IN THE SUPREME COURT

STATE OF ARIZONA

BONNIE KNIGHT; DEBORAH McEWEN; SARAH RAMSEY; and LESLIE WHITE, Petitioners, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, and STATE OF ARIZONA, Respondents,	Supreme Court No. CV-24-0220-T/AP Court of Appeals No. 2 CA-CV 2024-0280 Maricopa County Superior Court No. CV 2024-000431

APPELLANTS' OPENING BRIEF

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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 unequally denies voters the right to vote in some (or in some cases most) of these retention elections based on their county of residency. Under the statutory scheme, voters do not have an equal influence on the outcome of individual retention elections or the makeup of the Court of Appeals as a whole.

Additionally, A.R.S. § 12-120.02 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 Arizona voters based on their county of residency, resulting in unequal voting privileges.

Because A.R.S. § 12-120.02 is unconstitutional as written, and no other statute or constitutional provision regarding judicial retention elections for Court of Appeals judges permissibly divides the electorate along county or quasi-county boundaries, the Secretary of State has a non-discretionary constitutional duty to certify the names

of all Court of Appeals judges who state their candidacy for retention elections to be placed on the statewide ballot.

The court below erred as a matter of law by finding that Plaintiffs'/Appellants' Verified Special Action Complaint failed to state a claim under either the Free and Equal Elections Clause or the Equal Privileges and Immunities Clause. The court below further erred in concluding that it could not issue a mandamus-style order directing the Secretary of State to certify Court of Appeals retention election candidates to the statewide ballot.

The trial court's decision granting the State's Motion to Dismiss should be reversed, and this Court should grant the special action relief Appellants request.

STATEMENT OF THE CASE

On January 8, 2024, Plaintiffs/Appellants Bonnie Knight, Deborah McEwen, Sarah Ramsey, and Leslie White ("Voters"), each of whom respectively resides in the four distinct geographic areas of the state created by A.R.S. § 12-120.02 for purposes of retention elections for Court of Appeals judges, filed this special action in Maricopa County Superior Court against Defendants Adrian Fontes[1] and the State of Arizona, seeking to vindicate Voters' constitutional rights to free and equal elections, and to equal privileges and immunities as Arizona voters. IR.1.

[1] Defendant Fontes was sued in his official capacity as Arizona Secretary of State and participated in the proceedings below only as a nominal defendant. *See*, *e.g.*, IR.11 at 19.

On February 16, 2024, the State moved to dismiss for failure to state a claim. IR.11; IR.12. Voters subsequently moved for summary judgment.[2] IR.17. The trial court held oral argument on the State's Motion to Dismiss on July 22, 2024. IR.34; IR.44; IR.45.

In a Minute Entry filed July 30, 2024, the Superior Court dismissed Voters' special action for failure to state a claim. IR.35. It issued its Final Judgment on August 6, 2024. IR.38.

Voters immediately appealed, IR.39, and sought transfer to this court. *See* Pet. to Transfer and Expedite Election Matter. This Court granted the Petition to Transfer on August 13, 2024.[3] IR.42.

On September 11, 2024, Court of Appeals Division One transferred the case to Division Two under A.R.S. § 12-120(E) as part of the court's efforts to equalize caseloads. *See* Transfer Order. The same day, Division Two transferred the case to this Court. Order (Sept. 11, 2024); *see also* Order (Sept. 12, 2024).

[2] Although the State's Motion to Dismiss and Voters' Motion for Summary Judgment essentially addressed the same substantive legal issues, the trial court decided to hold the summary judgment motion in abeyance and rule solely on the Motion to Dismiss. *See* IR.30 at 2; IR.35; IR.38. At oral argument, though, it agreed that the case hinged on legal issues rather than factual issues. *See* IR.45 at 54:6–8 ("It's a legal issue. It involves the vote of Court of Appeals judges."); *see also* IR.27 (discussing lack of genuine dispute of material fact).

[3] Voters' request for expedited consideration was denied.

On October 2, 2024, this Court issued an Order creating a new case number, CV-24-0220-T/AP, and setting forth a briefing schedule. Order (Oct. 2, 2024).

STATEMENT OF FACTS

I. The four Voters reside in the four geographic areas set forth in Section 12-120.02.

Plaintiff/Appellant Bonnie Knight is a registered voter and taxpayer residing in Yuma County. IR.1 ¶ 13. Under Section 12-120.02, Ms. Knight can only vote on the retention of a Court of Appeals judge if that judge resides in Yuma, La Paz, Mohave, Coconino, Yavapai, Navajo, or Apache Counties. *Id.* ¶ 14. She is denied the right to vote on the retention of judges to the Court of Appeals whose residence is Maricopa, Pima, Pinal, Cochise, Gila, Santa Cruz, Graham, or Greenlee Counties, even though the judges in these counties have the same jurisdiction—including to issue decisions that are binding on Ms. Knight—as the judges residing in her geographic area. *Id.*

Plaintiff/Appellant Deborah McEwen is a registered voter and taxpayer residing in Santa Cruz County. *Id.* ¶ 15. Under Section 12-120.02, Ms. McEwen can only vote on the retention of a Court of Appeals judge if that judge's residence is in one of six counties: Santa Cruz, Pinal, Cochise, Greenlee, Graham, or Gila. *Id.* ¶ 16. Apart from these six counties, McEwen is prohibited from voting on the retention of judges to the Court of Appeals, even though these judges have the same appellate

jurisdiction over her as the judges who sit for retention in the same geographic area in which she resides. *Id.*

Plaintiff/Appellant Sarah Ramsey is a registered voter and taxpayer residing in Pima County. *Id.* ¶ 17. Under Section 12-120.02, Ms. Ramsey can only vote on the retention of a Court of Appeals judge if that judge resides in Pima County. *Id.* ¶ 18. Thus, although Ramsey is subject to the legal precedents and appellate jurisdiction of all the state's Court of Appeal judges, she cannot vote on the retention of such judges who reside outside Pima County. *Id.*

