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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

ARIZONA REPUBLICAN PARTY; et al.;

Plaintiffs,

v.

KATIE HOBBS; et al.;

Defendants.

No. S8015CV202200594

**MOTION FOR PRELIMINARY
INJUNCTION**

(Oral Argument Requested)

Plaintiffs hereby move for a preliminary injunction pursuant to Arizona Rules of Civil Procedure 7.1(a) and 65(a); the Arizona Uniform Declaratory Judgments Act; A.R.S. §§ 12-122, 1801, and 2022(B);¹ and the Verified Complaint, which is incorporated herein. They ask that Defendants be preliminarily enjoined from conducting Arizona's 2022 General Election, set for November 8, 2022, under the post-1991 system of no-excuse mail-in voting and instead be ordered to conduct it under the pre-1991 system in place before S.B. 1320 was enacted in 1991. **Exhibit A**, attached hereto, is a redlined version of the 1991 changes to the prior law.

¹ As well as any other applicable law.

MEMORANDUM OF POINTS AND AUTHORITIES²

The Arizona Constitution guarantees that the results of our elections will be the product of each voter's independent decision made alone and in secret at the polls—free of the danger of outside influences from employers, unions, families, spouses, or anyone else. This guarantee is safeguarded by the Constitution's requirements that ballots be distributed directly to voters by election officers at the polling place, where they can ensure that the vote is cast in secret.³

Through 1990, Arizona voters were required to vote in this manner unless physical disability, age, distance, religious beliefs, or travel prevented them from doing so. Even for voters entitled to vote absentee, the Arizona Legislature took pains to preserve these constitutional prerequisites. Until 1991, A.R.S. § 16-541 provided that (a) absentee ballots were to be supplied to the voter in person by an election official who witnessed the voter's signature on the application for the ballot and verified his identity, and (b) the voter was then to "Display ballot unmarked before the officer in his presence," vote the ballot in "such a manner that [the official] cannot see your vote," and seal the ballot in the ballot envelope. *See* 1991 Ariz. Sess. Laws ch. 51 (1st Spec. Sess.). This system increased, not decreased, the protections afforded to Arizona's most vulnerable voters, the sick and elderly, while facilitating their participation in elections. *See* Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation."). The relief Plaintiffs seek would restore it.

In contrast, after 1991, all voters may request an absentee ballot by mail, vote in the presence and subject to the influence of anyone, and return those ballots by mail; as a consequence, elections are now conducted almost entirely by mail. This post-1991 system of "no-excuse mail-in voting" violates the Arizona Constitution.

² Emphasis added and internal citations and quotations omitted for most citations herein. This motion refers to the Arizona Constitution as the "Constitution," despite the convention that only the U.S. Constitution is capitalized.

³ This motion does not challenge voting under the Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. Ch. 203.

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF IN CASE ALLEGING THE UNLAWFUL CONDUCT OF ELECTIONS

When public officials seek to exceed their legal authority in the means by which they conduct an election, the typical multi-factor standard for preliminary injunctive relief need not be satisfied. Rather, plaintiffs in cases such as these are entitled to preliminary injunctive relief by showing that they are likely to prevail on their claim that Defendants have acted unlawfully. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 64 ¶ 26 (2020) (“Because Plaintiffs have shown that the Recorder has acted unlawfully and exceeded his constitutional and statutory authority, they need not satisfy the standard for injunctive relief.”). Thus, if Plaintiff establishes the likelihood of success on the merits (as is the case here), then irreparable harm, balance of hardships, and public policy in the movant’s favor are presumed, and the requisite injury is shown by demonstrating that the movant is “beneficially interested” in compelling the public officials to perform their legal duty. *Id.* at 64 ¶¶ 26–27. All Arizona citizens and voters are “beneficially interested” in the enforcement of Arizona constitutional and statutory provisions related to election law. *Id.* at 62 ¶¶ 11–12.⁴ Just as in *Fontes*, where the defendant sought to conduct early voting unlawfully by promulgating illegal instructions to early voters, here, Defendants seek to employ an unlawful system of no-excuse mail-in voting. Thus, relief is warranted here for the reasons set out below.⁵

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE NO-EXCUSE MAIL-IN VOTING IS UNCONSTITUTIONAL.

Arizona’s no-excuse mail-in voting system is unconstitutional both facially and as applied. The applicable rule of construction is the plain meaning rule: “[I]f the Constitutional language is clear, judicial construction is neither required nor proper.”

⁴ Plaintiff Ward is an Arizona citizen and registered voter. Verified Compl. ¶ 30. Plaintiff Arizona Republican Party (“AZGOP”) is beneficially interested. *Id.* ¶¶ 39–45.

