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 24-0280 Maricopa County Superior Court No. CV 2024-000431

APPELLANTS' REPLY BRIEF

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Section 12-120.02 violates both the Free and Equal Elections Clause and Equal Privileges and Immunities Clause of the Arizona Constitution. That Section injures Plaintiffs/Appellants ("Voters") by creating a system of *unequal* elections and by treating voters across the state *unequally*. Voters properly pleaded their claims, and the Superior Court erred in granting the State's Motion to Dismiss.

The State attempts to sidestep the constitutional analysis by raising tangential arguments. *First*, the constitutionality of Section 12-120.02 is not a "political question"; it is a legal question this Court can resolve. *Second*, the age of the original version of Section 12-120.02 does not shield the statute from constitutional scrutiny. If mere longevity could shield a statute from constitutional scrutiny, then unconstitutional laws of old vintage would automatically be deemed valid—a proposition entirely at odds with fundamental principles of judicial review. *Third*, while the Legislature has the authority to set the geographic composition of the Court of Appeals through appointment requirements, that power does not extend to violating the Free and Equal Elections Clause or the Equal Privileges and Immunities Clause in structuring retention elections. *Fourth*, the State—and the Superior Court—erred in relying on constitutional provisions that apply only to the Superior Court. And *finally*, Voters are not asking this Court to rewrite the statute, but to declare it unconstitutional. That outcome would require the Secretary of State to

certify future Court of Appeals retention candidates to the ballot statewide rather than allowing for the continuation of an unequal electoral process.

The Court should reverse the decision below and grant special action relief.

I. The State mischaracterizes the issues presented.

Although the State acknowledges that the Free and Equal Elections Clause "requires that each vote be given the same weight as every other and that no elector be prevented from voting," its framing masks the issue by stating that "Section 12-120.02 permits all Plaintiffs to vote in [*some, but not all*] Court of Appeals retention elections, and no Plaintiff has alleged[1] that her vote is weighted unequally from others *within her region*." Ans. Br. at 10 (emphasis added). This framing ignores (1) that Section 12-120.02 prevents *all* Voters from voting in *some* Court of Appeals retention elections that they would otherwise be entitled to participate in,[2] and (2)

[1] Contrary to the State's (and the Superior Court's) repeated assertions, Voters *do* allege—over and over—that voters across the state (including themselves) are prevented from casting ballots in certain elections and that the votes they do cast are treated unequally. *Compare* Ans. Br. at 10, 12, 22, 24, *and* State's APP009-10, *with* Op. Br. at 13, 15, 19–23, 35, and State's APP023-36 ¶¶ 3, 5, 7, 14, 16, 18, 20, 23, 56, 59–62, 72–73, 75, 82–84, 86, 89–90, 94, 96–97. These paragraphs contain more than enough supporting factual allegations and reasonable inferences drawn therefrom to overcome the State's Motion to Dismiss.

[2] Put another way, the numbers of Court of Appeals retention elections in which Voters respectively participate are unequal. For example, in 2024, Voter Deborah McEwen, as a rural Division 2 voter residing in Santa Cruz County, could not vote on *any* of the four Court of Appeals judges up for retention. *See* State of Arizona Official Canvas at 15, Meanwhile, Voters Bonnie Knight and Leslie White could each vote on the retention of one judge in their respective Division 1 regions. *See id.* And Voter Sarah Ramsey, as a Pima County voter, could vote on the retention of

that each vote is *not* given the same weight as every other *across regions within the Court of Appeals' jurisdictional boundaries*. Both of these consequences deny Voters the right to equal elections.

Next, while the State acknowledges that the Equal Privileges and Immunities Clause is violated when voters are subject to "differential treatment," it erroneously claims that Section 12-120.02 "impacts all plaintiffs (and all voters) identically." Ans. Br. at 10. This simply is not true, as Voters have alleged. *See* Op. Br. at 19–22; *supra* n.1. Section 12-120.02 unequally prevents Voters from casting votes in different numbers of elections, and it also causes their votes to have unequal weight. *See* Op. Br. at 35–36; *supra* n. 1. Some voters get to vote in more elections, with less weight given to their votes. Other voters get to vote in fewer elections, with more weight given to their votes.[3] But all Court of Appeals judges' decisions affect all voters across the state equally, regardless of the size or location of their retention electorate, or the judge's county of residency. The result is that voters *are* treated differently by Section 12-120.02, and their right to equal voting privileges is denied.

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two judges. *See id.* Over time, Maricopa County voters will be allowed to vote on a significantly higher number of Court of Appeals judges than voters in other counties, and rural Division Two voters will be prevented from voting in far more Court of Appeals retention elections than voters in Division One or in Pima County. *See* A.R.S. § 12-120.02.