Plaintiff/Appellant Leslie White is a registered voter and taxpayer residing in Maricopa County. *Id.* ¶ 19. Under Section 12-120.02, Ms. White can only vote on the retention of a Court of Appeals judge if that judge resides in Maricopa County. *Id.* ¶ 20. As with the other Voters, White is subject to the appellate jurisdiction and binding legal precedents of the state's Court of Appeals judges, but cannot vote on the retention of any Court of Appeals judge who resides outside Maricopa County. *Id.*

II. 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. *Id.* ¶ 26. In 1910, when Arizona sought admission to the union, it did so under a constitution that provided for the democratic recall of judges. *Id.* ¶ 27. 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 measure* 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.* ¶ 28; *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. It was created in 1964 as "a single court" with two geographic divisions—one centered around Maricopa County and the other around Pima County. IR.1 ¶ 28; 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. IR.1 ¶ 29; 1964 Ariz. Sess. Laws 220.[4] 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. IR.1 ¶ 30.

[4] The 1964 Act created Section 12-120.02. Unless otherwise indicated, the relevant amendments discussed herein were made to that Section of the statute.

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. Sess. 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. IR.1 ¶ 31; 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. *Id.* Eventually, in 1994, the Legislature amended Section 12-120.02[5] adding the word "retention" to the statute. IR.1 ¶ 32; 1994 Ariz. Sess. Laws 1145–47.

In 2022, additional "at-large" judges were added in each division. IR.1 ¶ 33; 2022 Ariz. Legis. Serv. Ch. 310. The following critical provision was also added: "A matter may be transferred between divisions in order to equalize caseloads and for the best use of judicial resources." *Id.*[6] The purpose of this transfer provision was to equalize the caseload between Divisions 1 and 2, the former traditionally having

[5] 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).
[6] This provision is codified in A.R.S. § 12-120(E).

a much more crowded docket. *Id.* As a result, an appeal that would previously have been decided by Division One may now be 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. *Id.* ¶ 34.

III. The Court of Appeals has statewide jurisdiction and creates binding statewide legal precedent.

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 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* IR.1 ¶¶ 2, 37, 45, 82. 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. IR.1 ¶ 40; 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. IR.1 ¶ 41; 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. IR.1 ¶¶ 34, 42–44. The chief judge for each Division may change panel assignments "from time to time," A.R.S. § 12-120.07(A),[7] and each

[7] 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

department can hear "causes and all questions arising therein," *id.*; *see also* IR.1 ¶¶ 44–46. 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* IR.1 ¶¶ 29–30, 40–41, *department* (or panel) assignments are *not* based on the residency of the judge. *See* IR.1 ¶¶ 42–44 & n.6. Cases within a division are assigned to a particular department "without regard to which judges are on a particular panel." IR.1 ¶ 44.

Additionally, "[e]ach judge of the court of appeals may participate in matters pending before a different division," IR.1 ¶ 45; A.R.S. § 12-120(E), and cases are regularly transferred between the two divisions pursuant to Section 12-120(E) using a formula designed to equalize their caseloads, IR.1 ¶ 46.[8] Importantly, "cases are transferred *sequentially without regard to the parties involved* or the number of issues raised."[9] *Id.* (emphasis added). Therefore, the judges on both divisions of the Court of Appeals have statewide jurisdiction over parties residing in *any* county in the state, and all Court of Appeals judges create statewide legal precedent.

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to the Complaint as Ex. 6, 8, & 9. *See* IR.1 ¶ 43 n.6. As a matter of policy, Division One rotates the composition of its three-judge panels every six months. *Id.*

[8] "[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." IR.1 ¶ 46.

[9] This appeal was subject to the Court of Appeals' transfer formula. *See supra* at 3.

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. IR.1 ¶ 47.

IV. Section 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 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." IR.1 ¶ 49; 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. *See* IR.1 ¶ 50. 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. *Id.*

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." IR.1 ¶ 51. 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, he or she "shall be elected for retention by the voters of the counties … excluding Maricopa county." *Id.* ¶ 52.

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," two others 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," and three "at-large" judges may be residents "of any county in the division." IR.1 ¶ 53; 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." IR.1 ¶ 54.

Consequently, Court of Appeals judges stand for retention elections based on which of the 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. IR.1 ¶ 55. 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. *Id.* ¶ 56; A.R.S. § 12-120.02. A

voter cannot vote on the retention of judges who reside outside of the voter's own geographic area. *Id.*

By contrast, all Arizona voters participate in retention elections for Justices on the Arizona Supreme Court—another unitary court with statewide jurisdiction and the ability to create binding statewide precedent. *See, e.g.*, Ariz. Const. art. VI § 38. Notably, this Court reviews only about 1% of Court of Appeals decisions; thus, the Court of Appeals has the final word on about 99% of all appeals. *See* IR.1 Ex. 5 at 16.

Of course, Arizona's population is not equally distributed between the four geographic areas. IR.1 ¶¶ 57–58. 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. *Id.* ¶ 58. 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. *Id.*

All of this means that a retention election for any given Court of Appeals judge unequally disenfranchises voters based on residency. *See id.* ¶ 59. Consider, for example, 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. *Id.* ¶ 60. 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—even though all Arizonans are governed by the judge's decisions.[10] *Id.* ¶ 61.

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.* ¶ 62. 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. *See id.*

V. Voters' constitutional injury could be remedied by the Secretary of State certifying the names of all Court of Appeals retention election candidates to the ballot statewide.

Defendant/Respondent Adrian Fontes is the Secretary of State and is charged with administering various aspects of statewide and judicial elections, including retention elections for judges on the Arizona Court of Appeals. *Id.* ¶ 21; Ariz. Const.