⁵ Typically, a party seeking a preliminary injunction is obligated to establish: (a) a strong likelihood of success on the merits; (b) the possibility of irreparable injury; (c) the balance of hardships favors the movant; and (d) public policy favors the injunction.” *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). However, the movant may show either probable success on the merits and the possibility of irreparable injury or the presence of serious questions and that the balance of hardships tips sharply in the movant’s favor to obtain relief. *Id.*

1 *Perini Land & Dev. Co. v. Pima Cty.*, 170 Ariz. 380, 383 (1992). Only if the text is unclear
2 should “we...examine the original public meaning of the words as understood by the
3 drafters and people at the time of adoption.” Clint Bolick, *Principles of State Constitutional*
4 *Interpretation*, 23 Federalist Soc’y Rev. 1, 15 (March 24, 2022). Also, “the dominant
5 judicial philosophy at the time of Arizona’s statehood was originalism[;] thus, our framers
6 would have assumed that the provisions they drafted would be interpreted in accordance
7 with original meaning.” *Id.* at 18; *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 56
8 (2021) (original meaning). Either way, today’s system of no-excuse mail-in voting cannot
9 stand.

10 ***A. Article 7, section 1 of the Arizona Constitution requires secrecy in voting to***
11 ***protect voter autonomous choice and election outcomes from undue influences.***

12 Article 7, section 1 allows the legislature to enact only those laws regulating the
13 conduct of elections that do not dispense with “secrecy in voting.” Whatever this term may
14 mean to modern readers, the framers understood it as requiring voters to make their
15 selections at the polls, on election day, in the presence of election officials whose task it
16 was to make it impossible for anyone to see how they were voting. Whether our current
17 system is sufficient to satisfy some contemporary notion of secrecy is irrelevant.

18 The constitutional requirement of secrecy in voting originated with the “Australian
19 Ballot” reforms of the late 19th century, a reaction across the country to the plague of
20 crooked elections. “[A]fter the 1888 presidential election, which was widely regarded
21 as...plagued by fraud, many States moved to the ‘Australian ballot system.’ Under that
22 system, an official ballot, containing the names of all the candidates legally nominated by
23 all the parties, was printed at public expense and distributed by public officials at polling
24 places.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). *See also* John C.
25 Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for*
26 *Election Reform*, 36 U. Mich. J. L. Reform 483, 488 (2003) (essential components of
27 Australian Ballot are: (a) ballots printed and distributed at public expense; (b) ballots with
28 the names of all candidates duly nominated by law (“blanket ballot”); (c) ballots distributed

“only by election officers at the polling place”; and (d) detailed provisions for “physical arrangements to ensure secrecy in casting the vote.”).

In 1891, the Arizona territorial legislature adopted the Australian Ballot to ensure popular sovereignty by honest elections as a check on the malignant influence on voting of corporations and political machines. It passed a law expressly defining secrecy in voting to mean that ballots were to be provided to voters only at the polls, where citizens would make their selections in a private voting booth. John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 68 (1988) (citing 1891 Ariz. Terr. Sess. Laws No. 64, §§ 2, 26, 32 at 71, 73) (hereinafter, “Leshy, *Making*”). The law was entitled “AN ACT: To Promote Purity of Elections, **Secure Secrecy of the Ballot** and to Provide for the Printing and Distribution of Ballots at Public Expense.” 1891 Ariz. Terr. Sess. Laws no. 64⁷ (hereinafter, the “1891 Law”). It was the Australian Ballot System on all fours, and its provisions were incorporated by reference into the 1912 Constitution.

The framers of Arizona’s 1912 Constitution adopted the 1891 Law’s secrecy safeguards into the state’s fundamental law to stop corporate interests or political machines from corrupting future legislatures to depart from them. Thus, to the language of article 10, section 4 of the prior 1891 Constitution,⁸ they added the key qualifier “**Provided, that secrecy in voting shall be preserved.**” Ariz. Const. art. 7, § 1; John D. Leshy, *The Arizona State Constitution* 16 (2d ed. 2013) (hereinafter, “Leshy”) (“The [constitutional] convention included the Australian import, the secret ballot, that had been adopted by the territorial legislature nineteen years earlier” in article 7, section 1.). In other words, the 1912 Constitution constrains the legislature’s ability to deviate from the 1891 Law.

The term “secrecy in voting” is not limited to *privacy* in voting; rather, it means that voting by “secret ballot” is intended “to protect individual voters from coercion.” *See, e.g., McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 11 (2010) (Prop. 108 violated single amendment rule because “**Secrecy of voting in public elections is already protected in**

⁷ Available at <https://azmemory.azlibrary.gov/digital/collection/lawsession/id/2667>.

⁸ Congress failed to ratify the 1891 Constitution.

