

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. _____

**APPLICATION FOR ISSUANCE OF WRIT UNDER EXERCISE OF
ORIGINAL JURISDICTION**

Alexander Kolodin (030826)
Veronica Lucero (030292)
Roger Strassburg (016314)
Arno Naeckel (026158)
Davillier Law Group, LLC
4105 N. 20th St., Ste. 110
Phoenix, AZ 85016
T: (602) 730-2985 F: (602) 801-2539
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
rstrassburg@davillierlawgroup.com
anaeckel@davillierlawgroup.com
phxadmin@davillierlawgroup.com (file copies)
Attorneys for Petitioners

Arizona Republican Party and Yvonne Cahill, hereby apply for the issuance of a writ in the exercise of this Court's original jurisdiction, as more fully set forth in the Verified Petition for Special Action filed herewith and expressly incorporated herein by reference. This application is made pursuant to Arizona Supreme Court Rule 1 and the other authorities cited therein.

DATED this 25th day of February 2022.

Davillier Law Group, LLC

By: /s/Alexander Kolodin

Attorney for Petitioners

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. _____

VERIFIED PETITION FOR SPECIAL ACTION
Original Jurisdiction

Alexander Kolodin (030826)
Veronica Lucero (030292)
Roger Strassburg (016314)
Arno Naeckel (026158)
Davillier Law Group, LLC
4105 N. 20th St., Ste. 110
Phoenix, AZ 85016
T: (602) 730-2985 F: (602) 801-2539
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
rstrassburg@davillierlawgroup.com
anaeckel@davillierlawgroup.com
phxadmin@davillierlawgroup.com (file copies)
Attorneys for Petitioners

Table of Contents

	Page
Table of Authorities.....	ii
Introduction	1
Jurisdictional Statement	6
Statement of the Issues	13
Statement of Facts	14
Argument.....	15
I. Signature Verification Guidelines Must Be Included in the EPM.....	15
II. The Secretary May Not Authorize Voting Via Drop-boxes	17
III. No-excuse Mail-in (or “Early” or “Absentee”) Voting Is Unconstitutional, Either in Whole or in Part; Alternatively, It Must Be Narrowly Construed to Conform to the Arizona Constitution	19
A. Arizona Constitutional Provisions—by their Plain Meaning, History, and Initial Principles—Require In-person Voting at the Polls on a Specific Day	21
B. “Early Voting” is Contrary to Secure, In-person Voting at the Polls on a Specific Day and Is Therefore Unconstitutional.....	39
C. In the Alternative, “Early Voting” Must Be Construed Narrowly to Conform to the Arizona Constitution.....	40
Conclusion.....	44

Table of Authorities

Cases

<i>Adams v. Bolin</i> , 77 Ariz. 316 (1954).....	8
<i>Ariz. Ctr. for Law in Pub. Interest v. Hassell</i> , 172 Ariz. 356 (App. 1991).....	44
<i>Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs</i> , 249 Ariz. 396 (2020).....	1
<i>Ariz. Indep. Redistricting Comm’n. v. Brewer</i> , 229 Ariz. 347 (2012)	7
<i>Ariz. Pub. Integrity All. v. Fontes</i> , 250 Ariz. 58 (2020)	<i>passim</i>
<i>Ariz. Sch. Bds. Ass’n v. State</i> , No. CV-21-0234-T/AP, 2022 Ariz. Lexis 31(Jan. 6, 2022).....	20
<i>Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.</i> , 148 Ariz. 1 (1985)	11
<i>Baca v. Ortiz</i> , P.2d 320 (N.M. 1936).....	20
<i>Brewer v. Burns</i> , 222 Ariz. 234 (2009).....	7
<i>Bourland v. Hildreth</i> , 26 Cal. 161 (1864)	20
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	1, 8
<i>Chase v. Miller</i> , 41 Pa. 403 (1862).....	<i>passim</i>
<i>Chavez v. Brewer</i> , 222 Ariz. 309 (App. 2009).....	17, 24

<i>Citizens for Growth Mgmt. v. Groscost</i> , 199 Ariz. 71 (2000).....	7
<i>City of Phoenix v. Yates</i> , 69 Ariz. 68 (1949).....	23, 37
<i>City of Surprise v. Ariz. Corp. Comm’n</i> , 246 Ariz. 206 (2019).....	7
<i>Clark v. Nash</i> , 192 Ky. 594 (1921).....	20, 21
<i>David C. v. Alexis S.</i> , 240 Ariz. 53 (2016).....	24
<i>Dobson v. State ex rel. Comm’n. on App. Ct. Appointments</i> , 233 Ariz. 119 (2013).....	7
<i>Fann v. State</i> , 493 P.3d 246 (Ariz. 2021)	23, 37
<i>Forty-Seventh Legislature v. Napolitano</i> , 213 Ariz. 482 (2006).....	18
<i>In re Contested Election</i> , 281 Pa. 131 (1924).....	20
<i>Lake Havasu City v. Mohave Cty.</i> , 138 Ariz. 552 (App. 1983).....	19
<i>Leach v. Hobbs</i> , 250 Ariz. 572 (2021).....	19
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	20
<i>McLaughlin v. Bennett</i> , 225 Ariz. 351 (2010).....	26
<i>McLinko v. Commonwealth</i> , 2022 Pa. Commw. Lexis 12 (Commw. Ct. Jan. 28, 2022).....	<i>passim</i>

<i>McKenna v. Soto</i> , 250 Ariz. 469 (2021).....	2, 16
<i>Miller v. Picacho Elementary Sch. Dist. No. 33</i> , 179 Ariz. 178, 180 (1994)	27
<i>Pedersen v. Bennett</i> , 230 Ariz. 556 (2012).....	1
<i>Perini Land & Dev. Co. v. Pima Cty.</i> , 170 Ariz. 380 (1992).....	22
<i>Randolph v. Groscost</i> , 195 Ariz. 423 (1999).....	8
<i>Rios v. Symington</i> , 172 Ariz. 3 (1992).....	8
<i>Rodgers v. Huckelberry</i> , 247 Ariz. 426 (App. 2019).....	11
<i>Saban Rent-a-Car LLC v. Ariz. Dep’t of Revenue</i> , 246 Ariz. 89 (2019).....	24, 26
<i>Sherman v. City of Tempe</i> , 202 Ariz. 339 (2002).....	38, 39
<i>Thompson v. Scheier</i> , 57 P.2d 293 (N.M. 1936).....	20
<i>Twitchell v. Blodgett</i> , 13 Mich. 127 (1865)	20
<i>US W. Communs., Inc. v. Ariz. Corp. Comm’n</i> , 201 Ariz. 242 (2001).....	41
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	11, 12

Constitutional Provisions

Ariz. Const. art. 2, § 341

Ariz. Const. art. 4, § 1 *passim*

Ariz. Const. art. 5, § 917

Ariz. Const. art. 6, § 56

Ariz. Const. art. 7, § 1 *passim*

Ariz. Const. art. 7, § 229, 34

Ariz. Const. art. 7, § 436, 37

Ariz. Const. art. 7, § 537

Ky. Const. § 14721

Penn. Const. art. 7, § 129, 35

Penn. Const. art. 7, § 431

Statutes

1925 Ariz. Sess. Laws, ch. 75, § 128

1991 Ariz. Sess. Laws, vol. 1, ch. 51 § 128, 37, 41, 42

A.R.S. § 12-20216

A.R.S. § 16-10110

A.R.S. § 16-21138

A.R.S. § 16-40418, 23

A.R.S. § 16-41118, 22

A.R.S. § 16-452 *passim*

A.R.S. § 16-50225

A.R.S. § 16-51523

A.R.S. § 16-541.....	29, 33, 40, 42
A.R.S. § 16-542.....	11, 18, 33
A.R.S. § 16-548.....	17, 19, 35
A.R.S. § 16-550.....	15, 35
A.R.S. § 16-552.....	11
A.R.S. § 16-609.....	16
A.R.S. § 16-621.....	11
A.R.S. § 16-821.....	10
A.R.S. § 16-822.....	10
A.R.S. § 16-825.....	10
A.R.S. § 16-827.....	10

Rules

RPSA 1.....	8, 9
RPSA 3.....	<i>passim</i>
RPSA 7.....	6

Other Authorities

Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012).....	24
Ariz. Republican Party, <i>Bylaws</i> , https://azgop.com/about/bylaws	12
Ariz. Republican Party, <i>Proposal 9</i> , https://azgop.com/call/resolution	12
Ariz. Republican Party, <i>State Party, Elected Officers</i> , https://azgop.com/directory/state-party	10

