ARIZONA SUPREME COURT

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

Plaintiffs/Appellants/Petitioners,

v.

ADRIAN FONTES, in his 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 NAVAJO;
GABRIELLA CAZARES- KELLY, in

Supreme Court
No.

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

Mohave County Superior Court
No. CV-2022-00594

RETRIEVED FROM DEMOCRACYDOCKET.COM

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; ROBYN STALLWORTH POUQUETTE in her official capacity as RECORDER, for the COUNTY OF YUMA;

Defendants/Appellees/Respondents.

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

Defendant Intervenors/Appellees/ Respondents.

RETRIEVED FROM DEMOCRACYDOCKET.COM

PETITION FOR REVIEW

Alexander Kolodin (030826)
Veronica Lucero (030292)
Arno Naeckel (026158)
Davillier Law Group, LLC
4105 N. 20th St., Ste. 110
Phoenix, AZ 85016
T: (602) 730-2985 F: (602) 801-2539
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
anaeckel@davillierlawgroup.com
phxadmin@davillierlawgroup.com (file copies)
Attorneys for Petitioners

Alan Dershowitz
1575 Massachusetts Avenue
Cambridge, MA 02138
adersh@gmail.com
Additional Counsel Pro Hac Vice

ISSUES PRESENTED FOR REVIEW

1. The Arizona Constitution provides: "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." Ariz. Const. art. 7, § 1. Is secrecy in voting nonetheless waivable by the voter, or did the Court of Appeals err in holding that the legislature must merely "uphold voters' *ability* to conceal their choices"? APP.00007-8 ¶ 22 (emphasis added).

2. Did the Court of Appeals err in holding that Plaintiffs are required to establish that no set of circumstances exists under which the mail-in voting statutes would be valid to succeed on their constitutional challenge?

INTRODUCTION

RETRIEVED FROM DEMOCRACYDOCKET.COM

This case involves a constitutional challenge to Arizona's post-1990 system of mail-in voting whereby anyone—even those who are most vulnerable to coercion, intimidation, and bribery (e.g., nursing-home residents, domestic-abuse victims, and voter sellers)—can vote without the protection of "secrecy" that article 7, section 1 of the Arizona Constitution *mandates*. *See* Ariz. Const. art 7, § 1 (mandating "that secrecy in voting *shall* be preserved") (emphasis added).[1] The framers of our constitution understood "secrecy in voting" within the framework of the Australian ballot system. This system was the product of an era where powerful

[1] Petitioners no longer allege, as they did prior to refiling this action in the trial court, that the Arizona Constitution prohibits mail-in voting *per se*. Rather, they now allege that the 1991 changes to Arizona's system of mail-in voting render the *current* iteration unconstitutional. *See* APP.00004 ¶ 5 ("Prior to 1991, when voting by mail, a voter had to be in the presence of an officer authorized to administer oaths, mark the ballot in a manner so that the officer could not see how the person voted, and then seal the ballot.").

corporations and political machines frequently induced voters to "waive" the secret ballot through bribery and intimidation. It was a time our framers remembered well. They understood that the integrity of elections can only be maintained if voters are mandatorily protected from coercion, intimidation, and bribery.

Indeed, the trial court and court of appeals both acknowledged that the constitution requires the preservation of secrecy for all methods of voting. However, both courts failed to recognize that, in order to preserve secrecy, it is not enough for the legislature to merely direct voters to fill out their ballots in secret. The legislature must also enact procedures by which voters are *unable* to mark their ballots in the presence of others even if individual voters desire to waive the secrecy of their own ballots.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Because Arizona's mail-in voting statutes in their current form fail to enact such procedures—e.g., requiring a restricted zone to be secured around mail-in voters or the presence of an official to ensure voters are not only able to but *must* mark their ballots in secret (and thus freely)—the statutes fail to preserve secrecy, meaning that voters can still be coerced, intimidated, or bribed to vote a certain way. Yet *preventing* this very evil is precisely why the framers adopted the Australian ballot system and mandated its equivalent—the preservation of secrecy—for any other method of voting the legislature might enact in the future. Thus, it is not enough that our modern election statutes provide for wrongdoers to

be punished *after* the fact; the laws provided for that even in the era in which the framers sought to remedy those very abuses. The current system thus stands in direct opposition to the constitutional command "that secrecy in voting *shall be* preserved."