Article 7, Section 1 of the Arizona Constitution” but if approved would add a new section guaranteeing secrecy in union elections resulting in two sections “that **both ensure secrecy in public elections.**”).⁹ In addition, secrecy protects not just individual voters from undue influence but also the process itself—which is why the right to cast a secret ballot is also an obligation. *See Hunt v. Campbell*, 19 Ariz. 254, 282–3 (1917) (“If the voter is not held to a substantial compliance [with prohibition on obtaining assistance marking the ballot], the spirit of the Australian ballot system is ignored. We might as well return to the old system of haphazard voting in vogue before this innovation, and to remedy the many evils of which, the new system was inaugurated.”).

“Secrecy” is the primary means of safeguarding the Constitution’s guarantee that voting is individual, independent, and free of external coercion or influence. However, current mail-in voting—allowing votes to be cast anywhere from a kitchen table to an employer’s cafeteria table and in the presence of bosses, activists, family, friends, and others—fails constitutional muster.

1. Preservation of secrecy in voting implies that it pre-existed the 1912 Constitution.

By requiring that “secrecy in voting” be “preserved,” the 1912 Constitution (still in effect today) was safeguarding the 1891 Law, which had adopted secrecy in voting along with the other reforms of the “Australian Ballot,” from future legislatures. The 1891 Law required secret voting in privacy at a polling place protected by election authorities:

On receiving his ballot the voter shall forthwith and **without leaving the polling place or going outside** of said guard rail, **retire alone** to one of the booths or compartments **not occupied by any other person**, and prepare his ballot.... Before leaving the booth or compartment, the voter **shall fold his ballot...in such a way that the contents of the ballot shall be concealed....**

Id. § 26. It required that all ballots “shall be printed and distributed at public expense.” *Id.* § 2. It also penalized disclosure of how the voter intended to vote and the breaking of

⁹ The constitution was subsequently amended on November 2, 2010, to include article 2, section 37, which guaranteed a secret ballot in employee representation elections: “The right to vote by secret ballot for employee representation is fundamental.” *Id.* at 353 n.1. Since the right to vote by secret ballot is fundamental for employees voting in union representation elections, so much more so must be the right to vote by secret ballot in public elections.

1 secrecy after voting. *Id.* §§ 32, 36. Electioneering at the polls was also not allowed. *Id.* See
2 also Leshy, *Making, supra* 68. The 1912 Constitution thus raised the provisions of the 1891
3 Law mandating secrecy in voting to the status of the fundamental law of our state, where
4 they remain today.

5 **2. The secrecy in voting provision in the 1912 Constitution prohibits the**
6 **legislature from repealing the Australian Ballot enacted by the 1891 Law.**

7 The phrase “[p]rovided, that secrecy in voting shall be preserved” limits the
8 legislature’s power to enact laws that deviate from the essential provisions of the 1891
9 Law. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 823 (2015)
10 (“Core aspects of the electoral process regulated by state constitutions include voting by
11 ‘ballot’ or ‘secret ballot’.... [T]he States’ legislatures had no hand in making these laws
12 and may not alter or amend them.”); *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949) (“Each
13 word, phrase, and sentence must be given meaning so that no part will be [void], inert,
14 redundant, or trivial.”). Thus, any statute that fails to preserve secrecy in voting
15 substantially as it existed in 1912, when the Constitution was ratified, is beyond
16 legislature’s power to enact and is unconstitutional.

17 **3. The phrase “such other method as may be prescribed by law” does not**
18 **authorize the legislature to stop preserving secrecy.**

19 The phrase “such other method as may be prescribed by law” is not a broad and
20 general grant of authority allowing the legislature to deviate from the Australian Ballot and
21 its requirements of secrecy. Rather, the framers meant to allow the legislature to authorize
22 voting machines *in lieu of* paper ballots. See *McLaughlin*, 225 Ariz. at 355 (“Arizona’s
23 framers...fashioned Article 7, Section 1 to preserve the state’s ability to adopt voting
24 machines.”). See also *In re Contested Election*, 281 Pa. 131, 137–38 (1924) (stating that
25 Pennsylvania’s parallel constitutional provision was included “to enable the substitution of
26 voting machines, if found practicable”); *People ex rel. Deister v. Wintermute*, 194 N.Y. 99
27 (1909) (same). The framers thus included the phrase to clarify that voting machines, if
28 used, must adhere to the four principles of the Australian Ballot. See *McLaughlin*, 225

Ariz. at 356. But, though the legislature has now authorized the use of “electronic voting systems”, even current statutory law makes clear that they only provide for secrecy in voting when voters vote at the polls. *See* A.R.S. § 16-446 (“An electronic voting system shall: 1. Provide for voting in secrecy **when used with voting booths.**”).

