IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CLAUDIA DUFF, *Petitioner,* v. HON. KENNETH LEE, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, *Respondent,* and TUCSON POLICE DEPARTMENT, a municipal agency; and the CITY OF TUCSON, a municipal corporation, *Real Parties in Interest.*	No. 2 CA-SA 2018-0058 Pima County Superior Court No. C20182262

PETITION FOR SPECIAL ACTION

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JURISDICTIONAL STATEMENT

¶ 1 Petitioner Claudia Duff is the plaintiff in a lower-value personal injury action arising from a motor-vehicle accident in Pima County. Because her overall damages do not exceed $50,000, her negligence claim would be subject to compulsory arbitration under A.R.S. § 12-133 but for the Fast Trial and Alternative Resolution ("FASTAR") pilot program adopted for the Pima County Superior Court by an order of the Arizona Supreme Court filed late last year. *See generally* Ariz. Sup. Ct. Admin. Order 2017-116 (Oct. 26, 2017).[1]

¶ 2 That order, which created the experimental FASTAR program, made three broad reforms. First, it purported to lower § 12-133(A)(1)'s compulsory arbitration limit to $1,000, "effectively replacing compulsory arbitration with the FASTAR program." Hon. Jeffrey T. Bergin, *Pilot FASTAR Program Aims for Improved Civil Justice*, ARIZONA ATTORNEY 28, 30 (Feb. 2018). Second, for cases up to $50,000, it allowed plaintiffs (not defendants) to opt into a new court-created "Alternative Resolution" arbitration system similar to the prior compulsory arbitration system, except that plaintiffs generally would be bound by the results. *See generally*

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[1]To date, the FASTAR rules are not available either through Westlaw's website or as a supplement to the Arizona Rules of Court published by Thomson Reuters. Plaintiff therefore has attached the order containing the FASTAR rules. (APP. 031-054.)

FASTAR 101-103, 120-126. Third, for the same lower-value cases, FASTAR also created the option of a "Fast Trial," which involves an expedited schedule, more limited discovery, and greater restrictions on trying the case. *See generally* FASTAR 110-119.

¶ 3 For purposes of this petition, the fast-trial portion of FASTAR is not at issue. Instead, plaintiff Duff's objections are based on the following FASTAR arbitration rules.[2] As noted, for cases with an amount in controversy above $1,000 and up to $50,000, those rules force plaintiffs to choose between arbitration and a fast trial. Ariz. Sup. Ct. Admin. Order 2017-116, at 1 & FASTAR 101(b)(2)-(3), 102(a), 103(a)-(c). If a plaintiff chooses arbitration, the rules provide that he or she must expressly "waive[] . . . the rights . . . to appeal the Alternative Resolution decision, award, or judgment to the superior court or to an appellate court." FASTAR 103(b)(2)(B). After an arbitration hearing, the arbitrator ultimately files a signed award or enters a decision that is deemed a final award by operation of the rules. FASTAR 123, 124(a)(1), (b)(4), (c). Thereafter, the superior court will "enter judgment" upon a party's timely motion. FASTAR 124(d)(1). But if a defendant so chooses, he or she may "appeal" the award and request a trial "de novo." FASTAR

[2] Throughout this petition, Duff uses the phrases "compulsory arbitration," "mandatory arbitration," and "statutory arbitration" to describe the arbitration conducted under § 12-133 and Rules 72 to 77, ARCP, as opposed to an "Alternative Resolution" arbitration conducted under FASTAR.

126(a)(2), (d). As with a compulsory arbitration "appeal" under § 12-133(H), a defendant must obtain a result at least 23% more favorable than the arbitrator's award in order to avoid sanctions after a trial de novo. FASTAR 126(h); *see* § 12-133(I). A plaintiff may appeal an arbitration award only to challenge a counterclaim or similar claim asserted by another party. FASTAR 103(d)(2). Otherwise, a plaintiff in an arbitration proceeding forfeits the right to appeal the decision, award, or judgment to the superior court or to an appellate court. FASTAR 103(b)(2)(B), 126(a)(1).

¶ 4 Upon filing her complaint, Duff certified that her case is not subject to FASTAR. (APP. 009-010.) She certified instead that her case is subject to compulsory arbitration under § 12-133 (APP. 007.) She then filed an objection to the FASTAR arbitration provisions and moved to proceed under § 12-133 and Rules 72 to 77, ARCP. (APP. 013.) The respondent judge overruled the objection and denied the motion, essentially finding the FASTAR program to be applicable and lawful. (APP. 220.)

¶ 5 The immediate effect of the trial court's ruling is to deny Duff the benefits of compulsory arbitration and force her to proceed with a fast trial. Among the particular benefits lost are the ability to admit evidence of her medical bills, or special damages, without need of an expert witness to testify that the bills represent reasonable charges, *compare* ARCP 75(d)(1)-(4), *with* FASTAR 117(d)(1), as well

as the ability to make a valid offer of judgment under Rule 68, ARCP, and collect sanctions under that rule if the offer is rejected and an equal or better result is later obtained, FASTAR 109.[3] Assuming arguendo that Duff is still eligible to choose arbitration under the FASTAR program (the trial court issued its ruling after the deadline to make this choice), she would be required to waive her right to a trial de novo in the superior court and her right to appeal in the court of appeals as a condition of receiving such arbitration. FASTAR 103(b)(2), 126(a)(1).

¶ 6 The trial court's challenged order denying statutory arbitration is an interlocutory order that cannot be appealed under A.R.S. § 12-2101. (APP. 220.) Furthermore, the order is one for which Duff lacks an "an equally plain, speedy, and adequate remedy by appeal." ARPSA 1(a). This is apparent from the procedural dilemma the plaintiff faces. If, on the one hand, Duff were to choose FASTAR arbitration, then she could not raise her arguments on direct appeal that the waiver provisions of FASTAR are inapplicable, invalid, and unconstitutional. (APP. 013-014, 026, 029.) Those issues would evade appellate review following a waiver of appellate rights. *See Glenn H. v. Hoskins*, 244 Ariz. 404, ¶ 9 (App. 2018) (identifying avoidance of appellate review among grounds for special action jurisdiction). If, on the other hand, she proceeded with a FASTAR fast trial, then this proceeding might

[3]Although Duff served an offer of judgment on the defendants with her pleading, the trial court's ruling appears to nullify the offer. (APP. 011.)

be found to cure the alleged error of denying her compulsory arbitration, or it might otherwise prevent her from obtaining later appellate relief, despite the merits of her underlying contentions. *Cf.* State v. Eddington, 226 Ariz. 72, ¶ 20 (App. 2010) (recognizing near impossibility of demonstrating prejudice from certain procedural errors), *aff'd*, 228 Ariz. 361 (2011); State v. Vallejo, 215 Ariz. 193, ¶¶ 13-14 (App. 2007) (Howard, P.J., specially concurring) (suggesting no prejudice occurs when fair trial follows alleged constitutional error). In effect, a fast trial could prejudice Duff's case and render moot her arguments challenging the denial of statutory arbitration and her associated appeal rights. Under the existing FASTAR rules, the new arbitration program is generally insulated from critique on appeal. Special action jurisdiction under A.R.S. § 12-120.21(A)(4) is therefore appropriate.

¶ 7 This Court should exercise its discretion to grant special action jurisdiction for a number of other reasons as well. First, the case presents purely legal questions on matters of first impression that will affect an entire class of cases—namely, civil actions in Pima County valued up to $50,000. *See* Valler v. Lee, 190 Ariz. 391, 392 (App. 1997) (finding jurisdiction appropriate given "purely legal issue of first impression which may recur"). Second, the case concerns the proper construction and application of statutes and new court rules. *See* Sierra Tucson, Inc. v. Lee, 230 Ariz. 255, ¶ 7 (App. 2012). Third, considerations of time and efficiency militate in favor of an appellate court resolving the threshold issue of the correct process by

which to decide the plaintiff's case, as well as all other FASTAR cases. *See* *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 8 (App. 2009) (noting special action may be appropriate before trial in order to avoid unnecessary expenditure of resources and promote judicial economy); *Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶ 8 (App. 2006) (finding special action jurisdiction warranted when trial otherwise "would proceed in an incorrect manner"). Fourth, the error here is evident, *see* *King v. Superior Court*, 138 Ariz. 147, 149-50 (1983), with the trial court declining to expressly address Duff's numerous developed arguments; "refusal to correct the error at this stage would be pointless," *Valler*, 190 Ariz. at 392. Fifth, the volume of cases subject to this pilot program calls for an immediate, final determination of the FASTAR program's validity. *See* *Dobson v. State ex rel. Comm'n on Appellate Court Appointments*, 233 Ariz. 119, ¶ 8 (2013) (listing need for prompt resolution among grounds for special action jurisdiction). Sixth, the trial court has already granted an interlocutory stay in this matter, implicitly recognizing that the case presents urgent and important legal questions that demand guidance from a published appellate opinion. *See* *State ex rel. McDougall v. Superior Court*, 186 Ariz. 218, 220 (App. 1996) ("[S]pecial action review is appropriate because of the lack of case law addressing this specific issue.").

STATEMENT OF THE ISSUES

¶ 8 The issues to be decided are as follows:

(1) Whether the FASTAR pilot program applies to petitioner's case.

(2) Whether the compulsory arbitration statute, § 12-133, prohibits the FASTAR arbitration program.

(3) Whether FASTAR's arbitration program violates the Arizona Constitution.

STATEMENT OF FACTS

¶ 9 The relevant procedural facts are discussed above. *Supra* ¶¶ 1, 4. On May 4, 2018, the same day that she filed her complaint, Duff also filed her certificates related to FASTAR and compulsory arbitration. (APP. 004, 007, 009.) After service of process, she filed her Objection to FASTAR Pilot Program and Motion for Arbitration Pursuant to A.R.S. § 12-133. (APP. 013, 209, 211.) The defendants answered on May 29, 2018. (APP. 213.) On the same date, defendants filed a Rule 102(b) FASTAR Controverting Certificate that formally took no position on plaintiff's pending objection and motion. (APP. 217.) Twenty-one days after the defendants' answer, on the day after the deadline to file a "Choice Certificate" under FASTAR 103(b)(1), the trial court issued its order overruling Duff's objections and denying her motion. (APP. 220.) That order was later filed on Friday, June 22, 2018. (Id.) Duff filed a motion to stay the action the next week, on June 29, 2018. (APP.

222.) The trial court granted the motion for an interlocutory stay on July 9, 2018.[4] (APP. 231.) This petition for special action followed.

ARGUMENT

¶ 10 Special action relief is warranted when a trial court "has failed . . . to perform a duty required by law as to which he has no discretion," ARPSA 3(a), or when the court's determination "was arbitrary and capricious or an abuse of discretion," ARPSA 3(c). As she maintained below, petitioner will show, first, that the trial court erred as a matter of law and thereby abused its discretion by finding the FASTAR program applies to Duff's case, as a technical matter. *See* *State v. Mangum*, 214 Ariz. 165, ¶ 6 (App. 2007) ("A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles.") (quoting *State v. Jackson*, 208 Ariz. 56, ¶ 12 (2004)). Regardless of the program's validity, the applicable jurisdictional limit is $50,000, and it requires Duff's case to be referred to compulsory arbitration pursuant to § 12-133. (APP. 014, 026, 029.)

