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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND RULE 3,
RULES OF PROCEDURE FOR
JUDICIAL REVIEW OF
ADMINISTRATIVE DECISIONS**

Supreme Court No. R-20-0008

**PETITIONER'S REPLY
IN SUPPORT OF THE PETITION**

Pursuant to the Court's order, Petitioner New Civil Liberties Alliance (NCLA) respectfully submits this reply in support of its rule-change petition. Replies are due, per the Court's order, by June 1, 2020. Petitioner respectfully requests that the Court amend the Arizona Rule of Procedure for Judicial Review of Administrative Decisions 3 (JRAD Rule 3) as set forth in the rule-change petition.

REASONS THE PETITION SHOULD BE GRANTED

There are at least seven reasons the rule-change petition should be granted. No opposition to the proposed rule change has been filed as of May 1, 2020 (the deadline for filing comments) or thereafter.

First, Arizona Constitution article VI, § 5(5) limits the Court's "[p]ower to make rules ... to all procedural matters in any court." The Constitution does not give the

Court the power to create substantive rules other than through case-by-case decisionmaking. Yet, JRAD Rule 3, as it is currently written, was a substantive rule change that broke the bounds of the Court’s procedural rulemaking authority. The proposed amendment to JRAD Rule 3 will securely anchor the Court’s rulemaking authority to Article VI, § 5.

Second, if there were any doubt as to the scope of rulemaking authority defined by Article VI, § 5, the legislature has dispelled that doubt by enacting A.R.S. § 12-903.

With respect to judicial review of administrative decisions, this Court:

may make rules of pleading, practice and procedure supplementary to but not inconsistent with the provisions of this article, and to amend such rules, for the purpose of making this article effective for the convenient administration of justice, and simplifying procedure so far as it affects judicial review of administrative decisions.

Id. As it currently stands, JRAD Rule 3 is “inconsistent with the provisions of” Arizona’s JRAD Act—and it has made “administration of justice” “[in]convenient” and “[in]effective,” and instead of “simplifying procedure,” it has severely complicated it. JRAD appellants are usually appellants of limited financial means. The current JRAD Rule 3 asks them to brief and meet the stringent preliminary-injunction standard, when the legislature specifically shunned that standard in favor of requiring “good cause.” A.R.S. § 12-911(A)(1). The practical effect of the Court’s departure from the legislatively mandated “good cause” standard has “taken this Court to the precipice of administrative absolutism,” for *all* appeals from state-agency decisions. *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting from denial of certiorari). The current JRAD Rule 3 makes it practically impossible to obtain stays of administrative decisions.

That is particularly egregious because the legislature “simpli[fied]” JRAD appeals and crafted the good-cause standard to make it more “convenient” to obtain such stays. A.R.S. § 12-903.

Third, the Court of Appeals has already explained why the severe preliminary-injunction standard should not be applied in the JRAD context. *P & P Mehta LLC v. Jones*, 211 Ariz. 505 (App. 2005). Yet the current JRAD Rule 3, that came with *no* explanation from this Court when it amended the rule to command the preliminary-injunction standard, completely ignores the well-reasoned and comprehensive explanation of *P & P Mehta*.

Fourth, this Court has traditionally not issued any written decisions or separate written statements of individual Justices as to why it is adopting a particular rule. So, the actual reasons why the *Court* adopted JRAD Rule 3 as it is currently written is a mystery. The only available explanation for the current JRAD Rule 3, comes from the State Bar’s rulemaking petition that initially proposed the rule change in 2017. *See Petition to Amend the Rules of Procedure for Judicial Review of Administrative Decisions*, No. R-17-0013 (Jan. 5, 2017), available at <https://www.azcourts.gov/Rules-Forum/aft/660>. The only explanation contained in that *Petition* is as follows:

This rule provides the framework for motions to stay, including the identification of the core factors to be addressed and evaluated by the court under the standards governing stays. This language was developed to help guide litigants seeking to stay administrative decisions under the standard announced by the Supreme Court in *Smith v. Arizona Citizens Clean Elections Com’n*, 212 Ariz. 407 (2006).

