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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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT** (Assigned to Hon. Frank Moskowitz) **(Oral Argument Requested)**

Plaintiffs present "an abstract political grievance better addressed by the legislature" (Resp. n.2.) and ask this Court for a judicial rewrite of A.R.S. § 12-120.02 that they failed to achieve legislatively. To manufacture a purported injury, they contort two constitutional provisions and encourage this Court to depart from binding appellate precedent. Plaintiffs' complaint simply cannot withstand scrutiny. For starters, Plaintiffs lack standing to bring their "abstract political grievance" to the courthouse. And even setting that aside, their claims rest on the invented notion that the geographic reach of a judge's jurisdiction grants a concomitant right to vote in her retention election (a notion contradicted by other constitutional and statutory provisions that Plaintiffs encourage this Court to ignore). This Court should decline Plaintiffs' invitation to adopt novel and unsupported interpretations of the Constitution, all so they can achieve a policy result that they don't have the votes for. The complaint should be dismissed.

I. Plaintiffs cannot demonstrate an injury.

Plaintiffs have "failed to plead . . . [a] palpable injury personal to themselves." *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16 (2003). Instead, Plaintiffs' alleged injury is an "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992) (citation omitted). But that is simply a complaint "better addressed to the legislature." *Babbitt v. Asta*, 25 Ariz. App. 547, 549 (1976).

Having lost in the legislative arena, Plaintiffs turn to this Court to accomplish their preferred organization of the Court of Appeals. *See* H.B. 2757 Veto Letter from Governor Katie Hobbs to Speaker of the House of Representatives Ben Toma (May 19, 2023), https://www.azleg.gov/govlettr/56leg/1r/hb2757.pdf. Indeed, the political nature of their grievance is underscored by the fact that legislators unhappy with the Governor's veto have joined them on their foray into the courts, filing an amicus brief in support when Plaintiffs first attempted to bring this case to the Arizona Supreme Court. *See* Amicus Brief, *Knight v. Fontes*, No. CV-23-0229-SA (Ariz. Sup. Ct. Sept. 22, 2023).

But section 12-120.02's geographic design is a question entrusted to the Legislature, which determines the "jurisdiction, powers, duties and composition" of the Court of Appeals. Ariz. Const. art. VI, § 9. The "most" Plaintiffs "can establish is that they disagree" with the retention election system as it exists. *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 14 (1998). Plaintiffs still cannot describe the contours of their alleged injury. Plaintiffs assert they "do not argue that judicial districts must be apportioned along the one-person, one-vote rule" (Resp. 11), perhaps "for the excellent reason that the principle is inapplicable to judicial elections challenged as denials of equal protection," *Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998). They attempt to avoid this legal fatality to their claims by making generalized allegations about "unequally weighted votes" (Resp. 2, 3, 8, 9) without describing who is being treated unequally and how. "[I]ndividual claims of vote dilution, debasement, and the like," however, "all stem from the one-person-one-vote jurisprudence of the Supreme Court." *Field v. Michigan*, 255 F. Supp. 2d 708, 712 (E.D. Mich. 2003).

At times, Plaintiffs suggest that their injury is best perceived by counting the number of retention elections on a voter's ballot, but they still cannot say who is worse off. They intimate that urban voters fare better because they get to vote in more "individual retention elections" than rural voters do. (Resp. 15.) But Plaintiffs also imply that urban voters are worse off because Plaintiffs Ramsey (Pima County) and White (Maricopa County) can vote for judges residing in only one county, but Plaintiffs Knight and McEwen can vote for judges from multiple counties. (Resp. 2.) When the basis for a constitutional challenge requires a showing of disparate treatment, an allegation that *everyone* is harmed cannot demonstrate standing. Disparate treatment requires someone to benefit at another's detriment. *See Waltz Healing Ctr., Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 616 ¶ 24 (App. 2018).

