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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

BONNIE KNIGHT; DEBORAH McEWEN; SARAH RAMSEY; and LESLIE WHITE Plaintiffs, vs. ADRIAN FONTES, in his official capacity as Arizona Secretary of State; and STATE OF ARIZONA, Defendants.	Case No. CV 2024-000431 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)** (Assigned to the Hon. Frank W. Moskowitz)

Pursuant to Ariz. R. Civ. P. 56, Plaintiffs Bonnie Knight, Deborah McEwen, Sarah Ramsey, and Leslie White ("Voters") respectfully move for summary judgment on the claims asserted in their Verified Special Action Complaint. There are no genuine disputes as to any material fact, and Voters are entitled to judgment as a matter of law.

INTRODUCTION

The Free and Equal Elections Clause of the Arizona Constitution, art. II § 21, forbids the legislature from "erect[ing] barriers to voting ***or*** treat[ing] voters unequally." *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021) (emphasis added). But A.R.S. § 12-120.02, which governs retention elections for judges on the Arizona Court of Appeals—a single, unified court that establishes binding legal precedent statewide—violates this Clause because it denies Voters the right to vote in some, or in some cases most, of these retention elections based on their residency. Additionally, A.R.S. § 12-120.02 also violates Voters' rights under the Equal

Privileges and Immunities Clause of the Arizona Constitution, art. II § 13, which guarantees that the right to vote shall "equally belong to all citizens." Specifically, the statute discriminates among voters right to vote in retention elections based on their residency. As a result, summary judgment should be entered in favor of Voters.

LEGAL STANDARD

Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment may be entered "if parties agree as to operative facts and only dispute application of the law to these facts." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 118 ¶ 24 n.8 (App. 2008).

Summary judgment is appropriate here because the disputes in this case are *legal*, not *factual*. Indeed, in the Defendant's Motion to Dismiss, the State did not dispute any facts relevant to resolving this matter.

This case should be resolved on summary judgment.

FACTUAL BACKGROUND

I. The right to vote for judges is deeply engrained in Arizona's history.

The right of Arizona's citizens to hold state judges accountable at the ballot box is one of our state's most important historical and constitutional principles. In 1910, when Arizona sought admission to the union, it did so under a constitution that provided for the democratic recall of judges. Pls.'Separate Statement of Facts in Support of Mot. for Summ. J. ("SOF") ¶ 11. President William Howard Taft, who objected to this idea, vetoed the state's admission to the union for this reason. *Id.* Arizonans then eliminated this provision from their proposed Constitution and sought admission again in 1912. *Id.* This time, statehood was granted—whereupon the state legislature, *in its very first act,* referred the state's *first ballot initiative* to the voters: to amend the Constitution to re-insert this provision. *Id.* That referendum was approved by an 81 percent vote. *Id.*

For Arizona's first six decades, all state judges were elected by popular vote. *Id.* ¶ 12; *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 121 ¶ 2 (2013). This included the first decade of the Court of Appeals' existence, which was created in 1964 as "a

single court" with two geographic divisions—one centered around Maricopa County and the other around Pima County. SOF ¶ 13; 1964 Ariz. Sess. Laws 218–32.

The original 1964 act creating the Court of Appeals gave Maricopa and Pima County voters the ability to elect two of the three judges in each of their respective divisions, with the third judge elected from the outlying counties of each division. SOF ¶ 14; 1964 Ariz. Sess. Laws 220.[1] Each time the Court of Appeals expanded over the next couple of decades, judges were added three at a time, maintaining the same 2-1 ratio for Maricopa/Pima-elected to rural-county-elected judges. SOF ¶ 15. *See also* 1969 Ariz. Sess. Laws 79–81 (Division One); 1973 Ariz. Sess. Laws 1183–86 (Division One); 1981 Ariz. Sess. Laws 548–50 (Division One); 1984 Ariz. Session Laws 760–61 (Division Two); 1988 Ariz. Sess. Laws 142–43 (Division One).

