

ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, et al.;	No. CV-23-0018-PR
Plaintiffs/Appellants,	No. 1 CA-CV-22-0388
vs.	Mohave County Superior Court
ADRIAN FONTES, et al.;	No. S8015CV-2022-00594
Defendants/Appellees.	

RESPONSE TO PETITION FOR REVIEW OF THE COCONINO, GILA, GRAHAM, GREENLEE, LA PAZ, MARICOPA, NAVAJO, AND PIMA COUNTY RECORDER APPELLEES

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Table of Contents

Table of Contents	2
Table of Authorities	3
Introduction	5
Issue Decided by the Court of Appeals	6
Statement of Material Facts	6
Reasons the Petition Should be Denied	8
I. The Court of Appeals properly affirmed the superior court’s dismissal of the Party’s complaint because vote-by-mail does not conflict with the Arizona Constitution.	8
A. Article 7, § 1 of the Arizona Constitution authorizes the legislature’s 1991 expansion of vote-by-mail.....	8
B. The Party’s arguments lack merit.....	12
Conclusion	13

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Table of Authorities

Cases

<i>Adams v. Bolin</i> , 74 Ariz. 269 (1952).....	8, 11
<i>Cave Creek Unified Sch. Dist. v. Ducey</i> , 233 Ariz. 1 (2013).....	9
<i>Earhart v. Frohmler</i> , 65 Ariz. 221 (1947).....	9, 11, 12
<i>Jett v. City of Tucson</i> , 180 Ariz. 115 (1994).....	8, 9
<i>Johnson Utilities, L.L.C. v. Ariz. Corp. Comm’n</i> , 249 Ariz. 215 (2020).....	11
<i>Kotterman v. Killian</i> , 193 Ariz. 273 (1999).....	9, 12
<i>Miller v. Picacho Elem. Sch. Dist. No. 33</i> , 179 Ariz. 178 (1994).....	11
<i>Pacuilla v. Cochise Cnty. Bd. of Sup’rs</i> , 186 Ariz. 367 (1996).....	10
<i>State ex rel. La Prade v. Cox</i> , 43 Ariz. 174 (1934).....	9
<i>State v. Arevalo</i> , 249 Ariz. 370 (2020).....	10
<i>State v. Ault</i> , 150 Ariz. 459 (1986).....	13

Statutes

Ariz. Const. art. 2, § 8.....	13
Ariz. Const. art. 7, § 1.....	<i>passim</i>

Other Authorities

A.R.S. § 16-541.....	5, 8
A.R.S. § 16-541(A).....	5
A.R.S. § 16-545(B)(2).....	11
A.R.S. § 16-548(A).....	11

A.R.S. § 16-552.....5, 8
A.R.S. § 16-552(F).....11

Constitutional Provisions

1918 Ariz. Sess. Laws ch. 117
1921 Ariz. Sess. Laws ch. 1177
1925 Ariz. Sess. Laws ch. 757
1953 Ariz. Sess. Laws ch. 768
1955 Ariz. Sess. Laws ch. 598
1959 Ariz. Sess. Laws ch. 1077
1968 Ariz. Sess. Laws ch. 178
1970 Ariz. Sess. Laws ch. 1518
1991 Ariz. Sess. Laws, ch. 51, § 15, 8
1997 Ariz. Sess. Laws ch. 58

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Introduction

Petitioners the Arizona Republican Party and Kelli Ward (collectively, “the Party”) seek this Court’s review of their challenge to the Arizona legislature’s no-excuse, early voting laws that allow “[a]ny qualified elector [to] vote by early ballot.” *See* A.R.S. § 16-541(A). The legislature enacted this law over thirty years ago. *See* 1991 Ariz. Sess. Laws, ch. 51, § 1. Under the statutory scheme, any voter who requests an early ballot may vote in person during the twenty-seven days before an election or by delivering or mailing their ballot to election officials. *See* §§ 16-541 through 16-552. Relevant to this appeal, this Response¹ refers to this method of voting as “vote-by-mail.”

