SUPREME COURT OF ARIZONA

BONNIE KNIGHT; DEBORAH McEWEN; SARAH RAMSEY; and LESLIE WHITE, Petitioners, v. ADRIAN FONTES, in his official capacity as Secretary of State, Respondent, KRISTIN MAYES, in her official capacity as Attorney General, Intervenor.	Arizona Supreme Court No. CV-23-0229-SA

RESPONSE TO PETITION FOR SPECIAL ACTION

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INTRODUCTION

In an attempt to invoke this Court's original special action jurisdiction, Petitioners try to concoct an emergency where none exists. This Court rarely accepts original jurisdiction over special actions, and need not do so now. The laws and procedures Petitioners challenge have been in place for decades. The next Court of Appeals judicial retention election is over a year away, and the deadline for judges to declare their desire to be retained is almost a year away. This case thus lacks the condensed timelines that justify this Court's hearing a special action in the first instance. If any court hears this case, it should be the Superior Court first.

But, in truth, Petitioners' case does not belong in *any* court: It belongs in the legislature. *Amici curiae* Speaker of the House of Representatives Toma and Senate President Petersen bemoan Governor Hobbs's recent veto of H.B. 2757, which would have granted Petitioners' requested relief. Although Petitioners and *amici* now turn to this Court to achieve what they could not in the political arena, policy disagreement with the Governor is no basis for a constitutional claim.

Despite Petitioners' best efforts to constitutionalize their policy disagreement with current law, they fail. For starters, they lack standing

because they have failed to articulate the type of particularized harm required by this Court's case law. On the merits, neither the free and equal elections clause nor the equal privileges and immunities clause of the Arizona Constitution grants electors throughout the state a right to vote in the retention of every Court of Appeals judge. Petitioners' invented link between our system of judicial retention and the statewide effect of appellate decisions is in tension with the Constitution and case law, and it could raise fact issues better heard by the Superior Court. Regardless, the legislature's decision to organize retention elections for Court of Appeals judges by geography survives any level of constitutional scrutiny.

Even if Petitioners' novel constitutional theory is accepted, they cannot be entitled to mandamus. The free and equal elections clause and equal privileges and immunities clause have coexisted with the geographic distribution of the Court of Appeals' selection and retention scheme for that court's entire history. It defies reason to suggest that these two broadly worded grants of individual rights impose a *non-discretionary* duty on the Secretary of State to implement the precise arrangement that Petitioners desire.

Petitioners ask this Court to enact H.B. 2757 into law. But they have turned to the wrong audience: A veto override requires two-thirds of each house of the legislature, not a majority of the Supreme Court.

FACTS

I. The selection and retention of judges on the Court of Appeals have always been determined by geography.

The geography-based balloting system that persists today was in place from the Court of Appeals' beginnings. In 1960, Arizona voters passed an initiative that created an "integrated, organized judicial system" and provided that "the jurisdiction, powers, duties and composition of any intermediate appellate court shall be as provided by law." Ariz. Sec'y of State, *Initiative and Referendum Publicity Pamphlet* 14 (1960); Ariz. Const. art. VI, § 9.

Four years later, the legislature implemented this initiative, organizing the Court of Appeals into two divisions of three judges each. S.B. 269, 26th Leg., 2d Reg. Sess., 1964 Ariz. Sess. Laws 219. The basic structure of the Court of Appeals was the same then as it is now, with Division One consisting of Maricopa, Yuma, Mohave, Coconino, Yavapai, Navajo, and

Apache counties, and Division Two consisting of Pima, Pinal, Cochise, Santa Cruz, Greenlee, Graham, and Gila counties. *Id.*[1]

The law required two of the Division One judges to be "residents of and elected from" Maricopa County; the third was required to be a resident of and elected from the remaining counties in Division One. *Id.*, 1964 Ariz. Sess. Laws 220. Similarly, two of the Division Two judges were required to be residents of and elected from Pima County; the third was required to be a resident of and elected from the remaining counties in Division Two. *Id.* Cases appealed from superior courts were to be "brought or filed" in the encompassing division, but the statute did not prevent the courts from transferring cases between divisions. *Id.*, 1964 Ariz. Sess. Laws 223.

In 1969 and 1973, the legislature increased the number of Division One judges to six and then nine while continuing the geography-based appointment and retention system. *See* S.B. 51, 29th Leg., 1st Reg. Sess., 1969 Ariz. Sess. Laws 80–81; S.B. 1156, 21st Leg., 1st Reg. Sess., 1973 Ariz. Sess. Laws 1184, 1186. The 1969 amendment to A.R.S. § 12-120(E) permitted Court

[1] Division One now also includes La Paz County. *See* A.R.S. § 12-120(C).

of Appeals judges to "participate in matters pending before a different division or department." S.B. 51, 1969 Ariz. Sess. Laws 79.

In 1974, the voters again amended the Constitution by initiative, this time changing the method of selecting Court of Appeals judges from election to appointment and retention. Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 26–28 (1974); Ariz. Const. art. VI, §§ 36(A), 37. The amendment required that an appointee be "a resident of the counties or county in which that vacancy exists." Ariz. Const. art. VI, § 37(D).

Opponents sought to defeat the constitutional initiative by convincing voters that they would "lose the power to nominate and recall judges." John M. Roll, *Merit Selection: The Arizona Experience*, 22 Ariz. St. L.J. 837, 854 (1990). But no argument for or against the amendment suggested that the geographic balloting system was a problem, much less that it violated the free and equal elections or equal privileges and immunities clauses of the Arizona Constitution. *See generally* Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 29–31 (1974).

In any event, the 1974 amendment did not "define the electorate that votes on the retention of different categories of judges." John D. Leshy, *The Arizona State Constitution: A Reference Guide* 174 (1993). In 1981 and 1988, the

legislature increased the number of judges and departments in Division One, and it did the same for Division Two in 1984. *See* S.B. 1117, 35th Leg., 1st Reg. Sess., 1981 Ariz. Sess. Laws 549; S.B. 1169, 36th Leg., 2d Reg. Sess., 1984 Ariz. Sess. Laws 760; S.B. 1002, 38th Leg., 2d Reg. Sess., 1988 Ariz. Sess. Laws 142. All three times, the legislature left unamended the retention election system that Petitioners challenge.

In 1992, the voters once again amended the method of judicial appointment without altering the geographical balloting system. *See* Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 55 (1992); Ariz. Const. art. VI, § 38. Among other things, the amendment maintained the requirement that Court of Appeals judges be appointed to vacancies in their "counties or county" of residence. Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 55 (1992); Ariz. Const. art. VI, § 37(D).

