SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN PARTY, et al., Petitioners, v. KATIE HOBBS, et al., Respondents, and ARIZONA DEMOCRATIC PARTY, et al., Intervenor-Respondents.	Arizona Supreme Court No. CV-22-0048-SA

ARIZONA DEMOCRATIC PARTY, DNC, DSCC, AND DCCC'S RESPONSE TO PETITION FOR SPECIAL ACTION

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INTRODUCTION

Arizonans overwhelming rely on early voting to exercise their right to vote.[1] In 2020, nearly 90 percent of ballots cast were early ballots.[2] Early voting also has a longstanding tradition in Arizona: the Legislature first adopted absentee voting in 1925 and "no-excuse" early voting in 1991. But Petitioners Arizona Republican Party and Yvonne Cahill now argue that all voting other than in-person voting on election day is unconstitutional. They bring this special action, ostensibly labeled as one for mandamus, against the State of Arizona and the Secretary of State, asking the Court to enjoin all early voting and to dictate what the Secretary must include in the Elections Procedures Manual. The Petition should be denied.

As a threshold matter, Petitioners lack standing to bring any of their claims: they are not entitled to the more forgiving standards of standing applied to mandamus actions (because their claims do not

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[1] Procedures for early voting are codified at A.R.S. § 16-541 *et seq*., and includes what is sometimes referred to as mail or absentee voting. This brief refers to this type of voting collectively as "early voting," consistent with the statutory terminology.

[2] *See* Voter Registration Statistics – Jan. 2020, Ariz. Sec. of State, *available at*: https://azsos.gov/elections/voter-registration-historical-election-data.

actually sound in mandamus), and they allege no cognizable injury that could sustain any of their claims. Petitioners' claims are also meritless as a substantive matter. Their constitutional argument rests on a tortured reading of provisions having nothing to do with the manner of voting and that make only ancillary reference to polling places. Granting the relief Petitioners request, moreover, would violate express provisions of the Arizona Constitution that guarantee the right to vote and compel interpretation in favor of enhancing the franchise. Petitioners' statutory claims likewise are unsustainable, ignoring plain text that grants the Secretary rulemaking discretion and allows voters to deliver their ballots to county election officials with no prohibition on drop-boxes.

As a matter of law, the Court can and should swiftly and promptly deny Petitioners' requests for relief.

JURISDICTIONAL STATEMENT

This Court has original jurisdiction of extraordinary writs to state officers and as the Legislature may further provide. Ariz. Const. art. VI, § 5(1), (6); *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 595 ¶ 23

(2017).[3] The Court exercises this jurisdiction through the special action procedure, though whether to accept jurisdiction remains "highly discretionary." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485–86 ¶¶ 10–11 (2006). The exercise of original jurisdiction is appropriate in cases raising novel constitutional questions of statewide importance that are likely to recur, and where resolution of the merits requires no factual development. *See, e.g.*, *id.*; *Brewer v. Burns*, 222 Ariz. 234, 237 ¶¶ 7–8 (2009); *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 4 (2009); *State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997). Here, Petitioners seek relief as a legal matter, declare no factual development is needed, and raise issues of profound statewide importance—including whether the method of voting long used by the vast majority of voters may suddenly now be found to violate the Arizona

[3] The Court may enter injunctions in original jurisdiction only against state ***officers***. *See Graham v. Moore*, 56 Ariz. 106, 108–09 (1940) (county officials are not "state officers" to whom extraordinary writs could issue in original jurisdiction). While the Legislature has expanded the Court's original mandamus jurisdiction to include state entities, A.R.S. § 12-2021, it has not done so for injunctions, A.R.S. § 12-1801. As a result, the Court may not enjoin the State of Arizona as an entity. But it may enter declaratory relief, A.R.S. § 12-1831, and may therefore address Petitioners' constitutional claim insofar as they seek declaratory relief, should it exercise its discretion to consider the matter in the first instance. *See* Pet. at 40 (seeking declaration in addition to injunction).

Constitution. The question—both as to Petitioners' standing and the merits—is highly likely to recur, as Petitioners make clear that they intend to re-file and litigate the same questions through appeal if the Court declines jurisdiction. Pet. at 7–8. As a result, the Court may accept special action jurisdiction. Ariz. R. P. Special Actions 7(b).

ARGUMENT

I. Petitioners Lack Standing.

As a threshold matter, Petitioners lack standing to bring any of their claims. They fail to allege ***any*** injury, let alone one that could be redressed by the relief they seek. Petitioners attempt to avoid this result by claiming to bring a mandamus action. Where a claim is accurately characterized as one for mandamus, petitioners may enjoy a "more relaxed standard for standing." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 11 (2020). But the relief that Petitioners request may not properly be granted in mandamus. And Petitioners fail to allege any particularized injury that would entitle them to pursue any of their claims under this Court's applicable standing jurisprudence.

A. Generalized claims of injury broadly shared by the citizenry are ordinarily insufficient for standing.

Arizona employs a "rigorous standing requirement." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). "To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury. An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998) (citation omitted). The injury must also be traceable to the defendant's conduct and redressable by the relief sought. *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405–06 ¶¶ 23–26 (2020).

The Court does apply "a more relaxed standard for standing in mandamus actions." *Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 11. Arizona's mandamus statute allows any "party beneficially interested" to bring a mandamus action. A.R.S. § 12-2021. Because the term "party beneficially interested" is "applied liberally to promote the ends of justice," *Barry v. Phoenix Union High Sch.*, 67 Ariz. 384, 387 (1948), members of the public for whose benefit the act to be compelled in mandamus was enacted have standing. *Armer v. Superior Court*, 112 Ariz. 478, 480 (1975).

