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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: ARIZONA RULES OF PROCEDURE FOR SPECIAL ACTIONS 3	Supreme Court No. R-26-0011 **REPLY IN SUPPORT PETITION TO AMEND RULE OF PROCEDURE FOR SPECIAL ACTIONS 3**

The Rules of *Procedure* for Statutory Special Actions are, by their nature, procedural. The *substance* of the claims that may be brought through a statutory special action is determined by the Legislature. When the Legislature creates a statutory cause of action and directs that it be brought under particular *procedural* rules, that does not authorize the judiciary to impose *substantive* limitations on the scope of that cause of action.

The State Bar's comment opposing the Petition suggests otherwise. *See* Bar Comment at 2 (characterizing Rule 4 as "limit[ing] the court's scope of review in a special action"). Read in the manner the State Bar urges, Rule 4 would restrict statutory special actions in substantive ways—ways not contemplated by the Legislature, and which would undermine the Legislature's decision to create special action remedies as a way to provide meaningful and efficient judicial review.

To eliminate any uncertainty and to confirm that the revised special action rules do not alter the substantive scope of statutory special actions, the Court should grant the petition to amend RPSA 3 and restore the requested language derived from former Rule 1(b).

I. Rule 4 does not independently limit the scope of special actions.

Contrary to the Bar's suggestion that RPSA 4 "limits the court's scope of review in a special action," that rule simply reflects the function of the common law writs—as codified in statute[1]—that special actions replaced. Indeed, the State

[1] The Legislature codified the common law writs of certiorari and mandamus at A.R.S. §§ 12-2001 and 12-2021, respectively. *See also* RPSA 2(c). The Legislature has enacted statutes regarding the common law writ of prohibition as well. *See* A.R.S. § 12-124(C) (authorizing the superior court to issue writs of prohibition); *id*. § 1-302(B) ("writs of prohibition may be issued and served on any day"). *Cf. id.* § 12-120.21(A)(3) (granting court of appeals jurisdiction to issue "other writs … necessary and proper to the complete exercise of its appellate jurisdiction."). This Court has "[p]ower to issue … writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction," and "[p]ower to make rules relative to all *procedural* matters in any court." Ariz. Const. art. VI § 5. Where the Legislature has codified the old writs, and not substantively altered their function or meaning,

Bar Committee Note to former Rule 3 (the predecessor to current Rule 4) makes clear that the Rule merely "codifie[d] existing practice in Arizona" regarding the treatment of those writs at the time the original special action rules were adopted. The Note indicates that the goal was to "eliminate any problem of label" where various writs might overlap. *Id.*[2]

The "questions" raised under the former rule—now described as "grounds for bringing" a special action—closely track the functions historically served by the old writs of mandamus, certiorari, and prohibition, respectively. *See id.* The Rule was therefore designed as a "codification of existing extraordinary writ law in Arizona," incorporating established understandings of those traditional remedies. *Id.* The Rule was *not* designed to impose new substantive restrictions on special actions—even those derived from common law. The comment to the old rule notes that it was written to "fully maintain[]" a court's discretion to review by special action whether "essential justice has been done" in cases where there was no "'equally' plain, speedy, or adequate" remedy by appeal. *Id.* The Rule thus

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the relevant common law meanings are incorporated. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320-21 (2012) (explaining the canon of imputed common law meaning).

[2] Indeed, by that time, this Court had already come to treat writs as components of a single procedural mechanism. *See id.* (citing *State v. Superior Court*, 103 Ariz. 208 (1968)).

describes the traditional grounds for special-action relief; it does not independently define or restrict the substantive scope of judicial review.

The Task Force that proposed the current rules also sought to preserve existing practice rather than alter the substance of the rules when it changed the description of "questions" to "grounds." Indeed, Appendix C to Rule Petition R-23-0055, which "provides a detailed explanation of each proposed rule," says that the change was meant simply "to make the title more descriptive" and to "restat[e]" the questions as affirmative grounds, because "rules do not conventionally pose questions, *there is no meaning lost* in converting the questions to statements, and we believe direct phrasing communicates most clearly." *Id.* at 2, 5–6. The Task Force explained, "[t]he *substance* of the rule is otherwise similar to the substance of the [old] rule." *Id.* at 6.

