ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA REPUBLICAN PARTY, et al., Plaintiffs/Appellants, v. KATIE HOBBS, et al., Defendants/Appellees,	No. 1 CA-CV 22-0388 Mohave County Superior Court No. S-8015-CV-202200594
ARIZONA DEMOCRATIC PARTY, et al. Intervenor-Defendants/Appellees.	

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INTRODUCTION

Article VII, Section 1 of the Arizona Constitution expressly permits any voting method "by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved." Consistent with that clear text, the legislature authorized no-excuse early voting for all Arizona voters in 1991.[1] Over the three-plus decades since, early voting has become—by far—the most popular means by which Arizonans access the franchise. Many could not do so without early voting. Not only does Arizona's early voting system robustly preserve "secrecy in voting," it also helps to guarantee that all elections in Arizona are "free and equal," as required by Article II, Section 21, and to avoid unequal voting access in violation of Arizona's equal protection clause in Article II, Section 13.

Nevertheless, Appellants maintain that the only permissible method of voting under the Arizona Constitution is in person, at a polling place, on election day. Of course, the Arizona Constitution nowhere says this, so Appellants' theory is now that Arizona's early voting system

[1] Arizona's early voting regime permits voters to request, vote, and return ballots by mail or hand during a designated early voting period. This brief refers to this system as a whole as "early voting."

categorically fails to preserve "secrecy in voting" as required by Article VII, Section 1. But they never really explain why. They do not address at all, for example, why statutes requiring that early ballots be voted, transmitted, and processed in secret and securely are insufficient to preserve secrecy. They do not allege that they or any of their members have been unable to vote in secret. (This also defeats their standing, as neither they nor their members have suffered any injury.) They also do not argue that it is impossible to vote an early ballot in secret, as they must to meet their burden to succeed on a facial challenge: showing unconstitutionality in every application.

Appellants also maintain that a few passing prepositional phrases in the Arizona Constitution contemplate only in-person voting at a polling place on a single day. They sidestep the obvious question of why Arizona's pre-1991 system of absentee voting, which they now maintain is fine, would pass muster under such a theory. More fundamentally, though, they ignore the structural principle that "state constitutions are not grants of power, but instead are limitations thereof," *Earhart v. Frohmiller*, 65 Ariz. 221, 224 (1947), and that the Legislature may thus enact any law not ***clearly*** prohibited by the Constitution. *Id.* at 225.

Appellants' attempts at textual gymnastics fail to produce anything close to a clear constitutional prohibition of early voting.

Until the specious accusations of voter fraud and "unlawful voting" were cynically peddled to the public in an ongoing attempt to undermine the legitimate results of the 2020 election, no one had seriously suggested that the Arizona Constitution meant anything other than what it says: any form of voting prescribed by law is permissible, provided secrecy of the vote is preserved. This case is simply a misguided attempt to mask Appellants' partisan policy preferences as constitutional theory. Because the text and structure of the Arizona Constitution in no way support that theory, the Court must affirm the judgment of the superior court and deny relief.

STATEMENT OF THE CASE

In February of 2022, Plaintiff-Appellant the Arizona Republican Party ("AZ GOP") filed an original action with the Arizona Supreme Court advancing similar claims challenging Arizona's early voting system. Br. at 7–8. On April 5, the Arizona Supreme Court denied jurisdiction and dismissed AZ GOP's petition. IR 47 at 1.

Appellants then waited six weeks to file this suit in Mohave County Superior Court on May 17. *See* IR 1. A few days later, Appellants filed a motion for preliminary injunction requesting that Arizona's early voting system be enjoined prior to the upcoming general election, which was then less than six months away.

On June 3, the superior court held argument on Appellants' pending motions and resolved to address the constitutional question: "Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting?" IR 61 at 1. On June 6, the superior court correctly answered in the negative. *Id.*

The superior court identified the appropriate standard for a motion for a preliminary injunction—the movant bears the burden of showing "1) a strong likelihood of success on the merits; 2) the possibility of irreparable harm; 3) that the balance of hardships tips in the favor of the seeking party; and that 4) public policy favors the injunction." *Id.* at 2 (quoting *Shoen v. Shoen*, 167 Ariz. 58 (App. 1990)). The superior court denied preliminary relief because there was not "a likelihood of success on the merits" and, therefore, Appellants "d[id] not meet the first element." *Id*. Specifically, the superior court concluded that, "[s]ecrecy in

voting being preserved is an element of the no-excuse mail-in ballot voting statutes approved in Arizona in 1991." IR 61 at 3.

With Appellants' consent, on June 9, 2022, the superior court entered final judgment dismissing their challenge to Arizona's early voting system. IR 65. Nearly a week later, on June 15, Appellants filed a notice of appeal.

