

**ARIZONA SUPREME COURT**

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

No. CV-22-0048-SA

**PETITIONERS' REPLY TO RESPONDENT ARIZONA SECRETARY OF  
STATE**

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For the reasons set forth below, the Court should exercise its original jurisdiction over Petitioners' special action.

**I. This Court Has Jurisdiction Over All of Petitioners' Claims.**

This Court has original jurisdiction over special actions seeking mandamus, injunction, and other extraordinary writs against state officers. Ariz. Const. art. 6, § 5(1); A.R.S. § 12-2021. *See also City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 ¶ 6 (2019) (same). This Court also has “[s]uch other jurisdiction as may be provided by law,” Ariz. Const. art. 6, § 5(6), including the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” A.R.S. § 12-1831. Further, “[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.” *Id.*

As to the Secretary, a state officer, Petitioners have sufficiently alleged a special action in this Court. [*See* Pet. at 5–19.] First, Petitioners complain that the Secretary has failed to perform her non-discretionary duty under A.R.S. § 16-452 to incorporate the signature guidelines she has propounded into the EPM and to then *present it to the Attorney General and Governor for review and approval*. *See* Ariz. R. P. Spec. Act. 3(a) (proper question to be raised in a special action is “[w]hether the defendant has failed...to perform a duty required by law as to which [s]he has no discretion”). That “the Secretary may not unilaterally adopt rules through the EPM” without first receiving approval from the Attorney General

(“AG”) and the Governor [Sec’y Resp. at 13] does not relieve her of her duty to issue rules and to include them in the EPM, thereby ensuring that election procedures are uniform throughout the state. In other words, the Secretary cannot shrug off her legal duty simply because it requires her to gain approval from others, which is akin to saying, “I cannot do my job because my supervisors must approve my work,” or, worse, “I will only do my job if I do not have to seek approval from my supervisors,” which is essentially what the Secretary has done by issuing signature verification guidelines outside of the EPM.

Second, Petitioners have also sufficiently alleged a special action regarding the Secretary’s illegal authorization of ballot drop-boxes. [Pet. at 5–19.]; Ariz.. R. P. Spec. Act. 3(b) (proper question to be raised in a special action is “[w]hether the defendant has proceeded or is threatening to proceed without or in excess of...legal authority”). It is proper for this Court to determine whether the Secretary has exceeded her legal authority by authorizing counties to use unstaffed drop-boxes for the collection of ballots and, if it determines that she has, to enjoin her from doing so. If the Secretary is compelled to propound an EPM that omits drop-boxes, the AG and Governor are powerless to insert them, as they themselves do not draft the EPM but only approve it. ARS § 16-452. Thus, both of Petitioners’ claims against the Secretary fall squarely into the framework of the Arizona Rules of Procedure for Special Actions, and this Court has original jurisdiction under the

constitution to resolve them.

This Court also has jurisdiction to resolve Petitioners' claims regarding the constitutionality of early voting statutes. *See* Ariz. Const. art. 6, § 5(6); A.R.S. § 12-1831; *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119 (2013) (exercising original jurisdiction over mandamus claim while also declaring statute unconstitutional). Courts of record may declare "rights, status, and other legal relations *whether or not further relief is or could be claimed.*" A.R.S. § 12-1831 (emphasis added). And "[a]ny person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832. Further, the power "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" is "to be liberally construed and administered." A.R.S. § 12-1842.

Here, Petitioners seek a declaration that Arizona's early voting statutes are unconstitutional (their third claim) either in whole or in part. [Pet. at 42–43.] This claim is intricately woven into Petitioners' statutory claims (their first and second claims) because a declaration that early voting is unconstitutional would render the statutory claims irrelevant. (Signature verification procedures and drop-boxes would not exist outside the context of early voting.) For instance, Petitioners allege

that, even if the legislature were to authorize drop-boxes—which would provide the statutory authority the Secretary needs to promulgate drop-box procedures—such legislation would be unconstitutional. [Pet. 18–19.] Petitioners also assert that the Secretary’s recent abuses of election law are only “possible because of a longstanding deviation from Arizona’s constitutional mandates regarding the time, place, and manner of elections,” that is, because early voting statutes “violate the Arizona Constitution, in whole or in part.” [Pet. at 3.] Thus, in essence, all of the Secretary’s instructions regarding early voting are unconstitutional. Yet, she is not the proper party against which to seek declaratory relief in this regard.<sup>1</sup>