For the more relaxed standing requirements to apply, however, the action must be appropriate for mandamus. *See Sears*, 192 Ariz. at 68 ¶ 11 ("We need not decide whether the Sears are 'beneficially interested' within the meaning of section 12-2021 because this action is not appropriate for mandamus."). This is where Petitioners first stumble.

B. This is not a mandamus action to which relaxed standing requirements apply.

This is not a mandamus action. "[T]he requested relief in a mandamus action must be [1] the *performance* of an act and [2] such act must be *non-discretionary*." *Id.* Petitioners, however, do not ask the Court to compel Respondents to do anything: quite to the contrary, they ask the Court to "*enjoin* the State from enforcing Arizona's unconstitutional voting laws," Pet. at 5 (emphasis added); *see also id.* at 6 (seeking "to *prohibit* the State from enforcing unconstitutional early voting statutes") (emphasis added). The same is true of Petitioners' request that the Court "prohibit" the Secretary from including drop-box rules in the Elections Procedures Manual. *Id.* at 19. And Petitioners' request to compel the Secretary to formally adopt the 2020 Signature Verification Guide seeks to improperly dictate *how* the Secretary exercises her *discretionary* rulemaking authority. Because none of Petitioners' claims sound in

mandamus, the more relaxed "beneficially interested" standard for standing does not apply. *Sears*, 192 Ariz. at 68 ¶ 11.

1. In considering whether a claim sounds in mandamus, the Court looks to function, not form.

Petitioners seek to avail themselves of the more forgiving legal standards that govern mandamus actions by framing their request for an injunction as one also to "compel" the State to follow the law. Pet. at 6, 11. This Court firmly rejected a similar attempt to pass off a request for injunction as a mandamus action in *Sears*. It should do the same here.

In *Sears*, the plaintiffs purported to seek mandamus to prohibit the Governor from entering into a gaming compact that they alleged violated federal law. 192 Ariz. at 68 ¶ 6. The Court held that the plaintiffs' disagreement with the Governor's interpretation of the law could not entitle them to mandamus relief—if it could, "virtually any citizen could challenge any action of any public officer under the mandamus statute by claiming that the officer has failed to fulfill state or federal law, as interpreted by the dissatisfied plaintiff." *Id.* at 69 ¶ 14. This would be inconsistent with the mandamus statute, "which limits a cause of action to beneficially interested parties who seek to compel a public officer to perform 'an act which the law specially imposes as a duty resulting from

an office.'" *Id.* (quoting A.R.S. § 12-2021). Relatedly, mandamus is unavailable to seek a declaration as to the scope of an official's duties. *See Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 467 ¶ 26 (App. 2007) ("[M]andamus is not an appropriate method to use to obtain a definition of duties that are otherwise subject to dispute."); *Sensing v. Harris*, 217 Ariz. 261, 265 ¶ 14 (App. 2007) ("[P]laintiff may disagree with how [an official] has chosen to act, but disagreement alone is not a basis for mandamus.").

2. Mandamus cannot be used to obtain what is in reality an injunction.

Petitioners' requests for relief relating to Arizona's early voting regime and the Secretary's inclusion of drop-box rules in the Election Procedure Manual are both requests for injunctions that Petitioners attempt to disguise as mandamus actions. All are explicitly requests that the Court *stop or prohibit* Respondents from taking some action: they request that the Court "*enjoin* the State from enforcing Arizona's unconstitutional voting laws," Pet. at 5, "*prohibit* the State from enforcing unconstitutional early voting statutes," *id.* at 6, and "*prohibit* the Secretary from . . . authorizing counties to use drop-boxes," *id.* at 19. Mandamus is available only to compel an act, not to prohibit it. *Sears*,

192 Ariz. at 69 ¶¶ 12–14. These claims, as with all the others brought by Petitioners, do not sound in mandamus.

Arizona Public Integrity Alliance v. Fontes, 250 Ariz. 58 (2020), decided by this Court in division, is not to the contrary. There, in an action to enjoin a county recorder from using a ballot instruction different from that prescribed by the Elections Procedures Manual, the Court applied the relaxed standing requirement for mandamus actions and granted relief. But mandamus was appropriate in that case because the recorder ***was*** required by law to perform a non-discretionary act: specifically, to provide the precise ballot instructions specified in the Elections Procedures Manual. *See id.* at 61 ¶ 3 (explaining that "with respect to overvotes, the Recorder has a non-discretionary duty to provide the Overvote Instruction authorized by the Arizona Secretary of State" in the Elections Procedures Manual). The case does not stand for the broad and untenable proposition that any voter may bring a mandamus action generally "to compel public officials to comply with state election laws." Pet. at 10. This Court firmly rejected that theory in *Sears*. 192 Ariz. at 69 ¶ 14.

3. Mandamus cannot be used to dictate how a state official exercises her discretion.

Petitioners also seek to compel the Secretary to prescribe a ***specific*** rule in the exercise of her rulemaking authority, Pet. at 6 (asking to "compel the Secretary to include the 2020 Guide in the EPM"), but mandamus is not available to dictate to state officials ***how*** to exercise the discretion afforded them by law. The Secretary is directed by statute to consult with county election officials and then "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" in election procedures. A.R.S. § 16-452(A). The rules are published in an Elections Procedures Manual, and they carry the force of law once the manual is approved by the Governor and the Attorney General. A.R.S. § 16-452(B)–(C).

