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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

PLAINTIFFS' RESPONSE TO STATE OF ARIZONA'S MOTION TO DISMISS

(Assigned to the Hon. Frank W. Moskowitz)

Two core principles drive this case. First, because judges on the Arizona Court of Appeals stand for retention elections, the state constitution mandates that those elections be "free and equal." And the second principle follows the first: since the judges on the Court exercise statewide jurisdiction, Arizona voters should have a free and equal opportunity to vote in their retention elections. But here, A.R.S. § 12-120.02 violates this constitutional guarantee by permanently denying voters the right, based on their county of residency, to fairly and equally participate in retention elections for the judges on the Court.

Although the Attorney General attempts to recast Plaintiffs' claims as raising merely a "policy dispute" involving the political branches of government, protecting the rights guaranteed by the Arizona Constitution is hardly a "policy dispute." Rather, Plaintiffs' right to "free and equal" elections, meaning elections "in which each vote is given the same weight as every other ballot," *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33 (App. 2009), and their right under the Equal Privileges and Immunities Clause to "participate in elections on an equal basis with other citizens

in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis added), are constitutional rights, not mere matters of "policy."

INTRODUCTION

This case is about Plaintiffs' right to vote in the retention elections of all the judges on the Court of Appeals. The Court has statewide jurisdiction that establishes precedent binding all Arizonans and is, in fact, the court of last result for most cases.

To be clear, this case does not challenge the residency requirement for the *appointment* of judges. Nor does it argue that judicial districts must be of equal size or population. Rather, Plaintiffs challenge the fact that under current law, only voters in one of four geographic areas of the state may cast ballots in the retention election for any given Court of Appeals judge, while voters in the three other areas do not. In other words, in every individual retention election for a Court of Appeals judge, at least some voters—and in many instances *most*—are disenfranchised and have an unequal say in the retention of judges on this statewide court.

The divvying up of retention elections for judges with statewide jurisdiction on a quasi-county, quasi-division basis—as is the situation now—results in unequally weighted votes, because the current designated geographic areas all have differing numbers of judges, voters, and residents. Take, for example, Plaintiff Bonnie Knight, who lives in Yuma County. Under Section 12-120.02, she can only vote on the retention of a judge to the Court of Appeals if that judge's residence is in Yuma, La Paz, Mohave, Coconino, Yavapai, Navajo, or Apache Counties. In other words, she can *never* vote on the retention of judges to the Court of Appeals whose residence is in Maricopa, Pima, Pinal, Cochise, Gila, Santa Cruz, Graham, or Greenlee Counties. Likewise, Plaintiff Deborah McEwen, who lives in Santa Cruz County, can only vote on the retention of a judge whose residence is in Santa Cruz, Pinal, Cochise, Greenlee, Graham, or Gila Counties—meaning she's *totally prohibited* from voting on the retention of judges who reside in any of Arizona's nine other counties. Plaintiff Sarah Ramsey, from Pima County, can only vote on the retention of a judge in *one* county: her own. And Plaintiff Leslie White, in Maricopa County, can also vote only for the retention of judges who live in that county; she is entirely barred from voting for any other judges on the Court.

The current statutory scheme creates even more irrational and confusing results. Plaintiff Knight (Yuma County) cannot vote on the retention of a Court of Appeals judge who resides in neighboring Pima County—but *can* vote for a judge in Apache County, on the opposite end of the state, 400 miles away. Meanwhile, Plaintiff Ramsey (Pima County), may vote on the retention of a judge who resides in *Pima* County, but *not* one who resides in adjacent Yuma County. And Plaintiff McEwen (Santa Cruz County), can only vote for retention of Court of Appeals judges in her home county or the contiguous counties of Cochise, Greenlee, Graham, Gila, or Pinal. Thus, if an appellate panel of Division Two were made up of judges from Pima, Pinal, and Cochise counties, McEwen could vote for two, Ramsey could vote for one, and Knight could vote for none. Yet all Plaintiffs are subject to that panel's decisions. Meanwhile, there is no guarantee that any judge that any of these voters voted for will actually be assigned to hear cases affecting their counties of residence.

