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, KRISTIN MAYES, in her official capacity as Attorney General, Intervenor.	Supreme Court No. CV-23-0229

REPLY IN SUPPORT OF PETITION FOR SPECIAL ACTION

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Arizona Revised Statute Section 12-120.02, through its arcane system of judicial retention elections, disenfranchises Arizona voters from voting on Arizona Court of Appeals judges who decide cases that are binding on a statewide basis. As a result, their rights to "free and equal" elections and to the equal privileges and immunities of citizenship are violated. The Petition for Special Action raises these pure issues of law under the Arizona Constitution.

The Court should reject Intervenor's non-meritorious arguments for the reasons discussed below.[1] Accordingly, the Court should accept jurisdiction and grant Petitioners relief.

I. Petitioners have standing.

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 Ariz. Pub. Integrity All. v. Fontes ("AZPIA")*, 250 Ariz. 58, 62 ¶ 12 (2020). In *AZPIA*, a voter filed a special action in this Court seeking to enjoin the Maricopa County Recorder from including certain new instructions with mail-in ballots. *Id.* at 61 ¶ 2. This Court accepted jurisdiction and granted relief, holding that the Recorder lacked constitutional or statutory authority to promulgate voting instructions. *Id.* at 61 ¶¶ 2–3.

In addressing the issue of standing, the Court stated:

[1] Respondent Secretary of State has taken no position on the Petition.

> *[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 [§ 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).

Simply put, the Court held in *AZPIA* that because mandamus actions serve the public interest by forcing public officials to comply with their statutory and constitutional duties, relaxed standing requirements were 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.

Under *AZPIA*, Petitioners, as Arizona citizens and voters, have a sufficient beneficial interest and have established standing in this case. Here, Petitioners, seek to compel the Secretary of State 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 A.R.S. § 12-120.02.

Intervenor's reliance on *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998) is inapt. *Sears* involved citizens claiming that a gaming compact the State entered with the

Salt River Pima-Maricopa Indian Community would negatively affect their Scottsdale community. *Id.* at 68 ¶ 6. Thus, *Sears* concerned a disagreement with the type of compact entered, not a public official failing to perform a non-discretionary duty, which is entirely unlike the election-related challenge brought in *AZPIA*. *See id.* at 69 ¶ 12. Indeed, the Court specifically held that petitioner had *failed* to allege a mandamus action and merely sought injunctive relief. *Id.* at 68–69 ¶¶ 11–12. In fact, the Court prefaces the sections cited by Intervenor (¶¶ 15–23) as addressing standing "*apart from mandamus principles*." *Id.* at 69 ¶ 15 (emphasis added). *Sears* has no bearing here.

Moreover, apart from their standing under *AZPIA*, Petitioners' injuries are not, as Intervenor claims, "wholly abstract and widely dispersed." Resp. at 15. Simply put, Intervenor misconstrues Petitioners' claims. Here, Petitioners' injuries are not only that they are subject "to decisions by judges whom [they] did not get to vote to retain (or not retain)." *See id.* at 16. Rather, the constitutional injury is the deprivation of the fundamental right to an *equal* vote as protected by the Free and Equal Elections Clause and the Equal Privileges and Immunities Clause. Certainly, Petitioners' injuries are no more "abstract" and "dispersed" as those of the voter in *AZPIA*, and under Intervenor's argument, *no* voter would have standing to challenge such disenfranchisement when it happens to be pervasive.

Relatedly, Intervenor's standing argument rests on the faulty premise that "[a]ll voters are in the *exact same* situation as the Petitioners, for all voters in Arizona are subject *in the same manner* to the provisions of A.R.S. § 12-120.02. And … they share their purported injury *identically* with every similarly situated voter in Arizona." *Id.* (emphasis added). But that is not the case.

Petitioners reside in each of the four geographic regions identified in A.R.S. 12-120.02, and each Petitioner is statutorily limited to voting on judges from their region and prevented from voting on judges from the other three regions. By contrast, the Court of Appeals is a single, statewide court, and its published opinions are binding legal precedent for all the citizens of Arizona. Retention elections for judges that sit on the Court of Appeals are constitutionally required by Article VI *and* subject to Article II's Declaration of Rights. Therefore, the proper framework for analyzing Petitioners' injuries is statewide, not region by region. Petitioners' constitutional rights cannot be subdivided as Intervenor contends, into geographic regions with different collections of voters given the right to vote to retain a certain subset of judges.

