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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

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. CV2024-000431 **STATE OF ARIZONA'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT** (Hon. Frank Moskowitz)

Plaintiffs do not like A.R.S. § 12-120.02 and wish to see it amended. And having failed to achieve the result they want legislatively, they have now turned to the courts—first the Arizona Supreme Court (which turned them away) and now this Court. But the many flaws in the Complaint underscore that a court is no place to resolve Plaintiffs' policy dispute.

Plaintiffs lack the standing required to sue in Arizona. Even setting that critical flaw aside, Plaintiffs do not come close to stating a viable claim on the merits. They invent novel claims based on the free and equal elections and equal privileges and immunities clauses that find no support in Arizona case law. Indeed, Plaintiffs' theories are inconsistent with prior Arizona case law and have been soundly rejected by the U.S. Supreme Court and other jurisdictions.

On the shaky foundation of their novel theories, Plaintiffs ask the Court to issue sweeping mandamus relief that would improperly rewrite a legislative scheme that has been in place for the Court of Appeals' entire history. This Court should decline that remarkable invitation. Plaintiffs fail to state a claim for which relief can be granted.

I. Factual Background

The geographic system Plaintiffs challenge has been in place since the Court of Appeals was established in 1964.[1] *See* S.B. 269, 26th Leg., 2d Reg. Sess., 1964 Ariz. Sess. Laws 219–20. The basic structure of the Court of Appeals was the same then as it is now, with Division One covering Arizona's central, northern, and western counties, and Division Two covering southeastern Arizona. *Id.*, 1964 Ariz. Sess. Laws 219. The law required two of Division One's three judges to be "residents and elected from" Maricopa County; the third was to be a resident of and elected from the remaining counties in Division One. *Id.*, 1964 Ariz. Sess. Laws 220. Two of the Division Two judges were to be residents of and elected from Pima County; the third was to be a resident of and elected from the remaining counties in Division Two. *Id.* Cases appealed from superior courts were to be "brought or filed" in the encompassing division, but the statute did not prevent the courts from transferring cases between divisions. *Id.*, 1964 Ariz. Sess. Laws 222–23.

In the late 1960s and early 1970s, the Legislature increased the number of Division

[1] A "complaint's exhibits, or public records regarding matters referenced in a complaint, are not 'outside the pleading,' and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012) (citation omitted).

One judges while continuing the geography-based system. *See* S.B. 51, 29th Leg., 1st Reg. Sess., 1969 Ariz. Sess. Laws 80–81; S.B. 1156, 21st Leg., 1st Reg. Sess., 1973 Ariz. Sess. Laws 1184, 1186. The 1969 amendment to A.R.S. § 12-120(E) expressly permitted Court of Appeals judges to "participate in matters pending before a different division or department." S.B. 51, 1969 Ariz. Sess. Laws 79.

A 1974 constitutional amendment provided that Court of Appeals judges would be appointed and retained, not elected. Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 26–28 (1974); Ariz. Const. art. VI, §§ 36(A), 37. Appointees were and are required to be "a resident of the counties or county in which that vacancy exists." Ariz. Const. art. VI, § 37(D). No argument for or against the amendment suggested that the geographic balloting system was a problem, much less that it was unconstitutional. *See* John M. Roll, *Merit Selection: The Arizona Experience*, 22 Ariz. St. L.J. 837, 854 (1990); *see generally* Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 29–31 (1974).

Since then, the Legislature has repeatedly increased the number of Court of Appeals judges without changing the geographic scheme that has always been used. *See* S.B. 1117, 35th Leg., 1st Reg. Sess., 1981 Ariz. Sess. Laws 549; S.B. 1169, 36th Leg., 2d Reg. Sess., 1984 Ariz. Sess. Laws 760; S.B. 1002, 38th Leg., 2d Reg. Sess., 1988 Ariz. Sess. Laws 142; *See* H.B. 2208, 41st Leg., 2d Reg. Sess., 1994 Ariz. Sess. Laws 1146.