Nevertheless, this Court—as the highest court of record and best arbiter of constitutional issues of this magnitude—has both jurisdiction and the duty to determine the construction and validity of Arizona’s early voting statutes. “No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.” A.R.S. § 12-1831. *See also In re Buccheri*, 431 P.2d 91, 93 (App. 1967) (“Substance being of the essence, the appellate courts of this state authorized to grant relief by extraordinary writs are inclined to grant appropriate relief notwithstanding the writ applied for is labeled otherwise.”) Here,

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<sup>1</sup> Though, as set forth more fully in Petitioners’ reply to the State’s response, the Secretary *is* the proper state officer against whom to seek an extraordinary writ regarding the overall constitutionality of absentee voting under both article 4, section 1 of the Arizona Constitution and the Arizona Revised Statutes.

Petitioners seek both mandamus and declaratory relief, and this Court should exercise its discretionary jurisdiction to resolve their claims.

**II. Petitioners' Claims Are Properly Before this Court Under the Rule 7(b) Factors, and a Factual Record Is Unnecessary to Resolve Them.**

In response to the Secretary's contention that Petitioners have not set forth circumstances rendering their claims proper in this Court [Sec'y Resp. at 13], Petitioners note that they have indeed addressed these issues [Pet. at 7–10, 14]. However, because the Court's February 28, 2022, Order states that "the pleadings shall address...whether this matter requires a factual record," Petitioners briefly expound on their previous arguments.

Due to the nature of Petitioners' claims and the upcoming statewide general election, initiating this case in a lower court would not only waste judicial resources but would also further exacerbate the urgent timing issues election officials are already contending with because of the Secretary's failure to perform her statutory duties. For example, as the State points out, the Secretary has failed to issue a new EPM as required by law, and election officials are therefore uncertain as to what procedures they must implement in the upcoming election cycle. [State's Resp. at 4–12.] Yet this Court does not require a factual record to observe that the "current EPM" is in fact the prior EPM and to determine whether the EPM is therefore lawful.

And regardless of the several policy issues and factual matters that amici and

the Secretary have attempted to inject into Petitioners’ statutory and constitutional claims, Petitioners have brought a purely legal argument of first impression before this Court. Requiring a lower court to determine whether the Secretary has failed to perform her duties and whether she has exceeded her legal authority—based entirely on publicly available documents that she has propounded, on Arizona statutes, and on the constitution—is pointless because only this Court can provide a speedy, adequate, and *final* resolution to the issues Petitioners raise.

### **III. Petitioners Have Standing to Bring this Action, and Their Claims Are Proper and Timely.**

Petitioners have standing to initiate a special action against the Secretary because they are Arizona citizens and voters beneficially interested in compelling her to follow the law. [Pet. at 10–11 (citing *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 12 (2020))]. They also have standing to seek declaratory relief because “[a]ny person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status or other legal relations thereunder.” A.R.S. § 12-1832. As previously explained, state election laws establish Petitioner AZGOP’s right and duty to monitor the early voting process against improprieties. *See, e.g.*, ARS §§ 16-621(A) & 16-552(C) & (H). Declaratory relief regarding the constitutionality of some or all of Arizona’s early voting statutes minimizes these burdens and, more broadly, implicates Petitioner

AZGOP's status and legal relations with respect to its constituents.

Regarding the Secretary's criticism of the propriety and timing of Petitioners' action [Sec'y Resp. at 16–19], the Secretary fails to grasp that December 31, 2021, is the earliest Petitioners could have known that an updated EPM would not issue for the 2022 election cycle. Because the Secretary had until that date to include new or modified instructions for election officials pursuant to A.R.S. § 16-452(A), Petitioners could not have challenged the deficiencies complained of here until they knew either (1) the specific instructions that would be included in the new EPM or (2) that the Secretary would simply rely on the 2019 EPM for the 2022 election cycle. Petitioners are not deficient for waiting to see whether the Secretary would include signature verification guidelines in a new EPM or whether she would continue to illegally instruct counties on the use of drop-boxes. Accordingly, because the Secretary herself is responsible for the timing issues she complains about, the *Purcell* and laches doctrines do not apply.

