IN THE SUPREME COURT

STATE OF ARIZONA

PROGRESS ARIZONA, *et al.*, Plaintiffs/Appellants, v. STATE OF ARIZONA, *et al.*, Defendants/Appellees.	No. CV-24-0179-AP/EL Maricopa County Superior Court No. CV2024-016113

ANSWERING BRIEF OF INTERVENOR-APPELLEES

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Intervenor-Appellees Ben Toma, in his official capacity as Speaker of the Arizona House of Representatives, and Warren Petersen, in his official capacity as President of the Arizona State Senate, respectfully submit this Answering Brief. As the trial court recognized, the provisions of Senate Concurrent Resolution 1044 are facially, historically, and conceptually interrelated components of a unitary public policy topic—to wit, "the timing and functioning of retention elections," and hence constitute a single proposed amendment to the Arizona Constitution. This Court should affirm its well-reasoned judgment.

STATEMENT OF THE CASE

For the last fifty years, Arizona has maintained a merit selection process for justices of the Supreme Court, judges of the Court of Appeals, and judges of Superior Court divisions in certain counties. Under this system, non-partisan nominating commissions composed of attorney and non-attorney members confirmed by the Arizona Senate assess candidates for judicial vacancies and make recommendations to the Governor, who chooses an appointee. *See* ARIZ. CONST. art. VI, §§ 36, 40, 41. Judges and justices selected through this process serve staggered, periodic terms—four years for Superior Court judges and six years for appellate court jurists, *see id.* §§ 4, 12; A.R.S. § 12-120.01(B)—and are subject to retention votes by the electorate. If a majority of those casting ballots on the question vote "yes," a judge or justice may continue in office for an additional term. All justices and judges

standing for retention are evaluated by the Commission on Judicial Performance Review ("JPRC"). *See* ARIZ. CONST. art. VI, §§ 38, 42.

The State's growing population has necessitated a commensurate increase in the ranks of judges, which, in turn, has led to a proliferation of retention questions on each general election ballot. In addition to imposing cost and logistical burdens, burgeoning ballots have the perverse effect of diluting accountability by allowing the small number of judges whose performance may be substandard to camouflage themselves in a lengthy roster of other jurists.

To address these issues, the Legislature has proposed SCR1044 to the statewide electorate in the November 2024 general election. SCR1044 permits all judges and justices appointed through the merit selection process to serve during a term of good behavior (subject to the mandatory retirement age and removal through the impeachment process), but it prescribes that certain conduct or occurrences will trigger a retention election. Specifically, a judge or justice must stand before the voters if he or she (1) is convicted of a felony offense or of any crime involving fraud or dishonesty, (2) initiates personal bankruptcy proceedings, (3) is the mortgagor in a foreclosure proceeding, or (4) is found by the JPRC not to have met judicial performance standards. *See* SCR1044, §§ 1–7. SCR1044 maintains the JPRC review process but provides for the addition of two members appointed by each legislative chamber, respectively, and authorizes legislators to request JPRC

investigations of judges who may have engaged in a pattern of malfeasance. *See id.* § 8.

ARGUMENT

SCR1044's eight sections are topically, facially, textually, historically, and qualitatively intertwined components of a discrete proposal relating to the judicial retention process.

I. Overview of the Separate Amendment Rule

Article XXI, Section 1 of the Arizona Constitution provides, in relevant part, that "[i]f more than one proposed amendment is submitted at any election, the proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately." This so-called Separate Amendment Rule prohibits welding independent and disjointed policy ideas into a single constitutional amendment.

Stated another way, the Separate Amendment Rule requires the constituent provisions of a measure to be "sufficiently related to a common purpose or principle that the proposal can be said to 'constitute a consistent and workable whole on the general topic embraced,' that, 'logically speaking, . . . should stand or fall as a whole.'" *Korte v. Bayless*, 199 Ariz. 173, 177, ¶ 10 (2001) (citations omitted).

This Court has distilled that general rubric into two distinct facets. First, the provisions of a proposed amendment must be "topically related." Second, the

provisions also must be "sufficiently interrelated" to each other. *Arizona Together v. Brewer*, 214 Ariz. 118, 121, ¶ 6 (2007). SCR1044 comports with both elements.

