

ARIZONA SUPREME COURT

BONNIE KNIGHT, DEBORAH
McEWEN; SARAH RAMSEY; and
LESLIE WHITE,

Petitioners,

v.

ADRIAN FONTES, in his official capacity
as Arizona Secretary of State,

Respondent.

No. CV-23-0229-SA

**BRIEF OF *AMICI CURIAE* SPEAKER OF THE ARIZONA HOUSE OF
REPRESENTATIVES BEN TOMA AND PRESIDENT OF THE ARIZONA
STATE SENATE WARREN PETERSEN ON BEHALF OF THE 56TH
ARIZONA LEGISLATURE**

Linley Wilson, AZ Bar No. 027040
Arizona House of Representatives
1700 W. Washington St.
Phoenix, Arizona 85007
(602) 926-5418
LWilson@azleg.gov

Counsel for Speaker Toma

Rusty Crandell, AZ Bar No. 026225
Arizona State Senate
1700 W. Washington St.
Phoenix, Arizona 85007
(602) 926-3559
RCrandell@azleg.gov

Counsel for President Petersen

*Attorneys for Amici Curiae Speaker of the Arizona House of Representatives and
President of the Arizona Senate on behalf of the 56th Arizona Legislature*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
INTEREST OF THE <i>AMICI</i>	2
BACKGROUND	2
ARGUMENT	6
I. This Court Should Accept Jurisdiction to Give Meaning and Effect to the Judicial Retention Clause of Article VI, § 38 of the Arizona Constitution, Which Bolsters Petitioners’ Constitutional Claims	6
II. This Court Should Accept Jurisdiction to Determine Whether A.R.S. § 12- 120.02 Is Unconstitutional Because It Disenfranchises Voters	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs</i> , 249 Ariz. 396, 405 (2020)	1
<i>Bristor v. Cheatham</i> , 75 Ariz. 227, 234 (1953)	6
<i>Dobson v. State ex rel., Comm’n on Appellate Court Appointments</i> , 233 Ariz. 119, 121 (2013)	1
<i>Fairfield v. Foster</i> , 25 Ariz. 146, 149 (1923)	5
<i>Harrison v. Laveen</i> , 67 Ariz. 337, 459 (1948)	1
<i>In re Marriage of Nudson and Lopez</i> , No. 2 CA-CV 2022-0048-FC, 2023 WL 110523 (Ariz. App. Jan. 5, 2023) (mem.)	9
<i>In re Pima County Mental Health No. MH20220769</i> , No. 2 CA-MH 2022-0006, 2023 WL 1525019 (Ariz. App. Feb. 3, 2023) (mem.)	9
<i>In re Termination of Parental Rights as to N.M.</i> , No. 2 CA-JV 2022-0090, 2022 WL 17222390 (Ariz. App. Nov. 25, 2022)	10
<i>Planned Parenthood Arizona, Inc. v. Brnovich</i> , 254 Ariz. 401 (App. 2022)	9, 10
<i>Scappaticci v. Sw. Sav. & Loan Ass’n</i> , 135 Ariz. 456, 461 (1983)	9
<i>State v. Lee</i> , 226 Ariz. 234, 239, ¶ 11 (App. 2011)	7, 8
<i>State v. Scott</i> , 530 P.3d 1178 (Ariz. App. June 1, 2023)	9
<i>Smith v. Town of Marana</i> , 254 Ariz. 393 (App. 2022)	9
<i>State v. Patterson</i> , 222 Ariz. 574, 579-80, ¶¶ 16, 20 (App. 2009)	9
<i>Trails at Amber Ridge Homeowners Ass’n v. Macias</i> , No. 2 CA-CV 2022-0096, 2022 WL 10208498 (Ariz. App. Oct. 17, 2022)	10

Statutes

A.R.S. §§ 12-101	7
A.R.S. § 12-119.05	7
A.R.S. § 12-120	3, 9
A.R.S. § 12-120.02	passim
A.R.S. § 12-120.07(A)	9

