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' COLLECTIVE RESPONSE TO AMICUS BRIEFS

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Introduction

Pursuant to the Court's Order that any party may file one collective response to any amicus briefs, Petitioners hereby submit their collective response to amici.

Amicus Mayes cites this Court well: "The peculiar value of a written Constitution is that it places, in unchanging form, limitations upon legislative action, unless amended by the people in the mode they have designated, thus giving a permanence and stability to popular government which otherwise would be lacking." *State ex rel. Davis v. Osborne*, 14 Ariz. 185, 192 (1912). [quoted in Mayes Br. at 10.] While amici implore this Court to extend consideration to these issues of policy, the matter here is simply one of construction: as "[w]hatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. [The judge] must not read in by way of creation." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947). In any event, the framers have already made the relevant policy determinations. If, after this Court issues its ruling, amici wish to revisit them, they may do so—by seeking to amend the Arizona Constitution.

Argument

I. The requirements of the Arizona Constitution regarding the time, place, and manner of voting *advance* the goals of representative democracy and of free and equal elections.

Many amici share a general concern that strictly enforcing the Arizona Constitution will undermine the goals of representative democracy. Quite the opposite.

The framers of Arizona's progressive-era constitution were deeply concerned with limiting the political influence and power 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 the Arizona Corporation Commission); John D. Leshy, *The Arizona State Constitution* 356 (2d ed. 2013) (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."). *See also* AG. Op. I16-005 (R16-002) (discussing the issue and citing a variety of sources).[1]

Amicus Orenstein himself once noted that "there are no safeguards for the voter in the absentee ballot system to ensure he or she is not coerced or paid to vote a certain way." John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 503 (2003). His law review article explains that the Australian ballot came about in part because of a concern that, if constitutional safeguards were not put in place

[1] *Available at* https://www.azag.gov/sites/default/files/2018-06/I16-005.pdf.

requiring voters to cast their ballot in secret, employers or "party machines" might require voters to show them their ballots to ensure they voted according to their own wishes. *See, e.g.*, *id*. at 486, 490, 512. The only place election officials could ensure there was no coercion was "at the polling place." *Id*. at 488. The framers of the Arizona Constitution shared these concerns.

And indeed, despite Orenstein's insistence that the policy fears discussed in his 2003 article have not come to fruition, the very year after his article was written, this Court held otherwise. In *Miller v Picacho Elementary Sch. Dist. No. 33*, it found that "[d]istrict employees with a pecuniary interest in [an] override's passage delivered ballots to electors whom they knew….[S]chool employees urged them to vote and even encouraged them to vote for the override." 179 Ariz. 178, 180 (1994).[2] That, in and of itself is not important; the policy and factual considerations here were for the framers, and not this Court, to decide. What *is* important is that it was of no moment to this Court that electors had voluntarily

[2] And just recently, in 2020, Maricopa County Recorder Adrian Fontes had to be enjoined from providing early voters with illegal instructions that would have unwittingly left it to election officials to subjectively determine voter "intent" without first providing voters the opportunity to cure the ballots they would be afforded at the polls. *See Fontes*, 250 Ariz. 58. Also in 2020, a TRO was entered against Fontes preventing him from carrying out another plan to mail ballots for Arizona's presidential preference election to voters who had not requested ballots. *See* TRO (Without Notice) *State v. Fontes* (CV2020-003477) (finding that "sending out unauthorized ballots…could result in voters attempting to vote ballots that are not lawfully authorized.").

opened their doors to their friends and invited them in, thus "waiving" their right to cast a secret ballot by the Secretary's reasoning. [Sec'y Resp. at 40–41.] Indeed, far from finding that the *requirement* to cast a secret ballot was an individual right that voters could waive, this Court instead found that "dangers [like this] were the very ones" that the "constitutional goal" of secrecy in voting was meant to prevent. *Miller*, 179 Ariz. at 180. It then hammered the point home by stating, "Even if the elector voted his or her conscience, the ballots still would never have been cast but for the procedures adopted by the district," and by then setting aside the results of the election. *Id*. This makes sense, for it is entirely consistent with this Court's more recent holding that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 4 (2020) (citing *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)).