Accordingly, any limitations on the "scope of review"[3] in a special action do not and cannot arise from the procedural rules themselves. Rather, they derive from the underlying substantive law. For common law writs, that substance includes traditional common law understandings. *See supra* n.1. But in the case of statutory special actions, any substantive limits must originate with the Legislature. Nothing

[3] *See* Bar Comment, *passim*.

in either the former rules or the current rules suggests any intent to alter that fundamental principle.

II. The Bar's reliance on the Court of Appeals' decision in *Abraham v. Arizona Board of Regents* is misplaced both because that decision is pending this Court's review and because the Court of Appeals failed to consider former Rule 1(b) and separation-of-powers concerns.

The Bar favorably cites the Court of Appeals decision in *Abraham v. Arizona Board of Regents*, 563 P.3d 632 (Ariz. App. 2025), for the proposition that "Rule 4 defines the scope of review in a special action." Bar Comment at 2 n.2 (citing *Abraham*, 563 P.3d at 641-42 ¶ 37). The Bar's reliance on *Abraham* is misplaced.

First, this Court is currently reviewing that decision. CV-25-0020-PR. *See also* Pet. at 7 n.5. The relevance of the Court of Appeals' decision to the special action rules therefore remains unsettled.

Second, and more importantly, the Court of Appeals simply erred when it stated—without qualification—that the prior Rule 3 "limits the scope of issues that may be raised in a special action," and that the new Rule 4 "imposes the same standard." *Abraham*, 563 P.3d at 641–42 ¶ 37. As explained below, that is not true.

A. The Court of Appeals, like the Task Force, failed to consider the relevant carveout for statutory special actions contained in former Rule 1(b).

In *Abraham*, the Court of Appeals ignored the fact that former Rule 1(b) specifically carved out statutory special actions from the old ruleset's treatment of the questions that could be raised and considered in such cases. Paragraph 37 of that opinion cited only former Rule 3 and current Rule 4, but not former Rule 1(b). That is important because Rule 1(b) says: "[w]here a statutory special action is involved, the questions to be raised and considered are wholly unaffected by this Rule,[[4]] but the provisions of this Rule as to parties, procedure, interlocutory orders and stays, and judgments shall apply."

The plain language of former Rule 1(b) demonstrates that former Rule 3 could not have categorically defined or limited the questions that can be raised in *every* special action. The rules themselves expressly recognized a distinction between traditional special actions and statutory special actions. For the latter, the rules govern procedural matters while leaving the substantive questions to the underlying statute. Any contrary reading is difficult to reconcile with the text of the former rules.

However, the current rules no longer contain this express qualification and distinct treatment of statutory special actions, thereby causing confusion. This Court should remedy that oversight.

The Bar's comment doesn't meaningfully engage with substance of former Rule 1(b). It merely cites the relevant language in a footnote and dismisses its

[4] As noted in the Petition, the old rules' use of the term "this Rule" appears to refer to the entire ruleset. Pet. at 3 n.2.

omission as a merely "perceived or potential problem." Bar Comment at 3 & n.3. According to the Bar, there's no "conflict between the scope of review in the current rule and the scope of review in a statutory special action." *Id.* at 3.

Even if that is true, it does not resolve the underlying issue. There is ongoing uncertainty now, as demonstrated by *Abraham*, and the Legislature remains free to create new statutory special actions in the future that may not fit neatly within the traditional categories reflected in the former writs or the grounds identified in Rule 4. The rules should therefore make clear that they do not constrain the substantive scope of legislatively created remedies. Clarifying that point now would avoid future uncertainty and ensure continued respect for the separation of powers.