STATEMENT OF THE FACTS

In 1991, the legislature enacted an early voting system that exists in substantially the same form today. IR 61 at 3. For more than 30 years, no court has questioned the constitutionality of this system. Br. at 27-28. Over the decades in which it has been in use, voters have come to rely overwhelmingly on early voting to exercise their right to vote. Nearly 90% of all ballots cast in the 2020 general election were early ballots. Br. at 12.

Arizona voters can vote early in any Arizona election. They have three options for obtaining an early voting ballot: (1) they can appear in-person at an early voting location, where they can obtain and cast a ballot in advance of election day, *see* A.R.S. § 16-542(A); (2) they can request that a one-time early ballot be sent to them by their local election official,

id.; (3) they can request to be included on the Active Early Voting List ("AEVL") and be automatically sent an early ballot before each election, *see* A.R.S. § 16-544. Early voting ballots may be returned by mail or in person at any polling place, drop box, or county recorder's office. *See* A.R.S. § 16-548(A).

Early voting occurred in Arizona's most recent statewide election, the August 2, 2022 primary, as it has in every Arizona election for the past 30 years. According to the Secretary of State's unofficial results, voters cast over 1 million early ballots in the primary election for Governor, comprising 85% of all ballots cast in that election.[2]

Arizona will hold a general election on November 8, 2022—three months from today. Over three million Arizona voters are on the AEVL and expect to automatically receive a general election ballot in advance of that election. IR 51 at 131. Counties will begin mailing those ballots on October 12. A.R.S. §§ 16-545 and 16-542(C). They must send ballots even earlier, by September 24, to overseas and military voters. A.R.S. § 16-543; 52 U.S.C. § 20301 *et seq*. As of yesterday, Arizona counties

[2] Ariz. Sec'y of State, *2022 Primary Election, Unofficial Results*, available at https://results.arizona.vote/#/state/32/0.

began accepting requests for one-time early ballots for the 2022 general election. A.R.S. § 16-542(A) (voters may request an early ballot 93 days before the election). Voters have until October 28 to submit a request to either receive a one-time early ballot or to be added to the AEVL in advance of the November election. A.R.S. § 16-542(E).

STATEMENT OF THE ISSUES

1. Is Arizona's system of no-excuse, mail-in voting constitutional?

2. Did the Superior Court abuse its discretion in denying Appellants' request for a preliminary injunction?

ARGUMENT

Appellants' challenge fails for the simple reason that the Arizona Constitution nowhere prohibits early voting, let alone clearly so. The superior court correctly rejected Appellants' arguments to the contrary. Separate from the merits, Appellants lack standing to bring this action, and the superior court did not abuse its discretion in denying preliminary injunctive relief. Each of the other preliminary injunction factors weighs heavily against the extraordinary relief requested by Appellants—the effective elimination of the form of voting by which nearly 90% of voters

participated in the last statewide general election, mere months before the next general election. The superior court's decision should be affirmed.

I. Arizona's early voting system is constitutional.

The legislature may pass any act that is not "clearly prohibited" by the Arizona Constitution. *Earhart*, 65 Ariz. at 225. This is because "state constitutions are not grants of power, but instead are limitations thereof." *Id.* at 224. Thus, 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.* The prohibition must be clear, and legislative acts must "be given a construction with validity if at all possible." *Id.* at 225.

The Arizona Constitution does not prohibit Arizona's system of early voting, let alone clearly so. The inquiry should thus begin and end there. But Appellants' arguments also cannot be reconciled with the Constitution's *express approval* of elections in which voters participate "by ballot, or by such other method as may be prescribed by law," with the only requirement being "that secrecy in voting be preserved." Ariz. Const. Art. VII, Section 1 (emphasis added). No one disputes that early

voting takes place "by ballot," and the superior court correctly found that secrecy in voting is preserved with early voting.

Appellants' arguments that the Arizona Constitution must be read—contrary to its clear text and history—to prohibit all forms of voting except in-person, election-day voting are illogical and entirely without merit. These arguments contravene the plain text of the Arizona Constitution, are inconsistent with guidance of the Arizona Supreme Court in *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994), are not supported by U.S. Supreme Court precedent in *Burson v. Freeman*, 504 U.S. 191 (1992), and were rejected just last week by the Pennsylvania Supreme Court. *See McLinko v. Dep't of State*, No. 14 MAP 2022, --- A.3d ---, 2022 WL 3039295, at *3 (Pa. Aug. 2, 2022). Finally, Appellants have not even demonstrated standing to seek the requested relief. The Court can and should affirm under any of these grounds.

A. Standard of review.

This Court reviews the constitutionality of statutes de no novo. *AZ Petition Partners LLC v. Thompson*, 253 Ariz. 223, 230 ¶ 17 (App. 2022).

