

Roy Herrera (032901)
Daniel A. Arellano (032304)
Jillian L. Andrews (034611)
HERRERA ARELLANO LLP
530 East McDowell Road
Suite 107-150
Phoenix, Arizona 85004
(602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
jillian@ha-firm.com

*Attorneys for Intervenor-
Defendants Arizona Democratic
Party, DSCC, DCCC, and
Democratic National Committee*

SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN
PARTY, et al.,

Plaintiffs/Appellants,

v.

KATIE HOBBS, et al.,

Defendants/Appellees,

ARIZONA DEMOCRATIC
PARTY, et al.

Intervenor-Defendants/Appellees.

No. T-22-003-CV

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

Mohave County Superior Court
No. S-8015-CV-202200594

**INTERVENOR-
DEFENDANTS' RESPONSE
TO PETITION FOR
TRANSFER**

(Additional counsel listed on inside cover)

M. Patrick Moore Jr.*
HEMENWAY & BARNES LLP
75 State Street
Boston, Massachusetts 02109
(617) 557-9715
pmoore@hembar.com

Elisabeth C. Frost*
Maya Sequeira*
Richard A. Medina*
William K. Hancock*
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
(202) 968-4513
efrost@elias.law
msequeira@elias.law
rmedina@elias.law
whancock@elias.law

** Pro hac vice application to be
filed*

*Attorneys for Intervenor
Defendant Democratic National
Committee*

** Pro hac vice application to be
filed*

*Attorneys for Intervenor-
Defendants Arizona Democratic
Party, DSCC, and DCCC*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Introduction

This case does not warrant the Court's review, let alone by skipping the court of appeals. The appeal seeks merely to *distinguish* a prior decision of this Court, *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994), not overrule or qualify it, as required for transfer under ARCAP 19(a)(1). The case also does not present "extraordinary circumstances" to justify transfer under ARCAP 19(a)(3). It is exceedingly weak on the merits and presents a straightforward legal question the court of appeals can easily resolve: Does the Arizona Constitution clearly prohibit Arizona's long-established system of no-excuse early voting? (It does not.) The Court should deny the Petition to Transfer.

Background

Plaintiffs are the Arizona Republican Party and its chair, Kelli Ward. They challenge as unconstitutional Arizona's no-excuse early voting statutes (though they do not specify which ones), contending that they do not preserve "secrecy in voting" as required by Article VII, Section 1 of the Arizona Constitution. *See id.* ("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.”). Their theory is that secrecy in voting can be preserved only at a physical polling place, though they nowhere allege that Ms. Ward or any member of the Arizona Republican Party was unable to vote an early ballot in secret in the 31 years since the Legislature enacted the current system.

Plaintiffs first filed this suit as a special action in this Court on February 25, 2022, seeking to upend early voting less than five months before mailing of early ballots for the August 2, 2022 primary election. *See* Appl. for Issuance of Writ Under Exercise of Original Jurisdiction, *Ariz. Republican Party v. Hobbs*, No. CV-22-0048 (Ariz. Feb. 25, 2022). The Court declined jurisdiction on April 5. Order Declining Jurisdiction, *Ariz. Republican Party v. Hobbs*, No. CV-22-0048 (Apr. 5, 2022).

Plaintiffs then waited **six weeks**, until May 15, to file their complaint anew in Mohave County Superior Court. R. 1. The trial court ruled against Plaintiffs and entered final judgment on June 9. R. 61, 65. Plaintiffs then waited six days, until June 15, to file their notice of appeal. R. 66. They then waited nearly two weeks more to file the instant Petition (on June 28) and to move to expedite proceedings before the court of appeals (on June 29). In the meantime, and since well before Plaintiffs

initiated this litigation, the counties have budgeted and planned their administration of elections consistent with the expectation that the vast majority of voters will vote early by mail. R. 48 at 4, 12.

Argument

I. This Case Does Not Ask to Overrule or Qualify *Miller*.

Plaintiffs maintain that this appeal asks the Court to overrule or qualify its prior decision in *Miller*. Pet. at 5–6. But the appeal seeks only to *distinguish Miller* by arguing that it does not answer the question presented by this case. There is no occasion for the Court to revisit its precedent.

