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19 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

20 **IN AND FOR THE COUNTY OF MOHAVE**

22 ARIZONA REPUBLICAN PARTY, *et*
23 *al.*;

24 Plaintiffs,

25 vs.

26 KATIE HOBBS, *et al.*;

27 Defendants.

No. S8015CV202200594

**RESPONSE IN OPPOSITION TO
PLAINTIFFS' APPLICATION FOR
ORDER TO SHOW CAUSE**

(Honorable Lee F. Jantzen)

1 Pursuant to Ariz. R. Civ. P. 7.3 and this Court’s May 26 and 27, 2022 Orders,
2 defendants Coconino County Recorder Patty Hansen, Gila County Recorder Sadie Jo
3 Bingham, Greenlee County Recorder Sharie Milheiro, La Paz County Recorder Richard
4 Garcia, Maricopa County Recorder Stephen Richer, Navajo County Recorder Michael
5 Sample, and Pima County Recorder Gabriella Cazares-Kelly, (collectively, the “7 County
6 Recorders”) submit this Response in Opposition to Plaintiffs’ Application for Order to Show
7 Cause.¹ This Response is supported by the following Memorandum of Points and
8 Authorities.

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 Without a trace of irony, Plaintiffs seek to end Arizona’s broadly popular early voting
11 system by relying on provisions in our Constitution that were designed to reduce—not
12 raise—barriers to political participation for Arizona’s citizens. *Cf. Whitman v. Moore*, 59
13 Ariz. 211, 218 (1942), *overruled, in part, on other grounds by Renck v. Superior Court*, 66
14 Ariz. 320, 327 (1947) (stating whether to include initiative and referendum in our
15 Constitution “was a burning issue in this state,” “the choice of delegates to the constitutional
16 convention was fought out primarily upon this issue,” and at “ratification, that issue was
17 again the principal one before” voters).

18 “Perhaps the most constant thread running through the Arizona Constitution is its
19 emphasis on democracy—popular control through the electoral process.” John D. Leshy,
20 *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 59 (1988) (hereinafter,
21 “Leshy”); *see also Whitman*, 59 Ariz. at 220 (“[T]he people . . . meant to exercise their
22 supreme sovereign power directly to a far greater extent than had been done in the past.”).
23 Indeed, the Arizona Constitution guarantees “free and equal” elections and guards against
24 interference that would “prevent the free exercise of the right of suffrage.” Ariz. Const. art.
25

26 ¹ The Maricopa County Deputy County Attorneys also represent Apache County Recorder Larry
27 Noble, Cochise County Recorder David Stevens, Graham County Recorder Wendy John, Pinal
28 County Recorder Virginia Ross, Santa Cruz County Recorder Suzanne Sainz, and Yuma County
Recorder Robyn Stallworth Pouquette. Those Recorders are nominal, results-only defendants in
this action and take no part in this Response.

1 II, § 21. In addition to reserving the powers of referendum and initiative to the people, our
2 founding generation ensured that all officers of state government and “principal county
3 officers” were subject to popular election. Leshy, at 60 (“Not even such low visibility jobs
4 as clerks of courts were exempted.”). In view of this history, Plaintiffs’ attempt to cherry
5 pick a few words from disparate sections of the state constitution utterly fails to justify the
6 sweeping relief that they seek in this case.

7 Factual Background

8 Arizona has had some form of absentee voting since 1918. *See* 1918 Ariz. Sess. Laws
9 ch. 11 (3d Leg. 1st Spec. Sess.) (enacting first absentee voting statute for active-duty military
10 personnel); 1921 Ariz. Sess. Laws ch. 117 (5th Leg. Reg. Sess.) (expanding absentee voting
11 to any voter who would be absent from the county during the election); 1925 Ariz. Sess.
12 Laws ch. 75 (7th Leg. Reg. Sess.) (extending absentee voting to voters with disabilities).
13 And since 1991, any registered Arizona voter has had the option of voting an early ballot.
14 *See* 1991 Ariz. Sess. Laws, ch. 51, § 1 (40th Leg. 1st Reg. Sess.) (amending § 16-541).²

