SUPREME COURT OF ARIZONA

BONNIE KNIGHT, et al., Plaintiffs/Appellants, v. ADRIAN FONTES, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-24-0220-T/AP Court of Appeals No. 2 CA-CV 24-0280 Maricopa County Superior Court No. CV2024000431

STATE OF ARIZONA'S ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Having repeatedly failed to enact their preferred scheme of statewide retention elections for Court of Appeals judges through political processes, Plaintiffs turn to this Court in a misguided attempt to constitutionalize their dispute. But the law that Plaintiffs challenge, § 12-120.02, has been in place since the Court of Appeals' inception, persisting for decades through constitutional amendments and legislative adjustments to that court's appointment and retention systems. No new fact or legal development has materialized that would justify invalidating the law. Instead, Plaintiffs simply do not like § 12-120.02 and want to see it changed.

Section 12-120.02 is part of Arizona's long-successful experiment in pairing merit selection with judicial retention elections. The Legislature—exercising its power to provide by law the "jurisdiction, powers, duties and composition" of the Court of Appeals, Ariz. Const. art. VI, § 9—long ago divided the state into four geographic areas. Each Court of Appeals Division contains two of those geographic areas. The Legislature has further provided that Court of Appeals judges are appointed from each region and are retained by voters in the region from which they were appointed. *See* A.R.S. § 12-120.02. The statute aligns with various constitutional provisions,

including the ones requiring that new judges be residents of the counties where vacancies exist and that the diversity of the state's population be considered in the appointment process. Ariz. Const. art. VI, §§ 36(D), 37.

Despite § 12-120.02's cohesion, Plaintiffs claim that the Constitution also contains a heretofore undiscovered right of all electors statewide to participate in each Court of Appeals judge's retention election. No case in this state or any other stands for that absolutist proposition.

Plaintiffs' arguments are without merit, and they ask this Court to fashion a novel and political remedy. In addition to seeking reversal of the superior court's order granting the State's motion to dismiss, Plaintiffs ask this Court to issue judgment in their favor without further proceedings. Even setting aside the procedural impropriety of Plaintiffs' request, Plaintiffs are not entitled to mandamus relief. Plaintiffs ask this Court to rewrite the law, not to enforce a clear legal duty.

At bottom, Plaintiffs ask this Court to intercede in an ongoing political debate about the proper structure of Court of Appeals retention elections and to issue an unsupported and unprecedented decision to resolve that political dispute. This Court should decline the invitation.

STATEMENT OF FACTS AND CASE*

I. A.R.S. § 12-120.02's geographic structure has dictated the voting areas for Court of Appeals elections since that court's establishment.

Court of Appeals judges have always been elected or retained by voters within the same limited geographic area in which they reside. In 1960, Arizona voters approved a constitutional amendment providing that the "jurisdiction, powers, duties and composition of any intermediate appellate court shall be as provided by law." Ariz. Const. art. VI, § 9. Four years later, the Legislature created the Court of Appeals as "a single court" with two divisions of three judges each. 1964 Ariz. Sess. Laws, ch. 102, § 1 (2d Reg. Sess.). Division One consisted of Apache, Coconino, Maricopa, Mohave, Navajo, Yavapai, and Yuma counties. *Id.* Division Two consisted of Cochise, Gila, Graham, Greenlee, Pima, Pinal, and Santa Cruz counties. *Id.*[1]

The same legislation contained A.R.S. § 12-120.02, which established the structure that persists to this day. *See id.* Two judges were to be

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* Selected record items cited are included in the separately filed appendix, cited by page numbers (e.g., APP001), which also match the PDF page numbers. Other record items are cited with "IR-" followed by the record number.

[1] Division One now contains La Paz County, but § 12-120.02's geographic structure otherwise remains unchanged. *See* A.R.S. § 12-120(C), (D).

"residents of and elected from Maricopa [C]ounty," one judge a resident of and elected from a different county in Division One, two judges "residents of and elected from Pima [C]ounty," and one judge a resident of and elected from a different county in Division Two. *Id.* Although appeals from superior court judgments were to be heard in the encompassing Court of Appeals division, judges could "hold sessions in either division." *Id.*

In 1969, the Legislature split Division One into two departments of three judges each and clarified that "[e]ach judge of the court of appeals may participate in matters pending before a different division or department." 1969 Ariz. Sess. Laws, ch. 48, § 1 (1st Reg. Sess.). It maintained § 12-120.02's geographic areas, requiring that four Division One judges be residents of and elected from Maricopa County, and that the other two judges be residents of and elected from the remaining counties in Division One. *See id.* § 3. And in 1973, the Legislature expanded Division One to nine judges across three departments and again retained § 12-120.02's geographic areas. *See* 1973 Ariz. Sess. Laws, ch. 147, §§ 3, 5 (1st Reg. Sess.).

Arizonans voted to amend the Constitution by initiative in 1974, creating a merit selection and electoral retention process for appellate courts and some superior courts. *See* Ariz. Sec'y of State, *1974 Publicity Pamphlet* 26-

28 (1974). The amendment required that an appointee be "a resident of the counties or county in which that vacancy exists." Ariz. Const. art. VI, § 37(D). It also required Court of Appeals judges to file with the Secretary of State a declaration of desire to remain in office before standing for retention, and it required the Secretary to certify to the "several boards of supervisors the appropriate names of the candidate or candidates appearing on such declarations filed in his office." Ariz. Const. art. VI, § 38(A).

In 1992, the voters established the judicial performance review process and adjusted the Commissions on Appellate Court Appointments and Trial Court Appointments. *See* Ariz. Sec'y of State, *1992 Publicity Pamphlet* 51-58 (1992). Even while providing that merit shall be the "primary consideration" in judicial selection processes, the amendments nonetheless required the Governor and the Commission on Appellate Court Appointments to "consider the diversity of the state's population" when making appointments to the Court of Appeals. *See* Ariz. Const. art. VI, §§ 36(D), 37(C). The amendments made no changes that required revising § 12-120.02. *See* Ariz. Sec'y of State, *supra*, at 51-58.

