ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, a recognized political party; and KELLI WARD, Chairwoman of the Arizona Republican Party and an Arizona voter and taxpayer;

Petitioners/Appellants,

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State; LARRY NOBLE, in his official capacity as RECORDER for COUNTY OF APACHE; DAVID W. STEVENS, in his official capacity as RECORDER for COUNTY OF COCHISE; PATTY HANSEN, in her official capacity as RECORDER for COUNTY OF COCONINO; SADIE JO BINGHAM, in her official capacity as RECORDER for COUNTY OF GILA; WENDY JOHN, in her official capacity as RECORDER for COUNTY OF GRAHAM; SHARIE MILHEIRO, in her official capacity as RECORDER for COUNTY OF GREENLEE; RICHARD GARCIA, in his official capacity as RECORDER for COUNTY OF LA PAZ; STEPHEN RICHER, in his official capacity as RECORDER for COUNTY OF MARICOPA; KRISTI BLAIR, in her official capacity as RECORDER for COUNTY OF MOHAVE; MICHAEL SAMPLE, his official capacity as RECORDER for COUNTY OF NAVAHO; GABRIELLA CAZARES-KELLY, in

No. 1 CA-CV-22-0388

Mohave County Superior Court
No. CV-2022-00594

her official capacity as RECORDER for the COUNTY OF PIMA; VIRGINIA ROSS, in her official capacity as RECORDER for COUNTY OF PINAL; Suzanne "SUZIE" SAINZ, in her official capacity as RECORDER for COUNTY OF SANTA CRUZ; LESLIE M. HOFFMAN, in her official capacity as RECORDER for COUNTY OF YAVAPAI; and ROBYN STALLWORTH POUQUETTE in her official capacity as RECORDER for the COUNTY OF YUMA;

Appellees.

THE ARIZONA DEMOCRATIC PARTY; DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE; and DEMOCRATIC NATIONAL COMMITTEE;

Defendants-in-Intervention Below.

PETITION FOR TRANSFER

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Pursuant to Ariz. R. Civ. App. P. 19 ("Rule 19"), Petitioners/Appellants Arizona Republican Party ("AZGOP") and Kelli Ward move that the appeal of matter no. CV-2022-00594 be transferred from the Court of Appeals, Division One, to this Court. This petition is based upon Appellants' request that this Court's decision in *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178 (1994), be qualified or, alternatively, that extraordinary circumstances justify transfer.[1]

1. Introduction.

Earlier this year, the AZGOP petitioned this Court to assert original jurisdiction over a special action against the Secretary of State and the State of Arizona. This petition raised, *inter alia*, the claim that Arizona's current system of no-excuse mail-in voting, adopted in 1991, was contrary to the Arizona Constitution, including article 7's "secrecy in voting" directive.

The Attorney General filed a response to Plaintiffs' petition stating that "the Application raises important questions about the constitutionality of the early-voting system in Arizona" but claiming that relief could not be granted on the procedural grounds that this Court lacks original jurisdiction over the State. [Ex. 1 at 22 (State's Resp. to Application, Mar. 11, 2022).][2] This Court agreed that it could not hear an

[1] This matter is not subject to the expedited elections appeal process of Ariz. R. Civ. App. P. 10.

[2] All citations to documents related to the initial litigation before this Court are to Case No. CV-22-0048-SA.

application seeking to have it exercise original jurisdiction over the State and, on that ground alone, directed the AZGOP to refile its constitutional claim in superior court. [Ex. 2 at 2 (Order Declining Jurisdiction, Apr. 5, 2022) ("Issue #3 must be declined for lack of original jurisdiction over the respondent State, which is not itself a 'state officer.'").]

Plaintiffs subsequently did so after refining their case by, among other things: (1) limiting their challenge to the post-1991 system and not all absentee voting, (2) naming the relevant election official from every county, and (3) performing additional research which revealed that the Arizona Territorial Legislature defined secrecy in voting by statute in 1891 and that the framers of the Arizona Constitution intended to restrict future legislatures from deviating from the conception of "secrecy in voting" reflected in this statute. They asked the trial court for various forms of relief, including preliminary injunctive relief requiring Arizona's election officials to comply with constitutional mandates in Arizona's 2022 general election as well as a permanent injunction as to all future elections and corresponding declaratory relief. The State was dismissed without prejudice pursuant to a Rule 80 agreement to abide by the outcome of the litigation, including any appeals. Seven county elections officials decided to take a nominal role in the defense.

The trial court held that there was only one issue in the case: "Is the Arizona legislature prohibited by the Arizona Constitution from enacting voting laws that

include no-excuse mail-in voting?" [Ex. 3 at 2 (Ct. Order/Notice/Ruling, June 6, 2022) ("Ruling") (underscore in original).] It concluded the legislature is not prohibited from doing so. This is an appeal from that ruling.

Transfer on appeal to this Court is appropriate if "the appeal requests that a decision of the Supreme Court be overruled or qualified" or upon a showing of "extraordinary circumstances justify[ing] the transfer." Rule 19(a)(1, 3).

2. *Transfer is appropriate because this appeal requests this Court's decision in Miller be qualified.*

In *Miller*, this Court set aside the results of an election because "District employees with a pecuniary interest in [a bond] override's passage delivered ballots to electors whom they knew." 179 Ariz. at 180. Then, "[a]lthough these electors did not ask for ballots, school employees urged them to vote and even encouraged them to vote for the override. District employees went to the homes of the electors and stood beside them as they voted." *Id*.

Intervenor-Defendants contended below that this Court, in *Miller*, "blessed" Arizona's current system of no-excuse mail in voting "quite explicitly," [Ex. 4 at 60:22–61:20 (Order to Show Cause Tr., June 3, 2022).] Plaintiffs argued that *Miller* was not a constitutional challenge to any statute but rather a challenge to the results of an election on the grounds of impropriety and that, therefore, any reference to article 7, section 1 of the Arizona Constitution in that case was dicta (and in any case

that *Miller* illustrated the harms of abandoning the Australian ballot). [Ex. 4 at 87:20–88:18.] The trial court, perplexingly, found that the relevant portions of *Miller* were "dicta in **that** case" but "[i]n **this** case" were "much more important." [Ex. 3 at 3 (emphasis supplied)]. It then proceeded, on the basis of *Miller*, to reject Plaintiffs' arguments regarding the original public meaning of "secrecy in voting" and conclude that that statutory safeguards on no-excuse mail-in voting are sufficient to comply with the constitutional requirement of secrecy in voting. [*Id*.]

Because a statutory, not constitutional, violation was at issue in *Miller*, the fundamental question of what "secrecy in voting" means was simply not presented to this Court. And even in the dicta above, this Court did not go so far as to posit that statutory safeguards were **sufficient** to comply with the constitutional requirement of secrecy in voting but merely remarked that they "advance[d]" that goal. 179 Ariz. at 180.

Thus, the AZGOP's 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.

3. Other extraordinary circumstances justify the transfer.

a. Judicial economy favors transfer.

While ordinarily, judicial economy is promoted by requiring parties to go through the normal appeals process, this is an extraordinary case. This Court has

already reviewed numerous briefs by the parties, amici, and intervenors related to the issues raised by this appeal. While these issues have been refined in the trial court, this Court need not start from scratch to get up to speed. Further, this issue is almost certain to be appealed to this Court if transfer is not granted because, fundamentally, it is one that only this Court can decide.

b. Enforcing constitutional safeguards for elections is a matter of statewide importance.

While rare, this Court accepts transfers concerning matters of general or widespread importance. For example, in a case addressing the funding of public pensions, this Court accepted transfer because it raised issues of statewide importance. *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 38 ¶13 (2016). Similarly, the constitutionality of municipal code provisions for the removal of magistrates constituted an appropriate issue for transfer to this Court because many other municipal codes included similar provisions and thus a decision would have broad effect statewide. *Winter v. Coor*, 144 Ariz. 56, 57 (1985). *See also Deer Valley Unified Sch. Dist. V. Superior Court*, 157 Ariz. 537, 537 (1988) (disposition of state school trust lands, a matter of first impression, addressed a sufficiently important question for transfer).

In the present case, as a matter of first impression, Petitioners/Appellants contended below that the Arizona Constitution specifically requires elections to be

conducted in adherence to the Australian ballot system to guard against the possibility of coercion, fraud, and undue influence (with which the trial court agreed), and that this system requires, as a matter of law, that a restricted zone around the voter be secured (with which the trial court disagreed). There are fewer cases of greater statewide importance than one which touches upon suffrage and the integrity of the cornerstone institution of our democratic system.

c. The upcoming general election necessitates rapid determination.

The need for a timely determination also carries weight when considering a petition for transfer. This Court accepted a petition for transfer due to the need for the parties to "obtain a timely determination whether the proposed initiative will be on the ballot for the next city election," and because the issue was one of general importance as at least one other city provided for a similar measure. *Fleischman v. Protect Our City*, 214 Ariz. 406, 409 ¶ 14 (2007).

Much as in *Fleischman*, the parties need a timely determination of the constitutionality of these statutory provisions. Each of the county recorders needs 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.

WHEREFORE, Petitioners/Appellants respectfully request that this Court grant this Petition for Transfer and hear this appeal directly.

RESPECTFULLY SUBMITTED this 28th day of June 2022.

Davillier Law Group, LLC

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

Attorneys for Petitioners/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 19, the undersigned counsel certifies that the Petition for Transfer is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and contains 1,398 words according to the word-count function of Microsoft Word.

RESPECTFULLY SUBMITTED this 28th day of June 2022.

Davillier Law Group, LLC

By */s/* Alexander Kolodin
Alexander Kolodin
Veronica Lucero
Roger Strassburg
Arno Naeckel
Attorneys for Petitionsers/Appellants

Exhibit 1

ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, et al. Petitioners, v. KATIE HOBBS, et al. Respondents.	Case No. CV-22-0048-SA

STATE OF ARIZONA'S RESPONSE TO APPLICATION FOR ISSUANCE OF WRIT UNDER EXERCISE OF ORIGINAL JURISDICTION

AND

BRIEF AMICUS CURIAE OF ARIZONA ATTORNEY GENERAL MARK BRNOVICH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

Pursuant to the Court's Order Directing Service, and Fixing Time For Response and Reply ("Order"), the State of Arizona ("State") hereby responds to Petitioners' Application for Issuance of Writ Under Exercise of Original Jurisdiction ("Application"). Pursuant to A.R.S. § 12-1841 and the Court's Order, Arizona Attorney General Mark Brnovich ("AG") also hereby responds to the Application.

INTRODUCTION

The Court should accept jurisdiction to decide important issues of pure law relating to the Election Procedures Manual ("EPM") and the proper interpretation of A.R.S. § 16-452.

Fifty years ago, the Legislature created the EPM "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452. After the EPM was not promulgated for two election cycles, the Legislature in 2019 amended the EPM statute to require the Secretary of State ("Secretary") to provide a draft EPM to the AG and Governor by October 1 of every odd-numbered year. *See id.* § 16-452(B). The Legislature, thereby, clearly expressed its intent that a new version of the EPM take effect every two years.

Since that amendment, this Court has twice provided new guidance on the proper scope of the EPM. First, because § 16-452 does not mention candidate

nominating petitions, the Court held that the 2019 EPM's procedures relating to that topic were not promulgated under § 16-452 and do not have the force of law. *See McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021). The Court subsequently made clear that "an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law." *Leach v. Hobbs*, 250 Ariz. 572, __ ¶21 (2021).

Despite this clear guidance, on October 1, 2021, the Secretary provided a draft EPM to the AG and Governor chock full of provisions beyond the scope of her authority in § 16-452 or inconsistent with the purpose of Arizona election laws. For example, the Secretary included procedures relating to candidate nominating petitions that this Court had just held in *McKenna* are beyond the scope of the EPM. Following an exchange of correspondence with the AG, the Secretary wrote Arizona's county recorders to report that no 2021 EPM would be forthcoming for the 2022 election cycle and that they should instead rely on the "now not fully up-to-date" 2019 EPM. Contrary to that instruction, because § 16-452 makes clear that a new EPM is required every two years and the AG did not approve the 2019 EPM for use during the 2022 election cycle, there currently is no valid EPM in place.

The Court, therefore, cannot decide the important legal issues Petitioners raise, or grant the relief they request, without deciding two predicate legal issues of statewide importance. Specifically, the Court cannot decide what topics should and

should not be included in the 2019 EPM without first deciding whether the 2019 EPM remains valid under A.R.S. § 16-452. It is the State and the AG's position that the 2019 EPM is no longer valid. The Court also cannot grant the relief Petitioners request—ordering the Secretary to include or exclude certain subjects in the EPM—without first ordering her, as statutorily mandated in § 16-452(B), to provide a valid draft EPM to the AG and Governor for analysis and approval. Thus, the Court should accept jurisdiction and resolve those two predicate issues, and should do so now prior to the start of the 2022 election cycle. The Court should hold that the 2019 EPM is no longer valid and that the Secretary is required to provide a valid draft EPM to the AG and Governor by a date certain in the near future, at which time Petitioners' concerns could be addressed in the 2022 EPM.

Finally, while Petitioners raise important issues about the constitutionality of the early-voting system in Arizona, the Court does not have original jurisdiction over the State. Thus, the Court should deny jurisdiction over that issue without addressing the merits of the claim.

LEGAL ARGUMENT

Petitioners seek various writs related to three primary issues: (1) whether the Secretary should be required to promulgate her existing signature guidance through the EPM; (2) whether the Secretary is authorized to create ballot drop boxes through the EPM; and (3) whether the State's no-excuse early voting laws are inconsistent

with the Arizona Constitution. The first two questions are statutory in nature and the third is constitutional. As to the third issue, the Application appears to seek relief only against the State. The State and AG, therefore, respond to the first two statutory issues, but only the State responds to the constitutional issues.

I. The Court Should Accept Jurisdiction And Order The Secretary To Provide The AG And Governor With A Valid Draft EPM Because The 2019 EPM Is No Longer Valid.

A. The Court Should First Decide Whether The 2019 EPM Is Legally Effective And Order The Secretary To Comply With § 16-452.

Petitioners raise several issues of statewide importance related to the EPM. As explained further below, however, the Secretary failed to provide the AG and Governor, by October 1, 2021, with a draft EPM consistent with § 16-452 and this Court's holdings in *Leach* and *McKenna*. Consequently, before the Court could reach the important issues Petitioners raise, or grant the relief they request, the Court must resolve predicate legal issues regarding the continuing validity (or lack thereof) of the 2019 EPM and whether the Secretary must comply with her mandatory duty under § 16-452 to provide a valid draft EPM to the AG and Governor.

Neither of the important issues Petitioners raise can be answered without first determining whether the 2019 EPM remains valid. If the Court orders the Secretary to include her signature verification guidance in the 2019 EPM (more on this below), as Petitioners request, and yet the 2019 EPM is not legally binding, then Petitioners requested relief will be of no value. Similarly, if the 2019 EPM is not legally

binding, then the Secretary's allowance of ballot drop boxes therein is now irrelevant. If Arizona law does not permit ballot drop boxes, as Petitioners argue, then county recorders will not be permitted to utilize them during the 2022 elections.

Thus, the Court cannot reach Petitioners' legal issues without first deciding whether the 2019 EPM remains legally valid. The Court should accept jurisdiction to decide that pure legal issue, which is a matter of statewide importance. The parties to this action, and scores of election officials throughout the State, require clarity on whether the 2019 EPM remains valid for purposes of the 2022 election cycle, which will begin in earnest in a matter of months.

The Court also cannot grant the relief requested to modify the EPM without first requiring the Secretary to comply with § 16-452. The Court should, therefore, order the Secretary to comply with her mandatory statutory duty to provide the AG and Governor with a valid draft EPM by a date certain to allow sufficient time for review and approval before the 2022 election cycle begins.

B. There Currently Is No Valid EPM.

1. The Secretary Failed To Provide A Valid Draft EPM In 2021.

Arizona law provides that the Secretary, every two years, "shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of

producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A). The Secretary discharges that statutory duty through the EPM.

The Secretary does not enjoy unlimited discretion in determining what provisions to include in the EPM. Rather, this Court has recently (and correctly) made clear that "an EPM regulation that exceeds the scope of its statutory authorization or contravenes an election statute's purpose does not have the force of law." *Leach v. Hobbs*, 250 Ariz. 572, __ ¶21 (2021); *see also McKenna v. Soto*, 250 Ariz. 469, 473 ¶20 (2021) ("Because the statute that authorizes the EPM does not authorize rulemaking pertaining to candidate nomination petitions, those portions of the EPM relied upon . . . to invalidate the signatures without a complete date were not adopted 'pursuant to' § 16-452.").

