**IN THE SUPREME COURT**
**OF THE STATE OF ARIZONA**

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| ARIZONA REPUBLICAN PARTY, a recognized political party; and YVONNE CAHILL, an officer and member of Arizona Republican Party and Arizona voter and taxpayer,<br><br>Petitioners,<br>v.<br><br>KATIE HOBBS, in her official capacity as the Arizona Secretary of State; and STATE OF ARIZONA, a body politic,<br><br>Respondents. | No. CV-22-0048-SA |

# BRIEF OF AMICUS CURIAE LAWYERS DEMOCRACY FUND


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions**



**Statutes**



**Rules**



**Other Authorities**

Pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure, Lawyers Democracy Fund submits this *amicus curiae* brief in response to Petitioners' request for special action relief.

## INTEREST OF *AMICI CURIAE*[1]

Lawyers Democracy Fund ("LDF") is a non-partisan non-profit organization dedicated to promoting the role of ethics and legal professionalism in the electoral process. To accomplish this mission, LDF conducts, funds, and publishes research and in-depth analysis regarding the effectiveness of current and proposed election methods, including mail-in voting and the use of ballot drop boxes. LDF also periodically engages in public interest litigation where appropriate to uphold the rule of law and integrity in elections, including filing briefs as *amicus curiae* in cases where its background and experience in the field of election law may help illuminate important points for consideration.

Consistent with Rule 16(a) of the Arizona Rules of Civil Appellate Procedure, no counsel for any party has authored this brief in whole or in part.

## INTRODUCTION

This case concerns the essential balance between safeguarding ballot secrecy and maintaining convenience for exercising the franchise. What procedures most

[1] Funding for this brief was provided by Webgrazers LLC. Webgrazers LLC does not have a financial interest in the outcome of this case.

effectively establish this balance is the focus of this brief. This case is not about any one candidate or election, nor is it about the conduct or outcome of any particular contest.

The Constitution of Arizona guarantees a right to a secret ballot. It also provides that voting take place "at the election." There is an inherent and recognized tension between the need for ballot secrecy and mail-in voting provisions. Historically, ballot secrecy provisions were closely tied to in-person voting requirements and were adopted at a time when in-person voting was understood to be the universal norm. Exceptions to the general rule of in-person voting were adopted sparingly prior to 1910, often through Constitutional amendments, and then with significant procedural safeguards to ensure secrecy was maintained.

Regardless of whether one thinks changes are good or bad, the adoption of widespread mail-in voting and the use of drop boxes is fundamentally a choice between the competing values of convenience and secrecy. By authorizing mail-in voting and permitting ballot drop boxes, the legislature and the Secretary of State undermined ballot secrecy to bolster convenience without going through the proper constitutional channels.[2] Moreover, the failure to include adequate signature

[2] In conjunction with Petitioners, we do not challenge or urge this Court to rule contrary to any federal election statutes, such as the Uniformed Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302. *See* Petition at 37.

verification standards in the Elections Procedures Manual compounds this imbalance by undercutting the secrecy and security guarantees in the Constitution that underpin alternative voting procedures. These are properly questions reserved for the people of Arizona to resolve through the constitutional amendment process.[3] Accordingly, this Court should find that this overreach is contrary to law and return the question back to the people of Arizona.

## ARGUMENT

The Constitution of Arizona is not neutral when weighing ballot secrecy and convenience. The text and historical context of the Constitution embody a choice of the people in favor of erring on the side of ballot secrecy.

### I. The Context of Section 1 — The Rise of the Australian Ballot

Provisions concerning suffrage and elections are largely unchanged since the Constitutional Convention of 1910 that presaged Arizona's entry into the Union. *See The Arizona Constitution: 1912 Edition*, Ariz. St. U. Center for Pol. Thought and Leadership, https://cptl.asu.edu/arizona-constitution/1912-edition (noting that the 1912 Constitution was "with one exception . . . the same as the text of the 1910 Constitution adopted by the Constitutional Convention that met from October 10 to December 9 of that year."). As such, they are products of their time, and should be

[3] This is particularly true for the use of drop boxes, which have a much shorter history in Arizona and lack legislative imprimatur.

interpreted in accordance with that context. *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 81 (2012) ("A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." (quoting Thomas M. Cooley, *A Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 54 (1868))); *see also Cain v. Horne*, 220 Ariz. 77, 80 (2009) ("In interpreting a constitutional provision, '[o]ur primary purpose is to effectuate the intent of those who framed the provision,'" which requires looking first at the plain language of the Constitution and, when a provision is not clear, "the history behind the provision, the purpose sought to be accomplished by its enactment, and the evil sought to be remedied." (citations omitted)).

