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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 **RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (Assigned to Hon. Frank Moskowitz) **(Oral Argument Requested)**

Arizona's geographic framework for conducting retention elections for Court of Appeals judges, which mirrors the geographic framework for the Court's merit-selection process, is constitutional. The county-based election system has been in place since the Court of Appeals' inception 60 years ago. The staleness of Plaintiffs' claims underscores the true nature of the dispute here: this is a policy disagreement with the Governor, who recently vetoed legislation that would have provided the system Plaintiffs seek.

Plaintiffs' constitutional claims falsely presume that a judge whose decisions have statewide effect can only be retained through a statewide election. But there is no legal basis for that flawed assumption, which would have consequences well beyond the Court of Appeals. Even setting that aside, Plaintiffs' motion is premature, having been filed while a motion to dismiss is pending and before any discovery has occurred. The Court should deny Plaintiffs' motion for summary judgment, both because Plaintiffs fail to establish their claims as a matter of law and because material facts are disputed.[1]

BACKGROUND

I. Historical context supports A.R.S. § 12-120.02's constitutionality.

a. The original election and jurisdictional framework established the geography-based system Plaintiffs challenge.

For the last sixty years, Arizona's election process for Court of Appeals judges has been based upon the same regional framework in use today. In 1960, Arizona voters passed an initiative 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 implemented this initiative, creating the Court of Appeals and organizing it into two divisions of three judges each. The basic structure of the Court of Appeals was the same then as it is now, with Division One consisting of Maricopa, Yuma, Mohave, Coconino, Yavapai, Navajo, and Apache counties, and Division Two

[1] Plaintiffs' Motion for Summary Judgment mirrors in many ways their response to the State's Motion to Dismiss (to which the State has also filed a Reply on this same day). The State has attempted not to simply repeat arguments made in its Motion to Dismiss and Reply here, and in an effort not to be repetitive incorporates here the arguments made in those two filings, both on the merits and that Plaintiffs lack standing.

consisting of Pima, Pinal, Cochise, Santa Cruz, Greenlee, Graham, and Gila counties. 1964 Ariz. Sess. Laws, ch. 102, § 1 (2d Reg. Sess. 1964).[2]

The law required two of the Division One judges to be "residents of and elected from" Maricopa County; the third was required to be a resident of and elected from the remaining counties in Division One. *Id.* Similarly, two of the Division Two judges were required to be residents of and elected from Pima County; the third was required to be a resident of and elected from the remaining counties in Division Two. *Id.* Though the Legislature has increased the number of judges in each Division from time to time, this geography-based structure has remained. *See, e.g.*, 1969 Ariz. Sess. Laws, ch. 48, § 1 (1st Reg. Sess.); 1973 Ariz. Sess. Laws, ch. 147, § 3 (1st Reg. Sess.); 1981 Ariz. Sess. Laws, ch. 185, § 1 (1st Reg. Sess.); 1984 Ariz. Sess. Laws, ch. 198, § 1 (2d Reg. Sess.); 1988 Ariz. Sess. Laws, ch. 38, § 1 (2d Reg. Sess.).

The Court of Appeals was established as "a single court" with statewide jurisdiction and the judges of Division One and Division Two were permitted to "hold sessions in either division." 1964 Ariz. Sess. Laws, ch. 102, § 1. *See also Neil B. McGinnis Equip. Co. v. Henson*, 2 Ariz. App. 59, 62 (1965) ("Even though the Court of Appeals sits in two independent Divisions, it is nevertheless, a single Court."). And although cases appealed from superior courts were (and still are) to be "brought or filed" in the encompassing division, the 1964 statute did not prevent the Court from transferring cases between divisions. 1964 Ariz. Sess. Laws, ch. 102, § 1. Plaintiffs attempt to characterize (at 3–4) the transfer of cases between divisions as a new development, but the 1969 amendment to A.R.S. § 12-120(E) specifically permitted Court of Appeals judges to "participate in matters pending before a different division or department." 1969 Ariz. Sess. Laws, ch. 48, § 1.