Moreover, the Secretary is subject to oversight by other state officials—both the AG and the Governor must approve the draft EPM before it enjoys the force of law. A.R.S. § 16-452(B). To ensure that the EPM is timely promulgated, Arizona law requires the Secretary to provide a draft EPM to the AG and Governor by October 1 of each odd-numbered year. *Id.*

The AG is not statutorily authorized to rubber stamp the EPM without regard to what provisions the Secretary includes. Instead, "the authority of the [AG] must be found in statute." *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, __ ¶8 (2020). And no Arizona statute, including § 16-452, allows the AG to approve

an EPM provision exceeding the scope of its statutory authorization or contravening an election statute's purpose. Put differently, the AG has no statutory authority to approve policies not adopted "pursuant to § 16-452" and which are mere guidance. These limitations—scope and approval—on the Secretary's authority are particularly vital in light of the fact that "[a] person who violates any rule adopted pursuant to [§ 16-452] is guilty of a class 2 misdemeanor." A.R.S. § 16-452(C).

At the end of 2021—after the Court's guidance in *Leach* and *McKenna*—the Secretary provided a draft EPM to the AG and Governor. Unfortunately, many of the draft provisions either exceeded the scope of the Secretary's authority or were inconsistent with the purpose of one or more election statutes. The following are just some of the more egregious examples and are not meant to be exhaustive.

The Secretary included seventeen pages of rules and procedures relating to candidate nominating procedures. *See* APP. Vol. II at 131-48. The Secretary included those provisions despite this Court's clear conclusion in *McKenna* that "the statute that authorizes the EPM does not authorize rulemaking pertaining to candidate nomination petitions" and that such provisions are "not adopted 'pursuant to' § 16-452." 250 Ariz. at 473 ¶20. Because candidate nominating provisions cannot be adopted pursuant to § 16-452, they should not again have been included in the EPM and the AG could not approve them pursuant to § 16-452.

The Secretary also included over forty-five pages of rules and procedures relating to voter registration. *See* APP. Vol. II at 12-56. Voter registration is not one of the topics upon which the Secretary is empowered to promulgate rules under § 16-452, which mentions instead "early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." The Legislature granted statutory authority for voter registration solely to county recorders. *See, e.g.*, A.R.S. §§ 16-131, 16-163(A). Because voter registration provisions cannot be adopted pursuant to § 16-452, the Secretary should not have again included them and the AG could not approve them pursuant to § 16-452.

One final example. For years, Arizona has, at least in part, followed a precinct system for in-person voting. Those who vote in person in a county using the precinct system must vote in their assigned precinct. A.R.S. § 16-122. The Democratic National Committee ("DNC") challenged Arizona's out-of-precinct rule on the grounds that it violated § 2 of the Voting Rights Act. The AG defended the law and the Court rejected DNC's challenge, explaining that "[h]aving to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting.'" *Brnovich v. DNC*, 141 S. Ct. 2321, 2344 (2021). The Secretary's draft 2021 EPM, however, inserted provisions allowing voters who appear at the wrong precinct to nonetheless cast a provisional ballot for certain races, which is in direct conflict with A.R.S. §§ 16-122 and -584 (not to mention *Brnovich*). *See* APP. Vol.

II at 231 (indicating that "ballots cast in the wrong precinct must also be manually duplicated in order to be tabulated"); *see also id*. at 232 ("for out-of-precinct ballots, only the voter's selections for races and ballot measures for which the voter is eligible to vote shall be duplicated onto the correct ballot style").[1]

Again, these are just a few examples (of many) of invalid provisions included in the Secretary's draft EPM. Faced with a draft containing a multitude of invalid provisions, the AG could not approve the EPM. Instead, the AG redlined those provisions he concluded were beyond the Secretary's statutory authority or inconsistent with an election statute and indicated that he would approve as modified. *See generally* App. Vol. II. The Secretary refused to remove all of the offending provisions.[2] After exchanging correspondence about the draft, the Secretary simply gave up, writing county recorders that no 2021 EPM would be forthcoming, but reassuring them that "it was our hard work during 2019 that gave us an EPM that remains relevant, though now not fully up-to-date." *See* APP. Vol. I at 7-23; APP. Vol. I at 25.

2. The 2019 EPM Was Not Approved For The 2022 Elections And Is No Longer Valid.

[1] Again, these three examples represent just a few of the problematic provisions. On December 9, 2022, the AG sent the Secretary a redline EPM showing the provisions that were inconsistent with Leach and McKenna. *See* APP. Vol. II; *see also* APP. Vol. I at 10 (cover letter transmitting the redlined EPM).

[2] The Secretary offered only to remove certain of the offending provisions. *See* APP. Vol. I at 12.

Petitioners correctly recognize that there is no 2021 EPM, instead asking the Court to order the Secretary to add or remove certain provisions from the 2019 EPM. But the 2019 EPM is no longer legally binding or valid. Thus, while Petitioners raise important issues about the 2019 EPM, ordering the Secretary to include or exclude provisions from the 2019 EPM about signature verification or ballot drop boxes will not change the status quo—that county election officials are not currently bound to follow any EPM (obviously, they can voluntarily follow EPM provisions so long as they do not violate state statutes in the process).

In 1979, the Legislature first charged the secretary of state with promulgating an election procedures manual. Back then, A.R.S. § 16-452(B) provided the following: "Such rules shall be prescribed in an official instructions and procedures manual to be issued not later than thirty days prior to each election. Prior to its issuance, the manual shall be approved by the governor and the attorney general." For the next forty years, various secretaries of state dutifully discharged their duty to promulgate a manual. Things went off the tracks beginning in 2016 and, for reasons not relevant here, no manual was promulgated during the 2016 and 2018 election cycles. The Legislature stepped in during 2019, enacting new statutory language referenced above *requiring* (1) the EPM "to be issued not later than December 31 of each odd-numbered year" and (2) the Secretary to "submit the

manual to the governor and the attorney general not later than October 1 of the year before each general election." A.R.S. § 16-452(B).

There is nothing in the statutory language supporting that an old EPM remains legally binding or valid once the deadline for promulgation of a new EPM passes. Construing the statute to imply such a result would render the Legislature's 2019 revisions superfluous and fail to take into consideration this Court's intervening precedent in *Leach* and *McKenna*, which now provide clear direction on what can and cannot be included in the EPM. In fact, such a construction would be inconsistent with the purpose of the Legislature's revision to § 16-452, which was intended to avoid a situation like in 2016 and 2018 where no new manual was published. Any motivation to promulgate a lawful manual decreases significantly if a secretary can simply instruct county election officials to follow an old version she prefers more. That reality was borne out here when the Secretary failed to provide the AG and Governor with a valid draft and instead signaled to county recorders that they should continue to follow the 2019 EPM. APP. Vol. I at 25. EPMs also become stale fairly quickly—the Secretary acknowledged that the 2019 EPM is no longer "fully up-to-date"—and, therefore, should not be relied upon for more than one election cycle. *See id.*

To be clear, the AG has not approved the 2019 EPM for use during the 2022 election cycle and the Secretary has failed to comply with her statutory directive to

present the AG and Governor with a lawful EPM for review and approval. Consequently, there will be no EPM for the 2022 elections as required by law unless and until the Secretary complies with her obligations under A.R.S. § 16-452. The Court should order her to do so.

The lack of a legally-binding, valid EPM could have a significantly deleterious impact on the 2022 elections. After all, the stated goal of the manual required under § 16-452 is "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency" for voting in, and tabulating the results of, elections. That goal was thwarted when the Secretary failed to comply with § 16-452 by drafting an EPM that disregarded this Court's guidance on the lawfully permissible contents of the EPM.

Based on the foregoing, the AG respectfully requests that the Court accept jurisdiction to determine whether the 2019 EPM remains valid. The Court should hold that that the 2019 EPM was not approved for the 2022 election cycle and is no longer valid. The Court should also order the Secretary to comply with § 16-452 by promptly providing a valid draft EPM to the AG and Governor by a date certain.

II. The AG Agrees That Signature Verification Is An Issue Of Statewide Importance, But Does Not Believe That The Secretary's Guidance Should Be Fully Included In The EPM For Several Reasons.

A. Arizona's Early Voting System Requires Robust Signature Verification.

Arizona provides a number of options for voters to cast ballots, and has taken multiple steps to make voting less burdensome. Arizona, for example, allows voters to register online, allows voters to be included on a list to automatically receive a ballot for every election, and provides multiple options for returning or submitting a ballot.

Arizona has permitted some form of absentee balloting since 1918, beginning with World War I soldiers. Since the 1992 election cycle, Arizona has allowed no-excuse access to mail-in balloting. *See* 1991 Ariz. Sess. Laws, ch. 51, § 1. With absentee voting, voters may elect to receive a ballot and return envelope (return postage pre-paid) by mail. To cast the ballot, the voter simply makes her selections on the ballot, seals the envelope, and signs the outside of the return envelope, which doubles as a ballot affidavit. A.R.S. §§ 16-547, 16-548. The affiant declares, under penalty of perjury, that he or she "voted the enclosed ballot." A.R.S. § 16-547(A). Arizona's voters may vote by mail during the last four weeks of an election. A.R.S. §§ 16-541(A), 16-542(C)–(D). Both the ballot and the signed affidavit must be delivered to the office of the county recorder no later than 7:00 p.m. on election day. A.R.S. § 16-548(A).

A ballot is not complete, and cannot be counted, unless and until it includes a signature on the ballot affidavit. Once received, county election officials compare the signature on the affidavit with the signature in the voter's registration record.

A.R.S. § 16-550(A). If county election officials determine that the signature matches that on file, the ballot is counted. If, on the other hand, county election officials determine that the signature on the ballot affidavit does not match that on file, then the ballot cannot be counted unless the voter verifies the signature. *Id.*

Requiring a match between the signature on the ballot affidavit and the signature on file with the State is the primary, if not only, and certainly most important election integrity measure when it comes to absentee ballots. The Ninth Circuit acknowledged, in response to a constitutional challenge to the deadline for submitting signed ballot affidavits, that "Arizona requires early voters to return their ballots along with a signed ballot affidavit in order to guard against voter fraud." *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1085 (9th Cir. 2020). County election officials, therefore, must be extremely diligent in ensuring that early-ballot signatures match those on file with the State. Regardless of the sheer quantity of early ballots received, the administrative burdens imposed by verifying each one, or for other reasons that could be construed as nefarious or partisan, county election officials and their staffs cannot violate their statutory duty to match *every* signature.

B. Signature Verification Is Vulnerable To Non- or Mal-feasance.

Voting by mail is widespread in Arizona: 79% of Arizona voters cast mail-in ballots in 2018 and that number reportedly increased to 89% for the 2020 General Election. With over 3.4 million ballots cast in the General Election, Arizona

elections officials were required to match signatures on over 3 million ballots during a five to six-week period in 2020. Unfortunately, this large number of early mail-in ballots combined with the administrative burden of confirming every one of the signatures submitted in a very short period of time, when not administered diligently, could result in election officials approving ballots that should not otherwise be approved without further verification.

Statistics for Maricopa County, for example, over the last three election cycles reflect that the number of ballots rejected because of missing and mismatched signatures is trending down. *See* APP. Vol. I at 27. During the 2016 General Election, when Helen Purcell was county recorder, Maricopa County received 1,249,932 mail-in ballots. *Id.* Of that amount, Maricopa County rejected 2,209 ballots because of missing signatures and 1,451 ballots because of mismatched signatures. *Id.*

Just two years later, during the 2018 General Election, after Adrian Fontes became county recorder, Maricopa County received 1,184,791 mail-in ballots, just 65,141 less than in 2016. *Id.* Yet the number of ballots rejected in 2018 because of missing signatures (only 1,856) and mismatched signatures (only 307) declined significantly—the number of missing signature ballots decreased by 353 and the mismatched signature ballots decreased by 1,144 (a 79% decrease). *Id.* By

comparison, Pima County received 302,770 ballots (882,081 less than Maricopa) and rejected 488 (135 more than Maricopa) because of mismatched signatures. *Id.*

During the 2020 General Election, Maricopa County saw a significant increase in the number of mail-in ballots, receiving 1,908,067 mail-in ballots (an increase of 723,276 mail-in ballots). *Id.* Yet the number of ballots rejected because of missing signatures continued its dramatic decrease (to only 1,455 ballots) and the number of ballots rejected because of mismatched signatures increased only slightly (to 587 ballots).[3] *Id.* To be sure, Maricopa County has explained that the number of ballots rejected for mismatched signatures during the 2020 General Election was impacted by the Legislature's creation of a 5-day post-election cure period for mismatched signatures. But the existence of that cure period in 2020 does not explain the dramatic decrease—on an absolute or percentage basis—of ballots with missing signatures from 2016 to 2020[4] or the dramatic decrease in ballots with mismatched signatures from 2016 to 2018. One possible explanation for these trends, and the AG acknowledges there could be others, is that Maricopa County became less diligent with signature review beginning in 2018.[5]

[3] Pima County by contrast rejected nearly the same number of ballots based on mismatched signatures (572) despite receiving 1,479,386 less ballots. APP. Vol. I at 27.

[4] Ballots with missing signatures were required to be cured prior to close of polls on election day.

[5] The AG has asked Maricopa County to provide information about its signature verification policies and procedures. *See* APP. Vol. I at 3-5.

Certain data stemming from litigation following the 2020 General Election is also instructive. In November 2020, certain individuals filed an election challenge under A.R.S. § 16-672. In connection with that challenge, the trial court ordered that the parties' counsel and retained forensic experts could review 100 randomly selected ballot affidavits and conduct a signature comparison of ballots where a signature match had occurred. *Ward v. Jackson*, No. CV2020-015285, 2020 WL 13032880, *3 (Maricopa Cnty. Super. Ct. Dec. 4, 2020). Two forensic document examiners testified during an evidentiary hearing, one for the plaintiffs and one for the defendants. The plaintiffs' expert testified that of the 100 ballots reviewed, 6 signatures were "'inconclusive,' meaning she could not testify that the signature on the envelope/affidavit matched the signature on file." *Id.* at *4. The forensic expert for Defendants, who sought to defeat the election challenge, "testified that 11 of the 100 envelopes were inconclusive, mostly because there were insufficient specimens to which to compare them."[6] *Id.* Neither of the forensic experts found any sign of forgery. *Id.*

Although the trial court rejected the election challenge and this Court affirmed[7], that does not render the forensic experts' findings irrelevant for purposes

[6] There was no indication in the trial court's ruling rejecting the election challenge whether there was overlap between the 6 affidavits that Plaintiffs' expert found inconclusive and the 11 affidavits that Defendants' expert found inconclusive.
[7] *Ward v. Jackson*, No. CV-20-0343, 2020 WL 8617817, *3 (Ariz. Dec. 8, 2020).

of analyzing whether current election procedures can be improved. And the fact that two forensic experts could differ so widely on whether particular signatures matches were inconclusive (one thought 6 signatures were inconclusive, the other 11) and that defendants' own expert concluded, less than one month after the General Election, that 11% of signatures sampled were inconclusive, suggests, as Petitioners argue, that improvement is needed.

C. Portions Of The Secretary's "Signature Verification Guide" Are Inconsistent With Arizona Election Law.

Additional ballot integrity measures for mail-in ballots could come in at least two forms—(1) enhanced signature verification procedures or methods or (2) additional ballot integrity measures for mail-in ballots. Petitioners request that the Court order the Secretary to include, in the 2019 EPM, signature verification procedures the Secretary has entitled, "Signature Verification Guide" (the "Guide"). APP. Vol. I at 29-48. Again, the AG has not, and will not, approve the 2019 EPM for use in future elections. While Petitioners may be correct that additional signature verification guidance should be included in a future EPM, the AG would not approve wholesale inclusion of the Guide in the EPM.

The Secretary's Guide is flawed in several respects. By way of example, it describes both broad characteristics of signatures (e.g., type, speed, spacing, size, slant, etc.) and local characteristics of signatures (e.g., internal spacing, letter size, curves, pen lifts, etc.). *Id.* at 31-32. The Guide suggests that signature review can

end based only on a comparison of broad characteristics without any consideration of local characteristics, or vice versa. *Id.* The Guide emphasizes that "[o]nly a **combination** of characteristic differences between signatures should trigger a flag for a second check[.]" *Id.* at 31. Even when there are multiple characteristic differences between a ballot affidavit signature and a signature on file, the Guide instructs that a signature can be accepted if the reviewer "can reasonably explain the differences." *Id.* This is much too amorphous to ensure the "maximum degree of correctness, impartiality, uniformity and efficiency" in election administration. A.R.S. § 16-452(A).

Most concerning, however, is a section of the Guide instructing county election officials to accept "electronic signatures that appear to be cut and paste" so long as the cut-and-paste signature matches based on the amorphous review process described above. APP. Vol. I at 42. The Guide explains that "[i]t is now possible for voters to cut and paste a handwritten signature that has been scanned electronically onto a ballot affidavit that they then return electronically." *Id.* The Guide states that "these signatures should be compared to the voter's signature found in the voter registration database as you would any other signature." *Id.* Allowing voters (or others) to skirt the signature verification process by utilizing electronically-scanned and cut-and-paste signatures could result in election fraud or unreliable results. At the very least, there is no authority under Arizona law for

accepting such signatures and doing so is inconsistent with the entire purpose of the signature requirement in A.R.S. § 16-550(A). Thus, the AG would not approve of such a procedure being included in any EPM. *See Leach*, 250 Ariz. at __ ¶21.