Ariz. Sec’y of State, <i>Arizona Election Laws & Publications</i> , https://azsos.gov/elections/arizona-election-laws-publications	1, 16
Ariz. Sec’y of State, <i>2019 Elections Procedures Manual</i> , https://azsos.gov/sites/default/files/2019ELECTIONS PROCEDURES_MANUAL_APPROVED.pdf	<i>passim</i>
Ariz. Sec’y of State, <i>Elections Calendar & Upcoming Events, 2022 Elections</i> , https://azsos.gov/elections/elections-calendar-upcoming-events	9
Ariz. Sec’y of State, <i>Signature Verification Guide</i> (July 2020), https://azsos.gov/sites/default/files/ AZSOS_Signature_Verification_Guide.pdf	<i>passim</i>
Ariz. Sec’y of State, <i>Signature Verification Guide</i> (July 2020), https://azsos.gov/sites/default/files/ AZSOS_Signature_Verification_Guide.pdf	<i>passim</i>
Ariz. Sec’y of State, <i>Voter Registration Statistics – January 2022</i> , https://azsos.gov/elections/voter-registration-historical-election-data	13
<i>Cambridge Dictionary</i> , https://dictionary.cambridge.org/us/dictionary/english/at	34
<i>Cambridge Dictionary</i> , https://dictionary.cambridge.org/us/dictionary/english/thereto	36
<i>Cambridge Dictionary</i> , https://dictionary.cambridge.org/us/dictionary/english/therefrom	36
John C. Fortier & Norman J. Ornstein, <i>The Absentee Ballot and the Secret Ballot: Challenges for Election Reform</i> , 36 U. Mich. J. L. Reform 483 (2003)	<i>passim</i>
John R. Lott, <i>Why Do Most Countries Ban Mail-In Ballots? They Have Seen Massive Vote Fraud Problems</i> , SSRN (Aug. 3, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666259	3
<i>The Records of the Arizona Constitutional Convention of 1910</i> (John S. Goff ed., 1990)	25, 32

Introduction

As this Court has recognized, “[e]lection laws play an important role in protecting the integrity of the electoral process.” *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 61 ¶ 4 (2020) (citing *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (“[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”)). In Arizona, however, ongoing abuse of election laws is jeopardizing public confidence in the electoral process.

In July 2020, Arizona Secretary of State Katie Hobbs (“Secretary”) issued a Signature Verification Guide (“2020 Guide”) outlining procedures for verifying signatures on early ballot envelopes.¹ However, the Secretary has never added these procedures to the operative Elections Procedures Manual (“EPM”),² or an addendum thereto, as required by A.R.S. § 16-452. If adopted into the EPM and approved by the Governor and Attorney General, the procedures would have the force of law, and their violation would be punishable as a misdemeanor. *Id.* at (C);

¹ Ariz. Sec’y of State, *Signature Verification Guide* (July 2020), https://azsos.gov/sites/default/files/AZSOS_Signature_Verification_Guide.pdf. The Court may take judicial notice of publicly available records “from sources whose accuracy cannot reasonably be questioned.” *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 403 n.1 (2020) (citing *Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012)).

² See Ariz. Sec’y of State, *Arizona Election Laws & Publications*, <https://azsos.gov/elections/arizona-election-laws-publications> (linking to EPM and noting “current EPM went into effect on December 20, 2019”).

Ariz. Pub. Integrity All., 250 Ariz. at 63 ¶ 16; *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 21 (2021).

The Secretary’s failure to execute her non-discretionary duty under A.R.S. § 16-452(B) to include the procedures in the EPM means county recorders are not required to follow them. Even if they were, the Secretary’s procedures purport to authorize counties to supplement her rules with their own *See, e.g.*, 2020 Guide at 1. Failure to include the procedures in the EPM also means the Secretary can modify them at will without the checks and balances that approval by the Governor and Attorney General provides. Thus, the Secretary’s signature verification procedures do not ensure that “the maximum degree of correctness, impartiality, uniformity and efficiency,” A.R.S. § 16-452(A), will be achieved among Arizona counties in the 2022 state general election.

On the other hand, *exceeding* her legal authority, the Secretary has prescribed rules in the EPM allowing county officials to “develop and implement procedures” for placing drop-boxes, including “unstaffed drop-box[es],” in various locations throughout the several counties.³ Neither the Secretary nor county recorders have statutory authority to implement “drop-box” voting under Arizona law. Moreover, the legislature may not delegate this authority to the Secretary, nor

³Ariz. Sec’y of State, *2019 Elections Procedures Manual*, https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf at 60–62.

may the Secretary delegate a portion of this authority to county recorders, as the EPM purports to do. *See* EPM at 60–61.

These recent abuses are possible because of a longstanding deviation from Arizona’s constitutional mandates regarding the time, place, and manner of elections. Stated simply, Arizona’s “early voting” statutes—which provide for “absentee” or “no-excuse mail-in” voting—violate the Arizona Constitution, in whole or in part.

Absentee voting naturally lends itself to these and other abuses,⁴ which is why Arizona’s constitution is a product of the national movement to implement the “Australian ballot system,” a secure system quickly adopted by several states with little controversy and containing the following four essential provisions: (1) ballots printed and distributed at public expense; (2) ballots containing the names of all the candidates duly nominated by law (a “blanket ballot”); (3) ballots distributed “only by election officers *at the polling place* (‘exclusive’ or ‘official ballot’)”; and (4) detailed provisions for compartments and “other physical arrangements to ensure secrecy in casting the vote.” John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L.

⁴ Most European democracies have banned absentee voting due to security concerns. *See* John R. Lott, *Why Do Most Countries Ban Mail-In Ballots? They Have Seen Massive Vote Fraud Problems*, SSRN (Aug. 3, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666259.

Reform 483, 488 (2003) (emphasis added).

Accordingly, the Arizona Constitution prescribes that “Official Ballot[s]” are to be provided “*at the next regular general election*”⁵ in “such manner that the electors may express *at the polls* their approval or disapproval of [a] measure.”

Ariz. Const. art. 4, § 1(10). The provision that voting is to take place “at the polls” appears in three other places. *See id.* at (1), (3), & (15). Additional constitutional provisions, discussed more fully below, further support the proposition that in-person voting at the polls on a fixed date is the only constitutionally permissible manner of voting. The Court found this to be obvious in 1913, the year after the constitution was ratified: “We thus find that the people, who are the source of all power, in a proper manner, by their votes, *at a proper place, at the polls, and at a proper time, a general election*, have registered the public will....” *Allen v. State*, 14 Ariz. 458, 460 (1913) (emphasis added).

Thus, at minimum, Arizona’s no-excuse mail-in voting system, adopted in 1991, violates the Arizona Constitution. In fact, a Pennsylvania appellate court recently struck down that state’s no-excuse mail-in voting system as unconstitutional under provisions like those in Arizona’s constitution. *See McLinko v. Commonwealth*, 2022 Pa. Commw. Lexis 12, at *61 (Commw. Ct. Jan. 28,

⁵ Therefore, as discussed more fully below, this provision applies to all general election ballots.

2022) (discussing history of constitutional challenges and noting irreconcilability of absentee voting with state constitutions containing “secrecy” provisions), *prob. juris. noted*. And although the constitutionality of absentee voting has been challenged in other states, Arizona has never squarely addressed the question with either a constitutional amendment or a decision by this Court—perhaps due to the odd timing of Arizona’s entry into the union, coming as it did, between two waves of litigation on the subject. *See Fortier & Ornstein, supra* at 493–500 & 506–11.

Whether or not the Court agrees with this constitutionality argument, it should nevertheless provide a final resolution to the question and articulate what, if anything, the Arizona Constitution authorizes regarding absentee voting, the source of this authority, and any applicable limiting principles.

For these reasons, Petitioners Arizona Republican Party (“AZGOP”) and Yvonne Cahill (collectively, “Petitioners”) ask this Court to exercise its original jurisdiction over this special action and compel the Secretary to include the 2020 Guide in the EPM, prohibit her from including drop-box rules in the EPM, and enjoin the State from enforcing Arizona’s unconstitutional absentee voting laws.

Petitioners also respectfully request that the Court expedite this matter so that state officials, candidates, and voters will have certainty in the upcoming general election.

Jurisdictional Statement

Jurisdiction

This Court has original jurisdiction over actions seeking mandamus, injunction, and other extraordinary writs against the state and its officers. Ariz. Const. art. 6, § 5; A.R.S. § 12-2021; *See also* Ariz. Sup. Ct. R. 1; Ariz. R. P. Special Actions R. (“RPSA”) 1, 3, & 7 (replacing prior procedures, describing questions which may be raised, and allowing such a case to be brought in this Court via “special action...initiated by the filing of a petition”).