Perhaps recognizing the shaky ground they stand on, Plaintiffs quickly pivot to a request that this Court resolve this case despite their lack of standing for "prudential" reasons. (Resp. 4–5.) But prudential concerns weigh *against* this Court's involvement

here. This Court should refrain from entering "the political arena" as a "referee." *Bennett*, 206 Ariz. at 528 ¶ 34 (citation omitted). The Arizona Supreme Court "has, as a matter of sound judicial policy, required persons seeking redress in the courts first to establish standing, *especially* in actions in which constitutional relief is sought against the government." *Id.* at 524 ¶ 16. "A contrary approach would inevitably open the door to multiple actions asserting all manner of claims against the government." *Id.* And although the Arizona Constitution "does not contain the specific case or controversy requirement of the U.S. Constitution," it likewise differs from the federal Constitution in that it "contains an express mandate, requiring that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately." *Id.* at 525 ¶ 19. "This mandate underlies our own requirement that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue." *Id.*

Plaintiffs simply cannot meet that burden and this Court should decline to referee their policy dispute. Because Plaintiffs search for a novel duty in broad constitutional provisions and cannot define who among them would be "beneficially interested" by their favored system, Arizona's "relaxed standard for standing in mandamus actions" is unhelpful to them. *See Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶ 11 (2020).

II. The Legislature defines a Court of Appeals judge's retention electorate; the geographic reach of her jurisdiction does not.

A judge's jurisdiction does not create a right to vote in her retention election. There is no authority for one of Plaintiffs' "core principles": that Court of Appeals judges' "statewide jurisdiction" creates a statewide right to "vote in their retention elections." (Resp. 1.) And without that linchpin, Plaintiffs fail to state a claim.

Indeed, as the State articulated in its Motion to Dismiss, several provisions of the Constitution recognize that the reach of a court's jurisdiction does not create a right to vote for a judge's retention. (MTD 8–10.) For starters, Plaintiffs' claims cannot be harmonized with article VI, § 20, which permits retired justices and judges to "serve as a

justice or judge of any court." Plaintiffs attempt to brush aside the fact that retired judges may constitutionally exercise jurisdiction over Arizonans who do not vote for their retention by stating that the issue "does not concern" "retention *elections*." (Resp. 8.) But they offer the contradicting assertion that the Constitution requires that they be able to "cast[ ] a ballot on the retention of judges who exercise authority over them." (Resp. 3.) Both cannot be true, and the Constitution plainly permits judges to exercise authority without creating a right that every single voter be able to vote in the retention election of every single judge. *See also* Ariz. Const. art. VI, § 3 (permitting the Chief Justice to "assign judges of intermediate appellate courts, superior courts, or courts inferior to the superior court to serve in other courts or counties"); *id.* art. VI, § 19 (similar).

Constitutional provisions relating to the superior courts similarly illustrate the point. In attempting to manufacture their claim that the Court of Appeals is different, Plaintiffs have relied on the fact that the Court of Appeals is a single, unified court. (*E.g.* Compl. ¶ 2, 39, 45; *see also* MSJ 1 (noting that the Court of Appeals is "a single, unified court that establishes binding legal precedent statewide").) But so too is the superior court.

The Constitution is explicit that the superior courts are "a single court, composed of all the duly elected or appointed judges in each of the counties of the state." Ariz. Const. art. VI, § 13; *see also Olesen v. Daniel*, 251 Ariz. 25, 28 ¶ 10 (App. 2021) ("All superior courts of the state constitute a single court . . . ."); *State v. Patterson*, 222 Ariz. 574, 580 ¶ 20 & n.7 (App. 2009) ("Location of superior courts and judges in each county is for administrative convenience because, although superior court judges primarily serve in their home county, they are qualified and eligible to serve in any division of the court." (cleaned up)). 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." Ariz. Const. art. VI, § 13. Yet the Constitution also requires that judges of the superior court "be subject to retention or rejection by a vote of the qualified electors of the county from which they were appointed." Ariz. Const.

art VI, § 37(B). Superior court judges—like Court of Appeals judges—exercise statewide jurisdiction, but the Constitution not only sanctions a limited electorate for their retention elections, it requires it.

