ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, et al., Plaintiffs/Appellants, v. KATIE HOBBS, et al., Defendants/Appellees. --- ARIZONA DEMOCRATIC PARTY, et al., Intervenors/Appellees.	No. T-22-0003-CV Court of Appeals No. 1 CA-CV-22-0388 Mohave County Superior Court No. CV-2022-00594

APPELLANTS' CONSOLIDATED REPLY IN SUPPORT OF THEIR PETITION FOR TRANSFER

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The several Respondents (Appellees and Defendants below) each oppose Petitioners' (Appellants and Plaintiffs below) Petition for Transfer—although the County Respondents do not fully object [Cnty. Resp. at 2, 6]—for essentially the same reasons: (1) they do not believe this case presents extraordinary circumstances, and (2) they do not believe *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994), needs to be overruled or qualified. Respondents also pepper their responses regarding Petitioners' request for transfer with an un unhealthy dose of hyperbole and condescension over the *merits* of Petitioners' claims. None of this is helpful; worse, however, is that it is also misleading and incorrect.

I. This case presents urgent and extraordinary circumstances of statewide importance.

When Petitioners first filed their petition for special action in this Court on February 25, 2022, the Court did not hesitate to set an expedited briefing schedule by order filed on February 28, 2022, compressing the briefing schedule to completion by March 17, 2022. [Order Directing Service and Fixing Time for Response and Reply.] And when Petitioners refiled their case in the Mohave County Superior Court on May 17, 2022, that court also did not hesitate to order an expedited hearing on the merits by order dated May 18, 2022, setting the date for the show cause hearing of June 3, 2022. Even after the County Respondents asked the court to reconsider its order to hold an expedited hearing, the court denied their request

[Ct. Order (May 27, 2022) (Ex. 1)] and made it clear to all the parties that Petitioners' case "is not about allegations of fraud in the voting process." [Ct. Order at 2 (June 6, 2022) (Ex. 2).] "It is not about politics. It is not even about whether the parties believe mail-in voting is appropriate. It is about one thing: Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting?" [*Id.* (underscore in original)]

The expedited treatment this case has warranted thus far refutes Respondents' claims that this case is not extraordinary. Indeed, the trial court easily recognized the gravity of the issues. Though it reached the wrong conclusion, the court understood that the case should be and could be decided on the merits as quickly as possible, dismissing Respondents' standing, *laches*, and *Purcell* challenges and stating that the "case can be decided on the merits based on the information the Court has received." [*Id.*]

This case presents extraordinary circumstances of statewide importance and asks for extraordinary relief because it brings to light the fact that Arizona has been conducting unconstitutional elections statewide for 30 years. The legislature has continuously expanded no-excuse mail-in voting since 1991, "further harm[ing] the integrity of elections" [IR 38 at 2] such that almost 90 percent of voting in Arizona now occurs without a shred of the "secrecy within a restricted zone" that the constitution mandates. Moreover, as the Attorney General noted, "there was a

significant increase in the use of no excuses mail-in voting in 2020 and many defects in the current system only became apparent in the 2020 election. [*Id.* at 3. *See also* IR 53 (in which Appellants addressed the same timing issues Appellees raised below).] When the framers of the Arizona Constitution mandated the legislature to preserve "secrecy in voting" in article 7, section 1, they categorically and unequivocally enshrined the Australian ballot system into the constitution, thereby restricting the legislature from adopting voting methods that do not preserve secrecy. *See* John D. Leshy, *The Arizona State Constitution* 235 (2d ed. 2013) (noting that Ariz. Const. art. 7, § 1 "adopts what was known as the 'Australian' or secret ballot"). *See also* John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 68 (1988). The legislature enacted no-excuse mail-in voting in 1991, now codified at A.R.S. § 16-541 *et. seq.*, but this system of voting does not preserve secrecy.