15 This system of no-excuse early voting is incredibly popular. Beginning in 2007, the
16 state implemented the Permanent Early Voting List (now called the Active Early Voting List
17 (“AEVL”)), through which voters may sign up to receive an early ballot in the mail for every
18 election in which the voter is entitled to vote. *See* 2007 Ariz. Sess. Laws, ch. 183, § 5 (adding
19 § 16-544). Use of early voting has grown steadily, especially since implementation of the
20 permanent early voting option.³ For the 2020 general election, more than three million
21

22 ² In 1997, the Legislature amended A.R.S. § 16-541 and related statutes to replace the term
23 “absentee” with “early.” 1997 Ariz. Sess. Laws, ch. 5, §§ 16-30 (43d Leg. 2nd Spec. Sess.).
24 Unless otherwise required by the context, this Response uses the terms “early ballot” or
25 “early voting” to mean any and all ballots mailed to voters and returned to the counties by
26 mail, drop box, or dropped off at a polling place as well as ballots cast at an in-person early
27 voting location during the 27 days before an election.

28 ³ *See Arizona Republican Party v. Hobbs*, No. CV-22-0048-SA, Brief of Amicus Curiae
Coconino County Bd. of Supervisors, at 9, available at
<https://www.azcourts.gov/Portals/201/ASC-CV220048%20-%20203-11-2022%20-%20FILED%20-%20THE%20COCONINO%20COUNTY%20BOARD%20OF%20-SUPERVISORS%20AMICUS%20CURIAE%20BRIEF.pdf>. (explaining that early voting
has gone from 34% of Coconino County voters in 2004 to 83% in 2020).

1 Arizona voters—88% of those who voted—voted by early ballot.⁴ No county had fewer than
2 60% of its voters vote early, and more than half the counties had 80% or more of their voters
3 use early ballots.

4 These numbers are important not simply because they show the overwhelming
5 popularity of early voting, but because they form the basis of county election officials’
6 election planning.⁵ See A.R.S. § 16-411(B)(3); 2019 Elections Procedures Manual (“EPM”),
7 at 166-72 (requiring counties to rely on data from recent elections as part of their election
8 planning).⁶ Because of the heavy use of early voting in past elections and the popularity of
9 AEVL, counties have budgeted to mail ballots to the majority of their voters and provide
10 election day polling locations sufficient to accommodate only a small fraction of voters. See,
11 e.g., Maricopa Plan, at 40-55; Pima Plan, at 2. If early voting is eliminated in advance of the
12 2022 elections, county election officials will need to secure hundreds, if not thousands of
13 additional, ADA-compliant polling locations, hire thousands of additional staff, and acquire
14 additional check-in and tabulation equipment. See EPM, at 103-04 (explaining that polling
15 locations must comply with the Americans with Disabilities Act Standards for Accessible

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18 ⁴ Total votes and early votes are derived from the county canvasses available here:
19 <https://azsos.gov/2020-general-election-county-canvass-returns>. Santa Cruz County’s
20 19,807 votes are excluded from this calculation because it did not separately report early
21 ballots.

22 ⁵ See Maricopa County 2022 Elections Plan (“Maricopa Plan”), at 11-15 (explaining
23 modeling based on past elections used to forecast needs for 2022 elections) available at
24 <https://recorder.maricopa.gov/site/pdf/FINAL%20-%202022%20Elections%20Plan.pdf>;
25 Pima County Vote Center Implementation Update, May 3, 2022, at 1-2 (“Pima Plan”),
26 available at
27 <https://pima.legistar.com/View.ashx?M=F&ID=10862774&GUID=DC2E817D-F2D8-4DAF-976B-FB50E4C65CA7>.

28 ⁶ The Elections Procedures Manual is drafted by the Secretary of State, in consultation with
elections officials from each of Arizona’s fifteen counties. A.R.S. § 16-452(A). It has the
force of law as to matters concerning “procedures for early voting and voting, and of
producing, distributing, collecting, counting, tabulating and storing ballots.” *Id.* The
currently operative version is the 2019 edition, available at
https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

1 Design to ensure voters with disabilities can participate in the political process); *see also id.*,
2 at 128-32 (addressing selection of voting locations more generally).

