ARIZONA COURT OF APPEALS

DIVISION ONE

ARIZONA REPUBLICAN PARTY, et al.; Plaintiffs-Appellants, vs. KATIE HOBBS, et al.; Defendants-Appellees.	No. 1 CA-CV-22-0388 Mohave County Superior Court No. S8015CV-2022-00594

BRIEF OF THE COCONINO, GILA, GRAHAM, GREENLEE, LA PAZ, MARICOPA, NAVAJO, AND PIMA COUNTY RECORDER APPELLEES

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

Thomas P. Liddy (019384)
Joseph J. Branco (031474)
Joseph E. LaRue (031348)
Karen J. Hartman-Tellez (021121)
Anna G. Critz (034530)
Deputy County Attorneys
MCAO Firm No. 0003200

CIVIL SERVICES DIVISION
225 West Madison Street
Phoenix, Arizona 85003
Telephone (602) 506-8541
Facsimile (602) 506-4316
brancoj@mcao.maricopa.gov
ca-civilmailbox@mcao.maricopa.gov

THE BURGESS LAW GROUP

Emily Craiger* (Bar No. 021728)
emily@theburgesslawgroup.com
3131 East Camelback Road, Suite 224
Phoenix, Arizona 85016
Telephone: (602) 806-2100

Attorneys for the Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Navajo, Pima, Pinal, Santa Cruz, and Yuma County Recorder Appellees

**Attorney for the Maricopa County Recorder Appellee*

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Introduction

Plaintiffs-Appellants the Arizona Republican Party and Kelli Ward (collectively, "the Party") challenge 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 Brief[1] refers to this method of voting as "vote-by-mail."

As with its complaint, which failed to even identify a cause of action, the Party's arguments on appeal are difficult to parse. It appears that the Party seeks to overturn thirty years of successful vote-by-mail because—it claims—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.) 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 Brief 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. This Court should affirm the dismissal of the Party's complaint and the denial of its request for a preliminary injunction.

Statement of the Case and Facts

I. The long history of vote-by-mail in Arizona

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

[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.

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 "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.

II. This litigation

In February 2022, the Party first filed its facial challenge in the Arizona Supreme Court as a special action. *See Ariz. Republican Party v. Hobbs*, No. CV-22-0048-SA. On April 5, 2022, that Court declined jurisdiction. *Id.*

The Party then waited six weeks before filing its complaint on May 17, 2022 in superior court. (*See* Index of Record ("I.R.") 1.) The Party sued the State of Arizona, Arizona Secretary of State Katie Hobbs, and Arizona's fifteen county recorders. (*Id.*) Three days later, the Party requested a preliminary injunction. (I.R. 5.) The superior court permitted the Arizona Democratic Party, the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee ("Intervenor-Defendants") to intervene. (*See* I.R. 63 at 1.)

On June 3, the superior court held a preliminary injunction hearing. (*See id.*) On June 6, the superior court denied the Party's requested relief. (*See id.* at 4.) On June 9, the superior court entered a final judgment under Arizona Rule of Civil Procedure 54(c), dismissing the Party's complaint with prejudice. (I.R. 65.)

Six days later, on June 15, the Party filed a notice of appeal. (I.R. 66.)

Statement of the Issues

1. Laches bars a claim "if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin v. Thomas*, 213 Ariz. 496, 497, ¶ 10 (2006). Here, the Party waited thirty years after the legislature's 1991 expansion of vote-by-mail to bring this facial challenge, seeking to upend a method of voting that millions of Arizona voters depend on in the midst of an election cycle. Is the complaint barred by laches?

2. 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 superior court err when it concluded the Constitution thus permits vote-by-mail, dismissing the Party's complaint?

3. To obtain a preliminary injunction, the Party must show, *inter alia*, "a strong likelihood of success on the merits" and that "public policy favors granting the injunctive relief." *Fann v. State*, 251 Ariz. 425, 432, ¶ 16 (2021). Because the Arizona Constitution does not prohibit vote-by-mail and the Party's injunctive relief would disrupt voting for millions of Arizonans, did the superior court abuse its discretion when it denied the Party's request for a preliminary injunction?

