

IN THE SUPREME COURT

STATE OF ARIZONA

ARIZONA REPUBLICAN PARTY, a recognized political party; and YVONNE CAHILL, an officer and member of the Arizona Republican Party and Arizona voter and taxpayer,

Petitioners,

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State; STATE OF ARIZONA, a body politic.

Respondents.

Arizona Supreme
Court No.
CV-22-0048-SA

***AMICUS CURIAE* BRIEF OF KARI LAKE SUPPORTING APPLICATION FOR
ISSUANCE OF WRIT UNDER EXERCISE OF ORIGINAL JURISDICTION**

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LEGAL ARGUMENT

I. INTRODUCTION

Arizona lived without its current system of no-excuse, mail-in voting for the first eighty years of its existence. As it happens, no-excuse mail-in voting, which has been in place since the early 1990's, is not consistent with the Arizona Constitution, and its requirement that, absent an actual reason why the voter cannot vote at the polls, voting occur at the polls on Election Day, **not** Election Month. And a "reason" does not include that the able-bodied, physically present voter simply does not want to take the minimally burdensome step of presenting him or herself at a polling place on Election Day.

Arizona's founders made it clear in the Arizona Constitution that voting is to be done by secret ballot. Arizona's current, wide open mail-in voting system is an abject failure at preserving this secrecy, and is inconsistent with this constitutional requirement. If there is a way for the Legislature to preserve ballot secrecy, and the right of voters to vote without the fear of threats or intimidation with universal mail-in voting, it has not been thought of yet.

We also saw in 2020 that the unscrupulous were not beyond using COVID as an excuse to try to "game" the election. That is, in a number of states, COVID was used as an excuse to violate the laws related to voting, sometimes in the form of mailing out ballots without lawful authority or placement of so-called "drop boxes."

The fact is that mail-in ballots provide any number of opportunities to tweak the law to give one side an unlawful advantage. That was on display here in Arizona in 2020 as well when a partisan elected official tried to exceed his authority by promulgating rules purporting to alter the law on how overvotes are treated legally. Fortunately, here in Arizona this practice was challenged by a group that was fortunate enough to become aware of this in time and the Court put a stop to this.

In many other states, illegal “temporary” COVID procedures were not challenged, and voting occurred pursuant to these illegal procedures. But if voting occurs as it should, at the polls on Election Day, such opportunities for mischief are largely eliminated. This Court should grant the Petitioners the relief they seek.

II. THE ARIZONA CONSTITUTION AND ITS PROVISIONS PROVIDING FOR IN-PERSON VOTING ON ELECTION DAY

A. The Arizona Constitution Requires Voting By Secret Ballot, And No-Excuse Mail-In Balloting Clearly Fails To Secure This Secrecy

One must look no further than the Arizona Constitution to right many of the wrongs in our electoral system. The Arizona Constitution contains a variety of provisions that leave no doubt that it contemplates only day of, in-person voting. First among these are Article VII, Section 1, the very first provision in the Arizona Constitution covering Suffrage and Elections:

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.**

(Emphasis added).

Mail-in voting cannot be made secret and free from intimidation. When one votes on Election Day, one votes by him or herself at a polling place. With very limited exceptions, no other person is allowed to accompany the voter. Avenues that could be used to pressure and intimidate voters are foreclosed by the laws and system related to in-person voting at the polls.

In contrast, with no-excuse mail-in voting it is impossible to protect against such duress. To safeguard the secrecy that is guaranteed in the Arizona Constitution, the Arizona Legislature has adopted a number of provisions that clearly have no other goal than maintaining ballot secrecy and preventing any intimidation of electors. But these laws only protect secrecy for those voting in person at the polls.

The primary such law is A.R.S. § 16-515:

A. Except as prescribed in this section and section 16-580, a person shall not be allowed to remain inside the seventy-five foot limit while the polls are open, except for the purpose of voting...and no electioneering may occur within the seventy-five foot limit. Voters having cast their ballots shall promptly move outside the seventy-five foot limit.

B. The board of supervisors shall furnish, with the ballots for each polling place, three notices, printed in letters not less than two inches high, with the heading: "Seventy-five foot limit" and underneath that heading the following:

No person shall be allowed to remain inside these limits while the polls are open, except for the purpose of voting...Voters having cast their

ballots shall at once retire without the seventy-five foot limit. A person violating any provision of this notice is guilty of a class 2 misdemeanor.

...

G. Notwithstanding section 16-1018, a person may not take photographs or videos while within the seventy-five foot limit.

