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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND THE RULES
OF SPECIAL ACTION PROCEDURE

Supreme Court No. R-23-0055

**COMMENT TO PETITION TO
AMEND THE RULES OF
PROCEDURE FOR SPECIAL
ACTIONS**

Pursuant to Arizona Supreme Court Rule 28(e), I submit this Comment to the Task Force's Petition to Amend the Rules of Procedure for Special Action. I submit this comment in my personal capacity, and not on behalf of the Arizona Court of Appeals or any of my colleagues.

INTRODUCTION

I join with others in commending the Supreme Court for appointing the Task Force to review and update the Rules of Procedure of Special Actions. I commend the Task Force for their hard work in drafting the Proposed Rules, which were in dire need of an update. I write to raise concern only about the Proposed Rules' failure to state that a special action is not available where there is an adequate remedy by way of appeal.

1 ANALYSIS

2 I.

3 The Arizona Constitution governs the judicial department’s jurisdiction and
4 authority. *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 594-95 (2017)
5 (“Our state constitution identifies the various components of this Court's subject
6 matter jurisdiction.”); *see also* A.R.S. § 12-102 (“The supreme court shall discharge
7 the duties imposed and exercise the jurisdiction conferred by the constitution and by
8 law.”). No court, by rule or otherwise, can expand its jurisdiction or authority
9 beyond that set forth in the Constitution.

10 The provisions in the Arizona Constitution governing the jurisdiction and
11 authority of the judicial branch do not mention special actions or grant the judicial
12 department jurisdiction over special actions. Instead, the Constitution grants the
13 supreme court and the superior courts jurisdiction over, and authority to issue,
14 certain extraordinary writs. For example, the supreme court has “[o]riginal
15 jurisdiction of habeas corpus, and quo warranto, mandamus, injunction and other
16 extraordinary writs to state officers.” Ariz. Const. art. 6, § 5(1). It also has “[p]ower
17 to issue . . . writs of mandamus, review, prohibition, habeas corpus, certiorari, and
18 all other writs necessary and proper to the complete exercise of its appellate and
19 revisory jurisdiction.” Ariz. Const. art. 6, § 5(4). The superior courts “may issue
20 writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas
21 corpus[.]” Ariz. Const. art. 6, § 18; *see also* A.R.S. § 12-123(A) (“The superior
22 court shall have original and concurrent jurisdiction as conferred by the
23 constitution[.]”).

24 When it comes to the court of appeals, the Constitution says that “[t]he
25 jurisdiction, powers, [and] duties . . . of any intermediate appellate court shall be as
provided by law.” Ariz. Const. art. 6, § 9. Though the Arizona Rules for Special

1 Action went into effect in 1970, the Arizona Legislature did not then extend
2 jurisdiction over special actions to the court of appeals, creating some confusion
3 about the scope of the court’s jurisdiction. *See State ex rel. Neely v. Rodriguez*, 165
4 Ariz. 74, 77 (1990) (explaining that the court of appeals “may entertain special action
5 jurisdiction only in matters that it might properly consider in an appeal”). But in
6 1990, the Legislature closed the gap by adding A.R.S. § 12-120.21(4), which
7 provides that the court has “[j]urisdiction to hear and determine petitions for special
8 actions brought pursuant to the rules of procedure for special actions, without regard
9 to its appellate jurisdiction.” This effectively provided the court of appeals with
10 authority to issue extraordinary writs to the same extent as the supreme court and the
11 superior court.

12 II.

13 Because the Constitution speaks of authority in terms of the writs courts can
14 issue, it is important to understand the history and scope of those writs. The three
15 writs relevant to special action procedures are the writ of certiorari, the writ of
16 mandamus, and the writ of prohibition. *See Bledsoe v. Goodfarb*, 170 Ariz. 256,
17 257 n.1 (1991) (“In Arizona, relief formerly obtained by writs of prohibition,
18 mandamus or certiorari is now obtained by ‘special action.’”). Each of those writs
19 is equitable in nature. Thus, authority to issue them does not exist where there is an
20 adequate remedy at law, including by way of appeal. *See City of Bisbee v. Ariz. Ins.*
21 *Agency*, 14 Ariz. 313, 314 (1912) (“As a general rule, the equity side of the court
22 may not be invoked when the complainant has a plain, speedy, and adequate remedy
23 at law.”).