3 Planning for an election cycle does not begin in June of an election year, it begins more
4 than a year before the scheduled primary and general elections. *See, e.g.*, Maricopa Plan, at
5 4. County election plans take into account a variety of concerns under federal and state law.
6 But if Plaintiffs succeed in eliminating early voting now, there simply is not enough runway
7 before the August 2022 primary and November 2022 general elections to land a plane this
8 size without the significant risk of disaster. *Accord Purcell v. Gonzalez*, 549 U.S. 1, 4-5
9 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result
10 in voter confusion and consequent incentive to remain away from the polls. As an election
11 draws closer, that risk will increase.”).

12 Standard of Review

13 Plaintiffs’ Complaint seeks preliminary and permanent injunctions barring defendants
14 from “carrying out or enforcing the unconstitutional provisions of Arizona’s no-excuse mail-
15 in voting system” in all future elections, including the August 2, 2022 primary election and
16 the November 8, 2022 general election. As such, Plaintiffs must establish (1) “a strong
17 likelihood of success on the merits,” (2) “irreparable harm if the [injunction] is not granted,”
18 (3) “that the harm to the requesting party outweighs the harm to the party opposing,” and
19 (4) “that public policy favors” the requested relief. *Smith v. Ariz. Citizens Clean Elections*
20 *Comm’n*, 212 Ariz. 407, 410 ¶ 11 (2006) (citing *Shoen v. Shoen*, 167 Ariz. 58, 63 (App.
21 1991). Where, as here, the likelihood of success on the merits is weak, the showing of
22 irreparable harm must be stronger. *Id.* at 410-11 (describing the factors as a “sliding scale”).
23 Because the harm to the Defendants and the public interest in the orderly conduct of elections
24 would be unprecedented, the balance of hardships tips sharply in *Defendants’* favor and bars
25 the injunctive relief that Plaintiffs seek.

26 In the previous iteration of this lawsuit, the Arizona Supreme Court explained that it
27 must be filed in the Superior Court in the first instance, in part, because a factual record is
28 necessary. *Ariz. Republican Party v. Hobbs*, No. CV-22-0048-SA, Order, at 2 (Ariz. April

1 5, 2022) available at <https://www.azcourts.gov/Portals/201/01.pdf>. In their Application for
2 Order to Show Cause, Plaintiffs assert that the Verified Complaint constitutes the affidavit
3 required to support such an Application. See Ariz. R. Civ. P. 7.3(a); (App. for Order to Show
4 Cause, at 2). And while Plaintiff Ward certified that the Complaint is “true and correct to the
5 best of [her] knowledge and belief,” it is virtually devoid of facts of which Dr. Ward could
6 have personal knowledge. (See Compl. at 51). Instead, it is 49 pages of mostly irrelevant
7 history and legal argument. As such, the record presently before the court cannot establish
8 that Plaintiffs are entitled to the extraordinary relief that they seek.

9 Argument

10 **I. Plaintiffs do not have a likelihood of success on the merits.**

11 Plaintiffs’ 197-paragraph Complaint is a meandering exposition of the history of
12 voting—mostly, but not exclusively, in the United States. But it does not set forth a “short
13 and plain statement” of any claim showing that Plaintiffs are entitled to relief. Ariz. R. Civ.
14 P. 8(a)(2). Indeed, the Complaint does not even specifically identify any causes of action.
15 Defendants are left to try to ferret out the basis for Plaintiffs’ claims, which appear to be that
16 Arizona’s early voting system is barred by Arizona’s “constitutionally mandated Australian
17 Ballot System.” (Compl., ¶¶ 195-96). Plaintiffs, however, pick and choose words and
18 phrases from different sections of the Constitution in order to cobble together a constitutional
19 mandate that simply is not there.

20 **A. The Arizona Constitution does not prohibit the Legislature from 21 enacting early voting laws.**

22 Plaintiffs hang their claims on Arizona’s adoption of the Australian Ballot System
23 and assert that by including the requirement of secrecy in Ariz. Const. art. 7, § 1, the framers
24 of the Arizona constitution enshrined all four elements of the Australian Ballot in the
25 constitution, including “ballots distributed ‘only by election officers *at the polling place*’”
26 and “detailed provisions for ‘physical arrangements *to ensure secrecy in casting the vote.*’”
27 (Compl. ¶ 3, quoting John C. Fortier & Norman Ornstein, *The Absentee Ballot and the*
28 *Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483, 488 (2003))

