

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN

DIVISION 4

DATE: JUNE 6, 2022

*DL

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. Frohmler*, 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.

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