Notably, the Appellants have never directly disputed the topical relatedness that underlies SCR1044's eight sections, and even conceded in the trial court that "its provisions may be topically related under the general topic of the 'judiciary.'" Pl. Reply to Intervenors' Response for Preliminary Injunction (Jul. 11, 2024) at 1–2. By not developing any articulable "topicality" challenge to SCR1044 either in the trial court or in their opening brief, the Appellants have waived any ostensible claim under that prong of the Separate Amendment Rule. *See McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5 (1997) (noting that certain "challenges were not properly raised below and thus we do not consider them here"); *United Bank v. Mesa N.O. Nelson Co.*, 121 Ariz. 438, 443 (1979) (court will not consider an argument "first presented in [a] reply brief"). In any event, the trial court's finding that all of SCR1044's provisions "address the mechanisms and timing of retention elections" [Ruling at 3], and hence are topically related, was well-founded.

This appeal accordingly pivots only on SCR1044's compliance with the "interrelatedness" dimension of this Court's test.

II. SCR1044's Provisions Are Interrelated with Each Other

The trial court properly concluded that section 8 of SCR1044, which pertains to the JPRC's composition and duties, is interrelated with the preceding seven

sections. The "sufficient interrelatedness" inquiry examines the relationship of the amendment's provisions to one another by assessing "objective factors," such as whether the provisions (1) "are facially related," (2) "concern a single section of the constitution," (3) have been "historically . . . treated" as a single subject, and (4) "are qualitatively similar in their effect on either procedural or substantive law." *Arizona Together*, 214 Ariz. at 122, ¶ 10. The inquiry entails a "balanc[ing]" of considerations, rather than a binary "strict rule." *Id.*

A. Facial Relatedness

The ligature connecting section 8 to the remaining provisions of SCR1044—namely, the role of the JPRC in judicial retention elections—is direct and explicit. SCR1044 devises several conditions that will trigger a retention vote, to include "a determination pursuant to section 42 of this article, by a majority of all members of the [JPRC], that the justice or judge does not meet judicial performance standards." SCR1044, § 5. Section 8 of SCR1044, in turn, amends section 42 of Article VI to (i) provide that the JPRC must include two members appointed by the Legislature and (ii) authorize the initiation of JPRC investigations at a legislator's request, which may or may not result in findings that require a retention election. The Court need not infer a relationship between these provisions; it is enunciated explicitly on their face. *See Arizona Together*, 214 Ariz. at 122, ¶ 11 (provision defining marriage was facially related to provision prohibiting legal recognition for other types of

relationships). All of SCR1044's provisions relate to procedures for determining when judges would be subject to a retention vote.

Amicus Civic Engagement Beyond Voting ("CEBV") attempts to contrive an internal differentiation between "the *when* and *why* judges should sit for retention," (*i.e.*, sections 1 through 7), and "*who* can sit on the JPRC" and "force the JPRC" to initiate investigations (*i.e.*, section 8). CEBV Br. at 6. But even accepting for the moment the conceptual validity of CEBV's haphazard when/why/who trichotomy, SCR1044's provisions are, in fact, facially interrelated. The results of a JPRC investigation pursuant to section 8 can directly and immediately determine "who" sits for a retention election and "why" (namely, judges found not to "meet judicial standards") and "when" they will do so (namely, in the next ensuing general election). Indeed, section 5 expressly cross-references section 8 when itemizing the triggers for a retention election. This is the quintessence of a facial interrelationship.[1]

[1] The contrast to *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241 (2004), is telling. There, the Court could identify no common purpose between ending taxpayer funding of certain candidate campaigns and the effective defunding of wholly unrelated voter education and enforcement duties conducted by the Citizens Clean Elections Commission. *See id.* at 246, ¶¶ 18–20. SCR1044, however, expressly and functionally binds the JPRC investigative and review responsibilities denoted in section 8 with the retention election prerequisites prescribed in the remaining provisions.

B. Textual Relatedness

SCR1044's textual scope is confined to a single article (namely, Article VI) of the Arizona Constitution, and more specifically to provisions in that article that relate to judicial retention. While SCR1044 implicates multiple sections of Article VI, the Separate Amendment Rule does not arbitrarily constrict amendments to a one-section cap. *See Korte*, 199 Ariz. at 175, 176, ¶¶ 5, 8 (sustaining initiative that changed six sections and added three more). Because SCR1044 amends only those sections of Article VI that relate to retention elections, SCR1044's multi-section character does not run afoul of the Separate Amendment Rule.