In 2022, the Legislature created more at-large judgeships in each division, and provided that matters "may be transferred between divisions in order to equalize caseloads and for the best use of judicial resources." H.B. 2859, 55th Leg., 2d Reg. Sess., 2022 Ariz. Sess. Laws 1723–24. This change reflected the longstanding historical practice of transferring cases between the divisions under A.R.S. § 12-120(E).[2]

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[2] *See, e.g.*, *State v. Hicks*, 146 Ariz. 533, 535 (App. 1985); *City of Phoenix v. Kennedy*, 138 Ariz. 406, 408 (App. 1983); *Murphy v. Murphy*, 547 P.2d 1102, 1104 (Ariz. Ct. App. 1976); *Kimmell v. Clark*, 520 P.2d 851, 851 (Ariz. Ct. App. 1974); *Copeland v. Anderson*, 485 P.2d 1177, 1179 (Ariz. Ct. App. 1971); *Webb v. Dixon*, 447 P.2d 268, 273 (Ariz. Ct.

After all these changes, the current version of A.R.S. § 12-120.02 retains the same geographic structure as the version first passed in 1964. *See* A.R.S. § 12-120.02(A)–(B).

The retention election process drew increased attention after November 2022, when three Maricopa County Superior Court judges were not retained. *See* Kiera Riley, *Taskforce makes recommendations on changes to evaluation process for judges*, Ariz. Cap. Times (Apr. 12, 2023).[3] The Supreme Court subsequently established a Judicial Performance Review Task Force. Ariz. Sup. Ct., Admin. Order No. 2023-24 (Feb. 1, 2023). In a presentation to the Task Force, retired legislator Jonathan Paton outlined a legislative proposal that "would request for Court of Appeal judges to be retained statewide," just like Plaintiffs' request here. Judicial Performance Review Task Force, Feb. 21, 2023 Meeting Minutes at 2.

In 2023, the Legislature passed a bill that would enact statewide Court of Appeals retention elections according to the precise terms outlined in Plaintiffs' requested relief. *Compare* H.B. 2757, 56th Leg., 1st Reg. Sess. (Ariz. 2023) *with* Compl. at 15 ¶¶ C–D. The Governor 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 explaining her veto, the Governor expressed concern that the bill would "unfairly dilute the votes of those Arizonans most directly impacted by each Division's judges" and "urge[d] the Legislature next session to take a more holistic look at the organization of the Court of Appeals, including its retention election rules, and craft more comprehensive improvements." *Id.*

II. Procedural History

On September 5, 2023, Plaintiffs filed a petition for special action in the Arizona

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App. 1968); *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.").

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

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

Supreme Court, urging that court to take the case in the first instance because (Plaintiffs said) an urgent resolution was required. *See* Pet. for Special Action, *Knight v. Fontes*, No. CV-23-0229-SA. That petition largely mirrored the complaint in this case. On October 6, 2023, the Attorney General filed a response. Resp. to Pet. for Special Action, *Knight*, No. CV-23-0229-SA. And on November 8, 2023, the Supreme Court denied the petition "without prejudice to filing a special action complaint with the superior court." Order of Dismissal, *Knight*, No. CV-23-0229-SA.

Then nothing happened for two months. On January 8, 2024, Plaintiffs filed the instant Complaint, raising the same claims and seeking the same relief. *Compare* Pet. for Special Action at 5–6, *Knight*, No. CV-23-0229-SA *with* Compl. at 11–15, *Knight v. Fontes*, No. CV 2024-000431 (Maricopa Cnty. Super. Ct. Jan. 8, 2024).

III. Legal Standard

Dismissal under Rule 12(b)(6) is appropriate when, "as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts." *Cleckner v. Ariz. Dep't of Health Servs.*, 246 Ariz. 40, 42 ¶ 6 (App. 2019) (cleaned up). Courts "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012). Courts "do not accept as true allegations consisting of conclusions of law" or "legal conclusions alleged as facts." *Swift Transp. Co. v. Ariz. Dep't of Revenue*, 249 Ariz. 382, 385 ¶ 14 (App. 2020) (citation omitted).