As Petitioners explain in their opening brief in the court of appeals, "secrecy" is not merely a private method of voting but is actually an entire system by which "***compulsory*** secrecy of voting is secured." *Australian ballot system*, Ballentine's Law Dictionary (3rd ed. 2010) (emphasis added). And U.S. Supreme Court has stated, "the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. ***The only way to preserve the secrecy of the ballot is to limit access to the area around the voter***." *Burson v. Freeman*, 504 U.S. 191, 207–08 (1992) (emphasis added). Further, to preserve

secrecy in voting, this restricted zone "was open only to election officials, two 'scrutinees' for each candidate, and electors about to vote." *Id.* at 202. Thus, the only way to limit such access is via enforcement by election officials—either at the polls or whenever else ballots are cast. But currently the casting of votes that are supposed to reflect each voter's individual choice can occur far from a "restricted zone proctored by neutral election officials, literally anywhere—at the kitchen table surrounded by spouses and family members, or the workroom lunch table surrounded by co-workers, foremen, and supervisors.

Given the statewide importance of the issues herein raised, a final resolution that can only come from this Court is necessary. No matter which way the court of appeals rules, there will be petitions filed in this Court seeking that final word. This is an extraordinary circumstance, but it is this Court that should have the final say on such an important constitutional question. Moreover, this case is well prepared for review by this Court. The transcript of the trial before the superior court runs only 93 pages for a one-day hearing.

Contrary to the Secretary's misstatement that Petitioners' "claims are part of a broader, ongoing, and pernicious effort to sow doubt about our electoral process and restrict voting rights" [Sec'y Resp. at 1], Petitioners in fact seek to restore the electoral process to its constitutional foundation such that it is impossible to coerce or influence any one vote, thus making every vote truly the free decision of each

voter—just as intended by the framers and the Australian ballot system they adopted. The Secretary is therefore also incorrect that Petitioners' "claims are legally baseless" and "threaten our democracy." [*Id.*[1]] Instead, Petitioners seek to uphold our democracy by ensuring the legislature preserves a constitutional method of voting. Moreover, Petitioners' challenge to mail-in voting is not "baseless" because it is clearly unconstitutional to deny the electorate the constitutionally mandated conditions of secrecy in the casting of a vote within the restricted zone proctored by neutral election officials as the U.S. Supreme Court in *Burson* has indicated.

The Secretary states that there is no evidence that no-excuse mail-in voting is not secure. In fact, no evidence is actually necessary, because the statutes fail to preserve secrecy *on their face*. Yet the trial court concluded otherwise, partially basing its decision on its interpretation of *Miller*, which is why Petitioners ask this Court to accept transfer of this case, not only because it presents extraordinary circumstances, but also to qualify or overrule *Miller*.

II. *Miller* should be qualified or overruled.

The trial court ruled as follows: "The statutes allowing no-excuse mail-in

[1] The Secretary also states that Petitioners brought their suit "on the eve of the 2022 elections and dragged its feet each step of the way, continuing a campaign of disinformation about Arizona's elections systems and the hardworking, bipartisan public servants who operate those systems." [*Id.* at 4.] This is simply untrue and unsupported by the record.

voting set forth procedural safeguards to prevent ballot tampering and, more importantly, to the question before this Court to maintain secrecy in voting. *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994)." [Ex. 2 at 3.] As the Intervenor Respondents note [Resp. at 5], the court *did* state that *Miller*'s reference to A.R.S § 16-545(B)(2) is *dicta*, yet the court inexplicably relied on that reference to conclude that A.R.S § 16-545(B)(2) and the other mail-in voting statutes comply with the constitution's mandate that secrecy be preserved. [*Id.*] The trial court thus clearly relied on *Miller* as if that case had held that mail-in voting statutes preserve secrecy, which they cannot do without the restricted zone of secrecy proctored by neutrals at the place of actual casting of the mail in vote. *Miller* is not authority for the constitutional question at issue, and Petitioners urge this Court—in deciding the question in *this* case—to either qualify their interpretation of *Miller* or overrule *Miller* if that case indeed holds that mail-in voting statutes preserve secrecy as required by the constitution.

