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, Respondent.	Supreme Court No.

PETITION FOR SPECIAL ACTION

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INTRODUCTION

Under Arizona's Constitution, judges on the Arizona Court of Appeals must stand for retention elections to remain in office. Ariz. Const. art. VI, § 38. Although the Court of Appeals is a "single court," A.R.S. § 12-120(A), and it issues opinions that are binding statewide, *see, e.g.*, *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461 (1983), its judges do not stand for retention on a statewide basis. Rather, they sit for retention elections in limited geographic areas based on the judge's county of residence. A.R.S. § 12-120.02. As a result, voters who do not reside in those geographic areas are denied the right to vote in retention elections for many of the appellate judges who have jurisdiction over them.[1]

This electoral framework violates the Arizona Constitution's requirement that "[a]ll elections shall be free *and equal* … ." Ariz. Const. art. II, § 21 (emphasis added). Specifically, the statute excluding participation in retention elections—A.R.S. § 12-120.02—prevents equal elections in the state by denying all Arizona voters the right to vote on the retention of many Court of Appeals judges with jurisdiction over them, and who issue binding statewide decisions.

[1] By contrast, all Arizona voters participate in retention elections for Justices on the Arizona Supreme Court—another unitary court with statewide jurisdiction. Ariz. Const. art. VI, § 38. *Compare* A.R.S. §§ 12-101 and 12-119.05. 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* Arizona Court of Appeals Division One 2022: The Year in Review, APP.019.

Additionally, the Arizona Constitution commands that "[n]o law shall be enacted granting to any citizen [or] class of citizens … privileges or immunities which, upon the same terms, shall not *equally* belong to all citizens." Ariz. Const. art. II, § 13 (emphasis added). Section 12-120.02 violates this Clause because it excludes citizens, based on where they reside, from voting on the retention of Court of Appeals judges in Arizona who have jurisdiction over them.

For the reasons discussed below, this Court should exercise its original jurisdiction over mandamus actions through the special action procedure and order the Secretary of State to certify that the names of all Court of Appeals judges for retention elections to be placed on the ballot statewide.

JURISDICTIONAL STATEMENT

This case is a mandamus action. Specifically, Petitioners ask this Court to declare that the Constitutional duties of the Secretary of State require him to certify the names of all Court of Appeals judges who state their candidacy for retention elections to be placed on the ballot statewide. *Arizonans for Second Chances, Rehab., and Pub. Safety v. Hobbs*, 249 Ariz. 396, 404 ¶¶ 16–19 (2020) (stating that, "one purpose of a mandamus action is to determine the extent of a state official's legal duties."); *see infra*, pgs. 14–15 (Secretary of State's duties). Because the Secretary does not currently place the names of Court of Appeals judges on the statewide ballot, Petitioners ask this Court, pursuant to Ariz. R.P. Spec. Act. 3(a), to

determine whether the Secretary of State "has failed to perform a duty required by" Ariz. Const. art. II, § 21 (Free and Equal Elections Clause) and Ariz. Const. art. II, § 13 (Equal Privileges and Immunities Clause) "as to which he has no discretion." *See* *Stagecoach Trails MHC, L.L.C. v. City of Benson*, 231 Ariz. 366, 370 ¶ 19 (2013) (stating, "[a]n 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. 3(a) State Bar Committee Note (a).

This Court has original jurisdiction to issue writs of mandamus and exercise this jurisdiction through the special action procedure. *Arizonans for Second Chances*, 249 Ariz. at 404 ¶ 16 (quotations and citations omitted); *see* Ariz. Const. art. VI, § 5(1) ("The supreme court shall have … [o]riginal jurisdiction of…quo warranto, mandamus, injunction, and other extraordinary writs to state officers.); *id.* art. VI, § 5(4) ("The supreme court shall have…[p]ower to issue injunctions and writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction."); 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 proper question that may be raised in a special action.).

This Court should exercise its discretionary special action jurisdiction for four reasons.