[10] Because there is no guarantee that *any* Court of Appeals judge will sit on *any* given case, *see* IR.1 ¶¶ 34, 42–47, (since the Chief Judge in each Division has broad discretion in making panel assignments, and cases are regularly transferred between Division One and Division Two), some electors—especially in rural counties—will frequently be subject to appellate decisions where they cannot vote on the retention of a *single* judge on the panel. *Id.* ¶ 63. That's true even in cases where the voter may have appeared as a litigant or otherwise have a particularized interest in a case. Such outcomes undermine the accountability function of retention elections and represent one of several forms of disenfranchisement under the current statutory scheme.

art. VI § 38; *see also* Ariz. Const. art. V § 9 ("The powers and duties of … secretary of state … shall be as prescribed by law."); A.R.S. § 41-121(A)(6), (9), (13) (outlining various election-related duties of the secretary of state).

Voters have standing[11] because they have each been disenfranchised from voting in certain judicial retention elections based on county residency, the retention elections they participate in are unequal, and they will continue to be harmed again in each future election cycle. *See* IR.1. ¶ 23. This harm is "fairly traceable" to the Secretary of State, whose actions determine which names are certified for placement on each county's ballot. *Id.*; *Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 405–06 ¶¶ 21–24 (2020) (finding standing in special action where secretary of state's actions would result in the petitioners' denial of access to the ballot).

[11] The trial court found it "unnecessary to address the issue of standing," IR.35 at 2, which the State raised in its Motion to Dismiss, IR.11 at 5–7. Voters extensively addressed the issue of standing in their Response. IR.14 at 4–7. To the extent the State seeks to revisit the issue on appeal, or to the extent the Court is interested, Voters' standing arguments are still valid, including the fact that this Court applies "a more relaxed standard for standing in mandamus actions." *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 11 (2020).

STATEMENT OF THE ISSUES

1. Do the judicial retention election provisions of A.R.S. § 12-120.02 violate the Arizona Constitution's Free and Equal Elections Clause, Ariz. Const. art. II § 21, by creating unequal retention elections for Court of Appeals judges?
2. Do the judicial retention election provisions of A.R.S. § 12-120.02 violate the Arizona Constitution's Equal Privileges and Immunities Clause, Ariz. Const. art. II § 13, by treating Arizona voters (and Court of Appeals judges) unequally for purposes of retention elections for Court of Appeals judges?
3. Did the trial court err as a matter of law in concluding that it could not order the Secretary of State to certify the names of Court of Appeals judges who state their candidacy for retention elections to be placed on the statewide ballot?

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a complaint for failure to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 355 ¶ 7 (2012). That is because "questions of law are reviewed de novo." *Id.* at 356 ¶ 8 (citation omitted). "Dismissal is appropriate under Rule 12(b)(6) *only* if 'as a matter of law plaintiffs would not be entitled to relief under *any* interpretation of the facts susceptible of

proof.'" *Id.* (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶ 4 (1998)) (emphasis added). "In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Id.* ¶ 9.

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 person from a specified class to discharge certain duties in a state, corporation, or society," *Election*, 1 Bouvier's Law Dictionary 638 (Rawle's Rev. 1897), the "[a]ct of choosing by vote a person to fill an office," *Election*, Webster's New International Dictionary 706 (1909), or "[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). *See also* *Election*, Black's Law Dictionary (12th ed. 2024) ("… **retention election** (1963) A nonpartisan election in which the electorate decides whether a state judge will remain in office"). Thus, the Free and Equal Elections Clause encompasses

retention elections.[12] *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. 5.

The Free and Equal Elections Clause has no federal analog, and only a few Arizona cases have addressed it. *See* IR.35 at 3. In *Brnovich*, 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 said 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

[12] The court below "d[id] not reach or decide whether a judicial retention election is an 'election' for purposes of Arizona's free and equal elections clause," but expressed "concern[]" at the possibility that judicial retention elections might not be subject to free and equal election protections, which could violate public policy and the public trust. IR.35 at 2 n.2.

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: (1) that eligible voters be allowed to cast ballots, and (2) 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 a right to vote only for judges residing in the same area, 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. *See* IR.1 ¶¶ 72–76.

Thus, the current statutory scheme creates two related constitutional violations: (1) some voters are completely disenfranchised in each individual judge's retention election ("individual" disenfranchisement), and (2) voters are treated unequally with regard to the weight and impact of their votes on the Court of Appeals

as a whole ("collective" imbalance).[13] This means that *each individual* retention election for a Court of Appeals judge is unequal, and that Court of Appeals retention elections *collectively* are unequal. Both aspects implicate the Free and Equal Elections Clause. And both consequences result from the specific geographic boundaries imposed by Section 12-120.02.

The trial court mischaracterized Voters' position in this regard, claiming that "Plaintiffs argue that the Statute violates the Arizona Constitution's free and equal elections clause and the equal privileges and immunities clause *because it places geographical limitations on voters*." IR.35 at 1–2 (emphasis added). But Voters made no such argument. Instead, they assert that the arbitrary geographical lines drawn by Section 12-120.02 *unequally* subdivide the electorate (and the makeup of the Court of Appeals), resulting in unequal elections and unequally weighted votes—the exact ills the Free *and Equal* Elections Clause aims to prevent.

The trial court also inaccurately asserted that "[h]ere, there are no allegations … that each vote is not given the same weight as every other ballot." *Id.* at 3.

[13] The collective view is pled in the Complaint. Complicated math is not necessary to see that the number of judges, the size of the population, and the number of voters vary widely across the four geographic areas. The number of judges in each of the two divisions is not equal. IR.1 ¶¶ 40-41. Within the divisions, those judges are not equally distributed between urban and rural areas (and there's no per capita distribution requirement). *Id*. ¶¶ 50-55. The geographic areas are not equipopulous "districts" as in the legislative context; indeed, the areas' respective populations vary widely, *id*. ¶¶ 57-58 & n.7, and the voting population is not equally distributed throughout the four areas. *Id*. ¶¶ 60–62 & n.8.