The geography-based election system and simultaneous exercise of binding statewide jurisdiction is thus not a new construct. Court of Appeals judges *never* had to stand for statewide elections, and have *always* exercised statewide authority.

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[2] Division One now also includes La Paz County. A.R.S. § 12-120(C).

b. Constitutional amendments to the judicial selection process incorporated a geography-based retention electorate.

In 1974, voters amended the Constitution by altering the method of selecting Court of Appeals judges from election to merit-selection and retention. Prop. 108, Ariz. Sec'y of State, Referendum and Initiative Publicity Pamphlet 26–28 (1974); Ariz. Const. art. VI, §§ 36–40. The amendments required that an appointee to the Court of Appeals be "a resident of the counties or county in which that vacancy exists," Ariz. Const. art. VI, § 37(D), integrating the already-existing county-based system for judicial elections. The amendment also described the procedures for conducting judicial retention elections, requiring an appellate court judge to file a declaration of her desire to be retained in office with the secretary of state, who "shall certify to the several [county] boards of supervisors the appropriate names of the candidate or candidates appearing on such declarations." Ariz. Const. art. VI, § 38(A). When read in conjunction with A.R.S. § 12-120.02 (which was in effect at the time), it is clear that voters intended to conform the process for judicial merit-selection and retention elections with the county-based process for electing Court of Appeals judges.

Other than increasing the number of judges on the Court, no substantive changes were made to A.R.S. § 12-120.02 until 1994, when the Legislature added the word "retention" to describe the type of election. 1994 Ariz. Sess. Laws, ch. 245, § 3 (2d Reg. Sess.) (amending A.R.S. § 12-120.02(A)).

c. 2022 amendments to A.R.S. § 12-120 codified existing case-transfer practices.

The 2022 amendment to § 12-120 provided that matters "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 (at 3, 5, 7), likely in an attempt to overcome the staleness of their claims. But the amendment's effect was simply to codify the existing practice of transferring cases between the divisions. *See e.g., State v. Hicks*, 146 Ariz. 533, 535 (App. 1985); *Kimmell v. Clark*, 21 Ariz. App. 455, 455 (1974); *Webb v. Dixon*, 8 Ariz. App.

453, 458 (1968); *see also* (Compl. Ex. 5 at 3) (prior to 2022 amendments, Division Two judges had "agreed to handle some overflow cases originating in superior courts from within Division One, which has generally had a higher case load per judge").

Although now cases may be more regularly transferred between Divisions, Arizonans were *always* subject to appellate decisions where they "never voted for a *single* judge on the panel." (MSJ at 7) (emphasis in original). The Court of Appeals has always acted as "a single court," and decisions from each division have always applied with equal force to residents of the other division.

II. The Legislature recently attempted to amend the judicial retention election framework.

In 2023, the Governor vetoed legislation that proposed to enact statewide Court of Appeals retention elections identical to Plaintiffs' requested relief. *Compare* H.B. 2757, 56th Leg., 1st Reg. Sess. (Ariz. 2023) *with* Compl. at 15 ¶¶ C–D. This proposed legislation followed soon after the 2022 retention election process, in which three Maricopa County Superior Court judges were not retained and one Supreme Court Justice nearly lost his seat.[3]

Underscoring the political nature of this dispute, Plaintiffs' counsel, Jonathan Riches, testified before the House Judiciary Committee in support of HB 2757 on behalf of the Goldwater Institute.[4] Mr. Riches testified that the current Court of Appeals retention election framework is "unfair to voters who are bound by these statewide decisions" and asserted citizens' votes were not "afforded any weight." Mr. Riches further opined that under the current framework, the weight given to rural votes was

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[3] Kiera Riley, *Taskforce makes recommendations on changes to evaluation process for judges*, Ariz. Cap. Times (Apr. 12, 2023), https://azcapitoltimes.com/news/2023/04/12/taskforce-makes-recommendations-on-changes-to-evaluation-process-for-judges/; Miguel Torres, *3 Maricopa County judges losing heavily; Montgomery appearing safe in judicial retention vote*, AZCentral (Nov. 8, 2022), https://www.azcentral.com/story/news/local/arizona/2022/11/08/arizona-judges-election-results/10653178002/

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

"obviously much greater" than urban votes. Plaintiffs have notably declined to make this "obvious" argument here.