First, it is the traditional, if not the preeminent role of this Court to determine "purely legal questions of statewide importance that turn on interpreting Arizona's Constitution." *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 121 ¶ 7 (2013); *see also Cronin v. Sheldon*, 195 Ariz. 531, 533, 534 ¶¶ 3, 6 (1999) (accepting special action jurisdiction to decide constitutional issue of first impression); *Kromko v. Super. Ct.*, 168 Ariz. 51, 53 (1991) (in a suit to enjoin the secretary of state and county officials from placing initiative measure on statewide ballot, this Court found that "[w]e have jurisdiction of the special action pursuant to Ariz. Const. art. VI, § 5(4), and rule 1, Arizona Rules of Procedure for Special Actions."). This case involves a purely legal interpretation of two state Constitutional provisions of immense statewide importance and public concern.

Second, this case "requires an immediate and final resolution," *Dobson*, 233 Ariz. at 121 ¶ 8; *see also State Comp. Fund v. Symington*, 174 Ariz. 188, 192 (1993), because Court of Appeals judges will stand for retention in the upcoming 2024 election cycle. This Court has routinely accepted special action jurisdiction against the Secretary of State and other election officials to provide timely resolution of election-related cases. *See id.* ("Timely resolution of the matter before us would not be promoted by requiring the [petitioners] to proceed through the trial and appellate courts, nor are such proceedings necessary because the issue before us turns solely on legal issues rather than on controverted factual issues."). In short, to prepare for

an orderly retention election in 2024, the judges on the Court of Appeals and the voters of this state need a clear, timely decision on this issue.

Third, this case presents a legal issue where the material facts are not in dispute. *See Dobson*, 233 Ariz. at 121 ¶ 7 (stating that grant of special action jurisdiction was proper where resolution of the case did not turn on disputed facts); *Brewer v. Burns*, 222 Ariz. 234, 237 ¶¶ 8–9 (2009) (to same effect). Here, the sole issue is whether the geographical limitations placed on retention elections by A.R.S. § 12-120.02 violate Ariz. Const. art. II, § 21 (Free and Equal Elections Clause) and Ariz. Const. art. II, § 13 (Equal Privileges and Immunities Clause). There is no need to develop an evidentiary record in this case.

Fourth, resolution of this matter by the Court of Appeals is improvident. Judges on the Court of Appeals have an electoral interest in the laws governing their retention, *see* Arizona Rule of Judicial Conduct 2.11(3), and even if individual judges were not directly conflicted from hearing the matter, this Court provides a more proper forum for resolving this issue.

STATEMENT OF THE ISSUES

1. Does the Secretary of State have a non-discretionary duty required by Ariz. Const. art. II, § 21 (Free and Equal Elections Clause) to certify the names of all Court of Appeals judges who state their candidacy for retention elections to be placed on the ballot statewide?

2. Do the judicial retention procedures of A.R.S. § 12-120.02 violate the Arizona Constitution's Free and Equal Elections Clause, Ariz. Const. art. II, § 21, because the subject statute prohibits Arizona voters from voting on the retention of judges to the Court of Appeals on a statewide basis?
3. Does the Secretary of State have a non-discretionary duty required by Ariz. Const. art. II, § 13 (Equal Privileges and Immunities Clause) to certify the names of all Court of Appeals judges who state their candidacy for retention elections to be placed on the ballot statewide?
4. Do the judicial retention procedures of A.R.S. § 12-120.02 violate the Constitution's Equal Privileges and Immunities Clause, Ariz. Const. art. II, § 13, by denying voters the right to vote on the retention of judges to the Court of Appeals on a statewide basis?

PARTIES AND STANDING

Petitioners are Arizona voters and taxpayers residing in distinct geographic areas of the state.

