

Attachment B

William E. Morris Institute for Justice

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April 12, 2021

Sent by E-mail to Anni Foster

The Honorable Douglas Ducey
Governor of Arizona
1700 West Washington Street
Phoenix, Arizona 85007

Re: Request for a Veto of Senate Bill 1322

Dear Governor Ducey:

The William E. Morris Institute for Justice (“Institute”) strongly urges you to veto Senate Bill 1322. The Institute is a non-profit public interest program that works on issues that are important to low-income Arizonans. The rights of tenants in eviction cases is such an issue. We thank you for your past work to prevent certain evictions during this pandemic and we appreciate your understanding of the critical importance of housing. The Institute closely monitors procedural rules for eviction cases to ensure that tenants are treated fairly and appropriately. As we discuss below, Senate Bill 1322 violates the separation of powers principles between the legislature and the courts, harms tenants and is simply unnecessary.

What the bill does: There are two parts to the bill. **First**, the bill provides that in an *eviction case*, “any party, including an attorney or witness, upon written notice to the court shall be permitted to participate at the initial appearance remotely” by telephone or video conference connection. **Second**, if the case is contested and continued then at the discretion of the court, the court “may” require “all parties, attorneys and witnesses to participate in person.”

I. The Bill Violates the Separation of Powers Doctrine

The Arizona Constitution, Article 3, provides that the legislative, executive and judicial departments of government “shall be separate and distinct, and no such departments shall exercise the powers properly belonging to either of the others.” Under the Supreme Court’s constitutional authority, the Court “shall have administrative supervision over all the courts of the state,” Article 6, § 3, and shall also have the power

“to make rules relative to all procedural matters in any court.” Article 6, §5(5).

The legislature has the authority to pass substantive laws. Substantive law “creates, defines and regulates rights” while the procedural rules are the method of enforcing the right. *State v. Birmingham*, 96 Ariz. 109, 110 (1964). Thus, “under the traditional separation of powers doctrine, the legislature lacks authority to enact a statute if it conflicts with or tends to engulf the Court’s constitutionally vested rulemaking authority.” *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342 (1999) (citation omitted) (internal quotation mark omitted).

It is hard to imagine a more “procedural” rule than how and when litigants, their attorneys and witnesses may appear telephonically. The bill engulfs the Court’s rulemaking authority in this area and violates the separation of powers between the courts to set court procedures and the legislature to determine substantive rights. The bill has nothing to do with any substantive rights. Thus, Senate Bill 1322 is an improper procedural rule and should be vetoed on that basis alone.

II. The Legislature Has Usurped the Arizona Supreme Court’s Authority to Issue Administrative Orders Concerning Telephonic Appearances

During the COVID-19 pandemic the Arizona Supreme Court has issued several administrative orders concerning eviction cases. The most recent order, Number 2021-19, was issued on February 1, 2021. This order, like all prior eviction orders issued during the COVID-19 pandemic, provides that “Parties, attorneys, and witnesses in an eviction proceeding *shall* be permitted to participate remotely by telephone or video conferencing, *at their discretion.*” Section III Hearings, ¶1 (emphasis added). This provision in the administrative order is expected to continue during the pandemic.

Senate Bill 1322 conflicts with the Court’s administrative order in two ways. First, it requires that each party must provide written notice to the court if the party wants to participate telephonically. The current administrative order has no such requirement.

The Institute and other advocates do not object to the court allowing everyone to appear remotely at the first appearance and certainly this option is needed during the COVID-19 pandemic. The concern is what will happen at subsequent contested hearings/trials. The need to provide a written notice to appear remotely at the first appearance will be an impediment to participation for most tenants due to the short time frame for service of process before the first appearance. A tenant can be served on a Friday for a Monday initial appearance. “The summons in a special detainer action shall be served at least two days before the restrain day” A.R.S. § 33-1377(B) (Arizona

Residential Landlord and Tenant Act). While the bill creates a barrier for tenant participation by telephone, there is no such barrier for landlords and their attorneys. Landlords and landlord attorneys can easily file the written notice when they file the eviction complaint. The overwhelming majority of landlords are represented, and their attorneys can easily include this notice in their form pleadings. This additional requirement presents a barrier to remote participation by tenants who are over 99% unrepresented.

The second way the bill conflicts with the administrative order is that although participation by telephone is a uniquely procedural action, the bill takes discretion away from the courts and other parties when eviction cases are continued as a contested matter. The bill would mean that in-person participation in a continued contested hearing or trial would be at the discretion of the court, but the court would have to have *all* parties, attorneys and witnesses participate in person or *none*. The bill would prevent a party or the court from requesting that another party or witness appear in court. This all or none approach is counter to the flexibility that the courts should have in these matters. For all these reasons, the Institute suggests the courts are in the best position to set the procedural policies for remote participation for all cases, including evictions.

Conclusion

There can be no dispute that the proposed statute is procedural rather than substantive. There also is no way to reconcile the differences in Senate Bill 1322 and the Supreme Court's administrative order. Senate Bill 1322 creates a barrier to telephonic appearances at the initial court hearing and takes away the parties' discretion to appear telephonically at subsequent hearings. When a statute is procedural and conflicts with a rule, it is unconstitutional. *Seisinger v. Siebel*, 220 Ariz. 85 (2009).

But even if the bill did not violate the separation of powers doctrine, the bill is not needed and sets bad policy. The courts are still functioning during the pandemic and learning what works in these situations. The proponents of the bill want to lock in court procedures that favor them, harm tenants and take away the courts' flexibility.

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Therefore, for all the above reasons, the Institute requests that you protect tenants and veto Senate Bill 1322. Please let me know if you have any questions or if I can provide you with any additional information.

Sincerely,

A handwritten signature in cursive script that reads "Ellen Sue Katz". The signature is fluid and connected, with a large initial "E" and a long, sweeping tail on the "z".

Ellen Sue Katz