FACTS AND PROCEDURAL HISTORY[2]

In February 2022, the Arizona Republican Party and its chairwoman, Kelli Ward (collectively, "Plaintiffs" or "Petitioners") filed a special action petition with this Court, challenging Arizona's mail-in voting laws under, *inter alia*, article 7, section 1 of the Arizona Constitution (the "Secrecy Clause"). APP.00004 ¶ 6. The Court declined special action jurisdiction but noted Plaintiffs could re-file their claim in superior court. *Id.* Six weeks later, Plaintiffs filed this case in Mohave County Superior Court against the Arizona Secretary of State and county election officials (collectively, "Defendants"), alleging Arizona's mail-in voting system violates the Secrecy Clause. Plaintiffs sought declaratory judgment and injunctive relief. *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

The superior court allowed the Arizona Democratic Party ("ADP"), the Democratic Senatorial Campaign Committee ("DSCC"), the Democratic Congressional Campaign Committee ("DCCC"), and the Democratic National

[2] *See* APP.00003-4 ¶¶ 3-5 for the facts the court of appeals considered.

Committee ("DNC") (collectively, "Intervenors") to intervene as defendants. *Id.* ¶ 7.

Plaintiffs requested an order to show cause why their requested relief should not be granted and moved for a preliminary injunction to prevent Defendants from carrying out and enforcing mail-in voting laws in the 2022 general election. APP.00005 ¶ 8. In response, Defendants argued (1) Plaintiffs sought a change in voting laws too close to an election, *see Purcell v Gonzalez*, 549 U.S. 1 (2006); (2) Plaintiffs lacked standing; (3) Plaintiffs' claims were barred by laches; and (4) Plaintiffs' claims failed on the merits. *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

In June 2022, after full briefing and oral argument, the superior court denied Plaintiffs' requested relief. The court found Plaintiffs had standing, *Purcell* and laches did not apply, and Plaintiffs' claims failed on the merits because Arizona's mail-in voting laws do not violate the Secrecy Clause. *Id.* ¶ 9. The court consolidated the preliminary injunction hearing with a bench trial on the merits and, finding Plaintiffs' claims failed as a matter of law, entered a final judgment on June 6, 2022, dismissing Plaintiffs' complaint with prejudice. *Id.*

Plaintiffs timely filed their notice of appeal on June 15, 2022. APP.00380. On June 28, Plaintiffs filed their opening brief in the court of appeals, APP.00012-75, and a petition for transfer in this Court, which the Court then denied on July 8, 2022, APP. 00177-78. On June 29, Plaintiffs filed a motion to

expedite in the court of appeals, APP.00170-74, which the court then denied on July 12, 2022, APP.00180-182. After full briefing and oral argument, the court of appeals issued a memorandum decision affirming the trial court on January 17, 2023. APP.00001-11. This timely appeal follows.

REASONS THE PETITION SHOULD BE GRANTED

I. The Court should grant review because this matter concerns a statewide issue of first impression, and this Court—like the highest courts in other states—should be the final word on whether Arizona's current system of mail-in voting is unconstitutional.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Whether the Arizona Constitution's mandate that secrecy in voting shall be preserved is essentially waivable by individual voters is plainly a matter of statewide importance. If secrecy is not waivable, as Petitioners contend, then Arizona's current system of mail-in voting is unconstitutional, and it is the Court's duty to say whether this is so. Without rehashing their arguments below here (though Petitioners have included their substantive briefing below in the attached appendix), Petitioners maintain that secrecy is not waivable but is instead mandatory under the Arizona Constitution. *See* Ariz. Const. art. 2, § 32 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.").

