

Pursuant to Rule 2(b) of the Arizona Rules of Procedure for Special Actions and Rule 24 of the Arizona Rules of Civil Procedure, Andrew M. Tobin, Speaker of the Arizona House of Representatives, moves to intervene in this special action as a respondent.

Subject to approval of this intervention, Speaker Tobin joins and incorporates by reference the Motion for Expedited Reconsideration of this Court’s Order of November 17, 2011 (“the Order”) and Motion for Stay filed by the Governor and the Arizona Senate. Speaker Tobin also writes separately addressing why the Order should be reconsidered.¹

ARGUMENT

I. SPEAKER TOBIN SHOULD BE ALLOWED TO INTERVENE AS OF RIGHT

Speaker Tobin meets the standard for intervention of right in Rule 24(a)(2) of the Arizona Rules of Civil Procedure. In relevant part, the Rule states:

“Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the

¹ In the event that this Court denies intervention, the Speaker seeks leave to be heard on the Motion for Reconsideration as *amicus curiae* pursuant to Rules 2(b) and 7(f) of the Arizona Rules of Procedure for Special Actions and Rule 16 of the Arizona Rules of Civil Appellate Procedure.

applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.”

Rule 24(a), Ariz. R. Civ. P. (emphasis added). The relief sought by Petitioners strikes at the core of the constitutional authority of the House of Representatives, of which Speaker Tobin is the presiding officer. Petitioners seek—and by this Court’s Order have received—relief that nullifies a final action taken by the Arizona Senate by more than a two-thirds majority. That final action—reviewing the Governor’s removal of the IRC chairwoman—is exclusively conferred upon the Senate by ARIZ. CONST., art. IV, pt. 2, §1, ¶ 10. While this provision does not give the House a role in removal proceedings, the Constitution grants the House similar authority in other contexts. For example, the House may punish its members for “disorderly behavior” as well as expel any member “with the concurrence of two-thirds of its members.” ARIZ. CONST., art. IV., pt. 2, § 11. Similarly, the House holds the “sole power of impeachment” for “high crimes, misdemeanors, or malfeasance in office. . .” resulting in removal if the Senate concurs by a two-thirds vote. ARIZ. CONST., art. VIII, pt. 2, §§ 1-2. This Court has said that the House and Senate have “exclusive jurisdiction” over impeachments. *Mecham v. Gordon*, 156 Ariz. 297, 302, 751 P.2d 957, 962 (1988) (quoting *State ex rel. Trapp v. Chambers*, 220 P. 890, 892 (Okla. 1923)). This Court’s Order is a clear departure from recognizing the Legislature with

“exclusive jurisdiction” over a process that has been specifically conferred upon it by the Constitution. The Order stands to extend judicial power over coordinate branches to an unprecedented extent. The Constitution gives the Senate the sole and final word on the decision to remove a member of the IRC. In this context, this Court’s assumption of jurisdiction in this action raises troubling prospects for the constitutional authority of the House as well. As the presiding officer of the House, Speaker Tobin has the duty to ensure that the chamber’s clear constitutional purview is not compromised.

The current disposition of this case is a direct blow to the constitutional authority of the Senate. But it also clearly sets a precedent for similar judicial review over decisions of the House on which the Constitution by its terms confers finality. This Court has approved of intervention of right for private entities impacted by public litigation. *See Morris v. Woolery*, 103 Ariz. 392, 393, 442 P.2d 839, 840 (1968) (owners of copper mines granted intervention in litigation over agency director’s valuation of copper); *Saunders v. Superior Court In and For Maricopa County*, 109 Ariz. 424, 425-426, 510 P.2d 740, 741 - 742 (1973) (police and fire associations granted intervention in litigation challenging the constitutionality of retirement system). The House is one half of the legislative branch of government. Any diminution of the Senate’s

constitutional jurisdiction necessarily impacts the House. Protecting the constitutional jurisdiction and authority of the House is a weighty interest. This is an interest sufficient to justify intervention as of right.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION SHOULD BE GRANTED

Permitting Speaker Tobin to intervene advances the purpose of Rule 24. “It is well settled in Arizona that Rule 24 ‘is remedial and should be liberally construed with the view of assisting parties in obtaining justice and protecting their rights.’” *Bechtel v. Rose In and For Maricopa County*, 150 Ariz. 68, 72, 722 P.2d 236, 240 (1986) (quoting *Mitchell v. City of Nogales*, 83 Ariz. 328, 333, 320 P.2d 955, 958 (1958).). The Speaker feels strongly that the authority of his chamber as well as the constitutional separation of powers are adversely impacted by this Court’s Order. This is sufficient to meet the standard for permissive intervention under Rule 24(b):

Upon timely application anyone may be permitted to intervene in an action . . . [w]hen an applicant’s claim or defense and the main action have a question of law or fact in common.