Similarly, statutes relating to superior court jurisdiction further disrupt Plaintiffs' theory that a judge's jurisdiction defines her retention electorate. Many venue statutes provide for superior court jurisdiction over cases where the parties have not cast a retention ballot. *See, e.g.*, A.R.S. § 41-1034 (requiring suits seeking relief from administrative rule, practice, or policy statement to file in Maricopa County); *Id.* § 12-822(B) (providing for change of venue to Maricopa County when the State is sued); *Id.* §§ 12-406–408 (other venue transfer statutes). Thus, many superior court practices bear similarity to the Court of Appeals' practice of transferring cases between divisions, a cornerstone of Plaintiffs' arguments here. And even setting certain venue statutes aside, many superior court cases (including this one) will inevitably require a judge of a single county to issue a decision with statewide effect. After all, cases of statewide importance have to be heard somewhere.

Despite their focus on the statewide jurisdiction of Court of Appeals judges, Plaintiffs at times seem to agree that the geographic reach of a judge's jurisdiction does not define the geographic area of her retention electorate. On the one hand, Plaintiffs complain that they are deprived of a purported right to "an equal participation in the election of officials who wield power over them." (Resp. 4.) But they contradict themselves, arguing that they have never claimed that cases cannot be transferred to judges for whom litigants have not voted or that "parties must have voted on each and every judge presiding over any specific case." (Resp. 8.) Which is it? There is not support for the novel claim that a judge's jurisdiction grants a conterminous right to vote for her retention. Without that underpinning, Plaintiffs' other arguments crumble.

III. The free and equal elections clause does not support Plaintiffs' claims.

Plaintiffs cite no case applying the free and equal elections clause to the geographical divisions in judicial retention elections. Plaintiffs can state a claim only if

the Court agrees with their novel theory that a judge's statewide jurisdiction creates a statewide right to vote in her retention. (*Cf.* Resp. 9–11.) That is because Plaintiffs are granted the right to vote equal to other members of their geographic voting areas, and each voter in Arizona has the right to vote in retention elections. *See State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45, 52 ¶ 30 (2021).

Neither of Arizona's two published cases interpreting the free and equal elections clause undermines the challenged geographic scheme. To the extent that the clause applies, it requires that voters be "exposed to no intimidation or improper influence" and that "the vote of each voter is equal in its influence upon the result to the vote of every other elector." *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33 (App. 2009) (citation omitted); *see also City of Tucson*, 251 Ariz. at 52 ¶ 30 (determining whether the challenged scheme "erects barriers to voting or treats voters unequally"). Each Plaintiff admits that she may vote on the retention of judges in accord with the voting areas that § 12-120.02 mandates. (*See* Compl. ex. 1 ¶ 3; *id.* ex. 2 ¶ 3; *id.* ex. 3 ¶ 3; *id.* ex. 4 ¶ 3.) No Plaintiff alleges intimidation, improper influence, or that her vote is accorded less weight than others within her voting area.

And Plaintiffs disclaim that the basis of their argument is "that parties must have voted on each and every judge presiding over any specific case." (Resp. 8). That concession is irreconcilable with their contention that the free and equal elections clause mandates that all voters statewide be able to participate in the retention of all Court of Appeals judges because of that court's "statewide jurisdiction." (*See* Resp. 9.).

By suggesting that "voters across the geographic areas at issue here" must cast "*equally weighted* votes," Plaintiffs double down on two faulty premises: that a judge's jurisdiction creates her retention electorate and that one-person, one-vote principles apply. (Resp. 10.) But "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 v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973). Although the State does not dispute the

fundamental maxim that "the right to participate in our republican form of government constitutes the essence of American democracy," (Resp. 11 (cleaned up)), the judges of the Court of Appeals are not members of "an elected body" who must "speak[ ] for approximately the same number of constituents," *Wells*, 347 F. Supp. at 455. Each Plaintiff is granted a right to vote within her voting area equal to all other members of that area. The Court need look no further.

