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

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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.

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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

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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

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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.

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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

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[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

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[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.

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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.

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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.

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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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