When viewed from the perspective of the individual voter, this statutory scheme unconstitutionally deprives Knight, McEwen, and others of their right to vote in elections by permanently barring some citizens from casting a ballot on the retention of judges who exercise authority over them. And when viewed from the perspective of the Arizona electorate as a whole, the retention election system also treats voters unequally, because although all voters get to vote in at least *some* judicial retention elections *some* of the time, the weight of each vote and its effect on the composition of the court is unequal.

In short, this means that in *individual* Court of Appeals judges' retention elections, some voters are heard, and others are not—and that in Court of Appeals retention elections *collectively*, some votes carry more weight than others. Viewed from either perspective, the election system created by Section 12-120.02 violates the Free and Equal Elections Clause and causes voters to be treated unequally, in violation of the Equal Privileges and Immunities Clause.

LEGAL STANDARD

Rule 12(b)(6) motions to dismiss are disfavored. *Luchanski v. Congrove*, 193 Ariz. 176, 179 ¶ 17 (App. 1998). They may be granted "*only* if 'as a matter of law [] plaintiffs would not be entitled to relief under *any* interpretation of the facts susceptible of proof.'" *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (citation omitted; emphasis added). "In determining if a complaint states a claim on which relief can be granted, courts *must* assume the truth of all well-pleaded factual allegations and indulge *all* reasonable inferences from those facts." *Id.* ¶ 9 (emphasis added). Plaintiffs' Verified Special Action Complaint easily satisfies Arizona's pleading standard.

ARGUMENT

I. Plaintiffs have standing because they are deprived of the important, fundamental right to vote in retention elections.

Plaintiffs have suffered and are suffering an injury sufficient to confer standing because the challenged statutes deprive them of their constitutionally guaranteed right to an equal participation in the election of officials who wield power over them. "[I]f a vote is properly alleged to have counted less than the constitutionally required amount, standing exists to claim a constitutional injury." *Biggs v. Cooper*, 234 Ariz. 515, 521 (App. 2014), *aff'd in part, vacated in part sub nom. Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415 (2014).

Although Arizona's standing requirements are less strict than federal standing requirements, given that our constitution has no case or controversy requirement, *Dobson v. State ex rel. Commission on Appellate Court Appointments*, 233 Ariz. 119, 122 (2013), even if the stricter federal requirement applied here, Plaintiffs would have standing. Indeed, they certainly would have standing under federal rules 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.").

But even if Plaintiffs lacked federal standing, the Court should proceed to the merits. Specifically, the fact that standing is considered prudential—not jurisdictional—under state law

means Arizona courts may consider the merits of a case even absent standing, if the case raises "issues of great public importance that are likely to recur." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). 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' voting rights in every judicial retention election, the issues presented are absolutely certain to recur.

As for the "fairly traceable" element of the standing test, 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).[1]

The State argues that Plaintiffs lack standing because their injuries are widespread or "universally dispersed." *See* Mot. at 6. But the State mischaracterizes Plaintiffs' injury and relies upon inapt authorities. While it's true that a plaintiff must allege a "distinct and palpable injury" to have standing, as opposed to a "generalized harm," *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998), the fact that a law deprives a large number of people of their constitutional rights doesn't insulate it from challenge by a citizen whose rights are violated.[2] *See, e.g., George v. Haslam*, 112 F. Supp.3d 700, 709 (M.D. Tenn. 2015) ("Plaintiffs' claimed injury is 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.").

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[1] This also means Plaintiffs' injuries are redressable, because if the Secretary is ordered to certify all appellate retention candidates to the ballot statewide, Plaintiffs will have a right to an equal vote. *See Arizonans for Second Chances*, 249 Ariz. at 406 ¶¶ 25–26.

[2] 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, Plaintiffs allege a violation of their constitutional rights to free and equal elections—not a mere policy concern.

In *FEC v. Akins*, 524 U.S. 11, 13–14 (1998)—which, again, was decided under the stricter federal standing rules—the Court found that voters had standing to challenge the Commission's decision not to bring an enforcement action against an alleged political committee regarding federal disclosure requirements. The Commission said the voters' injury was "widely shared," and therefore they had no standing, but the Court rejected that argument. The Court disagreed, holding 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*. We conclude that, similarly, the 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).