The relief Petitioners seek in this special action falls within the traditional categories this Court considers when exercising its original jurisdiction. Petitioners seek to compel the Secretary to include uniform signature verification guidelines in the EPM—to be used by all county recorders in Arizona—as required by A.R.S. § 16-452(A). Additionally, Petitioners seek to prohibit the Secretary from including ballot drop-box provisions in the EPM because she lacks legal authority to prescribe rules that are not authorized by statute, and no Arizona statute authorizes drop-boxes in lieu of official polling places. Further, even if the legislature were to enact a statute authorizing drop-boxes, as discussed below, such legislation would violate the Arizona Constitution. Thus, Petitioners also seek to prohibit the State from enforcing unconstitutional early voting statutes and to compel it instead to abide by the constitution.

Although the Court’s original jurisdiction is discretionary, it has often exercised it in cases that (1) involve purely legal questions of first impression, (2) involve matters of substantial public impact that are likely to be appealed to this Court regardless of a lower court’s decision, or (3) require a final resolution on an expedited basis. *See, e.g., City of Surprise v. Ariz. Corp. Comm’n*, 246 Ariz. 206, 209 ¶¶ 5–7 (2019) (exercising original jurisdiction to clarify scope of commission’s authority because jurisdiction is appropriate in cases involving purely legal questions of statewide importance or requiring an immediate and final resolution, particularly when a defendant proceeds or threatens to proceed without legal authority); *Dobson v. State ex rel. Comm’n. on App. Ct. Appointments*, 233 Ariz. 119, 121 ¶¶ 5–8 (2013) (exercising original jurisdiction where petitioners sought to declare unconstitutional and enjoin a statute because petition presented purely legal questions of statewide importance that turned on interpretation of constitution and required immediate and final resolution); *Ariz. Indep. Redistricting Comm’n. v. Brewer*, 229 Ariz. 347, 348 ¶¶ 11–14 (2012) (exercising original jurisdiction because legal issues required prompt resolution and were of first impression and statewide importance); *Brewer v. Burns*, 222 Ariz. 234, 237 ¶¶ 8–9 (2009) (exercising jurisdiction because issue was of one of first impression, statewide importance, purely legal, and turned on meaning of constitution); *Citizens for Growth Mgmt. v. Groscost*, 199 Ariz. 71, 71–72 ¶¶ 1–2 (2000)

(exercising jurisdiction over challenge to description of ballot initiative); *Randolph v. Groscost*, 195 Ariz. 423, 425 ¶ 6 (1999) (exercising jurisdiction over challenge to commission’s authority); *Rios v. Symington*, 172 Ariz. 3, 4 (1992) (challenge to governor’s line item vetoes); *Adams v. Bolin*, 77 Ariz. 316, 317 (1954) (whether secretary of state was required to accept petitioner’s nomination papers for congressional election).

This petition (1) involves purely legal questions of first impression that are (2) matters of substantial public impact (and that will certainly be appealed to this Court regardless of a lower court’s decision) and that (3) require a final resolution on an expedited basis because there is no “equally plain, speedy, and adequate remedy by appeal.” RPSA 1. Whether the Secretary must include signature verification guidelines in the EPM, whether she may create drop-box rules without legal authority, and whether mail-in voting statutes are constitutional (a question that requires this Court to interpret the Arizona Constitution) are purely legal questions of first impression that Arizona courts have never addressed.

Moreover, this case involves issues of substantial public impact. “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.” *Burdick*, 504 U.S. at 441. “Election laws play an important role in protecting the integrity of the electoral process.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 61 ¶ 4. In Arizona, the

Secretary is tasked with prescribing “rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting.” A.R.S. § 16-452(A). Because of the substantial public impact of a decision on any one of Petitioners’ claims—each of which concerns Arizona election laws—this Court should be the only court to weigh in, thus preventing the confusion and delay that would inevitably result from a lower court’s ruling.

Additionally, a ruling by a lower court simply would not suffice here because Petitioners, election officials, and voters require a speedy and final resolution of these claims, and there is no “equally plain, speedy, and adequate remedy by appeal.” RPSA 1. Because of the upcoming Arizona general election, which will occur months from now, it is in the state’s best interest for the Court to resolve on an expedited basis the serious issues Petitioners raise. Early voting begins October 12, 2022, for the State General Election to be held on November 8, 2022.⁶

If the Court grants Petitioners’ requested relief, election officials need time to adopt the uniform signature guidelines and to ensure there are sufficient polling places to replace drop-box and no-excuse mail-in voting. Commencing this action

⁶ Ariz. Sec’y of State, *Elections Calendar & Upcoming Events, 2022 Elections*, <https://azsos.gov/elections/elections-calendar-upcoming-events>.

in trial court would necessarily expand its duration and render it difficult, if not impossible, for election officials to comply with the law prior to the upcoming statewide election. Commencing this action in a lower court would also waste judicial resources by triggering an appeal—because even though a lower court could address these legal questions, only this Court can provide a final resolution. Thus, Petitioners lack an “equally plain, speedy, and adequate remedy by appeal.”

For these reasons, Petitioners respectfully request this Court to exercise its original jurisdiction over this special action and grant the expedited relief Petitioners seek.

Standing

Petitioner Cahill has standing as an Arizona citizen and voter. In *Arizona Public Integrity Alliance*, this Court held that “Arizona citizens and voters” have “sufficient beneficial interest to establish standing” in a mandamus action seeking to compel public officials to comply with state election laws. 250 Ariz. at 62 ¶ 12. Petitioner Cahill is an Arizona citizen and a registered voter⁷ seeking to compel the Secretary to perform her non-discretionary duty to include signature verification

⁷ Petitioner Cahill is a statutory officer (Secretary) of the AZGOP’s state committee. *See AZGOP, State Party, Elected Officers*, <https://azgop.com/directory/state-party>; A.R.S. § 16-827. As such, she is required by law to be a precinct committeeman (an elected party *and* public official), and being a registered Arizona voter is a statutory requirement to hold the office of precinct committeeman. *See* A.R.S. §§ 16-101, 16-821(A), 16-822(A), 16-825, 16-827.

guidelines in the EPM, to prohibit the Secretary and State from exceeding their legal authority by executing and enforcing invalid election laws, and to compel them to operate within the statutory and constitutional limitations of state election laws. Thus, Petitioner Cahill has standing to bring this challenge.⁸

Petitioner AZGOP has direct interests in the outcome of this litigation because state election laws establish its right and duty to monitor the early voting process against improprieties. *See, e.g.*, ARS §§ 16-621(A) & 16-552(C) & (H). Striking down as unconstitutional some or all of Arizona’s early voting statutes, and enjoining the Secretary’s unlawful acts, would affect these duties in regards to early ballots.

Petitioner AZGOP also has standing to assert the claims of its members in a representational capacity. *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 5–6 (1985). In Arizona, “cases such as this need not be determined by rigid adherence to the three-prong [standing] test of *Warth*, although those factors may be considered.” *Id.* at 6 (citing *Warth v. Seldin*, 422 U.S. 490

⁸ Petitioner Cahill also has standing as a taxpayer. As set forth below, mail-in voting is unconstitutional. Arizona funds the pre-paid postage for mail-in ballots. *See* A.R.S. § 16-542 (“The county recorder...shall mail the early ballot and the envelope for its return postage prepaid to the address provided by the requesting elector.”). Thus, the State is making illegal expenditures and will continue doing so unless compelled to follow the constitution. *See* *Rodgers v. Huckelberry*, 247 Ariz. 426, 429 ¶ 11 (App. 2019).

(1975)).⁹ “The issue in Arizona is [1] whether, given all the circumstances in the case, the association has a legitimate interest in an actual controversy involving its members and [2] whether judicial economy and administration will be promoted by allowing representational appearance.” *Id.*

Regarding the first *Armory* factor, the AZGOP has a legitimate interest in an actual controversy involving its members, which include voters and candidates. The Secretary’s failure to include signature verification procedures and her addition of drop-box procedures in the EPM (as well as her unlawful delegation of this authority to counties) compromises the uniformity of the election procedures under which the AZGOP’s candidates compete and implicates Petitioner’s ability to ensure its members are elected in a lawful process.¹⁰ Further, ensuring that Republican voters and candidates are elected pursuant to the laws and constitution of this state is germane to the AZGOP’s resolution to protect the “electoral process” by, *inter alia*, ensuring that all Arizona voters are required to prove their identities and qualifications¹¹ (e.g., via uniform signature verification procedures or by presenting identification, which voters cannot do at drop-box locations or via

⁹ The three factors are: (a) association members would have standing to sue in their own right; (b) the interests which the association seeks to protect are relevant to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members. For the reasons stated below, establishing standing under Arizona’s test, Petitioners also meet the *Warth* factors.

