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March 15, 2021

The Honorable Kyrsten Sinema
United States Senate
317 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mark Kelly
United States Senate
Dirksen Senate Office Suite B40B
Washington, D.C. 20510

Letter in Opposition to H.R. 1, "For the People Act of 2021"

Dear Senators Sinema and Kelly:

Public servants have no duty more sacred than protecting the peoples' right to vote while maintaining the integrity of elections. As the chief legal officer for Arizona, I respectfully urge you to vote "No" on the companion Senate bill to H.R. 1, the *For the People Act of 2021* (the "Act") because it would not expand Arizonans' right to vote, but only eviscerate the integrity of Arizona elections and undermine voter confidence.

For decades, Arizona has enacted commonsense and commonplace laws to not only expand opportunities for people to vote, but also maintain the integrity of our elections. Arizona legislators have struck a careful balance in our election laws, and the Act would undermine those efforts. The Act would subvert Arizona's ability to continue to do so and impede traditional notions of federalism by eradicating virtually all state control of the time, place, and manner of federal elections.

States are considered the "laboratories of democracy," with each state instituting its own unique election systems through their democratic processes. Over the course of the past century, Arizona has carefully crafted and culled election procedures and laws to maximize voter turnout while not only securing the integrity of our elections, but also instilling confidence in our election systems.¹ The Act threatens to bring chaos to Arizona's well-established election procedures without improving access for Arizona voters. And while Arizona has successfully implemented an expansive early voting program, Arizona has invested incredible time and resources over the past three decades to make it work. Forcing nationwide changes to state voting systems at a time

¹ The November 2020 General Election elicited Arizona's largest voter turnout since 1980, with 79.9% registered voters casting a ballot. 2020 Arizona Official General Election Canvass, available at https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf; 1980 Arizona Official General Election Canvass, available at <https://azsos.gov/sites/default/files/canvass1980ge.pdf>.

when voter confidence is at an all-time low is likely to further erode trust in America's democratic institutions.²

Notably, most of the provisions of the Act seeking to expand voting opportunities are already available in Arizona. While the Act mandates no-excuse absentee balloting³ and requires in-person early voting opportunities,⁴ Arizona has permitted no-excuse early voting for three decades⁵ and enabled counties to establish in-person early voting centers for nearly as long.⁶ Over the years, early voting has been expanded extensively; and in-person early voting is now offered starting 27 days before every statewide and federal election.⁷ In fact, Arizona's expansive early voting laws permit voters to request an early ballot up to ten days before an election,⁸ or make a one-time, permanent request to receive early ballots by mail for all elections.⁹ Like provisions of the Act,¹⁰ Arizona statutorily requires counties to provide voters with postage-paid early ballot return envelopes.¹¹

Arizona also makes sensible use of technology by mandating auditable, durable, and voter verifiable paper ballots to be used in conjunction with electronic voting systems.¹² Further, balancing both accessibility and security, Arizona permits use of early ballot drop boxes, but requires implementation of sound security protocols to preserve ballot secrecy and prevent fraud.¹³

Conversely, provisions of the Act would invalidate several of Arizona's commonsense election integrity safeguards; safeguards that mirror recommendations made by former President Jimmy Carter and former Secretary of State James A. Baker III in their 2005 bipartisan Commission on Federal Election Reform (the "Commission") report.¹⁴ The Commission recognized that "[a]bsentee ballots remain the largest source of potential voter fraud"¹⁵ and recommended states prohibit third-parties from handling absentee ballots (a practice known as "ballot harvesting").¹⁶ In 2016, Arizona enacted a sensible law restricting ballot harvesting, a law that I personally defended on March 2, 2021 before the Supreme Court of the United States. The

² <https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx>;
<https://kateto.net/covid19/COVID19%20CONSORTIUM%20REPORT%2029%20ELECTION%20DEC%202020.pdf>;
see also <https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx>.

³ H.R. 1, Sec. 1621

⁴ H.R. 1, Sec. 1611

⁵ Arizona Revised Statutes ("A.R.S.") § 16-541 ("Any election called pursuant to the laws of this state shall provide for early voting. Any qualified elector may vote by early ballot.")

⁶ S.B. 1003, 43rd Leg., 2nd Spec. Sess., 1997 Ariz. Legis. Serv. 2nd Sp. Sess. Ch. 5 (West).

⁷ See generally A.R.S. § 16-542; see also 2019 Elections Procedures Manual, Ch. 2, § II On-Site Early Voting available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (last accessed 3/3/21).

⁸ A.R.S. § 16-542(A).

⁹ A.R.S. § 16-544.

¹⁰ H.R. 1, Sec. 1623.

¹¹ A.R.S. § 16-542(C).

¹² H.R. 1, Sec. 1502; A.R.S. § 16-446(B)(4),(7).

¹³ 2019 Elections Procedures Manual, Ch. 2, § I Ballot-By-Mail(H) at 60.

¹⁴ Building Confidence in U.S. Elections; Report of the Commission on Federal Election Reform (Sept. 2005).
https://web.archive.org/web/20050919164225/https://www.american.edu/ia/cfer/report/full_report.pdf

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 47.