Rules

Ariz. House of Reps. Rule 4(K)	2
Ariz. Senate Rule 2(N)	2

Other Authorities

2022 Ariz. Legis. 2d Reg. Sess. (H.B. 2859).....	3
2023 Ariz. Leg. 56th Reg. Sess. (H.B. 2757)	4
<i>Ariz. House of Reps., Comm. on Judiciary</i> (Feb. 15, 2023), at 3:03-3:12.....	4
<i>Ariz. State Senate, Comm. on Judiciary</i> (Mar. 23, 2023), at 2:35-2:45.....	4
Veto Letter, H.B. 2757 (May 19, 2023).....	5, 8

Constitutional Provisions

Ariz. Const. art. II, § 13	5, 6
Ariz. Const. art. II, § 21	5, 6
Ariz. Const. art. IV, pt. 2, § 8.....	2
Ariz. Const. art. VI, § 37(B)	7
Ariz. Const. art. VI, § 38.....	3, 7

INTRODUCTION

“To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality.” *Harrison v. Laveen*, 67 Ariz. 337, 459 (1948). The voters in this case ask a fundamentally important question: Do Arizona voters have a constitutional right to vote in retention elections for all judges on the Arizona Court of Appeals? That question—which requires interpretation of several provisions of our state constitution—indisputably warrants this Court’s jurisdiction. Indeed, this Court routinely exercises special action jurisdiction in similar cases that implicate voting rights, elections, and constitutional issues of law. *See, e.g., Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs*, 249 Ariz. 396, 405 (2020) (accepting jurisdiction over petitioner’s ballot access claim to interpret Arizona Constitution’s signature-gathering requirements); *Dobson v. State ex rel., Comm’n on Appellate Court Appointments*, 233 Ariz. 119, 121 (2013) (“Special action jurisdiction is appropriate here because the petition presents purely legal questions of statewide importance that turn on interpreting Arizona’s Constitution.”).

Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona State Senate Warren Petersen respectfully submit this brief as *amici curiae* in support of Petitioners Bonnie Knight, Deborah McEwen, Sarah Ramsey, and Leslie White. Speaker Toma and President Petersen agree with Petitioners that

the judicial retention provisions of A.R.S. § 12-120.02 violate the Arizona Constitution to the extent that they prohibit statewide electors from voting in judicial retention elections for judges on the Court of Appeals. This Court should accept jurisdiction of the Petition and grant the relief requested.

INTEREST OF THE *AMICI*

Under Arizona law, Speaker Toma and President Petersen are “entitled to be heard” in “any proceeding in which a state statute ... is alleged to be unconstitutional.” [A.R.S. § 12-1841\(A\)](#). Accordingly, they submit this brief on behalf of the 56th Legislature as presiding officers of their respective chambers, [see Ariz. Const. art. IV, pt. 2, § 8; Ariz. House of Reps. Rule 4\(K\); Ariz. Senate Rule 2\(N\)](#), to articulate the Legislature’s perspective on the constitutionality of the statute at issue here, A.R.S. § 12-120.02. Speaker Toma and President Petersen also submit this brief to describe the Legislature’s recent attempts to bring A.R.S. § 12-120.02 into compliance with the Arizona Constitution.

BACKGROUND

The Petition fully describes how the right of Arizonans to vote for state court judges “is deeply engrained in Arizona’s history,” beginning in 1910 when Arizona sought admission to the union. Petition at 9-11.

In 1974, through Proposition 108, voters amended the Arizona Constitution to implement merit selection and retention elections for appellate judges. Today, the

judicial-retention clause of article VI, § 38 requires that “[a] justice or judge of the supreme court or an intermediate appellate court shall file in the office of the secretary of state...not less than sixty nor more than ninety days prior to the regular general election next preceding the expiration of his term of office, a declaration of his desire to be retained in office.” [Ariz. Const. art. VI, § 38](#). Thus, our state constitution makes no distinction between retention elections for the justices serving on this Court or retention elections for the judges who serve on the Arizona Court of Appeals. And the constitution does not impose any geographical prerequisites on the right to vote in these elections.