¹⁰ AZGOP, *Bylaws* at 1, <https://azgop.com/about/bylaws>.

¹¹ AZGOP, *Proposal 9*, <https://azgop.com/call/resolutions> (passed).

mail-in voting and which, under current election laws, they can do *only* “at the polls”).

Regarding the second factor, judicial economy and administration will be promoted by allowing representational appearance because the AZGOP is comprised of 1.5 million registered voters,¹² and it is not feasible to address their concerns through individual lawsuits. Thus, Petitioner AZGOP—like Petitioner Cahill—has standing to seek the requested special-action relief.

Statement of the Issues

1. Must the Arizona Secretary of State include uniform signature verification guidelines in the EPM pursuant to A.R.S. Title 16? RPSA 3(a).
2. Was/is the Secretary required to propound an EPM providing only statutorily and constitutionally authorized procedures for returning ballots? RPSA 3(a). Or was/is the Secretary instead without legal authority to prescribe “drop-box” rules in the EPM when those rules are not statutorily or constitutionally authorized? RPSA 3(b).
3. Was/is the State required to provide for a statutory voting system that conforms to the Arizona Constitution? RPSA 3(a). Or was/is the State instead without legal authority to enact, enforce, or facilitate unconstitutional

¹² Ariz. Sec’y of State, *Voter Registration Statistics – January 2022*, <https://azsos.gov/elections/voter-registration-historical-election-data>.

early (“absentee” or “no-excuse mail-in”) voting statutes? RPSA 3(b).

4. Alternatively, do Respondents abuse their discretion in doing any of the above? RPSA 3(c).

Statement of Facts

Because this petition asks the Court to resolve purely legal questions, there are no facts on record for the Court to review. All facts presented in the petition are derived from publicly available documents, statutes, and constitutional provisions. The essential facts of the case are these: (1) The Secretary has prescribed signature verification procedures via the 2020 Guide,¹³ which is not included in the EPM or an addendum thereto. (2) The Secretary has authorized the use of ballot drop-boxes in the EPM. *See* EPM at 60.¹⁴ (3) Arizona election laws provide for no-excuse mail-in voting.

Moreover, Petitioners do not assert any claims regarding election integrity or lack thereof. Instead, Petitioners argue that—based on the text of election materials (e.g., the EPM and the 2020 Guide), Arizona election statutes, and applicable constitutional provisions—the Secretary fails to perform a non-discretionary duty and exceeds her legal authority, and the State, without legal authority, is executing

¹³ This document also purports to authorize county recorders to supplement the Secretary’s procedures with their own. *See, e.g.*, 2020 Guide at 1.

¹⁴ Notably, the Secretary cites no statutory authority for drop-boxes as she does for other items in the EPM.

and enforcing unconstitutional election statutes rather than complying with the Arizona Constitution.

Argument

I. Signature Verification Guidelines Must Be Included in the EPM.

A.R.S. § 16-550 requires county recorders to ensure that signatures on mail-in ballot envelopes are valid by verifying that signatures on envelopes match electors' signatures on file in voter registration records. However, the statute itself does not establish procedures for such verification. Instead—"to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots"—A.R.S. § 16-452(A) delegates this responsibility to the Secretary, who must include these rules "in an official instructions and procedures manual" (i.e., the EPM) no later than December 31 of each year preceding the general election. A.R.S. § 16-452(A)–(B). Before its issuance, "the manual shall be approved by the governor and the attorney general," and the Secretary "shall submit the manual to the governor and the attorney general not later than October 1 of the year before each general election." *Id.* However, addenda may be added to the EPM outside of

this timeframe.¹⁵ “Once adopted, the EPM has the force of law; any violation of an EPM rule is punishable as a class two misdemeanor.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 63 ¶ 16; *McKenna*, 250 Ariz. at 473 ¶ 21.

Because invalid ballots may not be counted, A.R.S. § 16-609(A), it is imperative that election officials ensure the validity of signatures on all mail-in ballot envelopes. Thus, the Secretary’s failure to include the guidelines in the EPM is not only remiss but also perpetuates inconsistent and non-uniform signature verification procedures by allowing her and the various Arizona counties to create and change their own procedures at will, whatever those may be, without the safeguard of the Governor’s and the Attorney General’s approval.

Ensuring the validity of ballots in a uniform manner throughout Arizona is vital “to protecting the integrity of the electoral process.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 61 ¶ 41. Because the Secretary has failed to perform her duty to ensure that all mail-in ballot envelopes are verified in the same manner—thus achieving the maximum degree of correctness, impartiality, *uniformity* and efficiency” as required by A.R.S. § 16-452(A)—Petitioners urge this Court to compel the

¹⁵ See Ariz. Sec’y of State, *Arizona Election Laws & Publications*, <https://azsos.gov/elections/arizona-election-laws-publications> (linking to the [Electronic Adjudication Addendum to the 2019 Elections Procedures Manual](#) (“EPM Addendum”)). Note that in their cover letters, the Secretary, the Governor, and the Attorney General all conclude that adding an addendum to the EPM is lawful.

Secretary to include the guidelines in the current EPM, or an addendum thereto, and submit them to the Governor and Attorney General for review and approval.

II. The Secretary May Not Authorize Voting Via Drop-boxes.

The Arizona Constitution provides that “the powers and duties of Secretary of State...shall be as prescribed by law.” Ariz. Const. art. 5, § 9. *See also Chavez v. Brewer*, 222 Ariz. 309, 316 ¶ 17 (App. 2009). The Secretary—in the current EPM—has prescribed rules for county officials to “develop and implement procedures” for placing “unstaffed drop-box[es]” in various locations throughout the several counties. *See* EPM at 60–62. However, unlike virtually every other portion of the EPM, the Secretary cites no authority for prescribing drop-box rules. *Id.* Indeed, the Secretary lacks statutory authority to authorize drop-box voting and should be enjoined from doing so. *Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14 (Public officials may be enjoined from acts beyond their power.).

Arizona statutes provide only two ways for early voters to transmit ballots for tabulation: (1) delivering or mailing “*to the county recorder or other officer in charge of elections*” or (2) depositing “*at any polling place in the county.*” A.R.S. § 16-548(A) (emphasis added). Thus, early voters may deliver their ballots to the county recorder (or other officer) or deposit their early ballots “at any polling place in the county.” A drop-box is not an office of the county recorder, nor is it a “polling place.” Polling places are designated by county boards of supervisors.

A.R.S. § 16-411(B). Polling places have a “sufficient number of voting booths on which voters may conveniently mark their ballots screened from the observation of others.” A.R.S. § 16-404.

Moreover, although county boards may authorize “voting centers,” A.R.S. § 16-411 (B)(4), drop-boxes are also not voting centers—which, like polling places, are staffed so that a voter may present identification “to receive the appropriate ballot for that voter on election day.” A.R.S. § 16-411(B)(4).

A “county recorder may also establish any other early voting locations.” A.R.S. § 16-542(A). However, “other early voting locations” are also not drop-boxes because the statute states that “[a]ny on-site early voting location or other early voting location shall require each elector to present identification...before receiving a ballot.” *Id.* Electors cannot present identification at unstaffed drop-boxes.

As explained below, the Arizona Constitution never contemplated and does not authorize mail-in voting, much less a system by which voters deliver ballots to unstaffed drop-boxes. But even assuming, *arguendo*, that the constitution allows the legislature to authorize drop-boxes, the legislature has never enacted such a law. Thus, the Secretary exceeds her legal authority by prescribing drop-box rules. *See Ariz. Pub. Integrity All.*, 250 Ariz. at 62 ¶ 14. *See also Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 489 ¶ 26 (2006) (Governor’s veto

exceeded her constitutional authority and was therefore invalid.).

A.R.S. § 16-452 does not grant the Secretary authority to expand the scope of statutes such as A.R.S. § 16-548(A). *Leach v. Hobbs*, 250 Ariz. 572, 576 at ¶ 21 (2021) (EPM regulation exceeding scope of its statutory authorization or contravening an election statute’s purpose does not have force of law). And even if the legislature intended A.R.S. § 16-452 to authorize the Secretary to establish additional locations for returning early ballots, this would be an illegal delegation because “[i]t is a well settled principle of law that the state legislature may not delegate its power to make laws.” *Lake Havasu City v. Mohave Cty.*, 138 Ariz. 552, 559 (App. 1983) (citations omitted). By including EPM rules allowing voters to cast ballots at unsupervised drop-boxes, the Secretary is effectively authorizing drop-boxes, but only the legislature, if constitutionally permissible, may do so.