[3] Even taken collectively, the weight of the total votes cast by region is unequal. *See* Op. Br. at 35–36 & nn. 27–28.

The State also casts Voters' injury as "being subject to the authority of judges whom they did not vote to retain." Ans. Br. at 11. This, too, misses the point. Voters' constitutional injuries are the denial of their rights to equal elections and to equal voting privileges. Those disenfranchising injuries recur every election cycle, including the one that passed during the pendency of this case.[4] And courts across the country have recognized such injuries. Op. Br. at 27–30, 41–43.

The State also attempts to color Voters' request to declare the statute unconstitutional as a request to "reform" or "rewrite the statute" in accordance with Voters' "political" "goals" or "preferences." Ans. Br. at 11–13. These rhetorical ploys should be ignored. Voters do not seek to rewrite the law—merely to enforce their rights under the state constitution. Because the proper role of the judiciary is to interpret the law as it currently stands, efforts to change the law in the political branches are irrelevant. Section 12-120.02 is in effect *now*, is unconstitutional *now*, and harms Voters *now*. Failing to resolve this issue in the courts, out of speculation

[4] Any timeliness argument based on the age of the statute is misplaced. *See* Ans. Br. at 6. An unconstitutional statute or practice does not become constitutional by the mere passage of time. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *Cf. United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("It would be weird to say that [a law] is unconstitutional in 2010 but will become constitutional by 2043."). That Voters could have brought a challenge in prior years is irrelevant. In fact, changed circumstances can highlight or exacerbate constitutional violations over time. That is what occurred here. In 2022, the Legislature amended Section 12-120(E) to authorize the wholesale transfer of cases between divisions. *See* Ans. Br. at 6–7. Even if limited transfers occurred historically, the 2022 amendment codified, normalized, and expanded the practice. *See id.*

that the political branches might *someday* act to change the statute (or amend the Constitution), would eviscerate judicial review. That is why similar arguments have been rejected by this Court. *See* *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 355 ¶ 34 (2012).

Lastly, the State cites a string of apportionment cases to frame its perception of "Arizona's constitutional structure" and "the unique role of judges in our system of government." Ans. Br. at 13–14. But this is not an apportionment case. *See* Op. Br. at 24–25. Apportionment presumes the existence of districts—in particular, *legislative* districts. *See, e.g.,* *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 220 Ariz. 587, 595 ¶ 22 (2009) ("[R]edistricting and reapportioning *legislative* bodies is a *legislative* task … . Judicial relief becomes appropriate only when a *legislature* fails to reapportion according to constitutional requisites." (cleaned up, emphasis added)).[5] Voters do not argue that there must be judicial districts, or that there must be equal population between various judicial districts, to comply with the Free and Equal Elections Clause or the Equal Privileges and Immunities Clause. Instead, Voters assert that the geographical voting boundaries created by Section 12-120.02 are unconstitutional.

[5] *See also* *Apportionment*, Black's Law Dictionary (12th ed. 2024) ("… Distribution of *legislative* seats among districts; esp., the *allocation of congressional representatives* among the states based on population, as required by the 14th Amendment … — Also termed *legislative apportionment*." (all but final emphasis added)).

And anything the Legislature might choose to do in the future regarding retention elections is irrelevant to the constitutional issues raised here.

II. Voters have standing.

Section 12-120.02 has injured and continues to injure Voters and their constitutionally protected rights to vote in equal elections, with equal voting privileges. Those injuries are far more serious than that Voters "might be affected by the decisions of judges whom they did not vote to retain." Ans. Br. at 39. *See Campbell v. Hunt*, 18 Ariz. 442, 445 (1917) ("the right to vote, the conditions under which the right can be exercised [and] … the laws under which elections are held … must, or ought to be, of vital importance to every thoughtful citizen."). These injuries are sufficient to confer standing on Voters, and Voters are entitled to relief.

Even under stricter federal standing requirements, Voters would have standing to challenge voting schemes whereby their votes count for less than those of others. *Baker v. Carr*, 369 U.S. 186, 207 (1962); *ACLU v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) ("unequal treatment of … voters is sufficient injury to confer standing."). That is true even where large classes of voters are concerned.

In *FEC v. Akins*, 524 U.S. 11, 13–14 (1998), voters had standing to challenge the FEC's decision not to bring an enforcement action against an alleged political committee regarding federal disclosure requirements. The FEC argued that the voters' injuries were "widely shared," and therefore they had no standing. But the

Court rejected that argument, finding instead that government action that infringes on a legally cognizable interest,

> where sufficiently concrete, may count as an "injury in fact." *This conclusion seems particularly obvious where … large numbers of voters suffer interference with voting rights conferred by law.* … [T]he informational injury at issue here, *directly related to voting, the most basic of political rights,* is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Id. at 24–25 (citations omitted, emphasis added). And, naturally, since Arizona's standing requirements are less demanding than Article III, the fact that Voters here satisfy the federal test means they also satisfy the Arizona test.