Further, despite amicis' reading, it is ***these*** concerns that the constitution's "free and equal" clause is actually meant to address. For a free and equal election is not one where it is equally convenient for all to vote. Rather, "a 'free and equal' election [is] one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot." *Chavez v. Brewer*, 222 Ariz. 309, 319 (App. 2009). *See also Yazzie v.*

Hobbs, No. CV-20-08222-PCT-GMS, 2020 U.S. Dist. LEXIS 184334, at *13–15 (D. Ariz. Sep. 25, 2020) (holding no "serious question" raised under constitution's "free and equal" clause in case alleging unequal access to early voting procedures where plaintiffs produced no evidence that "Navajo voters are unable to cast a vote because of intimidation or lack of free will" or of selective enforcement of the early ballot receipt deadline and citing *Chavez*, 222 Ariz. at 319).[3]

The U.S. Supreme Court agrees: "[B]ecause voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is ***equally open*** and that furnishes an ***equal opportunity*** to cast a ballot must tolerate the usual burdens of voting." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021) (internal quotations omitted; emphasis supplied). "***Having to identify one's polling place and then travel there to vote does not exceed the 'usual burdens of voting***'" *Id*. at 2328 (citing *Crawford*, 553 U. S. at 198) (emphasis supplied). And while amici try to create a factual issue over the degree to which fraud or malfeasance occurs within the context of absentee voting, "prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. Third-party ballot collection can lead to pressure and

[3] Amici do not, and could not logically, allege that the relief Petitioners seek will prevent voters from casting a ballot because of threats or intimidation, thus highlighting why a factual record is unnecessary.

intimidation. Further, a State may take action to prevent election fraud without waiting for it to occur[.]" *Id*. at 2329.

Thus, voters have no right to waive the systemic and structural protections put in place by the framers to limit the power of corporations and political machines over our democracy.

II. The construction of the Arizona Constitution prevents the broad reading urged by the *Amici.*

The court in *Chavez v. Brewer* outlined the standard procedure for analysis of a constitutional provision:

> To determine the intent of the framers, we first examine the plain language of the provision involved. If the constitutional provision is clear on its face and is logically capable of only one interpretation, we simply follow that text. When a constitutional or statutory provision is not clear, we may look to the context, subject matter, historical background, effects, consequences, spirit, and purpose of the law. Finally, [w]e strive to interpret a constitutional provision or statute in a manner that gives meaning to all of its language.

222 Ariz. at 319 (citations omitted).

A. Logic demands Petitioners' reading of the totality of Arizona's elections and suffrage provisions.

Amicus Kris Mayes contends that Petitioners "contort the straightforward purposes" of sections 2, 4, and 5 of article 7 of the Arizona Constitution. [Mayes Br. at 7.] Yet to permit absentee or early voting renders these provisions indefensibly vague or otherwise pointless. For instance, what purpose would

freeing an elector from the obligations of military duty on a particular day—the day of the election—serve if that day is not the day the elector casts his or her vote? Ariz. Const. art. 7, § 5.

Similarly, Mayes attempts to differentiate the powers of initiative and referendum from those of general suffrage:

> Given their dedication to popular control through the electoral process, the pro-direct democracy framers would not have envisioned a restrictive voting process in the arena where the People exercise their broad legislative authority, nor on any matter where the People exercise their fundamental right to vote.

[Mayes Br. at 8–9, 11.] But this looks to the past with the eyes of a modern voter, accustomed to the convenience of voting from the comfort of the living room. To the framers of the constitution, the vote was just recently developed into a true secret ballot system, carefully protected by vigilant watchers at the polls; before then it was common in the United States to vote by vocal acclamation in a group on the day of the election. [*See, generally*, Lawyers Democracy Fund Br. at 9–11.] In other words, what amicus Mayes attempts to read into the historical records as a "restrictive voting process"—that is, the process of voting in person at a polling place—would have been the expected, though relatively new, process familiar to all at the time. Again, this looks back to the founding with modern eyes, rather than the eyes of those framing the document.