Although *AZPIA* forecloses Intervenor's standing argument, standing is also appropriate here because it is a prudential doctrine under Arizona's Constitution and 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 Ariz. 415, 418 ¶ 8 (2014); *State v. B Bar Entrs., Inc.*, 133 Ariz. 99, 101 n.2 (1982) (discussing lack of case or controversy provision in state constitution). 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.

Here, Intervenor concedes that the Petition raises issues of statewide importance. Resp. at 14. Moreover, courts regularly hear claims regarding restrictive election procedures even where a claimant cannot demonstrate their own disenfranchisement. *See, e.g., Ariz. Democratic Party v. Hobbs*, 485 F. Supp.3d 1073, 1086 (D. Ariz. 2020), vacated on other grounds (finding standing in challenge to election procedure even though no harmed voter could be identified). Even if Petitioners did not have standing—they clearly do—the Court should exercise its discretion and hear the significant constitutional questions of statewide importance raised in this Petition.

II. Petitioners' claims are timely.

Intervenor attempts to have it both ways in arguing when this case should have been filed. On the one hand, Intervenor implies that Petitioners filed too early, because "the 2024 election is over one year away" and "[t]he deadline for Court of Appeals judges to file their declarations of desire to remain in office is…just under a year away," so "[t]here is no rush." Resp. at 10. On the other, Intervenor argues

that "[t]he doctrine of laches bars Petitioners' action from being heard in the Supreme Court in the first instance." *Id.* at 12.

Intervenor does not advance a credible laches argument. Laches requires Intervenor to prove *both* that Petitioners (a) unreasonably delayed filing the action and (b) that delay caused Respondent undue prejudice. *See* *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013). Intervenor has the burden of proving each element. *Id.* But Intervenor fails to demonstrate that Petitioners unreasonably delayed filing the action and offers no argument whatsoever (let alone evidence) as to undue prejudice. In fact, by noting that the next election is more than a year away, Intervenor admits no such prejudice exists. *See* Resp. at 10. The laches argument fails on that ground alone.

Additionally, Petitioners have not unreasonably delayed in filing their action. They seek only prospective relief, and they do so sufficiently in advance of the next retention election to allow this Court to fairly consider the matter. *See* *McLaughlin v. Bennett*, 225 Ariz. 351, 353 ¶ 6 (2010) (rejecting laches where action filed "almost sixteen weeks before the [ballot] printing deadline" and therefore "did not 'deprive judges of the ability to fairly and reasonably process and consider the issues'" (citation omitted)). Indeed, Petitioners have filed now, rather than waiting until the eve of the 2024 election, to avoid forcing both Intervenor and this Court to address this important constitutional issue under a truncated time frame.

The fact that Petitioners could have brought their challenge in prior years is irrelevant and does not act to effectively amend Arizona's Constitution to engrain an unconstitutional practice. *See, e.g.,* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Under Intervenor's reasoning, countless lesser-known constitutional provisions could forever lose their meaning if they were not vigorously enforced and/or litigated from their inception.[2]

Finally, Intervenor's argument also fails because the doctrine of laches does not apply against the government on matters affecting the public interest unless the law expressly allows such a defense, which is not the case here. *See, e.g.,* *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ 33 (App. 2014).

III. The Petition seeks redress for constitutional violations.

Intervenor seeks to characterize this constitutional case as a policy disagreement between the legislature and executive that should be resolved by the political branches. It is not. This case is about Petitioners' rights under Article II, Sections 13 and 21, of the Arizona Constitution and seeks to redress a constitutional

[2] Changed circumstances can highlight or exacerbate constitutional violations. This occurred here. In 2022, the legislature amended A.R.S. § 12-120(E) to authorize the wholesale transfer of cases between divisions regardless of the parties' domicile, the location of the *res*, or where the incident giving rise to the appeal occurred. Pet. at 11. Even if limited transfers occurred historically, *see* Resp. at 7, the 2022 amendment codified a broader practice.

injury on a matter Intervenor concedes is of statewide importance. *See* Resp. at 12, 14.

At bottom, Intervenor's arguments would eviscerate judicial review, and similar arguments for judicial abdication have been rightly rejected by this Court before. *See, e.g.*, *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 355 ¶ 34 (2012) (rejecting "argument [that] would preclude courts from reviewing any law promulgated under the legislature's Article IV power because the enactment was subject to an executive check"). The political branches always *could* act to "resolve" almost *any* legal issue. But they often don't, and they frequently disagree—not only as to what the law should be, but what the law *is*. But "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And, "[a]lthough each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 8 (2006); *see also Ariz. Indep. Redistricting Comm'n*, 229 Ariz. at 355 ¶ 34 ("[I]t is well settled that when one with standing challenges a duly enacted law on constitutional grounds, the judiciary is the department to resolve the issue even though promulgation and approval of statutes are constitutionally committed to the other two political branches.").