1 (emphasis supplied in Compl.)). But Article 7, § 1 does not say that. Instead, it expressly
2 recognizes that the Legislature may enact legislation governing how elections are
3 conducted, provided that those laws preserve secrecy. Ariz. Const. art. 7, § 1. Indeed, one
4 of the authors of the cited article disagrees with Plaintiffs’ view and submitted a brief in the
5 Arizona Supreme Court explaining that Plaintiffs’ “reliance on his article is misplaced and
6 . . . mischaracterizes the legal and policy issues set forth in the article.”⁷

7 The Arizona “constitution, unlike the federal constitution, does not grant power, but
8 instead limits the exercise and scope of legislative authority.” *Cave Creek Unified Sch. Dist.*
9 *v. Ducey*, 233 Ariz. 1, 5 ¶ 13 (2013). Accordingly, Arizona courts do not look “to the
10 constitution to determine whether the legislature is authorized to act.” *Id.* (citation omitted).
11 Rather, the Arizona Constitution is “a vesting of all power.” *Adams v. Bolin*, 74 Ariz. 269,
12 281 (1952). The people and the Legislature thus have “plenary power to deal with any topic
13 unless otherwise restrained by the Constitution.” *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26
14 (2009); *see Strode v. Sullivan*, 72 Ariz. 360, 365 (1951) (“In the absence of a constitutional
15 or lawful restriction, the legislature has full power to act.”).

16 In order to succeed on their claims, Plaintiffs must identify a clear constitutional
17 prohibition on early voting, which they cannot do. *See State ex rel. Davis v. Osborne*, 14
18 Ariz. 185, 191 (1912) (“If the Constitution had remained silent . . . the power of the
19 Legislature . . . would have been absolute.”); *Earnhart v. Frohmiller*, 65 Ariz. 221, 224-25
20 (1947) (“[E]xcept for those things necessarily inhibited by the Federal or state constitution,
21 the state legislature may pass any act.”); The Records of the Arizona Constitutional
22 Convention of 1910, at 446 (John S. Goff ed., 1990) (Mr. Mulford Winsor: “I want to point
23 out that our constitution is one of limitations, and that the legislature or the people can do
24 whatever they are not specifically prohibited from doing.”). This principle is “the prism
25 through which all government actions must be assessed.” *Johnson Utilities, LLC v. Ariz.*

26 _____
27 ⁷ *Arizona Republican Party v. Hobbs*, No. CV-22-0048-SA, Brief of Amicus Curiae
28 Norman Ornstein, at 1-2, available at
[https://www.azcourts.gov/Portals/201/2022_03_15_04392957-0-0000-
BriefOfAmicusCuriaeNormanOrnst.PDF](https://www.azcourts.gov/Portals/201/2022_03_15_04392957-0-0000-BriefOfAmicusCuriaeNormanOrnst.PDF).

1 *Corp. Comm'n*, 249 Ariz. 215, 234 (2020) (Bolick, J., concurring and dissenting in part).
2 Not only does the Arizona Constitution lack an express prohibition on early voting, it also
3 expressly allows the Legislature to establish the method of voting in elections in Arizona.
4 As such, Plaintiffs' claims fail as a matter of law.

5 The Arizona Constitution guarantees "free and equal" elections and guards against
6 interference that would "prevent the free exercise of the right of suffrage." Ariz. Const. art.
7 II, § 21. In furtherance of the free exercise of the right of suffrage, the Arizona Constitution
8 addresses the method of voting in Arizona: "All elections by the people shall be by ballot,
9 or by such other method as may be prescribed by law; Provided, that secrecy in voting shall
10 be preserved." Ariz. Const. art. 7, § 1. Nothing in that provision reflects any intent by the
11 framers to prohibit the Legislature from enacting an early voting statutory scheme. To the
12 contrary, article 7, section 1, expressly grants the Legislature discretion over the method of
13 voting in elections. To start, it provides that voting must be by "ballot." Absentee or early
14 voting is, of course, by "ballot." Absentee Ballot, Black's Law Dictionary (11th ed. 2019).
15 But in any event, under section 1, the Legislature has broad authority to establish other
16 methods of voting as it sees fit. *See State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz.
17 127, 130 ¶ 8 (2020) ("prescribed by law" means by statute).

