

ARIZONA SUPREME COURT

PROGRESS ARIZONA, an Arizona nonprofit corporation; PROGRESS ARIZONA PAC, an Arizona political action committee; and JOEL EDMAN, a qualified elector,

Plaintiffs/Appellants,

v.

STATE OF ARIZONA; and ADRIAN FONTES, in his official capacity as Secretary of State,

Defendants/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,

Intervenor-Defendants/Appellees.

Arizona Supreme Court
No. CV-24-0179-AP/EL

Maricopa County Superior Court
Case No.: CV2024-016113

OPENING BRIEF

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Introduction

In the final day before SCR 1044 was passed out of the Legislature and submitted to the Secretary of State for presentation to the voters, a new amendment was included in the referendum. To this constitutional referendum seeking to restrict the conditions under which judicial officers would sit for retention election, the Legislature added an amendment increasing legislative oversight of the judiciary. Added to SCR 1044 was a new amendment that would permit the Legislature to have a member on the Judicial Performance Review Commission and a single Legislator would not be empowered to place any judicial officer under investigation.

Providing for a more independent judiciary—or put another way, reducing judicial accountability to the electorate—is an amendment one may or may not support. Making the Judiciary accountable to the Legislature, or indeed to any single Legislator, is another amendment one may or may not support. However, under Arizona’s Constitution, “such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately.” Ariz. Const. art. XXI, § 1. SCR 1044 deprives the electors of this opportunity.

Statement of the Case

This matter is an accelerated election law appeal of the trial court’s Order entered on August 2, 2024 denying Plaintiffs/Appellants’ Application for

Preliminary Injunction, the hearing of which had been combined with a hearing on the merits. Appellants have only appealed the ruling as to application of the Separate Amendment Rule. The matter must be decided by August 22, 2024, based on representations of the Secretary of State concerning the printing deadline for ballots.

Factual Background

On June 12, 2024, the Arizona House passed SCR 1044; it having been passed by the Senate on March 6, 2024, it was forwarded to the Secretary of State on June 13, 2024. [Exhibit A at 11.] Also on June 12, 2024, the House adopted a floor amendment presented by Representative Alexander Kolodin (the “Kolodin Amendment”). [Exhibit B at 3.]

Section 1 of SCR 1044 eliminates the six-year term for justices, while Sections 2 and 3 eliminate the presumptive term of office for judges serving on intermediate appellate courts or superior courts. Section 4 adjusts the circumstances giving rise to vacancies on the bench to conform with the other changes in SCR 1044. Section 5 changes the requirements for retention elections, limiting such elections to circumstances in which the judicial officer has committed a felony, a crime involving fraud, or dishonesty; initiates a bankruptcy proceeding as a debtor; forecloses as the mortgagor; or does not otherwise meet judicial performance standards. Sections 6 through 8, prior to the Kolodin Amendment, make conforming changes to related sections of the Constitution. Section 8 of SCR 1044 also directs

the judiciary to make rules that allow for smaller counties to participate in what is known as “Merit Selection” and adds a specific periodicity for conducting performance reviews—not less than every four years.

The Koldin Amendment proposed an amendment that is unrelated to judicial retention elections. Instead, the Kolodin Amendment changes the process for judicial review. *Id.* at §8. The Judicial Performance Review Commission is currently composed of members of the public, attorneys, and judges in accordance with a process adopted by this Court. Ariz. Const. art. VI, § 42; *see also* Arizona Commission on Judicial Performance Review, *Commission Members*, available at <https://www.azcourts.gov/jpr/About-JPR/Commission-Members> (last visited 8/11/24). After the Kolodin Amendment, SCR 1044 changes the process to incorporate appointees from the legislative branch into the performance review process by providing for a majority of the House of Representative the authority to appoint a member of the commission and a majority of the Senate to appoint another member. *Id.*(B). Furthermore, under the Kolodin Amendment, SCR 1044 § 8 adds the ability of a single Legislator to compel the Commission to initiate an investigation against a judicial officer. Finally, Section 9 would make SCR 1044 apply retroactively, effectively mooting the upcoming judicial retention decisions on November 5, 2024. *Id.* at §9. All of these amendments, unless the Court takes action, will be presented to the voters in a single proposition.

Standard of Review

This case presents a question of constitutional interpretation, which this Court reviews *de novo*.

Statement of the Issue

Did the trial court err in ruling that SCR 1044 may present voters with an amendment to restructure retention elections, and another amendment to restructure the performance review process in the same proposition despite the requirement of Article 21, Section 1 of the Arizona Constitution that “such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately”?

Argument

SCR 1044 unquestionably presents multiple amendments to the Arizona Constitution. It amends several sections of the Constitution. It amends the circumstances under which judicial retention elections happen, and it amends the judicial performance review system. On the one hand, it enhances judicial independence, or as opponents would put it, it reduces judicial accountability. On the other hand, it enhances legislative oversight, or as opponents would put it, enables legislative interference.

The Court’s task is not to determine whether there are multiple amendments, there plainly are, but whether under the Court’s precedents these several

amendments are such that the Court may nonetheless permit them to be presented to the voters in a single proposition and to be voted on together despite the requirement that all amendments be considered separately.

I. Separate Amendment Rule

The Separate Amendment Rule provides that, “[i]f more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately.” Ariz. Const. art. XXI, § 1. The Separate Amendment Rule prevents log-rolling, which bundles separate and distinct propositions into one proposed amendment so that voters favoring one proposition must vote for all. *Ariz. Chamber of Com. & Indus. v. Kiley*, 242 Ariz. 533, 541 ¶ 30 (2017). The “Court is obligated to ensure that voters receive an opportunity to cast separate votes for separate amendments.” *Ariz. Together v. Brewer*, 214 Ariz. 118, 121 ¶ 3 (2007).