24 A.

25 The writ of certiorari pre-dates statehood. In 1878, the Supreme Court of the
Territory of Arizona, applying Comp. Laws Ariz. § 458, reversed a trial court’s

1 issuance of a writ of certiorari. In doing so, the court explained that “[t]his writ
2 issues only when excess of jurisdiction has occurred, and then only when there is no
3 appeal.” *Reilly v. Tyng*, 1 Ariz. 510, 511 (1878). The statute the court applied stated
4 that “[t]he writ shall be granted in all cases when an inferior tribunal, board, or
5 officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal,
6 board, or officer[.]” Comp. Laws. Ariz. § 458. Moreover, it stated that the writ
7 applied only when “there is no appeal, nor, in the judgment of the court, any plain,
8 speedy, and adequate remedy.” *Id.*

9 The Legislature included the writ of certiorari in the state’s first civil code.
10 That statute, like its territorial predecessor, provided that “the writ shall be granted
11 in all cases when an inferior tribunal, board or officer, exercising judicial functions,
12 has exceeded the jurisdiction of such tribunal, board or officer[.]” Ariz. Civil Code
13 1913 § 1495. Moreover, the writ was only available if “there is no appeal, nor, in
14 the judgment of the court, any plain, speedy and adequate remedy.” *Id.*

15 Just two years prior to creation of the special action rules, the Supreme Court
16 explained that “[t]his Court has not infrequently restated the rule expressed by the
17 statute that a writ of certiorari may be employed when an inferior tribunal has
18 exceeded its jurisdiction and there is no appeal, nor a plain, speedy and adequate
19 remedy available.” *Genda v. Super. Ct., Pima County*, 103 Ariz. 240, 242 (1968).
20 The statute granting the supreme court and superior courts power to issue a writ of
21 certiorari has remained untouched since 1913 and still makes clear that the writ
22 should not issue unless “there is no appeal, nor, in the judgment of the court, a plain,
23 speedy and adequate remedy.” A.R.S. § 12-2001.

24 **B.**

25 The writ of mandamus also pre-dates statehood. In 1875, the Supreme Court
of the Territory of Arizona explained that a writ of mandamus could issue “to control

1 the action of any inferior court, board, or officer” but not when “the party injured
2 has no other speedy and adequate remedy.” *Woffenden v. Bd. of Supervisors of Pima*
3 *County*, 1 Ariz. 237, 238 (1875).

4 The Legislature also included the writ of mandamus in the first civil code.
5 That statute provided that “The writ of mandamus may be issued by the supreme or
6 superior court to any inferior tribunal; corporation, board (whether the governor is
7 a member of such board or not) or person, to compel the performance of an act which
8 the law specially enjoins as a duty resulting from an office, trust or station[.]” Ariz.
9 Civil Code 1913 § 1553. The next section clarified, however, that “[t]he writ may
10 be issued in all cases where there is not a plain, speedy and adequate remedy in the
11 ordinary course of law.” Ariz. Civil Code 1913 § 1554.

12 Just four years before adopting the special action rules, the Supreme Court
13 emphasized that “[t]he writ of mandamus will not issue where there is a plain, speedy
14 and adequate remedy in the ordinary course of law[.]” *Morrison v. Stanford*, 100
15 Ariz. 211, 213 (1966). And the statute addressing writs of mandamus continues to
16 make clear that the writ should not issue where there is “a plain, adequate and speedy
17 remedy at law.” A.R.S. § 12-2021.