IV. Argument

Plaintiffs are not entitled to relief under any interpretation of the facts: Plaintiffs lack standing, fail to state claims under the free and equal elections and equal privileges and immunities clauses, and are not entitled to the sweeping and unprecedented mandamus relief they seek.

A. Plaintiffs lack standing.

A special action plaintiff must demonstrate standing to sue. *See, e.g.*, *Sears v. Hull*, 192 Ariz. 65, 67 ¶ 1, 69–71 ¶¶ 15–23 (1993). 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).

Plaintiffs lack standing because their injury is, at best, "wholly abstract and widely dispersed." *Id.* at 526 ¶ 28 (citation omitted). The alleged injury—being subject to decisions by judges whom Plaintiffs did not get to vote to retain (or not retain)—is not only abstract, but entirely novel. *See* Compl. ¶¶ 72, 75–76, 83–97. And Plaintiffs' purported harm is not just widely dispersed, it is universally dispersed. *Napolitano*, 206 Ariz. at 526 ¶ 28. All voters are in the exact same situation as the Plaintiffs, for all voters in Arizona are subject in the same manner to the provisions of A.R.S. § 12-120.02. Indeed, by Plaintiffs' own reckoning, they share their purported injury identically with every similarly situated voter in Arizona. *See* Compl. ¶¶ 14, 16, 18, 20.

Such a universal "injury" cannot confer standing. "An allegation of generalized harm that is shared alike by all or a large class of citizens is generally not sufficient to confer standing." *Sears*, 192 Ariz. at 69 ¶ 16. It is hard to imagine a more generalized purported harm than one which affects every single Arizona voter in the exact same manner.

Plaintiffs' Complaint amounts to a disagreement about the best way to organize judicial retention elections. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923, 1929–33 (2018) (plaintiffs lacked standing because their allegations of statewide vote dilution amounted to a "generally available grievance about government" (citation omitted)).[5] Such a theory is insufficient to establish standing. *Napolitano*, 206 Ariz. at 526–27 ¶ 28; *Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 17 (2005); *cf. Babbitt v. Asta*, 545 P.2d 58, 60 (Ariz. Ct. App. 1976) (concerns about lack of proportionality in county commission appointments

[5] Although Arizona courts are not "bound by federal jurisprudence on the matter of standing . . . federal case law" is "instructive." *Takata*, 210 Ariz. at 141 ¶ 11 (citation omitted).

were "better addressed to the legislature than to us").

In rare circumstances, a court may overlook standing issues, but the Arizona Supreme Court has not done so for decades. *E.g.*, *Rios v. Symington*, 172 Ariz. 3, 5 & n.2 (1992). The Court should not invoke this "narrow[ ]" and "rare" exception here, *Napolitano*, 206 Ariz. at 527 ¶ 31, for at least four reasons.

First, the standing requirement applies "especially in actions in which constitutional relief is sought against the government." *Id.* at 524 ¶ 16; *see Sears*, 192 Ariz. at 70–71 ¶ 23 (failure to show standing to challenge constitutionality of state statutes on equal protection grounds).

Second, courts are appropriately "reluctant to become the referee of a political dispute," which this plainly is. *Napolitano*, 206 Ariz. at 527 ¶ 32; *see Brownlow*, 211 Ariz. at 195–96 ¶ 15; *see also* H.B. 2757; Gov. Hobbs, *supra*.

Third, standing should not be waived because "the legislature may enact [a] future" law that obviates this action. *Napolitano*, 206 Ariz. at 528 ¶ 35. Vetoing a bill that would do just that, the governor urged the Legislature to "take a more holistic look at the organization of the Court of Appeals, including its retention election rules, and craft more comprehensive improvements for Arizonans." Gov. Hobbs, *supra*. And as of this date, Senator Sonny Borrelli has proposed amendments to a constitutional resolution in the Arizona Senate that would enact Plaintiffs' exact proposal. *See* Proposed Amendments to S.C.R. 1044, 56th Leg., 2d Reg. Sess. (Ariz. 2024). The political branches may yet resolve this issue in the near future. *Napolitano*, 206 Ariz. at 527–28 ¶¶ 31, 35.