A. Logrolling and Voter Support

In *Clean Elections Inst., Inc. v. Brewer*, the Court wrote that if the Court “cannot conclude that the provisions should stand or fall together or that a voter supporting one would reasonably be expected to support the principle of the other, we are obliged to find that [the proposition] violates the separate amendment rule of Article 21.” 209 Ariz. 241, 246, ¶ 17, 99 P.3d 570, 575 (2004). The practice of searching for evidence that a voter supporting one amendment to the Constitution

found in a proposition would be reasonably expected to support another amendment found in the same proposition has been abandoned by this Court. *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 151 ¶18 (2013) (citing *Arizona Together v. Brewer*, 214 Ariz. 118, 124 ¶ 21 (2007)).

Nonetheless, when deciding whether to permit multiple amendments to go to the voters under the same proposition, the Court cannot ignore the potential for creating a dilemma for voters. The *Clean Elections Institute* opinion could not affirmatively find a reason why supporting one change would necessarily lead to supporting the other. That approach has been abandoned. However, when the two changes are actually at odds with each other, that is, when they present the exact evil the Separate Amendment Rule was enacted to prevent, the Court can and should consider it.

A voter who wants greater judicial independence by creating a system wherein there are only for-cause retention elections cannot vote for this system without also accepting a new avenue for interference with the judiciary by the legislative branch. The Court should not ignore the dilemma this creates for voters. While it may not be dispositive in and of itself, such a crisis of choice confronting Arizona voters absolutely supports the conclusion that a proposition containing both amendments violates the Separate Amendment Rule. The Arizona Constitution obligates the

Court to prevent Arizona voters from facing this type of dilemma, that is, to prevent logrolling by the Arizona Legislature.

B. Topically Related and Sufficiently Interrelated

It would be cumbersome to require that each change to a section of the Constitution be presented separately to the voters. Perhaps for that reason the Court has developed criteria for when multiple changes, which is of course a synonym for amendments, can be included under a single proposition. The provisions of a proposed amendment must be “sufficiently related to a common purpose or principle.” *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 151 ¶ 22 (2013). The test for a violation of the same amendment rule requires an analysis of, “(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.’” *Id.* at 150 ¶ 13. To determine if the provisions are topically related, “All the provisions must embrace the same general topic.” *Ariz. Together*, 214 Ariz. at 121 ¶ 6. To determine if the amendments are sufficiently interrelated, the following factors are considered, “whether various provisions are facially related, whether all the matters addressed by [the proposition] concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.” *McLaughlin v. Bennett*, 225

Ariz. 351, 354 ¶ 10 (citation omitted). These factors are not exclusive and may not all apply in a particular case. *Id.* at n.2.

McLaughlin found that though the subject matter of the amendments (secret ballots in public elections and union elections) were topically related, they were not sufficiently interrelated. *Id.* at 355 ¶ 18. Though the two provisions there would have established a “secret ballot” in the election context, the “contexts are quite different and wholly unrelated.” *Id.* at 354 ¶ 12. This did not constitute a comprehensive approach to a general topic because they did not clearly share a logical relationship or derive meaning and effect from the mandates contained in the other provision. *Id.* at 355 ¶ 17 (cleaned up).

In *Clean Elections Institute*, the proponents of the ballot measure sought to do two things: “[n]o taxpayer money shall be used to fund any political candidate or campaign for statewide office or the office of a member of the legislature;” and “all money in [the Clean Elections Fund], on and after the effective date of this section, shall be deposited in the general fund of the state.” *Id.* ¶¶ 18, 19. The proponents of the measure explained that in addition to ending publicly funded campaigns, they sought to divest the Clean Elections Commission of its authority to regulate independent expenditures. *Id.* at 247, ¶ 23. The Court compared the elimination of publicly funded candidates from Section A and the total defunding of the Commission from Section C as follows:

Whereas the Commission now can itself decide how much to spend on enforcement of election laws, under Proposition 106 the Commission would be required to apply to the legislature for funds to fulfill its enforcement duties, even though the members of the legislature are always potential targets of such enforcement efforts. Arizona's voters surely could adopt such an approach. But because the proposition advanced by section C rests upon a principle quite different from that advanced by section A, Article 21 requires that the voters be afforded the opportunity to consider a constitutional amendment that presents only that decision, not an amendment that joins the separate question of whether Arizona should publicly fund political campaigns.

Id. The amendments found in SCR 1044 prior to the Kolodin Amendment satisfy the topically related and sufficiently interrelated test. Each amendment contained in SCR 1044 initially addressed judicial retention elections. Each amendment was related to the others, varying only in which type of judicial officer was the subject of the amendment and how the changes enacted by the amendment would necessarily require change other sections of the Constitution.

It is important that, for example, sections related to vacancies had to be amended to account for a new system of retention elections. The system created by SCR 1044 would not be workable without those changes. So, it is practical that the Constitution not be read as to require these several changes to be voted on separately. One change is required by the other. Thus, in a sense, they are one amendment. Or at the very least, they should be treated as one amendment to avoid an absurdly cumbersome system to amend our constitution.

The Kolodin Amendment, addresses something else. Its provisions do not relate to judicial retention elections. They do relate to judicial oversight, which is fairly captured under the notion of judicial accountability, but they are certainly not related to retention elections or the other provision contained in the pre-Kolodin Amendment version of SCR 1044.

The Legislature could easily have referred the provisions of the Kolodin Amendment to the voters as another proposition. The system proposed under the rest of SCR 1044 did not need the Kolodin Amendment to be a workable whole. Indeed, the Legislative oversight of the Judiciary provided in the Kolodin Amendment did not need for periodic retention elections to be replaced by for-cause retention elections. The two sets of amendments do not depend on each other in anyway, and it cannot be justified to treat them as if they are a single amendment. They are not.

C. The Separate Amendment Rule is not the Single Subject Rule

It must be noted that we are not applying the Single Subject Rule. The question here is not whether all of the amendments are a single subject. It is whether they are all a single amendment, or change, to the Constitution? Or, to avoid being so literal, are they so interrelated as to be treated as a single amendment for the sake of workability?