In 1974, voters amended the Constitution to implement merit selection and retention elections for appellate judges serving on the Arizona Court of Appeals, eliminating the prior system of judicial elections. SOF ¶ 16; Proposition 108 (1974). Although Section 12-120.02 was not immediately amended to refer to retention elections, when read together with the new constitutional provisions, the result of the 1974 amendments was that new retention elections would be based on the residency of the voter and the judge's residence. Eventually, in 1994, the Legislature amended Section 12-120.02[2] adding the word "retention" to the statute. SOF ¶ 17; 1994 Ariz. Sess. Laws 1145–47.

In 2022, additional "at-large" judges were added in each division. SOF ¶ 18; 2022 Ariz. Legis. Serv. Ch. 310. Additionally, the following provision was added: "A matter may be transferred between divisions in order to equalize caseloads and for the best use of judicial resources." *Id.*[3] The purpose of this transfer provision was to equalize the caseload between Divisions 1 and 2, the former traditionally having a much more crowded docket. SOF ¶ 19. As a result, an appeal that would previously have been decided by Division One may now be

[1] The 1964 Act created Section 12-120.02. Unless otherwise indicated, the relevant amendments discussed herein were made to that Section of the statute.
[2] The 1994 revision also added an "extra" or "at large" judge to Division One, effectively freeing Division One's chief judge from both the rigid three judge panel structure and 2-1 urban/rural ratio. *See* A.R.S. § 12-120(B).
[3] This provision is codified in A.R.S. § 12-120(E).

transferred to Division Two, without regard to the domicile of the parties, the location of the *res*, or the location of the incident giving rise to the appeal. SOF ¶ 20.

II. The Court of Appeals has statewide jurisdiction.

The Arizona Constitution outlines the basic structure of our judiciary. *See, e.g.*, Ariz. Const. art. VI, § 1 ("The judicial power shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts."). Statutes and court rules, where they do not conflict with the Constitution, fill in the gaps. *See id.* art. VI, § 9 ("The jurisdiction, powers, duties and composition of any intermediate appellate court shall be as provided by law.").

Court of Appeals decisions can establish legal precedent and are binding statewide—for lower courts and the public at large. *Scappaticci v. Sw. Sav. & Loan Ass'n,* 135 Ariz. 456, 461 (1983). *See also* SOF ¶ 48. Thus, even though a judge may sit for retention election in a limited geographic area based on her county of residence, her decisions are binding on all lower courts and persons in the state, regardless of their geographic location. *See State v. Patterson*, 222 Ariz. 574, 579–80 ¶¶ 16, 20 (App. 2009) ("Rather than endorse any geographical rule," Arizona law "applies court of appeals decisions to *all* trial courts in the state, regardless of the division in which the trial court is located. … The superior court is bound by our decisions, regardless of the division out of which they arise."); *see also* A.R.S. § 12-120.07(A) (stating that "[a]n opinion of a division or department of a division shall be the opinion of the court of appeals.").

Although the Court of Appeals "constitutes a single court" (A.R.S. § 12-120(A)), the Court is divided into two geographical "Divisions." Division One covers Maricopa, Yuma, La Paz, Mohave, Coconino, Yavapai, Navajo, and Apache Counties, and includes a chief judge and six departments consisting of three-judge panels. SOF ¶ 21; A.R.S. § 12-120(B)–(D). Division Two covers Pima, Pinal, Cochise, Santa Cruz, Greenlee, Graham, and Gila counties, and consists of three departments of three-judge panels. SOF ¶ 22; A.R.S. § 12-120(B)–(D).

