

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2023-019899

06/05/2024

HONORABLE SCOTT A. BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

ARIZONA STATE SENATE, et al.

KORY A LANGHOFER

v.

KATIE HOBBS

DAVID ANDREW GAONA

THOMAS J. BASILE
AUSTIN C YOST
SAMBO DUL
NOAH T GABRIELSEN
ALEXIS E DANNEMAN
THOMAS D RYERSON
ROY HERRERA
JILLIAN L ANDREWS
BRUNN W ROYSDEN III
LINLEY SARAH WILSON
JUDGE BLANEY

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

1. Plaintiffs' *Cross-Motion for Summary Judgment*;
2. *Joint Statement of Facts in Support of Cross-Motions for Summary Judgment*;
3. Arizona Governor Katie Hobbs' *Response to Arizona State Senate's Motion for Summary Judgment*;
4. Arizona Governor Katie Hobbs' *Cross-Motion for Summary Judgment*;
5. Arizona Governor Katie Hobbs' *Separate Statement of Facts in Support of Her Cross-Motion for Summary Judgment*;

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6. Plaintiffs' *Response to Defendant's Cross-Motion for Summary Judgment*;
7. Plaintiffs' *Response to Defendant's Statement of Facts*;
8. *Brief of Amicus Curiae Speaker Toma in Support of Summary Judgment for Plaintiffs*;
9. Arizona Governor Katie Hobbs' *Response to Speaker Toma's Amicus Brief*;
10. *Brief for Amicus Curiae Senator Lela Alston in Support of Defendant Governor Katie Hobbs*;
11. Plaintiffs' *Application for Order to Show Cause or, Alternatively, for Expedited Hearing*;
12. Arizona Governor Katie Hobbs' *Response to Application for Order to Show Cause or, Alternatively, for Expedited Hearing*; and
13. The arguments received at the May 20, 2024 oral argument.

This case arises from a dispute between the Executive branch of Arizona and the Legislative branch regarding the Governor's agency director appointments. More specifically, the Governor withdrew from Senate review certain nominees for agency directorships based upon allegations that the Senate was slow-walking and being disrespectful to her nominees. She then appointed the nominees to lead the agencies without oversight from the Senate under the title of "Executive Deputy Directors." Plaintiffs brought this action challenging the Governor's appointment of the Executive Deputy Directors and seeking an order requiring the Governor to actually appoint agency directors pursuant to relevant statutes.

For the reasons stated below, the Court concludes that the Governor has improperly, unilaterally appointed *de facto* directors for these 13 agencies, despite the actual job title she has assigned to each of them. The Governor took a series of actions that, when viewed in isolation, arguably complied with certain applicable statutes, but took those actions for an improper purpose, culminating in an improper result – one that violates Arizona law.

For the reasons stated below, the Court further concludes that the Governor must comply with the procedures and deadlines in A.R.S. § 38-211(B)&(C) for appointment of the agency directors.

Both parties have moved for summary judgment on their respective positions. The parties stipulated to the majority of facts. The Governor separately asserted additional facts to establish that the Senate has not acted in good faith in the processing of her director nominations.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Rule 56(a), *Arizona Rules of Civil Procedure*; *Orme School v. Reeves*, 166 Ariz. 301, 305 (1990).

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I. RELEVANT FACTS

Plaintiffs Arizona State Senate and Warren Petersen, as President of the Senate, seek declaratory relief in two forms. First, Plaintiffs ask the Court to declare that the Governor has, in violation of Arizona law, unilaterally appointed *de facto* directors for 13 administrative agencies without the consent of the Senate. Second, Plaintiffs ask the Court to declare that once a director position becomes vacant, the Governor may not leave the position vacant but must actually nominate a director pursuant to the procedures and within the timelines detailed in A.R.S. § 38-211(B)&(C).¹

The Governor argues in response that she has not unilaterally appointed directors; instead, she has appointed “Executive Deputy Directors” (“EDDs”) with all the powers of a director but without the need for Senate consent. The Governor further argues that Arizona law does not require her to nominate an agency director by a specific deadline, or to nominate an agency director at all.