The Trial Court constructed a single-subject-like analysis of SCR 1044 finding that “Sections 1-7 provides the outline for when retention elections are going

to occur. Subsection 8 provides a definition for one component of the outline and the apparatus for its detection.” Order at 4. But this demonstrates that SCR 1044 addresses a single subject—it does not show that it is only one amendment.

This caused the Trial Court to conclude that the provisions that had existed initially in SCR 1044 were facially related to the changes added by the Kolodin Amendment. However, altering the make up of the JPRC is not related to holding judicial retention elections. These amendments did not fill a gap that created a workable whole. Instead, they added an entirely new feature. Admittedly, SCR 1044 would pass single subject review. But the question is not whether the several amendments are related to a single subject; it is whether there are several amendments.

Again, in analyzing for qualitative similarity, the Trial Court seems to fall back on single subject analysis. It finds, “all the proposed amendments relate to the time and functioning of retention elections.” *Id.* at 5. One, the point is that if there are multiple proposed amendments they have to be voted on separately. Two, it does not matter if they relate to the same subject. Three, the provisions of the Kolodin Amendment only tangentially relate to retention elections. In *Arizona Together*, the issue was the treatment of marriage and domestic partnerships. The treatment of the two was qualitatively similar because they were both being denied to a class of citizen. Here, we have unrelated amendments. One replacing periodic retention

elections with for-cause retention elections, the other empowering Legislators to initiative investigations of judicial officers. These are not qualitatively similar.

More evidence of their qualitative dissimilarity is the separation of powers implications made manifest by the Kolodin Amendment. Changing the frequency of or criteria for retention elections does not alter the distribution of power between the legislative and judicial branches. By contract, the provisions of the Kolodin Amendment does so dramatically. While this shifting of power is permissible via a constitutional amendment, the fact of the shift in power demonstrates that the provisions added by the Kolodin Amendment are not qualitative similar to the provisions related to judicial retention elections.

When taken together, the timing of the Kolodin Amendment being affixed to SCR 1044, the dilemma created for the voters by placing these multiple amendments before them in a single proposition, and an evaluation of the Court's precedents to date on the Single Subject Rule, Appellants submit the Court must conclude that SCR 1044's multiple amendments to the Constitution cannot be presented under a single proposition to be voted on together. SCR 1044 is not a single amendment.

Conclusion

For the above reasons, this Court should reverse the lower court's ruling and find that SCR 1044 violates the Separate Amendment Rule and for that reason,

Appellees must be enjoined from placing it on the November 2024 General Election Ballot.

RESPECTFULLY SUBMITTED this 11th day of August, 2024.

BARTON MENDEZ SOTO PLLC

By /s/ James E. Barton II
James E. Barton II
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Exhibit A

House Engrossed Senate Bill
judicial retention elections

State of Arizona
Senate
Fifty-sixth Legislature
Second Regular Session
2024

SENATE CONCURRENT RESOLUTION 1044

A CONCURRENT RESOLUTION

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF ARIZONA; AMENDING ARTICLE VI, SECTIONS 4, 9, 12, 37, 38, 39, 41 AND 42, CONSTITUTION OF ARIZONA; RELATING TO THE JUDICIAL DEPARTMENT.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it resolved by the Senate of the State of Arizona, the House of
2 Representatives concurring:

3 1. Article VI, section 4, Constitution of Arizona, is proposed to
4 be amended as follows if approved by the voters and on proclamation of the
5 Governor:

6 4. Supreme court; term of office

7 Section 4. Justices of the supreme court shall hold
8 office ~~for a regular term of six years~~ DURING GOOD BEHAVIOR,
9 ~~except as provided by~~ AS DETERMINED EXCLUSIVELY THROUGH THE
10 PROVISIONS OF this article AND ARTICLES VI.I AND VIII.

11 2. Article VI, section 9, Constitution of Arizona, is proposed to
12 be amended as follows if approved by the voters and on proclamation of the
13 Governor:

14 9. Intermediate appellate courts

15 Section 9. The jurisdiction, powers, duties and
16 composition of any intermediate appellate court shall be as
17 provided by law. JUDGES OF INTERMEDIATE APPELLATE COURTS
18 SHALL HOLD OFFICE DURING GOOD BEHAVIOR, AS DETERMINED
19 EXCLUSIVELY THROUGH THE PROVISIONS OF THIS ARTICLE AND
20 ARTICLES VI.I AND VIII.

21 3. Article VI, section 12, Constitution of Arizona, is proposed to
22 be amended as follows if approved by the voters and on proclamation of the
23 Governor:

24 12. Superior court; term of office

25 Section 12. A. Judges of the superior court in
26 counties having a population of less than two hundred fifty
27 thousand persons according to the most recent United States
28 census shall be elected by the qualified electors of their
29 counties at the general election. They shall hold office for
30 a regular term of four years except as provided by this
31 section from and after the first Monday in January next
32 succeeding their election, and until their successors are
33 elected and qualify. The names of all candidates for judge of
34 the superior court in such counties shall be placed on the
35 regular ballot without partisan or other designation except
36 the division and title of the office.

37 B. The governor shall fill any vacancy in such counties
38 by appointing a person to serve until the election and
39 qualification of a successor. At the next succeeding general
40 election following the appointment of a person to fill a
41 vacancy, a judge shall be elected to serve for the remainder
42 of the unexpired term.

43 Judges of the superior court in counties having a
44 population of two hundred fifty thousand persons or more
45 according to the most recent United States census shall hold

1 office ~~for a regular term of four years~~ DURING GOOD BEHAVIOR,
2 ~~except as provided by~~ AS DETERMINED EXCLUSIVELY THROUGH THE
3 PROVISIONS OF this article AND ARTICLES VI.I AND VIII.