For these reasons, Petitioners request that the Court prohibit the Secretary from exceeding her legal authority by authorizing counties to use drop-boxes in the 2022 general election and beyond.

III. No-excuse Mail-in (or “Early” or “Absentee”) Voting Is Unconstitutional, Either in Whole or in Part; Alternatively, It Must Be Narrowly Construed to Conform to the Arizona Constitution.

In-person voting at the polls on a fixed date (election day) is the only constitutional manner of voting in Arizona. The Court found this to be obvious a year after the constitution was ratified. *See Allen*, 14 Ariz. at 460. Yet Arizona has

since implemented (and repeatedly expanded) absentee voting.

Although litigants have challenged various mail-in voting statutes on other grounds, the statutory scheme itself has never been directly challenged on state constitutional grounds or directly authorized by constitutional amendment. *But see, e.g., Bourland v. Hildreth*, 26 Cal. 161 (1864); *Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Chase v. Miller*, 41 Pa. 403 (1862); *Clark v. Nash*, 192 Ky. 594 (1921); *In re Contested Election*, 281 Pa. 131 (1924); *Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936); *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936) (successful constitutional challenges to absentee voting in other states). *See also* Fortier & Ornstein, *supra* at 496–500, 506–08 (explaining that several states amended their constitutions throughout the 1800s to expressly authorize mail-in voting, first for soldiers and again during the early 1900s in response to further constitutional challenges to expansions of absentee voting).

Petitioners now respectfully ask this Court to determine whether Arizona’s no-excuse mail-in statutory scheme is constitutional—to fulfill its “duty...to say what the law is,” *Marbury v. Madison*, 5 U.S. 137 (1803)—and to clarify for those who, like Petitioners, are intimately affected by election laws and seek guidance as to what the constitution presently allows. “The responsibility of determining whether the legislature has followed constitutional mandates that expressly govern its activities is given to the courts.” *Ariz. Sch. Bds. Ass’n v. State*, No. CV-21-

0234-T/AP, 2022 Ariz. Lexis 31, at *13 (Jan. 6, 2022) (describing this as the Court’s core duty). Whether or not the Court finds Arizona’s no-excuse mail-in voting statutes constitutional, it should articulate the constitutional authority for its holding and establish whether there are any limiting principles to that authority.

However, as detailed below, the constitution is plain that no-excuse mail-in voting is unlawful and must be struck down. And while it may be “regretted that so convenient, useful and popular legislation should be found in conflict with our basic law,” as the Kentucky Supreme Court remarked when striking down that state’s mail-in voting system as unconstitutional under a similar provision of Kentucky’s constitution, “[t]he only remedy is an amendment to the Constitution, which the people can have, if they wish, allowing the passage of an absent voters act.” *Clark*, 192 Ky. at 597–98 (interpreting in-person provision¹⁶ of state constitution). Kentuckians later ratified a constitutional amendment to allow for mail-in voting, and Arizonans may do the same. That, however, is a choice for the people, and not the legislature, to make.

A. Arizona Constitutional Provisions—by their Plain Meaning, History, and Initial Principles—Require In-person Voting *at the Polls on a Specific Day.*

“[I]f the Constitutional language is clear, judicial construction is neither

¹⁶ “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.” Ky. Const. § 147.

required nor proper.” *Perini Land & Dev. Co. v. Pima Cty.*, 170 Ariz. 380, 383 (1992). The text of the Arizona Constitution is clear that voting rights are to be exercised “at the polls”:

“Official ballot. When any initiative or referendum...shall be filed...with the secretary of state, he shall cause to be printed on the official ballot **at** the next regular general election the title and number of said measure, together with the words ‘yes’ and ‘no’ **in such manner that the electors may express at the polls** their approval or disapproval of the measure.”

Ariz. Const. art. 4, § 1(10) (emphasis added). The provision that voting is exercised “at the polls” appears in three other places. *See id.* at (1) (reserving to people the “power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments **at the polls**...and they also reserve...the power to approve or reject **at the polls** any” legislative act); *id.* at (3) (“Legislature, or five per cent of the qualified electors, may order the submission to the people **at the polls** of any measure...enacted by the Legislature[.]”); *id.* at (15) (“Nothing in this section shall be construed to deprive or limit the Legislature of the right to order the submission to the people **at the polls** of any measure, item, section, or part of any measure.”) (Emphasis added for all.)

The ordinary meaning of “polls” is “[o]ne of the places where the votes are cast at an election. The place of holding an election within a district, precinct, or other territorial unit.” *Polls*, Ballentine’s Law Dictionary (3rd ed. 2010). *See also* A.R.S. § 16-411(B) (polling places designated by county boards of supervisors);

id. at (J) (Secretary shall “provide for a method to reduce voter wait time *at the polls*” in primary and general elections) (emphasis added); A.R.S. § 16-404 (polling places have “sufficient number of voting booths on which voters may conveniently mark their ballots screened from the observation of others”); A.R.S. § 16-515(A) (prohibiting electioneering “inside the seventy-five foot limit while the polls are open”). Mail-in voting does not occur at a specific place designated by county boards or a place with a sufficient number of voting booths, regardless of where mail-in votes are actually tallied, and wait times and electioneering are irrelevant at one’s own home. Because no-excuse mail-in voting is not exercised at the polls, it is unconstitutional.

If the Court does not find that “at the polls” ordinarily means in-person voting at a specific polling place, it may apply principles of statutory construction. In interpreting constitutional and statutory provisions, courts give words their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended; accordingly, courts interpret statutory language in view of the entire text and consider the context in which it was used. *Fann v. State*, 493 P.3d 246, 255 ¶ 25 (Ariz. 2021) (quotations and citations omitted). Courts “also avoid interpreting a statute in a way that renders portions superfluous.” *Id.* “Each word, phrase, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial.” *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949).

“Constitutions, meant to endure, must be interpreted with an eye to syntax, *history*, *initial principle*, and *extension of fundamental purpose*.” *Saban Rent-a-Car LLC v. Ariz. Dep’t of Revenue*, 246 Ariz. 89, 95 ¶ 21 (2019) (quotations and citations omitted; emphasis added). *See also Chavez*, 222 Ariz. at 319 ¶ 32. Moreover, “[s]tatutes that are *in pari materia*—those of the same subject or general purpose—should be read together and harmonized when possible.” *David C. v. Alexis S.*, 240 Ariz. 53, 55 ¶ 9 (2016). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (Any word or phrase interpreted by a court “is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. It is also, however, part of an entire *corpus juris*.... Hence laws dealing with the same subject...should if possible be interpreted harmoniously.”). Keeping an eye to these principles, it becomes even more apparent the constitution not only requires in-person voting at the polls but also requires voting to be on election day.

For instance, although the “at the polls” provisions appear in article 4 (addressing the legislative department and reserving certain law-making powers to the people) of the constitution rather than in article 7 (addressing suffrage and elections), the “at the polls” language is not limited to elections on referenda and initiatives for the simple reason that referenda and initiatives are always decided “at the next regular general election.” Ariz. Const. art. 4, § 1(10). Moreover, these

provisions were adopted contemporaneously with the provisions in article 7. *See The Records of the Arizona Constitutional Convention of 1910*, 1402–05 & 1416–17 (John S. Goff ed., 1990) (documenting constitution as originally adopted in 1910). Thus, the framers intended all voting to occur at the polls. Additionally, specific provisions in article 7, discussed below, establish that *in-person* voting at the polls *on a fixed date* is the only constitutional manner of voting in Arizona.

1. Ariz. Const. art. 7, § 1

Article 7, section 1 provides: “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. 7, § 1 (emphasis added). As detailed below, the phrase “as may be prescribed by law” is not a broad and general grant of authority allowing the legislature to deviate from the Australian ballot system. Rather, the framers included the phrase “such other method” to allow the legislature to authorize voting machines in lieu of paper ballots. They included the phrase “[p]rovided, that secrecy in voting shall be preserved” to clarify that voting machines, if used, must adhere to the Australian ballot system.