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

“Under this liberal standard, the intervenor-by-permission does not even have to be a person who would have been a proper party at the beginning of the suit.” *Bechtel*, 150 Ariz. at 72, 722 P.2d at 240 (citations and quotation

omitted.) Similar or shared responsibilities between the House and Senate for legislative power makes questions of law for one chamber relevant, and perhaps even controlling for the other.

Where the facial standard of Rule 24(b) has been met, this Court has endorsed considering other factors to determine whether intervention is appropriate; these include:

whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

Bechtel, 150 Ariz. at 72, 722 P.2d at 240. The Speaker agrees with the positions taken by the Governor and the Senate in this case; but the House's interests are not represented by them. The Governor and the Senate seek to vindicate the respective authority conferred on them by the removal provision. The Speaker, by contrast, seeks to ensure that the legal result of this case does not adversely affect similar grants of constitutional authority to the House. Intervention by the Speaker will not delay this proceeding. The Speaker's position with regard to the Motion for Reconsideration is provided contemporaneously and is set forth *infra* at section III. Finally, an assessment of the implications of this Court's Order for the House of Representatives contributes to a "just and equitable adjudication" of this

action. Because it focuses on the actions of coordinate branches of government, this special action has significant implications for state government outside of the specific question of the removal of members of the IRC. The Arizona judiciary has a proud tradition of affirming and maintaining the separation of powers. It is altogether fitting and proper for this Court to permit the presiding officer of the Arizona House of Representatives to address the constitutional issues in this action—issues that will doubtlessly have broad ramifications for the constitutional structure of government in Arizona.

III. THE MOTION FOR RECONSIDERATION SHOULD BE GRANTED.

Speaker Tobin joins fully in the arguments made by the Governor and Senate in support of their combined Motion for Reconsideration. Briefly, and by way of separate emphasis, he respectfully requests that the Court consider the following.

A. This Court Does Not Have Jurisdiction.

The Constitution confers the sole power of review of the Governor's removal decision on the Senate. The Constitution's repose of this power of review in the Senate excludes this Court from exercising any review of the Governor's removal decision. Here is why:

In this case, Petitioners invoked the Court’s original jurisdiction under the special action rules. The source of such jurisdiction is found in ARIZ. CONST., art. VI, § 5, ¶ 1, which the Court itself cited in its order of November 17, 2011, granting relief. Special Action Rule 1(a) spells out that the special actions rules do not enlarge “the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition.” As a result, the analysis devolves onto which of the three writs – mandamus, prohibition, or certiorari—supplies original jurisdiction for this Court to act in this case. The Governor’s removal does not involve questions of whether “the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion,” which rules out mandamus. The removal is a completed act, which rules out prohibition. Thus, if this Court is to have jurisdiction to hear this case, it must be found in certiorari, and we turn our attention now to that writ and find it wanting.

“The purpose of the writ [of certiorari] is to review the proceedings and acts of inferior tribunals, boards, or officers exercising judicial functions to determine whether the jurisdiction of such inferior tribunal, board, or officer has been exceeded, and there is no appeal.” *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 131, 166 P.2d 943, 944 (1946) (emphasis

added). This function of certiorari is captured in Special Action Rule 3(b). Later, the Court expanded the scope of certiorari to include review for an abuse of discretion made by a lower tribunal, board, or officer exercising judicial powers. Robert O. Leshner, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34, 48 (1966). This function is captured in Special Action Rule 3(c). The seminal expansion of certiorari to cover review of an abuse of discretion occurred in *State ex re. Ronan v. Superior Court*, 95 Ariz. 319, 390 P.2d 109 (1964).

There can be no question that the Governor had jurisdiction to remove a member of the IRC “for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.” ARIZ. CONST., art. 4, pt. 2, § 1, ¶ 10 explicitly confers such jurisdiction on her. That would have ended the inquiry in the statute defining instances when certiorari may be granted, ARIZ. REV. STAT. 12-2001, and in the pre-*Ronan* cases of this Court. See Leshner, *supra*, 7 ARIZ. L. REV. at 46 (“If there has, throughout most of their long development, been one basic rule governing these two writs [certiorari and prohibition], it must be this: that they issue only to correct or prevent an excess of jurisdiction.”).

Yet the Constitution explicitly placed the power to review the Governor’s decision for abuse of discretion in the Senate, and this explicit

grant of jurisdiction to the Senate leaves no room for this Court to exercise the same power. If the Court were to assume such a power, it would render the Senate's judgment meaningless whenever this Court disagreed with it. Indeed, neither petitioners nor *amici* have cited to this Court a single case from any jurisdiction of which we are aware in which the judicial branch exercised a power of review for abuse of the Governor's authority when the Constitution placed such power in the Senate. That is the precise question of jurisdiction presented to this Court, and this Court has never assumed such jurisdiction in its long history.