Throughout the years, the Legislature continued to increase the size of the Court of Appeals without changing A.R.S. § 12-120.02's geographic

structure. *See* 1981 Ariz. Sess. Laws, ch. 185, § 3 (1st Reg. Sess.); 1984 Ariz. Sess. Laws, ch. 198, § 1 (2d Reg. Sess.); 1988 Ariz. Sess. Laws, ch. 38, § 1 (2d Reg. Sess.); 1994 Ariz. Sess. Laws, ch. 245, § 1 (2d Reg. Sess.); 2022 Ariz. Sess. Laws, ch. 310, § 2 (2d Reg. Sess.).

The Legislature's 2022 amendments provided that "a matter may be transferred between divisions in order to equalize caseloads and for the best use of judicial resources." 2022 Ariz. Sess. Laws, ch. 310, § 2 (2d Reg. Sess.). Plaintiffs make much of this amendment in an effort to ripen their 60-year-old injury. *See* OB 7, 10. But this provision simply codified in new terms a long-standing practice of transferring cases between divisions. *See, e.g.*, *State v. Bennett*, 213 Ariz. 562, 565 ¶ 12 (2006); *State v. Hicks*, 146 Ariz. 533, 535 (App. 1985); *Goodwin v. Hewlett*, 147 Ariz. 356, 358 (App. 1985); *City of Phoenix v. Kennedy*, 138 Ariz. 406, 408 (App. 1983); *Murphy v. Murphy*, 26 Ariz. App. 302, 304 (1976); *Kimmell v. Clark*, 21 Ariz. App. 455, 455 (1974); *Copeland v. Anderson*, 15 Ariz. App. 60, 62 (1971); *Webb v. Dixon*, 8 Ariz. App. 453, 458 (1968). In 1989, for instance, this Court noted explicitly that "A.R.S. § 12-120(E) allows for a case arising in one Division to be decided by judges of the other Division." *Schroeder v. Schroeder*, 161 Ariz. 316, 319 (1989); *see also*

Snow v. Snow, 155 Ariz. 138, 202 (App. 1987) (Fidel, J., dissenting) ("[T]here are case transfers between divisions of the court of appeals.").

Notwithstanding the changes to judicial selection and retention over the past sixty years, today's version of A.R.S. § 12-120.02 retains the same geographic structure as it did when enacted.

II. The political process recently failed to provide Plaintiffs' requested relief—twice.

Twice in recent history, the political branches have declined to provide Plaintiffs' sought-after remedy. The judicial retention process drew renewed attention after November 2022, when voters did not retain three Maricopa County Superior Court judges. *See* Kiera Riley, *Taskforce makes recommendations on changes to evaluation process for judges*, Ariz. Capitol Times (Apr. 12, 2023).[2]

The next year, the Legislature passed a bill that would have required that "[e]ach judge of the Court of Appeals shall be elected for retention on a statewide basis." H.B. 2757, 56th Leg., 1st Reg. Sess. (Ariz. 2023). Plaintiffs' counsel testified in support of that bill on behalf of the Goldwater Institute,

[2] https://azcapitoltimes.com/news/2023/04/12/taskforce-makes-recommendations-on-changes-to-evaluation-process-for-judges/

asserting that the current framework is "unfair to voters who are bound by these statewide decisions."[3] The Governor, however, vetoed the bill. *See* H.B. 2757 Veto Letter from Governor Katie Hobbs to Speaker of the House of Representatives Ben Toma (May 19, 2023).[4]

In 2024, the Legislature tried again—this time referring to the voters a constitutional amendment that would have made broad changes to Arizona's retention election system. *See* S.C.R. 1044, 56th Leg., 2d Reg. Sess. (Ariz. 2024). Among other changes, the proposed amendment would have required that Court of Appeals judges facing retention elections "be elected for retention on a statewide basis." *Id.* § 5. The voters overwhelmingly rejected the Legislature's referral, leaving § 12-120.02's geographic structure in place. *See* Ariz. Sec'y of State, *State of Arizona Official Canvass*, at 16 (Nov. 22, 2024).[5]

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[3] https://www.azleg.gov/videoplayer/?eventID=2023021075&startStreamAt=118 (starting at 10:01)

[4] https://www.azleg.gov/govlettr/56leg/1r/hb2757.pdf

[5] https://apps.azsos.gov/election/2024/ge/canvass/20241105_GeneralCanvass_Signed.pdf

III. Procedural Background.

In September 2023, Plaintiffs filed a petition for special action in this Court that largely mirrored the Complaint in this case. *Compare* APP023-097, *with* APP098-130. On November 8, 2023, this Court denied the petition "without prejudice to filing a special action Complaint with the superior court and later seeking a motion to transfer." *See* APP022.

Two months later, Plaintiffs filed their Complaint in superior court, raising the same claims and seeking the same relief as their petition for special action. *See* APP033-037. The State moved to dismiss, and the superior court suspended discovery deadlines. APP016. Plaintiffs moved for summary judgment, but the superior court held the motion "in abeyance" to "first rule on the Motion to Dismiss." *See* APP015.

The superior court granted the State's Motion to Dismiss Plaintiffs' Complaint, holding that § 12-120.02 does not violate the Constitution's free and equal elections clause, Ariz. Const. art. II, § 21, or its equal privileges and immunities clause, *id.* art. II, § 13. APP012-013. The superior court determined that § 12-120.02 "gives all Arizona voters the right to vote for those Court of Appeals judges that are up for retention election in the voters' respective counties," "treats all similarly situated voters in each county the

same," and denies no voter the right to vote. APP010. And it reasoned that "Plaintiffs' argument that statewide jurisdiction constitutionally mandates statewide retention elections for Court of Appeals judges fails" because the Constitution expressly requires county-based retention elections for superior court judges—who also possess the power to issue decisions with statewide effect, including in "cases like this." APP011-012.

Plaintiffs timely appealed, and this Court granted an unopposed petition to transfer from the Court of Appeals. APP020.

STATEMENT OF THE ISSUES

1. The Constitution's free and equal elections clause, Ariz. Const. art. II, § 21, requires that each vote be given the same weight as every other and that no elector be prevented from voting. Section 12-120.02 permits all Plaintiffs to vote in Court of Appeals retention elections, and no Plaintiff has alleged that her vote is weighted unequally from others within her region. Does the free and equal elections clause provide Plaintiffs a basis for relief?

2. A claimed violation of the Constitution's equal privileges and immunities clause, Ariz. Const. art. II, § 13, requires a showing of differential treatment. But § 12-120.02 impacts all plaintiffs (and all voters) identically, and there is no one-person, one-vote requirement for judicial retention

elections. Have Plaintiffs stated a valid claim for relief under the equal privileges and immunities clause?

