

SUPERIOR COURT, STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

<p>Progress Arizona, Progress Arizona PAC, Joel Edman</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>State of Arizona, Adrian Fontes,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. CV2024-016113</p> <p style="text-align: center;">UNDER ADVISEMENT RULING</p>
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<p>HONORABLE JOHN NAPPER VISITING JUDGE</p>	<p>BY: Rosie Flores, Judicial Assistant DATE: August 2, 2024</p>
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The Court has received and reviewed Plaintiff’s Application for Preliminary Injunction, the Intervenor’s response to Plaintiff’s Application for Preliminary Injunction, Plaintiffs Reply, and the Court’s file. The Court also held oral argument on the application. As there are no disputes of material fact, the parties agreed this argument constituted a trial on the merits.

The Court finds the component parts of SCR 1044 relate to a single topic and are interrelated. Accordingly, SCR 1044 does not violate the separate amendment rule found in Article XXI § 1 of the Arizona Constitution. The Court further finds, the title of Judicial Accountability Act for SCR 1044 is not misleading. Based on these findings the Application for a Preliminary Injunction is **Denied**.

Facts and Procedural History

Current Retention Elections / Judicial Performance Review

The people of Arizona have adopted merit selection process for appellate court judges and trial judges from certain counties. *Ariz. Const. Art. VI §§ 36, 40, 412*. Judges appointed through merit selection must sit for retention election. *Ariz. Const. VI § 38*. Any judge receiving a majority of yes votes during the election “shall remain in officer for another term.” *Id.* Retention elections are held every 4 years for Superior court judges and every 6 years for appellate judges. *Id.* at §§ 4, 12 ; *A.R.S. §12-120.01(B)*.

Every judge in a retention election system is also subject to a judicial performance review. *Ariz. Const. Art. VI § 42*. The Arizona Constitution requires the Arizona Supreme Court to construct how this review will be conducted. This process is “established by Court rules.” *Id.*

The Arizona Supreme Court has established the rules for judicial performance evaluation and the creation of Commission on Judicial Performance Review. [Commission on Judicial Performance Review \(azcourts.gov\)](https://www.azcourts.gov). This Commission (“JPRC”) is responsible for administering “the process for reviewing the performance of judges subject to retention.” *See, JPR R. Pro. 2(a)*. Pursuant to these rules and the Arizona Constitution, the Supreme Court appoints members of the JPR commission. *See, JPR R. Pro. 2(b)*.

Proposed Amendments to the Constitution

In the last session, the Arizona Legislature passed SCR 1044. SCR 1044 referred to the general electorate several amendments to Art. VI of the Arizona Constitution. The first alters the requirement for a retention election based on a judicial term of years. Instead, a retention election only occurs if: (1) a judge is convicted of a felony or any crime involving fraud or dishonesty; (2) a judge initiates bankruptcy proceedings; (3) is the mortgagor in a foreclosure; or (4) is found by the JPR to not meet judicial standards. *SCR 1044* §§ 1-7. This proposal alters many of the constitutional provisions outlined above.

SCR 1044 also changes the composition of the JPRC and how members of the JPRC are selected. SCR 1044 now requires the addition of two new members of the JPRC, one from each chamber of the legislature. *Id.* at § 8. These members are no longer selected by the Supreme Court. Instead, they are selected by each legislative chamber. *Id.* This section also requires the JPRC to investigate any retention judge for malfeasance if requested by any member of the legislature. *Id.* Any determination that a judge has committed malfeasance results in the judge having to stand for a retention election. *Id.*

Pending Litigation

Progress Arizona has filed an application to enjoin the Secretary of State from placing these Amendments on the 2024 general election ballot. They argue these proposed amendments violate the Separate Amendment clause of the Arizona Constitution. *Ariz. Const. art. XXI § 1*. They further argue the name “Judicial Accountability Act” violates the anti-fraud and subject and title bills provisions of the Arizona Constitution. *See, Ariz. Const. art. VII § 12 and Ariz. Const. art. IV Part 2 § 13*. Specifically, they argue SCR 1044 violates the separate amendment doctrine because it improperly log-rolls the amendments on the processes for retention elections (SCR 1044 sec. 1-7) into the altering of the composition and authority of the JPRC (SCR 1044 sec. 8). They also argue title Judicial Accountability Act is misleading because SCR 1044 reduces accountability for judges instead of increasing it.