Petitioners aver there is no perfect time to challenge election laws. Given the frequency and cyclical nature of elections, any successful challenge will always be inconvenient for everyone involved. Moreover, these challenges will always either be too early or too late in someone's estimation. More to the point, however, is that, although successful constitutional challenges frequently come too late for those whose rights are affected—and perhaps too early for those who cannot yet

see or who do not *wish* to see that a law is unconstitutional (e.g., segregation laws)—tardiness is not a sound reason to refuse the challenge altogether. If that were so, Arizonans and U.S. citizens would only be able to challenge unconstitutional laws shortly after their enactment, but we know this is not the case. *See, e.g., Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (holding in 2013 that sections of the Voting Rights Act of 1965, 42 U.S.C.S. §§ 1973b(b) and 1973c, were unconstitutional).

The Secretary is nevertheless wrong that “Arizona has allowed early voting for more than a century.” [Sec’y Resp. at 17.] In fact, early voting as we know it today—with most voters now choosing to mail in rather than vote their ballots at the polls (as several amici and the Secretary have correctly pointed out)—is a relatively new practice that has gained increasing momentum and popularity over the last thirty years.

The legislature first enacted no-excuse mail-in (“early”) voting in 1991. *See* 1991 Ariz. Sess. Laws, vol. 1, ch. 51 § 1. Before that, as Petitioners explained in their initial brief, absentee voter laws, including the 1925 law passed shortly after the constitution was ratified, hewed much more closely to the Australian ballot system. [Pet. at 28, 41–42.] Indeed, as discussed further below, even the 1918 Soldiers Voting Bill the Secretary highlights [Sec’y Resp. at 8–9] supports Petitioners’ argument that the early legislature understood absentee voting is not

permissible under the constitution. If the Court declines jurisdiction today, it will be faced with the same questions tomorrow, but those questions will be even more pressing in the future.

#### **IV. The EPM**

The Secretary argues that she is not required to include signature verification procedures in the EPM because A.R.S. § 452(A) does not “impose a duty to adopt a specific procedure all counties must follow to perform every task related to early voting or processing ballots.” [Sec’y Resp. at 20–21.] Rather, she claims, when the legislature intends the Secretary to adopt a specific election procedure, it says so. [*Id.* at 21 (citing statutes requiring the Secretary to adopt certain procedures).]

The first problem with this argument is that signature verification is required by law; thus, procedures related thereto must be included in the EPM. *See* A.R.S. §§ 16-542(A, B), 16-550.

The second problem with this argument is that the Secretary has already propounded signature verification guidelines. [*See* Pet. at 1.] However, she has failed to include them in the EPM. This omission allows the Secretary to issue guidance without having to gain approval by the Governor and AG. This, in turn, allows the Secretary to unilaterally change these procedures at will and ensures that inferior election officials are not required by law to follow them.

That the Secretary bothered to issue guidelines at all suggests that she also

believes they are critical. Regardless of whether the legislature requires the Secretary to provide for uniformity of signature verification procedures (and it certainly *should*), the Secretary has taken it upon herself to issue such guidance. That being a given, these guidelines must be included in the EPM pursuant to A.R.S. § 452(A). Thus, if for some reason, this Court were to find that the inclusion of such procedures is not required by law, then it should still find that failure to include them is arbitrary, capricious, or an abuse of discretion, *King v. Neely*, 143 Ariz. 329, 331 (App. 1984), thus entitling Petitioners to relief under Rule 3(c).<sup>2</sup>

Petitioners are not, therefore, inconsistent when they argue that, by the same token, the Secretary *cannot* include drop-box procedures in the EPM. As Petitioners have shown, there is no statutory or constitutional authority for drop-boxes. The Secretary lacks constitutional authority to do *anything* she is not empowered by law to do. Ariz. Const. art. 5, § 9. Unlike the statutory mandate for the verification of signatures (critically important if mail-in voting is to stand), there is no provision in Arizona election statutes that requires, much less *allows*, drop-boxes. Moreover, even if the Secretary's argument that the legislature may provide by law for voting other than at the polls on election day is correct [Sec'y. Resp. at 29–30], this would hardly authorize the *Secretary*, an executive branch

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<sup>2</sup> This issue was raised in the petition. [Pet. at 14.]

official, to provide for other methods of voting.

That counties have been using drop-boxes for eons is no excuse for acting outside of the laws and constitution of this state, and the Court should compel the Secretary to remove drop-box provisions from the EPM and declare that drop-boxes are unlawful and unconstitutional.

## **V. The Early Voting Statutes**

Due to the word limit of this reply and in anticipation that the Court will request supplemental briefing if it accepts jurisdiction over this special action, Petitioners incorporate their previous arguments on the constitutionality of Arizona's no-excuse mail-in voting statutes and the arguments set forth in their Reply to the State and their Consolidated Response to Amici.

