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**Pro hac vice motions to be filed*

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

ARIZONA REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

KATIE HOBBS, et al.,

Defendants,

and

ARIZONA DEMOCRATIC PARTY, et al.,

Intervenor-Defendants.

No. S-8015-CV-202200594

RESPONSE TO PLAINTIFFS' APPLICATION FOR ORDER TO SHOW CAUSE

(Assigned to the Honorable Lee F. Jantzen)

INTRODUCTION

Over three months ago, Plaintiff Arizona Republican Party ("AZ GOP") filed a Petition for Special Action with the Arizona Supreme Court advancing the same meritless argument it makes here: that Arizona's decades-old early vote system is unconstitutional. *See* Verified Petition for Special Action ("Pet."), *Arizona Republican Party v. Hobbs*, No. CV-22-0048-SA (Ariz. Feb 25, 2022). At that time, AZ GOP represented that "election officials need time … to ensure there are sufficient polling places to replace drop-box and no-excuse mail-in voting," and that "[c]ommencing this action in trial court would necessarily expand its duration and render it difficult, if not impossible, for election officials to comply with the law prior to the upcoming statewide election." Pet. at 9-10. The Arizona Supreme Court issued an order declining jurisdiction on April 5, 2022.

Inexplicably, AZ GOP then waited six weeks to initiate this action in this Court. AZ GOP and its co-plaintiff Kelli Ward ask this Court to issue an extraordinary order that would require a wholesale revision of Arizona's election infrastructure and administration mere months before the coming elections. When AZ GOP brought its claim in February, it attacked a voting system that was already 30 years old, which voters and election administrators alike have come to rely on to access the ballot and administer elections. There is no justifiable reason for Plaintiffs to now insist that their constitutional misapprehension must be evaluated by this Court on an expedited basis. Plaintiffs are not entitled to the relief they seek. Their claims are meritless, and they fail to satisfy the well-established test for a preliminary injunction. In addition to Plaintiffs' substantive issues, they also lack standing to pursue their claims. Their request for extraordinary relief should be thoroughly denied.

ARGUMENT

I. Plaintiffs are not entitled to expedited relief.

A. Plaintiffs' Application is subject to the preliminary injunction standard.

Plaintiffs' requested relief would upend Arizona elections just weeks before early ballots for the August 2 primary are scheduled to be mailed to voters who have requested

them. They seek this truly unprecedented relief based on the allegations of their complaint alone, before even any answer or responsive motion has been filed. Their request to enjoin all early voting before judgment is, by its nature, preliminary to judgment. As a result, it must be resolved by the standards and procedure applicable to preliminary injunctions. *See* Ariz. R. Civ. P. 65(a) (providing procedure for preliminary injunctions as distinct from trials on the merits); *id.* 52(a)(2) (requiring court to state findings of fact and conclusions of law in granting or refusing interlocutory injunction). Under that standard:

> A party seeking a preliminary injunction must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4) public policy favors granting the injunctive relief.

Fann v. State, 251 Ariz. 425, 432 ¶ 16 (2021). "The critical factor is relative hardship, for which the movant must show either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and the balance of hardships tips sharply in his favor." *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 495 ¶ 21 (Ct. App. 2013).[1] An injunction that "goes beyond simply maintaining the status quo pending a trial on the merits" is not favored. *Shoen v. Shoen*, 167 Ariz. 58, 63 (Ct. App. 1990).

These standards govern even—indeed, especially—in actions challenging the constitutionality of state statutes. In *Fann v. State*, plaintiffs challenged the constitutionality of a statutory measure, passed through initiative, that would have raised certain income taxes. In assessing plaintiffs' request for a preliminary injunction, the Arizona Supreme Court applied the four-part test described above. *See* 251 Ariz. at 432 ¶ 16. The test also applies in actions challenging the lawfulness of state officials' actions. *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 9-10 (2006) (applying four-factor test to request for stay in case challenging officeholder's removal).