Importantly, the three-judge panels/departments deciding cases within each Division, which are binding throughout the state, may consist of judges from a single county or from several

different counties, and the residency of the judges may not align with the residency of any of the parties involved in the case or the *res* or incident concerned. SOF ¶¶ 20, 23. The chief judge for each Division may change panel assignments "from time to time," A.R.S. § 12-120.07(A),[4] and each department can hear "causes and all questions arising therein," *id.*; *see also* SOF ¶¶ 25–27. Thus, although *division* appointments are, by statute, based on the judge's county and division of residency, *see* A.R.S. §§ 12-120.01(A), 12-120.02; *see also* SOF ¶¶ 14–15, 21–22, *department* (or panel) assignments are *not* based on the residency of the judge. *See* SOF ¶¶ 23–24. Cases within a division are assigned to a particular department "without regard to which judges are on a particular panel". SOF ¶ 25.

Additionally, because "[e]ach judge of the court of appeals may participate in matters pending before a different division," SOF ¶ 26; A.R.S. § 12-120(E), and cases are regularly transferred between the two divisions pursuant to Section 12-120(E),[5] SOF ¶ 27, the judges on both Divisions of the Court of Appeals have statewide jurisdiction over parties residing in *any* county in the state. Likewise, Division One has statewide authority over appeals from the Arizona Industrial Commission, the Department of Economic Security Appeals Board, and the Arizona Corporation Commission, regardless of where the cases arise or where the parties reside. SOF ¶ 29.

III. A.R.S. § 12-120.02 imposes an unequal residency limitation on the right of citizens to vote in judicial retention elections.

The Constitution and related statutes specify the precise appearance of the ballot and the procedure for holding judicial retention elections. *See* Ariz. Const. art. VI, § 38(B); A.R.S. § 16-502. When a Court of Appeals judge seeks retention, he or she must file a declaration of candidacy

[4] Department assignments are changed with some frequency. The department assignments in Division One changed three times during the first half of 2023 alone. *See* Division One Administrative Orders 2023-01, 2023-02, and 2023-03, attached to the SOF as Ex. 6, 7, & 8. As a matter of policy, Division One rotates the composition of its three-judge panels every six months. SOF ¶ 24.

[5] Cases are regularly transferred between the two divisions pursuant to A.R.S. § 12-120(E), using a formula designed to equalize the caseload within each division. *See also* SOF ¶ 27 ("[F]or the first quarter of 2023, the Division One Clerk's Office anticipate[d] sending every 8th civil case, every 27th criminal case, and every 6th family law case filed in Division One to Division Two."). Importantly, "[t]he cases are transferred *sequentially without regard to the parties involved* or the number of issues raised." *Id.* (emphasis added).

with the Secretary of State's office "not less than sixty nor more than ninety days prior to the regular general election next preceding the expiration of his term of office." SOF ¶ 30; Ariz. Const. art. VI, § 38(A). The Secretary must then certify to the county boards of supervisors the names that are to appear on the ballot. *Id.*

Nothing in the Constitution, however, imposes residency requirements for the judicial retention elections of Court of Appeals judges. Such limits appear only in Section 12-120.02, which provides that retention elections for Court of Appeals judges are allocated between counties based on where the judge resides.

Section 12-120.02(A) states that of the nineteen judges in Division One, ten "shall be residents of and elected for retention from Maricopa county," five "shall be residents of the remaining counties … excluding Maricopa county," and four "shall be at-large judges, and be residents of any county in the division." *Id. See also* SOF ¶¶ 40–42. If an "at-large" judge resides in Maricopa County, he or she "shall be elected for retention by the voters of Maricopa county," but if not, then he or she "shall be elected for retention by the voters of the counties … excluding Maricopa county." SOF ¶ 42.

