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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE	)	Supreme Court No. R-23-0055
RULES OF PROCEDURE FOR	)	
SPECIAL ACTIONS	)	COMMENT OF JOEL NOMKIN ON
	)	PETITION TO AMEND THE RULES
	)	OF PROCEDURE FOR SPECIAL
	)	ACTIONS
	)	
	)	

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, and in my individual capacity as an Arizona appellate practitioner, I submit this comment on the Task Force’s Petition to Amend the Rules of Procedure for Special Actions. The Petition brings much needed clarity and reform to the special action rules. I write to raise concern with only one aspect of the Petition—Proposed Rule 11.

Proposed Rule 11 would replace the current guidepost for the exercise of special action jurisdiction with thirteen non-dispositive factors—weighing for and against jurisdiction—“the court should consider.” As drafted, that group of factors

may sanction and encourage appellate special actions that go beyond the intended scope and purpose of special action relief.

For over 50 years, Rule 1(a) has stated the standard for the exercise of special action jurisdiction. That Rule recognizes that special actions are meant only to replace, without broadening, traditional writ relief, and that as with the old writs, special actions should be available only in the absence of an adequate appellate remedy. To quote Rule 1(a):

Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition.

The same standard of “no equally plain, speedy, and adequate remedy by appeal” appears in current Rule 8(a), which specifically concerns appellate special actions.

The Petition acknowledges (at 10) that it deliberately “omitted the phrase ‘no [equally] plain, speedy, and adequate remedy by appeal’ from the Rule 11 factors.” In doing so, the Petition does not question the substance of that standard, nor does it express an intent to broaden the circumstances in which special action relief is appropriate. Rather, the Petition says (*id.*) that “sometimes the phrase is merely a recital and is not tethered to specific circumstances,” and that the proposed “factors in Rule 11 are more tangible for guiding the exercise of special action discretion.”

The Task Force’s desire to provide better guidance deserves applause. Yet, it’s worth noting that the “no equally plain, speedy, and adequate remedy by appeal” language is entrenched in Arizona case law. According to a Westlaw search on March 7, 2024, that standard appears in 433 Arizona appellate decisions. Moreover, that standard mirrors the blackletter and universal principle that equitable relief is unavailable when an alternative remedy exists. But even accepting the Task Force’s premise—that sometimes the phrase is merely a recital—the phrase’s removal from the rules may have unintended substantive consequences. It may signal that special action jurisdiction *may be appropriate* even when there *is* an adequate remedy by appeal.

That signal is especially possible given the factors listed in Proposed Rule 11. Subsection (b) lists eight factors that support the exercise of special action jurisdiction. Several of these factors are consistent with the “no equally plain, speedy, and adequate remedy by appeal” standard. But practitioners could read at least some of the other listed factors as invitations for special actions even when there is an adequate appellate remedy—like factor 3 (a question “of first impression”) or factor 4 (a question “of statewide importance”).¹ This concern isn’t cured by subsection (c), which lists five factors for declining jurisdictions. The

¹ The uniqueness and importance of an issue may well be plus-factors for the exercise of special action jurisdiction. But those factors alone should not make a question special-action worthy when a regular appeal would be an adequate remedy.

fourth listed factor asks whether the question presented is “equally appropriate to address by appeal.” But that factor, like the others in subsection (c), only “support[s] but do[es] not require declining jurisdiction.”

If the absence of an adequate appellate remedy is to become only one of thirteen non-dispositive factors for special action jurisdiction, then the rules may well “enlarge[e] the scope of the relief traditionally granted,” Rule 1(a), under the old writs. That would not only be contrary to current Rules 1(a) and 8(a), but it would also be contrary to the Petition’s Proposed Rule 2(c), which expressly reaffirms that the special action rules “do not enlarge the scope of relief [the traditional] writs formerly required.” On a practical level, opening the spicket to more special actions would allow more cases to cut to the head of the appellate line, potentially delaying resolution of other cases in the queue.

The Task Force’s desire to provide more tangible guidance can be accomplished without removing the standard that courts and practitioners have so long relied on. An easy alternative: rework Proposed Rule 11 to keep the “no equally plain, speedy, and adequate remedy by appeal” language, but follow that language with clarifying examples of when that standard may be met. Those examples can be drawn from at least some factors now listed in the Proposed Rule, such as whether a petition presents a question of privileges and immunities, a question that may become moot during appeal, or a question the speedy resolution of which is

necessary to avoid real harm. The use of such examples would provide the sort of additional guidance that the Petition seeks to offer without threatening an expansion of special action jurisdiction.²

Respectfully submitted this 18th day of March 2024.

By: /s/ Joel Nomkin

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² One word of caution regarding the certification process contemplated by Proposed Rule 12. I assume that the Task Force does not intend that process to allow certification of issues where there is “an equally plain, speedy, and adequate remedy by appeal.” Perhaps in a separate proceeding, Arizona should consider adopting a certification process (like 28 U.S.C. § 1292(b)) that does not require the absence of an adequate appellate remedy. But doing so in the context of the special action rules would allow those rules to go beyond the boundaries long established by current Rules 1(a) and 8(a), and still recognized by the Task Force in Proposed Rule 2(c).