THE COURT FINDS AS FOLLOWS:²

1. Plaintiff Arizona State Senate is a constitutional body established by Article IV, Part 2 of the Arizona Constitution.
2. Plaintiff Warren Petersen is the President of the Arizona State Senate.
3. Defendant Katie Hobbs is the Governor of Arizona.
4. The Governor assumed office on January 2, 2023.
5. The first regular session of the Fifty-Sixth Arizona Legislature (the “2023 Legislative Session”) convened on January 9, 2023.
6. During the 2023 Legislative Session, the Senate – by rule – established the Committee on Director Nominations (the “DINO Committee”) to consider certain of the Governor’s director nominations for executive agencies.

¹ Plaintiffs alleged in their *Motion* and stipulated in the *Joint Statement of Facts* that the directorships were/are presently vacant. Plaintiffs’ counsel qualified at the oral argument that Plaintiffs’ position was that the directorships were not currently occupied by a *properly appointed* director. The Court finds this explanation reasonable. Someone is occupying the top leadership spot at each of the 13 agencies, but that person has not been appointed as a *director* pursuant to A.R.S. § 38-211 or any other applicable statute.

² The majority of these facts are taken from the parties’ stipulated *Joint Statement of Facts*.

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7. This was the first time that the Senate referred the Governor's director nominations to a single committee constituted for that purpose. In all past administrations in recent memory, the Governor's director nominations were considered by the Senate's regular standing committees with oversight over (and expertise in) the relevant executive agency.
8. During the 2023 Legislative Session, the Governor transmitted to the Senate nominations for numerous state offices and board positions, including for the director positions that are the subject of Plaintiffs' *Complaint*.³
9. At the time the Governor transmitted the foregoing nominations to the Senate, the director positions of each of the Agencies was vacant.
10. All told, during the 2023 Legislative Session, the Governor submitted 22 nominations for the director positions of various state agencies. Of those nominations:
 - a. 11 did not receive a hearing in the DINO Committee; and
 - b. 11 did receive a DINO Committee hearing.
 - c. Of the 11 that received a DINO Committee hearing:
 - i. one received a hearing and was approved in the DINO Committee but did not receive a vote on the Senate floor;
 - ii. one received a hearing but was held in the DINO Committee and neither a DINO Committee vote nor a Senate floor vote was taken on her confirmation;
 - iii. three were voted down in the DINO Committee; and
 - iv. six were approved in the DINO Committee and were confirmed by the full Senate.
11. In addition, during the 2023 Legislative Session, the Governor submitted another 37 nominations for various state boards and commissions whose members are subject to Senate approval. These nominations were not referred to the DINO Committee. Of those nominations:
 - a. 27 did not receive a committee hearing;

³ The 13 agencies at issue in this case are: (1) Department of Administration; (2) Department of Economic Security; (3) Department of Environmental Quality; (4) Health Care Cost Containment System; (5) Department of Child Safety; (6) Department of Gaming; (7) Department of Housing; (8) Department of Insurance and Financial Institutions; (9) Department of Veterans' Services; (10) State Lottery Commission; (11) Residential Utility Consumer Office; (12) Office of Tourism; and (13) State Land Department.

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- b. one was withdrawn by the Governor before any committee hearing was held; and
 - c. nine received a committee hearing.
 - d. Of the 9 that received a committee hearing:
 - i. one received a hearing but was held in committee and did not receive a vote in committee or on the Senate floor; and
 - ii. eight were approved in committee and were confirmed by the full Senate.
12. The first regular session of the Fifty-Sixth Arizona Legislature adjourned *sine die* on July 31, 2023. At the time of adjournment, the Senate had not held a vote on any of the 13 nominations for the director positions of the Agencies that are the subject of this lawsuit.
13. On September 25, 2023, the Governor informed President Petersen that she was immediately withdrawing her nominations for the agency director positions.
14. In her letter, the Governor notified President Petersen that she was withdrawing all nominees and would “pursue other lawful avenues of ensuring State government can continue to function.” The Governor further stated that she would resume submitting nominations for Senate review if, *inter alia*, the Senate resumed “regular order of confirming nominees as contemplated by law[.]”
15. On September 25, 2023, the Governor nominated Ben Henderson to serve as the Interim Director of 12 of the 13 agencies (the agencies at issue in the present case except the Arizona Department of Veterans’ Services) for the purpose of allowing the Governor and Henderson to appoint the withdrawn nominees as Executive Deputy Directors of their respective agencies. In the September 25 letter, the Governor instructed Henderson to “ratify and confirm the appointment of an Executive Deputy Director for” each agency prior to resigning as Interim Director of that agency.
16. The Governor specifically informed Henderson that she would temporarily relieve him of his duties as Director of Operations and would nominate him as the Executive Director of a particular agency. Upon a nominee’s acceptance of the new Executive Deputy Director position and title, Henderson would ratify and confirm the nominee’s appointment as EDD, and would delegate to the new EDD all the duties of a director of that particular agency. Henderson would then immediately resign from the Executive Director position and move on to the next agency. Henderson and the Governor would then repeat the process the same day with each of the remaining agencies before Henderson ultimately returned to his role as Director of Operations.

