ARIZONA SUPREME COURT

ARIZONA REPUBLICIAN 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

ARIZONA SECRETARY OF STATE'S COMBINED RESPONSE TO BRIEFS OF AMICI CURIAE (1) KARI LAKE, (2) KELLY TOWNSEND, AND (3) LAWYERS DEMOCRACY FUND

Roopali H. Desai (024295)
rdesai@cblawyers.com
D. Andrew Gaona (028414)
agaona@cblawyers.com
Kristen Yost (034052)
kyost@cblawyers.com
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1900
Phoenix, Arizona 85004
T: (602) 381-5478

Sambo (Bo) Dul (030313)
bo@statesuniteddemocracy.org
STATES UNITED DEMOCRACY CENTER
8205 South Priest Drive, #10312
Tempe, Arizona 85284
T: (480) 253-9651

Attorneys for Respondent Arizona Secretary of State Katie Hobbs

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Constitutions

Other Authorities

Introduction

Amici Curiae Kari Lake, Senator Kelly Townsend, and Lawyers Democracy Fund ("LDF") all filed briefs supporting Petitioners. Much of Amici's briefs raise general policy arguments about mail-in voting that aren't relevant to the legal questions here, and the Secretary won't address them. [*E.g.*, Lake Br. at 9-12 (complaining about potential "gamesmanship" with mail-in voting); Townsend Br. at 1-2 (criticizing mail-in voting and hypothesizing that a future legislature might enact "voting via a web portal or even via email")]

But Amici also make several arguments backing Petitioners' remarkable claim that Arizona's century-old practice of allowing mail-in voting is unconstitutional. Senator Townsend urges the Court to accept jurisdiction of what she calls a "cert-worthy" legal question, while Lake and LDF argue that the Arizona Constitution prohibits early voting.[1] And as an alternative request for relief, Lake asks the Court to invalidate current early voting statutes and revive pre-1991 "absentee" voting statutes. These arguments all lack merit.

[1] As the Secretary noted in her Response to the Petition ("Response"), the term "early voting" in Arizona—and as used in her briefs—includes early in-person and mail-in voting.

First, Petitioners' last-minute claims to upend early voting mid-election cycle do not warrant this Court's extraordinary special action jurisdiction. Second, the "secrecy" clause in Article VII, Section 1 doesn't prohibit early voting. Amici and Petitioners disregard Arizona's robust procedural safeguards that preserve secrecy in voting, and their facial challenge fails. Third, none of the other various constitutional provisions Amici and Petitioners string together prohibit early voting. In fact, interpreting these provisions to impliedly limit access to the franchise would be unconstitutional. Last, Lake and Petitioners' alternative request to reinstate the historical absentee voting laws they prefer would be improper judicial legislation.

For his part, Attorney General Mark Brnovich ("AG") also filed an "amicus brief" that he combined with the State's "response." He fails to defend the constitutionality of Arizona's early voting statutes, despite his repeated assurances that his "job is to defend the law and [he] will continue to do so." AG's Office, Press Release, *Attorney General Brnovich Continues Defense of Arizona's Laws Challenged by Left-Wing Groups* (Sept. 29, 2021); *see also, e.g.*, Mark Brnovich, Twitter (May 1, 2020) ("Unlike other elected officials, I will defend the law and not cave to

political pressure."). But his brief is nothing if not political. Moreover, the combined brief raises new claims and seeks affirmative relief against the Secretary far beyond the scope of the Petition. The AG's purported amicus brief is improper, and it should be stricken.[2]

Argument

I. The Court Should Decline Jurisdiction.

Senator Townsend urges the Court to accept jurisdiction, claiming [at 1] Petitioners "make a 'cert-worthy' argument" that a (stayed) decision of the Pennsylvania Commonwealth Court interpreting different language in a different state constitution "could be applied to Arizona." [Citing *McLinko v. Dep't of State*, 2022 WL 257659 (Pa. Commw. Ct. Jan. 28, 2022)] According to Senator Townsend [at 1], the Court should

[2] The Secretary does not respond to the AG's brief here for several reasons. First, the combined brief is improper and is subject to a pending motion to strike, which may result in an order striking some or all of the arguments in the brief. Second, the Secretary cannot decipher which arguments in the AG's 7,300-word brief are part of his "amicus brief" or the State's "response." And without the benefit of this Court's ruling on the pending motion to strike, the Secretary cannot know what arguments, if any, necessitate a response. Third, assuming the Secretary is required to respond to all the arguments raised in the combined brief, she cannot do so in the word limit for this combined response to all briefs of amici curiae. Rather, the Secretary should have the opportunity to submit a full response to the AG's new claims if the Court does not grant her motion to strike.