18 The Legislature's authority to determine the method of voting is constrained in only
19 one way: "secrecy in voting [must] be preserved." Ariz. Const. art. 7, § 1. By its terms, the
20 secrecy requirement does not bar early voting and does not require that voting occur on any
21 particular day. In fact, existing "regulations on the distribution of absentee and early ballots
22 advance Arizona's constitutional interest in secret voting, 'by setting forth procedural
23 safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation.'" *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 372 (9th Cir. 2016) (emphasis added)
24 (quoting *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994))
25 (internal citation omitted); *see also* A.R.S. §§ 16-545(A)(2), 16-548(A), 16-552(F)
26 (securing the secrecy of early voting).
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1 The secrecy requirement “was never intended to preclude reasonable measures to
2 facilitate and increase exercise of the right to vote such as absentee and mail ballot voting.”
3 *Peterson v. City of San Diego*, 666 P.2d 975, 978 (Cal. 1983). Without an express limitation
4 to the contrary, this Court should not “assume that the secrecy provision was designed to
5 serve a purpose other than its obvious one of protecting the voter’s right to act in secret,
6 when such an assumption would impair rather than facilitate exercise of the fundamental
7 right.” *Id.* Indeed, ballot secrecy can actually be furthered by the ability to vote at home.
8 Both federal and state constitutions recognize the home as the place where voters have the
9 greatest right to privacy. U.S. Const. amend. 4 (“The right of the people to be secure in their
10 persons, houses, papers, and effects, against unreasonable searches and seizures, shall not
11 be violated”); Ariz. Const. art. 2, § 8 (“No person shall be disturbed in his private
12 affairs, or his home invaded, without authority of law.”). Plaintiffs’ argument to the contrary
13 strains credulity.

14 In over a century of the Legislature providing for some form of absentee or early
15 voting, no Arizona court has ever even hinted that those statutes might violate the secrecy
16 requirement. And for good reason. The framers knew how to limit the right to vote, and
17 they did so clearly when they wanted to. *See* Ariz. Const. art. 7, § 2(A) (citizenship and age
18 limitations); art. 7, § 2(C) (incapacitation and felony convictions limitations); art. 7, § 12
19 (requiring the Legislature to enact registration laws). If the framers intended to prohibit
20 anything other than in-person voting at the polls on election day, they would have said that.
21 They did nothing of the sort. Their “silence on the constitutional provision on the right of
22 the legislature to authorize” early voting cannot “be construed as an implied prohibition
23 against the same.” *Cox v. Superior Ct. in & for Pima Cnty.*, 73 Ariz. 93, 96-97 (1951).

24 With no prohibition to cite, Plaintiffs cobble together disparate provisions to attempt
25 to make the point. (Compl. ¶¶ 139-55). But their strained interpretations only reinforce that
26 the framers did not address early voting, let alone prohibit it. From article 7, sections 2, 4,
27 5, and 11, Plaintiffs assert that the framers of the Arizona Constitution intended elections
28 to be “in person at a specific voting location (at the polls) on a specific day every other

1 year.” (Compl. ¶ 157.) But this argument can only succeed if one contorts these sections to
2 mean much more than they say. Section 2 addresses qualifications to vote. Section 4
3 protects electors from arrest. And section 5 relieves electors from military duty. None of
4 these provisions prohibit early voting. Plaintiffs also read too much into the phrase “at a
5 general election.” Ariz. 7, § 2. Of course, voting occurs at an election, and an election is on
6 “a particular day.” *Sherman v. City of Tempe*, 202 Ariz. 339, 340 ¶ 19 (2002); *see also*
7 *Osborne*, 14 Ariz. at 192 (“It is fundamental that an election cannot be held at a time not
8 designated by law; that a volunteer election is no election.”). But it does not follow that all
9 voting must occur on election day. None of the provisions Petitioners cite limit when voting
10 begins. And under Arizona’s early voting system, there is still an election day. *See* A.R.S.
11 § 16-548(A) (“In order to be counted and valid, the ballot must be received . . . no later than
12 7:00 p.m. on election day.”). Indeed, the Arizona Supreme Court has distinguished between
13 “election day” and “the start of early voting.” *See Sherman*, 202 Ariz. at 339 ¶ 13
14 (interpreting A.R.S. § 19-141). There is no inconsistency between these two concepts. For
15 similar reasons, article 7, section 11, cannot bear the weight that Plaintiffs place on it. That
16 provision simply established when the first general election would occur after statehood
17 “and biennially thereafter.” Ariz. Const. art. 7, § 11. It does not establish when voting can
18 begin in all elections.