It was only in 1994, two decades after the voters established a merit-based judicial appointment system with retention elections, that the legislature added the word "retention" to A.R.S. § 12-120.02 to specify that judges would be "elected for retention" by voters in Maricopa County or the remaining counties in Division One. *See* H.B. 2208, 41st Leg., 2d Reg. Sess., 1994 Ariz. Sess. Laws 1146. This technical correction did not have any

practical effect, and it did not add the words "for retention" to the subsection addressing Division Two. *See id.* The legislature also added one at-large judge for Division One. *See id.*

In 2022, the legislature created more at-large judgeships in each division. *See* H.B. 2859, 55th Leg., 2d Reg. Sess., 2022 Ariz. Sess. Laws 1723–24. The at-large judgeships could be held by residents of any county in the division. *Id.* § 3, 2022 Ariz. Sess. Laws 1724. The 2022 amendment to § 12-120 provided that matters "may be transferred between divisions in order to equalize caseloads and for the best use of judicial resources," *id.* § 2, 2022 Ariz. Sess. Laws 1723, reflecting a historical practice of transferring cases between the divisions, *see* Hon. Patrick Irvine, *Arizona Court of Appeals*, Ariz. Att'y, June 2005, at 14.

After all these changes, the current version of A.R.S. § 12-120.02 retains the same geographic structure as the version first passed in 1964. *See* A.R.S. § 12-120.02(A)–(B).

II. In 2023, the legislature attempted to enact a proposal identical to Petitioners' requested relief.

The retention election process drew increased attention after November 2022, when three Maricopa County Superior Court judges were

not retained. *See* Kiera Riley, *Taskforce makes recommendations on changes to evaluation process for judges*, Ariz. Cap. Times (Apr. 12, 2023), https://azcapitoltimes.com/news/2023/04/12/taskforce-makes-recommendations-on-changes-to-evaluation-process-for-judges/. This Court subsequently established a Judicial Performance Review ("JPR") Task Force to evaluate the JPR process. Ariz. Sup. Ct., Admin. Order No. 2023-24 (Feb. 1, 2023). In a presentation to the Task Force, retired legislator Jonathan Paton noted that the discussion of the JPR process "comes as the result of the 2022 retention election where JPR may not necessarily have been the cause but could be used as the tool for potential changes." JPR Task Force, Feb. 21, 2023 Meeting Minutes at 2. He also outlined legislative proposals including one that "would request for Court of Appeal judges to be retained statewide," just like Petitioners' request here. *Id.*

The legislature later passed a bill that would enact statewide Court of Appeals retention elections according to the precise terms outlined in Petitioners' requested relief. *Compare* H.B. 2757, 56th Leg., 1st Reg. Sess. (Ariz. 2023) *with* Pet. 5–6, 26; *see also* Amicus Br. The Governor vetoed the bill. H.B. 2757 Veto Letter from Governor Katie Hobbs to Speaker of the House of Representatives Ben Toma (May 19, 2023),

https://www.azleg.gov/govlettr/56leg/1r/hb2757.pdf. She explained her veto in the following statement:

> I have vetoed HB 2757. Allowing voters statewide to vote on whether to retain all Court of Appeals judges regardless of the judge's Division assignment, while retaining the Division structure, would unfairly dilute the votes of those Arizonans most directly impacted by each Division's judges. I urge the Legislature next session to take a more holistic look at the organization of the Court of Appeals, including its retention election rules, and craft more comprehensive improvements for Arizonans. HB 2757, standing alone, is not the right approach.

Id.

Petitioners now seek to circumvent the Governor's veto by transforming their policy proposal into a constitutional claim.

JURISDICTIONAL STATEMENT

This Court rarely accepts directly filed special actions, and hearing such a case is "exceptional." *Cronin v. Sheldon*, 195 Ariz. 531, 533 ¶ 2 (1999); *see* Ariz. R.P. Spec. Act. 4(a) (concurrent special action jurisdiction among Supreme Court, Court of Appeals, and Superior Court); Ariz. R.P. Spec. Act. 7(b) (requiring petitioner to explain why case was not initiated in a lower court). "The decision to accept jurisdiction of a special action petition is highly discretionary," and generally occurs only when "justice cannot be satisfactorily obtained by other means." *Gockley v. Ariz. Dep't of Corr.*, 151

Ariz. 74, 75 (1986) (citation omitted). Jurisdiction is usually not accepted unless the case is "highly time-sensitive" or requires "rapid resolution." 1 State Bar of Ariz., Arizona Appellate Handbook 2.0, ch. 4, 4.2–4.3 (2020); *see also State v. Simon*, 229 Ariz. 60, 62 ¶ 6 (App. 2012) ("It is unusual for a higher court to accept special action jurisdiction when such an action could lawfully be initiated in a lower court."). Petitioners have not shown that their petition must begin in the Supreme Court, so the petition should be dismissed without prejudice to refiling in Superior Court. *See Gockley*, 151 Ariz. at 75–76.

I. This case is not time-sensitive.

In pressing for this Court to take the unusual step of hearing their action in the first instance, Petitioners observe that "Court of Appeals judges will stand for retention in the upcoming 2024 election cycle." Pet. 4. But the 2024 election is over one year away, on November 5, 2024. Ariz. Sec'y of State Adrian Fontes, *2024 Election Dates*, https://azsos.gov/2024-election-dates-0 (last visited Oct. 6, 2023). The deadline for Court of Appeals judges to file their declarations of desire to remain in office is September 6, 2024, just under a year away. Ariz. Const. art. VI, § 38(A). There is no rush.

The absence of an emergency is further underscored by the fact that, as Petitioners admit, the geographic scheme for the retention of Court of Appeals judges has been in place since 1964.[2] Pet. 10–11. Only on the eve of the sixtieth anniversary of the geography-based scheme do Petitioners purport to discover a fundamental constitutional problem with it.

This case is thus very unlike those cited by Petitioners for the proposition that immediate resolution is necessary. Pet. 4. It is a far cry from *Dobson v. State ex rel. Commission on Appellate Court Appointments*, where the Court accepted jurisdiction over a petition filed within three months of the challenged law's passage and two months before it would take effect. 233 Ariz. 119, 121 ¶ 2, 122 ¶ 8 (2013); Petition for Special Action, *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, No. CV 13-0225-PR, 2013 WL 4498534 (July 12, 2013). So too for *State Compensation Fund v. Symington*, where petitioners filed the special action petition one day after the law became effective. 174 Ariz. 188, 192 (1993). Here, Petitioners' decades-in-the waiting challenge to a method of balloting that won't be used again for over

[2] Before the adoption of merit selection in 1974, judges faced direct election rather than retention election, but under a similar geographic scheme. *See* S.B. 269, 26th Leg., 2d Reg. Sess., 1964 Ariz. Sess. Laws 220.

a year lacks the hallmarks of a special action that this Court must hear in the first instance.