¶ 11 Second, as a matter of statutory interpretation, the trial court committed an error of law by finding that § 12-133 permits the FASTAR arbitration rules. FASTAR is directly contrary to the plain text and purpose of the compulsory arbitration statute. (APP. 023-029.) This pilot program conflicts with § 12-133, at

[4]Due to a scheduled reassignment of the superior court's civil bench, Duff's case was transferred to Judge D. Douglas Metcalf for a stay ruling.

minimum, with respect to jurisdictional limits, funding, and post-arbitration review rights.

¶ 12 Third, the Arizona Constitution prohibits those portions of FASTAR related to a plaintiff's waiver or forfeiture of appellate review. (APP. 016-023.) Regardless of how § 12-133 and the FASTAR rules are construed, separation-of-powers principles based in Article III dictate that the substantive right of appeal cannot be modified, conditioned, or limited by the Arizona Supreme Court, nor can that court alter the appellate jurisdiction of the Arizona Court of Appeals.

I. FASTAR Does Not Apply to this Case.

A. The Arizona Supreme Court Could Not, and the Pima County Superior Court Did Not, Lower the Jurisdictional Limit for Compulsory Arbitration in § 12-133(A)(1).

¶ 13 Section 12-133(A)(1) mandates that "[t]he *superior court, by rule of court,* shall . . . [e]stablish jurisdictional limits" for arbitration up to $65,000. (Emphasis added.) Statutory distinctions between different courts must be recognized and given effect. *W. Ag. Ins. Co. v. Chrysler Corp.*, 198 Ariz. 64, ¶ 13 (App. 2000).

¶ 14 Despite this clear statutory language, the Arizona Supreme Court's October 2017 administrative order purports to set the superior court's jurisdictional limit for compulsory arbitration. That order states: "The jurisdictional limit for arbitration claims authorized by A.R.S. § 12-133 is established at one thousand dollars for Pima County for the [three-year] duration of the pilot program." Ariz. Sup. Ct. Admin.

Order 2017-116, at 1. An administrative order of the Arizona Supreme Court is distinct from a *rule* of a *superior court*, which is a local rule that must be promulgated in accordance with Rule 28.1, Ariz. R. Sup. Ct. By the plain terms of § 12-133(A)(1), the Arizona Supreme Court cannot establish a jurisdictional limit for compulsory arbitration in Pima County or any other county in the state. Accordingly, the quoted portion of the administrative order is a nullity with no legal effect on the superior court's jurisdictional limit.

¶ 15 Without citing any authority, the trial court asserted that, "[a]s part of the FASTAR Program, the Pima County Superior Court has changed its limits for referring cases to [compulsory] arbitration." (APP. 220.) In fact, the superior court issued no such rule change affecting Duff's case. A local rule of the superior court must be approved by a majority of that court's judges, Ariz. R. Sup. Ct. 28.1(b)(2); it must be filed with the Arizona Supreme Court for circulation and ultimate approval by the high court, Ariz. R. Sup. Ct. 28.1(c)-(e); and it must be published, Ariz. R. Sup. Ct. 28.1(i). As shown in Section I-B, *infra*, when Duff filed her complaint and moved for compulsory arbitration, the only published local rule provided that her case did "fall within the range prescribed by the Court," meaning that she did have a "right to an arbitration," contrary to trial court's express determinations in its order denying her motion. (APP. 220.) The supreme court's records confirm that the superior court never lowered its jurisdictional limit pursuant to § 12-133(A)(1).

(APP. 253-256.) The trial court simply misconstrued the supreme court's administrative order on this point.

B. Duff's Case Is Governed by the $50,000 Jurisdictional Limit in Pima County's Local Rule 4.2(a).

¶ 16 Pima County's applicable local rule provides as follows:

> All civil cases filed with the Clerk of the Court in which . . . the amount in controversy does not exceed $50,000.00, except those specifically excluded by Rules 72 through 77, A.R.C.P., shall be submitted to and decided by an Arbitrator or Arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 through 77, A.R.C.P.

Ariz. Local R. Prac. Super. Ct. (Pima) 4.2(a) (2018). This local rule was adopted by Arizona Supreme Court Order R-08-0023, which was filed September 30, 2008. (APP. 233-246) Pima County's Local Rule 4.2(a) was operative and in effect when Duff filed her complaint and moved for compulsory arbitration.

¶ 17 As Duff acknowledged below, Pima County now has adopted new local rules effective on July 1, 2018. Ariz. Sup. Ct. Order R-17-0051 (Mar. 26, 2018).[5] (APP. 014.) These new rules took effect after the trial court made its challenged ruling, and they did not provide the basis for the court's order. Moreover, the new local rules do not apply to Duff's case, because her filing date gives her a vested right to statutory

[5]As of the date of this petition, the new local rules for Pima County are neither available through Westlaw's website nor as a supplement to the Arizona Rules of Court published by Thomson Reuters.

arbitration and all the substantive rights it entails. *Cf.* *Ariz. Dep't of Econ. Sec. v. Reinstein*, 214 Ariz. 209, ¶¶ 15-16 (App. 2007) (holding statutory right to jury trial vested when parents elected to proceed with jury on state's motion to terminate parental rights). In addition, the new local rules are invalid insofar as they attempt to lower the superior court's jurisdictional limit to $1,000. *See* Ariz. Sup. Ct. Order R-17-0051, at 11 (promulgating Local Rule 2.9(A)). Both these points are developed more fully in the following sections of this petition.

II. Section 12-133 Prohibits the FASTAR Arbitration Program.

¶ 18 When a court construes a statute, it looks first to the text of the statute, striving always to effectuate the intent of the legislature. *Mangum*, 214 Ariz. 165, ¶ 12. A court must read a statute as a whole and in context, giving meaningful operation to all of its provisions and words whenever possible. *See* *Stambaugh v. Killian*, 242 Ariz. 508, ¶ 7 (2017); *State v. Sweet*, 143 Ariz. 266, 269-70 (1985); *Mangum*, 214 Ariz. 165, ¶ 15. "[T]he words of a statute are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *State ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, ¶ 7 (2018) (quoting *State v. Miller*, 100 Ariz. 288, 296 (1966)) (alteration in *Brnovich*). When "it is reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent." *Pima Cty. ex rel. City of Tucson v. Maya Constr. Co.*,

158 Ariz. 151, 155 (1988). If the language of a statute does not clearly determine its meaning, then a court must examine the law's subject matter, historical background, effects and consequences, and spirit and purpose. *Scheehle v. Justices of the Sup. Ct. of the State of Ariz.*, 211 Ariz. 282, ¶ 16 (2005). In keeping with these principles, the legislature has stated that its "[s]tatutes shall be liberally construed to effect their objects." A.R.S. § 1-211(B).

A. The $1,000 Jurisdictional Limit Is Lower than that Mandated by Law.

¶ 19 As mentioned above, our supreme court's FASTAR order purports to lower Pima County's jurisdictional limit to $1,000. Ariz. Sup. Ct. Admin. Order 2017-116, at 1. Pima County's new Local Rule 2.9(A) now does the same, providing as follows:

> All civil cases filed with the Clerk of the Court in which the Court finds or the parties agree the amount in controversy does not exceed $1,000.00, except those specifically excluded by Rules 72 through 77, Arizona Rules of Civil Procedure, must be submitted to and decided by an arbitrator or arbitrators in accordance with the provisions of A.R.S. § 12-133 and Rules 72 through 77, Arizona Rules of Civil Procedure.

Ariz. Sup. Ct. Order R-17-0051, at 11. Both of these judicial enactments violate § 12-133.[6]

[6]Although Duff's argument in Section I of this petition is sufficient to resolve her case, she urges this Court to reach her other arguments as well, in order to provide needed guidance on the legality of the pilot program.

¶ 20 Section 12-133 operates by two basic procedural mechanisms. Subsection (A)(1) requires each superior court to establish a "jurisdictional limit[]" up to $65,000 "for submission of disputes to arbitration." Subsection (A)(2), in turn, "[r]equire[s] arbitration in all cases which are filed in superior court" within that limit. Whereas decades ago § 12-133 had prescribed an optional arbitration scheme for the superior court, "the legislature amended the statute *to require, as opposed to merely permit*, superior courts to implement mandatory arbitration programs by rule." *Scheehle*, 211 Ariz. 282, ¶ 6 (emphasis added).

¶ 21 A separate but related statute, A.R.S. § 22-201, specifies the civil jurisdiction of Arizona's justice courts with respect to lower-value cases. It provides: "Justices of the peace have *exclusive original jurisdiction* of all civil actions when the amount involved, exclusive of interest, costs and awarded attorney fees when authorized by law, is ten thousand dollars or less." § 22-201(B) (emphasis added). In 1993, our supreme court reasoned that this statute cannot literally mean what it says regarding "exclusive original jurisdiction." *State ex rel. Neely v. Brown*, 177 Ariz. 6, 8 (1993). After all, Article VI, § 14(3) of the Arizona Constitution grants the superior court "original jurisdiction" over civil controversies of $1,000 or more. This provision acts as a "barrier[] to legislative divestiture of jurisdiction in [the] superior court." *Neely*, 177 Ariz. at 8. Nonetheless, the operative language in § 22-201(B) grants the justice courts "concurrent original jurisdiction" over cases valued up to $10,000, *see Neely*,

177 Ariz. at 8, which is the maximum civil jurisdiction our state constitution permits for justice courts, Ariz. Const. art. VI, § 32(C).

¶ 22 Just as the term "jurisdiction" cannot be construed literally in § 22-201(B), it likewise cannot be interpreted literally in § 12-133. In short, neither the legislature nor the superior court can "limit[]" that court's "jurisdiction[]" granted by the constitution. § 12-133(A)(1). The superior court always retains its jurisdiction under the constitution. *Neely*, 177 Ariz. at 8. In light of the plain impossibility in § 12-133(A)(1), it is therefore clear that the legislature used the word "jurisdiction[]" imprecisely within this provision and that lawmakers necessarily intended a different meaning from the ordinary and customary definition of the term. *See Maricopa Cty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, ¶ 7; *see also Taliaferro v. Taliaferro*, 186 Ariz. 221, 223 (1996) (acknowledging "the word 'jurisdiction' means different things in different contexts," and recognizing "imprecise" use of term even by supreme court). In the context of § 12-133, the word "jurisdiction[]" neither refers nor equates to the "jurisdiction" provided by Article VI, § 14(3) of the Arizona Constitution and its $1,000 amount-in-controversy figure.

¶ 23 Rather, reading these statutes in a natural and harmonious manner, the legislature intended the justice court to be the "exclusive" venue for civil cases involving controversies up to that court's statutory jurisdictional limit, with the justice court having primary authority to decide those cases. § 22-201(B); *see also*

Ariz. Const. art. VI, § 32(B) (limiting justice court's jurisdiction to that provided by law); § 22-201(A) (same). Lower-value civil cases of $10,000 or less that are filed in the superior court are either subject to dismissal, pursuant to the "exclusive" term in § 22-201(B), or transfer to the justice court.[7] Whereas lawmakers have made court-ordered arbitration *permissible* in the justice court, *see* § 22-201(H), they have made arbitration *mandatory* in the superior court, *see* § 12-133(A). By creating a compulsory arbitration scheme uniquely for the superior court, the legislature intended this program to apply to civil cases above the jurisdictional limit for the justice court, up to the $65,000 limit specified in § 12-133(A)(1). The legislature designed the compulsory arbitration program, in other words, to capture cases that would otherwise be subject to adjudication in the superior court. Thus, the "jurisdictional limit[]" required by § 12-133(A)(1) must be greater than the $10,000 figure in § 22-201(B).

