

**ARIZONA SUPREME COURT**

ARIZONA REPUBLICAN PARTY, <i>et al.</i> ,	No. T-22-0003-CV
Plaintiffs-Appellants,	Court of Appeals
vs.	No. 1 CA-CV-22-0388
KATIE HOBBS, <i>et al.</i> ,	Mohave County Superior Court
Defendants-Appellees.	No. S8015CV-2022-00594

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**RESPONSE OF THE MARICOPA, COCONINO, GILA, GRAHAM,  
GREENLEE, LA PAZ, NAVAJO, AND PIMA COUNTY RECORDERS  
TO APPELLANTS' PETITION FOR TRANSFER**

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Pursuant to this Court’s June 30, 2022 Order, the Maricopa County Recorder, along with the Coconino, Gila, Graham, Greenlee, La Paz, Navajo, and Pima County Recorders (collectively, the “Counties”), hereby respond to Plaintiffs-Appellants’ Petition for Transfer.<sup>1</sup>

### **MEMORANDUM OF POINTS AND AUTHORITIES**

Appellants the Arizona Republican Party and Kelli Ward (collectively, “the Party”) acknowledge that “[t]his matter is not subject to the expedited elections appeal process of Ariz. Civ. App. P. 10.” [Pet. for Transfer, at 3, n.1] Despite that acknowledgment, the Party asks this Court to recognize non-existent extraordinary circumstances and transfer the appeal out of the Court of Appeals in order to expedite final resolution of the case. [*Id.* at 5 (citing Ariz. R. Civ. App P. 19(a)(3))] At the same time, the Party has moved the Court of Appeals to accelerate the Appellants’ briefing schedule and hear the appeal by an arbitrary August 1, 2022 deadline.<sup>2</sup> But this is not an extraordinary case. It is an ordinary civil appeal in a case challenging the constitutionality of a statute that has governed every Arizona election for thirty years. Transfer to eliminate a level of appeal and short circuit the courts’

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<sup>1</sup> The Maricopa County Attorney’s Office also represents the Apache, Cochise, Pinal, Santa Cruz, and Yuma County Recorders. These county recorders are nominal, results-only Defendants-Appellees and take no position on the Petition for Transfer.

<sup>2</sup> The Counties have opposed the motion to accelerate briefing in the Court of Appeals. A copy of their Response is attached hereto as Exhibit A.

consideration of this matter is not necessary.

When this Court first considered the precursor to this case, *Arizona Republican Party v. Hobbs*, No. CV-22-0048-SA, it declined jurisdiction without prejudice to the Party filing the same action in the superior court. [Order, April 5, 2022, at 2] Six weeks later, the Party got around to filing a similar lawsuit in Mohave County Superior Court, the direct appeal of which it now seeks to transfer to this Court. Nothing in this Court’s April 5 Order expressly stated that an appeal of a ruling in the potential superior court action would go directly to the Supreme Court, but if that is what this Court intended, the Counties do not object.

The Counties, however, do not agree with the Party that this Court should grant the Petition for Transfer so that this Court can decide it in time for the Counties to “make suitable preparations for the November 2022 general election and determine the necessary number of polling locations and workers in advance of the day of the election.” [Pet. for Transfer, at 8] As required by Arizona law, the Counties have already made such determinations based on in-person voter turnout from recent general elections. *See* A.R.S. § 16-411(B)(3); 2019 Elections Procedures Manual (“EPM”), at 166-72.<sup>3</sup> And the Counties know that if nearly all

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<sup>3</sup> The Elections Procedures Manual has the force of law. *See Democratic Nat’l Comm. (“DNC”) v. Reagan*, 329 F. Supp. 3d 824, 842 (D. Ariz. 2018) (citing A.R.S. § 16-452(B)-(C)), *aff’d sub nom Brnovich v. DNC*, 141 S. Ct. 2321 (2021); [https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)

voting were required to occur in-person on election day, they would need hundreds more ADA-compliant polling locations and thousands more poll workers than their current plans contemplate.<sup>4</sup> But knowing what is needed and being able to contract to meet those needs are two different things. The Counties have been planning for the November 2022 General Election for more than a year.<sup>5</sup> Substantially changing those plans after the Primary Election has begun (or is completed) will confuse voters and push the Counties to the brink of election disaster. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

In view of the near certain impossibility of switching to an all in-person, election day model for November 2022, there is no need to transfer this case simply

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<sup>4</sup> Moving to an all in-person, election day model would also require additional check-in equipment, ballot printers, polling place supplies, accessible voting devices, and ballot paper. Counties have not budgeted for such additional materials, and with current supply-chain issues, including a world-wide paper shortage, acquiring sufficient equipment and materials would likely be impossible. *See* Bipartisan Policy Center, *Preparing for Ballot Paper Shortages in 2022 and 2024*, <https://bipartisanpolicy.org/report/ballot-paper-shortages/>.

