7–11.

As the Secretary points out, unlike civilian absentee voting, neither the 1918 Soldier's Voting Act nor current laws allowing absentee voting by members of the armed forces have ever contained the requirement of proctoring by a neutral official. Sec'y Br. at 43. However, Appellants explained in their opening brief that they are not challenging such laws because they recognize the fundamental tension between the constitutional demands of "secrecy in voting" on the one hand and the plain text of the "free and equal" clause on the other. AZGOP Br. at 41 n.25. The "free and equal" clause provides that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. Const., art. 2, § 21.[14] Appellants recognize that it is not possible to require a restricted zone around voters subject to combat or military conditions (or to ensure that a public official from Arizona is available in such locales). Thus, when it comes to military voters, it is simply not possible to fully comply with both the plain text of the "free and equal" clause and the constitutional provisions at issue in this case. Without some deviation from the secrecy in voting requirement, soldiers would be totally stripped of their right to vote by virtue of their service in the military.

This, of course, was noted by the proponents of the Soldier's Voting Act. In calling for a special session to enact that law, Governor Hunt proclaimed that its

[14] In the modern era, UOCAVA voting is also prescribed by federal statute and potentially implicates Supremacy Clause considerations given that the armed forces are subject to federal control. *See* AZGOP Br. at 41 n.25.

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," Sec'y Br. at SA166, thus acknowledging that the franchise was ***not*** presently available to Arizonans fighting in the First World War. *See also Roberts v. Spray*, 71 Ariz. 60, 70 (1950) ("As the clause in the constitution and the act of the legislature relate to the same subject, like statutes in *pari materia*, they are to be construed together."); Sec'y Br. at SA160 (purpose of the Soldier's Voting Act was to "make it ***possible*** for persons serving in the military forces to cast their votes") (emphasis added). With civilian absentee voting, the free and equal clause ceases to be a countervailing constitutional consideration, as discussed below in section IV.

III. *Burson* is not only applicable here but also demonstrates that secrecy in voting must often take precedence over even other fundamental constitutional rights.

Appellees argue that *Burson*, 504 U.S. 191, is inapplicable to this case because it does not apply to mail-in voting. Sec'y Br. at 32; ADP Br. at 21. *Burson* held that a state's compelling interest in protecting in-person voting at the polls from intimidation and fraud was so important that it outweighed the competing and fundamental constitutional right of free expression—even under strict scrutiny, where statutes "rarely" survive.[15] There, the Supreme Court upheld a Tennessee

[15] Once the factor of preventing intimidation of voters and voting fraud is removed, the First Amendment compels the striking down of an offending statute. *McCullen*

statute prohibiting electioneering within 100 feet of a polling place on election day because the fundamental interest of preventing voter intimidation and fraud could not be served by less the restrictive means (i.e., criminalizing voter intimidation and fraud).

A. The *Burson* holding is not state specific. It defines secrecy in voting in the context of the era and the national Australian ballot movement.

Burson's holding is not limited to Tennessee or to the specific provisions of its constitution. All states have a compelling interest in preventing intimidation and fraud in voting. Rather, *Burson* defined the constitutional interest of secrecy in the casting of ballots to prevent voter intimidation and fraud. Thus, the state interest defined in *Burson* is held by Arizona, too, and applies to non-secret voting outside of a restricted zone, which the legislature enacted in 1991, abolishing the former law's requirement of a restricted zone of secrecy enforced by a neutral official who subscribed and swore to the voter's compliance with the procedure. [*See* IR 7.]

Burson establishes the intended nationwide breadth of its decision by reciting an extensive history of all 50 states' attempts to protect the right of voters to cast ballots free from outside influences by instituting the "Australian ballot" reforms.

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v. Coakley, 573 U.S. 464 (2014) (content and viewpoint neutral state statute establishing buffer zones of 35 feet around abortion clinics that prohibited protestors engaging in close, personal "sidewalk" counseling in the buffer zone violated the First Amendment, as applied to abortion protestors, because it was not narrowly tailored).