Moreover, while Petitioners understandably point out that the Court of Appeals may not be an appropriate forum for this particular case, that concern does not require this Court to decide the case in the first instance. If Petitioners refile in Superior Court and that court's decision is appealed, review could be sought directly in this Court at that time. *See, e.g.*, *Tobin v. Rea*, 231 Ariz. 189, 193 ¶¶ 7–8 (2013) (accepting special action jurisdiction directly from Superior Court).

The presumption that the case should be heard first in a lower court applies and the action should be dismissed. *See Gockley*, 151 Ariz. at 75–76.

II. The doctrine of laches bars Petitioners' action from being heard in the Supreme Court in the first instance.

"Laches will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 6 (2000). Here, Petitioners contend that there has been an unresolved constitutional violation hiding in plain sight for over half the state's history.

This Court has "long emphasized that a party may not unreasonably delay" in seeking "mandamus and other extraordinary forms of

relief." *Transp. Infrastructure Moving Ariz.'s Econ. v. Brewer*, 219 Ariz. 207, 214 ¶ 33 (2008). Fifty-nine years is an unreasonable delay. *Cf. Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993) (suit barred by laches where petitioners knew of alleged violation "more than a year" before filing).

The delay at least illustrates why invoking this Court's original jurisdiction is unwarranted. Heading straight to the Supreme Court without first airing the issues before a lower court risks undermining "the quality of decision making in matters of great public importance." *Sotomayor*, 199 Ariz. at 83 ¶ 9. It is not necessary to take such a risk when the challenged scheme has existed longer than some justices of this Court have been alive.

III. Material facts may be in dispute.

The petition also is not limited to pure legal issues where the facts are not in dispute. *See* Pet. 4–5. Petitioners argue that their right to equal privileges and immunities under the Arizona Constitution has been violated. Pet. 6. Such challenges generally require a party to prove, and a court to consider, facts. *See, e.g.*, *Vong v. Aune*, 235 Ariz. 116, 123 ¶ 32 (App. 2014) ("To establish an equal protection violation, a party must establish two *facts*." (emphasis added) (citation omitted)). In this case, the State disputes that Petitioners are being differentially treated, and discovery, as well as lay

and expert witness testimony, could be necessary to resolve that dispute. Further, as explained below, the State disputes Petitioners' standing to bring this action. Although standing is generally a question of law, whether a party has standing can present fact issues. *See Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 356 ¶ 15 (App. 2007). It would be better for the Superior Court to address possible fact issues in the first instance. *See Gockley*, 151 Ariz. at 75–76.

Setting aside any fact issues, it is generally preferable to permit a lower court to hear a case first, and then have this Court make its decision on a fulsome record and more sharply developed arguments. *See id.*; *see also State ex rel. Bullard v. Jones*, 15 Ariz. 215, 221 (1914) ("While by the Constitution the Supreme Court is given original jurisdiction in certain named cases, it is essentially an appellate court, a court of last resort and not of first resort."). Even where, as here, a petition presents issues of statewide importance, allowing facts and arguments to develop in the Superior Court is the best course.

ARGUMENT

I. Petitioners lack standing.

A special action petitioner is required to demonstrate standing to sue. *See, e.g.*, *Sears v. Hull*, 192 Ariz. 65, 67 ¶ 1, 69–71 ¶¶ 15–23 (1993). This Court's standing requirement is "rigorous," and the "paucity of cases" waiving standing demonstrates this Court's "reluctance to do so." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). Standing is "especially" important "in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003). The Arizona Constitution's "express mandate" of separation of powers "underlies" this Court's standing requirement. *Id.* at 525 ¶ 19.

This action rests on "generalized" claims that show "no distinct and palpable injury." *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 16 (2005). For this reason and others, this Court should adhere to the general standing rule and not follow the rare exception of waiver. *See id.*

A. Petitioners' purported injury is, at best, "wholly abstract and widely dispersed."

At best, Petitioners' purported injury is "wholly abstract and widely dispersed." *Napolitano*, 206 Ariz. at 526 ¶ 28 (quoting *Raines v. Byrd*, 521 U.S. 811, 829 (1997)). "An allegation of generalized harm that is shared alike by

all or a large class of citizens is generally not sufficient to confer standing." *Sears*, 192 Ariz. at 69 ¶ 16.

The alleged injury—being subject to decisions by judges whom Petitioners did not get to vote to retain (or not retain)—is not only abstract, but entirely novel. *See* Pet. 12–14, 17–25. And Petitioners' purported harm is not just widely dispersed, it is universally dispersed. *Napolitano*, 206 Ariz. at 526. All voters are in the exact same situation as the Petitioners, for all voters in Arizona are subject in the same manner to the provisions of A.R.S. § 12-120.02. And by Petitioners' own reckoning, they share their purported injury identically with every similarly situated voter in Arizona. *See* Pet. 6–8.

Thus, any voter, like Petitioner Bonnie Knight, who lives in a Division One county other than Maricopa, is limited to voting in the retention election of judges in non-Maricopa Division One counties. A.R.S. § 12-120.02(A). And any voter who lives in a Division Two county other than Pima, like Petitioner Deborah McEwen, is limited to voting in the retention election of judges in non-Pima Division Two counties. *Id.* § 12-120.02(B). Any voter, like Petitioner Sarah Ramsey, who resides in Pima County, is limited to voting on the retention of Division Two judges from Pima County. *Id.* And

any voter who resides in Maricopa County, like Petitioner Leslie White, is limited to voting on the retention of Division One judges from Maricopa County. *Id.* § 12-120.02(A). In short, each Petitioner is situated *identically* to every other voter within her own geographic unit.

Such a universal "injury" cannot confer standing. As this Court explained in *Sears*, parties lack standing when they allege "only generalized harm rather than any distinct and palpable injury." 192 Ariz. at 70 ¶ 16; *see also Gill v. Whitford*, 138 S. Ct. 1916, 1923, 1929–33 (2018) (concluding that plaintiffs lacked standing because their allegations of statewide vote dilution amounted to a "generally available grievance about government"(citation omitted)).[3] It is hard to imagine a more generalized purported harm than one which affects every single Arizona voter in the exact same manner. What Petitioners complain of amounts to a disagreement about the best way to organize judicial retention elections. *Cf. Babbitt v. Asta*, 25 Ariz. App. 547, 549 (1976) (concluding that concerns about lack of proportionality in county commission appointments were "better addressed to the legislature than to

[3] Although Arizona courts are not "bound by federal jurisprudence on the matter of standing," this Court has "previously found federal case law instructive." *Takata*, 210 Ariz. at 141 ¶ 11 (citation omitted).

us"). Such a theory is insufficient to establish standing. *Napolitano*, 206 Ariz. at 526–27 ¶ 28; *Brownlow*, 211 Ariz. at 196 ¶ 17.