19 Plaintiffs’ arguments about article 4, part 1, section 1 and its use of the words “at the
20 polls” do not advance their claims. (*See* Compl. ¶¶ 104-28). Article 4, part 1 relates to the
21 reservation of legislative power to the people through initiative and referendum, but does
22 not address the manner of voting. *See McLaughlin v. Bennett*, 225 Ariz. 351, 355 ¶ 14
23 (2010) (observing the Arizona Constitution’s organizational structure and that it “addresses
24 public elections in Article 7”). The section includes the word “polls,” but in context, the
25 purpose of Article 4, part 1 is to set out the people’s “powers of initiative and referendum.”
26 *Hoffman v. Reagan*, 245 Ariz. 313, 315 ¶ 9 (2018). It is illogical for Plaintiffs to argue that
27 a part that specifically reserves a broad power to the people also significantly restricts the
28 people’s access to voting.

1 **B. Plaintiffs cannot allege facts sufficient to show that early voting violates**
2 **the Arizona Constitution’s guarantee of secrecy in voting.**

3 Plaintiffs describe their challenge to the early voting statutory scheme as both facial
4 and as applied. (Mot. for Prelim. Inj. at 2.) Yet the Complaint neither shows that any of
5 Arizona’s early voting statutes violate the secrecy requirement in every application nor that
6 the early voting laws do not provide any specific voter or group of voters with the secrecy
7 that the Arizona Constitution requires. The Complaint does not contain a single factual
8 allegation establishing that an early voter cannot maintain their desired level of secrecy.
9 Indeed, Plaintiffs’ sole allegation regarding undue influence related to early ballots in
10 Arizona comes from a case in which those who allegedly exerted influence *violated* Arizona
11 early voting laws by hand-delivering ballots to voters who had not requested them instead
12 of mailing them and urging them to vote a certain way. (Compl. ¶ 176, citing *Miller v.*
13 *Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994)). If the school district had
14 followed the laws that Plaintiffs challenge here, the secrecy of the voting process would
15 have been preserved. *Miller*, 179 Ariz. at 180. In addition, fatal to Plaintiffs’ claims is that
16 any voter who is concerned that early voting does not provide the level of secrecy that the
17 voter desires, may choose to vote at a polling place on election day.

18 **II. The balance of hardships and the public interest tip sharply in defendants’**
19 **favor.**

20 **A. Laches and the *Purcell* principle bar Plaintiffs’ claims.**

21 “Laches—unreasonable and prejudicial delay—requires denial of injunctive relief,
22 including preliminary relief.” *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922
23 (D. Ariz. 2016) (quoting *Ariz. Pub. Integrity All. Inc. v. Bennett*, No. CV-14-01044-PHX-
24 NVW, 2014 WL 3715130, at *2 (D. Ariz. June 23, 2014)); *Harris v. Purcell*, 193 Ariz. 409,
25 412 ¶ 15 (1998). “The doctrine of laches prevents a party from asking this court to decide a
26 difficult question of Arizona constitutional law on the eve of ballot printing when such a
27 question could have been presented much earlier.” *Mathieu v. Mahoney*, 174 Ariz. 456, 460
28 (1993); *see also Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261 (D.
 Ariz. Dec. 9, 2020) (“Laches can bar untimely claims for relief in election cases, even when

1 the claims are framed as constitutional challenges.”). “Courts should not be forced to make
2 hasty legal decisions in such important areas” when the election is looming and the plaintiffs
3 could have brought their lawsuit earlier. *Mathieu*, 174 Ariz. at 460. Plaintiffs and their
4 attorneys “have an affirmative duty to bring their challenges as early as practicable.” *Id.*
5 “Laches will generally bar a claim when the delay is unreasonable and results in prejudice
6 to the opposing party.” *Sotomayor v. Burns*, 199 Ariz. 81, 83 (2000). ““In the context of
7 election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if
8 a party’s unreasonable delay prejudices the opposing party or the administration of justice.”
9 *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). In particular, “[u]nreasonable delay can
10 prejudice the administration of justice by compelling the court to steamroll through . . .
11 delicate legal issues in order to meet election deadlines.” *Ariz. Libertarian Party*, 189 F.
12 Supp. 3d at 923 (quotation marks omitted). Indeed, the Arizona Supreme Court has
13 recognized that a plaintiff’s dilatory conduct in bringing a claim that affects counties’
14 preparations for elections warrants dismissal on laches grounds. *Harris*, 193 Ariz. at 412 ¶
15 15.