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17. On September 25, 2023, the Governor nominated Mark Cardenas to serve as the Interim Director of the Arizona Department of Veterans' Services for the purpose of allowing the Governor and Cardenas to appoint the last withdrawn nominee as the Executive Deputy Director of that agency, in the same manner that she enlisted Henderson to appoint and empower the other Executive Deputy Directors.
18. On September 25, 2023, the Governor and Henderson appointed Elizabeth Thorson the Executive Deputy Director of the Arizona Department of Administration. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and subsequently resigned on January 5, 2024.
19. On September 25, 2023, the Governor and Henderson appointed Angela Rodgers the Executive Deputy Director of the Arizona Department of Economic Security. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
20. On September 25, 2023, the Governor and Henderson appointed Karen Peters the Executive Deputy Director of the Arizona Department of Environmental Quality. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
21. On September 25, 2023, the Governor and Henderson appointed Carmen Heredia the Executive Deputy Director of the Arizona Health Care Cost Containment System. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
22. On September 25, 2023, the Governor and Henderson appointed David Lujan the Executive Deputy Director of the Arizona Department of Child Safety. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
23. On September 25, 2023, the Governor and Henderson appointed Jackie Johnson the Executive Deputy Director of the Arizona Department of Gaming. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
24. On September 25, 2023, the Governor and Henderson appointed Joan Serviss the Executive Deputy Director of the Arizona Department of Housing. Mr. Henderson, in

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his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.

25. On September 25, 2023, the Governor and Henderson appointed Barbara Richardson the Executive Deputy Director of the Arizona Department of Insurance and Financial Institutions. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
26. On September 25, 2023, the Governor and Cardenas appointed Dana Allmond the Executive Deputy Director of the Arizona Department of Veterans' Services. Mr. Cardenas, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
27. On September 25, 2023, the Governor and Henderson appointed Alec Esteban Thomson the Executive Deputy Director of the Arizona State Lottery Commission. Mr. Henderson, in his capacity as Interim Executive Director, ratified the appointment, delegated the duties of the Executive Director to the Executive Deputy Director, and thereupon resigned.
28. On September 25, 2023, the Governor and Henderson appointed Cynthia Zwick the Executive Deputy Director of the Arizona Residential Utility Consumer Office. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
29. On September 25, 2023, the Governor and Henderson appointed Lisa Urias the Executive Deputy Director of the Arizona Office of Tourism. Mr. Henderson, in his capacity as Interim Director, ratified the appointment, delegated the duties of the Director to the Executive Deputy Director, and thereupon resigned.
30. On September 25, 2023, the Governor and Henderson appointed Robyn Sahid the Executive Deputy Commissioner of the Arizona State Land Department. Mr. Henderson, in his capacity as Interim Commissioner, ratified the appointment, delegated the duties of the Commissioner to the Executive Deputy Commissioner, and thereupon resigned.
31. As of the date of this Ruling, each of the foregoing individuals continues to serve as the Executive Deputy Director of his or her respective agency.