Further, this case sounds in mandamus (because it seeks to compel the Secretary to certify the names of all Court of Appeals judges who declare their candidacy for retention in 2024 and all future elections on the statewide ballot, (*see* Compl. at 15 ¶ D), and Arizona courts have "a more relaxed standard for standing in mandamus actions." *See Ariz. Pub. Integrity All. ["AZPIA"] v. Fontes*, 250 Ariz. 58, 62 ¶ 11 (2020).

In *AZPIA*, a voter and a nonprofit organization sued the Maricopa County Recorder regarding a "non-discretionary duty to provide ballot instructions that comply with Arizona law." *Id.* ¶ 12. The court mentioned the "general" standing requirements, then 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. The phrase "party beneficially interested" is "applied liberally to promote the ends of justice." 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. ¶ 11 (citations omitted).

The Court determined that "Plaintiffs, *as Arizona citizens and voters*" had "sufficient beneficial interest to establish standing" in a mandamus action to compel an election official to comply with Arizona election law. *Id.* ¶ 12. Not only had the plaintiffs met the "relaxed standard"

for mandamus actions, but they also "satisfied the standard for injunctive relief" because they were "likely to succeed on the merits" and "public policy and the public interest are served by enjoining his unlawful action." *Id.* at 64 ¶ 27.

The same is true here. Plaintiffs are Arizona citizens and voters with a beneficial interest in ensuring that the Secretary complies with the constitution—indeed, their fundamental right to vote depends upon it. *See id.* at 62 ¶ 12; A.R.S. § 12-2021 (mandamus statute); Compl. at ¶¶ 12–23. Each Plaintiff has been and will again be denied the right to vote in retention elections for Court of Appeals judges appointed from other geographical regions of the state. They, therefore, have standing for their mandamus action. And, given that their voting rights are infringed upon by Section 12-120.02, they also have standing to seek declaratory relief. *See Dobson*, 233 Ariz. at 122 ¶ 11 ("Without standing to raise the constitutional question in court, Petitioners would have no means of redress. That standing exists under these circumstances is implicitly recognized by Arizona's declaratory judgment statute.").

At bottom, the State's "widely dispersed" argument amounts to saying that if a law deprives enough people of their voting rights, none of them have standing to sue. Mot. At 6. That is not the law, and none of the cases cited by the State support this claim. On the contrary, *Bennett v. Napolitano* found that legislators who objected to the governor's veto lacked standing because their injury was unlikely to recur, the legislature had failed to exhaust available remedies (by not trying to override the veto) and the legislature had not authorized the lawsuit. 206 Ariz. 520, 526–27 ¶¶ 28–30 (2003). And *Sears v. Hull* stated 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. 192 Ariz. at 69, 71 ¶¶ 12, 23 (emphasis added). None of that reasoning applies here. Plaintiffs have suffered and are suffering an injury to their constitutionally protected right to vote in free and equal elections, and are entitled to injunctive, declaratory, and mandamus relief.

II. Plaintiffs have pleaded a valid claim under the Free and Equal Elections Clause.

Plaintiffs do not (as the State claims) argue that judges are "representatives." *See* Mot. at 8–9. Rather, Plaintiffs argue that because the state holds retention elections for judges, the Arizona Constitution mandates that those elections be free and equal, meaning that Plaintiffs should not be disenfranchised or have their votes count unequally.

The current system creates two related problems: 1) some voters are completely disenfranchised in each individual judge's retention election (the "individual" perspective), and 2) voters are treated unequally with regard to the weight of their votes and the impact of these votes on the Court of Appeals as a whole (the "collective" view). This means that *each* individual retention election for a Court of Appeals judge is unequal, and that the Court of Appeals retention elections *collectively* are unequal. Both aspects implicate the Free and Equal Elections Clause.

The State's arguments about venue statutes and retired judges are inapt. First, the State says that because cases can be transferred to different venues (especially to Maricopa County), a case might ultimately be decided by a judge over whom a party has no voting rights. Mot. at 9. But the State confuses a change of venue with the right to free and equal elections. The Arizona Constitution doesn't guarantee free and equal *venue*—it guarantees free and equal *elections*. Plaintiffs have never denied that the legislature can arrange for the transfer of certain cases, or that parties must have voted on each and every judge presiding over any specific case. Rather, Plaintiffs simply assert that if there are judicial retention elections, those elections must be free and equal.