H. Any person violating this section is guilty of a class 2 misdemeanor.

I. For the purposes of this section, electioneering occurs when an individual knowingly, intentionally, by verbal expression and in order to induce or compel another person to vote in a particular manner...

In addition, A.R.S. § 16-580(A) provides, with limited exceptions, that “only one person per voting booth shall be permitted at any one time to sign for the receipt of a ballot and to wait for an opportunity to vote...”

With the old absentee balloting system in place prior to 1991, absentee voting was only allowed for those with statutorily prescribed reasons. 1991 Ariz. Sess. Laws, ch. 51 § 1. And the pre-1991 law also contained a number of measures designed to ensure the integrity and secrecy of absentee balloting. It required would-be absentee electors to swear an oath as to the validity of their reason for needing to vote absentee, and electors were required to swear before an officer that they were qualified electors and personally voted their ballots. This preserved the integrity and secrecy of absentee balloting while respecting the rights of those who literally could not vote at the polls on Election Day.

It is almost as if the Legislature, with the 1991 change, forgot about the Arizona Constitution's requirement for ballot secrecy and did not even attempt to replicate the protections enshrined in Arizona with the new system of unlimited no-excuse mail-in voting. They may have thought it futile, and perhaps they were right. The above provisions that prevent badgering and intimidation of voters at the polls are nonsequiters and lose all efficacy once we get away from in-person voting. As a Pennsylvania appellate court stated, "[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control." *In re Second Legislative District Election*, 4 Pa. D. & C. 2d 93, 95 (1956). There is no way to safeguard secrecy absent in-person voting at the polls.

The possibility that mail-in ballots may lead to undue pressure can be seen in the Arizona Democratic Party's 2016 challenge to House Bill 2023, the so-called "ballot harvesting ban". The constitutionality of that bill is not before this Court. Yet, the information that the Arizona Democratic Party revealed in arguing that House Bill 2023 should be struck down as unconstitutional reveals the way mail-in voting provides easy opportunities to pressure voters. In that case, the court described the efforts of the Arizona Democratic Party as follows:

Ernesto Teran, a Maricopa County Democrat, stated that he voted by mail in the last two elections. During the last election, volunteers from the ADP [Arizona Democrat Party] came to his house and asked if he

had mailed in his early ballot. He told the volunteers that he “was certain that [he] had done so,” but decided to check again to confirm. He then discovered that he had forgotten to mail his ballot it...[and decided] to entrust it with the ADP volunteers. Carmen Arias, another Maricopa County Democrat, stated that she votes by mail and typically is able to mail in her ballot before Election Day. Sometimes, however, she “has forgotten to do so before it's too late,” and in those situations she has entrusted her ballot to an ADP volunteer.

Feldman v. Arizona Secretary of State's Office, 208 F.Supp.3d 1074, 1090 (D. Ariz. 2016).

Lists of those requesting mail-in ballots, and up-to-date lists of which voters have already turned those ballots in, are clearly public records that can be and are used by entities such as the major political parties. A.R.S. § 39-121 *et. seq.* While *Feldman* did not involve any claims of undue pressure from the Arizona Democratic Party, “volunteers” who come to a voter’s house to inquire as to whether the voter has mailed his or her ballot in can just as easily attempt to pressure and intimidate the voter. They can even demand to see how the elector votes. And these “visits” to the homes of electors may be repeated and pressure-filled. A report issued by The Heritage Foundation titled “Vote Harvesting: A Recipe for Intimidation, Coercion, and Election Fraud” documents the problems endemic with early ballots¹. And as alluded to above, even ballot harvesting bans do not prevent potentially coercive, in-

¹ This report was authored by Hans von Spakovsky, and is available at <https://www.heritage.org/election-integrity/report/vote-harvesting-recipe-intimidation-coercion-and-election-fraud>

person pressure as to how to vote. As the report notes in quoting an investigation of these practices in Texas, “away from on-site monitors and electioneering restrictions at traditional polling places, the law that prohibits anyone from telling voters how to vote or marking their ballot without consent is often honored in the breach.”

It is unclear what, if anything, could prevent a person from, in the words of the Pennsylvania court, subjecting a voter to “pressure, and perhaps, control” in the context of universal mail-in voting. *See also* Wis. Stat. § 6.84 (“[t]he legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.”)