Indeed, a Pennsylvania appellate court recently struck down Pennsylvania’s “no-excuse mail-in voting” system, which “created the opportunity for all Pennsylvania electors to vote by mail without secrecy or having to demonstrate a valid reason for absence from their polling place on Election Day, *i.e.*, a reason provided in the Pennsylvania Constitution.” *McLinko v. Commonwealth*, 2022 Pa. Commw. Lexis 12, at *4 (Pa. Commw. Ct. 2022) (review pending). That court explained that the secrecy provision, adopted in 1901, derives from the Australian Ballot reforms, noting that the “1901 amendment guaranteed the secrecy of the ballot, **both in its casting and in counting.** ‘[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control.’” *Id.* at *21. Noteworthy is the fact that, unlike Arizona, Pennsylvania has already amended its constitution several times to expressly allow for some forms of mail-in voting.

Current statutes regulating in-person voting on election day preserve the 1891 Law. In language largely unchanged from section 26 of the 1891 Law, A.R.S. §16-580(B) still requires secrecy for in-person voting: “On receiving a ballot the voter shall promptly and without leaving the voting area retire alone...to one of the voting booths that is not occupied, prepare the ballot in secret and vote.” In language extending the secrecy provisions of the 1891 Law to account for modern technology, the legislature has even criminalized photographing one’s own ballot if cast at the polls. A.R.S. § 16-515(G).

4. The history of the Arizona Constitution shows that secrecy in voting was the primary reason for adoption of the “Australian Ballot” reform.

The Arizona Constitution was a product of its time and should be interpreted in light of its history and purpose. “Constitutions, meant to endure, must be interpreted with an eye to syntax, **history, initial principle,** and **extension of fundamental purpose.**” *Saban*

1 *Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89, 95 ¶ 21 (2019). *See also Chavez*
2 *v. Brewer*, 222 Ariz. 309, 319 ¶ 32 (App. 2009).

3 Historically, voting in the U.S. lacked secrecy and integrity in results. In *Burson v.*
4 *Freeman*, 504 U.S. 191, 206 (1992), the Supreme Court described voter privacy through
5 secrecy as the means adopted historically to prevent voter fraud and undue coercion:

6 [T]he history of election regulation in this country **reveals a persistent**
7 **battle against two evils: voter intimidation and election fraud.** After an
8 unsuccessful experiment with an unofficial ballot system, all 50 States,
9 together with numerous other Western democracies, settled on the same
10 solution: a **secret ballot secured in part by a restricted zone around the**
11 **voting compartments.**

12 By 1896, almost all the states in the U.S. had adopted the Australian Ballot. *See Doe v.*
13 *Reed*, 561 U.S. 186 (2010) (Scalia, J. concurring) (“It was precisely **discontent over the**
14 **non-secret nature of ballot voting**, and the abuses that produced, which led to the States’
15 adoption of the Australian secret ballot. New York and Massachusetts began that
16 movement in 1888, and almost 90 percent of the States had followed suit by 1896.”).

17 Arizona, too, was caught up in the progressive political movement that swept the
18 country in the early 1900s when the 1912 Constitution was drafted. Popular sovereignty
19 through the electoral process has been described as the “most constant thread running
20 through the Arizona Constitution” with its “emphasis on democracy—**popular control**
21 **through the electoral process.**” Leshy, *Making supra* 59. Accordingly, the Arizona
22 Constitutional Convention adopted the “best known” of the progressive innovations:
23 initiative, referendum, and recall, all intended to strengthen popular sovereignty. All these
24 innovations depended on free elections. *See Hunt*, 19 Ariz. at 283 (Australian Ballot
25 “designed to purify elections by securing to the voter the prerogative of **freely and**
26 **privately** selecting the candidates of his own choice”); Fortier & Ornstein, *supra* 512
27 (Australian Ballot came about in part because of a concern that, if constitutional safeguards
28 were not put in place requiring voters to **cast their ballot in secret**, employers or “party
machines” might require voters to show their ballots to ensure they voted correctly.)

In addition, the Arizona framers were deeply concerned with limiting the political influence of corporations and political machines over the democratic process. *See Ariz. Corp. Comm'n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 290–92 (1992). *See also* Ariz. Const. art. 15 (establishing Arizona Corporations Commission); Leshy, *supra* 356 (Arizona Constitution reflects a “pronounced, progressive-era concern with regulating corporations, a concern enhanced by the perceived dominance of large railroad and mining companies during the territorial era.”). Accordingly, the framers included a provision “broadly proscribing corporate influence on ‘any election or official action.’” Leshy, *Making supra* 91 (citing Ariz. Const. art. 15, § 18). They also enshrined direct primary elections into the Constitution to limit the influence of political machines. *Id.* at 62. Again, most critically, these provisions depended upon free elections, and the integrity of those elections depended on the secrecy of the Australian Ballot.