"resolve the 'cloud' of uncertainty this creates over Arizona's own mail-in voting scheme." Not so.

McLinko's interpretation of the Pennsylvania Constitution doesn't create "uncertainty" about the Arizona Constitution. As the Secretary explained in her Response [at 34-36, 44], that case turned on constitutional language describing the district "where" an elector must "offer to vote." *McLinko* tells us nothing about what the Arizona Constitution means, and it doesn't create a "cert-worthy" question for this Court.

As the League of Women Voters of Arizona ("LWVAZ") explained in its amicus brief [at 3], Petitioners don't come close to meeting this Court's "high bar" for original special action jurisdiction, which is reserved for exceptional, rare cases. LWVAZ rightly noted [at 4] that "many constitutional challenges to election laws involve pure questions of law and questions of first impression," but our "courts have never treated all election law cases as deserving of expedited treatment."

Beyond that, Petitioners also seek to make a radical change to Arizona's entire voting system in an election year. Their eleventh-hour request to invalidate laws they've known about for decades is a

manufactured "emergency" that doesn't support special action jurisdiction. It would also disrupt the orderly administration of elections and cause significant voter confusion, which is why courts shouldn't alter election rules on the eve of an election. *E.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); [*see also* Maricopa Cnty. Br at 4-10 and Coconino Cnty. Br. at 9-12 (describing the disruption and problems Petitioners' requests would cause)]. As Lake points out [at 13], when "public officials, in the middle of an election, change [election laws], they undermine public confidence in our democratic system and destroy the integrity of the electoral process." Yet that's exactly what Petitioners ask this Court to do.

In short, Petitioners' request to upend longstanding election laws mid-election cycle doesn't meet this Court's criteria for exercising original special action jurisdiction. This is not a rare case in which "justice cannot be satisfactorily obtained by other means." *King v. Superior Ct.*, 138 Ariz. 147, 149 (1983). The Court should decline jurisdiction.

II. Arizona's Early Voting System Is Constitutional.

A. Arizona's "secrecy in voting" clause does not prohibit mail-in voting.

Lake and LDF spill much ink claiming that early voting is "inconsistent" with Article VII, Section 1 of the Arizona Constitution.

They are wrong. That section states: "[a]ll elections by the people shall be by ballot, or by such other method as may be prescribed by law; [p]rovided, that secrecy in voting shall be preserved." Consistent with this section, Arizona statutes provide that "[a]ny qualified elector may vote by early ballot" in any election. A.R.S. § 16-541(A). Early voting is "by ballot," and the Legislature properly "prescribed" early voting as a "method" of voting in elections.

Arizona's early voting statutes also ensure "secrecy" in early voting. As the Secretary explained in her Response [at 36-38], these statutes have detailed procedural safeguards protecting the secrecy and integrity of early ballots. Among other things, early ballot envelopes must conceal the ballot and be tamper-evident when sealed, A.R.S. § 16-545(B)(2), voters must conceal their votes and fold their voted early ballot so it cannot be seen, A.R.S. § 16-548(A), and election officials must remove voted ballots from envelopes without unfolding or reviewing them so they can be separately processed and tabulated, A.R.S. § 16-552(F); EPM Ch. 2 § VI(B)(3) [APP166-67[3]].

[3] "APP" refers to the Secretary's Appendix attached to her Response.

