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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

ARIZONA REPUBLICAN PARTY; et al.;

Plaintiffs,

v.

KATIE HOBBS; et al.;

Defendants.

Case No. S8015CV202200594

PLAINTIFFS' REPLY IN SUPPORT OF THEIR APPLICATION TO SHOW CAUSE

Plaintiffs hereby file their Reply in support of their Application to Show Cause. Due to the truncated nature of this Reply, Plaintiffs incorporate by reference their previous arguments and therefore do not waive any issues raised in their Complaint and Motion. Moreover, Plaintiffs will further elaborate on the constitutional issue at the show-cause hearing on June 3, 2022.[1]

I. *Fontes* defines the appropriate standard for preliminary injunctive relief.

The Arizona Supreme Court recently held that Plaintiffs who have shown that an

[1] Also, Plaintiffs reserve their right to file a response to the Secretary's Motion to Dismiss by the deadline to do so.

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election official "has acted unlawfully and exceeded his constitutional and statutory authority…need not satisfy the standard for injunctive relief." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 64 (2020). This holding is not limited to mandamus or special actions, as the cases the court cited for this proposition were not special actions. *See Burton v. Celentano*, 134 Ariz. 594, 594 (App. 1982) (nuisance case); *Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 422 (E.D. Mo. 1985) (federal court action). Rather, the only part of the holding that was even arguably so limited was its standing analysis. This is because the "mandamus statute [§ 12-2021] reflects the Legislature's desire to broadly afford standing to members of the public to bring lawsuits to compel officials to perform their public duties." *Fontes*, 250 Ariz. at 62.

Thus, whether this suit properly pleads a claim for mandamus relief relates to standing but not to whether Plaintiffs must satisfy any element of the traditional analysis for preliminary injunctive relief other than likelihood of success on the merits. And this Court need not reach that question even as it relates to standing because, as discussed below, Plaintiffs have standing under the Arizona Uniform Declaratory Judgment Act ("DJA"), which entitles them to both declaratory and injunctive relief. *See Rivera v. Douglas*, 132 Ariz. 117, 119 (App. 1982) ("Declaratory judgment relief is an appropriate vehicle for resolving controversies as to the legality of acts of public officials."). As is the case in special actions, injunctive relief is also available in declaratory judgment actions to enjoin public officers "from acts which are beyond their power" whenever rights "have been" or "will be affected" by such an act. *Id. See also Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 737 (Ariz. 2022) (question of "whether the legislature has followed constitutional mandates" is not a non-justiciable political question but is instead properly raised in an action under DJA).

Further, even if claims for mandamus relief arise only in the context of a special action, and the Court finds it necessary to reach the question of whether Plaintiffs are entitled to this particular form of relief, then it may simply treat that part of the Complaint as a special action. *See Clark v. State Livestock Sanitary Bd.*, 131 Ariz. 551, 555 (App.

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1982) ("[I]nsofar as special action review [is] applicable to any claims" a party may assert, their petition should "be[] considered by the trial court as an application for special action relief.").[2] And if this Court finds that Plaintiffs' failure to caption their Complaint "Verified Complaint for Declaratory and Injunctive Relief and, In the Alternative, Special Action Relief' somehow bars them from relief, then the Court should simply designate this action as such (or, alternatively, leave to amend the caption is certainly appropriate). In the meantime, there is no bar toward granting preliminary injunctive relief to Plaintiffs. *See Guinn v. Schweitzer*, 190 Ariz. 116, 119 (App. 1997) ("On appeal, as in the trial court, the objective of the rules "is to dispose of cases on the merits, irrespective of technical, harmless errors.").

II. Plaintiffs have standing.

"Unlike the Federal Constitution, Arizona's Constitution does not contain a specific case or controversy requirement." *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 (2020). Even when courts exercise judicial restraint and require litigants to demonstrate standing, "[t]his requirement is a low bar and 'easily shown if there is a direct relationship between the plaintiff and the defendant with respect to the conduct at issue.'" *Id.* at 405. Thus, the court cited with approval a portion of *Florida Democratic Party v. Scott* regarding the requisite standing analysis. *Id*. There, the federal district court judge concluded that "political parties have standing to assert, at least, ***the rights of its members who will vote in an upcoming election***…. even though the political party could not identify specific voters that would be affected." *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016). "[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of

[2] The issue on appeal in *Aguilera* was simply whether the Court of Appeals could review a trial court action as a special action where the trial court had not treated it as such. *See Aguilera v. Richer*, No. 1 CA-CV 20-0688 EL, 2021 Ariz. App. Unpub. LEXIS 639, at *5 (Ct. App. June 15, 2021) ("If Aguilera and Drobina had brought their complaint as a special action, they would have allowed the superior court to evaluate it as such[.]"). Here, this court may treat the mandamus claim as a special action, making the unpublished holding in *Aguilera* inapposite.