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32. As of the date of this Ruling, there are over 100 vacancies for positions that require appointments under the process that A.R.S. § 38-211 establishes. And as of the date of this Ruling, the Governor is working to identify nominees but has not nominated individuals for all of these positions.
33. The second regular session of the Fifty-Sixth Legislature (the “2024 Legislative Session”) convened on January 8, 2024.
34. Since the Governor’s notice of nomination withdrawals on September 25, 2023, no nominations for director positions of any of the agencies have been made by the Governor or transmitted to the Senate.
35. Since September 25, 2023, when the Governor sent her letter to the Senate President, the Governor and the Senate President have engaged in discussions in an effort to reach mutually agreeable terms under which the Governor would resume nominations and the Senate would consider those nominations. As of the date of this Ruling, the Governor and the Senate President have not reached such an agreement.

II. LEGAL ANALYSIS

In addition to mandamus and injunctive relief, which the Court will address separately, Plaintiffs seek declaratory relief. Arizona law grants this Court the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” A.R.S. § 12-1831. This case presents a justiciable controversy in that “there are adverse claims asserted upon present existing facts that have ripened for judicial review.” *Planned Parenthood Center of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 310 (App. Div. 2 1972).

Justiciability and Political Question

The Governor argues that this case presents a nonjusticiable political question, which requires that a court abstain from judicial review of the merits of a case, even if timely brought by a party with standing, if the issue could be properly decided by one of the “political branches” of government. *Brewer v. Burns*, 222 Ariz. 234, 238 (2009) (citing *Kromko v. Ariz. Bd. of Regents*, 216 Ariz. 190, 192–93 ¶¶ 11–12 (2007)).

But the current dispute does not focus upon *who* the Governor nominates to a director position or *why*; nor does the dispute involve the Senate’s *basis* for confirming or rejecting a nominee. Such issues would clearly be political questions. Instead, this case concerns statutory interpretation and an alleged violation of the Governor’s statutory duty to nominate and promptly transmit the nomination to the Senate. If the Governor has violated her statutory duties, those

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violations could have the effect of usurping the Senate's statutory duty to review the Governor's nominees and provide or withhold its consent.

"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and courts possess the authority to review legislative or executive action that potentially violates constitutional and statutory mandates. *Nixon v. United States*, 506 U.S. 224, 238 (1993). The political question doctrine is not triggered simply because a lawsuit involves politically charged issues. *Puente v. Arizona State Legislature*, 254 Ariz. 265, 268 (2022). Indeed, courts are responsible for resolving challenges to another branch's constitutional authority "[even when] the issues have political implications." *Brewer*, 229 Ariz. at 351 ¶ 16 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

Here, no avenue exists for the Senate to seek redress on its claims within the Executive or Legislative Branches. Rather, judicial review is the proper method to determine whether or not the Governor violated the laws governing agency appointments.

Plaintiff's Request for Declaratory Relief.

After review of the pleadings, the respective motions, and the arguments received at the oral argument, the Court can determine that Plaintiffs' request for declaratory relief is two-fold. First, Plaintiffs ask the Court to declare that the Governor has unilaterally appointed *de facto* directors for the 13 agencies discussed above, without the consent of the Senate, and in violation of Arizona law. Second, Plaintiffs ask the Court to declare that the Governor may not leave these director positions vacant and must actually nominate directors to these positions, according to the procedures and within certain timelines embodied in A.R.S. § 38-211(C).

Appointment of Agency Directors Requires the Consent of the Senate

By statute, the appointment of a director for each of the 13 agencies listed above requires the consent of the Senate. A.R.S. § 38-211(A) states "[w]hen 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." Each of the statutes governing the specific agency either mandates compliance with A.R.S. § 38-211(A)'s requirement of Senate consent, or where the statute does not expressly refer to A.R.S. § 38-211(A), the statute explicitly requires the Governor to obtain the consent of the Senate for her nominee. More specifically:

1. The statute governing the appointment of a director of the Arizona Department of Administration does not cite to A.R.S. § 38-211 but instead expressly requires the Governor to obtain "the advice and consent of the senate." *See* A.R.S. § 41-701(C).

