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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ARIZONA STATE SENATE, *et al.*, Plaintiffs, v. KATIE HOBBS, in her official capacity as the Governor of Arizona, Defendant.	No. CV2023-019899 **APPLICATION FOR ORDER TO SHOW CAUSE OR, ALTERNATIVELY, FOR EXPEDITED HEARING** (Assigned to the Hon. Scott Blaney)

Pursuant to A.R.S. § 12-2021 and Rule of Special Action Procedure 4(c), Plaintiffs Arizona State Senate and Warren Petersen, in his official capacity as the President of the Senate, respectfully apply for an order to show cause why the relief requested in the Verified Special Action Complaint—*i.e.*, a writ of mandamus compelling the Governor to transmit nominations for the directorships of thirteen administrative agencies to the Senate no later than the first week of the next legislative session—should not be granted. In the alternative,

the Plaintiffs respectfully request that the Court set an expedited hearing on their claim for declaratory relief, pursuant to Arizona Rule of Civil Procedure 57.

INTRODUCTION

Nearly a century ago, the Arizona Supreme Court was invited to pronounce that "the office of the Governor is of a different and higher nature than other state offices created by the Constitution, and for that reason not bound by" strictures of accountability to the judiciary. *Winsor v. Hunt*, 29 Ariz. 504, 510–11 (1926). Retorting that "[w]ith this doctrine we can in no wise agree," *id.* at 511, the court recounted that "[i]t is the boast of American democracy that this a government of laws, and not of men," *id.* at 512.

This foundational pillar of republican government—that when the Governor abjures a legal duty, the courts must compel her to act as the law requires—endures today. When the directorship of an administrative agency becomes vacant, "the governor shall nominate and with the consent of the senate shall appoint" a successor. A.R.S. § 38-211(B). When a vacancy occurs after the Legislature has adjourned, a nomination must be submitted no later than the first week of the next regular session in January. *See id.* § 38-211(C). While the Governor's discretionary determination of *whom* to appoint to any given office is not susceptible to judicial oversight, her duty to transmit *a* nomination to the Senate is concrete, categorical and unconditional.

Resentful of the Senate's scrutiny and occasional rejection of her nominees, the Governor, in open and explicit defiance of her statutory obligation, has announced that she will not nominate individuals to vacant directorships in thirteen state agencies. Absent judicial intervention, the vacancies will remain unfilled, and the agencies will be controlled indefinitely by the Governor's handpicked "Executive Deputy Directors"—a fictive appellation coined by the Governor—who have never been confirmed by the Senate.

The Governor "can no more ignore the law than any other citizen." *Holmes v. Osborn*, 57 Ariz. 522, 539 (1941). When, as here, the very officer charged with enforcing

the law instead spurns it, it is the courts' right and responsibility to restore the constitutional equilibrium.

FACTUAL BACKGROUND

Most administrative agencies in Arizona government must be led by a director who is nominated by the Governor and confirmed by the Senate. *See* A.R.S. § 38-211. Shortly after taking office in January 2023, the Governor began transmitting nominations for these various directorships to the Senate, which had constituted a standing Committee on Director Nominations ("DINO") to evaluate nominees and make recommendations to the Senate as a whole. Between approximately January 9, 2023 and September 25, 2023, the DINO Committee held votes with respect to ten of the Governor's nominees, and recommended seven of these individuals for confirmation by the Senate. *See* Compl. ¶ 20–22. Three nominees, however, did not receive a confirmation recommendation, either because some DINO Committee members had reservations about the nominee's qualifications or suitability for the position or because the DINO Committee required additional time to examine the nominee's background.

On September 25, 2023, the Governor sent a letter to President Petersen in which she announced that she was withdrawing her nominees for directorships of the Department of Administration, the Department of Economic Security, the Department of Environmental Quality, the Arizona Health Care Cost Containment System, the Department of Child Safety, the Department of Housing, the Department of Insurance and Financial Institutions, the Department of Veterans' Services, the State Lottery, the Residential Utility Consumer Office, the Office of Tourism, and the State Land Department (each an "Agency" and collectively, the "Agencies"). The Governor indicated that she did not intend to submit new nominees for these positions and instead would pursue other "avenues." *See* Compl. Ex. A.