B. Waiver is unwarranted.

In rare circumstances, this Court may overlook standing issues, but it has not done so for decades. *E.g.*, *Rios v. Symington*, 172 Ariz. 3, 5 & n.2 (1992). The Court should not invoke this "narrow[]" and "rare" exception here, *Napolitano*, 206 Ariz. at 527 ¶ 31, for at least four reasons.

First, the standing requirement applies "especially in actions in which constitutional relief is sought against the government." *Id.* at 524 ¶ 16; *see Sears*, 192 Ariz. at 70–71 ¶ 23 (failure to show standing to challenge constitutionality of state statutes on equal protection grounds).

Second, this Court is appropriately "reluctant to become the referee of a political dispute," which this plainly is. *Napolitano*, 206 Ariz. at 527 ¶ 32; *see Brownlow*, 211 Ariz. at 195–96 ¶ 15; *see also* H.B. 2757; Gov. Hobbs, *supra*.

Third, and relatedly, "the legislature may enact [a] future" law that obviates this action. *Napolitano*, 206 Ariz. at 528 ¶ 35. The legislature came very close to doing so earlier this year, and the Governor vetoed it while urging the legislature to "take a more holistic look at the organization of the Court of Appeals, including its retention election rules, and craft more

comprehensive improvements for Arizonans." Gov. Hobbs, *supra*. Thus, it would be imprudent to adjudicate constitutional claims absent standing instead of allowing the political branches to resolve this issue, as they have come so close to doing and may yet do in the near future. *Napolitano*, 206 Ariz. at 527–28 ¶¶ 31, 35.

Fourth, deciding this case would raise profound constitutional concerns, because this Court is not well-suited to craft a remedy like the one urged here, which essentially involves the writing of new law.

More fundamentally, the issue raised by the petition affects all Arizonans equally, and thus is properly the domain of the political branches. Ariz. Const. art. III. This Court does not lightly cross such boundaries, even when presented with issues of statewide importance. *See Brownlow*, 211 Ariz. at 195–96 ¶ 15; *Napolitano*, 206 Ariz. at 525 ¶ 19, 527–28 ¶ 32–34. The Court should not waive standing in this case.[4]

[4] If petitioners believe they can adduce facts to support standing, any such fact dispute belongs before the Superior Court in the first instance.

II. The statewide application of Court of Appeals decisions is irrelevant to who participates in retention elections.

"Judges do not represent people, they serve people." *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (citation omitted), *aff'd*, 409 U.S. 1095 (1973).[5] The "judiciary, unlike the legislature, is not the organ responsible for achieving representative government." *Id.* at 456 (citation omitted). When a person comes under the jurisdiction of an Arizona court, her rights are protected by our State's robust due process protections and high standards of judicial professionalism. *See* Ariz. Const. art. II, § 4; *id.* art. VI, §§ 6, 22, 42; *id.* art. VI.I. Concerns about representation are therefore "simply not relevant to the makeup of the judiciary." *Wells,* 347 F. Supp. at 455.

Petitioners' and *amici*'s professed concerns about the lack of statewide judicial retention elections fail to grasp this basic point. *See* Pet. 1, 11–17; Amicus Br. 8–10 & n.1. As a result, they fail to grapple with the potentially far-reaching consequences of their theory.

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[5] Although the U.S. Supreme Court affirmed the *Wells* decision without analysis, 409 U.S. at 1095, the Court has recognized that in *Wells* it "held the one-person, one-vote rule inapplicable to judicial elections," *Chisom v. Roemer*, 501 U.S. 380, 402 (1991). The *Wells* decision is discussed in greater detail in Part III, *infra*.

If Petitioners were correct, all sorts of standard court practices could be called into question. Consider Arizona statutes that direct parties to file suit in certain jurisdictions. Section 41-1034, for example, provides that any person seeking declaratory relief against an administrative rule, practice, or policy statement must seek such relief in Maricopa County. Does that mean that all non-Maricopa voters are disenfranchised because these decisions by Maricopa County judges have statewide impact? Or consider A.R.S. § 12-822(B), which provides for change of venue to Maricopa County when the state is sued. Such cases, by their nature, are likely to have statewide effect, and § 12-822(B) virtually ensures that a disproportionate number of them will be heard in Maricopa County, even though only Maricopa County residents may vote in Maricopa County retention elections. And more broadly, decisions of the various superior courts in Arizona will of course sometimes have statewide impact. It would be absurd to suggest that this fact requires them to face a statewide electorate, but this seems to be the logical consequence of Petitioners' argument. *See* Pet. 8, 17; *see also* Ariz. Const. art. VI, § 37; A.R.S. § 12-120.02 (relating to appointment and election of judges).

Moreover, Petitioners' interpretation is in tension with other plainly constitutional practices (including practices of this Court). Article 6, Section 20 of the Arizona Constitution, for example, expressly provides that "[a]ny retired justice or judge of any court of record who is drawing retirement pay may serve as a justice or judge of any court." This Court regularly takes advantage of this provision to facilitate the work of the courts. *See, e.g.*, Ariz. Sup. Ct., Admin. Order No. 2023-95 (June 21, 2023); Ariz. Sup. Ct., Admin. Order No. 2023-14 (Jan. 11, 2023); Ariz. Sup. Ct., Admin. Order No. 2022-162 (Nov. 28, 2022); Ariz. Sup. Ct., Admin. Order No. 2022-107 (Sept. 14, 2022); Ariz. Sup. Ct., Admin. Order No. 2022-100 (Aug. 31, 2022); Ariz. Sup. Ct., Admin. Order No. 2022-44 (Apr. 20, 2022); Ariz. Sup. Ct., Admin. Order No. 2022-32 (Mar. 22, 2022). But of course, *no one* votes on the retention of retired judges and justices. Petitioners cannot explain why Arizona's Constitution would explicitly authorize this practice, which they seem to say would otherwise violate fundamental rights to free and equal elections and/or equal privileges and immunities. *See also* Amicus Br. 10 n.1 (complaining of a retired Division One judge who decided an appeal of "statewide importance").