These types of situations are foreclosed with in-person voting. It is true that mail-in voters who may otherwise be subject to intimidation could resist efforts to pressure them. However, if it were enough to simply put this responsibility on the individual voter and expect easy resistance to such pressure, the Legislature never would have felt the need to pass the above laws protecting the sanctity of polling places and preventing efforts to pressure voters at the polls. As these guarantees of ballot secrecy cannot be replicated in the context of no-excuse mail-in voting, the

system is inconsistent with the Arizona Constitution's guarantees of ballot secrecy. Whatever the claimed merits of the current system, it is unconstitutional and cannot stand.

B. Other Provisions Of The Arizona Constitution Make It Clear That Voting Is To Occur At The Polls On Election Day

In addition, other provisions in the Arizona Constitution leave no doubt that the framers intended a single Election Day to determine who would hold public office, not a month-long Election Period. Article VII, Section 11 states that “[t]here shall be a general election of representatives in congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year...”

With mail-in voting, submission of these ballots before Election Day often means that the election has already been decided by Election Day, making the “first Tuesday after the first Monday in November” a formality.

Article 4, Section 1(10), adopted contemporaneously with the original Arizona Constitution, also makes clear where voting is to occur:

[T]he secretary of state...shall cause to be printed on the official ballot at the next regular general election the title and number of said measure, together with the words ‘yes’ and ‘no’ in such manner that the electors may express **at the polls** their approval or disapproval of the measure.

(Emphasis added).

No-excuse mail-in voting is incompatible with the Arizona Constitution's provisions requiring ballot secrecy and in-person voting on a single Election Day.

III. IT IS NOT NECESSARY TO HAVE UNIVERSAL NO-EXCUSE, MAIL-IN VOTING TO PROTECT THE RIGHTS OF THE PHYSICALLY INFIRM AND THE PHYSICALLY ABSENT

As the Petitioners point out, the old system of absentee balloting, with the prophylactic provisions outlined above, protects the rights of those who literally cannot vote on Election Day. But again, simply not wanting to go through the effort of voting on Election Day does not mean the individual must be accommodated with a no-excuse mail-in voting system that compromises ballot secrecy and opens the door to pressure and coercion. Many other states do not have no-excuse mail-in voting and there is nothing unconstitutional about their systems of voting. *See, e.g.,* Wis. Stat. § 6.84.

If this Court were to agree with the Petitioner, it could simply strike the 1991 law, leaving the prior absentee ballot provisions in place. Or the Legislature could be given time to create an early balloting system that provided for absentee voting.

IV. THE UNIQUE OPPORTUNITIES FOR ELECTION GAMING THAT NO-EXCUSE MAIL-IN VOTING PERMITS HAVE BEEN WELL DOCUMENTED

As the days drag on after Election Day without clear winners, thanks to no-excuse mail-in voting, the public becomes more and more suspicious as to the vote counting. But worse still are the myriad opportunities no-excuse mail-in voting

provide for gaming the system prior to Election Day. This was evident in other states. An exhaustive study by a respected Wisconsin group demonstrates the chicanery that can result from manipulation of early voting. See “A Review of the 2020 Election”, Will Flanders, Kyel Koenen, Rick Esenberg, Noah Diekember, & Miranda Spindt, *Wisconsin Institute for Law & Liberty*, December 2021, available at <https://will-law.org/wp-content/uploads/2021/12/2021ReviewStudy127.pdf>.

Wisconsin does not have the type of no-excuse mail-in voting that Arizona has. Instead, to obtain an absentee ballot, an elector, in the two weeks leading up to an election, must go to the municipal clerk's office and apply for an absentee ballot. Upon providing photo identification, the elector receives a ballot, marks the ballot, the clerk witnesses the voter's certification and the elector casts a vote by returning the absentee ballot to the municipal clerk. Wisc. Stat. § 6.86(1)(b).

Wisconsin law provides a manner by which some electors may obtain an absentee ballot outside of the mode outlined above. Those who are “indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period” may apply for an absentee ballot on that basis. Wisc. Stat. § 6.86(2)(a). Those electors are then excused from the absentee ballot photo identification requirement. Wis. Stat. § 6.87(4)(b)1.