Similarly, Section 12-120.02(B) provides that four of the nine judges in Division Two "shall be residents of and elected from Pima county," *see* SOF ¶ 43; it also provides for two who must reside in "the remaining counties in the division" and "shall be elected by the voters of the counties in division 2, excluding Pima county," *see* SOF ¶ 44, and three "at-large" judges, who may be residents "of any county in the division," *see* SOF ¶ 45. A.R.S. § 12-120.02(B). If an "at-large" judge resides in Pima County, that judge "shall be elected for retention by the voters of Pima county," and if that "at-large" judge is not a resident of Pima County, then he or she "shall be elected for retention by the voters of the counties in division 2, excluding Pima county." *Id.*

Consequently, Court of Appeals judges stand for retention election based on which of four statutorily created geographic areas they reside in: (1) Maricopa County, (2) the remaining counties in Division One, (3) Pima County, and (4) the remaining counties in Division Two. And a voter may *only* cast a ballot in retention elections for those Court of Appeals judges who reside in the same statutorily designated geographic area as the voter. SOF ¶ 46; A.R.S. § 12-120.02.

Stated another way, a voter cannot vote on the retention of judges who reside outside of the voter's own geographic area. SOF ¶ 47; A.R.S. § 12-120.02.

Of course, Arizona's population is not equally distributed between the four geographic areas. SOF ¶¶ 31–35. Maricopa County's population is more than 4.5 million, while the total population of the remaining counties in Division One is just over 1 million. SOF ¶¶ 32–33. Pima County is home to another 1 million residents, while the combined population of the remaining counties in Division Two is less than 750,000. SOF ¶¶ 34–35.

All of this means that a retention election for any given Court of Appeals judge disenfranchises voters based on residency. By way of example, for a judge residing in Maricopa County, that county's 2.4 million registered voters get to vote on her retention, while the remaining 640,000 or so voters in Division One, and more than 1 million voters in Division Two, do not. *See* SOF ¶¶ 36–39. Conversely, for a "rural" judge in Division Two, fewer than 430,000 registered voters can vote for or against her retention, while the state's remaining 3.7 million voters have no vote—despite the fact that all of these Arizonans are governed by the judge's decisions. *Id.*

Meanwhile, only about 10% of Arizona's voting population may vote on the retention of a Court of Appeals judge who lives in a "rural" Division Two county—while nearly 60% of Arizona voters vote on the retention of a judge residing in Maricopa County. *Id.* This is true even though the "rural" Division Two judge and the "urban" Division One judge perform the same function, and their decisions are binding statewide authority.

Perhaps more importantly, voters under Arizona's current retention election scheme run the risk of being completely disenfranchised because there is no guarantee that *any* judge they vote for will sit on *any* given case. *See* SOF ¶¶ 20, 23–29. Specifically, because the Chief Judge in each Division has broad discretion in making panel assignments, SOF ¶¶ 23–24, and cases are regularly transferred between Divisions One and Division Two, SOF ¶ 27, some electors (especially those in rural counties) will frequently be subject to appellate decisions where they never voted for a *single* judge on the panel, *see* SOF ¶¶ 46–48.

ARGUMENT

I. The judicial retention provisions of A.R.S. § 12-120.02 violate Arizona's Free and Equal Elections Clause.

The Arizona Constitution requires that "[a]ll elections shall be free and equal." Ariz. Const. art. II, § 21. When our Constitution was ratified, the word "election" denoted "[t]he selection of one man from among several candidates to discharge certain duties in a state, corporation, or society." "Election," *Black's Law Dictionary* 415 (2d ed. 1910). Thus, the Free and Equal Elections Clause encompasses retention elections. *See also Arpaio v. Davis*, 221 Ariz. 116, 122 ¶ 25 n.7 (App. 2009) (characterizing Superior Court judges who sit for periodic retention elections as "independent elected official[s]"). This construction is further supported by the fact that, as noted above, the right of Arizona's citizens to hold state judges accountable at the ballot box is one of our state's most important historical and constitutional principles. *See supra*, at p. 2.

The Free and Equal Clause has no federal analog, and only a few Arizona cases have addressed it. In *City of Tucson*, the Supreme Court made clear that the Clause forbids the legislature from "erect[ing] barriers to voting ***or*** treat[ing] voters unequally." 251 Ariz. at 52 ¶ 30 (emphasis added). It also said the Clause "guarantees that voters will 'participate in state elections on an equal basis with other qualified voters.'" *Id*. (citation omitted).