4 4. Article VI, section 37, Constitution of Arizona, is proposed to
5 be amended as follows if approved by the voters and on proclamation of the
6 Governor:

7 37. Judicial vacancies and appointments; residence;
8 age

9 Section 37. A. Within sixty days from the occurrence of
10 a vacancy in the office of a justice or judge of any court of
11 record, except for vacancies occurring in the office of a
12 judge of the superior court or a judge of a court of record
13 inferior to the superior court, the commission on appellate
14 court appointments, if the vacancy is in the supreme court or
15 an intermediate appellate court of record, shall submit to the
16 governor the names of not less than three persons nominated by
17 it to fill such vacancy, ~~no~~ NOT more than two of whom shall be
18 members of the same political party unless there are more than
19 four such nominees, in which event not more than sixty
20 ~~percentum~~ PERCENT of such nominees shall be members of the
21 same political party.

22 B. Within sixty days from the occurrence of a vacancy
23 in the office of a judge of the superior court or a judge of a
24 court of record inferior to the superior court except for
25 vacancies occurring in the office of a judge of the superior
26 court or a judge of a court of record inferior to the superior
27 court in a county having a population of less than two hundred
28 fifty thousand persons according to the most recent United
29 States census, the commission on trial court appointments for
30 the county in which the vacancy occurs shall submit to the
31 governor the names of not less than three persons nominated by
32 it to fill such vacancy, ~~no~~ NOT more than two of whom shall be
33 members of the same political party unless there are more than
34 four such nominees, in which event ~~no~~ NOT more than sixty ~~per~~
35 ~~centum~~ PERCENT of such nominees shall be members of the same
36 political party. A nominee shall be under sixty-five years of
37 age at the time ~~his~~ THE NOMINEE'S name is submitted to the
38 governor. Judges of the superior court shall be subject to
39 retention or rejection by a vote of the qualified electors of
40 the county from which they were appointed at the general
41 election UNDER THE CONDITIONS AND in the manner provided by
42 section 38 of this article.

1 C. A vacancy in the office of a justice or a judge of
2 such courts of record shall be filled by appointment by the
3 governor without regard to political affiliation from one of
4 the nominees whose names ~~shall be~~ ARE submitted to ~~him~~ THE
5 GOVERNOR as hereinabove provided. In making the appointment,
6 the governor shall consider the diversity of the state's
7 population for an appellate court appointment and the
8 diversity of the county's population for a trial court
9 appointment, however the primary consideration shall be
10 merit. If the governor does not appoint one of such nominees
11 to fill such vacancy within sixty days after their names are
12 submitted to the governor by such commission, the chief
13 justice of the supreme court forthwith shall appoint on the
14 basis of merit alone without regard to political affiliation
15 one of such nominees to fill such vacancy. If such commission
16 does not, within sixty days after such vacancy occurs, submit
17 the names of nominees as hereinabove provided, the governor
18 shall have the power to appoint any qualified person to fill
19 such vacancy at any time thereafter prior to the time the
20 names of the nominees to fill such vacancy are submitted to
21 the governor as hereinabove provided. ~~Each justice or judge~~
22 ~~so appointed shall initially hold office for a term ending~~
23 ~~sixty days following the next regular general election after~~
24 ~~the expiration of a term of two years in office. Thereafter,~~
25 ~~the terms of justices or judges of the supreme court and the~~
26 ~~superior court shall be as provided by this article.~~

27 D. A person appointed to fill a vacancy on an
28 intermediate appellate court or another court of record now
29 existing or hereafter established by law shall have been a
30 resident of the counties or county in which that vacancy
31 exists for at least one year ~~prior to his~~ BEFORE THE PERSON'S
32 appointment, in addition to possessing the other required
33 qualifications. A nominee shall be under sixty-five years of
34 age at the time ~~his~~ THE NOMINEE'S name is submitted to the
35 governor.

36 5. Article VI, section 38, Constitution of Arizona, is proposed to
37 be amended as follows if approved by the voters and on proclamation of the
38 Governor:

39 38. Declaration of candidacy; form of judicial
40 ballot, rejection and retention; failure to
41 file declaration

42 Section 38. A. ~~★~~ ANY justice or judge of the supreme
43 court or an intermediate appellate court ~~shall file in the~~
44 ~~office of the secretary of state~~, and ~~a~~ ANY judge of the
45 superior court or other court of record including such

1 justices or judges who are holding office as such by election
2 or appointment at the time of the adoption of this section OR
3 ANY AMENDMENT TO THIS SECTION except for judges of the
4 superior court and other courts of record inferior to the
5 superior court in counties having a population of less than
6 two hundred fifty thousand persons, according to the United
7 States census, shall BE SUBJECT TO A VOTE OF RETENTION ON THE
8 OCCURRENCE OF ANY OF THE FOLLOWING:

9 1. A FINAL CONVICTION OF A FELONY OFFENSE IF NOT
10 OTHERWISE REMOVED PURSUANT TO ARTICLE VI.I, SECTION 3.

11 2. A FINAL CONVICTION OF ANY CRIME INVOLVING FRAUD OR
12 DISHONESTY IF NOT OTHERWISE REMOVED PURSUANT TO ARTICLE VI.I,
13 SECTION 3.

14 3. AN INITIATION OF PERSONAL BANKRUPTCY PROCEEDINGS IN
15 WHICH THE JUSTICE OR JUDGE IS A DEBTOR.

16 4. A FORECLOSURE OF ANY MORTGAGE FOR WHICH THE JUSTICE
17 OR JUDGE IS A MORTGAGOR.

18 5. A DETERMINATION PURSUANT TO SECTION 42 OF THIS
19 ARTICLE, BY A MAJORITY OF ALL MEMBERS OF THE COMMISSION ON
20 JUDICIAL PERFORMANCE REVIEW, THAT THE JUSTICE OR JUDGE DOES
21 NOT MEET JUDICIAL PERFORMANCE STANDARDS.