Because of A.R.S. § 12-120.02, however, court of appeals judges sit for retention elections in limited geographic areas tied to the judge’s county of residence. Yet—as Petitioners point out—an appellate judge’s residence has no relationship whatsoever to the scope of the court’s jurisdiction, the particular disputes that a judge will resolve, or the precedential effect of a judge’s decision. Petition at 11-14.

In 2022, the Legislature amended A.R.S. § 12-120(E) by adding a provision stating, “[a] matter may be transferred between divisions in order to equalize caseloads and for the best use of judicial resources.” [2022 Ariz. Legis. 2d Reg. Sess. \(H.B. 2859\)](#). But the geographic limitations on the right to vote reflected in A.R.S. § 12-120.02 remained intact.

This spring, Speaker Toma sponsored House Bill (“H.B.”) 2757 to amend A.R.S. § 12-120.02 by eliminating the county-based right to vote and extending the right to vote in appellate judicial retentions to all Arizonans on a statewide basis. [2023 Ariz. Leg. 56th Reg. Sess. \(H.B. 2757\)](#). When the Arizona House of Representatives’ Judiciary Committee heard H.B. 2757, Speaker Toma explained that the bill was designed to give “all Arizona voters the chance to vote for the Arizona Court of Appeals judges, both [on] Division One and Division Two.” [Ariz. House of Reps., Comm. on Judiciary \(Feb. 15, 2023\), at 3:03-3:12](#). He explained that decisions of the Court of Appeals affect all Arizonans throughout the state, that justices on this Court are already retained by voters on a statewide basis, and that voters should likewise have the right to vote for court of appeals judges on a statewide basis. [Id. at 3:13-4:03](#). The House later passed H.B. 2757 and transmitted it to the Senate.

Before the Senate Committee on Judiciary, Speaker Toma explained that “when this [statute] was set up, there might have been a reason why judges were elected only in the county where they’re from, but the reality now is that the court of appeals, both Divisions, hear cases that are statewide.” [Ariz. State Senate, Comm. on Judiciary \(Mar. 23, 2023\), at 2:35-2:45](#). Speaker Toma emphasized, “It really doesn’t make any sense for residents of, say, Coconino County, to not be able to vote on a judge that hears their case.” [Id. at 2:45-3:16](#). The committee adopted a minor

technical amendment to the bill and the bill worked its way through the legislative process. On May 15, 2023, the Legislature transmitted H.B. 2757 to Governor Hobbs.

Four days later, Governor Hobbs vetoed the bill. In her veto letter, Governor Hobbs stated that “[a]llowing voters statewide to vote on whether to retain all Court of Appeals judges regardless of the judge’s Division assignment, while retaining the Division structure, would unfairly dilute the votes of those Arizonans most directly impacted by each Division’s judges.” [Veto Letter, H.B. 2757 \(May 19, 2023\)](#). The Governor’s reasoning is both illogical and wrong as a matter of law. *Extending* the right to vote in these elections to all Arizonans does not *dilute* the vote of any Arizonan. To the contrary, Arizona’s *existing* law deprives Arizonans of their constitutional rights under the Free and Equal Elections Clause, Ariz. Const. art. II, § 21, and the Equal Privileges and Immunities Clause, Ariz. Const. art. II, § 13. Petition, at 18-25.