In *Abraham*, the Court of Appeals jumped from 1) recognizing that the rules describe "the scope of issues that may be raised in a special action," including—but not limited to—whether there was an abuse of discretion,[5] to 2) at least

[5] "Abuse of discretion" is ambiguous in the public records context because it can refer to two separate types of discretion: that of the records custodian, or that of a reviewing court. *See* RPSA 4 (the "grounds" apply to decisions made by "a lower court ***or*** a body, officer, or person" (emphasis added)). That is one likely cause of some of the confusion here. Whether the records custodian abused her discretion by withholding records that should have been disclosed is a distinct question from whether a reviewing court abused its discretion on any number of matters during a special action proceeding. The former is a purely legal question subject to *de novo* review, *Cox Ariz. Publ's v. Collins*, 175 Ariz. 11, 14 (1993). But while the latter could involve similar legal errors (as recognized in the new rules, *see* RPSA 4(c); *see also* *Mitchell v. Superior Court*, 142 Ariz. 332, 334 (1984) (referring to "the court's discretion" in the context of *in camera* inspection of records to conduct the

implying that the rules themselves were the source of the "limits" on the issues that could be raised, to 3) concluding that these limits determine not only the *issues* that could be raised (the "*scope* of review," to use the Bar's framing), but also dictate the *standard* of review. *Abraham*, 563 P.3d at 641-42 ¶ 37. The first premise is correct. The second is faulty. The third is flat wrong and likely to create ongoing problems in this area. *See* Goldwater Am. Br. in *Abraham* at 6–8; Goldwater Supp. Am. Br. in *Abraham* at 6–7 & n.7.

Restoring the substance of former Rule 1(b) would eliminate confusion on this point and confirm what the former rules expressly recognized: procedural rules govern the manner in which statutory special actions are litigated, but the substantive scope of those actions remains a matter of legislative determination.

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balancing test set forth in *Carlson v. Pima County*, 141 Ariz. 487 (1984)), a reviewing court's discretion could also refer to a variety of other matters, from procedural decisions to attorney fee awards. *See, e.g.,* RPSA 7(j) ("For good cause, a court *may* suspend or accelerate any procedure for an original special action." (emphasis added)); *Cox*, 175 Ariz. at 14 (discussing "abuse of discretion" in the context of fee awards). The standards of review in each of those contexts vary. *Id.* ("Several standards of review apply here."). In other words, the consideration of "an abuse of discretion" as one possible question or ground in a special action does *not* set the standard of review for that question. *See* Goldwater Supp. Am. Br. in *Abraham* at 7 (explaining that "records custodians have some level of discretion *in the first instance*" to decide whether to withhold records, but that "courts review even discretionary denials of access to public records *de novo*").

B. The public records statute does not delegate the substantive contours of public records claims to the judiciary, and placing substantive limitations on statutory special actions within the RPSA would create separation of powers problems.

1. In the public records statute, the Legislature merely recognized the judiciary's constitutional rulemaking function.

The Bar, like the Board of Regents in *Abraham*, relies heavily on the public records statute for the erroneous proposition that it "incorporates the scope of review from the Rules." Bar Comment at 4 (citing A.R.S. § 39-121.02(A)). *See also Abraham*, 563 P.3d at 641-42 ¶ 37; ABOR Resp. to Goldwater Supp. Am. Br. in *Abraham* at 7. That interpretation assumes that, by providing that public records actions proceed "pursuant to the rules of procedure for special actions," A.R.S. § 39-121.02(A), the Legislature intended to relinquish authority over the substantive scope of the cause of action. The more natural—and constitutionally sound—reading is that the Legislature simply recognized that special actions are governed by *procedural* rules promulgated by the judiciary.