Appellants advance a facial challenge to Arizona's early voting system. *See* Br. 7, 28-29 (challenging Arizona's early voting system "on its face" and "as a matter of law"). "A facial challenge to the constitutionality of a statute requires a showing that no set of circumstances exist under which the statute would be valid." *Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021). This is a demanding standard: even if a movant can show that the law that it challenges "might operate unconstitutionally under some conceivable set of circumstances," that is "insufficient to render it wholly invalid." *State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018).

B. Arizona's early voting system fully comports with the text and history of Article VII, Section 1 of the Arizona Constitution.

The Arizona Supreme Court has long understood that "the state legislature may pass any act" that is not clearly prohibited. *Earhart*, 65 Ariz. at 224; *accord State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 113 ¶ 31 (App. 2012) ("The legislature need not be expressly granted authority to act when it would otherwise be entitled to do so."). Legislative acts will thus be struck down only 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.").

Rather than clearly state a prohibition, the Arizona Constitution here provides an affirmative *grant* of authority, and Appellants' interpretation is foreclosed by it. Article VII, Section 1 expressly approves *any* form of voting "by ballot" *or* "as *may* be prescribed by law," with the only restriction being that "secrecy in voting shall be preserved." No party disputes that early voting occurs "by ballot," and the superior court correctly found that Arizona's early voting system preserves secrecy in voting. IR 61 at 3. Remarkably, Appellants never squarely address this finding or explain why the early voting statutes do not, in their view, sufficiently preserve secrecy. This alone amounts to waiver. *See Stafford v. Burns*, 241 Ariz. 474, 483 ¶ 34 (App. 2007) (the failure to develop an argument in a meaningful way constitutes waiver).

Under Arizona's early voting system, no voter is forced to vote early or to forgo voting in-person at a polling place on election day. A voter

must timely request an early ballot to receive one. *See* A.R.S. § 16-542(A). 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 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 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).

The superior court found that these provisions sufficiently protect the secrecy of the early voter's selections. This finding was consistent with the Arizona Supreme Court's observation that Arizona's early voting law "advances this constitutional goal [of secrecy in voting] by

setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation." *Miller*, 179 Ariz. at 180.

Throughout this litigation, Appellants have repeatedly relied on an intermediate court decision from Pennsylvania to suggest otherwise. Br. at 37-38 (citing) *McLinko v. Dep't of State*, 270 A.3d 1243 (Pa. Commw. Ct. 2022). However, just last week, the Pennsylvania Supreme Court reversed that decision and upheld Pennsylvania's early voting system. *McLinko*, 2022 WL 3039295, at *34. Pennsylvania's Constitution features a secrecy-in-voting provision that is nearly identical to Arizona's. Pa Const. art. VII, § 4 ("All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved."). Yet the Pennsylvania Supreme Court noted that "the requirement that secrecy must be preserved cannot alone inform the legislature as to what methods it may prescribe, only that those methods must maintain this secrecy." *McLinko*, 2022 WL 3039295, at *30. The court then looked to the ways in which Pennsylvania's early voting statutes preserve secrecy, which largely parallel Arizona's:

> The Election Code provides for secrecy in universal mail-in voting by requiring the use of both an inner envelope marked

> only as "Official Election Ballot," and a larger envelope. *See* 25 P.S. § 3150.14. Once a universal mail-in voter receives an official mail-in ballot, they are required to mark the ballot in secret and seal it in the envelope marked "Official Election Ballot," and then they must secure the secrecy envelope inside the larger envelope. *Id.* § 3150.16. If there is any identifying information on any of the envelopes, it is required that the envelopes and ballots must be set aside and declared void. Id. § 3146.8.

Id. at *32 n. 49. The court concluded, based on these provisions, that Pennsylvania's early voting law adequately ensured the secrecy of the vote. *Id.* at *32.

Arizona also imposes numerous criminal prohibitions that further ensure the secrecy of early votes. For example, A.R.S. § 16-1003 establishes that destroying or defacing a ballot, or delaying the delivery of a ballot, is a class 3 misdemeanor. A.R.S. § 16-1006 makes it a class 5 felony to attempt to influence an elector by force, threats, menaces, bribery, or any corrupt means. A.R.S. § 16-1007 prohibits election officials from attempting to find out for whom an elector voted. In the face of these rigorous measures, the Superior Court properly recognized that Appellants have—at most—provided a handful of "examples of bad actors violating no-excuse mail-in voting laws." IR 61 at 3. This is woefully insufficient to meet Appellants' high burden of demonstrating that

Arizona's early voting system is broadly unconstitutional in all applications, as necessary to succeed on their facial challenge.