The election provisions of the Arizona Constitution arose during a period of national reform and were intended to "ensure that the citizen's right to cast his vote was meaningful and elections were pure." John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L. J. 1, 68 (1988) ("Leshy"). While today, the secret ballot is a fundamental element of voting, at the time of the constitutional convention it was "a relatively recent import from Australia." *Id*. During the early days of the states, voting was viewed as a communal activity. To wit, "[d]uring the colonial period, many government officials were elected by the *viva voce* method

or by the showing of hands, as was the custom in most parts of Europe." *Burson v. Freeman*, 504 U.S. 191, 200 (1992) (plurality opinion). "Because of the opportunities for bribery and intimidation in the *viva voce* system, the colonies began using written ballots." *McLinko v. Dept. of State*, -- A.3d --, 2022 WL 257659, *8 (Pa. Commw. Ct. 2022). "Initially, this paper ballot was a vast improvement" as "[i]ndividual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting." *Burson*, 504 U.S. at 200.

However, beginning in the 1820s, voters began utilizing printed ballots, which were often produced as straight ticket ballots by political parties. *See* 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, 489 (2003) ("Fortier & Ornstein"); *see also Henshaw v. Foster*, 26 Mass. 312 (Mass. 1830) (holding that the term "written" vote included printed ballots). "These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance," creating an opportunity for impropriety. *Burson*, 504 U.S. at 200.

As commentators have noted, "[a]ll of these practices inspired a reform movement in the states in the late 19th century." Fortier & Ornstein at 490. "Between 1888 and 1892, 38 states adopted the Australian ballot, a reform

consisting of a standard ballot and private voting booth" intended to ensure secrecy in the voting process. Fortier & Ornstein at 486. Arizona fell squarely within this trend. The secret "Australian" ballot was initially adopted by the territorial legislature in 1891, then incorporated largely unchanged as Article VII, Section 1 of the 1910 Constitution. Leshy at 68. Section 1 is thus a textual and contextual commitment to secrecy, even at the cost of some convenience. Its reference to "other methods" is best read as a reference to the then-new Australian ballot system, not as a broad grant of authority to rebalance secrecy and convenience.

## II. The Predominance of In-Person Voting

Many of the same trends that animated the development and adoption of the secret ballot informed in-person voting requirements.

To this point, the experience of the Commonwealth of Pennsylvania is instructive. Delegates at the 1837 Pennsylvania Constitutional convention "were concerned with facilitating 'the attendance' of voters, and spoke of large numbers of voters 'assembled together' at elections" against a backdrop where allowing individuals to cast their ballots outside of their community would be understood as a "radical departure." Brief of Amici Curiae Molly Mahon, Pam Auer, Marisa Niwa, Matthew Jennings, Cindy Jennings, Disability Rights Pennsylvania, Leah Marx, and Hassan Bennett at 14, 16, *McLinko v. Pennsylvania, et al.*, 15 MAP 2022, *et seq*. (Pa. 2022) (quoting 2 *Proceedings and Debates of the Constitutional*

*Convention of the Commonwealth of Pennsylvania* 24-25 (1837)). As one delegate to the 1837 Pennsylvania Constitutional Convention stated, election day is "a day on which the people had been accustomed from the days of the revolution, to meet and consult, and decide who should rule over them." *Id*.

Since 1837, the Pennsylvania Constitution, like others, has included language requiring voters to "have resided in the election district where he or she shall *offer to vote* at least sixty (60) days immediately preceding the election." Pa. Const. Art. VII, § 1(3) (emphasis added). As Petitioners have observed, this "offer to vote" language in the Pennsylvania Constitution is similar to the "at any election" language in sections 2 and 4 of the Arizona Constitution and serves a similar purpose.