B. The term “Official Ballot” means a ballot that is distributed and voted at the polls in secret under the watchful eyes of election officials; thus, article 4, section 1 of the Arizona Constitution precludes any other ballot.

Since the framers understood “secrecy in voting” to mean, among other things, that voting was only to take place at the polls, this is naturally reflected in other portions of the Constitution. For example, article 4 is a constitutional mandate to the Secretary of State regarding the form and manner of delivery of “official ballots.”

“Official ballot. When any initiative or referendum...shall be filed...with the secretary of state, **he** shall cause to be printed on the official ballot **at** the next regular general election the title and number of said measure, together with the words ‘yes’ and ‘no’ in such manner that the **electors may express at the polls** their approval or disapproval of the measure.”

Ariz. Const. art. 4, § 1(10). The constitutional requirement that votes are cast “at the polls” appears in three other places in article 4, section 1. *See id.* at (1) (reserving to people the “power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments **at the polls**...and they also reserve...the power to approve or reject **at the polls** any” legislative act); *id.* at (3) (“Legislature, or five per cent of the qualified electors, may order the submission to the people **at the polls** of any measure...enacted by

the Legislature.”); *id.* at (15) (“Nothing in this section shall be construed to deprive or limit the Legislature of the right to order the submission to the people at the polls of any measure, item, section, or part of any measure.”).

It was obvious to our Supreme Court, the year after our Constitution was ratified, that this meant voters needed to go to the polls to cast their ballots. *See Allen v. State*, 14 Ariz. 458, 460–62 (1913) (“That the votes of the electors were cast at the ‘polls’ in the manner provided by [article 4, section 1] is unquestioned.... [T]he electors...went to the polls and voted.”).

The 1891 Law adopting the Australian Ballot—just as the Arizona Constitution would do later—had also prescribed an official ballot to be used at the polls. Leshy, *Making supra* 68. Official ballots were to be prepared and distributed at public expense and obtainable by voters only at polling places and only from election officers. 1891 Law §§ 1, 15, 21, 25, 36. The 1912 Constitution’s article 7, section 1 (requiring secrecy in voting be preserved) meant that the provisions of the 1891 Law were constitutionally required, and voting at the polls was an integral part of those requirements. Leshy, *Making supra* 68.

Even today, the plain meaning of “at the polls” in Arizona’s election statutes signifies a place provided by election officials where votes are cast in booths screened from view of others and within the 75-foot circle in which electioneering is prohibited. *See, e.g.*, A.R.S. § 16-411(B) (polling places designated by county boards of supervisors); *id.* at (J) (Secretary shall “provide for a method to reduce voter wait time at the polls”); A.R.S. § 16-404 (polling places have “sufficient number of voting booths on which voters may conveniently mark their ballots screened from the observation of others”); A.R.S. § 16-515(A) (no electioneering “inside the seventy-five foot limit while the polls are open”).

In contrast to “at the polls,” the actual casting of a mail-in ballot does not occur at the polls—a specific place provided by county boards or a place with a sufficient number of private voting booths and within a 75-foot “no-go” zone. Rather, mail-in votes can be cast from anywhere a voter can fill out a ballot with no protection for the voter from the influences of others—the kitchen table with an activist present, the cafeteria table at work

surrounded by employees and shop stewards, or anywhere else. Because a mail-in vote is not cast at the polls, it is unconstitutional under the Constitution’s plain meaning.

Although the “at the polls” provisions appear in article 4 (addressing the legislative department and reserving certain law-making powers to the people) rather than in article 7 (addressing suffrage and elections), that language is not limited to elections on referenda and initiatives for the simple reason that **referenda and initiatives are always decided “at the next regular general election.”** Ariz. Const. art. 4, § 1(10). Moreover, these referenda provisions were adopted contemporaneously with the provisions in article 7. *See The Records of the Arizona Constitutional Convention of 1910*, 1402–05 & 1416–17 (John S. Goff ed., 1990) (documenting Constitution as originally adopted in 1910). Thus, the framers intended all voting to occur at the polls. It is also worth noting that other foundational provisions relating to elections are not found in article 7. *See e.g.*, art. 2, § 21 (“Free and Equal” clause). In addition, the voting provisions of articles 4 and 7 are “*in pari materia*—those of the same subject or general purpose—[and] should be read together and harmonized when possible.” *David C. v. Alexis S.*, 240 Ariz. 53, 55 ¶ 9 (2016). Also worth noting is that, having defined the term “official ballot” in article 4 as a ballot distributed “at the polls,” the Constitution then goes on to use the term in several other places. Article 7, for example, provides that such “official ballots” are to be used for “any election or primary.” Ariz. Const. art. 7, § 14. Such “official ballots” were also to be used for, among other things, elections for federal officers and recall elections. Ariz. Const. art. 6 § 38; art. 7 §§ 9, 14, 38; art. 8 §§ 3, 4, 6.