16 Here, Plaintiffs challenge a statutory scheme that has authorized absentee voting for
17 more than a century and no-excuse early voting since 1991. *See, e.g.*, 1918 Ariz. Sess. Laws
18 ch. 11 (3d Leg. 1st Spec. Sess.); 1991 Ariz. Sess. Laws, ch. 51, § 1 (40th Leg. 1st Reg. Sess.)
19 (amending § 16-541). Plaintiff Arizona Republican Party’s members have cast millions of
20 early ballots over that time. And Plaintiff Ward has voted an early ballot multiple times since
21 2016.⁸ Until this year, Plaintiff Arizona Republican Party praised Arizona’s early voting
22 laws and relied on early voting to defend Arizona’s election system. *See Ariz. Republican*
23 *Party Pet. Cert.* at 29 (Apr. 27, 2020), *in Ariz. Republican Party v. Democratic Nat’l Comm.*,
24 2020 WL 2095042 (“[V]oting in Arizona is much *less* burdensome than it traditionally was,

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⁸ Stacey Barchenger, Republicans backing lawsuit to end early voting in Arizona have
history of voting early, *The Arizona Republic*, March 23, 2022.
<https://www.azcentral.com/story/news/politics/elections/2022/03/23/arizona-republicans-wanting-to-ban-early-voting-with-lawsuit-are-early-voters/7069428001/>.

1 because all citizens have an equal right to cast a ballot either in person or by mail up to 27
2 days before election day.”).

3 But it is not only Plaintiffs’ 30-year delay in challenging early voting that supports
4 dismissal for laches. Their dilatory conduct in this election year warrants application of the
5 laches doctrine. Plaintiffs filed essentially the same action in the Arizona Supreme Court on
6 February 25, 2022. The Supreme Court denied jurisdiction on April 5, 2022. Plaintiffs then
7 waited six weeks, until May 17, 2022, to file this action in the Mohave County Superior
8 Court. They then waited another three days, until May 20, 2022, to file their preliminary
9 injunction motion. In the intervening six weeks between the conclusion of the Supreme
10 Court proceedings and Plaintiffs filing this action, Arizona counties continued their
11 preparations for the 2022 primary and general elections, including arranging for printing and
12 mailing of millions of early ballots, sending notices to voters on the Active Early Voter List
13 regarding the ballots they will be receiving in the mail, securing polling places and voting
14 equipment, and hiring and training pollworkers. *See, e.g.*, Maricopa Plan; Pima Plan.

15 As a corollary to laches, the *Purcell* principle counsels against enjoining early voting
16 during the elections in 2022. The *Purcell* principle, derived from the Supreme Court’s
17 decision in a case that would have changed voter identification rules in Arizona shortly
18 before the 2006 midterm election, stands for the proposition that “federal courts ordinarily
19 should not enjoin a state’s election laws in the period close to an election.” *Merrill v.*
20 *Milligan*, 595 U.S. ___, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). While the
21 *Purcell* principle is a rule applicable to federal courts, cautioning them to avoid upending
22 state election laws too near in time to an election, the risks to candidates, political parties,
23 voters, and elections administration underpinning the *Purcell* rule are equally present when
24 state courts enjoin those laws.

25 The *Purcell* principle has been relied upon so frequently by federal courts that it
26 “reflects a bedrock tenet of election law: When an election is close at hand, the rules of the
27 road must be clear and settled.” *Id.* at 880-81. *See Republican Nat’l Comm. v. Democratic*
28 *Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (collecting cases). This is because “[l]ate judicial

1 tinkering with election laws can lead to disruption and to unanticipated and unfair
2 consequences for candidates, political parties, and voters, among others.” *Merrill*, 142 S. Ct.
3 at 881. Indeed, “state and local election officials need substantial time to plan for
4 elections[,]” which “require enormous advance preparations by state and local officials, and
5 pose significant logistical challenges.” *Id.* at 880. This “bedrock principle” counsels that this
6 Court should not enjoin early voting for the 2022 primary and general election.