Plaintiffs' reliance in their Motion for Preliminary Injunction on *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58 (2020) (in division), is misplaced. The plaintiffs in that case, unlike here, filed a petition for special action that sought mandamus relief that

[1] Unless expressly included, all citations and internal quotation and alteration marks have been omitted.

ordered compliance with existing law. *See id.* at 61 ¶ 6. It was in that context that the court remarked that the plaintiffs need not satisfy the standard for injunctive relief, once they established that an official acted contrary to a definite and immediate legal duty. *See id.* at 64 ¶ 26. Notably, the court proceeded to apply those standards and balance the parties' relative hardships anyway. *See id.* at 64-65 ¶¶ 27-29.

Here, of course, Plaintiffs have ***not*** filed a special action; and they seek not to conform official conduct to existing law, but to displace that law entirely on the basis of unfounded constitutional claims. As a result, the Court lacks jurisdiction to enter mandamus relief. *See* Ariz. R. P. Spec. Act. 1(a) (mandamus proceedings "shall" be sought in special action proceeding); *Aguilera v. Richer*, No. 1 CA-CV 20-0688 EL, 2021 WL 2425918, at *2 (Ariz. Ct. App. June 15, 2021) (dismissing suit for mandamus relief where plaintiffs—represented by same lead counsel as Plaintiffs here—did not make request in a special action). Because Plaintiffs seek preliminary ***injunctive*** relief rather than mandamus, the Court must apply the preliminary injunction standard, as the Supreme Court did in *Fann*.

B. The balance of the equities weighs against granting Plaintiffs' request.

As discussed below, Plaintiffs' suit fails on the merits. It fails on the equities as well. The balance of hardships tips sharply ***against*** Plaintiffs, as it is Defendants and Arizona voters that would suffer immeasurable prejudice if the requested relief were granted. Plaintiffs' request for immediate relief is also barred by laches: they sat on their hands, first for decades after the early vote statutes were enacted, and then for nearly two months after the Arizona Supreme Court rejected the AZ GOP's petition seeking the same relief, before coming to this Court on the eve of an election demanding expedited relief.

As Plaintiffs acknowledge, Arizona adopted its current, no-excuse early voting system in 1991. Plaintiffs left that system unchallenged for over 30 years, only now demanding the immediate dismantling of a decades-old system on which millions of Arizona voters have come to rely. Arizona's election administration system is now organized around the long-settled expectation that most of the state's nearly 4.3 million voters will vote early, obviating the need to accommodate millions of voters at in-person

polling sites. Early ballots for the August 2 primary are scheduled to be mailed on July 6, 2022, less than five weeks from the scheduled return hearing. *See* A.R.S. § 16-542(C) (providing for early ballot distribution 27 days before the election). Under both federal and Arizona law, counties must mail ballots to uniformed and overseas citizens even sooner—no later than 45 days before the election, *i.e.*, by June 17, 2022. *See* A.R.S. § 16-543(A); 52 U.S.C. § 20302(a)(8). And the counties must begin preparing and printing early ballots even sooner than that. The deadlines for the general election follow shortly after. Under these circumstances, the public interest strongly disfavors Plaintiffs' requested relief.

Plaintiffs' plea for expedited relief is also barred by laches. Plaintiffs sat on their hands and cannot now demand that everyone—the Court, Defendants, and the public—accommodate their contrived emergency schedule. "In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497 ¶ 10 (2006). Indeed, "time is of particular importance because all disputes must be resolved before the printing of absentee ballots." *Id.* As the Arizona Supreme Court has explained:

> The real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance. The effects of such delay extend far beyond the interests of the parties. Waiting until the last minute to file an election challenge places the court in a position of having to steamroll through the delicate legal issues in order to meet the deadline for measures to be placed on the ballot. We repeat our caution that litigants and lawyers in election cases must be keenly aware of the need to bring such cases with all deliberate speed or else the quality of judicial decision making is seriously compromised. Late filings deprive judges of the ability to fairly and reasonably process and consider the issues and rush appellate review, leaving little time for reflection and wise decision making.

Sotomayor v. Burns, 199 Ariz. 81, 83 ¶ 9 (2000). The Court must consider fairness not only to the parties, but to election officials and Arizona voters. *Id.* Here, Plaintiffs not only waited decades to challenge this well-settled system at all, they then waited six more weeks after the Arizona Supreme Court declined to hear AZ GOP's petition before filing the instant suit, which raises the same legal challenges to early voting as raised in the February petition.