18 C.

19 A “writ of prohibition is the proper remedy to prevent [judicial or quasi-
20 judicial] action when it is without jurisdiction, and there is no other plain, speedy,
21 and adequate remedy available.” *Johnson v. Betts*, 21 Ariz. 365, 371 (1920). It
22 appears that the first discussion of a writ of prohibition in a published Arizona
23 decision occurred in 1894, but with that discussion came the notion that the writ is
24 not available if there is an adequate remedy by way of appeal. In *Walker v. District*
25 *Court of Pinal County*, the Supreme Court of the Territory of Arizona, when
requested to issue a writ of prohibition, had the following to say:

1 The question of a want of jurisdiction in the supreme court to issue such
2 a writ by virtue of its original jurisdiction was extensively argued at the
3 hearing, but, inasmuch as the determination of that question is not
4 necessary to the conclusion which we have reached, we do not express
5 any opinion upon that subject. If the power exists in this court to issue
6 the writ, the petitioner, we are convinced, *has an adequate remedy by*
7 *appeal or error from the action of the district court; and it is*
8 *everywhere agreed that in such case the writ will not issue.* Any other
9 course, ordinarily, would bring all civil cases where jurisdictional
10 questions are involved to this court by the writ, instead of appeal or
11 error; a course not authorized by our practice.

12 4 Ariz. 249, 252 (1894) (emphasis added).

13 After statehood, the Supreme Court again made clear that “prohibition may
14 not be resorted to if a party has a plain, speedy, and adequate remedy by appeal.”
15 *Miller v. Super. Ct. of Mohave County*, 21 Ariz. 61, 64 (1919). Though the
16 Legislature has never codified the writ of prohibition, the Supreme Court has
17 repeatedly said that the writ cannot issue where there is an adequate remedy by
18 appeal. See, e.g., *Valley Drive-In Theatre Corp. v. Super. Ct. in and for Pima*
19 *County*, 79 Ariz. 396, (1955) (“[O]rdinarily a writ of prohibition will not be allowed
20 if one has a plain, speedy and adequate remedy by appeal.”); *Town of Tempe v.*
21 *Super. Ct. in and for Maricopa County*, 33 Ariz. 166, 170 (1928) (rejecting a writ of
22 prohibition where “[t]he only reason suggested why the remedy by appeal is not
23 adequate is that the petitioner would be put to considerable expense and annoyance
24 in trying the counterclaim on its merits”); *Taylor v. Stanford*, 100 Ariz. 346, 350
25 (1966) (granting a writ of prohibition because “there is no other plain, speedy and
adequate remedy and we can in our discretion issue the writ”).

23 III.

24 The foregoing history informs the original meaning of the terms in the Arizona
25 Constitution granting courts the authority to issue extraordinary writs. In 1960, the

1 electorate repealed the prior version of Article 6 and replaced it with the current
2 version. By that time, as we have seen, there was a well-developed body of case law
3 and decades-old statutes delimiting the meaning of the terms “certiorari,”
4 “mandamus,” and “prohibition.” In 1960, each of those terms were commonly
5 understood to describe a unique form of equitable relief, and all were understood to
6 be unavailable where there is an adequate remedy by way of appeal. *See Matthews*
7 *v. Indus. Comm’n of Ariz.*, 254 Ariz. 157, 163 ¶ 29 (2022) (“When construing a
8 constitutional provision, we seek to give terms the original public meaning
9 understood by those who used and approved them.”). By again using those terms
10 without modification in 1960, the electorate re-baked that common and original
11 meaning into the Arizona Constitution. *See Sekhar v. United States*, 570 U.S. 729,
12 733 (2013) (“[A]s Justice Frankfurter colorfully put it, ‘if a word is obviously
13 transplanted from another legal source, whether the common law or other legislation,
14 it brings the old soil with it.’” (quoting Felix Frankfurter, *Some Reflections on the*
15 *Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))). The constitutional grant
16 of authority in Article 6 to issue writs of certiorari, mandamus, and prohibition is
17 limited by the historical contours of those writs—the scope of the writs determines
18 the scope of the courts’ authority to issue them. Thus, that authority extends only to
19 those situations where no adequate remedy by way of appeal is available.