To the extent this Court looks beyond Arizona and Supreme Court case law, Plaintiffs offer no satisfactory reason to disregard *Eugster v. State*, which reasoned that "voting districts need not be numerically equivalent for judicial elections" because "the judiciary has fundamental obligations of impartiality and independence that do not apply to elected representatives of the legislative branch." 259 P.3d 146, 150 ¶ 11 (Wash. 2011).

Just as in *Eugster*, "[n]o voter is shut out of Court of Appeals elections," and Plaintiffs do not argue that the relevant statute "invidiously dilute[s] the voting strength of a particular racial or political element of the voting population." *Eugster*, 259 P.3d at 150 ¶ 10 & n.4 (citation omitted). There is no principled reason why Plaintiffs' alleged "complete denial" of the right to vote should be treated differently from Eugster's. (Resp. 10–11.) It is founded upon the unsupported premise that a judge's jurisdiction creates her retention electorate. (*See* Resp. 1.) And Plaintiffs' alleged vote-weighting problems (Resp. 10) are no different than the one-person, one-vote allegations addressed in *Eugster* and *Wells*. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (comparing "a debasement or dilution of the weight of a citizen's vote" with "wholly prohibiting the free exercise of the franchise"); *see also Field*, 255 F. Supp. 2d at 712 (noting "individual claims of vote dilution, debasement, and the like all stem from the one-person-one-vote jurisprudence"). Plaintiffs have not been deprived of any entitlement to vote.

Moreover, Eugster and Plaintiffs source their claimed right from identical constitutional provisions. *Compare* Ariz. Const. art. II, § 21 *with* Wash. Const. art. I, § 19. Plaintiffs and Eugster both present arguments relating to a vote's impact on the

composition of courts of appeals. *See Eugster*, 259 P.3d at 150 ¶ 10 ("Washington cases have never held that article I, section 19 requires substantial numerical equality between voting districts."); (Resp. 10 (suggesting infirmity because "voters across the geographic areas at issue here do not cast *equally weighted* votes that *equally affect* the composition of the Court of Appeals")).

Plaintiffs attempt to differentiate *Eugster* by arguing that they seek a different remedy. (*See* Resp. 11 ("Plaintiffs do not argue that judicial districts must be apportioned along the one-person, one-vote rule . . . .").) But a difference in sought-after remedy does not create a difference in the theories of injury. Plus, Plaintiffs seem to suggest that Eugster's proposed remedy would also address their "collective" concerns. (*See* Resp. 10 n.4 (noting that § 12-120.02 "is in contrast to . . . equipopulous district elections, where every vote is weighted equally and has an equal impact on the outcome of a given election or on the composition of a multimember body as a whole").)

Finally, Plaintiffs' other case, *Blankenship v. Bartlett*, says nothing about Arizona's free and equal elections clause. 681 S.E. 2d 759 (N.C. 2009). It interpreted the equal protection clause of the North Carolina Constitution and addressed voting power across judicial districts, not a claim that every voter in the state should elect every judge. *Id.* at 762, 766. Although the court held that intermediate scrutiny applied to "districts drawn for the [direct] election of superior court judges," *id.* at 768, the dissent noted that "every other jurisdiction" that had considered the issue refused "to apply population proportionality to judicial elections," *id.* at 770 (Timmons-Goodson, J., dissenting). Plaintiffs "offer[ ] little persuasive authority to support or explain why this Court should deviate from the reasoning of every other court in the country." *Id.*