Because article 7, section 1 requires the legislature to preserve secrecy in voting in a manner equivalent to the Australian ballot system—and the trial court found that the framers indeed adopted the Australian system of voting, APP.00237,

which the court of appeals affirmed—it makes no sense to permit the legislature to enact a method of voting with a lesser degree of secrecy that, even worse, is waivable by voters. To permit this is to unravel the reforms that all states, including Arizona, adopted by the turn of the century to restore the integrity of elections.

Indeed, many of the issues that the adoption of the Australian ballot system meant to address have come full circle with the unraveling of these reforms, and this is especially true in Arizona. For example, because unmonitored drop-box voting is currently permissible under Arizona's mail-in voting statutes, many voters purported to experience intimidation while dropping off their ballots at unmonitored drop boxes during the 2022 General Election. *See*, e.g., 12News, *18 claims of voter intimidation at ballot drop boxes in Arizona submitted to law enforcement ahead of Election Day*, 12News.com (Nov. 4, 2022, 6:32 PM).

RETRIEVED FROM DEMOCRACYDOCKET.COM

However, this type of intimidation does not and cannot occur at polling places, where the Australian ballot system continues to operate and provides a protected zone around voters such that no one may follow them as they cast their ballots or see how they vote. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) ("After an unsuccessful experiment with an unofficial ballot system, *all 50*

States[3]…settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments."). Accordingly, after a thorough examination of the history of the era in which the Australian ballot system arose and in which the framers lived, the U.S. Supreme Court concluded that the "link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. *The only way to preserve the secrecy of the ballot is to limit access to the area around the voter.*" *Id*. at 207-08 (emphasis added).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Today, all 50 States still "limit access to the areas in or around polling places." *Id.* at 206. But Arizona's mail-in voting statutes fail to preserve these protections because they do not require the presence of public officials to secure a protected zone around the voter. Such a protected zone ensures that voters do not experience intimidation by others and that voters are not subjected to aggressive electioneering tactics as they attempt to vote. But those protections do not exist under the current mail-in voting system, as Petitioners argued below, APP.00012-169, 00183-235, 00241-376, rendering the current system unconstitutional.

There is currently no published decision in Arizona that definitively addresses the constitutionality of no-excuse mail-in voting, yet the highest courts

[3] *Compare with* APP.00004 ¶ 4 (noting that "many" states adopted the Australian Ballot system).

in three other states have recently addressed the issue in the last year alone. *See Albence v. Higgin*, No. 342, 2022, 2022 Del. LEXIS 377 (Dec. 13, 2022) (striking down universal mail-in voting as unconstitutional because it does not fall under one of the enumerated exceptions for absentee voting, and several provisions of the Delaware Constitution plainly establish that voting is to be done in person), *McLinko v. Commonwealth*, 279 A.3d 539 (Pa. 2022) (reversing the appellate court and overturning precedent to uphold mail-in voting under the "offer to vote" phrase of the Pennsylvania Constitution), and *Lyons v. Sec'y of the Commonwealth*, 490 Mass. 560 (2022) (upholding universal mail-in voting despite the enumerated exceptions to absentee voting in the Massachusetts Constitution).

These cases do not challenge the constitutionality of mail-in voting based on secrecy requirements (though the *Lyons* court discusses secrecy in the context of "electronic voting," 490 Mass. at 592-94, and the *McLinko* court notes that the plaintiffs in that case never contended that the mail-in statutes fail to preserve secrecy, 279 A.3d at 582), but they are nevertheless instructive, as Petitioners will explain if the Court grants review of their case. For purposes of this petition, however, these cases serve to demonstrate the current importance of this issue—whether mail-in voting is constitutional under a given state's constitution—across the nation. This Court, like the highest courts in other states, should be the final word on this important question in Arizona.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Whether the Court agrees or disagrees with the memorandum decision issued by the court of appeals, that decision is unpublished and is not precedential under Arizona Rules of the Supreme Court 111(c). This Court, therefore, should grant review to address the constitutionality of mail-in voting for all Arizonans, for it is plainly a matter of statewide importance.

II. The Court should also grant review because this matter raises important issues regarding Arizona's jurisprudence on what showing is required to invalidate unconstitutional statutes.