As for the "fairly traceable" element, the Secretary of State is the proper defendant, because as Arizona's chief elections officer, the Secretary implements and enforces election laws. *See Arizonans for Second Chances v. Hobbs*, 249 Ariz. 396, 405 ¶ 23 (2020). Where the Secretary is the only state officer capable of providing ballot access, and the constitutionality of statutes affecting voters' options is at issue, the "alleged injury is fairly traceable to the Secretary." *Id.* at ¶ 24. *See also Browne v. Bayless*, 202 Ariz. 405, 406 ¶ 1 (2002) (plaintiff had standing to sue the Secretary of State where the constitutionality of a statute regarding candidate filings was at issue).[6]

[6] This also means Voters' injuries are redressable, because if the Secretary is ordered to certify all appellate retention candidates to the ballot statewide, Voters will have

Moreover, this Court has squarely held that a voter has standing to compel an election official to perform his or her non-discretionary duty to comply with Arizona law. *See* *Arizona Pub. Integrity All. v. Fontes* ("AZPIA"), 250 Ariz. 58, 62 ¶ 12 (2020). In *AZPIA*, a voter and a nonprofit organization brought a special action to compel the Maricopa County Recorder "to perform his non-discretionary duty to provide ballot instructions that comply with Arizona law." *Id.* This Court clarified:

> *[W]e apply a more relaxed standard for standing in mandamus actions*. Specifically, under A.R.S. § 12-2021, a writ of mandamus allows a "party beneficially interested" in an action to compel a public official to perform an act imposed by law. … Thus, the "mandamus statute [Section 12-2021] reflects the Legislature's desire to *broadly afford standing to members of the public* to bring lawsuits to compel officials to perform their public duties."

Id. at 62 ¶ 11 (cleaned up; emphasis added).

In other words, this Court held that because mandamus actions serve the public interest by forcing public officials to comply with their statutory and constitutional duties, relaxed standing requirements are justified. As a result, the Court concluded that because "Plaintiffs, as Arizona citizens and voters" sought "to compel the Recorder to perform his non-discretionary duty to provide ballot instructions that comply with Arizona law," plaintiffs had "shown a sufficient beneficial interest to establish standing." *Id.* ¶ 12.

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a right to an equal vote. *See* *Arizonans for Second Chances*, 249 Ariz. at 406 ¶¶ 25–26.

Under *AZPIA*, Voters here have a sufficient beneficial interest and have established standing in this case. Voters seek to compel the Secretary to perform his non-discretionary duty to certify the names of judicial retention election candidates in a manner that complies with Arizona's Constitution, *i.e.,* without regard to the unconstitutional geographic limitations imposed by Section 12-120.02.

The State's reliance on *Bennett v. Napolitano*, 206 Ariz. 520, 526 ¶ 28 (2003), is misplaced. That case primarily discusses standing *for legislators* who sued the governor regarding use of the item veto. *Id.* at 525-27 ¶¶ 20–29. *Bennett* was brought by members of one political branch against the other—not by voters asserting constitutional violations. *Id.* The legislators' failure to show "injury to a private right or to themselves personally," rather than merely "a loss of political power" as individual legislators, was fatal to their standing arguments. Also, the legislature failed to exhaust available remedies (by not trying to override the veto), and the legislature had not authorized the lawsuit—none of which apply here. *Id.* at 526–28, ¶¶ 24, 28–31, 42. By contrast, the private rights of Voters in this case—their constitutional rights to equal elections and equal voting privileges—are violated, so they have standing. And they seek mandamus relief in an election context, just like in *AZPIA*, so even if they didn't meet traditional standing requirements, they would meet the "relaxed" standing requirement.

The State's reference to *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 17 (1998), is also unconvincing. Ans. Br. at 39. *Sears* involved a disagreement over the effects of a gaming compact, not a public official failing to perform a non-discretionary duty as in *AZPIA*. *See id.* at 69 ¶ 12. Indeed, the *Sears* Court specifically held that the petitioner had *failed* to allege a mandamus action and merely sought injunctive relief. *Id.* at 68–69 ¶¶ 11–12. The Court even prefaced the section cited by the State as addressing standing "*apart from mandamus principles*." *Id.* at 69 ¶ 15 (emphasis added).