The delay is inexcusable and bars any claim to relief on the extremely expedited basis Plaintiffs demand. *See Lubin*, 213 Ariz. at 497-98 ¶¶ 10-11.

II. Plaintiffs are unlikely to succeed on the merits.

Plaintiffs' constitutional claims are meritless. From the outset, they misunderstand the nature of the legislative power in our state system of government. The Arizona Supreme Court has long understood that "the state legislature may pass any act" which is not prohibited. *Earhart v. Frohmiller*, 65 Ariz. 221, 224 (1947). As a result, Arizona courts look to the Arizona Constitution not "to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited." *Id.*; *accord State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 113 ¶ 31 (Ct. App. 2012) ("The legislature need not be expressly granted authority to act when it would otherwise be entitled to do so."). Indeed, legislative acts will only be struck down if "clearly prohibited" by the Constitution. *Earhart*, 65 Ariz. at 225 (explaining that courts must entertain presumption of constitutionality and construe legislation "consistent with validity if at all possible"); *Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 595 ¶ 21 (2009) ("[W]hen there is a reasonable, even though debatable, basis for the enactment of a statute, we will uphold the act unless it is clearly unconstitutional.").

No provision of the Arizona Constitution speaks to early voting, much less prohibits it in clear and unambiguous terms. Plaintiffs try to find an implied, indirect prohibition by following a collection of distorted and selective breadcrumbs that lead them astray from the text, history, and purposes of the Arizona Constitution. Not only is Plaintiffs' reading unsupported by the plain text, it conflicts with the robust protections for the right to vote and access to the ballot that are affirmatively and expressly guaranteed by the Arizona Constitution.

A. The Arizona Constitution does not prohibit early voting.

The reason Plaintiffs' claim fails is simple: no provision of the Arizona Constitution prohibits any of the challenged voting methods. The only provision addressing the method of voting is Article VII, Section 1, which states: "All elections by the people shall be by

ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved." That provision imposes no limitation as to the time or place for holding an election or casting a ballot. Far from limiting the Legislature's authority to adopt early voting, this provision expressly confers the authority to create "other method[s]" of voting. In the absence of a clear prohibition on early voting in the text of the Arizona Constitution, Plaintiffs assemble a collection of passing phrases none of which can reasonably be read to impose a prohibition on Arizona's most popular method of voting.

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

Venturing far beyond the plain text of Art. VII, section 1, Plaintiffs far overread the requirement that "secrecy in voting shall be preserved" to encompass a whole scope of baseless security and integrity concerns. Citing no authority that could possibly support such a conclusion, Plaintiffs argue that Article VII, section 1 "require[es] voters to make their selections at the polls, on election day, in the presence of election officials whose task it was to make it impossible for anyone to see how they were voting." Plaintiffs' Motion for Preliminary Injunction ("Mot.") at 3 (May 20, 2022).[2]

The Arizona Constitution contains no such requirement. Moreover, Arizona's early voting statutes rigorously preserve "secrecy in voting" as required by Article VII, section 1. At the outset, a voter must timely request an early ballot to receive one. A.R.S. § 16-542(A). No voter is forced to vote early or to forgo voting in person at a polling place on election day. In preparing early voting materials, election officials must ensure that early ballot return envelopes "are of a type that does not reveal the voter's selections or political party affiliation and that is tamper evident when properly sealed." A.R.S. § 16-545(B)(2). What is more, a voter who opts to receive and vote an early ballot must also preserve its

[2] In deploying this argument against early voting, Plaintiffs do not mention the host of criminal prohibitions on coercion, undue influence, and violating a voter's right to secrecy. *See, e.g.*, A.R.S. § 16-1003 (destroying or defacing a ballot; or delaying the delivery of a ballot is a class 3 misdemeanor), A.R.S. § 16-1006 (attempting to influence an elector by force, threats, menaces, bribery, or any corrupt means is a class 5 felony), A.R.S. § 16-1007 (prohibits election officials from attempting to find out for whom an elector voted). Instead, they suggest that the willingness of bad actors to defy criminal prohibitions can create a constitutional issue.