As relevant here, the power of mandamus is limited to compelling "performance of act which the law ***specifically*** imposes as a duty resulting from an office, trust or station." A.R.S. § 12-2021 (emphasis added). No law ***specifically*** imposes upon the Secretary a duty to adopt the rule Petitioners prefer. While the statute requires the Secretary to prescribe rules, it is silent as to ***which*** rules she must prescribe, leaving instead to the Secretary the discretion to determine how best to "achieve

and maintain the maximum degree of correctness, impartiality, uniformity and efficiency." A.R.S. § 16-452(A).

Petitioners do not ask the Court to determine ***whether*** the Secretary must exercise her rulemaking authority. They ask the Court to dictate ***how*** the Secretary does so and to compel a certain result. That is not in the nature of mandamus. *See Sears*, 192 Ariz. at 68 ¶ 11 ("Mandamus does not lie if the public officer is not specifically required by law to perform the act." (internal quotation marks omitted)); *State Bd. of Dispensing Opticians v. Carp*, 85 Ariz. 35, 38 (1958) (explaining that mandamus may compel "the exercise of discretion or rendition of judgment but may not designate how the discretion shall be exercised nor the nature of the judgment to be rendered").

C. Petitioners do not allege any injury, let alone one that is redressable by the relief they seek.

Petitioners have not alleged any injury—indeed, the term appears nowhere in the Petition. The vague interests they cite do not entitle them to standing.

Petitioners begin by pointing to statutes that allow party representatives to observe early ballot processing, alleging vaguely that the relief they seek "would affect these duties in regards to early ballots."

Pet. at 11. Even if "affect[ing] these duties" (whatever that means) were a cognizable injury, it would be caused by the relief *Petitioners* seek, not any action by the State or the Secretary. *See Arizonans for Second Chances*, 249 Ariz. at 405 ¶ 23 (requiring that party "establish a causal nexus between the defendant's conduct and their injury" to establish standing (internal quotation marks and alteration omitted)).

Petitioners next try their hand at associational standing. In Arizona, this requires the association to have "a legitimate interest in an actual controversy involving its members." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6 (1985). But Petitioners nowhere identify what actual controversy exists. They say that the Secretary's actions "compromise[] the uniformity of the election procedures under which" Republican candidates compete, Pet. at 12, yet they never allege that counties are actually applying disparate election procedures. They also cite the Arizona Republican Party's interests in ensuring that "its members are elected in a lawful process" and in protecting the "electoral process" by ensuring that voters be required to prove their identities and qualifications to vote. Pet. at 12–13. Later in the Petition, however, Petitioners expressly disclaim such an interest,

stating unequivocally that they "do not assert any claims regarding election integrity or lack thereof." Pet. at 14.[4] Petitioners never allege that early voting harms Republican candidates.

Finally, Petitioners—in a halfhearted footnote—try taxpayer standing, pointing to the use of public funds for early ballot postage. Pet. at 11 n.8. But "preexisting, incidental" administrative costs cannot sustain taxpayer standing. *See Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 525 ¶ 18 (2021). Any funds spent on early voting postage are also irrelevant to Petitioners' requested relief, as "[a] court order

[4] It makes good sense for Petitioners to disclaim a theory of standing based on "election integrity or lack thereof": there is no credible argument that Arizona's elections are not already secure, or that early voting, drop-boxes, or anything else that the Republican Party now challenges impede the integrity of the state's elections. And courts across the country have universally rejected theories of standing based on such allegations. *See, e.g.*, *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711–12 (D. Ariz. 2020) (state actors allegedly counting ballots in violation of state election law is not a concrete harm under the Equal Protection Clause); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 609 (E.D. Wis. 2020) (alleged election fraud does not constitute a concrete, particularized injury suffered by plaintiff); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000-1001 (D. Nev. 2020) (similar); *see also King v. Whitmer*, --- F. Supp. 3d ---, Civil Case No. 20-13134, 2021 WL 3771875, at *1 (E.D. Mich. Aug. 25, 2021) (sanctioning attorneys who filed unfounded complaints alleging fraud in the 2020 presidential election).

restoring those funds to [state] coffers would not redress the injury" of allegedly unlawful early voting. *Id.* at 525 ¶ 20.

Petitioners also face a fatal redressability problem in their claims against the Secretary. The Secretary may not make binding changes to the Elections Procedures Manual unilaterally; to have the force of law, the manual must also be approved by the Governor and Attorney General. A.R.S. § 16-452(B). So, even an order directing the Secretary to revise the manual would not redress any injury possibly sustained by Petitioners, as such a change would remain non-binding unless and until it were approved by the Governor and Attorney General.

II. Petitioners' Claims Fail on the Merits.

Even if the Court determines that Petitioners have standing, each of their claims fails on the merits as a matter of law. There is no basis in any statute for Petitioners' claims against the Secretary. As for Petitioners' constitutional claims, they are not only based on a misreading of inapplicable sections of the Constitution, but seek relief that would itself *violate* the Arizona Constitution. Finally, to accept Petitioners' constitutional theories would be to conclude that over 95 years of laws passed by the Legislature related to early voting were all

unconstitutional. Such a holding would contravene the presumption of constitutionality afforded to acts of the Legislature. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 595 ¶ 21 (2009).

A. Petitioners' statutory claims fail on the merits.

As discussed, no part of A.R.S. § 16-452 requires the Secretary to include in the Elections Procedures Manual the specific rule Petitioners demand. Just as important, nothing prohibits the Secretary from providing county election officials with training and guidance materials that are purely advisory, as the Secretary has done with the 2020 Signature Verification Guide. Petitioners allege that the Guide's absence from the Elections Procedures Manual "perpetuates inconsistent and non-uniform signature verification procedures," Pet. at 16, but they allege no facts that would indicate there is any evidence of such inconsistency, nor do they show that any minor inconsistencies have any meaningful impact, much less an impact that could be cognizable as a matter of law.