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the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

Plaintiffs assert that the Arizona Constitution mandates a specific structure for the electoral process that our framers enshrined to maintain the integrity of the democratic system and that Defendants have unconstitutionally deviated from that structure. Thus, Plaintiff Arizona Republican Party ("AZGOP") has standing to assert the rights of its members, including Plaintiff Chairwoman Ward, to the voting process—and its protections—bequeathed to Arizonans by our framers.

Further, the DJA makes it clear that "[a]ny person…whose rights, status or other legal relations are ***affected*** by a statute…may have determined any question of construction or validity arising under the…statute…and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. §12-1832. Thus, while Secretary Hobbs argues that Plaintiffs lack standing because they have failed to articulate a "harm" [Sec'y Resp. at 6:26-7:2], she really ought to know better. After all, her counsel just recently prevailed on behalf of the Arizona School Boards Association in a case where the Arizona Supreme Court said that a Plaintiff raising claims under the DJA "need not demonstrate past injury or prejudice." *Ariz. Sch. Bds. Ass'n v. State*, 501 P.3d 731, 736 (Ariz. 2022). [*See also* Verified Compl. ¶ 35 (asserting that Plaintiffs' claims arise under, among other laws, the DJA).]

The Arizona Democratic Party ("ADP") recognizes the realities of A.R.S. ¶ 12-1832, which is perhaps why it makes the strange argument that the AZGOP has failed to meet its burden to articulate how the challenged laws "***affect*** [the] AZ GOP's efforts to hold primaries." [ADP Resp. at 17:7-9.] Plaintiffs are befuddled by this argument as the rejoinder is self-explanatory: under Arizona's current statutory framework, the AZGOP must hold its primaries under Arizona's unconstitutional no-excuse mail-in voting system. Similarly, the ADP acknowledges that the AZGOP has a statutory right and obligation to provide ballot challengers to challenge mail-in votes. [*Id.* 17:1-9.] However, it then asserts that this does not matter, since the same challenge procedure exists for in-person voting. [*Id.*] But if Plaintiffs obtain the relief they seek, the AZGOP will need to provide

challengers for in-person voting only instead of for both. The ADP does not, and cannot, articulate how this fails to affect the AZGOP's rights, status, or legal relations.

Also noteworthy is that on May 31, 2022, the Associated Press, after having made a public records request in February, finally obtained the Attorney General's investigation records related to the Guillermina Fuentes case. These records revealed that Ms. Fuentes "apparently ran a sophisticated operation using her status as a well-known Democratic operative in the border city of San Luis to persuade voters to let her gather and in some cases fill out their ballots."[3] On the basis of these records, the AP reported, "Investigators said it appears she used her position as a powerful figure in the heavily Mexican American community to get people to give her or others their ballots to return to the polls." It further reported, "Although Fuentes is charged only with actions that appear on the videotape and involve just a handful of ballots, investigators believe the effort went much farther." Clearly then, if Plaintiffs were required to articulate some sort of prejudice, and not merely that their rights, status, and legal relations are affected, then this would satisfy even that requirement, as in-person voting under the Arizona Constitution prevents anyone other than voters from filling out their ballots.[4]

III. The *Purcell* principle and laches do not bar Plaintiffs' claims for relief in 2022.

In essence, Defendants complain that (1) Plaintiffs should not have waited 30 years after the legislature enacted no-excuse mail-in voting to bring their constitutional claim and that (2) Plaintiffs should not have waited six weeks to refile their case in *this* Court after the Arizona Supreme Court declined original jurisdiction over their initial special action, and that for these reasons Plaintiffs' claims are barred by the *Purcell* doctrine and laches. [ADP Resp. at 3-5; Sec'y Resp. at 8-10; Cnty. Resp. at 10-13.] However, neither *Purcell* nor laches apply to this case, which Plaintiffs initiated in state court several months

[3] Bob Christie, *Records show coordinated Arizona ballot collection scheme*, AP News (June 1, 2022), https://apnews.com/article/arizona-presidential-elections-conspiracy-election-2020-government-and-politics-65a3f0f130905dd7151e5189e7242784.

