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

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

Plaintiffs ("Voters") are entitled to judgment declaring A.R.S. § 12-120.02 unconstitutional under Arizona's Free and Equal Elections and Privileges and Immunities Clauses.

I. This special action should be resolved on summary judgment.

A. Plaintiffs' motion is timely, and discovery is not required or appropriate here.

The State asserts that Voters' summary judgment motion is "premature" because "a motion to dismiss is pending." Resp. at 1. But the Rules[1] expressly allow claimants to move for summary judgment after the filing of a Rule 12(b)(6) motion to dismiss. Ariz. R. Civ. P. 56(b)(1)(B).

The State also claims Voters' "motion is premature because no disclosures or discovery have occurred." Resp. at 6; *see also* Defs.' Opposing Statement of Facts ("DSOF") at 1 ¶ 2. But discovery is rare and not routinely permitted in special actions, particularly in non-statutory special actions seeking mandamus-style relief. *See* Ariz. R. P. Spec. Act. ("RPSA") 1 cmt. (b) &

[1] The Rules of Civil Procedure should apply here to the extent they do not conflict with the Rules of Procedure for Special Actions ("RPSA"). *See* Joint Report at 2, n.1.

4 cmt. (e). Discovery is *only* available where "a triable issue of fact is raised," which is not true here. RPSA 4(f); *see also Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz. 610, 615–16 (App. 1996).

Further, discovery is not "prudent," *see* Resp. at 6, *at all* in a case like this because the State has not raised any genuine dispute of material fact and, in special actions, "the speedy determination of the issue is of prime consideration." *Riggins v. Graham*, 20 Ariz. App. 196, 198 (1973). The discovery the State claims to need concerns legal, not factual matters. *See* Resp. at 6 (anticipating "discovery to evaluate Plaintiffs' assertions that their constitutional rights have been violated," which is a legal issue). The State wants to inquire "whether and how Plaintiffs have been subject to disparate treatment." *Id.* But this is a self-evident function of how the statutes and constitution operate—that is, a legal question, not a factual one. Voters' unequal treatment has to do only with their respective areas of residence and the way Arizona law treats those four distinct groups. *See, e.g.*, Compl. ¶ 7.

Orme School v. Reeves, 166 Ariz. 301, 309 & n.10 (1990), does not help the State because "[d]iscovery is complete … when … the court can say that all discovery necessary for the purposes of the motion has been completed." No discovery is necessary for purposes of this motion because no genuine dispute of material fact exists and the State is not entitled to discovery in a special action unless a triable issue of fact is raised. RPSA 4(f) & cmt (e).

B. Plaintiffs have standing and their claims are not "stale."

Voters have standing because Section 12-120.02 disenfranchises three of them each time a Court of Appeals ("COA") judge's retention election is held. Voters also have unequal influence on the outcome of any individual retention election, as well as on the COA as a whole. Pls.' Resp. to Mot. to Dismiss ("MTD Resp.") at 4–7.

In mandamus actions, Arizona courts use "a more relaxed standard for standing," so "as Arizona citizens and voters," Plaintiffs have "sufficient beneficial interest to establish standing" in a mandamus action to compel an election official to comply with Arizona election law. *Ariz. Pub. Integrity All. ("AZPIA") v. Fontes*, 250 Ariz. 58, 62 ¶¶ 11–12 (2020).[2]

[2] The State does not seriously engage with *AZPIA*, which forecloses its standing argument. *See* State's Reply in Support of Mot. to Dismiss ("MTD Reply") at 4. It asserts only a merits argument as to whether mandamus is warranted. *Id.*

Nor are Voters' claims stale because of Section 12-120.02's age. *See, e.g.,* Resp. at 1. 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). 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* Resp. at 3–4. Even if limited transfers occurred historically, the 2022 amendment codified, normalized, and expanded the practice. *See id.*

C. There is no genuine dispute of material fact.

The State's filings demonstrate agreement with Voters "as to operative facts and only dispute[s] application of the law to these facts," rendering summary judgment appropriate. *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 118 ¶ 24 n.8 (App. 2008). Of the 48 paragraphs in Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment ("PSOF"), 27 are wholly "Undisputed," and 20 are "Generally Undisputed." *See* DSOF. The State disputes only *one* fact alleged in the PSOF (¶ 20), and that is simply an immaterial dispute over certain wording in Voters' Complaint and statement of facts.[3]

Moreover, none of the State's 12 "[a]dditional facts" create any genuine dispute of material fact. Paragraphs 49 to 53 all concern the Superior Court, not the COA.[4] And these "facts" are actually just legal assertions citing constitutional provisions and caselaw.