The creation and definition of statutory causes of action and remedies are quintessentially legislative functions, and Arizona courts have long recognized that the Legislature creates and defines substantive rights, while the judiciary interprets and applies them. *See, e.g., Roberts v. State*, 253 Ariz. 259, 270 ¶ 43 (2022) (legislative power is inalienable); *Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶ 28 (2009) ("judge-made substantive law is subordinated to contrary legislative acts"); *State v. Murray*, 194 Ariz. 373, 375 ¶ 9 (1999) ("As a general matter, the separation of powers doctrine leaves creation of future statutory law to the legislative branch and determination of existing law and its application to past events to the judicial branch."); *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 211 ¶ 37 (1999) ("The Legislature has the power to enact and create law within constitutional bounds. The power to define existing law, including common law, and to apply it to facts rests exclusively with the judicial branch." (citation omitted)).

By contrast, promulgating procedural court rules is a core judicial function expressly assigned to this Court by the Constitution. Ariz. Const. art. VI § 5; *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, 342 ¶¶ 6–7 (1999) (recognizing this Court's constitutional "power to make *procedural* rules" as "exclusive" (emphasis added)). *See also* *Burney v. Lee*, 59 Ariz. 360, 364 (1942) ("[T]he rule-making power is essentially judicial in its nature.").

Against that backdrop, the public records statute should not be construed as authorizing—or requiring—the judiciary to impose substantive limitations on a public records special action, or any other statutory cause of action, merely because the statute references a procedural mechanism for those cases. *See* *State v. Wagstaff*, 164 Ariz. 485, 493 (1990) ("[T]here are limits beyond which [the judiciary] cannot go in finding what [the Legislature] has not put into so many words…." (quoting *United States v. Evans*, 333 U.S. 483, 486 (1948)).

The converse is equally true. Procedural rules should not be interpreted to create substantive limitations on statutory special actions, such as restricting the legal questions that may be raised or considered. Outside of the common-law context, those matters remain "the Legislature's prerogative." *State v. Hansen*, 215 Ariz. 287, 289 ¶ 9 (2007); *Phoenix Newspapers, Inc., v. Superior Court*, 180 Ariz. 159, 163 (App. 1993) (applying separation of powers analysis to a statute concerning judicial records, which were governed by procedural rule, and reiterating that a "sharp separation of powers must be carefully preserved by the courts so that one branch of government is not permitted to encroach upon functions properly belonging to another branch" (citation omitted)).

The Petition does not ask the Court to alter the substance of any statutory special action. It asks only that the rules make explicit what former Rule 1(b) already recognized: procedural rules govern the manner in which statutory special actions are litigated, while the substantive scope of those legislatively created remedies remains a matter of legislative determination.

2. The Petition's proposed rule properly protects the separation of powers.

The Bar's comment suggests that granting the Petition "would authorize special actions that do not fit within one of the categories of special action used since the Old Writs." Bar Comment at 5. That is not correct. The Petition would not authorize any new causes of action, but would simply clarify that when the Legislature creates a statutory special action, the substantive scope of that action is determined by the Legislature—not by procedural rules derived from the common-law writs.

This respects the constitutional separation of powers. "The Legislature has plenary power to deal with any topic unless otherwise restrained by the Constitution." *Seisinger*, 220 Ariz. at 92 ¶ 26. That includes non-procedural (i.e., *substantive*) legal matters, including statutory causes of action.

For example, burdens of proof are matters of substantive law. *Id.* at 90 ¶ 30. Relatedly, "common law privileges are substantive and generally subject to legislative amendment." *Id.* (citations omitted). And "the Legislature may modify the elements of common law causes of action, subject to constitutional constraints." *Id.* (citations omitted).

The grounds upon which a litigant may invoke a statutory special action are more analogous to those substantive matters than to procedural rules governing the mechanics of litigation. The question of whether a litigant may bring a particular claim, and on what legal basis, concerns the scope and availability of a remedy. By contrast, *procedural* rules govern matters such as pleadings, service, venue, discovery, briefing schedules, and other mechanisms through which substantive rights are enforced. *See* RPSA 7 ("*Procedures* for Original Special Actions" (emphasis added)).