The same day, the Governor appointed Ben Henderson to a rapid succession of "interim director" positions in each of the Agencies. During his hours-long tenure as an "interim director," Henderson appointed each of the withdrawn nominees as the "Executive Deputy Director" of the respective Agency. In an email to the "Executive Deputy

Directors," Henderson stated that the appointments would permit them "to ensure leadership continuity at your agency and give you the ability to move forward in the important work of your agency. Should the Senate resume a good faith process of reviewing and confirming nominees as contemplated by law, the Governor will consider resending her nominees to the Senate for confirmation." Compl. Ex. B. To date, the Governor has not nominated individuals for directorships of any of the Agencies, and the "Executive Deputy Directors" are exercising all the powers and duties of the Agency's director on an indefinite basis. Upon information and belief (founded on the Governor's own statements and actions), she does not intend to transmit any nominations for Agency directorships to the Senate at all, and certainly not by the first week of the next legislative session.

ARGUMENT

The Senate is entitled to a writ of mandamus requiring the Governor to transmit nominations for the directorships of each Agency to the Senate no later than the first week of the legislative session that will begin on January 8, 2024. The Governor's duty to nominate a qualified successor upon the occurrence of a vacancy in an agency directorship is absolute and unqualified. *See* A.R.S. § 38-211. And even assuming *arguendo* that Section 38-211's provisions are somehow discretionary, the Governor has abused any ostensible latitude the statute confers by willfully and unjustifiably obstructing the Senate's advice and consent prerogatives.

I. The Governor Has Failed or Refused to Discharge Her Non-Discretionary Statutory Duty to Nominate Agency Directors

"[A] mandamus action is designed to compel performance of an act the law requires." *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11 (1998); *see also* A.R.S. § 12-2021 ("A writ of mandamus may be issued . . . to compel, where there is not a plain, adequate and speedy remedy at law, performance for an act which the law specially imposes as a duty resulting from an office."); Ariz. R. Proc. for Spec. Action 3(a).[1] An indispensable mechanism for

[1] Although mandamus traditionally consisted of two species of writs, peremptory or alternative, depending on whether an order to show cause procedure is employed, *see*

ensuring that parchment obligations are honored in practical governance, "[t]he mandamus statute reflects the Legislature's desire to broadly afford standing . . . to bring lawsuits to compel officials to perform their 'public duties.'" *Arizona Dept. of Water Res. v. McClennen*, 238 Ariz. 371, 377, ¶ 32 (2015).

Mandamus relief is warranted when a public officer (1) is under a constitutional or statutory compulsion to perform some discrete, identifiable and non-discretionary act, and (2) fails or refuses to effectuate that act. Both criteria are satisfied here; the Governor is statutorily obligated to transmit nominations for agency directorships to the Senate but has declared that she will not do so. *See Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs*, 249 Ariz. 396, 404, ¶¶ 18, 19 (2020) (finding that plaintiffs "have properly alleged a mandamus action" by "asserting that the Secretary [of State] has refused to perform her constitutional duty . . . and that this Court should order her to perform that constitutional duty," adding that "one purpose of a mandamus action is to determine the extent of a state official's legal duties").

A. The Governor's Obligation to Nominate Directors Is Non-Discretionary

The nomination of agency directors who are subject to Senate review and confirmation is an obligatory attribute of the governorship. The controlling statute affords no room for interpretive creativity. "When it is provided by law that a state officer shall be appointed pursuant to this section, the governor ***shall nominate*** and with the consent of the senate appoint such officer as prescribed in this section." A.R.S. § 38-211(A) [emphasis added]. These dual prerequisites of nomination and confirmation are two inseverable components of a unitary process; the Governor's "power to appoint is in conjunction with the Senate. The two must concur. The Governor cannot exercise the power alone. [S]he may put into motion this joint power by appointing the officer, but such appointment is ineffective until and unless ratified or confirmed by the Senate." *McCall v. Cull*, 51 Ariz.

A.R.S. §§ 12-2022, 12-2023, the two iterations are now effectively merged. *See* Ariz. R. Proc. for Spec. Action 5 ("The forms of alternative and peremptory writs shall not be used.").