Fourth, deciding this case would raise profound constitutional concerns because this Court is not well-suited to craft a remedy like the one urged here, which essentially involves the writing of new law. This Court should not lightly cross such boundaries. *See Brownlow*, 211 Ariz. at 195–96 ¶ 15; *Napolitano*, 206 Ariz. at 525 ¶ 19, 527–28 ¶ 32–34.

B. Plaintiffs' novel theories fail to state a claim.

Plaintiffs contend that there has been an unresolved constitutional violation hiding

in plain sight for sixty years (over half the state's history),[6] but they misunderstand the nature of the judiciary. "Judges do not represent people, they serve people." *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (citation omitted), *aff'd*, 409 U.S. 1095 (1973).[7] The "judiciary, unlike the legislature, is not the organ responsible for achieving representative government." *Id.* at 456 (citation omitted). Plaintiffs, overlooking this bedrock principle, express concern that electors "will frequently be subject to appellate decisions where they never voted for a *single* judge on the panel." Compl. ¶ 63. But as the U.S. Supreme Court has held, concerns about representation are "simply not relevant to the makeup of the judiciary," especially when judges are appointed. *Wells,* 347 F. Supp. at 455. Plaintiffs' invented claims are not legally cognizable and should be dismissed.

Granting Plaintiffs their requested relief could wreak havoc on a variety of our State's standard judicial practices. Consider 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 this Court. Only Maricopa County voters decide whether Maricopa County Superior Court judges will be retained. *See* Ariz. Const. art. VI § 38(A). Does that mean that all non-Maricopa voters are disenfranchised because these decisions by Maricopa

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[6] The Supreme Court has "long emphasized that a party may not unreasonably delay" in seeking "mandamus and other extraordinary forms of relief." *Transp. Infrastructure Moving Ariz.'s Econ. v. Brewer*, 219 Ariz. 207, 214 ¶ 33 (2008). A six-decade delay is unreasonable. *Cf. Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993) (suit barred by laches where petitioners knew of alleged violation "more than a year" before filing). And Plaintiffs waited two months after the dismissal of their Supreme Court special action petition to file their Complaint, further belying their entitlement to special action relief. *Cf.* 1 State Bar of Ariz., Arizona Appellate Handbook 2.0, ch. 4, 4.29 (2020) ("[D]elay may suggest that the petitioner did not consider the issue to be particularly important or urgent, thereby undermining the basis for invoking the special action procedures.").

[7] Although the U.S. Supreme Court affirmed the *Wells* decision without analysis, 409 U.S. at 1095, the Court has recognized that in *Wells* it "held the one-person, one-vote rule inapplicable to judicial elections," *Chisom v. Roemer*, 501 U.S. 380, 402 (1991).

County Superior Court judges have statewide impact? Or take § 12-822(B), which provides for change of venue to Maricopa County when the state is sued. Such cases, by their nature, are likely to have statewide effect, and § 12-822(B) virtually ensures that a disproportionate number of them will be heard in Maricopa County. And actions are frequently transferred to the Superior Courts of different counties to avoid conflicts of interest or for other reasons, even though the parties may not reside in those counties. *See* A.R.S. §§ 12-406–408. More broadly, decisions of the various superior courts in Arizona will of course sometimes have statewide impact (as in this case). Plaintiffs' Complaint suggests that to avoid violating Arizonans' constitutional rights, they must be able to vote on the retention of every single Superior Court judge in Arizona. *See, e.g.*, Compl. ¶¶ 5, 7, 72–74.

The claims should also be dismissed because they conflict with plainly constitutional practices, including constitutionally enshrined practices of the Supreme Court. For example, "[a]ny retired justice or judge of any court of record who is drawing retirement pay may 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. 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). But of course, *no one* votes on the retention of retired judges and justices.