Id. That explanation is deeply flawed, as already explained in NCLA’s rule-change petition. *Smith* is inapposite in the JRAD context because it dealt with obtaining stays of

Superior Court decisions from the Court of Appeals; it did not involve obtaining stays of administrative decisions from the Superior Court under A.R.S. § 12-911(A)(1). But for the erroneously adopted current JRAD Rule 3, the governing standard is, and remains, the one given in A.R.S. § 12-911(A)(1) as explained by *P & P Mehta*.

Perhaps no one at the Court caught or double-checked the State Bar's rule-change petition. At this point, there is no way to find out whether that error was inadvertent or intentional because, again, the Court does not issue written opinions explaining its adoption of any changes in the court rules. But the fact remains that the current JRAD Rule 3 is an anomaly that needs to be corrected immediately.

Fifth, tellingly, the State Bar has not filed a comment supporting or opposing NCLA's rule-change petition. The State Bar's usual practice is to study all rule-change petitions that it does not file, and it usually takes policy positions and frequently supports or opposes such petitions. It is, however, *not* an organization known to confess error. Maybe it has done so *sub silentio* here—by not opposing NCLA's petition. That silence, perchance, might indicate that the State Bar's explanation given in its 2017 rule-change petition is indefensible. That surely it is—for the reasons given in NCLA's petition and this reply. In any event, now that the error is apparent, the Court should not compound and ossify the error by failing to adopt NCLA's proposed changes to JRAD Rule 3. “[I]t is never too late to ‘surrende[r] former views to a better considered position.’” *Baldwin*, 140 S. Ct. at 690 (Thomas, J., dissenting from denial of certiorari) (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring))).

Sixth, trial-court stays of administrative decisions are fundamentally different from appellate-court stays of trial-court decisions. The legislature struck the proper balance in A.R.S. § 12-911(A)(1) by requiring superior-court judges to freely grant stays of administrative decisions. The lenient good-cause standard is consistent with—and may even be necessary due to—the heightened due-process concerns involved in administrative adjudications. *See Horne v. Polk*, 242 Ariz. 226, 230 ¶ 14 (2017) (discussing the “magnified” due-process concern when a single agency or official is tasked with investigating, prosecuting, and adjudicating administrative cases against an individual). The proposed amendment to JRAD Rule 3 would restore the “appearance of complete fairness” in judicial review of administrative decisions. *Id.* at 234 ¶ 28.

Seventh, the proposed amendment to JRAD Rule 3 is necessary to comply with Article III of the Arizona Constitution. This Court is sensitive to the separation of functions between the separate branches of government. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588 (2017). It does not permit one branch to “usurp,” *id.* at 593 ¶ 16, the powers and functions “properly belonging” to the other branches of government, Ariz. Const. art. III. When the political branches enact a provision (pursuant to Ariz. Const. art. IV, pt. 1, § 1) such as the good-cause standard of A.R.S. § 12-911(A)(1), the court’s job is to apply that standard as enacted unless the enacted standard is otherwise unconstitutional under the state and federal constitutions. The current JRAD Rule 3, instead of applying the good-cause standard as enacted, replaces it with the preliminary-injunction standard.

Such a delete and replace works a usurpation by the judicial department of the legislature’s lawmaking function. The usurpation likely violates the Arizona

Constitution's separation-of-powers doctrine. The proposed amendment to JRAD Rule 3, which restores the good-cause standard as enacted, would return the Court's rule-making authority to be once again in compliance with Articles III, IV, pt. 1, § 1, and VI, § 5(5) of the Arizona Constitution.

CONCLUSION

NCLA's petition to amend JRAD Rule 3 should, therefore, be granted.

Respectfully submitted, this 1st day of June, 2020.

/s/ Aditya Dynar

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