

SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN PARTY, a
political party; and YVONNE CAHILL,
an individual,

Petitioners,

v.

KATIE HOBBS, in her official capacity
as Arizona Secretary of State; and
STATE OF ARIZONA, a body politic,

Respondents.

Arizona Supreme Court

No. CV-22-0048-SA

BRIEF OF AMICI CURIAE ARIZONA VOTING RIGHTS ADVOCATES

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Per ARCAP 16(b)(1)(A), Arizona Voting Rights Advocates: Arizona Democracy Resource Center, the Arizona Center for Disability Law, Arizona Center for Empowerment, ADRC Action, Arizona Wins, Fuerte Arts Movement, Living United for Change in Arizona, Mi Familia Vota, One Arizona, Planned Parenthood Arizona, Planned Parenthood Advocates of Arizona, Poder in Action, and Rural Arizona Engagement hereby file this brief as amici curiae in support of Respondents. The parties have consented to the filing of amicus briefs.

INTEREST OF AMICI CURIAE

Amici curiae are organizations or coalitions encouraging civic engagement and promoting state-level policy change through a variety of techniques, including, protecting voting rights, encouraging voter registration, supporting “get out the vote” (GOTV) efforts, advocating for changes directly to legislators and directly to voters. They seek to improve public policy for working families, impacted communities, and others whose voices are too often not heard by protecting and encouraging their participation in the electoral process.

Amicus curiae the Arizona Center for Disability Law (ACDL) is the federally-mandated Protection and Advocacy (P&A) agency for people with disabilities in Arizona. 42 U.S.C. § 10801 *et seq.* This mandate grants ACDL

authority to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of [people with disabilities] within the State.” 29 U.S.C. § 794e(f)(3) (2014); *see also* 42 U.S.C. § 15043(2)(A)(i) (2004) (granting the same authority concerning the rights of people with developmental disabilities), 42 U.S.C. § 10805(1)(B) (2016) (granting the same authority concerning the rights of people with mental illness). Addressing discrimination and eliminating barriers to voting for Arizona voters with disabilities is a crucial ACDL priority.

More details on specific amicus curiae is provided in the Appendix.

ARGUMENT

Arizona became a state with a strong desire to empower voters. It incorporated direct democracy and expansive voting rights in its structure like other 20th Century Progressives. Consider two issues that loomed large in Arizona’s pending statehood: Judicial Recall and Women’s Suffrage. The former resulted in President William Taft vetoing Arizona’s first bid for admission into the union. Following President Taft’s veto, a conditional resolution was passed allowing Arizona to enter the Union on the condition that it removed recall of judges from its Constitution. 47 CONG. REC. 1245 (statement of Mr. Martin of Colorado). During the Second Arizona Constitutional Convention in 1910, many advocated for Women’s Suffrage to be included, but Governor Brodie objected because he thought it would

jeopardize the bid for statehood with President Taft. *Women's Suffrage*, Ariz. State Library, Archives, and Public Records, <https://azlibrary.gov/dazl/learners/research-topics/womens-suffrage> (last visited Mar. 15, 2022) App'x at 1-2. Thus, on December 12, 1911, Arizonans accepted a compromise that led to a constitution without the direct democracy component of judicial recall, in response to the explicit conditions of the resolution for entering the union, and limiting voting to men only, in anticipation of another rebuke from the federal government.

On April 27, 1912, the first act of the Arizona Legislature was to refer an amendment to its constitution to the citizens restoring the right to recall judges. The first exercise of initiative power by our new state was to collect signatures and put to the voters the question of women's suffrage. On November 5, 1912, Arizonans approved both amendments, thereby returning the recall of judges to the Constitution and granting women suffrage, effective December 1912. *See* Notes for Ariz. Const. art. VII, §2, and art. VIII, Pt. 1 § 1. Thus, it is not surprising that our founders were prescient in granting broad authority to the legislature to use “such other method as may be prescribed by law,” for ensuring the right to vote to all eligible electors in the process of conducting elections. Ariz. Const. art. VII, § 1.

