

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.

Arizona Supreme Court
No. CV-22-0048-SA

**BRIEF OF *AMICUS CURIAE* KRIS MAYES
IN SUPPORT OF KATIE HOBBS**

FILED WITH WRITTEN CONSENT OF THE PARTIES

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Introduction

“The question for consideration is one of power and not of policy.” *State v. Osborne*, 14 Ariz. 185, 207 (1912). And that question is not, as Petitioners assert, whether the Arizona Constitution *authorizes* absentee or early voting, but rather does it *prohibit* the Legislature from enacting such voting methods. The answer is unavoidable: No. The Arizona Constitution does not prohibit absentee or early voting. To the contrary, the Arizona Constitution vests the Legislature with broad discretion to establish voting methods, and the Legislature has properly exercised that constitutional authority. Petitioners’ claims find no support in text or history. This Court should reject them.

Interests of *Amicus Curiae*¹

Kris Mayes served as an Arizona Corporation Commissioner from 2003 to 2010, including as the Commission’s Chairwoman for two years. She is now running for the Democratic nomination in the 2022 Arizona Attorney General race. As a former elected statewide official and current candidate for Attorney General, she has a strong interest in ensuring that all Arizonans may fully exercise their constitutional right to vote, including through Arizona’s longstanding statutory framework governing absentee or early voting.

¹ Under Arizona Rule of Civil Appellate Procedure 16(b)(3), the counsel below certifies that no persons or entities provided financial resources for preparing this brief.

Argument

I. **Unless expressly limited, the People and the Legislature retain plenary authority under the Arizona Constitution.**

Petitioners err at the threshold of their claims. Searching for an express grant of legislative power (and purporting to find none), they ask this Court to “articulate what, if anything, the Arizona Constitution authorizes regarding absentee voting, the source of this authority, and any applicable limiting principles.” Pet’rs’ Br. 5. Petitioners fundamentally misunderstand Arizona’s constitutional scheme.

“Our state constitution, unlike the federal constitution, does not grant power, but instead limits the exercise and scope of legislative authority.” *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶ 13 (2013). Accordingly, this Court does not look “to the constitution to determine whether the legislature is authorized to act.” *Id.* (citation omitted). Rather, the Arizona Constitution is “a vesting of *all* power.” *Adams v. Bolin*, 74 Ariz. 269, 281 (1952). The People and the Legislature thus have “plenary power to deal with any topic unless otherwise restrained by the Constitution.” *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 26 (2009); *see Strode v. Sullivan*, 72 Ariz. 360, 365 (1951) (“In the absence of a constitutional or lawful restriction, the legislature has full power to act[.]”).

By looking for authorization for absentee or early voting, Petitioners’ reasoning is exactly backwards. The People and the Legislature need no such grant of power—it is Petitioners who must identify a clear constitutional prohibition. *See*

Osborne, 14 Ariz. at 191 (“If the Constitution had remained silent . . . the power of the Legislature . . . would have been absolute.”); *Earnhart v. Frohmler*, 65 Ariz. 221, 224-25 (1947) (“[E]xcept for those things necessarily inhibited by the Federal or state constitution, the state legislature may pass any act[.]”); *The Records of the Arizona Constitutional Convention of 1910*, at 446 (John S. Goff ed., 1990) (Mr. Mulford Winsor: “I want to point out that our constitution is one of limitations, and that the legislature or the people can do whatever they are not specifically prohibited from doing.”). This principle is the touchstone for constitutional interpretation and “the prism through which all government actions must be assessed.” *Johnson Utilities, LLC v. Ariz. Corp. Comm’n*, 249 Ariz. 215, 234 (2020) (Bolick, J., concurring and dissenting in part).

Petitioners’ claims are thus doubly wrong. Not only does the Arizona Constitution lack an express prohibition on absentee or early voting, it also *expressly allows* the Legislature to establish the method of voting in elections in Arizona.

II. The Arizona Constitution does not prohibit absentee or early voting.

“In a democracy suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded.” *Harrison v. Laveen*, 67 Ariz. 337, 342 (1948). The Arizona Constitution reflects that truth, providing that “[a]ll elections shall be free and equal” and prohibiting interference with “the free exercise of the right of suffrage.” Ariz. Const. art. II, § 21. Indeed, the “most

constant thread running through the Arizona Constitution is its emphasis on democracy, on popular control expressed primarily through the electoral process.” John D. Leshy, *The Arizona State Constitution*, at 14 (2d ed. 2013); see *Ariz. Minority Coal. for Fair Redist. v. Ariz. Indep. Redist. Comm’n*, 220 Ariz. 587, 595 ¶ 20 n.7 (2009) (recognizing that voting rights are “fundamental rights”).