Petitioner Bonnie Knight is a registered voter and taxpayer residing in Yuma County. Decl. of Bonnie Knight.[2] Under A.R.S. § 12-120.02, she can only vote on the retention of a judge to the Court of Appeals if that judge's residence[3] is in Yuma,

[2] APP.029 ¶ 2.
[3] Petitioners' declarations refer to the judge's "post of duty." *See, e.g.*, APP.029 ¶ 3. "The designated post of duty of judges of the court of appeals who are elected

La Paz, Mohave, Coconino, Yavapai, Navajo, or Apache Counties. *Id.* In other words, Knight may not 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. *Id.*

Petitioner Deborah McEwen is a registered voter and taxpayer residing in Santa Cruz County. Decl. of Deborah McEwen.[4] Under Section 12-120.02, she can only vote on the retention of a judge to the Court of Appeals if that judge's residence is in Santa Cruz, Pinal, Cochise, Greenlee, Graham, or Gila Counties. That means McEwen is prohibited from voting on the retention of judges to the Court of Appeals if that judge's residence is in any of Arizona's nine other counties. *Id.*

Petitioner Sarah Ramsey is a registered voter and taxpayer residing in Pima County. Decl. of Sarah Ramsey.[5] Under the subject statute, she can only vote on the retention of a Court of Appeals judge if that judge's residence is Pima County. A.R.S. § 12-120.02. Thus, although Ramsey is subject to legal precedents established by all of the state's Court of Appeal judges, she cannot vote on the retention of Court of Appeals judges whose residence is not Pima County. *Id.*

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by the voters of the counties in division one, excluding Maricopa county, and in division two, excluding Pima county, as prescribed by the terms of § 12-120.02, shall be deemed to be their place of physical residence." A.R.S. § 12-120.10.

[4] APP.031 ¶ 2.

[5] APP.033 ¶ 2.

Petitioner Leslie White is a registered voter and taxpayer residing in Maricopa County. Decl. of Leslie White.[6] Under the challenged statutes, she can only vote on the retention of a judge to the Court of Appeals if that judge's residence is Maricopa County. A.R.S. § 12-120.02. As with the other Petitioners, Petitioner White is subject to decisions written by all appellate judges, but she cannot vote on the retention of any Court of appeals judge whose residence is outside Maricopa County. *Id.*

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. Ariz. Const. 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). He is sued in his official capacity only.

Petitioners have standing because they have each been disenfranchised from voting in certain judicial retention elections based on county residency—and they will be harmed again in each upcoming election cycle. This harm is "fairly traceable" to the Secretary of State, whose actions determine which names are certified for placement on each county's ballot. *Arizonans for Second Chances,* 249 Ariz. at 405–

[6] APP.035 ¶ 2.

06 ¶¶ 21–24 (finding standing in special action where secretary of state's actions would result in the petitioners' denial of access to the ballot).

STATEMENT OF FACTS

I. The Right to Vote for Judges is Deeply Engrained in Arizona's History.

The right of Arizona's citizens to vote on the retention of state judges 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. President William Howard Taft, who objected to this idea, vetoed the state's admission to the union for this reason.[7] Arizonans were therefore forced to eliminate this provision from their proposed Constitution, and seek admission again in 1912. *See generally* Toni McClory, *Understanding the Arizona Constitution* 31–34 (2d ed. 2010). 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. That referendum was approved by an 81 percent vote. *See* Proposition 101 (1912).[8]

For Arizona's first six decades, all state judges were elected by popular vote. *Dobson*, 233 Ariz. at 121 ¶ 2. This included the first decade of the Court of Appeals'

[7] Taft's Veto of H.J. Res. 14, National Archives.
[8] *See further Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 491 ¶ 46 & n.6 (2022) (Montgomery, J., concurring in part and dissenting in part); *see also* The Road to Statehood, Arizona State Library Museum Division; George H. Kelly, Legislative History, Arizona 1864–1912 at 282–83 (1926).

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. 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. *See* 1964 Ariz. Sess. Laws 220.[9] 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. *See* 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, eliminating the prior system of judicial elections at the appellate level. 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

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

residence. Eventually, in 1994, the Legislature amended Section 12-120.02[10] adding the word "retention" to the statute. 1994 Ariz. Sess. Laws 1145–47.

In 2022, additional "at-large" judges were added in each division. *See* 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.*[11] 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. *See* APP.005–6. 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, or the location of the *res* or the incident giving rise to the appeal.

