IN THE SUPREME COURT

STATE OF ARIZONA

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

Plaintiffs/Appellants/Petitioners,

v.

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

Arizona Supreme Court
No. CV-23-0018-PR

Arizona Court of Appeals,
Division One
No. 1-CA-CV-22-0388

Superior Court of Arizona,
Maricopa County
No. CV-2022-00594

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

Defendants/Appellees/ Respondents

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

Defendant Intervenors/Appellees/ Respondents

RESPONSE TO PETITION FOR REVIEW

Craig A. Morgan (AZ Bar No. 023373)
Shayna Stuart (AZ Bar No. 034819)
Jake T. Rapp (AZ Bar No. 036208)
SHERMAN & HOWARD L.L.C.
2555 East Camelback Road, Suite 1050
Phoenix, Arizona 85016
Telephone: (602) 240-3000
Facsimile: (602) 240-6600
CMorgan@ShermanHoward.com
Attorneys for Defendant/Appellee/Respondent Adrian Fontes

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I. INTRODUCTION

This case involves a failed challenge to Arizona's no-excuse mail-in voting statutes (A.R.S. §§ 16-541 through -552) – a system that has been implemented, and in place, for over three decades – on the flimsy basis that it violates the ballot secrecy clause in Article VII, Section 1 of Arizona's Constitution.

Now, Petitioners seek review from this Court. Petitioners argue review is warranted because: (1) hypothetical situations that did not arise here, but perhaps may arise someday, might cause someone to not vote secretly; (2) this Court has never opined on this issue before, so it should do so here despite the absence of any actual evidence of the ills Petitioners posit could come to pass; and (3) this Court should clarify whether those challenging the "facial" constitutionality of a statute must follow the "no set of circumstances" rule to state a claim.

This Court should decline review for several reasons. First, the statutes that prescribe no-excuse mail-in voting in Arizona are time-tested, secure, and facially constitutional.

Second, Petitioners' complaints of speculative hypothetical scenarios whereby ballot secrecy could be infringed cannot render Arizona's no-excuse mail-in voting statutes unconstitutional, let alone justify this Court rendering what would amount to an advisory opinion concerning scenarios not actually before this Court.

Third, this Court need not grant review to address the appropriate standard for facially challenging the constitutionality of a statute, because that standard is well settled in Arizona and the record on appeal presents no reason to deviate from or alter that standard.

Accordingly, for the reasons that follow, this Court should deny the Petition and decline review.

II. BACKGROUND

A. ARIZONA'S EARLY MAIL-IN VOTING STATUTES WERE ENACTED OVER THREE DECADES AGO IN 1991

While some form of absentee voting has been in place in Arizona for over a century, Arizona's present system of no-excuse mail-in voting for all Arizonans has been codified since 1991. *See* 1991 Ariz. Sess. Laws, ch. 51, § 1. And those statutes carefully protect ballot secrecy. For example, A.R.S. § 16-548(A) states in part:

> The early voter shall make and sign the affidavit and shall then mark his ballot in such a manner that his vote *cannot be seen*. The early voter shall fold the ballot, if a paper ballot, *so as to conceal the vote* and deposit the voted ballot in the envelope provided for that purpose, which shall be *securely sealed* and, together with the affidavit, delivered or mailed to the county recorder or other officer in charge of elections of the political subdivision in which the elector is registered or deposited by the voter or the voter's agent at any polling place in the county. ….

(Emphasis added). A.R.S. § 16-545(B)(2) requires an election officer to "[e]nsure that the 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." (Emphasis added). A.R.S. § 16-552(F) mandates that, when a voted mail-in early ballot is received, after verifying the eligibility of the voter to cast the enclosed ballot via the information provided on the outside of the envelope, election officials must remove a voted mail-in ballot from the secure envelope without unfolding or reviewing the ballot. This process ensures the ballot secrecy that voters who voluntarily vote by mail-in ballot are entitled to. And the law provides various criminal penalties for those who interfere with the sanctity or secrecy of early-voted ballots. *See* A.R.S. §§ 16-1003; -1005; -1006(A); -1016(9), (11); -1017(6); -1018(4), (5), (8), (9).