With this litigation, the Party seeks to overturn thirty years of successful vote-by-mail because—it claimed below—Article 7, § 1 of the Arizona Constitution mandates the “Australian ballot system” and its “four essential elements.” (*See, e.g.*, Opening Brief (“O.B.”) at 5, 20, *available at* Party’s APP00012–75.) But Article 7, § 1 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.” It

¹ This Response is filed by Appellees Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Navajo, and Pima County Recorders, represented by Maricopa County Attorney Rachel Mitchell and her Deputy County Attorneys. Those same attorneys also represent Appellees Apache, Cochise, Pinal, Santa Cruz, and Yuma County Recorders, who are nominal, results-only appellees and take no position on appeal. Outside counsel Emily Craiger of The Burgess Law Group also represents Appellee Maricopa County Recorder.

does not mandate any particular method of voting—let alone the “Australian ballot system” or its elements. Indeed, it expressly grants the legislature authority to “prescribe[] by law” the “method” of voting, and nothing else in our Constitution prohibits vote-by-mail. The Party’s arguments fail as a matter of law.

Because the Court of Appeals properly concluded in an unpublished memorandum decision that the Arizona Constitution does not prohibit the current system of vote-by-mail, this Court should deny the Petition.

Issue Decided by the Court of Appeals

1. Under Article 7, § 1 of the Arizona Constitution, “[a]ll 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.” Neither this provision, nor any other provision of the Constitution, mandates the “Australian ballot” or its elements. Did the Court of Appeals err when it concluded the Constitution thus permits the current system of vote-by-mail?

Statement of Material Facts

Almost immediately after Arizona’s founding, in the midst of the First World War, the legislature adopted vote-by-mail for “all qualified electors, in war time or after peace, in the actual military or naval establishments of this State, or of the United States in any capacity as defined by Congress, and by reason thereof absent

from the State on any election day.” *See* 1918 Ariz. Sess. Laws ch. 11, § 1.² The 1918 act provided detailed instructions for handling the ballot, including the use of a “blue envelope” to maintain secrecy. *Id.*, § 5. The act further specified that “[n]o one has any right to see or know how the voter cast his ballot.” *Id.*, § 6. And it admonished election officials: “the Board shall proceed so as to protect the absolute secrecy of the ballot.” *Id.*, § 7.

In 1921, the legislature expanded absentee voting to “[a]ny qualified elector of this State having complied with the laws in regard to registration, who is absent from the county of which he is an elector on the day of holding any general election.” 1921 Ariz. Sess. Laws ch. 117, § 1. The law provided instructions for marking and folding the ballot “so as to conceal the vote.” *Id.*, § 7.

In 1925, the legislature again expanded this provision, extending it to “[a]ny qualified elector of this State . . . who furnishes the County Recorder with a doctor’s certificate that he or she will not, because of physical disability, be able to go to the polls.” 1925 Ariz. Sess. Laws ch. 75, § 1. The legislature maintained the instructions for marking and folding the ballot “so as to conceal the vote.” *Id.*, § 7. Along these lines, the legislature would later remove the “doctor’s certificate” requirement for a

² Relatedly, the legislature later expanded early voting to cover an absentee voter “in the United States service,” meaning “[m]embers of the armed forces while in the active service” and “[m]embers of the merchant marine of the United States while in the active service.” 1959 Ariz. Sess. Laws ch. 107, § 2.

“disabled voter” and then expand absentee voting to voters with a “visual defect.”

1955 Ariz. Sess. Laws ch. 59; 1968 Ariz. Sess. Laws ch. 17.

In 1953, the legislature expanded absentee voting to “[a] person who on account of the tenets of his religion cannot attend the polls on the day of a general, primary, or special election.” 1953 Ariz. Sess. Laws ch. 76, § 1. And in 1970, it extended the law’s application to cover voters “sixty-five years of age or older.” 1970 Ariz. Sess. Laws ch. 151, § 79.