¶ 24 If § 12-133(A) were read otherwise, this would create an absurd loophole through which the superior court could avoid entirely the compulsory arbitration system. *Cf. Anderson v. State Farm Mut. Auto. Ins. Co.*, 133 Ariz. 464, 469 (1982) (rejecting construction of insurance statute that created absurd loophole in

[7]As with the supreme court's concurrent appellate jurisdiction with the court of appeals, the effect of this technical overlap in jurisdiction is to transfer all qualifying cases to the lower court. *E.g.*, *Ariz. Podiatry Ass'n v. Dir. of Ins.*, 101 Ariz. 544, 548-49 (1966).

comprehensive scheme of coverage). Allowing a superior court to set its jurisdictional limit within the justice court's exclusive jurisdictional range would have no effect on the superior court's caseload, and it would eviscerate § 12-133, making it optional rather than mandatory. Such an interpretation would ignore the fact that the legislature has "amended the statute . . . *to require, as opposed to merely authorize*, each superior court to adopt a mandatory arbitration program." *Scheehle*, 211 Ariz. 282, ¶ 20 (emphasis added). It also would render the "shall . . . [e]stablish" clause in § 12-133(A)(1) an empty formalism and a triviality, violating basic principles of statutory construction. *See Mangum*, 214 Ariz. 165, ¶ 15. "What a statute necessarily implies is as much a part of the statute as what the statute specifically expresses." *Guzman v. Guzman*, 175 Ariz. 183, 187 (App. 1993). Accordingly, the text, context, and related statutes all establish that a superior court may not simply "replac[e] compulsory arbitration" by adopting a $1,000 jurisdictional limit pursuant to § 12-133(A)(1), which Judge Bergin suggests was the goal of this maneuver. Bergin, *supra*, at 30.[8]

¶ 25 If there were any lingering doubt about the invalidity of the $1,000 jurisdictional limit, the purposes and policy behind compulsory arbitration confirm that the FASTAR arbitration program is prohibited by § 12-133. This statute is

[8] Judge Bergin's comment is especially instructive insofar as he served on the committee that drafted the FASTAR rules, as discussed *infra* ¶ 26. Ariz. Sup. Ct. Admin. Order 2015-126, at 3 (Dec. 23, 2015).

designed "to reduce the number of cases being tried by superior court judges." *Burnett v. Walter*, 135 Ariz. 307, 308 (App. 1982). By "limit[ing] judicial intervention or participation" in cases and by reducing "the primary expense of litigation-attorneys' fees," *Romer-Pollis v. Ada*, 223 Ariz. 300, ¶ 17 (App. 2009) (quoting *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 180 Ariz. 148, 152 (1994)), the legislature has created an arbitration system that offers a reasonable, cost-effective alternative to trial, *see Lane v. City of Tempe*, 202 Ariz. 306, ¶ 6 (2002). The long-standing public policy of our state therefore favors arbitration. *Maya Constr. Co.*, 158 Ariz. at 154; *W. Ag. Ins. Co.*, 198 Ariz. 64, ¶ 14; *Einhorn v. Valley Med. Specialists, P.C.*, 172 Ariz. 571, 572 (App. 1992); *Jeanes v. Arrow Ins. Co.*, 16 Ariz. App. 589, 591 (1972).

¶ 26 The Committee on Civil Justice Reform ("CCJR"), which proposed the draft version of the FASTAR program, pursued a different public policy. *See* Ariz. Sup. Ct. Admin. Order 2017-116, at 1; Ariz. Sup. Ct. Admin. Order No. 2015-126 (Dec. 23, 2015). This court-created committee explicitly designed the program to combat the phenomenon of the "vanishing [civil] trial" and to "promote more jury trials in our communities." Ariz. Sup. Ct., CCJR, *A Call to Reform* 18-19 (Oct. 2016). The FASTAR architects advocated for this reform, in part, because it would avoid the perceived "downsides of compulsory arbitration"—namely, "divert[ing] cases away from juries," "divert[ing] cases away from judges," and "diverting lawyers away

from trials," which deprives attorneys of valuable "experience in the art of trying civil cases." *Id.* The framers of this program also were concerned that the existing statutory arbitration system was "laced with potential unfairness" that unduly discouraged participation in trials de novo. *Id.*

¶ 27 The separation-of-powers problems arising from the FASTAR program are discussed in Section III, *infra*. As a pure matter of statutory interpretation, however, § 12-133 must be liberally construed to effectuate its purpose, § 1-211(B), with this Court exercising its "duty to uphold the obvious intent of the legislature," *Varga v. Hebern*, 116 Ariz. 539, 541 (App. 1977), *disagreed with on other grounds by Riendeau v. Wal-Mart Stores, Inc.*, 223 Ariz. 540, ¶¶ 7-9 (App. 2010). Because the FASTAR program is expressly designed to counteract § 12-133 and undermine the legislature's compulsory arbitration system, the $1,000 jurisdictional limit adopted for the Pima County Superior Court is forbidden by this statute. Nothing in § 12-133 permits a court to avoid compulsory arbitration and promote jury trials instead. Ultimately, court rules must "not frustrate but rather advance[] the intent behind the statute." *Graf v. Whitaker*, 192 Ariz. 403, ¶ 14 (App. 1998).

B. FASTAR Misappropriates County Funds Meant for Compulsory Arbitration.

¶ 28 As the prior discussion shows, the FASTAR program provides the option of an "Alternative Resolution" arbitration that is distinct from statutory arbitration. FASTAR 101(b)(2), 103(a), 120(a). Through this distinction, FASTAR attempts to

both satisfy the statutory command to adopt a jurisdictional limit for compulsory arbitration in § 12-133(A)(1) and provide defendants, but not plaintiffs, the benefits of that statute if arbitration is selected.

¶ 29 A defect remains, however, in funding this alternative arbitration system. Under Rules 125 and 126(h)(1), a FASTAR arbitrator is to be paid by the county in accordance with § 12-133(G). FASTAR 125(a) states, in relevant part: "An arbitrator assigned to a case under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12[-]133(G) per day for each day, or part of a day, necessarily expended in hearing the case." FASTAR 125(b) further states that "[t]he compensation paid in each county must be provided by local rule." FASTAR 126(h)(1), in turn, specifies the circumstances under which "the compensation actually paid to the arbitrator" by "the county" is to be reimbursed after a trial de novo. Together, these rules direct Pima County to provide funds for FASTAR's alternative resolution arbitration program as if that program were statutory arbitration. Section 12-133(G), for its part, states as follows:

> Each arbitrator shall be paid a reasonable sum, not to exceed one hundred forty dollars per day, to be specified by the rules of the appointing court, for each day necessarily expended by the arbitrator in the hearing and determination of the case. *The compensation of the arbitrators shall be paid by the county*, in which the court has jurisdiction, *from its general revenues and shall not be taxed as costs.*

(Emphasis added.)

¶ 30 It is axiomatic that FASTAR may not be treated as statutory arbitration for some purposes but not others. In particular, FASTAR may not use public funds meant for statutory arbitration unless the proceeding being funded is the compulsory arbitration specified by § 12-133. By attempting to create an elective arbitration program and funding it with compulsory arbitration monies from Pima County's general revenues, the existing FASTAR rules misappropriate public funds without lawful authority. [9]

¶ 31 Notably, the legislature has both authorized and created dedicated funding for alternative dispute resolution ("ADR") programs other than compulsory arbitration. For example, A.R.S. § 12-134 permits a superior court to utilize "mediation and other alternative dispute resolution procedures" that are funded by specific "alternative dispute resolution service[]" fees set by the county's board of supervisors. The fees collected under § 12-134 go into a "local alternative dispute resolution fund" established by A.R.S. § 12-135.01. This local ADR fund is directly administered by the presiding judge of the superior court, with the county treasurer making disbursements only at the direction of the presiding judge. § 12-135.01(B).

¶ 32 Similarly, A.R.S. § 12-135(A) creates an "alternative dispute resolution fund" at the state level which consists of monies drawn from superior court fees, *see* A.R.S.

[9]Consistent with the FASTAR rules cited above, the Pima County Superior Court has provided a payment form for asserting a claim against the county for an arbitrator's services. (APP. 250-252.)

§ 12-284.03(A)(5); justice court fees, *see* A.R.S. § 22-281(C)(2); and notary bond fees, *see* A.R.S. § 41-178(5). This ADR fund is directly administered by the Arizona Supreme Court, § 12-135(B), with the state treasurer dealing only with investment and divestment of monies in the fund, § 12-135(C). That the legislature has distinguished compulsory arbitration from other ADR programs in this manner, and that the legislature has further allocated general county funds for compulsory arbitration but has allocated only specific fee-based funds for other forms of ADR, indicates that the legislature regards statutory arbitration under § 12-133 as a separate program with prioritized funding.

¶ 33 Consistent with this legislative vision and priority, one other aspect of compulsory-arbitration funding bears mentioning. Because § 12-133 "relies on 'judicial rulemaking to implement a workable arbitration scheme,'" *Phillips v. Garcia*, 237 Ariz. 407, ¶ 16 (App. 2015) (quoting *Graf*, 192 Ariz. 403, ¶ 13), the legislature has authorized dedicated ADR funds to be used on compulsory arbitration conducted under § 12-133. Section 12-135.01(B) allows the presiding judge of the superior court to use the local ADR fund "to establish, maintain, evaluate and enhance" the court's § 12-133 programs. But the converse is not true—that is, general-revenue funds of the county may not be used on ADR programs other than compulsory arbitration. If the legislature ever intended to fund other ADR programs

in this manner, it would have said so. *See* Vega v. Sullivan, 199 Ariz. 504, ¶ 12 (App. 2001).

¶ 34 In sum, the only situation in which Pima County would actually pay an arbitrator as contemplated by FASTAR 125 and 126(h)(1) would be if the FASTAR arbitration program were funded by § 12-133(G). Yet FASTAR arbitration is not statutory arbitration under § 12-133. Thus, in the absence of legislative authorization, the existing FASTAR rules create an invalid, improperly funded ADR program.

C. FASTAR Is Not Authorized by § 12-133(L), Which Simply Allows More Cases to Be Subject to Compulsory Arbitration.

¶ 35 As noted, the FASTAR rules repeatedly characterize their new arbitration system as an "Alternative Resolution" program, suggesting the program is one specifically authorized by § 12-133(L). *See, e.g.*, FASTAR 103(a), 120(a). A careful reading of that statutory provision, however, demonstrates the error in such an interpretation. Section 12-133(L) states, in full: "The jurisdictional limit under *subsection A, paragraph 1* of this section does not apply to *arbitration* that is conducted under an alternative dispute resolution program approved by the supreme court." (Emphasis added.)

¶ 36 Specific statutory references must be interpreted "to include certain provisions and exclude others," otherwise the enumeration would be meaningless. Cemex Constr. Materials S., LLC v. Falcone Bros. & Assocs., 237 Ariz. 236, ¶ 20 (App.

2015). Furthermore, "[t]he provision of one exemption in a statute implicitly denies the existence of other unstated exemptions." *Pivotal Colo. II, L.L.C. v. Ariz. Pub. Safety. Pers. Ret. Sys.*, 234 Ariz. 369, ¶ 16 (App. 2014) (quoting *State Comp. Fund v. Superior Court*, 190 Ariz. 371, 375 (App. 1997)). Also, courts "must, if possible, give effect to every word, not merely select words" in a statute. *State v. Burbey*, 243 Ariz. 145, ¶ 10 (2017).