[4] Plaintiffs have received the documents provided to the AP through a public records request to the Attorney General's office. *See* Exhibit A.

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before the general election.

The *Purcell* principle establishes that "federal district courts ordinarily should not enjoin state election laws in the period close to an election" and "that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill v. Milligan*, 595 U.S. ___, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam)). This is because "[i]t is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a ***federal*** court to swoop in and re-do a State's election laws in the period close to an election." *Id.* at 881 (emphasis added).

This Court is obviously not a federal district court and is therefore not bound by *Purcell*. However, even if the Court finds *Purcell* to be persuasive, this is simply not a case—for the reasons discussed below—in which "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." [Cnty. Resp. at 12-13 (quoting *Merrill*, 142 S. Ct. at 881).]

Many times during our country's history, several states have had to implement a new/modified election system, or election procedures, in response to successful judicial challenges (or statutory/constitutional amendments) shortly before an upcoming election. For instance, the Pennsylvania Supreme Court invalidated a statute permitting voting by absentee ballot outside of the elector's voting district on July 8, 1924—less than four months before the November 4, 1924, general election. *See In re Contested Election in Fifth Ward of Lancaster City* 281 Pa. 131, 138 (1924). *See also Thompson v. Scheier*, 40 N.M. 199 (1936) (holding absentee voting "unconstitutional, in that it permits voters to vote otherwise than by personally casting their ballots in the precinct of their residence" on May 7, 1936—six months before the general election on November 3, 1936); *Baca v. Ortiz*, 40 N.M. 435 (1936) (upholding trial court's order enjoining absentee voting as unconstitutional approximately one month prior to state's November 1936 presidential and

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gubernatorial elections[5]); *Clark v. Nash*, 192 Ky. 594 (1921) (invalidating Kentucky's "absent voters law enacted in 1918" despite the imminence of state's "regular November [1921] election," reasoning "[m]anifestly a ballot cannot be 'furnished by public authority to the voter at the polls' if mailed to him at some address outside of the county where the election is being held").

Notably, and as detailed in Plaintiffs' briefing, Pennsylvania's no-excuse mail-in voting scheme was just recently invalidated after the state court determined the system was repugnant to the election provisions contained in the Pennsylvania Constitution. *See McLinko v. Dep't of State*, 270 A.3d 1243, 1273 (Pa. Comm. Ct. 2022) (pending review). Although that decision is currently pending review, Plaintiffs anticipate the lower court's ruling in *McLinko* will be upheld in the very near future. If so, Pennsylvania election officials will have approximately five months to implement the state's modified election system.[6] And, in the event this Court grants Plaintiffs' requested injunctive relief, which it should, Arizona election officials would have a similar (and sufficient) timeframe to implement the pre-1991 election system before the 2022 general election.

Moreover, in this case, election officials have *months* to prepare for the 2022 general election. In *Purcell*, the court stayed an injunction that was issued "just weeks before the election." *See* 549 U.S. at 4. Notably, the deadline for voter registration in Arizona's 2022 general election is October 11, 2022, early voting begins October 12, 2022, and the deadline to request a mail-in ballot is October 28, 2022.[7] Thus, there is ample time to prepare for and conduct Arizona's 2022 election by constitutionally permissible means.

Further, courts have rejected arguments similar to those made by Defendants regarding undue burden or inconvenience that may be caused by enjoining the enforcement

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[5] *See New Mexico Governor*, 1936, Our Campaigns, available at https://www.ourcampaigns.com/RaceDetail.html?RaceID=262122.

[6] Upcoming Elections, Penn. DOS Voting & Election Information, available at https://www.vote.pa.gov/About-Elections/Pages/Upcoming-Elections.aspx.

[7] Arizona Secretary of State, Elections Calendar & Upcoming Events, available at https://azsos.gov/elections/elections-calendar-upcoming-events.