<sup>5</sup> *See* Maricopa County 2022 Elections Plan (“Maricopa Plan”), at 11-15 (explaining modeling based on past elections used to forecast needs for 2022 elections) available at <https://recorder.maricopa.gov/site/pdf/FINAL%20-%202022%20Elections%20Plan.pdf>; Pima County Vote Center Implementation Update, May 3, 2022, at 1-2 (“Pima Plan”), available at <https://pima.legistar.com/View.ashx?M=F&ID=-10862774&GUID=DC2E817D-F2D8-4DAF-976B-FB50E4C65CA7>.

to get a faster ruling from the court of last resort. It is already too late to implement changes that radically overhaul Arizona's 2022 elections.

The case that the Party cites in support of transfer, *Fleischman v. Protect Our City*, 214 Ariz. 406 (2007), does not advance the Party's position. That case decided whether a single city referendum issue should be placed on the ballot and interpreted a statute that expressly provided for direct appeal to the Supreme Court. 214 Ariz. at 408, ¶ 10. Here, the Party does not seek to squeeze just one more race onto a ballot, but instead to completely upend administration of Arizona elections. Moreover, unlike in *Fleischman*, there is no statutory basis for seeking appellate review in this Court in the first instance.

Transferring this case to obtain an expedited ruling will not benefit this Court, the parties, or Arizona voters. Indeed, “[l]ast-minute election challenges, which could have been avoided, prejudice not only defendants but the entire system. They deprive judges of the ability to fairly and reasonably process and consider the issues. They unreasonably telescope the process and rush appellate review, leaving little time for reflection and wise decision making.” *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993). For this reason, this Court has regularly dismissed election appeals based on laches. *Id.* at 460 (“The doctrine of laches prevents a party from asking this court to decide a difficult question of Arizona constitutional law on the eve of ballot printing when such a question could have been presented much earlier.”). And

as the record below demonstrated, any requested relief, even if granted (which, as the record below *also* demonstrates, should not happen), could not be implemented in time for the 2022 General Election. This Court should not “steamroll through [] delicate legal issues” just to meet the Party’s manufactured emergency. *See id.* at 459.

The Party also argues that transfer is warranted under Ariz. R. Civ. App. P. 19(a)(1) because a ruling in the Party’s favor requires this Court to qualify its ruling in *Miller v. Picacho Elementary School Dist. No. 33*, 179 Ariz. 178 (1994). This wholly misrepresents the Superior Court’s reference to *Miller* in its June 6, 2022 Ruling. The Party asserts that its “appeal asks that *Miller* be qualified as not deciding the issue of whether no-excuse mail-in voting satisfies the constitutional requirement of secrecy in voting.” [Pet. for Transfer at 6] But as the Superior Court recognized below, this Court’s “reference to [one early voting statute] in *Miller* is dicta.” [Pet. for Transfer, Ex. 3, at 3] The Court of Appeals can rule in favor of the Party without running afoul of *Miller*. Indeed, the Superior Court did not reach its conclusions regarding Arizona statutes protecting ballot secrecy by relying on *Miller*: it reviewed the text of the statutes themselves to make that decision. [*Id.* (citing the ballot secrecy provisions of A.R.S. §§ 16-545(B)(2) and -548(A)] Accordingly, Ariz. R. Civ. App. P. 19(a)(1) does not call for transfer of this appeal.

For these reasons, the Party’s Petition does not establish that transfer would

benefit the judicial process in this case. The Counties believe that, typically, the judicial process benefits from the ordinary course of appeal from the Superior Court to the Court of Appeals, and discretionary appeal from the Court of Appeals to the Supreme Court. That process allows this Court to have a fully developed record as well as the analysis of *four* judges—one from the Superior Court, and three from the Court of Appeals. That said, if this Court prefers to hear this appeal immediately and forego the analysis that the Court of Appeals would provide, the Counties recognize that is this Court’s prerogative and do not object.

RESPECTFULLY SUBMITTED this 6th day of July, 2022.

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