In fact, it is a crime for election officials to "attempt[] to find out for whom the elector has voted," open or examine a voter's "folded ballot" when it is delivered, mark "a folded ballot with the intent to ascertain for whom any elector has voted," or disclose how an elector voted "[w]ithout consent of the elector." A.R.S. § 16-1007. The law also criminalizes various other conduct relating to early ballots, including trying to influence a person's vote, A.R.S. § 16-1006, marking someone else's ballot, buying or selling voted or unvoted ballots, or collecting ballots, A.R.S. § 16-1005.

Amici and Petitioners ignore these procedural safeguards. Senator Townsend (a sitting legislator) should know about these statutes, yet she incorrectly asserts [at 1] that "there is only one fairly unrestrictive statute that governs mail-in voting." And Lake makes the bald claim [at 3] that "[m]ail-in voting cannot be made secret and free from intimidation." She cites nothing to support this sheer conjecture, just like Petitioners who have the burden of proving "that no set of circumstances exists under which" early voting statutes are constitutional. *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 10 (2020).

LDF also claims [at 18] that the "creation of drop boxes tips the balance towards convenience at the expense of secrecy in substantive and important ways that are inconsistent with the Constitution." But nothing in Arizona's "secrecy in voting" clause prohibits drop-boxes. Under A.R.S. § 16-548(A), a voted early ballot must be "delivered or mailed to the county recorder or other officer in charge of elections . . . or deposited by the voter or the voter's agent at any polling place in the county." For many years, counties have been designating drop-boxes as a place where voters can "deliver" their early ballots. [APP147-52] All the same secrecy safeguards detailed above apply when a voter delivers their early ballot in a drop-box.[4]

Like Petitioners' Petition for Special Action, LDF's amicus brief relies heavily on a 19-year-old article by John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483 (2003). But Petitioners completely abandon their reliance on the article in their reply briefs,

[4] The EPM also prescribes detailed security measures for drop-boxes, which Petitioners oddly ask the Court to invalidate. [APP162-63 (requiring, among other things, that drop-boxes are "located in a secure location" approved by the Board of Supervisors and "securely fastened in a manner to prevent moving or tampering")]

presumably after reading Dr. Ornstein's amicus brief. Indeed, Dr. Ornstein explained in his amicus brief [at 1-2] that Petitioners grossly mischaracterize his article, which doesn't support the claim that the Arizona Constitution prohibits mail-in voting. Dr. Ornstein also explained [at 3] that "in the almost 20 years that have elapsed since [his] article was published, absentee or mail-in voting has been used extensively throughout the United States, and there is no evidence pointing to any widespread problems."

LDF also points [at 16] to a Kentucky Supreme Court decision holding that mail-in voting violated this constitutional provision: "All elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited." *Clark v. Nash*, 192 Ky. 594 (1921) (emphasis added). The Arizona Constitution has none of this language after the secrecy clause requiring ballots to be "furnished," "marked," and "deposited" at the polls.

At bottom, nothing in Article VII, Section 1 prohibits mail-in voting or delivering a mail-in ballot at a drop-box. Arizona's early voting statutes preserve secrecy in voting, and Petitioners cannot prove those

statutes are "unconstitutional in all [their] applications." *Arevalo*, 249 Ariz. at 373 ¶ 10 (quotation omitted).

B. Other provisions in Arizona's Constitution do not mandate in-person voting on Election Day.

Next, Lake [at 8] claims that Article VII, Section 11 and Article IV, Part 1, Section 1 require in-person voting on Election Day. But as the Secretary explained in her Response [at 41-43, 46-48], these provisions have nothing to do with the manner of voting. Article IV grants the people the fundamental right of initiative and referendum, and nothing in the text or history of that article suggests that the framers meant to limit the fundamental right to vote. And Article VII, Section 11 merely sets the date for "general election[s]." It doesn't mandate that all votes must be cast on Election Day, and Arizona's early voting statutes contemplate that the actual election happens on "Election Day." *E.g.*, A.R.S. § 16-548(A) (early ballots must be returned "no later than 7:00 p.m. on election day"). Indeed, this Court has recognized the difference between "the start of early voting" and "the actual day of election." *See Sherman v. City of Tempe*, 202 Ariz. 339, 343 ¶¶ 15, 18 (2002). There's nothing incompatible about those two concepts.