Petitioners' argument also generates tension with other provisions of the Constitution, which routinely permits judges and legislators to exercise statewide power without creating a concomitant statewide electorate. For instance, the Chief Justice "may assign judges of intermediate appellate courts, superior courts, or courts inferior to the superior court to serve in other courts or counties." Ariz. Const. art. VI, § 3. And when it comes to the legislature, Arizona representatives and senators, who pass laws with statewide effect, are only subject to elections in their districts. Ariz. Const. art. IV, pt. 2 § 1. Does that mean an Arizonan is injured every time he is subject to a law passed by legislators he did not vote for?

In fact, the geographic arrangement that underlies the judicial retention scheme is itself part of the Constitution: An appointee to fill an appellate court vacancy must be "a resident of the counties or county in which that vacancy exists." Ariz. Const. art. VI, § 37(D). And the Constitution requires that judges standing for retention "be placed on the *appropriate* official ballot," not that the ballot be one distributed statewide. Ariz. Const. art. VI, § 38(B) (emphasis added). Use of the word "appropriate" connotes a choice among different options, not a single statewide ballot. *See Appropriate, New Oxford American Dictionary*, (3d ed.

2010) ("suitable or proper in the circumstances"). Section 12-120.02 simply implements the constitutional geographic scheme, providing that judges "shall be residents of and elected for retention from" the seats within each division.

Petitioners' interpretation contravenes this Court's duty to interpret the Constitution as "a consistent workable whole." *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196 (1969).

III. Geographical restrictions in judicial retention elections do not violate the free and equal elections clause.

As Petitioners acknowledge, "only a few cases have addressed" Arizona's free and equal elections clause. Pet. 18. More to the point: No Arizona court has ever held that the clause applies to geographical divisions in judicial retention elections—or any other analogous context—much less explained how it would apply.

This is unsurprising. Since 1974, Arizona appellate judges have been appointed, not elected. *See* Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 26–28 (1974); Ariz. Const. art. VI, § 37(A). And by Petitioners' own definition, a retention election does not constitute an "election" as that term was understood at the time of the Constitution's

enactment, because voters in retention elections do not "select[] . . . one man from among several candidates," they merely vote on whether to retain each judge individually. Pet. 18 (quoting *Election*, *Black's Law Dictionary* (2d ed. 1910)); *see* Ariz. Const. art. VI, § 38(C). Indeed, as this Court has observed, Arizona judges, "once appointed, do not run for election." *In re Marquardt*, 161 Ariz. 206, 207 n.1 (1989). "[I]nstead, [they] appear on the ballot for retention or disapproval by the voters every four years." *Id.* This authority speaks to the questions relevant here much more directly than the Court of Appeals' passing reference to a judge as "an independent elected official." *Arpaio v. Davis*, 221 Ariz. 116, 122 n.7 (App. 2009); *see* Pet. 18.

Only two published Arizona cases have interpreted the free and equal elections clause and neither supports Petitioners' novel theory. The first, *Chavez v. Brewer*, looked to the interpretation of similar constitutional provisions in other states to discern the meaning of the Arizona clause. *See* 222 Ariz. 309, 319–20 ¶¶ 30–34 (App. 2009). The court concluded that a "free and equal" election is generally "one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot." *Id.* at 319 ¶ 33. It

held that the clause "is implicated when votes are not properly counted." *Id.* at 310 ¶ 34. Accordingly, a cause of action could lie against the Secretary of State if the voting machines she chose would result in "a significant number of votes cast" being improperly counted or recorded. *Id.* The court thus endorsed the principle that the clause protects each voter's right to be permitted to vote and to have that vote count. It said little (if anything) about any question relevant here.

The other case, *State ex rel. Brnovich v. City of Tucson*, reached a similar conclusion. *See* 251 Ariz. 45, 52 ¶ 30 (2021). In holding that a charter city's decision to schedule off-cycle elections was a matter of municipal autonomy protected by the Constitution's "home rule charter" provision, this Court recognized that the free and equal elections clause might be violated if a government entity "erects barriers to voting or treats voters unequally." *Id.* But, the Court clarified, election scheduling that results in low turnout "does not deprive . . . voters of their constitutional right to vote." *Id.* Thus, the Court took the commonsense route of interpreting the clause to protect an individual's rights to vote and be treated equally in the casting of ballots, but rejected the State's urged expansive reading of the clause. *Id.*

Looking to case law outside of Arizona similarly hurts, rather than helps, Petitioners' case. In *Wells*, for example, the U.S. Supreme Court affirmed without analysis a federal district court's decision holding that "the one man, one vote rule does not apply to the state judiciary, and therefore a mere showing of a disparity among the voters or in the population figures in the district would not be sufficient to strike down" a geographic judicial election procedure. 347 F. Supp. at 455 (citation omitted), *aff'd*, 409 U.S. at 1095; *see also Chisom v. Roemer*, 501 U.S. 380, 402–03 (1991) ("[W]e have held the one-person, one-vote rule inapplicable to judicial elections . . . ."). To the extent Petitioners here urge something akin to a one-person, one-vote rule, their claims should fail for similar reasons. After all, "[j]udges do not represent people, they serve people. Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary." *Wells*, 347 F. Supp. at 455 (citation omitted).

Case law from Washington, which has an identical free and equal elections clause in its constitution,[6] likewise supports this result. *See Eugster v. State*, 259 P.3d 146, 149–51 ¶¶ 7–13 (Wash. 2011). In rejecting a challenge even narrower than the one presented by Petitioners, the Washington Supreme Court reasoned that "voting districts need not be numerically equivalent for judicial elections" because judges have "fundamental obligations of impartiality and independence that do not apply to elected representatives of the legislative branch."[7] *Id.* at 150 ¶ 11. In reaching that conclusion, the court noted that the free and equal elections clause has been "historically interpreted as . . . prohibiting the *complete* denial of the right to vote to a group of affected citizens." *Id.* at 150 ¶ 10 (emphasis added). Thus, even assuming the clause "applies in a general way to judicial elections," the clause does not "require voting districts with equal populations in the

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[6] *Compare* Ariz. Const. art. II, § 21 *with* Wash. Const. art. I, § 19. The language of Arizona's equal privileges and immunities clause is also virtually identical to Washington's. *Compare* Ariz. Const. art. II, § 13 *with* Wash. Const. art. I, § 12.

[7] Petitioners here seem to argue that even the system advocated for by the challengers in *Eugster*—which would have conducted elections by equally sized districts—would be unconstitutional. According to them, nothing short of statewide retention elections can pass constitutional muster.

unique context of the Court of Appeals." *Id.* Here, as in *Eugster*, "[n]o voter is shut out of Court of Appeals elections" and "every [Arizona] voter has the opportunity to vote for at least one Court of Appeals judge." *Id.*

The principles underlying the free and equal elections clause, and all existing authority, suggest that Arizona's geographic system of appointing and retaining Court of Appeals judges does not violate the free and equal elections clause.