The Court said the plaintiffs lacked standing because they failed to assert that the statutes at issue "discriminate[d] in favor of some person or persons," in a case that "d[id] *not* fulfill either of the basic requirements of an action for mandamus" or involve a matter of great public importance. *Id.* at 69, 71 ¶¶ 12, 23 (emphasis added). None of that applies here. Even if Voters must allege a "distinct and palpable injury" to have standing, as opposed to a "generalized harm," *id.* at 69 ¶ 16, the fact that a law deprives a large number of people of their constitutional rights *doesn't* insulate it from challenge by someone whose rights *are* violated.[7] *See, e.g., George v. Haslam*, 112 F. Supp.3d 700, 709 (M.D. Tenn. 2015) ("Plaintiffs' claimed injury is

[7] A "generalized harm" is not synonymous with "an injury lots of people suffer." Rather, it means an abstract political grievance better addressed by the legislature. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, Voters allege a violation of their constitutional rights to free and equal elections and equal voting privileges—not a mere policy concern.

that their individual votes … were not counted and valued the same way as other votes, making their injury distinct. … [This] is not a generalized grievance.").

The State's standing argument rests on the faulty premise that Section 12-120.02 "impacts all plaintiffs (and all voters) *identically*." Ans. Br. at 10 (emphasis added). That is not true. The four Voters here reside in each of the four respective geographic regions identified in Section 12-120.02, and each Voter is statutorily limited to voting on judges from their specific region, and prevented from voting on judges from the other three regions. The State admits that Voters adequately alleged that Section 12-120.02's retention elections "call for 'different numbers of judges, voters, etc.,'" but ignores that Voters also alleged that those differences mean that "*the elections they get to vote in aren't equal*." *Compare* Ans. Br. at 39 (quoting Op. Br. at 35, omitting this phrase), *with* Op. Br. at 35–36. *See also supra* n.1. And if the elections are not equal, Voters are not affected "identically," even if they are all affected somehow.

Although *AZPIA* forecloses the State's standing argument,[8] it should also be rejected for another reason: under Arizona's Constitution, standing is prudential, not jurisdictional. *Dobson v. State ex rel. Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 121–22 ¶¶ 8, 11 (2013). *See also Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236

[8] Voters repeatedly raised *AZPIA* below, and again mentioned it in the Opening Brief. Op. Br. at 15 n.11. That the State does not even attempt to address it, while reasserting its flawed standing arguments, is revealing.

Ariz. 415, 418 ¶ 8 (2014); *State v. B Bar Entrs., Inc.*, 133 Ariz. 99, 101 n.2 (1982). In *Dobson*, this Court recognized that "[w]ithout standing to raise the constitutional question in court, [the p]etitioners would have no means of redress." 233 Ariz. at 122 ¶ 11. The same is true here.

Consequently, if a case raises "issues of great public importance that are likely to recur," *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005), the Court can exercise its discretion to resolve the controversy. Cases involving elections and the right to vote are unquestionably of great public importance, *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 11 (App. 2013); *City of Flagstaff v. Mangum*, 164 Ariz. 395, 400 (1990), and because the statutes challenged here disenfranchise Arizonans in every judicial retention election, **the issues presented are absolutely certain to recur.**

Additionally, courts regularly hear claims regarding restrictive election procedures, even where a claimant cannot demonstrate her own disenfranchisement. *See, e.g., Arizona Democratic Party v. Hobbs*, 485 F. Supp.3d 1073, 1086 (D. Ariz. 2020), *vacated on other grounds,* 18 F.4th 1179 (9th Cir. 2021) (finding standing in challenge to election procedure even though no harmed voter could be identified).

Even if Voters did not have standing—they clearly do—the Court should exercise its discretion and resolve the significant constitutional questions of statewide importance raised by this case.

III. When setting the "jurisdiction, powers, duties and composition" of the Court of Appeals, the legislature may not create unequal elections or treat voters unequally.

Retention elections for judges on the Court of Appeals are both required by Article VI *and* subject to Article II's Declaration of Rights. Voters agree that under Article VI, the Legislature may set the "jurisdiction, powers, duties and composition" of the Court of Appeals, Ariz. Const. art. VI, § 9—*as long as it complies with all other applicable constitutional provisions*, including those in Article II. *See* Op. Br. at 8. Any action taken regarding *elections* must comport with the Free and Equal *Elections* Clause. Likewise, in creating statutory subclasses of voters, the Legislature may not violate the Equal Privileges and Immunities Clause. The State cannot simply ignore these constitutional imperatives.

Article VI Section 9 supports Voters' position, not the State's. Although retention elections might, in some sense, affect the "composition" of the Court of Appeals by affecting how long individual judges sit on the court, in reality the geographic composition of the Court of Appeals is determined by its statutory *appointment* requirements, not the constitutional accountability mechanism of retention *elections*. The Legislature has never asserted authority to specify *which individuals* sit on the Court of Appeals, so such a cramped interpretation of the word "composition" in Article VI Section 9 is inappropriate.