In fact, the Complaint plainly alleges that voters "are *unequally* denied the right to vote," IR. 1 ¶ 3 (emphasis added), that the statute "prevents equal elections by denying Arizona voters the right to vote on the retention of Court of Appeals judges with appellate jurisdiction over them,"[14] *id.* ¶ 5, that due to population, registered voter, and judicial residence disparities, "a retention election for any given Court of Appeals judge is held on an *unequal* basis," *id.* ¶ 59 (emphasis added), and that "*[a]ll* Arizonans are *equally* affected by the decisions and appellate jurisdiction of the Court of Appeals judges but are unequally denied the right to vote with respect to their retention," *id.* ¶ 84. *See also id.* ¶¶ 69, 71, 85–86, 88.

Voters also made these points in their Response to the State's Motion to Dismiss, explicitly arguing that "the weight of each vote and its effect on the composition of the court is unequal." IR.14 at 3. *See also, e.g., id.* at 2 ("The divvying up of retention elections for judges with statewide jurisdiction on a quasi-county, quasi-division basis … *results in unequally weighted votes*, because the current designated geographic areas all have differing numbers of judges, voters, and residents." (emphasis added)).

[14] The trial court took this one paragraph from the Complaint's Introduction out of context and claimed it is merely a "conclusory allegation." IR.35 at 4.

In short, Voters adequately alleged and argued that their votes are not given the same weight as every other ballot, and those allegations must be taken as true. That's reason enough on its own for reversal of the decision below.

The current statutory county-based residency and retention regime is an outdated 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, even though Court of Appeals decisions are binding statewide.

Meanwhile, voters are arbitrarily disenfranchised through the retention election process. For example, Plaintiff/Appellant Bonnie Knight, who lives in Yuma County, *cannot* vote on the retention of an appellate judge who resides in neighboring Pima County. IR.1 ¶¶ 13–14. Yet she *can* vote for a judge in Apache County—on the opposite end of the state, 400 miles away. *Id.* And no matter whom 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, has *no* vote for many, if not most, Court of Appeals judges who issue statewide decisions that are binding on her.

Similarly, Plaintiff/Appellant 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. IR.1 ¶¶ 17–18. And Plaintiff/Appellant 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. IR.1 ¶¶ 15–16.[15] 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).

The disenfranchisement at issue here is therefore pervasive, arbitrary, and unequal.

In dismissing Voters' Free and Equal Elections claim, the court below ignored this arbitrary disenfranchisement and unequal treatment because Section 12-120.02

[15] Plaintiff/Appellant White resides in the other geographic area and faces similar circumstances. IR.1 ¶¶ 19–20.

"specifically gives all Arizona voters the right to vote for those Court of Appeals judges that are up for retention election *in the voters' respective counties*," "treats all similarly situated voters *in each county* the same," and "[n]o voter is *completely* denied the right to vote." IR.35 at 4.

The trial court completely missed the point. It is the unequal treatment of Arizona voters *in different counties* that creates the constitutional problem. When it comes to the Court of Appeals, all Arizona voters are similarly situated, because they are all bound by its decisions and legal precedents. They therefore must be treated equally in retention elections to comport with the Free and Equal Elections Clause.

The trial court also improperly relied on and applied the Washington Supreme Court's decision in *Eugster v. State*, 259 P.3d 146 (Wash. 2011). *See* IR.35 at 3.

In that case, the plaintiff[16] made an entirely different argument than the one advanced here. Rather than argue that all voters should be allowed to vote on all Court of Appeals judges, no matter where those judges reside, the plaintiff's argument was based on *apportionment. See Eugster*, 259 P.3d at 149 ¶ 8. That is,

[16] Mr. Eugster, who was an attorney by trade, a former elected official, and a frequent litigant in Washington courts, *see, e.g.*, *Eugster v. City of Spokane*, 156 P.3d 912 (Wash. App. 2007) (frivolous action by same plaintiff), appeared pro se in the case discussed above. 259 P.3d at 147 ¶ 1. It appears that at the time the lawsuit was filed, he may have been suspended from the practice of law. *See In re Disciplinary Proceeding Against Eugster*, 209 P.3d 435 (Wash. 2009).

the plaintiff argued that Washington's Constitution requires that *judicial districts be equally populated* under the one-person-one-vote principle (which, of course, does not apply to judicial elections under federal caselaw[17]). He apparently cited no authorities or arguments regarding the original meaning of Washington's Free and Equal Elections Clause. *Id.* As a result, the court engaged in little textual analysis, and simply held that "voting districts need not be numerically equivalent for judicial elections." *Id.* at 150 ¶ 11. It said the clause prohibits "the complete denial of the right to vote to a group of affected citizens," and that such denial had not happened in Eugster's case. *Id.* ¶ 10.

Here, Voters do not argue that judicial districts must be apportioned along the one-person, one-vote rule, or that judges are like legislative representatives; rather, they assert that Arizona statutes *do* result in the complete denial of the right to vote to a group of affected citizens. The *Eugster* court went out of its way to note that the plaintiff "makes no claim that the Court of Appeals divisions and districts are drawn in such a way to systematically exclude any particular group of voters from an election," *id.* at 150 ¶ 11, n.4, but Arizona statutes *do* systematically exclude voters from elections.

For example, Plaintiff/Appellant Knight (Yuma County) can vote for a judge in Apache County, on the opposite end of the state, but not for a judge in contiguous

[17] *See Chisom v. Roemer*, 501 U.S. 380, 402–03 (1991).

Maricopa or Pima Counties. Plaintiff/Appellant McEwen (Santa Cruz County) can vote on retaining a judge who lives in adjacent Cochise County, but not one who lives in adjacent Pima County—but *can* vote on a judge from Pinal County (north of Pima) and Gila (the next county north of that) … but *not* a judge from Coconino County, the next county up from *that*. She can vote on a patchwork of counties. Such arbitrary divvying up of voting rights is far more extreme than what was addressed in *Eugster*.

The *Eugster* decision also dealt with direct elections, not retention elections. The election structure in Washington is therefore distinct from the selection process, composition, and retention election framework of the Arizona Court of Appeals.