LDF devotes much of its brief [at 12-14, 16] to other states' interpretations of "offer to vote" constitutional language that doesn't exist in our Constitution. LDF claims [at 16, 17] this language is like Article VII, Section 2 of the Arizona Constitution, which describes the qualifications for voting "at any general election." This provision is nothing like other states' "offer to vote" language; it merely describes who is qualified to vote, not how or where they must cast their vote. LDF relies [at 13-14] on historical cases cited in the Fortier and Ornstein article, but as Dr. Ornstein explained [at 2] in his amicus brief:

> [T]he article explains that the courts' treatment of challenges to absentee voting statutes have depended on the specific language in the various states' constitutions. Some state constitutions (unlike Arizona's) had specific language that courts found required only in-person voting. In these states, the courts struck down absentee voting statutes. However, in states without explicit constitutional requirements for in-person voting (like Arizona's) the courts have rejected challenges and have left absentee voting requirements to the legislature.

LDF's reliance on other states' constitutions with language unlike Arizona's is unhelpful.

Even worse, adopting Amici's and Petitioners' strained interpretations of various phrases in the Constitution to restrict access to voting would infringe Arizonans' fundamental right to vote and violate

the Free and Equal Elections Clause. Ariz. Const. art. II § 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."). "No right is more precious in a free country than that of having a voice" in elections. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). And "no election can be free and equal . . . if any substantial number of persons entitled to vote are denied the right to do so." *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33 (App. 2009) (quotation omitted). As detailed in several amicus briefs opposing Petitioners' claims, eliminating early voting would disenfranchise scores of Arizonans and make access to voting more burdensome for certain classes of voters. [LWVAZ Br. at 13-15; Ariz. Voting Rights Advocates Br. at 4-15; Inter Tribal Ass'n of Ariz. Br. at 6-14; Navajo Nation Br. at 3-9]

In sum, none of the constitutional provisions Petitioners rely on prohibit early voting, and holding otherwise would violate other provisions in the Constitution that protect the exercise of the franchise.

III. Petitioners' and Amici's Alternative Requested Relief Is Improper.

Finally, Lake argues in the alternative [at 9] that the Court "could simply strike the 1991 law, leaving the prior absentee ballot provisions

in place." There are two problems with this absurd request.

First, Lake doesn't explain why the Constitution somehow prohibits only "no-excuse" early voting. She argues [at 4] that pre-1991 absentee voting laws required electors to swear under oath the "reason for needing to vote absentee, and . . . that they were qualified electors and personally voted their ballots." To the extent Lake claims this oath helped assure "secrecy in voting," it provides no greater protection than the current no-excuse early voting laws. Early voters still must sign a ballot affidavit and declare under penalty of perjury:

> I am a registered voter in _____ county Arizona, I have not voted and will not vote in this election in any other county or state, I understand that knowingly voting more than once in any election is a class 5 felony and I voted the enclosed ballot and signed this affidavit personally unless noted below.

A.R.S. § 16-547(A). Having an "excuse" or "reason" to vote early has no bearing on secrecy.

Second, and more to the point, this Court "cannot judicially legislate" by reinstating certain pre-1991 statutes that Petitioners like better. *State ex rel. Lassen v. Harpham*, 2 Ariz. App. 478, 487 (1966). That's now how constitutional challenges work. *E.g.*, *Cohen v. State*, 121 Ariz. 6, 9 (1978) ("[A] court should avoid legislating a particular result by

judicial construction."); *Bowslaugh v. Bowslaugh*, 126 Ariz. 517, 519 (1979) (changing the law "by judicial fiat" would be "an infringement upon the province of the legislature.").

Conclusion

Arizona's early voting system preserves voters' fundamental right to vote by providing a secure, efficient, and reliable method of voting in our elections. Petitioners' attacks on this system are baseless, and Amici's argument fare no better. The Court should dismiss the Petition.

RESPECTFULLY SUBMITTED: March 18, 2022.

COPPERSMITH BROCKELMAN PLC

By: /s/ Kristen Yost
Roopali H. Desai
D. Andrew Gaona
Kristen Yost

STATES UNITED DEMOCRACY CENTER
Sambo (Bo) Dul