Reading Arizona's constitution to restrict the right to vote of millions

of Arizonans, to *de facto* disenfranchise many of them, is as offensive to the principals of Arizona's founders as it is contrary to the plain reading of our Constitution.

A. Early Voting and Mail Voting Are Essential to Voter Access

Early voting, both in person and by mail, is the method by which most Arizonans vote. Publicly available statistics show that by large margins most Arizonans chose to vote early. Based on information provided by Arizona County Recorders via the Voter Action Network, there are 4,351,446 registered voters in Arizona. Of those 4.3 million voters, 3,254,830 have signed up for the early voting list, meaning that they receive automatically an early ballot. Similarly, based on data from the Arizona Secretary of State's Office, in 2020 of the 2,974,643 votes cast, 3,420,565 were cast by some means of early voting.

The Citizens Clean Elections Commission (CCEC) confirms this, writing, "Ballot by mail has been available in Arizona for over two decades. In the 2020 General Election, approximately 89% of ballots cast were early ballots. As the majority of Arizona voters already choose this method to vote, the infrastructure and security measures are well in place to ensure ballots are safe and secure." *Vote By Mail*, CCEC, <https://www.azcleelections.gov/how-to-vote/early-voting/vote-by-mail> (last visited Mar. 15, 2022) App'x at 3. Voter Education Director for the

Citizens Clean Elections Commission Gina Roberts reported to the CCEC on January 27, 2022, that even during the COVID outbreak of 2020, Arizona saw a record breaking 80% turnout. *Reporter's Transcript of Virtual Public Meeting*, CCEC (January 27, 2022) 1, 16, App'x at 9. She noted during her testimony that “really we’re seeing 11 percent of our voters across the state are actually showing up on election day. . . . Arizona has had ballot by mail for three decades now. It’s what voters are using.” *Id.* at 17, 20, App'x at 13-14.

These “other method[s] as may be prescribed by law,” drop boxes, early in-person voting, and mail-in voting, have completely eclipsed in-person, Election Day voting as the means by which Arizonans cast their vote. That is true for all Arizonans.

B. Disadvantaged Communities Are Particularly Impacted.

Disadvantaged Arizonans are particularly impacted by the change to voting practices advocated for by Petitioners. The working poor are more susceptible to have transportation and scheduling issues interfere with in-person, Election Day voting. Groups protected by the Voting Rights Act similarly are potentially disadvantaged by narrowing the time and method by which a vote may be cast. Finally, voters protected by the Americans with Disabilities Act can experience significant barriers to voting that will be exacerbated if drop box and mail-in voting is prohibited. These real-world

impacts should give the Court pause when it entertains the very strained legal arguments proposed by Petitioners.

1. Voters with lower incomes are especially impacted.

Low-income individuals, regardless of party affiliation, vote in lower numbers than those of higher income. *Voting and Registration in the Election of November 2020*, Table 7, United States Census Bureau,

<https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> (last visited Mar. 15, 2022), App’x at 58-61.

Researchers have begun monitoring this by assessing the cost of voting, creating the Cost of Voting Index. *See, e.g.*, Scot Schraufnagel, Michael J. Pomante II, and Quan Li, Cost of Voting in the American States: 2020, 19 *Election Law J.* 503 (2020), App’x at 62-68. A definitive study on this topic specifically tracked twelve factors within the broader category of “voting inconvenience” that is essentially a description of the relief sought by Petitioners:

- No early voting
- Excuse required for absentee voting
- No in-person absentee voting
- No “ask once and always able to vote absentee”
- No time off from work for voting
- No time off from work with pay for voting
- No all-mail voting
- Reduced number of polling stations since 2012
- Reduced number of stations more than 50% some areas
- Age and other restrictions on absentee voting
- No state holiday for Election Day

- No voting centers

Scot Schraufnagel, Michael J. Pomante II, and Quan Li, Cost of Voting in the American States: 2020, 19 Election Law J. 503, 505 (2020), App'x at 64.

