

SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN PARTY, a)	
recognized political party, and)	
YVONNE CAHILL, an officer and)	
member of the Arizona Republican)	No. CV-22-0048-SA
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.)	
)	

BRIEF OF AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF ARIZONA¹

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¹ The parties have consented to the filing of amicus briefs.

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Pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(1)(A), the League of Women Voters of Arizona (“LWVAZ”) hereby files this amicus curiae brief in opposition to the petition.

Statement of Interest

LWVAZ is a non-partisan, grassroots political organization that encourages informed and active participation in the democratic process. For nearly a century, LWVAZ has dedicated its efforts to protecting and promoting the democratic processes of government through public service and robust voter education and registration. LWVAZ consists of both a statewide organization and five local chapters with 800 members statewide, and ninety percent of the members use early voting. Thus, the elimination of early voting will directly harm the organization and its members.

LWVAZ participates in educating voters about upcoming elections, including the dates and deadlines for early in-person and mail-in voting, as well as the availability of drop box voting in the state, works to encourage individuals to vote, and participates in statewide coalitions with other organizations that share similar goals.

The organization envisions a democracy where every person has the desire, the right, the knowledge, and the confidence to participate. LWVAZ uses many tools

to achieve these goals, and when its consensus-building and lobbying efforts have proven insufficient, it has participated in litigation.

LWVAZ believes that its long history of promoting democracy lends it a unique perspective as an amicus curiae. LWVAZ volunteers help tens of thousands of citizens in Arizona register to vote, check their registration status, update their information, and navigate the system of early in-person and mail-in voting. During the COVID-19 pandemic, LWVAZ provided Arizona citizens with vital voting information through online platforms like VOTE411.org and printed materials, including voter guides.

LWVAZ continues to encourage Arizona voters to cast their ballot via the mechanism that is safest and most convenient for them, using any of the available early voting options that have been available for decades in Arizona and any of the options to apply for and return a ballot. LWVAZ's goal to enfranchise all eligible voters would be severely hindered by suddenly declaring all early voting unconstitutional. Eliminating early voting in the state will cause enormous confusion for Arizona voters who have come to rely on the options that have long been available to them. Eliminating early voting will depress turnout and discourage voters from participating in the electoral process.

1. This special action petition does not meet the high bar for this Court's original jurisdiction, and taking this case would undermine voters' and officials' settled expectations.

Filed just three months before ballots for the August primary election will be mailed out, this special action petition seeks a tectonic shift in the way Arizona conducts its elections. Petitioners assert various constitutional challenges to Arizona election laws and request that this Court hear this case in its original jurisdiction. Rule of Procedure for Special Actions 7(b) requires the petitioners to set forth “the circumstances” that “render it proper that the petition should be brought in the particular appellate court to which it is presented.” This Court has made clear that the circumstances justifying the exercise of its original jurisdiction must be “exceptional” and that such cases are “rare.” *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 486 ¶ 11 (2006) (“Because of these exceptional circumstances, we conclude that this is one of those rare cases that justify the exercise of our special action jurisdiction.”). This case does not meet that standard.

Petitioners argue that their challenge:

(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.

Pet. 8. However, these are features of all election law cases. They do not justify invoking this Court’s original jurisdiction, which is reserved for rare cases with exceptional circumstances.

First, many constitutional challenges to election laws involve pure questions of law and questions of first impression. Second, all election law cases involve the rules and procedures by which voters, candidates, and parties compete for public offices and power; they are necessarily and uniformly “matters of substantial public impact.” Consequently, they are vigorously contested and controversial. Third, there is always an election approaching faster than the speed of the typical case, but Arizona’s legislature and courts have never treated all election law cases as deserving of expedited treatment. *See, e.g., Quality Educ. & Jobs Supporting I–16–2012 v. Bennett*, 231 Ariz. 206, 207 ¶ 2 (2013) (rejecting plaintiffs’ request to expedite case after finding that expedited appeals rule “applies only to election-related cases designed by statute for expedited consideration on appeal” and noting that the case at hand “[did] not fall within that category”).

There is clearly nothing unique or exceptional about this challenge to Arizona election laws and Respondent Secretary of State Katie Hobbs’s actions. If this action “require[s] a final resolution on an expedited basis because there is no ‘equally plain, speedy, and adequate remedy by appeal,’” Pet. 8, then any challenge to election laws could plausibly be filed in this Court. Petitioners have failed to advance any limiting

principle for this Court’s original jurisdiction in the election law context. The absence of any such limitation will have consequences for future election law disputes.