II. Court of Appeals Judges Have Statewide Jurisdiction.

The Arizona Constitution outlines the basic structure of our judiciary. *See, e.g.*, Ariz. Const. art. VI, § 1 (stating that "[t]he 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

[10] 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).
[11] This provision is codified in A.R.S. § 12-120(E).

court rules, where they do not conflict with the Constitution, fill in the gaps. *See* Ariz. Const. art. VI, § 9 (stating, "[t]he jurisdiction, powers, duties and composition of any intermediate appellate court shall be as provided by law.").

Court of Appeals decisions are binding statewide—for lower courts and the public at large. *Scappaticci*, 135 Ariz. at 461. Thus, even though a judge may sit for retention election in a limited geographic area based on his or her county of residence, their decisions are binding on all 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. A.R.S. § 12-120(B) – (D); *see also* APP.005–6. Division Two covers Pima,

Pinal, Cochise, Santa Cruz, Greenlee, Graham and Gila counties, and consists of three departments of three-judges panels. *Id*.

Importantly, the three-judge panels/departments deciding cases in each Division 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. *See, e.g.*, APP.043–44, APP.045–46. The chief judge for each Division may change panel assignments "from time to time" (*id.* § 12-120.07(A)),[12] and each department can hear "causes and all questions arising therein," *id.*; *see also* APP.007. 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* APP.006, *department* (or panel) assignments are *not* based on the residency of the judge, *see* Division One Administrative Order 2023-03, APP.043–44; Division Two 2023 Organizational Order, APP.045–46. *See also* APP.007, APP.010 (three-judge panel composition rotates every six months, and cases are assigned "without regard to which judges are on a particular panel").

Additionally, because "[e]ach judge of the court of appeals may participate in matters pending before a different division" (A.R.S. § 12-120(E)), and cases are

[12] 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 as APP.037–44. As a matter of policy, Division One rotates the composition of its three-judge panels every six months. *See* APP.007.

regularly transferred between the two divisions pursuant to § 12-120(E),[13] the judges on both Divisions of the Court of Appeals effectively 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. *See* APP.007.

III. A.R.S. § 12-120.2 Disenfranchises Electors by Imposing 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." Ariz. Const. art. VI, § 38(A). The

[13] 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* APP.006 ("[F]or the first quarter of 2023, the Division One Clerk's Office anticipates 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).

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. Instead, 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.* 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." *Id.*

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 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, who may be residents "of any county in the division." *Id.* 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 their county of residency, which consists of four statutorily created geographic areas: (1) Maricopa County, (2) the remaining counties in Division One, (3) Pima County, and (4) the remaining counties in Division Two. Importantly, voters may *only* cast ballots in retention elections for Court of Appeals judges who reside in the *same designated geographic area as the voter*. A.R.S. § 12-120.02. Stated another way, voters cannot vote on the retention of judges who reside outside their geographic area.

Arizona's population is, of course, not equally distributed between the four geographic areas specified by these statutes. According to U.S. Census Bureau estimates,[14] 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. 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.

All of this means that a retention election for any given Court of Appeals judge is held on an unequal basis. 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

[14] APP.047.

the remaining 640,000 or so voters in Division One, and more than 1 million voters in Division Two, do not.[15] 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 input—despite the fact that all of these Arizonans are governed by the judge's decisions.

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. This is true even though the "rural" Division Two judge and the "urban" Division One judge perform the same function, and their decisions carry equal weight.

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. Specifically, because the Chief Judge in each Division has broad discretion in making panel assignments, and cases are regularly transferred between Divisions One and Division Two, 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.

[15] *See* State of Arizona Registration Report, 2022 General Election, APP.048–57.

ARGUMENT

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

The Arizona Constitution, by its terms, 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* (2d ed. 1910). Thus, the Free and Equal Elections Clause encompasses retention elections, like all others. *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]").

The Free and Equal Clause has no federal analog, and only a few cases have addressed it. In *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021), this Court made it clear that the "Free and Equal" Clause forbids the legislature from "erect[ing] barriers to voting or treat[ing] voters unequally." The Court also stated that 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)).