3. This Court may affirm for any reason supported by the record. Although the Superior Court did not determine whether Plaintiffs have standing, no court has recognized Plaintiffs' purported injury: being subject to the authority of judges whom they did not vote to retain. Do Plaintiffs have standing?

4. Plaintiffs ask this Court to reform § 12-120.02 to conform to their notions of fairness. But the Constitution grants the Legislature the authority to provide by law the "jurisdiction, powers, duties and composition" of the Court of Appeals and does not otherwise offer a judicially manageable standard for how to create retention election districts. Ariz. Const. art. VI, § 9. Should this Court rewrite the statute?

STANDARD OF REVIEW

This Court reviews "a trial court's dismissal of a complaint under Rule 12(b)(6) de novo." *Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504 ¶ 7 (2018). "In evaluating a motion to dismiss, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts. Mere conclusory statements, however, are insufficient." *Satamian v.*

Great Divide Ins. Co., 545 P.3d 918, 924 ¶ 10 (Ariz. 2024) (cleaned up). "Arizona courts consider only the 'well-pled facts,' not legal conclusions." *Grand v. Nacchio*, 225 Ariz. 171, 175 ¶ 20 n.1 (2010) (citation omitted).

ARGUMENT SUMMARY

Having failed to achieve their goals in the political arena, Plaintiffs ask this Court to rewrite § 12-120.02, which has existed for the Court of Appeals' entire life. But because they have not pleaded the infringement of any constitutional right, they have no redressable injury. Instead, they claim the abstract harm of being subject to the authority of judges whom they cannot vote to retain. No court has recognized such an injury, which is in tension with many parts of Arizona's Constitution and everyday features of Arizona's judicial system.

Section 12-120.02 does exactly what the Constitution's free and equal elections and equal privileges and immunities clauses require: No voter is precluded from voting in a Court of Appeals retention election, and all voters within each region are treated equally. Because Plaintiffs have not alleged cognizable disenfranchisement, their claims fail and this Court should affirm.

Illustrating the problems with Plaintiffs' case, their requested remedy does not fit their requested form of relief (mandamus) and asks this Court to answer a political question. The Constitution vests the Legislature—not the courts—with the power to determine the "jurisdiction, powers, duties and composition" of the Court of Appeals. Ariz. Const. art. VI, § 9. In exercising that power, the Legislature chose to require that judges be appointed and retained from the same geographic region. *See* A.R.S. § 12-120.02. Even if the Court were to determine that § 12-120.02 is flawed, it would have no standards with which to redraft it. Plaintiffs ask for the judicial creation of a never-before-recognized (and non-existent) right, not performance of a clear legal duty.

ARGUMENT

Plaintiffs come to this Court seeking to constitutionalize their preferences about how Court of Appeals retention elections should be run. But neither constitutional provision they cite gives rise to the right they claim. Indeed, their theories are squarely at odds with Arizona's constitutional structure.

At the outset, Plaintiffs' claims ignore the unique role of judges in our system of government. Ordinarily, apportionment claims "make sure that

each official member of an elected body speaks for approximately the same number of constituents." *Eugster v. State*, 259 P.3d 146, 149 ¶ 7 (Wash. 2011) (citation omitted). But "[j]udges do not represent people, they serve people," so Plaintiffs do not have a protected interest in ensuring that a Court of Appeals judge "speaks" for them. *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) (citation omitted).

Elected officials represent their own parts of the state; impartiality binds judges. Litigants are safeguarded by the Constitution's guarantees of due process and equal treatment, *see* Ariz. Const. art. II, §§ 4, 13, regardless of "the residency of any of the parties involved in the case or the *res* or incident concerned," OB 9. Because, as Plaintiffs admit, Court of Appeals judges "do not 'represent' voters," there is no injury resulting from having a different number of electors and judges within each of § 12-120.02's geographic areas. OB 34; *see also Rucho v. Common Cause*, 588 U.S. 684, 699-703 (2019) (describing interests in malapportionment cases); *Angle v. Miller*, 673 F.3d 1122, 1129 (9th Cir. 2012) (equal apportionment secures "equal political power"); *Clayton v. Kiffmeyer*, 688 N.W.2d 117, 125 (Minn. 2004) ("[T]he one-person, one-vote requirement does not apply to judicial elections because judges do not serve in a truly representative capacity.").

Because Court of Appeals retention elections do not safeguard Plaintiffs' representational interests, they must turn elsewhere to explain how § 12-120.02 injures them. They have argued that a "core principle[ ]" of the case is that "the judges on the Court exercise statewide jurisdiction," generating a statewide right "to vote in their retention elections." IR 14 at 1; *see also* APP033 ¶ 72, APP034 ¶ 75, APP035 ¶ 82, APP035 ¶ 84 (similar). And on appeal, Plaintiffs now also emphasize the Court of Appeals' "official authority" and power to issue precedential decisions. *See, e.g.*, OB 10, 13, 24, 32, 37. But, however characterized, no Plaintiff suffers an injury by the lack of a "guarantee that *any* judge she voted for will hear the cases affecting her" or her county. OB 22-23.

I. The free and equal elections clause does not provide Plaintiffs a basis for relief.

As the superior court determined, § 12-120.02 "gives all Arizona voters the right to vote for those Court of Appeals judges that are up for retention election in the voters' respective counties." APP010. "It treats all similarly situated voters in each county the same," and "[n]o voter is completely denied the right to vote," but "not all Arizona voters will be able to vote on

all Court of Appeals judges up for retention elections." *Id.* Arizona's free and equal elections clause requires nothing more.

Plaintiffs make unrecognizable the Constitution's requirement that "[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. Const. art. II, § 21. They contend that the free and equal elections clause mandates statewide, at-large retention elections for Court of Appeals judges, and that Arizona law has flouted that requirement for sixty years. The cornerstone of Plaintiffs' constitutional claims is that the scope of a judge's authority defines the makeup of her electorate. But as the superior court put it, "an 'equal' retention election for Court of Appeals judges is not defined by the Court's 'statewide jurisdiction'" and "'equal' does not mean that all Arizona voters will be able to vote on all Court of Appeals judges up for retention." APP012.