Standard of Review

This Court reviews dismissal of a complaint for failure to state a claim *de novo*. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). A complaint may be properly dismissed for failure to state a claim if it lacks a cognizable legal theory or contains insufficient facts to support a claim under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *see also Honig v. Ariz. Health Care Cost Containment Sys. Admin.*, No. 1 CA-CV 14-0727, 2015 WL 3470181, at *2, ¶ 9 (App. May 28, 2015) (mem. decision), *available without charge at* https://casetext.com/case/honig-v-ariz-health-care-cost-containment-sys-admin (citing *Balistreri*).[3]

This Court reviews a trial court's decision on laches for abuse of discretion. *McLaughlin v. Bennett*, 225 Ariz. 351, 353, ¶ 5 (2010). This Court also reviews the denial of a preliminary injunction for an abuse of discretion. *Fann*, 251 Ariz. at 432, ¶ 15.

This Court will affirm the superior court's ruling if it was correct for any reason. *State v. Perez*, 141 Ariz. 459, 464 (1984).

[3] This case is cited for persuasive authority consistent with Arizona Rule of the Supreme Court 111(c).

Argument

I. Laches bars this untimely suit.

By delaying their facial challenge[4] to § 16-541(A) for thirty years—and then compounding that delay by waiting until May 17 of an election year to bring a challenge that will upend a statewide election—the Party's claims are barred by laches. "[T]he laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Lubin*, 213 Ariz. at 497, ¶ 10. "The real prejudice caused by delay in election cases is the quality of decision making in matters of great importance." *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 9 (2000). "Unreasonable delay can therefore prejudice the administration of justice by compelling the court to steamroll through delicate legal issues in order to meet" election deadlines. *Lubin*, 213 Ariz. at 497, ¶ 10. More than that, delayed election litigation prejudices "election officials[] and the voters of Arizona." *Sotomayor*, 199 Ariz. at 83, ¶ 9.

In this case, the late filing defies explanation. In 1991, the legislature amended § 16-541 to state: "Any qualified elector may vote by absentee ballot." *See* 1991 Ariz. Sess. Laws, ch. 51, § 1. Thirty years later, in February 2022, the Arizona

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[4] The complaint does not indicate whether the challenge is facial or as-applied, but by its terms—challenging the entire statutory scheme in all circumstances—it must be facial. *See Sabri v. United States*, 541 U.S. 600, 609 (2004) (argument that "no application of the statute could be constitutional" is facial).

Republican Party first filed their facial challenge in the Arizona Supreme Court. *See Ariz. Republican Party v. Hobbs*, No. CV-22-0048-SA. On April 5, that Court declined jurisdiction to hear the matter. *Id.* The Party then waited six weeks—from April 5 to May 17—before filing its 51-page complaint in superior court. *See Ariz. Republican Party v. Hobbs*, CV-2022-00594 (Mohave Cnty. Sup. Ct.). Waiting thirty years to bring a facial challenge to a statutory scheme is inexcusable—as is waiting six weeks to file in the proper court.

The Party's delay is undoubtedly prejudicial. In the 2020 general election, more than three million Arizona voters—88% of those who voted—voted by early ballot.[5] (I.R. 48, at 3 & n.4.) And Arizona's election officials have already set their plans for the 2022 general election, to include vote-by-mail. *See, e.g.*, Maricopa Cnty. 2022 Elections Plan, *available at* https://recorder.maricopa.gov/site/publications.aspx (last visited Aug. 8, 2022). The prejudice to Arizona's voters and election officials is obvious.

Indeed, the prejudice caused by a change of election rules this close to an election—in the midst of an election cycle—is so well-established that the federal

[5] This figure includes vote-by-mail and in-person early voting under the statutory scheme. Total votes and early votes are derived from the county canvasses available on the Arizona Secretary of State's website. *See* Ariz. Sec'y of State, *2020 General Election County Canvass Returns* https://azsos.gov/2020-general-election-county-canvass-returns (last visited Aug. 8, 2022). Santa Cruz County's votes are excluded from this calculation because it did not separately report early ballots.

courts have developed a body of law to guard against it. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Consistent with *Purcell*, courts generally will not change election rules on the eve of an election because "[c]ourt orders affecting elections can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5.