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of a state's election laws. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018) (enjoining enforcement of Georgia's absentee ballot signature verification statute, *rejecting the defendants arguments that it "would be unduly burdensome to employ a new procedure this close to the election and that Plaintiffs should have brought their actions sooner*…[and that] [b]y changing the procedures this close to the election…the integrity of the election process will be put into question") (emphasis added); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 799 (S.D. Ind. 2020) (enjoining Indiana Secretary of State from enforcing "statutes govern[ing] the casting of mail-in absentee ballots…insofar as the challenged statutes fail to provide such voters notice and an opportunity to cure before their ballots are rejected for a perceived signature mismatch" and *ordering the Secretary to*, *inter alia*, "inform forthwith all affected Indiana election officials of this injunction and to *instruct such officials regarding the implementation of notice and cure procedures in time for the upcoming general election on November 3, 2020*") (emphasis added).

Finally, Arizona's 1992 election officials were able to implement the 1991 no-excuse absentee/early voting law, which became effective on January 1, 1992, prior to the state's September 1992 primary election. In other words, Arizona election officials had approximately 9 months before the September 1992 primary election to implement the substantial (but unconstitutional) modifications to the state's election laws. *See* Elections—Absentee Voting, 1991 Ariz. Legis. Serv. Ch. 51 (S.B. 1320); STATE OF ARIZONA OFFICIAL CANVAS—PRIMARY ELECTION—SEPTEMBER 8, 1992, available at https://azsos.gov/sites/default/files/canvass1992pe.pdf.

Regarding Defendants' laches argument, this is simply not a case in which "[Plaintiffs'] dilatory conduct in this election year warrants application of the laches doctrine." [*Id.* at 12.] "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, 497-98 (2006) (cleaned up). As explained above, Defendants have ample time to prepare for in-person voting before the general election.

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Moreover, Defendants are incorrect that laches bars a constitutional challenge to a statutory scheme simply because no one bothered or thought to challenge the law when it was first enacted. Although successful constitutional challenges frequently come too late for those whose rights are affected—and perhaps too early for those who cannot yet see or who do not wish to see that a law is unconstitutional (e.g., segregation laws)—tardiness is not a sound reason to refuse the challenge altogether. If that were so, litigants would only be able to challenge unconstitutional laws shortly after their enactment, but we know this is not the case. *See, e.g.*, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (holding in 2013 that sections of the Voting Rights Act of 1965, 42 U.S.C.S. §§ 1973b(b) and 1973c, were unconstitutional).

Petitioners aver there is no perfect time to challenge election laws. Given the frequency and cyclical nature of elections, any successful challenge will always be inconvenient for everyone involved. Moreover, these challenges will always either be too early or too late in someone's estimation. In this case, however, the timing of the challenge coincides with the fact that no-excuse mail-in voting has been gradually coming to a head as voting by mail has steadily increased over the last 30 years. Even the County Defendants acknowledge this basic fact. [Cnty. Resp. at 2 n.3 (noting that "early voting has gone from 34% of Coconino County voters in 2004 to 83% in 2020).]

The precipitating event, of course, was the 2020 election—in which more people voted by mail than in any prior election, bringing new information and concerns to light. As the late Justice Ginsburg noted, "[i]n the weeks leading up to the [2020] election, the COVID-19 pandemic ha[d] become a 'public health crisis,'" resulting in "an unprecedented number of Wisconsin voters—at the encouragement of public officials—[turning] to voting absentee," a heavy burden on election officials, and "a severe backlog of ballots requested but not promptly mailed to voters." *Republican Nat'l Comm.*, 140 S. Ct. at 1208-09. In Arizona, 92% of voters cast early ballots in 2020.[8]

[8] Total votes and early votes available at https://azsos.gov/2020-general-election-county-canvass-returns.

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Only now—when no-excuse mail-in voting has become the rule and in-person voting the exception—do we truly understand the fundamental reasons our framers enshrined the protections of the Australian Ballot into our constitutional scheme. Today, voters are disillusioned with the system, and their concerns can all by traced to the fact that voting by mail occurs away from the watchful eyes of election officials and is therefore subject to the same pressures that prompted the Australian system in the first place. Eyes on every part of the process, as under the pre-1991 system of voting, fixes these concerns in a way that unenforceable criminal laws cannot—by preventing undue influence, vote-buying, and coercion in the first place rather than punishing bad actors after the fact if and when those bad actors are ever caught.