Raising the cost of voting necessarily has a disproportionate impact on low-income voters.

An August 11, 2020, story in the New York Times noted, “People with low incomes who are eligible to vote are much less likely to do so in national elections than those with higher incomes, and are more often constrained from casting ballots by transportation issues, illness or other problems out of their control.” Matt Stevens, Poorer Americans have much lower voting rates in national elections than the nonpoor, a study finds, N.Y. Times, Aug. 11, 2020, at 1, App'x at 69; *See also* Robert Paul Hartley, Unleashing the Power of Poor and Low-Income Americans: Changing the Political Landscape, Aug., 2020, at 9, App'x at 79.

These studies demonstrate the profound impact that can be anticipated for low-income voters when barriers to access are erected.

2. Voters covered by the Voting Rights Act are especially impacted.

Facially neutral changes to voting procedures have long been recognized to have disparate impact on voters based on race. The United States Supreme Court explained in *United States v. Bd. of Comm'rs of Sheffield, Ala.*,

The core of the [Voting Rights] Act “is a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant.” Congress resorted to these stern measures because experience had shown them to be necessary to eradicate the “insidious and pervasive evil of [racial discrimination in voting] that had been perpetuated in certain parts of the country.” Earlier efforts to end this discrimination by facilitating case-by-case litigation had proved ineffective in large part because voting suits had been “unusually onerous to prepare” and “exceedingly slow” to produce results. And even when favorable decisions had been obtained, the affected jurisdictions often “merely switched to discriminatory devices not covered by the federal decrees.”

435 U.S. 110, 118 (1978) (internal citation omitted). Eliminating early voting threatens to bring about the “insidious and pervasive evil,” that was the target of the VRA in 1965. Other courts have held as much. In Florida, considering much less than complete elimination of early voting, the District Court for the District of Columbia wrote, “As an initial matter, we find that minority voters will be disproportionately affected by the changes in early voting procedures because they disproportionately use early in-person voting.” *Fla. v. United States*, 885 F. Supp. 2d 299, 322 (D.D.C. 2012).

Similarly, the United States Court of Appeals for the Fourth Circuit considered changes in voting procedure, including “the reduction in days of early voting,” holding that these changes “were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act,” and thus enjoining

the changes. *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 219 (4th Cir. 2016). While discriminatory intent is not at issue in the instant case, that reducing early voting would be one manifestation of the North Carolina Legislature’s discriminatory intent demonstrates the potential for Petitioner’s proposed changes to decades of Arizona voting procedures to have a disproportionate impact on minority voters.

Indeed, restricting drop boxes, in-person early voting, and mail-in voting are precisely the types of changes that, in a post pre-clearance regime, have caused many scholars to raise the specter of *de facto* voter suppression. See Edward K. Olds, More than “Rarely Used”: A Post-Shelby Judicial Standard for Section 3 Preclearance, 117 Colum. L. Rev. 2185, 2187 n.14 (collection of voter suppression and voter intimidation reports) (2017), App’x at 95. Of course, the impact of an election law change is a fact intensive inquiry, and if nothing else, the above cited material demonstrates that the Court should not grant Petitioners the relief sought without providing an opportunity for the collection of evidence to evaluate its impact.

3. Voters covered by the Americans with Disabilities Act are especially impacted.

Eliminating mail-in and early in-person voting in Arizona would disproportionately impact people with disabilities, making it far more difficult to vote and further marginalizing one of Arizona’s historically disadvantaged

demographics.