In 1991, the legislature made its final expansion: “[a]ny qualified elector may vote by absentee ballot.” *See* 1991 Ariz. Sess. Laws ch. 51, § 1; *see also* 1997 Ariz. Sess. Laws ch. 5, § 17 (changing terminology from “absentee ballot” to “early ballot”). Today, the vote-by-mail statutes are codified at §§ 16-541 through 16-552.

Reasons the Petition Should be Denied

I. The Court of Appeals properly affirmed the superior court’s dismissal of the Party’s complaint because vote-by-mail does not conflict with the Arizona Constitution.

A. Article 7, § 1 of the Arizona Constitution authorizes the legislature’s 1991 expansion of vote-by-mail.

This Court’s “primary purpose” in constitutional interpretation “is to effectuate the intent of those who framed the provision.” *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994). It therefore starts (and often ends) with “the plain language.” *See id.* Constitutional provisions mean what they say, and this Court will not read words into a provision. *See Adams v. Bolin*, 74 Ariz. 269, 273 (1952).

Consistent with these principles, litigants cannot contort the Constitution's terms "by technical rules of grammar." *State ex rel. La Prade v. Cox*, 43 Ariz. 174, 177–78 (1934). Nor can litigants rely on any "extrinsic matter . . . to support a construction that would vary its apparent meaning." *Jett*, 180 Ariz. at 119. Only "where necessary" does this Court resort to "history in an attempt to determine the framers' intent." *Kotterman v. Killian*, 193 Ariz. 273, 288, ¶ 54 (1999).

When a litigant claims that election legislation is at odds with the Constitution, the litigant must overcome additional hurdles that favor the legislation's constitutionality. *See Kotterman*, 193 Ariz. at 284, ¶ 31 ("We resolve all uncertainties in favor of constitutionality."). This Court presumes the statutory scheme's constitutionality. *Earhart v. Frohmler*, 65 Ariz. 221, 224–25 (1947). That presumption follows the principle that, unlike its federal counterpart, the Arizona Constitution permits the legislature to pass any act that is not "clearly prohibited" by the Constitution's plain language. *See id.* This Court also presumes that "the legislature acted with full knowledge of relevant constitutional provisions." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5, ¶ 11 (2013). Moreover, "[a] party raising a facial challenge to a statute must establish that no set of circumstances exists under which the [a]ct would be valid." *State v. Arevalo*, 249 Ariz. 370, 373, ¶

10 (2020) (internal quotation marks omitted).³ And this Court “must exercise restraint when interpreting constitutional and statutory provisions relating to election matters before imposing unreasonable restrictions on the right to participate in the legislative process.” *See Pacuilla v. Cochise Cnty. Bd. of Sup’rs*, 186 Ariz. 367, 368 (1996) (cleaned up).

With these background principles in place, the Party’s challenge to the vote-by-mail statutory scheme fails. Begin with the text of Article 7, § 1: “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.” It simply does not, as the Party claims, mandate the Australian ballot system. It makes no mention of the “Australian ballot.” The absence of an explicit description of how Arizonans will vote under Article 7, § 1 ends the matter. *See Adams*, 74 Ariz. at 273 (“Nothing is more firmly settled than under ordinary circumstances, where there is no ambiguity or absurdity, a statutory or constitutional provision requires no interpretation.”).

But taking the analysis one step further, the plain text of Article 7, § 1 *supports* the Arizona Legislature’s 1991 expansion of vote-by-mail. Specifically, Article 7,

³ The Petition also relies on the concurrence in *Arevalo* to seek review of the presumption of constitutionality. (*See* Pet. Rev. at 9–11.) This reliance is misplaced. This litigation does not implicate the central concern raised by the concurrence: “that our constitutions are intended primarily not to shelter government power, but to protect *individual liberty*.” *Arevalo*, 249 Ariz. at 378, ¶ 30 (emphasis added) (Bolick, J., concurring).