Indeed, the most fitting definitions of the term "composition" (among several listed in *Merriam-Webster*) are "the *manner* in which something is composed," or the "*general* makeup" of something. *Composition*, Merriam-Webster (2025) (emphasis added). These align with Voters' view that the term "composition" in Article VI Section 9 is limited to the appointment process ("the manner in which [the Court of Appeals] is composed") and the "general makeup" of the court (numbers of judges, division and department structures, etc.).

The Legislature exercised its power under Article VI Section 9 in a separate statute—Section 12-120 ("… *composition*; …")—*not* in Section 12-120.02 ("*Election* of judges").[9] Only the latter is challenged here under the Free and Equal *Elections* Clause. Invalidating Section 12-120.02 would not affect Section 12-120 *at all*, including division and department structures, the counties and number of judges in each division, a chief judge, etc.

Like the word "composition," the terms "jurisdiction" and "powers" in Article VI Section 9 support Voters' position. The Legislature exercised its authority to determine the intermediate appellate court's jurisdiction in the geographical sense in A.R.S. § 12-120 when it placed *all* the state's counties within the geographical

[9] Even if the residency requirements for appointments contained in Section 12-120.02 arguably fall within the definition of "composition," those are not what render that statute unconstitutional. Rather, the portions that unequally subdivide the court's *retention electorate* without any constitutional basis for doing so, and in violation of other express constitutional protections, are the issue.

jurisdiction of the Court of Appeals. And the Legislature specified the court's powers in A.R.S. § 12-120.21, which grants the court appellate jurisdiction and related authority. Nothing in Section 12-120.02 alters the jurisdiction or powers of the Court of Appeals or its judges.

The State argues that "Arizona's constitutional design presumes no relationship between a judge's authority and her retention electorate," and that any "connection between judicial authority and retention elections is illusory." Ans. Br. at 16, 18. But the Court of Appeals' jurisdiction is relevant to the questions of whether retention elections are equal and whether voters are treated equally because **the court's jurisdiction and ability to issue binding precedent are what make voters statewide similarly situated**.[10] That Arizona voters enacted a different structure and relevant constitutional provisions for Superior Court judges, *see* Ans. Br. at 16–18, is beside the point. But the fact that *no* such provisions exist for the *Court of Appeals* supports Voters' arguments, not the State's.

Invalidating Section 12-120.02 does not affect Article VI, either. Article VI Section 37(D) deals with judicial *appointees*, not retention candidates. And Article VI Section 38(A) is easily harmonized because it also applies to the statewide retention of justices on this Court, and Voters argue that the retention of Court of

[10] The State makes too much of *venue* provisions that do not affect whether voters across regions are similarly situated. Ans. Br. at 19.

Appeals judges should be treated similarly. Indeed, Article VI Section 38(A) requires both Supreme Court justices *and all* intermediate appellate court judges to file candidacy forms with the Secretary of State rather than with the clerk(s) of the county board(s) of supervisors. There is no contemplation there that some Court of Appeals judges would only sit for retention in a single county. If the state Constitution had contemplated the provisions of Section 12-120.02, then it would make sense for Article VI Section 38(A) to direct Court of Appeals judges residing in Maricopa and Pima County to file directly with their local boards.

Section 12-120.02 and Article VI Section 38 are not incompatible, because retention elections invoke the Free and Equal Elections Clause and other constitutional provisions. Accordingly, when all relevant constitutional provisions are harmonized, the statute must fall, contrary to the State's assertions. *See* Ans. Br. at 16–22.

What's more, the statute may not be judicially rewritten to avoid constitutional scrutiny, or to save it from constitutional flaws. *See, e.g., State v. Holle*, 240 Ariz. 300, 310 ¶ 47 (2016). The State, like the Superior Court, repeatedly adds the qualifying words "within those areas" (or similar phrases) when discussing whether voters are equally treated. *See, e.g.*, Ans. Br. at 26. But no such qualifiers exist in the Free and Equal Elections or Equal Privileges and Immunities Clauses. Indeed, if they did, those clauses would be worthless, because different classes of people could then

be subjected to all sorts of differential treatment, as long as members of each respective class were treated equally amongst themselves. (For example, giving citizens in one county one dollar each, and giving citizens in another county one hundred dollars each is not equal treatment, even if all citizens are treated equally "within their areas." That is not what "equal" means in this context, or any context dealing with constitutional rights, which apply statewide.)

Because the Court of Appeals is a single court with statewide jurisdiction, and its published opinions are binding precedent for all Arizona citizens, the proper framework for analyzing Voters' injuries is statewide, not region by region. Voters' constitutional rights cannot be unequally subdivided into geographic regions, with different collections of voters given the right to vote to retain a certain subset of judges, without violating the equality provisions of Article II. The Legislature determined that the entire state constitutes the geographical jurisdiction of the court. All Arizonans are therefore similarly situated in the relevant respect. And the composition function of the appointment process is distinct from the accountability function of the retention election process.

