ARIZONA SUPREME COURT

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

BRIEF OF AMICUS CURIAE CIVIC ENGAGEMENT BEYOND VOTING IN SUPPORT OF PLAINTIFFS/APPELLANTS

FILED WITH CONSENT OF THE PARTIES

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Introduction

The Separate Amendment Rule "serves a gatekeeping function by protecting the integrity of the constitutional amendment process from the 'pernicious practice of logrolling.'" *Arizona Together v. Brewer*, 214 Ariz. 118, 120 ¶ 3 (2007) (cleaned up). Amendments to our Constitution "should represent the free and mature judgment of the electors," and voters "cannot be constrained to adopt measures of which in reality they disapprove, in order to secure the enactment of others they earnestly desire." *Id.* (citations omitted).

SCR 1044 violates the Separate Amendment Rule by combining (1) a change to when judges and justices must stand for retention, and (2) an unprecedented insertion of the legislature into the functions of the judiciary. This is the precise type of logrolling our framers sought to prevent when adopting the Separate Amendment Rule. Whatever the wisdom of these discordant subjects, the people of Arizona have the right to vote separately on whether each of these changes should be enshrined in our Constitution.

As detailed by Appellants and below, voters who support one component of SCR 1044 but not another should have the chance to vote

up or down on each, and the Separate Amendment Rule guarantees just that. This Court should thus reverse the trial court's judgment and enjoin the Secretary from placing SCR 1044 on the general election ballot.

Interest and Identity of Amicus

Amicus Curiae Civic Engagement Beyond Voting ("CEBV") is a nonpartisan 501(c)(4) social welfare organization that works to engage everyday Arizonans with their state and local governments. CEBV works to maximize the rights of the people to have a voice in the democratic process and ensure that public officials – no matter the role they serve – are accountable to the people they serve. CEBV supports Arizona's merit selection and judicial retention system, which extends nonpartisan public accountability to the judiciary. CEBV also supports the direct democracy provisions of the Arizona Constitution and believes that provisions such as the Separate Amendment Rule help protect these rights from abuse.

Argument

As SCR 1044 made its way through the legislative process, all understood its purpose: to eliminate judicial retention elections on a set schedule for all, and instead require them only when judges and justices engage in certain identified conduct. SCR 1044 (at § 10) identifies this

purpose in legislative findings that say nothing about giving the Legislature a role in either the composition or role of Judicial Performance Review Commission (JPRC).[1]

But a late amendment offered by Representative Alexander Kolodin added a new section that would fundamentally alter the JPRC by (1) enabling the Legislature to appoint two JPRC members, and (2) empowering any legislator to compel JPRC to investigate any judge or justice. Bundling these discordant provisions together in a single legislative referral violates the Separate Amendment Rule. Ariz. Const. art 21, § 1.

[1] Section 10 provides the following findings of the "People of the State of Arizona": (1) judicial retention elections occur too frequently or infrequently, depending on the conduct of the judge; (2) voters almost always retain judges in retention elections; (3) having too many retention elections on the ballot increases the cost of elections and the length and complexity of ballots; (4) voters will be able to focus on judges whose conduct falls below objective standards; and (5) amending the process of retention elections will ensure accountability and increase efficiency.

I. Eliminating Judicial Retention as We Know it and Giving the Legislature a Role on JPRC are Two Separate Proposed Amendments.

A. Topicality is not enough.

The lynchpin of any Separate Amendment Rule challenge is "whether the provisions of a proposed amendment 'are 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.'" *Arizona Together*, 214 Ariz. at 121 ¶ 5 (cleaned up). In answering that question and determining whether a challenged measure passes constitutional muster, this Court looks to "(1) whether a proposition's provisions are '*topically related,*' and (2) whether they are '*sufficiently interrelated* so as to form a consistent and workable proposition.'" *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 8 (2010) (cleaned up).

The answers to both questions must be "yes," meaning that topicality alone doesn't suffice. A measure's provisions must "exhibit both topicality *and* interrelatedness' to comply with the separate amendment rule." *Id.* (emphasis added). To assess whether the provisions are sufficiently interrelated, courts consider the following factors:

> Whether various provisions are [1] facially related, [2] whether all the matters addressed by the proposition concern a single section of the constitution, [3] whether the voters or the legislature historically has treated the matters addressed as one subject, and [4] whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.

Id. ¶ 10 (cleaned up).

The trial court held that Section 8 of SCR 1044 is topically related to Sections 1-7 because all pertain to retention elections and what should (or, better stated, might) trigger them. And it proceeded to both misunderstand and misapply to the four-factor test set forth above, then. Under a proper analysis, SCR 1044 fails all four factors of the interrelatedness test.