Moreover, the fact that the political branches disagree here as to what the constitution means cuts in favor of the Court accepting jurisdiction to perform its constitutional function of interpreting state constitutional provisions, particularly on matters of first impression. *See* *Forty-Seventh Legislature*, 213 Ariz. at 486 ¶ 11 (noting that "the two political branches obviously disagree in good faith" about a constitutional question, "making the issues raised … likely to recur," and thus rendering it "one of those rare cases that justify the exercise of our special action jurisdiction").

IV. The Supreme Court is the appropriate forum to resolve the Petition.

Intervenor argues that Petitioners should have filed their action in the Superior Court because factual issues are in dispute. But this action concerns pure issues of constitutional law. No factual record needs to be developed, and Intervenor fails to identify any meaningful factual dispute whatsoever.

Here, the only relevant facts consist of the law and constitutional provisions at issue, the current practices of the Court of Appeals, and publicly available voter information.[3] These facts are all included in the Petition and cannot be reasonably disputed. No trial court needs to adjudicate them.

[3] Petitioners provide the Court with United States Census estimates of the resident population for Arizona counties, as well as county-specific voter registration data for the most recent election cycle. App.047–App.057.

Intervenor's claim that fact-finding is necessary to resolve their "vote dilution" argument lacks merit. If the relief Petitioners request is granted, the "strength" of a vote cast as to a judge from that voter's region will be equalized with every other voter in the state, and the strength of a vote related to judges from the three other regions will go from nothing to equality with every other voter in the state.[4] Equality is the only voting "weight" that matters under the Arizona Constitution. In short, there is simply no cognizable dilution argument here.

V. Article VI does not provide a constitutional basis for Section 12-120.02.

Intervenor's attempt at conjuring a constitutional basis for Section 12-120.02 rests on language in Article VI that is inapplicable to the retention of Court of Appeals judges on a statewide basis. The use of the phrase "counties or county" in Article VI § 37(D) applies to the geographic *composition* of appointments to the courts, not the *retention elections* of judges on any Arizona court. And the fact that Justices of this Court and judges on the Court of Appeals must both "file in the office of the secretary of state," while lower court judges must file "in the office of the clerk of the board of supervisors," under Article VI § 38 clearly indicates that the statewide ballot is the "appropriate" ballot for Court of Appeals judges.

[4] The Citizen Voting Age Population for the state and each county state can be estimated from the United States Census or the American Community Survey. Intervenor could easily quantify its irrelevant "dilution" argument using simple arithmetic. Expert testimony is unnecessary.

In any event, as Intervenor ironically points out, this Court has a duty to interpret the Constitution as "'a consistent workable whole.'" Resp. at 24 (quoting *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196 (1969)). That means that any election designated by the legislature must comply with *all* constitutional provisions, including the requirements that all elections be "free and equal," and any privileges and immunities—including the right to vote in a judicial retention election—granted to Arizona citizens must be granted equally, not to one of four arbitrary constituencies.

VI. The Free and Equal Election Clause requires that all votes have equal influence in judicial retention elections.

Intervenor's attempt to distinguish *Chavez v. Brewer*, 222 Ariz. 309 (App. 2009) and *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45 (2021) from the requirement to have free and equal statewide retention elections is unconvincing. After quoting *Chavez*'s statement that a "free and equal" election is "one … *in which each vote is* ***given the same weight*** *as every other ballot*," Resp. at 25 (quoting *Chavez*, 222 Ariz. at 319 ¶ 33), Intervenor characterizes the case as merely "endors[ing] the principle that the clause protects each voter's right to be permitted to vote and to have that vote count." Resp. at 26. That Intervenor omits the word "***equally***" after the word "count" is telling, and highlights the crux of the matter. Similarly, after acknowledging the *Brnovich* Court "recognized that the free and equal elections clause might be violated if a government entity 'erects barriers to

voting *or treats voters unequally*,'" *id.* (quoting *Brnovich*, 251 Ariz. at 52 ¶ 30), Intervenor spins this critical phrase as merely "protect[ing] an individual's rights to vote and be treated equally *in the casting of ballots,*" limiting language which obviously appears nowhere in the constitution. Resp. at 26.