secrecy: the voter must "mark his ballot ***in such a manner that his vote cannot be seen***," then "fold the ballot . . . ***so as to conceal the vote***," and finally deposit the voted ballot in a specially provided envelope "which shall be ***securely sealed***." A.R.S. § 16-548(A) (emphasis added). Upon receipt of the envelope and after confirming the voter's eligibility, election officials must open the envelope and "take out the ballot without unfolding it or permitting it to be opened or examined" before separating the ballot for counting. A.R.S. § 16-552(F). All these steps protect the secrecy of the early voter's selections. That the voter may choose to reveal for whom he voted on an early ballot is no different than an in-person voter revealing for whom he voted upon leaving the polling place.

In addition, Plaintiffs provide no credible support for the idea that no-excuse mail voting is more likely to lead to coercion of Arizona voters. Their examples of potential avenues by which voters may be influenced apply to any voting method—including in-person voting on election day. *See, e.g.*, Compl. ¶ 163 (contending campaign workers target elderly voters for coercive treatment); *id.* ¶ 183 (contending anyone can purchase access to highly detailed voter databases). And Plaintiffs do not contend with the fact that secrecy in voting also means protection against compelled disclosure of a person's vote after the fact. *Huggins v. Superior Court*, 163 Ariz. 348, 351 (1990) (rejecting the "prospect of judges compelling good faith voters . . . to reveal what they supposed were private votes"). Plaintiffs do not explain how early voting makes it more difficult for a voter to preserve the secrecy of his vote against compelled disclosure after his ballot is cast.

While reading provisions into the Constitution that are not there, Plaintiffs also ignore the plain text of provisions that do not fit their tortured reading. Article VII, section 1 plainly confirms the Legislature's authority to provide for elections "by ballot, or by such other method as may be prescribed by law." Ariz. Const. art. VII, § 1. Under Arizona law, early voters cast the same paper ballot used by in-person voters on Election Day, save for an "early" stamp. A.R.S. § 16-541(A), -545(A). And, regardless, the Arizona Constitution permits "such other method" of voting that the Legislature "may[] prescribe[]by law" which also allows for the provision of early voting. Mot. at 6-7. Plaintiffs' contention that the

framers used the term "other method" to refer only to voting machines is impossible to reconcile with the text; and fails in comparison to other state constitutional provisions which, rather than granting a broad legislative power to define methods of voting as the Arizona constitution does, instead specifically permit the use of voting machines. *E.g.*, Col. Const. art. VII, § 9 "All elections by the people shall be by ballot . . . . Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast . . . "). Conn. Const. art. VI, § 4 ("In all elections . . . the votes of electors shall be by ballot, either written or printed, except that voting machines or other mechanical devices may be used in all elections in the state"). While the framers discussed the use of voting machines, they did not do so to the exclusion of all other possible voting innovations, as the text of Article VII reflects. *See* The Records of the Arizona Constitutional Convention of 1910, 559-560 (John S. Goff ed., 1990). And as discussed, early voting plainly preserves secrecy in voting.

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

Unable to identify a clear prohibition on early voting in the provision of the Constitution that concerns voting methods, Plaintiffs turn to other sections of Article VII. In section 2, Plaintiffs latch onto the phrase "at a general election." Compl. ¶¶ 140-42. But section 2 is titled "Qualifications of voters," and only deals with *who* may vote. *Ahrens v. Kerb*y, 44 Ariz. 337, 341 (1934). It has no bearing on *how* they may vote. It is nonsensical to suggest that section 2's voter qualifications implicitly limit section 1's explicit approval of voting "by ballot" or the broad power that it confers on the Legislature to implement "such other method" of elections. The U.S. Supreme Court has recognized that legal drafters do not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—[they] do[] not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 468 (2001).