§ 1 states that “[a]ll elections by the people shall be by ballot, or by such other method *as may be prescribed by law*[.]” (Emphasis added). Arizona’s courts have consistently interpreted the phrase “as may be prescribed by law” to give the legislature express authority to act. *See Johnson Utilities, L.L.C. v. Ariz. Corp. Comm’n*, 249 Ariz. 215, 222–23, ¶ 29 (2020) (collecting cases). As a result, not only does Article 7, § 1 fail to “clearly prohibit[]” the challenged legislation, *see Earhart*, 65 Ariz. at 224–25—it expressly authorizes the legislature to “prescribe[]” the “method” by which Arizonans vote.

To be sure, the legislature’s authority is not absolute. Article 7, § 1 contains a specific limitation: “Provided, that secrecy in voting shall be preserved.” But this limitation does not mandate the Australian ballot system. If the framers had intended that system, they would have said so. *See Adams*, 74 Ariz. at 273 (refusing to read words into a constitutional provision that “could easily have been added to the sentence”).

Further, the legislature has explicitly accounted for secrecy in the vote-by-mail statutory scheme. *See* § 16-545(B)(2); § 16-548(A); § 16-552(F); *cf. Miller v. Picacho Elem. Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994) (addressing, in *dicta*, “procedural safeguards” associated with vote-by-mail).

In sum, the plain language of Article 7, § 1 means what it says, and it does not “clearly prohibit” the Arizona Legislature’s 1991 expansion of vote-by-mail. The

Court of Appeals properly affirmed the superior court's dismissal the Party's complaint.

B. The Party's arguments lack merit.

1. Given the plain language of Article 7, § 1, the Party's dubious claims about the supposed superiority of the Australian ballot system—largely based on an irrelevant tour of Nineteenth Century U.S. history, a 2005 journal article written by two political scientists, and an inapposite U.S. Supreme Court case that addressed whether a “campaign-free-zone” at polling places violated the First Amendment—are the kinds of arguments to be evaluated by the legislature and the people, not the courts. (*See, e.g.*, O.B. at 12–24); *see also Earhart*, 65 Ariz. at 227 (“The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power.”) (quotation mark omitted). The Party's superficial (if long) gloss on history does not change the text of Article 7, § 1. *See Kotterman*, 193 Ariz. at 288, ¶ 54.

2. The Party's absolutist “Australian ballot” argument is belied by the Party's own tortured logic. The Party claims that the Arizona Constitution mandates the “Australian ballot,” and it posits that the Australian ballot has “four essential provisions”: (1) “ballots printed and distributed at public expense”; (2) “ballots containing the names of all the candidates duly nominated by law”; (3) “ballots

distributed only by election officers *at the polling place*”; and (4) “detailed provisions for physical arrangements *to ensure secrecy in casting the vote.*” (See, e.g., O.B. at 5, 20 (all emphasis in original).)

Yet the Party contends that the legislature’s pre-1991 vote-by-mail legislation passes constitutional muster because it “did not clearly compromise ‘secrecy in voting’ because it still provided for a restricted area around voters while they completed their ballots,” (O.B. at 6)—retreating from their own argument that voting must occur “*at the polling place.*” Describing the legislature’s authorization of the use of “electronic voting machines,” the Party omits the paper ballots requirement, (see O.B. at 37–38)—ignoring that the Australian ballot system is predicated on the use of ballots. And the Party fails to explain why the sanctity of a voter’s home provides less secrecy than the bustle of a polling place. Cf. Ariz. Const. art. 2, § 8 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”); *State v. Ault*, 150 Ariz. 459, 466 (1986) (explaining that Arizona’s Constitution is “specific in preserving the sanctity of homes and in creating a right of privacy”). At bottom, the Party’s motivated reasoning is no substitute for sound constitutional interpretation.

Conclusion

For these reasons, this Court should deny the Petition.

RESPECTFULLY SUBMITTED this 27th day of March 2023.

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