The Arizona Constitution addresses the method of voting in Arizona: “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. VII, § 1. Nothing in that provision reflects any intent by the framers to prohibit the Legislature from enacting an absentee or early voting statutory scheme. To the contrary, article 7, section 1, expressly grants the Legislature discretion over the method of voting in elections. To start, it provides that voting must be by “ballot.” Absentee or early voting is, of course, by “ballot.” *Absentee Ballot*, Black’s Law Dictionary (11th ed. 2019). But in any event, under section 1, the Legislature has broad authority to establish other methods of voting as it sees fit. See *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 130 ¶ 8 (2020) (“prescribed by law” means by statute).

The Legislature’s authority to determine the method of voting is constrained in only one way: “secrecy in voting [must] be preserved.” Ariz. Const. art. VII, § 1. By its terms, the secrecy requirement does not bar absentee or early voting and does

not require that voting occur on any particular day. In fact, existing “regulations on the distribution of absentee and early ballots *advance* Arizona’s constitutional interest in secret voting, ‘by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation.’” *Feldman v. Ariz. Sec’y of State’s Off.*, 843 F.3d 366, 372 (9th Cir. 2016) (emphasis added) (quoting *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994)) (internal citation omitted); *see also* A.R.S. §§ 16-545(A)(2), 16-548(A), 16-552(F) (securing the secrecy of absentee or early voting).

The secrecy requirement “was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting.” *Peterson v. City of San Diego*, 666 P.2d 975, 978 (Cal. 1983). Without an express limitation to the contrary, this Court should not “assume that the secrecy provision was designed to serve a purpose other than its obvious one of protecting the voter’s right to act in secret, when such an assumption would impair rather than facilitate exercise of the fundamental right.” *Id.*²

² Contrary to Petitioners’ uncited assertions (at 26), the framers’ adoption of the Australian ballot does not mean they adopted the entire Australian system. Arizona’s territorial legislature adopted the secret ballot 19 years before the constitutional convention. Leshy, *supra*, at 16. Had the framers wished to incorporate other elements, the Constitution would have said so expressly. *See* Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468 (2012) (“The framers had the opportunity to ponder more than 100 years of United States history

In over a century of the Legislature providing for some form of absentee or early voting, this Court has never even hinted that those statutes might violate the secrecy requirement. And for good reason. The framers knew how to limit the right to vote, and they did so clearly when they wanted to. *See* Ariz. Const. art. VII, § 2(A) (citizenship and age limitations); art. VII, § 2(C) (incapacitation and felony convictions limitations); art. VII, § 12 (requiring the Legislature to enact registration laws). Had the framers intended to prohibit anything other than in-person voting at the polls on election day, they would have said that. They did nothing of the sort. Their “silence on the constitutional provision on the right of the legislature to authorize” absentee or early voting cannot “be construed as an implied prohibition

before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona’s needs.”).

Moreover, Australia has allowed “voting by post” under certain circumstances since 1902, and further expanded access in 1918. Commonwealth Electoral Act of 1902, Part X; Commonwealth Electoral Act of 1918, Part XII. Today, Australia allows early, mail, and mobile voting. AEC, Voting Options, https://www.aec.gov.au/Voting/ways_to_vote/ (last visited March 12, 2022). Indeed, “[d]espite the compulsory nature, Australia has tried to make elections as easy as possible for voters by nominating Saturday as election day, providing easy-to-find polling stations, and allowing absentee voting.” Amanda Kelley Myers, *Importing Democracy: Can Lessons Learned From Germany, India, and Australia Help Reform the American Electoral System?*, 37 Pepp. L.Rev. 1113, 1150 (2010).

against the same.” *Cox v. Superior Ct. in & for Pima Cnty.*, 73 Ariz. 93, 96-97 (1951).³

With no prohibition to cite, Petitioners cobble together a scattershot of provisions to attempt to make the point. But their strained interpretations only reinforce that the framers did not address absentee or early voting, let alone prohibit it. Take first Petitioners’ reliance on article 7, sections 2, 4, and 5. Pet’rs’ Br. 25, 34-38. From these provisions, Petitioners gather that “voting is to be in person at the polls on a specific day.” Not so. Petitioners contort the straightforward purposes of these sections to mean much more than they say. Section 2 addresses qualifications to vote. Ariz. Const. art. VII, § 2. Section 4 protects electors from arrest. Ariz. Const. art. VII, § 4. And section 5 relieves electors from military duty. Ariz. Const. art. VII, § 5. None of these provisions prohibit absentee or early voting.