7 **B. Massive disruption of Arizona’s election administration will harm the**
8 **County Defendants and the public interest.**

9 Completely changing the conduct of Arizona elections just a few weeks before the first
10 primary ballots are scheduled to be mailed to voters is nearly certain to cause huge disruption
11 to the orderly, accessible, and secure conduct of Arizona elections. Moreover, it will cost
12 Arizona counties millions of dollars for which the Legislature has not appropriated funds
13 and the counties have not budgeted. In November 2020, fewer than 500,000 Arizona voters
14 voted in person on election day; the remaining three million voters used early voting,
15 receiving a ballot either by mail or at an early voting location. Increasing the number of
16 election day voters six-fold or more would be sure to cause problems for voters and election
17 administrators.⁹

18 Even modest changes to election procedures can cause serious problems. Maricopa
19 County’s experience in the 2016 Presidential Preference Election is instructive. For that
20 election, the County had acquired a new electronic check-in system and set up 60 vote
21 centers around the County instead of the hundreds of precinct polling places it had used in
22 the past. The combination of technical issues with the check-in system, the limited number
23 of polling places, and a larger-than-expected number of Independent voters who were not
24 eligible to vote in the election showing up at vote centers led to very long waits—five hours
25 and more—and some polling places running out of ballots.¹⁰

26 ⁹ The discussion in this section only scratches the surface of the potential problems
27 Plaintiffs’ requested relief will cause. The 7 County Defendants should be permitted to
28 provide testimony and documentary evidence to the Court to establish the hardships that
they and the voting public are likely to face if early voting is enjoined.

¹⁰ See Mary Jo Pitzl, Anne Ryman, & Rob O’Dell, *Long lines, too few polls anger Phoenix*

1 Following that election, Maricopa County increased its number of vote centers to 175
2 for the 2020 general election and more than 200 for the 2022 elections. Maricopa Plan, at 7.
3 Counties begin locating and contracting for polling locations at least a year before the
4 election. *See id.* at 52-53. With two months before the primary and five months before the
5 general election, finding six times more polling places, acquiring the equipment to supply
6 those polling places, and hiring the additional thousands of pollworkers to staff them would
7 be a Herculean—and likely impossible—task. And that does not even address the additional
8 cost.

9 Voter confusion is also a serious concern. Pursuant to Arizona law, AEVL voters have
10 already been mailed a card notifying them that they can expect their primary ballot in the
11 mail shortly after the July 6, 2022 start of early voting. *See* A.R.S. § 16-544(D). Changing
12 course this late, without a communications plan in place, is sure to cause widespread voter
13 confusion. This is just the type of harm against which the *Purcell* Court warned. 549 U.S. at
14 4-5 (“Court orders affecting elections, especially conflicting orders, can themselves result in
15 voter confusion and consequent incentive to remain away from the polls.”).

16 Balanced against this near certain and widespread harm to Arizona elections is
17 Plaintiffs’ conjecture about early voting lacking secrecy and being open to undue influence.
18 (*See* Compl. at ¶¶ 67-98.) Yet Plaintiffs’ Verified Complaint does not cite a single instance
19 where compliance with Arizona’s early voting laws has actually led to such inappropriate
20 influence. Moreover, any voter who is concerned about a lack of secrecy in early voting has
21 the option to vote in person at a polling place on election day. Clearly, the balance of
22 hardships does not weigh in Plaintiffs’ favor. Instead, it weighs heavily in favor of the
23 Defendants and Arizona voters, and an injunction barring early voting is not warranted.

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27 voters, *The Arizona Republic* (Mar. 22, 2016) available at
28 <https://www.usatoday.com/story/news/politics/elections/2016/03/22/arizonaprimary-turnout-trump-cruz-kasich-clinton-sanders/82134252/>.

1 **CONCLUSION**

2 For the foregoing reasons, this Court should deny Plaintiffs the relief requested in their
3 Verified Complaint.

4 RESPECTFULLY SUBMITTED this 1st day of June, 2022.

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