As this Court observed a century ago, the Governor’s veto power is “essentially legislative in its nature...though negative only in character.” [Fairfield v. Foster, 25 Ariz. 146, 149 \(1923\)](#). “But this power, conferred by a Constitution, must be exercised only in the cases and the manner provided by that Constitution[.]” [Id.](#) Here, the Governor had a clear opportunity to sign a law that would have remedied a constitutional defect in a state statute. But her questionable exercise of

the veto power placed Petitioners in the unfortunate position of seeking judicial relief to vindicate their constitutional rights. Unless this Court accepts their Petition, Arizonans will continue to be wrongly disenfranchised by A.R.S. § 12-120.02.

ARGUMENT

I. **This Court Should Accept Jurisdiction to Give Meaning and Effect to the Judicial Retention Clause of Article VI, § 38 of the Arizona Constitution, Which Bolsters Petitioners’ Constitutional Claims**

Petitioners advance two compelling and meritorious arguments in their Petition. First, they contend that A.R.S. § 12-120.02 violates the Arizona Constitution’s Free and Equal Elections Clause, [Ariz. Const. art. II, § 21](#), because, *inter alia*, the statute “disenfranchises voters because it establishes geographical boundaries that have *no* relationship to the judge’s jurisdiction or authority.” Petition at 18-19. Second, they argue that A.R.S. § 12-120.02 violates the Equal Privileges and Immunities Clause, [Ariz. Const. art. II, § 13](#), because the statute “discriminates among voters based on their residency.” *Id.* at 21-25. This Court should accept jurisdiction of the Petition to enforce these declared constitutional rights that belong to all Arizonans. [See *Bristor v. Cheatham*, 75 Ariz. 227, 234 \(1953\)](#) (“It is the court’s duty to protect constitutional rights.”).

Moreover, accepting jurisdiction of the Petition would provide this Court with an opportunity to give meaning and effect to the judicial-retention clause of article VI, § 38 of the Arizona Constitution. [See *State v. Lee*, 226 Ariz. 234, 239, ¶ 11 \(App.](#)

2011) (“We read constitutional provisions as a whole, and give meaningful operation to each part in harmony with the others.”). As noted above, when voters added this provision to the Arizona Constitution, they did not create any distinctions—geographic or otherwise—between retention elections for justices on this Court and those for judges on the Arizona Court of Appeals. [Ariz. Const. art. VI, § 38](#) (requiring appellate judges to declare their desire to be retained in office with the secretary of state sixty to ninety days “prior to the regular general election next preceding the expiration of his term of office”). As Petitioners correctly note, under Arizona law, “all Arizona voters participate in retention elections for Justices on [this Court]—another unitary court with statewide jurisdiction.” Petition at 1 n.1 (citing [Ariz. Const. art. VI, § 38](#), [A.R.S. §§ 12-101](#), and [12-119.05](#)). Notably, the state law governing this Court’s retention elections mirrors the language of the judicial-retention clause of article VI, § 38. *Compare* [A.R.S. § 12-101](#) *with* [Ariz. Const. art. VI, § 38](#).

In contrast, article VI, § 37(B) states that “[j]udges of the *superior court* shall be subject to retention or rejection *by a vote of the qualified electors of the county from which they were appointed* at the general election in the manner provided by § 38 of this article.” [Ariz. Const. art. VI, § 37\(B\)](#) (emphasis added). All of these constitutional provisions together demonstrate that, when the voters adopted a merit selection process, they intended for trial court judges to be subject to retention

elections by voters in their respective counties and for all appellate judges to be retained on a statewide basis. [See Lee, 226 Ariz. at 237-38, ¶ 9](#) (“To determine the meaning of a constitutional provision, we must determine the intent of the electorate that adopted it” and “[t]he best reflection of that intent is the plain language of the provision”) (cleaned up). This makes logical sense, given the differences between the jurisdiction of a trial court and Arizona’s appellate courts and the impact of those judges’ decisions on the electorate.

Accordingly, this Court should grant review to consider Petitioners’ claims under the Free and Equal Elections Clause and Equal Privileges and Immunities Clause, and to effectuate the provisions describing appellate retention elections contained in article VI, § 38 of the Arizona Constitution.