The trial court appeared to agree that SCR1044 is, on its face, properly confined to Article VI, but added that it "also concern[s] Article III, § 1" because (according to the trial court) it "inserts the legislature into the functions of the judiciary." Ruling at 4.[2] Preliminarily, the Appellees agree that, in principle, a proposed amendment can exert substantive, albeit indirect, changes to constitutional provisions not explicitly incorporated into its text. The Court accordingly can and does consider such externalities in its Separate Amendment Rule analysis. *See McLaughlin*, 225 Ariz. at 355, ¶ 16. But the Appellant's gambit to thwart a statewide

[2] This Court has previously assessed a proposed amendment's interplay with extrinsic constitutional provisions as part of the "qualitative interrelatedness" prong. *See McLaughlin v. Bennett*, 225 Ariz. 351, 355, ¶¶ 15–16 (2010). Because the trial court integrated this inquiry into the "textual interrelatedness" element, though, this brief follows suit.

vote on SCR1044 on the theory that it implicitly amends Article III flounders for three reasons.

First, SCR1044 does not directly or indirectly transplant any component of the judicial power to the legislative branch. Section 8 authorizes members of the Legislature to (a) appoint two members to the JPRC, and (b) file complaints that, in turn, initiate JPRC investigations. The former clause simply allows two individuals chosen by the Legislature—who may not necessarily be legislators themselves and who certainly would not possess any authority to speak or act for the Legislature as an institution—to serve as an almost negligible minority of what is currently a 34-member body. The legislative appointees cannot, on their own, effectuate any substantive JPRC action. *Contrast State ex rel. Woods v. Block*, 189 Ariz. 269, 276, 277 (1997) (finding separation of powers problem where Legislature "appoint[ed] the controlling majority of the voting members" of a council that performed executive functions, which distinguished it from a "cooperative venture" between two branches).

Similarly, this Court has expressly held that a legislator's ability to merely instigate an investigation does not partake of any other branch's powers. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593, ¶ 15 (2017) (noting that "neither the requesting legislator(s) nor the legislature as a whole controls the 'exercise' of the executive branch's investigative and enforcement power'" by

initiating an inquiry). And a determination under section 8 that an investigated judge "does not meet judicial performance standards"—which, it bears emphasis, requires a majority vote of the full JPRC—operates simply as an opinion conveyed to the voters, who will decide the judge's continued fitness for office in a resulting retention election. Thus, even a JPRC finding of substandard performance does not entail the exercise of a judicial power. *See City of Tucson*, 242 Ariz. at 594, ¶ 19 ("The Attorney General is not exercising a judicial function" when issuing "legal opinions"). The Appellants' and CEBV's fevered declamations that section 8 "dramatically" [Op. Br. at 12] and "radically" [CEBV Br. at 10] upends the inter-branch dispersion of power find easy refutation in SCR1044's actual text.

Second, even assuming *arguendo* that SCR1044 does implicitly apportion some measure of "judicial" power to the legislative branch, any such incidental reallocation is interrelated with SCR1044's other procedural judicial retention election reforms. *See Slayton v. Shumway*, 166 Ariz. 87 (1990). The plaintiff in *Slayton* contended that a "Victims' Bill of Rights" initiative's proposed transfer of rulemaking authority from the judiciary to the legislative branch departed significantly from the initiative's other provisions. But this Court disagreed, explaining that whatever interbranch recalibration of power the initiative entailed "deal[t] only with procedural rules pertaining to victims and not with the substantive general subject of the rulemaking power." *Id.* at 92. That reasoning adapts easily to

this case. SCR1044 does not imbue the Legislature with "control" over the judiciary or, as the trial court said, "strip[]" this Court of any appointment authority. Rather, it simply authorizes each chamber to make a single appointment to a large, multimember commission, and allows legislators to request JPRC investigations, which may or may not result in a retention vote. Whatever incidental adjustments to the interbranch equilibrium this provision contemplates are directly and solely in furtherance of all eight provisions' "common purpose," *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 151, ¶ 21 (2013), of reforming constitutional procedures for retaining judges.

Third, even if the trial court's view that SCR1044 "concerns" Article III were correct (and it was not), it properly found that the overall "balance," *Arizona Together*, 214 Ariz. at 122, ¶ 10, of relevant factors validated section 8's interrelatedness with SCR1044's other seven provisions.

C. Historical Relatedness

The trial court rightly recognized that SCR1044 aligns with the historical treatment of Arizona's judicial branch as a unitary constitutional structure. The electorate adopted the modern incarnation of Article VI as a single, 35-section proposition in the November 1960 general election. *See* Ariz. Sec'y of State, 1960 Initiative & Referendum Publicity Pamphlet 7–14, *available at* https://azmemory.azlibrary.gov/nodes/view/102816. Fourteen years later, an

amendment established judicial nominating commissions and required periodic retention elections for appellate court and some trial court jurists. *See* Ariz. Sec'y of State, 1974 Initiative & Referendum Publicity Pamphlet 25–29, *available at* https://azmemory.azlibrary.gov/nodes/view/102825. Notably, the Legislature has been integral to the merit selection process since its creation; appointments to the appellate and trial court commissions are contingent upon Senate confirmation. *See* ARIZ. CONST. art. VI, §§ 36, 41. Embedded in Appellants' position that the introduction of any legislative branch participation in judicial personnel processes must be presented as a standalone constitutional amendment is the extraordinary—and untenable—corollary that the entire merit selection regime has been constitutionally defective since its inception fifty years ago.