237, 244–45 (1938). To accommodate the practical exigencies of governance, the Legislature has tempered this rubric with some narrow provisos. If the Senate does not act on a nomination during the legislative session, or if a vacancy does not arise until after the Senate has adjourned *sine die*, the Governor must nominate an individual to fill the office on an interim basis—subject to Senate confirmation in the next legislative session. *See* A.R.S. § 38-211(B), (C). But "[i]n no event shall a nominee serve longer than one year after nomination without senate consent." *Id.* § 38-211(E). It is (or should be) undisputed that each of the Agencies must be led by a director who is nominated and confirmed in accordance with A.R.S. § 38-211.[2]

The duty to nominate denoted by A.R.S. § 38-211 is non-discretionary. Preliminarily, it is critical to disentangle two distinct gubernatorial functions embedded in the statute. Antecedent to any nomination is the choice of a particular nominee. This determination is entrusted to the Governor's judgment; the Senate does not (and could not) seek a judicial order compelling or forbidding the selection of any given individual for an agency directorship.[3] *See generally Ackerman v. Houston*, 45 Ariz. 293, 296 (1935) (mandamus cannot be used to compel a criminal prosecution because the county attorney "must necessarily exercise judgment and discretion in determining whether the things complained of constitute a crime and warrant prosecution").

The express terms of Section 38-211 command, however, that the Governor ***must*** transmit ***a*** nomination to the Senate when an agency directorship becomes vacant. While the choice of a nominee is discretionary, the duty to nominate is not. Non-discretionary—or, "ministerial"[4]—duties "are those which permit a public officer only one course of action

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[2] *See* A.R.S. §§ 41-701(B)-(C), 41-1952(B)-(C), 49-102(B), 36-2902(B), 8-452(A), 5-604(B), 41-3952(B), 20-141(A), 41-604(A), 5-553(A), 40-462(B), 41-2302(C), 37-131(B).

[3] Although some agency directors must possess certain statutorily enumerated qualifications or credentials, the question of who may enforce those prerequisites is beyond the scope of this action.

[4] Notably, more recent Arizona Supreme Court decisions have eschewed the term "ministerial" when characterizing the duties that mandamus may compel. *See, e.g.*, *Arizonans for Second Chances*, 249 Ariz. at 404, ¶¶ 18, 19; *Ariz. Public Integrity All. v.*

on an admitted state of facts. Mandamus may compel the performance of a ministerial duty or compel the officer to act in a matter involving discretion, but it may not designate how that discretion shall be exercised." *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995) (citation omitted). In other words, while the Court cannot direct the manner in which the Governor exercises her statutory function (*i.e.*, whom to choose as a nominee), it can enforce her obligation to fill the vacancy.

The Arizona Supreme Court's decision in *Brewer v. Burns*, 222 Ariz. 234 (2009), illuminates this dichotomy. There, the Governor sought a writ of mandamus compelling the Speaker of the House and President of the Senate to transmit for her signature or veto budget bills that both houses had adopted. Agreeing that the Governor had stated a valid claim for special action relief, the court emphasized that "[t]he issue here is not whether the Legislature should include particular items in the budget or enact particular legislation," or whether the Governor should approve or veto the items. *Id.* at 239, ¶ 21. Those decisions—like the Governor's selection of a nominee—are matters of political judgment. But attendant to those discretionary determinations is a binding obligation, codified in the Constitution, to transmit adopted bills to the Governor. *See id.* at 242, ¶ 39. The same reasoning engrafts easily onto this case. The choice of a nominee resides with the Governor, but a nomination must be transmitted to the Senate.

Indeed, a contrary holding would subsume key components of the separation of powers infrastructure into unilateral executive whims. "If the Legislature see fit to require the advice and consent of the senate to an appointment it may do so." *Sims v. Moeur*, 41 Ariz. 486, 491 (1933). In such instances, "[t]he approval of the senate is just as necessary as the action of the executive to complete the appointment and give the appointee any right

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Fontes, 250 Ariz. 58 (2020). The semantic evolution makes sense; the term "ministerial" is susceptible to the misapprehension that mandamus relief is dependent on the complexity or magnitude of the relevant duty. As courts have consistently maintained, however, the analytical lodestar in determining the applicability of mandamus is whether the duty is discretionary or absolute. *See generally Yes on Prop. 200 v. Napolitano*, 215 Ariz. 458, 465, ¶ 12 (App. 2007).

whatever to take over the office and discharge its duties." *McBride v. Osborn*, 59 Ariz. 321, 328 (1942). Any notion that the Governor is vested with "discretion" to circumvent this stricture and install handpicked officers to manage state agencies in perpetuity without Senate confirmation would vitiate A.R.S. § 38-211, and, by extension, the Legislature's constitutional authority to prescribe the process for appointing public officers.

