Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-000431 07/29/2024

HONORABLE FRANK W. MOSKOWITZ

CLERK OF THE COURT
S. Motzer
Deputy

BONNIE KNIGHT, et al. ANDREW W GOULD

v.

ADRIAN FONTES, et al. KAREN HARTMAN-TELLEZ

EMMA H MARK
JUDGE MOSKOWITZ

MINUTE ENTRY

Pending before the Court is the State of Arizona's Motion to Dismiss Plaintiffs' Complaint ("the Motion"). It was filed on February 16, 2024. It is fully briefed. Oral argument was held on July 22, 2024.

THE COURT FINDS AS FOLLOWS:

Plaintiffs' Complaint requests that this Court find A.R.S. § 12-120.02 ("the Statute")[1] unconstitutional. More specifically, Plaintiffs argue that the Statute violates the Arizona

[1] This statute was first put in place by the Legislature in 1964. The retention election process for Court of Appeals judges under this statue has never been on a statewide basis. This statute currently provides as follows:

> **A.** In division 1, of the nineteen judges, ten of the judges shall be residents of and elected for retention from Maricopa county, five of the judges shall be residents of the remaining counties in the division and shall be elected for retention by the voters of the counties in division 1, excluding Maricopa county, and four of the judges shall be at-large judges and be residents of any county in the division. If an at-large judge is a resident of Maricopa county, the judge shall be elected for retention by the voters of Maricopa county. If an at-large judge is not a resident of Maricopa

Constitution's free and equal elections clause and the equal privileges and immunities clause because it places geographical limitations on voters. Plaintiffs argue that statewide voting in retention elections for Court of Appeals judges is constitutionally mandated.

The State of Arizona has moved to dismiss Plaintiffs' Complaint arguing that "as a matter of law, plaintiffs would not be entitled to relief under any interpretation of the facts." [*See* Motion, at p. 5] More specifically, the State argues that Plaintiffs lack standing and that the Statute does not violate Arizona's free and equal elections clause or the equal privileges and immunities clause. The State also argues that because this Court is not the legislature, it cannot order that Court of Appeals judges stand for retention elections on a statewide basis.

The Court concludes as a matter of law that the Statute does not violate Arizona's free and equal elections clause or the equal privileges and immunities clause. The Court also agrees that it cannot legislate by ordering that Court of Appeals judges must stand for statewide retention elections. It is therefore unnecessary to address the issue of standing.

The Statute Does Not Violate the Arizona Constitution's Free and Equal Elections Clause.

The issue before the Court is whether the geographical limitations on voters set forth in the Statute violates Arizona's free and equal elections clause.[2] There is no existing Arizona case law that addresses this specific question of law.

County, the judge shall be elected for retention by the voters of the counties in division 1, excluding Maricopa county.

B. In division 2, of the nine judges, four of the judges shall be residents of and elected from Pima county, two of the judges shall be residents of the remaining counties in the division and shall be elected by the voters of the counties in division 2, excluding Pima county, and three of the judges shall be at-large judges and be residents of any county in the division. If an at-large judge is a resident of Pima county, the judge shall be elected for retention by the voters of Pima county. If an at-large judge is not a resident of Pima county, the judge shall be elected for retention by the voters of the counties in division 2, excluding Pima county.

[2] The State makes a compelling argument that there is a difference between judicial retention elections and other elections. For example, retention elections do not pit one candidate against another. That said, the Court does not reach or decide whether a judicial retention election is an "election" for purposes of Arizona's free and equal elections clause. For what its worth, the Court would be concerned about whether a finding that judicial retention elections are not subject to free and equal election protections would violate public policy, let alone public trust.

As of 2009, "[t]here [was] no Arizona case law interpreting what protections the framers intended by the "free and equal" election guarantee in Article 2, section 21." *Chavez v. Brewer*, 222 Ariz. 309, 319 (App. 2009). While the Court in *Chavez* considered how other states with similar constitutional provisions interpreted "free and equal, the Cout merely concluded "that Arizona's constitutional right to a "free and equal" election is implicated when votes are not properly counted." *Id*.

In *State ex rel. Brnovich v. City of Tucson*, there was very little discussion about the breadth of Arizona's free and equal elections clause. 251 Ariz. 45 (2021). The Court simply stated that:

> the Attorney General point[ed] to nothing about off-cycle elections that erects barriers to voting or treats voters unequally. *See Arizonans for Second Chances, Rehab. & Pub. Safety v. Hobbs*, 249 Ariz. 396, 408 ¶ 41, 471 P.3d 607, 619 (2020) ("Ballot access restrictions implicate the right to vote...."); *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 33, 214 P.3d 397, 407 (App. 2009) ("Other states with similar constitutional provisions have generally interpreted a 'free and equal' election as one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot.").