1. Section 8 is not facially related to the balance of SCR 1044.

The trial court said (at 4) that "[w]hile distinct from topically related, facially related is akin to topically related." It then essentially repeated the same findings that led it to conclude the provisions were topically related and found they also established that they were facially related. *Id*. This was clear error.

In *McLaughlin*, this Court considered a measure that required secret ballots in public elections and union elections. Though both

provisions were "topically" related to secret ballots, this Court rejected the contention that this necessarily made them also "facially related." *McLaughlin*, 225 Ariz. at 355 ¶ 12. "The type of 'facial relatedness' [proponent] urges would reduce that component of the 'interrelatedness' test to a mere repetition of the topicality requirements." *Id.* This Court explained that the different contexts between the measure's provisions were *not* facially related.

Sections 1-7 of SCR 1044 – confirmed by Section 10's findings – establish the *when* and *why* judges should sit for retention. But apart from that process, Section 8 eviscerates the longstanding separation between judicial and legislative functions by altering *who* can sit on the JPRC (currently determined exclusively by the judiciary) and *who* can force the JPRC to investigate any sitting judge or justice for an undefined "pattern of malfeasance." To be sure, the Separate Amendment Rule doesn't require complete overlap of a proposition's provisions. But "'[d]ifferences between the two contexts' are pertinent to the inquiry on interrelatedness . . . ." *Id.* The different contexts of Sections 1-7 and Section 8, though housed under the expansive tent of retention, render them facially distinct.

2. SCR 1044 "Concerns" Multiple Sections of the Constitution.

As the trial court described (at 4), "[t]he text of the proposed amendments purport to only amend Article VI of the Arizona Constitution." But the trial court correctly found (*id.*) that SCR 1044 also concerns article III, Ariz. Const., which establishes the separation of powers:

> Historically, the creation and the operation of the JPRC has been conducted entirely within the confines of the judicial branch. . . .
>
> **Section 8 of SCR 1044 inserts the legislature into the functions of the judiciary**. **The Arizona Supreme Court will be stripped of the authority to appoint members to the JPRC**. The two legislative houses are now granted the authority to place their members on this committee. **The Arizona Supreme Court will be stripped of its authority to make rules for the JPRC**. Instead, any member of either house of the legislature can call for an investigation into a sitting . . . judge. Further, the JPRC is required to engage in this investigation. **Meaning at any time, any member of the Arizona Legislature could force the judicial branch into investigating itself with the assistance of two members of the legislature.**

(Emphasis added). This factor weighs heavily in favor of a Single Amendment Rule violation.[2]

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[2] *See also* Ariz. Const. art. VI.1 (establishing a constitutional mechanism for policing the conduct and performance of sitting judges).

3. The provisions of SCR 1044 have not been treated as the same subject matter.

Contrary to the trial court's finding (at 5), neither the People nor the Legislature has historically treated "retention elections and the operation of the JPRC" as "involving the same subject matter."[3]

In 1974, the People went to the polls and amended the Constitution to require the merit selection of certain judges. *See* Ariz. Sec'y of State, 1974 Initiative & Referendum Publicity Pamphlet 25-29, *available at* https://azmemory.azlibrary.gov/nodes/view/102825. But it wasn't until almost two decades later, in 1992, when the People stepped in again to create the JPRC. Ariz. Sec'y of State, 1992 Initiative & Referendum Publicity Pamphlet 58, *available at* https://azmemory.azlibrary.gov/nodes/view/102835. And though the 1992 amendments dealt with other topics affecting the judiciary, it did not touch the terms or timing of retention elections. The trial court's linkage of the two thus has no basis. And beyond that, the 1992 amendments said nothing about the Legislature's involvement in JPRC, but left the

3 The trial court (at 5) referenced "the adoption of the Modern Courts Amendment in 1960; the 1974 amendments which related to retention elections; and the multiple amendments to Article VI in 1992, which included the rules allowing for the creation of JPRC."

operation of the judiciary up to the judiciary ("The Supreme Court shall adopt . . . a process, established by court rules for evaluating judicial performance."). *See* Ariz. Sec'y of State, 1992 Initiative & Referendum Publicity Pamphlet 51-57, *available at* https://azmemory.azlibrary.gov/nodes/view/102835.

4. The Provisions of SCR 1044 are not "qualitatively similar."

Finally, SCR 1044's provisions are not "qualitatively similar in their effect on the law." *Arizona Together*, 214 Ariz. at 123 ¶¶ 16-17. Sections 1-7 deal with judicial terms and when judges must sit for retention. And Section 8 changes the makeup of the JPRC and injects the legislature into the workings of the judiciary.