The State and AG do not, however, object to additional signature verification guidance being included in the EPM, provided that such guidance complies with the Court's statements in *Leach* about the scope of the EPM. The only effective way Petitioners requested relief can be granted, however, is by ordering the Secretary to provide the AG and Governor with a valid draft EPM, such that they can then analyze and approve any new signature guidance for the 2022 election cycle.

III. There Is No Valid EPM Allowing Ballot Drop Boxes And, In Any Event, Ballot Drop Boxes Must Be Properly Staffed.

Petitioners request a writ requiring the Secretary to remove certain provisions relating to ballot drop boxes from the EPM. Petitioners contend that Arizona law does not otherwise permit the use of ballot drop boxes. As explained, the Secretary failed to provide the AG and Governor with a valid draft EPM in 2021 and the AG has not approved the 2019 EPM for use during the 2022 election cycle. Thus, it is the State and the AG's position that the 2019 EPM is no longer valid, and election officials cannot rely upon any provisions therein to implement ballot drop boxes.

If ballot drop boxes are permitted, Arizona law requires that they be properly staffed. Specifically, A.R.S. § 16-1005(E) provides that "[a] person or entity that . . . is found to be serving as a ballot drop off site, *other than those established and*

staffed by election officials, is guilty of a class 5 felony." (emphasis added). Thus, under Arizona law, any ballot drop-off site must be established and staffed by election officials. To give the phrase "staffed" meaning separate from "established," election officials must do more than simply set up a ballot drop box and leave it for the duration of the early-voting period. Instead, ballot drop boxes must be monitored by an election official's staff. Such staffing must be sufficient "to secure the purity of elections" and in such a manner that "secrecy in voting shall be preserved." *See* Ariz. Const. art. VII §§ 1, 12. The Arizona Constitution and § 16-1005(E) require that ballot drop boxes, if permitted, be monitored at all times.

These issues demonstrate why the Court should accept jurisdiction to determine the validity of the 2019 EPM and to require the Secretary to provide a valid draft EPM to the AG and Governor. Such relief is necessary to provide election officials with clarity about allowable procedures, including with respect to ballot drop boxes, for the 2022 election cycle. And the AG, in connection with the EPM approval process could ensure that any EPM provisions relating to ballot drop boxes comply with the scope of § 16-452 and Arizona election law under the Court's new guidance in *Leach*.

IV. The Court Lacks Original Jurisdiction Over the State.

As the State understands the Application, Petitioners claim that the early-voting system in Arizona is inconsistent with certain provisions of the Arizona

Constitution is asserted only against the State. Such a claim is not properly asserted against the Secretary because she does not administer early voting in Arizona. Only the county recorders administer early voting. *See* A.R.S. §§ 16-541 to -550. As explained below, however, the Court lacks original jurisdiction over the State. While the Application raises important questions about the constitutionality of the early-voting system in Arizona, because the Court lacks original jurisdiction over the only party named in that claim, the State does not address the merits of Petitioners' constitutional claim.

A. The Court Has Limited Jurisdiction Over Original Special Actions.

This Court's subject matter jurisdiction is limited to that provided in the Arizona Constitution or by law. *See* A.R.S. § 12-102(A) ("The supreme court shall discharge the duties imposed and exercise the jurisdiction conferred by the constitution and by law."); *see also* Ariz. Const. art. VI, § 5 (setting forth this Court's jurisdiction). No provision of the Arizona Constitution or Arizona law grants the Court original jurisdiction over the State.

At common law, courts could issue various writs compelling state officials to take, or refrain from taking, action. Arizona's founders recognized the utility of these common law writs and granted Arizona courts the power to issue them. *See* Ariz. Const. art. VI, § 5(1) ("The supreme court shall have . . . [o]riginal jurisdiction of habeas corpus, and quo warranto, mandamus, injunction and other extraordinary

writs to state officers."); *id.* art. VI, § 18 ("The superior court or any judge thereof may issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of a person held in actual custody within the county."). The Arizona Legislature later codified several of the writs. *See*, *e.g.*, A.R.S. § 12-2021 (writ of mandamus); A.R.S. § 12-2001 (writ of certiorari); A.R.S. § 12-2041 (writ of quo warranto).

But the technical and procedural aspects of the writs resulted in confusion, and so, in 1970, this Court streamlined the procedure for writs of mandamus, certiorari, and prohibition through creation of the special action rules. *See State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990) ("In 1970, this court adopted the Arizona Rules of Procedure for Special Actions to effect a procedural reorganization of the extraordinary writs of certiorari, mandamus, and prohibition."); Ariz. R. P. Spec. Act. 1 cmt. (a) ("The Rule is necessitated by the existing confusion as to the proper lines between these various writs, and by lack of a simple procedure which can be followed by all members of the bar and by the judiciary."). Thus, "[r]elief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule[.]" Ariz. R. P. Spec. Act. 1(a).

The creation of this new procedural mechanism, however, did not alter the nature or availability of the underlying writs or this Court's subject matter

jurisdiction. The Rules of Procedure for Special Actions make clear that "nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition." *Id.* This Court has further confirmed that the streamlined special action procedure did not expand this Court's original jurisdiction over the writs beyond that granted in Article VI, § 5(1) of the Arizona Constitution. *See Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 350 ¶11 (2012) ("Those procedural rules combine the old common law writs into a single form of action, but do not expand the constitutional scope of this Court's original jurisdiction.").

Thus, the Court's jurisdiction over Petitioners' action against the State hinges on whether that claim falls within any of the grants of jurisdiction in Article VI, § 5, including the narrow grant of original jurisdiction in § 5(1). Petitioners' action does not fall within any such grant.

B. The Arizona Constitution Does Not Grant The Court Original Jurisdiction Over The State.

Petitioners ask the Court to exercise original jurisdiction as to the State. The Arizona Constitution grants this Court original jurisdiction in only two situations. One involves claims and disputes among counties and is clearly inapplicable here. *See* Ariz. Const. art. VI, § 5(2). Thus, if the other provision does not apply, there is no jurisdiction over the State in this case.

The other original jurisdiction provision also does not apply. Article VI, § 5(1) grants the Court "[o]riginal jurisdiction of habeas corpus, and quo warranto, mandamus, injunction and other extraordinary writs to state officers." That provision thus grants the Court original jurisdiction to issue certain of the common law writs. But there is a very important limitation to that grant: this Court has only been granted original jurisdiction to issue such writs "*to state officers*," and not the State itself. *See Rios v. Symington*, 172 Ariz. 3, 5 (1992) ("This court has original jurisdiction over the issuance of extraordinary writs against state officers."); *see also Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323, 326 ¶13 (2011) ("[*N*]*oscitur a sociis* . . . dictates that a statutory term is interpreted in context of the accompanying words.").

The State is not a "state officer." The former is a sovereign legal entity, formed with the consent of the people, and which is immune from suit without consent from its elected branches. *See* Ariz. Const. art. II, § 2; *Clouse v. State*, 199 Ariz. 196, 198 ¶8 (2001) ("The doctrine of sovereign immunity precludes bringing suit against the government without its consent."); *see also Hans v. Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.") (quoting The Federalist No. 81 (Alexander Hamilton)); *cf. Garcia v. State*, 159 Ariz. 487, 488 (Ct. App. 1988) (the State is not a "person" under 42 U.S.C. § 1983). The latter is an actual person who

can be compelled by law to take action, or refrain from doing so, through one of the common law writs; requiring a "state officer" to take action has long been understood to be qualitatively different than requiring the State to do so. *Ingram v. Shumway*, 164 Ariz. 514, 516 (1990) ("[O]ur jurisdiction to hear this case is well founded in the constitutional provisions giving this court original jurisdiction to issue common law writs *to state officers*[.]" (emphasis added)); *see also Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 n.14 (2006) (explaining that a writ of habeas corpus "being in the nature of an injunction against a state official, does not commence or constitute a suit against the State"); *Ex parte Young*, 209 U.S. 123, 167–68 (1908) (an action for issuance of an injunction against a state official acting without authority is not an action against the state). There would be no need for the extraordinary writs if parties could simply name the State directly.

This is why it has long been accepted that the proper use of the common law writ of mandamus—part of what Petitioners seek here—is to compel a *state officer* to act. *See, e.g.*, *Transp. Infrastructure Moving Arizona's Econ. v. Brewer*, 219 Ariz. 207, 213 ¶32 (2008) ("We have described mandamus as available only 'to require public officers to perform their official duties when they refuse to act.'") (quoting *Sears v. Hull*, 192 Ariz. 65, 68 ¶11 (1998)); *Bd. of Educ. of Scottsdale High Sch. Dist. No. 212 v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344 (1973) ("Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an

act which the law specifically imposes as a duty."); *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464 ¶9 (Ct. App. 2007) ("Mandamus is a remedy used to compel a public officer to perform a duty required by law."). Neither Arizona law nor the Rules of Procedure for Special Actions expand the scope of mandamus beyond public officers. *See* A.R.S. § 12-2021 (mentioning relief against "any person, inferior tribunal, corporation or board"); Ariz. R. P. Spec. Act. 3(a) (special action seeking relief in the nature of mandamus asks "[w]hether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion"); Ariz. R. P. Spec. Act. 1(a) (special action rules do not expand the scope of the traditional writs).

Similarly, the writ of certiorari—the other part of what Petitioners seek—was only available to review the actions of inferior tribunals, boards, or officers exercising judicial or quasi-judicial functions. *See Miller v. Super. Ct.*, 88 Ariz. 349, 351 (1960) ("It is clear that there are two conditions precedent to the granting of a writ of certiorari: First, an inferior tribunal must exceed its jurisdiction; Second, there must be no appeal from the judgment or order entered."). Certiorari relief is only available "when an inferior tribunal, board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, a plain, speedy and adequate remedy." A.R.S. § 12-2001; Ariz. R. P. Spec. Act. 3(b) (special action seeking relief in the nature of certiorari or prohibition

asks "[w]hether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority"). There is no indication in the statute authorizing certiorari relief that such relief is available against the State. *See* A.R.S. § 12-2001.[8]

Indeed, writs of mandamus sought through special action have been brought directly in this Court almost exclusively against state officers or bodies seeking performance of a duty. *See, e.g*, *Indep. Redistricting Comm'n*, 229 Ariz. at 350 ¶10 (original special action by the Independent Redistricting Commission and one of its members against Governor Brewer, the Arizona Senate, and Senate President Pearce); *Brewer v. Burns*, 222 Ariz. 234, 236 ¶5 (2009) (original special action by Governor Brewer against the Arizona Legislature and some of its individual members); *Ingram*, 164 Ariz. at 516 (original special action by a registered voter against former Governor Mecham). There is no practice of bringing original special actions directly against the State, let alone of the Court exercising jurisdiction over such actions.[9]

[8] For the same reason, Petitioners' request for relief against the State under Rule of Special Action 3(c) fails. *See* Ariz. R. P. Spec. Act. 3 cmt. (b) (explaining that "This subsection and the following subsection (c) inherit the tradition of the writs of certiorari and prohibition.").

[9] The only such action the State could locate was *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119 (2013). In that case, however, the State appeared on behalf of a state body, the Commission on Appellate Court Appointments, and this Court went out of its way to point out that the State had

This all explains why the Rules of Procedure for Special Actions do not contemplate that the State should be named as a party in this, or any, special action. Rule 2 provides that "[t]he complaint shall join as a defendant the body, officer, or person against whom relief is sought." Ariz. R. P. Spec. Act. 2(a)(1). The State is a not a "body, tribunal, or officer" against which mandamus or certiorari relief can be granted.

In sum, the Court's original jurisdiction to issue writs to state officers does not include the State. The Court should, therefore, decline to exercise jurisdiction over the State.

CONCLUSION

The State and AG respectfully request that the Court accept jurisdiction to decide the pure legal issue—predicate to the important statutory issues Petitioners raise—whether the 2019 EPM remains valid for the 2022 elections. The Court should order the Secretary to comply with her mandatory statutory duty under § 16-452 to provide a valid draft EPM to the AG and Governor by a date certain in the near future.

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conceded that "that this Court could grant mandamus relief by directing the Commission to comply with a ruling on the merits[.]" *Id.* at 121 ¶7. Here, the State is not representing an inferior state body and, therefore, the Court cannot grant mandamus relief by directing the State to take action.

As to Petitioners' constitutional claim, the State is not subject to the Court's original jurisdiction. The Court should, therefore, deny original jurisdiction or special action relief as to the State without addressing the merits of Petitioners' important constitutional claim.

RESPECTFULLY SUBMITTED this 11th day of March, 2022.

MARK BRNOVICH
Arizona Attorney General

Joseph A. Kanefield
Chief Deputy & Chief of Staff

/s/*Michael S. Catlett*
Brunn ("Beau") W. Roysden III
Michael S. Catlett
Jennifer J. Wright
Assistant Attorneys General

Exhibit 2

SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN PARTY, a recognized political party; and YVONNE CAHILL, an officer and member of the Arizona Republican Party and Arizona voter and taxpayer, Petitioners, v. KATIE HOBBS, in her official capacity as Arizona Secretary of State; and STATE OF ARIZONA, a body politic, Respondents.	Arizona Supreme Court No. CV-22-0048-SA **FILED 04/05/2022**

ORDER DECLINING JURISDICTION

The Court has before it an "Application for Issuance of Writ under Exercise of Original Jurisdiction" filed by the Arizona Republican Party and Yvonne Cahill ("Petitioners"), a "Combined Response to Petition for Special Action" filed by Arizona Secretary of State Katie Hobbs, a "Response to Application for Issuance of Writ Under Exercise of Original Jurisdiction" filed by the State of Arizona, a "Reply to State of Arizona's Response to Application" and "Reply to Respondent Arizona Secretary of State" filed by Petitioners, and a number of amicus briefs, both in support of Petitioners' application and in opposition. After consideration,

IT IS ORDERED declining jurisdiction of Petitioners' "Application for Issuance of Writ under Exercise of Original Jurisdiction." Petitioners have not persuaded the Court that Issues #1 and #2 can be decided without a factual record; and Issue #3 must be declined for lack of original jurisdiction over the respondent State, which is not itself a "state officer." Ariz. Const. art. 6 § 5 (1)(conferring original jurisdiction on the Arizona Supreme Court over "habeas corpus, and quo warranto, mandamus, injunction and other extraordinary writs to state officers")(emphasis supplied). This order is without prejudice to the parties' refiling this case in Superior Court.

IT IS FURTHER ORDERED dismissing as moot the "Motion to Intervene as Respondents" filed by the Arizona Democratic Party, et al.

IT IS FURTHER ORDERED denying Petitioners' request for attorneys' fees and costs.

DATED this 5TH day of April, 2022.

/s/
ROBERT BRUTINEL
Chief Justice

TO:

Alexander Michael del Ray Kolodin
Veronica Thorson
Roger W Strassburg Jr
Arno Naeckel
Sambo Dul
Roopali H Desai
Kristen M Yost
D Andrew Gaona
Mark Brnovich
Joseph A Kanefield
Brunn W Roysden III
Michael S Catlett
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William P Ring
Roy Herrera
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Richard A Medina
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Joseph Eugene La Rue
Anna Christina Estes-Werther
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Corey Lovato
Doreen N McPaul
Katherine Claire Belzowski
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Aidan Graybill
Patricia F Bohnee

Judith M Dworkin
Joshua W Carden
David Warrington
Gary Lawkowski
Dennis I Wilenchik
John D Wilenchik
Jordan C Wolff

Exhibit 3

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.

cc:

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Honorable Lee F Jantzen
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Exhibit 4

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF MOHAVE

ARIZONA REPUBLICAN PARTY, etc.,

Plaintiffs,

vs. **CV-2022-00594**

KATIE HOBBS, etc.,

Defendants.