Id. at 52 ¶ 30.

No other Arizona cases were provided to the Court interpreting Arizona's free and equal elections clause and the Court is not aware of any other Arizona cases.

In *Eugster v. State*, the Supreme Court of the State of Washington concluded that the State of Washington's process for electing Court of Appeals judges did not violate Washington's free and equal elections clause.[3] 259 P.3d 146 (Wash. 2011). In doing so, the Court affirmed the trial court granting a motion to dismiss and denying the plaintiff's motion for partial summary judgment on the issue. *Id*. at 151. The Court also made clear that "Washington cases have never held that article I, section 19 requires substantial numerical equality between voting districts. Rather, we have historically interpreted article I, section 19 as prohibiting the complete denial of the right to vote to a group of affected citizens." *Id*. at 150.

Here, there are no allegations about votes not being properly counted, ballot access restrictions, intimidation or threats of violence, or any other influence that would deter a voter from exercising free will, or that each vote is not given the same weight as every other ballot.

[3] Washington and Arizona have identical free and equal elections clauses in their respective Constitutions.

There is, however, a conclusory allegation that the retention election of Court of Appeals judges as set forth in the Statute treats voters unequally "by denying Arizona voters the right to vote on the retention of Court of Appeals judges with appellate jurisdiction over them." [*See* Plaintiff's Complaint, at ¶ 5][4] The Statute, which is also referenced in Plaintiffs' Complaint, belies this allegation. It specifically gives all Arizona voters the right to vote for those Court of Appeals judges that are up for retention election in the voters' respective counties. It treats all similarly situated voters in each county the same. No voter is completely denied the right to vote. It just means that not all Arizona voters will be able to vote on all Court of Appeals judges up for retention elections. Thus, the issue becomes whether that is "equal" for purposes of Arizona's free and equal elections clause.

Plaintiffs argue that it is not "equal" because the Court of Appeals has "statewide jurisdiction."[5] According to Plaintiffs, if the Court of Appeals has such jurisdiction, then voters statewide should be able to vote on all Court of Appeals judges that are up for retention elections. The problem with that argument is two-fold.

First, the Arizona Constitution already provides that not all judges serving on the Court of Appeals will be voted on by all Arizona voters and, in some instances, any Arizona voters.

For example, the Arizona Constitution provides that "[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. Thus, any such retired justice or judge may serve on the Court of Appeals and no voter will ever vote on them. No relief requested in the Plaintiffs' Complaint would remedy that outcome.

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[4] "[M]ere conclusory statements are insufficient to state a claim upon which relief can be granted. The inclusion of conclusory statements does not invalidate a complaint, but a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008) (citation omitted).

[5] It is not clear how Plaintiffs are using the term "statewide jurisdiction." Although established as "a single court," the Court of Appeals is divided into two divisions, division 1 and division 2. *See* A.R.S. § 120. Those divisions are comprised of different counties in Arizona. *Id*. Court of Appeals decisions have statewide impact and "[w]hen confronted with conflicting decisions by different departments of [the Court of Appeals], a trial court must use its discretion to adopt the decision that most persuasively interprets the law, regardless of the division to which the department making the decision belongs or within which the trial court sits." *State v. Patterson*, 222 Ariz. 574, 580 (App. 2009).

The Arizona Constitution also provides that the Chief Justice of the Arizona 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. That means, for example, that the Chief Justice could assign a Pima County Superior Court judge to serve on a case(s) pending before Division 1 of the Court of Appeals. When that Pima County Superior Court Judge subsequently comes up for a retention election in Pima County, all the voters in the Division 1 counties, including Maricopa and Yuma Counties,[6] would be treated equally – none would be able to vote in the retention election of that Pima County Superior Court judge who had decided a case(s) as a judge on Division 1 of the Court of Appeals. The same would be true if the Chief Justice appointed a Maricopa County Superior Court Judge to hear a case(s) on Division 2 of the Court of Appeals. When that Maricopa County Superior Court Judge subsequently comes up for a retention election in Maricopa County, all the voters in the Division 2 counties, including Santa Cruz and Pima Counties,[7] would be treated equally – none would be able to vote in the retention election of that Maricopa County Superior Court judge who had decided a case(s) as a judge on Division 2 of the Court of Appeals. No relief requested in the Plaintiffs' Complaint would remedy those outcomes.