A. Section 12-120.02 is consistent with Arizona's constitutional design.

1. Several constitutional provisions contradict Plaintiffs' theory.

Arizona's constitutional design presumes no relationship between a judge's authority and her retention electorate. Superior court judges in some

counties, for example, are "subject to retention or rejection by a vote of the qualified electors of the county from which they were appointed," but their jurisdiction is shared statewide. Ariz. Const. art. VI, § 37(B). The superior court is "a single court, composed of all the duly elected or appointed judges in each of the counties of the state" and the "judgments, decrees, orders and proceedings of any session of the superior court held by one or more judges shall have the same force and effect as if all the judges of the court had presided." *Id.* art. VI, § 13; *see also State v. Patterson*, 222 Ariz. 574, 580 ¶ 20, n.7 (App. 2009) (noting that the superior court "is not a system of jurisdictionally segregated departments but rather a 'single unified trial court of general jurisdiction'" (citation omitted)).

Indeed, in this very case, Plaintiffs asked the superior court in Maricopa County to issue an order changing judicial retention elections for every voter statewide. *See* APP037. But the Constitution permits only Plaintiff White to vote in that superior court judge's retention election—a process that Plaintiffs do not challenge.

Plaintiffs likewise have no answer to the fact that superior court judges may sit on the Court of Appeals by designation and exercise that court's authority. *See* Ariz. Const. art. VI, § 3. As the superior court put it, that

means "the Chief Justice could assign a Pima County Superior Court judge to serve on a case(s) pending before Division 1 of the Court of Appeals." APP011. "When that Pima County Superior Court Judge subsequently comes up for a retention election in Pima County," no voter in a Division One county could vote on her retention. *Id.*

Plaintiffs' theory is further in tension with the fact that the Constitution permits qualifying retired justices or judges to "serve as a justice or judge of any court." Ariz. Const. art. VI, § 20. The Supreme Court regularly uses this provision to facilitate the work of the courts. *See, e.g.*, Ariz. Sup. Ct., Admin. Order No. 2024-219 (Nov. 6, 2024); Ariz. Sup. Ct., Admin. Order No. 2024-143 (July 17, 2024); Ariz. Sup. Ct., Admin. Order No. 2024-142 (July 17, 2024); Ariz. Sup. Ct., Admin. Order No. 2023-95 (June 21, 2023); Ariz. Sup. Ct., Admin. Order No. 2023-14 (Jan. 11, 2023); Ariz. Sup. Ct., Admin. Order No. 2022-32 (Mar. 22, 2022). Plaintiffs suggest that this provision exists outside their claims because retired judges or justices are not required to stand for retention. OB 31-32. But this myopic view misses the point—this provision further illustrates that Plaintiffs' purported connection between judicial authority and retention elections is illusory.

Other parts of the Constitution recognize that a government official's statewide power does not grant every Arizonan a right to vote for that official. Arizona representatives and senators, who pass laws with statewide effect, are subject to elections only in their districts. Ariz. Const. art. IV, pt. 2, § 1.

Consider also Arizona statutes that direct parties to file suit in certain jurisdictions. Section 41-1034, for example, provides that any person seeking declaratory relief against an administrative rule, practice, or policy statement must seek such relief in Maricopa County. Does that mean that all non-Maricopa voters are disenfranchised because these decisions by Maricopa County judges have statewide impact? And § 12-822(B) provides for change of venue to Maricopa County when the State is sued. Such cases, by their nature, are likely to have statewide effect, even though only Maricopa County residents may vote in Maricopa County retention elections.

Plaintiffs' assertion that the geographic scope of a judge's authority defines her retention electorate fails to keep the Constitution "a consistent workable whole." *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196 (1969). Plaintiffs offer no authority—from this state or any other—supporting that

claim. Without that, they cannot displace the presumption that statutes are constitutional. *See State v. Ramos*, 133 Ariz. 4, 6 (1982).

2. The Constitution also provides for geographic interest-balancing.

The statute at issue here—§ 12-120.02—promotes the Constitution's close link between the merit-selection and retention-election processes. As Plaintiffs note, the "appointment of judges from rural counties promotes" the interest in rural perspective on the Court of Appeals. OB 37 (italicization normalized). Section 12-120.02 helps ensure that Court of Appeals judges are not only appointed from different parts of the state, but also allows voters in each geographic area to retain or not retain judges from that area, without having the voices of those voters drowned out by the voices of voters from other parts of the state.

A judge appointed to the court must be "a resident of the counties or county" in which a vacancy exists. Ariz. Const. art. VI, § 37(D). For the Court of Appeals, the Constitution expressly delegates many other details to the Legislature. *See id.* art. VI, § 9. But where the Constitution speaks more specifically to details relating to other courts, it creates symmetry between the appointment process and the retention process. When appointing judges

to the superior court, the Governor and the Commissions on Trial Court Appointments consider "the diversity of the county's population and the geographical distribution of the residences of the judges throughout the county." *Id.* art. VI, §§ 37(B), (C), 41(J). Superior court judges are then "subject to retention or rejection by a vote of the qualified electors of the county from which they were appointed." *Id.* art. VI, § 37(B). And superior court judges in smaller counties are "elected by the qualified electors of their counties." *Id.* art. VI, § 12(A).

There is likewise a connection between the geography of the applicant pool for the Supreme Court and its retention electorate. Supreme Court nominees may come from any part of the state, and electors throughout the state vote in the retention elections of Supreme Court justices. *See id.* art. VI, §§ 6, 38(A).

The Constitution also demonstrates its concern with geographic interest-balancing by requiring the Governor and the Commission on Appellate Court Appointments to consider "the diversity of the state's population" when appointing appellate judges, even though merit remains the "primary consideration." *Id.* art. VI, §§ 36(D), 37(C). The concern extends even to the members of the various judicial nominating

commissions. *See id.* art. VI, § 36(A) (requiring that members of the Commission on Appellate Court Appointments represent a variety of counties); *id.* art. VI, § 41(B)(2)-(3) (requiring that members of the Commissions on Trial Court Appointments represent a variety of supervisorial districts in the county).

Although Plaintiffs attempt to distinguish between the interests that retention serves and the interests that appointment serves, they cannot explain why those interests are distinct. *See* OB 37. Section 12-120.02 is part of a comprehensive scheme that balances the State's varied geographic interests through the appointment and retention processes.

B. The free and equal elections clause is not implicated where no voter is excluded and all voters in the relevant geographic area are treated equally.