And the Chief Justice "may assign judges of intermediate appellate courts, superior courts, or courts inferior to the superior court to serve in other courts or counties." Ariz. Const. art. VI, § 3; *see also id.* art. VI, § 19 ("A judge of the superior court shall serve in another county at the direction of the chief justice of the supreme court . . . ."). If Plaintiffs' theory were accepted, these practices—prescribed by Arizona's Constitution—would seem to violate constitutional rights to free and equal elections and/or equal privileges and immunities.

Plaintiffs' claims even implicate the Legislature. Arizona representatives and senators, who pass laws with statewide effect, are only subject to elections in their

districts. Ariz. Const. art. IV, pt. 2 § 1. Does that mean an Arizonan is injured every time he is subject to a law passed by legislators he did not vote for?

In fact, the geographic arrangement underlying the judicial retention scheme is itself part of the Constitution: An appointee to fill an appellate court vacancy must be "a resident of the counties or county in which that vacancy exists." Ariz. Const. art. VI, § 37(D). Section 12-120.02 simply implements the constitutional geographic scheme, providing that judges "shall be residents of and elected for retention from" the seats within each division. Plaintiffs' theory violates the foundational principle that the Constitution must be interpreted as "a consistent workable whole." *State ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196 (1969).

Finally, Plaintiffs overlook that when someone comes under the jurisdiction of an Arizona court, her rights are guaranteed by our state's robust due process, rigorous merit selection system, and high standards of judicial professionalism. *See* Ariz. Const. art. II, § 4; *id.* art. VI, §§ 6, 22, 36–37, 41–42; *id.* art. VI.I. It is these protections that safeguard Plaintiffs' rights, not a heretofore nonexistent ability to vote in the retention election of every judge who might one day exercise jurisdiction over them. *Cf.* Compl. ¶¶ 56, 63, 72–74, 82–84. Indeed, three of the four Plaintiffs may not vote in this Court's retention election, yet Plaintiffs evidently take no issue with hearing their case in this forum.

If Plaintiffs' theory is accepted, it might suggest that Arizona judges are political representatives, undermining the independence and impartiality so crucial to the judicial role. *See Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("[I]deally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment."). It also threatens chaos by calling into question the legitimacy of the countless judgments Arizona judges have rendered under the existing scheme. The Court should prevent Plaintiffs from throwing Arizona's judiciary into disarray and dismiss the Complaint.

1. The free and equal elections clause does not mean what Plaintiffs say it means.

No Arizona court has ever held that the free and equal elections clause applies to geographical divisions in judicial retention elections—or any other analogous context—much less explained how it would apply.

This is unsurprising. Since 1974, Arizona appellate judges have been appointed, not elected. *See* Ariz. Sec'y of State, *Referendum and Initiative Publicity Pamphlet* 26–28 (1974); Ariz. Const. art. VI, § 37(A). By Plaintiffs' own definition, a retention election does not constitute an "election" as that term was understood at the time of the Constitution's enactment: Voters in retention elections do not "select[ ] . . . one man from among several candidates," but vote on whether to retain each judge individually. Compl. ¶ 66 (quoting *Election*, *Black's Law Dictionary* (2d ed. 1910)); *see* Ariz. Const. art. VI, § 38(C). Indeed, Arizona judges, "once appointed, do not run for election." *In re Marquardt*, 161 Ariz. 206, 207 n.1 (1989). "[I]nstead, [they] appear on the ballot for retention or disapproval by the voters every four years." *Id.*

Only two published Arizona cases have interpreted the free and equal elections clause and neither supports Plaintiffs' novel theory. In the first, *Chavez v. Brewer*, the court concluded that a "free and equal" election is generally "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." 222 Ariz. 309, 319 ¶ 33 (App. 2009). It held that the clause "is implicated when votes are not properly counted." *Id.* at 310 ¶ 34. The court thus endorsed the principle that the clause protects each voter's right to be permitted to vote and to have that vote count. It said little (if anything) about any question relevant here.