Application of Law

Separate Amendment Rule (log-rolling)

The Arizona Constitution requires that “if more than one proposed amendment is submitted to any election, the proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately.” *Ariz. Const. art. XXI § 1*. This clause of the Arizona Constitution prevents combining several distinct propositions into one amendment and forcing an all or none vote: “log-rolling.” In determining whether a proposed amendment violates the separate

amendment rule, Courts “examine whether provisions of a proposed amendment are sufficiently related to a common purpose or principle.” *Save our Vote, Opposing C-03-2012 v. Bennet*, 231 Ariz. 145, 149 ¶ 12 (2013). This common purpose or principle must, “constitute a consistent and workable whole on the general topic embraced, that, logically speaking should stand or fall as a whole.” *Id.*

There is a two-part test to determine whether there is a common purpose or principle that should stand or fall as a whole. First, the Court must determine if the provisions are topically related. *Arizona Together v. Brewer*, 214 Ariz. 118, 121 ¶ 6 (2007). If they are topically related, then the Court must determine “whether they are sufficiently interrelated so as to form a consistent and workable proposition.” *Id.* Topically related and sufficiently interrelated amendments do not implicate the separate amendment clause of the Constitution. *Save Our Vote*, 231 Ariz. at 151 ¶ 22.

Topically Related

To determine whether multiple amendments are topically related, the Court must find, “all the provisions must embrace the general topic.” *Arizona Together*, 214 Ariz. at 121 ¶ 6. In *Arizona Together*, the Court found an amendment defining marriage and also preventing the conferring of marriage-like status to those not meeting the formal definition of marriage were topically related. *Id.* In *McLaughlin v. Bennet*, the Court found amendments to secret ballots in public elections were topically related to secret ballots for union voting. 225 Ariz. 351, 354 ¶ 9 (2010). The Court found the two provisions were topically related because they both pertained to “secret ballots.” *Id.*

In this case, there is no genuine dispute that SRC 1044 Sec. 1-7 are topically related to Sec. 8. Sections 1-7 eliminate a time-based trigger for retention elections and instead creates a conduct-based trigger. Meaning, retention elections will now only occur if a judge is found to have comported themselves in a particular manner. One of these findings is a determination by the JPRC that an individual judge does not meet judicial standards. The amendment to Section 8 involves modifying the make-up of the current JPRC which is the body that determines whether a judge meets judicial standards. This section also provides a definition for when a judge does not meet judicial standards: “a pattern of malfeasance.”

So, Sections 1-7 outline what triggers a retention election. Section 8 provides a definition for one of the mechanisms triggering just such an election. It also outlines a process for investigating if one of the triggers has been met and includes instructions on how to form the body charged with conducting this investigation. All these amendments address the mechanisms and timing of retention elections. The Court finds Section 1-7 of SCR 1044 are topically related to Section 8.

Sufficiently Interrelated

There is a four-part test to determine if multiple changes to the constitution are sufficiently interrelated. *McLaughlin*, at 354 § 10. These are: (1) are the changes facially related; (2) do they concern a single section of the constitution; (3) have they been historically treated as a single subject; and (4) are they qualitatively similar in the effect on the law. *Arizona Together*, 214 Ariz. at 122 ¶10.

These factors are, “not exclusive” but they are used to “guide” the Court’s analysis. *Save Our Vote*, 231 Ariz. 150 ¶ 15.

Facially Related

While distinct from topically related, facially related is akin to topically related. In this case, for all the reasons stated above these amendments are both topically and facially related. Section 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. Section 1-7 and Section 8 “advance” a “common purpose” and “principle.” *Id.* at 151 ¶ 17. The Court finds Section 1-7 are facially related to Section 8.