III. Having failed legislatively, Plaintiffs turned to the courts.

On September 5, 2023, Plaintiffs filed a petition for special action in the Arizona Supreme Court. *See* Pet. for Special Action, *Knight v. Fontes*, No. CV-23-0229-SA (Ariz. Sup. Ct. Sept. 5, 2023). That petition largely mirrored the complaint in this case. Shortly thereafter, Senate President Petersen and House Speaker Toma (HB 2757's sponsor) filed an amicus brief "on behalf of the 56th Arizona Legislature," disputing the Governor's "questionable exercise" of her veto power. Amicus Brief, *Knight*, No. CV-23-0229-SA (Ariz. Sup. Ct. Sept. 22, 2023). After the Attorney General filed a response, 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 (Ariz. Sup. Ct. Nov. 8, 2023). Two months later, 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.

On February 16, 2024 the State filed a Motion to Dismiss Plaintiffs' Complaint ("MTD") for failure to state a claim under Ariz. R. Civ. P. 12(b)(6). Plaintiffs filed their response on March 27, 2024 and their instant Motion for Summary Judgment ("MSJ") on April 11, 2024.

ARGUMENT

I. Standard of review and Plaintiffs' lack of standing.

Because Plaintiffs' claims cannot survive a motion to dismiss, the Court should dismiss the case entirely and deny Plaintiffs' Motion for Summary Judgment as moot. But if the Court reaches this motion, summary judgment is appropriate only "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Plaintiffs cannot carry that burden.

Moreover, before even reaching the merits, Plaintiffs' motion should be denied for lack of standing. The State has argued in its MTD and Reply in support thereof that

Plaintiffs failed to adequately allege standing as a matter of law, and the State incorporates those arguments here. (*See* MTD at 5–7; Reply at 2–4.) At the summary judgment stage, a plaintiff must do even more—simply alleging standing is not enough. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (to survive a motion for summary judgment, a plaintiff must set forth evidence that, taken as true, creates a genuine fact dispute as to standing). Because Plaintiffs have failed to meet their burden here, summary judgment is inappropriate for this reason as well.

II. Plaintiffs' motion is premature and their claims are disputed as a matter of fact.

To begin, Plaintiffs' motion is premature because no disclosures or discovery have occurred. Summary judgment "assum[es] discovery is complete." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309 & n.10 (1990). But here, pursuant to a stipulation, the Court has stayed all deadlines relating to disclosures and discovery during the pendency of the parties' dispositive motions. Order, April 30, 2024.

The State continues to believe that disclosures and discovery are not a prudent use of time while the Motion to Dismiss is pending, because granting that motion would end the case. But if the Court denies that motion and does not resolve Plaintiffs' claims as a matter of law, the State would take discovery to evaluate Plaintiffs' assertions that their constitutional rights have been violated. Specifically, the State would seek discovery regarding whether and how Plaintiffs have been subject to disparate treatment and whether any particular Plaintiff belongs to a group whose vote has been impermissibly diluted or given insufficient weight. It would be premature to grant summary judgment to Plaintiffs before then.[5]

[5] For the same reasons that the Complaint should be dismissed for lack of standing and failure to state a claim, summary judgment for the State would also be appropriate. The State's decision not to move for summary judgment yet should not be construed as a waiver or forfeiture of the State's ability to move for summary judgment on similar grounds later if the Court does not dismiss.

III. Arizona's judicial retention election scheme is constitutional.

A party bringing a constitutional challenge to lawfully enacted legislation bears a heavy burden. Arizona courts use "a strong presumption supporting the constitutionality of a legislative enactment and the party asserting its unconstitutionality bears the burden of overcoming the presumption." *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387 ¶ 33 (2013) (citation omitted). A court "will uphold it unless it is clearly unconstitutional." *State v. Oakley*, 180 Ariz. 34, 38 (App. 1994).