The centrality of in-person voting to contemporary ideas of suffrage was confirmed in *Chase v. Miller*, 41 Pa. 403 (Pa. 1862). In *Chase* the Pennsylvania Supreme Court held that this "offer to vote" language required in-person voting. At issue in *Chase* was the Military Absentee Act of 1839, which permitted Pennsylvania citizens in actual military service "to vote '*at such place as may be appointed by the commanding officer*[.]'" *McLinko* at *5 (quoting *Chase*, 41 Pa. at 416) (emphasis in the original). At the time of *Chase*, many Pennsylvanians were away from home fighting the Civil War. Their votes were outcome determinative in a district attorney's race, where one candidate led by 165 votes on Election Day

with the help of 402 votes pursuant to the authority of the Military Absentee Act. *Id*. Nevertheless, the Court invalidated the 402 votes, holding that:

> To "offer to vote" by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. *The ballot cannot be sent by mail or express*, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

*Chase*, 41 Pa. at 419.

While the courts were not unanimous, *Chase* was hardly an outlier.[4] During the Civil War "[t]he constitutional discussions in the states were extensive and centered around the state constitutional requirements for in-person voting, many of which were instituted in an attempt to register voters and cut down on fraud."

[4] *See generally Thompson v. Scheier*, 40 N.M. 199, 57 P2d 293, 301 (N.M. 1936) ("The greater weight of authority (including all recent cases cited by appellant) is that the act of voting under such constitutional provisions must be exercised in the precinct of the residence of the voter, though courts differ as to what constitutes that act."). State supreme courts upheld the validity of military absentee voter laws during the Civil War in Iowa, Wisconsin, Ohio, and New Hampshire. *See* Fortier & Ornstein at 499 (citing *Morrison v. Springer*, 15 Iowa 304 (Iowa 1863); *State ex rel. Chandler v. Main*, 16 Wis. 398 (Wis. 1863); *Lehman v. McBride*, 15 Ohio St. 573 (Ohio 1863); *Constitutionality of the Soldiers' Voting Bill*, 45 N.H. 595 (N.H. 1864) (advisory opinion)).

Fortier & Ornstein at 499. "[M]any state constitutions explicitly or implicitly required voting in person at a local polling location." Fortier & Ornstein at 497. While "offering" to vote may sound odd to modern ears, it was commonly understood at the time to require in-person voting. *See*, *e.g.*, *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (Mich. 1865); *Blourland v. Hildreth*, 26 Cal. 161 (Cal. 1864); *In re Opinion of Justices*, 30 Conn. 591 (Conn. 1862).

The expectation in the mid-19th century was that citizens would vote in person. Exceptions even for what might be viewed as very worthy causes, such as soldiers serving on the front lines of the Civil War were rare and often required the people of a state to weigh in directly through a constitutional amendment. To wit, during the Civil War, several states, including Connecticut, Kansas, Maine, New York, Rhode Island, and Pennsylvania did what Arizona has not done with respect to general mail-in voting or ballot drop boxes: amend their constitutions to permit deviations from in-person voting. *See* Fortier & Ornstein at 498.[5]

This was the status quo and context leading up to the adoption of the Arizona constitution. As scholars have noted, "[d]espite the prevalent use of absentee voting in the military context in the Civil War, nearly fifty years elapsed

[5] In addition, Maryland adopted a new constitution during the war that allowed military absentee voting, while Nevada was admitted to the Union with a constitutional provision for military absentee voting. Fortier & Ornstein at 498-499. New Jersey amended its constitution in 1875. *Id*. at 499.

before a major move to institute absentee voting for civilians began." Fortier & Ornstein at 501. Prior to 1911, two states had civilian absentee ballot laws: Vermont and Kansas. *Id*. By 1917, the number increased to twenty-four. P. Orman Ray, *Absent-Voting Laws 1917*, 12 Am. Pol. Sci. Rev. 251 (1918). Arizona's Constitution was adopted at a time and context when absentee voting was rare and in-person voting was the expectation.

## III. There is a Tension Between Secrecy and Convenience

There is an inherent tension between ensuring the secrecy of ballots and improving the convenience of voting away from polling locations. *See* Fortier & Ornstein at 516. This tension was recognized by the Pennsylvania Supreme Court in *In re Contested Election in Fifth Ward of Lancaster City*, 281 Pa. 131 (Pa. 1924) ("*Lancaster City*"). In *Lancaster City*, the court struck down an absentee voter law based largely on the state's in-person voting requirement identified in *Chase*. It further reasoned:

> It may well be argued that the scheme of procedure fixed by the act of 1923, for the receipt, recording, and counting of the votes of those absent, who mail their respective ballots, would end in the disclosure of the voter's intention prohibited by the amendment of 1901 to section 4 of article 8 of the Constitution, undoubtedly the result if but one vote so returned for a single district. Though this provision as to secrecy was likely added in view of the suggestion of the use of voting machines, yet the direction that privacy be maintained is now part of our fundamental law.