Petitioners also contend that “[b]ecause 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.” Pet. 9 (emphasis added). However, the possibility of stays or reversals on appeal cannot be the basis for this Court exercising its original jurisdiction because such case development is part and parcel of litigation, and the impact on the public is considered by appellate courts in deciding whether to grant a stay of any relief issued by the trial court. *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410 ¶ 10 (2006) (listing stay factors, including whether “public policy favors the granting of the stay”). If this election law challenge might sow confusion among voters if it proceeds like a normal case in the trial court, then that would be true of every case that involves the rules of registering and casting a ballot.

If Petitioners truly cared about minimizing voter or election administrator confusion, Pet. 5, then they would not be seeking such a radical and dramatic change in the way Arizona conducts its elections just three months before ballots are mailed out for the August 2 primary. 52 U.S.C. § 20302(7) (mandating mail-in ballots be

sent to military and overseas voters at least 45 days before an election unless an exception applies). This is precisely what the U.S Supreme Court has cautioned against—radical changes to registration and voting rules close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (“Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”); *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 368 (9th Cir. 2016) (“[T]he concern in *Purcell* and *Southwest Voter* was that a federal court injunction would disrupt long standing state procedures.”). Some of the Justices have also suggested that a sliding-scale framework should govern the issuance of injunctions or stays close to an election, such that larger, more complex and disruptive changes must be made farther in advance of an election. *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 n.1 (2022) (Kavanaugh, J. and Alito, J., concurring) (“How close to an election is too close may depend in part on the nature of the election law . . . Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement.”). Regardless of the parties’ views on the merits of these claims, they must agree that the relief sought here would work the most radical change of Arizona election rules and procedures in a generation. Such a case should work its way through the state court system so that these extremely novel arguments can be thoroughly tested.

Further, Petitioners have not proceeded with diligence to file this action at the earliest possible moment. This case obviously should not have been filed so close to impending elections. When this Court has taken a special action in its original jurisdiction, it has typically been a challenge to **recent** actions by the legislature, a state agency, or the governor. For this reason, the eight cases Petitioners proffer are very poor analogues for the instant suit, as each of those cases involved exigent circumstances and the need for a quick resolution, not challenges to longstanding rules. *See City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 208–09 ¶¶ 3–7 (2019) (reviewing scope of Arizona Corporation Commission’s statutory authority over eminent domain proceedings three months after ACC ordered a public utility to apply for approval of condemnation of its assets); *Dobson v. State, ex rel., Comm’n on App. Ct. Appointments*, 233 Ariz. 119, 121–22 ¶¶ 4–8 (2013) (determining constitutionality of recently enacted legislation that would have altered Arizona’s judicial nomination process for appellate vacancies); *Ariz. Indep. Redistricting Comm’n v. Brewer*, 229 Ariz. 347, 350–51 ¶¶ 9–14 (2012) (reviewing Arizona Independent Redistricting Commission’s challenge to governor’s removal power, filed three days after governor removed Commission’s chairperson); *Brewer v. Burns*, 222 Ariz. 234, 236–37 ¶¶ 4–5, 7–9 (2009) (analyzing governor’s petition for order directing the legislature to immediately present final budget bills one day after legislature rejected governor’s request); *Citizens for Growth Mgmt. v.*

Groscost, 199 Ariz. 71, 71–72 ¶¶ 1–2 (2000) (striking part of Arizona Legislative Council’s summary analysis of initiative proposal three months before November election); *Randolph v. Groscost*, 195 Ariz. 423, 427 ¶¶ 14–15 (1999) (establishing a severability test for initiative measures after voters approved a measure concerning legislative salaries and legislators’ per diem reimbursements in the most recent election); *Rios v. Symington*, 172 Ariz. 3, 5 (1992) (reviewing state senate president’s challenge to governor’s vetoes and revision orders from most recent special session); *Adams v. Bolin*, 77 Ariz. 316, 317–18 (1954) (determining sufficiency of a candidate’s nomination papers for impending primary election). Importantly, the instant petition presents significantly different circumstances, where the petition requests that this Court overturn Arizona’s early voting laws at least **thirty-one years** after Arizona adopted no-excuse absentee voting and over a century after absentee voting was first adopted.²

Arizona has had no-excuse absentee (now early) voting for three decades, *see* 1991 Ariz. Sess. Laws, vol. 1, ch. 51 § 1, and by-excuse absentee voting for over a century beginning in 1918. 1918 Ariz. Sess. Laws, ch. 11, § 1. The Election Procedures Manual has included instructions for drop box delivery of ballots since

² In 1997, absentee voting was relabeled “early” voting. A.R.S. § 16-541, *as amended by* 1997 Ariz. Sess. Laws, ch. 5, § 17.

at least 2019.³ The Arizona Republican Party cannot claim that it has just realized these voting rules violate the Arizona Constitution and Arizona statutes and argue the state’s highest Court must act immediately before fast-approaching elections. That is not a proper invocation of this Court’s original jurisdiction. These claims could have been filed at any point last year, and some could have been filed decades earlier.