22 B. A JUSTICE OR JUDGE OF THE SUPREME COURT OR AN
23 INTERMEDIATE APPELLATE COURT WHO IS SUBJECT TO A VOTE OF
24 RETENTION PURSUANT TO SUBSECTION A OF THIS SECTION SHALL FILE
25 IN THE OFFICE OF THE SECRETARY OF STATE, AND A JUDGE OF THE
26 SUPERIOR COURT WHO IS SUBJECT TO A VOTE OF RETENTION PURSUANT
27 TO SUBSECTION A OF THIS SECTION SHALL file in the office of
28 the clerk of the board of supervisors of the county in which
29 ~~he~~ THE JUSTICE OR JUDGE regularly sits and resides, not less
30 than sixty nor more than ninety days ~~prior to~~ BEFORE the
31 regular general election ~~next preceding the expiration of his~~
32 ~~term of office~~ SUBSEQUENT TO THE EVENT REQUIRING A VOTE OF
33 RETENTION, a declaration of ~~his~~ THE JUSTICE'S OR JUDGE'S
34 desire to be retained in office, and the secretary of state
35 shall certify to the several boards of supervisors the
36 appropriate names of the candidate or candidates appearing on
37 such declarations filed in ~~his~~ THE JUSTICE'S OR JUDGE'S
38 office, EXCEPT THAT IF THE EVENT REQUIRING A VOTE OF RETENTION
39 OCCURS LESS THAN ONE HUNDRED TWENTY DAYS BEFORE A REGULAR
40 GENERAL ELECTION, THE DECLARATION SHALL BE FILED NOT LESS THAN
41 SIXTY NOR MORE THAN NINETY DAYS BEFORE THE NEXT ENSUING
42 REGULAR GENERAL ELECTION. NOT LATER THAN ONE HUNDRED TWENTY
43 DAYS BEFORE A REGULAR GENERAL ELECTION, THE CHIEF JUSTICE OF
44 THE SUPREME COURT SHALL PROVIDE TO THE SECRETARY OF STATE A
45 LIST OF ALL JUSTICES OR JUDGES WHO ARE SUBJECT TO A VOTE OF

1 RETENTION AT SUCH ELECTION PURSUANT TO SUBSECTION A OF THIS
2 SECTION. THE DETERMINATION OF WHETHER A JUSTICE OR JUDGE IS
3 SUBJECT TO RETENTION SHALL BE MADE BY THE CHIEF JUSTICE OF THE
4 SUPREME COURT, EXCEPT THAT, WITH RESPECT TO ANY EVENT
5 REQUIRING A VOTE OF RETENTION INVOLVING THE CHIEF JUSTICE OF
6 THE SUPREME COURT, THE DETERMINATION SHALL BE MADE BY THE VICE
7 CHIEF JUSTICE OF THE SUPREME COURT.

8 ~~B.~~ C. The name of any justice or judge whose
9 declaration is filed as provided in this section shall be
10 placed on the appropriate official ballot at the next regular
11 general election under a nonpartisan designation and in
12 substantially the following form:

13 Shall _____, (Name of justice or judge) of the
14 _____ court be retained in office? Yes ___ No ___ (Mark X
15 after one).

16 ~~C.~~ D. If a majority of those voting on the question
17 votes "No," ~~then, upon the expiration of the term for which~~
18 ~~such justice or judge was serving~~ ON JANUARY 1 OF THE YEAR
19 FOLLOWING THE GENERAL ELECTION, a vacancy shall exist, which
20 shall be filled as provided by this article. If a majority of
21 those voting on the question votes "Yes," such justice or
22 judge shall remain in office ~~for another term~~, subject to
23 removal as provided by this constitution.

24 ~~D.~~ E. The votes shall be counted and canvassed and the
25 result declared as in the case of state and county elections,
26 whereupon a certificate of retention or rejection of the
27 incumbent justice or judge shall be delivered to ~~him~~ THE
28 INCUMBENT by the secretary of state or the clerk of the board
29 of supervisors, as the case may be.

30 ~~E.~~ F. If a justice or JUDGE WHO IS SUBJECT TO
31 RETENTION PURSUANT TO SUBSECTION A OF THIS SECTION fails to
32 file a declaration of ~~his~~ THE JUSTICE'S OR JUDGE'S desire to
33 be retained in office, as required by ~~this section~~
34 SUBSECTION B OF THIS SECTION, ~~then his~~ THE JUSTICE'S OR
35 JUDGE'S office shall become vacant ~~upon expiration of the term~~
36 ~~for which such justice or judge was serving~~ ON JANUARY 1 OF
37 THE YEAR FOLLOWING THE GENERAL ELECTION IN WHICH THE JUSTICE
38 OR JUDGE WOULD HAVE BEEN A CANDIDATE FOR RETENTION.

39 G. ANY JUDGE OF AN INTERMEDIATE APPELLATE COURT WHO IS
40 SUBJECT TO A VOTE OF RETENTION PURSUANT TO SUBSECTION A OF
41 THIS SECTION SHALL BE ELECTED FOR RETENTION ON A STATEWIDE
42 BASIS AND ALL OTHERWISE ELIGIBLE REGISTERED VOTERS IN THIS
43 STATE ARE ELIGIBLE TO VOTE ON SUCH RETENTION ELECTIONS.

1 6. Article VI, section 39, Constitution of Arizona, is proposed to
2 be amended as follows if approved by the voters and on proclamation of the
3 Governor:

4 39. Retirement of justices and judges; vacancies

5 Section 39. A. On attaining the age of seventy years a
6 justice or judge of a court of record shall retire and ~~his~~ THE
7 JUSTICE'S OR JUDGE'S judicial office shall be vacant, except
8 as otherwise provided in section 35 of this article. In
9 addition to becoming vacant as provided in this section, the
10 office of a justice or judge of any court of record becomes
11 vacant ~~upon his~~ ON THE JUSTICE'S OR JUDGE'S death or ~~his~~ THE
12 JUSTICE'S OR JUDGE'S voluntary retirement pursuant to statute
13 or ~~his~~ THE JUSTICE'S OR JUDGE'S voluntary resignation, and
14 also, IF SUBJECT TO A VOTE OF RETENTION as provided in section
15 38 of this article, ~~upon the expiration of his term~~ ON JANUARY
16 1 OF THE YEAR next following a general election at which a
17 majority of those voting on the question of ~~his~~ THE JUSTICE'S
18 OR JUDGE'S retention vote in the negative or for which general
19 election ~~he~~ THE JUSTICE OR JUDGE is required, but fails, to
20 file a declaration of ~~his~~ THE JUSTICE'S OR JUDGE'S desire to
21 be retained in office.