ORDER TO SHOW CAUSE

JUNE 3, 2022

KINGMAN, ARIZONA

BEFORE THE HONORABLE LEE JANTZEN, JUDGE

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ALAN DERSHOWITZ (Pro Hoc Vice) via zoom

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RYAN H. ESPLIN, ESQUIRE

FOR THE DEFENDANT YAVAPAI COUNTY RECORDER:

M. COLLEEN CONNOR, ESQUIRE

FOR THE DEFENDANT RECORDERS AND ELECTIONS OFFICERS FOR THE COUNTIES OF APACHE, COCHISE, COCONINO, GILA, GRAHAM, GREENLEE, LA PAZ, MARICOPA, NAVAJO, PIMA, PINAL, SANTA CRUZ, and YUMA:

JOSEPH E. LaRUE, ESQUIRE
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FOR THE DEFENDANT SECRETARY OF STATE KATIE HOBBS:

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KRISTIN YOST, ESQUIRE via zoom
SAMBO (BO) DUL (Pro Hoc Vice) via zoom

FOR THE INTERVENORS ADP, DCCC, DSCC, and DNC:

ROY HERRERA, ESQUIRE via zoom
DANIEL A. ARELLANO, ESQUIRE
JULLIAN L. ANDREWS, ESQURE via zoom

BE IT REMEMBERED that the foregoing captioned case came on for hearing before the Honorable Lee Jantzen, Judge, Mohave County Superior Court, on June 3, 2022, beginning at the hour of 1:30 p.m., at the Mohave County Courthouse, Kingman, Arizona, as follows:

P R O C E E D I N G S

THE COURT: Thank you. Please be seated. Good afternoon, Everyone. All right.

This is CR-2022-00594, in the matter of the Arizona Republican Party, plaintiffs, versus Katie, Hobbs et cetera, defendants.

Can we get introductions, please.

Plaintiffs' attorney.

MR. KOLODIN: Good morning, your Honor.

THE COURT: Good afternoon. Got that one wrong already.

MR. KOLODIN: I swear. Well, hopefully the rest of the day goes a little bit better.

Good afternoon, your Honor. I'm Alexander Kolodin. Joining me is Veronica Lucero, my associate, Arno Naeckel here in the courtroom.

Via zoom link, we have Michael Kielsky, another one of our colleagues. We also have Mr. Dershowitz, who has not been admitted pro hoc yet. He is still awaiting his original certificate of good standing.

We have our client individually named plaintiff and client representative for plaintiff Arizona Republican Party, Dr. Kelli Ward, on the zoom link as

well. She is in a wedding out of state. So that's why she joins us via zoom. But she has blocked out this time for our hearing so that she could be present and attend.

THE COURT: All right. And Mr. Kolodin, are you going to be doing all the speaking today, then? Is that the plan?

MR. KOLODIN: Your Honor, begging the court's indulgence, I would also like my associate, Veronica Lucero, to be able to participate. I know that's a little bit uncommon, but given the number of attorneys on the other side. I'm quick on my feet, but maybe (indiscernible), right.

THE COURT: All right. Well, certainly as long as we can -- we'll try to talk about time limits and situations here in the next few minutes but exactly what we're doing.

So we'll go ahead on the courtroom on the other side.

MR. ARELLANO: Good afternoon, your Honor. Daniel Arellano on behalf of intervenor defendants, the Arizona Democratic Party, DSCC, DCCC, and the Democratic National Committee. And with me on the zoom link is my colleague, Roy Herrera and Julian Andrews.

THE COURT: All right. Thank you.

And then for Secretary Hobbs?

MS. DESAI: Good afternoon, your Honor. Roopali Desai, Kristin Yost, and Sambo Dul, representing Katie Hobbs, Arizona Secretary of State.

THE COURT: And you're going to be doing the talking, Ms. Desai?

MS. DESAI: Yes, your Honor. Depending on where we go this afternoon, I may ask my colleague, Ms. Yost, to argue some of the issues. But as you said, we'll be happy to talk about that in a moment.

THE COURT: All right. I did get another response from the Maricopa County Attorney's Office.

MR. LaRUE: Correct. Joe LaRue, your Honor. Deputy County Attorney. With me, Karen Hartman-Tellez, Deputy County Attorney. We represent the thirteen counties other than Yavapai and Mohave. And also with us is Emily Craiger of the Burgess Law Group. She represents the Maricopa County Recorder with us.

THE COURT: All right. And Mr. LaRue, you're you going to be doing the speaking?

MR. LaRUE: Your Honor, it depends on what the court wants today, what the court orders us to do. But there might be all three of us speaking, depending on what the court decides.

THE COURT: Well, I might decide that won't work, but let's see if we can figure out as we go forward.

Mr. Esplin, you're appearing for Mohave County?

MR. ESPLIN: That's correct, Mohave County Recorder. We are taking a nominal position. So we don't anticipate asking any questions. But we're here if necessary if you have any questions for us.

THE COURT: And I'm wondering about the questions' portion of it.

Is there somebody from Yavapai County just nominally as well or?

MS. CONNOR: Yes, your Honor. Colleen Connor with the Yavapai County Attorney's Office representing Leslie Austin, the Yavapai County Recorder.

THE COURT: Thank you. And you guys, you take a nominal position as well, the same as Mohave County?

MR. CONNOR: Yes, your Honor.

THE COURT: All right. So what I, when I was looking at this, this is a request by the plaintiff for a preliminary injunction. They've asked an order to show cause today. They are I think wanting to argue the verified complaint, the additions to the verified complaint.

And I'm thinking it might be more like an oral argument today, hearing from all sides with the plaintiff going first and then eventually last.

I would be inclined to admit any exhibits that both parties have, all parties have into the record. I would give the exhibits the weight they deserve. I have scheduled this case to go until 5:00 o'clock today.

We would have to take at least one break during the day because the court reporter works harder than we do during these processes and would be a break at some point.

I would try to limit that to five or ten minutes. But every time you do that, it's always longer than whatever you limit it to. And so we'll try to get that done.

I don't know if we get things done today if that's the schedule, especially if multiple people want to speak on each side. I was thinking, you know, an hour and a half to the plaintiffs and an hour and a half to all the defendants. I think maybe that should be shorter than that.

Mr. Kolodin, do you think your presentation, like an opening presentation, would be more than and hour?

MR. KOLODIN: No, your Honor.

THE COURT: Okay. So maybe we can finished today. The break I anticipate would be around 3:10, 3:15, whatever is convenient based on who's speaking at that particular point.

If we reserve some time at the end of the day, I'll talk about where we are. But I guess does anybody not think that that's the -- we're here about the preliminary injunction, the order to show cause. This is about the November election only. It's not about the August primary election.

The injunction specifically is for the November general election. So we don't need to address that.

I do find that the plaintiffs have standing to bring this case. I don't want to spend any time on that. They are voters in Arizona. There doesn't have to be a specific harm.

I think under the act, The Arizona Declaratory Judgment Act, they have standing to bring this. I don't think the Purcell, the Federal Court Rule, applies. This isn't too close to the election. That's a federal court getting involved in enjoining a state election. So I'm making those rulings.

The latches that was brought up in some of the pleadings, that doesn't apply in this case. The fact that this is a 30 year old law that they now are saying is unconstitutional, I think one of the documents I read, maybe it was the most recent one is why it's standing out, perhaps the most recent election as made what they believe

the problems with the law come out to it's fore. So that's just something I read today. I'm just trying to read that. But I'm just saying latches doesn't apply. I don't want to spend much time on those.

This case is not about election fraud or about other things. It's about whether or not the law that was passed in 1991 to expand mail in voting to be no excuses mail in voting from what it had been since 1918 until 1991 is unconstitutional, whether it's unconstitutional under the Arizona Constitution, not any other, not the United States Constitution but the Arizona Constitution.

So we're looking at that issue and that issue only today and whether or not a preliminary injunction is necessary to preclude any irreparable harm, whether there is a likelihood of success on the merits and whether public policy, all of those things I'll be addressing in the ruling that I have to make at the end of the day.

So that's the only issue. And maybe if we can save some time by just focusing on those things today, we'll do that.

Do any of the parties, and I'll start with Mr. Kolodin, you didn't object to every exhibit that's been proffered being admitted?

MR. KOLODIN: No. I have no objection, your

Honor.

THE COURT: Ms. Desai, do you object to that?

MS. DESAI: Your Honor, I do object to the plaintiffs' exhibits. I'm happy to walk through those. But before I do that, your Honor, I have a procedural threshold issue on my range before.

I'm not sure whether or not the plaintiffs in this case complied with the saltatorial requirement to provide notice to the legislature about their pleading as to constitutionality.

The statute, which is 12-1841, which requires that a notice be served of the proceedings prior to any proceedings taking place. And it's possible that the plaintiffs did that but didn't provide copies to defendants. But if they have not received notice, I have court cases that indicate that this proceeding can't proceed without that notice being properly served.

THE COURT: Mr. Kolodin.

MR. KOLODIN: Your Honor, in order to expedite this, I will state that we indeed served the notice of claim about constitutionality on the required parties via process server. We did not file those certificates of service because they are not required to be made parties. And the notice of claim of unconstitutionality hasn't made them parties. But we still

complied with the statutory requirements to serve them.

THE COURT: All right. And obviously at some point, you can provide that proof to Ms. Desai.

MR. KOLODIN: Yeah.

THE COURT: All right. Sounds like they did that. And this was originally brought before the Supreme Court back in March is the impression I got from the pleadings. So this isn't the first time this issue had come up.

Ms. Desai, what I was going to do is admit the exhibits and let you address any objections you have to admission of the exhibits. I'll give the exhibits the weight they deserve. But that's the impression I have. I certainly don't mind you making a record of what you object to when it's your chance to speak on it.

MS. DESAI: So your Honor, do you want me to state my objections to, my (indiscernible) objections to the exhibits on the record right now?

THE COURT: Not -- I guess what I'm saying is I would like to hear them. I would like them to be in the record. But I'm going to admit the exhibits anyway. And then we'll address that, that point. All right. And I'm going to give them, again, the weight they deserve. And I'll into consideration your position. But I think you should be able to make those objections. And I'm just

looking at time factors.

I was talking to my JA. If we can't get done today, I could probably come back Wednesday or Thursday afternoon based on my calendar. I would have to move some things around. But I don't want to do that if we can move forward.

MS. DESAI: And your Honor, the only other issue that I would like to note for the court since you were asking about what we're doing today, it is our understanding from looking at the court's orders that we're here on an OSC application, that at least from Secretary's standpoint, we had not intended to have a preliminary injunction hearing because the court did not set a preliminary injunction hearing.

We, of course, would be available next week if the court wants to reconvene for a PI hearing. But to the extent the court wants to hear argument, we're certainly prepared to make argument on the PI issues.

This case is a pure legal issues case. I don't think there's necessarily presentation of evidence from testimony. I wanted to make sure that I'm stating for the record our objection to any proceeding on a PI which wasn't specifically ordered for today. Thank you.

THE COURT: Thank you, Ms. Desai.

Mr. LaRue.

MR. LARUE: Thank you, your Honor. I agree with what Ms. Desai said. I, too, want to raise objections to most of the exhibits. Some of them we don't have any objection to. I would be happy to do that now or do it whenever your Honor directs. But I would like that on the record.

THE COURT: All right. I'm going to give you that opportunity when it's that time. All right.

MR. LARUE: Okay.

THE COURT: Thank you, Mr. LaRue, when it's your time.

MR. LARUE: Thank you, your Honor. And furthermore, we agree with Ms. Desai. We would like for the preliminary injunction hearing to be put off and scheduled for a full day as opposed to the limited amount of time that the court has been able to offer.

We understand you have a busy schedule. But in order to evaluate the preliminary injunction, one of the platitudes for the court is the balance of hardships. And if we're going to talk about the affect of granting this PI on the counties that are active defendants in this lawsuit, we need to be able to put on witness testimony to prove what the affect will actually be so that court can weight those hardships and make the correct balance and rule.

THE COURT: Yeah, the order to show cause is

about this particular statute and the law. That's what we're going to be discussing today. They filed along with it a motion for preliminary injunction. If we need to take evidence on that, if we discover that at the end of the day, we'll go forward from there.

But that's is my position, is we're going forward with the order to show cause today. That's what I set on the calendar. I think it does kind of include those issues of whether a preliminary injunction is part of it. But we'll talk about that as we hear the arguments.

Mr. Kolodin, you're standing up.

MR. KOLODIN: If I may briefly, I want to decomplicate the procedure a little bit. Rule 7.3, which governs orders to show cause, states that a show cause hearing is a hearing on whether the persons requesting the OSC should have the relief that they requested in their application.

We requested a preliminary injunction in the application. We filed a motion for preliminary injunction along side it just as a procedural matter to check every box. But very clearly, the OSC under Rule 7.3 is about that preliminary relief.

THE COURT: And that's what I understood it to be as well. We can argue that as we get done.

Mr. Arellano, did you -- and I might as well

make a record. I will probably give you the least time if we are getting short on time, Mr. Arellano, when it's your time to speak. And you are intervenor in this case, not a named party. I think the plaintiff didn't object to you being an intervenor. But I just want to make sure you know that.

So what is your position on the exhibits?

MR. ARELLANO: I understand, your Honor. And I'm mindful of that. I will do my best to not be redundant with the other parties.

We would join the objections of the Secretary of State and Maricopa County both to the exhibits and to holding a hearing today on the PI motion.

The only thing that I'll add is that the application did ask for relief on the terms of the verified complaint and the verified complaint alone. So, you know, we do think it's improper to have all these exhibits without witnesses when really we're just here about the terms of the verified complaint and whether the plaintiffs on the terms of that complaint are entitled to relief.

THE COURT: All right. And I understand that. And we can address the specifics. But it is ordered admitting all of the exhibits that have been proffered by both sides. And it sounds like they have only been proffered by one side. But all exhibits are admitted for

the purposes of today's hearing.

This court will address and allow all sides to make any specific objections to those exhibits as we process today.

I guess it's time to get started, Mr. Kolodin. Are you ready to go?

MR. KOLODIN: Yes, your Honor.

So I think I'm going to be far briefer than an hour because I hope to reserve the balance of my time for rebuttal because the court has read our verified complaint and our motion for preliminary injunction. Obviously the verified complaint is extremely extensive. And so I don't feel the need to rehash any but the highest points.

To begin with, I want to put this case into the appropriate constitutional framework. There are many things that the framers of the Arizona Constitution entrusted to the political branches of government. In fact, probably more in some ways than almost any other state had at the time.

For example, the Arizona Constitution allows for the unprecedented powers of initiative and referendum, and even as your Honor is aware, has certain powers over to elect judges.

And commensurate with these constitutional

powers, the framers of the Arizona Constitution put in safeguards because if they were going to give the people the unprecedented powers that the Arizona Constitution gives them, they wanted to make sure that those powers were exercised in a manner free of undue influence.

So why did they want to do that? Well, there is a couple of reasons. There is Arizona's territorial history. Arizona, of course, being sparsely populated during the territorial days, was a place of mining, place of railroads, a place where the corporate interests and political machines had a relatively disproportionate power over the population.

And they exercised that power in the territorial days to twist the arms of their employees, to twist the arms of citizens to either apply influence or outright buy votes. And so this was something that the framers of the constitution were deeply concerned with.

And so the plaintiffs have noted in the briefing very capably prepared by Ms. Desai and others, who it is always a pleasure to litigate against, that Arizona's current system of no excuses mail in voting is very popular. And it is. Plaintiffs acknowledge it is a very popular system. And it's a very convenient system.

But mail in and postal voting was known to the framers of the Arizona Constitution. And they had

known about its popularity. And they had known about its convenience because it had been around since the civil war.

And they still decided to restrict it. Because they knew of its popularity, they did not want to entrust that decision to the political branches of government because they viewed it as a systemic risk.

Now, another thing that's also very popular is security in elections. And when voters are asked, you know, which they prefer, security in elections or convenience, come voters typically down in polls on the side of security.

Why is that relevant here? Because there is one political branch in Arizona's government that is entrusted with the power to change the terms of Arizona's Constitution. And again in unprecedented fashion, the framers of that constitution made it very easy. And it is the citizens, themselves.

If the citizens wish to have a system of no excuses mail in voting, they may certainly do so. Any citizen may initiate an initiative or referendum on that issue. I'm sorry. Referendum on that issue. Raise the required number of signatures and pass it by simple majority. That is possible. But the public would be permitted to have that debate among themselves just as the framers intended.

Until then, constitutions are constitutions and not statutes. Because they are supposed to be a reflection of eternal truths of human nature and human rights. And so therefore, I'm going to begin at the beginning because by beginning at the beginning, I also begin with Arizona's present history.

The Australian ballot came about during the contested presidential election of 1888. Then, as now, there were allegations of plenty that the results of the election had been skewed by external forces. Right.

And of course, the courts never found that to be the case in 1888. And the results of the election were unchanged and upheld. But still, there was that level of public concern then, as there was now.

And regardless of the merits of those issues, what the framers of the Arizona Constitution realized and what the proponents of the Australian ballot in 1888 realized was that the system, itself, was too volnerable to the influence of large actors, large corporations, large unions, large political machines and that it needed to be secured against even the appearance of impropriety or even the potential of impropriety in a systemic and structural way.

And that is why after the 1888 presidential election, there was a movement that began across the

country called the Australian ballot movement. And as your Honor will note from the briefs, it had four components.