As to retired judges serving on appellate panels, Mot. at 9, the State's argument misses the mark. Plaintiffs' claim is based on the constitutional guarantee of free and equal retention *elections*; it does not concern the *appointment* of judges to the Court of Appeals, nor does it address *temporarily recalling* retired judges back into service on the Court. Once again, Plaintiffs do not claim that the Free and Equal Elections Clause guarantees the assignment of any specific judge to any specific case on the Court; rather, the Clause ensures that any *election* of a judge to the Court must be free and equal. Thus, the provisions of Ariz. Const. art. VI, § 20 addressing retired judges and Article II § 21 concerning free and equal elections are easily harmonized. *See*

State v. Lee, 226 Ariz. 234, 238 ¶ 11 (App. 2011); *Corp. Comm'n v. Pac. Greyhound Lines*, 54 Ariz. 159, 170 (1939).

Finally, the State's analogy to the election of State Legislators demonstrates a fundamental misunderstanding of the authority and role of judges on the Arizona Court of Appeals. Unlike legislators, who are elected in districts to represent specific constituencies, Court of Appeals judges do not represent specific constituencies or districts. Rather, each judge on the Court, regardless of where they reside, is responsible for issuing decisions that are binding on the entire state. Thus, here, the more apt analogy for state legislators would be denying the right to vote for certain legislators *within a legislative district*.

Thus, because Court of Appeals judges exercise statewide jurisdiction, the Free and Equal Elections Clause mandates that they stand for retention election with all the voters of this state. *See State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021) (citation omitted)) (stating that the Free and Equal Elections Clause bars the Legislature from "erect[ing] barriers to voting or treat[ing] voters unequally" and "guarantees that voters will 'participate in state elections on an equal basis with other qualified voters'" (citation omitted)); *Chavez*, 222 Ariz. at 319 ¶ 33 (holding that Free and Equal Elections Clause requires that "each vote [be] given the same weight as every other ballot."). And to argue, as the State claims, that such statewide elections will cause "chaos" or "throw[] Arizona's judiciary into disarray," is absurd. Mot. at 10. Justices on the Arizona Supreme Court stand for statewide retention elections, and those elections have certainly not caused "chaos" or "disarray."

The State attempts to minimize *Chavez* as merely "endors[ing] the principle that the [C]lause protects each voter's right to be permitted to vote and to have that vote count." Mot. at 11. That the State omits the word "equally" here is revealing. Indeed, Section 12-120.02 "erects barriers to voting [*and*] treats voters *unequally*," because it prohibits certain voters within the Court of Appeal's jurisdiction—i.e., the State of Arizona—from voting in certain retention elections. *Brnovich*, 251 Ariz. at 52 ¶ 30 (emphasis added). The statute therefore does not guarantee that voters will participate in Court of Appeals retention elections on an *equal* basis with other qualified voters. Instead, its effect is that each vote is *not* given the same weight as

every other, whether in an individual judge's retention election or in Court of Appeals retention elections collectively. *See Chavez*, 222 Ariz. at 319 ¶ 33 ("Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot." (citation omitted)).

From the *individual* perspective[3]—that is, the question of whether an individual voter is barred from voting for the retention of judges who reside in different sections of the state despite the fact that those judges govern her— the current system unconstitutionally "erects barriers to voting." *Brnovich*, 251 Ariz. at 52 ¶ 30. Some Arizonans' votes carry weight and others' do not; they simply get no vote.

From the *collective* perspective, too, voters across the geographic areas at issue here do not cast *equally weighted* votes that *equally affect* the composition of the Court of Appeals.[4] That is, the vote of each voter is not "equal in its influence … to the vote of every other elector." *Chavez*, 222 Ariz. at 319 ¶ 33 (citation omitted). Either way one looks at it, the system violates the principle of free and equal elections, because *as a whole*, the vote of each voter is not equal in its influence, *id.*, and *individually*, a "'substantial number of persons entitled to vote are denied [that] right.'" *Id*. (citation omitted).