*Lancaster City* at 137-138. Article 8, section 4 of the Pennsylvania Constitution (renumbered article 7, section 4 in 1967) is functionally identical to Article VII, Section 1 of the Arizona Constitution, and reads: "All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved."

This tension was also acknowledged by the court in *Clark v. Nash*, 192 Ky. 594 (Ky. 1921). In *Clark*, the Kentucky Supreme Court struck down mail-in voting law based in part on a provision in the Kentucky Constitution similar to the "at the election" language in sections 2 and 4 of the Arizona Constitution, reasoning "[m]anifestly a ballot cannot be 'furnished by public authority to the voter at the polls' if mailed to him at some address outside of the county where the election is being held." *Clark*, 192 Ky. At *2. Likewise, in *Thompson v. Scheier*, 40 N.M. 199 (1936), the Supreme Court of New Mexico struck down an absentee voter law based on "offer to vote" language in the state constitution that, for the reasons set forth above, is analogous to the "at the election" language in the Arizona Constitution. *See also* Fortier & Ornstein at 506-508 (describing constitutional challenges to absentee voting, including *Lancaster City*, *Clark*, and *Thompson*, and concluding "[t]o the extent that a state's constitution explicitly embraces in-person voting to combat fraud or protect the secrecy of the ballot, it must carve out exceptions for absentee balloting.").

## IV. The Application of this Dichotomy to Arizona Law

In the debate between convenience and secrecy, the Arizona Constitution is not neutral. Section 1 establishes a clear mandate for secrecy. Particularly when placed in their historical context, the phrase "at the election" in sections 2 and 4 connote voting in person.

In order to withstand constitutional scrutiny, absentee voter laws have in the past incorporated "ingenious" safeguards. P. Orman Ray, *Absent Voters*, 8 Am. Pol. Sci. Rev. 442, 443 (1914) (describing a North Dakota absentee voter law). Arizona's initial foray into absentee voting incorporated many of these safeguards. *See* 1925 Ariz. Sess. Laws, ch. 75, § 1. While many protections remain, *see, e.g.*, A.R.S. § 16-411; A.R.S. § 16-548; A.R.S. § 16-550, subsequent practices, such as those at issue in this case, have moved away from these vital protections in favor of convenience, resulting in procedures that are inconsistent with the original meaning of the Constitution. While this is true for both mail-in voting and the use of drop boxes, the issue is particularly acute for the latter. It is also particularly true of the failure to incorporate adequate signature verification methods into the Elections Procedures Manual. *See* A.R.S. §16-550.

These safeguards matter. *See generally* A.R.S. § 16-609(A) ("Only ballots that are provided in accordance with the provisions of law shall be counted."). In *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994), this

Court went so far as to set aside the results of an election based on violations of procedural safeguards governing absentee voting, even when there was not a showing of fraud. Specifically, this Court determined "the integrity of the electoral process is an issue of statewide importance." *Miller*, 179 Ariz. at 278. This Court explained:

> At first blush, mailing versus hand delivery may seem unimportant. But in the context of absentee voting, it is very important. Under the Arizona Constitution, voting is to be by secret ballot. Ariz. Const. art. VII, § 1. Section 16–542(B) advances this constitutional goal by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation. Here, the dangers were the very ones the statute was designed to prevent.

*Id.* at 279. Like the procedures at issue in *Miller*, 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.

Many may well argue that it is past time to rebalance convenience and secrecy in Arizona's elections. However, there is a proper channel to effect this reevaluation: amend the Arizona Constitution and thereby give the people of Arizona the ability to balance these important interests. Failing that, significant policy decisions, like implementation of drop boxes, should be left to the legislature, not the Secretary of State.

## CONCLUSION

For the foregoing reasons, this Court should accept original and special action jurisdiction and grant Petitioners' requested relief by directing the Secretary to include adequate signature verification methods in the Elections Procedures Manual, prohibiting the Secretary from authorizing drop-boxes in the 2022 general election and beyond, and requiring the people's vote before mail-in voting is expanded beyond the bounds of the Constitution.

Respectfully submitted March 15, 2022:

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