As the Ninth Circuit has explained: "as we rapidly approach the election, the public interest is well served by preserving Arizona's existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure . . . at the eleventh hour." *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020); *see also League of United Latin Am. Citizens v. Abbott*, No. 121CV991LYJESJVB, --- F. Supp. 3d ---, 2022 WL 1410729, at *30 (W.D. Tex. May 4, 2022) (*per curiam*) (agreeing with election official defendants and applying *Purcell* because "the primary elections were already underway as this Court heard the preliminary-injunction motion" and "[a] delay . . . would require election administrators to duplicate their efforts [and] would increase costs (particularly for small counties)").

Although *Purcell* has its origins in the federal courts, its reasoning has been adopted by several state supreme courts. *E.g.*, *In re Khanoyan*, 637 S.W.3d 762, 764 (Tex. 2022) ("This Court, like the U.S. Supreme Court, therefore has repeatedly explained that invoking judicial authority in the election context requires unusual

dispatch—the sort of speed not reasonably demanded of parties and lawyers when interests less compelling than our society's need for smooth and uninterrupted elections are at stake."); *Jones v. Sec'y of State*, 239 A.3d 628, 630–31, ¶ 4 (Me. 2020) ("[T]here is a strong public interest in not changing the rules for voting at this late time."). This Court should extend the *Purcell* principle to Arizona's election law laches jurisprudence to clearly define the prejudice to Arizona's voters and election officials when election rules are changed on the eve of an election.

In sum, the Party's inexcusable thirty-year delay and its resultant prejudice should bar this suit.

II. The superior court properly dismissed 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. Frohmiller*, 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). 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. (*See, e.g.*, O.B. at 5, 12–40). 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, § 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"). For instance, in contrast to Article 7, § 1, the Kentucky Constitution (erroneously relied upon by the Party on Page 51 of its Opening Brief) details how Kentuckians will vote:

> In all elections by persons in a representative capacity, the voting shall be viva voce and made a matter of record; but all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited, or any person absent from the county of his legal residence, or from the state, may be permitted to vote in a manner provided by law. Counties so desiring may use voting machines, these machines to be installed at the expense of such counties. . . . The General Assembly shall pass all necessary laws to enforce this section, and shall provide that persons illiterate, blind, or in any way disabled may have their ballots marked or voted as herein required.

Ky. Const. § 147. Kentucky's provision contains the language the Party improperly seeks to import into Article 7, § 1.

Further, the legislature has explicitly accounted for secrecy in the vote-by-mail statutory scheme. *See* § 16-545(B)(2) ("The officer charged by law with the duty of preparing ballots at any election shall . . . [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."); § 16-548(A) ("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."); § 16-552(F) ("If the vote is allowed, the board shall open the envelope containing the ballot in such a manner that the affidavit thereon is not destroyed, take out the ballot without unfolding it or permitting it to be opened or examined and show by the records of the election that the elector has voted."); *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 superior court properly dismissed the Party's complaint; this Court should affirm.

B. The Party's remaining arguments lack merit.

1. The Party's arguments based on other provisions of the Arizona Constitution do not change the plain-language reading of Article 7, § 1. (*See* O.B. at

29–42.) The Party's set of "at" arguments—based on Article 4, § 1, Article 7, § 2, and other constitutional provisions that include the word "at"—is the type of hyper-technical grammatical reading that Arizona's courts will not entertain when interpreting constitutional provisions. *See Saban Rent-a-Car L.L.C. v. Ariz. Dep't Revenue*, 246 Ariz. 89, 95, ¶ 21 (2019) ("[W]e do not apply fine semantic or grammatical distinctions, legalistic doctrine or parse sentences, as doing so may lead us to results quite different from the objectives which the framers intended to accomplish.") (cleaned up); *La Prade*, 43 Ariz. at 177–78 ("It is the general rule that, because constitutions are for the purpose of laying down broad general principles, and not the expression of minute details of law, their terms are to be construed liberally, for the purpose of giving effect to the general meaning and spirit of the instrument, rather than as limited by technical rules of grammar."). From this farrago of provisions, there is simply no way of knowing whether Arizona's founders meant "at" to refer to the place or time for elections. *See, e.g.*, Noah Webster, A Practical Dictionary of the English Language 25 (1910 ed.), *available at* https://openlibrary.org/books/OL25500521M/Webster%27s_practical_dictionary (defining "at" as "denoting presence or nearness in place or time (*at* home; *at* one o'clock)").[6]