22 B. This section is alternative to and cumulative with
23 the methods of removal of judges and justices provided in
24 ARTICLE VI.I AND ARTICLE VIII, parts 1 and 2 ~~of article 8 and~~
25 ~~article 6.1~~ of this Constitution.

26 7. Article VI, section 41, Constitution of Arizona, is
27 proposed to be amended as follows if approved by the voters and on
28 proclamation of the Governor:

29 41. Superior court divisions; commission on trial
30 court appointments; membership; terms

31 Section 41. A. Except as otherwise provided, judges of
32 the superior court in counties having a population of two
33 hundred fifty thousand persons or more according to the most
34 recent United States census shall hold office ~~for a regular~~
35 ~~term of four years~~ DURING GOOD BEHAVIOR, AS DETERMINED
36 EXCLUSIVELY THROUGH THE PROVISIONS OF THIS ARTICLE AND
37 ARTICLES VI.I AND VIII.

38 B. There shall be a nonpartisan commission on trial
39 court appointments for each county having a population of two
40 hundred fifty thousand persons or more according to the most
41 recent United States census which shall be composed of the
42 following members:

43 1. The chief justice of the supreme court, who shall be
44 the chairman of the commission. In the event of the absence

1 or incapacity of the chairman the supreme court shall appoint
2 a justice thereof to serve in his place and stead.

3 2. Five attorney members, none of whom shall reside in
4 the same supervisorial district and not more than three of
5 whom shall be members of the same political party, who are
6 nominated by the board of governors of the state bar of
7 Arizona and who are appointed by the governor subject to
8 confirmation by the senate in the manner prescribed by law.

9 3. Ten nonattorney members, no more than two of whom
10 shall reside in the same supervisorial district.

11 C. At least ninety days ~~prior to~~ BEFORE a term expiring
12 or within twenty-one days of a vacancy occurring for a
13 nonattorney member on the commission for trial court
14 appointments, the member of the board of supervisors from the
15 district in which the vacancy has occurred shall appoint a
16 nominating committee of seven members who reside in the
17 district, not more than four of whom may be from the same
18 political party. The ~~make-up~~ MAKEUP of the committee ~~shall~~,
19 to the extent feasible, SHALL reflect the diversity of the
20 population of the district. Members shall not be attorneys
21 and shall not hold any governmental office, elective or
22 appointive, for profit. The committee shall provide public
23 notice that a vacancy exists and shall solicit, review and
24 forward to the governor all applications along with the
25 committee's recommendations for appointment. The governor
26 shall appoint two persons from each supervisorial district who
27 shall not be of the same political party, subject to
28 confirmation by the senate in the manner prescribed by law.

29 D. In making or confirming appointments to trial court
30 commissions, the governor, the senate and the state bar shall
31 endeavor to see that the commission reflects the diversity of
32 the county's population.

33 E. Members of the commission shall serve staggered four
34 year terms, except that initial appointments for the five
35 additional nonattorney members and the two additional attorney
36 members of the commission shall be designated by the governor
37 as follows:

38 1. One appointment for a nonattorney member shall be
39 for a one-year term.

40 2. Two appointments for nonattorney members shall be
41 for a two-year term.

42 3. Two appointments for nonattorney members shall be
43 for a three-year term.

44 4. One appointment for an attorney member shall be for
45 a one-year term.

1 5. One appointment for an attorney member shall be for
2 a two-year term.

3 F. Vacancies shall be filled for the unexpired terms in
4 the same manner as the original appointments.

5 G. Attorney members of the commission shall have
6 resided in this state and shall have been admitted to practice
7 in this state by the supreme court for at least five years and
8 shall have resided in the supervisorial district from which
9 they are appointed for at least one year. Nonattorney members
10 shall have resided in this state for at least five years,
11 shall have resided in the supervisorial district for at least
12 one year before being nominated and shall not be judges,
13 retired judges nor admitted to practice before the supreme
14 court. None of the attorney or nonattorney members of the
15 commission shall hold any governmental office, elective or
16 appointive, for profit and no attorney member is eligible for
17 appointment to any judicial office of this state until one
18 year after membership in the commission terminates.

19 H. No person other than the chief justice shall serve
20 at the same time as a member of more than one judicial
21 appointment commission.

22 I. The commission shall submit the names of not less
23 than three individuals for nomination for the office of ~~the~~
24 superior court judge pursuant to section 37 of this article.

25 J. ~~Prior to~~ BEFORE making recommendations to the
26 governor, the commission shall conduct investigations, hold
27 public hearings and take public testimony. An executive
28 session as prescribed by rule may be held upon a two-thirds
29 vote of the members of the commission in a public hearing.
30 Final decisions as to recommendations shall be made without
31 regard to political affiliation in an impartial and objective
32 manner. The commission shall consider the diversity of the
33 county's population and the geographical distribution of the
34 residences of the judges throughout the county, however the
35 primary consideration shall be merit. Voting shall be in a
36 public hearing. The expenses of meetings of the commission
37 and the attendance of members thereof for travel and
38 subsistence shall be paid from the general fund of the state
39 as state officers are paid, upon claims approved by the
40 chairman.

41 K. After public hearings the supreme court shall adopt
42 rules of procedure for the commission on trial court
43 appointments.