Even if section 2 had broader application, Plaintiffs simply misread the phrase "at a general election." The term's plain meaning is nothing more than a generic reference to the election during which Arizona voters choose officeholders, as distinguished from, for

example, primary elections, where additional qualifications may be imposed (e.g., party registration). Instead, they contend it must be read to strictly limit all filling out of ballots to in-person election day voting. Compl. ¶ 142. Plaintiffs' overdetermined interpretation of "at" cannot convert a passing reference into a broad restriction on permissible voting methods. Even the Arizona Supreme Court has used phrases like "at the last general election" interchangeably with general references to the election, and not to specifically mean election day itself. *See Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 191 (1973) ("If the wholesale cancellation of all voters, including those who did vote *in the last general election*, can be upheld because of the state's interest in the purification of its election system, surely the cancellation of the registrations of those who have not voted *at the last general election* is not constitutionally infirm.") (emphasis added). Plaintiffs' reading would also preclude voting at any election other than the general election, including primaries and special and local elections.

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

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

Plaintiffs also cannot support their extrapolation that "[b]ecause no-excuse mail-in voting is not exercised at the polls, it is unconstitutional." Compl. ¶ 114. First, this argument (like the one discussed above) suffers from an overdetermined reading of the preposition "at." That word cannot sustain the heavy weight that Plaintiffs would have it bear. Second, Plaintiffs' interpretation of "polls" is unjustifiably narrow. A "poll" is "the place where votes are cast." Poll, Black's Law Dictionary (11th ed. 2019). All ballots—whether mail or

in-person—are "cast" when submitted for counting. Under Arizona's early voting system, some ballots are marked and deposited at a physical polling place, others are marked and mailed to a central location, and still others are marked and later dropped off at a physical polling place to later be sent to a counting location. The use of the phrase "at the polls" does not invalidate those ballots not marked and deposited in person.

In sum, Plaintiffs would have this Court read passing references to voters' expression "at the polls," in a section dealing with the initiative and referendum power rather than voting in general, not as a reference to the electoral process, but as a constitutional command that voters can never fill out their ballots in any Arizona election (1) away from a physical polling place, (2) on any day other than election day itself. This contention is irreconcilable with the text of Arizona's constitution, its history, and settled practices of constitutional and statutory interpretation.

4. Protections and provisions addressing in-person voting do not require the invalidation of early voting

Article VII, Section 4 protects electors from arrest "in all cases . . . during their attendance at any election, and in going thereto and returning therefrom." Section 5 provides that "No elector shall be obliged to perform military duty on the day of an election except in time of war or public danger." And in section 11, Plaintiffs cite the requirement that an election be scheduled the "first Tuesday after the first Monday in November." Plaintiffs argue that these provisions would be rendered superfluous if the Constitution allowed for "early voting." Mot. at 11-12. Plaintiffs' arguments with respect to all three sections follow a similar logic—in Plaintiffs' view, these provisions do not expressly reference early voting and should be read to prohibit early voting. These arguments all suffer from the same flaws.

Under the no-excuse early voting system that Plaintiffs challenge, additional protections for in-person voting are not superfluous. Voters may still, if they so choose, vote in person on election day. And in fact, although the overwhelming majority of Arizonans vote early, a considerable number—over 376,000 voters in the 2020 general election—still cast their votes at the polls on election day. Article VII protects their right to vote in this

manner, but it does not require them to do so.

All parties agree that there is one "election day" that constitutes the final day of voting and signals the close of both early and in-person voting. *See* A.R.S. § 16-547 ("In order to be valid and counted, the [early] ballot and affidavit must be delivered to the office of the county recorder . . . or may be deposited at any polling place in the county no later than 7:00 pm on election day."); *cf. Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 367 (D.N.J. 2020) ("Courts of Appeals addressing conflict preemption between the Federal Election Day Statutes and state election laws have found that some acts associated with the election, such as early or absentee voting, may be conducted before the federal election without violating the Federal Election Day Statutes."); *see also Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000) (holding that early voting is not inconsistent with federal election statutes); *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001) (same); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (same). That election day must be scheduled every even-numbered year (section 11), no elector can be obligated to perform military duty on that day (section 5), and electors are protected from arrest when voting on that day (section 4). None of these provisions references, let alone limits, the availability of early voting.

