

## ***Knight, et al. v. Fontes, et al. – Backgrounder***

Date Filed: January 8, 2024

Last Step: Filed Verified Special Action Complaint in Maricopa County Superior Court

Next Step: Await Government's response

### **Executive Summary**

The Arizona Constitution requires that all elections—including judicial retention elections—be “free and equal.” This means that each voter gets an equal say in the outcome of elections for public officials with jurisdiction over them.

But not everyone gets to vote in retention elections for Court of Appeals judges, even though those judges have statewide jurisdiction. Currently, only voters residing in the same geographic area as a particular judge may vote in that judge's retention election. Voters living in the other parts of the state do not get to vote in those elections even if they have sat before that judge in court or have been otherwise affected by a judge's decision. Such unequal treatment violates the Free and Equal Elections Clause and another constitutional provision guaranteeing that privileges such as the right to vote “equally belong to all citizens.”

That is why the Goldwater Institute, through its Scharf-Norton Center for Constitutional Litigation, partnered with former Arizona Supreme Court Justice Andrew Gould, a partner at Holtzman Vogel, to file a Special Action Complaint on behalf of four disenfranchised Arizona voters, demanding that all retention elections for Court of Appeals judges comply with the Constitution and be held on a statewide basis.

### **Background**

The right to vote in judicial elections is deeply engrained in Arizona's history, dating back to the very founding of the state. President Taft vetoed Arizona's admission to the United States because the proposed state constitution allowed for the recall of judges. Arizonans removed the offending provision to gain statehood. But then, in true independent fashion, the First Legislature placed an amendment restoring the provision before the voters, and they approved it.

Unfortunately, when it comes to judges sitting on the Arizona Court of Appeals, current law does not protect the constitutional right of all Arizonans to have a say in whether those judges are retained.

Under the Arizona Constitution, the judicial power of the state is vested in an integrated judicial department consisting of a superior court, a supreme court, and “such intermediate appellate courts as may be provided by law.” Ariz. Const. art. VI, § 1. Arizona law establishes the Court of Appeals as that intermediate appellate court. A.R.S. § 12-120(A).

The Court of Appeals was created in 1964 and has expanded several times since then, including most recently in 2022. It is currently comprised of 28 judges and decides appeals in panels of three judges called “departments.” These departments are administratively divided into two

divisions, with six in division one and three in division two. A.R.S. § 12-120(B). Nevertheless, the Court of Appeals acts as a “single court.” A.R.S. § 12-120(A). That means when a department of the Court of Appeals renders an opinion, that decision is binding legal precedent that affects the entire state and all its voters, irrespective of which department or division issued it. *Scappaticci v. Sw. Sav. & Loan Ass’n*, 135 Ariz. 456, 461 (1983) (“A decision by the Arizona Court of Appeals has statewide application.”). Importantly, because the Arizona Supreme Court accepts review in only a small number of cases, the Court of Appeals issues the final decision in the vast majority of appellate cases in Arizona.

The unitary nature of the Court of Appeals is exemplified in other ways. For example, the Court of Appeals can, and regularly does, transfer cases between the two divisions “to equalize caseloads and for the best use of judicial resources.” A.R.S. § 12-120(E). Judges may participate in matters pending before either division. *Id.* The composition of departments can change. *See generally* Administrative Orders of the Court of Appeals. And the Commission on Appellate Court Appointments, a statewide commission that nominates judges to the Arizona Supreme Court and Court of Appeals, vets and nominates the applicants for the Court of Appeals.

Despite its statewide character, existing law does not afford all Arizona voters the right to vote on the retention of all the judges on the Court of Appeals. A.R.S. § 12-120.02. This is unlike the statewide retention elections for justices of the Arizona Supreme Court. Instead, the voter’s residency limits the voter’s choices to only those judges sitting for retention in a corresponding geographic area. That is not only unfair to Arizona voters, who are bound by the decisions of these judges, it also violates the Arizona Constitution.

### Legal Analysis

Arizona’s Constitution requires that “[a]ll elections shall be free and equal....” Ariz. Const., art. II, § 21 (emphasis added). That means that the vote of each voter must be “equal in its influence.” *Chavez v. Brewer*, 222 Ariz. 309, 319 (App. 2009) (citation omitted). And that “each vote is given the same weight as every other ballot.” *Id.* In other words, the state cannot “erect[] barriers to voting or treat[] voters unequally.” *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 (2021).

Existing law does not allow for “equal influence” from voters on the retention of appellate judges. Arizona voters in each county get no vote on several members of the statewide court. Court of Appeals judges also do not sit for retention before an equal voting population. Only about 10% of Arizona voters may weigh in on the retention of a Court of Appeals judge who lives in Pinal, Cochise, Santa Cruz, Greenlee, Graham, or Gila counties. But nearly 60% of Arizona voters may participate in retention elections for judges residing in Maricopa County. This is true even though the two judges perform the same function and their judgments carry equal weight.

The Constitution also commands that “[n]o law shall be enacted granting to any citizen [or] class of citizens...privileges or immunities which, upon the same terms, shall not *equally* belong to all citizens.” Ariz. Const. art. II § 13 (emphasis added). The current statutory system violates this

Clause because it impairs the equal administration of the right to vote on the retention of Court of Appeals judges in Arizona.

### **Case Logistics**

The Goldwater Institute represents four plaintiffs, all Arizona voters who have been wrongfully denied the right to vote in retention elections for Court of Appeals judges residing in other areas of the state.

Bonnie Knight resides in Yuma County and may only vote on the retention of judges residing in Division 1, excluding Maricopa County. Deborah McEwen resides in Santa Cruz County and may only vote on the retention of judges residing in Division 2, excluding Pima County. Sarah Ramsey resides in Pima County and may only vote on the retention of Court of Appeals judges who also reside in Pima County. Likewise, Leslie White, a resident of Maricopa County, may not vote on the retention of Court of Appeals judges who reside outside Maricopa County.

Each of these plaintiffs should be able to vote on the retention of all Court of Appeals judges statewide because Court of Appeals judges issue statewide decisions.

Secretary of State Adrian Fontes is sued in his official capacity because under the state constitution the Secretary of State's office receives judicial retention candidate declarations and certifies to the county boards of supervisors which candidates' names shall appear on the ballot. The State of Arizona is also a defendant in the lawsuit.

The case was filed in the Superior Court of Arizona in and for Maricopa County on January 8, 2024.

### **The Legal Team**

**Andrew Gould** is a Partner at Holtzman Vogel Baran Torchinsky & Josefiak PLLC. He is a former Arizona Supreme Court justice, Arizona Court of Appeals judge, Yuma County Superior Court judge, prosecutor, and civil litigator. He has extensive experience in and institutional knowledge regarding Arizona's judicial system.

**Jon Riches** is the Vice President for Litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation and General Counsel for the Institute. He litigates in federal and state trial and appellate courts in the areas of economic liberty, regulatory reform, free speech, taxpayer protections, public labor issues, government transparency, and school choice, among others.

**Scott Day Freeman** is a Senior Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. He has more than 28 years of experience litigating complex commercial and tort defense cases at large international and regional law firms. Scott previously served as Vice Chair for the Arizona Independent Redistricting Commission during the 2011 redistricting cycle. He litigates free speech, associational rights, property rights, and election-related cases.

**Parker Jackson** is a Staff Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, where he focuses on taxpayer protection, free speech, associational rights, government transparency, education, and election-related issues.