Plaintiffs do not dispute that A.R.S. § 12-120.02 set forth a constitutionally valid judicial election framework when it was enacted 60 years ago. (*See* MSJ at 9.) Neither the Court of Appeals' statewide jurisdiction nor the geography-based election framework has materially changed since then. And to the State's knowledge, no constitutional challenge to the statute's geography-based election framework has ever been made. Plaintiffs have not articulated any valid reason to do so now. On the contrary, the history of the statute, corresponding constitutional provisions, and case law show that section 12-120.02 is constitutional.

When voters passed Proposition 108 in 1974, they acknowledged the county-based election framework of A.R.S. § 12-120.02 in the judicial merit-selection and retention process. *See* Ariz. Const. art. VI, § 37(D) (requiring Court of Appeals appointee to be "a resident of the counties or county in which that vacancy exists"); Ariz. Const. art. VI, § 38(A) (in judicial retention elections, secretary of state shall certify to the several county boards of supervisors which appellate court judges will appear on the ballot); Compl. ¶ 31 ("when read together" the statute and constitutional amendment provided that "retention elections would be based on the residency of the voter and the judge's residence"). The Legislature's decision not to change § 12-120.02's geography-based retention election framework for almost half a century demonstrates that the statute and related constitutional provisions work in harmony with one another.

Plaintiffs argue (at 6) that "nothing in the Constitution [ ] imposes residency requirements for the judicial retention election of Court of Appeals judges" and that the geographical framework is purely a function of A.R.S. § 12-120.02. But that is the

Legislature's prerogative. The Legislature has the power to determine the duties and composition of the Court of Appeals. Ariz. Const. art. VI, § 9. And the Constitution does not require the Legislature to implement the at-large election system Plaintiffs demand. In other contexts, the Arizona Supreme Court has recognized that an at-large election "by its nature allows candidates to win who may not receive a majority of votes in particular areas," while a geography-based election "allow[s] council members to vote on matters affecting the entire city even though they are not elected, and might not be preferred, by a majority of the city's voters." *City of Tucson v. State*, 229 Ariz. 172, 179–80 ¶ 45 (2012). The Legislature may weigh each system's positive and negative attributes; but neither is required by Arizona's Constitution. *Id.* at 180.

The Legislature's recent attempt to change the election framework does not constitutionalize this policy dispute. Courts are appropriately "reluctant to become the referee of a political dispute," which this plainly is. *Bennett v. Napolitano*, 206 Ariz. 520, 527 ¶ 32 (2003). The ongoing efforts in the Legislature to amend the judicial retention election process underscore the political nature of this case. Indeed, despite Plaintiffs' enthusiastic rhetoric (at 2, 13) describing judicial elections as one of Arizona's "most important" and "deeply rooted" historical and constitutional principles deserving of the "highest form of judicial solicitude," the Senate recently approved a proposed constitutional amendment that would allow all members of the judiciary to avoid the retention election process altogether.[6] As amended, the resolution's provisions sunset on December 31, 2034, signifying an intent to protect only current court personnel and further supporting the conclusion that this is a political dispute between the Legislature and the Governor.

Section 12-120.02 was constitutional when it was enacted and it remains constitutional now. The Legislature has the authority to implement a different system, but the Constitution does not require it.

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[6] https://www.azleg.gov/legtext/56leg/2R/adopted/H.SCR1044MUNICIPAL%20OVERSIGHT%20%20ELECTIONS.pdf.

IV. Plaintiffs' constitutional claims fail as a matter of law.

a. Plaintiffs are not entitled to statewide, at-large retention elections.

The premise of Plaintiffs' constitutional claims is fundamentally flawed. Even Plaintiffs recognize (at 11) the validity of geographic distinctions in elections. Yet Plaintiffs' claims rest on the presumption that Arizona is required to hold statewide, at-large judicial retention elections simply because the Court of Appeals exercises statewide jurisdiction. (*See* MSJ at 7, 9–11); (Compl. ¶¶ 74–75, 82–83, 94, 97).