¶ 37 The first half of the quoted provision clarifies that its exemption is specific and limited: Only the enumerated subsection (A)(1) of § 12-133—specifically, the superior court's local "jurisdictional limit" of up to $65,000—"does not apply" to these qualifying cases. § 12-133(L). All other subsections of § 12-133 continue to apply to such qualifying cases, meaning that these actions remain subject to a trial de novo and subsequent appeal to the intermediate appellate court. *See* § 12-133(E), (H), (I).

¶ 38 This meaning is confirmed by the second half of subsection (L). It states that the qualifying cases—i.e., those exempt from the normal jurisdictional limit—involve "*arbitration* that is conducted under an alternative dispute resolution program approved by the supreme court." § 12-133(L) (emphasis added). The "arbitration" referred to here is the same "arbitration" referred to throughout § 12-133—namely, compulsory arbitration, with all the burdens imposed and benefits conferred by this statute.

¶ 39 Taken as a whole, the plain meaning of § 12-133(L) is that the supreme court may direct cases into the compulsory arbitration program established by § 12-133 notwithstanding the normal jurisdictional limit of $65,000 (or $50,000 in Pima County, as the situation may be). In other words, subsection (L) authorizes the supreme court to approve a narrow "alternative dispute resolution program" of "arbitration" for cases whose value otherwise would not qualify for arbitration. Section 12-133(L) does not broadly authorize the supreme court to enact other forms of "alternative dispute resolution," such as "mediation," to replace compulsory arbitration. § 12-134(A). Nor does § 12-133(L) in any way authorize the supreme court to remove cases from compulsory arbitration, change the existing compulsory arbitration system, construct a parallel arbitration system, or lower the compulsory arbitration limit of a superior court.

¶ 40 Again, if the legislature wished to fully exempt some cases from § 12-133, then it would have said so. *See Vega*, 199 Ariz. 504, ¶ 12. In all likelihood, the legislature would have simply deleted the first part of subsection (L) to say: "[T]his *section* does not apply to arbitration that is conducted under an alternative dispute resolution program approved by the supreme court." (Emphasis added.) Instead, the legislature provided an exemption only from the normal jurisdictional limit of "subsection" (A)(1). § 12-133(L). And by doing this, the legislature clearly

expressed its intention for the remainder of § 12-133 to apply to the "arbitration" cases at issue. § 12-133(L).

¶ 41 Legislative history underscores the point. In 1992, the legislature enacted what was then § 12-133(K) and what is now codified as subsection (L), with only one stylistic change. *See* 2012 Ariz. Sess. Laws, ch. 44, § 1; 1992 Ariz. Sess. Laws, ch. 9, § 1. Lawmakers did not intend this provision to allow the jurisdictional limit for compulsory arbitration to be *decreased.* To the contrary, they specifically intended this provision to allow "experimentation to *increase* the cap to a higher amount for alternative dispute resolution programs which are expressly approved by the Arizona Supreme Court." S. Minutes of Comm. on Judiciary, 40th Leg., 2d Reg. Sess., at 3 (Ariz. Feb. 4, 1992) (emphasis added). The change "*lifts* the $50,000 limit *for cases in arbitration* that are conducted under an alternative dispute resolution program approved by the Supreme Court." H. Summary of Legislation, 40th Leg., 2d Reg. Sess., at 216 (Ariz. 1992) (emphasis added). The legislative history therefore illustrates that § 12-133(L) does not make the statutory arbitration system wholly discretionary with the supreme court. It merely gives the supreme court limited discretion to place more cases within the compulsory arbitration system.

D. FASTAR Denies Plaintiffs a Trial De Novo After Arbitration.

¶ 42 Not only does FASTAR impermissibly lower the jurisdictional limit for compulsory arbitration and improperly fund the alternative arbitration program, but

FASTAR also denies plaintiffs the trial de novo granted by statute while preserving this de novo review for defendants. *See* FASTAR 103(b), 126.

¶ 43 Section 12-133 grants the right to a "trial de novo" in the superior court after an arbitration award is filed, pursuant to subsections (E), (H), and (I) of the statute.[10] This right of review applies to "[a]ny party," with the law drawing no distinction between plaintiffs and defendants. § 12-133(H). As this Court observed in *Valler*, "any party who appears and participates in the arbitration proceedings and who timely appeals from the award is entitled to a trial *de novo* on the law and the facts." 190 Ariz. at 396.

¶ 44 By attempting to place unique restrictions and limitations on the statutory right to a trial de novo for plaintiffs, but not defendants, the FASTAR rules violate the plain terms of § 12-133, as well as the separation of powers, as discussed *infra*. Much like with the funding of FASTAR arbitration, *see* Section II-B *supra*, this pilot program may not be treated as statutory arbitration for some purposes but not others. Either § 12-133 applies to FASTAR cases or it does not. There is no textual basis and no evidence of a legislative intent to apply the various provisions of § 12-133 differently to defendants and plaintiffs.

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[10]Although the statute uses the phrases "trial de novo" and "appeal" interchangeably, § 12-133(H), Duff refers to this particular form of review as a "trial de novo," because the post-arbitration proceeding does not invoke the true appellate jurisdiction of the superior court. (APP. 017-018.)

III. FASTAR Violates the Arizona Constitution.

A. FASTAR's Arbitration Program Conflicts with a Valid, Substantive Law, § 12-133.

¶ 45 In light of the separation of powers mandated by Article III of the Arizona Constitution, our courts have established that "when a constitutionally enacted substantive statute conflicts with a procedural rule, the statute prevails." *Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, ¶ 26 (2011) (citing *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 24 (2009)). Section 12-133 is a long-standing statute with recognized substantive components. One substantive feature of the law is the right to a "trial de novo" provided by § 12-133(H). As the court of appeals established in *Graf v. Whitaker*, this "right to appeal from arbitration is a statutorily created substantive right." 192 Ariz. 403, ¶ 9 (App. 1998). Furthermore,

> a trial de novo is, as its name implies, a trial 'anew' and if the Legislature intends to restrict an independent determination by the trial court in proceedings where the Legislature has provided for a trial de novo, the Legislature must also by statute spell out any such limitation on the trial court.

Davis v. Brittain, 89 Ariz. 89, 95 (1960).

¶ 46 At minimum, FASTAR conflicts with a substantive statute in that it denies a de novo trial to plaintiffs. *See* Section II-D *supra*. The court of appeals therefore possesses the judicial power to review the FASTAR rules and declare them illegal. *See Scheehle*, 211 Ariz. at 298 ("[A]doption of a rule does not constitute a prior

determination that the rule is valid and constitutional against any challenge."); *Segura v. Cunanan*, 219 Ariz. 228, ¶ 43 (App. 2008) (acknowledging intermediate court's power to rule on constitutionality of rules promulgated by supreme court).

¶ 47 Our case law leaves no open questions about the validity and constitutionality of § 12-133. Since the mandatory arbitration statute first became law, in 1971, numerous cases have held that a party's failure to adhere to § 12-133 and its associated rules precludes further judicial relief. *See, e.g.*, *Romer-Pollis*, 223 Ariz. 300, ¶¶ 1, 18 (affirming dismissal of de novo "appeal" based on party's failure to participate in arbitration in good faith); *Jarostchuk v. Aricol Commc'ns, Inc.*, 189 Ariz. 346, 349-50 (App. 1997) (striking untimely "appeal" from arbitration award and emphasizing that general court rule regarding extensions of time "cannot be interpreted to extend the . . . appeal deadline provided by the arbitration statute"), *superseded on other grounds as recognized by Sw. Barricades, L.L.C. v. Traffic Mgmt., Inc.*, 240 Ariz. 139, ¶ 16 (App. 2016); *Anderson v. Fid. S. Ins. Corp.*, 119 Ariz. 563, 565 (App. 1978) (upholding dismissal of untimely "appeal" from arbitration award, stating "appeal is allowed only by statute, which must be strictly complied with"). In so ruling, these cases all implicitly recognize § 12-133 as a valid, substantive legislative enactment.

¶ 48 More recently, the court of appeals rejected a constitutional challenge to the statutory arbitration system in *Fisher v. Edgerton*, 236 Ariz. 71 (App. 2014). There,

the appellant argued that the sanctions provided by § 12-133 chilled the exercise of the right to a trial de novo. *Fisher*, 236 Ariz. 71, ¶ 6. The appellate court affirmed the validity and constitutionality of the system. *Id.* ¶ 41. The court specifically determined that the arbitration system amounts to a reasonable regulation of the right to trial that neither eliminates the right nor significantly burdens or impairs its exercise. *Id.* ¶¶ 34-38.

¶ 49 Under all these precedents, compulsory arbitration pursuant to § 12-133 bears some resemblance to an administrative process established by law. Compulsory arbitration is, in effect, a quasi-judicial program that is a prerequisite to judicial relief. *See Fisher*, 236 Ariz. 71, ¶ 34. Under § 12-133, a party to a lower-value case must first exhaust statutory arbitration before the party may obtain a final judgment in the superior court.

¶ 50 For over 46 years now, no Arizona court has held that the compulsory arbitration program established by § 12-133 is unconstitutional or invalid. To the contrary, *Graf* expressly determined that the arbitration statute is substantive, and *Fisher* upheld that system against a constitutional challenge. With many decades of practice and precedent thus supporting § 12-133, neither the supreme court nor the superior court may deprive plaintiffs of the full rights and benefits of this long-standing quasi-judicial program, including the substantive right of a trial de novo.

¶ 51 Indeed, as discussed in Section II-A above, the purposes of the FASTAR pilot program confirm that it encroaches on the legislative domain, dealing more with public policy than procedure. As to the "vanishing [civil] trial" that FASTAR aims to correct, CCJR, *A Call to Reform*, at 18, this trend represents the success of the compulsory arbitration program, by its own measure, *see* D. Greg Sakall & Julie A. Pack, *Short Trials: An Appropriate Replacement for Compulsory Arbitration in Arizona?* 59 Ariz. L. Rev. 485, 490-94, 504-07 (2017). Such legislative success cannot be the basis for judicial reform. In fact, this very effect has led our state to view "arbitration as good, not evil." *Broemmer v. Abortion Servs. of Phx., Ltd.*, 173 Ariz. 148, 156 (1992) (Martone, J., dissenting).

¶ 52 Nor can the judiciary replace the legislature's arbitration system in order to achieve greater efficiency. Our legislature has plenary power to deal with any topic unless prohibited by the constitution. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, ¶ 27 (2017). So long as the existing arbitration system is a permissible legislative enactment—and our precedents uniformly hold that it is—our courts cannot supplant that arbitration system on the hypothesis that alternative resolution or fast-track trials offer a speedier, less expensive, and preferable way to resolve cases. Similarly, when our supreme court upheld § 12-133's sanctions as a means "to discourage appeals from reasonable arbitration awards," *Farmers Ins. Co. v. Tallsalt*, 192 Ariz. 129, ¶ 6 (1998), and when the court of appeals further held that

this arbitration system creates no unreasonable deterrent to a jury trial, *Fisher*, 236 Ariz. 71, ¶¶ 34-35, these judicial determinations prohibited our courts from erecting a new system to guard against "potential unfairness." CCJR, *A Call to Reform*, at 18. The separate judicial power simply does not allow prophylactic measures that override or circumvent a valid legislative program.

B. FASTAR Is Involuntary and Prohibited by the Doctrine of Unconstitutional Conditions.

¶ 53 As noted, the arbitration rules of FASTAR require plaintiffs who have filed their complaints in the superior court to "waive[]" all rights of appeal "to the superior court or to an appellate court" in order to obtain a judgment on an arbitrator's award. FASTAR 103(b); *see also* FASTAR 124(d), 126. The purpose of this waiver requirement, like other FASTAR reforms, is to "incentivize short trials," CCJR, *A Call to Action*, at 19, and discourage arbitration.