In the thirty-plus years since Arizona enacted its early voting system, there have been no credible showings that the early voting statutory safeguards have in fact proved inadequate. Quite to the contrary, every attempt by election deniers to challenge the 2020 election based on false claims of fraud or unlawful voting, failed in court—this includes several cases brought by the same Appellants who now pursue this appeal. *See, e.g.*, *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 706 (D. Ariz. 2020) (finding complaint brought by several plaintiffs, including Appellant Kelli Ward, seeking to set aside 2020 election results "because they claim the election process and results were 'so riddled with fraud, illegality and statistical impossibility'" to be "sorely wanting of relevant of reliable evidence" and dismissing case); *Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (in election challenge filed by Appellant Ward, finding that the parties' experts were unable to find no signs of fraud in review of mail-in ballots, nor did the challengers present "*any* evidence of 'misconduct,' 'illegal votes' . . . let alone establish any degree of fraud or a sufficient error rate that would

undermine the certainty of the election results") (emphasis added); *Ariz. Republican Party v. Fontes*, No. CV2020-014533, Ruling, Slip op. at 2, 9 (Maricopa Cnty. Sup. Ct. Dec. 21, 2020) (dismissing as "meritless" request by Appellant AZ GOP to redo its 2020 hand count audit and describing AZ GOP's argument that relief was necessary to address worries about "potential widespread voter fraud" as "an [illogical] attempt to disprove a theory for which no evidence exists").

Moreover, Appellants present a paradoxical view of the framers of the Arizona Constitution that is directly at odds with the relevant historical context. According to Appellants, the framers were deeply and specifically committed to four distinct elements of the Australian ballot system, but rather than make that clear in the constitutional text, they opted to convey that mandate solely through the inclusion of the word "secrecy" in Article VII, Section 1, Br. at 2; the framers contemplated alternative methods of casting ballots, but did not contemplate alternative methods of providing secrecy, *id.* at 36; the framers intended to forbid anything other than in-person voting in the Constitution, but a mere six years after the ink on that document was dry, they subsequently enacted laws providing for military absentee voting, *id.* at 5-6; the

framers were progressive innovators, but they wanted to prohibit any further innovation in voting methods, *id.* at 18-19. These arguments are illogical and misunderstand the history that Appellants themselves present.

As is widely documented, Arizona and other states were deeply concerned about bribery and voter intimidation. The framers of the Arizona Constitution were clearly *inspired by* the Australian ballot system, and the trial court correctly recognized as much. IR 61 at 3. As Appellants acknowledge, the "primary purpose of these reforms was, simply put, to render bad actors unable to determine the effectiveness of bribery" through secrecy. Br. at 17. If a voter can secretly choose which candidates or issues to support, then bad actors cannot "ascertain whom among their henchmen or dependents to reward and whom to punish." *Id.* at 37. The framers of the Arizona Constitution understood this principle and placed the secrecy requirement directly in Article VII, Section 1.

While the framers constitutionalized a commitment to secrecy, they did not bind future legislatures to *the exact methods for securing* that secrecy. That much is evident from the plain language chosen by the

framers, 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." Ariz. Const. art. VII, § 1. If the framers meant to forever enshrine only a specific method of voting—ballots or voting machines in person on election day—to secure that secrecy, the language of that provision makes no sense. *McLinko*, 2022 WL 3039295, at *32 (holding, in interpreting nearly identical language, that "although the recorded history of the amendment reflects that the drafters envision the legislative allowance of voting machines, the legislature's authority was conspicuously not limited to that one other method"). Yet, Appellants insist that this language was meant to enshrine the 1891 Law, which set forth certain requirements for voting via ballots, and render them forever "constitutionally required." Br. at 21-22. This is nonsense. The inquiry should begin and end with the plain text, which cannot sustain Appellants' reading.

This much is evidenced by Appellants' insistence that the Court examine both the 1891 Constitution and election laws enacted in 1891 and use them to rewrite the plain text of Article VII, Section 1. *See id.* But neither of these historical events actually support Appellants'

position; instead, both provide further reason to find that the framers did not intend to foreclose early or mail-in voting. The 1891 Law illustrates that the framers knew how to enumerate specific methods for preserving secrecy, making it all the more significant that they chose *not* to do so in the Constitution. This Court must assume that the framers thoughtfully appreciated the difference between statues and constitutional mandates—and that the framers did not intend to impose all of their policy views on future legislatures. *See, e.g.*, *Apache Cnty. v. Sw. Lumber Mills, Inc.*, 92 Ariz. 323, 326 (1962) (holding a statute in existence at the time of constitutional adoption does not "interpret the constitutional provision" because such a statute, "by its terms, limited in application to the section in which it is given").

The changes between the 1891 and the 1912 Constitutions provide further support for this view. As Appellants recount, the parallel to Article VII, Section 1 in the 1891 Constitution read: "The mode and manner of holding elections … shall be as they now are, or may hereafter be prescribed by law." Br. at 23. If the 1912 Constitution was intended to constrain future legislatures from "substantively deviat[ing] from the 1891 Law"—as Appellants suggest, Br. 23-24—then the framers should

have simply removed the broad grant of authority from the original Section 1 to simply read: "The mode and manner of holding elections shall be as they now are." That is not what they did. Instead, the framers withdrew their reference to the statutory scheme writ large and chose two key elements to constitutionalize: that voting would occur (1) by ballot (or any other method as may be prescribed by law), and (2) in secret. As the Superior Court correctly concluded, these two elements are fully respected by Arizona's early voting system. IR 61 at 4.