IV. The current system does not violate Arizona's equal privileges and immunities clause.

Petitioners next turn to Arizona's equal privileges and immunities clause in their attempt to manufacture a right that will give them the result they seek. Again, they fail.

A. Because Arizona's equal privileges and immunities clause and the federal equal protection clause are read similarly, this Court should follow the U.S. Supreme Court and hold that Arizona's clause does not apply to the geographic apportionment of judicial retention elections.

"The effects of the federal and state equal protection guarantees are essentially the same . . . each generally requiring the law treat all similarly situated persons alike." *Loncar v. Ducey*, 244 Ariz. 519, 523 ¶ 11 (App. 2018) (cleaned up); *see also Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 39 (2012) ("[T]his Court has construed Article 2, Section 13 of Arizona's Constitution

as applying the same standard as applies to equal protection claims under the federal constitution . . . ."). Petitioners contend that Arizona's clause is more stringent than the federal clause in the context of judicial retention elections, but ample case law shows that the Arizona and federal clauses are generally coextensive. *See, e.g.*, *Standhardt v. Superior Court*, 206 Ariz. 276, 289 n. 19 (App. 2003) ("We have held that this clause provides the same benefits as its federal counterpart . . . ."); *Vong*, 235 Ariz. at 122 ¶ 31 ("The guarantees in the two constitutions are essentially the same in effect.") (cleaned up); *Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 366 (App. 1997) ("[T]he equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." (quoting *Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 554 (1945))); *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 77 (App. 1996) ("Article 2, Section 13 of the Arizona Constitution . . . . has been held to have the same effect as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."); *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) ("Because the Fourteenth Amendment cannot be read to prohibit Arizona's felon disenfranchisement scheme, neither can this provision of the Arizona Constitution.").

There is no principled reason to diverge from the U.S. Supreme Court's federal equal protection jurisprudence here. And applying the federal equal protection standard, the U.S. Supreme Court's holding in *Wells* makes clear that "the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary." *Wells*, 347 F. Supp. at 455, *aff'd* 409 U.S. 1095.

"The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." *Id.* (citation omitted). And Petitioners' case here is even weaker than the case that was presented in *Wells*, which involved direct judicial elections. *See id.* at 454–55. If geographic apportionment of direct judicial elections for statewide office does not raise equal protection concerns, then geographic division of retention elections cannot raise such concerns.

The Court of Appeals came to a similar conclusion in an equality-based apportionment challenge to county official appointments. *See Asta*, 25 Ariz. App. at 549. In *Asta*, plaintiffs argued that a statute that permitted extremely lopsided representation violated the equal privileges and immunities clause. *Id.* at 548–49. The court recognized that the federal and Arizona standards

were the same, and also that plaintiffs' concerns were "better addressed to the legislature than to us." *Id.* at 549. The court further recognized that the "one person-one vote rule is inapplicable" to appointments. *Id*. at 550. So too here. *See Eugster*, 259 P.3d at 150 ¶ 11 (holding that "voting districts need not be numerically equivalent for judicial elections").

Petitioners suggest that Arizona's history and tradition create daylight between the federal and state clauses, Pet. 25, but the opposite is true. The geographical system of judicial elections has been in place since 1964, including the current system of retention elections since 1974. That is over half of Arizona's 111-year history, and the entirety of the Court of Appeals' existence. "Long-established practices, accepted by other branches of government, may be relevant in construing constitutional provisions." *Brewer v. Burns*, 222 Ariz. 234, 241 ¶ 33 (2009). Petitioners seek to upset Arizona's "[d]eeply embedded traditional ways of conducting government," but "history, case law, and logic suggest" that the current scheme is entirely consistent with the Constitution. *Eugster*, 259 P.3d at 150-51 ¶ 13 (citation omitted).

B. In any event, Petitioners' claim fails any applicable test.

To succeed on an Article II, § 13 claim, "a party must establish (1) that it was treated differently than those who are similarly situated, and (2) when disparate treatment does not implicate fundamental rights or suspect classification, that the classification bears no rational relation to a legitimate state interest." *Waltz Healing Ctr., Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 616 ¶ 24 (App. 2018) (citation omitted).[8]

[8] Resolving these issues could require fact-finding. As a general matter, whether a party can prove an equal privileges and immunities claim requires resolution of "factual disputes" and depends "on the course of proceedings in the trial court." *City of Mesa*, 230 Ariz. at 363 ¶ 46. Petitioners carry the burden to show a violation. *Phoenix Newspapers, Inc.*, 187 Ariz. at 78; *see also Vong*, 235 Ariz. at 123 ¶ 32. Petitioners should have to meet their burden. For instance, Petitioners assert facts about the population breakdown of the voting districts in the Court of Appeals divisions, arguing that the population difference causes a form of vote dilution and risks "complete[ ] disenfranchise[ment]." Pet. 16–17. But it is far from clear that any geographic subset of voters is worse off because of § 12-120.02, and if so, whether it is Maricopa/Pima voters or voters from other counties. *See* Pet. 16–17, 20–21, 23–24; *infra* Section IV.B.1. If such a dispute is eventually entertained, the State may wish to introduce expert testimony, as is appropriate in such circumstances. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 19–22 (2023) (discussing fact-finding and expert analysis of vote dilution claims).

1. Petitioners' claim fails at the threshold because there is no differential treatment.

Nowhere do Petitioners explain which group of voters is being treated worse than some other group of voters. At times, they seem to suggest that rural voters are being treated worse, *see* Pet. 16–17, 20, while in the next breath seeming to argue that it is the urban voters who suffer, *see* Pet. 17, 20–21, 23–24. Ultimately, however, Petitioners seem to contend that all Arizonans are harmed by the purportedly faulty § 12-120.02. *See* Pet. 20–21, 23–24. In other words, all Arizonans are equally affected and there is no differential treatment.

This flawed argument results from each Petitioner representing each of the § 12-120.02 voting areas. So, to the extent any Petitioner is being treated differently from any other voter, she is also treated differently from at least one of her co-Petitioners. *See* Pet. 6–8; *supra* Section I.A. Thus, if § 12-120.02 favors rural voters, as Petitioners suggest, Pet. 23–24, then Petitioners' requested relief cannot be granted without damaging the interests of two out of four Petitioners. Pet. 6–8. Or, if § 12-120.02 favors Maricopa and Pima voters, as Petitioners elsewhere seem to suggest, Pet. 16–17, the relief cannot be granted without damaging the interests of the other

two. In other words, Petitioners never even *allege* differential treatment, nor could they, because they collectively represent all four possible voting areas.