Paragraphs 54 to 56 concern retired judges and justices, which are likewise not implicated by Voters' claims. Indeed, because there are *no elections* for retired judges and justices, *see* DSOF at 17 ¶ 56, the Free and Equal *Elections* Clause is inapplicable and can easily be harmonized with Article VI § 20.

Lastly, paragraphs 57 to 60 make additional legal assertions regarding the history of Section 12-120.02 (¶ 57), appellate court appointment requirements (¶ 58), the Secretary of State's

[3] Whether "it is not possible to know which appeals would have been transferred before [the 2022] amendments were enacted" is irrelevant, and the State does not dispute current transfer procedures. DSOF at 9–10 ¶ 20.

[4] The State speculates about how the outcome of this case might affect Superior Court retention elections, but that raises legal questions not at issue here.

certification obligations for appellate retention candidates under Article VI § 38 (¶ 59), and the COA's previous irregular transfers of certain cases between divisions prior to the 2022 amendments (¶ 60). None of those matters raise material factual issues, only disputes of how the law applies to the undisputed facts of this special action.

II. Section 12-120.02 is unconstitutional.

Retention elections are about judicial accountability, not representation. And when elections are implemented, they must comport with the Free and Equal Elections Clause, the Equal Privileges and Immunities Clause, and other constitutional requirements. Section 12-120.02 creates an unconstitutional system of *unequal* elections and must be declared invalid.

A. No presumption of constitutionality applies here.

The State leans heavily on caselaw stating that statutes enjoy a presumption of constitutionality, Resp. at 7, but "if 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.").

B. Failed legislative proposals to amend Section 12-120.02 are irrelevant.

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.[5] Section 12-120.02 is unconstitutional *now* and Voters are harmed *now*. Failing to resolve this issue in the courts out of speculation that the political branches might *someday* act to save the statute (or amend the Constitution) would eviscerate judicial review. That is why similar arguments have been rejected in the past. *See, e.g.*, *Arizona Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 355 ¶ 34 (2012).

[5] Likewise, any pre-representation comments by Voters' counsel are also irrelevant. *See* Resp. at 4–5.

The political branches always *could* act to "resolve" almost *any* legal issue. But they often don't,[6] and they frequently disagree—not only as to what the law should be, but what the law *is*, even where such disputes might have political implications. Rather, the fact that the political branches disagree as to what the Constitution means cuts in favor of the judiciary performing its function of interpreting the law. *See, e.g.*, *Forty-Seventh Legislature v. Napalitano*, 213 Ariz. 482, 485–86 ¶ 11 (2006). Thus, the State's efforts to frame this as merely "a political dispute between the Legislature and the Governor" lack merit. Resp. at 8. That is especially true here, where disenfranchised and unequally treated Voters have brought the action.

C. County-based *appointment* requirements do not necessitate county-based *elections*.

The State tries again to equate county-based *appointment* requirements with county-based *elections*. Resp. at 1. But again, this action does *not* challenge the residency requirement for the *appointment* of judges. MTD Resp. at 2.

It is true "[t]he Legislature has the power to determine the duties and composition of the Court of Appeals" under Ariz. Const. art. VI, § 9. Resp. at 8. But the Legislature exercised this power in a separate statute—Section 12-120 ("… *composition*; …")—*not* in Section 12-120.02 ("*Election* of judges"). Only the latter must comport with the Free and Equal *Elections* Clause. That it fails to do so doesn't invalidate the composition provisions of Section 12-120, including division and department structures, the counties and number of judges in each division, a chief judge, etc.