B. PETITIONERS FILE A SPECIAL ACTION IN 2022

In February 2022, Petitioners filed a special action petition with this Court, challenging Arizona's no-excuse mail-in voting laws as unconstitutional in violation of the ballot secrecy clause in Article VII, Section 1 of Arizona's Constitution. Index of Record ("IR") at 1(Verified Complaint at ¶¶ 24-26). This Court declined review without prejudice. IR 1(Verified Complaint at ¶ 26). Six weeks later, Petitioners filed this action in the Superior Court of Arizona, Mohave County, seeking a preliminary injunction preventing the Respondents from enforcing Arizona's early voting statutes in the 2022 general election. IR at 1.

The superior court consolidated the preliminary injunction hearing with the

trial on the merits pursuant to Arizona Rule of Civil Procedure 65(a)(2)(A). IR at 65. After briefing and oral argument, the superior court entered a final judgment denying Petitioners the relief sought, and dismissing the action with prejudice, on the basis that Petitioners' claims failed because Arizona's no-excuse mail-in voting statutes do not violate the Secrecy Clause. IR at 63 (Court Order/Notice/Ruling), 65 (Judgment).

Petitioners timely appealed to the court of appeals, which affirmed the superior court, holding:

> Arizona's mail-in voting statutes ensure that voters fill out their ballot in a manner that does not disclose their vote and that voters' choices are not later revealed. The superior court did not err in finding that these protections are sufficient to preserve secrecy in voting.

Ariz. Republican Party et al. v. Fontes, et al., Case No. 1 CA-CV 22-0388, ¶ 31 (App. 2023).[1]

III. ISSUES FOR REVIEW

Secretary Fontes has no additional issues for this Court's review in the event it grants the Petition.

IV. THE REASONS WHY THIS COURT SHOULD DECLINE REVIEW

Again, this Court should decline review for three reasons. First, Arizona's early voting statutes are facially constitutional. Second, Petitioners' concerns of

[1] A copy of this decision can be accessed here: https://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2023/1%20CA-CV%2022-0388%20AZ%20Republican%20Party.pdf (Mar. 15, 2023).

anti-secrecy and intimidation are merely hypothetical, and this Court should continue to refrain from issuing advisory opinions about hypothetical situations. Third, on the record before this Court, there is no reason for it to accept review in order to clarify or address the well-settled standard for making a constitutional challenge to the facial validity of a statute.

A. ARIZONA'S EARLY VOTING STATUTES ARE FACIALLY CONSTITUTIONAL

Arizona's Constitution "does not grant power, but instead limits the exercise and scope of legislative authority", meaning that the Legislature has absolute power to act unless our Constitution expressly states otherwise. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶ 13 (2013); *see also* Ariz. Const. art. 2, § 33 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people."); *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26 (2009) ("The legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution."); *Earhart v. Frohmiller*, 65 Ariz. 221, 224 (1947) (holding that the Legislature "may pass any act" not "inhibited" by the Constitution).

Article II, Section 21 of Arizona's Constitution states that "[a]ll elections shall be free and equal, and no power … shall at any time interfere to prevent the free exercise of the right of suffrage." Article VII, Section 1 of Arizona's Constitution states that "[a]ll elections by the people shall be by ballot, *or by such*

other method as may be prescribed by law; [p]rovided, that secrecy in voting shall be preserved." (Emphasis added). These provisions neither prohibit early or mail-in voting nor mandate only in-person voting. Rather, these provisions ensure the right to a secret ballot while leaving the precise *methods* of voting, whether in-person or by mail, to the People's discretion. This conclusion is manifest from the unambiguous text of our Constitution, which is the best evidence of the framer's intent. *See State v. Mixton*, 250 Ariz. 282, 289 ¶ 28 (2021).

