

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

ARIZONA REPUBLICAN PARTY, a	)	Arizona Supreme Court
Recognized political party; and	)	No. CV-22-0048-SA
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 the Arizona Secretary of State; and	)	
STATE OF ARIZONA, a body politic,	)	
	)	
Respondents.	)	
	)	
	)	
	)	

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**THE COCONINO COUNTY BOARD OF SUPERVISORS  
AMICUS CURIAE BRIEF**

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Pursuant to Rule 16, Ariz.R.Civ.App.P., the Coconino County Board of Supervisors files this amicus curiae brief in response to the Petitioners' request for Special Action relief. This brief is filed with consent of the parties and in conformity with Rules 13(i) and 13.1, Ariz.R.Civ.App.P.

**I. ARGUMENT.**

The purpose of an election is to determine the will of the governed, not to test the degree of their fortitude and determination to cast their vote. [AFFIDAVIT, Patty Hansen, Appendix A, ¶10]. It is not a test of fitness and stamina. The *exercise* of the franchise also transcends partisanship. Petitioners' Special Action cannot be addressed without a factual record that puts their academic argument into relevant context. The absence of history, data and information about the electorate's balloting preferences, the consequential effects upon the creation and consolidation of voting precincts, and the collateral interference with voting rights if the Petitioners prevail, leaves this Supreme Court without any perspective to gauge the tension that plays upon the Constitution; in particular the right of suffrage expressed in ART. 2, §21.

“All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” ART. 2, §21, ARIZ. CONST.

When interpreting the meaning of free and equal elections courts have considered the context, historical background, and effects of the provision.

*Chavez v. Brewer*, 222 Ariz. 309, 319, 214 P.3d 397, (Ct.App., 2009); citing: *American Federation of State, County and Municipal Employees, AFL-CIO Local 2384 v. City of Phoenix*, 213 Ariz. 358, 363, 142 P.3d 234 (Ct.App, 2006), rev.den. Jan. 9, 2007).

The free exercise of the right to vote, and its denials, has a painful history in Arizona and Coconino County as seen in the refusal to recognize the Native American vote prior to 1948.<sup>1</sup> Conversely, voter participation has gained substantially with early voting preferences and by those methods described in Title 16 [Ariz.Rev.Stat.] and by Amicus' facts below. See also: Appendix A.

The Petitioners contend that a prepositional phrase (**at the polls**) describing the relationship of initiatives and referendum to the Legislative function [ARIZ.CONST. Article IV, §1(10)] has a controlling effect upon how any Arizona election is conducted. The use of a preposition to cancel an entire

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<sup>1</sup> At inception, the Arizona Territory denied Native Americans the right to vote. In 1928 the Arizona Supreme Court concocted a construction of ARIZ.CONST. Art. 7, §2 to mean that Native Americans were under guardianship as wards of the United States and therefore were not entitled to vote. *Porter v. Hall*, 34 Ariz. 308, 271 P. 411 (1928). It was not until 1948 in the matter of *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948) that this Court reversed *Porter* and established competent citizenship with voting rights to Native Americans. Justice Udall noted that "To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality". *Harrison v. Laveen*, Id., at 342. For historic context on voting in Arizona, see: Redistricting in Arizona, *Arizona Attorney*, David J. Cantelme, 57-NOV Ariz.Att'y 26.

constitutional and statutory scheme is the sine qua non of tortured reading. A result is “absurd” if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion. *State v. Estrada*, 201 Ariz. 247, 251, 34 P.2d 356 (2001). The Petitioners’ exegetical reading of the constitution is dangerous because it invites electoral chaos.

Instead, the Constitutional particulars of Suffrage and Elections appear in the Arizona Constitution at Article VII. The emphasis there is not upon the *geography* of the polls so much as it is upon the *method* of voting by ballot.

“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. VII, §1.

Article VII further directs the legislature to enact appropriate laws to secure the truth of the outcome.

“There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise”. ARIZ.CONST. Art. VII, §12.