The Arizona authorities interpreting the free and equal elections clause further demonstrate that § 12-120.02 complies with the Constitution's demands. The clause protects against a law "that erects barriers to voting or treats voters unequally." *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021). And Plaintiffs agree (at 18-19) that the clause requires that voters "participate in state elections on an equal basis with other qualified voters." *Id.* (citation omitted). But they take the unsupported step of

assuming that being subject to a "judge's authority" mandates participation in that judge's retention election. OB 19. No Arizona or out-of-state case stands for that proposition.

The two Arizona appellate decisions interpreting the free and equal elections clause demonstrate § 12-120.02's constitutionality. In upholding an ordinance permitting off-cycle municipal elections, this Court determined that "low voter turnout results … does not deprive those voters of their constitutional right to vote." *City of Tucson*, 251 Ariz. at 52 ¶ 30. The ordinance did not violate the Constitution because there was "nothing about off-cycle elections that erect[ed] barriers to voting or treat[ed] voters unequally." *Id.* *City of Tucson* said little—if anything—to support Plaintiffs' proposed rule.

Similarly, in *Chavez v. Brewer*, the Court of Appeals vacated dismissal of a lawsuit that challenged the use of certain voting machines because relief could be available if "a significant number of votes cast on the … machines will not be properly recorded or counted." 222 Ariz. 309, 320 ¶ 34 (App. 2009). *Chavez* interpreted a "'free and equal' election as one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising

free will, and in which each vote is given the same weight as every other ballot." *Id.* at 319 ¶ 33. It stands for the undisputed proposition that "Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted." *Id.* at 320 ¶ 34.

Plaintiffs do not allege that voters within each of § 12-120.02's geographic areas are prevented from casting a ballot or that their votes are treated unequally from those of other voters within those areas. This Court need not look beyond Arizona precedents to affirm, but looking outside of Arizona shows courts unanimously agree that "equality" does not require statewide or at-large judicial elections.

Because "[j]udges do not represent people, they serve people," the United States Supreme Court upheld without analysis a direct election system in which state supreme court justices were elected from different geographic regions of varying population size. *Wells*, 347 F. Supp. at 455, *aff'd*, 409 U.S. 1095 (1973) (citation omitted). To the extent that Plaintiffs' claims are based upon an equipopulous voting requirement, they fail for the reasons *Wells* expressed. The "rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative

form of government, is simply not relevant to the makeup of the judiciary." *Id.* (citation omitted).

The Washington Supreme Court has held that Washington's free and equal elections clause—which is identical to Arizona's—does not "require voting districts with equal populations in the unique context of the Court of Appeals," let alone mandate that such districts be dissolved in favor of statewide elections, as Plaintiffs propose. *Eugster*, 259 P.3d at 150 ¶ 11; *compare* Wash. Const. art. I, § 19, *with* Ariz. Const. art. II, § 21. That court determined that no constitutional issue existed because "[n]o voter is shut out of Court of Appeals elections" and "every Washington voter has the opportunity to vote for at least one Court of Appeals judge." *Eugster*, 259 P.3d at 150 ¶ 10. Although the free and equal elections clause might apply "in a general way to judicial elections," it does not require changes to the court of appeals' election scheme when "[t]he judiciary has fundamental obligations of impartiality and independence that do not apply to elected representatives of the legislative branch." *Id.* at 150 ¶ 11.

Plenty of other courts have approved of geographically based judicial election schemes for judges with statewide authority. *See, e.g.*, *Madison County v. Ill. Bd. of Elections*, 214 N.E.3d 931, 944 (Ill. App. Ct. 2022) (holding

that "disparities amongst voters of different judicial subcircuits do not create unequal voting strength amongst similarly situated voters" and thus that those disparities "do not implicate the free and equal clause of our state constitution"); *Field v. Michigan*, 255 F. Supp. 2d 708, 712 (E.D. Mich. 2003) (describing lack of merit for claims similar to Plaintiffs'); *Republican Party of N.C. v. Martin*, 980 F.2d 943, 957 (4th Cir. 1992) (favorably comparing district-based election of judges with statewide jurisdiction to statewide election of judges); *Holshouser v. Scott*, 335 F. Supp. 928, 930 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972) (noting "no doubt" about "the provisions of the North Carolina Constitution requiring the election of Superior Court judges by districts or statewide as prescribed by the legislature").

In Arizona, as in *Eugster*, "[n]o voter is shut out of Court of Appeals elections" and "every [Arizona] voter has the opportunity to vote for at least one Court of Appeals judge." 259 P.3d at 150 ¶ 10. Because Plaintiffs did not allege that electors within § 12-120.02's geographic areas were prevented from voting for the retention of judges within those areas or that their votes were treated unequally from other electors' votes within those areas, the superior court properly dismissed Plaintiffs' Complaint.

C. Plaintiffs' out-of-state cases are unpersuasive.

The State agrees with Plaintiffs that Arizona Court of Appeals judges do not "'represent[ ]' the voters who selected them for office," OB 22, but Plaintiffs contradict that assertion by relying on out-of-state cases that consider free and equal elections clauses as protecting an office's representative function. Plaintiffs cannot reconcile their selected cases with Arizona's fifty-year-old merit selection and retention election scheme. *See* Ariz. Const. art. VI, §§ 37, 38.

Take *Blankenship v. Bartlett*, 681 S.E.2d 759 (N.C. 2009), which Plaintiffs criticize *Eugster* for "neglect[ing]." OB 28. That case's heightened scrutiny of judicial election districts depended on the "dual nature of the nonrepresentative and representative aspects of elected superior court judges." *Blankenship*, 681 S.E.2d at 525–26. Arizona appellate court judges, by contrast, do not share the "representative" attributes of North Carolina's elected superior court judges. *Id.* at 525. Moreover, the plaintiffs in that case demonstrated disparity in voting power within similarly situated subdivisions of a single county-based judicial district. *Id.* at 527–28. But Plaintiffs are not similarly situated in this respect—they belong to each of

§ 12-120.02's four regions, and each voter within those regions is treated equally to every other voter.