Single Subject of the Constitution

The text of the proposed amendments purport to only amend Article VI of the Arizona Constitution. However, the Court finds that the proposed amendments also concern Article III § 1 of the Arizona Constitution. This Article states, “the powers of the government of the State of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and except as provided in this constitution, such departments shall be separate and distinct.” Sections 1-7 of SCR 1044 do not implicate Article III. However, the Court finds subsection 8 of SCR 1044 concerns the portion of Article III quoted above.

Historically, the creation and the operation of the JPRC has been conducted entirely within the confines of the judicial branch. The Arizona Constitution mandates, the rules governing the conduct of the JPRC be created by the Arizona Supreme Court. The rules for the appointment of JPRC members are also to be created by the Arizona Supreme Court. The Arizona Supreme Court is responsible for appointing members to the JPRC uninfluenced by the other branches of government. As of this date, the JPRC has operated within the department of the judiciary separate and distinct from any other branch of government.

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 retention election 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 this assistance of two members of the legislature. Upon the passage of Section 8 of SCR 1044, these two branches are certainly less separate and distinct than they were before its adoption.

The Court need not determine whether Section 8 formally amends Article III sec. 1 of the Arizona Constitution. There are certainly arguments that Section 8 does not implicate the Separation of Power clause of the Arizona Constitution. *See, State ex. rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593-95 ¶ 12-20 (2017) (legislature requiring the executive branch to conduct investigations and file

claims). In this context, however, the Court must only determine, “whether all the matters addressed by an initiative *concern* a single section of the constitution.” *Save Our Vote*, 231 Ariz. at 150 ¶ 15 (emphasis added). In this case, the Court finds more than one section of the constitution is concerned by Section 8 of SCR 1044.

Historically the Same Subject

The Court finds that retention elections and the operation of the JPRC have historically been treated as involving the same subject matter. This history includes: 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. The purpose behind the 1992 amendments was to create a mechanism to provide voters more information about judges listed on their ballots. There is a history of linking retention elections and the judicial review process.

Qualitatively Similar

Sections 1-7 are qualitatively similar to Section 8. As noted above, all the proposed amendments relate to the timing and functioning of retention elections. This includes what information is provided to voters and how this information is to be gathered. Portions of Section 8 change the dynamic of who initiates the investigation and to some degree who conducts the investigation. However, this change does suggest the provisions of Section 8 are qualitatively dissimilar than those in 1-7.

In this case, as in *Arizona Together*, both provisions affect the substantive law the same way. The provisions of the proposed amendments, “while not logically dependent on one another, clearly share a logical relationship and comprise a unified pronouncement.” *Id.* at 123 ¶ 17. Again, like *Arizona Together*, Sections 1-7 and Section 8 pertain to the same subject and derive meaning and effect from the mandates contained in the other provisions. *Id.*

The Court finds Sections 1-7 are qualitatively similar to Section 8.

Overall Balancing

The Court finds the proposed amendments are facially related, historically treated as a single subject, and qualitatively similar. The Court also finds Section 8 concerns differing portions of the constitution left untouched by Sections 1-7. However, the Court finds on balance any concerns related to Section 8 are well within the knowledge of the voter based on the text of the amendment. The modifications to the JPRC and the legislative authority to initiate investigations are all clearly outlined in the text of SCR 1044.

Ruling

All is laid bare for decision by the people. *Ariz. Const.* art. XXI § 1. Before them is a proposal to rework how retention elections work in the State of Arizona. This includes modification to the entity responsible for evaluating judicial performance and how such evaluations are initiated. They will either reject SCR 1044 or adopt it fully aware of the modification to their right to vote for judges and of the

intrusion into the independence of the judiciary. A difficult decision, certainly, but not one they have been log-rolled into making.

The Court finds Sections 1-7 and Section 8 of SCR 1044 are topically related and sufficiently interrelated. Therefore, these proposed amendments do not violate Article XXI § 1 of the Arizona Constitution. The Plaintiff's Application for Preliminary Injunction on this ground is **Denied**.