504 U.S. at 200–206. *Burson* found that "the failure of the law to secure secrecy opened the door to bribery and intimidation." *Id.* at 201.[16] It found that the entire purpose of the "Australian system" was to adopt measures to "preserve the secrecy of the ballot." *Id.* at 202. And securing a restricted zone around voters was the key to preserving secrecy. *Id.* at 203. Indeed, the Supreme Court declared that "[t]he ***only way to preserve the secrecy of the ballot*** is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is ***necessary*** to secure the State's compelling interest." *Id*. at 207–08 (emphasis added).

In addition, far from limiting the scope of its reasoning to just Tennessee, the *Burson* Court expressly broadened its reasoning to include all states:

> In sum, an 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 restricted zone is necessary in order to serve ***the States'*** compelling interests in preventing voter intimidation and election fraud."

[16] The opposition notes that the opinion in *Burson* is a plurality and not majority opinion. This is irrelevant. The only justice who wrote a concurrence without joining in the opinion was Justice Scalia. Justice Scalia fully embraced the majority's reasoning and differed with them only as to whether strict scrutiny should apply at all. *See Burson* at 216 ("For the reasons that the plurality believes § 2-7-111 survives exacting scrutiny, ante, at 198-211, I believe it is at least reasonable; and respondent does not contend that it is viewpoint discriminatory.") (Scalia, J., concurring).

Id. at 206 (emphasis added).

Further evidence that the Supreme Court was speaking in a broader context is its observation that it is "common sense" that a restricted zone surrounding the voter is the "only way to preserve the secrecy of the ballot[.]" *Id.* at 207–208 (emphasis added). *See also Madison Teachers, Inc. v. Scott*, 379 Wis.3d 439 (2018) (upholding records custodian's denial of union requests for voter names during a union certification election on the grounds that the *Burson* interest of the state in preventing voter intimidation and fraud outweighed the interest in transparency). In *Scott*, the Wisconsin Supreme Court reasoned that, though "[t]he right to vote in certification elections is a statutory right [under Wisconsin law]; yet *Burson* is instructive in the matter before us because of its exposition of the policies that underlie the use of secret ballots." *Id.* 452. It also acknowledged that "When elections are conducted over a period of time and voting occurs in many locations, there is no physical boundary by which voter intimidation can be regulated as there was in *Burson*. Therefore, preventing voter intimidation during elections conducted by phone and email, as occurred here, is challenging." *Id*. at 456. Clearly, *Burson* has application informing the meaning of secrecy in voting that extends beyond the facts of that specific case.

Arizona also has the same fundamental interest in voter secrecy that the Supreme Court recognized can only be secured with a restricted zone around the

voter, which Arizona's pre-1991 absentee voting law provided. Arizona has long recognized (since 1891) that preserving secrecy for in-person voting requires a restricted zone around the polling place. Originally adopted in 1891 and now codified at A.R.S. § 16-515, Arizona law establishes a 75-foot restricted zone prohibiting electioneering at the polls. [*See* IR 7.]

B. *Burson*'s definition of secrecy in voting is incompatible with the post-1991 system.

Since a restricted zone of secrecy is the only means to ensure secrecy even for *in-person* voting, *so much more so* is it here the only means to ensure secrecy during casting of votes for mail-in voting—which the pre-1991 absentee voting statutes provided. [*See* IR 7, detailing 1991 amendments to A.R.S. §§ 16-544, 16-547, and 16-552.]

In-person voting occurs under controlled and restricted conditions of secrecy at the polls with physical barriers to isolate the voter when casting his ballot as enforced by neutral election officials. In contrast, mail-in voting takes place outside of any such restricted zone of secrecy with no physical barriers and outside the presence of a neutral election official. Voters can fill out their mail-in ballots at the kitchen table with no protections against undue influence from spouses or other family members. Voters can fill out their mail-in ballots at the union hall, the board room, taverns, and in the presence of others seeking to influence their votes.