Act dispenses with the Commission's recommendations and would override Arizona law, instead requiring Arizona to permit *anyone* to collect an unlimited number of ballots.¹⁷

Further, one of the five "sturdy" pillars the Commission identified as necessary to "increase voter participation and to assure the integrity of the electoral system,"¹⁸ included use of photo voter identification. In fact, the Commission noted that an "electoral system cannot inspire confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."¹⁹ The Act, in complete disregard of these recommendations, would prevent Arizona from requiring any type of photo or non-photo identification from a voter before issuing a ballot. Instead, the Act would allow a voter to receive a ballot by simply signing an attestation affirming identity.²⁰ The Act would even criminalize good-faith challenges to a voter's identity.²¹

These provisions of the Act would conflict with Arizona's statutory requirement that voters present identification (either photo or two forms of acceptable non-photo identification) prior to receiving a ballot, which was enacted by Arizona voters in 2004.²² Given the Act's conflict with Arizona's voter-protected²³ identification law, Arizona will necessarily have to create a bifurcated identification and voting system. Voters who attempt to vote without identification will receive a "federal-only" ballot (containing only federal offices) while voters with proper identification will receive a "full-ballot" (including all candidates/issues). Such a bifurcated system will lead to voter confusion and distrust in election administration. The Act would also create an opportunity for widespread voter disenfranchisement, as all safeguards to prevent voter impersonation will be removed.

The Act would also eliminate many of Arizona's commonsense tools to maintain voter registration records, including preventing election officials from moving voters to an inactive status when mail is returned as undeliverable.²⁴ And it would reduce Arizona's ability to use the multistate Electronic Registration Information Center ("ERIC") system to move voter registrations to an inactive status when individuals are identified as having moved within 6 months of *any* federal election.²⁵

In addition to regulating election administration, the Act would also establish a new and comprehensive set of campaign finance laws. Arizona, however, already has a robust set of campaign finance laws that regulate the source, amount, and use of contributions in elections, as well as required disclosures.²⁶ These laws balance the need to prevent corruption in elections and

¹⁷ A.R.S. § 16-1005(H); H.R. 1, Sec. 1621.

¹⁸ *Supra* note 13, at 6.

¹⁹ *Supra* note 13, at 18.

²⁰ H.R. 1, Sec. 1903.

²¹ H.R. 1, Sec. 1201.

²² A.R.S. 16-579(A).

²³ Arizona's constitution prevents the state legislature from repealing or amending "an initiative measure approved by a majority of the votes cast thereon[.]" Ariz. Const. Art. IV, Pt. 1 § 1(6)(B),(C),

²⁴ H.R. 1, Sec. 1201.

²⁵ H.R. 1, Sec. 1041; In practice, within 6 months of any federal election prevents election officials from putting any voter on the inactive list from September of the year before a presidential election through Election Day (March Presidential Preference Election, August Primary, through the November General Election) and from February through Election Day during midcycle elections (August Primary through November General Election).

²⁶ See A.R.S. §§ 16-901 *et seq.*

promote transparency with Arizona citizens' constitutional right to freedom of speech and association. The campaign finance provisions in the Act would upset that balance. Notably, while the Act appears aimed at preventing foreign money from influencing federal, state and local elections (including initiatives and referendums), the broad definition of foreign entity combined with the expansive definition of disbursements will prevent many locally controlled entities from so much as tweeting statements that could be construed as promoting, supporting, attacking, or opposing a candidate/issue, "regardless of whether the communication contains express advocacy."²⁷ Not only would such broad restrictions on political speech be constitutionally suspect, they would do nothing to combat actual corruption or promote transparency.

Finally, since a constitutional amendment adopted by voters in 2000²⁸, Arizona has utilized a five-member independent redistricting commission to "foster[] increased competition in individual legislative districts and promot[e] partisan fairness in the state as a whole[.]"²⁹ The Act would require every state to utilize a fifteen-member commission for drawing congressional boundaries and would impose federal map drawing requirements. Unless Arizona's constitution was amended to reflect a fifteen-member commission for state legislative boundaries, Arizona would be required to create two independent commissions: one with fifteen members for drawing congressional districts³⁰ and one with five members for drawing state legislative districts.³¹ Those two commissions would likely utilize different district drawing standards. With two different commissions and two different map drawing standards, district boundaries for congressional and state legislative districts are likely to have little overlap, burdening election administrators in crafting convenient voting precincts and resulting in unnecessary polling place confusion.

As public officials, there is no higher priority than maintaining the integrity of our elections. The very foundation of our nation and our state rests on the notion that our government is derived from the consent of the governed. Distrust in the elective franchise shakes the core of that foundation and delegitimizes those in power. In Arizona we have laws that allow every voter ample opportunity to vote, free from intimidation, and that prevent disenfranchisement and fraud. Our systems maintain the public's trust and provide for secure elections. Let's keep it that way.

Respectfully,



Mark Brnovich
Arizona Attorney General

²⁷ H.R. 1, Sec. 4101-05.

²⁸ Ariz. Const. Art. IV, Pt. 2 § 1 (14) (requiring Arizona's Independent Redistricting Commission to "establish congressional and legislative districts").

²⁹ <https://ash.harvard.edu/news/arizona-redistricting-policy-brief>

³⁰ H.R. 1, Sec. 2400.

³¹ Ariz. Const. Art. IV, Pt. 2 § 1.