The ones most at issue today are that ballots were delivered directly to ballots at the poling place by official election officials, so by those who were actually recognized by the government as election's officials. They would then be there along with political party observers, of course, like those my client, the Arizona Republican Party, to provides to oversee the voting process, not just to make sure that it was administered properly but also to make sure that even the influences that would be perfectly appropriate to apply to voters outside of the polling place were not present when the voter was actually making that decision to fill out their ballots. Right.

That nobody also could ever really know how a voter had voted. Right. That a voter could go out of that polling place and tell their employer or the union or their spouse or a political party organizer or maybe of their party that they had voted the preferred way.

But at the end of the day, the only person who would ever know that in the entire world was the voter. It makes vote buying impossible because you can never verify that you got what you paid for. And it makes the pressure and influence on voters while they are in the process of filling out their ballots impossible as well.

And it also makes it impossible to violate the secrecy of voting by looking at the choices.

So right after the presidential election of 1888, which was the trigger for this Australian ballot movement, Arizona in fact ratified as a state a draft constitution, the 1891 constitution, which Congress never accepted but which was ratified by the voters of the state.

And the 1891 constitution says exactly what Ms. Desai says that the 1912 constitution says, which is that the means and method of voting are pretty much entirely up to the legislature. I'm paraphrasing, but that's what it says, shall be as provided by law.

Also in 1891, of course, the legislature for the first time defines secrecy in voting. They define it statutorily when the pass a law that is entitled an Act, I won't give the rest of the title, but an act to secure secrecy in voting.

And we know that the framers of the Arizona Constitution met the four essential elements of the Australian ballot system when they later said secrecy in voting because that 1891 law defines it in exactly the same way. It defines it in exactly the same way.

So fast forward to 1912, Arizona has now lived with this 1891 statute for approximately 20 years. And the proponents of the 1912 constitution, who met in 1910, they

realized, you know what, this 1891 law as worked very well. We want it to be unchanging for all time unless the constitution, itself, is changed, we want to actually enshrine that into the constitution.

So to the words of the 1891 constitution passed the same year as this 1891 law that said, you know, means of voting shall be as prescribed by law, they then added a second phrase. And that phrase was provided secrecy in voting is preserved.

Now, the central question of this case is what work do those words do. To accept defendants' contentions, those words are meaningless. They're superfluous. They do nothing. The legislature can still make whatever laws that it wishes regarding the means and method of voting.

But fundamental tenet of constitutional construction is that constitutions are to be construed in such a way that no phrase, clause or word is rendered meaningless or superfluous. And so the question remains, what work do those words do?

Now, a second argument that has been raised is that secrecy in voting is a right of the voter only, that it can be waived. There is a couple problems with this argument.

First, if secrecy in voting can be waived, it

can't possibly have the affect that the framers intended of stopping the abuses of the gilded age regarding vote buying and pressure by political machines.

And the reason for that, among others, is vote buying is voluntary. Of course, I want to show you my ballot so that I can receive the money. If you make that right waivable, it becomes nonsensical.

And the early Supreme Court in 1913, I believe, recognized this, recognized that the Australian ballot system was not a right of the voter only but rather also an obligation of the voter to themselves to do their part to keep their ballots secret.

And we can still see this today in some of the vestigial laws that relate back to statutes governing voting at the time of statehood that really make no sense at all if one doesn't view them in this paradyne because surprisingly the laws governing election day voting at the polls that are on the books in the Arizona Revised Statutes these days, they haven't changed much since 1891. They are very similar.

And they say things, in fact, they sort of have been updated to take modern technology, they go so far as to criminalize a voter taking a picture of their own ballot in the voting booth.

What sense does that make if the voter can

just request an early ballot and show that ballot to whomever? In fact, there's a law on the books that if you vote early as opposed to at the polls, you can post a picture of your ballot on the internet. There is actually a statute that says that. But at the polls if you do it, you get thrown in jail.

Again, it makes no sense if you consider these laws outside of the context of the Australian ballot system. And in fact, Maricopa County, as they're well aware, recently in the past couple of years implemented an electronic voting system.

And the statutes that allows them to implement that electronic voting system, it's very self-conscious because it says, the statutory mandate from the legislature is an electronic voting system must preserve secrecy in voting provided its use in conjunction with the voting booth, for instance.

So in other words, we understand that it doesn't preserve secrecy in voting when it is used outside of the polls. And to clarify a little bit what the electronic voting system is and how it can be used outside of the polls, it's all very similar. There is still paper ballots employed in Maricopa County, right, but they are simply tabulated by a different sort of system. So it can be used outside of the polls.

Now, another argument that the defense brings up is well, what about the 1981 soldier's voting bill. Ms. Desai, of course, is very excellent at making originalist arguments. And she points out, again quite intelligently, that there were several delegates to the constitutional convention, including Governor Hunt, who was the chair of the constitutional convention that actually either voted for in the legislature or as Governor ratified the 1918 soldier's voting bill.

How can we possibly explain this if by secrecy in voting, those same framers, and again, they weren't all who were in the legislature, but there were some, those same framers then voted for a statutory authorization of a system to allow for postal voting for uniformed members of the armed services. How can that be?

Well, it's very simple. The Arizona legislature in 1918 did exactly what a court is supposed to do when confronted with a clash between two opposing constitutional provisions that in a certain application cannot both be fully and completely satisfied because there is another part of the Arizona Constitution that came into play when it came to the 18 -- or the 1918 soldier's voting bill.

And in fact, it's referenced in the title of that bill, which is an -- sorry. So an act, a paraphrase

but basically, an act to ensure that, you know, free and equal right of suffrage, you know, is preserved. Again, I'm paraphrasing. It's not the exact quote, but that's the gist of it.

Because there is a provision of the Arizona Constitution called the free and equal clause as well. And what the free and equal clause says is no power, civil or military, shall interfere to prevent the right of suffrage.

And to avoid that from happening, the framers of the Arizona Constitution thought they had a clever way to avoid that from happening, which was to prohibit the State from requiring voters to perform military services in the armed forces on the day of an election. But 1918 was in the middle of World War I.

And World War I was not a war the State had any control over. Right. This was a National Guard that was called up by the federal government and was a federal army. Right. The State had no say in soldiers going off to war.

And so the 1918 soldier's voting bill basically aimed to do the minimum degree of violence to the fundamental tenets of the Australian ballot system that was possible without wholly violating the free and equal clause because obviously if you're off and serving in Europe during an election, it is impossible for you to vote.

There is no way. You can't do it unless you can vote postally.

So how did they try to preserve these essential elements? Well, in the 1918 bill, ballots were still provided at public expense. In the 1918 bill, ballots were still to be sent and received by elections officials. Fine. Easy.

In the 1918 bill, voters were still commanded to vote in private. Even if they were serving in the trenches, they were not allowed to vote in the presence of any other person. The State of Arizona reached across the sea with its statute to go, yeah, we know we have to mail you a ballot.

But you better go leave your buddies while you're voting. And you better vote in private. And instead of an elections official, which the State of Arizona couldn't send to the trenches of Europe, either, they had a soldier's commanding officer take the necessary affidavits to ensure chain of custody for the ballots.

So again, the very minimum violation of the Australian ballot system that was necessary to ensure that the right of soldiers to vote was not polling impacted. That is how they resolved the constitutional conflict. And they were aware of it.

Now, I want to discuss very briefly the

preliminary injunctive standard. There is a fairly recent Arizona Supreme Court decision from 2020 called Arizona Public Integrity Alliance versus Fontes. And in this case, the Arizona Supreme Court abolished the traditional four factor standard for preliminary injunctions institute by seeking to remediate the unlawful act or unconstitutional act of an elections official.

Now, as Ms. Desai notes in her briefing, the Arizona Supreme Court then after abolishing the standard and say we don't have to apply it, the only thing that matters is probability of success on the merits in these kind of cases.

They go on to then apply the four factors in the alternative, the Arizona Supreme Court doing it in the alternative. But the reason they do that is to demonstrate that it makes no difference because probability of success on the merits gets you the other three factors automatically. And that is what the Supreme Court says.

For example, they say if you got an unconstitutional act by an elections official, then irreparable harm is assumed. Okay. Well, great. We got that factor.

If you have a voter who is going to have vote, you know, under an unlawful or unconstitutional set of procedures, why then as long as it is possible for an

elections official to comply with our ruling, then the balance of hardship is satisfied. It's a good opinion, very well worth a read.

And again, they use that word possible, as long as it's possible to comply, then there is no balancing of hardships to take place. And the reason for that is look, it's always hard to change the procedures for an election.

And if you look at the arguments that Maricopa County has advanced in the briefing, they state that they begin preparing for an election a year before the primary. Well, a year before the primary is about six months after the last general. So there is a very brief window of time in which they are not engaged in the process for preparing for an election.

And yet the legislature also meets every year. And the legislature usually changes election laws every year and at least somewhat. And of course, the most noteworthy way they changed in recent years since '91 is to continue to expand the time period for early voting to now where it reaches 27 days before election day.

Now, let's talk about the relevance of facts to this case. There was an issue we danced around in the preliminary matter.

So there are two components to the plaintiffs'

challenge. The first is a facial challenge to the constitutionality of the post '91 system that by its very definition, postal voting violates the definition of secrecy laid down by the framers. You don't need more. Right.

When they said secrecy in voting, they meant voting at polls under the lawful gaze of election officials who are there to make sure nobody was looking over your shoulder. That is just how they defined it. They did not have a lay person, certainly not a 21st century lay person definition of the term secrecy. It meant something very specific. And they told us what they meant in the 1891 law.

And of course, we know this, know that they told what they meant in the 1891 law because probably the seminal source on Arizona constitutional history and seminal work on Arizona constitutional history, the Arizona State Constitution, says this is what the records demonstrate, the records of the convention demonstrate, that there was this 1891 law. They were incorporated.

And we provided those citations in the briefing. So to the as applied challenges, facts are not particularly relevant because — or sorry. To the facial challenge, the facts are not particularly relevant.

And we know as well that the '91 system or the

pre-'91 system, that it passed constitutional mustard because the courts have never said to what generally under the federal system, states have fairly plenary power to regulate their elections however they see fit.

Then, of course, there is also other provisions of the Arizona Constitution or perhaps the federal constitution, though the courts have never said so, you know, that might pose a restriction on that.

For instance, if you were trying to regulate your election in a way that required both tests for that, American voter's law, the courts would have something to say about that. Right.

But the 1991 and pre-'91 system, it was clearly constitutional because there were means for voters who are old or sick or they had religious conflicts that prevented them from going to the polls on elections day, there were provisions for those voters, who again if they had to travel to the polls on election day and they just simply could not do it, right, there might be a free and equal clause violation or other violations, there was provision that allowed them to do it.

But again, just as the legislature had way back when in 1918, these accommodations were made in such a way that it was the minimum possible violation of the tenets of the Australian ballot system.

What do I mean? Well, nobody mailed an absentee voter a ballot in 1991. That's not the way the statute was written. Of course, your Honor has in evidence the 1991 changes, which clearly demonstrate what those changes were and the state of the law pre-1991.

But a voter was actually brought a ballot, right, a voter who was entitled to vote absentee again because they were old or sick or had a religious conflict was actually brought a ballot to their home by elections officials.

So you have the same hand delivery of a ballot from an elections official that you have at the polls. Right. And you have an elections official standing there waiting while you vote to make sure there is no impropriety. And then the elections official takes the ballot from you and brings it back. That is the way the pre-'91 statute is written to offer.

And at that point, you know, because defendants have brought out well, why didn't you challenge the pre-'91 system. Well, we wanted to confine this case to challenge the laws that are clearly unconstitutional. Right.

And we acknowledge, right, that there could be arguments raised if you abolished any means for somebody to vote from home even they were prevented by physical

infirmity from getting out of bed.

We acknowledge, right, that it wouldn't be clear, right, that that accommodation, that deviation from the Arizona Constitution, would not be crystal clear that it was not required. And we didn't want to litigate over a grey area. We wanted to litigate over the clearly unconstitutional post-'91 changes.

So again, facially as a matter of law that the facts there are not relevant. They are not relevant for another reason as well, which is the Arizona, or I'm sorry, the U.S. Supreme Court just recently in Brnovich versus DNC made it clear, right, that the level of burden if there is a constitutional requirement, if there is some constitution requirement to provide a means of voting for, you know, old, disabled, whatever, the level of burden required for that is extremely high before any constitutional requirement is implicated.

And what the U.S. Supreme Court specifically said in Brnovich versus DNC is that having to travel to one's own polling place and cast a ballot there does not exceed the normal burdens of voting and that voters were expected to tolerate the normal burdens of voting.

And the free and equal clause says much the same. The free and equal clause has been a bit of a Batanor in the briefing in this action. The courts have

defined the free and equal clause. And actually, the definition of the free and equal clause supports what plaintiffs are seeking, right, because the definition of the free and equal clause that the courts have provided, both the Arizona Court of Appeals as well as the District Court that reviewed Yazzi versus Hobbs was that a free and equal election is one in which a voter is not again wholly prevented from voting by power, civil or military, but more importantly one in which the voter is not pressured to vote a certain way, does not have their arm twisted to vote a certain way, right, is not subject to that influence.

It tracts with the intent, the original intent of the framers of the Arizona Constitution. And unless you have a total depravation of the right to vote or something very close to it, the free and equal clause is not violated. The case law is clear on that.

So any sort of factual consideration about hardships to voters that the new system would pose versus the old system is simply an opposite, right, an opposite. The framers have already struck the balance between secrecy in elections and convenience in voting, right. They struck that balance for us. And it's not the place of the courts or the legislature to revisit it. Only the people may do that.

What about, though, the relevance to

plaintiffs' claim in the alternative, right, that the current system is unconstitutional as defined, right. Let's assume for a second that it would be proper to adopt some sort of modern notion of the definition of the term secrecy in voting.

Let's assume that that was proper instead of applying the framework the framers gave us, which is not. The Arizona Supreme Court has said that the motive interpretation of the Arizona Constitution is the original (indiscernible). Unlike perhaps, I believe unlike the U.S. Supreme Court, the Arizona Supreme Court has explicitly adopted the doctrine of originalism and textualism.

So it would not be appropriate to use that definition. But if we were to use it, then that might be relevant to an as apply challenge. And this has some bearing on the exhibits that were admitted, which were totally unavailable to the public until two days ago.

The Associated Press had put in a request, a public records request to the Attorney General's Office, a further investigation into a vote buying and pressure ring out of Yuma County, of which the Yuma County Recorder that Mr. LaRue represents apparently was very instrumental in helping take down that ring.

And the Attorney General's Office finally released those records two days ago, first to the

Associated Press. As soon as we saw it, we put in a public records request and got the records yesterday.

And what these records demonstrate -- well, let's talk to the relevance of these records. It's not relevant whether these records demonstrate that this problem is some sort of, you know, phenomena that some massive change in a presidential election or anything like that. Right. It's not relevant.

And frankly, as the bipartisan commission on election reform noted in its report, which we also cite in our brief, it's kind of an unknowable question. The fundamental thing about mail in voting is that it's virtually impossible to catch bad actors.

And the reason that the ring in Yuma was unraveled was simply that they were just being very stupid about it. They were being very blatant about it. They were doing it in broad daylight in front of a ballot dropoff point. And so they got caught that way.

But it's very difficult for more sophisticated actors to be caught when they do so. The magnitude of the issue is not really the relevant factual consideration here. The relevant factual consideration, if this court were to reach the as apply challenge, which again should not, is does the setup of our current no excuses mail in voting system, does that setup make it so that that is

possible, that it is possible to run the very influence and pressure and vote buying operation that the framers were specifically intended or specifically intending to prevent when applying the principles of the Australian system into law.

Does the fact that our current system allows for that to happen, does that violate the intent of the framers. In that case, were the court to reach an as apply challenge, then facts might become more relevant.

So before I reserve the rest of my time for rebuttal, I just want to emphasize, right, this is not a policy question. It's not a question of the desirability of early voting, whether it's good, whether it's bad, whether it's popular. Right.

It's those are determinations that the framers of the constitution have already made for us. Our question here today is simply what do they intend, what do they intend by adding the words provided secrecy in voting was preserved. Was this prohibited, Arizona's post-1991 system of no excuses mail in voting or systems like that, simple as that. The answer is yes.

Preserve the remainder of our time for rebuttal.

THE COURT: Thank you, Mr. Kolodin.

Ms. Desai.

MS. DESAI: Thank you, your Honor. Can you

hear me okay?

THE COURT: Yes.

MS. DESAI: Okay. I'm having difficulty hearing the speakers in the courtroom. So I want to make sure you could hear me.

THE COURT: Well, that's because our speakers are at the main table. And then when you move away from it in the middle of the courtroom, which I like to do, that's the least catching the mics in the courtroom. So the parties can be heard better from the tables.

Go ahead, Ms. Desai.

MS. DESAI: Okay. And your Honor, I may interrupt any time if I can't hear if I could ask the court to pause if I can't hear some of the other speakers in the courtroom.