In short, the Governor's duty to make a nomination when an Agency directorship becomes vacant is mandatory and non-discretionary.

B. The Governor Has Refused to Transmit Nominations

By her own admission, the Governor refuses to nominate directors of the Agencies and to transmit such nominations to the Senate during the first week of the next regular legislative session, as A.R.S. § 38-211(C) requires. Any response from the Governor that Section 38-211 prescribes no particular durational timetable for making a nomination dissipates under scrutiny.[5] Channeling common sense, the Supreme Court has instructed that "[a]ny conduct on the part of the officer or tribunal under a duty to perform signifying unequivocal intention not to do so amounts to a refusal. A refusal may be implied from a colorable or unreasonable delay in acting, although a proper and reasonable postponement of action, made in good faith, does not constitute a refusal to act." *State Bd. of Barber Examiners v. Walker*, 67 Ariz. 156, 161 (1948) (citation omitted)).

Again, *Brewer* is instructive. Rejecting the argument that the absence of any specific constitutional deadline for submitting an enrolled bill to the Governor devolved discretion to the Legislature, the Supreme Court held that "the Legislature must present [its] bills to the Governor with no more delay than is reasonably necessary to complete any ministerial tasks and otherwise effect their orderly transmittal." 222 Ariz. at 242, ¶ 39; *see also id.* at 239, ¶ 30 (noting that, even under an alternative standard, "the Legislature could not delay

[5] It bears noting that A.R.S. § 38-211 does, in fact, demand timely nominations. When the Legislature is in session, the Governor must make the nomination "during such session." A.R.S. § 38-211(B). When the vacancy occurs after the Legislature has adjourned, the nomination must be transmitted within the first week of the next legislative session, *id.* § 38-211(C), which necessarily presupposes that the nomination must be made no later than that date.

presentment indefinitely"). A contrary position, of course, would license a *de facto* disregard of legal obligations under the guise of indecision or bureaucratic inertia.

In any event, this Court need not parse the outer temporal limit that can permissibly separate the occurrence of a directorship vacancy from the nomination of a successor. The Governor has made her intentions clear. Withdrawing all pending nominations for directorships of the Agencies, the Governor informed President Petersen that she would "pursue other lawful avenues." Compl. Ex. A. Any ambiguity as to whether these "avenues" would honor the advice and consent process mandate by A.R.S. § 38-211 was quickly dispelled. After breezing through a day-long series of "interim director" stints during which he installed the Governor's favorites as "Executive Deputy Directors"—a contrived title that ostensibly allows them to exercise all powers of the directorship while avoiding Senate confirmation—the Governor's office advised the "Executive Deputy Directors" that they "remain leaders of their agencies" and the Governor would not make directorship nominations unless and until she can extract her desired political concessions from the Senate. *See* Compl. Ex. B. The lingering directorship vacancies are not the product of temporary delays incurred in the ordinary course of identifying and vetting potential successors. They were deliberately engineered by the Governor in a calculated strategy to ensure perpetual governance of the agencies by shadow directors who will never be subject to Senate confirmation. *See generally Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. 1984) (distinguishing a *bona fide* temporary appointment from "an attempt to circumvent the senate's supervisory function over permanent appointments"); *State ex rel. Satterthwaite v. Stover*, 159 A. 239, 244 (Del. Super. 1932) (rejecting "absurd" construction of constitutional provisions that would allow "the failure to send in the name [of a nominee] for confirmation . . . [to] have the same effect as confirmation," noting that it "gives the Governor an arbitrary and unlimited power in filling offices and makes a mockery of the

right of confirmation reserved in the representatives of the people, to-wit, by the assent or confirmation by the Senate").