In *Slayton v. Shumway*, 166 Ariz. 87 (1990), this Court considered a Separate Amendment Rule challenge to what we now know as the Victims' Bill of Rights. Several provisions of that measure pertained to victims' procedural rights in the criminal justice system, and one final provision dealt with rulemaking authority for court proceedings (which is this Court's exclusive province with limited exception). That final provision, if read broadly, would "transfer rulemaking authority in all criminal proceedings from the court to the legislature," a "radical

departure from our practice." *Slayton*, 166 Ariz. at 89. The Court explained that such a reading of the measure would violate the Separate Amendment Rule in part because providing procedural protections to crime victims is qualitatively different from "destroying the separation of powers." *Id.* at 192. To avoid a constitutional violation, this Court adopted a narrow construction of the measure. *Id.*

Here, no "alternative" construction can solve Section 8's inherent separation of powers issue. Stripping this Court's exclusive power to appoint JPRC members and control its rules about membership and judicial investigations, and transferring those powers to the Legislature is radically different from simply changing *when* or *why* judicial officers must stand for retention.

This Court appoints JPRC members under rules intended to "promote fairness and public confidence in the Commission," and that identify qualifying factors including "outstanding competence and reputation" and being "held in high esteem by their personal and professional communities." Rule 2(b), (c)(1)-(2), R. P. Jud. Per. Rev.

Those Rules also *require* recusal of JPRC members for "political considerations" and *preclude* "outside influence," which is defined to

include "political considerations." Rule 9, R. P. Jud. Per. Rev; *see also* Rule 10, R. P. Jud. Per. Rev (judges being reviewed may challenge members of the JPRC for cause based on "conflict of interest, bias, or prejudice.").

Granting the Legislature unfettered discretion to appoint two JPRC members and allowing any disgruntled legislator to compel the JPRC to investigate any sitting judge would cause a sea change in the Committee's make-up and operation.

II. Requiring a single vote on the disparate provisions of SCR 1044 constitutes impermissible logrolling.

The trial court also erred by ignoring the Separate Amendment Rule's purpose to justify the legislative mischief it blessed. As the trial court declared (at 5-6): "All is laid bare for decision by the people. . . . They will either reject SCR or adopt it fully aware of [1] the modification of their right to vote for judges and [2] of the intrusion into the independence of the judiciary." And while acknowledging this may be a difficult decision for voters, the trial court gave the back of the hand to logrolling concerns because "any [such] concerns related to Section 8 are well within the knowledge of the voter based on the text of the amendment." *Id.*

But the question is not whether voters could understand the disparate parts of SCR 1044 if they read the entire proposition; it's whether those separate parts are related enough that it's fair and reasonable to ask voters to approve them as a single, take-it-or-leave-it package. When this Court struck down the measure in *McLaughlin*, it wasn't because the public couldn't understand a requirement for secret ballots in public elections and union elections. Instead, the Court didn't allow that measure to go to voters because the Separate Amendment Rule protects the integrity of the important process of amending the Arizona Constitution by requiring that the People be allowed to vote separately on these different subjects. *McLaughlin*, 214 Ariz. at 353-56 ¶¶ 7, 11-19.

In *Clean Elections Institute v. Brewer*, 209 Ariz. 241, 244 ¶ 7 (2004), *abrogated on other grounds by Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219 (2022), this Court explained that "[s]imply showing that several sections of a proposed amendment relate to the same general subject . . . does not satisfy the requirements of Article 21." Rather, if the principles set out in the Arizona Constitution "are to be changed by a vote of the people, the voters must receive the opportunity to express their opinion clearly as to *each* proposed change." *Clean Elections*, 209 Ariz. at 244 ¶

9. The ultimate question is whether a measure's various provisions "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." *Id.* at ¶ 10 (striking down proposition that combined subjects of ending public funding for political campaigns with inserting the legislature into the funding of Clean Elections Commission) (citations omitted).[4] For all the reasons stated above, SCR 1044 fails that test.

Conclusion

Perhaps people want to limit the number of judicial retention elections for all the reasons set forth in Section 10 of SCR 1044.

Perhaps the people want to empower any legislator to compel the JPRC to investigate any judge or justice for any reason, and to allow the Legislature to appoint members of the JPRC using whatever criteria it wishes rather than applying this Court's existing rules requiring competence and impartiality.

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[4] As Appellants noted, the Separate Amendment Rule is stricter than the Single Subject Rule. *See Clean Elections*, 209 Ariz. at 244 ¶¶ 6-8. Because this matter falls under the Separate Amendment Rule, there's no reason to analyze whether SCR 1044 would satisfy the Single Subject Rule.

But the Separate Amendment Rule protects the people from being forced to address these two very different questions with a single up or down vote. This Court should reverse the judgment below.

RESPECTFULLY SUBMITTED this 14th day of August, 2024.

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