III. Respondents' complaints about the timing and strategy of Petitioners' lawsuit are irrelevant to the issue of transfer.

Petitioners' have already addressed Respondents' endless complaints regarding the timing and strategy of their lawsuit *ad infinitim*. [See Pet'r Cons. Reply (Ex. 3) (filed in the court of appeals on July 7).] Regardless of whether this Court or the court of appeals can render a decision in time to affect the upcoming general

election, transfer to this Court is appropriate because—contrary to the Intervenor Respondents contention that this case is the type routinely decided by the court of appeals [Resp. at 6]—this is the type of case that requires final resolution by a court of last resort. Petitioners agree that the court of appeals is capable of addressing the question, but they disagree that allowing that court to weigh in first conserves judicial economy.

As Petitioners noted in their initial suit in this Court, a Pennsylvania appellate court recently opined on the same question, concluding that mail-in voting is unconstitutional. *See McLinko v. Commonwealth*, 270 A.3d 1243, 1247 (Pa. Commw. Ct. 2022). Nevertheless, that case was appealed to the state's highest court, where review is still pending months after oral argument was held. Petitioners wish to avoid further delay in receiving a final resolution of their claims, and Arizonans need to know whether mail-in voting is constitutional as quickly as possible so that constitutional voting may be restored sooner rather than later.

Thus, regardless of whether the timing and strategy of Petitioners' lawsuit is ideal in the eyes of Respondents, this Court should accept transfer to decide whether the Arizona Constitution mandates compulsory secrecy in the manner the framers intended. Whether or not it is inconvenient for election officials to comply with this constitutional mandate in the 2022 general election is beside the point (though

Petitioners contend that it is not impossible nor wildly inconvenient to do so[2]).

Either this Court or the court of appeals (or perhaps both if this case follows the trajectory of the Pennsylvania case), a higher court must reach the merits of Petitioners' constitutional claim, and, if it finds that Petitioners' interpretation of the constitution is correct, it must enjoin mail-in voting as soon as practicable so that voting occurs in a constitutional manner. Transfer of this case to this Court would aid that process, and Petitioners urge the Court to grant their motion, thereby giving election officials the maximum amount of time possible to conduct in-person voting. All the parties agree this case presents a purely legal question. They simply disagree about whether that question should be answered as quickly as possible and by this Court. It should.

RESPECTFULLY SUBMITTED this 7th day of June 2022.

Davillier Law Group, LLC

By /s/ Veronica Lucero
Alexander Kolodin
Veronica Lucero
Roger Strassburg
Arno Naeckel

[2] Other courts have issued decisions striking down mail-in voting months before an election was to occur. *See, e.g.*, *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 138 (1924) (less than four months before election); *Thompson v. Scheier*, 40 N.M. 199 (1936) (six months before the general election); *Baca v. Ortiz*, 40 N.M. 435 (1936) (upholding trial court's order enjoining absentee voting as unconstitutional approximately one month before election).

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 19, the undersigned counsel certifies that the Appellants' Consolidated Reply in Support of Their Petition for Transfer is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and does not exceed an average of 280 words per page according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 7th day of July 2022.

Davillier Law Group, LLC

By */s/* Veronica Lucero
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Attorneys for Petitioners/Appellants

Exhibit 1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN
DIVISION 4 ***DL**
DATE: MAY 27, 2022

COURT ORDER/NOTICE/RULING

ARIZONA REPUBLICAN PARTY,
et al., et ux.,
Plaintiffs,

vs. **CV-2022-00594**

KATIE HOBBS, et al., et ux.,
Defendants.

The Court has read Maricopa County Defendant's Motion for Reconsideration of Order Dated May 26, 2022 setting June 1, 2022 Briefing Schedule filed May 26, 2022 and Plaintiff's Opposition to Maricopa County Defendant Motion for Reconsideration filed May 27, 2022.