This problem is fatal to Petitioners' equal privileges and immunities claim. The threshold question in such a case is whether parties "have been treated unequally when compared to other members of their class." *Craven v. Huppenthal*, 236 Ariz. 217, 220 ¶ 17 (App. 2014). "Unless that question is answered affirmatively, it is unnecessary to decide whether disparate treatment in this context would be subject to strict scrutiny or rational basis review." *Id.*

Here, Petitioners are not "treated differently from other" voters. *Brink Elec. Constr. Co. v. Ariz. Dep't of Revenue*, 184 Ariz. 354, 362 (App. 1995). Each Petitioner is treated identically with the other voters in her respective geographic region and, by Petitioners' own reckoning, voters across all four voting areas are alike affected by § 12-120.02. *See* Pet. 6–8, 16–17, 20–21, 23–24; *supra* Section I.A. It is therefore unnecessary even to ask whether rational basis or strict scrutiny applies and Petitioners' claim fails on this basis alone. *Craven*, 236 Ariz. at 219 ¶ 6, 220 ¶ 17.

2. Rational basis is the appropriate standard, which A.R.S. § 12-120.02 survives.

Even if Petitioners could clear the threshold inquiry, rational basis review would apply because heightened scrutiny applies in the election context only "if it is alleged that some portion of [the] electorate is favored" via "classifications between and among electors within a voting district." *City of Tucson v. Pima County*, 199 Ariz. 509, 516 ¶ 21 (App. 2001). Here, there is no distinction between or among voters within any of the voting areas provided by A.R.S. § 12-120.02.

Further, equal protection "does not preclude the establishment of distinct classes within a geographic area if the classifications are reasonably related to a legitimate state interest and all persons within the class are treated equally." *City of Tucson*, 199 Ariz. at 518 ¶ 29. The geographic classifications here are related to the legitimate state interest of implementing the Constitution's Court of Appeals appointment scheme: An appointee to fill an appellate court vacancy must be "a resident of the counties or county in which that vacancy exists." Ariz. Const. art. VI, § 37(D). The Constitution requires that judges standing for retention "be placed on the *appropriate* official ballot," not that the ballot be one distributed

statewide. *Id*. art. VI, § 38(B) (emphasis added). And the Constitution empowers the legislature to provide for the "jurisdiction, powers, duties and composition" of the Court of Appeals. *Id.* art. VI, § 9. Section 12-120.02 simply implements these provisions of the Constitution.

Section 12-120.02 thus "does not *implicate*, let alone burden" Petitioners' right to vote. *City of Tucson*, 199 Ariz. at 518 ¶ 30 (emphasis added). It would make no sense to conclude that a statute implementing a constitutional mandate is itself unconstitutional based on Petitioners' nebulous interpretation of the equal privileges and immunities clause.

Petitioners attempt to skirt these principles by arguing that they are being disenfranchised. *See* Pet. 22–23. Not so. Each of the Petitioners may vote in Court of Appeals retention elections in the exact same manner as every other voter within her respective region, and each voter in Arizona has the right to vote in such elections. A.R.S. § 12-120.02. This framework does not implicate, let alone burden, the Petitioners' equal privileges and immunities right to participate in elections. *City of Tucson*, 199 Ariz. at 518 ¶ 30; *Eugster*, 259 P.3d at 150 ¶ 10.

The cases Petitioners cite are helpfully distinguishable because they show what disenfranchisement actually looks like. *See* Pet. 22–23. In *Mayor*

& Council v. Royal, tens of thousands of individuals "los[t] their right to vote in the 1973 primary election." 20 Ariz. App. 83, 84, 89 (1973). And in *Cipriano v. City of Houma*, a state law gave "only 'property taxpayers' the right to vote" to approve bonds, which "exclude[d] otherwise qualified voters." 395 U.S. 701, 702, 706 (1969). Nobody is being excluded here. Every Arizonan has the right to vote in a retention election. *See Eugster*, 259 P.3d at 150 ¶ 10. And being affected by a judge's authority does not create the right to vote for that judge's retention. *Wells*, 347 F. Supp. at 455–56; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–70 (1978) (explaining that merely being affected by government action does require "concomitant extraterritorial expansion of the franchise").

Rational basis review therefore applies and A.R.S. § 12-120.02 survives such review, given the legitimacy of balancing urban and rural interests. *See City of Tucson*, 199 Ariz. at 519 ¶ 31 (recognizing protecting interests of geographic subgroups as a legitimate state interest).

3. Even if strict scrutiny applies, A.R.S. § 12-120.02 survives.

Here, there is no improper classification to trigger strict scrutiny, which can be a fact-intensive inquiry. *See supra* note 8. But even assuming strict scrutiny were applied, and even accepting Petitioners' thin facts, Pet.

16–17, the statute is "necessary to promote a compelling state interest." *Big D. Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 566 (1990).

Arizona's system has long promoted the important interest of balancing rural and urban interests. That explains why the Constitution requires appointees to the Court of Appeals to be "a resident of the counties or county" in which vacancies exist. Ariz. Const. art. VI, § 37(D). Such a system ensures residents outside of Arizona's two most populous counties sit on the Court of Appeals. And § 12-120.02 ensures that voters in the more rural counties may cast a vote consistent with that constitutional arrangement.

Petitioners make much of Arizona's history and tradition regarding judicial elections. *See, e.g.*, Pet. 25. But Arizona's history and tradition cut strongly in the other direction. The geographic allocation of Court of Appeals elections has been in place consistently since the genesis of that court in 1964. From the beginning, the system has been designed to ensure that both rural and urban voters have a voice in retaining Court of Appeals judges.

Keeping the geographic structure for retention elections—and not just judicial appointments—helps further this important interest. After all, if the

judges appointed from rural counties had to appeal to a largely urban statewide electorate, it is not hard to imagine that the "rural" judges might behave a lot more like their "urban" counterparts. The current geographical system for retention elections helps ensure that the judges who occupy the seats reserved for smaller counties reflect the priorities and values of the voters in those counties. *Cf. Ball v. James*, 451 U.S. 355, 371 (1981) (upholding geographical voting limits); *Hancock v. Bisnar*, 212 Ariz. 344, 350 ¶¶ 25–27 (2006) (same); *City of Tucson*, 199 Ariz. at 519 ¶ 31 (recognizing protecting interests of geographic subgroups as a legitimate state interest). And so too for the judges in Maricopa and Pima counties, for that matter.