With this constitutional authority in place, the Arizona Legislature has enacted a comprehensive scheme in Title 16 of the Arizona Revised Statutes to address the conduct of elections by ballot in Arizona. This legal architecture places reliance

upon the operations of Arizona's counties. The counties are political subdivisions of the State, governed through their elected Board of Supervisors. The powers of the Board derive from the constitution and the laws of the state. Ariz.Rev.Stat. §11-202. Thus, there exists a direct legal linkage between the Arizona Constitution's Suffrage and Elections provisions and the laws the Legislature enacts that enable an Arizona County to conduct an election.

The request to invalidate statutory early voting, if it should be considered at all, requires the development of historical and relevant facts. Those facts are necessary to gauge the degree of impairment to the citizens' free exercise of the suffrage right. ARIZ.CONST. Art. II, §21; *Chavez v. Brewer*, 222 Ariz. 309, 214 P.3d 397 (Ct.App., 2009)([F]ree and equal clause is generally interpreted to prevent influences that would deter the voter from exercising free will. *Id.*, at p. 319, citing related cases from other states). That impairment has real, historical significance in Coconino County (See: Footnote 1, supra. At p. 4; Compare: *Porter v. Hall*, 34 Ariz. 308 (1928) with *Harrison v. Laveen*, 67 Ariz. 337 (1948) and the eventual grant of suffrage to Native Americans.). A factual record is also needed to place into context the consequences upon the Board of Supervisors and their deliberative effort to construct precincts for voting and voting by ballot.

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**A. Early Voting and Precinct Formation.**

It is the early voter herself that initiates an early ballot by providing an oral or written and signed request to the county recorder or elections officer. Ariz.Rev.Stat. §16-542(A). The voter can choose to make that selection permanent. Ariz.Rev.Stat. §16-544(A). Thus, early voting is an option belonging to the citizen and self-selected by the elector upon request to the county government.

The following factors explain why voters in Coconino County choose to vote by early ballot [AFFIDAVIT, Patty Hansen, Coconino County Recorder, Appendix A, ¶8]:

- a. Many voters that reside on the Navajo Nation or in the two Hopi villages of Upper and Lower Moenkopi work in the Cities of Page, Tuba City or Flagstaff. These voters have permanent residences on the reservation but also a residence in the towns where they work. They cast their votes by early ballots because they are not at their permanent residence on the reservation on election day which is Tuesday.
- b. The polling place for the Havasupai Precinct is located in Supai Village at the bottom of the Grand Canyon. The only way to get to the village is by hiking several miles, riding a horse or mule or by helicopter. The helicopter only flies two or three days of the week and usually the days that it is operating

are Thursday or Fridays and Sundays. The majority of the voters in the village work outside the village during the week and return home on the weekend. These voters are not in the village on election day and they cast their votes by early ballot.

c. Housing in Flagstaff is very expensive so several of our voters that work in Flagstaff live in communities outside of Flagstaff. They are commuting from areas such as Bellemont, Williams, Munds Park, Parks, Mormon Lake or unincorporated rural areas. Their commute requires them to leave early in the morning and get home in the evening. These voters vote by early ballot because they cannot get to their assigned polling place during the hours the polling place is open.

Early voting has been embraced by a large percentage of voters in Coconino County. The number of voters that cast their vote by early ballot at the November 3, 2020, General Election was 61,440 which was 83.06% of the 73,968 total votes cast. Since 2004 Coconino County has seen a steady increase in the percentage of voters casting their votes by early ballot. In 2004, 34.32% of the voters cast their votes by early ballot and it has increased steadily to the 83.06% as seen at 2020 General Election. [AFFIDAVIT, Id. At ¶7].

While early voting is self-selected upon voter demand, balloting is configured around the voting precinct. The Coconino County Board of Supervisors assigns precincts and polling places in accordance with Ariz.Rev.Stat. §16-411. The Board utilizes a formula that takes into *direct* consideration *the degree of early voter participation* in Coconino County. Id., at §16-411(B)(3).