IT IS ORDERED denying the Maricopa County Defendant's Motion for Reconsideration of Order Dated May 26, 2022 setting June 1, 2022 Briefing Schedule.

The hearing will take place as scheduled on **Friday, June 3, 2022 at 1:30 p.m**. If the Court determines at some point that additional evidence is required, the Court will address that with the parties.

The Court has received and reviewed a Motion to Intervene filed by the Democratic National Committee (DNC), the Arizona Democratic Party (ADP) and two national Democratic committees (DSCC and DCCC) filed May 26, 2022. Any objections to the Motion to Intervene must be filed by Tuesday, May 31, 2022 at 3:00 p.m.

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Exhibit 2

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN
DIVISION 4 ***DL**
DATE: JUNE 6, 2022

COURT ORDER/NOTICE/RULING

ARIZONA REPUBLICAN PARTY,
et al., et ux.,
Plaintiffs,

vs. **CV-2022-00594**

KATIE HOBBS, et al., et ux.,
Defendants.

Plaintiffs Arizona Republican Party and Kelli Ward, as Chairman of Arizona Republican Party, and as a resident of Mohave County (hereinafter Plaintiffs) filed a request for an Order to Show Cause and Verified Complaint alleging Arizona's no-excuse mail-in ballot system violates the Arizona Constitution. Plaintiffs also filed a Motion for Preliminary Injunction asking the Court to stop the use of no-excuse mail-in ballots in the November 2022 General Election. The Court heard arguments from Plaintiffs and multiple parties opposed on Friday, June 3, 2022.

Defendants include Secretary of State Katie Hobbs (hereinafter Defendant Secretary of State), each of Arizona's counties by each of the County Recorders (hereinafter Defendant Counties), and the State of Arizona itself (the State reached a stipulation with the Plaintiffs to abide by whatever this Court rules or any appellate court might rule in the future). The Court, by motion, allowed the Arizona Democratic Party ("ADP"), the Democratic National Committee ("DNC") and a couple of Democratic Party election committees (the DSCC and the DCCC) to intervene (hereinafter Intervenor-Defendants).

The Court has reviewed Plaintiffs' Application for Order to Show Cause, Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' Verified Complaint, Defendant Secretary of State's Response to Motion for Preliminary Injunction, Intervenor-Defendants' Response to Plaintiffs' Application for Order to Show Cause, Maricopa County's (on behalf of multiple defendant counties) Response In Opposition to Plaintiffs' Application for Order to Show Cause. The Court has also reviewed Plaintiffs' Reply in Support of their Application to Show Cause.

The Court has reviewed the attachments to all the above listed pleadings, the

evidence admitted at the oral arguments, the applicable statutes and rules, as well as case law and the arguments made by counsel during the hearing.

First, the Court made a record during the hearing that Plaintiff does have standing to bring this challenge under the Arizona Declaratory Judgment Act. If the voting law is unconstitutional, the Plaintiff would have to continue to participate in an unconstitutional system. The Court also found that *laches* does not apply. It isn't dilatory to bring this case to the Superior Court in late May of an election year. The Court also found the *Purcell* doctrine does not apply. *Purcell* is a case in which a federal court enjoined a state election late in the election process. That is not what is being sought here and it does not apply. This case can be decided on the merits based on the information the Court has received.

It is important to note what this case is not about allegations of fraud in the voting process. It is not about politics. It is not even about whether the parties believe mail-in voting is appropriate. It is about one thing: Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting?

A party seeking a preliminary injunction has 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. *Shoen v. Shoen,* 167 Ariz. 58 (App. 1990).

Plaintiffs do not meet the first element. There is not a likelihood of success on the merits. This action is asserting laws written and passed by the Arizona legislature to be in violation of the Arizona Constitution. This is an extremely high burden for any party to meet. Arizona legislative acts will only be struck down if clearly prohibited by the Arizona Constitution. *Earhart v. Frohmiller*, 65 Ariz. 221 (1947). The legislature does need not be expressly granted authority to act when it would otherwise be entitled to do so. *Montgomery v. Mathis*, 231 Ariz. 103 (App. 2012). There is nothing in the Arizona Constitution which expressly prohibits the legislature from authoring new voting laws, including "no-excuse" mail-in ballots.