The Court should also grant review to determine whether the court of appeals erred in its determination that Plaintiffs are required to establish that no set of circumstances exists under which the mail-in voting statutes would be valid to succeed on their "facial" constitutional challenge. APP.00007 ¶ 18. If this is so, then Arizonans are tasked with an almost insurmountable challenge in attempting to invalidate unconstitutional statutes. This challenge is comparable to the "presumption of constitutionality" that is "a significant weight on the scales of justice, which presents a real risk of sustaining unconstitutional laws because they do not meet the more exacting requirement of being 'clearly' unconstitutional." *State v. Arevalo*, 249 Ariz. 370, 381-82 (2020) (Bolick, Pelander, J.J., concurring). "Either way, the result is unsatisfying, yet sends an unmistakable message to Arizonans that they face a judicially manufactured uphill battle any time they challenge an infringement of their rights." *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

Here, of course, Petitioners challenge the infringement of the right of Arizonans to vote freely by *preventing* intimidation, coercion, and bribery rather than leaving it to individual voters to ensure that they do not face these evils. Many voters are simply unable to protect themselves and can only vote freely in a system where they are not forced (e.g., in the case of domestic violence) to request a mail-in ballot only to be coerced and intimidated to vote a certain way when marking their ballots. But if the onus is on Plaintiffs to show that there is no set of circumstances under which this system can be constitutional (and Plaintiffs do contend there is no such set of circumstances) rather than on the government to show that there is no set of circumstances under which the system is *un*constitutional, then it is difficult to imagine how laws are ever held to be unconstitutional. Yet they are.

RETRIEVED FROM DEMOCRACYDOCKET.COM

This is because the as-applied v. facial constitutional challenge distinction is largely confusing, contradictory, and, as some commentators argue, "fundamentally flawed." *See, e.g.*, Alex Kreit, *Making Sense of Facial and As-applied Challenges*, 18 Wm. & Mary Bill of Rts. J. 657, 664-68 (noting the confusion that has ensued after the U.S. Supreme Court issued the "no set of circumstances" rule in *United States v. Salerno*, 481 U.S. 739, 745 (1987)). *See also City of Chi. v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) (arguing that the *Salerno* test was merely dicta and has never been the decisive

factor in any Supreme Court case). This Court cited the *Salerno* rule in *Arevelo*, 249 Ariz. at 373 ¶ 10, and the court of appeals relied on *Arevelo* and *Salerno* in its memorandum decision. *See* APP.00007 ¶ 18.

Indeed, the "no set of circumstances" rule raises the same problems the "presumption of constitutionality" raises. *See Lyons*, 490 Mass. at 568-69 (noting that a statute subjected to a facial challenge "is presumed constitutional") (citation omitted). "What does the presumption of constitutionality mean in real life and real cases? It is hard to say. Is it mere verbiage that [courts] recite to show [they] are appropriately constrained before [they] strike down a law?" *Arevelo*, 249 Ariz. at 381 ¶ 45 (Bolick, Pelander, J.J., concurring) (citing John D. Leshy, *The Arizona State Constitution* 119 (2d ed. 2013) (asserting that the Court has "overstate[d] the degree to which the judiciary defers to legislative judgments")). The same can be said for the "no set of circumstances" rule, especially given its inconsistent use in various cases challenging the constitutionality of statutes.

This Court should grant review to clarify whether Plaintiffs must follow the *Salerno* rule for all "facial" challenges, whether there is a meaningful distinction between facial and as-applied challenges, and whether there are exceptions to the *Salerno* rule (e.g., the overbreadth exception in First Amendment cases).

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCLUSION

For the reasons discussed above, Petitioners respectfully request that the Court grant their Petition for Review.[4]

RESPECTFULLY SUBMITTED January 28, 2023.

Davillier Law Group, LLC

By /s/ Veronica Lucero
Alexander Kolodin
Veronica Lucero
Arno Naeckel
Attorneys for Petitioners

RETRIEVED FROM DEMOCRACYDOCKET.COM

[4] Notice Under Rule 21(a): Petitioners request attorney fees and costs pursuant to the private attorney general doctrine, *see Ariz. Ctr. For Law in Public Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991), and other applicable law.