Additionally, "[i]t is a notorious fact that the choice of delegates to the constitutional convention was fought out primarily [on the issue of initiative and referendum]." *Whitman v. Moore*, 59 Ariz. 211, 218 (1942). In other words, to ensure that the principle of initiative and referendum was enshrined in the new state's constitution, delegates were chiefly chosen based on where they stood on this issue. Therefore, to ascribe any less value to these passages *vis-à-vis* the matter of voting in article 7 misperceives the importance of article 4 to the constitution as a whole. The processes of initiative and referendum are uniquely Arizonan and have been used throughout the state's history to make it the first in many measures, including extending suffrage to women in 1912. [*See* Arizona Voting Rights Advocates Br. at 3.] These processes are inextricably intertwined with those of the general election and must therefore be read alongside article 7.

Thus, amicus Orenstein's argument that the Arizona Constitution's lack of an express provision requiring voting to be conducted "at the polls" in its article on suffrage is fatal reflects a misunderstanding of how the Arizona Constitution came to be. [Orenstein Br. at 5.] As amicus Mayes notes, it was the section on initiatives and referenda that was of central concern to the delegates to the constitutional convention. [Mayes Br. at 11.] Accordingly, the insertion of the "at the polls" language in article 4 was not, as proposed intervenors suggest, an example of hiding "elephants in mouseholes." [Proposed Intervenors' Br. at 30.] Instead, its

inclusion there highlights the central importance of the Arizona Constitution's provisions related to the time, place, and manner of voting and demonstrates the delegates' intent that this unprecedented new power only be exercised under tight and secure control.

There is another fundamental problem with the readings proposed by the various amici regarding the initiative and referendum. These petitions "shall be filed with the Secretary of State," who shall print them on the official ballot "at the next regular election" so that the "electors may express at the polls their approval or disapproval of the measure." Ariz. Const. art. 4, pt. 1, § 1(10). If the provisions of this section, as several amici suggest, are not relevant to those of article 7, and we then take the plain locational meaning of "at the polls" (discussed in more depth below), we arrive at an absurd conclusion: that although initiatives and referenda must be placed on the official ballot for the next general election, they must be voted upon in person at the polls, but other general election matters under article 7 need not be. Because "the court when construing a statute should give it a sensible construction, such as will accomplish the legislative intent and if possible avoid an absurd conclusion or avoid making the statute invalid," this cannot be an appropriate reading of these two sections. *Mendelsohn v. Superior Court*, 76 Ariz. 163, 169 (1953).

Alternatively, if, as other amici contend, "at the polls" merely suggests the colloquial meaning of "at an election," not only is this colloquial meaning suspect, as addressed below, it also leads to a larger problem: the words "at the polls" become meaningless in the context of article 4. This principle is often referred to as the surplusage canon, or *verba cum effectu sunt accipienda*: "[i]f possible, every word and every provision is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* Canon 26 (2012). There is no need for those drafting article 4 to restate "at an election" after having required that the initiative or referendum be placed upon the official ballot "at the next general election"; it is needlessly redundant and unnecessary.

B. Historically, "at the polls" held a limited, locational meaning.

Orenstein also hangs his hat upon his reading of the definition of "at the polls," contending the legislature meant for it to be used as a synonym for "in an election." [Ornstein Br. at 12.] He cites to common dictionary definitions to show the term can mean either an election or a place where people go to vote—yet the dictionary he cites is modern, not one from 1912. This argument, and the same or similar echoed by the other amici on this topic, fails to contemplate the semantic shift between the sense of words in the more than one hundred years since the

Arizona Constitution was first written. Analyzing the word in its historical context and meaning at the time is the core of what Justice Scalia referred to as the "fixed meaning canon" of statutory interpretation. *See* Scalia & Garner, *supra*, Canon 7.

In so doing, Orenstein ignores Petitioners' argument that the language "at the polls" was found to be sufficiently express to strike down early voting under a similar provision of the Kentucky constitution [Pet. at 21 & 21 n.16], a fact he does ***not*** overlook in his law review article. *See* Fortier & Ornstein, *supra*, at 407. In any case, a search of books and laws from 1911–1912 demonstrates that "at the polls" was more commonly used, at least as a legal term of art, in the restricted, geographic sense, rather than the metaphoric or colloquial sense the amici urge.

For instance, during the examination of a witness in a contested election case, the attorney and witness both repeatedly use the term "at the polls" to designate the place of employment—the physical location where voting occurred. *See* Charles Calvin Bowman and George R. McLean, *Contested Election Case of George McLean V. Charles C. Bowman: From the Eleventh Congressional District of Pennsylvania*. United States: n.p., 1911, at 221 retrieved from https://www.google.com/books/edition/Contested_Election_Case_of_George_McLean/CXILAAAAYAAJ (last visited March 16, 2022).