C. Construing article 7, § 1, and article 4, § 1 as meaning something other than that ballots must be provided and filled out “at the polls” renders other portions of the Arizona Constitution meaningless.

An alternative construction would render several other constitutional provisions meaningless. For example, Article 7, section 4 provides: “Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their **attendance** at any election, and in **going thereto** and **returning therefrom**.” The plain meaning of

“attendance” is “[p]hysical presence plus freedom to perform the duties of an attendant.” *Attendance*, Ballentine’s Law Dictionary (3rd ed. 2010). That meaning should govern here. *Fann v. State*, 493 P.3d 246, 255 ¶ 25 (Ariz. 2021) (courts interpret language in view of the entire text and consider the context in which it was used). Also, “Each word, phrase, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial.” *Yates*, 69 Ariz. at 72. Arizona’s present early voting laws allow electors to fill out their ballots anywhere and do not require physical presence at any election on a specific day. Thus, it is impossible for “[e]lectors...in all cases...[to] be privileged from arrest during their attendance at any election, and in going thereto and returning therefrom,” Ariz. Const. art. 7, § 4 (emphasis added).

In addition, Article 7, section 11 would be meaningless. It provides: “There shall be a general election of Representatives in Congress, and of State, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to Statehood and biennially thereafter.” As with article 7, section 5, this provision plainly mandates that the general election must take place on a specific day. See *Sherman v. City of Tempe*, 202 Ariz. 339, 343–44 ¶¶ 14–20 (2002). In *Sherman*, the court held that “the Arizona Constitution and Arizona’s election statutes employ the word ‘election’ to refer to a particular day” and explained that the Constitution “states that ‘there shall be a *general election*...on the first Tuesday after the first Monday in November.’” Thus, the court held, “according to the Constitution and Arizona election statutes, elections occur on one particular date and the term ‘election’ refers to that date.” *Id.* at 344 ¶ 19. In contrast to the Constitution’s requirements, Arizona’s no-excuse mail-in voting statutes allow electors to cast their ballots up to 27 days before election day. A.R.S. § 16-542(C). Why stop at 27 days? Does “day” in the Constitution stretch to 37, 47, or more days without limit? The simple answer is that early voting, in its present form, violates the Arizona Constitution.

By way of further example, article 7, section 5 provides: “No elector shall be obliged to perform military duty on the day of an election, except in time of war or public danger.”

Ariz. Const. art. 7, § 5. “[O]n the day of an election” plainly refers to an election that occurs on a particular day, not a month-long period during which voters can mail in ballots. If the Constitution provided for mail-in voting, article 7, section 5 too would be irrelevant.

II. THOUGH NOT REQUIRED, THE OTHER ELEMENTS TYPICALLY REQUIRED FOR PRELIMINARY INJUNCTIVE RELIEF ARE PRESENT.

A. *Though not required, Plaintiffs will experience irreparable injury if Defendants violate their constitutional right to participate in a general election safeguarded against undue influence.*

Here, irreparable injury should be presumed because Plaintiffs have shown a likelihood of success on the merits of their constitutional claims. *Fontes*, 250 Ariz. at 64 ¶ 26. *See also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’”); *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev’d on other grounds*, 562 U.S. 134 (2011) (“[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.”).

Nevertheless, Plaintiffs also satisfy the irreparable harm element. “A person who is denied the right to vote suffers irreparable injury.” *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004). “[T]he right to vote” is not merely the right to cast a ballot and have that ballot counted but also “the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” *Fontes*, 250 Ariz. at 61 ¶ 4 (citing *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)).

As *Shoen* provides, the party seeking an injunction must show only **a possibility** of irreparable injury not remediable by damages. 167 Ariz. at 63. Here, Plaintiff Ward is an individual voter in her county of residence. Absent an injunction, she will be deprived of the right to cast her vote in an election conducted under constitutional principles that safeguard against the possibility of undue influence. Plaintiff AZGOP’s members and candidates will be deprived of the right to participate in an election conducted under constitutional principles. Absent an injunction, Plaintiff AZGOP will also have to employ more resources to monitor early voting against improprieties instead of using them for

other election-related purposes. *See, e.g.,* A.R.S. 16-552 (C) & (H); *League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620-PHX-JAT, 2018 U.S. Dist. LEXIS 159302, at *22 (D. Ariz. Sep. 18, 2018) (irreparable harm to defendant with “mandate to enforce Arizona’s election laws” where a court fails to enforce a law facilitating the discharge of that duty); *IB Prop. Holdings, LLC v. Rancho Del Mar Apts. Ltd. P’ship*, 228 Ariz. 61 (App. 2011) (where loss uncertain or difficult to quantify, Arizona courts find irreparable harm warranting injunctive relief). Once it takes place, the election cannot be re-run. Thus, absent an injunction, these harms are irreparable.