C. Appellants' reliance on the U.S. Supreme Court's decision in *Burson v. Freeman* is misplaced.

Appellants argue emphatically but unpersuasively that a First Amendment case, *Burson v. Freeman*, 504 U.S. 191 (1992), requires holding that in-person voting on election day is the only way to preserve secrecy in voting under the Arizona Constitution. *See* Br. at 1-3, 5, 6, 13, 15, 17, 36, 46, 47, 49 (repeatedly citing *Burson*). This argument is as absurd as it sounds. *Burson* held that a state ***could***, consistent with the First Amendment, restrict electioneering within 100 feet of the entrance to a polling place. 504 U.S. at 193. In stating that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter," *id.* at 207–08, the plurality meant only that a state's enactment of

electioneering buffer zones served its compelling interest in preserving secrecy ***at polling locations*** and therefore survived strict scrutiny under the First Amendment. Indeed, the Court confined its extremely narrow holding to the "last 15 seconds before" a voter enters a polling place because "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation" would violate the First Amendment. *Id.* at 210.

The Court never said that a state ***must*** limit voting to in-person polling locations, nor did it even *mention* voting by mail. It also did not apply the "secrecy in voting" provision of the Arizona Constitution or that of other any other state. *Burson* is entirely inapposite and could not, in any event, bind Arizona courts as to the meaning of the Arizona Constitution. *See State v. Soto-Fong*, 250 Ariz. 1, 11 ¶ 43 (2020) ("[W]e are not bound by federal precedent in interpreting our Constitution . ..").

Finally, when Appellants praise the security and secrecy of voting in-person, they are giving full credence to the efficacy of that regulatory regime. But when Appellants attack early voting, they simply ignore the corresponding rules and regulations. Fundamentally, Appellants asks this Court to treat some statutes as efficacious and some as ineffectual

as a matter of law. There is simply no legal basis to presume that the Legislature's efforts to secure early voting are inadequate. Nor have Appellants identified any evidentiary basis that would support such a conclusion.

D. No other provision of the Arizona Constitution limits the time or place for voting.

Separate from Appellants' arguments regarding "secrecy," they also identify a handful of other constitutional provisions that use phrases like "at the polls" or "at the general election" in passing. *See* Br. at 29-36; 39-41. These arguments ignore that any restriction on the legislature's power to act must be clear from the Arizona Constitution's text. *Earhart*, 65 Ariz. at 225. The legislature's power may not be so significantly circumscribed by peripheral, out-of-context readings of isolated, passing phrases.

Appellants focus primarily on Article IV, Part 1, Section 1, which lays out the process for initiatives and referenda under the Arizona Constitution. Br. at 29-33. Appellants claim that Article IV's use of the phrase "at the polls" means only "in-person voting at a specific polling place," and because "no-excuse mail-in voting is not exercised at the polls, it is unconstitutional." Br. at 33. Put another way, Appellants argue that

the framers of the Arizona Constitution intended to constrain all future legislatures to only in-person voting in all elections; and they did so not with an express provision, but by sprinkling the preposition "at" in provisions unrelated to the method of voting. This reading has no merit, and it would create serious conflicts within the Arizona Constitution and within Appellants' own argument.

Not only do Appellants get the text wrong—they also misconstrue the context. The phrase "at the polls" appears only in Article IV, Part 1, Section 1 of the Arizona Constitution, which deals with initiatives and referenda. The use of "polls" here is not intended to place some special emphasis on polling places, as Appellants suggest. Br. at 30. Instead, the term appears exclusively in Article IV to distinguish the different means by which Arizona citizens can express their views in the political process. Conventionally, voters express their views by electing candidates to office in elections. But in Arizona, they can also participate in direct democracy—by proposing laws and amendments and "enact[ing] or reject[ing] such laws and amendments at the polls." Ariz. Const. art. IV, pt. 1, § 1. The provisions of Article IV are intended to *expand* access to the democratic process, and there is no reason to think the framers

intended this section to implicitly limit the voting methods available to Arizonans. *See, e.g., Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 468 (2001) (recognizing 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.").