II. This Court Should Accept Jurisdiction to Determine Whether A.R.S. § 12-120.02 Is Unconstitutional Because It Disenfranchises Voters

As Petitioners argue, A.R.S. § 12-120.02 “prevents equal elections in the state by denying all Arizona voters the right to vote on the retention of many Court of Appeals judges with jurisdiction over them, and who issue binding statewide decisions.” Petition at 1. *Amici* agree. The Legislature passed H.B. 2757 for these very reasons. *See supra*, Background.

When Governor Hobbs vetoed H.B. 2757, she asserted that some voters are more “directly impacted by each Division’s judges” than others. [Veto Letter, H.B. 2757 \(May 19, 2023\)](#). Not so. As the Petition explains, the Arizona Court of

Appeals is a “single court,” A.R.S. § 12-120(A), and its decisions “are binding on all courts and persons in the state, regardless of their geographic location.” Petition at 12 (citing A.R.S. § 12-120.07(A) and *State v. Patterson*, 222 Ariz. 574, 579-80, ¶¶ 16, 20 (App. 2009)). Simply put, “[a] decision by the Arizona Court of Appeals has statewide application.” *Scappaticci v. Sw. Sav. & Loan Ass’n*, 135 Ariz. 456, 461 (1983).

The judges on Divisions One and Two of the Arizona Court of Appeals are more integrated today than they have ever been. Particularly in recent years, three-judge panels comprised of judges on *both* Divisions One and Two have sat together to resolve appellate disputes in published and unpublished decisions—without regard to the case’s geographic origins or its subject matter. *See, e.g., State v. Scott*, 530 P.3d 1178 (Ariz. App. June 1, 2023) (criminal appeal); *In re Pima County Mental Health No. MH20220769*, No. 2 CA-MH 2022-0006, 2023 WL 1525019 (Ariz. App. Feb. 3, 2023) (mem.) (appeal from involuntary treatment order granting petition for court-ordered treatment); *In re Marriage of Nudson and Lopez*, No. 2 CA-CV 2022-0048-FC, 2023 WL 110523 (Ariz. App. Jan. 5, 2023) (mem.) (appeal from post-decree order in marital-dissolution action); *Smith v. Town of Marana*, 254 Ariz. 393 (App. 2022) (public records dispute); *Planned Parenthood Arizona, Inc. v. Brnovich*, 254 Ariz. 401 (App. 2022) (interpreting Arizona’s statutes regulating

abortion), *review granted* on August 23, 2023;¹ *In re Termination of Parental Rights as to N.M.*, No. 2 CA-JV 2022-0090, 2022 WL 17222390 (Ariz. App. Nov. 25, 2022) (termination of parental rights case arising from juvenile court); *Trails at Amber Ridge Homeowners Ass’n v. Macias*, No. 2 CA-CV 2022-0096, 2022 WL 10208498 (Ariz. App. Oct. 17, 2022) (civil case). As a matter of law, Petitioners accurately state that “the judges on both Divisions of the Court of Appeals effectively have statewide jurisdiction over parties residing in *any* county in the state.” Petition at 14.

In sum, *Amici* agree that “voters under Arizona’s current retention election scheme run the risk of being completely disenfranchised because there is no guarantee that *any* judge they vote for will sit on *any* given case.” *Id.* at 17. This Court should accept jurisdiction to consider Petitioners’ important claims and resolve the dispute between the Legislative and Executive branches over the constitutionality of A.R.S. § 12-120.02.

¹ In *Planned Parenthood*, a retired Division One judge was “called back to active duty to serve on th[e] case.” 254 Ariz. at n.1. Thus, an appeal of unquestionable statewide importance was decided by two judges on Division Two and one retired Division One judge who will not stand for any retention election.

CONCLUSION

For the reasons above, this Court should accept jurisdiction of the Petition.