The Secretary has not raised any arguments that defeat Petitioners' claims at this stage. Instead, the Secretary has provided helpful information that underscores Petitioners' argument that the constitution prohibits no-excuse mail-in voting in the absence of robust secrecy provisions. Specifically, the Secretary urges the Court to "look to absentee voting laws the Legislature passed shortly after statehood," including the 1918 Soldiers Voting Bill. [Sec'y Resp. at 29; App. to Sec'y Resp. at 88–98.]

The Court should indeed do so, for the 1918 law demonstrates the veracity of Petitioners' argument. It states in the preamble that its purpose is to enable

active military to “Exercise the Right of Suffrage While Absent From the State in Such Military Establishments.” [*Id.* at 90.] Section 1 provides:

***Notwithstanding any more general law*** respecting the time or manner of voting...at any general or primary election, or the time manner of voting on any question submitted to a popular vote, a general election, or at any primary or general election where registration of votes is required by law, all qualified electors, in war time or after peace, ***in the actual military or naval establishments*** of this State, or of the United States in any capacity as defined by Congress, ***and by reason thereof absent from the State on any election day, shall be entitled to exercise the right of suffrage*** and to vote at such elections in the manner and form provided for in this Act and by general and primary election laws now in effect in this State.

[*Id.* (emphasis added)]. As is evident by the “notwithstanding language,” the legislature understood that the constitution placed restrictions on the time and manner of voting. Thus, it enacted the bill to allow active military personnel absent from the state due to their service to exercise the right of suffrage as *required* by the constitution, which provides that “***no power***, civil or ***military***, shall at any time ***interfere to prevent*** the free exercise of the right of suffrage.” Ariz. Const. art. 2, § 21 (emphasis added).

Thus, the 1918 Soldiers Voting Bill was a necessary response to the exigencies of military service, namely, that mandatory military service in America’s first major overseas conflict interfered with a soldier’s free exercise of suffrage. Absentee voting was the *only* way to avoid violating this provision. Thus, the legislature crafted a workaround to ensure that article 2, section 21 could be

harmonized with the rest of constitution's requirements regarding time, place, and manner of voting, to the maximum extent possible.

To maintain the strict secrecy provisions of the Australian ballot system, the law required soldiers to swear before a commissioned officer of the military (who knew the identity of the soldier) that the soldier was the qualified elector he claimed to be and that he personally voted his ballot. [*Id.* at 92–93 (§ 3)]. It was plain to the drafters of the 1918 law that “secrecy in voting” meant voting in private, which was far more important than convenience, as evident by the law’s requirement that soldiers *leave the trenches in order to vote in private*. [*Id.* § 7 (soldier “shall not mark his ballot in the presence of anyone”). Also plain was that the constitution required ballots to be returned *directly* to election officials and that the election day provision was to be adhered to as strictly as possible without preventing a soldier’s exercise of the right of suffrage. [*Id.* § 6, 7 (absentee ballots to be returned directly to election clerk and no votes received even one minute after closing of polls on election day to be counted).]

As Petitioners emphasized in their initial brief, requiring voters to prove that they are who they say are, to attest that they personally voted their ballots, vote their ballots in a place where election officials could ensure privacy (the polls), and deliver their ballots directly to election officials were all essential features of the Australian ballot system. [Pet. at 3.] The drafters of the 1918 law maintained as

many of these provisions as possible without stripping WWI soldiers of their constitutional right of suffrage.

### **Conclusion**

The Court should exercise its original jurisdiction over Petitioners' special action against the Secretary, a state official who must be compelled to issue an EPM that complies with Arizona election laws and the Arizona Constitution. And because the constitutionality of Arizona's no-excuse mail-in voting statutes is integral to the question of what the Secretary can or cannot include in the EPM, the Court should also provide declaratory relief concerning Petitioners' constitutional claims, whether or not the State is a necessary party in that determination.

Should the Court determine that a limited factual record is necessary to resolve these issues, Petitioners request that the Court follow the most expedited procedure available under Rule 4 of the Arizona Rules for Special Actions. *See* Ariz. R. P. Special Actions R. 4 (Appellate "court may, if it believes that the matter should be tried, either designate a master or transmit the matter to a Superior Court for trial, subject to reference back if the court desires. The court may use an advisory jury on matters of fact."). Finally, if the Court grants Intervenors' Motion, Petitioners request that they be allowed to reply to Intervenors' Response at a later date.

RESPECTFULLY SUBMITTED this 17th day of March 2022:

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