Nothing prohibits the use of ballot drop-boxes, either. A voter may transmit a voted early ballot to the county recorder or other officer in

charge of elections by (1) delivery, (2) mail, or (3) deposit at a polling place. *See* A.R.S. § 16-548(A) (providing that ballot and completed affidavit shall be "[1] delivered ***or*** [2] mailed to the county recorder or other officer in charge of elections of the political subdivision in which the elector is registered ***or*** [3] deposited by the voter or the voter's agent at any polling place in the county"). Placing a ballot in a drop-box whose contents will be collected by county election officials is simply one way to "deliver" a ballot to the county. *Id.* Nothing in the statute requires that the delivery take place at the office of the county recorder.

B. Petitioners' constitutional claims fail on the merits.

Petitioners' constitutional claims are equally meritless. From the outset, they misunderstand the most basic principles of the Arizona Constitution. Petitioners ask the Court to identify "what, if anything, the Arizona Constitution authorizes regarding absentee voting." Pet. at 5. However, this Court has long understood that "the state legislature may pass any act" which is *not prohibited*, and Petitioners' suggestion that early voting "requires express authorization is inappropriate when applied to the Constitution of the State of Arizona." *Earhart v. Frohmiller*, 65 Ariz. 221, 224 (1947). Indeed, the Court cannot invalidate

early voting ***unless*** it is "*clearly prohibited*" by the Arizona Constitution. *Id.*; *accord Ariz. Minority Coal. for Fair Redistricting*, 220 Ariz. at 595 ¶ 21 ("[S]tatutes are constitutional unless shown to be otherwise, and when there is a reasonable, even though debatable, basis for the enactment of a statute, we will uphold the act unless it is clearly unconstitutional." (internal quotation marks and citations omitted)).

Petitioners do not come close to identifying a clear prohibition in the Constitution on early voting. Instead, they attempt to follow a collection of distorted and selective breadcrumbs that lead them astray from the text, history, and purposes of the Arizona Constitution. Only by distorting the Constitution's text do they reach the radical conclusion that "[i]n-person voting at the polls" on election day "is the only constitutional manner of voting in Arizona." Pet. at 19. Not only is there a total absence of support for such a reading, it would conflict with the robust protections for the right to vote and access to the ballot that are affirmatively and expressly guaranteed by the Arizona Constitution.

1. Petitioners' radical interpretation violates the Arizona and U.S. Constitutions' protections of the right to vote.

The right to vote is expressly protected by the Arizona Constitution. Article II, Section 21 declares that all elections shall be "free and equal" and that no power shall "at any time interfere or prevent the free exercise of the right of suffrage." In addition, Arizona's Equal Protection clause provides protections for fundamental rights—including voting—akin to the federal Equal Protection Clause. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 345 ¶ 18 (App. 2005). Yet, the Petition makes no mention of either provision.

As this Court has long recognized, "suffrage is the most basic civil right" and to deny that right "is to do violence to the principles of freedom and equality." *Harrison v. Laveen*, 67 Ariz. 337, 342 (1948). Consistent with that principle, "laws should be construed so as to uphold and sustain the citizen's right to vote" because "this privilege should be encouraged and not discouraged." *Abbey v. Green*, 28 Ariz. 53, 72 (1925). Central to these protections is the idea that "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot." *Chavez v. Brewer*, 222 Ariz. 309, 319–20 ¶ 33 (App. 2009). As a result, courts must "exercise

restraint when interpreting constitutional and statutory provisions relating to election matters before imposing unreasonable restrictions on the right to participate in legislative processes." *Pacuilla v. Cochise Cnty. Bd. of Supervisors*, 186 Ariz. 367, 368 (1996).

Consistent with those principles, this Court has repeatedly resisted distorted readings of the Arizona Constitution that would restrict the franchise. In *Johnson v. Maehling*, this Court rejected "the literal application sought by appellant" because it would cause an "absurd result"—namely, making it more difficult to exercise the right to a recall election. 123 Ariz. 15, 17–18, (1979). Similarly, in *Harrison v. Laveen*, this Court rejected a "tortious construction" of the phrase "under guardianship" that would deny the elective franchise to Native Americans. 67 Ariz. 337, 345 (1948).

Against the backdrop of robust protections for the right to vote, Petitioners seek truly extraordinary relief from this Court—a declaration that Arizona may not allow *any* person to vote in any way except in person at the polls on election day. Pet. at 19. While their main objective is to strike down Arizona's current voting laws, which allow for early voting, Petitioners also claim that Arizona's former absentee voting

scheme, which existed in some form from 1925 to 1991, was unconstitutional from its inception. Pet. at 42 (requesting the Court declare "mail-in voting entirely unlawful"). Most recently before the 1991 no-excuse amendment, the only people entitled to vote absentee were those who fell in six explicit categories, including those "physically unable to go to the polls" and those who "cannot attend the polls on the day of the election because of the tenets of [their] religion." 1979 Ariz. Laws, Ch. 209 § 3.