Intervenor points to the State of Washington for help interpreting Arizona's Free and Equal Elections Clause by citing *Eugster v. Washington*, 259 P.3d 146 (Wash. 2011). Resp. at 28. But *Eugster* is inapposite.

In *Eugster*, a pro se plaintiff argued that Washington's process for electing its Court of Appeals judge and assigning them to panels violated the "free and equal" elections clause of Washington's Constitution. 259 P.3d at 148. But any similarity *Eugster* has with this Petition ends there.

First, *Eugster* postdates *Chavez v. Brewer* and other more relevant Arizona authorities, meaning that the Arizona courts already began interpreting Arizona's free and equal elections clause before Washington did, and in different ways. Indeed, no cases in Arizona—or any state other than Washington, for that matter—cite *Eugster*.

Second, Mr. Eugster made an entirely different argument than the one advanced here. Rather than argue that all Washington voters should be allowed to vote on all Court of Appeals judges, no matter where those judges reside, he argued that Washington's Constitution requires that Court of Appeals judges "represent"

districts within the state, that those districts must be equally populated under the one-person-one-vote principle (which, of course, does not apply to judicial elections under federal equal protection caselaw) and that voters are to vote for only the judge that "represents" the voter's district. *Id.* at 149. Mr. Eugster appears to have simply argued that the words "free and equal" in the Washington Constitution required all of this, without citing any other authorities regarding the original meaning of the clause. *Id.* As a result, the Washington Supreme Court engaged in very little textual analysis. *Id.* at 149–50.

Third, *Eugster* dealt with direct elections, not retention elections. Therefore, the election structure in Washington is not conceptually distinct from the selection process or composition of the court, as in Arizona.

Fourth, *Eugster* contains language supporting Petitioners' position. In commenting about Washington's "free and equal" elections clause, the court noted that "we have historically interpreted article I, section 19 as prohibiting *the complete denial of the right to vote to a group of affected citizens*." *Id.* at 150 ¶ 10 (emphasis added). This is precisely what occurs in Arizona: in any given retention election, voters in three of the four geographic regions are completely denied the right to vote. Finally, unlike here, the plaintiff in *Eugster* did not bring a state Equal Protection/Equal Privileges and Immunities claim. *Id.* at 150 ¶ 11 n.4 ("Eugster makes no claim that the Court of Appeals divisions and districts are drawn in such a

way to systematically exclude any particular group of voters from an election."). For these reasons, the Court should look to Arizona courts, rather than the Washington Supreme Court, for guidance as to the meaning of Arizona's Free and Equal Elections Clause.

VII. Denying all Arizona voters the right to vote on the retention of Court of Appeals judges violates the Equal Privileges and Immunities Clause.

A. The "one person, one vote" principle should apply to judicial retention elections, whether under the Free and Equal Elections Clause or the Equal Privileges or Immunities Clause.

As explained in the Petition, the "one person, one vote" principle should apply to judicial retention elections in Arizona—whether under Arizona's Free and Equal Elections Clause or its Equal Privileges or Immunities Clause—because Arizona's constitutional provisions provide greater protections for the right to an equal vote than does the federal constitution. *See* Pet. at 24–25. This is also due to the unique history and tradition of judicial accountability in the state. *See id.*

Petitioners' votes affect the Court of Appeals—as a single, statewide court—unequally because neither voters nor judges are equally dispersed across the four geographic areas. *See* Pet. at 15–17. This means that, inevitably, voters in certain areas have an out-sized influence on the court. *See* Pet. at 17. Courts typically refer to remedying the first type of harm as adhering to the "one person, one vote" principle. As Petitioners have pointed out, however, federal caselaw does not apply the "one person, one vote" principle to judicial elections. But Arizona's Constitution

provides additional protections and prohibits the selective disenfranchisement of voters for a statewide court.[5]

Babbitt v. Asta is not to the contrary. *See* Resp. at 30–31. That case held the "one person, one vote" principle inapplicable *to appointments only*, not to retention *elections* for appointees. 25 Ariz. App. 547, 550 (1976) ("[I]t is the power to appoint and not the right to vote that is at issue in this case."). Furthermore, *Asta* interpreted the state Equal Privileges and Immunities Clause in lockstep with the federal Equal Protection Clause, a practice this Court has increasingly departed from. *Compare id.* at 549, *with* Pet. at 24–25.