I want to start with I know your Honor has set forth his preliminary thoughts and views. But I do want to make my record (indiscernible) on short (indiscernible) on the procedural issues.

So what we have here today, plaintiffs' verified complaint, an OSC application that claims that its supporting affidavit is a verified complaint.

That is what the OSC application says. It refers to an affidavit, the verified complaint and nothing else. And then there is separately a PI motion that was

filed, which must establish the PI parameters. And I will talk about that in a moment.

So we're here today based on the court's order for that OSC application only. I want to -- I know I said this earlier, your Honor, but I want to make sure I make my record, that the plaintiffs cannot get a PI under its OSC application.

At best, theoretically plaintiff can have this court consider its legal arguments as to why certain laws are unconstitutional. But then plaintiffs have separately made a preliminary injunction order after a preliminary injunction hearing to stop early voting for the 2022 election.

One, a ruling on the constitutionality does not automatically provide an injunction unless, of course, the defendants in the case take leave to accept the court's ruling on the legal argument as an injunction, which my client, the Secretary of State, is not willing to do.

And as I said here earlier, the fact that the voter in intent factors require filling of hardship, injuries and things other than selected consent on the merits, there is more work that needs to be done before this court ever enjoins early voting for this (indiscernible) election.

I'll now turn to the Secretary's argument on

the actual OSC application and why the court relief that is being sought. As a very preliminary threshold issue, I would like to have the court consider what it has before it.

There is a 48 page complaint where there is not a single cause of action clearly identified. There is no short and clean statement of the claim as required by Rule 8A2. That rule very clearly requires notice to the defendants about what specific claim is being brought.

And I think we're hearing today is very mesh mash and confusing declaratory action and injunctive relief and mandamus and constitutionality issues. And yet there is nothing in the complaint that tells the court this is the cause of action, this is the claim that we have brought under this particular statute and these are the statutes that we are asking the court to declare unconstitutional.

They vaguely state that the constitution has been violated. But they don't delineate any of those statutes that they seek to enjoin in full or in part.

They vaguely request a declaration that Arizona's post-1990 system of no excuse mail in voting is contrary to the Arizona Constitution. And after requesting a broad injunction with the system in its entirety, the plaintiffs carve out summary voting like the uniformed and overseas absentee voting, which is required under federal

law.

So even if the court were to grant some broad relief that the laws, the post-1990 system of no excuse mail in voting is contrary to Arizona Constitution, the defendants are entitled to know what specific statute is the court enjoining, which statutes is the court enjoining in whole or in part, election administrators and voters in this state need to understand which pieces are proceeding, which are not.

And as I mentioned, some of these laws are required and covered by federal law. We must give our uniformed service men and women ballots to vote and absentee ballots overseas. That is clearly part of the post-1990 system of voting in which the plaintiff on the one hand asked to have enjoined in its entirety and on the other hand say that they are willing to carve out.

I want to turn briefly to the issue of the facial challenge versus something else. Your Honor, these are very specific legal terms of art whether there is a facial constitutional challenge versus an as applied challenge. Plaintiffs' counsel throws these terms around as if they mean the same thing. They don't.

The only claims that have been asserted that I can tell, and like I said, there is no actual claim asserted in this 48 page, 49 page complaint. But if you

look to the specific request for relief at the bottom of page 48 and the top of page 49, there is only a request that the Arizona post-1990 system of no excuse mail in voting is contrary to Arizona Constitution. That's the facial challenge that Mr. Kolodin refers to.

There is no as applied challenge. There is no argument. And there are no allegations in all of these paragraphs in the verified complaint that any particular conduct specifically or even generally as applied violates the constitution.

And your Honor, that's why in large part I will in moment express my objections to many of the exhibits that have been set forth by the plaintiffs and admitted by this court but not even relied on in Mr. Kolodin's argument.

In short, it's impossible to make heads or tails of what the plaintiffs' allegations are. And from looking at these proposed exhibits, Mr. Kolodin says, you know, the contents of a lot of these exhibits are not relevant, the facts are not relevant and yet he wants the court to review them and somehow consider his I guess testimony interpretations about what these records, public records mean and say for purposes of interpreting the Arizona Constitution.

I think this would be a good point, your Honor,

to turn to the objections. And I'm just going to state them on the record for the court. Obviously you have admitted them, and you will decide what you are going to take into account. But I would like for the record to just assert my objections.

With respect to Plaintiffs' Exhibit 1, I object on relevance and hearsay grounds. With respect to Exhibit 2, I object on relevance and hearsay grounds.

I have no objection to Plaintiffs' Exhibits 3, 4, and 5. Those are documents that are, historical documents that are in public records. The court can consider them with no objection.

Exhibits 6 through 12, your Honor, I object on relevance grounds, on hearsay grounds. They are incomplete and are highly prejudicial. These are documents that have been cherry picked from an entire production of public records.

They are unsworn records and statements. They are untested. They are partial. And they are prejudicial to an ongoing criminal case that is pending in a different county that relates to human beings that are the subject of these records who don't have an opportunity to come in to this proceeding and to provide any context for these unsworn, untested hearsay statements.

I don't know what Exhibit 13 is, your Honor.

Counsel did not talk about it, utilize it, admit it for purposes of any argument. So I'll reserve any objection with respect to Exhibit 13 since I can't tell what it is or what its relevance is.

And with respect to Exhibit 14, I would state the same objections that I had for Exhibits 6 through 12, relevance, hearsay, they are incomplete and highly prejudicial.

Your Honor, briefly on the standing argument, I want to make sure the court understands here like the facial and as applied in terms of argument that's going around, the plaintiffs kind of goes back and forth, and I think this is because they don't allege a cause of action, there is no (indiscernible) being brought, but they say that there is a relaxed standard for the PI actually brought. There is not anything like that.

It is an OSC application seeking to declare some laws that are not identified as unconstitutional. So this relaxed standard that they prey to does not apply. And the plaintiffs can conveniently make this whatever they decide to make it. They filed a complaint with no clear cause of action. The consequences are theirs to bare.

The case also, the complaint also does not seek declaratory relief. There is no declaratory action pled in the complaint. There is a very specific statutory

provision that you must cite when you're bringing a DEC action. It is not cited in the complaint.

So the arguments with respect to (indiscernible) don't hold water. The generalized statement and grievances are not acceptable under Arizona law and appear to be from the Arizona School Board Association's v. State case. And your Honor, the cite is 252 Arizona 219. That was an Arizona Supreme Court case decided this year.

The court expressed the issue of standing and rejected the exact arguments the plaintiffs make here for general party standing and individualized standing on a taxpayer basis.

I'll move, your Honor, to the latches and Purcell argument also very briefly only to make a record. The real issue for the latches today, we can talk more, when a court, if a court is going to consider an actual preliminary injunction order, I don't want to go too much into that today because I don't know if that is what we're doing.

But I do want to touch on the prejudice issue. Purcell and latches talk about when confusion and prejudice. It's a very significant component of these offerings.

And I do not think of a more confusing and

prejudicial thing to Arizona voters to tell them that in the same election cycle, they can early vote in one election, that being potentially the primary election that is basically underway but not the next part of the '22 election, which is the general election.

That is what it appears plaintiffs are asking this court to do, which is to impose a different standard on not just elections administrators but on voters, on citizens across the State who have for many years utilized a facilitory voting who understand that they going to, the ones who have requested their early ballots who will be participating in the election and to be able to utilize that system in a primary but not the general could not be further from what the courts have permitted to proceed this late in the stage of litigation with respect to voting.

And now, your Honor, I'll turn to the injunction factor. I'm going to turn it over to my colleague, Ms. Yost, to argue with respect to the length of it on the merits.

I really want to be very clear to address Mr. Kolodin's comments about the fact that there is an opposing integrity alliance, the case that he cited in 2020. He indicated there is a very recent case from 2020 that is underway with (indiscernible) factors with the plaintiffs bringing constitutional challenge.

And he said, well, in that case, you know, the alternative he cited had factors. But they didn't have to. They just did. Well, putting aside entirely what the court did in the alternative or otherwise, and I don't concede that, your Honor, that it was done in the alternative, I think the court went through that exercise as a necessary analysis the court must undergo to issue an injunction.

But a year later, so (indiscernible) public integrity alliance in Van v. State, the cite, your honor, for that case is 251 Arizona 425, a 2001 case, in that case, the court very clearly and unequivocally stated that a party seeking a preliminary injunction on a (indiscernible) constitutional challenge must show one, a strong likelihood of success on the merits;

Two, the possibility of irreparable harm if the relief is not granted;

Three, the balance of hardships favoring the party in the injunctive relief;

And four, public policy arguments favoring granting the injunctive relief.

Plaintiffs must, and they have not in any way, shown that these factors under the preliminary injunction standards have been met. And in fact plaintiffs will suffer no injury if the court denies their request for an injunction.

Their request is to make voting more difficult, to limit voting, to make it so that less people have opportunity to vote. They are not arguing in any way that there are members who are harmed and not able to vote because of these early voting laws. And the balance of hardship and public interest clearly favor upholding the Arizona early voting system.

Your Honor, I will turn the camera over to my colleague, Ms. Yost, to address the merits of the facial constitutionality.

THE COURT: Go ahead, Ms. Yost.

MS. YOST: Hello, your Honor. Can you hear me?

THE COURT: Yes.

MS. YOST: Plaintiffs are not entitled to any relief in this case because they cannot succeed on the merits of their complaint. They made a fairly legal challenge to the constitutionality of Arizona's vote by mail system from what we can tell from the complaint.

They are claiming as a matter of law. Plaintiffs' claim primarily rests on Article 7, Section 1, of the Arizona Constitution. And we heard argument today that never talks about the actual type of constitutional provision. That provision is secrecy in voting.

For those three words, secrecy in voting,

plaintiffs claim that the framers meant that all voting must occur in person on election day and adhere to pages and pages of specific procedures that were adopted by the Territorial legislature 19 days post (indiscernible). Plaintiffs couldn't be more wrong. That is not what the constitution says.

And in fact, it confirms that the framers decided to, did not intend what plaintiffs claim they meant. In 1918, some of the very same constitutional delegates who passed Arizona's first absentee voting laws, it allowed election officials to mail the ballots to voters, who then voted the ballots in private, sealed them in the sealed envelop, signed an affidavit and mailed the envelop back.

That's exactly what happened today under our vote by mail system in Arizona. We can infer that those legislators who passed that first law went over the details, knew what the framers intended. They were there. And we cited the Clark Voyt case, your Honor, under that point.

Today's plaintiffs are arguing that the 1918 bill was okay under their version of what the constitution says because (indiscernible) not to appear in person. But their entire argument assumed that voting in person and voting in private, they ignore what Article 7, Section 1,

actually says.

Having an excuse or reason to vote early has no bearing on the issues. They didn't pass the burden in here of proving that there is no present circumstances under which Arizona's early voting statutes are unconstitutional. They don't even reference the relevant statutes, let alone proving the statutes are unconstitutional in all their applications.

Plaintiffs today, Plaintiffs' counsel argued that their as applied (indiscernible) and not asserted in the complaint raised the question it's possible that early voting can result in the (indiscernible). That is the opposite of what the legal standard is. They have the burden of proving that the law is unconstitutional in all applications.

In reality, Arizona's statutes have significant safeguards in place to preserve integrity. And your Honor, the plaintiffs purport to many statutes cited in our brief, pages 13 to 14, about how early voting actually worked and preserve the integrity of early voting. The short of the matter is if the framers wanted to require in person voting at the polls on election day (they would have said so.

The plaintiffs' own authority they rely on in their papers proves this point. They base their

(indiscernible) court case, Clark v. Nash, relied on constitutional provisions that required ballots be furnished at the poll to the voter marked in private at the poll. And then they are disposited.

That is language that our framers would have included if they intended to to require something other than preserving legal (indiscernible) voting.

Plaintiffs argue that other mandamus provisions in words in the constitution explicitly require in person voting on election day. They point to Article 4, part 1, part 1 of the constitution, which preserves in whole the fundamental rights of the Michigan referendum. They use the words at the poll to describe the right of the people to make law directly at an election instead of through your legislative representative.

they said nothing about the manner of voting in elections. That is in Article 7, Section 1.

They also point to other provisions of Article 7, none of which govern how a person may cast their votes. Article 7, Section 2 decides who is qualified to vote at an election. Article 7, Section 4 and 5, protects voters from (indiscernible) or military service while they are voting or on election day.

And Section 11 makes the first Tuesday in November election day. That's an unconvertible statement.

All agree that that is election day. But many people (indiscernible) that election day, that all voting must occur on election day. The election is (indiscernible) on that day. And the Arizona Supreme Court (indiscernible).

Your Honor, early voting is secure in its system and is widely used in Arizona and has been around for over a century. Nothing in the constitution disallows it.

THE COURT: Thank you.

Ms. Desai, is your presentation done, then?

Ms. Desai? Is your presentation done?

MS. DESAI: Yes, your Honor. We don't have anything further, but we reserve the right to (indiscernible) when you get defendants done, I don't know what is happening next.

THE COURT: I don't think we are having any witnesses today.

Mr. LaRue, you were next. Are you or somebody else going to speak?

MS. HARTMAN-TELLEZ: Your Honor, Karen Hartman-Tellez on behalf of seven counties.

THE COURT: What is the name again?

MS. HARTMAN-TELLEZ: Karen Hartman-Tellez.

THE COURT: Ms. Hartman-Tellez. All right. Go ahead, Ms. Hartman-Tellez.

MS. HARTMAN-TELLEZ: Thank you, your honor.

I won't spend too much time repeating what the counsel for the Secretary of State has said. We join in their objections to the evidence that has been, exhibits that have been submitted to the court.

And we join their argument on the legal grounds on standing and latches and Purcell. And I would also I won't belabor it actually, but I did want to make a bit more of a record about the harm to voting election systems and what the administrators and to the public if injunctive relief that is requested is granted.

We (indiscernible) in our papers. But on the question of voter confusion, I wanted to add that Arizona law requires election officials, recorders, to send what we call a 90 day notice in advance of a primary election to those voters who are on the active early voter list, which is somewhere around 75 percent of Arizona voters.

That notice tells the voters that they will be receiving their early ballots both for the primary and for the general election. So even if the court doesn't grant relief with respect to the primary that has early voting starting on July 6th, if relief is granted for the general election, voters would have already received information that they will be getting an early ballot in the mail.

So that will cause confusion. And then (indiscernible) of driving force of the papers in the Purcell case which arose out of an Arizona election law.

With respect to the legal argument regarding the constitutionality of early voting, I just want to make a few points about our constitutional structure. The Arizona legislature is granted power to make laws by the constitution. It's only restrained from making laws if the constitution expressly prohibits.

And nothing in the Arizona Constitution prohibits the legislature from making laws permitting early voting. Indeed, early Arizona legislators, many of whom were also participants in the Arizona constitutional convention, enacted absentee voter laws.

And in interpreting of very similar constitutional privileges, the California Supreme Court specifically held that the secret voting requirements in the California constitution do not bar mail in ballots, early ballots or absentee ballots.

And indeed, the Secretary's counsel already mentioned this, but there are many laws in place relating to secret early ballots. The legislature has followed the constitutional requirement of making, of protecting secrecy in voting while still making early voting laws.

And then just a couple more points. I mentioned

the confusion to voters. And should we get to the point where the court is considering taking evidence regarding a preliminary injunction, the county recorders can provide testimony about the extreme problems that will be caused if early voting is enjoined.

The election planning up to a year before an election, the county recorders have to secure the building locations. Those voting locations must be AEA compliant. They must hire a sufficient number of poll workers to staff those locations.

They must have equipment sufficient to supply those locations. They will likely be unable to do so if they need to do so for six times or more as many locations as they have now.

They have some difficulty even now securing enough poll workers. Getting many times over as many will be impossible. Election officials are fantastic problem solvers. But they are not magicians. They cannot conjure polling places or poll workers our of (indiscernible.)

I think that for now I am (indiscernible). So if the court has any questions, I can answer them.

THE COURT: All right. That's it from the Maricopa County, then?

MS. HARTMAN-TELLEZ: Your Honor, on behalf of Maricopa County and all of the other six counties that we

are actively defending (indiscernible).

THE COURT: Right. Thank you. I don't have any questions.

I guess I'll give Mr. Arellano some time. So go ahead.

MR. ARELLANO: Thank you, your Honor. And given the issues with the audio, do you prefer I argue from counsel table or from the podium?

THE COURT: Counsel table.

MR. ARELLANO: Okay.

So your Honor, I would begin as Mr. Kolodin did with the nature of the legislative power. And it's a point that Ms. Hartman-Tellez has touched on, which it appears in the constitution doesn't grant power to the legislature.

We don't look for grants of power in Arizona as we do say with the federal constitution. We don't look to see if the Congress allows this, if the spending clause allows this. What we look to instead is whether the constitution prohibits a particular practice.