IV. Retention elections are a constitutional accountability mechanism in which voters are entitled to participate equally.

Because retention elections serve an accountability function and not a "representation" function, the interests served by retention and by appointment are distinct. *See* Ans. Br. at 22.

Residency requirements for appointment serve any necessary "geographic interest-balancing." Ans. Br. at 20. Those requirements apply not only to judges already on the court, but also to any successors. So, if the statewide electorate were to vote not to retain a particular judge, the outgoing judge's replacement would have to be appointed from the same geographic area. Thus, there is a continuity of "geographic interest-balancing" provided through the appointment process regardless of what occurs during retention elections.[11]

Court of Appeals judges are state—not county—officials, and they exercise binding appellate jurisdiction over the entire state. Thus, if any reason arises for a

[11] The State argues that "[c]ommon sense dictates that the systems for selecting judges and for holding them accountable *both* serve the interest of balancing urban and rural perspectives on the Court of Appeals." Ans. Br. at 37. That would only be true if judges *represented* particular urban and rural perspectives when voting on cases. In contrast, what common sense actually demonstrates is that if a judge is only accountable to a subset of the voters over whom she exercises jurisdiction, there's a perverse incentive to cater to the preferences of that group at the expense of voters in other areas to which the judge is not accountable. Such selective accountability is precisely one of the ills that the merit selection and retention system was designed to prevent. It's also why regional majoritarian "support" is far less important for judges than for political branch officials. *See* Ans. Br. at 37 (quoting *Pub. Integrity All. v. City of Tucson*, 836 F.3d 1019, 1028 (9th Cir. 2016) (en banc)).

Court of Appeals judge to be held accountable, that judge should answer to voters statewide.

Retention elections were designed as a compromise between direct elections and appointment-only judicial selection. *See, e.g.,* Tarr, *Do Retention Elections Work?*, 74 Mo. L. Rev. 605, 632 (2009) ("Retention elections represent an uneasy compromise between contested elections and the elimination of the populace from direct participation in the process of judicial selection."); O'Connor, et al., *The O'Connor Judicial Selection Plan*, The Institute for the Advancement of the American Legal System 8 (June 2024) ("We do not recommend that elections be contested and partisan, but we endorse the opportunity for citizens to make their choice. The compromise is a retention election in which the judges are 'retained' in office or not on the basis of the vote of the electorate."). This compromise allows voters to still hold judges accountable at the ballot box without directly electing them to "represent" voters. That makes sense because judges do not—or should not—engage in policymaking. But judges should be held to high standards of personal and professional conduct, and if a judge falls short, voters can choose not to retain her in office.[12] This right to vote to hold Court of Appeals judges accountable belongs to

[12] Of course, other accountability mechanisms exist, including impeachment and recall. *See, e.g.*, Op. Br. at 5–6.

all Arizona voters equally and has deep historical and constitutional roots. Op. Br. at 5–6.

Voters do not argue, as the State claims, that there is "a heretofore undiscovered right of all electors statewide to participate in each Court of Appeals judge's retention election." Ans. Br. at 2. Rather, Voters assert that their constitutional rights to *equal elections* and to *equal privileges* are violated by Section 12-120.02. That the immediate practical effect of invalidating Section 12-120.02 would be to require statewide elections does not rule out other potential alternatives that might comport with the two constitutional provisions. Put another way, the word "equal," standing alone, does not necessarily require that *all* voters participate in *all* retention elections. Ans. Br. at 16. But structuring some constitutionally permissible alternative is a job for the Legislature. For today's purposes, all that is necessary to decide is that allowing all voters to vote in all retention elections *would be equal*, as the Constitution requires—and that no other statutory or constitutional alternatives currently exist.

Voters do not, as the State claims, "take the absolutist position that elections by equally populated districts would still be unconstitutional." Ans. Br. at 41. Depending on specific facts, equally populated districts might pass constitutional muster under one or both relevant clauses—but Voters do not argue that such districts are mandated here in part because it's unclear whether judicial districts are

constitutional *at all* in this context. In short, the only thing "absolutist," Ans. Br. at 2, 41, about Voters' claims is their adherence to the Constitution, which requires both that retention elections *exist* for Court of Appeals judges, and that those elections and the right to vote in them be free and *equal*. Section 12-120.02 fails to comply with the latter and is therefore unconstitutional.