20 IV.

21 The current rules of procedure for special actions repeatedly state that they do
22 not expand the scope of the extraordinary writs and, therefore, special action relief
23 is unavailable where there is an adequate remedy by way of appeal. Thus, the current
24 special action procedures cannot result in the issuance of relief where it would not
25 have been available prior to 1970, including where there is an adequate remedy by
way of appeal. By incorporating traditional limitations on the extraordinary writs,

1 the current rules also heed the constitutional limitations on courts' authority to issue
2 those writs.

3 Start with Rule 1. That Rule states that “[e]xcept as authorized by statute, the
4 special action shall not be available where there is an equally plain, speedy, and
5 adequate remedy by appeal[.]” Ariz. R. P. Spec. Act. 1(a). Moreover, “nothing in
6 these rules shall be construed as enlarging the scope of the relief traditionally granted
7 under the writs of certiorari, mandamus, and prohibition.” *Id.*

8 The comments to Rule 1 further emphasize the historical and constitutional
9 limitations on the availability of special action relief. Comment (a) says that “[t]his
10 Rule proposes to combine the traditional writs of certiorari, mandamus and
11 prohibition into one proceeding[.]” Comment (a) adds that “[t]he writs are
12 constitutional in Arizona, Ariz.Const. Art. 6, §§ 5, 18, as amended, and the Rule
13 does not alter their substance but merely establishes the procedure for obtaining their
14 remedies.” Finally, comment (a) explains that, by not altering the substance of the
15 writs, Rule 1 is consistent with A.R.S. § 12-109, which provides that court rules shall
16 not “[a]bridge, enlarge or modify substantive rights of a litigant” or “[a]bridge,
17 enlarge or modify statutory, contractual or common law real property rights or
18 questions of substantive law.” A.R.S. § 12-109(B).

19 Rule 2 incorporates the limits on the extraordinary writs by providing that
20 “[a]ny person who previously could institute an application for a writ of mandamus,
21 prohibition, or certiorari may institute proceedings for a special action.” The
22 comments to Rule 3 explain that Rule 3(a) “sets forth the traditional functions of the
23 writ of mandamus” and Rules 3(b) and (c) “inherit the tradition of the writs of
24 certiorari and prohibition.” The comment also explains that the language in Rule
25 3(c) “is a codification of existing extraordinary writ law in Arizona,” and therefore
“these words of art carry with them their traditional interpretations.” The comments

1 to Rule 3 again emphasize “[t]his section is of course subject to the basic limitation
2 that there is no review by special action when there is an equally plain, speedy, or
3 adequate remedy by appeal.” Finally, comment (e) to Rule 7 explains that “[t]his
4 Rule changes terminology, and we now refer to petitions for extraordinary relief as
5 special actions. However, the change in terminology does not signal any relaxation
6 of the standards heretofore used by the courts with regard to special writs.”

7 V.

8 The proposed rules explain that “[t]he writs of certiorari, mandamus, or
9 prohibition by which parties formerly obtained relief in proceedings are now called
10 special actions.” Proposed Rule 2(c). Like the current rules, they also state that
11 “[t]hese rules do not enlarge the scope of relief those writs formerly granted.” *Id.*

12 But the proposed rules do not state that special action relief is unavailable
13 where there is an adequate remedy by way of appeal. Instead, Proposed Rule 11 lists
14 factors a court should consider for accepting or declining special action jurisdiction.
15 Proposed Rule 11(b)(5) provides that one factor that supports accepting jurisdiction
16 is where the petition asks the court to resolve questions “tending to evade review.”
17 Proposed Rule 11(c)(4) then provides that one factor that supports declining
18 jurisdiction is where the petition asks the court to resolve questions “equally
19 appropriate to address by appeal.” Proposed Rule 11(c) then emphasizes that
20 “[t]hese factors support but do not require declining jurisdiction.”