[6] Notably, because the language of Article 7, § 1 is clear, any ambiguity in "at" found in other provisions need not be resolved in this appeal. *See Jett*, 180 Ariz. at

Similarly, the Party's "attendance" argument based on Article 7, § 4 does not undermine the plain-language reading of Article 7, § 1—it merely suggests that a voter is not immunized from arrest during a traffic stop by carrying their early ballot in their glove box during the weeks leading up to election day. *See* Ariz. Const. art. 7, § 4 ("Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at any election, and in going thereto and returning therefrom."); *cf. City of Phoenix v. Yates*, 69 Ariz. 68, 73 (1949) ("[I]t is well settled that the lawmaking body may or may not, as it chooses, pass laws putting into effect a constitutional provision, and if, in its efforts to give effect to a constitutional provision, the statute is not broad and comprehensive enough to cover all subjects that it might, we know of no reason why it should not be valid as far as it goes.").

2. 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,[7] a 2005 journal article written by two political scientists (one of whom filed an amicus brief in the Arizona Supreme Court in the earlier iteration of this challenge disputing the Party's application of his

119 ("If the language is clear and unambiguous, we generally must follow the text of the provision as written.").

[7] It is unclear why the Party included an uncritical explication of literacy tests. (*See* O.B. at 20–21.)

work), 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.

3. Instead, the specific history of vote-by-mail in Arizona indicates that the founders did not interpret Article 7, § 1 as narrowly as the Party does. *See Abbey v. Green*, 28 Ariz. 53, 70 (1925) (considering early legislative enactments to interpret constitutional provision); *Clark v. Boyce*, 20 Ariz. 544, 554–56 (1919) (same). Almost immediately after the founding, the legislature adopted vote-by-mail for active-duty service members, quickly expanding this "method" of voting for anyone absent from their county on election day. *See* 1918 Ariz. Sess. Laws ch. 11, § 1; 1921 Ariz. Sess. Laws ch. 117, § 1. Indeed, the legislature has repeatedly expanded vote-by-mail, culminating in its availability to all voters. *See* 1925 Ariz. Sess. Laws ch. 75, § 1; 1953 Ariz. Sess. Laws ch. 76, § 1; 1955 Ariz. Sess. Laws ch. 59; 1959 Ariz. Sess. Laws ch. 107; 1968 Ariz. Sess. Laws ch. 17; 1970 Ariz. Sess. Laws ch. 151; 1991 Ariz. Sess. Laws, ch. 51, § 1.

4. The Party also relies on a Pennsylvania intermediate appellate court's decision striking down vote-by-mail under Pennsylvania's constitution. (O.B. at 28, 38.) That reliance is misplaced: among other infirmities with the Party's argument, the Supreme Court of Pennsylvania recently reversed that decision. *See McLinko v. Dep't of State*, No. 14 MAP 2022, --- A. 3d ---, 2022 WL 3039295 (Pa. Aug. 2, 2022). Indeed, that Court clarified that a prior Pennsylvania decision interpreting the Pennsylvania Constitution's analogue to Article 7, § 1 "was only with regard to the newly added secrecy requirement, not the grant of authority to the General Assembly to devise methods of voting. In so doing, the Court failed to consider the entirety of this constitutional provision." *Id.*, at *24. Going further, it explained: "The only restraint on the legislature's design of a method of voting is that it must maintain the secrecy of the vote.[] [The Pennsylvania legislation] ensures such secrecy in the same manner as it did with the design of the procedure for absentee voting by mail which has been a part of our election methodology since 1963." *Id.*, at *32 (footnote omitted).