The Arizona Constitution states in Article 7, Section 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**." (emphasis added). This language does not prohibit mail-in ballots yet does allow new laws concerning voting to be passed as long as secrecy in voting is preserved.

The Arizona Constitution was adopted in 1912. In the Constitution, the framers adopted the Australian Ballot System for elections. Voters, who went to a polling place, were handed a ballot, filled it out in a private booth and folded it, and turned it back in; exactly the same way voters do today if they go to their polling place on election day.

Mail-in voting began in Arizona in 1918, only six years after the Arizona Constitution was adopted. These new laws were created by the Arizona Legislature to

allow people that could not get to the polls, mostly military people, an opportunity to vote. These laws mandated the mail-in voter keep his ballot private, so the legislature had the right to write election laws in 1918 that maintained secrecy, and they did so.

No-excuse mail-in voting was approved by the Arizona legislature in 1991 and became effective on January 1, 1992. This process is codified in A.R.S. §§ 16-541, *et seq*. This change in law was approved by the legislature and signed by the Governor.

The statutes allowing no-excuse mail-in voting set forth procedural safeguards to prevent ballot tampering and, more importantly, to the question before this Court to maintain secrecy in voting. *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178 (1994). (In *Miller*, ballots were removed from a school district's budget override election because the no-excuse mail-in voting rules were not strictly followed as 41 ballots were hand delivered to voters instead of mailed). The Supreme Court's reference to A.R.S. §16-545(B)(2) in *Miller* is dicta in that case, but it reflects an understanding of the legislative process. In this case, where the Plaintiffs specifically argue the legislature is not complying with the Constitution's mandate to preserve secrecy in voting, then it is much more important. The statutes are clear.

A.R.S. §16-545(B)(2) ensures 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. § 16-548(A) provides 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).

Secrecy in voting being preserved is as an element of the no-excuse mail-in ballot voting statutes approved in Arizona in 1991.

Plaintiffs also allege the no-excuse mail-in voting statutes are in violation of the Arizona Constitution "as applied." In the Verified Complaint, and in a series of exhibits the Court admitted at the hearing over objection of opposing parties, Plaintiffs show examples of bad actors violating no-excuse mail-in voting laws. These examples are concerning but they do not address the issue before the Court: the constitutionality of the statutes in question. Furthermore, they do not show a pattern of conduct so egregious as to undermine the entire system of no-excuse mail-in voting as provided by the Arizona legislature. Enforcement mechanisms exist within the statutes to punish those that do not abide by the statutes.

Defendants for the past thirty years have applied the laws of Arizona as written. The laws are far from perfect and nobody anticipated thirty years ago that approximately 90 percent of Arizona voters would vote by mail-in ballot during a pandemic, but these laws are NOT in violation of the Arizona Constitution. They are not inapposite of the intentions of the framers of the Constitution who emphasized the right to suffrage for Arizona citizens and that the voters' ballots be secret. The laws passed by the Arizona legislature in 1991 further those goals.

It is the only question before the Court: Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that include no-excuse mail-in voting? The answer is no.

IT IS ORDERED denying the relief requested in the Plaintiffs' Application for an Order to Show Cause and denying Plaintiffs' Motion for a Preliminary Injunction.

Any party wishing to appeal this ruling shall provide a written order consistent with this ruling that contains Rule 54(c) language and a signature line for the Court.