Regarding Defendants' complaint that Plaintiffs waited six weeks to refile their case in superior court, this is not the kind of "dilatory conduct" laches seeks to prevent, nor is it an "unreasonable delay." Plaintiffs had to review the *numerous* briefs filed in the supreme court, perform additional research to shore up any perceived gaps in their case, completely retool their case and strategize over how to get the most expeditious relief, and analyze new data that became available during the intermission. And of course, the fact that Plaintiffs rushed through this process as quickly as they could belies the fiction that Plaintiffs have unlimited resources. Nevertheless, Plaintiffs chose to request expedited relief only for the general election and not for the primary election, as they did in the Supreme Court. Plaintiffs have not been dilatory, nor have they caused an unreasonable delay because the soonest they could refile was six weeks later.

In addition, Defendants have certainly been on notice that this suit was coming since the Supreme Court directed the AZGOP to refile this case in trial court. Like Plaintiffs, Defendants have doubtless spent the intervening time assessing the arguments of the opposing parties, the scores of amici who filed briefs, and the disposition of the Supreme Court and performing additional related research.

IV. The 1891 Law

As the Secretary is forced to acknowledge, Arizona adopted the Australian Ballot

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System in 1891, decades before statehood. [Sec'y Resp. at 3 (citing Laws of 1891, 16 Leg. Assemb., No. 64) (cited in Plaintiffs' Motion as 1891 Ariz. Terr. Sess. Laws No. 64) (hereinafter, the "1891 Law"). *See also* Ver. Cmplt. at ¶10.] Defendants also concede, as they must, that article 7, section 1 of the Arizona Constitution guarantees "secrecy in voting." [Sec'y Resp. at 3.] However, Defendants seize on the phrase "or by such other method as may be prescribed by law" and argue that the framers "left it to the Legislature to prescribe the precise 'method' of voting in elections." [*Id.* at 3, 11-13.]

But as Plaintiffs have shown, in their Complaint and throughout their Motion, the ballot secrecy guarantee of article 7, section 1 constrains and *prohibits* the legislature from deviating from the protections of the 1891 Law. [Mot. at 4]. Notably, the Secretary admits that the "such other method" clause of article 7, section 1 was understood by delegates at the Constitutional Convention to mean "methods such as the 'use of the voting machine'" as an alternative to paper ballots. [Sec'y Resp. at 3.] Nevertheless, later in her response the Secretary argues that "[i]f the framers meant to limit such other method solely to 'voting machines,' they would have said so." [*Id.* at 12.]

This ignores the fact that a voting machine, or its modern equivalent, would not depart from the principles of the Australian Ballot System. A voting machine still requires a voter to appear at the polls on election day and vote in secret, in an enclosed booth. *See* A.R.S. § 16-446 (electronic voting system shall provide for voting in secrecy when used with voting booths); A.R.S. § 16-570 (voting machine shall be so placed and protected that it is accessible to only one voter at a time and is in full view of all election officers and observers at the polling place). Thus, whatever "such other method(s)" the legislature may enact, they must, like voting machines, be consistent with the intent of article 7 and the 1891 Law.

Rather than engage the argument, Defendants avert their eyes and utterly disregard the relationship between article 7, section 1 and the 1891 Law. Instead, the Secretary argues that "several Convention delegates who also served in the early legislature wouldn't have passed—and Governor Hunt would have signed—multiple mail-in voting statutes."

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[Sec'y Resp. at 4-5, 12.] Like her comment on voting machines, this argument relies on some sleight of hand. The early legislation allowing for absentee ballots in 1918 and 1921 did not provide for "mail-in voting" as it has been used in Arizona since 1991. Rather, those early laws sought to harmonize the Australian Ballot System and the Free and Equal Clause of article 2 while maintaining consistency with the 1891 Law by providing significant procedural safeguards against undue influence and coercion while protecting secrecy—measures that are completely absent from the post-1991 statutory regime.

For example, the Soldiers Voting Bill of 1918, 1918 Ariz. Sess. Laws ch. 11, provided detailed and strict conditions for executing the Oath of Absent Elector, and the acknowledgement had to be signed by a commissioned officer who was personally acquainted with the voter. *Id.* at § 2. It also prohibited the soldier from marking his ballot in the presence of anyone unless physically unable to do so. *Id.* at § 6. Likewise, the 1921 act required a voter to apply to receive an absentee ballot in person, prior to their anticipated absence and required execution of an affidavit in the presence of a notary or justice of the peace. 1921 Ariz. Sess. Laws ch. 117, §§ 2, 6.