B. Even if the "one person, one vote" principle were not to apply, Section 12-120.02 violates the Equal Privileges and Immunities Clause because it makes an improper geographic distinction between and among classes of persons within the Court of Appeals' jurisdiction regarding the right to vote.

The unequal impact of certain groups of voters on the Court of Appeals *writ large* due to regional population disparities is only the first of two ways in which Section 12-120.02 harms Petitioners in violation of Arizona's Equal Privileges and Immunities Clause. The second—and more blatant—harm is that Section 12-120.02

[5] Arizona would not be the first state to apply the "one person, one vote" principle to judicial elections under its state constitution. *See Blankenship v. Bartlett*, 681 S.E.2d 759, 765 (N.C. 2009) ("[W]e hold that the right to vote in superior court elections on substantially equal terms is a quasi-fundamental right which is subject to a heightened level of scrutiny."). *Cf. League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (invalidating partisan gerrymander under Pennsylvania's Free and Equal Elections Clause despite federal nonjusticiability).

currently disenfranchises voters unequally in every respective retention election for each individual Court of Appeals judge. That is because voters in only one of the four statutory regions get to vote in any given candidate's retention election, while the other three areas are denied that right.

This type of harm, referred to herein as "*intrajurisdictional disenfranchisement*," has *not* been held inapplicable to judicial elections at either the state or the federal level, so both state and federal caselaw in that area is instructive. *See* Pet. at 22–23.

Intrajurisdictional disenfranchisement occurs when certain segments of the voting population within a given jurisdiction are improperly denied the right to vote for a public official within that jurisdiction. Or, to quote the Arizona Court of Appeals, 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." *City of Tucson v. Pima Cnty.*, 199 Ariz. 509, 518 ¶ 30 (App. 2001).

Section 12-120.02 causes intrajurisdictional disenfranchisement in every individual retention election for a Court of Appeals judge: the residents of the judge's home county or region get to vote, while other voters within the judge's statewide jurisdiction do not.

The U.S. Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the*

jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citations omitted) (emphasis added). Here, the jurisdiction of the Court of Appeals and its judges is *statewide*. Yet, voters statewide may not participate equally in all Court of Appeals retention elections. Therefore, not all citizens get to participate in these judicial retention elections "on an equal basis with other citizens in the jurisdiction." *Id.*; *cf. Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978) (noting that the "one man, one vote" principle does not extend "*beyond* the geographic confines of the governmental entity concerned, be it the State or its political subdivisions" (emphasis added)).

Nor is the current system of retention elections for the Court of Appeals a typical "reasonable residence restriction." *See id.* ("[A] government unit may legitimately restrict the right to participate in its political processes *to those who reside within its borders*."); *see also Carrington v. Rash*, 380 U.S. 89, 91 (1965). The disenfranchisement here is not of non-residents, but of Arizona residents subject to the jurisdiction of the Court of Appeals and its judges. The fact that voters—or judges for that matter—reside in a particular county or division is irrelevant. Imposing residence restrictions that are narrower than that of residence within the applicable jurisdiction is unreasonable and unconstitutional.

Similarly, the U.S. Supreme Court has intervened on equal protection grounds where election laws have excluded voters who have a "distinct and direct interest"

in the decisions of the governmental entity. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632 (1969) (rejecting intrajurisdictional limitations on the franchise in school elections to those "primarily interested," such as parents and property owners). *See also Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (overturning statute limiting franchise in municipal bond elections to "property taxpayers" because all residents in the jurisdiction were affected); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 212 (1970) (same, for general obligation bonds). In *Cipriano*, the Court explained, "[t]he 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," and that such a scheme "clearly does not meet the 'exacting standard of precision we require of statutes which selectively distribute the franchise.'" 395 U.S. at 706 (citing *Kramer*, 395 U.S. at 632) (emphasis added). And in *Kolodziejski*, the Court said that even though property owners and nonproperty owners had "somewhat different" interests, it was not enough to "justify denying the vote in a current bond election to all those nonproperty owners *who have a significant interest* in the facilities to be financed." 399 U.S. at 212 (emphasis added).

Here, Section 12-120.02 likewise excludes voters who have a "distinct and direct interest" in the decisions made by Court of Appeals judges. *Kramer*, 395 U.S. at 632. "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." *Cipriano*, 395 U.S. at 706. And even though voters in a particular county might have "somewhat different" interests when voting for or against a judge from their own county or region, *see* Resp. at 39–40, those interests are not sufficiently compelling to overcome strict scrutiny.