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2. The Governor's appointment of the director of the Arizona Department of Economic Security must comply with A.R.S. § 38-211. A.R.S. § 49-102(B).
3. The Governor's appointment of the director of the Arizona Department of Environmental Quality must comply with A.R.S. § 38-211. *See* A.R.S. § 41-1952(C).
4. The statute governing the appointment of a director of the Arizona Health Care Cost Containment System Administration does not cite to A.R.S. § 38-211 but instead expressly requires the Governor to obtain "the advice and consent of the senate." *See* A.R.S. § 36-2902(B).
5. The Governor's appointment of the director of the Arizona Department of Child Safety must comply with A.R.S. § 38-211. *See* A.R.S. § 8-452(A).
6. The Governor's appointment of the director of the Arizona Department of Gaming must comply with A.R.S. § 38-211. *See* A.R.S. § 5-604(B).
7. The Governor's appointment of the director of the Arizona Department of Housing must comply with A.R.S. § 38-211. *See* A.R.S. § 41-3952(B).
8. The Governor's appointment of the director of the Arizona Department of Insurance and Financial Institutions must comply with A.R.S. § 38-211. *See* A.R.S. § 20-141(A).
9. The Governor's appointment of the director of the Arizona Department of Veterans' Services must comply with A.R.S. § 38-211. *See* A.R.S. 41-604(A).
10. The Governor's appointment of the director of the Arizona State Lottery Commission must comply with A.R.S. § 38-211. *See* A.R.S. § 5-553(A).
11. The Governor's appointment of the director of the Arizona Residential Utility Consumer Office must comply with A.R.S. § 38-211. *See* A.R.S. § 40-462(B).
12. The Governor's appointment of the director of the Arizona Office of Tourism must comply with A.R.S. § 38-211. *See* A.R.S. § 41-2302(C).
13. The Governor's appointment of the director of the Arizona State Land Department must comply with A.R.S. § 38-211. *See* A.R.S. § 37-131(B).

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Thus, pursuant to the plain language of the statutes listed above, the Governor is precluded from appointing directors for these 13 agencies without first obtaining the Senate's consent to the particular nominee. *See Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) ("If the statute is subject to only one reasonable interpretation, we apply it without further analysis.") (internal quotations omitted). But that is what the Governor has done.

The Governor Appointed *De Facto* Directors in Violation of Applicable Statutes

As detailed in the Findings above, the Governor conceived and implemented a process to circumvent Senate oversight of her director nominees. Once the Governor became frustrated with the Senate's purported slow-walking and disrespectful treatment of nominees, she notified Plaintiffs that she was withdrawing all nominees and would "pursue other lawful avenues of ensuring State government can continue to function." *See* September 25, 2023 Letter from Governor Hobbs to President Petersen at pg. 2. The Governor further informed Plaintiffs that she would resume submitting nominations for Senate review if, *inter alia*, the Senate resumed "regular order of confirming nominees as contemplated by law[.]" *Id.*

That same day, the Governor ordered her Director of Operations – Ben Henderson – to offer a new title to the 13 individuals that she had previously nominated for agency director positions: "Executive Deputy Director."⁴ The Governor further informed Henderson that upon a nominee's acceptance of the new position and title, she would temporarily relieve him of his duties as Director of Operations and would nominate him as the Executive Director of a particular agency. Henderson would then be tasked with ratifying and confirming the nominee's appointment as Executive Deputy Director and also with delegating to the new EDD all the duties of the director of that particular agency. Henderson would then immediately resign from the Executive Director position and move on to the next agency. Henderson and the Governor would then repeat the process the same day with each of the remaining agencies before Henderson ultimately returned to his role as Director of Operations. The Governor ordered Mark Cardenas to engage in the same tasks at the Department of Veterans Services, including appointment of an EDD and delegation of all authorities of the Director of Arizona Department of Veterans Services, before ultimately resigning.

THE COURT THEREFORE FINDS that these "Executive Deputy Directors" are *de facto* directors – unilaterally appointed to their leadership positions without Senate oversight in violation of Arizona law. They purport to exercise all the powers and authorities that the agencies'

⁴ The Governor's letter directs Mr. Henderson to offer the Executive Deputy Director positions/titles to "the 13 agency director nominees pending senate confirmation." *Id.* But it appears that one of those nominees, Joan Serviss, had already been considered and rejected by the Senate's DINO committee. *See* Governor's *Separate Statement of Facts* at ¶¶ 5-8.