The Secretary argues that modern early voting furthers the Free and Equal Clause by "ensuring equal access to the franchise for all voters, including those who live far from their polling places . . . or face other barriers to voting in-person on Election Day." [Sec'y Resp. at 10-11.] This argument at least concedes that the Free and Equal Clause was never meant to absolve the "such other method" clause of article 7 of any constraints. But it nevertheless misses the mark.

The Free and Equal Clause is not a guarantee against *inconvenience* when voting. Rather, "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot." *Chavez v. Brewer*, 222 Ariz. 309, 319 (App. 2009); Ariz. Const. art. 2, § 21. *See also Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, 2020 U.S. Dist. LEXIS 184334, at *13-15 (D. Ariz. Sep. 25, 2020) (no evidence that "Navajo voters [were] unable to cast

a vote because of intimidation or lack or free will" or of selective enforcement of the early ballot receipt deadline); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021) ("[B]ecause voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is ***equally open*** and that furnishes an ***equal opportunity*** to cast a ballot must tolerate the usual burdens of voting.") (emphasis added). A voter who had to serve in the trenches of Europe, or who was otherwise *physically unable* to be present at the polls on Election Day, at least arguably fell within the ambit of the Free and Equal Clause. But the ordinary task of "[h]aving to identify one's polling place and then travel there to vote does not exceed the usual burdens of voting." *Id.* at 2328 (cleaned up).

The Secretary casts about for support by relying on authorities from other states. [Sec'y Resp. at 13-15.] These authorities are inapposite. For example, in *Peterson v. City of San Diego*, 666 P.2d 975 (Cal. 1983), the court noted that in 1972 California repealed and replaced a constitutional provision that had been practically identical to Arizona's article 7, section 1. 666 P.2d at 976. It was not until after those changes, in 1978, that the California Legislature extended mail-in voting to everyone, regardless of their reasons for being absent from the polls. *Id.* at 977.

The decision in *Downs v. Pharis*, 122 So. 2d 862 (La. Ct. App. 1960) actually buttresses Plaintiffs' case. There, the statute at issue had been enacted following a suggestion from the state's supreme court that the prior absentee voting regime exposed voters "to intimidation and other forms of reprisal, [and] present[ed] a ready-made pattern for vote fraud, such as vote buying." *Id.* at 864 (citing *Dowling v. Orleans Parish Democratic Committee*, 102 So. 2d 755, 762 (La. Sup. Ct. 1958)). The new statute required a voter seeking to cast an absentee ballot to apply "in person to the clerk of court to cast an absentee ballot, [to] fill in his ballot in secret and after the applicant has properly marked the ballot and properly folded it, [to] deposit it in the envelope furnished him by the clerk and seal it in the presence of the clerk." *Id.* (cleaned up). Such procedural safeguards are perfectly consistent with the pre-1991 regime in Arizona.

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The facts and issues in *Jones v. Samora*, 318 P.3d 462 (Colo. 2014) bear no resemblance to this case. Also, unlike here, in *Sawyer v. Chapman*, 729 P.2d 1220 (Kan. 1986) the requirement of secrecy was not in the state's constitution but found to be implied by a series of court decisions.

Finally, the Secretary argues that the current law nevertheless preserves secrecy because it "criminalizes fraud or other abuses related to early ballots." [Sec'y Resp. at 17.] But, as Plaintiffs have pointed out, the post-1991 statutory regime fails to preserve secrecy as contemplated by article 7, section 1, as well as by modern standards. Unlike other states with similar constitutional provisions, we know from the 1891 Law that the framers intended to maintain ballot secrecy in a manner consistent with the Australian Ballot System. Indeed, that is what they ***meant*** by secrecy in voting.

As to the force of criminal penalties, robbing a bank is also a criminal offense, but banks do not leave themselves unguarded. The framers understood that democracy derives its legitimacy from faith in its institutions, including the integrity of the voting process, itself. This fundamental point was made by the Arizona Supreme Court when it noted that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Fontes*, 250 Ariz. at 61 ¶ 4 (citing *Burdick*, 504 U.S. at 441).

V. The Free and Equal Clause

Defendants share a general concern that strictly enforcing the Arizona Constitution will undermine the goals of representative democracy and restrict access to elections, violating the Free and Equal Elections Clause. [*See* Sec'y Resp. at 18; ADP Resp. at 13.] Quite the opposite. Defendants falsely characterize Plaintiffs' cause as restricting the vote; instead, Plaintiffs respectfully request that this Court instead *protect* the vote and the purpose of universal suffrage, for "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Fontes*, 250 Ariz. at 61 ¶ 4 (2020) (citation omitted).