Ultimately, if this Court agrees to hear this case, there will be long-term consequences for the resolution of election law disputes and for this Court’s docket. It would openly invite litigants challenging election laws to sit on their claims and delay filing until an election is closer, bootstrapping themselves into exigent circumstances. *Cf. Feldman*, 843 F.3d at 369 (“[U]nlike the circumstances in *Purcell* and other cases, plaintiffs did not delay in bringing this action.”). Accepting jurisdiction here would invite repeated attempts to file election law actions in this Court. Even though this Court’s exercise of original jurisdiction is discretionary, it wastes this Court’s time and resources to even consider such petitions and dismiss those that do not meet the high bar for this Court’s original jurisdiction. Forcing election law litigants, absent exceptional circumstances, to proceed in the trial court,

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

confers some stability upon election administration and can serve as a deterrent to frivolous lawsuits.

Because Petitioners have failed to demonstrate why their petition bears the exceptional circumstances that would justify this Court taking it now in its original jurisdiction, this action should be dismissed under Rule of Procedure for Special Actions 7(b).

2. Eliminating early voting will have a broad, harmful effect on Arizona voters by withdrawing a whole spectrum of easily accessible means for casting and returning ballots.

Arizona has long been a trendsetter in conducting elections by mail. Many states have used Arizona and other vote-by-mail states as models for how free and fair elections can and should be conducted.

On the legality of drop boxes, Petitioners argue that depositing an early ballot in a drop box does not constitute “deliver[ing] or mail[ing a ballot] to the county recorder or other officer in charge of elections.” A.R.S. § 16-548(A); Pet. 17. Petitioners point out that “[a] drop-box is not an office of the county recorder.” Pet. 17. That fact is irrelevant though because Section 16-548(A) does not use the word “office.” Petitioners may not rewrite the statute, which does not specify the means of delivery to the county recorder and certainly does not mandate in-person or mail delivery to the county recorder’s office.

Beyond the lack of authority for Petitioners' claim, withdrawing the option to deliver a ballot via a drop box will hurt countless voters, particularly those who rely on them for their accessibility. A variety of different groups of voters will be disproportionately burdened by this change. Many voters living in rural areas would need to drive many more miles to deposit a ballot if drop box use is eliminated. For example, voters in the Village of Oak Creek used to drive either 20 miles roundtrip to Sedona (40 minutes) or 40 miles roundtrip (60 minutes) to Cottonwood until a drop box was installed in Oak Creek in 2020. The elimination of drop boxes would add an unreasonable burden in forcing voters to drive long distances to deliver their ballots.

Many voters, such as working voters, self-employed workers who lose pay when they do not work, and voters with daytime family obligations including child or elder care, need access to drop boxes, which permit delivery outside of regular business hours. Often located near county buildings and fire stations, they are used by voters of all political persuasions, and collection from these boxes is conducted by a bipartisan team according to standardized rules and procedures. 2019 EPM, *supra* n.3, at 61–62.

Drop boxes have become particularly necessary as the reliability of on-time U.S. Postal Service delivery has deteriorated over the last few years.⁴ One press report noted that over 1,400 ballots arrived on the Wednesday and Thursday after Election Day in 2020 and, by Arizona law, could not be counted.⁵ Voters who live in areas with unreliable mail service, such as Native American communities, need ballot drop boxes as a secure alternative to USPS delivery. Recent administrative and cost-cutting measures at USPS have undermined its performance around general elections when the volume of ballots is highest.⁶ Ballot drop boxes remove mail delivery uncertainties from the return process and save counties money in unpaid postage. Accordingly, drop boxes offer reliable, convenient, and secure options to return a ballot.

But not only have Petitioners sought to eliminate one means to return an early ballot; they have requested that this Court invalidate all early voting. This change

⁴ Jacob Bogage & Christopher Ingraham, “USPS processed 150,000 ballots after Election Day, jeopardizing thousands of votes” WASH. POST (Nov. 6, 2020), available at <https://www.washingtonpost.com/business/2020/11/05/usps-late-ballots-election/>.