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properly appointed directors would have. Their reporting chains are identical to that of a properly appointed director, reporting directly to the Governor or a chief of staff as the heads of their respective agencies. And they serve as the leaders of their respective agencies indefinitely at the pleasure of the Governor, the same tenure as a properly appointed director. Their indefinite tenure without Senate consent directly violates A.R.S. § 38-211(E), which states: “In no event shall a nominee serve longer than one year after nomination without senate consent.”

It is also not lost on the Court that the Executive Deputy Directors are the same individuals that the Governor previously nominated and forwarded to the Senate for review, but withdrew when she grew frustrated with the Senate. One of the EDDs - Joan Serviss – had even previously been considered and rejected by the Senate’s DINO committee. *See Governor’s Separate Statement of Facts* at ¶¶ 5-8.

The Governor’s counsel argued at the oral argument that each of the individual steps the Governor took were compliant with certain Arizona statutes and thus the end result – “executive” deputy directors indefinitely filling the role of directors – was permissible. *See, e.g.* A.R.S. § 38-461(A) (“Every state officer ... may appoint *deputies* and assistants when authorized by law[.]”) (emphasis added). But that argument improperly elevates form over substance. Under Arizona law, directors run the respective administrative agencies and are appointed to their important positions through a statutorily defined process. That process requires oversight by the Legislative branch. Here, the Governor willfully circumvented that statutory process and eliminated the Legislative branch from its oversight role.⁵

If the Court were to agree that the Governor can side-step applicable statutes in this manner to arrive at her desired end state, it would render meaningless the following statutes, all discussed *supra*: A.R.S. §§ 38-211(A); 41-701(C); 49-102(B); 41-1952(C); 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); and 37-131(B). When engaging in statutory interpretation, “[w]e presume the legislature did not intend to write a statute that contains a void, meaningless, or futile provision, and when possible, we interpret a statute to give meaning to every word or phrase.” *State v. Pitts*, 178 Ariz. 405, 407 (1994) (internal quotations omitted). The Court therefore cannot arrive at any statutory interpretation that results in elimination of the Senate’s consent role from the statutory scheme.

⁵ The long-standing doctrine of substance over form requires the Court to examine the objective realities of the Governor’s actions and the results of those actions, rather than whether the Governor refers to these leadership positions as “Executive Deputy Directors” instead of “directors.” *See Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978) (“In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed.”).

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The Governor's counsel further argued that the Governor's actions were permissible because they aligned with the Governor's general duty to "take care that the laws be faithfully executed," Ariz. Const. art. V, § 4, as well as the Governor's statutory duty to "supervise the official conduct of all executive and ministerial officers," and to "see that all offices are filled and the duties performed." A.R.S. § 41-101(A)(1), (2). But when read properly, the Governor's general duties embodied in § 41-101 do not conflict with the statutes listed above – statutes that define the process to be used when appointing agency directors. The statutes must be read and harmonized to avoid a conflict. "When possible, we seek to harmonize statutory provisions and avoid interpretations that result in contradictory provisions." *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, 195, ¶ 9 (2016); *see also State v. Seyrafi*, 201 Ariz. 147, 150, ¶ 14 (App. 2001) (statutory provisions must be "construed in context with related provisions and in light of their place in the statutory scheme").

Thus, when the Governor is carrying out her general duty to "see that all offices are filled and the duties performed" (§ 41-101(A)), she must at the same time comply with the more specific statutes that govern the actual process of appointment (*e.g.* §§ 5-553(A) & 38-211). *See State v. Chopra*, 241 Ariz. 353, 355 ¶ 6 (App. 2016) ("[I]n general, the more specific statute controls over the less specific statute."). In summary, the Governor's duty to see that positions are filled does not override the statutory process she must use to fill the positions.⁶

The Governor's frustration with a co-equal branch of government – even if that frustration was justified – did not exempt her director nominees from Senate oversight. Each of these *de facto* directors remains in control of their respective agencies in violation of applicable statutes, but with all the authority of a properly appointed director. These agencies wield tremendous power – they issue rules that have the effect of law and decide when and where to enforce laws and their rules.⁷