¶ 54 The supreme court, however, may not coerce participation in the fast-trial pilot program by threatening forfeiture of a plaintiff's review rights. First, the absence of any precedent for such a practice demonstrates its illegality and its deviation from due process. *See* Ariz. Const. art. II, § 4. Second, the doctrine of unconstitutional conditions prohibits this practice. The state may not require "a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *State v. Quinn*, 218 Ariz. 66, ¶ 26 (App. 2008) (quoting *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593-94 (1926)). Third, absent some

misconduct or error by a party, a waiver of the right to appeal must be voluntary to be enforceable. *See* Webb v. Crane Co., 52 Ariz. 299, 319-20 (1938) (finding appellant's actions did not constitute waiver of right to appeal when "it cannot be said that . . . he acted voluntarily"). The FASTAR program is involuntary because it forces a plaintiff to surrender the rights to a de novo trial and an appeal unless the plaintiff submits to the fast-trial process. The program therefore remains involuntary even for plaintiffs who challenge the program but then submit their controversies to it. *Cf.* Johnson v. Mofford, 181 Ariz. 301, 303 (App. 1995) (holding participation in administrative hearing "under a circumstance of strong compulsion" did not waive right to appeal).

C. FASTAR Denies Plaintiffs the Right to Appeal.

¶ 55 Putting aside any issues regarding the interpretation of the FASTAR rules and § 12-133, the waiver provisions of FASTAR 103 and 126 are unconstitutional because they deny plaintiffs the right to appeal to the court of appeals. This violation of Article III of the Arizona Constitution provides an independent ground for granting the petitioner relief.

¶ 56 In the civil context, the right to appeal is a purely statutory right. *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 16 (1999). The right to appeal also is a substantive right that "cannot be enlarged or diminished by judicial rule." *Graf*, 192 Ariz. 403, ¶ 9. "Although the procedural aspects of processing an appeal

are subject to the exclusive regulation of [the Arizona Supreme Court], the substantive right to appeal is statutory and this court may not diminish or alter that right." *In re Pima Cty. Juv. Action No. S-933*, 135 Ariz. 278, 280 (1982).

¶ 57 With one exception not applicable here, A.R.S. § 12-2101(A)(1) provides a right of appeal from a final judgment in all civil actions "commenced" in the superior court.[11] This statute, together with A.R.S. § 12-120.21(A)(1), creates a right of appeal specifically to the Arizona Court of Appeals. Under Article VI, Sections 1 and 9 of the Arizona Constitution, this intermediate appellate court has mandatory jurisdiction over all such civil appeals. *See State v. Buhman*, 181 Ariz. 52, 54 (App. 1994) (distinguishing mandatory and discretionary jurisdiction).

¶ 58 Our state constitution protects a plaintiff's fundamental right to prosecute a personal injury action in the superior court. *See* Ariz. Const. art VI, § 17 (preserving right to jury trial), art. XVIII, § 6 (protecting individuals' right to damages); *Baker v. University Physicians Healthcare*, 231 Ariz. 379, ¶ 39 (2013) (recognizing fundamental nature of right to negligence action). Once a plaintiff files a civil negligence complaint in the superior court, the right of appeal accrues to that plaintiff pursuant to § 12-2101(A)(1). *See Burnett*, 135 Ariz. at 308 (holding arbitration cases

[11]The lone exception is for "actions of forcible entry and detainer when the annual rental value of the property is less than three hundred dollars." § 12-2101(A)(1). This proviso dates back to our early statehood, *see* Rev. Code Ariz. § 3659(1) (1928), and it has virtually no present-day application given the annual rental rates for real property.

are commenced in superior court and consequently appealable to court of appeals); *cf.* Reinstein, 214 Ariz. 209, ¶¶ 15-16 (explaining accrual of statutory right to jury trial upon state's filing of motion to terminate parental rights). Similarly, once the superior court enters a final judgment in a personal injury action, the plaintiff has a right to appeal that judgment by law. *See* Haywood Securities, Inc. v. Ehrlich, 214 Ariz. 114, ¶ 9 (2007) ("The legislature has provided that an appeal lies from 'a final judgment entered in . . . superior court.'") (quoting former § 12-2101(B), current subsection (A)(1)) (alteration in *Ehrlich*). The Arizona Supreme Court cannot, through its rulemaking authority or otherwise, force a plaintiff to forgo this statutory, substantive right in a particular class of cases (those subject to arbitration), because this would "diminish or alter" the right to appeal. Pima Cty. No. S-933, 135 Ariz. at 280. Again, "[t]he right to appeal 'can only be given or denied by [the] constitution or the legislature of the state.'" Ehrlich, 214 Ariz. 114, ¶ 9 (quoting State v. Birmingham, 96 Ariz. 109, 111 (1964)) (second alteration in *Ehrlich*). When the legislature has given this right in *all* civil actions commenced in the superior court, our supreme court cannot take away that right in *any* civil action.

¶ 59 Nor can the court place conditions on the right to appeal that the legislature has implicitly rejected. When the legislature has wished to regulate arbitration and restrict the grounds for challenging arbitration awards, the legislature has done so. *See, e.g.*, A.R.S. § 12-1512 (limiting grounds for opposition to arbitration award

under Uniform Arbitration Act). When the legislature has wished to provide a limited right of appeal after an arbitration, it has so stated. *See, e.g.*, A.R.S. § 12-2101.01(A) (authorizing appeals from specified orders arising from Uniform Arbitration Act and Revised Uniform Arbitration Act). When the legislature has wished to specify conditions under which an appeal is waived, it has so provided. *See, e.g.*, A.R.S. § 13-4033(C) (denying right of appeal to criminal defendants who delay sentencing by absconding); A.R.S. § 42-16056(B) ("If the petitioner and the assessor reach an agreement within five business days after the conclusion of the meeting, both parties shall sign the agreement, and both parties waive the right to further appeal."). By placing no such restrictions on the right to appeal lower-value arbitration cases commenced in the superior court, the legislature has granted all parties an unqualified right to appeal in these civil actions. The supreme court's FASTAR rules therefore unconstitutionally alter and diminish this unqualified right to appeal.

¶ 60 Notably, the waiver provisions of FASTAR are distinguishable from ordinary waiver agreements reached by both parties to an action. Section 12-133(D), for instance, acknowledges that "any case may be referred to arbitration by an agreement of reference signed by the parties or . . . counsel for both sides in the case." Rules 72(d) and 77(e), ARCP, similarly allow the parties to agree to binding arbitration, thereby jointly relinquishing the right to appeal. This type of waiver

involves the mutual assent of both parties, and it is essentially contractual and private in nature. Absent such a mutual agreement in the FASTAR system, and absent any statutory authorization from the legislature, the supreme court may not regulate and limit the right of appeal as it has attempted to do with the FASTAR rules. In short, the court may not condition a plaintiff's receipt of a final judgment in the superior court on a unilateral waiver of his or her right to appeal.

D. FASTAR Abridges the Appellate Jurisdiction of the Court of Appeals.

¶ 61 In taking away plaintiffs' rights to appeal in a subset of civil cases, the FASTAR rules also unlawfully restrict the court of appeals' appellate jurisdiction. "Absent a pertinent provision in the Arizona Constitution, appellate jurisdiction is governed entirely by statute." *Vincent v. Shanovich*, 243 Ariz. 269, ¶ 7 (2017). Our constitution states that the jurisdiction of the intermediate appellate court is "provided by law." Ariz. Const. art. VI, § 9. Section 12-120.21(A)(1) expressly grants the court of appeals "[a]ppellate jurisdiction *in all actions* . . . originating in or permitted by law to be appealed from the superior court." (Emphasis added.) Section 12-2101(A)(1), in turn, permits "[a]n appeal [to] be taken" from a final judgment in any action commenced in the superior court.

¶ 62 The Arizona Supreme Court "has no power to limit the constitutional jurisdiction of any of the other judicial tribunals established by the Constitution or statutes adopted in pursuance thereof." *Collins v. Superior Court*, 48 Ariz. 381, 393

(1936); *accord* *Scheehle*, 211 Ariz. at 298 (noting court rules may not conflict with constitution). Despite the express grant of appellate jurisdiction in §§ 12-120.21(A)(1) and 12-2101(A)(1), the FASTAR rules eliminate a plaintiff's right to appeal a final judgment entered by the superior court after a FASTAR arbitration. *See* FASTAR 103(b)(2)(B), 124(d)(1), 126(a)(1). The FASTAR rules therefore conflict with these statutes and the Arizona Constitution, unlawfully curtailing the mandatory appellate jurisdiction of the court of appeals.

CONCLUSION

¶ 63 "Generally speaking, a voluntary, short-trial program may make perfect sense for most small-value cases . . . ." Sakall, *supra*, at 499. For the reasons explained above, however, the FASTAR program is inapplicable, invalid, and unconstitutional. Petitioner Duff therefore reiterates her objections to that system, generally, and her particular objection to the Choice Certificate that demands her waiver of rights as a prerequisite to arbitration. *See* FASTAR 103. Because Duff's case is still subject to the existing statutory arbitration system, according to Pima County's Local Rule 4.2(a), she asks this Court to accept special action jurisdiction, reverse the trial court's legally erroneous ruling, and grant her request for an order directing her case to proceed with statutory arbitration under § 12-133 and Rules 72 to 77, ARCP.

RESPECTFULLY SUBMITTED this 19th day of July, 2018.

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ARIZONA COURT OF APPEALS

DIVISION TWO

CLAUDIA DUFF, Petitioner, v. HON. KENNETH LEE, Judge of the Superior Court of the State of Arizona in and for the County of Pima, Respondent, And TUCSON POLICE DEPARTMENT, a municipal agency; and the CITY OF TUCSON, a municipal corporation, . Real Parties in Interest.	No. 2 CA-SA 2018-0058 Pima County Superior Court No. C20182262

RESPONSE TO PETITION FOR SPECIAL ACTION

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INTRODUCTION

The Honorable Kenneth Lee, Judge of the Pima County Superior Court, submits this substantive Response to Petitioner Claudia Duff's Petition for Special Action in accordance with *Hurles v. Superior Court*, 174 Ariz. 331, 332-33 (App. 1993), which provides that a judge who is a nominal respondent in a special-action petition may respond to the petition to explain or defend the general validity of the court's administrative practice, policy, or local rule. Duff's Petition seeks special-action relief from the superior court's order denying her motion to have her case referred to compulsory arbitration under A.R.S. § 12-133 rather than to the Fast Trial and Alternative-Resolution ("FASTAR") pilot program that the Arizona Supreme Court established in the Pima County Superior Court by administrative order. Duff challenges the validity of the program's Alternative Resolution option. She contends that the FASTAR program conflicts with A.R.S. § 12-133, which governs compulsory arbitration; exceeds the supreme court's authority; misappropriates funding intended for compulsory arbitration; and is unconstitutional or otherwise invalid because it requires plaintiffs who choose the program's Alternative Resolution option to waive their right to appeal to the superior court or to an appellate court.[1] As the argument section of this Response

[1] This Response will address only the FASTAR program's implementation and validity. Counsel for the City of Tucson will address the correctness of the

explains, her arguments do not support these contentions. If this Court accepts special-action jurisdiction, it should therefore deny Duff the relief that she is seeking to the extent that she is asking the Court to rule that the FASTAR program is unconstitutional or otherwise invalid.