21 VI.

22 The special action rules should continue to make clear that a special action is
23 not available where there is an adequate remedy by way of appeal. Failing to include
24 that limitation, and instead ostensibly treating it as one of several factors to be
25 considered when deciding whether to accept special action jurisdiction is
problematic for a few reasons, each of which is related to the other.

1 First, it risks expanding the courts' authority beyond that conferred in the
2 Arizona Constitution. As explained, the Constitution grants only authority to issue
3 writs of certiorari, mandamus, and prohibition. Each of those writs was commonly
4 understood in 1960 to come with a substantive limitation—they cannot issue when
5 there is an adequate remedy by way of appeal. By omitting that limitation on
6 authority—or relegating it to one factor among a multi-factor consideration—the
7 Proposed Rules risk signaling to courts that they can accept jurisdiction and issue
8 equitable relief even when there is an adequate remedy by way of appeal. If a court
9 did so, it would act beyond the authority the Constitution grants it.

10 Second, it is inconsistent with the original meaning of the Constitution.
11 Equitable relief—regardless of its form—is not available if there is an adequate
12 remedy at law. Therefore, since before the dawn of statehood, Arizona courts have
13 recognized that the writs of certiorari, mandamus, and prohibition cannot issue when
14 there is an adequate remedy by way of appeal. And, when the electorate approved
15 the current version of Article 6 in 1960, it was well understood that those writs
16 cannot issue when there is an adequate remedy by way of appeal. By continuing to
17 peg the courts' authority to the terms “certiorari,” “mandamus,” and “prohibition,”
18 the people brought the old soil within Article 6. *See State v. Winegardner*, 243 Ariz.
19 482, 485 ¶ 9 (2018). By omitting the adequate remedy by way of appeal
20 requirement, the Proposed Rules risk disregarding that decision.

21 Third, the Court risks violating § 12-109 by using a court rule to modify
22 substantive rights and law. The special action rules are merely a procedural device
23 intended to remedy “the existing confusion as to the proper lines between these
24 various writs, and by lack of a simple procedure which can be followed by all
25 members of the bar and by the judiciary.” Ariz. R. P. Spec. Act 1 cmt. (a). But the
adequate remedy by way of appeal requirement was not merely a procedural device.

1 Rather, it was a substantive limitation on a court’s authority to issue an extraordinary
2 writ, which is why the current special action rules repeatedly emphasize that the
3 requirement must be met. Section 12-109(B) says that court rules “shall not”
4 “[a]bridge, enlarge or modify substantive rights of a litigant” or “[a]bridge, enlarge
5 or modify statutory . . . rights or questions of substantive law.” By omitting the
6 adequate remedy by way of appeal requirement, the Rules risk doing both.

7 Fourth, the special action rules will be internally inconsistent. On the one
8 hand, Proposed Rule 2(C) claims that “[t]hese rules do not enlarge the scope of relief
9 those writs formerly granted.” On the other hand, the Proposed Rules risk doing just
10 that by not making clear that the special action procedures are not available when
11 there is an adequate remedy by way of appeal, and instead using a watered-down
12 version of that requirement as one factor among many when deciding whether to
13 accept special action jurisdiction.

14 CONCLUSION

15 The amended special action rules should continue to make clear that the
16 special action procedures are not available where there is an adequate remedy by
17 way of appeal. I also agree with many of the points Mr. Joel W. Nomkin makes in
18 his comment and with his proposal for how to incorporate the adequate remedy by
19 way of appeal requirement into the updated version of the special action rules.

20 RESPECTFULLY SUBMITTED this 17th day of May, 2024.

21 */s/ Michael S. Catlett*

22 Michael S. Catlett
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24 Appeals, Division One
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