⁶ The Court further notes that Senator Alston in her amicus brief – and to a lesser extent the Governor in her filings – provided the Court with a brief history of how the Senate has exercised its advice and consent role in the past. Senator Alston argued that the Senate's new DINO committee has had a profoundly negative impact on the process. Specifically, Senator Alston argues: "the Senate's newly adopted process for vetting nominees, through the Committee on Director Nominations ("DINO"), represents a radical departure from the way nominees have been considered and voted on in the past." *Brief for Amicus Curiae Senator Lela Alston* at pg. 2. But based upon separation of powers principles, this Court is not in a position to scrutinize the Senate's internal rules, or to require that the Senate continue to adhere to its past procedures. Our constitution empowers legislative houses to determine and implement their own rules and procedures. *See Ariz. Const. art IV, pt. 2 §§ 8, 9*. "That authority is absolute and continuous, meaning each successive embodiment of a house is empowered to establish its own procedures." *Puente v. Arizona State Legislature*, 254 Ariz. 265, 270 ¶ 14 (2022).

⁷ The Governor's actions were also unnecessary because A.R.S. § 38-211 provides the Governor with a remedy if the Senate fails to take action on a nominee, directing: "If the senate takes no formal action on

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**A.R.S. § 38-211 mandates that the Governor nominate a candidate
for a vacancy by a specific deadline.**

The second issue for which Plaintiffs seek declaratory relief focuses on the purported mandates and deadlines in A.R.S. § 38-211, and specifically the mandates and deadlines in § 38-211(B)&(C): which state, *inter alia*:

If the term of any state office that is appointive pursuant to this section expires, begins or becomes vacant *during a regular legislative session*, the governor shall during such session nominate a person who meets the requirements of law for such office and shall promptly transmit the nomination to the president of the senate. . .

§ 38-211(B) (emphasis added).

If the term of any state office that is appointive pursuant to this section expires, begins or becomes vacant *during a time in which the legislature is not in regular session*, the governor shall nominate a person who meets the requirements of law for such office and shall transmit the nomination to the president of the senate during the first week of the next regular session. . .

§ 38-211(C) (emphasis added).

Plaintiffs argue that when Henderson and Cardenas resigned on September 25, 2023 at the direction of the Governor, their resignations triggered new vacancies in the agency directorships. Because the Senate was not in regular session, the Governor was obligated to nominate a new director and transmit the nomination to the President of the Senate during the first week of the next regular session pursuant to § 38-211(C). Plaintiffs argue that the Governor's duty to timely make and transmit nominations is mandatory.

The Governor argues in response that § 38-211(C) does not expressly impose any deadline by which she must make nomination decisions and, even if the statute did impose a deadline, it would be "directory" only – expressing a legislative preference rather than a mandatory obligation. The Governor further argues that interpreting § 38-211(C) to mandate that the Governor must nominate by a particular deadline violates separation of powers principles by dictating how the Governor exercises her authority to fill vacancies in executive branch agencies.

the nomination during such legislative session ... the governor shall after the close of such legislative session appoint the nominee to serve, and the nominee shall discharge the duties of office, subject to confirmation during the next legislative session.

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The Court's primary goal when interpreting A.R.S. § 38-211, or any statute, is to give effect to the legislature's intent. *J.D. v. Hegyi*, 236 Ariz. 39, 40, ¶ 6 (2014); *see also Hampton v. Glendale Union High School District*, 172 Ariz. 431, 434 (App. 1992) (cardinal rule of statutory construction is that courts must primarily attempt to ascertain and give effect to the intent of the legislature). The Court's task in statutory construction is to effectuate the text if it is clear and unambiguous. *BSI Holdings, LLC v. Arizona Department of Transportation*, 244 Ariz. 17, 19 ¶ 9 (2018).

The Governor is correct in that subsection C of § 38-211 does not expressly impose any deadline by which she must make nomination decisions. The section merely states that when a vacancy occurs during a period in which the Legislature is not in session, the Governor shall nominate a person and then transmit the nomination to the President of the Senate during the first week of the next regular session. The Governor therefore urges the Court to view § 38-211(C) in isolation and interpret its lack of deadlines to mean that there is in fact, no deadline, and the Governor can at her discretion wait indefinitely to nominate a director, as long as the vacancy occurred when the Legislature was not in regular session.