Plaintiffs' Pennsylvania congressional gerrymandering case also interprets that state's free and equal elections clause as securing representational rights, starting from the premise that the clause's "actual and plain language … mandates that all voters have an equal opportunity to translate their votes into representation." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). The clause ensured "the people's right to elect their representatives in government" and was intended to prevent "the dilution" of Pennsylvanians' right "to select representatives to govern their affairs." *Id.* at 808–09. As a result, the court determined that the clause allowed electors "an equally effective power to select the representative of his or her choice" and prevented vote dilution through partisan gerrymandering of congressional districts. *Id.* at 814.

But again, Arizona appellate court judges are not representatives. As other Pennsylvania decisions have explained, "judges … are not representatives in the same sense as are legislators or the executive"; they "administer the law" not "the cause of a particular constituency." *Cavanaugh*

v. Schaeffer, 444 A.2d 1308, 1312 (Pa. Commw. Ct. 1982) (citation omitted), *aff'd*, 444 A.2d 1165 (Pa. 1982).

Other out-of-state cases Plaintiffs cite are similarly distinguishable because they relate to electors' right to select representative positions. *See Oviatt v. Behme*, 147 N.E.2d 897, 900 (Ind. 1958) (popularly elected treasurer); *Ladd v. Holmes*, 66 P. 714, 719 (Or. 1901) (upholding partisan delegate elections to party nominating conventions). In fact, those same courts and others emphasize the Legislature's role in implementing the free and equal elections clause through statutes like § 12-120.02. *See, e.g.*, *Thurston v. League of Women Voters of Ark.*, 687 S.W.3d 805, 813-14 (Ark. 2024) (explaining that a free and equal election is "one in which qualified voters can vote in accordance with rules and processes established by the legislature"); *State v. Bartlett*, 230 P. 636, 638 (Wash. 1924) (holding that the "power to regulate elections is a legislative one" in primary elections for judges (citation omitted)); *Ladd*, 66 P. at 722 (stating that "the legislative authority is adequate to prescribe all reasonable rules and regulations looking to the security and safeguarding of" the right to free and equal elections).

The merit-selection and retention-election process is a hallmark of Arizona's Court of Appeals. *See* Ariz. Const. art. VI, §§ 37, 38. The system

the Legislature has chosen guards against the concerns Plaintiffs' out-of-state cases discuss. This Court should decline Plaintiffs' invitation to use stray quotations from those cases to mandate that Arizona hold statewide judicial retention elections, a result that none reaches.

II. Arizona's equal privileges and immunities clause cannot salvage Plaintiffs' claims.

A. Federal equal protection principles demand affirmance.

Plaintiffs' equal privileges and immunities claim is founded on one-person, one-vote principles because "individual claims of vote dilution, debasement, and the like all stem from the one-person-one-vote jurisprudence of the Supreme Court." *Field*, 255 F. Supp. 2d at 712; *see also Rucho*, 588 U.S. at 699-703 (describing such claims). The *Wells* rule therefore applies: "[T]he rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government," is "simply not relevant" to Arizona Court of Appeals retention elections. *Wells*, 347 F. Supp. at 455.

Plaintiffs attempt to escape this fatal reality by arguing that Arizona's equal privileges and immunities clause, Ariz. Const. art. II, § 13, has a broader reach than the analogous federal Equal Protection Clause. But "this

Court has construed Article 2, Section 13 of Arizona's Constitution as applying the same standard as applies to equal protection claims under the federal constitution." *Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 39 (2012).

Plaintiffs offer no principled reason to diverge from the many Arizona cases holding that "[t]he effects of the federal and state equal protection guarantees are essentially the same[,] each generally requiring the law treat all similarly situated persons alike." *Loncar v. Ducey*, 244 Ariz. 519, 523 ¶ 11 (App. 2018) (cleaned up); *see also, e.g.*, *Valley Nat'l Bank of Phx. v. Glover*, 62 Ariz. 538, 555 (1945) (similar); *State v. Coleman*, 241 Ariz. 190, 192 ¶ 7 (App. 2016) (similar); *Chavez*, 222 Ariz. at 320 ¶ 35 (similar); *Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 366 (App. 1997) (similar); *Schuff Steel Co. v. Indus. Comm'n*, 181 Ariz. 435, 443 (App. 1994) (similar).

In urging this Court to set all of that precedent aside, Plaintiffs assert that textual distinctions between Arizona's equal privileges and immunities clause and the federal equivalent require a different analysis. But they do not elaborate on how this Court should undertake such an analysis in any given case or how their proffered test might differ from federal principles. *See* OB 39-40.

Plaintiffs offer Arizona's "legal history" as the only clue about why they think this argument helps their claims in this case. OB 41. But history does not support upending § 12-120.02 when that statute has existed in relevant respect for the Court of Appeals' lifespan and has persisted through amendments to the constitutional and statutory structures for appointment and retention of Court of Appeals judges. "Long-established practices, accepted by other branches of government, may be relevant in construing constitutional provisions." *Brewer v. Burns*, 222 Ariz. 234, 241 ¶ 33 (2009). If Arizona's history teaches anything, it is that § 12-120.02 is constitutional.

B. Plaintiffs' Complaint does not allege differential treatment, which is a precondition to an equal privileges and immunities claim.

Plaintiffs have not surmounted the "threshold question," which is whether Plaintiffs "have been treated unequally when compared to other members of their class." *Craven v. Huppenthal*, 236 Ariz. 217, 220 ¶ 17 (App. 2014). The most they muster is that § 12-120.02 requires elections that "involve different numbers of judges, voters, etc." OB 35. But that is a fact of § 12-120.02's geography, and "the Equal Protection Clause relates to equality between persons as such, rather than between areas," so "territorial uniformity is not a constitutional prerequisite." *McGowan v. Maryland*, 366

U.S. 420, 427 (1961). That urban voters can vote for more judges' retentions and that fewer voters participate in rural retention elections does not offend the Constitution. *See* OB 36.

"To establish an equal protection violation, a party must establish (1) that it was treated differently than those who are similarly situated, and (2) when disparate treatment does not implicate fundamental rights or suspect classification, that the classification bears no rational relation to a legitimate state interest." *Waltz Healing Ctr., Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 616 ¶ 24 (App. 2018) (citation omitted). Plaintiffs have alleged neither proposition.