Courts in other states with similar constitutional provisions have stated that "'free and equal' means that 'the vote of every elector is equal in its influence upon the result to the vote of every other elector.'" *See Oviatt v. Behme*, 147 N.E.2d 897, 901 (Ind. 1958) (citation omitted). And consistent with these cases, Arizona courts have generally stressed that "[e]lections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot." *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33 (App. 2009) (quoting *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932)).

In short, the Free and Equal Elections Clause imposes two requirements: that eligible voters be allowed to cast ballots, and that the ballots they do cast be of equal influence with the votes cast by other voters. Section 12-120.02 violates both rules.

It does this because it establishes geographical boundaries that have *no* relationship to the judge's jurisdiction or authority. It grants voters residing in the same area as the judge a right to vote, denies voters residing in a different area any vote, and subjects both sets of voters to that same judge's authority. What's more, under the current retention scheme there is no guarantee, apart from random "luck of the draw," that any judge an elector votes for will be assigned to hear any case from their geographical area.

The current statutory county-based residency and retention regime is a vestige of a time when judges stood for contested elections, and effectively "represented" the voters who selected them for office. *See Patterson*, 222 Ariz. at 577 ¶ 10 (noting that the statutes governing our appellate courts retain some "vestiges" of "[o]utdated" features of Arizona's court system). But that time has passed. The merit selection and retention elections statutes of recent decades have created a system in which judges who reside in Maricopa or Pima counties never have to stand for retention in outlying counties—and judges residing in outlying counties are not subject to retention elections in the state's two major population centers, despite the fact that Court of Appeals decisions are binding statewide.

Meanwhile, voters are arbitrarily left out of the retention election process. For example, Plaintiff Bonnie Knight, who lives in Yuma County, *cannot* vote on the retention of an appellate judge who resides in neighboring Pima County. SOF ¶¶ 1–2. Yet she *can* vote for a judge in Apache County—on the opposite end of the state, 400 miles away. *Id.* And no matter who she votes for, apart from the random chance that a judge will be assigned to a panel, there is no guarantee that *any* judge she voted for will hear the cases affecting her or Yuma County. Additionally, Ms. Knight, like the other Voters here, have *no* vote for many, if not most Court of Appeals judges that issue statewide decisions that are binding on them.

Similarly, Plaintiff Ramsey, who resides in Pima County, which borders Yuma County, may *only* vote on the retention of a Court of Appeals judge who resides in Pima County, but not for a judge who resides in neighboring Yuma County. SOF ¶¶ 5–6. And Plaintiff McEwen, who lives in Santa Cruz County, can only vote for retention of appellate judges in her home county or

the contiguous counties of Cochise, Greenlee, Graham, Gila, or Pinal. SOF ¶¶ 3–4.[6] Thus, if an appellate panel of Division Two were made up of judges from Pima, Pinal, and Cochise counties, McEwen could vote for two, Ramsey could vote for only one, and Knight could vote for none. Yet all these Voters are subject to that panel's decision, "regardless of the division or department in which the case is heard." *Angelica R. v. Popko*, 253 Ariz. 84, 89 ¶ 17 (App. 2022).

Thus, the disenfranchisement at issue here is pervasive, arbitrary, and unequal. The Free and Equal Elections Clause forbids this geographical discrimination which bars voters from voting on the retention of judges whose jurisdiction is statewide.

II. A.R.S. § 12-120.02 violates Arizona's Equal Privileges and Immunities Clause because it discriminates among voters based on their residency, and therefore denies the right of all citizens to vote equally in judicial retention elections.