The Court can find no logical reason, and the Governor does not offer one, for why the Legislature would have required the Governor to nominate a director by a certain deadline if the vacancy occurs during the Legislature's regular session, *see* § 38-211(B), but not require the Governor to nominate a director by a certain deadline – if at all – if the vacancy occurs while the Legislature is not in regular session. *See* § 38-211(C).

The answer is simply that § 38-211(C) should not be read in a vacuum. “We do not ... construe statutory phrases in isolation; we read statutes as a whole.” *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) citing *United States v. Morton*, 467 U.S. 822, 828 (1984); *see also Stambaugh*, 242 Ariz. at 509 ¶ 7 (“In construing a specific provision, we look to the statute as a whole and ... give effect to all of the provisions involved.”). After reviewing A.R.S. § 38-211 as a whole, the Court concludes that the Legislature intended four primary mandates in the statute addressing timing and deadlines to ensure an orderly and structured appointment process:

- (1) the Governor shall nominate directors for certain agencies and must obtain the consent of the Senate to ultimately appoint the proposed directors (§ 38-211(A));
- (2) if a director vacancy occurs while the Legislature is in regular session, the Governor must nominate a director during that regular session and promptly transmit the nomination to the President of the Senate (§ 38-211(B));
- (3) but if that director vacancy occurs while the Legislature is not in regular session, the Governor must both nominate a director and transmit the nomination to the President of the Senate by the end of the first week of the next regular session (§ 38-211(C)); and

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(4) a nominee may not serve longer than one year without Senate consent after he or she was nominated for a directorship (§ 38-211(E)).

Thus, the only logical way to harmonize the entire statute, stay true to its purpose, and to give effect to each of its provisions, is to view subsection C as an extension of subsection B, with the only difference between the subsections being the deadline by which the Governor is required to nominate a director and transmit the nomination depending upon when the vacancy occurs – during or outside of regular session. Interpreting the statute in the manner urged by the Governor leaves subsection C in isolation, without any real purpose and entirely optional. That is not what the Legislature could have intended. *Pitts*, 178 Ariz. at 407 (“We presume the legislature did not intend to write a statute that contains a void, meaningless, or futile provision,” and when possible, we interpret a statute to give meaning to every word or phrase.”).

THE COURT THEREFORE FINDS that Plaintiffs have established that there are no genuine issues of material dispute. Plaintiffs have further “presented sufficient undisputed admissible evidence to establish [their] entitlement to judgment [on their declaratory judgment claims].” *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 213 (App. 2012).

IT IS THEREFORE ORDERED granting Plaintiff’s request for declaratory relief and declaring as follows:

1. The Governor has unilaterally appointed *de facto* directors for the 13 agencies discussed above without the consent of the Senate in violation of Arizona law.
2. A.R.S. § 38-211 precludes the Governor from leaving these director positions vacant and mandates that the Governor actually nominate directors to positions, pursuant to the procedures and according to the deadlines contained in the statute.⁸

IT IS FURTHER ORDERED declining to rule on Plaintiffs’ request for mandamus and injunctive relief at this time. The Court will set a separate evidentiary hearing or oral argument for a date in late July or early August 2024. This will give these co-equal branches of government an opportunity to meet and confer in an attempt to reach a mutually agreeable resolution of this dispute. If they are unsuccessful, the Court will hold a brief hearing to consider the evidence and arguments regarding mandamus and injunctive relief, including the Governor’s allegations of “unclean hands.”

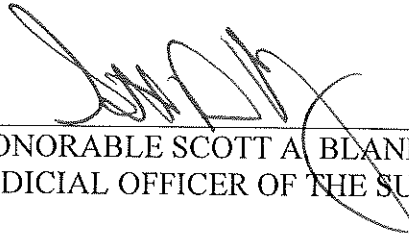
⁸ It is unclear whether these mandates and deadlines apply to nominations for directorships of the Department of Administration and/or the Arizona Health Care Cost Containment System because the respective statutes governing appointment of directors to those agencies do not expressly mention A.R.S. § 38-211.

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IT IS FURTHER ORDERED declining to address the parties' remaining arguments as either moot or unpersuasive.



HONORABLE SCOTT A. BLANEY
JUDICIAL OFFICER OF THE SUPERIOR COURT