A “ballot” is a printed implement of voting marked by electors to indicate their preferences. Ariz. Const. art. 4, § 1(10); A.R.S. § 16-502 (Title: “Form and contents of ballot”). *See also Ballot*, Ballentine’s Law Dictionary (3rd ed. 2010) (directing reader to also see “Australian ballot system”). An “election by ballot” is

“[n]othing less than an election by secret ballot.” *Id.* A “secret ballot” is a “method of election essential to the preservation of the integrity of the election. A secret method of voting at an election.” *Id.* “Secrecy in voting” is not limited to *privacy* in voting but, rather, is a term of art encompassing the understanding that voting by “secret ballot” is intended “to protect individual voters from coercion.” *See, e.g., McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 11 (2010). “Secrecy” thus refers to the “Australian ballot system.” To understand why the framers included this specific language in the constitution, it is helpful to look at the “history” and “initial principle[s],” *Saban Rent-a-Car*, 246 Ariz. at 95 ¶ 21, behind adoption of the Australian ballot system in the U.S.

In the late 1800s, the U.S. underwent a major election reform cycle inspired by a new Australian policy that allowed the government to control and standardize election procedures and ballot distribution. Prior to this reform, political parties and individuals created their own ballots, engendering a system rife with coercion and fraud and devoid of any consistent privacy or security standards. Derek T. Muller, *Ballot Speech*, 58 Ariz. L. Rev. 693, 696–697 (2016). As discussed above, the “Australian ballot system” requires that ballots: (1) be printed and distributed at public expense; (2) contain the names of all duly nominated candidates; (3) be distributed only by election officers *at the polling place*; and (4) contain detailed provisions to ensure secrecy in casting the vote. Fortier & Ornstein, *supra* at 488

(emphasis added).

Once voting by written ballot became standardized, confidential, and secure across the nation, the next major election reform cycle involved development of “absentee ballots,” which expanded the franchise to those unable to cast their ballots at their local polling places. *Id.* at 492. “The early impetus behind absentee balloting was war: making sure that soldiers on the battlefield were not disenfranchised by their military service.” *Id.* However, even advocates of absentee ballots were “cognizant of the tensions between the reforms that led to the Australian ballot and the absentee ballot, which was voted away from the polling place without its privacy protections.” *Id.* Because “absentee voting took place *away* from the voter’s home voting booth, there were serious questions about fraud and coercion, the same kind of concerns that had been the impetus behind the move to adopt the Australian ballot.” *Id.* (emphasis added). Recognizing this tension, many states in the early 1900s developed “elaborate provisions to safeguard voter privacy and the integrity of the ballot.” *Id.* at 492–493.

Notably, mail-in ballots, by their very nature, cannot be made entirely secret or free from coercion. If bad actors wish to pay for votes or coerce electors to vote a certain way, there is nothing to stop them from standing over electors as they complete their ballots. *See e.g., Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994) (Despite statutory prohibition, “District employees with

a pecuniary interest in the override’s passage delivered [absentee] ballots to electors whom they knew. Although these electors did not ask for ballots, school employees urged them to vote and even encouraged them to vote for the override. District employees went to the homes of the electors and stood beside them as they voted.”).

In Arizona, the legislature enacted absentee voting in 1925. *See* 1925 Ariz. Sess. Laws, ch. 75, § 1. As originally enacted, absentee voting extended only to a “qualified elector” who was “absent from the county of which he or she [was] an elector” or “who furnishe[d] the County Recorder with a doctor’s certificate that” the elector “[would] not, because of a physical disability, be able to go to the polls.” *Id.* To secure an absentee ballot and vote, electors had to prove identity by appearing before a “registration officer” or “Notary Public” and signing an affidavit. *Id.* at §§ 2–6. Thus, although absentee voting took place *away from the polls*, the law at least attempted to provide enough security measures—more so than a simple signature on the back of a ballot envelope, as the law presently allows—to guard against fraud and coercion while maintaining the “secrecy” of the ballot.

In 1991, the legislature expanded absentee voting from six categories of electors to “[a]ny qualified voter.” *See* 1991 Ariz. Sess. Laws, vol. 1, ch. 51 § 1. Simultaneously, it also removed the witness requirement for the affidavit, thus

eradicating a great deal of the prior law’s protections against coercion and fraud and, throwing the baby out with the bathwater, further erasing the initial principles underlying the American ballot system (modeled on the Australian system).¹⁷

The current law, codified at A.R.S. § 16-541 *et seq.* and titled “Early Voting,” expands voting such that any elector, without excuse, may vote early, by mail, and at random voting places—none of which are constitutionally authorized—as discussed in Part B below. Indeed, a Pennsylvania appellate court recently struck down Pennsylvania’s “no-excuse mail-in voting” system, which “created the opportunity for all Pennsylvania electors to vote by mail without having to demonstrate a valid reason for absence from their polling place on Election Day, i.e., a reason provided in the Pennsylvania Constitution.” *McLinko*, 2022 Pa. Commw. Lexis 12, at *4. The court based its reasoning on three constitutional provisions like those found in Arizona’s constitution.

First, article 7, section 1 of the Pennsylvania Constitution provides that electors “shall have resided in the election district where he or she shall offer to vote.”¹⁸ *Id.* at *9 (quoting Penn. Const. art. 7, § 1). The *McLinko* court explained

¹⁷ If this Court finds that federal constitutional concerns (e.g., 14th Amendment and Supremacy Clause) make striking all absentee voting improper, Petitioners suggest below that the Court strike the 1991 and post-1991 amendments to absentee voting rather than declaring that all absentee voting is unlawful. Any such concerns should not be implicated in the system existing prior to 1991.

¹⁸ *Compare with* Ariz. Const. art. 7, § 2 (irrelevant portions omitted; emphasis added):

that the Pennsylvania Supreme Court, in striking down the state’s prior military absentee voter law in 1862, had already construed the words “offer to vote by ballot” as meaning “to present oneself, with the 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.” *Id.* at *10–11 (quoting *Chase*, 41 Pa. at 419).

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.

Id. at *12 (quoting *Chase*, 41 Pa. at 419). Further, the “constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district.” *Id.* “Mail-in ballots present particular challenges with respect to ‘safeguards of honest suffrage.’” *Id.* at *13 n.12 (quoting *Chase*, 41 Pa. at 419).

Following the *Chase* court’s decision, Pennsylvania amended its constitution in 1864 to permit electors in military service to vote by absentee ballot. *Id.* at *13 (citing Penn. Const. art. 3, §4 (1864)). However, as the *McLinko* court explains, the Pennsylvania Supreme Court invalidated another iteration of absentee voting in

No person shall be entitled to vote ***at any general election***... unless such person... shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters ***at a general election*** for the purpose of electing presidential electors shall be as prescribed by law.

1924 because the constitution limited absentee voting to active military, “concluding that the election should be determined solely on the basis of ballots cast in person on Election Day.” *Id.* at *14 (citing *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924)).

Next, the *McLinko* court detailed the historical background and initial principles underlying Article 7, section 4 of the Pennsylvania Constitution, which provides that “[a]ll 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.” *McLinko*, 2022 Pa. Commw. Lexis 12, at *16–24 (quoting Penn. Const. art. 7, § 4). That provision is nearly identical to article 7, section 1 of Arizona’s constitution: “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. 7, § 1.

The *McLinko* court explained that the provision, adopted in 1901, derives from the Australian ballot reforms, noting that the “1901 amendment guaranteed the secrecy of the ballot, both in its casting and in counting. ‘[T]he cornerstone of honest elections is secrecy in voting. A citizen in secret is a free man; otherwise, he is subject to pressure and, perhaps, control.’” *McLinko*, 2022 Pa. Commw. Lexis 12, at *21 (quoting *In re Second Legislative District Election*, 4 Pa. D. & C. 2d 93, 95 (1956)). The court also noted that “such other method” was included to

authorize “mechanical devices” (i.e., voting machines) in lieu of paper ballots at polling places. *Id.* at *23–24. *See also* Goff, *supra* at 559–60 (documenting that Arizona’s framers similarly fashioned article 7, section 1 to preserve state’s ability to adopt voting machines).

Finally, the *McLinko* court analyzed Article 7, section 14 of the Pennsylvania Constitution, the amendment authorizing military and other absentee voting after the *Chase* court struck down absentee voting prior to the constitutional amendment. Because Arizona’s constitution has not been amended, the analysis is largely irrelevant to Petitioners’ argument here. However, importantly, the court noted that “Pennsylvania and many other states recognized that absentee voting by the military conflicted with the ‘constitutional provisions for in person voting, and undertook to amend their state constitutions in order to pass appropriate legislation.”” *McLinko*, 2022 Pa. Commw. Lexis 12, at *26. Again, Arizona has not amended the constitution to enable the legislature to create methods of voting other than by paper ballots or voting machines at the polls on election day. To the contrary, as Petitioners explain below, the constitution contains several other provisions which make it plain that voting is to be *in person* at the polls on a specific day.