The collective view is adequately pleaded in Plaintiffs' Complaint. Complicated math is not necessary to see that the number of judges, the size of the population, and the number of voters vary widely across the four geographic areas. The number of judges in each of the two divisions is not equal. Compl. ¶¶ 40–41. Within the divisions, those judges are not equally distributed between urban and rural areas (and there's no per capita distribution requirement). *Id*. ¶¶ 50–55. The geographic areas are not equipopulous "districts" as in the legislative context; indeed, the areas' respective populations vary widely, *id*. ¶¶ 57–58 & n.7, and the voting population is not equally distributed throughout the four areas. *Id*. ¶¶ 60–62 & n.8. Therefore Section 12-120.02 establishes unequal voting areas that have *no* relationship to a judge's jurisdiction or authority,

[3] The first scenario is set forth in ¶¶ 14, 16, 18, and 20 of the Verified Special Action Complaint, as incorporated in ¶ 64 and applied in ¶¶ 72–76. Each individual Plaintiff here is entirely disenfranchised in retention elections outside his or her respective county or set of counties.

[4] This is in contrast to statewide elections or equipopulous district elections, where every vote is weighted equally and has an equal impact on the outcome of a given election or on the composition of a multimember body as a whole.

granting voters residing in the same area as the judge a right to vote, and denying voters in different areas *any* vote—while nonetheless subjecting both sets of voters to that same judge's authority. And, of course, there's no guarantee that any judge an elector votes for will be assigned to hear any case from his or her geographical area.

This offends basic constitutional principles. *Harrison v. Laveen*, 67 Ariz. 337, 459 (1948) ("To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality."). If "[t]he right to participate in our republican form of government constitutes the essence of American democracy," *Miller v. Board of Supervisors,* 175 Ariz. 296, 301 (1993), and the Arizona Constitution guarantees free and equal elections, then Section 12-120.02 is unconstitutional.

The State's argument to the contrary depends on nonbinding authority, which is also inapposite, particularly, *Eugster v. State*, 259 P.3d 146 (Wash. 2011).

First, in *Eugster*, the plaintiff made an entirely different argument than the one advanced here. Rather than argue that all voters should be allowed to vote on all Court of Appeals judges, no matter where those judges reside, plaintiff's argument was based on *apportionment. See id.* at 149 ¶ 8. That is, he argued that Washington's Constitution requires that *judicial districts be equally populated* under the one-person-one-vote principle (which, of course, does not apply to judicial elections under federal caselaw). He seems to have simply argued that the words "free and equal" in the Washington Constitution required all of this on the theory that judges are like legislative representatives, and apparently cited no authorities or arguments regarding the original meaning of the Clause. *Id.* As a result, the court engaged in little textual analysis, but held that "voting districts need not be numerically equivalent for judicial elections." *Id*. at 150 ¶ 11. It said the Free and Equal Elections Clause prohibits "the complete denial of the right to vote to a group of affected citizens," and that such denial had not happened in Eugster's case. *Id.* ¶ 10.

Here, the Plaintiffs do not argue that judicial districts must be apportioned along the one-person, one-vote rule, or that judges are like legislative representatives; rather, they argue that Arizona statutes *do* result in the complete denial of the right to vote to a group of affected citizens. The *Eugster* court went out of its way to note that the plaintiff "makes no claim that the Court of

Appeals divisions and districts are drawn in such a way to systematically exclude any particular group of voters from an election," *id.* at 150 ¶ 11, n.4, but Arizona statutes certainly *do* systematically exclude voters from elections.

For example, Plaintiff Knight (Yuma County) can vote for a judge in Apache County, on the opposite end of the state, but not for a judge in contiguous Maricopa or Pima Counties. Plaintiff McEwen (Santa Cruz County) can vote on retaining a judge who lives in adjacent Cochise County, but not one who lives in adjacent Pima County—but *can* vote on a judge from Pinal County (north of Pima) and Gila (the next county north of that) … but *not* a judge from Coconino County, the next county up from *that*. She can vote on a patchwork of counties. Such arbitrary divvying up of voting rights is far more extreme than anything addressed in *Eugster*.