Affidavits provided to the Senate for a hearing in 1912 made repeated reference to men employed to be "at the polls" to distribute literature. United

States Congressional Serial Set. United States: U.S. Government Printing Office, 1912, at 1996, 2011, retrieved from https://www.google.com/books/edition/United_States_Congressional_Serial_Set/H9tGAQAAIAAJ (last visited March 16, 2022).

Finally, in a state law from Indiana, the legislature permitted expenditures to compensate employees of the treasurer "employed in the registration rooms, in the voting rooms and at the polls." *Laws of the State of Indiana, Passed at the Sixty-Seventh Regular Session of the General Assembly*. United States: J.P. Chapman, 1911, at 293, retrieved from https://www.google.com/books/edition/Laws_of_the_State_of_Indiana_Passed_at_t/lTo4AAAAIAAJ (last visited March 16, 2022).

In any event, though Orenstein now claims in his brief that "at the polls" is simply synonym for "in an election" [Orenstein Br. at 12], his law review article demonstrates that he knows that this is not the case. *See* Fortier & Ornstein, *supra*, at 514 ("The differences between voting at the polling place and absentee and mail voting were made clear during the election reform debate in Congress last year."); 515 ("If there must be a more widespread alternative to election day voting at the polls, early voting at a city hall or other official office at least preserves the

sanctity of privacy for a voter, and partially replicates the collective experience of voting.").[4]

Thus, it is apparent that the meaning of "at the polls" contains within it the express spatial sense of the term. To render the phrase in the modern sense of a metaphor extracts the phrase from its historical context and renders it effectively meaningless, something specifically prohibited by both standard canons of construction and the courts of Arizona. The end result is clear: "at the polls," regardless of modern colloquial language or the convenience of mail-in voting, was a phrase specifically included in the constitution and intended by this inclusion to carry meaning. To find otherwise either renders the word surplusage or the meaning of the requirements of article 4 with regard to referenda absurd. Either reading does injury to the textual integrity of the Arizona Constitution.

III. Petitioners' action is a timely attempt to determine a crucial aspect of Arizona law in advance of the general election.

A.R.S. § 16-452(A) requires the Secretary to include the rules on the "procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots" no later than December 31 of each year

[4] Similarly, Orenstein now claims that the Arizona Constitution's "secrecy-in-voting clause" is not an express prohibition on mail in voting. [Orenstein Br. at 8.] But at the time he wrote his law review article, he knew better about that, too. Fortier & Ornstein, *supra*, at 502 ("The lack of any secrecy-in-voting clauses in the Kansas and Missouri constitutions made it possible to adopt a very simple system of voting by mail for intra-state voters.").

preceding the general election—that is, December 31, 2021, for the 2022 general election. The Secretary's failure to do so, less than two months from the filing of this special action, served as the impetus for Petitioner's claims. Contrary to the claims of amicus League of Women Voters of Arizona, these claims therefore could not have "been filed at any point last year," as the Secretary's failure to perform the statutory duties described in Petitioners' brief did not occur until the very end of 2021. [League of Women Voters Br. at 9.]

Amicus League of Women Voters of Arizona attempts to downplay the nature of the petition as "clearly nothing unique or exceptional about this challenge to Arizona election laws and Respondent Secretary of State Katie Hobbs's actions." [*Id.* at 4.] Yet, as Attorney General Mark Brnovich makes clear in the State's response to the Petition, the draft EPM provided to the Attorney General by the Secretary included many provisions that "either exceeded the scope of the Secretary's authority or were inconsistent with the purpose of one or more election statutes." [State's Resp. at 7.] Attorney General Brnovich describes the current situation in detail, but it suffices to say that there could be little more unique or exceptional than a Secretary of State entirely failing to comply with statutory requirements, leaving county recorders with no legal, binding, or relevant EPM to guide the elections of 2022—a critical situation that must be resolved forthwith.

Conclusion

Petitioners respectfully request that this Court agree to exercise its original jurisdiction over their special action based upon these and other arguments made before this Court.

RESPECTFULLY SUBMITTED this 18th day of March 2022:

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