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Exhibit 3

ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA REPUBLICAN PARTY, et al., Plaintiffs/Appellants, v. KATIE HOBBS, et al., Defendants/Appellees. --- ARIZONA DEMOCRATIC PARTY, et al., Intervenors/Appellees.	No. 1 CA-CV-22-0388 Mohave County Superior Court No. CV-2022-00594

APPELLANTS' CONSOLIDATED REPLY IN SUPPORT OF THEIR MOTION FOR A PROCEDURAL ORDER

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The several Appellees each oppose Appellants' Motion for a Procedural Order (requesting an expedited briefing schedule) for essentially the same two reasons: (1) they complain that Appellants have been dilatory and that (2) it would be impossible to administer the 2022 general election if the Court were to grant Appellants their requested relief. However, neither of these reasons defeats the good cause shown for expediting this case, and the trial court agreed with Appellants on both counts.

I. The trial court found that Appellants were not dilatory and that good cause supported its decision to hold an accelerated hearing on the merits, and the parties were able to seamlessly proceed through the accelerated schedule, as they can also do in this Court.

At every opportunity throughout this litigation, Appellees have complained that Appellants have been dilatory because (1) they waited 30 years to bring their constitutional challenge against Arizona's system of no-excuse mail-in voting and (2) they waited weeks to refile their lawsuit in superior court and days to file their appeal. The Arizona Supreme Court did not address these complaints in its court order stating that it lacks original jurisdiction over the State of Arizona because the state is not an "officer" for purposes of jurisdiction under article 6, section 5 of the Arizona Constitution. [Order Declining J. (Apr. 5, 2022).] However, the Court did not hesitate to set an expedited briefing schedule similar to the expedited schedule the trial court set. [IR 38 at 2.]

Moreover, the trial court *did* address Appellees' complaints and found that

"[i]t is not dilatory to bring this case to the Superior Court in late May of an election year" and thus that "*laches* does not apply." [IR 63 at 2.] In fact, Maricopa County made the same arguments when it asked the trial court to reconsider its decision to set an accelerated briefing schedule below. [IR 37.] The trial court denied the County's motion [IR 41], however, and the parties seamlessly proceeded through briefing and an accelerated Show Cause Hearing on the merits of Appellants' constitutional claim.

Refuting these very same contentions in the court below, Appellants argued several points, which they reiterate here for convenience. First, although the legislature initially authorized no-excuse mail-in voting 30 years ago, it has continuously expanded the law since, "further harm[ing] the integrity of elections" [IR 38 at 2] such that almost 90 percent of voting in Arizona now occurs without a shred of the "secrecy within a restricted zone" the constitution mandates. Moreover, as the Attorney General noted, "there was a significant increase in the use of no excuses mail-in voting in 2020 and many defects in the current system only became apparent in the 2020 election. [*Id.* at 3. *See also* IR 53 (in which Appellants addressed the same timing issues Appellees raised below).] Further, given that elections occur every two years, there is never an opportune time to initiate a challenge such as this one. [*Id.*] Finally, Appellants have diligently pursued their claims, going so far as attempting to initiate their suit in the supreme court early this

year in hopes of bypassing the timing issues the parties are now facing. [*Id.*]

Regarding Appellees' complaints about Appellants' timing when refiling their suit in superior court (six weeks after the supreme court declined jurisdiction) and the timing of this appeal (six days after entry of judgment and thirteen days to file their opening brief), the Court should simply dismiss these complaints as the trial court did. [IR 63 at 2. *See also* IR 53.] Appellants have met every deadline and have retooled their suit as quickly as possible at every juncture. Appellees have successfully responded in kind, and there is no reason they cannot continue to do so now. At this stage, there are no new arguments, only the need for a final resolution of the arguments as expeditiously as possible.

There is good cause to accelerate this case—the prevention of yet another unconstitutional election in a year when voters continue to doubt the integrity of our state's voting system. Contrary to the Secretary's unfair and unproven assertion that Appellants "claims are part of a broader, ongoing, and pernicious effort to sow doubt about our electoral process and restrict voting rights" [Sec'y Resp. at 1], Appellants in fact seek to restore the electoral process to its constitutional foundation such that it is impossible to coerce or influence any one vote, thus making every vote truly free.