Perhaps realizing the extreme nature of their request that the Legislature be prevented from accommodating voters with physical or religious needs, Petitioners attempt to decouple pre-1991 absentee voting from the current scheme. In doing so, Petitioners make unsubstantiated assertions that the pre-1991 scheme was more secure because it required certain procedural safeguards. Pet. at 42. But having just argued that all early or absentee voting is unconstitutional because the Legislature lacks the authority to permit voting other than in-person on an election day, Petitioners cannot avoid the extremity of their position when it is convenient for them to do so. And threading the needle in this way is not only illogically divorced from Petitioners' own reasoning, it would result

in differential treatment that would raise federal equal protection concerns. *See Obama for Am. v. Husted*, 697 F.3d 423, 434–36 (6th Cir. 2012).

If this Court were to agree with Petitioners that the Constitution affirmatively prohibits the Legislature from enacting no-excuse early voting, it would revoke the Legislature's authority to allow *anyone* to vote absentee.[5] This would create the nation's most extreme voting policy—one that deprives every Arizonan of the right to vote absentee, even when such deprivation will result in the effective loss of a fundamental right.[6]

[5] Endorsing Petitioners' interpretation of the Arizona Constitution would also raise an explicit conflict with the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et seq*., which by its terms requires that states permit members of the U.S. Uniformed Services and merchant marines, their family members, and U.S. citizens residing outside the United States to register and vote absentee in elections *for federal offices*. *See* 52 U.S.C. § 20302(a). Should Petitioners prevail, it is far from clear that Arizona would still be permitted to constitutionally offer absentee voting for these voters in elections that do not include a federal office on the ballot.

[6] Petitioners anticipate this argument about federal constitutional challenges and attempt to explain it away by saying that courts should "construe the Arizona Constitution to avoid conflict with the United States Constitution and federal statutes." Pet. at 40–41 (citing *US W. Commc'ns., Inc. v. Ariz. Corp. Comm'n*, 201 Ariz. 242, 246 ¶ 23 (2001)). But the best—and likely, only—way for this Court to avoid such conflict is to maintain Arizona's no-excuse early voting system, which has existed in harmony with federal law since 1991. Failing that, Petitioners seem to

See Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Nat'l Conf. of State Legislatures. (Feb. 17, 2022) https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (all 50 states currently have some form of absentee voting—26 with no-excuse, 8 with all-mail elections, and 16 with excuse-required absentee voting). The consequences of the relief Petitioners seek are far more grievous than they acknowledge.

The Legislature's present and past early voting schemes are and were constitutional because the Arizona Constitution does not prohibit the Legislature from acting in this area. In fact, the Constitution grants the Legislature authority to pass laws regarding the method of elections. Ariz. Const. art. VII, § 1. But even absent such explicit authorization, A.R.S. § 16-541 *et seq.* remains constitutional because "the rule of construction which requires the finding of express authorization [for legislation] is inappropriate when applied to the Constitution of the State of Arizona." *Earhart*, 65 Ariz. at 224. To strike down legislation, Petitioners must show that the Constitution specifically *prohibits* its

suggest that the Court should somehow revive the 1979 version of a statute that no longer exists because it was amended by the more recent iterations of A.R.S. § 16-541. This is not how the judiciary operates.

enactment. Here, all Petitioners can muster are a few ancillary references from Articles IV and VII that do not in any way speak to early voting.

2. The Arizona Constitution does not prohibit early voting.

At its core, Petitioners' claim fails because no provision of the Arizona Constitution prohibits any of the challenged voting methods. Arizona's only constitutional provision addressing the method of voting is Article VII, Section 1, which states: "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." That provision creates no limitation as to the time or place for holding an election or casting a ballot. Far from limiting the Legislature's authority to adopt early voting, this provision *expressly* confers the authority to create "other method(s)" of voting. But even more notably, under the plain terms of this apex provision, the "other methods" language need not be invoked to find that early voting is authorized by the Constitution—because early voting occurs *by ballot*. A.R.S. § 16-545. Whether a voter appears in-person on election day to cast their ballot, or votes during early voting, in

both instances they vote by "ballot." *Ballot*, Black's Law Dictionary (11th ed., 2019) ("[a]n instrument, such as paper . . . used for casting a vote").

In the absence of a clear prohibition on early voting in the text of the Arizona Constitution, Petitioners assemble a collection of passing phrases that, in Petitioners' view, add up to a prohibition on Arizona's most popular method of voting. None can bear the weight that Petitioners would have them carry.

First, Petitioners claim that the word "secrecy" in Article VII, Section 1 incorporates and constitutionalizes a four-part "Australian ballot system." Pet. at 26. In addition, they claim that any voting method is unconstitutional if it "cannot be made entirely secret or free from coercion." Pet. at 27. Not only are these contentions completely divorced from the text, but they would also call into question the constitutionality of *any* voting method—including in-person voting on election day.

Second, Petitioners identify one section of Article VII that uses phrases like "at a general election." Pet. at 34–5. Petitioners do not give "at a general election" its natural, ordinary meaning—a simple reference to the relevant election. Instead, they understand it as strictly limiting all filling out of ballots to in-person, election-day voting. Pet. at 35. This

tortured reading has no support in the text, history, or structure of the Constitution. And, in addition to causing widespread disenfranchisement, it would create absurd results in other constitutional provisions.

Third, Petitioners identify a handful of constitutional provisions that have special protections for voting on election day. Here, Petitioners have simply identified a constitutional floor and declared that it is also a ceiling. This reading is foreclosed by basic principles of constitutional interpretation, as well as Arizona's Reservation of Rights Clause. *See* Ariz. Const. art. II, § 33.

Finally, Petitioners rely on the phrase "at the polls" as it appears in Article IV, Part 1, Section 1. Petitioners' overdetermined reading of "at the polls" suffers from the same flaws as its reading of "at a general election." Moreover, it relies on a set of narrow election provisions only relating to the initiative process to support a radical shift in all elections.