Section 12-120.02 disenfranchises voters because it establishes geographical boundaries that have *no* relationship to the judge's jurisdiction or authority. The statute 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. And perhaps most importantly, 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. In short, if "[t]he right to participate in our republican form of government constitutes the essence of American democracy," *Miller v. Bd. of Supervisors of Pinal Cnty.*, 175 Ariz. 296, 301 (1993), and the Arizona Constitution guarantees free and equal elections, then Section 12-120.02 is clearly unconstitutional.

Here, the current statutory county-based residency and retention regime is a vestige of a time when judges stood for competitive 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 election in outlying counties—and judges residing in outlying counties are not subject to 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 process. For example, Petitioner Bonnie Knight, who lives in Yuma County, *cannot* vote on the retention of an appellate judge who resides in neighboring Pima County. Yet she *can* vote for a judge in Apache County—on the opposite end of the state, 400 miles away. And no matter who she votes for, there is no guarantee that *any* judge she voted for will hear the cases affecting her or Yuma County.

Similarly, Petitioner 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. And Petitioner 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. 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). *See also* A.R.S. § 12-120.07(A) ("An opinion of a division or a department of a division shall be the opinion of the court of appeals.").

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

II. Section 12-120.02 violates the 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 Equal Privileges and Immunities Clause of the Arizona Constitution 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 here, because A.R.S. § 12-120.02 discriminates among voters based on their residency, the right to vote in judicial 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 for State of Ariz., Div. One*, 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").

As observed above, the jurisdiction of the Court of Appeals is *statewide*, but voters do not get to participate 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.

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 here, by contrast, *all* Arizonans are *equally* affected by all Court of Appeals judges but 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, an "improper distinction is being made by the Arizona legislature between and among classes of persons *within the relevant area*." *Id.* at 518 ¶ 30. Some people get to vote and others don't, for no good reason—and that is unequal. *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 important 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 is not narrowly tailored to serve that interest. Simply put, although *appointing* judges from rural counties promotes this important interest, mandating unequal *elections* does not. Indeed, the current retention election scheme is not even rationally related to promoting rural representation, because under A.R.S. § 12-120.02, some voters can vote on the retention of judges who reside on opposite ends of the state—Petitioner Knight, for

instance, who lives in Yuma County, can vote for a judge in Apache County—but others are barred from voting on judges who reside in contiguous counties: Petitioner Ramsey, who lives in Pima County, cannot vote for a judge who resides in Yuma County. Thus even if the reason for the disenfranchisement is because voters in one geographic area are either presumed to know more about a judge who resides in that area, or are affected more by a distinct class of legal issues than are citizens in distant counties, the statute fails to serve those purposes because 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 Clause 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. *See* Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution*, 20 Ariz. St. L.J. 115, 138–140 (1988). And when interpreting the Equal Privileges and Immunities Clause, this Court increasingly

does *not* follow the federal courts' interpretation of the federal Equal Protection Clause, *see generally* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 268–70 (2003) (citing numerous examples). This is particularly true where, as here, Arizona's distinct legal history shows that its Constitution should be read as more protective than its federal counterpart. *See State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986) (explaining when state constitution should be interpreted independently); *see also State v. Hunt*, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring) (same).

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, *id.* at 966, 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.

This Court should continue its longstanding tradition of enforcing greater protections under the Arizona's Equal Privileges and Immunities Clause, and hold that the challenged statutes, which restrict and even entirely nullify the right to vote in retention elections for a court with statewide jurisdiction, violates Arizona's Constitution.

ARCAP 21(A) ATTORNEY FEES NOTICE

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

CONCLUSION

Based on the foregoing, this Court should exercise its mandamus jurisdiction, 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 5th day of September 2023, by:

/s/ *Andrew W. Gould*
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petition for Special Action complies with Ariz. R.P. Spec. Act. 7(e). The Petition is double-spaced, uses a proportionally spaced typeface of 14 points, and contains 6,321 words using the word count of the word processing system used to prepare the Petition.

By: /s/ *Andrew W. Gould*

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, Respondent.	Supreme Court No.

CERTIFICATE OF COMPLIANCE

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