Plaintiffs cite *Sherman v. City of Tempe* to establish that an "election day" means only one day. Compl. ¶¶ 153-55. But that is at odds with the opinion itself. In *Sherman*, the Supreme Court reasoned that while "votes may be cast prior to election day, measures are not conclusively voted upon until the actual day of election." 202 Ariz. 339, 344 ¶ 18 (2002). In other words, election day is the final day for voting, but it is not the only day. The Ninth Circuit reached a similar conclusion in *Voting Integrity Project, Inc. v. Keisling*, where it upheld Oregon's early voting scheme and concluded that "election day" was a final day consummating the election—not a standalone day on which all votes must be cast. 259 F.3d at 1175 (holding "the Oregon scheme leaves the election 'unconsummated' until the federal election day, with a residual ritual of in person voting at central election offices still to take place on that day").

Fundamentally, all three of these provisions serve to protect the right to vote and make it easier for Arizonans to vote. It would be counter to their purposes to read into them an implied restriction on further efforts to encourage and facilitate voting. Moreover, under Arizona's Reservation of Rights Clause, these provisions must be interpreted as a floor, not a ceiling. Ariz. Const. art. II, §33 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.").

5. Plaintiffs' invocation of one Pennsylvania case is not applicable.

Plaintiffs rely heavily on a recent intermediate court decision from Pennsylvania, *McLinko v. Commonwealth*, 270 A.3d 1243 (Pa. Cmwlth., Jan. 28, 2022). That decision, currently on review by the Pennsylvania Supreme Court and not currently in effect, has no bearing on this challenge.[3]

Intervenors respectfully assert that the Pennsylvania court's decision was in error and anticipate it will be reversed on appeal. But this Court need not relitigate the Pennsylvania case nor delve into that state's jurisprudence to conclude that the case is easily distinguished. The Pennsylvania constitutional provisions are substantially and materially different from those at issue here. Most prominently, Pennsylvania's constitution contains an enumerated list of classes of voters who may vote absentee. Pa. Const. art. VII § 14. The *McLinko* court found that those provisions, "established the rules of absentee voting as both a floor and a ceiling," 270 A.3d at 1264, and that the legislature could not, by statute, expand absentee voting to other groups of unenumerated voters. *Id*. (concluding because article VII section 14 offers a "list of reasons [why voters may vote absentee,] which does not include no-excuse absentee voting, it is excluded"). Even if that analysis is correct—which Intervenors do not believe that it is—Arizona's Constitution does *not* contain a list of specific groups permitted to vote absentee. Quite to the contrary, the Arizona Constitution broadly permits voting *by any method prescribed by law*. Ariz. Const. art. VII, §1. Second, the Pennsylvania decision rests substantially on the phrase "offer to vote," which is used in

[3] Argument in the appeal was held before the Pennsylvania Supreme Court on March 8, and a decision is expected any day. *See McLinko v. Commonwealth*, Supreme Court of Pennsylvania Docket Nos. 14 MAP 2022, 17 MAP 2022.

the Pennsylvania constitution; but not, notably, the Arizona constitution. In 1868, the Supreme Court of Pennsylvania interpreted the phrase "offer to vote" to require in-person voting; the primary question in *McLinko* is whether that interpretation still controls given that the Pennsylvania constitutional provisions related to voting have been almost completely rewritten in the intervening 170 years. *McLinko*, 270 A.3d at 1264. Neither of those circumstances—that is, the continued salience of an 1868 state court decision nor the impact of extensive constitutional revisions—is before this Court.

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

Plaintiffs' atextual interpretation of the Arizona Constitution is also unsustainable because it runs contrary to affirmative protections of the right to vote, both in the Arizona Constitution and as guaranteed by the U.S. Constitution. The right to vote is expressly protected by the Arizona Constitution. Article 2, Section 21 declares that all elections shall be "free and equal" and that no power shall "at any time interfere or prevent the free exercise of the right of suffrage." In addition, Arizona's Equal Protection clause provides protections for fundamental rights—including voting—akin to the federal Equal Protection Clause. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 345 ¶ 18 (App. 2005).