Most people with disabilities vote by mail-in and via early in-person voting. A large majority of voters with disabilities (74%) voted using a mail-in ballot or early in-person in 2020; “[t]his represents a significant increase from 2012 and is higher than the two-thirds of non-disabled voters who did so in 2020.” Dr. Lisa Schur and Dr. Douglas Kruse, *Disability and Voting Accessibility in the 2020 Elections: Final Report on Survey Results Submitted to the Election Assistance Commission*, Rutgers University, Program for Disability Research, 1, 1 (February 16, 2021), App’x at 136.

In the 2020 election, the use of mail-in ballots was higher for voters with disabilities across all major disability types. Dr. Lisa Schur and Dr. Douglas Kruse, *Fact sheet: Disability and Voter Turnout in the 2020 Elections*, 1, 4, App’x at 188. The difference is even more pronounced among particular demographic groups; a survey following the 2020 election showed that 61% of people with developmental disabilities voted by mail and a further 25% by early voting, with only 13% voting in-person on election day. *Experience Survey Results – “Power of the Disability Vote,”* SABE GoVoter Project, 2021, 1, 60, App’x at 258. Most participants—individuals with all types of disabilities—voted by mail-in or absentee ballot in the 2020 General Election. *Id.* at 41, App’x at 239. “Voting by mail increased during the pandemic for people both with and without disabilities, and voters with disabilities continued to be more likely to use this option.” *Fact Sheet: 2020*

Elections at 1, App’x at 185. Some voters with disabilities also face higher health risks voting in-person due to infectious diseases, as exemplified by the COVID-19 pandemic. See *People with Certain Medical Conditions*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited March 15, 2022), App’x at 430-445.

People with disabilities who vote in-person face more barriers than those who vote by mail, such as architectural barriers and lack of poll worker training. A nationwide survey taken after the 2020 election found that voters with disabilities were much more likely to experience difficulty voting in-person, with 18% of voters with disabilities reporting difficulty voting in-person compared to just 5% who had difficulty using a mail-in ballot. *Fact Sheet: 2020 Elections* at 3 App’x at 187.

While Title II of the Americans with Disabilities Act (ADA) requires polling places be accessible for voters with disabilities (see *infra* at 4-5), the reality is that many barriers at polling places persist.

A Government Accountability Office (GAO) report of a survey sampling polling places in the 2016 General Election found that 60% of polling places had one or more potential impediments outside and inside the voting area, and that 65% of polling places had a voting station with “an accessible voting system that could impede the casting of a private and independent vote.” *Voters With Disabilities, Observations on Polling Place Accessibility and Related Federal Guidance*, GAO-18-4 (Oct. 2017), App’x at 447-522. A 2018 Advisory Memorandum to the U.S.

Commission on Civil Rights surveyed members of Arizona’s disability community, finding that poll workers lacked knowledge on how to operate accessible voting machines, machines did not have the option to change or view access options, and that polling locations were inaccessible as many lacked wheelchair ramps, elevators, or sufficient accessible parking spaces. *Voting Rights in Arizona*, U.S. Commission on Civil Rights (July 2018), App’x at 523-540.

Eliminating voting by mail will lead to more barriers and lower voter participation among people with disabilities. Studies have shown that a reduction in voting barriers is linked to increased participation among people with disabilities.

Dr. Lisa Schur and Dr. Douglas Kruse, *Fact Sheet: Disability and Voting Access Policies in 2020*, 1, 4,

https://smlr.rutgers.edu/sites/default/files/Documents/Centers/Program_Disability_Research/FactSheet_Disability_State_Voting_Access_Rules_2020.pdf (last accessed March 10, 2022) App’x at 541-545.

Since most people with disabilities voted by mail and barriers persist at polls, state and local governments will be responsible for providing more reasonable modifications to ensure access to polling places if voting by mail is eliminated. State and local governments must ensure access to the voting process for voters with disabilities. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination against people with disabilities in any service, program, or activity that receives federal financial assistance (29 U.S.C. § 794), and the ADA prohibits

discrimination in public services, including voting. 42 U.S.C. §§ 12131-12132.