The constitutional foundation provided by the framers of the Arizona Constitution was an express restriction on legislative authority and requires secrecy

in casting votes via a restricted zone protected by election officials: "Provided, that secrecy in voting shall be preserved." Ariz. Const. art. 7, § 1. *See also* art. 4, pt. 1, § 1. By adopting this provision, the framers made the elements of the Australian or secret ballot, which had been adopted by the territorial legislature in 1891, a constitutional requirement from which future legislatures would not be free to deviate. *See* John D. Leshy, *The Arizona State Constitution* 235 (2d ed. 2013) (noting that Ariz. Const. art. 7, § 1 "adopts what was known as the 'Australian' or secret ballot"). As the U.S. Supreme Court has stated, "the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The ***only way*** to ***preserve the secrecy of the ballot is to limit access to the area around the voter***." *Burson v. Freeman*, 504 U.S. 191, 207-08 (1992) (emphasis added). Further, to preserve secrecy in voting, this restricted zone "was open only to election officials, two 'scrutinees' for each candidate, and electors about to vote." *Id*. at 202.

Arizona eventually adopted a system of absentee voting which provided an alternative means by which the elderly, disabled, and others who would be absent from their precinct on election day could vote. *See, e.g.*, 1918 Ariz. Sess. Laws ch. 11 (1st Spec. Sess.)[1]; 1925 Ariz. Sess. Laws ch. 75, § 1 (Reg. Sess.)[2]. This, system,

[1] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/73.
[2] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/24.

which was in place through 1991, did not clearly compromise "secrecy in voting" because it still provided for a restricted area around voters while they completed their ballots. Absentee voters were required to fill out their ballots in the presence of an election officer (or other officer authorized by law to administer oaths) who would have to sign an affidavit that they had secured such a restricted zone for the voter:

> I further certify that the affiant exhibited the enclosed ballot to me unmarked. Then, in my presence, the affiant personally and privately marked such ballot in such a manner that neither I, nor any other person, was able to see the affiant vote (or it was marked by me according to the affiant's instructions) and enclosed and sealed it in this envelope. The affiant was not solicited or advised by any person to vote for or against any candidate or measure.
>
> Signature and title of officer

A.R.S. § 16-547 (1990); 1991 Ariz. Sess. Laws vol. 1, ch. 51 § 3 (1st Reg. Sess.)[3] (in strikethrough). In contrast, Arizona's current system of no-excuse mail-in voting, first adopted in 1991, neither abides by the fourth requirement of the Australian ballot system (ballots distributed by public officials ***at polling places***) nor provides for the ***securing of a restricted zone around the voter by an election officer*** for casting his or her votes with secrecy. It is therefore plainly and necessarily in conflict with the Arizona Constitution. However, though the trial court acknowledged that the constitution "adopted the Australian Ballot System for

[3] Available at https://azmemory.azlibrary.gov/digital/collection/azsession/id/14/rec/4.

elections" [IR at 2], it declined to hold that the post-1991 mail-in system is unconstitutional. This is a legal error that is readily addressable by this Court on an expedited basis.

And contrary to the Counties' assertion that expedited briefing in this matter is unwarranted and untenable for the litigants and the Court alike [Cnty. Resp. at 2–4], as explained above, the parties, the supreme court, and the trial court have all successfully navigated expedited briefing in this case since Appellants first initiated their suit in February 2022. Moreover, both cases the Counties cite in support of their contentions are inapposite because they analyzed the defense of *laches* in election cases involving printing deadlines for publicity pamphlets and ballot measures. [*Id.* at 3 (citing *Sotomayor v. Burns*, 199 Ariz. 81 (2000) & *Mathieu v. Mahoney*, 174 Ariz. 456 (1993)).] As the supreme court noted, "The defense of laches is available in an action challenging the legal sufficiency of a proposed initiative measure and seeking to enjoin the measure's printing on the official ballot." 174 Ariz. at 458–59. However, whether *laches* applies in this case—an argument the trial court rejected [IR 63 at 2]—does not bear on whether this Court should set an expedited briefing schedule for good cause,[4] and in any event this case does not seek to enjoin ballot (or publicity pamphlet) language such that the state

[4] Petitioners also not that there is no *laches* defense concerning Petitioners' request for a permanent injunction.

will be prejudiced because of printing deadlines, a point discussed further below in refuting Appellees claims that it would be impossible to administer the upcoming election without no-excuse mail-in voting.