The other case, *State ex rel. Brnovich v. City of Tucson*, reached a similar conclusion. *See* 251 Ariz. 45, 52 ¶ 30 (2021). In holding that a charter city's decision to schedule off-cycle elections was a matter of municipal autonomy protected by the Constitution's "home rule charter" provision, the Supreme Court recognized that the free and equal elections clause might be violated when a government entity "erects barriers to

voting or treats voters unequally." *Id.* But election scheduling that results in low turnout "does not deprive . . . voters of their constitutional right to vote." *Id.* Thus, the Court took the commonsense route of interpreting the clause to protect an individual's rights to vote and be treated equally in the casting of ballots, but rejected the State's urged expansive reading. *Id.*

Looking to case law outside of Arizona hurts, rather than helps, Plaintiffs' case. In *Wells*, for example, the U.S. Supreme Court affirmed a federal district court's decision holding that "the one man, one vote rule does not apply to the state judiciary, and therefore a mere showing of a disparity among the voters or in the population figures in the district would not be sufficient to strike down" a geographic judicial election procedure. 347 F. Supp. at 455 (citation omitted), *aff'd*, 409 U.S. at 1095; *see also Chisom*, 501 U.S. at 402–03 ("[W]e have held the one-person, one-vote rule inapplicable to judicial elections . . . ."). To the extent Plaintiffs here urge something akin to a one-person, one-vote rule, their claims fail for similar reasons. After all, "[j]udges do not represent people, they serve people. Thus, 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." *Wells*, 347 F. Supp. at 455 (citation omitted).

Case law from Washington, which has an identical free and equal elections clause in its Constitution,[8] likewise supports dismissal. *See Eugster v. State*, 259 P.3d 146, 149–51 ¶¶ 7–13 (Wash. 2011). In rejecting a challenge *narrower* than the one presented by Plaintiffs, the Washington Supreme Court reasoned that "voting districts need not be numerically equivalent for judicial elections" because judges have "fundamental obligations of impartiality and independence that do not apply to elected representatives of the legislative branch." *Id.* at 150 ¶ 11. In reaching that conclusion, the court noted that the free and equal elections clause has been "historically interpreted as . . . prohibiting

[8] *Compare* Ariz. Const. art. II, § 21 *with* Wash. Const. art. I, § 19. The language of Arizona's equal privileges and immunities clause is also virtually identical to Washington's. *Compare* Ariz. Const. art. II, § 13 *with* Wash. Const. art. I, § 12.

the *complete* denial of the right to vote to a group of affected citizens." *Id.* at 150 ¶ 10 (emphasis added). Thus, even assuming the clause "applies in a general way to judicial elections," the clause does not "require voting districts with equal populations in the unique context of the Court of Appeals." *Id.* Here, as in *Eugster*, "[n]o voter is shut out of Court of Appeals elections." *Id.* All relevant authorities suggest § 12-120.02 does not violate the free and equal elections clause.

2. Section 12-120.02 does not implicate, much less violate, the equal privileges and immunities clause.

"The 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 Coleman*, 230 Ariz. at 361 ¶ 39. Plaintiffs contend (without authority) that Arizona's clause is more stringent than the federal clause in the context of judicial retention elections, Compl. ¶ 92, but the Arizona and federal clauses are generally coextensive. *See, e.g.*, *Standhardt v. Superior Court*, 206 Ariz. 276, 289 n. 19 (App. 2003) ("We have held that this clause provides the same benefits as its federal counterpart . . . ."); *Vong*, 235 Ariz. 116, 122 ¶ 31 (App. 2014); *Westin Tucson Hotel Co. v. State Dep't of Revenue*, 188 Ariz. 360, 366 (App. 1997); *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 77 (App. 1996).