Invalidating Section 12-120.02 does no damage to Article VI, either, which the State erroneously[7] claims "incorporated" county-based retention elections into the constitutional text. Resp. at 3. Article VI Section 38(A) is easily harmonized because it also applies to the statewide retention of Arizona Supreme Court justices. *See* Resp. at 3 (quoting Ariz. Const. art. VI, § 38(A)). Its reference to "the several boards of supervisors" thus says nothing about voters' alleged intent "to conform the process for judicial merit-selection and retention elections with the county-based

[6] Legislative decisions *not* to change a statute do not make a statute any more or less constitutional. *See* Resp. at 7.

[7] By the State's admission, the relevant amendments to Article VI deal with judicial *appointees*, not retention candidates. *Id.* (quoting Ariz. Const. art. VI, § 37(D)).

process for electing Court of Appeals judges." Resp. at 3. 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* Resp. at 7. And 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).

D. Section 12-120.02 creates unequal elections.

COA judges are *state* (not county or division or special district) officials. *See* Resp. at 9. Moreover, their decisions not only have statewide effect: they have binding precedential weight over the entire state, like the Arizona Supreme Court. As a result, their retention elections must be "equal" for all Arizona voters. Ariz. Const. art. II §§ 13, 21.

Republican Party of N. Carolina v. Martin does not help the State here. Resp. at 9 (citing 980 F.2d 943, 957 (4th Cir. 1992)). Critically, the district-based elections involved there were required by North Carolina's Constitution, not by statute, N.C. Const. art. IV § 10, and North Carolina's Constitution has no "free *and equal*" elections clause.[8] *Martin* only decided whether political gerrymandering in judicial elections was justiciable under the Fourteenth Amendment, which is not at issue here. 980 F.2d at 961.

The State says Plaintiffs "have not claimed that a group is subject to disparate treatment." Resp. at 9. That is false. Voters, representing four distinct regions, have demonstrated at least two ways in which they are unequally treated. First, in any given retention election, three groups of voters are disenfranchised, while the other group votes on the retention of judges residing in the same geographic area. MTD Resp. at 9–10. And second, the four groups of voters do not have an equal influence on the outcome of individual retention elections or the makeup of the COA as a whole. *Id.* at 10.

Unequal treatment is mathematically self-evident here. Urban (Maricopa/Pima) voters can vote in about twice as many COA retention elections as rural voters. *Id.* at 15. Additionally, the

[8] What's more, the North Carolina Supreme Court has held that its state Equal Protection Clause requires heightened scrutiny in the context of judicial elections. *Blankenship v. Bartlett*, 681 S.E.2d 759, 768 (N.C. 2009).

distribution of voters and judges across the four areas is unequal, *id.* at 10, meaning the weight of votes across areas is unequal. For example, Maricopa County gets at least 10 judges that sit for retention before approximately 2.4 million voters. *See* DSOF ¶¶ 36, 40. That means there are about 240,000 voters per COA 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. So, **in Division One, the weight of a rural vote is nearly twice that of an urban vote.**[9] *See* Resp. at 4–5.

Put another way, a judge residing in Maricopa County answers to 2.4 million voters, whereas judges in the rest of Division One or in Pima County answer to just over a quarter of that number (about 640,000 in each of those regions[10]), and a judge in a non-Pima Division Two county answers to even fewer (about 430,000—just over one sixth the number of Maricopa voters). DSOF ¶¶ 36–39. That means a Maricopa voter constitutes 0.00004% of a judge's electorate. And a single voter in "rural" Division One or in Pima County makes up 0.00016% of their respective electorate. But a voter in the "rural" Division Two counties is 0.00023% of that judge's electorate. In that sense, retention voters in Maricopa County have one fourth the influence of voters in rural Division One or in Pima County. Worse still, **a rural Division Two voter has nearly *six times* more of an influence** on an individual COA judge's retention election than does a Maricopa County voter.[11]

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[9] These numbers do not account for at-large judges, the residency of which will fluctuate and can either exacerbate or mitigate discrepancies in specific circumstances. At-large judges, however, standing alone, do not save Section 12-120.02.

[10] Despite having nearly identical numbers of registered voters (and residents), *see* DSOF ¶¶ 33–34, 37–38, rural Division One and Pima County are guaranteed unequal numbers of resident COA judges under the statute. Rural Division One counties get at least five, Section 12-120.02(A), while Pima County may only get four, Section 12-120.02(B).