The only way to prevent undue influence, thereby preserving secrecy of the vote, is to have an official present to ensure a restricted zone around the voter—as in *Burson*—to guarantee that voters are not subject to coercion by others. As set forth above, that is why the requirement that an official proctor be present while absentee voters filled out their ballots was instituted in the first place. Arizona's current system of mail-in voting fails to provide any means to protect vulnerable voters in this manner and is therefore unconstitutional.

IV. The "free and equal" clause supports Appellants' position.

Intervenors cite *Chavez v. Brewer* for the proposition that "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot." ADP Br. at 30. Mysteriously, however, they supply a period where none exists and omit the rest of the sentence. The actual quote is "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot ***by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot***." *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33 (App. 2009) (emphasis added). Of course, the "widespread and time-tested consensus" is that a "restricted zone around…voting compartments" is "necessary in order to serve the States' compelling interests in preventing ***voter intimidation and election fraud***." *Burson*, 504 U.S. at 206 (emphasis added). Accordingly, the restricted zone required to preserve secrecy in voting comports

with and advances the real intent of the "free and equal" clause. In other words, Intervenors cite *Chavez* for the proposition that the framers meant the clause to preference ease of voting over secrecy in voting when actually, consistently with article 7, section 1, they meant it to ***reinforce*** secrecy in voting. Constitutional provisions must indeed be read as a whole and in harmony with other parts. ADP Br. at 29 (citing *State v. Lee*, 226 Ariz. 234, 238 ¶ 11 (App. 2011)). Unfortunately for Intervenors, the entire constitutional scheme reflects the Progressive Era priorities of preventing voter intimidation and election fraud, not a preference for convenience in voting.

Intervenors also cite *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 345 ¶ 18 (App. 2005), for the proposition that that the Arizona Constitution's "equal protection" clause provides protections for fundamental rights—including voting—akin to the federal Equal Protection Clause. However, the paragraph they cite says nothing of the sort. Rather, it merely recounts the plaintiffs' allegations. *Id*. The court went on to dispel the notion that any burden on the right to vote must be subject to strict scrutiny by making express refence to *Burdick v. Takushi*'s admonition that "there must be a substantial regulation of elections if they are to be fair and honest" even though "such regulations would necessarily impose some burdens upon voters." *Id*. ¶ 25. And perhaps Intervenor Democratic National Committee will recall that they recently lost a Supreme Court

case where the court pronounced in response to a similar argument that "the concept of a voting system that is equally open and that furnishes an equal opportunity to cast a ballot must tolerate the usual burdens of voting." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021). The Court then went on to say: "Having to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting.'" *Id*. at 2344.

Other cases construing the "free and equal" clause have been in accord with these propositions. *See Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, 2020 U.S. Dist. LEXIS 184334, at *13–15 (D. Ariz. Sep. 25, 2020) (holding no "serious question" raised under Arizona constitution's "free and equal" clause in case alleging unequal access to early voting procedures where plaintiffs produced no evidence that "Navajo voters are unable to cast a vote because of intimidation or lack of free will" or of selective enforcement of the early ballot receipt deadline and citing *Chavez*, 222 Ariz. at 319).[17] Just as in *Yazzie*, here, Appellees presented no evidence that, should the pre-1991 system be restored, any suspect class will be unable to cast a vote because of intimidation or lack of free will. To the contrary, Appellants alleged below that "[v]oters who vote by mail have nearly identical demographic characteristics and political preferences to in-person voters. And turnout would be

[17] *Affirmed by Yazzie v. Hobbs*, 977 F.3d 964, 2020 U.S. App. LEXIS 32540, 2020 WL 6072861 (9th Cir. Ariz., Oct. 15, 2020).

similar whether or not in-person voting was available." [IR 1 at 10 ¶ 30 and 8 n.3–5 (citing sources).]

Finally, though Appellees argue that the fact that the 1991 changes occurred three decades ago should lead to some heightened presumption of constitutionality, this Court should recall that the pre-1991 system was also around for decades. To put the shoe on the other foot—if it violated the "free and equal" clause, why didn't they challenge it then?