Contrary to Plaintiffs' wholly unsupported assertion, however, courts have generally upheld geographically-based judicial election schemes like Arizona's as constitutionally sound. *See e.g., Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 957 (4th Cir. 1992) (comparing North Carolina's problematic statewide at-large elections with preferable district-based elections for judges who exercise statewide jurisdiction); *Eugster v. State*, 259 P.3d 146, 150 ¶ 12 (Wash. 2011) (finding similar geography-based judicial election scheme constitutional and a "good faith attempt to include judges from all regions of [the] state"); *Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) (dismissing federal Equal Protection Clause challenge to Louisiana's scheme of electing Supreme Court justices from unequal judicial districts because one-person, one-vote principle does not apply).

Plaintiffs are hardly the first to argue a state's judicial election process violates equal protection. But unlike other cases, Plaintiffs here have not claimed that a group is subject to disparate treatment. (MSJ at 7, 9.) Instead, Plaintiffs assert (at 11) that "all Arizona voters are disenfranchised" because "voters do not get to vote in retention elections for judges on a statewide basis." This does not comport with recognized equal protection principles. *Cf. Smith v. Boyle*, 144 F.3d 1060, 1061 (7th Cir. 1998) (asserting that at-large elections for justices denied Republicans a fair opportunity to elect candidates of their choice); *Chisom v. Roemer*, 501 U.S. 380, 385 (1991) (alleging method of electing justices impermissibly dilutes the strength of Black voters).

Plaintiffs' case rests on the desire for a "guarantee that any judge they vote for will sit on any given case." (MSJ at 7.) But Plaintiffs are not entitled to any such guarantee,

and they provide *no support* for the sweeping assertion that judges who exercise statewide jurisdiction must face statewide retention elections.

The Constitution itself precludes such a conclusion. For instance, the Constitution "creates superior courts in each county of the state that together 'constitute a single court'" with judges that "are qualified and eligible to serve in any division of the court." *State v. Patterson*, 222 Ariz. 574, 580 n.7 (App. 2009) (citations omitted). "[T]he superior court is not a system of jurisdictionally segregated departments but rather a 'single unified trial court of general jurisdiction.'" *Id.* (citation omitted). And although superior court judges exercise statewide jurisdiction, the Constitution *requires* that they "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). The Constitution also provides that the Chief Justice of the Supreme Court "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. The Constitution thus prohibits the conclusion that statewide, at-large judicial retention elections are required simply because the Court of Appeals exercises statewide jurisdiction. Because Plaintiffs' constitutional claims are premised on this incorrect and unsupported assumption, they fail as a matter of law.

b. A.R.S. § 12-120.02 does not implicate the free and equal elections clause.

Setting aside the erroneous foundation of Plaintiffs' case, Plaintiffs have failed to articulate how the judicial retention election scheme results in an election that is not "free and equal." Ariz. Const. art. II, § 21. Plaintiffs' nebulous claims of "geographical discrimination" (at 10) do not demonstrate that any particular group has been denied the franchise in a way that would implicate the free and equal elections clause.

The only two published Arizona cases analyzing Arizona's free and equal elections clause do not support Plaintiffs' claims. The first, *Chavez v. Brewer*, dealt with deficiencies in voting equipment, which resulted in voters with disabilities being denied the same access as non-disabled voters. 222 Ariz. 309, 319 ¶30 (App. 2009). The Court concluded that a "free and equal" election is "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 held that the clause "is implicated when votes are not properly counted." *Id.* at 320 ¶ 34. The other case, *State ex rel. Brnovich v. City of Tucson*, recognized that the free and equal elections clause might be violated if a government entity "erects barriers to voting or treats voters unequally." 251 Ariz. 45, 52 ¶ 30 (2021).

These two cases stand for the proposition that no vote should be given unequal weight or influence over that of another vote. But this principle does not mean, as Plaintiffs assert (at 8), that voters in different geographic areas are treated unequally simply because different candidates appear on their ballots.

Plaintiffs also cite two out-of-state cases (at 8) for the uncontroversial proposition that "free and equal" means each ballot should have the same influence as every other ballot. True enough, within the context of any particular election. But Plaintiffs then take the unsupported next step and assert (at 9–10) that because they cannot vote in the retention election of a judge from a different geographic area, their ballot does not have the same influence as every other ballot and "geographical discrimination" has occurred. The cases cited by Plaintiffs do not support this leap of logic.