Eugster also postdates *Chavez*, *supra*, and other more relevant Arizona authorities. Arizona appellate courts have thus interpreted Arizona's Free and Equal Elections Clause differently than Washington courts.[18] Indeed, no cases in Arizona—or any other state, for that matter—cite *Eugster*, and *Eugster* did not cite any state authorities outside of Washington. For these reasons, this Court should look elsewhere for guidance as to the meaning of Arizona's Free and Equal Elections Clause.

[18] Although the Washington clause itself is relevant as the most contemporaneous source of the Arizona clause, interpretation by Washington courts *subsequent* to the Constitution's adoption is markedly less persuasive, particularly given that *Eugster* engaged in essentially zero historical or textual analysis.

Indeed, other state courts have differed from the *Eugster* court's lockstep reasoning when analyzing similar issues. *See, e.g.*, *Blankenship v. Bartlett*, 681 S.E.2d 759, 765–66 (N.C. 2009) (describing tension in federal caselaw regarding application of the one-person, one-vote principle to judicial elections, and applying heightened scrutiny to judicial district challenges under state constitution's equal protection provision, further discussed *infra*). The plaintiff in *Eugster* did not bring a federal Equal Protection claim, 259 P.3d at 149 ¶ 8, nor a claim under Washington's "Special Privileges and Immunities" Clause, Wash. Const. art. I § 12 (which is nearly identical to Arizona's *Equal* Privileges and Immunities Clause), *see id.* at 150 ¶ 11 n.4. But apparently the plaintiff in *Eugster* still mentioned *Blankenship* for its reasoning, and the state distinguished the case in its briefing on the ground that "[t]he decision was based on North Carolina's state equivalent of the federal 'equal protection' clause" rather than an equal elections provision. Answer to Statement of Grounds for Direct Review, *Eugster v. State*, 2010 WL 6209267 at *5, n.2 (Apr. 12, 2010). *See also* Br. of Resp'ts *Eugster v. State*, 2010 WL 6209268 at *12–13 (June 23, 2010). To be fair, North Carolina's constitution only requires that "[a]ll elections shall be *free*"—full stop—so a directly analogous *equal elections* claim did not exist. N.C. Const. art. I § 10 (emphasis added). Ultimately, the *Eugster* decision completely ignores *Blankenship*, relying instead on federal equal protection cases such as *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd* 409 U.S.

1095 (1973). *See* *Eugster*, 259 P.3d at 149 ¶ 7. Since North Carolina's equal protection clause resembles its federal counterpart, *see* N.C. Const art. I § 19, *Blankenship*'s intentional departure from *Wells*, etc., is even clearer—and *Eugster*'s neglect of the case more glaring.

It's true that Arizona's Free and Equal Elections Clause was based on Washington's Constitution. John S. Goff, *The Records of the Arizona Constitutional Convention of 1910* 658–59 (1991). But Washington copied it from Oregon, which drew it from Indiana's constitution.[19] *Foster v. Sunnyside Valley Irrigation Dist.*, 687 P.2d 841, 847 (Wash. 1984). Indiana, in turn, had "borrowed heavily from existing state constitutions[,] especially … Kentucky."[20] Kentucky's statehood constitution, including its Free and Equal Elections Clause, First Const. of Ky. (1792), art. XII § 5,[21] was likewise based on[22] the 1790 Pennsylvania Constitution. *See* Pa. Const. of 1790 art. IX § 5. *See also* Pa. Const. of 1776 Ch. 1 § VII (earliest version of the clause).

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[19] *Compare* Ind. Const. art. 2 § 1, *with* Ind. Const. of 1816 art. I § 4.
[20] Indiana Constitution of 1816, Indiana Historical Bureau.
[21] *See also* Second Const. of Ky. (1799), art. X § 5; Third Const. of Ky. (1850), art. XIII § 7; Ky. Const. § 6; *Chavez*, 222 Ariz. at 319–20 ¶ 33 (quoting *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026-27 (Ky. App. 1915) ("[N]o election can be free and equal … if any substantial number of persons entitled to vote are denied the right to do so.")).
[22] *See* *Kentucky Constitution Collection*, Louis D. Brandeis School of Law Library.

Pennsylvania's Clause is thus the original source of all state free and equal election clauses, and its text is essentially identical to Arizona's. *Compare* Pa. Const. art. 1 § 5, *with* Ariz. Const. art. II § 21 (adding, like other states, the word "[a]ll," and varying slightly in punctuation).

The Pennsylvania Supreme Court recently conducted an extensive analysis of the clause, noting the "plain and expansive sweep of the words 'free and equal.'" *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Critically, the words "free and equal" "exclude not only all invidious discriminations between individual electors, or classes of electors, ***but also between different sections or places in the State***." *Id.* at 809 (emphasis added; citation omitted).[23] Pennsylvania's Free and Equal Elections Clause prohibits "lessening the power of an individual's vote based on the geographical area in which the individual resides," *id.* at 816, because "*a diluted vote is not an equal vote*." *Id.* at 814 (emphasis added). As a result, "[a]n election corrupted by … dilution of votes is not 'free and equal.'" *Id.* at 821. Elections are instead made equal "by laws which … make their votes

[23] Notably, Pennsylvania's Supreme Court has used the Free and Equal Elections Clause analysis in the context of judicial elections since the earliest days of Arizona's statehood. *See, e.g.*, *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914) (finding act related to judicial primaries constitutional because it "denies no qualified elector the right to vote; … treats all voters alike … and the inconveniences if any bear upon all in the same way under similar circumstances").

equally potent in the election; so that some shall not have more votes than others." *Id.* at 809 (citation omitted).