V. The *McLinko* reversal and Mr. Orenstein's attempt to claw back his previous statements do not defeat the plain meaning of "secrecy in voting."

The plain meaning of article 7, section 1 of the Arizona Constitution renders Arizona's current system of no-excuse mail-in voting unconstitutional because it fails to preserve secrecy. Regardless of recent developments in *McLinko v. Dep't of State*, 270 A.3d 1243 (Pa. Commw. Ct. 2022), *reversed by McLinko v. Commonwealth*, Nos. 14 MAP 2022, 15 MAP 2022, 17 MAP 2022, 18 MAP 2022, 19 MAP 2022, 2022 Pa. LEXIS 1124, at *3 (Aug. 2, 2022), and Mr. Orenstein's attempt to claw back his former commentary on no-excuse mail-in voting, Arizona's system of mail-in voting remains unconstitutional, and Appellees' points on these issues do not defeat the plain meaning of the Arizona Constitution.

To support their argument that mail-in voting is constitutional, Appellees refer to the recent decision in *McLinko*, 2022 Pa. LEXIS 1124. Sec'y Br. at 27–28,

41; ADP Br. at 13–14, 18; Cnty. Br. at 18. However, the Pennsylvania Supreme Court based its holding in that case on a different provision of the Pennsylvania Constitution, erroneously overturning longstanding precedent on its "offer to vote" clause in a 5-2 decision along party lines (5 Democrats in the majority and 2 Republicans dissenting). 2022 Pa. LEXIS 1124, at *95. Arizona's constitution does not have an "offer to vote" clause.

Further, the Pennsylvania constitution, unlike Arizona's, contains an express provision authorizing absentee voting. Pa. Const. art. 7, § 14(a) ("section 14"). This provision provides:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote.

McLinko at *91 (citing Pa. Const. art. 7, § 14(a)). The *McLinko* Court explained that "[t]he history of the inclusion in our Constitution of a provision for qualified electors to vote if they are absent from their election district on Election Day is relevant to our analysis." *Id*. at *92. In the Majority's view, section 14 was intended to both require the Pennsylvania Legislature to enact an absentee voting law and prescribe

the *minimum* classes of persons to which it could apply. *Id*. at **90–94. A bit different than the context here, to be sure.

Moreover, although the *McLinko* decision briefly discusses the state constitution's secrecy provision, it does not construe what it means to preserve secrecy. The court merely concluded, without analysis (and certainly without analysis of the plain meaning of the word "preserve") that the challenged law (Act 77) "ensures such secrecy in the same manner as it did with the design of the procedure for absentee voting by mail which has been a part of [the state's] election methodology since 1963." 2022 Pa. LEXIS 1124, at *90. However, the court's conclusion is not persuasive here and is distinguishable for several reasons.

First, the litigants in that case challenged a new statutory scheme as unconstitutional because it did not require *in-person* voting, and the court thus focused on whether the constitution's "offer to vote" language required in-person voting. The court may have reached a different conclusion if the litigation had centered on whether mail-in voting is a secret method of voting. In this case, Appellants are challenging the legislature's removal of the secrecy provision from a prior iteration of Arizona's absentee voting statutes, arguing that mail-in voting currently fails to preserve secrecy rather than arguing that it is unconstitutional because the constitution requires in-person voting only. Another difference is that the Pennsylvania Constitution does not provide that its provisions are mandatory, as

the Arizona Constitution does. As set forth above, this is the basis for the rule in our state, articulated in *Osborne*, that if directions are given in the constitution respecting the times or modes of proceeding in which a power should be exercised, the presumption that it should be exercised in that time and mode ***only*** binds both the government and the citizenry. In Arizona, this reinforces the view that secrecy in voting is mandatory and cannot be waived. In Pennsylvania, its absence allows for the view that section 14 provides a floor and not a ceiling for legislative authority to extend absentee voting. Additionally, Pennsylvania's mail-in voting statutes are not Arizona's mail-in voting statutes, and this Court must take a fresh look at whether Arizona's system of mail-in voting preserves secrecy under *our* constitution. As explained above, it does not, and *McLinko* does not change this.