And the standard on this, especially clear in Arizona and has been since at least 1947 when the Earhart v. Bromiller case which we cited in the papers.

The standard for judgment in the Arizona Supreme Court says it's clear we espine that an as

challenge is clearly prohibited, not that it just might be prohibited, not just you piece, you know, little word here, a word there and a word there and gather to maybe prohibit it. You need a clear prohibition for an act of a legislature to be unconstitutional.

And in doing that analysis, you have to, the courts have to entertain the presumption that the legislature acts constitutionally and it must give the statute a reading that is constitutional if possible. That is the standard. That is the framework from which we begin.

So I join fully in the Secretary of State and the Maricopa County, all the counties who have appeared today who have appeared today on the procedural issues we have discussed today.

And I'll add only with respect to Exhibit 2, which is the declaration, we would also object on Rule 702 and Dalbert, and that's represented by to have the right of opinion testimony. But putting that aside, I want to turn now to the merit.

And as I think plaintiffs' counsel made clear today, this case turns, at least according to them, entirely on the latter clause of Article 7, Section 1 of the State Constitution that provides that secrecy in voting shall be preserved. That's really what this case turns on.

Your Honor, Arizona preserves secrecy in voting. To begin, the distinction between this pre-'91 system versus post-'91 system, it's really not a temple one. You know, I go wholeheartedly with Ms. Yost's point, but whether someone had a reason or an excuse to obtain an early ballot or absentee ballot as it was called then has no bearing whatsoever on secrecy.

As I think your Honor but your Honor and the plaintiffs have acknowledged, this case is not about security. It's not about fraud. It's not about, you know, ballot collection is something we should allow or not. It's simply about whether Arizona preserves secrecy in voting. And they plainly do.

One procedural point I do want to touch on quickly is this distinction between a facial and an as applied challenge. As Ms. Desai mentioned, those are legal terms of art that have particular concrete standards to them. And plaintiffs failed to talk either.

A facial challenge, when the plaintiffs challenge the laws are constitutional facially, they have to show that there are no set of facts under which the statute can be constitutional. Plaintiffs don't even allege that, let alone try to show it.

What they would have to allege and show is that early voting in every single instance would be

unconstitutional because it would be impossible to vote early and private. And that's simply not the case.

People regularly vote in early ballots in private all the time. And they don't allege to the contrary.

For the as applied challenge, what that means is that the statute has to be unconstitutional as applied to them, as applied to plaintiffs specifically. And no plaintiff alleges that either they personally or any of the party's members have been unable to vote in secret by early ballot.

In the papers I mentioned, plaintiff Ward herself had voted early. There has been no reputation of that. And neither Ms. Ward nor the party have alleged that they or their members have been unable to vote in secret.

Now, as I mentioned, Arizona preserves secrecy in voting. Nobody is forced to vote in early ballot. Quite the contrary, a voter has to tender a request for an early ballot in order to receive one.

And in preparing that ballot -- and that's ARS 16-542A. In preparing a ballot, an early ballot envelope, the election officials have to make sure that the envelopes are a type that do not reveal the voter's selections or political party affiliation and it is tamper evident when properly sealed. There is secrecy.

Once the voter casts the ballot, only the elector may be in the possession of that elector's unvoted early ballot. ARS 16-542D, secrecy. The voter, quote, must mark his ballot in such manner that his vote cannot be seen. He must fold the ballot so as to conceal the vote.

And finally, he must put the ballot in the specially provided again tamper evident envelope, which shall be securely sealed. That's ARS 16-548A.

Finally when elections officials receive that voter early ballot, they have to first confirm the voter's eligibility, that they confirm it is a registered voter, that they have to do a signature comparison and other indicia that matches this person is in fact who submitted this early ballot as well as the ballot, itself, is it a valid envelope with indicia of authenticity.

But once they go through that process, there is still additional steps of privacy or secrecy. The election worker must take out the ballot without unfolding it or permitting it to be opened or examined before submitting that ballot for tabulation. So to satisfy clearly and robustly protects secrecy.

I want to talk briefly on a case that plaintiffs have cited in the papers and I actually think hurts them quite severely. It's the Miller v. Picacho case. It's 179 AZ 178. Your Honor, we believe that case is

one where the Arizona Supreme Court blessed early voting quite explicitly with reference to the secrecy in voting provision, Article 7, Section 1.

The court said, and I quote, under the Arizona Constitution, voting is to be by secret ballot. They then quote Article 7, Section 1. They go on to say, Section 16.543B, which is the early ballot section that we still have in effect today, advances this constitutional goal by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering and voter intimidation.

Again, we have statutes in place to protect precisely against the thing that plaintiffs allege, again without any support, are happening.

So your Honor, Arizona Constitution does not prohibit early voting, let alone clearly so. To the contrary, it explicitly grants the legislature to prescribe by law the method of voting. And it leaves to the legislature the prerogative to determine how best to ensure secrecy in voting. And that is something the legislature has done quite well.

Finally, your Honor, I just want to touch on the free and equal election clause that I know plaintiffs' counsel touched on. The issue is not simply is it a burden to have to go to one's polling place as opposed to voting an early ballot. The issue is would that voter have a

poling place to go to at all.

The Maricopa defendants have alleged, have stated in their papers this isn't the thing you can just flip on a switch and then just switch the millions of voters who have voted early to that vote in person. There is infrastructure that goes into that that simply can't be done, can't be turned on a dime.

You have to secure both a poll location as determined AEA compliant. You have to do that months, if not years, in advance. You have to do so, you know, Maricopa County, Pima County or really any part of the state, you're talking about thousands of polling locations.

It's not just a matter of oh, can you accommodate the absentee ballots, no excuse early ballots. You have to ask will voters have a place to vote. And as I think the election officials have shown here, many voters won't. And that would be a violation of the free and equal election process.

THE COURT: All right. Thank you.

I guess I was planning on taking a break around now. But I think we are close. I don't know how much more you have.

MR. KOLODIN: We have rebuttal, your Honor.

THE COURT: I know. How much time do you think it will take?

MR. KOLODIN: Probably -- how much time do I have remaining, your Honor?

THE COURT: You have time. I'm not saying unlimited. It's only 3:00 o'clock. Let's take a five minute, a five or ten minute break and give the court reporter a break. And then you have the time to argue whatever you want. We'll be back.

(Recess 2:57 to 3:14)

THE CLERK: All rise.

THE COURT: Thank you. Please be seated.

Back on the record in CV-2022-00594. I don't know if the attorneys that were talking earlier just decided to go off video because we don't see them. I don't know. But there are --

UNIDENTIFIED SPEAKER: You are still muted.

THE COURT: Well, I'm still muted. I'm still muted when I come back in. I always forget that. All right.

We're back on the record in CV-2022-00594. Show the presence of the parties and counsel. We have everybody I think now that I need to go forward.

Mr. Kolodin.

MR. KOLODIN: Thank you, your Honor.

THE COURT: And again, if you want everybody to hear you, maybe standing over there is better. I don't

mind coming up here. But the audio is better on the zoom.

MR. KOLODIN: Oh, the folks on zoom, did any of you have difficulty hearing me, I got a pretty loud voice, before?

MS. DESAI: You're better at the table.

THE COURT: Ms. Desai says she was going to interrupt you the next time is the impression I got. So she wanted to ask some questions the first time. But she got the gist of it.

And I'm just saying if you want to bring the podium back so you're more comfortable. Just standing by the edge is even better than being out in the middle of the courtroom.

MR. KOLODIN: I'll do that, your Honor.

THE COURT: All right.

MS. DESAI: Thank you.

THE COURT: For all of our new courthouse technology, the middle of the courtroom. We used to have that big old thing in the middle of the courtroom. And it didn't work.

MR. KOLODIN: Oh, there we go. See, this is what happens when some of your colleagues are former engineers.

THE COURT: That sounds like it's better. All right.

Go ahead, Mr Kolodin.

MR. KOLODIN: Thank you, Your Honor.

So I will start out by just addressing the arguments of each counsel that I'll be responding to. I'll take it by counsel organized by Ms. Desai, as I could, with you made one argument. If I messed that up, I apologize.

I'll start with the arguments of Ms. Desai. So Ms. Desai made the argument that a ruling on a declaratory judgment action doesn't enjoin anyone. So this is also related to her argument that there were no specific claims in the complaint, which is incorrect.

And the reason that both of these claims are incorrect are things Ms. Desai note, because we actually modeled our complaint in this action on her quite successful complaint in Arizona School Board Association versus Hobbs. As I said, I have great respect for Ms. Desai as an attorney. Studied her work closely.

And in Arizona School Board Association versus Hobbs, Ms. Desai sued the State of Arizona. She requested both declaratory and injunctive relief, seeking to enjoin certain statutes as unconstitutional and have them declared to be unconstitutional, certain statutes that the legislature had just passed during that budgetary session.

And what the court said in that action was well, because she had sued only the State of Arizona,

injunctive relief couldn't issue because injunctive relief couldn't issue against the State but that the court was issuing declaratory judgment and it was expected that the appropriate state officials would comply with the declaration.

And if they did not comply with the declaration, then injunctive relief would be available to issue against those particular state officials. And of course, the Arizona Supreme Court affirmed that ruling.

Here in contrast, we do have the appropriate state officials before the court. We have the Secretary and the applicable elections official from each county. And so therefore injunctive relief is also available.

Now, on the issue of the specific claim, very similarly to the work that Ms. Desai did in Arizona School Board Association, we cite the applicable statutes in paragraph 35, perhaps elsewhere but I was doing a quick search.

We cite paragraph 35, the Arizona Uniform Declaratory Judgment's Act as well as the mandamus statute based for this court's jurisdiction.

And then as Ms. Desai did in the School Board Association complaint, we simply discussed the separate constitutional provisions. The one thing that she did which we did not is she in her complaint put the words

Count 1 before the provision that was being discussed.

So for instance, in Ms. Desai's complaint in the Arizona School Board Association, she says Count 1, declaratory judgment, violation of title requirements. Your Honor, we posited. It's equally clear either way.

On the issue of delineation of statutes, Ms. Desai seems to posit that there is a requirement that the plaintiffs delineate each and every statute that would be rendered unconstitutional by the court's decision. There is no such thing.

And in fact, courts rarely do that when they issue their orders. And for example, your Honor will certainly be aware what the decision in Roe versus Wade, very seminal U.S. Supreme Court case, which invalidated scores of statutes in 15 different states related to abortion.

The Supreme Court's opinion in Roe versus Wade does not delineate all those statutes. There is a certain point in which it becomes unwieldy. It is expected, as in Arizona School Board Association, that elections officials will review the ruling and comply.

And it may also be that a statute deals partially with early voting and partially with in person voting. And so the clear way is to simply render a decision on the constitutionality of the post-'91 system,

which is what we ask this court to do.

Ms. Desai also brings up the example of Uocava to support this argument that there is a necessity to delineate each statute. Important for this court to know, Uocava operates on a totally different system than Arizona system notes of mail in voting.

In fact, it's not postal in nature at all. Uocava ballots are emailed sometimes to service members overseas. Sometimes they are faxed. Sometimes they faxed back. Sometimes they are emailed back.

And there are specific federal statutes that say the State has to, it has to allow for these procedures. And there is actually federal law that lays out these procedures. So it runs on a totally different track than no excuses mail in voting.

And again, Uocava just like the 1918 soldier's voting bill, even if it was being looked at purely within the framework of the Arizona free and equal clause and then also the framework of the federal, the power to regulate the conduct of the armed forces and Congress's power over the federal military as well, even if you just looked at it in the purely Arizona state law context as the same issue as the 1918 soldier voting law where without a system like Uocava, you have a power, military or a civil war military, it's military, right, that is preventing the free and equal

exercise and the right of suffrage body deploying our service members and or be ready to be deployed on pretty much instant basis. Like I said, a totally different animal.

I also want to address for the record the set of objections one, to preserve my own record; but two, more importantly to explain to the court why it really is quite appropriate for them to be considered.

Exhibit 1 is simply the Attorney General's Office's email where they note they are filling our response of public records request. And it's hard to see how an email from an official government body could qualify as hearsay.

It's a public record. And the record of that email is public record. And there is no reason to doubt that an email sent from an official account with the Attorney General's Office would be inauthentic. So I struggle to understand those objections.

Exhibit 2 is objected to relevance and hearsay. That is the declaration of Senator Kelly Townsend, who is the highest ranking member of the Arizona Senate that deals with elections issues, explaining that it is feasible for the court to grant the relief that is requested, that it is possible for elections officials to comply.

Of course, in her declaration, Senator Townsend

lays out before she was the highest ranking member of the Arizona State Senate dealing with elections, she was the second highest ranking member of the Arizona House dealing with elections on the committee that dealt with elections, vice-chair.

And so she has ample experience in this regard, and her testimony is relevant. And she is allowed to submit that testimony via declaration whether under the rules applicable to a show cause hearing or under the rules applicable to preliminary injunction hearing.

Either of those rules allows for the submission of testimony via declaration. And so it is submitted in this form.

Numbers 3, 4 and 5, Ms. Desai has no objection.

Exhibits 6 through 12. Exhibits 6 through 12 and also 14, which we sort of put in at the end, so these are all either police reports or a declaration from law enforcement or reports of the investigators at the Attorney General's Office.

So these are an express exemption from the hearsay rule. And it specifically -- specifically I'll pull up my notes because I figured to be at issue -- is specifically under Rule 803.8.

Rule 803 of the Arizona Rules of Evidence

provides the following are not excluded by the rule against hearsay regardless of whether the declarant is available as a witness.

And go down to 8, public records. A record of statement of a public office if it sets out A iii in a civil case or against the government in a criminal case factual findings from a legally authorized investigation and also ii, a matter observed while under a legal duty to report but not including any criminal case a matter observed by law enforcement personnel.

So in other words, a matter observed while service somebody engaged by the state in the practice of the profession of law enforcement is an exemption from the rule against hearsay in a civil case but not a criminal matter.

And I know that one of opposing counsel had mentioned, you know, that there was a parallel criminal case in Yuma. And this special against those individuals or whatever, it's a completely different evidentiary standard. In a criminal case, it's hearsay, it's excludable.

In a civil case, it's not hearsay. And it is to be considered. And this is a civil case. So I wanted to make that note clear.

On the relevance, there is also an objection,

of course, to Exhibit 6 through 12 on relevance, right. And the relevance beyond what is stated in my opening is that the target of this investigation, the court has the documents, I won't read through them, the target of this investigation was an elected official in Yuma, was an elected official in Yuma for many years, that was the leader of this ring according to the police reports and declarations and investigator reports.

MS. DESAI: Your Honor, I object to the direct by Mr. Kolodin testifying about that that are not evidence.

MR. ARELLANO.

THE COURT: Objection the form —

MS. DESAI: It is inappropriate for him to be testifying about things.

THE COURT: The objection is overruled. He is just telling me what he wants to tell me. It's argument home at this point. Objection is overruled.

MR. KOLODIN: I want to be very, very clear that I'm not testifying from personal knowledge, that I'm just discussing and summarizing the contents of Exhibit 6 through 12 and 14.

So there is an elected official working political NGOs, right, non-governmental organizations, to facilitate and run this vote buying and pressure ring. And

there is even items in the investigator's report about, this is Exhibit 14, about individual appearing, that this person running the ring was so powerful that she feared for her life or feared that she would be destroyed if she spoke out against it.

Again, I highlight these things because, again, the genes of the Australian ballot system was to protect the elections process, itself, from the undue influence of political machines engaged in these kind of machinations. That's why it exists. That's why it was put into the Arizona Constitution.

And we see a clear, relevant and very, very recent discovery of its violation, a violation that has been stretched back to at least 2016 but one that the AGs office just made public a day and a half ago.

Again, as Mr. Arellano pointed out very aptly, a facial challenge is a challenge that the challenged law unconstitutional under our circumstances is our position.

And we maintain the position that this is only relevant if the court decides that secrecy in voting was not defined by the framers of the Arizona Constitution as a matter of law, which they did. So to the extent that she objects on relevance in terms of plaintiffs' primary argument, we would agree. It's not relevant there.

But if the court decides to start considering issues that defendants diverge as to whether current law is really, you know, sufficient to preserve secrecy in voting under a modern lay definition, then it could potentially become relevant. So we have it, and it is submitted for the court's consideration.

Ms. Desai and her team also contend that the relaxed standard on standing on mandamus actions does not apply here. I want to point one thing out about that. And she is essentially talking Fontes. And I want to point one thing out on Fontes. And I will discuss it in a little more detail a little bit later.

But Fontes makes, abolishes the preliminary injunction relief factors as to all claims of unlawfulness or unconstitutionality as to the acts of elections officials. So those holdings are not limited to mandamus actions.

They expressly limit their holding regarding the relaxed standings standard to mandamus actions, to which that case was. But as this court has already said, plaintiffs have satisfied the requirements of standing under the declaratory judgment act.