B. Though not required, the balance of hardships favors Plaintiffs.

Here, a balance of hardships favoring Plaintiffs should be presumed because they have shown a likelihood of success on the merits. *Fontes*, 250 Ariz. at 64 ¶ 26. Nevertheless, the balance of hardships tips in favor of Plaintiffs because they will be irreparably damaged if the court fails to enjoin the state and its officials from implementing an unconstitutional voting system. Future relief (e.g., issuance of a permanent injunction) cannot undo the harm Plaintiffs will experience if the 2022 general election proceeds in an unconstitutional manner.

Defendants will not be impermissibly burdened if the injunction is granted. *See* 250 Ariz. at 64 ¶¶ 28–29 (even if court was to reach balance of hardships, it cannot favor election officials who are exceeding their authority when it is possible to grant the relief requested). The deadline for voter registration is October 11, 2022, early voting begins October 12, 2022, and the deadline to request a mail-in ballot is October 28, 2022.¹¹ Thus, there is sufficient time to conduct the election by constitutionally permissible means.¹² Further, mail-in voting is not the exclusive or necessary way to count a large number of votes. In the 2022 election for president of France, 32,077,401 ballots were reportedly voted and counted using paper ballots in paper envelopes with no absentee or early voting

¹¹ Arizona Secretary of State, *Elections Calendar & Upcoming Events*, <https://azsos.gov/elections/elections-calendar-upcoming-events> (last visited May 19, 2022).

¹² On the other hand, there is no time for an equally “plain speedy and adequate” remedy unless a preliminary injunction is appropriate on grounds other than mandamus. *See* 250 Ariz. at 64 ¶ 27 (preliminary injunctive relief appropriate in mandamus actions).

1 with the results reported within hours.¹³ Arizona itself used the pre-1991 system for
2 decades.

3 In addition, other members of the public will not suffer a cognizable harm if the
4 relief Plaintiffs seek is granted. Voters are expected to tolerate the “usual burdens of
5 voting.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338 (2021). “Having to
6 identify one’s own polling place and then travel there to vote does not exceed the ‘usual
7 burdens of voting.’” *Id.* at 2344.

8 ***C. Though not required, public policy favors preliminarily enjoining***
9 ***Defendants from conducting another unconstitutional general election.***

10 As the Arizona Supreme Court has recognized, “[e]lection laws play an important
11 role in protecting the integrity of the electoral process.” *Fontes*, 250 Ariz. at 61 ¶ 4. Thus,
12 as a matter of law, “public policy” and the “public interest” are served by enjoining the
13 unlawful acts of elections officials. *Id.* at 64 ¶ 27. Arizona’s current system of no-excuse
14 mail-in voting is unlawful because it does not preserve secrecy in voting. Remarkably,
15 even after 131 years, Arizona’s statutory provisions regarding the conduct of **in-person**
16 voting at the polls, on election day, preserve “secrecy in voting” every bit as strictly as they
17 did in 1891—in some ways even more so. For example, it remains a crime for voters to
18 remove their own ballot from the polls, and is now a crime for them even to photograph it,
19 lest it be shown to others. A.R.S. §§ 16-515 (A) &(G) and 16-1018 (1), (3), & (9). Whereas
20 in 1891 it was a crime to try to influence a voter within the polling place itself, it is now a
21 crime to attempt to do so even within 75 feet of the polling place. A.R.S. § 16-515 (A), (F),
22 & (I).¹⁴

23 Yet these restrictions are now frustrated by Arizona’s repeated expansion of no-
24 excuse mail-in voting. Approximately 89% of ballots cast in the 2020 election were early
25 ballots.¹⁵ It is simply absurd to prohibit electioneering within 75 feet of a polling place

26 ¹³ *Explainer: How France’s old-school voting system works*, AP News (Apr. 24, 2022),
<https://apnews.com/article/covid-health-business-elections-france-e06fab5cde84f23d682013e1661caf35>.

27 ¹⁴ A fuller, but by no means exclusive, list of side-by-side comparisons between the 1891 Law and current laws
regarding both traditional in-person voting and no-excuse mail-in voting is attached as **Exhibit B**.