RESPECTFULLY SUBMITTED this 22nd day of September, 2023.

By: /s/Linley Wilson

Linley Wilson
Arizona House of Representatives
1700 W. Washington St.
Phoenix, Arizona 85007

Counsel for Speaker Toma

/s/Rusty Crandell (w/permission)

Rusty Crandell
Arizona State Senate
1700 W. Washington St.
Phoenix, Arizona 85007

Counsel for President Petersen

*Attorneys for Amici Curiae Speaker of
the Arizona House of Representatives
and President of the Arizona Senate on
behalf of the 56th Arizona Legislature*

ARIZONA SUPREME COURT

BONNIE KNIGHT, DEBORAH
McEWEN; SARAH RAMSEY; and
LESLIE WHITE,

Petitioners,

v.

ADRIAN FONTES, in his official capacity
as Arizona Secretary of State,

Respondent.

No. CV-23-0229-SA

CERTIFICATE OF SERVICE

Linley Wilson, AZ Bar No. 027040
Arizona House of Representatives
1700 W. Washington St.
Phoenix, Arizona 85007
(602) 926-5418
LinleyWilson@azleg.gov

Counsel for Speaker Toma

Rusty Crandell, AZ Bar No. 026225
Arizona State Senate
1700 W. Washington St.
Phoenix, Arizona 85007
(602) 926-3559
Rustycrandell@azleg.gov

Counsel for President Petersen

*Attorneys for Amici Curiae Speaker of the Arizona House of Representatives and
President of the Arizona Senate on behalf of the 56th Arizona Legislature*

Counsel for *Amicus Curiae* Speaker of the Arizona House of Representatives and President of the Arizona Senate on behalf of the 56th Arizona Legislature certify that on September 22, 2023, the Amicus Brief was e-filed with the Arizona Supreme Court via Turbo Court and e-served via Turbo Court to the following:

Sharf-Norton Center for Constitutional Litigation
at the Goldwater Institute

Andrew W. Gould

Jonathan Riches

Scott Day Freeman

Parker Jackson

500 East Coronado Road

Phoenix, Arizona 85004

Litigation@goldwaterinstitute.org

awgould@outlook.com

Counsel for Petitioners

Amy Chan

Arizona Secretary of State

1700 W. Washington St. Floor 7

Phoenix, Arizona 85007

achan@azsos.gov

Counsel for Respondent

By: /s/Linley Wilson
Linley Wilson

ARIZONA SUPREME COURT

BONNIE KNIGHT, DEBORAH
McEWEN; SARAH RAMSEY; and
LESLIE WHITE,

Petitioners,

v.

ADRIAN FONTES, in his official capacity
as Arizona Secretary of State,

Respondent.

No. CV-23-0229-SA

CERTIFICATE OF COMPLIANCE

Linley Wilson, AZ Bar No. 027040
Arizona House of Representatives
1700 W. Washington St.
Phoenix, Arizona 85007
(602) 926-5418
LinleyWilson@azleg.gov

Counsel for Speaker Toma

Rusty Crandell, AZ Bar No. 026225
Arizona State Senate
1700 W. Washington St.
Phoenix, Arizona 85007
(602) 926-3559
Rustycrandell@azleg.gov

Counsel for President Petersen

*Attorneys for Amici Curiae Speaker of the Arizona House of Representatives and
President of the Arizona Senate on behalf of the 56th Arizona Legislature*

Counsel for *Amicus Curiae* Speaker of the Arizona House of Representatives and President of the Arizona Senate on behalf of the 56th Arizona Legislature certify that the Amicus Brief e-filed with the Arizona Supreme Court on September 22, 2023, is double-spaced, uses size 14 typed font, and complies with Rule 16 of the Arizona Rules of Civil Appellate Procedure and Rule 7(f) of the Arizona Rules of Procedure for Special Actions.

By: /s/Linley Wilson
Linley Wilson