The Arizona Equal Privileges and Immunities Clause provides that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz. Const. art. II, § 13. But because A.R.S. § 12-120.02 discriminates among voters based on their residency, the right to vote in retention elections for the Court of Appeals does "not equally belong to all citizens." As a result, the current system of retention election for judges based on A.R.S. § 12-120.02 violates the Equal Privileges and Immunities Clause.

The legality of classifications under Article II, Section 13, depends on the classification's "character, the individuals affected, and the asserted government purpose." *Big D Const. Corp. v. Ct. of Appeals*, 163 Ariz. 560, 566 (1990). When a statute "limits a 'fundamental right'" such as voting, it is subject to strict scrutiny. *Id.* Arizona courts have long held "that the right to vote is fundamental," *Chavez*, 222 Ariz. at 320 ¶ 36, and that deprivations of this right are subject to strict scrutiny. *See Mayor of Tucson v. Royal*, 20 Ariz. App. 83, 87 (1973) (in Equal Protection context, even *temporary* disenfranchisement requires that the state "must demonstrate a compelling state interest and that a less drastic means of serving that interest is not available").

[6] Plaintiff White resides in the other geographic area and faces similar circumstances. SOF ¶¶ 7–8.

However, although the jurisdiction of the Court of Appeals is *statewide*, voters do not get to vote in retention elections for judges on a statewide basis. Under the challenged statutes, *all* Arizona voters are disenfranchised with respect to the retention of *some or most* judges to the Court of Appeals and are therefore deprived of participating in these elections on an equal basis with all citizens in the state. The result is an inequality that violates the Equal Privileges and Immunities Clause.

True, the legislature may confine voting rights to a certain geographical area if the government entity in question confers a disproportionate burden or benefit on those living in that area. Thus, in cases such as *Ball v James*, 451 U.S. 355 (1981), *Hancock v. Bisnar*, 212 Ariz. 344, 350 ¶ 25 (2006), or *City of Tucson v. Pima Cnty.*, 199 Ariz. 509, 518 ¶ 29 (App. 2001), it was constitutional to limit voting rights with respect to irrigation districts or school districts to the people who lived within those districts; that fact justified the state in entitling only citizens disproportionately affected to vote in those elections. But no such rationale applies here, because *all* Arizonans are *equally* subject to the jurisdiction of all Court of Appeals judges—and yet are unequally denied the right to vote with respect to their retention.

There is no legitimate basis for divvying up voting rights based on the county of a judge's residence—a factor that bears no relationship to that judge's official authority. Thus, because, based on residency, some voters get to vote on judges and others do not, an "improper distinction is being made by the Arizona legislature between and among classes of persons *within the relevant area*." *City of Tucson*, 199 Ariz. at 518 ¶ 30; *cf. Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) ("The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote.").

Moreover, to the extent A.R.S. § 12-120.02 seeks to promote the interest of rural representation on the Court of Appeals, *cf. Royal*, 20 Ariz. App. at 84–85; *City of Tucson*, 199 Ariz. at 519 ¶ 31, the statute does not serve that interest. Simply put, although *appointing* judges from rural counties promotes this interest, mandating unequal *elections* does not. Indeed, the current retention election scheme is not even *rationally related* to promoting rural representation.

Plaintiff McEwen lives in Santa Cruz county, which has a 59.8% rural population, yet she *can* vote for a judge from Pinal County, which is *half* as rural (with a 23% rural population), but not a judge from Mohave County, which is almost exactly as rural as Pinal (23.9%), or a judge in Apache County, which is *twice* as rural (100%).[7] What's more, under A.R.S. § 12-120.02, some voters can vote on the retention of judges who reside on opposite ends of the state—Plaintiff Knight, for instance, residing in Yuma County, can vote for a judge in Apache County—but others are barred from voting on judges who reside in contiguous counties. Plaintiff Ramsey (Pima County) cannot vote for a judge who resides in Yuma County. SOF ¶¶ 1–2, 5–6. Thus, even if the reason for the disenfranchisement is to equalize rural interests, or a presumption that voters in one geographic area will know more about a judge who resides in that area, the statute fails to serve these purposes. It allows one group of voters to vote on the retention of judges who live 400 miles away—but bars another group of voters from participating in the retention election of a judge who lives in a nearby community.