Although a more granular look should be unnecessary, it shows that the balance struck by the current scheme is narrowly tailored to support the important state interest of ensuring geographic diversity. Based on Petitioners' figures, Maricopa County has approximately 62 percent of Arizona's total population, and the remaining Division One counties have about 14 percent. Pima County has about 14 percent of Arizona's population, and the remaining Division Two counties have about 10 percent. *See* Pet. App. 047. Section 12-120.02 reflects this basic population divide: Maricopa County automatically has about 36 percent of the Court of Appeals

judges, with the possibility of obtaining up to 50 percent thanks to the four at-large judgeships. *Id.* § 12-120.02(A). The less populous Division One counties automatically have about 18 percent of the state's Court of Appeals judgeships. *Id.* Pima County automatically gets about 14 percent of the judgeships, while the remaining Division Two counties get about 7 percent, with the possibility of higher numbers for either grouping from the three at-large judgeships. *Id.* § 12-120.02(B).

In practice, this has worked out to a rough parity between a region's population and the number of Court of Appeals judges. Currently, 14 of Arizona's 28 Court of Appeals Judges are from Maricopa County (50 percent), *see* Pet. App. 008–009, five are from the other Division One counties (18 percent), Pet. App. 008–009, five are from Pima County (18 percent), and four are from the remaining Division Two counties (14 percent).[9] In other words, the roster of Court of Appeals judges across both divisions roughly reflects Arizona's population breakdown, with a slight bias in favor of Arizona's more rural counties. Petitioners point to no authority whatsoever

[9] *See* Arizona Court of Appeals Division Two, Court Information, https://www.appeals2.az.gov/ODSPlus/courtInformation.cfm (last visited Oct. 6, 2023)

to suggest that such a minor deviation from population figures fails strict scrutiny, and none exists.

Moreover, Petitioners' rigid absolutism regarding what is constitutionally permissible further illustrates the absurdity of their position. Petitioners allege that the *only* possible constitutional scheme is one with statewide retention elections. *See* Pet. 2–3.

According to Petitioners, elections by equally populated district, as the challenger in *Eugster* sought, would still be unconstitutional. So too would division-wide elections, in which every voter in Division One could vote on every Division One judge, and every voter in Division Two could vote on every Division Two judge. Either such system would allow voters to "participate in state elections on an equal basis with other qualified voters," *State ex rel. Brnovich*, 251 Ariz. at 52 ¶ 30, and to have their ballot "given the same weight as every other ballot," *Chavez*, 222 Ariz. at 319 ¶ 33. But Petitioners would strike down both alternatives based on an equal protection theory for which they have zero authority.

Petitioners cannot concede even that these alternatives exist, because then their request to have this Court legislate would be even more transparent. Recognizing that this Court would never choose between

multiple constitutional options when none is written in law, Petitioners stake their claim on an all-or-nothing approach that strains credulity.

V. Petitioners are not entitled to mandamus or any other relief.

Mandamus relief is rare, and highly discretionary. "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Sears*, 192 Ariz. at 68 ¶ 11. The party seeking a writ of mandamus has the burden to show a "clear, legal right to have the thing done which is asked for, and it must be the clear legal duty of the party sought to be coerced to do the thing he is called on to do." *Taylor v. Tempe Irrigating Canal Co.*, 21 Ariz. 574, 580 (1920) (citation omitted). Mandamus will only lie if a public officer is "specifically required by law to perform the act." *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464 ¶ 9 (App. 2007) (citation omitted).

Here, as detailed above, Petitioners point to Arizona constitutional provisions that have never before been interpreted to require what Petitioners suggest (or anything remotely similar) as the source of the Secretary's "clear legal duty." *Taylor*, 21 Ariz. at 580. They identify no authority to support their novel arguments, much less clear authority. This is not the stuff mandamus relief is made of.

More fundamentally, this Court simply cannot grant Petitioners the relief that they seek. Petitioners seek declaratory and injunctive relief requiring statewide retention elections of Court of Appeals judges. *See* Pet. 26. But that would not merely require this Court to declare a statute invalid or enjoin its enforcement; it would require this Court to *rewrite the statute*, because no statute currently provides for statewide retention elections for Court of Appeals judges. And it is a bedrock rule that courts do not rewrite statutes. *See, e.g.*, *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 313 ¶ 22 (2017); *Lewis v. Debord*, 238 Ariz. 28, 31 ¶ 11 (2015); *First Nat'l Bank of Ariz. v. Super. Ct. of Maricopa Cnty.*, 112 Ariz. 292, 295 (1975). A court cannot give Petitioners the remedy they seek.

CONCLUSION

This case is not one in which a right has been transgressed and a remedy must be found. It is, instead, one in which Petitioners started by identifying their desired remedy and then went searching for a right that might fit. As their lack of authority indicates, no such right is to be found in Arizona's Constitution.

This Court should dismiss this petition on standing grounds. Alternatively, the Court should decline special action jurisdiction so the

Superior Court may determine, in the first instance, whether Petitioners have standing or are otherwise entitled to relief. Finally, if the Court decides to overlook these concerns and hear this action, it should rule that Petitioners' challenge is without merit because Arizona's longstanding geography-based method for retaining Court of Appeals judges is consistent with the Arizona Constitution.

RESPECTFULLY SUBMITTED this 6th day of October, 2023.

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SUPREME COURT OF ARIZONA

BONNIE KNIGHT; DEBORAH McEWEN; SARAH RAMSEY; and LESLIE WHITE, Petitioners, v. ADRIAN FONTES, in his official capacity as Secretary of State, Respondent, KRISTIN MAYES, in her official capacity as Attorney General, Intervenor.	Arizona Supreme Court No. CV-23-0229-SA

CERTIFICATE OF COMPLIANCE

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Pursuant to R.P. Spec. Act. 7(e), I certify that the attached response uses a proportionate typeface of 14 points, is double spaced using a roman font, and does not exceed 10,500 words.

Dated: October 6, 2023.

By /s/ Alexander W. Samuels

SUPREME COURT OF ARIZONA

BONNIE KNIGHT; DEBORAH McEWEN; SARAH RAMSEY; and LESLIE WHITE, Petitioners, v. ADRIAN FONTES, in his official capacity as Secretary of State, Respondent, KRISTIN MAYES, in her official capacity as Attorney General, Intervenor.	Arizona Supreme Court No. CV-23-0229-SA

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I certify that on October 6, 2023, Intervenor Kris Mayes, Arizona Attorney General, electronically filed her RESPONSE TO PETITION FOR SPECIAL ACTION, and served a copy of the same, via TurboCourt and email, on the following persons:

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