1 ~~t. The members of the commission who were appointed~~
2 ~~pursuant to section 36 of this article prior to the effective~~
3 ~~date of this section may continue to serve until the~~
4 ~~expiration of their normal terms. All subsequent appointments~~
5 ~~shall be made as prescribed by this section.~~

6 8. Article VI, section 42, Constitution of Arizona, is proposed to
7 be amended as follows if approved by the voters and on proclamation of the
8 Governor:

9 42. Retention evaluation of justices and judges

10 Section 42. A. The supreme court shall adopt, after
11 public hearings, and administer for all justices and JUDGES OF
12 THE INTERMEDIATE APPELLATE COURTS AND judges ~~who file a~~
13 ~~declaration to be retained in office,~~ OF THE SUPERIOR COURT IN
14 A COUNTY WITH A POPULATION OF TWO HUNDRED FIFTY THOUSAND
15 PERSONS OR MORE ACCORDING TO THE MOST RECENT UNITED STATES
16 CENSUS OR IN A COUNTY WITH A POPULATION OF LESS THAN TWO
17 HUNDRED FIFTY THOUSAND PERSONS ACCORDING TO THE MOST RECENT
18 UNITED STATES CENSUS THAT CHOOSES TO SELECT ITS JUDGES OF THE
19 SUPERIOR COURT AS IF IT HAD A POPULATION OF TWO HUNDRED FIFTY
20 THOUSAND PERSONS OR MORE a COMMISSION AND process, established
21 by court rules for evaluating judicial performance. The rules
22 shall PROVIDE THAT EACH JUSTICE OR JUDGE SHALL BE EVALUATED
23 NOT LESS FREQUENTLY THAN EVERY FOUR YEARS FROM THE YEAR OF
24 FIRST APPOINTMENT, AND SHALL include written performance
25 standards and performance reviews which survey opinions of
26 persons who have knowledge of the justice's or judge's
27 performance.

28 B. A MAJORITY OF THE HOUSE OF REPRESENTATIVES SHALL
29 APPOINT ONE MEMBER TO THE COMMISSION AND A MAJORITY OF THE
30 SENATE SHALL APPOINT ONE MEMBER TO THE COMMISSION. THE HOUSE
31 OF REPRESENTATIVES AND SENATE HAVE COMPLETE DISCRETION IN
32 APPOINTING MEMBERS PURSUANT TO THIS SECTION, AND SUCH MEMBERS
33 SHALL HAVE RIGHTS AND PRIVILEGES EQUAL TO ALL OTHER MEMBERS OF
34 THE COMMISSION.

35 C. UPON WRITTEN REQUEST OF A LEGISLATOR, THE COMMISSION
36 SHALL INVESTIGATE AN ALLEGATION THAT A JUSTICE OR JUDGE HAS
37 ENGAGED IN A PATTERN OF MALFEASANCE IN OFFICE. IF THE
38 COMMISSION FINDS THAT THE JUSTICE OR JUDGE HAS ENGAGED IN A
39 PATTERN OF MALFEASANCE IN OFFICE, THE COMMISSION SHALL MAKE A
40 DETERMINATION THAT THE JUSTICE OR JUDGE DOES NOT MEET JUDICIAL
41 PERFORMANCE STANDARDS.

42 D. The public shall be afforded a full and fair
43 opportunity for participation in the evaluation process
44 through public hearings, dissemination of evaluation reports
45 to voters and any other methods as the court deems advisable.

1 Sec. 9. Effective date

2 If approved by a majority of the votes cast thereon,
3 this act applies retroactively to from and after October 31,
4 2024, and the returns of any votes of retention or rejection
5 in the general election held on November 5, 2024 shall not be
6 included in the official canvass or result in the issuance of
7 any certificate of retention or rejection.

8 Sec. 10. Findings

9 The People of the State of Arizona find and declare as
10 follows:

11 1. Judicial retention elections in the State of Arizona
12 are simultaneously too infrequent, because judges whose
13 conduct proves unsuitable for judicial office may serve for
14 years before next standing for retention; and too frequent,
15 because judges whose conduct is objectively satisfactory stand
16 for retention regardless of their good behavior and
17 performance.

18 2. The voters of the State of Arizona have exercised
19 the right not to retain a judge in 0.3% of judicial retention
20 elections to date, indicating both general satisfaction with
21 judicial performance in the state and an ongoing public
22 interest in electoral accountability for the judicial branch.

23 3. The number of judicial retention elections appearing
24 on the ballot unduly increases the financial cost of
25 elections, the length and complexity of ballots, and the
26 complexity and duration of vote tabulation.

27 4. The voters of the State of Arizona will be able to
28 research judicial performance more efficiently, and persons
29 who are not well suited for judicial office will be unable to
30 "hide in a crowd" of peers, when retention elections feature
31 only judicial officers whose conduct falls below objective
32 standards.

33 5. It is appropriate to amend the process of judicial
34 retention elections to ensure accountability for the judicial
35 officers of this State and to increase the efficiency of our
36 elections.

37 Sec. 11. Short title

38 This act shall be titled the "Judicial Accountability
39 Act of 2024."

40 12. The Secretary of State shall submit this proposition to the
41 voters at the next general election as provided by article XXI,
42 Constitution of Arizona.

S.C.R. 1044

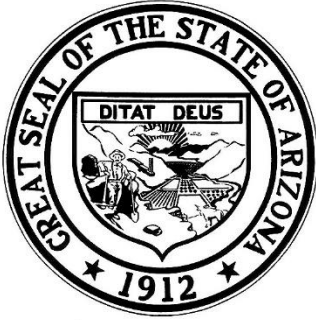
PASSED BY THE HOUSE JUNE 12, 2024.

PASSED BY THE SENATE MARCH 6, 2024.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JUNE 13, 2024.