[11] The State claims Section 12-120.02 does not implicate the Free and Equal Elections Clause because:

> Every Arizona voter is entitled to vote in the retention election of Court of Appeals judges *from within their respective geographic areas*. No Plaintiff has alleged that they have been unable to vote in the retention election of a judge *appointed from their region*, and each Plaintiff's ballot is of equal influence to every other voter *from their respective region*.

Resp. at 13 (emphasis added). But the italicized qualifiers beg the question, as they are functions of the statute, not the Constitution.

E. Because it creates unequal elections, Section 12-120.02 violates Arizona's Free and Equal Elections Clause.

The State admits that "no vote should be given unequal weight or influence over that of another vote." Resp. at 11. But that's precisely what happens.

In its response, the State takes issue with two out-of-state cases Voters cite (*Moran v. Bowley*, 179 N.E. 526, (Ill. 1932), and *Oviatt v. Behme*, 147 N.E.2d 897 (Ind. 1958)), and makes too much out of two[12] others. Resp. at 11–12.

The State's quarrel with *Moran* is really dissatisfaction with *Chavez v. Brewer*, 222 Ariz. 309 (App. 2009), as *Chavez* relied on *Moran*'s explanation of free and equal elections. *See id*. at 319–20 ¶¶ 33–34 (comparing clauses and caselaw in Illinois,[13] Kentucky, Pennsylvania, and elsewhere). Thus, there's no "leap of logic," Resp. at 11, in relying on *Moran* here. And *Oviatt* is relevant because it interprets a constitutional clause that is one of those Arizona's was based on. Both cases are therefore helpful in setting forth rules regarding free and equal elections.

Arizona's Free and Equal Elections Clause was copied from Washington's Constitution. Goff, *The Records of the Arizona Constitutional Convention of 1910* at 658–59 (1991). But Washington copied it from Oregon, which drew from Indiana's 1851 Constitution (hence the relevance of *Oviatt*). *Foster v. Sunnyside Valley Irr. Dist*., 687 P.2d 841, 847 (Wash. 1984). But the earliest version of the clause actually originated in Pennsylvania's 1776 Constitution (and is thus older than the U.S. Constitution). *See* Pa. Const. of 1776 Ch. 1 § VII; Pa. Const. of 1790 art. IX § 5 (altering wording to "free and equal").

Pennsylvania's Clause is relevant here because it's the source of all such clauses, and its text is essentially identical to Arizona's. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (noting the "plain and expansive sweep of the words 'free and equal'"). 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***

[12] *Eugster v. State*, 259 P.3d 146 (Wash. 2011) is inapposite for the reasons explained in Voters' MTD Response at 11–13.

[13] *Madison County v. Illinois Board of Elections*, 214 N.E.3d 931 (Ill. App. 2022), which Respondents cite (Resp. at 12), is distinguishable, because it concerned judicial *sub*-circuits in which a *subset* of trial-level judges sit for retention, while others sit for retention circuit-wide.

State." *Id.* at 809 (citation omitted).[14] In other words, it 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). Therefore, "[a]n election corrupted by … dilution of votes is not 'free and equal.'" *Id.* at 821. Elections are made equal "by laws which … make their votes 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 Clauses have said the same. *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.").[15]

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.

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[14] 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").

[15] 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.

F. Section 12-120.02 also violates Arizona's Equal Privileges and Immunities Clause.

Contrary to the State's argument, Voters provide "legal support" for the fact that the Equal Privileges and Immunities Clause sweeps more broadly than the federal Equal Protection Clause. *Compare* Resp. at 13, *with* MSJ at 12–13 (discussing textual differences and citing cases and secondary sources), *and* MTD Resp. at 13–14 (same). 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).

Voters are treated unequally under Section 12-120.02. Their fundamental right to vote is at stake, so strict scrutiny applies. The statute is not narrowly tailored to meet a compelling government interest. Therefore, the Equal Privileges and Immunities Clause is violated. Even if federal standards applied, the statute is still unconstitutional because it impermissibly divides Voters up within the COA's jurisdiction, resulting in unequal treatment. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

III. Conclusion

Voters' summary judgment motion should be granted.

RESPECTFULLY SUBMITTED this 10th day of June 2024.

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