The first, *Oviatt v. Behme*, dealt with a county official who appeared on the ballot even though they may have been ineligible for reelection. 147 N.E.2d 897, 900 (Ind. 1958). The second, *Moran v. Bowley*, dealt with a vote dilution claim in which "the power of one voter in [one district] in an election of a congressman is double that of a voter in [another] district." 179 N.E. 526, 531 (Ill. 1932). The court noted that the Legislature was not permitted to "bestow upon classes or sections of voters a greater power and influence in elections than upon other like groups," and "Members of the House of Representatives should be chosen by a method giving every voter a voice approximately equal to that of every other voter." *Id.* at 163. *Cf. Wells*, 347 F. Supp. at 454, *aff'd*, 409 U.S. 1095 (1973) (dismissing equal protection claim despite deviation in population of judicial districts because principle of one-person, one-vote does not apply to judicial

elections). Neither case cited by Plaintiffs applies to the situation here. *See also Madison Cnty. v. Ill. State Bd. of Elections*, 214 N.E.3d 931, 944 ¶ 68 (Ill. App. Ct. 2022) (holding that "disparities amongst voters of different judicial subcircuits do not implicate the free and equal clause of our state constitution").

Plaintiffs do not address another out-of-state case previously raised by the State, *Eugster*, 259 at 149–51 ¶¶ 7–13, which rejected a claim that Washington's similar appellate court structure violated the state's identical free and equal elections clause. (MTD at 12–13.) Washington has a single Court of Appeals that exercises statewide jurisdiction. It is made up of three divisions, and "[e]ach division is divided into three districts made up of one or more counties, and each of these districts elects a set number of judges." *Id.* at 148 ¶ 2. It hears cases in three-judge panels and cases are assigned in a way that "emphasizes equitably sharing workload and randomly assigning cases so that no particular litigant's or judge's interest is favored." *Id.* at ¶ 3. In rejecting the plaintiff's claim that this election structure violated Washington's identical free and equal elections clause, the court noted that it had "historically interpreted [the clause] as prohibiting the complete denial of the right to vote to a group of affected citizens." *Id.* at 150 ¶ 10. But under the Washington framework, "[n]o voter is shut out of Court of Appeals elections in the manner that our cases have rejected; every Washington voter has the opportunity to vote for at least one Court of Appeals judge." *Id.*

So too here. Like Plaintiffs, Eugster specifically argued that Washington's system of assigning judges violated the free and equal elections clause because there was no guarantee that each three-judge panel would "contain a judge from each district." *Id.* at 150 ¶ 12. The court interpreted this argument as "some kind of vote dilution" claim, but rejected it because "taken to its logical extreme" it would "invalidate any delegation of elected officials' duties." *Id.* Eugster's other arguments alleged violations of the one-person, one-vote principle, and were rejected because "[t]he Court of Appeals has been elected by districts drawn along county lines for over 40 years. Washington history, case law, and logic suggest that these districts need not be numerically equal for our elections to be 'free and equal.'" *Id.* at 150–51 ¶ 13.

Plaintiffs have not alleged any claims of vote dilution, vote deprivation, or unequal influence that would implicate the free and equal elections clause. Their general claims of "disenfranchisement" fall flat. Every Arizona voter is entitled to vote in the retention election of Court of Appeals judges from within their respective geographic areas. No Plaintiff has alleged that they have been unable to vote in the retention election of a judge appointed from their region, and each Plaintiff's ballot is of equal influence to every other voter from their respective region. Plaintiffs have not established that they are entitled to judgment as a matter of law on this claim.

c. A.R.S. § 12-120.02 does not violate the equal privileges and immunities clause.

Plaintiffs have not alleged a cognizable equal privileges and immunities claim. Even if some level of scrutiny applies, it is rational-basis review, which the statute easily survives.

i. Federal equal protection principles apply.