Beyond Article IV, Appellants highlight places in Article VII where phrases like "at the general election" appear. *See* Br. at 39 (citing Art. VII, Sec. 2); Br. at 49 (citing Art. VII, Sec. 4). Appellants suggest that this phrase also requires in-person voting, but that reading causes problems with the aforementioned Article IV. For example, Article IV, Part 1, Section 1 requires the Secretary of State to "cause to be printed on the official ballot *at the next regular general election* the title and number" of any ballot initiative. Ariz. Const. art. IV, pt. 1, §1(10). Under Appellants' interpretation, those ballot initiatives could only be printed on-site at polling places. Such an absurd result is clearly not intended in either Article IV or Article VII.

Overall, Appellants have simply misread the phrases upon which they rely, even in the context in which they are presented. For example, the phrase "at the general election" is nothing more than a generic

reference to the election during which Arizona voters choose officeholders. The word "at" does not have a "fixed locational meaning" as Appellants insist. Br. at 31. Petitioners' overdetermined interpretation of "at" does not convert a passing reference to the election into a broad restriction on permissible voting methods. Indeed, 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 refer to 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).

Put another way, Appellants argue that when the Constitution contemplates voting "at an election," it contemplates only physical attendance at an election. But this cannot be so—otherwise it renders other provisions superfluous. For example, Appellants cite Article VII, Section 4, which requires that voters be "privileged from arrest "during

their *attendance* at any election." Br. at 39-40. If "at any election" could only mean being present at a polling place, the word "attendance" would be entirely superfluous—the provision could have simply read "privileged from arrest at any election."

By contrast, interpreting "at the polls" or "at the general election" as a simple reference to public elections is harmonious across the entirety of the Arizona Constitution. Appellants identify two constitutional provisions where this interpretation allegedly causes an issue: the aforementioned "privilege from arrest" protections in Article VII, Section 4 and the release from military protections in Article VII, Section 5. Appellants argue that providing for mail-in voting makes these provisions "void, inert, or trivial," Br. at 40, or renders them "without purpose," Br. at 41. But there is no basis for this reasoning.

Both Sections 4 and 5 of Article VII are provisions designed to protect access to the ballot. In essence, Appellants are arguing that Arizona's early vote system makes elections so accessible as to render these provisions irrelevant. This reading flips those provisions on their head. The framers of the Arizona Constitution established broad protections for the right to vote, including Sections 4 and 5, as a *floor* for

what voters are entitled to—not a ceiling, as Appellants would have it. Indeed, the insights Appellants ask this Court to draw from Sections 4 and 5 would directly conflict with Arizona's Reservation of Rights Clause: "The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." Ariz. Const. art. II, § 33.

More importantly, Appellants are simply wrong that Sections 4 and 5 of Article VII cannot co-exist with mail-in voting. Turning to Section 4, Appellants claim that "it is illogical to interpret the words in section 4 to encompass mail-in voting." Br. 40. Intervenors agree. Section 4 of Article VII only applies to "*attendance* at any election, and in going thereto and returning therefrom." *Id.* Voters who fill out an absentee ballot at their kitchen table are not privileged from arrest. But there is no reason they need to be—it is perfectly acceptable for the Arizona Constitution to provide special protections for some voting methods and not others. To counter this obvious compatibility, Appellants place great emphasis on the phrase "in all cases" in Section 4. *Id.* However, Section 4 removes all doubt as to what kinds of "cases" it is talking about: criminal cases. The full language reads: "Electors shall in all cases, *except treason, felony, or breach of the peace,* be privileged from arrest . . . ." There can be no doubt

that "all cases" does not refer to "all forms of voting," but rather all cases of criminal conduct—except for the enumerated exceptions which Appellants' omit from their quotation of Section 4 when making this argument. *See* Br. at 40.

Appellants' argument with respect to Article VII, Section 5 fares no better. Again, Appellants are essentially arguing that Arizona's early vote system has made it too easy for military service members to vote—and rendered the protections against election day military duty "without purpose." While both federal and Arizona laws have made voting very accessible for military service members, there undoubtedly remain service members who vote in-person on election day; Article VII, Section 5 remains to protect those service members from being called away unexpectedly "on the day of an election."

On top of Appellants' flawed constitutional interpretation, they are not even capable of maintaining a consistent reading of "at the polls" in their own suit. Without explanation, Appellants have "limit[ed] their challenge to the post-1991 system and not all absentee voting." Br. at 8. Yet, Appellants openly admit that absentee ballots under the pre-1991 system "were still not cast 'at the polls.'" Br. at 6. There is no conceivable

reason why the phrase "at the polls" or "at the next election" would have a different meaning when applied to the post-1991 system and the pre-1991 system; nor is there explanation from Appellants as to why their vision of the Australian Ballot System must be strictly adhered to, with the exception of pre-1991 absentee voting. This, alone, is fatal to their proposed constitutional interpretation.

E. Appellants' radical interpretation would violate other constitutional provisions that protect the fundamental right to vote.