Courts in other states with Free and Equal Elections Clauses have said the same thing. *See, e.g.*, *Oviatt*, 147 N.E.2d at 900–01 ("The constitutional provision … means that 'the vote of every elector is equal in its influence upon the result to the vote of every other elector.'" (citation omitted)); *Ladd v. Holmes*, 66 P. 714, 718 (Or. 1901) ("The word 'equal' [means that] … '[e]very elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors … . [If] the legal voter is denied his adequate, proportionate share of influence, … the result is that the election, as to him, is unequal."); *State v. Bartlett*, 230 P. 636, 638 (Wash. 1924) ("The declaration in the bill of rights that elections shall be free and equal means that the voter shall not be physically restrained in the exercise of his right … and that every voter shall have the same right as any other voter.").[24]

[24] In *City of Seattle v. State*, 694 P.2d 641 (Wash. 1985), the Washington Supreme Court found that the Clause was violated by a law that allowed property owners in a particular locale to file a petition whereby the area could be annexed into a city without a vote by the affected residents, whereas they *would* be allowed to vote *absent* such a petition. *See id.* at 644–45. This procedure meant "a particular class" of voters could effectively "deny [others] … the opportunity to vote," which meant it violated both the "free" and "equal" requirements. *Id.* at 648. Similarly, Arizona's peculiar system gives voters in some counties extraordinary power, and deprives others of effective power, in choosing statewide officials.

Because Section 12-120.02 impermissibly discriminates "between different sections or places in the State," *League of Women Voters*, 178 A.3d at 809 (citation omitted), it violates the Free and Equal Elections Clause and must be invalidated.

The trial court also relied on three false equivalencies in dismissing Voters' claims.

First, the court equated active Court of Appeals judges who sit for retention with retired judges who only temporarily sit by assignment. IR.35 at 4. Although retired judges filling in during recusals or vacancies do not have to sit for retention elections, that's because under the Arizona Constitution, *retired judges do not hold a judicial office*. *E.g.*, Ariz. Const. art. VI § 39 ("On attaining the age of seventy years a justice or judge of a court of record shall retire *and his judicial office shall be vacant* … ." (emphasis added)). Judicial retention elections are only constitutionally required for judges actively holding office. *See* Ariz. Const. art. VI § 38(A) (requiring judges "*holding office* … at the time of the adoption of this section" to sit for retention (emphasis added)).[25]

[25] *See also id.* § 38(B) (question appearing on ballot is whether the judge "be retained *in office*" (emphasis added)); *id.* § 38(C) ("If a majority of those voting on the question votes 'Yes,' such justice or judge *shall remain in office for another term*, subject to removal as provided by this constitution." (emphasis added)); *id.* § 38(E) ("If a justice or judge fails to file a declaration of his desire to be *retained in office, as required by this section*, then *his office shall become vacant upon expiration of the term* for which such justice or judge was serving." (emphasis added)).

The Free and Equal Elections Clause does not require elections for every judge—it does not actually require *any* specific election be held for any particular office or position or assignment. But when elections are required, as retention elections are by Article 6, Section 38, then those elections must be free and equal. The trial court's observation that "[n]o relief requested in the Plaintiffs' Complaint would remedy" the question of retired justices or judges serving temporarily on the Court of Appeals without being subject to a retention election, *see* IR.35 at 4–5, is simply irrelevant to Voters' claims.

Second, the court below erred in equating retention elections for Court of Appeals judges with retention elections for Superior Court judges. *See id.* at 5–6. Of course, the current structure of retention elections for Superior Court judges is not at issue here. More importantly, however, decisions from the Superior Court do not create binding, statewide precedent. And although the trial court sought to "harmonize … and give effect to each" separate constitutional provision, *see id.* at 6 (quoting *Burns v. Arizona Pub. Serv. Co.*, 254 Ariz. 24, 31 ¶ 30 (2022)), "harmony" does not mean "unison." The application of the Free and Equal Elections Clause to retention elections for judges on the Superior Court differs from its application to retention elections for the Court of Appeals because superior court judges are not effectively the "final word" in 99% of appeals and because superior court judges do not issue legal opinions that establish binding legal precedent statewide. That is

sufficient to distinguish the question of Superior Court judges, if such distinction were necessary—which it is not, because the question of Superior Courts is simply not at issue here.

Instead, the closer analogy is with the retention of justices of this Court. Both justices and Court of Appeals judges file their declarations of candidacy with the Secretary of State, while superior court judges file theirs with the clerk of the board of supervisors in *the county* where the judge regularly sits and resides. Ariz. Const. art. VI § 38(A). Additionally, *all* Court of Appeals judges must sit for retention, while only superior court judges residing in counties with a population of 250,000 or more sit for retention. *Id.*; *see also* Ariz. Const. art. VI § 12 (providing for the direct election of superior court judges in counties with a population of less than 250,000 and setting term of office for all superior court judges at four years).

Further, the geographical boundaries for superior court elections along county lines are established by the state constitution, *id.*, while the constitution sets no geographical boundaries for Court of Appeals retention elections. Thus, the geographical dividing lines statutorily established in Section 12-120.02 must comport with the Free and Equal Elections Clause, and the existence in the constitution of geographical boundaries for superior court elections is not determinative of the constitutionality of the statute at issue. Voters' argument

regarding the application of the Free and Equal Elections Clause to Court of Appeals retention elections is therefore *not* "inconsistent." *See* IR.35 at 5–6.

Third, the trial court reasoned that because "[l]egislators make statewide decisions and not every voter in Arizona gets to vote for every legislator," then "'equal' does not mean that all Arizona voters will be able to vote on all Court of Appeals judges up for retention." *Id.* at 6 & n.9. But of course judges are not legislators. They do not "represent" voters. And voters do not directly elect Court of Appeals judges. Retention elections instead provide a judicial *accountability* mechanism, not a mode of *selection*.

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.

Arizona's 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. Because Section 12-120.02 discriminates among voters based on residency, the right to vote in retention elections for the Court of Appeals does "not equally belong to all citizens."

The legality of classifications under Article 2, 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.[26] *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").

Under Section 12-120.02, *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 the right to participate in these elections on an equal basis with all other citizens.