II. Alleged administrative challenges to holding a constitutional general election in 2022, without no-excuse mail-in voting, does not defeat good cause for expedited briefing (and a decision) on the merits.

Arizonans need to know whether mail-in voting is constitutional as quickly as possible so that constitutional voting may be restored sooner rather than later. Thus, whether the state would face administrative challenges and/or extra expenses in holding elections that comply with the constitution is irrelevant as to whether there is good cause to expedite briefing. There *is* good cause, and good cause exists whether or not it is inconvenient for election officials to comply with the Arizona Constitution. Appellants aver that it is not impossible nor wildly inconvenient to do so.

The County Appellees argue that Appellants' motion "fails to account for ballot printing and design." [Cnty. Resp. at 4.] However, this case does not affect ballot printing and design, as voters all receive the same ballot regardless of whether they vote in person or by mail. *See* A.R.S. § 16-545 (stating that mail-in ballot "shall be identical with the regular official ballots, except that it shall have printed or stamped on it 'early'"). Because the word "early" may simply be "stamped" on the ballot, there is no need to delay the printing of official ballots for the upcoming

election cycle. *See Sotomayor*, 199 Ariz. at 83 ¶¶ 7–8 (explaining that even though petitioners filed their challenge a day before a publicity pamphlet was to be printed, *laches* did not apply because the Secretary was not prejudiced by having to simply delete or revise one paragraph).

As for whether the state can secure enough voting places and poll workers in time to administer the upcoming election without mail-in voting when the election is still four months away,[5] other courts have issued decisions striking down mail-in voting months before an election was to occur [IR 53 at 6–7 (collecting cases[6])], and the Court should expedite this case to give election officials *more* time to respond, not *less* time, if the Court finds that mail-in voting in its current form does not preserve secrecy as required by the constitution.

As Appellants explained in their opening brief and above, "secrecy" is not merely a private method of voting but is actually an entire system by which "***compulsory*** secrecy of voting is secured." *Australian ballot system*, Ballentine's Law Dictionary (3rd ed. 2010) (emphasis added). And, as also discussed above, the

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[5] Appellants presented evidence in the trial court that election officials can indeed conduct the election without mail-in voting. [IR 71 (Decl. of Senator Kelly Townsend).]

[6] *See, e.g.*, *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131, 138 (1924) (less than four months before election); *Thompson v. Scheier*, 40 N.M. 199 (1936) (six months before the general election); *Baca v. Ortiz*, 40 N.M. 435 (1936) (upholding trial court's order enjoining absentee voting as unconstitutional approximately one month before election).

"only way to preserve the secrecy of the ballot is to limit access to the area around the voter." *Burson*, 504 U.S. at 207-08. The only way to limit such access is via enforcement by election officials—either at the polls or whenever else ballots are cast. The Court must reach the merits of Appellants' constitutional claim, and, if it finds that Appellants' interpretation of the constitution is correct, it must enjoin mail-in voting as soon as practicable so that voting occurs in a constitutional manner. This requires an accelerated briefing schedule, and Appellants urge the Court to grant their motion, thereby giving election officials the maximum amount of time possible to conduct in-person voting. It is election officials who need more time, not Appellees, who are just as familiar as Appellants are with the ins and outs of this case by now. All the parties agree this case presents a purely legal question. They simply disagree about whether that question should be answered as quickly as possible. It should.

RESPECTFULLY SUBMITTED this 7th day of June 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the Appellant's Consolidated Reply In Support of Their Motion For Procedural Order is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and does not exceed an average of 280 words per page according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 7th day of July 2022.

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