JURISDICTIONAL STATEMENT

This Court's acceptance of special-action jurisdiction is appropriate when the petitioner lacks an equally plain, speedy, or adequate remedy by appeal. *See* Ariz. R. P. Spec. Acts. 1(a). The order from which Duff is seeking special-action relief (App. 220-221)[2] is not an appealable order. *See* A.R.S. §§ 12-2101, 12-2101.01. This Court's acceptance of special-action jurisdiction is also appropriate in this case because the arguments that Duff is raising concerning the validity of the FASTAR pilot program involve pure issues of law and are matters of first impression and statewide importance that are likely to arise again. *See Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. v. Klein*, 231 Ariz. 467, 470, ¶ 9 (App. 2013).

For the reasons that the argument section of this Response explains, the arguments that Duff is making do not establish that the FASTAR program is

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superior court's ruling on Duff's objection to the FASTAR arbitration limits in the underlying case.

[2] This Response will refer to the Petition's Appendix as "App." and to the Response's Appendix as "R. App."

unconstitutional or otherwise invalid. If this Court accepts special-action jurisdiction, it should therefore deny Duff the relief that she is seeking to the extent that she is asking the Court to hold that the FASTAR program is unconstitutional or otherwise invalid. (Pet. at 38.)

STATEMENT OF THE ISSUES

1. Does A.R.S. § 12-133 prohibit lowering the jurisdictional limit for submitting cases to compulsory arbitration to $1,000 given that it authorizes the superior court to establish by rule of court a jurisdictional limit of up to $65,000 and does not establish any minimum amount for the jurisdictional limit?

2. Do the FASTAR rules violate separation-of-powers principles by conflicting with section 12-133 given that section 12-133 does not apply to FASTAR cases because to be assigned to the FASTAR program, cases must fall outside the jurisdictional limit for compulsory arbitration under section 12-133?

3. Was the adoption of the FASTAR pilot program and its accompanying procedural rules a valid exercise of the broad administrative authority over Arizona's courts that our Constitution vests in our supreme court and its Chief Justice?

4. Do the FASTAR rules require that the FASTAR program be funded from a county's general fund without legislative authorization rather than from alternative dispute resolution funds?

5. Is the FASTAR program's requirement that plaintiffs who choose the Alternative-Resolution option waive their right to appeal unconstitutional or otherwise invalid?

STATEMENT OF MATERIAL FACTS

The Arizona Supreme Court established the Committee on Civil Justice Reform by Administrative Order No. 2015-126 on December 23, 2015. (App. 247-248.) The Committee was part of the Arizona judiciary's civil justice reform efforts "seek[ing] to ensure that the courts are forums for the fair and efficient resolution of disputes without undue expense or delay." (*Id.* at 247.) The Committee was tasked with reviewing civil justice reform studies and developing recommendations—including rule amendments and pilot projects—"to reduce the cost and time required to resolve civil cases in Arizona's superior courts." (*Id.*)

In October 2016, the Committee issued *A Call to Reform: The Committee on Civil Justice Reform's Report* to the Arizona Judicial Council ("AJC"). (App. 055-202.) The AJC approved all fifteen of the Committee's proposals. (App. 031.) The Committee's recommendations included reforming compulsory arbitration with the goal of improving how courts handle lower-value civil cases. (App. 076-077.) The Committee's Proposal 12 was that a pilot program be implemented in Pima County under which plaintiffs could opt for a short trial in court instead of compulsory arbitration. (App. 077-078.) The Committee discussed the problems

with compulsory arbitration and with the trial de novo "appeals" that follow it that the pilot program was intended to ameliorate by implementing a streamlined jury trial for lower-value civil cases in the first instance. (App. 076-077.) It recommended amendments to the Arizona Rules of Civil Procedure to implement the pilot program. (App. 078, 179-196.)

The Pima County Superior Court began working on amending its local rules in anticipation of the pilot program's establishment. It approved the redrafted local rules on August 7, 2017. (R. App. 001) Between August 14, 2017, and October 22, 2017, it posted the proposed rules on its website and invited public comments concerning them. (R. App. 002) Pursuant to Arizona Supreme Court Rule 28.1, the Pima County Superior Court's Presiding Judge petitioned the Arizona Supreme Court to approve the amended local rules on October 23, 2017. (R. App. 003.) On October 26, 2017, the Arizona Supreme Court issued Administrative Order No. 2017-116, which included the following provisions: (1) the amended local rules and forms were approved for use in the Pima County Superior Court to implement the FASTAR pilot program, which would run from November 1, 2017, until October 31, 2020; (2) the jurisdictional limit for submitting cases to compulsory arbitration under A.R.S. § 12-133 would be $1,000 for the pilot program's three-year duration; (3) the pilot program would experiment with using short trials and an alternative dispute resolution program instead of compulsory arbitration in cases

in which the money sought did not exceed $50,000; (4) the Pima County Superior Court's Presiding Judge was authorized to approve changes or additions to forms that were necessary to implement the FASTAR program; and (5) the Pima County Superior Court and the Administrative Office of the Courts were to monitor the pilot program and submit annual reports concerning it to the AJC. (App. 031-032.) On October 31, 2017, the Supreme Court issued Administrative Order No. R-17-0051 setting a comment period for the proposed amendments to the Pima County local rules. (R.App. 006-008) On March 26, 2018, the Arizona Supreme Court issued Administrative Order No. R-17-0051 approving the amended Pima County Superior Court local rules effective July 1, 2018. (R. App. 009.)

Duff filed her Complaint, which sought to recover damages stemming from a motor vehicle accident, on May 4, 2018. (App. 004-006.) In subsequent filings, she contended that her case was not subject to the FASTAR program and that the FASTAR program was unconstitutional and otherwise invalid. (App. 009, 013-030.) She requested that her case be referred to compulsory arbitration under A.R.S. § 12-133 instead of to the FASTAR program. (App. 029.) The superior court rejected her arguments and denied her motion to have her case referred to compulsory arbitration under section 12-133 on June 22, 2018. (App. 220.) Duff moved for a stay of the action so that she could seek special-action relief from the

superior court's order. (App. 222-226.) The superior court granted the stay. (App. 231-232.) Duff then filed her Petition for Special Action in this Court.

ARGUMENT

I. A.R.S.§ 12-133 Does Not Prohibit Lowering the Jurisdictional Limit for Submitting Cases to Compulsory Arbitration to $1,000 Given that It Authorizes the Superior Court to Establish by Rule of Court a Jurisdictional Limit of Up to $65,000 and Does Not Establish Any Minimum Amount for the Jurisdictional Limit.

Duff contends that A.R.S. § 12-133 prohibited the Pima County Superior Court from lowering by Local Rule 2.9(A) the jurisdictional limit for the compulsory arbitration that the statute governs to $1,000. (Pet. at 13-19.) Duff is mistaken because A.R.S.§ 12-133 authorizes the superior court to establish by court rule the jurisdictional limit for the compulsory arbitration that it governs up to an amount that cannot exceed $65,000 and does not establish any minimum amount for that jurisdictional limit. Thus, although the statute mandates that cases that fall within the jurisdictional limit be submitted for arbitration, it authorizes the superior court to establish by rule what the limit will be and provides only that the limit cannot exceed $65,000. A.R.S. § 12-133(A).

This Court's goal in interpreting statutes is to determine and give effect to the Legislature's intent. *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 103 (1993). The Court looks first to the statute's language as the best indicator of that intent.

Id. Although section 12-133(A)(1) establishes an upper amount of $65,000 for the jurisdictional limit that the superior court can establish, nothing in the statute's plain language establishes a minimum amount for that limit. This Court should not read into the statute something that is not within the Legislature's intent as gathered from the statute itself. *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 209 (1960).

In support of the argument that section 12-133 prohibited lowering the jurisdictional limit to $1,000, Duff cites *State ex rel. Neely v. Brown*, 177 Ariz. 6, 8 (1993), in which our supreme court interpreted A.R.S. § 22-201(B), which gave the justice court "exclusive original jurisdiction" of civil actions involving amounts that overlapped with the amounts for which Arizona's Constitution gave the superior court "original jurisdiction" in civil actions. (Pet. at 14-15.) Our supreme court determined that because the Legislature could not diminish the jurisdiction that our Constitution had granted to the superior court by purporting to give the justice court exclusive jurisdiction of civil actions involving the overlapping amounts, the justice court and the superior court had concurrent original jurisdiction over civil actions involving those amounts. 177 Ariz. at 8.

Duff also cites *Arizona Podiatry Ass'n v. Director of Insurance*, 101 Ariz. 544, 547-49 (1966), in which our supreme court noted that although statutes enacted before this Court existed provided that appeals in certain areas should be

filed in the supreme court, other more recent statutory provisions authorized filing the same appeals in this Court. (Pet. at 16 n.7.) The supreme court determined that the two courts had concurrent jurisdiction under the statutes in question. *Id.* at 549. Given its workload, it adopted a policy that cases that could be filed in either court should be filed in this Court and stated that it would transfer any such cases filed in it to this Court. *Id.*

Our Constitution gives the superior court original jurisdiction of civil cases involving $1,000 or more. Ariz. Const. art. 6, § 14(3). Section 22-201(B) currently gives the justice court "exclusive original jurisdiction" of civil actions involving $10,000 or less. Duff notes that section 22-201(H) permits arbitration in justice court while section 12-133(A) mandates arbitration for cases within the established jurisdictional limit in superior court. (Pet. at 16.) She contends that the Legislature must have intended that arbitration be mandatory in the superior court for any case that involves an amount above the justice court's jurisdictional limit of $10,000 for civil actions. (*Id.*)

She bases this contention on the assertion that the effect of the overlapping jurisdiction of the justice court and the superior court is that cases filed in superior court that could have been filed in justice court are subject to dismissal or transfer to justice court. (*Id.*) She cites the justice court's "exclusive original jurisdiction" under section 22-201(B) and *Arizona Podiatry Ass'n* to support this assertion.

(Pet. at 16.) Her argument ignores our supreme court's holding in *Neely* that the justice court and the superior court have concurrent jurisdiction over civil cases involving the overlapping amounts. 177 Ariz. at 8. It also ignores the fact that the transfer of cases in which the supreme court and this Court have concurrent jurisdiction from the supreme court to this Court is based on a policy that the supreme court adopted. *Ariz. Podiatry Ass'n*, 101 Ariz. at 547-549; *Fleischman v. Protect Our City*, 214 Ariz. 406, 407-08, ¶ 7 (2007) (characterizing the policy as a "long-established practice"); *Perini Land & Dev. Co. v. Pima County*, 170 Ariz. 380, 382 (1992). Duff provides no evidence that the superior court has adopted a similar policy with respect to cases that could have been filed in justice court, and the fact that the superior courts in Santa Cruz County and Greenlee County have set their jurisdictional limits for arbitration at $1,000 demonstrates that the superior court has not adopted such a policy. *See* Local R. of Practice for Santa Cruz County Superior Court 5; Local R. of Practice for Greenlee County Superior Court 7.

Duff's assertions therefore do not support her argument that the Legislature intended A.R.S. § 12-133's jurisdictional limit for arbitration to be greater than the justice court's $10,000 jurisdictional limit for civil actions. (Pet. at 16.) Her assertions also do not support her argument that if the superior court could set its jurisdictional limit for arbitration within the justice court's jurisdictional limit, it

would be able to avoid section 12-133's mandatory arbitration system altogether (Pet. at 16-17) because that argument is based on her misconception that the superior court cannot or does not hear any cases with respect to which it has concurrent jurisdiction with the justice court. If the Legislature had wanted the jurisdictional limit for compulsory arbitration under section 12-133 to be greater than $10,000, it could have said so. It instead authorized the superior court to set by court rule any limit that does not exceed $65,000. A.R.S. § 12-133(A)(1). This Court should therefore reject Duff's argument that section 12-133 prohibited lowering the jurisdictional limit for submitting cases to compulsory arbitration to $1,000.