Under these federal laws, Arizona voters with disabilities are entitled to reasonable modifications to ensure they have access to the ballot and can exercise their fundamental right to vote. *See* 28 C.F.R. § 35.130(b)(7)(i) (ADA) (public entities must “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity”); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (“an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers...to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made,” discussing analysis Section 504’s requirements in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

If mail-in voting were to be eliminated in Arizona, those voters with disabilities who used mail-in or early ballots will instead have to come in person to the polls in order to vote. While some voters with disabilities may not require reasonable modifications to vote, many do. Such modifications can range from assistance reading and marking a ballot, accessible polling booths, curbside voting, provision of aids such as magnifying devices, special election board delivery of ballots, and assistance with operating accessible voting machines, among countless

others. If voting by mail is eliminated, state and local governments holding the election will be responsible for providing reasonable modifications that were unnecessary when voters with disabilities voted by mail.

C. Community Groups' Voter Registration and GOTV Programs Were Developed Assuming Early and Mail-in Voting.

Many of the amici filing this brief have all begun to develop, and in some cases execute, programs designed to increase voter registration and voter turnout. Literally millions of dollars have been committed to these programs that are in the field now—voter registration drives—and prepared to launch soon—get out the vote drives. With the massive preference of all Arizonans to voting by mail, these programs obviously cater to that function.

Amici One Arizona and Arizona Wins! have developed \$15 million and \$3 million budgets respectively to register voters and encourage those voters to participate in the 2022 General Election. Similarly, amici Living United for Change in Arizona and Arizona Center for Empowerment have plans to register 100,000 new voters and increase voter turnout among “low efficacy” voters, including millions of young, Latinx, black and women of Arizona, also with a budget of approximately \$3 million. Amici Fuerte Arts Movement, Poder in Action, and Mi Familia Vota have also begun developing GOTV plans. All of these plans were developed with the expectation of drop boxes, early in-person voting, and mail-in voting being available.

As Amicus Instituto notes, voter education takes time. With perpetual changes to election law, voters, especially new voters must overcome misinformation and disinformation campaigns in addition to other tangible barriers to voting. In 2020, Instituto received over 500 inquiries about voting requirements and logistics, and over 90% of those inquiring were in full-time jobs that prevented them from voting on Election Day.

State agencies other than the Secretary's Office are promoting participating in mail in voting. Most prominently, the Citizens Clean Elections Commission. *Vote By Mail*, CCEC, App'x at 3-8. On its website, the CCEC provides:

Voting by mail is a safe and secure process that's easy for you, the voter. Learn how to get on the Active Early Voting List (AEVL) for all eligible elections or request a ballot by mail for a specific election.

Id. App'x at 3. Ms. Roberts testified that the Commission had funded research to develop voter education programs in odd numbered years, and that they were working with an outside consultant firm to execute their voter education plans already—assuming the presence of mail in and early voting. *Reporter's Transcript of Virtual Public Meeting*, CCEC (January 27, 2022) 1, 23, App'x at 15. The plan described in Ms. Roberts' testimony is over \$3 million. *Id.* at 35, App'x at 18.

Millions of state and private dollars committed and spent on educating

voters on the current system of voting should also give the Court pause before upending the decades long practice of allow voting through drop boxes, early in-person voting and mail-in voting—each one an example of an “other method as may be prescribed by law,” for conducting Arizona elections. Ariz. Const. art. VII, § 1.

CONCLUSION

For the foregoing reasons, the above-named amici ask that this Court deny Petitioner’s relief and thereby protect the voting rights of Arizonans.

Respectfully submitted this 15th day of March, 2022.

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Pursuant to ARCAP Rule 14, the undersigned certifies that Amici's **CURIAE BRIEF** does not exceed 3500 words, is double-spaced and in 14-point font.

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Pursuant to ARACP Rule 16, the undersigned certifies that all parties have provided a blanket consent in writing for amicus briefs in the above captioned matter.

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