These selective and distorted interpretations do not provide sound support for Petitioners' contention that "[i]n-person voting" on election day "at the polls" "is the only constitutional manner of voting in Arizona."

Pet. at 19. And, as noted, Petitioners completely ignore the Arizona Constitution's *protections* for access to voting.

i. Protections for ballot secrecy do not prohibit no-excuse early voting.

Venturing far beyond the plain text of Article VII, Section 1, Petitioners far overread the requirement that "secrecy in voting shall be preserved" to encompass a whole scope of baseless security and integrity concerns. Citing no authority that could possibly support such a conclusion, Petitioners argue that Article VII, Section 1 is violated if a voting method "cannot be made entirely secret or free from coercion." Pet. at 27. In deploying this argument against early voting, Petitioners do not mention the host of criminal prohibitions on coercion, undue influence, and violating a voter's right to secrecy. *See, e.g.*, A.R.S. § 16-1003 (destroying or defacing a ballot; or delaying the delivery of a ballot is a class 3 misdemeanor), A.R.S. § 16-1006 (attempting to influence an elector by force, threats, menaces, bribery, or any corrupt means is a class 5 felony), A.R.S. § 16-1007 (prohibits election officials from attempting to find out for whom an elector voted). Instead, they suggest that the willingness of bad actors to *defy* criminal prohibitions can create a constitutional issue. Such logic would create similar constitutional issues

for in-person voting on Election Day—which similarly cannot be "entirely secret or free from coercion … [i]f bad actors wish to pay for votes." Pet. at 27.

Notably, Petitioners do not argue that early ballots are not "secret ballots." Instead, they argue that because the dictionary definition of "secret ballot" cites to the Australian ballot, whose features include being free from coercion, "secret ballot"—and by extension, "ballot" in Section 1—actually means "ballots free from coercion." This argument is so far divorced from the text of Section 1 as to be almost unintelligible.

Petitioners also do not contend with the fact that secrecy in voting means more than just avoiding coercion during the act of voting. This Court has addressed that type of coercion, *see Miller v. Picacho Elem. Sch. Dist. No. 33*, 179 Ariz. 178 (1994), but it has also construed "secrecy" as protection against compelled disclosure of a person's vote after the fact. *Huggins v. Superior Court*, 163 Ariz. 348, 351 (1990) (rejecting the "prospect of judges compelling good faith voters . . . to reveal what they supposed were private votes"). Petitioners also do not explain how absentee voting makes it more difficult for a voter to preserve the secrecy of his vote against compelled disclosure after his ballot is cast.

Further, Petitioners have represented to this Court that their arguments require no factual development, Pet. at 8, but now ask the Court to declare that early or no-excuse absentee voting is not the same as voting by "ballot" because it results in greater incidences of voter coercion than does in-person voting. They want the Court to presume a fact without requiring Petitioners to prove it. And they make this request despite the fact that the landscape of election law is littered with litigation in which parties have alleged election fraud but have been consistently unable to prove those allegations—including cases brought by Petitioners' counsel following the most recent presidential election. *See Bowyer*, 506 F. Supp. 3d at 706 (finding allegations of voter fraud "sorely wanting of relevant or reliable evidence").

Even if the Court concludes that early ballots are not "ballots," they would still qualify as some "other method" of voting, which the Legislature may prescribe under Section 1. Petitioners assert that "other method" refers to only one other method—voting machines.[7] Pet. at 25. But the Constitution contains no such limitation. It would make little

[7] Petitioners' reading would also preclude Arizona's scheme for digital return of absentee ballots by UOCAVA voters via fax or internet transmission. A.R.S. § 16-543.

sense if the framers used the general term "other method" to refer only to a specific method that they could have enumerated at the time. While the framers discussed the use of voting machines, they did not do so to the exclusion of all other possible voting innovations. *See Records of the Arizona Constitutional Convention of 1910*, 559-560 (John S. Goff ed., 1990).

ii. Article VII does not otherwise limit the time or place for voting.

Unable to identify a clear prohibition on early voting in the provision that concerns voting methods, Petitioners turn to other sections of Article VII. In Section 2, Petitioners latch onto the phrase "at a general election." However, Section 2 is titled "Qualifications of voters," and only deals with *who* may vote. *Ahrens v. Kerby*, 44 Ariz. 337, 341 (1934) ("These provisions, it is clear, . . . constitute restrictions or limitations upon the power of the legislature to provide who shall vote . . . ."). A section regarding ***who*** may vote has no bearing on ***how*** the state allows them to vote. It is nonsensical to suggest that Section 2's voter qualifications implicitly limit Section 1's explicit approval of voting "by ballot" or the broad power that it confers on the Legislature to implement "such other method" of elections. The U.S. Supreme Court has recognized

that legal drafters do not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[] not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n.*, 531 U.S. 457, 468 (2001).

Even if Section 2 had broader application, Petitioners have simply misread the phrase "at a general election." Rather than reference a precise time and place, the phrase is simply a generic reference to the election during which Arizona voters choose officeholders, as distinguished from, for example, primary elections, where additional qualifications for participating may be imposed (e.g., registration in a party for party primaries). Petitioners' overdetermined interpretation of "at" does not convert a passing reference to the election into a broad restriction on permissible voting methods. Indeed, even this Court has used phrases like "at the last general election" interchangeably with general references to the election, and not specifically to mean election day itself. *See Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 191 (1973) ("If the wholesale cancellation of all voters, including those who did vote *in the last general election*, can be upheld because of the state's interest in the purification of its election system,

surely the cancellation of the registrations of those who have not voted *at the last general election* is not constitutionally infirm." (emphasis added)). Petitioners' reading would also preclude voting at any election other than the general election, including primaries and special and local elections.