Because Section 12-120.02 unreasonably disenfranchises voters who reside within the boundaries of the Court of Appeals' jurisdiction and who have distinct and direct interests in the court's decisions, the statute violates the Equal Privileges or Immunities Clause—regardless of whether the "one person, one vote" principle directly applies to judicial elections under the state constitution, and regardless of whether there is "daylight between the federal and state clauses." Resp. at 32.

C. The right to an *equal* vote is fundamental under the Arizona Constitution, and because it is implicated here, strict scrutiny applies.

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 carries equal weight. *Chavez*, 222 Ariz. at 319 ¶ 33. That is 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.

Intervenor ignores the fundamental nature of the rights at stake, leading to a flawed Equal Privileges and Immunities analysis and the improper conclusion that rational basis, rather than strict scrutiny, applies. *Compare* Pet. at 21–22, *with* Resp. at 36–38. In fact, Intervenor argues that the right to vote is not even *implicated* here because of a selective reading of the constitutional provisions. Resp. at 36–37. Contrary to Intervenor's assertion, under the current system, each voter in Arizona does *not* have the 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).

Strict scrutiny therefore applies. *Mayor of Tucson v. Royal*, 20 Ariz. App. 83, 87 (1973); *see also* *Waltz Healing Ctr.*, 245 Ariz. at 616 ¶ 24 (mandating rational basis review "when disparate treatment does not implicate fundamental rights"). The statute fails the strict scrutiny test because it is not narrowly tailored to serve a compelling government interest. Pet. at 22–24. Indeed, Intervenor tries to pass off an interest recognized as "legitimate" under rational basis review in *City of Tucson*, 199 Ariz. at 519 ¶ 31 as one that is "important," Resp. at 39, which is still short of "compelling," *id.* (quoting *Big D Constr. Corp. v. Ct. of App.*, 163 Ariz. 560, 566 (1990)). Intervenor also tries unsuccessfully to parse the *City of Tucson* language 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." 199 Ariz. at 516 ¶ 21 (citing *Kolodziejski*, *Cipriano*, and *Kramer*). To Intervenor, the proper "voting district[s]" are "the voting areas provided by A.R.S. § 12-120.02," Resp. at 36, but correctly understood (and read in context with the federal cases cited[6]), the proper "voting district" for a statewide court is the state.

VIII. Mandamus relief is appropriate.

Because Section 12-120.02 is unconstitutional, the Secretary of State has a non-discretionary duty to certify the names of Court of Appeals judges sitting for retention to the statewide ballot, rather than certain county ballots. Any other method of certification would violate the constitutional provisions discussed above. This is precisely the type of non-discretionary duty that mandamus actions are designed for, and it is why mandamus relief is not uncommon in the election context. *AZPIA*, 250 Ariz. 58. The fact that this case presents constitutional questions of first impression does not undermine Petitioners' request for relief in any way—"novel" does not mean "wrong." *See* Resp. at 43. The Court should order the Secretary to certify any

[6] Intervenor minimizes *Cipriano* by claiming that "[n]obody is being excluded here" because "[e]very Arizonan has the right to vote in *a* retention election. Resp. at 38. But that again mischaracterizes the injury. Every Arizonan is excluded from *some* retention elections for judges with jurisdiction over them.

qualified Court of Appeals candidates to the statewide retention ballot in 2024 and all future elections.

CONCLUSION

Petitioners seek through this special action to vindicate their fundamental right to an *equal* vote in judicial retention elections for *each* Court of Appeals judge with jurisdiction over them, as protected by the Free and Equal Elections Clause and Equal Privileges and Immunities Clause of the Arizona Constitution. They have timely presented purely constitutional questions of statewide importance, and they have done so in the appropriate court.

The Court should accept special action jurisdiction over the Petition.

Respectfully submitted this 13th day of October 2023 by:

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CERTIFICATE OF COMPLIANCE

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The undersigned certifies that the foregoing Reply in Support of Petition for Special Action Complies with the Ariz. R.P. Spec. Act. 7(e). The Petition is double-spaced, uses a proportionally spaced typeface of 14 points, and contains 5,247 words using the word count of the word processing system used to prepare the Petition.

By: /s/ *Parker Jackson*

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, KRISTIN MAYES, in her official capacity as Attorney General, Intervenor.	Supreme Court No. CV-23-0229

CERTIFICATE OF SERVICE

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I hereby certify that the attached Reply in Support of Petition for Special Action has been electronically served via the court's electronic filing system to:

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