There are other reasons why *Eugster* fails to support Defendant's motion. It dealt with direct elections, not retention elections. Therefore, the election structure in Washington is conceptually distinct from the selection process or composition of the court in Arizona. Also, it postdates *Chavez, supra*, and other more relevant Arizona authorities; Arizona courts have interpreted Arizona's free and equal elections clause in different ways. Indeed, no cases in Arizona—or any other state, for that matter—cite *Eugster*, and *Eugster* did not cite any Arizona authorities. And other state courts have differed from *Eugster*'s reasoning. In *Blankenship v. Bartlett*, 681 S.E.2d 759, 766 (N.C. 2009), the plaintiff, like Eugster, argued that judicial districts should be equipopulous to satisfy the one-person, one-vote rule. The court said the proper test is whether judicial districts have been drawn in ways that "advance important governmental interests unrelated to vote dilution *and do not weaken voter strength substantially more than necessary to further those interests*." *Id.* (emphasis added). Although, again, Plaintiffs here aren't making an equipopulous argument, *Blankenship*'s language is instructive: voters may be deprived of their right to vote only where that (at a minimum) meaningfully advances some important government interest. Here, it doesn't.

Finally, unlike here, the plaintiff in *Eugster* did not bring a state Equal Protection/Equal Privileges and Immunities claim. 259 P.3d 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, this Court should look to Arizona courts, not the Washington Supreme Court, for guidance as to the meaning of Arizona's Free and Equal Elections Clause.

III. Plaintiffs' Verified Special Action Complaint pleads a valid claim under Arizona's Equal Privileges and Immunities Clause.

Plaintiffs assert valid claims under the Arizona Constitution's Equal Privileges and Immunities Clause. This Clause is more protective of Arizonans' rights than is the federal Equal Protection Clause.

"[W]henever a right that the Arizona Constitution guarantees is in question: we first consult our constitution." *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 356 (1989). Here, the textual differences between the two clauses make clear that our constitution is more protective. "[D]ifference[s] in language must be respected. If the authors of the constitution had intended the sections to mean the same thing, they could have used the same or similar language. The fact that they did not, requires the conclusion that the sections were meant to be different." *Rochlin v. State*, 112 Ariz. 171, 176 (1975).

The cases of *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986), and *State v. Hunt*, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring), set forth criteria for deciding when a state constitution provides greater protection than the federal Constitution. The foremost consideration is whether the state constitutional provision, by its terms, is different than the federal Constitution. That is the case here. As Justice Feldman explained, "the framers [of Arizona's Constitution] chose to go beyond a mere guarantee of equal protection to each citizen; they chose to forbid the legislature absolutely from extending special privileges to any person or group." Stanley G. Feldman & David L. Abney, *The Double Security of Federalism*, 20 Ariz. St. L.J. 115, 140 (1988).

Another reason to read the state constitution as more protective than the federal Constitution is that "[s]tate constitutional and common law history" calls for this result. *Gunwall*, 720 P.2d at 812. Indeed, "[o]ur history … *demands*" that greater protection apply in this context. *Mountain States Tel.*, 160 Ariz. at 356 (emphasis added).

If "special Arizona traditions or customs may require us to interpret provisions of the Arizona Constitution more expansively than the interpretation given to the federal Constitution," *State v. Hurley*, 154 Ariz. 124, 131 (1987),[5] that's surely so here. Arizona's 1910 application for statehood was vetoed by President Taft *because* the draft constitution included provisions providing for voter control over the courts.[6] This forced infuriated Arizonans to remove these from the constitution and seek admission again in 1912. *See generally* Toni McClory, *Understanding the Arizona Constitution* 31–34 (2d ed. 2010). Once statehood was granted, the Legislature immediately and defiantly referred the question to voters, in its *very first act*. Voters then amended the constitution to re-insert that provision by an *81%* vote. *See* Proposition 101 (1912).[7] Given that history, it would be anomalous to disregard the heightened protection for voting rights here.

The greater protections afforded by our constitution are plainly violated here. Although the Court of Appeals' jurisdiction is statewide, voters don't get to participate in retention elections for judges on a statewide basis. **All Arizona voters are disenfranchised with respect to the retention of some or most Court of Appeals judges** and are therefore barred from participating in these elections on an equal basis with others.