Petitioners' misreading of "at a general election" is clearly demonstrated by Article VII, Section 4. Section 4 protects electors from arrest "during their attendance at any election." Petitioners argue that this provision can only be read to protect electors who are physically present at any election. Pet. at. 36. Intervenors agree. When the Arizona Constitution intends to reference physical presence *at* a polling place, it includes the word "attendance" immediately prior to "at any election." If one accepted Petitioners' argument that the words "'at a general election' thus refer to the exact place and time of the general election," Pet. at 34–35, then including the word "attendance" in Section 4 would be superfluous. The only way to give consistent and complete meaning to all these provisions is to understand "at a general election" to be a general

reference to the election writ large, and to understand "attendance" as a more specific reference to physical presence.[8]

To accept Petitioners' cumbersome approach to that phrase would also cause absurd results in other constitutional provisions. For example, Article IV, Part 1, Section 1 requires the Secretary of State to "cause to be printed on the official ballot *at the next regular general election* the title and number" of any ballot initiative. Ariz. Const. art. IV, pt. 1, § 1(10). Under Petitioners' interpretation, those ballot initiatives could only be printed on the official ballot at the "exact place and time of the general election." Pet. at 35. Such an absurd result is clearly not intended in either Article IV or Article VII.

Beyond Section 2, Petitioners point to three other sections in Article VII. In Section 4, Petitioners cite the protections against arrest for electors "in all cases . . . during their attendance at any election, and in going thereto and returning therefrom." Pet. at 36–37. In Section 5,

[8] This interpretation also does not render meaningless the phrase "in all cases." *See* Pet. at 37. There is no case of a validly registered voter physically traveling to and from the polls in which the voter is not protected against arrest. Therefore, Section 4 *does* apply "in all cases." Notably, some of those cases could include early voters who choose to drop their ballot off in person at a polling place, thus necessitating travel to and from there.

Petitioners cite the prohibition on obligatory military duty "on the day of an election." Pet. at 37–8. In Section 11, Petitioners cite the requirement that an election be scheduled the "first Tuesday after the first Monday in November." Pet. at 38. Petitioners' arguments with respect to all three sections follow a similar logic—in Petitioners' view, these provisions do not expressly contemplate early voting and can, therefore, be read to prohibit early voting. These arguments all suffer from the same flaws.

All parties agree that there is one "election day" that constitutes the final day of voting and signals the close of both early and in-person voting. *See* A.R.S. § 16-547 ("In order to be valid and counted, the [early] ballot and affidavit must be delivered to the office of the county recorder . . . or may be deposited at any polling place in the county no later than 7:00 pm on election day."). That election day must be scheduled every even-numbered year (Section 11), no elector can be obligated to perform military duty on that day (Section 5), and electors are protected from arrest when voting on that day (Section 4). None of that speaks to or limits the availability of early voting.

Petitioners cite *Sherman v. City of Tempe*, 202 Ariz. 339 (2002), to establish that an "election *day*" means only one day. Pet. at 38 (emphasis

added). Intervenors agree. But *Sherman* does not support the Petitioners' extrapolations from that fact. In *Sherman*, this Court reasoned that while "votes *may be cast prior* to election day, measures are not conclusively *voted upon* until the actual day of election." 202 Ariz. 343 ¶ 18 (first emphasis added). In other words, election day is the *final* day for voting, but it is not the only day.

The Ninth Circuit reached a similar conclusion in *Voting Integrity Project, Inc. v. Keisling*, where it upheld Oregon's early voting scheme and concluded that "election day" was a final day consummating the election—not a standalone day on which all votes must be cast. 259 F.3d 1169, 1175 (9th Cir. 2001) (holding "the Oregon scheme leaves the election 'unconsummated' until the federal election day, with a residual ritual of in person voting at central election offices still to take place on that day").

Fundamentally, all three of these provisions serve to protect the right to vote and make it easier for Arizonans to vote. It would be counter to their purposes to read into them an implied restriction on further efforts to encourage and facilitate voting. Moreover, under Arizona's Reservation of Rights Clause, these provisions must be interpreted as a

floor, not a ceiling. Ariz. Const. art. II, §33 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.").

iii. Article IV does not otherwise limit the time or place for voting.

Petitioners point to four places in Article IV, Part 1, Section 1 (which deals with initiatives and referenda) where the framers used the phrase "at the polls" and argue this means that no Arizonan may vote in a place other than a designated polling place. However, by its very terms, Article IV, part 1 applies only to elections for initiatives and referenda—it cannot restrict voting methods in elections for public office. Even if Petitioners were correct in their interpretation of "at the polls," that would not entitle them to the extremely broad relief they seek.

Petitioners also cannot support their extrapolation that "[b]ecause no-excuse mail-in voting is not exercised at the polls, it is unconstitutional." Pet. at 23. First, this argument—like the "at a general election" argument—suffers from an overdetermined reading of the preposition "at."[9] A reference to voters expressing their views "at the

[9] Petitioners' distorted approach to the English language would even call into question the propriety of their own petition. Rule 4 of the Arizona

polls" is also just a general reference to democratic elections. All the absurdities that would result from Petitioners' reading of "at a general election" apply here with equal force because there can be no reading of the constitution that overdetermines "at" in Article IV, but not in Article VII.