Arizona's Legislature exercised that discretion over three decades ago by adopting early mail-in voting laws that constitutionally preserve secrecy in voting. *See* A.R.S. §§ 16-541, -545(B)(2) (early ballot envelopes must conceal the ballot and be tamper-evident), -548(A) (requiring voters to conceal their votes and fold their voted early ballot so it cannot be seen), -552(F) (requiring election officials to remove voted ballot from envelope without unfolding or reviewing it); *see also* A.R.S. §§ 16-1003; -1005; -1006(A); -1016(9), (11); -1017(6); -1018(4), (5), (8), (9) (criminalizing certain conduct related to ballots). Arizona's no-excuse mail-in voting statutes guarantee that all elections in Arizona are free and equal, and preserve secrecy when voting an early ballot. Our Constitution, which leaves with the People the right to decide the methods of voting (early by mail or otherwise), requires nothing more.

Accordingly, the plain text of the constitutional provisions at issue both

support the court of appeals' decision and belie the need for this Court's review.

B. NONE OF PETITIONERS' HYPOTHETICAL CONCERNS COMPEL REVIEW

This Court should be hesitant to issue what amounts to an advisory opinion declaring rights in hypothetical situations not actually before this Court. *See Moore v. Bolin*, 70 Ariz. 354, 357 (1950) (quoting 16 C.J.S. Constitutional Law, § 94, p. 211); *see also Isbell v Miller*, 165 Ariz. 199, 202 (App. 1990) ("Isbell also presents to us several hypothetical examples under which section 28-694 would be unconstitutional. We cannot construe section 28-694 as unconstitutional based on hypothetical examples which do not apply to this case."); *Babbitt v. Asta*, 25 Ariz. App. 547, 549 (1976) (holding "it is not within the power of this court to construe a statute on the basis of hypothetical conditions that have not yet occurred. Appellees' concerns, though clearly valid, are better addressed to the legislature than to us.").

To justify review, Petitioners proffer several hypothetical scenarios having no support in the record on appeal. For example, Petitioners conclude Arizona's early voting statutes "fail to preserve secrecy, meaning that voters can still be coerced, intimidated, or bribed to vote a certain way," but Petitioners fail to identify those portions of the record establishing the existence of this hypothetical situation. *See* Pet. at 2; *see also* Ariz. R. Civ. App. P. 23(d)(2) (evidentiary matters must include a reference to the record where the evidence appears). Petitioners

conclude, through citing hearsay, that "many voters purported to experience intimidation while dropping off their ballots at unmonitored drop boxes during the 2022 General Election." Pet. at 6. But again, Petitioners fail to cite any evidence in the record supporting this assertion, and resorting to hearsay to assert an injury no Petitioner actually claims to have suffered is as inappropriate as it is insufficient to warrant this Court's review. *See* Ariz. R. Civ. App. P. 23(d)(2).[2] Similarly, Petitioners generalize that Arizona voters may "face" the "evils" of intimidation, coercion, and bribery, "are simply unable to protect themselves," and can only freely vote outside a system that permits mail-in voting. Pet. at 10. But there is likewise no direction to those portions of the record supporting such generalizations. *See* Ariz. R. Civ. App. P. 23(d)(2).

At bottom, these hypotheticals are just that: hypothetical. This Court should refrain from adjudicating the constitutionality of a statutory scheme that has been in place for over three decades based on hypothetical "facts," because doing so would be tantamount to issuing an advisory opinion (an invitation which this Court

[2] Petitioners argue "this type of intimidation does not and cannot occur at polling places …." Pet. at 6. This is because of laws that have been passed criminalizing such conduct. And these laws are no different than the laws passed that secure early voting ballots and criminalize acts that interfere with voter secrecy. In both instances laws exist to protect voters in accordance with our Constitution. Petitioners' argument only highlights the reality that (1) these powers related to the manner of voting are reserved to the People, and (2) like those laws protecting people at the polls for in-person voting, Arizona's no-excuse mail-in voting statutes adequately protect ballot secrecy.

should continue to be reluctant to accept).

C. THERE IS NO REASON TO CLARIFY OR ADDRESS THE APPROPRIATE STANDARD OF CONSTITUTIONAL REVIEW WHEN ADDRESSING THE FACIAL VALIDITY OF A STATUTE

In Arizona:

> "To succeed on a facial challenge, ... 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" *State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), petition for cert. docketed, No. 18-391 (U.S. Sept. 27, 2018).