The State says Plaintiffs aren't treated differently from similarly situated voters. But that's wrong. From the *individual* perspective, each Arizona voter does *not* have the right to vote in all Court of Appeals retention elections. And from the *collective* perspective, voters don't have an *equal* vote. In short, there's both a deprivation of fundamental rights. *And* disparate treatment. Strict scrutiny therefore applies, *Mayor of City of Tucson v. Royal*, 20 Ariz. App. 83, 87 (App. 1973); *see also Waltz Healing Ctr., Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 616 ¶ 24

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[5] *See also* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 276 (2003) ("unique factors in the history or language of the state constitution [can] justify diverging from the [U.S] Supreme Court's interpretation of the comparable federal provision.").

[6] *See* Taft's Veto of H.J. Res. 14, National Archives, https://www.archives.gov/legislative/features/nm-az-statehood/taft-veto.html.

[7] *See further Ariz. Free Enter. Club v. Hobbs*, 253 Ariz. 478, 491 ¶ 46 & n.6 (2022) (Montgomery, J., concurring in part and dissenting in part).

(App. 2018), and the statute fails the strict scrutiny test because it's not narrowly tailored to a compelling government interest.

With respect the collective view, as described in Section II above, the Plaintiffs are deprived of an *equal* say because these Plaintiffs, residing in four distinct geographic areas, are treated differently *from each other*, even though they're similarly situated—*i.e.*, all are subject to the jurisdiction of the Court of Appeals. That they each get to vote in "*a* retention election" is beside the point, Mot. at 16, because they don't get to vote in *all* retention elections for those judges, and the elections they get to vote in aren't equal—they involve different numbers of judges, voters, etc. The urban/rural divide highlights this issue. **Urban voters get to vote in approximately twice as many individual retention elections as rural voters.** Compl. ¶¶ 51, 53. On that ground alone, Plaintiffs have pleaded a viable claim.

As for the individual perspective, Plaintiffs have adequately pleaded the deprivation of their right to vote in individual retention elections. When a statute limits a "fundamental" right (and the right to vote *is* fundamental, *Chavez*, 222 Ariz. at 320 ¶ 36), it's subject to strict scrutiny. *Royal*, 20 Ariz. App. at 87. Section 12-120.02 fails that scrutiny; indeed, it fails even rationality review. There's no legitimate basis for divvying up voting rights based on the county of a judge's residence—a factor that bears no relationship to that judge's official authority.

To the extent Section 12-120.02 seeks to "balance … urban and rural interests," Mot. at 15, it's not narrowly tailored to serve that interest. *Appointing* judges from rural counties promotes that interest, but *unequal retention elections* doesn't. Indeed, the current election scheme is not even *rationally related* to that interest. Plaintiff McEwen, who lives in Santa Cruz County, with a 59.8% rural population, cannot vote on the retention of a judge in Apache County, which is twice as rural (100%), but *can* vote for a judge from Pinal County, which is *half* as rural (with a 23% rural population)—yet *not* one from Mohave, which is roughly the *same* as Pinal, with a 23.9% rural population.[8]

Worse, some voters can vote on the retention of judges who reside on *opposite ends* of the state—Plaintiff Knight (Yuma County), for instance, can vote for a judge in Apache County—

[8] These figures come from the University of Arizona's 2020 Census/Rural Update for Arizona, https://crh.arizona.edu/sites/default/files/2023-06/2300601_Census-RuralUpdate-Brief.pdf.

while others can't vote for judges who reside in contiguous counties: Plaintiff Ramsey (Pima County) cannot vote for a judge who lives in Yuma. So even if the reason for the disenfranchisement is to balance urban and rural, or because voters in one county are presumed to know more about a judge who resides in that county, or are affected more by a distinct class of legal issues than citizens in distant counties, the statute fails to serve these purposes.

The Court should declare A.R.S. § 12-120.02 unconstitutional and enjoin its operation. It does not have to "rewrite the statute" to do so. Mot. at 17. The State is correct that "no statute currently provides for statewide retention elections for Court of Appeals judges." *Id.* But the Arizona Constitution does, and Plaintiffs are confident that the Secretary of State can figure out how to comply with it upon an order from this Court.

CONCLUSION

The Court should deny the State's motion to dismiss.

RESPECTFULLY SUBMITTED this 27th day of March, 2024.

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CERTIFICATE OF SERVICE

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