Miller touched on Arizona's secrecy-in-voting requirement. There, school district employees personally delivered early ballots concerning a bond override election to voters who had not requested them, urged the voters to support the override, and watched them vote their ballots. 179 Ariz. at 180. The parties agreed that this violated A.R.S. § 16-452, which provides that election officials must mail early ballots only to voters who request them and that only the voter may be in possession of his or her unvoted ballot. The Court held that because the district employees had procured a material number of ballots in violation of the statute, the

election had to be set aside. *Miller*, 179 Ariz. at 180. In doing so, the Court noted that the procedure specified in A.R.S. § 16-452 was “very important,” pointing to Article VII, Section 1’s requirement of secrecy in voting and noting that the early voting statute “advances this constitutional goal by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation.” *Id.*

This language obviously cuts strongly against the claim that Arizona’s early voting laws fail to preserve secrecy in voting. The truth is that the early voting statutes preserve secrecy in voting quite robustly, and any qualified elector who prefers to vote in person at a polling place may do so. *See* A.R.S. §§ 16-542(A) (early ballots mailed only to voters who timely request them); 16-545(B)(2) (early ballot envelopes must be “of a type that does not reveal the voter’s selections or political party affiliation and that is tamper evident when properly sealed”); 16-542(D) (“Only the elector may be in possession of that elector’s unvoted early ballot.”); 16-548(A) (the voter must “mark his ballot in such manner that his vote cannot be seen,” and then “fold the ballot . . . so as to conceal the vote,” and finally put the ballot in the specially provided envelope “which shall be securely sealed”); 16-552(F) (upon receipt of the ballot and

confirmation of the voter's eligibility, election officials must "take out the ballot without unfolding it or permitting it to be opened or examined" before separating the ballot for counting).

The trial court correctly recognized that these statutes "set forth procedural safeguards to prevent ballot tampering and . . . to maintain secrecy in voting." R. 61 at 3. The court noted that although it viewed *Miller's* discussion of A.R.S. §16-542 as dicta, *Miller* "reflects an understanding of the legislative process." *Id.* It was this legislative process and its preservation of secrecy in voting, not *Miller's* discussion of A.R.S. §16-542, that the trial court viewed as "much more important" in this case than it had been in *Miller*. *Id.* Plaintiffs thus misread the trial court's order as having turned on *Miller*. Pet. at 6.

Plaintiffs then try to cabin *Miller* by arguing that its discussion of A.R.S. § 16-452 in relation to secrecy in voting was dicta, as the constitutionality of no-excuse early voting was not at issue. Op. Br. at 48–49. But even if this Court were inclined to agree, it need not overrule or even qualify *Miller* to do so: *Miller* would remain perfectly good law even if its holding did not control here. There is no occasion to transfer under ARCAP 19(a)(1).

II. This Case Does Not Present Extraordinary Circumstances.

This is an ordinary case that the court of appeals is well equipped to handle. The case certainly is not “one that only this Court can decide,” Pet. at 7. While election cases are important, the court of appeals regularly resolves the constitutionality of election statutes. *See, e.g., AZ Petition Partners LLC v. Thompson*, --- Ariz. ---, No. 1 CA-SA 21-0170, 2022 WL 1638054 (App. May 24, 2022); *Ariz. Advoc. Network Found. v. State*, 250 Ariz. 109 (App. 2020); *Comm. for Just. & Fairness v. Ariz. Sec’y of State’s Off.*, 235 Ariz. 347 (App. 2014). This Court’s workload and its interest in judicial economy further counsel against taking a case that the court of appeals can resolve in the first (and, one can hope, final) instance. *See Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 382 (1992) (citing “the pending workload of this court” and its “desire to promote orderly judicial administration” in supporting policy of transferring to the court of appeals referendum cases over which the courts exercise concurrent jurisdiction).

Finally, Plaintiffs cannot possibly obtain relief in time for the November 2022 election, as preparations for that election are already well underway, and counties are mailing early ballots for the August 2

primary *today*. See A.R.S. §16-542(C) (early ballots mailed 27 days before the election). This litigation came too late when Plaintiffs first filed it over four months ago, and their stop-and-go pace since then belies their case for urgency now. There are no extraordinary circumstances that warrant transfer under ARCAP 19(a)(3).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Transfer.

RESPECTFULLY SUBMITTED this 6th day of July, 2022.

HERRERA ARELLANO LLP

/s/ Daniel A. Arellano

Roy Herrera

Daniel A. Arellano

Jillian L. Andrews

1001 North Central Avenue

Suite 404

Phoenix, Arizona 85004

*Attorneys for Intervenor-
Defendants Arizona Democratic
Party, DSCC, DCCC, and
Democratic National Committee*

HEMENWAY & BARNES LLP
M. Patrick Moore Jr.*
75 State Street
Boston, MA 02109

ELIAS LAW GROUP LLP
Elisabeth C. Frost*
Maya Sequeira*
Richard A. Medina*
William K. Hancock*
10 G Street NE, Suite 600
Washington, D.C. 20002

**Pro hac vice application to be
filed*

** Pro hac vice application to be
filed*

*Attorneys for Intervenor-
Defendant DNC*

*Attorneys for Intervenor-
Defendants Arizona Democratic
Party, DSCC, and DCCC*

RETRIEVED FROM DEMOCRACYDOCKET.COM