5. Finally, 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. This Court should reject the Party's "Australian ballot" argument and affirm the superior court's dismissal of the Party's complaint.

III. The Party's request for preliminary injunction is meritless.

The Party fails to satisfy the "traditional equitable criteria" for a preliminary injunction. *See Shoen v. Shoen*, 167 Ariz. 58, 62 (App. 1990). As a matter of law,

> A party seeking a preliminary injunction must show (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.

Fann, 251 Ariz. at 432, ¶ 16. "This is a sliding scale, not a strict balancing of factors." *Id.* 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 that the balance of hardships tips sharply in favor of the moving party." *Id.* (cleaned up). "The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger." (citing *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶ 10 (2006).[8]

[8] The Party erroneously relies on *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58 (2020) (in division), to argue that it need not satisfy the preliminary injunction standard to obtain a preliminary injunction. This argument misreads *Fontes*, a case in which the petitioner sought mandamus relief, not an injunction. *See* 250 Ariz. at 62, ¶¶ 10–12; *cf. Sears v. Hull*, 192 Ariz. 65, 68–69, ¶¶ 11–12 (1998) ("[T]he Sears actually seek injunctive relief, which is not available through an action for mandamus or any other form of special action.").

To be clear: *Fontes* did not establish a new standard to obtain a preliminary

Here, the Party fails to meet this standard.

A. The Party lacks a likelihood of success on the merits and cannot show a possibility of irreparable harm.

As discussed in greater detail in Argument § II above, the Party's complaint lacks merit. In short: nothing in the Arizona Constitution generally—and nothing in Article 7, § 1 in particular—mandates the "Australian ballot system" or its elements. Further, there is no irreparable harm from proceeding with a method of voting that the Party actively promotes. *See, e.g.*, Republican Party of Arizona (@AZGOP) (Jul. 26, 2022, 11:42 a.m.), https://twitter.com/AZGOP/status/1552001370600853504 (promoting "Mail-in Ballot[s]").

B. The balance of the hardships and public policy concerns tip sharply in favor the defendants, not the Party.

As discussed in greater detail in Argument § I, Arizona's millions of voters and thousands of election officials and workers will be prejudiced by the sea change in election administration requested by the Party. *See Purcell*, 549 U.S. at 4–5 ("Court orders affecting elections can themselves result in voter confusion and consequent incentive to remain away from the polls."); *Ariz. Democratic Party*, 976 F.3d at 1086 ("[A]s we rapidly approach the election, the public interest is well served by preserving Arizona's existing election laws, rather than by sending the

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injunction in election cases. Indeed, one year after *Fontes*, the Arizona Supreme Court applied the traditional equitable criteria for preliminary injunctions in an elections case. *See Fann*, 251 Ariz. at 432, ¶ 16. The Party's argument lacks merit.

State scrambling to implement and to administer a new procedure . . . at the eleventh hour."); *Jones*, 239 A.3d at 630–31, ¶ 4 ("[T]here is a strong public interest in not changing the rules for voting at this late time.").

In short, Arizona has successfully implemented some form of vote-by-mail for over a century—and no-excuse vote-by-mail for thirty years. This Court should reject the Party's challenge and affirm the superior court's denial of a preliminary injunction.

Conclusion

For these reasons, this Court should affirm the superior court's dismissal of the Party's complaint and denial of the Party's request for a preliminary injunction.

RESPECTFULLY SUBMITTED this 8th day of August 2022.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY: */s/Joseph J. Branco*
Thomas P. Liddy
Joseph J. Branco
Joseph E. La Rue
Karen J. Hartman-Tellez
Anna G. Critz
Deputy County Attorneys

Attorneys for the Apache, Cochise, Coconino, Gila, Graham, Greenlee, La Paz, Maricopa, Navajo, Pima, Pinal, Santa Cruz, and Yuma County Recorder Appellees

THE BURGESS LAW GROUP
Emily Craiger
Attorneys for Appellee Maricopa County Recorder