Further, the current section 42 of Article VI—which created the JPRC—was merely one provision of Proposition 109 (1992), which changed eight existing sections of Article VI and added two more. Significantly, Proposition 109 also addressed the filling of judicial vacancies, altered the composition of the Commission on Appellate Court Appointments, and created a new judicial selection process for counties having populations of 250,000 or more. *See* Ariz. Sec'y of

State, 1992 Initiative & Referendum Publicity Pamphlet 51–57, *available at* https://azmemory.azlibrary.gov/nodes/view/102835.[3]

This lineage of amendments underscores that the various components of the judicial retention system—including the length of judicial terms, the process for retention elections, and the composition of commissions responsible for judicial selection and oversight—have consistently been regarded as integrally intertwined with each other. *See State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 397 (1953) (holding that amendment that changed the composition of both the House and the Senate complied with the Separate Amendment Rule, noting that voters have historically "treat[ed] their legislature as a single subject in constitutional amendments").

D. Qualitative Relatedness

The conceptual axis uniting SCR1044's eight provisions is the process for accountability through retention elections for members of the judicial branch. *See*

[3] CEBV's assertion [at 8] that Proposition 109 "did not touch the terms or timing of retention elections" is not entirely correct. Section 1 of the amendment changed the population thresholds that determine whether a county directly elects its superior court judges or instead employs the merit selection process (including periodic retention elections). More generally, any dearth of proposed amendments to Article VI since the JPRC's creation in 1992 establishes merely an *absence* of evidence for Appellants' theory that SCR1044 is *not* consistent with the historical treatment of this facet of the constitution. *See Arizona Together*, 214 Ariz. at 122–23, ¶¶ 13, 15 (lack of precedent simply meant that the Court could "find little guidance from this factor"). It does not somehow affirmatively impugn SCR1044's compliance with the Separate Amendment Rule.

Arizona Together, 214 Ariz. at 122, ¶ 10 (provisions that are "qualitatively similar in their effect on either procedural or substantive law" are likely to be interrelated). SCR1044 charges the JPRC with determining whether adequate grounds exist for referring a given justice or judge to a retention vote. *See* SCR1044, § 5. Section 8, in turn, accommodates the JPRC's augmented responsibility with two additional members, and allows legislators to request investigations that may (or may not) culminate in a retention vote.

In other words, the JPRC investigation and review processes modified in section 8 "derive meaning and effect from," *Arizona Together*, 214 Ariz. at 123, ¶ 17, sections 1 through 7's prescription of retention election triggers that depend in part on the outcome of these JPRC proceedings. The legal and practical interplay between these provisions hence is unmistakable. *See Save Our Vote*, 231 Ariz. at 348, ¶ 19 (provision allowing open primary elections was "qualitatively similar" to provision banning public funding for political party activities); *Tilson v. Mofford*, 153 Ariz. 468, 472 (1987) (provisions of amendment had the common purpose of "regulat[ing] tort awards"); *contrast McLaughlin*, 225 Ariz. at 355, ¶ 17 (initiative provisions relating to public elections and labor union elections operated independently of each other).

* * *

In sum, SCR1044 easily comports with the Separate Amendment Rule. Its provisions relate to one topic: the procedures governing judicial retention elections. In addition, its provisions are facially, textually, and functionally interrelated with each other by addressing overlapping components of a single "common purpose or principle," *Arizona Together*, 214 Ariz. at 121, ¶ 6—to wit, reforming judicial retention election procedures by modifying JPRC investigation and review processes (section 8) that, in turn, may precipitate a retention vote (sections 1–7). SCR1044 also maintains fidelity to Article VI's historical evolution, which has always featured complementary changes to judicial selection and retention processes integrated into a single amendment. By likewise proposing "a multifaceted approach to a single, reasonably narrow purpose," *Korte*, 199 Ariz. at 178, ¶ 15, SCR1044 embodies one, internally cohesive amendment to the Arizona Constitution.

CONCLUSION

The Court should affirm the trial court's judgment.

RESPECTFULLY SUBMITTED this 16th day of August, 2024.

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