To the extent that Appellees refer to *McLinko*'s discussion of voting machines and Appellants' contention that the framers were envisioning voting machines when they drafted the phrase "such other methods," this is a red herring, as Appellants do not contend that voting machines are the one and only alternative method of voting the legislature may enact. Appellants have maintained throughout that, yes, the legislature was envisioning voting machines, which are equivalent to ballot voting because they are voted at the polls with the same secrecy provisions. The legislature may enact other methods—so long as those methods preserve secrecy in the manner Appellants have described (pursuant to the plain meaning of the constitution.).

Finally, it should be noted that the *McLinko* reversal was not unanimous. Rather, justices of the Pennsylvania Supreme Court are elected in partisan elections. Pa. Const. Art. 5 § 13. The five Democrats on the court voted to overturn the decision of the Commonwealth Court while the two Republicans on the court dissented. *See McLinko* at *95 (noting the filing of dissenting opinions by Justices Mundy and Brobson). While due respect should be given to the opinions of the Pennsylvania Supreme Court, to ignore its distinct political considerations is to ignore realties to which that court itself is not blind. *See League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 341, 357 (2018) (noting that, in Pennsylvania, "[e]very day of a jurist's life is rife with opportunities to offend one constituency or another.").

The Secretary also criticizes Appellants' so-called "continued reliance" on an article by Norman J. Orenstein. Sec'y Br. at 32 (citing 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)). But Appellants do not need to rely on this article. In fact, the co-author of that article, Mr. Fortier, wrote a subsequent article detailing the pitfalls of the country's silent conversion to absentee voting and making suggestions for improving mail-in voting to conform to the secrecy requirement of the various state constitutions. *See* Fortier, *supra*. Moreover, Mr. Orenstein's claw-back of his original scholarship is unavailing, disingenuous, likely partisan, and the work he previously published cannot simply be undone. Everything

he said about the Australian ballot system remains true and viable. His disagreement that *Arizona's* system of mail-in voting is unconstitutional under the *Arizona* Constitution does not bear on his prior work or this Court's analysis of the issue.

VI. Plaintiffs have standing; *Purcell* and *laches* do not apply here; and this Court should grant declaratory and permanent injunctive relief for future elections.

A. *Laches* cannot bar a claim for ongoing constitutional violations.

The Arizona Supreme Court has held that a request for a preliminary injunction against unlawful election procedures is not barred by *laches* unless it is impossible to comply with the requested relief. *See Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 65 ¶ 29 (2020). Moreover, *Purcell v. Gonzales*, 549 U.S. 1 (2006), is a federal court doctrine that does not apply in state court. [*See* IR 63 at 2.]

Nonetheless, the Court need not reach these issues because Appellants concede that, given the denial of an expedited briefing schedule, by the time this case is adjudicated, it will likely not be possible to restore the pre-1991 proctoring requirement in advance of the 2022 general election. Thus, at this juncture, this case is about Appellants' request for permanent injunctive and declaratory relief only.

But on those requests that are permanent in nature, Appellees are dead wrong that *laches* bars Appellants' claims for permanent relief. That the pre-1991 system was implemented thirty years ago somehow bars unconstitutional laws from being overturned is not a serious argument. Ongoing constitutional violations "do[] not become immunized

from legal challenge for all time" simply because no one challenges an unconstitutional law immediately. *Kuhnle Bros. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997). *See also Fontes*, 250 Ariz. at 65 ¶ 29 ("The Recorder also contends that due to Plaintiffs' delay, their claim is barred by *laches*. We disagree…delay does not excuse the County from its duty to comply with the law.") (Cleaned up.)[18] What's more, Appellees have not claimed, and could not claim, that they would suffer any prejudice from the grant of relief as to future elections.