Moreover, as the *McLinko* court explains, logic dictates that the phrase “such other method” cannot be read “to authorize a system of no-excuse mail-in voting to

be conducted from any location.” *Id.* at *36. “To begin, ‘such other method’ is limited to one that is ‘prescribed by law,’” including the fundamental law “that voting must be in person except where there is a specific constitutional exception” pursuant to article 7, section 4. *Id.*

The court rejected “the suggestion that ‘the law’ in Section 4 refers only to the legislature’s work product and not to the Pennsylvania Constitution.” *Id.* Further, the court explained, “the Supreme Court could have, but did not, state that ‘such other method’ included voting by mail, a system in existence and used for military absentee voting at the time *Lancaster City* was decided.” *Id.* Instead, the phrase “such other method” authorized mechanical devices at the polling place. *Id.* (citing *Lancaster City*, 126 A. at 201). The better reading is that the phrase indicates “a type of voting that takes place at the polling place, so long as it preserves secrecy.” *Id.*

Relevant to the argument here, the *McLinko* court concluded that “such other method as prescribed by law” could not be interpreted to authorize *mail-in* voting for two reasons. *Id.* at *38. “First, no-excuse mail-in voting uses a paper ballot and not some ‘other method.’” *Id.* The same is true for mail-in voting in Arizona. *See, e.g.,* A.R.S. § 16-541(A) (“Any election called pursuant to the laws of this state shall provide for early voting. Any qualified elector may vote by early ballot.”). Second, such an interpretation divorces the phrase from the remainder of article 7

“as well as its historical underpinnings,” ignoring “the in-person place requirement that was made part of [the] fundamental law” when the constitution was amended to include the “offer to vote” provision. *McLinko*, 2022 Pa. Commw. Lexis 12, at *38. The same reasoning applies here. As further discussed below, articles 7 and 4 of Arizona’s constitution also contain several other provisions establishing an “in-person place requirement,” and those provisions were adopted to maintain the integrity of elections.

2. Ariz. Const. art. 7, § 2

Article 7, section 2 is comparable to the “offer to vote” language found in the elector qualification provisions of the Pennsylvania Constitution: “No person shall be entitled to vote *at any general election*...unless such person...shall have resided in the state for the period of time preceding such election...provided that qualifications for voters *at a general election* for the purpose of electing presidential electors shall be as prescribed by law.” Ariz. Const. art. 7 § 2 (emphasis added).

The meaning of the words “at any general election” or “at a general election” is plain. The first two definitions of the word “at” are (1) a preposition “used to show an exact position or particular place”; (2) a preposition “used to show an exact or particular time.”¹⁹ The words “at a general election” thus refer to

¹⁹ *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/at>.

the *exact place and time of the general election* and are just as explicit as the words “where he or she shall offer to vote by ballot” as construed in *McLinko*. See *McLinko*, 2022 Pa. Commw. Lexis 12, at *10–13 (quoting Penn. Const. art. 7, § 1 and interpreting the words to mean “to present oneself, with the 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”).

To interpret the words “at a general election” to encompass mail-in voting is illogical. Nevertheless, Arizona’s legislature has continued to expand the time for both voting and counting early ballots, allowing electors to fill out their ballots at any place they choose and at any time from “twenty-seven days before the election” to election day. See A.R.S. § 16-542(A) (On-site “early voting locations...shall be open and available for use beginning the same day that a county begins to send out the early ballots.”); *id.* at (C) (“[E]arly ballot distribution shall not begin more than twenty-seven days before the election.”); A.R.S. § 16-548(A) (Early voter may deposit ballot at “any polling place in the county” on election day.). Tallying of ballots may begin immediately. A.R.S. § 16-550(B). On the other hand, under some circumstances, Arizona’s early voting statutes do not *require* election officials to even open early voting envelopes, let alone begin tabulating ballots, until five business days after election day. A.R.S. 16-550(A). There is nothing “exact” or “particular” about this timing.

3. Ariz. Const. art. 7, § 4

Article 7, section 4 provides: “Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their *attendance* at any election, and in going *thereto* and returning *therefrom*.” Ariz. Const. art. 7, § 4 (emphasis added).

“Attendance” is defined as “[p]hysical presence plus freedom to perform the duties of an attendant.” *Attendance*, Ballentine’s Law Dictionary (3rd ed. 2010).

The plain meaning of “thereto” is “to the thing just mentioned.”²⁰ The plain meaning of “therefrom” is “from that or from there; from a thing or place that has been previously mentioned.”²¹ Accordingly, the words “attendance at,” “thereto,” and “therefrom” in section 4 can be read thus: “Electors shall...be privileged from arrest during their *physical presence* at any election, and in going *to any election* and returning *from any election*.”

As with article 7, section 2, it is illogical to interpret the words in section 4 to encompass mail-in voting because Arizona’s early voting statutes allow electors to fill their ballots anywhere and do not require physical presence at any election on a specific day, as discussed above. In fact, even in 1991, the mail-in statutes were entitled “absentee voting,” meaning that the elector did *not* have to be

²⁰ *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/thereto>.

²¹ *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/therefrom>.

physically present. *See* 1991 Ariz. Sess. Laws, vol. 1, ch. 51 § 1.

Because mail-in voting does not require physical attendance at the polls on election day, it is impossible for “[e]lectors...*in all cases*...[to] be privileged from arrest during their attendance at any election, and in going thereto and returning therefrom,” Ariz. Const. art. 7, § 4 (emphasis added), rendering this provision void, inert, or trivial. Yet “[e]ach word, phrase, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial.” *Yates*, 69 Ariz. at 72.

4. Ariz. Const. art. 7, § 5

Article 7, section 5 provides: “No elector shall be obliged to perform military duty *on the day of* an election, except in time of war or public danger.” Ariz. Const. art. 7, § 5 (emphasis added). The words “on the day of an election” are self-explanatory and plainly refer to an election that takes place on a particular day. Furthermore, if the constitution provided for absentee voting, it would render this provision without purpose. Courts avoid interpreting statutes and constitutional provisions “in a way that renders portions superfluous.” *Fann*, 493 P.3d at 255 ¶ 25. “Each word, phrase, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial.” *Yates*, 69 Ariz. at 72.

Importantly, Petitioners are not challenging Arizona election statutes that implement the Uniformed and Overseas Citizens Absentee Voting Act, because providing for absentee voting for soldiers is now expressly required by federal law.

See 52 U.S.C. § 20301 *et seq.* However, this provision still serves to illuminate the framers' original intent in this regard.

5. Ariz. Const. art. 7, § 11

Article 7, section 11 provides: “There shall be a general election of Representatives in Congress, and of State, county, and precinct officers *on the first Tuesday after the first Monday in November* of the first even numbered year after the year in which Arizona is admitted to Statehood and biennially thereafter.” Ariz. Const. art. 7, § 11 (emphasis added). As with article 7, section 5, this provision is self-explanatory and plainly mandates that the general election must take place on a specific day. See *Sherman v. City of Tempe*, 202 Ariz. 339, 343–44 ¶¶ 14–20 (2002).

In *Sherman*, this Court held that “the Arizona Constitution and Arizona’s election statutes employ the word ‘election’ to refer to a particular day.” *Id.* at 343 ¶ 19. The Court explained that the constitution “states that ‘there shall be a *general election*...on the first Tuesday after the first Monday in November,” and “A.R.S. section 16-211 provides for a *general election* on the first Tuesday in November.” *Id.* at 343–44 ¶ 19 (citing Ariz. Const. art. 7, § 11 and A.R.S. § 16-211 (1996)). Thus, the Court held, “according to the Constitution and Arizona election statutes, elections occur on one particular date and the term ‘election’ refers to that date.” *Id.* at 344 ¶ 19.

As explained above, Arizona’s mail-in voting statutes allow electors to cast their ballots up to twenty-seven days before election day. Thus, voting, return, and tabulation of early ballots need not occur on election day, that is, “*on the first Tuesday after the first Monday in November* of the first even numbered year....” Ariz. Const. art. 7, § 11 (emphasis added). Yet “according to the Constitution and Arizona election statutes, elections occur on one particular date and the term ‘election’ refers to that date.” *Sherman*, 202 Ariz. at 344 ¶ 19. If the constitution allows the definition of election day to be stretched so far, is there a limiting principle? Or may the legislature constitutionally authorize mailing and counting of ballots for the next general election to begin the day after the last election? The simple answer is that early voting, in its present form, violates the Arizona Constitution.