The Title

Progress Arizona takes issue with the title of SCR 1044. They argue the people are being misled by the title "Judicial Accountability Act." They argue, SCR 1044 violates Article VII § 12 and Article IV Part 2 § 13 of the Arizona Constitution. This argument rests on Progress's position that the title "Judicial Accountability Act" is deceptive because, from their prospective, SCR 1044 reduces judicial accountability instead of increasing it.

Title Requirement

At the outset, it is not altogether clear either of the of the Articles relied on by Progress have anything to do with titling amendments to the Constitution. First, Article VII §12, "is direction to the legislature to enact appropriate laws to secure the purity of elections and guard against electoral abuses." *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶29 (App. 2009); *See also, Harless v. Lockwood*, 85 Ariz. 97, 100-01 (1934). Nothing in the text of this provision says anything about requiring the titling of proposed amendments to the constitution. Article IV Pt. §13 of the Constitution requires "every act of the Legislature shall embrace but one subject" which "shall be expressed in the title." This provision of the Constitution applies to legislative acts not proposed amendments. *See, Arizona School Boards Association, Inc. v. State*, 252 Ariz. 219, 228 ¶ 38 (2022); *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, 244 ¶8-12 (2004). Again, based on the text of these two Articles, it is certainly unclear that an amendment to the Constitution must have a title.

Misleading Title

In this case, definitively resolving that question is unnecessary. The chosen title for the SCR 1044 is "Judicial Accountability Act." Again, Progress's complaint is the title is deceptive because the amendment reduces judicial accountability. This argument fails for two reasons. First, the title "Judicial Accountability Act" is value neutral. Second, SCR 1044 certainly adds a method for accountability that did not previously exist. Meaning, it is possible the Judicial Accountability Act will increase the accountability of the judiciary.

Value Neutral

The title Judicial Accountability Act makes no mention of how SCR 1044 will affect the accountability of judicial officers. It does not state or suggest SCR 1044 *increases* judicial accountability. It does not state or suggest SCR 1044 *decreases* judicial accountability. It simply places the people on notice that it relates to the accountability of judges. They will then read the proposed

amendments and decide for themselves if they believe SCR 1044 provides the appropriate level of accountability for judges in a retention system.

The Court finds, the title “Judicial Accountability Act” succinctly expresses the subject of the SCR 1044.

Potential Increase

Further, SCR 1044 arguably increases judicial accountability. While it is true there will be fewer retention elections, SCR 1044 undoubtably creates an entirely new method for holding judges accountable. Upon adoption, any member of the legislative branch can call for an investigation of a retention election judge. *SCR 1044* § 8. The JPRC will be constitutionally mandated to conduct the requested investigation. *Id.* The legislature being given such vast authority to delve into the workings of a sitting judge is a different and increased method for creating judicial accountability. So much so, as outlined above, the Court has found SCR 1044 raises concerns related to the Separation of Powers clause in the Arizona Constitution. Progress’s suggestion the SCR 1044 decreases judicial accountability simply by lowering the number of retention elections ignores critical portions of Section 8 of SCR 1044.

Ruling

The Court finds the title Judicial Accountability Act is not deceptive. It appropriately places the voter on notice of the subject of SCR 1044. To the extent there is requirement that proposed amendments to the constitution must have their subject expressed in a title, SCR 1044’s title “Judicial Accountability Act” meets this requirement.

IT IS THEREFORE ORDERED, the Application for Preliminary Injunction is **Denied**.

IT IS FURTHER ORDERED, the Intervenor shall file a proposed Judgment with this Court within 10 days of this order. The proposed Judgment shall contain the appropriate language from Rule 56 of the Arizona Rules of Civil Procedure.



eSigned by NAPPER, JOHN 08/02/2024 11:40:04 AvAOiRst

HON. JOHN NAPPER

Judge of the Superior Court, visiting Judge

cc: James E. Barton II/Jacqueline Mendez Soto/Daniella Fernandez Lertzman- Barton Mendez Soto PLLC
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