That Voters each get to participate in *some* retention elections is beside the point, *see* IR.35 at 4, because they don't get to vote in *all* retention elections for those judges, and the elections they get to vote in aren't equal—they involve different numbers of judges, voters, etc. The urban/rural divide highlights this problem. Urban

[26] The court below, citing *Craven v. Huppenthal*, 236 Ariz. 217, 220 (App. 2014), concluded that it "need not reach or decide whether the Statute withstands any scrutiny, rational basis or strict," because it in its view "the Statute treats all similarly situated voters *in their respective counties* equally." IR.35 at 6–7 (emphasis added). But the four Voters here are similarly situated Arizona voters subject to the jurisdiction and bound by the precedential decisions of the Court of Appeals. Therefore, one class of voters is treated differently from another similarly situated class, and the court erred as a matter of law in finding otherwise.

voters get to vote in approximately twice as many individual retention elections as rural voters. IR.1 ¶¶ 51, 53. Conversely, ballots cast in rural counties have a significantly greater influence on individual retention elections than urban ballots: by one measure, rural votes carry nearly twice the weight of urban votes,[27] and by another measure, a rural Division Two voter has nearly *six times* more of an influence on an individual Court of Appeals judge's retention election than does a Maricopa County voter.[28]

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 living 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*

[27] For example, Maricopa County gets at least ten judges that sit for retention before approximately 2.4 million voters. *See* IR.1 ¶¶ 51, 60. That means there are about 240,000 voters per Court of Appeals judge in Maricopa County. The remaining Division One counties have as few as *five* judges and approximately *640,000* voters, or 128,000 voters per judge.

[28] A judge in a non-Pima Division Two county answers to about 430,000 voters. IR.1 ¶¶ 60–62 & n.8. That means each voter in the "rural" Division Two counties is 0.00023% of that judge's electorate. But each Maricopa voter constitutes only 0.00004% of a Court of Appeals judge's retention electorate.

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.

What's more, there is no legitimate basis for divvying up voting rights based on the county of a judge's residence because a judge's residency bears no relationship to that judge's official authority. Under Section 12-120.02, some voters get to vote on judges and others do not, based on an "improper distinction … 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.").

Section 12-120.02 does not 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. Although the *appointment* of judges from rural counties promotes this interest, mandating unequal *retention elections* does not. Plaintiff/Appellant 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%).[29] What's more, under Section 12-120.02, some voters can vote on the retention of judges who reside on opposite ends of the state—Plaintiff/Appellant 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/Appellant Ramsey (Pima County) cannot vote for a judge who resides in Yuma County. IR.1 ¶¶ 13–14, 17–18.

Thus, even if one of the purposes of Section 12-120.02 is to equalize rural interests, because, for example, voters in one geographic area may know more about a judge who resides in that area, the retention election portions of the statute fail to serve that purpose. 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. This fails even rational basis review, let alone strict scrutiny.

The U.S. Supreme Court's holding that the federal Equal Protection principle of "one person, one vote" does not apply to judicial elections,[30] *see* *Chisom*, 501

[29] These figures come from the University of Arizona's 2020 Census/Rural Update for Arizona. This Court can take judicial notice of census data, *State ex rel. Corbin v. Sabel*, 138 Ariz. 253, 256 (App. 1983), and Voters hereby move that it do so.

[30] The State argued that Section 12-120.02 does not even implicate the Equal Privileges and Immunities Clause, let alone violate it. IR.11 at 13. The court below acknowledged but did not reach that issue, relying instead on the mistaken belief that the statute does not treat Voters differently. IR.35 at 6–7. *See also supra* n. 21.

U.S. at 402, has little bearing here, because Arizona courts do not merely copy federal Equal Protection jurisprudence when interpreting the Equal Privileges and Immunities Clause. *State v. Sisneros*, 137 Ariz. 323, 325 (1983) (analyzing equal protection argument solely under state Constitution); *Kenyon v. Hammer*, 142 Ariz. 69, 71 (1984) (federal caselaw cited "only for the purpose of guidance and not because it compels the result which we reach" under the Equal Privileges and Immunities Clause); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454 (2002) (striking down statute on Equal Privileges and Immunities grounds where U.S. Supreme Court had upheld similar federal restrictions under Equal Protection Clause).

Indeed, the text of Arizona's Equal Privileges and Immunities Clause indicates a broader sweep than its federal counterpart. *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, sec. 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."). And this Court should look first to the Arizona Constitution's language and history, before proceeding to any federal questions. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160

Ariz. 350, 356 (1989) ("[W]henever a right that the Arizona Constitution guarantees is in question: we first consult our constitution."); *Rochlin v. State*, 112 Ariz. 171, 176 (1975) ("[D]ifference[s] in language must be respected. If the authors of the constitution had intended the sections to mean the same thing, they could have used the same or similar language. The fact that they did not requires the conclusion that the sections were meant to be different."); 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.[31] *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. *See also* *State v. Hurley*, 154 Ariz. 124, 131 (1987) ("[S]pecial Arizona

[31] 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).

traditions or customs may require us to interpret provisions of the Arizona Constitution more expansively than the interpretation given to the federal Constitution.").

Here, Arizona's distinct legal history plainly shows that our Constitution should be read as more protective in this context than is the federal Constitution. 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 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).

As alluded to *supra*, Arizona would not be the first state to scrutinize judicial election laws under a state equal protection or equal privileges and immunities clause. In *Blankenship*, the plaintiff argued that judicial districts should be equipopulous to satisfy the one-person, one-vote rule under the North Carolina

"equal protection of the laws" clause. 681 S.E.2d at 762–66. The court, applying heightened scrutiny, said the proper test is whether judicial districts have been drawn in ways that "advance important governmental interests unrelated to vote dilution *and do not weaken voter strength substantially more than necessary to further those interests*." *Id.* at 766 (emphasis added). Although, again, Voters here are *not* making an equipopulous argument, *Blankenship*'s language is instructive: voters may be deprived of their right to vote only when that denial meaningfully advances some important government interest. Here, it doesn't.[32]

The trial court erred in finding that Arizona's Equal Privileges and Immunities Clause does not provide broader protection than its federal counterpart. *See* IR.35 at 6.