In sum, A.R.S. § 38-211 obligates the Governor to nominate individuals to directorships of the Agencies and to transmit those nominations to the Senate no later than the first week of the legislative session. Because it is seemingly undisputed that the Governor will not do so, mandamus relief is necessary and appropriate.

II. Even if A.R.S. § 38-211 Conferred Gubernatorial Discretion, the Governor Has Abused It

For the reasons discussed above, while the choice of a nominee rests in the Governor's discretion, the duty to make a nomination is obligatory. Even when a statutory responsibility contemplates some ambit of discretion, however, mandamus relief is still available when it "clearly appear[s] that the officer has acted arbitrarily and unjustly and in the abuse of discretion." *Rosenberg v. Ariz. Bd. of Regents*, 118 Ariz. 489, 493 (1978) (citation omitted); *see also Yes on Prop. 200 v. Napolitano*, 215 Ariz. 458, 465, ¶ 12 (App. 2007) (acknowledging that mandamus is available to remedy an abuse of discretion); *Brown v. City of Phoenix*, 77 Ariz. 368, 376 (1954) (city's handling of contract award was abuse of discretion, notwithstanding the absence of any "fraud or corruption"); Ariz. R. Proc. Spec. Action 3(c).

The Governor's willful blockade of the Senate confirmation process is arbitrary, unjust and abusive. If the lingering vacancies were attributable to, for example, difficulties in finding qualified individuals or other logistical challenges, the Governor may be entitled to some latitude in the timing of her nominations. Similarly, a discrete disagreement between the two branches concerning a nomination's timeliness might warrant judicial forbearance. *See Brewer*, 222 Ariz. at 243, ¶ 42 (declining to issue writ when doing so "would have advanced the delivery of the Budget Bills by merely a week"). Here, by contrast, the Governor has subverted a foundational statutory framework in a dyspeptic display of political petulance. She does not—and cannot—credibly claim any legal deficiency in the Senate's confirmation process. The criteria by which nominees' fitness

for office is assessed, the speed at which nominations are considered, and even the decision of whether to hold a vote on a nominee at all are plenary prerogatives of the Senate. *See generally Mecham v. Gordon*, 156 Ariz. 297, 302 (1988) (holding in impeachment context that the Senate may formulate "trial procedures and rules" in its discretion). In any event, the Senate has, in fact, acted on many of the Governor's nomination submissions. The DINO Committee has carefully vetted all of the Governor's nominees. Many already have received a vote; of those, 70% have been recommended for confirmation. More fundamentally, the Governor's disagreement with the Senate's internal confirmation protocols does not—and could never—excuse her deliberate abnegation of a statutory duty.

For these reasons, the Court can and should issue a writ of mandamus on the alternative grounds that the Governor has abused whatever putative discretion A.R.S. § 38-211 confers.

REQUEST FOR SPEEDY HEARING PURSUANT TO RULE 57

Should the Court decline to issue an order to show cause, Plaintiffs request in the alternative that the Court expedite a hearing on Plaintiffs' claim for declaratory relief. *See* Ariz. R. Civ. P. 57 ("The court may order a speedy hearing of a declaratory judgment action."); *see also Yes on Prop. 200*, 215 Ariz. at 470–71, ¶ 39 (finding that plaintiff had stated valid declaratory judgment claim against the Governor with respect to implementation of statute); *Ponderosa Fire Dist. v. Coconino Cnty.*, 235 Ariz. 597, 601, ¶ 17 (App. 2014) (declining mandamus relief but concluding that declaratory relief claim was proper).

An accelerated disposition of this matter is appropriate. The material facts are few and—given that they are predicated primarily on the Governor's own statements—should be largely undisputed. Further, the commencement of the new legislative session in early January and the legal uncertainty that pervades the management and activities of the Agencies underscore the institutional and public interests in an expeditious resolution of this consequential question of law. *Cf. State Compensation Fund v. Symington*, 174 Ariz. 188, 192 (1993) ("A prompt resolution is needed so that the legislative and executive

branches will know where they stand and can take such action as they determine necessary . . . .").

CONCLUSION

For the foregoing reasons, the Court should order the Defendant to show cause why the relief requested in the Verified Special Action Complaint should not be granted. Alternatively, the Court should set a speedy hearing on the Plaintiffs' claim for a declaratory judgment.

RESPECTFULLY SUBMITTED this 8th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

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