There is no principled reason to diverge from the U.S. Supreme Court's federal equal protection jurisprudence here. And applying the federal equal protection standard, the U.S. Supreme Court's holding in *Wells* makes clear that being affected by a judge's authority does not create the right to vote for that judge's retention. *Wells*, 347 F. Supp. at 455–56; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–70 (1978) (explaining that merely being affected by government action does require "concomitant extraterritorial expansion of the franchise"). And Plaintiffs' case here is even weaker than the case presented in *Wells*, which involved direct judicial elections. *See* 347 F. Supp. at 454–55. If geographic apportionment of *direct* judicial elections for statewide office does not raise equal protection concerns, then geographic division of *retention*

elections cannot raise such concerns.

Arizona's history further undermines Plaintiffs' claims: "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). The geographical system of judicial elections has been in place since 1964. That is over half of Arizona's 112-year history, and the entirety of the Court of Appeals' existence. In other words, the Secretary of State, the Legislature, and the entirety of Arizona's judiciary have *always* accepted that the geographical system is consistent with the right to equal privileges and immunities. Plaintiffs seek to upset Arizona's "[d]eeply embedded traditional ways of conducting government," but "history, case law, and logic suggest" that the current scheme is entirely consistent with the Constitution. *Eugster*, 259 P.3d at 150-51 ¶ 13 (citation omitted).

a. There is no differential treatment of voters under the current system.

To succeed on an Article II, § 13 claim, Plaintiffs must first establish that they were "treated differently than those who are similarly situated." *Waltz Healing Ctr., Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 616 ¶ 24 (App. 2018) (citation omitted). Plaintiffs do not allege that they are being treated differently than any other group of voters. Indeed, perhaps because Plaintiffs collectively represent each of four possible voting areas, they never take a position on how § 12-120.02 makes any group of voters worse off. At times, Plaintiffs seem to allege that § 12-120.02 favors rural voters. Compl. ¶¶ 61–62, 87–89. Elsewhere Plaintiffs seem to allege that § 12-120.02 favors Maricopa and Pima voters. Compl. ¶¶ 60, 63. Ultimately, however, Plaintiffs' claim rests on a generalized objection to the geographic system—not that some subgroup of voters is being unequally treated. *See* Compl. ¶¶ 56, 72–73, 83–84.

This problem is fatal to Plaintiffs' equal privileges and immunities claim: If there is no differential treatment of Plaintiffs "compared to other members of their class," it "is unnecessary to decide whether disparate treatment in this context would be subject to

strict scrutiny or rational basis review." *Craven v. Huppenthal*, 236 Ariz. 217, 220 ¶ 17 (App. 2014). Plaintiffs' claim fails on this basis alone. *Id.* at 220–21 ¶¶ 17, 20.

b. At most, the appropriate standard is rational basis, which A.R.S. § 12-120.02 easily survives.

Even if Plaintiffs could clear the threshold inquiry, rational basis review would apply because heightened scrutiny applies in the election context only "if it is alleged that some portion of [the] electorate is favored" via "classifications between and among electors within a voting district." *City of Tucson v. Pima County*, 199 Ariz. 509, 516 ¶ 21 (App. 2001). Here, there is no distinction between or among voters within any of the voting areas provided by A.R.S. § 12-120.02.

Further, 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. The geographic classifications here are related to the legitimate state interest of implementing the Constitution's Court of Appeals appointment scheme: An appointee to fill an appellate court vacancy must be "a resident of the counties or county in which that vacancy exists," ensuring a balance between urban and rural interests on the Court of Appeals. Ariz. Const. art. VI, § 37(D). The Constitution requires that judges standing for retention "be placed on the *appropriate* official ballot," not that the ballot be one distributed statewide. *Id*. art. VI, § 38(B) (emphasis added). And the Constitution empowers the Legislature to provide for the "jurisdiction, powers, duties and composition" of the Court of Appeals. *Id.* art. VI, § 9. Section 12-120.02 simply implements these provisions of the Constitution, creating parity between the geography-based appointment of judges and their retention elections and ensuring a balance between urban and rural appellate judges.