Notwithstanding the system enshrined in law in Wisconsin, that did not stop certain Wisconsin officials from attempting to create a de facto no-excuse mail-in

ballot system through administrative fiat. This was done through a number of end-runs around the law. One of the primary methods was abuse of Wisc. Stat. 6.86(2)(a) and its allowance for an absentee ballot without showing photo identification for those “indefinitely confined”, as described by the Wisconsin Institute for Law & Liberty:

There were a significant number of ballots cast in the 2020 election through methods that do not meet statutory requirements or statutory intent. As recently confirmed by the Legislative Audit Bureau, the widespread adoption of absentee ballot drop boxes, encouraged by the Wisconsin Elections Commission (WEC), runs afoul of state law requirements for the collection of absentee ballots. This widespread adoption of absentee ballot drop boxes, not provided for under Wisconsin law, was correlated with an increase of about 20,000 votes for Joe Biden, while having no significant effect on the vote for Trump... More than 265,000 Wisconsin voters adopted the ‘indefinitely confined’ status, meaning they received an absentee ballot and were exempt from the statewide photo ID requirements. The number of indefinitely confined voters increased from 66,611 in 2016 to 265,979 in 2020. While certain local clerks initially said that COVID might render voters indefinitely confined, the state Supreme Court has said otherwise. Given the substantial increase in the number of such voters, it is almost certain that many voters improperly claimed “indefinitely confined status.” Many of these votes were cast unlawfully. Additionally, clerks in Dane and Milwaukee counties used the presence of the pandemic to encourage voters to adopt an uncommon status called “indefinitely confined.” The Wisconsin Supreme Court unanimously rebuked the Dane County clerk for encouraging voters to adopt this status in March 2020. In November, it confirmed that a person who did not wish to leave home due to the pandemic was not “indefinitely confined.”

The report also noted that changes into how the early votes were counted between the 2020 election and the 2016 accounted for another 6,000 vote net

difference in favor of Joe Biden, and also noted regional differences in how defective absentee ballots were treated. That is, in some locations, officials “cured” defective absentee ballots despite a lack of legal authority for doing so, and in other areas they followed the law.

Of course, Joe Biden won Wisconsin by 20,682 votes. One does not have to be a partisan to recognize that early voting provides all kinds of opportunities for gamesmanship that simply do not exist with in-person voting. In fact, in the 2020 election this Court was drawn into the battle and had to shut down illegal efforts by a partisan election official who was trying to put his thumb on the electoral scale. *See Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 63 (2020)(enjoining the then Maricopa County Recorder’s attempts to issue “instructions” for voters to fix overvotes on mail-in ballots, as under Arizona law, an overvote is invalid and is not counted under A.R.S. §§ 16-610-611).

Only this Court knows for sure, but the Court may not have loved the prospect of becoming enmeshed in an election dispute on the eve of an election. But its hand was forced thanks to no-excuse mail-in balloting and the efforts by partisans to manipulate it for political advantage. Overvotes are easily corrected at the polling place, but with mail-in ballots a voter has to request a new ballot and then wait to receive that ballot, if there is sufficient time. Most voters simply do not correct the overvote.

As this Court has observed, “when public officials, in the middle of an election, change the law based on their own perceptions of what they think it should be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.” *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 61 (2020); *see also Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 30 (U.S. 2020)(J. Gorsuch and Kavanaugh concurring)(“Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.”)

COVID was the big justification used by some to depart from the law with respect to election procedures, and mail-in ballots provided the perfect opportunity. Next election the same gang of partisans can be counted on to come up with another series of excuses as to why the law must be dispensed with. No excuse mail-in voting is the weakest link in the chain, and it is where these partisans always focus. Eliminating it goes a long way to preserving election integrity, as well as ballot secrecy.

To be sure, there can be last minute changes to the laws with relation to in-person voting at the polls that can also be deleterious to the public’s confidence in elections. But there are far fewer opportunities for such gamesmanship. Such efforts generally involve efforts to keep polls open for longer than is allowed by law (using

some subterfuge as an excuse). To the extent these types of efforts have been made, they have been limited and sniffed out as meritless and squelched by the Arizona judiciary. *See Arizona Democratic Party v. Reagan*, Maricopa County Superior Court CV2016-017099, 11/9/2016 (denying request by Arizona Democratic Party that the Court order various election officials to keep the polls open for two hours beyond that provided by law).

V. CONCLUSION

Amicus Curiae Kari Lake requests that this Court grant the Petition for Review and grant the relief requested. No-excuse mail-in voting is not consistent with the Arizona Constitution and its requirements for ballot secrecy and voting on a single Election Day.

If the voters of this state want to amend the Arizona Constitution, they may do so upon proper exercise of the right to initiative or legislative referral. But they must be the ones to do it. Simply because some find mail-in voting more convenient is no reason to dispense with the Constitution. And Arizona voters would be amending the Constitution with full knowledge of the problems created by no-excuse mail-in voting, as was on very vivid display in the 2020 election.

RESPECTFULLY SUBMITTED this 9th day of March, 2022.

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