II. The FASTAR Rules Do Not Violate Separation-of-Powers Principles by Conflicting with Section 12-133 Given that Section 12-133 Does Not Apply to FASTAR Cases Because to Be Assigned to the FASTAR Program, a Case Must Fall Outside the Jurisdictional Limit for Compulsory Arbitration Under Section 12-133.

Duff contends that the FASTAR pilot program's rules conflict with section 12-133's plain language (Pet. at 8-9, 27), deprive plaintiffs of the right to a trial de novo that section 12-133 establishes (*id.* at 27-28, 30), and contravene section 12-133's purposes and underlying policies (*id.* at 17-19, 31-32). She maintains that this violates the separation-of-powers principles that Article III of our Constitution establishes because courts are empowered to enact only procedural rules that cannot conflict with a substantive statute like section 12-133 that the Legislature

has enacted. (Pet. at 28-32.) Duff is mistaken. The FASTAR rules cannot conflict with section 12-133 because they apply only to cases that fall outside a jurisdictional limit for compulsory arbitration under section 12-133 that the superior court has established by local rule.

FASTAR Rule 101(b) establishes the four eligibility criteria for assigning cases to the FASTAR program. (App. 034.) FASTAR Rule 101(b)(2) provides that for a case to be assigned to the FASTAR program, the amount of money that each plaintiff in the case seeks must "exceed[] the limit set by local rule for compulsory arbitration." (*Id.*) Section 12-133 therefore does not apply to FASTAR cases because it applies only to cases "which are filed in superior court in which the court finds or the parties agree that the amount in controversy does not exceed the jurisdictional limit." A.R.S. § 12-133(A)(2).

"What a statute necessarily implies is as much a part of the statute as what the statute specifically expresses." *Hoyle v. Superior Court*, 161 Ariz. 224, 227 (App. 1989). By authorizing the superior court to establish by rule of court the jurisdictional limit for submitting cases to compulsory arbitration under section 12-133, the Legislature has also implicitly authorized the superior court to determine by rule of court the class of cases that will not be submitted to compulsory arbitration under section 12-133 because the amount in controversy in those cases exceeds the jurisdictional limit. The FASTAR rules establish procedures that

apply only to that class of cases. FASTAR Rule 101(b)(2) (App. 034). This Court should therefore reject all the arguments that Duff bases on an alleged conflict between section 12-133 and the FASTAR rules.

III. The Adoption of the FASTAR Pilot Program and Its Accompanying Procedural Rules Was a Valid Exercise of the Broad Administrative Authority over Arizona's Courts that Our Constitution Vests in Our Supreme Court and Its Chief Justice.

Duff contends that section 12-133 does not authorize our supreme court to adopt other forms of alternative dispute resolution such as meditation to replace compulsory arbitration, to remove cases from compulsory arbitration, to change the existing compulsory arbitration system, or to construct a parallel arbitration system. (Pet. at 8, 25.) As previously noted, section 12-133 does not apply to FASTAR cases because cases cannot be assigned to the FASTAR program unless they fall outside section 12-133's purview. FASTAR Rule 101(b)(2) (App. 034). Moreover, our supreme court did not need legislative authorization to adopt the FASTAR pilot program because our Constitution gives it broad administrative authority over Arizona courts that permits it to establish committees to improve court functioning, establish pilot programs to implement the recommendations of such committees, and promulgate and approve court rules that involve case resolution procedures such as those that the FASTAR rules establish.

Our Constitution vests our supreme court with administrative supervision over all of Arizona's courts and vests the Chief Justice with the authority to exercise that supervision. Ariz. Const. art. 6, § 3. One of the ways in which the supreme court fulfills the administrative responsibilities that our Constitution has given it is by promulgating rules. *Scheehle v. Justices of the Supreme Court*, 211 Ariz. 282, 289, ¶ 23 (2005). Our Constitution vests the supreme court with the exclusive power to promulgate rules concerning all procedural matters in Arizona's courts. Ariz. Const. art. 6, § 5(5); *Ariz. Podiatry Ass'n*, 101 Ariz. at 546. This includes promulgating rules governing court procedures for arbitration and other alternative dispute resolution methods. *See, e.g.*, Ariz. R. Civ. P. 72-77 (procedures governing compulsory arbitration under section 12-133); Ariz. R. Fam. L. P. 66-67 (procedures concerning alternative dispute resolution and mediation in family law cases). It also includes approving local rules that the superior courts in each county make concerning arbitration and other alternative dispute resolution procedures. *See* Ariz. Supreme Ct. R. 28.1(c) (requiring that the supreme court approve local court rules); Ariz. R. Civ. P. 16(i) (authorizing the superior court to direct parties to submit disputes "to an alternate dispute resolution program created or authorized by appropriate local court rules"); Ariz. Supreme Ct. R. 92(a)(6) (authorizing the presiding judge in each county to identify and develop alternative dispute resolution programs to which actions may be referred pursuant

to Ariz. R. Civ. P. 16(i) and "to promulgate such local rules as a majority of the judges of the county may approve establishing and governing" such programs).

Our supreme court also has the authority to establish committees to help it to fulfill the administrative responsibilities that our Constitution has given it. The committees that it has established include a Committee on Alternative Dispute Resolution to assist it in developing and implementing policies designed to improve "the quality of justice, access to the courts and efficiency in court operations by promoting alternatives to traditional litigation." Ariz. Code of Judicial Admin. § 5-104(E).

Given the broad administrative authority over Arizona's courts that our Constitution vests in our supreme court and its Chief Justice, the supreme court and the Chief Justice had the authority to establish the Committee on Civil Justice Reform, to implement the Committee's recommendation that the FASTAR pilot program be established in the Pima County Superior Court, and to approve the amended local rules that accompanied the program. This Court should therefore reject Duff's assertions that section 12-133 prohibited the supreme court from doing so.

IV. The FASTAR Rules Do Not Require that the FASTAR Program Be Funded from a County's General Fund Without Legislative Authorization Rather than from Alternative Dispute Resolution Funds.

Duff notes that the Legislature has created funds to finance alternative dispute resolution programs other than compulsory arbitration under section 12-133. (Pet. at 20-22 [citing A.R.S. §§ 12-134, -135, and -135.01].) She further notes that the Legislature has authorized superior court presiding judges to use funds from local alternative dispute resolution funds created under sections 12-134 and 12-135.01 "to establish, maintain, evaluate, and enhance" the court's section 12-133 compulsory arbitration program. (Pet. at 22 [citing section 12-135.01(B)].) Finally, she notes that the Legislature has required that arbitrators providing services under section 12-133 be compensated from the general fund of the county in which the superior court is located. (Pet. at 20 [citing A.R.S. § 12-133(G)].) She maintains that the FASTAR rules require that the FASTAR alternative dispute resolution program be financed from the general fund of the county in which the superior court is located rather than from the alternative dispute resolution funds. (Pet. at 20-23.) She contends that this requirement is invalid because the Legislature has not authorized financing FASTAR alternative dispute resolution programs from a county's general fund. (*Id.* at 21-23.) The FASTAR rules that Duff cites do not support her contention.

Duff notes that FASTAR Rule 125(a) (App. 049) provides in pertinent part that "[a]n arbitrator assigned to a case under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12-133(G) per day for each day, or part of a day, necessarily expended in hearing the case." (Pet. at 20.) She further notes that FASTAR Rule 125(b) (App. 049) requires that the amount of compensation to be paid to an arbitrator in each county "must be provided by local rule." (Pet. at 20.) Finally, she notes that FASTAR Rule 126(h)(1) (App. 051) specifies the circumstances under which a party must reimburse the county for the arbitrator's compensation following a trial de novo. (Pet. at 20.) She asserts that taken together, these rules direct a county to provide funds for FASTAR's alternative dispute resolution program from its general fund as if that program were compulsory arbitration under section 12-133. (*Id.* at 20-23.)

None of the FASTAR rules that Duff cites provide that FASTAR's alternative resolution program is to be funded from a county's general fund rather than from an alternative dispute resolution fund. By providing that the fee paid to FASTAR program arbitrators cannot exceed the maximum amount that section 12-133(G) establishes for the fee paid to compulsory arbitration arbitrators, FASTAR Rule 125(a) is not requiring that FASTAR arbitrators be paid from the county's general fund as section 12-133 arbitrators are. It is simply requiring that FASTAR

arbitrators not be paid more than the maximum amount that section 12-133(G) allows section 12-133 arbitrators to be paid. The other two rules that Duff cites do not mention section 12-133 or a county's general fund. Duff has not alleged that a superior court cannot fund FASTAR's alternative dispute resolution program from an alternative dispute resolution fund, and she has not established that the FASTAR rules require that FASTAR's alternative dispute resolution program be funded by county general funds rather than by an alternative dispute resolution fund. This Court should therefore reject Duff's assertion (Pet. at 23) that the FASTAR rules create an invalid, improperly funded alternative dispute resolution program.

V. The FASTAR Program's Requirement that Plaintiffs Who Choose the Alternative-Resolution Option Waive Their Right to Appeal Is Not Unconstitutional or Otherwise Invalid.

Duff acknowledges that in civil actions, the right to appeal is purely statutory. (Pet. at 33.) She notes that A.R.S. § 12-2101(A)(1) creates the right to appeal from a final judgment entered in an action or a special proceeding commenced in the superior court. (*Id.* at 34.) She contends that FASTAR Rules 103 (App. 035) and 126 (App. 049) violate separation-of-powers principles (Pet. at 33-36) and unconstitutionally abridge the jurisdiction that Arizona's Constitution has granted to this Court (Pet. at 37-38) by precluding plaintiffs from appealing Alternative-Resolution decisions to this Court. Duff's contentions are without

merit because they ignore the fact that the FASTAR rules permit plaintiffs who commence a civil action in superior court that meets the criteria for being assigned to the FASTAR program to choose one of two methods of resolving the action. *See* Rule 101(b)(2), (b)(3) (App. 034); Rule 103(a), (b) (App. 035). Plaintiffs may choose to proceed by a Fast Trial governed by Rules 110 through 119 (App. 037-042) or by Alternative Resolution governed by Rules 120 through 126 (App. 042-051). *See* Rule 103(a), (b) (App. 035). The rules that govern a Fast Trial provide plaintiffs with appeal rights.

Rule 117 (App. 039) provides for a jury trial in each Fast Trial case. It thus preserves the constitutional right to a jury trial. *See* Ariz. Const. art. 2, § 23; *Hoyle*, 161 Ariz. at 227 (noting that Ariz. Const. article 2, § 23 preserves the right to a jury trial as that right existed at common law when Arizona's Constitution was adopted in 1910). Rule 118(d) (App. 042) provides that a final judgment entered at a Fast Trial's conclusion may be appealed to this Court. Duff is not challenging the FASTAR Fast-Trial provisions. (Pet. at 2.)