B. “Early Voting” Is Contrary to Secure, In-person Voting at the Polls on a Specific Day and Is Therefore Unconstitutional.

Article 7 of the Arizona Constitution establishes the supreme law of the state regarding suffrage and elections. Sections 1, 4, 5, and 11 of article 7—which have remained unchanged since they were first adopted in 1910—make it plain that the framers intended elections to be secure and in person at a specific voting location (at the polls) on a specific day every other year. The provisions in article 4, part 1, section 1 of the constitution, which require that voting be done “at the polls,” further support this plain-meaning construction of the constitution.

Construing together *in pari materia* all the constitutional provisions of article 4 and article 7, the constitution makes it plain that elections are to be in person at the polls on a specific day. Elections held in this manner, in conformance with the initial principles underlying the Australian ballot system (the system the state adopted in 1912 when it ratified the constitution), protect the integrity of elections by preventing the possibility of coercion and fraud and by providing consistent privacy and security standards. *Muller, supra* at 696–697.

C. In the Alternative, “Early Voting” Must Be Construed Narrowly to Conform to the Arizona Constitution.

As discussed above, the “Australian ballot system” contains four essential provisions. Fortier & Ornstein, *supra* at 488. Currently, Arizona’s early voting statutes do not incorporate the final two essential provisions: (3) ballots distributed only by election officers *at the polling place* and (4) detailed provisions to ensure secrecy in casting the vote. *Id.* (emphasis added). It would be inappropriate for this Court to consider the factual question of whether alternative safeguards would be adequate to achieve the goal of protecting the integrity of elections. Arizona’s framers have already made a determination that is conclusive on this point unless and until the constitution is amended. Accordingly, Petitioners ask this Court to declare A.R.S. § 16-541 *et seq.* unconstitutional and enjoin the State from enforcing no-excuse mail-in voting statutes.

Petitioners recognize that the Secretary might argue that, even if absentee

voting is wholly prohibited by Arizona’s constitution, the complete abolition of absentee voting would raise other issues under the U.S. Constitution. The Arizona Constitution recognizes that in certain cases its provisions might conflict with those of the U.S. Constitution, Ariz. Const. art. 2, § 3, and this Court has already addressed how such conflicts are to be handled. *See e.g., US W. Communs., Inc. v. Ariz. Corp. Comm’n*, 201 Ariz. 242, 246 ¶ 23 (2001) (“Whenever possible...we construe the Arizona Constitution to avoid conflict with the United States Constitution and federal statutes.”). Therefore, even if this Court concludes that striking all early voting would run afoul of federal constitutional requirements, it must still strike the 1991 amendment, which adopted no-excuse absentee voting, *see* 1991 Ariz. Sess., vol. 1, Laws, ch. 51 § 1, as well as subsequent expansions of the no-excuse absentee voting system, as unconstitutional.

To the extent, if any, the U.S. Constitution requires some form of absentee voting (e.g., for those who are physically unable to make it to the polls), Arizona’s pre-1991 system of absentee voting *with excuses* was sufficient to satisfy such requirements. Immediately prior to the 1991 adoption of Arizona’s current no-excuse system, “absentee voting” statutes authorized absentee voting for (1) electors expected to be absent from their precincts on election day, (2) electors physically unable to go to the polls, (3) electors 65 years of age or older, (4) electors living more than 15 miles from their polling places, (5) electors unable to

attend the polls on election day because of their religion, and (6) electors with visual defects. 1991 Ariz. Sess. Laws, ch. 51 § 1. In addition to limiting absentee voting to those with qualified excuses, the pre-1991 law required electors to validate their excuses by swearing before an “officer empowered to administer oaths” to receive a ballot. *Id.* Additionally, when filling out their ballots, electors were required to swear before an officer that they were qualified electors and personally voted their ballots. *Id.*

By requiring electors to appear before an official empowered to administer oaths and requiring electors to prove their identities and swear that they personally voted their ballots, the law maintained some of the protections of the Australian ballot system, specifically, (3) ballots distributed *only by election officers* at the polling place and (4) detailed *provisions to ensure secrecy in casting the vote*. Fortier & Ornstein, *supra* at 488 (emphasis added).

If the Court does not find that Arizona’s early voting statutes (A.R.S. § 16-541 *et seq.*) are entirely unconstitutional, the Court should, at minimum, construe the statutes narrowly to conform to the Arizona Constitution. Specifically, Petitioners ask this Court to:

1. in the alternative to declaring that mail-in voting is entirely unlawful, declare that the 1991 amendment providing for no-excuse mail-in voting is unconstitutional, strike it, prohibit election officials from

enforcing the 1991 amendment, and compel election officials to enforce this constitutional restraint; and/or

2. declare that tabulation of votes may not occur prior to election day, prohibit election officials from doing so, and compel election officials to enforce this constitutional restraint; and/or
3. declare that voting on initiatives and referenda may only occur “at the polls,” prohibit election officials from allowing electors to vote on initiatives and referenda by mail, and compel election officials to enforce this constitutional restraint; and/or
4. declare that drop-boxes are unconstitutional because they are not polling places, prohibit election officials from implementing drop-boxes, and compel them to enforce this constitutional restraint; and/or
5. declare that early voting is constitutional only if voters personally cast their ballots at the polls, prohibit election officials from implementing mail-in voting, and compel election officials to abide by this constitutional restraint; and/or
6. provide such other relief as may be just and proper.

Conclusion

Petitioners request that this Court accept original and special action jurisdiction and grant them the relief they are requesting by: (1) ordering the Secretary to include the Signature Verification Guide in the current EPM or an addendum thereto and submit it to the Governor and Attorney General for their review and approval; (2) prohibiting the Secretary from authorizing drop-boxes in the 2022 general election and beyond; (3) either striking down no-excuse mail-in voting as unconstitutional or providing the alternative relief Petitioners request in Part C above. Arizona’s election officials must not continue to run Arizona elections however they see fit. For when public officials “change the law based on their own perceptions of what they think it *should* be, they undermine public confidence in our democratic system and destroy the integrity of the electoral process.” *Ariz. Pub. Integrity All.*, 250 Ariz. at 61.

Attorney Fees

Petitioners request attorney fees and costs pursuant to Ariz. R. Civ. App. P. 21, A.R.S. § 12-2030, the private attorney general doctrine, *see Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 371 (App. 1991), and other applicable law.

RESPECTFULLY SUBMITTED this 25th day of February 2022.

Davillier Law Group, LLC

By /s/ Veronica Lucero

Alexander Kolodin

Veronica Lucero

Roger Strassburg

Arno Naeckel

Attorneys for Petitioners

VERIFICATION

A.R.S. § 12-2021 states: “A writ of mandamus may be issued by the supreme or superior court...on the **verified complaint** of the party[.]” (emphasis added). RPSA 1(a), however, states: “[A]ny reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule. Special forms and proceedings for these writs are replaced by the special action provided by this Rule[.]”

RPSA 7 provides: “A special action brought in any appellate court shall be initiated by the filing of a petition in the form prescribed by this rule.” RPSA 7 does not mention a complaint or verification.

The facts set forth in the petition to which this verification is attached are all readily ascertainable from sources for which this Court may take judicial notice. Further, as set forth above, it no longer appears that verification is required. However, in an abundance of caution, I verify that the facts set forth therein are true and correct to the best of my knowledge and belief.

DATE: 2/25/2022

PRINTED NAME: Yvonne Cahill

SIGNATURE:

DocuSigned by:

2818147F0CE74D7...

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of February 2022, a copy of the foregoing Petition for Special Action was sent via email. Hand-delivery to be completed on February 28, 2022. It is addressed to the following:

Sambo (Bo) Dul
General Counsel
Arizona Secretary of State
bdul@azsos.gov
Office: 602-542-8683
1700 W Washington St.
Phoenix, AZ 85007

Jennifer Wright
Assistant Attorney General
Office of the Arizona Attorney General
Solicitor General's Office
Elections Integrity Unit
Jennifer.Wright@azag.gov
2005 North Central Ave.
Phoenix, AZ 85004

Greg Jernigan
General Counsel
Arizona Senate
gjernigan@azleg.gov
1700 W Washington St.
Phoenix, AZ 85007

Andy Pappas
General Counsel
Arizona House of Representatives
apappas@azleg.gov
1700 W Washington St.
Phoenix, AZ 85007

/s/Yuka Bacchus
Davillier Law Group, LLC