Here, allowing the current rules to serve as substantive limitations on the grounds for bringing, or issues to be raised in, statutory special actions, would raise core separation-of-powers concerns. The power being exercised would be legislative in nature because it would define the permissible scope of a legislatively created remedy. The practical consequences could likewise be substantial, including uncertainty regarding the issues that can be raised by special action, the improper alteration of standards of review in statutory special actions (as in *Abraham*, *supra*), and the elevation of purportedly procedural rules over substantive statutes.[6]

Restoring the substance of former Rule 1(b) would clarify that statutory special actions remain procedurally governed by the Rules of Procedure for Special

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[6] "The essential nature of the powers being exercised" and "the practical consequences of the action in question" are two key factors in analyzing separation-of-powers violations. *State ex rel. Woods v. Block*, 189 Ariz. 269, 276 (1997) (cleaned up).

Actions while their substantive scope remains determined by the Legislature. Such a clarification would be consistent with the text of the former rules, the intent underlying the recent revisions, and Arizona's longstanding separation-of-powers principles. *See, e.g.,* Ariz. Const. art. III.

III. The Bar ignores key caselaw cited in the Petition.

The Bar claims that public records caselaw supports its interpretation of Rule 4. Bar Comment at 5. But two key public records cases point in the opposite direction.

First, in *West Valley View, Inc. v. Maricopa County Sheriff's Office*, the Court of Appeals considered a special action brought by a newspaper to compel the ongoing production of press releases issued by the Maricopa County Sheriff's Office. 216 Ariz. 225, 226 ¶ 1 (App. 2007). The court explained how special action review works in public records cases: "After the superior court has accepted jurisdiction[7] and determined the merits of a special action petition, 'we review

[7] Because statutory special actions are non-discretionary, "accepting jurisdiction" over a public records special action is either unnecessary or is a mere formality. *See* Pet. at 5; *see also* RPSA 12(a) (appellate special actions are discretionary "*unless a statute* or an order requires the court to accept jurisdiction (emphasis added)); Hon. Andrew Jacobs, et al., *7 Things to Know About the New Rules of Procedure for Special Actions*, Arizona Attorney (Jan. 2025) ("Original special actions typically get filed in superior court, and jurisdiction is almost always mandatory—*particularly in statutory special actions*—meaning the superior court does not have discretion over whether to take the case."). *See also* *West Valley*

whether the court abused its discretion by its grant or denial of relief.'" *Id.* at 227 ¶ 7 (quoting *Ottaway v. Smith*, 210 Ariz. 490, 492 ¶ 5 (App. 2005)). The court then immediately qualified that statement in a footnote: **"When a special action is authorized by a statute such as A.R.S. § 39-121.02(A), the issues that may be raised are not limited by the Rules of Procedure for Special Actions."** *Id.* at 227 n.3 (citing *Primary Consultants, LLC v. Maricopa County Recorder*, 210 Ariz. 393, 395 ¶ 6 n.1 (App. 2005)).

The Court of Appeals then confirmed that "whether the denial of access to public records is wrongful" is a question courts "review *de novo*." *Id.* at 227 ¶ 7 (citing *Bolm v. Custodian of Records*, 193 Ariz. 35, 38 ¶ 7 (App. 1998)). Thus, *West Valley View* expressly recognized both propositions: the procedural framework of a special action remains relevant, but statutory special actions are not limited to the issues identified in the special-action rules.

Primary Consultants addressed the issue even more directly. 210 Ariz. at 395 ¶ 6. In that case, the Maricopa County Recorder and Maricopa County Director of Elections argued that certain records containing voter information were not public records under the public records laws. *Id.* Therefore, the officials asserted, the court's special action jurisdiction was not granted by the statute, but

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View, 216 Ariz. at 227 n.4 (rejecting argument that the superior court abused its discretion in accepting special action jurisdiction under the public records statute).

by what was then Rule 4[8] of the special action rules. *Id.* Once again, the Court of Appeals explained why the distinction mattered:

> A special action brought pursuant to the Arizona Rules of Procedure for Special Actions is limited to questions of "(a) Whether the defendant 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; or (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or (c) Whether a determination was arbitrary and capricious or an abuse of discretion." Ariz. R.P. Spec. Act. 3. **Where a special action is authorized by statute, the issues that may be raised are not limited by the rules. Ariz. R.P. Spec. Act. 1(b).**

Id. at 395 ¶ 6 n.1 (emphasis added).