V. The Court should not presume that Section 12-120.02 is constitutional.

The State relies on a "presumption that statutes are constitutional." Ans. Br. at 20 (citing *State v. Ramos*, 133 Ariz. 4, 6 (1982)). But no presumption of constitutionality applies here. "[I]f a law burdens fundamental rights … any presumption in its favor falls away." *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 9 (2014). Section 12-120.02 burdens the fundamental right to vote, as protected by the Free and Equal Elections and Privileges and Immunities Clauses. Therefore, the statute is not entitled to any presumption of constitutionality. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969) ("the general presumption of constitutionality afforded state statutes ... [is] not applicable" to statutes "deny[ing] some residents the right to vote.").

VI. Strict scrutiny applies because this case implicates fundamental rights, and the statute fails that scrutiny.

A. Strict scrutiny applies.

The State contends that if Voters indeed are treated differently[13] the Court should merely apply rational basis review to the Equal Privileges and Immunities claim because the disparate treatment here supposedly "does not implicate fundamental rights." Ans. Br. at 33. That is clearly false. Courts, including this one, have repeatedly held that voting rights are fundamental. *See, e.g.*, *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021) ("The fundamental right to vote guarantees that voters will participate in state elections on an equal basis with other qualified voters." (cleaned up)). Restrictions on fundamental rights are subject to strict scrutiny, and will be upheld only if "necessary to promote a compelling state interest."[14] *Big D Const. Corp. v. Ct. Appeals*, 163 Ariz. 560, 566 (1990); *accord, City of Tucson v. Royal*, 20 Ariz. App. 83, 87 (1973).

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[13] The Superior Court erroneously concluded that because "the Statute treats all similarly situated voters in their respective counties equally," it was "unnecessary to decide whether disparate treatment in this context would be subject to strict scrutiny or rational basis review." State's APP012-13. *See also* Op. Br. at 35 & n. 26. But the Voters here are each similarly situated Arizona residents and voters subject to the binding appellate jurisdiction of the Court of Appeals, and depriving them of the right to participate equally in Court of Appeals retention elections constitutes differential treatment that triggers a strict scrutiny analysis.

[14] *Blankenship* applied heightened, but intermediate, scrutiny to judicial election districts under its state equal protection clause because "judicial elections have a component that implicates the fundamental right to vote and a separate component that is ordinarily the province of the legislature, subject only to review for rationality

The State ignores the fundamentality of the rights at stake, which explains its flawed Equal Privileges and Immunities analysis. In fact, the State argues that the Clause is not even *implicated* here. Ans. Br. at 34. Contrary to the State's assertion, under the current system, each voter in Arizona does *not* have a statutory right to vote in all Court of Appeals retention elections, *see id.* at 37, let alone the right to an *equal* vote. In short, there is both disparate treatment *and* a deprivation of fundamental rights. *See* *Waltz Healing Ctr., Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 616 ¶ 24 (App. 2018).

The Legislature need not require *any* elections for Court of Appeals judges under the Free and Equal Elections Clause. That requirement comes from Article VI. But once elections *are* mandated, the Free and Equal Clause requires that they be held on an equal basis, meaning that every vote must be "equal in its influence." *Chavez*, 222 Ariz. at 319 ¶ 33 (citation omitted). That's why not just the generally defined "right to vote" is fundamental, *id.* at 320 ¶ 36, but the more specific right to an *equal* vote is likewise fundamental in Arizona. *See* *Brnovich*, 251 Ariz. at 52 ¶ 30.[15]

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by the courts." *Blankenship v. Bartlett*, 681 S.E.2d 759, 763–64 (N.C. 2009). So, even if this Court were to analyze Arizona's constitutional provisions similarly, the State is wrong that rational basis would apply.

[15] The State faults *Brnovich* for saying "little—if anything" about the Free and Equal Elections Clause. Ans. Br. at 23. Even if true, what the case does say—and what it doesn't—speaks volumes. In addition to reiterating that the right to an equal vote is fundamental in Arizona, the *Brnovich* Court provided an example of something that

B. The statute fails strict scrutiny.

The statute fails strict scrutiny because it is not necessary to promote a compelling state interest. *Big D Const.*, 163 Ariz. at 566. The State offers two purported interests to justify its position, which, even if recognized as "legitimate" (no legal authority is cited for that proposition, *see* Ans. Br. at 36), fall far short of "compelling."[16] The State asserts that "Section 12-120.02 is related to the legitimate state interest in implementing the Court of Appeals' appointment scheme and thereby promoting the State's geographic diversity." Ans. Br. at 36.