As the Arizona Supreme Court has long recognized, "suffrage is the most basic civil right" and to deny that right "is to do violence to the principles of freedom and equality." *Harrison v. Laveen*, 67 Ariz. 337, 342 (1948). As a result, "laws should be construed so as to uphold and sustain the citizen's right to vote" because "this privilege should be encouraged and not discouraged." *Abbey v. Green*, 28 Ariz. 53, 72 (1925). Central to these protections is the idea that "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot." *Chavez v. Brewer*, 222 Ariz. 309, 319-20 ¶ 33 (Ct. App. 2009). Courts must "exercise restraint when interpreting constitutional and statutory provisions relating to election matters before imposing unreasonable restrictions on the right to participate in legislative processes." *Pacuilla v. Cochise Cnty. Bd. of Supervisors*, 186

Ariz. 367, 368 (1996). Thus, Arizona courts have repeatedly resisted distorted readings of the Arizona Constitution that would restrict the franchise. In *Johnson v. Maehling*, the Supreme Court rejected "the literal application sought by appellant" because it would cause an "absurd result"—i.e., making it more difficult to exercise the right to a recall election. 123 Ariz. 15, 17-18, (1979). Similarly, in *Harrison v. Laveen*, the Supreme Court rejected a "tortious construction" of the phrase "under guardianship" that would deny the elective franchise to Native Americans. 67 Ariz. 337, 345 (1948).

Against this backdrop of a long line of jurisprudence robustly protecting the right to vote, Plaintiffs seek truly extraordinary relief—a declaration that the system of no-excuse early voting enacted by the Legislature over thirty years ago and relied on by nearly 90% of Arizona voters in the last general election is unconstitutional. Plaintiffs claim that they seek only to invalidate the post-1990 system of no-excuse early voting, leaving the absentee voting provisions that were in place until the 1991 amendments in place. But this relief is inconsistent with Plaintiffs' legal argument: if this Court were to agree with Plaintiffs that the Constitution *prohibits* the Legislature from enacting no-excuse early voting, it could not judicially legislate to carve out *any* exceptions. This would create the nation's most extreme policy—depriving every Arizonan of the right to vote absentee, even when such deprivation will result in the effective loss of a fundamental right. *See* Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Nat'l Conf. of State Leg. (Feb. 17, 2022) https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (all 50 states currently have some form of absentee voting—26 with no-excuse, 8 with all-mail elections, and 16 with excuse-required absentee voting). The consequences of the relief Plaintiffs seek are far more grievous than they would care to acknowledge.

C. Plaintiffs lack standing.

The Arizona Supreme Court has, "as a matter of sound judicial policy, required persons seeking redress in the courts first to establish standing, *especially* in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003) (emphasis added). Though it lacks the same "case or

controversy" requirement as in the federal constitution, the Arizona Constitution uniquely contains "an express mandate" that the powers of the three branches be "exercised separately." *Id.* at 525. This mandate underlies Arizona's standing doctrine and is most important when litigants challenge the constitutionality of laws duly enacted by the other branches. *Id.* (citing *Raines v. Byrd*, 521 U.S. 811, 819-820 (1997) ("Our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.")). Thus, to establish standing, Plaintiffs must satisfy three elements: (1) they must allege a distinct and palpable injury; an allegation of "generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing," *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998); (2) they must "establish a causal nexus between the defendant's conduct and their injury," *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 ¶ 23 (2020); and (3) they "must show that their requested relief would alleviate their alleged injury." *Id.* at 406 ¶ 25.

Plaintiffs fail to satisfy any of these elements. Their alleged interest is a generalized claim of the "right to have the Government act in accordance with law," which is insufficient to establish standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984). The injuries alleged are not direct or individualized, nor are they traceable to Defendants—Plaintiffs' imaginative scenarios in which bad actors violate a voter's privacy or election integrity turn on the conduct of third parties. Finally, it is inconceivable that any holding by this Court will remedy Plaintiffs' subjective policy concerns that Arizona's elections are allegedly insecure.

1. Plaintiff Kelli Ward lacks standing.

Plaintiffs' Complaint includes only two allegations in support of Ms. Ward's standing. *First*, it argues that she has standing as a citizen and voter under *Fontes*, 250 Ariz. at 62. *See* Compl. ¶ 38. *Second*, it argues that she has standing as a taxpayer because the mail-in voting system requires taxpayer funds. Neither theory is sufficient.