Petitioners also read too much into the phrase “at a general election.” Ariz. VII, § 2. Of course, voting occurs at an election, and an election is on “a particular day.” *Sherman v. City of Tempe*, 202 Ariz. 339, 340 ¶ 19 (2002); *see also Osborne*,

³ Petitioners’ facial attack on the absentee or early voting statutory scheme also fails because they cannot (and do not even try to) show that any statute violates the secrecy requirement in every application. If Petitioners have some reason in the future to believe that a statute did not provide a sufficiently large number of voters with the secrecy that the Arizona Constitution requires, then they might bring an as-applied challenge. But they cannot bring a facial challenge based solely on the bald allegation that “mail-in ballots, by their very nature, cannot be made entirely secret or free from coercion.” Pet’rs’ Br. 27.

14 Ariz. at 192 (“It is fundamental that an election cannot be held at a time not designated by law; that a volunteer election is no election.”). But that is not to say that *all* voting must occur on election day. None of the provisions Petitioners cite limit when voting begins. And under Arizona’s absentee or early voting system, there is still an election day. *See* A.R.S. § 16-548(A) (“In order to be counted and valid, the ballot must be received . . . no later than 7:00 p.m. on election day.”). Indeed, this Court has distinguished between “election day” and “the start of early voting.” *See Sherman*, 202 Ariz. at 339 ¶ 13 (interpreting A.R.S. § 19-141). There is no inconsistency between these two concepts. For similar reasons, article 7, section 11, cannot bear the weight that Petitioners place on it. That provision simply established when the first general election would occur after statehood “and biennially thereafter.” Ariz. Const. art. VII, § 11. It does not establish when voting can begin in all elections.

Petitioners’ arguments about article 4, part 1, sections 1(1), 1(3), 1(10), and 1(15), are even further afield. *See* Pet’rs’ Br. 22. Article 4 pertains to the “Legislative Department,” addressing the “reservation of power to people” in part 1 and the Legislature in part 2. As a general matter, article 4 does not address suffrage or the manner of voting; Petitioners are in the wrong Article. *See McLaughlin v. Bennett*, 225 Ariz. 351, 355 ¶ 14 (2010) (observing the Arizona Constitution’s organizational structure and that it “addresses public elections in Article 7”). But in

any event, the sections Petitioners cite are inapposite. The sections include the word “polls,” sure, but in context, the purpose of those sections (and the whole part) is to set out the People’s “powers of initiative and referendum.” *Hoffman v. Reagan*, 245 Ariz. 313, 315 ¶ 9 (2018). It is quite strange for Petitioners to argue that a part that specifically reserves a broad power to the People also significantly restricts the People’s access to voting.

Until recently, Petitioners did not interpret these provisions as a prohibition either. Just a year and a half ago before the U.S. Supreme Court, Petitioners expressed pride—not concern—about Arizona’s early and absentee voting:

Arizona administers one of the most convenient and open voting systems in the country. It gives voters three options for casting ballots: early voting by mail, early voting in-person, and Election Day in-person voting. The early-voting period is 27 days. No excuse is needed to vote early, and about 80% of Arizona voters did so in 2016. Voters can request early ballots or receive them automatically by joining a Permanent Early Voter List. Early Ballots can be returned in person or by postage-free mail.

Brief for Petitioners Arizona Republican Party at 6, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Nos. 19-1257, 19-1258), 2020 WL 7121775 (citations omitted); *see also id.*, Brief for Petitioners Mark Brnovich, et al. at 4, 2020 WL 7121776 (same). Indeed, they prevailed in the Supreme Court, in part, by representing that “Arizona law generally makes it very easy to vote” and “voters may vote by mail or in person for nearly a month before election day.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2330 (2021). Petitioners have changed

course now, but as a matter of policy only—perhaps because they do not like one of the many choices that Arizona voters made in the recent election—not because the Legislature’s power under the Arizona Constitution has suddenly changed.