As noted earlier, any interest in geographic diversity is served by judicial *appointment* requirements, which are different from *retention elections*. "[P]arity between the appointment and retention processes," whatever that means, is therefore not even a legitimate interest, let alone a compelling one. *Id*. And geographic

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did *not* violate the Free and Equal Elections Clause. The reason why off-cycle elections with "low voter turnout" did not "erect[] barriers to voting or treat[] voters unequally" is because voters retained the constitutional right to vote—or to *voluntarily choose* not to. 251 Ariz. at 52 ¶ 30. By contrast, Section 12-120.02 "deprive[s] … voters of their constitutional right to vote"—outright disenfranchisement—*every time* a retention election is held for a Court of Appeals judge. *Id.*

[16] A "compelling interest" is "one that has a 'clear justification ... in the necessities of national or community life' [and] prevents a 'clear and present, grave and immediate' danger to public health, peace, and welfare." *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992) (citations omitted), whereas a merely "legitimate" interest concerns only "greater efficiency or effectiveness in the performance of some public function." *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994).

diversity, even if it were served by the retention election portions of Section 12-120.02—it isn't—is not a compelling reason to deny Voters their fundamental rights to equal elections and equal voting privileges.

Even if the interests the State identifies were compelling, the statute would have to be the "least restrictive means practically available" to pass the narrow tailoring requirement of the strict scrutiny analysis. *Arizonans for Second Chances*, 249 Ariz. at 417 ¶ 82 (citations omitted). Divvying up the retention electorate, unequally denying them the right to vote in certain retention elections, and giving unequal weight to the votes they do cast, is far more restrictive than the residency requirements for judicial appointees.

The State's reliance on *City of Tucson v. Pima County*, 199 Ariz. 509, 518 ¶ 29 (App. 2001), is also misplaced. There, the court recognized that the right to vote is burdened when an "improper distinction is being made by the Arizona legislature between and among classes of persons within the relevant area." *Id.* ¶ 30. The court noted that "*once an election is provided*, classifications between and among electors within a voting district are subject to heightened scrutiny if it is alleged that some portion of that electorate is favored." *Id.* at 516 ¶ 21; *see also Reeder v. Kansas City Bd. of Police Comm'rs*, 796 F.2d 1050, 1053 (8th Cir. 1986) ("when the state chooses to regulate differentially, with the laws falling unequally on different geographic areas of the state, the Equal Protection Clause is not violated ... [*s*]*o long as all*

persons within the jurisdictional reach of the statute are equally affected by the law ... .” (emphasis added)). That’s precisely what Voters allege here, which is why strict scrutiny is appropriate.[17]

VII. Mandamus is an appropriate remedy.

Mandamus is appropriate when a public official fails to perform a non-discretionary duty required by law. *AZPIA*, 250 Ariz. at 62 ¶ 11; A.R.S. § 12-2021; RPSA 4(a).

The State contends that “the Secretary’s *only* ‘clear legal duty’ is to follow A.R.S. § 12-120.02.” Ans. Br. at 43 (emphasis added). But it’s axiomatic that the Secretary has an absolute legal duty to follow the Constitution, including its Free and Equal Elections and Equal Privileges and Immunities Clauses, as well as fulfill his duties under Article VI.

[17] It’s also why *McGowan v. Maryland*, 366 U.S. 420, 427 (1961) does not help the State. *See* Ans. Br. at 32–33. “[T]erritorial uniformity” in the *geographical* sense is “not a constitutional prerequisite” because “the Equal Protection Clause relates to *equality between persons as such*, rather than between areas.” *McGowan*, 366 U.S. at 427 (emphasis added). Both *City of Tucson* and *Reeder* cite *McGowan*, also recognizing that equal protection principles *do* apply when improper distinctions are made “*between and among classes of persons within the relevant area*,” *City of Tucson*, 199 Ariz. at 518 ¶ 30 (emphasis added), or when “all *persons within the jurisdictional reach of the statute*” are not equally affected by the law, *Reeder*, 796 F.2d at 1053 (emphasis added). The State ignores these limitations.

CONCLUSION

This special action presents plain legal issues that require no additional fact-finding. This Court should reverse the Superior Court's dismissal of Voters' action, and, in the interest of judicial economy, and given the nature of the constitutional questions at issue, it should direct the Superior Court to enter judgment in favor of Voters. *See generally* ARCAP 24(a) ("The mandate is the final order of the appellate court, which may command another appellate court, *superior court*, or agency to take further proceedings *or to enter a certain disposition of a case*.").

The Court should reverse and grant Voters' requests for special action relief.

Respectfully submitted this 24th day of February 2024 by:

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IN THE SUPREME COURT

STATE OF ARIZONA

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The undersigned certifies that the foregoing Appellants' Reply Brief complies with Ariz. R. App. P. 14. The Brief is double-spaced, uses a proportionally spaced typeface of 14 points, and contains 6,877 words using the word count of the word processing system used to prepare the Brief.

By: /s/ *Parker Jackson*

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I hereby certify that the attached Appellants' Reply Brief has been electronically served via the court's electronic filing system to:

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