Second, Petitioners' interpretation of "polls" is unjustifiably narrow. A "poll" is "the place where votes are cast." *Poll*, Black's Law Dictionary (11th ed. 2019). All ballots—whether mail or in-person—are "cast" when they are submitted for counting. Under Arizona's early voting system, some ballots are marked and deposited at a physical polling place, others are marked and mailed to a central location, and still others are marked and later dropped off at a physical polling place to later be sent to a counting location. The use of the phrase "at the polls" does not invalidate those ballots not marked and deposited in person.

Strangely, Petitioners point to various sections of Title 16 that use the word "poll" to illustrate that the term includes only physical polling

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Rules of Procedure for Special Actions requires that the special action be "brought *in* the Supreme Court." However, neither Petitioners nor their filing have ever been physically brought into the Court because they have taken advantage of the convenience of e-filing.

places. But those sections of Title 16 must be read together with A.R.S. § 16-541 *et seq*., which contemplates a system in which a voter may choose to vote at a physical polling location *or* submit their ballot by mail. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) ("laws dealing with the same subject . . . should if possible be read harmoniously"). Petitioners cannot rely on these statutes to imply the unconstitutionality of their brethren, which clearly permit ballots to be mailed ***or*** submitted at a polling place.

In sum, Petitioners would have this Court read passing references to voters' expression "at the polls," in a section dealing with the initiative and referendum power rather than voting in general, not as a reference to the electoral process, but as a *constitutional command* that voters can *never* fill out their ballots in any Arizona election (1) away from a physical polling place, (2) on any day other than election day itself. This contention is absurd, for the reasons discussed, and finds no support in the text or history of the Arizona Constitution.

3. Petitioners' invocation of one Pennsylvania case is not applicable.

Several other state courts have considered the constitutionality of early voting schemes, but this Court is not bound by the decisions of any

other state's courts and Arizona's Constitution is not identical to that of any other state. For example, Petitioners rely heavily on a recent court decision from Pennsylvania. *McLinko v. Commonwealth*, 2022 WL 2576600 (Pa. Cmwlth., Jan. 28, 2022). That decision, currently on appeal and *not currently in effect*,[10] has no bearing on this challenge.

Intervenors respectfully assert that the Pennsylvania court erred in striking down the state's no-excuse absentee ballot law, enacted by a Legislature with broad authority to regulate the *method* of elections. But this Court need not relitigate the Pennsylvania case nor delve into that state's jurisprudence to determine that Pennsylvania's situation is distinguishable from Arizona's.

[10] Enforcement of the trial court's ruling was automatically halted by a supersedeas upon the Commonwealth's notice of appeal to the Pennsylvania Supreme Court. *See* Pa. R.A.P. 1736(b). Though that supersedes was set to expire, the Pennsylvania Supreme Court indefinitely halted the trial court's ruling, pending appeal. *McLinko v. Commonwealth*, No. 14 MAP 2022 (Pa. March 1, 2022), hhttps://www.pacourts.us/Storage/media/pdfs/20220301/192803-14map2022-ordergrantingemergencyapplicationtoreinstateautomaticsupersedeas.pdf. Thus, the trial court's ruling has not gone into effect, and no-excuse absentee voting remains the law in Pennsylvania.

The Pennsylvania legislature recently opted to confer the right of no-excuse absentee voting, but unlike Arizona, its scheme is subject to an existing constitutional provision on absentee voting. Pa. Const. art. VII, § 14. That section sets forth discrete categories of Pennsylvania voters who may vote absentee. *Id*. As the *McLinko* court put it, "Section 14 established the rules of absentee voting as both a floor and a ceiling." 2022 WL 257659 at *17. The Pennsylvania court held that the Legislature could not, by statute, alter the Pennsylvania Constitution's enumerated list of groups who may vote absentee. *Id*. (concluding because Article VII, Section 14 of the Pennsylvania Constitution offers a "list of reasons [why voters may vote absentee,] which does not include no-excuse absentee voting, it is excluded").

Regardless of whether the Pennsylvania court's reading was correct, Arizona's Constitution does not contain a list of specific groups permitted to vote absentee. So, unlike in Pennsylvania, there is no argument to be made that the framers identified certain groups to the exclusion of others. Here, all absentee voting is a creation of the Legislature, and not subject to any constitutional "ceiling."

The other key difference between Arizona's and Pennsylvania's constitutions is that Arizona's does not include the 'offer to vote' language that is at the heart of the Pennsylvania decision, and which the court construed as a non-waivable requirement for physical presence. *McLinko*, 2022 WL 57659 at *17 ("'Offer to vote' . . . has been consistently understood, at least since 1862, to require the elector to appear in person"). Given this language, the *McLinko* court concluded that any "other method" of voting the legislature wishes to create must abide by a physical presence requirement. *Id.* at *18 ("The 1901 amendment authorizing 'such other method' of voting at the polling place did not repeal the in-person voting requirement in Section 1"). And given that Arizona does not have an "offer to vote" clause or its equivalent,[11] the logic employed by the Pennsylvania court simply does not apply. The Arizona Constitution only requires that voting be done "by ballot," which is the case with early and absentee voting, moreover, nothing prevents

[11] Petitioners assert that Arizona's Article VII, § 2 use of "at any general election" is the equivalent of Pennsylvania's "offer to vote." Pet. at 34. But as discussed herein, the Court should not interpret "at any general election"—or any portion of Section 2—as a physical presence requirement that modifies Section 1's methods of elections.

the Legislature here from adopting any "other method" of voting, should it so choose.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitioners' requested relief.

RESPECTFULLY SUBMITTED this 11th day of March, 2022.

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