Appellants' insistence that the Arizona Constitution "requires voting in person," rendering unlawful all forms of absentee voting or voting on any day other than election day, Br. at 29, also cannot be squared with the express protections for the right to vote in Arizona's free elections clause, *see* Ariz. Const. art. II, § 21, nor can it be applied consistently with protections for voting rights provided by the Arizona Constitution's equal protection clause. Yet, longstanding rules of construction require that these provisions be "read as a whole, and give[n] meaningful operation to each part in harmony with the others." *State v. Lee*, 226 Ariz. 234, 238 ¶ 11 (App. 2011). Simply put, the Arizona

Constitution cannot mean—consistent with its other provisions (or the federal constitution)—what Appellants say it means.

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

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). Consistent with that principle, "laws should be construed so as to uphold and sustain the citizen's right to vote" because "this privilege should be encouraged and not discouraged." *Abbey v. Green*, 28 Ariz. 53, 72 (1925). Central to these protections is the idea that "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot." *Chavez v. Brewer*, 222 Ariz. 309, 319–20 ¶ 33 (App. 2009). As a result,

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

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

Against the backdrop of robust protections for the right to vote, Appellants forward an alarming interpretation: that the Arizona Constitution requires the invalidation of the early voting system upon which 90% of voters relied in the last statewide general election. Though Appellants have "limit[ed] their challenge to the post-1991 system and

not all absentee voting," Br. at 8, there is no conceivable explanation for why their *constitutional* interpretation would not prohibit all absentee voting. Indeed, Appellants admit that the pre-1991 system conflicts with their own interpretation of "at the polls." Br. at 6. The pre-1991 system also conflicts with Appellants' supposed elements of the Australian ballot system. Even putting Appellants' inconsistencies aside, their Frankenstein Constitution would result in differential treatment that would raise equal protection concerns. *See Obama for Am. v. Husted*, 697 F.3d 423, 434–36 (6th Cir. 2012).

If this Court were to agree with Appellants' interpretation that the Constitution affirmatively prohibits the Legislature from enacting voting methods that are not in-person or are not consistent with all four supposed elements of the Australian Ballot system, it would revoke the Legislature's authority to allow *anyone* to vote absentee.[3] This would

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

create the nation's most extreme voting policy—one that deprives every Arizonan of the right to vote absentee, even when such deprivation will result in the effective loss of a fundamental right. *See Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, Nat'l Conf. of State Legislatures. (Feb. 17, 2022) https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (all 50 states currently have some form of absentee voting—26 with no-excuse, 8 with all-mail elections, and 16 with excuse-required absentee voting). The consequences of the relief Appellants seek are far more grievous than they acknowledge.

The Legislature's present and past early voting schemes are and were constitutional because the Arizona Constitution does not prohibit the Legislature from acting in this area. In fact, the Constitution grants the Legislature authority to pass laws regarding the method of elections. Ariz. Const. art. VII, § 1. But even absent such explicit authorization, A.R.S. § 16-541 *et seq.* remains constitutional because "the rule of construction which requires the finding of express authorization [for

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offer absentee voting for these voters in elections other than for federal office.

legislation] is inappropriate when applied to the Constitution of the State of Arizona." *Earhart*, 65 Ariz. at 224. To strike down legislation, Petitioners must show that the Constitution specifically *prohibits* its enactment. Here, all Petitioners can muster are a few ancillary references from Articles IV and VII that do not in any way speak to early voting.

F. Appellants lack standing.

The Superior Court ruled that Appellants have standing because, if their arguments are true, Appellants "would have to continue to participate in an unconstitutional system." IR 61 at 2. But this describes a textbook generalized "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). This Court may affirm "for any reason apparent in the record." *Forszt v. Rodriguez*, 212 Ariz. 263, 265 ¶ 9 (App. 2006). Appellants' lack of standing provides yet another reason to find Appellants are not entitled to any relief.

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). To establish standing, Appellants 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 (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.

Appellant Kelli Ward cannot support standing with her two allegations below: (1) that she is a citizen and a voter, IR 1 at ¶ 38; or (2) that she is an Arizona taxpayer. Simply being a voter or taxpayer, on its own and without any allegations of harm direct and individualized to her, is insufficient for standing. Ms. Ward has not alleged that she was forced to vote early or that she has been unable to vote in secret. And any impact on public expenditures would only be incidental to her claims, which is "too remote to support taxpayer standing." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 525 (2021).

Similarly, the AZ GOP's allegations cannot support standing. Below, Appellant AZ GOP made three arguments: *First*, that AZ GOP is burdened by its efforts to monitor early voting. IR 1 at ¶ 39. *Second*, it conducts primaries under Arizona law. *Id.* ¶ 40. *Third*, it argues it 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. In terms of monitoring burdens, AZ GOP does not explain how they constitute a harm or how they will be remedied by the relief requested: AZ GOP's complaint fails to mention that there are parallel monitoring and ballot challenge regimes for in-person voting. *See* A.R.S. §§ 16-621 and 16-590. The fact that AZ GOP's primaries follow Arizona law nothing more than a generalized grievance; and AZ GOP's members do not generate standing for all the same reasons that Appellant Ward does not have standing—there are no credible allegations that they are actually harmed in any cognizable way by early voting. Indeed, neither Appellant alleges that it or any of its members has been unable to vote in secret. There is no injury.