The fact that Plaintiffs cannot show differential treatment is perhaps best illustrated by the fact that Plaintiffs come from all four of § 12-120.02's geographic areas and they cannot explain who among them § 12-120.02 benefits and who it harms. They intimate that urban voters fare better because they "get to vote" in more "individual retention elections" than rural voters do. OB 36. But they also imply that rural voters benefit because their votes have more influence on individual judges' retention elections. *See id*. Setting everything else aside, dismissal was proper simply because disparate treatment requires someone to benefit at another's detriment and

Plaintiffs have failed to make that threshold allegation. *See Waltz Healing Ctr., Inc.*, 245 Ariz. at 616 ¶ 24.

Plaintiffs nonetheless argue for an expansion of their ballot because they are all "subject to the jurisdiction of all Court of Appeals judges." OB 37. As the superior court recognized, and as section I.A.1, *supra*, explains, that argument is in tension with many parts of Arizona's Constitution, including that superior court judges in some counties face retention elections only in their county of appointment but can issue decisions with statewide effect and can sometimes issue appellate decisions. *See* Ariz. Const. art. VI, §§ 3, 37(B).

A judge's functions are not those of a "general governmental power" requiring electoral rights for those who might come into her courtroom. *Ball v. James*, 451 U.S. 355, 370 (1981); *see also*, *e.g.*, *Hancock v. Bisnar*, 212 Ariz. 344, 350 ¶¶ 25-26 (2006) (analyzing the "primary purpose" of a governmental entity to determine who is a qualified elector). Her role is to decide cases before her, which is why "'it is a basic principle of law that a person who is not a party to an action is not bound by the judgment in that action.'" *State ex rel. Thomas v. Grant*, 222 Ariz. 197, 201 ¶ 12 (App. 2009) (quoting *Restatement (Second) of Judgments* § 62 cmt. a (Am. L. Inst. 1982)) (cleaned up).

Instead, it is the Legislature's prerogative to determine the "counties or county" of appointment and retention, Ariz. Const. art. VI, §§ 37(D), 38, and it may therefore "legitimately restrict the right to participate" to those who live within the relevant geographic areas, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978). In each of § 12-120.02's geographic areas, "[a]ll persons within the area … are treated equally," and Plaintiffs have not alleged that "persons within the given area [are] either denied the right to vote or [have] a burden placed upon their ability to vote." *City of Tucson v. Pima County*, 199 Ariz. 509, 518 ¶ 29 (App. 2001). As a result, "the statute does not implicate, let alone burden" the equal privileges and immunities clause. *Id.* at 518 ¶ 30.

C. Section 12-120.02 satisfies rational basis review.

Although the Court need not apply any level of scrutiny because Plaintiffs have not alleged differential treatment, *see Craven*, 236 Ariz. at 220 ¶ 16, it can also affirm the superior court's judgment because § 12-120.02 has a rational basis. Courts have "rejected the notion that 'any burden upon the right to vote must be subject to strict scrutiny,'" *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 346 ¶ 25 (App.

2005) (citation omitted), and Plaintiffs' pleadings do not merit heightened scrutiny here.

Equal protection "does not preclude the establishment of distinct classes within a geographic area if the classifications are reasonably related to a legitimate state interest and all persons within the class are treated equally." *City of Tucson*, 199 Ariz. at 518 ¶ 29. Section 12-120.02 is related to the legitimate state interest in implementing the Court of Appeals' appointment scheme and thereby promoting the State's geographic diversity.

Section 12-120.02 creates parity between the appointment and retention processes by allowing electors within each geographic area to create a vacancy by voting not to retain a judge, thereby triggering an appointment from that same area. *See* Ariz. Const. art. VI, § 38(C) (creating a vacancy to "be filled as provided by this article" if a majority of electors vote not to retain a judge). Plaintiffs' proposed alternative would, among other things, make urban voters (by sheer numbers) the dominant voice in *all* Court of Appeals retention elections, even those for judges from rural areas.

The design passes the low threshold for rationality: It ensures that judges appointed from a given area "actually have the support of a majority" of electors in that area, which is an "important interest." *Pub. Integrity All. v. City of Tucson*, 836 F.3d 1019, 1028 (9th Cir. 2016) (en banc). Common sense dictates that the systems for selecting judges and for holding them accountable both serve the interest of balancing urban and rural perspectives on the Court of Appeals.

The cases that Plaintiffs cite are helpfully distinguishable because they illustrate the type of disenfranchisement the Constitution protects against. *See* OB 35-37, 42-43. In *Mayor of Tucson v. Royal*, tens of thousands of electors "los[t] their right to vote in the 1973 primary election." 20 Ariz. App. 83, 84, 89 (1973). And in *Cipriano v. City of Houma*, a state law gave "only 'property taxpayers' the right to vote" to approve bonds, which "exclude[d] otherwise qualified voters." 395 U.S. 701, 702, 706 (1969) (per curiam); *see also Dunn v. Blumstein*, 405 U.S. 330 (1972) (law imposing durational residency requirements); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 623 (1969) (law limiting electorate to owners or lessees of real property, their spouses, and parents or guardians of children enrolled in school). But § 12-120.02 excludes no one. Every Arizonan has the right to vote in the retention

elections of some Court of Appeals judges. *See Eugster*, 259 P.3d at 150 ¶ 10. And simply being affected by a judge's authority does not create the right to vote for that judge's retention. *See Wells*, 347 F. Supp. at 455-56. Because Plaintiffs have shown no infringement of a constitutionally protected interest and § 12-120.02 has a rational basis, this Court should affirm.

III. Plaintiffs lack standing because they have not articulated an injury.

Although the superior court found it "unnecessary to address the issue of standing," APP008, this Court can "affirm the trial court on any basis supported by the record," *Sholem v. Gass ex rel. Maricopa Cnty.*, 248 Ariz. 281, 289 ¶ 32 (2020). Arizona's standing requirement is "rigorous," and the "paucity of cases" waiving standing demonstrates courts' "reluctance to do so." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). Standing is "especially" important "in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003).

This Court has long held that "to possess standing to assert a constitutional challenge, an individual must himself have suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *State v. B Bar Enters., Inc.*, 133 Ariz. 99, 101 n.2 (1982) (citation omitted). And the Court rightly continues to "require that petitioners show a particularized

injury" as "a matter of sound judicial policy" and "judicial restraint." *Advanced Prop. Tax Liens, Inc. v. Othon*, 255 Ariz. 60, 63 ¶ 18 (2023) (citations omitted).