Second, the Superior Court has "statewide jurisdiction,"[8] and the Arizona Constitution mandates that retention elections for Superior Court judges are held only in the respective counties in which the Superior Court judges were appointed. *See* Ariz. Const. art. VI, § 13. Since the Arizona Constitution recognizes that statewide jurisdiction does not mandate statewide retention elections for Superior Court judges, Plaintiffs' argument that statewide jurisdiction constitutionally mandates statewide retention elections for Court of Appeals judges fails. It would

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[6] Plaintiffs Leslie White and Bonnie Knight reside in Maricopa and Yuma Counties, respectively.

[7] Plaintiffs Deborah McEwen and Sarah Ramsey resides in Santa Cruz and Pima Counties, respectively.

[8] Just like the Court of Appeals, the Superior Court was established as a "single court:"

> [t]he Arizona Constitution creates superior courts in each county of the state that together "constitute a single court." Ariz. Const. art. 6, § 13. Although each superior court can have departments and divisions to manage cases, "the superior court is not a system of jurisdictionally segregated departments but rather a 'single unified trial court of general jurisdiction.' " *State v. Marks,* 186 Ariz. 139, 142, 920 P.2d 19, 22 (App.1996) (quoting *Marvin Johnson, P.C. v. Myers,* 184 Ariz. 98, 102, 907 P.2d 67, 71 (1995)); *see also Peterson v. Speakman,* 49 Ariz. 342, 348, 66 P.2d 1023, 1025 (1937) ("Its separation into divisions is purely imaginary and for convenience only. The jurisdiction of the court, no matter by which judge it is exercised, is that of the whole court, and not of one judge nor division thereof.").

Patterson, 222 Ariz. at 580 n. 7. And, like the Court of Appeals, Superior Court decisions can have statewide impact, such as in statewide election contests and cases like this that determine who and/or what will be included on a statewide ballot. Superior Court judges also have statewide jurisdiction to issue trial subpoenas. *See* Rule 45(b)(3)(A), Ariz. R. Civ. Pro. (stating "[s]ubject to Rule 45(e)(2)(B)(ii), a subpoena commanding attendance at a trial may require the subpoenaed person to travel for anywhere within the state.").

be inconsistent that geographical limitations on voters in Superior Court retention elections are constitutional, but any such limitations on voters in Court of Appeals retention elections are unconstitutional.

This Court can readily harmonize Article VI, §§ 3, 13, and 20 of the Arizona Constitution with the free and equal elections clause. First, an "equal" retention election for Court of Appeals judges is not defined by the Court's "statewide jurisdiction." Second, "equal" does not mean that all Arizona voters will be able to vote on all Court of Appeals judges up for retention.[9] *See Burns v. Arizona Pub. Serv. Co.,* 254 Ariz. 24, 31(2022) (stating that "[w]e do not read separate constitutional provisions to determine which prevails over the other; rather, we read them to harmonize the provisions and give effect to each.").

For these reasons, the Statute does not violate the Arizona Constitution's free and equal elections clause.

The Statute Does Not Violate the Arizona Constitution's Equal Privileges and Immunities Clause.

Plaintiffs argue that Arizona's equal privileges and immunities clause provides broader protection than its federal counterpart.[10] The State disagrees and cites to a number of cases, including *Chavez*, 222 Ariz. at 320 (stating that "Article 2, Section 13, Arizona's Privileges or Immunities Clause, provides: 'No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.' It is substantially the same in effect as the Equal Protection Clause in the United States Constitution."). The Court agrees with the State.

But even if Plaintiffs were correct, under any constitutional equal protection analysis, the Statute treats all similarly situated voters in their respective counties equally. When a party is asserting an equal protection violation, but cannot demonstrate that one class is treated differently

[9] This is not a novel concept. Legislators make statewide decisions and not every voter in Arizona gets to vote for every legislator. There are geographical limitations on voters.

[10] The State also argues that the equal privileges and immunities clause does not apply to judicial retention elections. The State cites to Chisom *v. Roemer,* 501 U.S. 380, 402 (1991) and *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) for the proposition that the "one person, one vote rule [is] inapplicable to judicial elections." The State argues that if the federal Equal Protection Clause has been held not to apply to a judicial election, it equally stands to reason that it would not apply to a judicial retention election. And, if the federal Equal Protection Clause does not apply to a judicial retention election, then, the State argues, the same is true with regard to Arizona's equal privileges and immunities clause. The Court does not reach this issue and does not need to in order to grant the Motion.

from another similarly situated 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, (App. 2014). Thus, this Court need not reach or decide whether the Statute withstands any scrutiny, rational basis or strict.

For these reasons, the Statue does not violate the Arizona Constitution's equal privileges and immunities Clause.

IT IS THEREFORE ORDERED granting the Motion.

IT IS FURTHER ORDERED that Defendant State of Arizona shall file a proposed form of Judgment by no later than August 5, 2024.