As an initial matter, Plaintiffs spend a considerable portion of their Motion (at 12–13) arguing that federal equal protection jurisprudence has "no bearing here" because Arizona's equal privileges and immunities clause "has a broader sweep."[7] Plaintiffs (once again) provide no legal support for the assertion that Arizona courts interpret the equal privileges and immunities clause differently than the U.S. Constitution's Equal Protection Clause. On the contrary, Arizona case law is clear that "[Arizona's Privileges or Immunities Clause] is substantially the same in effect as the Equal Protection Clause in the United States Constitution." *Chavez*, 222 Ariz. at 320. *See also Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 39 (2012) ("[T]his 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 . . . ."); *Westin Tucson Hotel Co. v. State Dep't of*

[7] On some level, Plaintiffs are forced to argue that federal equal protection principles don't apply here because, as even Plaintiffs' counsel acknowledged to the Legislature, federal equal protection law "does not extend to judicial elections." https://www.azleg.gov/videoplayer/?eventID=2023021075&startStreamAt=118 (starting at 10:01)

Revenue, 188 Ariz. 360, 366 (App. 1997) ("[T]he equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect." (citation omitted).

ii. As a matter of law, Plaintiffs have failed to allege a cognizable equal privileges and immunities claim.

Plaintiffs allege (at 11) that "although the jurisdiction of the Court of Appeals is *statewide*, voters do not get to vote in retention elections for judges on a statewide basis" and therefore "*all* Arizona voters are disenfranchised." This legal theory has been expressly precluded by the Supreme Court's decision in *Wells*, 347 F. Supp. at 454, *aff'd*, 409 U.S. 1095 (1973). Similar Equal Protection claims asserting that voters were improperly denied "the privilege of service of a judicial officer whom they have elected, and [instead, were subject to] the service of a judge over whose selection they had no choice" have been rejected by other courts, following the logic of *Wells*. *See, e.g.*, *Field v. Michigan*, 255 F. Supp. 2d 708, 711 (E.D. Mich. 2003). That is because such claims, which "can only be based on vote dilution, . . . all trace their origin to, and are dependent upon, the one-person-one-vote doctrine." *Id.* at 713. Plaintiffs' identical claims here fare no better.

Even if the Court disagrees that the rule of *Wells* applies in this case, Plaintiffs' equal privileges and immunities claim must fail because they have not alleged differential treatment. To succeed on an article II, section 13 claim, a party must establish that it has "been treated unequally when compared to other members of their class." *Craven v. Huppenthal*, 236 Ariz. 217, 220 ¶ 17 (App. 2014). "Unless that question is answered affirmatively, it is unnecessary to decide whether disparate treatment in this context would be subject to strict scrutiny or rational basis review." *Id.* Because Plaintiffs collectively reside in all four possible voting areas, they do not (and cannot) allege differential treatment. This is fatal to their equal privileges and immunities claim.

iii. Even under a generous reading of Plaintiffs' claim, at most rational-basis review is appropriate.

Ignoring Plaintiffs' failure to meet the threshold requirement, Plaintiffs broadly assert (at 10) that "A.R.S. § 12-120.02 discriminates among voters based on their residency" and that the statute must satisfy strict scrutiny. 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). Moreover, Plaintiffs' "analysis" is at odds with established equal protection standards. Plaintiffs cite (at 11) *City of Tucson v. Pima County*, 199 Ariz. 509 (App. 2001). But the principles discussed in *City of Tucson* hurt rather than help Plaintiffs' case. The plaintiffs in that case alleged that a statute that gave a neighboring city veto power over a community's ability to incorporate violated equal protection. *Id.* at 515. The Court noted that "once an election is provided, classifications between and among electors within a voting district are subject to heightened scrutiny if it is alleged that some portion of that electorate is favored." *Id.* at 516 ¶21. But, as was the case in *City of Tucson*, no such allegation has been made here.