B. The trial court correctly held that Appellants have standing.

Below, Appellants asserted their claims pursuant to the common law and Arizona Constitution as well as the Arizona Uniform Declaratory Judgments Act (the "Act") and A.R.S. § 12-2021 (mandamus). [*See, e.g.*, IR at 11 ¶ 35.] Both the Act and A.R.S. § 12-2021 provide for more relaxed standing rules. Yet, by and large, Appellees only address the test for common law standing. However, though Appellants do meet even that test as well, both the Act's and A.R.S. § 12-2021's more relaxed standing analyses apply.

1. As the trial court correctly found, Act's more relaxed standing rules apply.

[18] By way of some small example, abortion had been criminalized for over a century in some states at the time that *Roe v. Wade*, 410 U.S. 113 (1973), was adjudicated, but the claims in that case were in no way barred by *laches*.

The Arizona Uniform Declaratory Judgments Act provides: "Any person…whose rights, status or other legal relations are affected by a statute…may have determined any question of construction or validity arising under the…statute…and obtain a declaration of rights, status or other legal relations thereunder." A.R.S § 12-1832. The Act "is remedial and is to be liberally construed and administered." *Valley Nat'l Bank v. First Nat'l Bank*, 83 Ariz. 286, 292 (1958) (citations omitted).

The Secretary contends that Appellants must demonstrate injury to establish standing. Sec'y Br. at 13. While this is true in many instances, it is not the law in cases arising under the Act. *See Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 736 ¶ 16 (Ariz. 2022) (party "need not demonstrate past injury or prejudice" to establish standing under the Act). Rather, it is sufficient that the party simply have "an actual or real interest in the matter for determination." *Id*. (citing *Podol v. Jacobs*, 65 Ariz. 50, 54 (1946)).

A.R.S. § 16-401(A) provides that the AZGOP's primary elections are to be administered in the same fashion as general elections. It cannot be disputed that the AZGOP has an actual or real interest in how its own primaries are conducted.

Further, as the Secretary and Intervenors have noted, the AZGOP has unique statutory rights and duties to monitor the early voting process against improprieties. *See* Sec'y Br. at 14; ADP Br. at 36. *See also, for e.g.*, A.R.S. §§ 16-621(A) & 16-

552(C) & (H). In *Archer v. Bd. Of Supervisors*, the Arizona Supreme Court found that, because "any elector or voter, regardless of his political party registration" was tasked by statute with the right and responsibility to "uphold the integrity of the nomination process," any elector had standing to challenge the nomination of a candidate, even in another party's primary. 166 Ariz. 106, 107 (1990). Though different statutes apply here, likewise, the AZGOP's own statutory rights and responsibilities to monitor the early voting process against improprieties give it an interest in ensuring that the potential for such improprieties is lessened, which would simplify its task.

Further, in Arizona, the right to vote is not just the right to cast a ballot but "the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Fontes*, 250 Ariz. at 61 ¶ 4 (2020) (citing *Burdick*, 504 U.S. at 441). The framers of Arizona's constitution created such a structure, and Dr. Ward and the AZGOP's other members have the right to participate in a system governed by it. This right is affected by the challenged laws. Thus, she has standing individually to bring a suit for declaratory judgment, and the AZGOP has standing to vindicate the rights of the rest of its members in this regard. Thus, the trial court correctly held that "Plaintiff does have standing to bring this challenge under the…Act. If the voting law is unconstitutional, the Plaintiff would have to continue to participate in an unconstitutional system." [IR 63 at 2.]

2. *Fontes*' more relaxed standing rules also apply.