Plaintiffs' Complaint here claims no injury to "a private right or to themselves personally." *Bennett*, 206 Ariz. at 526 ¶ 28. Instead, § 12-120.02 equally affects all Plaintiffs, who do not allege that their votes are weighted differently from others in their geographic area or that they are excluded from participating in Court of Appeals retention elections. Although Plaintiffs and their counties might be affected by the decisions of judges whom they did not vote to retain, that is not "a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 17 (1998).

At bottom, all that Plaintiffs have alleged is that § 12-120.02's retention elections call for "different numbers of judges, voters, etc." OB 35. That is not enough to meet Arizona's "rigorous standing requirement." *Fernandez*, 210 Ariz. at 140 ¶ 6.

IV. Plaintiffs improperly ask this Court to use mandamus to answer a political question.

Plaintiffs ask that this Court not only strike down § 12-120.02, but also use its mandamus authority to direct the Secretary to place every Court of

Appeals judge on every voter's retention election ballot. But as the superior court correctly recognized, APP008, it is axiomatic that "[i]t is not the function of the courts to rewrite statutes," *Lewis v. Debord*, 238 Ariz. 28, 31 ¶ 11 (2015) (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 350 (2012) (a judge is not "a telepathic time-traveler and collaborative lawmaker").

Plaintiffs' proposed remedy invites this Court to exceed even the "extraordinary remedy" typical of mandamus cases, *Sears*, 192 Ariz. at 68 ¶ 11 (citation omitted), and weigh in on a political question. The Constitution grants the Legislature—not the courts—the power to provide the "jurisdiction, powers duties and composition" of the Court of Appeals, Ariz. Const. art. VI, § 9, so there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Puente v. Ariz. State Legislature*, 254 Ariz. 265, 268 ¶ 7 (2022) (citation omitted). And because "the method for electing" Court of Appeals judges "necessarily involves a weighing of competing policy concerns," *City of Tucson v. State*, 229 Ariz. 172, 180 ¶ 46 (2012), there is "a lack of judicially discoverable and manageable standards for resolving" § 12-120.02's configuration, *Puente*, 254 Ariz. at 268 ¶ 7 (citation omitted).

Put simply, the design of Court of Appeals retention elections is for the Legislature to decide. Moreover, even assuming Plaintiffs were right that some constitutional violation results from the current statutory scheme, it does not necessarily follow that statewide retention elections are the only constitutional solution. The Constitution does "not express a preference between at-large or district-based" elections, recognizing that "each form of election has possible advantages and disadvantages." *City of Tucson*, 229 Ariz. at 175 ¶ 15. Instead, in this context, it explicitly envisions that the Secretary certify to the various boards of supervisors only the "*appropriate* names of the candidate or candidates appearing on such declarations filed in his office," not that all names be placed on the ballots statewide. Ariz. Const. art. VI, § 38(A) (emphasis added). Thus, it is not this Court's role to "endorse[ ] one method of election over another." *City of Tucson*, 229 Ariz. at 180 ¶ 46.

Perhaps recognizing that this Court is not in a position to choose among multiple constitutional alternatives, Plaintiffs disavow any "equipopulous argument," *see* OB 42, and instead take the absolutist position that elections by equally populated districts would still be unconstitutional. According to Plaintiffs, so too would division-wide

elections, in which every voter in Division One could vote on every Division One judge, and every voter in Division Two could vote on every Division Two judge. But either system would allow voters to "participate in state elections on an equal basis with other qualified voters," *City of Tucson*, 251 Ariz. at 52 ¶ 30 (citation omitted), and to have their ballot "given the same weight as every other ballot," *Chavez*, 222 Ariz. at 319 ¶ 33.

Plaintiffs have pointed to no case—from this state or from any other—justifying their preferred relief that Court of Appeals judges be certified "for placement on the ballot statewide." APP037. Obtaining that relief would require replacing § 12-120.02 with a process that does not exist in law. The closest Plaintiffs have come is *Blankenship*, *see* OB 41, but that case mandated heightened scrutiny of North Carolina's subdivided judicial district population size, not erasing the districts altogether, *see* 681 S.E.2d at 766. And there is "no doubt as to the validity of the provisions of the North Carolina Constitution requiring the election of Superior Court judges by districts or statewide as prescribed by the legislature." *Holshouser*, 335 F. Supp. at 930. *Blankenship* stops far short of supplying the clear legal duty that would underwrite Plaintiffs' proposed relief.

This is simply not the stuff mandamus is made of. A writ of mandamus is rare and highly discretionary. "Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Sears*, 192 Ariz. at 68 ¶ 11 (citation omitted). The party seeking mandamus must show a "clear, legal right to have the thing done which is asked for, and it must be the clear legal duty of the party sought to be coerced to do the thing he is called on to do." *Taylor v. Tempe Irrigating Canal Co.*, 21 Ariz. 574, 580 (1920) (citation omitted). Relief will only lie if a public officer is "specifically required by law to perform the act." *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464 ¶ 9 (App. 2007) (citation omitted).

Neither the free and equal elections clause nor the equal privileges and immunities clause grants Plaintiffs "an immediate and complete legal right" to have all the Court of Appeals judges listed on their retention election ballots. *Bd. of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344 (1973). The Secretary's only "clear legal duty" is to follow A.R.S. § 12-120.02.

Finally, Plaintiffs ask this Court to issue their requested unprecedented and unwarranted relief through an improper procedural shortcut. Plaintiffs make the novel request (at 2, 45) that the parties forgo all further superior

court proceedings and that this Court enter judgment in Plaintiffs' favor. But this Court is reviewing only the grant of a motion to dismiss, and "a court of appeals sits as a court of review, not of first view." *City of Flagstaff v. Ariz. Dep't of Admin.*, 255 Ariz. 7, 14 ¶ 26 (App. 2023) (citation omitted). Ordinarily, subjecting a statute to a higher level of scrutiny triggers a burden of proof to be met with facts. *See, e.g.*, *Blankenship*, 681 S.E.2d at 766 (describing State's duty on remand). As of yet, there has been no factfinding: The superior court held Plaintiffs' motion for summary judgment in abeyance and suspended discovery deadlines. APP015-16. This Court should not enter judgment in Plaintiffs' favor and thereby deprive the State of an opportunity to meet any heightened burden this Court deems necessary. *See Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 386 ¶ 25 (2006). In the event that this Court reverses, it should remand for further proceedings.

CONCLUSION

For all the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 21st day of January, 2025.

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