Exhibit B

HOUSE FLOOR AMENDMENT EXPLANATION



Bill Number: SCR 1044

Kolodin Floor Amendment

-
- Specifies a Judge or Justice, unless otherwise removed as prescribed by the Arizona Constitution's article on the Commission on Judicial Conduct, is subject to a vote of retention upon a final conviction of a felony offence or any crime involving fraud or dishonesty.
 - Requires a majority of all members of the Commission on Judicial Performance Review to make a determination that a judge or justice does not meet judicial performance standards.
 - Directs the House and Senate to each appoint one member to the Commission on Judicial Performance Review.
 - Directs the Commission on Judicial Performance Review to investigate allegations that a judge or justice has engaged in a pattern of malfeasance in office upon a written request from a legislator.
 - Contains legislative findings.
 - Entitles this act as the *Judicial Accountability Act of 2024*.
 - Makes technical and conforming changes.

Amendment explanation prepared by J. Hobbins

Phone Number 6-3649

jh

6/12/2024

KOLODIN SUBSTITUTE FLOOR AMENDMENT
HOUSE OF REPRESENTATIVES AMENDMENTS TO S.C.R. 1044

I move the following SUBSTITUTE amendment to the MUNICIPAL OVERSIGHT & ELECTIONS
Committee Amendment to
SENATE CONCURRENT RESOLUTION 1044 (Reference to Senate engrossed resolution)

- 1 Page 1, line 9, strike "except as provided by" insert "AS DETERMINED EXCLUSIVELY
2 THROUGH THE PROVISIONS OF"; after "article" insert "AND ARTICLES VI.I AND
3 VIII"
- 4 Line 17, after the comma strike remainder of line insert "AS DETERMINED
5 EXCLUSIVELY THROUGH THE PROVISIONS OF"
- 6 Line 18, after "ARTICLE" insert "AND ARTICLES VI.I AND VIII"
- 7 Line 45, strike "except as provided by" insert "AS DETERMINED EXCLUSIVELY
8 THROUGH THE PROVISIONS OF"; after "article" insert "AND ARTICLES VI.I AND
9 VIII"
- 10 Page 4, line 3, after the first "A" insert "FINAL"; after "OFFENSE" insert "IF
11 NOT OTHERWISE REMOVED PURSUANT TO ARTICLE VI.I, SECTION 3"
- 12 Line 4, after "A" insert "FINAL"
- 13 Line 5, after "DISHONESTY" insert "IF NOT OTHERWISE REMOVED PURSUANT TO
14 ARTICLE VI.1, SECTION 3"
- 15 Line 11, after "ARTICLE" insert ", BY A MAJORITY OF ALL MEMBERS OF THE
16 COMMISSION ON JUDICIAL PERFORMANCE REVIEW,"
- 17 Page 6, line 26, after "BEHAVIOR" insert ", AS DETERMINED EXCLUSIVELY THROUGH THE
18 PROVISIONS OF THIS ARTICLE AND ARTICLES VI.I AND VIII"
- 19 Page 8, line 42, after "of" insert "justices and"
- 20 Page 8, line 43, after "Section 42." Insert "A."

1 Line 44, after "~~justices and~~" insert "justices and JUDGES OF THE INTERMEDIATE
2 APPELLATE COURTS AND"

3 Page 9, line 7, after "a" insert "COMMISSION AND"

4 Line 9, after "EACH" insert "JUSTICES OR"

5 Line 13, after "~~justices or~~" insert "justices or", after the period insert:

6 "B. A MAJORITY OF THE HOUSE OF REPRESENTATIVES SHALL APPOINT ONE
7 MEMBER TO THE COMMISSION AND A MAJORITY OF THE SENATE SHALL APPOINT ONE
8 MEMBER TO THE COMMISSION. THE HOUSE OF REPRESENTATIVES AND SENATE HAVE
9 COMPLETE DISCRETION IN APPOINTING MEMBERS PURSUANT TO THIS SECTION, AND
10 SUCH MEMBERS SHALL HAVE RIGHTS AND PRIVILEGES EQUAL TO ALL OTHER MEMBERS OF
11 THE COMMISSION."

12 C. UPON WRITTEN REQUEST OF A LEGISLATOR, THE COMMISSION SHALL
13 INVESTIGATE AN ALLEGATION THAT A JUSTICE OR JUDGE HAS ENGAGED IN A PATTERN
14 OF MALFEASANCE IN OFFICE. IF THE COMMISSION FINDS THAT THE JUSTICE OR
15 JUDGE HAS ENGAGED IN A PATTERN OF MALFEASANCE IN OFFICE, THE COMMISSION
16 SHALL MAKE A DETERMINATION THAT THE JUSTICE OR JUDGE DOES NOT MEET JUDICIAL
17 PERFORMANCE STANDARDS.

18 D."

19 Line 18, strike "Retroactivity" insert "Effective date"

20 Between lines 23 and 24, insert:

21 "Sec. 10. Findings

22 The People of the State of Arizona find and declare as follows:

23 1. Judicial retention elections in the State of Arizona are
24 simultaneously too infrequent, because judges whose conduct proves
25 unsuitable for judicial office may serve for years before next standing for
26 retention; and too frequent, because judges whose conduct is objectively
27 satisfactory stand for retention regardless of their good behavior and
28 performance.

29 2. The voters of the State of Arizona have exercised the right not
30 to retain a judge in 0.3% of judicial retention elections to date,
31 indicating both general satisfaction with judicial performance in the state

1 and an ongoing public interest in electoral accountability for the judicial
2 branch.

3 3. The number of judicial retention elections appearing on the
4 ballot unduly increases the financial cost of elections, the length and
5 complexity of ballots, and the complexity and duration of vote tabulation.

6 4. The voters of the State of Arizona will be able to research
7 judicial performance more efficiently, and persons who are not well suited
8 for judicial office will be unable to “hide in a crowd” of peers, when
9 retention elections feature only judicial officers whose conduct falls
10 below objective standards.

11 5. It is appropriate to amend the process of judicial retention
12 elections to ensure accountability for the judicial officers of this State
13 and to increase the efficiency of our elections.

14 Sec. 11. Short title

15 This act shall be titled the “Judicial Accountability Act of 2024.”

16 Renumber to conform

17 Amend title to conform

ALEXANDER KOLODIN

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06/12/2024

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