Petitioners’ claims illustrate well why express limitations on plenary legislative authority are required in a case like this—so that constitutional silence cannot be reinterpreted arbitrarily as political winds shift. This Court put it better: “The peculiar value of a written Constitution is that it places, in unchanging form, limitations upon legislative action, unless amended by the people in the mode they have designated, thus giving a permanence and stability to popular government which otherwise would be lacking.” *Osborne*, 14 Ariz. at 192.

III. History also rebuts Petitioners’ claims.

Petitioners argue that article 4, part 1, sections 1(1), 1(3), 1(10), and 1(15), limit the method of voting to in-person votes at the polls on election day. *See* Pet’rs’ Br. 22. But neither the text nor history supports Petitioners’ reliance on the “at the polls” language in article 4. Ariz. Const. art. IV, pt. 1, § 1; art VII, §§ 1, 2, 11.

As the above section explains, the Constitution’s text could not be more clear. Article 7, section 1, governs “[a]ll elections by the people” and reserves to the Legislature near total discretion to establish the methods of voting in elections. (Emphasis added).

History only confirms that Petitioners’ fanciful interpretation cannot possibly be true. *See* Berch, *supra*, at 503 (“[T]he Court looks to the framers’ apparent intent and the historical context of constitutional provisions for guidance.”). “It is a notorious fact” that delegates to Arizona’s constitutional convention were chosen based on whether they supported the initiative and referendum power. *Whitman v. Moore*, 59 Ariz. 211, 218 (1942); Leshy, *supra*, at 121; *see also* Berch, *supra*, at 467. Given their dedication to popular control through the electoral process, the pro-direct democracy framers would not have envisioned a restrictive voting process in the arena where the People exercise their broad legislative authority, nor on any matter where the People exercise their fundamental right to vote. *See, e.g., Pedersen v. Bennett*, 230 Ariz. 556, 558 ¶ 7 (2012) (“[C]ourts liberally construe initiative requirements and do not interfere with the people’s right to initiate laws unless the Constitution expressly and explicitly makes any departure from initiative filing requirements fatal.” (cleaned up)); *State v. Prentiss*, 163 Ariz. 81, 84 (1989) (Arizona’s “overall constitutional scheme [is] to protect individual rights.”); Leshy, *supra*, at 14.⁴

⁴ Indeed, “Arizona’s Constitution guarantees more opportunities for direct citizen participation in the political process than perhaps any other state in the Union.” Berch, *supra*, at 487; *see generally* Lisa T. Hauser, *The Powers of Initiative and Referendum: Keeping the Arizona Constitution’s Promise of Direct Democracy*, 44 Ariz. St. L.J. 567 (2012).

Early voting has its roots in absentee voting, which the Legislature first adopted in 1918 for active military personnel—a mere six years after statehood. Soldiers Voting Bill, ch. 11, 1918 Ariz. Sess. Laws. 3rd Leg., 1st Spec. Sess. The Legislature further expanded absentee voting in 1921, and then again in 1925. H.B. 74, ch. 117, 1921 Ariz. Sess., 5th Leg., Reg. Sess. (voters who would be absent from the county on election day); H.B. 87, ch. 75, § 1, 1925 Ariz. Sess., 7th Leg., Reg. Sess. (voters with physical disability and doctor’s note); *see also Sherman*, 202 Ariz. at 342-43. Since then, the Legislature has continued to expand access to absentee and early voting.

Petitioners argue that these laws, and all similar expansions of voting access over the last century, have each violated the Arizona Constitution. Pet’rs’ Br. 19-20. But their novel claims would come as a surprise to Arizona’s early legislatures, which included delegates from the constitutional convention, that quickly decided to “prescribe[] by law” alternative means for voting. Surely these framers and early legislatures, so near to the state’s founding, understood better than Petitioners what the Arizona Constitution meant.⁵ Fortunately, this Court need not guess—the text is clear.

⁵ *See, e.g., Clark v. Boyce*, 20 Ariz. 544, 554-55 (1919) (“Many of the members of the constitutional convention were members of the first and other sessions of the Legislature. The president of the constitutional convention was the Governor of the state during the sessions of 1912 and 1915. [A] construction of the fundamental law by members of the Legislature who were also members of the

Conclusion

The Arizona Constitution expressly authorizes the Legislature to establish the method of voting in Arizona. Because the Legislature exercised its constitutional power to enact an absentee or early voting statutory scheme, this Court should reject Petitioners' claims and deny their requested relief.

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Respectfully submitted,

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constitutional convention [is] entitled to great weight.”); *Records of the Arizona Constitutional Convention of 1910, supra*, at 1388, 1391, 1393, 1394, 1398.