II. The trial court properly denied preliminary relief.

For the reasons discussed above, none of Appellants' arguments have merit as a matter of law, and the case should end there. But in the event this Court were to reach the question, the superior court did not abuse its discretion in denying Appellants' motion for a preliminary injunction. Each of the other preliminary injunction factors weigh decidedly against usurping 30 years of practice three months before a general election. The superior court's denial of preliminary relief should accordingly be affirmed on those grounds as well.

A. Standard of review.

The denial of a preliminary injunction is reviewed for an abuse of discretion. *Fann*, 251 Ariz. at 432 ¶ 15. As the Arizona Supreme Court recently reiterated, a party seeking a preliminary injunction bears the burden of demonstrating the following factors: "(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. *Id.* ¶ 16. An injunction like the one Appellants seek here, which "goes beyond simply maintaining the status quo pending a trial on the

merits," is not favored. *Shoen*, 167 Ariz. at 63. A court commits an abuse of discretion in ruling on a motion for preliminary injunction when it "clearly err[s] in finding the facts or applying them to the legal criteria for granting an injunction[.]" *Fann*, 251 Ariz. at 432 ¶ 15 (quoting *Shoen*, 167 Ariz. at 62 (quotation marks omitted)).

B. Appellants argue for a standard that does not apply.

The superior court correctly applied the standard applicable to preliminary injunctions. *See* IR 61 at 2 (applying four factor test for preliminary injunction and finding no likelihood of success on the merits). This standard governs 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).

Appellants' reliance on *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58 (2020) (in division), is misplaced. Unlike here, the plaintiffs in that case filed a petition for special action seeking mandamus relief ordering 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 preliminary injunctive relief once they established that an official acted contrary to a definite and immediate legal duty. *See id.* at 64 ¶ 26. Here, Appellants seek not to conform official conduct to existing law, but to displace that law entirely based on unfounded constitutional claims. Because Appellants seek preliminary injunctive relief rather than mandamus, the superior court properly applied the preliminary injunction standard, as the Arizona Supreme Court did in *Fann*.[4]

C. Appellants fail to satisfy the standard required for a preliminary injunction.

[4] Notably, even under Appellant's misapplied mandamus standard, courts must employ the four-factor test for injunctive relief unless plaintiff has shown a likelihood of success on the merits, which Appellant here has failed to do. *Id.* ("in actions to enjoin continued violations of federal statutes, *once a movant establishes the likelihood of prevailing on the merits*, irreparable harm to the public is presumed[.]" (*quoting Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 427 (E.D. Mo. 1985)) (emphasis added)).

Applying the correct standard, it is clear that the superior court's denial of Appellant's request for a preliminary injunction should be affirmed. In *Shoen*, this Court explained that in evaluating a request for preliminary injunction, "[t]he critical element in this analysis is the relative hardship to the parties. To meet this burden, the moving party may establish 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 tip sharply in his favor." 167 Ariz. 58, at 63 (citation and quotation marks omitted). Appellants are unable to establish either of the above and therefore unable to meet their burden.

First, as the trial court found, and as explained in detail above, Appellants are unlikely to succeed on the merits. *See* IR 61 at 2. Second, the balance of hardships tips sharply against Appellants, as it is Intervenors and Arizona voters that would suffer immeasurable prejudice if the requested relief were granted. As Appellants acknowledge, Arizona adopted its current, no-excuse early voting system in 1991. Arizona's election administration system is now organized and budgeted around the long-settled expectation that the vast majority 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. The request Appellants seek would upend that system less than three months before a federal election, leaving Arizona election administrators without sufficient time or resources to secure the thousands of additional polling locations, staff, and materials necessary to accommodate so many in-person voters. Under these circumstances, the public interest strongly disfavors Appellants' requested relief.

Because Appellants are unlikely to succeed on the merits of their claims and because the balance of hardships favors Defendant-Appellees, the Superior Court's denial of a preliminary injunction should be affirmed.

CONCLUSION

In their complaint, Appellants insisted that there were no partisan designs behind their suit. IR 1 at 3. Now, Appellants openly acknowledge that opposition to no-excuse mail-in voting is a Republican policy preference. Br. at 52. In other words, this is a partisan lawsuit with partisan aims, meant to make it harder for Arizonans to access the ballot and make their voices heard in the state's elections. As explained above, neither Appellants' strained legal theories nor the Arizona Constitution

provide a legitimate basis to prohibit early voting. The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of August, 2022.

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