Stanwitz v. Reagan, 245 Ariz. 344, 349, ¶ 19 (2018), as amended (Nov. 27, 2018) (rejecting facial challenge).

Facial challenges, however, are disfavored, because they often rest on speculation and run contrary to the principle of judicial restraint compelling courts to neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied". *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (citations omitted). Hence the long-standing exacting standard to mount a successful constitutional challenge to the facial validity of a statute.

Petitioners argue that this Court should "grant review to determine whether the court of appeals erred in its determination that [Petitioners] are required to

establish no set of circumstances exists under which mail-in voting statutes would be valid to succeed on [Plaintiffs'] facial challenge." Pet. at 9. Unable to articulate a good reason to disregard the well-settled standard by which our courts determine facial constitutionality, Petitioners try to recast that standard as akin to a "presumption of constitutionality" and invoke the concurrence in *State v. Arevalo*, 249 Ariz. 370, 378-82 (2020) (Bolick, Pelander, J.J., concurring), as compelling review. *See* Pet. at 9. However, under careful analysis, Petitioners' position falters.

The legal standard for ascertaining whether a statute is facially unconstitutional co-exists *independently* from any presumption of constitutionality (whether such a presumption is prudent or not). One can engage in a facial constitutionality analysis without presuming the statute at issue is constitutional. Indeed, the separate test for facial unconstitutionality nowhere requires a court to presume anything about the constitutionality of the statute at issue. All a court must ascertain is whether a challenger has proven no set of circumstances exists under which the statute would be valid. This standard remains the appropriate standard by which to judge a facial challenge to a statute's constitutionality.

The concurrence in *Arevalo* seems to agree with this proposition, because while they would not adopt a presumption of constitutionality, they otherwise "join fully the Court's well-reasoned opinion," which includes the proclamation that "[a] party raising a facial challenge to a statute must establish that no set of

circumstances exists under which the Act would be valid." *Arevalo*, 249 Ariz. at 373 ¶ 10, 378 ¶ 29 (Bolick, Pelander, J.J., concurring). The concurrence also recognized that:

> … as a matter of statutory interpretation, we should whenever possible avoid constructions that would render the legislature's handiwork unconstitutional. … More specifically, we should avoid interpreting a statute in a way that places its constitutionality in doubt.

Id. at 380, ¶ 41 (Bolick, Pelander, J.J., concurring). Our long standing facial validity analysis, which is nothing more than a manner of statutory interpretation tinged with constitutional color, is compatible with these principles. After all, "interpreting statutes to avoid constitutional problems when an equally plausible interpretation presents itself is different, by order of magnitude, from a presumption that a statute is constitutional." *Id*. at 381, ¶ 42 (Bolick, Pelander, J.J., concurring). And the test to determine facial unconstitutionality is nothing more than one of statutory interpretation easily separated and employed without being confined by the constitutional presumption that concerns this Court's concurrence in *Arevalo*.

In the end, the court of appeals got it right under the facts at bar. A plain reading of our Constitution and our no-excuse mail-in voting statutes compels but one conclusion: regulating the manner of voting by mail is our Legislature's prerogative, the laws doing so adequately protect ballot secrecy, and these constitutional and statutory provisions do not conflict.

V. CONCLUSION

For the foregoing reasons, Secretary Fontes respectfully requests this Court deny the Petition and decline review.

RESPECTFULLY SUBMITTED: March 16, 2023.

SHERMAN & HOWARD L.L.C.

By: */s/ Craig A. Morgan*
Craig A. Morgan (AZ Bar No. 023373)
Shayna Stuart (AZ Bar No. 034819)
Jake T. Rapp (AZ Bar No. 036208)
2555 East Camelback Road, Suite 1050
Phoenix, Arizona 85016
Telephone: (602) 240-3000
Facsimile: (602) 240-6600
CMorgan@ShermanHoward.com
SStuart@ShermanHoward.com
JRapp@ShermanHoward.com
Attorneys for
Defendant/Appellee/Respondent
Adrian Fontes