The plaintiffs in *City of Tucson* argued, in part, that the law violated equal protection because the entire county "ought to be considered the relevant voting area" and that the smaller geographic classifications within the county were discriminatory. *Id.* at 518 ¶ 28. The Court reasoned, however, that unlike cases where "there was an election provided, and certain groups of persons within the given area were either denied the right to vote or had a burden placed upon their ability to vote" all persons within the geographic area designated by the Legislature were treated equally. *Id.* at ¶ 29. Therefore, like the situation in this case, because "no improper distinction is being made by the Arizona Legislature between and among classes of persons within the relevant area, the statute does not implicate, let alone burden, the Equal Protection Clause's right to vote" and rational-basis review is warranted. *Id.* at ¶ 30.

Plaintiffs attempt to circumvent this conclusion by arguing (at 11) the "relevant area" is the entire state because the Court of Appeals exercises statewide jurisdiction. But

as previously discussed (Arg. § IV.a.) this logic is unsupported by the law. Judicial power does not necessarily define the geography of the Court of Appeals retention electorate.

iv. A.R.S. § 12-120.02 bears a rational relationship to a legitimate state interest.

The geographic classifications here are related to the legitimate state interest of supporting the Constitution's appointment scheme: 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). 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). Section 12-120.02 simply accommodates these provisions of the Constitution.

Plaintiffs agree (at 11) that the geography-based system promotes the interest of rural and urban representation on the Court of Appeals. Plaintiffs argue, however, that because judges are now appointed rather than elected, the retention election framework no longer serves this interest. But common sense dictates that if the system for selecting judges to serve on the Court of Appeals sufficiently promotes the interest of rural/urban representation, then a retention scheme that mirrors that selection system also promotes the same interest.

At bottom, each Plaintiff may vote in Court of Appeals retention elections in the 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. This framework does not implicate, let alone burden, Plaintiffs' equal privileges and immunities right to participate in elections. *City of Tucson*, 199 Ariz. at 518 ¶ 30; *Eugster*, 259 P.3d at 150 ¶ 10.

d. Material facts are disputed.

Although the State disagrees that Plaintiffs' constitutional claims are properly presented or justiciable, satisfying any level of heightened review implicates factual disputes that cannot be resolved on summary judgment. Accordingly, if the Court does not dismiss Plaintiffs' Complaint, it should nonetheless deny Plaintiffs' Motion for Summary Judgment. *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603 ¶ 16

(App. 2016) ("[S]ummary judgment is appropriate where there is no genuine dispute as to any material fact, only one inference can be drawn from the undisputed material facts and based on the undisputed material facts the prevailing party is entitled to judgment as a matter of law.") (citation omitted).

Plaintiffs argue (at 2) that the State did not dispute "any facts" in its Motion to Dismiss. However, on a motion to dismiss for failure to state a claim "courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 9 (2012). In fact, if matters outside the pleading are considered, the motion will be treated as one for summary judgment. *Id*.; Ariz. R. Civ. P. 12(b)(6). Summary judgment is the proper stage to raise factual disputes.

As a general matter, whether a party can prove an equal privileges and immunities claim requires resolution of "factual disputes" and depends "on the course of proceedings in the trial court." *City of Mesa*, 230 Ariz. at 363 ¶ 46. Plaintiffs here spend nearly two pages of their Motion (at 6–7) discussing the composition of the Court of Appeals and the corresponding population distribution between the four geographic areas at issue. Plaintiffs have yet to reveal which group's vote has received differential treatment, and it is far from clear which geographic subset of voters is worse off because of § 12-120.02 to the extent Plaintiffs claim any kind of vote dilution or disparate impact. If such a dispute is eventually entertained, it raises factual questions that could require discovery and the State may wish to introduce expert testimony. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 19– 22 (2023) (discussing fact-finding and expert analysis of vote dilution claims).

Plaintiffs also allege (at 10) that strict scrutiny applies here. It doesn't, but even if it did the application of strict scrutiny would similarly require development of a factual record. *See Kenyon v. Hammer*, 142 Ariz. 69, 87 (1984). At present, no factual record exists.

CONCLUSION

Plaintiffs cannot carry their burden to show A.R.S. § 12-120.02 is unconstitutional as a matter of law. The Court should deny summary judgment on all claims.

RESPECTFULLY SUBMITTED this 13th day of May, 2024.

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