Even if the Arizona Equal Privileges and Immunities Clause were coextensive with the federal Equal Protection Clause, and the "one person, one vote" principle were inapplicable, Voters still adequately pleaded[33] a valid claim. First, voters within a given jurisdiction—here, the state—must be treated equally, *see* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (voters have "a constitutionally protected right

[32] The rationale of *Blankenship* may apply under *either or both* Arizona's Free and Equal Elections Clause and the Equal Privileges and Immunities Clause—especially when applied together. And this Court has even greater reason to depart from *Wells*, *Chisom*, etc., than did the North Carolina Supreme Court, because the relevant clauses' text and context are unique from the federal constitution.

[33] *See* IR.1 ¶¶ 93–97.

to participate in elections on an equal basis with other citizens in the jurisdiction" (citations omitted)). Second, voters who have a "distinct and direct interest" in the decisions of the governmental entity at issue cannot be excluded from elections without violating the Equal Protection Clause. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632 (1969) (rejecting intrajurisdictional limitations on the franchise in school elections to those "primarily interested," such as parents and property owners). *See also Cipriano*, 395 U.S. at 706. Such exclusion occurs under Section 12-120.02.

III. The trial court erred in concluding that it could not order the Secretary of State to certify the names of Court of Appeals retention election candidates to be placed on the ballot statewide.

The trial court also erred by misconstruing its equitable power to issue declaratory relief, and its mandamus power to order the Secretary of State to certify that judges on the Court of Appeals stand for statewide retention. IR.35 at 2.

Voters do not ask the Court to rewrite Section 12-120.02. *See, e.g., Fann v. State*, 251 Ariz. 425, 434 ¶ 23 (2021) (Arizona courts "will not rewrite a statute to save it." (citation omitted)); *State ex rel. Arizona Dept. of Revenue v. Tunkey*, 254 Ariz. 432, 438 ¶ 27 (2023) (Bolick, J., concurring) ("It … invites imprecision in legislative drafting if we appear to be at the ready to rescue a poorly drafted statute with a sharpened blue pencil."). Rather, Voters seek a declaration that the statute's geographic election scheme violates the Free and Equal Elections Clause and the

Equal Privileges and Immunities Clause—a routine undertaking for the judicial branch. *See, e.g.*, *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 354–55 ¶ 33 (2012) (judiciary has an obligation "to interpret and apply constitutional law"). That standalone request for declaratory relief was plainly within the power of the Superior Court. A.R.S. § 41-1034.

Special actions are also the proper procedural mechanism in Arizona for determining and enforcing compliance with a public officer's legal duties, and for the requested mandamus relief. *Arizonans for Second Chances*, 249 Ariz. at 404 ¶¶ 16–19 ("[O]ne purpose of a mandamus action is to determine the extent of a state official's legal duties."); *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370 ¶ 19 (2013) ("An action is in the nature of mandamus if it seeks to compel a public official to perform a non-discretionary duty imposed by law."); Ariz. R.P. Spec. Act. 1(a) ("Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule … . Special forms and proceedings for these writs are replaced by the special action provided by this Rule, and designation of the proceedings as certiorari, mandamus, or prohibition is neither necessary nor proper."); Ariz. R.P. Spec. Act. 3(a) ("Whether the defendant has failed … to perform a duty required by law as to which he has no discretion" is a question

properly raised by a special action.); Ariz. R.P. Spec. Act. 3(a) State Bar Committee Note (a) ("Mandamus is classically used to compel performance of an act … .").[34]

The trial court therefore had the authority in this special action to issue a mandamus-style order compelling the Secretary of State to perform his constitutionally required duty to certify the names of all Court of Appeals retention election candidates to the several county boards of supervisors for placement on the ballot statewide. *See* Ariz. Const. art. VI § 38(A). Issuing such an order would not constitute "legislating," but instead would fulfill the judiciary's proper constitutional role.

The trial court's opposite conclusion was legal error.

CONCLUSION

The trial court's decision granting the State's Motion to Dismiss should be *reversed*, and judgment should be entered in favor of Appellants.

[34] The current Rules of Procedure for Special Actions are abrogated effective January 1, 2025, per this court's August 22, 2024 Order Amending the Rules of Procedure for Special Actions and Related Rules, in matter No. R-23-0055. The relevant corresponding rules in the new ruleset are RPSA 2 ("Special Actions Defined") and RPSA 4 ("Grounds for Bringing a Special Action"). *See also* RPSA 5 ("Parties"); RPSA 10 ("Decisions, Judgments, and Appellate Review in Original Special Actions"). The new ruleset will apply to this proceeding on January 1, 2025, "except to the extent that the court in an affected special action determines that applying a newly adopted rule would be infeasible or work an injustice, in which event the former rule of procedure applies." Order at 2.

NOTICE UNDER RULE 21(A)

Appellants request attorney fees and costs pursuant to Ariz. R.P. Spec. Act. 4(g)[35], ARCAP 21, A.R.S. §§ 12-341, 12-348, 12-1840, 12-2030, and the private attorney general doctrine. *See* *Arnold v. Arizona Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989).

Respectfully submitted this 27th day of November 2024 by:

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[35] The corresponding new rule for attorney fees and costs in original special actions is RPSA 7(i).

IN THE SUPREME COURT

STATE OF ARIZONA

BONNIE KNIGHT; DEBORAH McEWEN; SARAH RAMSEY; and LESLIE WHITE, Petitioners, v. ADRIAN FONTES, in his official capacity as Arizona Secretary of State, and STATE OF ARIZONA, Respondents,	Supreme Court No. CV-24-0220-T/AP Court of Appeals No. 2 CA-CV 2024-0280 Maricopa County Superior Court No. CV 2024-000431

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The undersigned certifies that the foregoing Appellants' Opening Brief complies with Ariz. R. App. P. 14. The Brief is double-spaced, uses a proportionally spaced typeface of 14 points, and contains 11,588 words using the word count of the word processing system used to prepare the Petition.

By: /s/ *Parker Jackson*

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