B. At least twenty days before a general or primary election, and at least ten days before a special election, the board shall designate one polling place within each precinct where the election shall be held, except that:

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3. On a specific finding of the board that the number of persons who are listed as early voters pursuant to § 16-544 is likely to substantially reduce the number of voters appearing at one or more specific polling places at that election, adjacent precincts may be consolidated by combining polling places and precinct boards for that election. The board of supervisors shall ensure that a reasonable and adequate number of polling places will be designated for that election. Any consolidated polling places shall be listed in separate sections of the order or resolution of the board.

When early voter participation is taken into account [61,440 ballots/83.06% of votes cast in 2020] it has a significant effect upon the number and shape of precincts that the Board of Supervisors needs to create or consolidate. In both purpose and effect, early voting reduces the demand for precincts. Consolidation reduces election costs, the number of poll workers, the observers and the related elections equipment and mandatory personnel. It improves individual site security by reducing the overall

number of diverse locations requiring security coverage. It reduces lines and wait times at the physical polling place.

Consider as well, Coconino County is the second largest county in area in the contiguous United States. It is 18,661 square miles in area which is larger than nine of the smallest states in the U.S. The county has a population of 145,101 people according to the 2020 Decennial Census. The county is very rural with much of the population widely dispersed throughout the county. [AFFIDAVIT, Id, at ¶4]. There are 93,393 active registered voters in Coconino County. [AFFIDAVIT, Id, at ¶5] That is a substantial number of registered voters who today can self-select early voting. Eliminating early voting would create a large burden for many to be able to cast their votes. [AFFIDAVIT, Id., at ¶9]. Without early voting many voters in the rural areas of the county may have to drive over 60 miles one way to get to their polling place. [AFFIDAVIT, Id., at ¶6]. The current configuration of precincts and their outfitting of personnel and supplies would be at risk of collapse if 93,393 voters were suddenly at the polls as opposed to the established, self-selected practice of having 61,440 voters voting early.

## **II. CONCLUSION.**

The franchise is a right guaranteed to the people, from whom government derives its just powers. Compare: ARIZ.CONST. Art. 2, §21 and Art. 2, §2. The Petitioners'

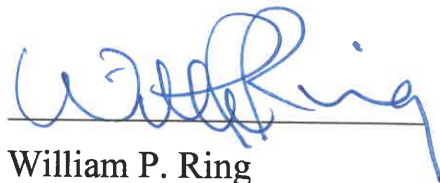
approach, which invalidates early voting, also inverts the fundamental principles that are essential to securing individual rights. See: e.g., ARIZ.CONST. Art. 2§1. A free and equal election should not become a test of the voter's stamina and fitness. It also is not a partisan issue. The historic and present circumstances surrounding the *exercise* of the right to vote in a vast and rural geography like Coconino County is already a test, just as living in this landscape is a test. That test is not equal to the urban context. But urban and rural realities must be taken equally into factual understanding when considering the Petition and early voting practices.

The Coconino County Board of Supervisors takes into account the facts and circumstances surrounding the historic use of early voting preferences. It takes into consideration geography, locality and history as it designs precincts and supplies polling places. The chaos Petitioner invites upon the Board of Supervisors and Coconino County's electors is relevant context this Court must consider.

This Court would strain to decide this matter on the law without reference to facts or to a record developed by our jurisprudential traditions and processes. Yet this court must justly consider whether action upon the Petition can or will *so* interfere as to prevent the free exercise of the right of suffrage. That cannot be done academically or by concocting an Einsteinian thought exercise. It requires consideration of facts that measure and gauge the personal impact upon the content of individual expectations that are assured by Article II, §1, §2 and §21.

The purpose for this Amicus brief is to give the Supreme Court an introduction to what the missing record might contain. The facts are impactful. Finally, consider that there are 14 other Counties in Arizona that have contemporaneous knowledge of similar facts not in the record.

RESPECTFULLY SUBMITTED, this 11th day of March, 2022.



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