B. The Purple Dress Case.

At argument, the Court tested the Governor's position by posing the purple dress question. That is, can the Governor remove a member of the IRC because she wore a purple dress? Yet that question cannot be asked in isolation. The key question is whether this Court can review such a decision. The answer to the second question is no, regardless of the answer to the first question. As demonstrated above, the Constitution vests the power of review in the Senate and only the Senate. The Court's intervention completely disrespects and eviscerates the collective judgment constitutionally entrusted to two-thirds of duly elected Senators.

This does not mean that neither the Governor nor the Senate can get it wrong. Because they are human they obviously can err. But in this sense, the purple dress question confused fallibility with finality. For its part, the judicial branch itself is by no means immune from getting a decision wrong—and on occasion horribly wrong. Consider, for example *Dred Scott*, *Plessy*, *Buck*, or *Korematsu*,² whose infamy forever stains the reputation of the United States Supreme Court. Consider as well *Porter v. Hall*, 34 Ariz. 308, 325, 271 P.411, 427 (1928), in which this Court denied Arizona’s native peoples the right to vote on the despicable reasoning “that the Indians were not capable of handling their own affairs in competition with the whites, if left free to do so”³

In this vein, the Senate cited Justice Jackson’s famous aphorism:

There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. Allen, 344 U.S. 443, 540 (1953) (Justice Jackson concurring).

Following Justice Jackson, the true jurisdictional question in this case is

² *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Buck v. Bell*, 274 U.S. 200(1927); *Korematsu v. United States*, 323 U.S. 214 (1944).

³ This Court redeemed the error in *Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948), a landmark on the road to justice in Arizona.

where does the Constitution place finality? The answer plainly is in the Senate, for right or for wrong.

C. Holmes v. Osborn

In *Holmes v. Osborn*, 57 Ariz. 522, 115 P.2d 775 (1941), this Court addressed removals pursuant to a statute authorizing the Governor to remove members of the Industrial Commission with no other recourse. The Senate had no role to play.

This Court has described in detail the type of quasi-judicial exercise of power by the executive branch that is susceptible to review by certiorari.

The law is made by the Legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction, as it is sometimes called, such a board may lawfully be endowed with very broad powers, and its conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong. Not only this, but many such boards are created whose decisions of fact honestly made within their jurisdiction are not subject to review in any proceeding. It is important to notice the limitation contained in the last sentence. The decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review. It cannot itself conclusively settle that question, and thus endow itself with power. If no appeal from its conclusions be provided, the question whether it has acted within or exceeded its jurisdiction is always open to the examination and decision of the proper court by writ of certiorari.

Batty v. Arizona State Dental Bd., 57 Ariz. 239, 250, 112 P.2d 870, 875 (1941) (emphasis added). Unlike the laws addressed in *Holmes and Batty*, ARIZ. CONST., art. 4, pt. 2, § 1, ¶ 10, is a constitutional provision and it confers final power of review on the Senate. It is not a statutory delegation of quasi-judicial authority. Certiorari does not apply where a constitutional provision grants authority to act on the executive with final review in the Senate.

Certiorari does not lie against a constitutional officer, whose discretion is founded in the Constitution itself, and who cannot act with finality. The Petitioners failed to provide this Court with a single example of certiorari applying against an executive officer acting under constitutional authority. Moreover, there is no authority to support certiorari applying where an executive-branch determination is non-final, and subject to a check by a coordinate branch of government. The Constitution leaves the final word with the Senate. This Court is without jurisdiction to displace the final determination of that body.

Thus Petitioner's rhetorical claims that the Governor seeks unilateral ability to define "substantial neglect of duty" and "gross misconduct in office" miss the mark. The Governor is not at liberty to apply an absurd standard for these constitutional criteria (i.e. hair color or style of dress). If

Paragraph 10 made no mention of the Senate, Petitioner’s rhetoric would have a closer correspondence with reality. But the Constitution confers exclusive review of the Governor’s removal determination upon the Senate. As with any form of final review, the Constitution does not purport to bestow infallibility—merely finality. This Court is, of course, deeply grounded in the weighty responsibility of final review. This Court serves our constitutional structure well when it acknowledges those occasions when our state charter confers final-review authority upon a coordinate branch. Finally, Petitioners spill significant ink painting a charged partisan narrative and inviting this Court to engage in political speculation. That path would divert this Court from its time-honored role of “saying what the law is.” It is process, not politics that must guide this Court if the separation of powers is to have meaning.

CONCLUSION

For these reasons, the Court should grant intervention to Speaker Tobin, reconsider its decision, and decline jurisdiction.

RESPECTFULLY SUBMITTED this 21st day of November, 2011.

By: /s/ Peter A. Gentala

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 22, Arizona Rules of Civil Appellate Procedure, I certify that the foregoing is in a proportionally spaced typeface and is comprised of 3,233 words, including footnotes.

DATED this 21st day of November, 2011.

/s/ Peter A. Gentala
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