In other words, the County's position was that judicial review was "limited … to whether the actions of the County were an abuse of discretion, arbitrary, or capricious" under former Rule 3. *Id.* at 397 ¶ 11. The requester, Primary Consultants, maintained that "although access to voter records is more restricted than to other public records, they nonetheless remain public records subject to the provisions of the public records laws … [such that] it properly brought a statutory special action pursuant to § 39-121.02(A), and that the superior court should have exercised de novo review." *Id.* (citing both *Cox*, 175 Ariz. at 14, **and former Rule**

[8] Former Rule 4(a) broadly provided that "[a]n action under this Rule shall be known as a special action, and in a proper case may be brought in the Supreme Court, the Court of Appeals, or the Superior Court." The rest of former Rule 4 broadly covered special action "Procedure."

1(b)). The court agreed with Primary Consultants. *Id.* at 397-98, ¶¶ 12, 15-16. It held that the *statute* governed, and that thus that the scope of review was not substantively limited by the Rule. *See id.* at 399 ¶ 21. In other words, because the public records statute controlled, the final sentence of former Rule 1(b) also applied and the court's analysis was *not* limited to the questions listed in former Rule 3.[9]

Primary Consultants and *West Valley View* both recognized that statutory special actions occupy a distinct position: they employ the procedural framework of special actions, but the substantive issues and standards governing claims derive from the *statute* and the body of law interpreting it. That is precisely the distinction former Rule 1(b) expressly preserved and that the Petition seeks to restore.

IV. Conflicts could arise in contexts other than the public records setting.

The Bar criticizes the Petition for focusing on statutory special actions involving public records. Bar Comment at 5. But public-records cases provide a timely, recurring, and well-developed example of the issue presented. They are also among the most frequently litigated statutory special actions, and they've generated substantial judicial analysis regarding the interaction between statutory

[9] Unlike *Abraham*, both *Primary Consultants* and *West Valley View* have been repeatedly relied upon in subsequent published appellate decisions. *See, e.g., Judicial Watch, Inc. v. Mayes*, No. 2-CA-CV 2025-0322, 2026 WL 1154050, at *2 ¶ 10, *4 ¶ 18 (Ariz. App. Apr. 29, 2026). Tellingly, *Abraham* cited neither of those cases.

causes of action and the special-action rules. Petitioners also have extensive experience litigating public records cases, including before this Court. *See, e.g.,* Goldwater Supp. Am. Br. in *Abraham* at 1.

That said, the issues with Rule 4 are not confined to public records litigation. Statutory special actions run the gamut from criminal law to employment and safety requirements, to property and zoning disputes, secured transactions, public funding, and tax-related issues. 2025 Comment to RPSA 3. Some retain their common law labels, others are expressly called special actions; some are original special actions, and a few are appellate. *Id.*

The breadth and diversity of these statutory special actions underscore the central point of the Petition: The Legislature has repeatedly created statutory special actions tailored to specific substantive areas of the law.

Ultimately, the Petition asks the Court to restore a distinction that formerly existed in the rules and that was recognized in the relevant caselaw, and that—if not made explicit—risks curtailing special actions substantively, in ways not contemplated by the Legislature and contrary to the separation of powers.

Taken together, (1) the old writs' consolidation in the old special action rules, (2) former Rule 1(b)'s express preservation of statutory special actions, 3) the cases applying those rules, 4) the Task Force's stated goal of preserving existing practice, and 5) Arizona's separation-of-powers principles all support Petitioners' position.

RPSA 3 should be amended to clarify that, while statutory special actions are procedurally governed by the Rules of Procedure for Special Actions, their substantive scope remains determined by the statutes that create them.

Conclusion

The Court should grant the Petition.

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