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); John D. Leshy, *The Arizona State Constitution* 356 (2d ed. 2013) (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."). *See also* AG. Op. I16-005 (R16-002) (discussing the issue and citing a variety of sources).[9]

Norman Ornstein himself once noted that "there are no safeguards for the voter in the absentee ballot system to ensure he or she is not coerced or paid to vote a certain way." John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 503 (2003). His law review article explains that the Australian Ballot came about in part because of a concern that, if constitutional safeguards were not put in place *requiring* voters to cast their ballot in secret, employers or "party machines" might require voters to show them their ballots to ensure they voted according to their own wishes. *See, e.g.*, *id*. at 486, 490, 512. The only place election officials could ensure there was no coercion was "at the polling place." *Id*. at 488. The framers of the Arizona Constitution shared these concerns. As Defendants point out, Mr. Ornstein submitted an *amicus* brief in the preceding matter before the Arizona Supreme Court, yet despite Ornstein's insistence that the policy fears discussed in his 2003 article have not come to fruition, the very year after his article was written, the Arizona Supreme Court held otherwise. In *Miller v Picacho Elementary Sch. Dist. No. 33*, it found that "[d]istrict employees with a pecuniary interest in [an] override's passage delivered ballots to electors whom they knew…. [S]chool employees urged them to vote and even encouraged them to vote for the override." 179 Ariz. 178, 180 (1994).

Maricopa County attempts to distinguish *Miller*, going so far as to claim that it is

[9] Available at https://www.azag.gov/sites/default/files/2018-06/I16-005.pdf.

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"fatal to Plaintiffs' claims" that voters who are concerned about secrecy could merely vote in person. [Cnty Resp. at 10, ll. 8-16.] But this fundamentally misconstrues the purpose of ballot secrecy: ballot secrecy and the integrity of elections is not an individually waivable right, as even *implied* impropriety harms the right to free and equal elections for the rest of the citizens of Arizona. Indeed, far from finding that the *requirement* to cast a secret ballot was an individual right that voters could waive, the Arizona Supreme Court instead found that "dangers [like this] were the very ones" that the "constitutional goal" of secrecy in voting was meant to prevent. *Miller*, 179 Ariz. at 180. It then hammered the point home by stating, "Even if the elector voted his or her conscience, the ballots still would never have been cast but for the procedures adopted by the district," and by then setting aside the results of the election. *Id*.

It is these concerns that the constitution's "free and equal" clause is actually meant to address. For a free and equal election is not one where it is equally convenient for all to vote. Rather, "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot." *Chavez*, 222 Ariz. at 319. *See also Yazzie*, 2020 U.S. Dist. LEXIS 184334, at *13–15 (holding no "serious question" raised under constitution's "free and equal" clause in case alleging unequal access to early voting procedures where plaintiffs produced no evidence that "Navajo voters are unable to cast a vote because of intimidation or lack of free will" or of selective enforcement of the early ballot receipt deadline and citing *Chavez*, 222 Ariz. at 319).

The U.S. Supreme Court agrees: "[B]ecause voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is ***equally open*** and that furnishes an ***equal opportunity*** to cast a ballot must tolerate the usual burdens of voting." *Brnovich*, 141 S. Ct. at 2338 (cleaned up; emphasis added). "Having to identify one's polling place and then travel there to vote does not exceed the 'usual burdens of voting.'" *Id*. at 2328 (citing *Crawford*, 553 U. S. at 198) (emphasis added). And while

Defendants try to create a factual issue over the degree to which fraud or malfeasance occurs within the context of absentee voting, "prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. Third-party ballot collection can lead to pressure and intimidation. Further, a State may take action to prevent election fraud without waiting for it to occur." *Id*. at 2329. Therefore, from a purely legal standpoint, mere appearance or the possibility of impropriety, the broad prevention of coercion, bribery, or even mere third-party knowledge of a voter's selections, and the safeguarding of election integrity are sufficient grounds to sustain this action—and sufficiently consequential to the health of our democracy so as to justify an injunction during the pendency of this matter.

RESPECTFULLY SUBMITTED this 2nd day of June 2022

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I CERTIFY that a copy of the forgoing will be served on the other party/parties to this matter in accordance with the applicable rule of procedure.

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