28 ¹⁵ Data Orbital, *General Election Early Vote Tracker*, <https://www.dataorbital.com/2020-general-election-early-vote-tracker> (last visited May 11, 2022); Citizens Clean Elections Commission, *Vote by Mail*,
<https://www.azcleanelections.gov/how-to-vote/early-voting/vote-by-mail> (last visited May 11, 2022).

while allowing it at the door of an early voter's home; to prevent voters from removing their own ballots from the polls while permitting them to fill out their ballots at a political rally; and to throw a voter in jail for photographing their own ballot in a voting booth while expressly permitting early voters to photograph their ballots and post them on the internet. A.R.S. § 16-1018(4). Though strictly enforced by election officials **at the polls**, these prohibitions do little work to secure the voting process against undue influence **when the vast majority of voting takes place outside of the presence of elections officials**.

Undue influence over voter choices is a real problem today. *See Building Confidence supra* 46. Early ballot return envelopes include a voter's name and address. Also available for purchase from the counties themselves is real-time data on who has returned their early ballots.¹⁶ Anyone with money to spend may purchase access to highly detailed voter databases. Computerized cross-referencing of these databases with a voter's name and address can readily yield much more than party affiliation but, in addition, can allow access to almost 30 "basic demographic variables" ("blue collar," "white collar," etc.) about that voter and predict which messaging is most likely to change their opinion on any given issue.¹⁷ Not a problem for voters who vote in person on election day—their ballot is never attached to any identifying information. But for voters who vote early, all this information and more might as well be stapled to their ballot as it sits in their mailbox and passes through hand after hand, none of which belong to election officials, on the way to the counting center. That hardly comports with a modern layperson's notion of secrecy in voting, much less what the framers had in mind. In sum, remarking to a neighbor in the parking lot of a polling place how he or she should vote is criminalized to safeguard the election system against undue influence. A.R.S. § 16-515(I). Yet anyone may purchase early ballot return data, identify voters with an early ballot sitting in their mailboxes, show up at their doors (or nursing homes or homeless shelters) with a message, incentive, or

¹⁶ See, e.g., Maricopa County Recorder, *Public Record Request for Voter Information*, <https://recorder.maricopa.gov/pdf/voterpublicdatarecordrequest.pdf> (last visited May 14, 2022).

¹⁷ Esri, *Was geography a factor in the 2016 election?*, <https://desktop.arcgis.com/en/analytics/case-studies/election-analysis-intro.htm> (last visited May 14, 2022).

1 threat tailored to that particular voter, and stand there until they fill out their ballots and
2 drop them in the mailbox. This is exactly the sort thing the framers intended to prevent -
3 exacerbated by modern technology.

4 Absent the Australian Ballot System, corruption flourishes. For example, in 2004,
5 supporters of a candidate were caught “assisting” voters in filling out the absentee ballots
6 they had been persuaded to request by those same supporters who were prowling polling
7 places to deflect voters—especially those who were poor, infirm, or spoke little English—
8 from voting in person. *See Pabey v. Pastrick*, 816 N.E.2d 1138, 1151 (Ind. 2004). The U.S.
9 Supreme Court remarked that this case demonstrated that “not only is the risk of voter
10 fraud real but that it could affect the outcome of a close election.” *Crawford v. Marion Cty.*
11 *Election Bd.*, 553 U.S. 181, 195–96 (2008). Soon after Arizona abandoned the Australian
12 Ballot System, this was made clear enough. *See e.g., Miller v. Picacho Elementary Sch.*
13 *Dist. No. 33*, 179 Ariz. 178, 180 (1994) (Despite statutory prohibition, “District employees
14 with a pecuniary interest in the override’s passage delivered [absentee] ballots to electors
15 whom they knew. Although these electors did not ask for ballots, school employees urged
16 them to vote and even encouraged them to vote for the override. District employees went
17 to the homes of the electors and stood beside them as they voted.”).

18 Plaintiffs are entitled to the protection the Constitution affords. *See Brnovich v.*
19 *Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2329 (2021) (“[A] State may take action to
20 prevent election fraud without waiting for it to occur within its own borders.”); *Burdick*,
21 504 U.S. at 441 (“[T]he right to vote is the right to participate in an electoral process that
22 is necessarily structured to maintain the integrity of the democratic system.”).

23 CONCLUSION

24 Defendants are required by law to conduct Arizona’s elections according to the
25 principles of the constitutionally mandated Australian Ballot System. Because Arizona’s
26 post-1991 system of no-excuse mail-in voting is unconstitutional both on its face and as
27 applied, Plaintiffs ask that Defendants be preliminary enjoined from utilizing it in the 2022
28 general election.

1 RESPECTFULLY SUBMITTED, this 20th day of May 2022

2
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15 I CERTIFY that a copy of the forgoing has been served upon the other parties to this
16 action in conformity with the applicable rules of procedure.

17 By /s/Yuka Bacchus

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