IV. Plaintiffs fail to state an equal privileges and immunities claim.

Citing law review articles and general principles, Plaintiffs urge this Court to hold that Arizona's equal privileges and immunities clause has a broader scope than the federal Equal Protection Clause (as must be the case for their claims to have any chance of success). But they ignore binding Arizona appellate precedent holding that Arizona's

clause "is substantially the same in effect as the Equal Protection Clause in the United States Constitution." *Chavez*, 222 Ariz. at 320 ¶ 35; (*see also* MTD 13 (collecting cases)). And because the United States Supreme Court has "held the one-person, one-vote rule inapplicable to judicial elections" under the federal Equal Protection Clause, Arizona's equivalent clause cannot be the basis of Plaintiffs' claimed rights. *Chisom v. Roemer*, 501 U.S. 380, 402 (1991). There is no relevant distinction between the one-person, one-vote rule and Plaintiffs' other alleged deprivations because they come from the same source. *See Reynolds*, 377 U.S. at 555 (1964); *Field*, 255 F. Supp. 2d at 712.

Even on their own terms, Plaintiffs do not state how § 12-120.02 has "extend[ed] special privileges to any person or group." (Resp. 13 (quoting Stanley G. Feldman & David L. Abney, *The Double Security of Federalism*, 20 Ariz. St. L.J. 115, 140 (1988))). Indeed, Plaintiffs contend that "[a]ll Arizona voters are disenfranchised with respect to the retention of some or most Court of Appeals judges." (Resp. 14.) Put another way, Plaintiffs do not contend that any Plaintiff is advantaged over the others. Without that, Plaintiffs cannot show that they are "treated differently than those who are similarly situated." *Waltz Healing Ctr.*, 245 Ariz. at 616 ¶ 24.

Although (at 15) Plaintiffs assign meaning to the fact that urban voters may vote in more retention elections than rural voters, the number of positions on a ballot is not evidence of a constitutional violation. *See Rodriguez v. Newsom*, 974 F.3d 998, 1003 (9th Cir. 2020) (stating that equal protection "requires as nearly as is practicable that one person's vote be worth as much as another's" but not that a voter be able to vote for the same number of positions (cleaned up)). For example, when it comes to superior courts, urban voters can cast ballots in more individual retention elections than rural voters do. *See* Ariz. Const. art. VI, § 37(B). That urban voters can vote for more positions is not a prohibited privilege; it is a fact of population distribution.

Nor does history support a different interpretation of the equal privileges and immunities clause. Plaintiffs simply ignore that the geographical system of judicial elections has been in place since 1964, over half of Arizona's 112-year history. 1964

Ariz. Sess. Laws, ch. 102 (2d Reg. Sess.). And Court of Appeals judges have not been directly elected since 1974. *See* Ariz. Const art. VI, § 37. If history teaches anything, it is that the geographical divisions in § 12-120.02 pass constitutional muster.

V. This Court is ill-suited to craft the remedy Plaintiffs seek.

Plaintiffs seek mandamus, which requires that they 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). The Secretary's only clear legal duty is to follow A.R.S. § 12-120.02, which prescribes who is to appear on which retention ballot. *See* Ariz. Sec'y of State, *2023 Elections Procedures Manual* 150 (2023), https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf.

In contrast to A.R.S. § 12-120.02, none of the cited Arizona constitutional provisions create "a clear legal duty," and mandamus "is not an appropriate method to use to obtain a definition of duties that are otherwise subject to dispute." *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 467 ¶ 26 (App. 2007). Here, Plaintiffs allege a "clear legal duty" originating from a novel interpretation of the Constitution inconsistent with other constitutional provisions and more than six decades of history. That just doesn't pass muster.

By seeking a mix of mandamus, declaratory, and injunctive relief, Plaintiffs ask the Court to rewrite A.R.S. § 12-120.02 to match their preferred design. But courts do not rewrite statutes. This dispute belongs in the Legislature, where debates about this issue are yet to be resolved. *See* Proposed Amendments to S.C.R. 1044, 56th Leg., 2d Reg. Sess. (Ariz. 2024).

VI. Conclusion

For the reasons stated above, the Court should grant the State's Motion to Dismiss Plaintiffs' Complaint.

RESPECTFULLY SUBMITTED this 13th day of May, 2024.

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