ARIZONA COURT OF APPEALS
DIVISION 1

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

Appellants,

v.

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

No. 1 CA-CV-22-0388

Mohave County Superior Court
No. CV-2022-00594

Expedited Consideration Requested

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

Appellees.

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

Defendants-in-Intervention Below.

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Introduction

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

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

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

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

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

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

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

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

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

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

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[1] Available at https://azmemory.azlibrary.gov/digital/collection/lawsession/id/2606/rec/2.

[2] Available at https://arizonahistoricalsociety.org/wp-content/uploads/2021/02/JAH-Statehood-Politics-and-Territorial-Development_Mark-E-Pry.pdf.

[3] Available at https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10181/.

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

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

Arizona eventually adopted a system of absentee voting which provided an

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

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

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

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

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

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

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

Statement of the Case[8]

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

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

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

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

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

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

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

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

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

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

Statement of the Issues

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

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Statement of Facts

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

added).]

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

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

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Argument

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

A. The origins of the "Australian ballot"

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

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

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

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

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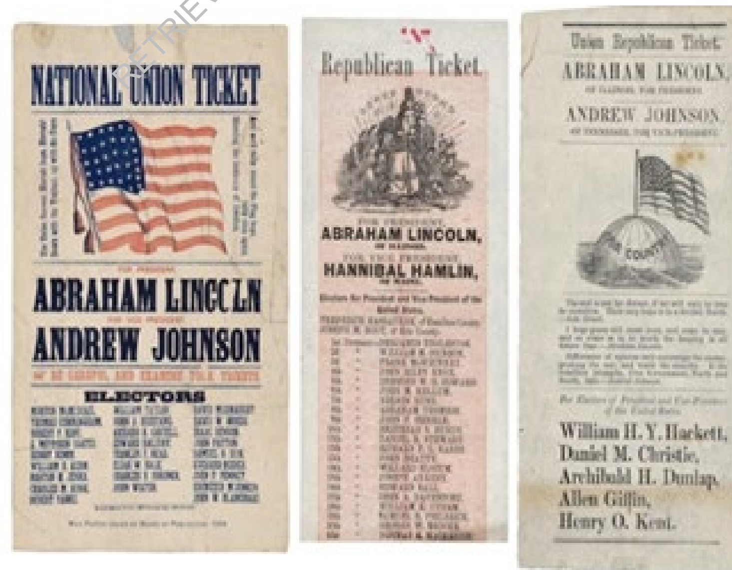

Party tickets for the Republican/National Union party and candidate Abraham Lincoln in the elections of 1860 and 1864.*(Library of Congress)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ariz. Const. art. 4, § 1

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

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

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

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

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

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

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

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

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

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

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

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

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

foot limit while the polls are open").

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

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

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

(App. 2009).

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

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

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

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

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

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

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

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

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

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Ariz. Const. art. 7, § 1

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

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

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

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

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

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

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

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

Ariz. Const. art. 7, § 2

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

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

Ariz. Const. art. 7, § 4

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

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

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

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

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

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

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

Ariz. Const. art. 7, § 5

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

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D. The above constitutional provisions should be read together.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

Attorney Fees

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

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RESPECTFULLY SUBMITTED this 28th day of June 2022.

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