The U.S. Supreme Court's holding that the federal Equal Protection principle of "one person, one vote" does not apply to judicial elections (*see Chisom v. Roemer*, 501 U.S. 380, 402 (1991)), has no bearing here, because Arizona's Equal Privileges and Immunities Clause has a broader sweep than its federal counterpart. The textual differences between Arizona's Equal Privileges and Immunities Clause and the federal Constitution's Equal Protection Clause should make plain that our state Constitution is more protective in this context. *Compare* Ariz. Const. Art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."), *with* U.S. Const. Amend. 14, sect. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... nor deny to any person within its jurisdiction the equal protection of the laws."). *See also Rochlin v. State*, 112 Ariz. 171, 176 (1975) ("Differences in language must be respected. If the authors of the constitution had intended the sections to mean the same thing, they could have used

[7] These figures come from the University of Arizona's 2020 Census/Rural Update for Arizona, https://crh.arizona.edu/sites/default/files/2023-06/2300601_Census-RuralUpdate-Brief.pdf. This Court can take judicial notice of census data, *State ex rel. Corbin v. Sabel*, 138 Ariz. 253, 256 (App. 1983), and Plaintiffs hereby move that it do so.

the same or similar language. The fact that they did not requires the conclusion that the sections were meant to be different." (cleaned up));Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution,* 20 Ariz. St. L.J. 115, 140 (1988) ("[T]he framers [of Arizona's Constitution] chose to go beyond a mere guarantee of equal protection to each citizen; they chose to forbid the legislature absolutely from extending special privileges to any person or group").

In *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986), the Washington Supreme Court set forth a test for determining when a state constitution is more protective than the federal Constitution; the foremost consideration is differences in the text.[8] *See also State v. Hunt*, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring) (saying the same). The second consideration is whether "state constitutional and common law history" require a different reading. *Gunwall*, 720 P.2d at 812. The Arizona Supreme Court "appl[ied] the Washington courts' approach" of examining "the textual language of the state constitution, significant textual differences between state and federal constitutions, [and] state constitutional and common law history" in *State v. Mixton*, 250 Ariz. 282, 296–97 ¶¶ 57, 63 (2021) (citation omitted).

Here, Arizona's distinct legal history plainly shows that our Constitution should be read as more protective in this context. If "matters of peculiar state interest or local concern" or "[a] state's history and traditions" are sufficient reason for reading the state Constitution differently from the federal Constitution, *Hunt*, 450 A.2d at 966 (Handler, J., concurring), then surely Arizona courts should be especially vigilant to ensure voters' right to free and equal participation in judicial elections—a matter on which the State of Arizona *literally staked its existence* in its very first act as a member of the federal union. The right of voters to decide who presides in its court system "is 'deeply rooted' in Arizona's 'history and tradition,'" and thus deserves the highest form of judicial solicitude. *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 270 ¶ 14 (App. 2011) (citation omitted).

[8] The Arizona Supreme Court relied on these factors in applying the state Constitution in *State v. Mixton*, 250 Ariz. 282, 296–97 ¶¶ 56–62 (2021).

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment to Voters on all claims and (1) declare the judicial retention provisions of A.R.S. § 12-120.02 unconstitutional to the extent they prohibit statewide electors from voting in judicial retention elections for judges on the Court of Appeals, (2) enjoin those portions of A.R.S. § 12-120.02 that prohibit statewide retention elections, and (3) order the Secretary of State to certify that the names of all Court of Appeals judges who declare their candidacy for retention in all future elections must be placed on the ballot statewide.

RESPECTFULLY SUBMITTED this 11th day of April, 2024.

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