And so whether they also satisfy the requirements of standing under the relaxed mandamus standards is just simply irrelevant.

Ms. Desai points out or argues that the Arizona Supreme Court rejected similar standing arguments in the Arizona School Board Association case with respect to the declaratory judgment act. That's not what they did at all.

In fact, quite the opposite. They had a very broad conceptions standing. They basically said that, for example, every citizen in a particular city was injured by unlawful act of a particular elections official.

And they pointed out that declaratory judgment access, any person interested or whose rights or legal relations may be affected by the challenged statute had standing.

And they pointed out in the Arizona School Board Association that that can mean both the natural person or an organization very similar to the case except the difference here is that plaintiffs have much stronger claim presented than even that.

The Arizona Republican Party conducts party primaries under Arizona's post-'91 system of no excuses mail in voting. We have to. It's statutory. But it's unconstitutional. And if that is not a sufficiently direct relationship to confer standing, I am very unsure what is.

In addition, the Arizona Republican Party supplies, by statute observers, ballot challengers,

signature challengers to both the early voting and in the person election day components of Arizona's election system.

And obviously the necessity to supply those challengers and what those challengers are actually able to observe of they system is highly affected by Arizona's post-'91 system of no excuses mail in voting.

Challengers, for example, the Attorney General has noted in a recent report that with respect to absentee voters, there has been insufficient access by party observers to the signature verfication process.

Again, you know, the Declaratory Judgment Act as the Supreme Court self noted explicitly in a quote set a low bar. And we quoted that in our complaint. But we certainly hurdled over that bar and probably hurdled over a a much higher bar.

There is no need to go on in terms of the standing issue. In fact, Mr. Arellano sitting right there is quite proof of that.

So Ms. Desai and her team also make this argument that they reject that the Arizona Supreme Court said that she didn't have to satisfy the preliminary injunctive relief elements in Fontes. And I don't know how they at put it had it been any clearer about that that's exactly what they were doing.

They say because plaintiffs have shown that the recorder has acted unlawfully and exceeded his constitutional and statutory authority, they do not satisfy the standard for injunctive relief. It's about as plain of English as it gets.

And it's almost as parallel to this case as it gets where the plaintiffs, we are in this court to demonstrate that the defendants are exceeding their constitutional authority. And therefore, we need not satisfy the standard of injunctive relief.

But let's talk about when they applied it anyway to demonstrate how it was a little bit of a potato, potato scenario, that how, you know, how they supported that.

For example, they say, you know, they say in Arizona Public Integrity Alliance versus Fontes because the recorder had no authority to include the new instruction with mail in ballots, plaintiffs are likely to succeed on the merits. Okay. Simple enough.

Nevertheless, we conclude that plaintiffs have satisfied the standard for injunctive relief because the recorder had no authority to include the new instruction with mail in ballots, plaintiffs are likely to succeed on the merits.

Likewise, 'cause the recorder's actions do

not comply with Arizona law, public policy and the public interests are ensured by enjoining his unlaw action.

And in the context of their mandamus action, plaintiffs have established a requisite injury by showing their beneficial interest in having the county recorder performing his legal duty.

We also conclude the (indiscernible) favors plaintiffs. The county claims that because plaintiffs unreasonably delayed in filing their action, it's too late for the county to order new instructions and meet the statutory mailing deadlines for mailing ballots.

THE COURT: Mr. Kolodin, you're reading, so you're going much faster than you normally do.

MR. KOLODIN: Oh, I'm so sorry. I will slow down, your Honor.

THE COURT: It's not for me. It's for the reporter.

MR. KOLODIN: Oh, and I apologize.

So with respect to this latches argument, the Arizona Supreme Court said we disagree because the county was able to meet the deadlines for early ballots and suffered no prejudice. And more importantly, plaintiffs' delay does not excuse the county from its duty to comply with the law.

So again, the analysis is exactly the same

whether you treat the preliminary injunctive relief standard as being abolished or you treat it as still containing the same factors because what the Arizona Supreme Court explained in Fontes is that those factors are not (indiscernible), those are the only relevant factor, is probably of success on the merits.

Ms. Desai and her team cite the example of Fann vs. the State as somehow overruling the standard, set aside that would be extremely odd for the Arizona Supreme Court to overrule a standard that they had just put in place a year or two prior, especially without expressly noting that that's what they were doing.

Fann versus State was not the type of suit, Fann versus State was not a suit by citizens seeking to enjoin the unconstitutional acts of an elections official. Fann versus State was a suit between the legislature and the State, not a citizen and the State.

And it was not an elections case. It was a wholly different type of case. And plaintiffs do not contend that in Fontes, the Arizona Supreme Court abolished the four factor preliminary injunctive tests for all cases. Certainly it remains in other cases.

It's simply when citizens and voters are challenging unlawful acts of an elections official or the unconstitutional acts of an elections official that that

abolition applies.

I think Ms. Desai's team also made the point that if the framers intended ballots be cast at the polls, they would have said so. That is the entire thrust of this case, is that they did say so. They had a -- the legislature very clearly defined secrecy in voting to mean the voting at the polls in 1819.

And the framers very clearly incorporated that 1891 law being to the Arizona Constitution when they added the words provided secrecy in voting shall be preserved and that the other portions of the Arizona Constitution support that analysis because many of them are rendered superfluous if that analysis is not so.

An example, the portion about voters being privileged from arrest on day of election. All right. Makes no sense if early voting is contemplated. The portion about voters being privileged from attending military service on the day of election makes no sense if a 27 day period of no excuses mail in voting is contemplated.

The provision about official ballots, the secretary taking care of official ballots being distributed at polls to voters, it makes no sense if it's contemplated that there will be early voting.

And the Secretary or the Secretary's attorneys, they also raise the argument free and equal

clauses in Article 7. Of course, they raise the argument that the form of the official ballot isn't prescribed in Article 7.

And we would point out the free and equal clause is also not in Article 7, that they clearly intended that it is relevant to this question. It made perfect sense for the framers to prescribe a form of official ballot in Article 4 because once they defined what an official ballot is and how it's distributed, then to go on to use that term in several other articles of the constitution.

So they defined it in the first instance so that they could use it later, a very logical manner of drafting. There is another reason it's very logical for that portion to be included in Article 4.

And I'll point out, too, that providing secrecy in voting language, provide secrecy in voting is preserved language. That is in Article 7. Right.

Article 4 is prescribing the form of official ballot as being distributed on election day by election works at the polls. But there is another good reason that's in Article 4, is Article 4 of the Arizona Constitution is probably the most important and most heavily related part of the Arizona Constitution. Right.

Placing something in Article 4, by placing in

Article 4, the framers were giving it a private place. And that's because Article 4 establishes the initiative and referendum powers.

And so again, the framers are recognizing we're granting voters some precedent power, and here's how we're going to safeguard that power.

We're going to require that the official ballots for the exercise of that power be distributed at that poll. So again, they reiterate in Article 7. And that's what they do. They do that.

And there is a bit of slight of hand going on in the briefs with respect to that article for provision for this argument oh, well, this only applies to initiatives and referenda. The same provisions of Article 4 make very clear on issues of referenda always occur at the general election.

And so if it applies to issues of referenda ballots, it applies to ballots for the general election because those are general election ballots. And there are many, many other sections of the Arizona Constitution of subsequent that talk about the use of these official ballots and what elections they are to be used at and all of that.

And they are fairly clear which side to go again, that they are to be used in general elections and

later primary elections. So again, that placement argument is visibly in opposite.

Argument about Sherman versus Tempe, I think we're on to Mr. Arellano. Or no, I think it was -- it might have been discussed by both in that this somehow was the Arizona Supreme Court authorizing and expressly giving their blessing I think, as Mr. Arellano said, to election day.

A couple -- to, of course, to the argument that early voting is expressly authorized. A couple of problems with this argument. One, if that were true, then that's what the Arizona Supreme Court did, they wouldn't have declined jurisdiction over the constitutional claim just on the basis that they did not have original jurisdiction over the state, which contrary to Maricopa County's assertion in the briefs is why they declined to review on that particular item.

Again, we have the order from the Supreme Court in evidence. The court can review it for itself and see what it says. The Arizona Supreme only noted that evidentiary issues were relevant to arguments not before this court.

So one, they would have just declined review and say, we already decided this issue. Actually, you plaintiffs, you're just wrong that we have never decided

the issue, because we have.

So the second problem with the argument is Sherman versus City of Tempe wasn't a challenge about whether mail in voting was constitutional. It was an election challenge as to -- and I'll let the court speak for itself on what that case is about.

We granted review to determine whether election as used in section 19-141 refers to election day or the day early ballots are distributed to consider whether the amendment constitutes a special law under the Arizona Constitution. After hearing oral argument, we answered our proposition, our upholding Proposition 100 and stating that this opinion would follow up.

And so in other words, one, it's about whether the word election is used in the statute refers to election day or day early ballots are distributed. This case tangentially with respect to one statutory provision, one constitutional provision plaintiffs have cited is an argument related to whether the term election day in the Arizona Constitution as opposed to statute means one fixed day. It's apples and oranges.

Now, also, any sort of discussion of the Arizona Constitution in this case is, if it's given treatment at all, is to hide it dicta and hired gun because this is a case as to whether the results of an election

should be invalidated.

The question presented to the Supreme Court was simply not about whether early voting is constitutional. So it's not precedential or persuasive value here.

The arguments that -- and actually in Sherman versus City of Tempe, as I cited in the brief, the Arizona Supreme Court with respect to the constitutional provision concerning election day seems to come down firmly on plaintiffs' side because the reason that they entered the ruling that they did was because they found election day refers to one particular day when it's used in the Arizona Constitution, so for the court's consideration.

There was also discussion by Ms. Desai's team about the case they cited in their briefs of a California court interpreting the California constitution. Perhaps the most glaring difference between the California constitution in that case at the time that case was decided and the Arizona Constitution today is that at the time that case was decided as the California court expressly notes, the California constitution has an expressed provision authorizing early voting. And so again, apples and hand grenades in that case.

In addition, of course, they proffered no sources to reach the conclusion that California's

constitutional history is anything like Arizona's constitution. Right.

The plaintiffs have laid out the very expressed arguments regarding why Arizona's constitutional history mandates this interpretation that plaintiffs are offering this court.

And I have cited a variety of sources. I think Mr. LaRue notes that our plaintiffs plain language about as short and plain as we can make it while still providing this court with the needed constitutional context, right, because our constitutional history in Arizona especially is distinct. We have a very unique state constitution.

It doesn't seem that defendants in this case have proffered any argument, certainly no evidence, that it is impossible to grant the relief requested. And they say it will be quite difficult. I'm sure that is likely true. As that is the argument they made in Fontes.

But again, the Arizona Supreme Court said the standard can be done, and again, as our declaration from Sara Townsend supports. And this makes logical sense because again, the state legislature meets. The State legislature is still in session.

The state legislature is still considering election bills, including one that is actually much more

radical than the relief plaintiffs request here that would abolish all forms of early and absentee voting.

Clearly if the legislature were to pass that law and if the governor were to sign it, elections officials would be expected to comply no less so than a ruling of this court on the constitutionality of the current statutory scheme.

Moving to Mr. Arellano's arguments, Mr. Arellano argues that the Arizona Constitution does not grant power to the legislature but restricts legislature power. Yes, that is a correct statement of law.

And the entire thrust of this case is whether the framers of the Arizona Constitution imposed such a restriction with respect to the adoption of a system of no excuses mail in voting. And plaintiffs will not repeat again the constitutional arguments advanced in this regard, but plaintiffs point to several specific constitutional provisions that support that interpretation as extensive, extensive legislative again constitutional related history.

Oh, and I think it was Mr. Arellano who points to Miller versus Picacho, the case that was decided fairly soon after Arizona adopted its post-91 system no excuses mail in voting as expressly blessing the use of no excuses mail in voting.

Miller versus Picacho was a, corporately a fraud

case or case about the lawfulness of a statute, a criminal statute that penalized Val Harmstein, not a direct challenge to the constitutionality, no excuses mail in voting.

And the statute promoted the goals of secrecy in voting as an off-hand remark. And dicta does not, it's not part of the core holding of the case, not part of the issues that the Arizona Supreme Court was considering. The Arizona Supreme Court was considering totally different constitutional issues.

Again, we have for months, there was months of litigation in this case where we consistently asserted that the Arizona Supreme Court has never taken up these issues of the constitutionality of no excuse mail in voting.

We have actually cited sources, academic sources that have similarly reviewed the case law in Arizona and have made similar notes of that. It never has been taken up here.

It has been taken up in many other states. And there is still litigation on this in other states. It's a civil war. And in many of those states, suit was successful.

In most of those states, voters eventually amended their constitution to authorize some form of no excuses in mail in voting, sometimes not for many decades

afterwards, sometimes very quickly.

But in all cases, either the voters or the legislature the state constitution provided got to the end. Of course, here in Arizona, it's the voters who get weigh in on something like that and a public debate that needs to be had.

And I think it's time for our state to have that debate and voters to get to decide for themselves what sort of system of absentee voting they are comfortable with and what sort of tradeoffs they are willing to make and for them to hear the arguments on both sides, which could only happen in the process of constitutional amendment. And ultimately the people will decide.

Mr. Arellano also confuses secrecy and privacy. These are terms with some relation but for different things. Privacy, and I'm not sure what he means by privacy. As we have offered the arguments, secrecy in voting has a defined meaning.

It means voting, you know, at the polls on election day and set up to allow detailed provisions for the voter to make sure that the voter casts his ballot without anybody to being able to see how he or she is voting and that has elections officials there to observe to make sure that those restrictions, that restricted zone around the voting booth is respected.

That is what the framers meant secrecy in voting. That is what the 1891 law provides in terms of a secret voting system. That is what the proponents of the Australian ballot system meant. That's what the framers of the Arizona Constitution meant.

This argument, of course, about tamper resistant envelopes is likewise sort of in opposite because one of the primary things the framers was concerned about is tampering before the ballot is filled out or while the ballot is being filled out. Once it's included in the envelope, that's very well and good.

In addition, as the Yuma County investigation documents reveal, there were voters who were being asked to please bring us your ballot in an unsealed envelope. Please sign it. We will seal it later. That is how that operation proceeded. So the tamper evidence is not particularly useful in that sort of item.

But again, the most relevant or the more relevant thing is not that. The more relevant thing is, you know, there is no chain of custody when a ballot is mailed. I can't go on to the postal service's website.

They figure out everybody who handled a ballot, and it passes through many hands, versus when a ballot is cast at the polls, as Mr. LaRue I'm sure can tell you, his office keeps great detail chain of custody of

exactly who has handled that ballot. And they are very meticulous about it.

And more than that, postal workers are not election officials, right. The Arizona Constitution when it says secrecy in voting, it means the voters receive their ballots from an elections official. And they hand it back to an elections official. That is constitutional requirement. That is what is violated by no excuses mail in voting.

So just to wrap up, then, one thing that we have not really heard advanced today is we have heard a sort of a lot of side arguments, but what we haven't heard advanced by the defense is argument as to why the provisions of the Arizona Constitution Claims Society don't mean what plaintiffs have contended they mean and don't provide the restriction that plaintiffs contend they provide.

They have offered no significant rebuttal to that argument. Their argument is the court of case. Their argument is the court v analysis of probability of success on the merits.

And we would contend that plaintiffs have established that a probability exists and that a preliminary injunction should be entered so that the elections officials at least have some knowledge of where

the court is going can begin their preparation process and don't lose any more time to get this system set up and configured constitutionally.

Thank you.

THE COURT: Is that the end of your argument? Ms. Lucero, you get a chance.

MS. LUCERO: I have nothing else.

THE COURT: All right. As you guys know, this is a case that is pretty new to the court. I accepted this quickly 'cause it was an order to show cause, a couple of weeks.

I set some deadlines for briefing. I received briefing on Wednesday from the opposing parties. And then I received a reply today. And I was reading that probably right before the hearing today. I read as much of it as I could. There was exhibits attached to that.

My intention is to get a written ruling out by Monday at noon. And I'm going to spend my weekend writing my ruling so it's explaining my ruling. I have some thoughts. I just want to have that done.

Because of the time limits of this matter and whether or not we going any further depending on what I rule, I want to have that done by Monday at noon.

We'll stand at recess. Thank you for everybody's cooperation and participation.

(Adjourned 3:53 p.m.)

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C E R T I F I C A T E

BE IT REMEMBERED that the foregoing hearing took place at the time and place mentioned in the caption above; that I, STEVE L. GARWOOD, CR# 50172, an Arizona Certified Court Reporter, took down by stenographic means and digital means said hearing, that the foregoing transcript of proceedings contains a true transcription of my stenographic notes and digital recording; and that I am not of counsel, related to any party, nor otherwise interested in the outcome of this action, signed this 8th day of June, 2022.

/s/

_____

Steve L. Garwood, CR# 50172

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