The Secretary acknowledges that *Fontes* held that every Arizona citizen and registered voter has standing to bring a claim for violations of Arizona elections law. Sec'y Br. at 13–14. Clearly then, if *Fontes* applies, there is no standing question at all. Perplexingly, however, the Secretary then contends that "that case doesn't apply here because it involved a mandamus action under A.R.S. § 12-2021." *Id*. 45. But, as noted above, Plaintiffs-below directly referenced A.R.S. § 12-2021, the statue authorizing mandamus actions, in their complaint as one of the grounds under which their claims arose. Recognizing this, Intervenors argue instead that, "[u]nlike here, the plaintiffs in [*Fontes*] filed a petition for special action seeking mandamus relief ordering compliance with existing law." ADP Br. at 39. But the Arizona Constitution is "existing law," and Plaintiffs-below did seek mandamus relief ordering compliance with it. Meanwhile, the Counties argue that the case below cannot have been a mandamus action because injunctive relief is not available through an action for mandamus or any other form of special action. Cnty. Br. at 20 n.8. True enough, which is why Plaintiffs-below did not rely solely on the mandamus statute. But, as Plaintiffs-below took pains to point out, prayers for special action and non-special action forms of relief may be combined into one action and the court was at liberty to treat the mandamus claim as a special action. [IR 53 at 2:25-3:10.] *See also Clark v. State Livestock Sanitary Bd.*, 131 Ariz. 551, 555 (App. 1982) (If only part of a suit

seeks relief available via special action, then that part should, if necessary, be treated as a special action in the interest of reaching the merits.).

3. Alternatively, Appellants satisfy a conventional standing analysis.

Even if *Fontes* and the Act's relaxed standing rules did not apply, Appellants would *still* have standing. To establish standing under a conventional analysis, a party must first establish a causal nexus between the defendant's conduct and injury. *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 ¶ 23 (2020) ("*Second Chances*"). "This requirement is a low bar." *Id*. Thus, *Second Chances* cited with approval a portion of *Florida Democratic Party v. Scott* regarding the requisite standing analysis. *Id*. There, the federal district court judge concluded that "political parties have standing to assert, at least, ***the rights of its members who will vote in an upcoming election***…. even though the political party could not identify specific voters that would be affected." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) (emphasis added). In other words, a depravation of rights alone is a sufficient injury, even if it causes no further harm. As set forth above, in Arizona, Dr. Ward and the rest of the AZGOP's members have the right to participate in a system structured to maintain the integrity of the democratic system. The Arizona Constitution prescribes such a structure, and they have a right to participate in elections governed by it.

Conclusion

As the trial court rightly acknowledged, this case boils down to one simple question: What did the framers mean when they commanded future legislatures to preserve secrecy in voting?

Appellees flounder for want of a clear answer. They flounder because they know that the framers of the constitution, drafting it during an era in which an election official assisting an illiterate voter was an impermissible violation of secrecy, *Hunt v. Campbell*, 19 Ariz. 254, 282–83 (1917), would never have believed that a system allowing voters to vote unmonitored from anywhere and to post pictures of their ballots on the internet preserves secrecy. They flounder because they know that the Australian ballot system was implemented precisely ***because*** it was not enough to merely criminalize voter manipulation when such behavior is so hard to detect. Thus, Appellees expend many pages arguing that the current system preserves secrecy in voting without ever actually defining what that means.

Appellants, however, do not flounder. Rather, they answer the question with the words of article 7, section 1 and what these words plainly meant to anyone who had lived through the abuses of the Gilded Age and the Australian ballot reforms. Their answer is that preserving secrecy in voting requires officials to secure a restricted zone around voters as they are filling out their ballots. Traditionally, this was accomplished by officials at the polls. In 1925, Arizona's legislature devised a creative means to extend this protection to civilian absentee voters. In 1991, it was

taken away. In its absence, the system that remains is clearly unconstitutional unless and until it is restored. The decision of the trial court must be REVERSED.

RESPECTFULLY SUBMITTED this 29th day of August 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 14, the undersigned counsel certifies that the Consolidated Reply is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and contains 12,948 words according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 29th day of August 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of August 2022, a copy of the foregoing Consolidated Reply was electronically filed via AZTurboCourt. The undersigned also certifies that a copy of the Consolidated Reply was e-served via AZTurboCourt and emailed to:

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