⁵ *Id.*

⁶ Erin Cox, *et al.*, “Postal Service warns 46 states their voters could be disenfranchised by delayed mail-in ballots,” WASH. POST (Aug. 14, 2020), https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html; Bryan Naylor, “Delays Still Plague Mail Deliveries As Election Day Nears,” NPR (Oct. 31, 2020), <https://www.npr.org/2020/10/31/929826650/delays-still-plague-mail-deliveries-as-election-day-nears>.

would make Arizona stand alone as the only state to require that all voting occur in person on Election Day.⁷ There is a simple reason why there are zero states in the country that refuse to offer at least absentee voting by excuse. Early voting is a crucial mechanism to provide equal access to the ballot for all citizens. Working and lower-income voters, particularly those with children and other dependents, have less flexible schedules. Early voting has the potential to help ease the competing burdens on their time by providing people with more choices about when and how they can vote. Turning back the clock on Arizona’s steady election modernization would also make access to voting less equal across racial groups and classes. Low-income Arizonans—amongst whom minority voters are disproportionately represented⁸—have less flexible work schedules and may lack reliable transportation to the polls.

⁷ See National Conference of State Legislatures, “Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options,” *available at* <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

⁸ Kaiser Family Foundation, Poverty Rate by Race/Ethnicity (Arizona in 2019), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?dataView=0¤tTimeframe=0&selectedDistributions=white--black--hispanic--asiannative-hawaiian-and-pacific-islander--american-indianalaska-native--multiple-races--total&selectedRows=%7B%22states%22:%7B%22arizona%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

Other groups of voters that would face disenfranchisement and declining turnout in the absence of early and mail voting include voters who lack transportation to the polls and voters who for reasons of illness or disability cannot travel to the polls or who have exceedingly limited or no accessible options for transportation. Older voters who do not drive, including many retirees and those living in nursing homes and residential care facilities, depend upon mail-in voting. Additionally, in many rural areas, voters live far from their assigned polling place and therefore rely on a mailed early ballot. Mail voting equalizes access to the ballot across urban, suburban, and rural communities, as well as across different racial and ethnic communities. Voters in northern and central communities, including voters living on reservations, depend on early voting. For people with limited access to transportation to the polls, they may be able to secure a ride on certain days but not on Election Day; they may have no way to travel to the polls but regularly pick up their mail at a P.O. Box. These are the kinds of practical difficulties and foreseeable harms that Petitioners ignore.

The data underscore how heavily Arizona voters rely on the early voting system. For the August 2020 primary, 88 percent of Arizona voters used an early ballot.⁹ For the November 2020 general election, 2,886,464 early ballots were cast,

⁹ Christopher Conover, “Arizona’s long history with voting by mail,” ARIZONA PUBLIC MEDIA (Aug. 21, 2020), *available at*

representing 84.4 percent of all ballots cast in the state.¹⁰ Eliminating early voting will have a devastating effect on our democracy by disenfranchising voters. Voting by mail is proven, long-established, and very popular.

Moreover, one might think eliminating early voting would reduce costs, but the opposite is true. One fiscal analysis of a proposed ballot initiative in Utah has determined that forcing most voters to vote in person “would cost local governments a total of \$36.8 million in one-time costs and another \$19.2 million every year thereafter.”¹¹ At bottom, what early voting does best is alleviate the strain on finite Election Day resources, including human, technological, and material resources. Early voting shortens Election Day lines, reduces stress on the system, improves poll worker performance, lowers the risk of error, and improves voter satisfaction for both in-person and mail-in early voters.

Finally, a further consequence of this special action, if successful, would be the loss of local control to conduct typically lower-turnout special district elections

<https://news.azpm.org/p/newsfeature/2020/8/21/178857-arizonas-long-history-with-voting-by-mail>.

¹⁰ NBC News, “Arizona Election Results 2020,”

<https://www.nbcnews.com/politics/2020-elections/arizona-results>; Nonprofit Vote and US Elections Projects, *America Goes to the Polls 2020*, at 30, <https://www.nonprofitvote.org/wp-content/uploads/2021/03/america-goes-polls-2020-7.pdf>.

¹¹ Bryan Schott, “Eliminating Vote by Mail Could Make Utah Election Costs Skyrocket,” THE SALT LAKE TRIBUNE (Jan. 5, 2022), <https://www.sltrib.com/news/politics/2022/01/05/eliminating-vote-by-mail/>.

in a cost-effective way. A.R.S. § 16-558 *et seq.* This change would also necessarily reduce engagement and participation in local elections.

For all the foregoing reasons, Petitioners' quest to end early and mail voting in Arizona, or, at a minimum, undo drop box delivery of ballots, is badly misguided. It will have foreseeable and cascading negative effects on the state's currently well-functioning and heretofore forward-thinking election system.

Conclusion

LWVAZ respectfully requests that this Court decline to exercise its original jurisdiction and dismiss this special action or, alternatively, reject the petition in full on the merits.

RESPECTFULLY SUBMITTED this 15th day of March, 2022.

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1 The undersigned certifies that the Brief of Amicus Curiae League of Women
2 Voters of Arizona uses type of at least 14 points, is double-spaced, and contains
3 3,459 words.
4

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