Plaintiffs' reliance on *Fontes* is misplaced. The Court was clear that there is a special,

more lenient inquiry for standing in mandamus suits like *Fontes*—a plaintiff need only establish "sufficient beneficial interest." 250 Ariz. at 62. This suit is not a mandamus action; it is a complaint seeking an injunction, which is subject to the heightened standing inquiry described above. *See Sears*, 192 Ariz. at 69. Ms. Ward's status as a voter, on its own, without any allegations of harm direct and individualized to her, is insufficient for standing.

Plaintiffs' taxpayer standing theory is similarly inapplicable. Arizona must spend money to administer elections and Plaintiffs do not allege that early voting is more expensive. Any impact on public expenditures would only be incidental to Plaintiffs' claims, which is "too remote to support taxpayer standing." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 525 (2021). Indeed, a basic test for taxpayer standing is whether returning funds to the government would redress the injury—and here that remedy would be nonsensical. *Id.* Put simply, where public funds are affected, "mere illegality is not enough," otherwise the standing doctrine would permit challenges to "every act" of government—the taxpayer must "show some interest beyond a general desire to enforce the law." *Dail v. City of Phoenix*, 128 Ariz. 199, 202 (App. 1980).

2. Plaintiff AZ GOP lacks standing.

Plaintiffs' Complaint contains three arguments in support of AZ GOP's standing. *First*, it argues that AZ GOP is burdened by its efforts to monitor early voting. Compl. ¶ 39. *Second*, it simply states that AZ GOP's primaries are conducted under Arizona law. *Id.* ¶ 40. *Third*, it argues that AZ GOP has standing on behalf of its members. *Id.* ¶¶ 41-45. All three do no more than assert generalized grievances that the government should act according to law.

AZ GOP does not explain how or why "some or all" of their burden to monitor elections would be "remedied" by the relief requested. The Complaint identifies two statues: ARS §§ 16-621 and 16-552. Section 16-1621 relates to monitoring counting centers in general—whether the ballots counted are early votes or were cast in-person on election day. It is not clear how shifting to voting in-person on election day would alleviate AZ GOP's burden to monitor counting centers. Section 16-552 concerns ballot challengers and does

apply only to early voting; however, the Complaint fails to mention that there is a parallel ballot challenger statute for ballots cast at polling places on election day. *See* ARS § 16-590. Since Arizona statutes provide for equivalent party monitoring efforts with respect to early ballots and election day ballots, there is no basis in the Complaint to accept the conclusory assertion that a remedy would "alleviate" AZ GOP's burden. Similarly, AZ GOP's statement that its party primaries are conducted under Arizona law holds no significance. It does not establish an injury or an interest; it simply states the reality of election law without describing *how* the challenged laws injure, or even affect, AZ GOP's efforts to hold primaries.

Finally, AZ GOP's attempt to assert standing on behalf of its members fails for the same reason Plaintiff Ward does not have standing—individual candidates and voters are not harmed by early voting. Plaintiffs claim to have an interest in "ensur[ing] its members vote and are elected in a manner protected against undue influence," Compl. ¶ 43, but this allegation suffers from every possible flaw under the standing doctrine. *First*, it doesn't establish an injury. They do not allege that any of AZ GOP's members have been forced to cast their ballots subject to undue influence. Nor could they—early voting is entirely voluntary and any voter who feels more comfortable in a voting booth may participate in that manner. *Second*, it is not traceable to Defendants, as there is no allegation that Defendants are influencing anyone. This theory of injury depends entirely on a "speculative chain of possibilities" about how third parties are going to act—which is insufficient to establish that an injury is "certainly impending or is fairly traceable" to Defendants. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 (2013).

CONCLUSION

For these reasons, the Court should deny the relief requested in Plaintiffs' Application and Verified Complaint.

RESPECTFULLY SUBMITTED this 1st day of June, 2022.

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**Pro hac vice application to be filed*

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2022, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Superior Court, Mohave County, for filing using the AZTurboCourt System. I further certify that a copy of the foregoing was sent via email this same date to:

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