Section 12-120.02 thus "does not *implicate*, let alone burden" Plaintiffs' right to vote. *City of Tucson*, 199 Ariz. at 518 ¶ 30 (emphasis added). It would make no sense to conclude that a statute implementing a constitutional mandate is itself unconstitutional

based on Plaintiffs' nebulous interpretation of the equal privileges and immunities clause.

Plaintiffs attempt to skirt these principles by asserting that they are being disenfranchised. *See, e.g.*, Compl. ¶ 72, 90. Not so. Each of the Plaintiffs may vote in Court of Appeals retention elections in the exact same manner as every other voter within her respective region, and each voter in Arizona has the right to vote in such elections. A.R.S. § 12-120.02. Plaintiffs' equal privileges and immunities rights are not implicated. *City of Tucson*, 199 Ariz. at 518 ¶ 30; *Eugster*, 259 P.3d at 150 ¶ 10.

The cases Plaintiffs cite are helpfully distinguishable because they show what disenfranchisement actually looks like. *See* Compl. ¶¶ 86, 93, 95. In *Mayor & Council v. Royal*, tens of thousands of individuals "los[t] their right to vote in the 1973 primary election." 20 Ariz. App. 83, 84, 89 (1973). In *Dunn v. Blumstein*, any voter who was not "a resident for a year in the State and three months in the county" was barred from voting. 405 U.S. 330, 334 (1972). 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); *see also Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 623 (1969) (holding unconstitutional a law that excluded electors who did not own or rent taxable property or were not the parent or guardian of a child enrolled in the school district). By contrast, nobody is being excluded here. Every Arizonan has the right to vote in a retention election. *Cf. Eugster*, 259 P.3d at 150 ¶ 10.

Rational basis review therefore applies and A.R.S. § 12-120.02 easily survives such review, given the legitimacy of balancing urban and rural interests and implementing the Constitution's geography-based judicial appointments. *See City of Tucson*, 199 Ariz. at 519 ¶ 31; Ariz. Const. art. VI, § 37(D).

C. Plaintiffs are not entitled to mandamus or any other relief.

Mandamus relief 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 a writ of mandamus has the burden to 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). Mandamus 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).

Here, Plaintiffs point to Arizona constitutional provisions that have never before been interpreted to require what Plaintiffs suggest (or anything remotely similar) as the source of the Secretary's "clear legal duty." *Taylor*, 21 Ariz. at 580. They identify no authority to support their novel arguments, much less clear authority. This is not the stuff mandamus relief is made of.

More fundamentally, this Court simply cannot grant Plaintiffs the relief that they seek. Plaintiffs seek declaratory and injunctive relief requiring statewide retention elections of Court of Appeals judges. *See* Compl. at 15 ¶¶ A–E. But that would not merely require this Court to declare a statute invalid or enjoin its enforcement; it would require this Court to *rewrite the statute*, because no statute currently provides for statewide retention elections for Court of Appeals judges. And it is a bedrock rule that courts do not rewrite statutes. *See, e.g.*, *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 313 ¶ 22 (2017). A court cannot give Plaintiffs the remedy they seek.

V. Conclusion.

This case is not one in which a right has been transgressed and a remedy must be found. It is, instead, one in which Plaintiffs started by identifying their desired remedy and then went searching for a right that might fit. No such right is to be found in Arizona's Constitution.

The Court should not bless Plaintiffs' novel theories by allowing them past the pleading stage. Plaintiffs lack standing and have articulated no claim for which relief can be granted, much less the extraordinary mandamus relief they seek.

RESPECTFULLY SUBMITTED this 16th day of February, 2024.

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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

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. CV2024-000431 **CERTIFICATE OF GOOD FAITH CONSULTATION** (Hon. Frank Moskowitz)

Counsel for Defendants conferred with counsel for Plaintiffs in good faith by Zoom on February 15, 2024, and could not resolve the issues presented in Defendants' motion to dismiss.

RESPECTFULLY SUBMITTED this 16th day of February, 2024.

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