Rule 103(b)(2) (App. 035) provides that a plaintiff who chooses to proceed by Alternative Resolution rather than by a Fast Trial must expressly waive the right to have a trial before a judge or jury and the right to appeal the Alternative Resolution decision, award, or judgment to the superior court or to an appellate court. Rule 103(d)(2) (App. 035) provides, however, that if there is a

counterclaim, cross-claim, or third-party complaint in an action in which the plaintiff has chosen to proceed by Alternative Resolution, the plaintiff may appeal to the superior court and have the right to a trial before a judge or jury regarding the decision or award on the counterclaim, cross-claim, or third-party complaint notwithstanding the waiver that Rule 103(b)(2) requires. Rule 126(d) (App. 050) provides that in the appeal to the superior court, a party is be entitled to a trial on all the issues that the arbitrator determined and that the arbitrator's legal rulings and factual findings are not binding on the court or on the parties. A plaintiff aggrieved by the final judgment in the trial de novo would then be able to appeal to this Court. A.R.S. § 12-2101(A)(1).

Given the foregoing provisions, the FASTAR rules do not deprive a plaintiff of the right that section 12-2101(A) creates to appeal to this Court from a final judgment in an action commenced in the superior court. The plaintiff may appeal to this Court from the final judgment entered following a Fast Trial or may appeal to this Court from the final judgment entered following a trial de novo in the superior court in an action in which there is a counterclaim, cross-claim, or third-party complaint.

Given that the FASTAR program gives plaintiffs the opportunity to exercise the right that A.R.S. § 12-2101(A)(1) creates to appeal from a final judgment entered in an action commenced in the superior court by choosing to proceed by a

Fast Trial, Duff has not identified anything that precluded the supreme court from giving a plaintiff an additional procedural option, Alternative Resolution, for resolving an action commenced in the superior court. Duff argues that "the absence of any precedent for such a practice demonstrates its illegality and its deviation from due process." (Pet. at 32.) Duff does not cite any authority for this argument other than the Arizona's Constitution's Due Process Clause, which provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." (Pet. at 32.) She makes no attempt whatsoever to explain how the novelty of the Alternative Resolution option makes it illegal or a deviation from due process. This Court should therefore consider the argument waived. *See Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987) ("It is not incumbent upon the court to develop an argument for a party."); *Nationwide Res. Corp. v. Massabni*, 134 Ariz. 557, 565 (App. 1982) (same).

Moreover, our supreme court has recognized that "a litigant does not have a vested right in any given mode of procedure" and that a change in remedy does not violate due process as long as the remedy that is provided is "substantial and efficient." *Ray v. Rambaud*, 103 Ariz. 186, 188 (1968). Binding arbitration, which is essentially what the Alternative-Resolution option establishes, is a method that private parties often agree to use to resolve their disputes, and it is unlikely that the courts would approve the use of this method if it did not provide a "substantial and

efficient" remedy. *See, e.g., W. Agric. Ins. Co. v. Chrysler Corp.*, 198 Ariz. 64, 69, ¶ 28 (App. 2000) (affirming the trial court's dismissal of the action so that the parties could submit to binding arbitration under an arbitration agreement).

Duff also contends that the doctrine of unconstitutional conditions prohibits making the waiver of the right to appeal a condition for proceeding by Alternative Resolution. (Pet. at 32.) She maintains that the State cannot require a party to surrender a right in exchange for a valuable privilege that the State otherwise threatens to withhold. (*Id.*) The unconstitutional conditions doctrine, however, applies only when the right at issue is a constitutional right. *See State v. Quinn*, 218 Ariz. 66, 73, ¶ 26 (App. 2008) (stating that "states may not condition the grant of a privilege on the forfeiture of a constitutional right" and that "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all") (internal quotation marks omitted). Duff has admitted that in civil actions, the right to appeal is purely statutory. (Pet. at 33.) Thus, the doctrine of unconstitutional conditions does not apply to the right to appeal that Duff is asserting here.

Duff further contends that a waiver of the right to appeal must be voluntary and that the Alternative-Resolution option is involuntary because it forces plaintiffs to surrender their rights to an appeal and a trial de novo unless they submit to the Fast-Trial process. (*Id.*) The Committee on Civil Justice Reform

addressed in its report the problems with compulsory arbitration that it had discovered. (App. 076-077.) The FASTAR program preserves parties' rights to have a jury trial and to appeal in the Fast-Trial option. It also gives parties the right to choose arbitration, but attaches conditions to it to encourage parties to choose the Fast-Trial option. Since litigants do not have the right to any particular mode of procedure, *Ray*, 103 Ariz. at 188, the Committee could recommend and the supreme court could approve these conditions.

This Court has recognized that procedural rules may have as their purpose discouraging actions that the courts disfavor, such as appealing from reasonable arbitration awards. *See Fisher v. Edgerton*, 236 Ariz. 71, 76, ¶ 13 (App. 2014) (noting that Ariz. R. Civ. P. 77(f)'s purpose is "to deter marginal appeals"); *Vega v. Sullivan*, 199 Ariz. 504, 509, ¶ 16 (App. 2001) (noting Uniform R. of P. for Arbitration 7(f)'s purpose is "to discourage appeals of reasonable arbitration awards") (internal quotation marks omitted). Duff has not established that the conditions here are not a reasonable means of attempting to reduce the problems with arbitration that the Committee identified and of attempting to achieve the benefits that the Committee and the supreme court hope that the Fast-Trial option will provide. Since the FASTAR rules do not force plaintiffs to choose the Alternative Resolution option and make clear that an express waiver of the right to a trial before a jury or a judge and of the right to appeal is required when choosing

that option, they do not result in an involuntary waiver of the right to appeal. *See* FASTAR Rule 103(b) (App. 035).

Duff maintains that our supreme court cannot place conditions on the right to appeal that the Legislature has implicitly rejected by not placing any statutory restrictions on the right to appeal lower-value arbitration decisions to the superior court. (Pet. at 35-36.) While a court rule cannot diminish a statutory right to appeal, *Graf v. Whitaker*, 192 Ariz. 403, 405, ¶ 9 (App. 1998), a statute that the Legislature could have enacted but did not obviously cannot restrict the court's constitutional authority to promulgate procedural rules, Ariz. Const. art. 6, § 5(5).

For the foregoing reasons, this Court should reject Duff's arguments that the FASTAR program's requirement that plaintiffs who choose the Alternative Resolution option waive their right to appeal is unconstitutional or otherwise invalid.

CONCLUSION

For the foregoing reasons, if this Court accepts special-action jurisdiction, it should deny Duff the relief that she is seeking to the extent that she is asking the Court to hold that the FASTAR program is unconstitutional or otherwise invalid.

Dated this 17th day of September, 2018.

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CLAUDIA DUFF, *Petitioner*, v. HON. KENNETH LEE, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, *Respondent*, and TUCSON POLICE DEPARTMENT, a municipal agency; and the CITY OF TUCSON, a municipal corporation, *Real Parties in Interest.*	No. 2 CA-SA 2018-0058 Pima County Superior Court No. C20182262

RESPONSE TO PETITION FOR SPECIAL ACTION

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STATEMENT OF JURISDICTION

This Court's exercise of special action jurisdiction is discretionary. *State ex. rel. Romley v. Martin*, 203 Ariz. 46 ¶ 4 (Ct. App. 2002). Here, Petitioner calls upon this Court to declare a program adopted by the Arizona Supreme Court invalid. Generally, the Arizona Supreme Court's rule-making power "may not be supplemented, annulled or superseded by an inferior court." *Anderson v. Pickrell*, 115 Ariz. 589, 590 (1977), citing *State v. Blazak*, 105 Ariz. 216 (1969). However, the Court of Appeals does have the power to determine the validity of a rule adopted by the Supreme Court "in connection with a case before" it. *State v. Meek*, 9 Ariz. App. 149, 151 (1969). Therefore, the City takes no position on whether this Court should take the extraordinary step of granting jurisdiction in this case.

STATEMENT OF THE ISSUES

1. **Petitioner filed her claim in the Superior Court during a brief period of conflict between the Arizona Rules of Court establishing the FASTAR program and Pima County Superior Court's Local Rule setting the amount in controversy for mandatory arbitration. The trial court held, consistent with the Arizona Supreme Court's Administrative Order, that "[a]s part of the FASTAR program, the Pima County Superior Court has changed its limits for referring cases to arbitration." Therefore, if the Arizona Supreme Court's FASTAR pilot program is valid, did the trial court abuse its discretion in holding that the FASTAR provisions applied to Petitioner's case?**

ARGUMENT[1]

Real Party in Interest, the City of Tucson ("the City"), takes no position on the validity of the FASTAR program. However, the City urges this Court, should it accept jurisdiction, to find that, if the FASTAR program is valid, the trial court correctly applied the FASTAR provisions to Petitioner's case.

Standard of Review

The issue before this Court is a legal question. Therefore, this Court will review the trial court's order *de novo*. *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, ¶ 5 (Ct. App. 2014).

I. Where a Local Rule is in Conflict with a rule promulgated by the Arizona Supreme Court, the Supreme Court rule prevails.

The Arizona Supreme Court is vested with exclusive authority to promulgate rules of procedure that govern the State's courts. Ariz. Const. art. 6, § 5(5); see also *State v. Blazak*, 105 Ariz. 216 (1969). The Court's rule-making power "may not be supplemented, annulled or superseded by an inferior court." *Anderson, Id.* Where there is a conflict between a local rule and those rules of procedure adopted by the Supreme Court, the Supreme Court rules prevail. See *State ex. rel. Corbin v. Superior Court*, 138 Ariz. 500, 503 (1984).

[1] Petitioner's recitation of the relevant procedural facts is sufficient.

Here, Petitioner argues that the Arizona Supreme Court lacked the authority to lower Pima County's jurisdictional limit for arbitration[2] and that the Pima County Superior Court did not adopt a lower limit for arbitration until July 1, 2018, almost two months after Petitioner filed her Complaint. (Pet., p. 9-12) However, Petitioner admits that the Supreme Court adopted the rules governing the FASTAR program on October 26, 2017, and issued a complementary Administrative Order, stating, "The jurisdictional limit for arbitration claims authorized by A.R.S. § 12-133 is established at one thousand dollars for the duration of the pilot program."

For the period of time between the issuance of the Supreme Court's Administrative Order and Pima County's adoption of a corresponding local rule lowering the amount in controversy limit for arbitration, the local rule and the rules of the Arizona Supreme Court were arguably in conflict. There is no question that the Arizona Supreme Court's rules prevail in that situation. Indeed, the trial court implicitly acknowledged the same when it issued an Order stating that "[a]s part of the FASTAR Program, the Pima County Superior Court has changed its limits for referring cases to arbitration."

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[2] Petitioner's initial contention -- that the Arizona Supreme Court lacked the authority to lower Pima County's arbitration limit under A.R.S. § 12-133 -- is misplaced. Where a procedural statute conflicts with the Arizona Supreme Court's rules, the Court's authority is paramount. *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 8 (2009), *en banc*. A.R.S. § 12-133 dictates the *procedure* by which amount in controversy limits will be adopted under the arbitration statute. The City anticipates that this argument is fully developed in the Response filed simultaneously by the Attorney General's Office.

II. If this Court finds that the FASTAR program is a valid exercise of the Arizona Supreme Court's rule-making authority, then the trial court correctly applied the FASTAR provisions to Petitioner's case.

Petitioner does not argue that her case would not be properly tracked under FASTAR, only that the program is invalid and that the local rules had not yet been amended at the time she filed her Complaint. Petitioner's case fits squarely within the amount in controversy limits established for FASTAR, and Petitioner did not provide any basis, other than the alleged invalidity of the program, why her case should not be subject to FASTAR.

Further, it is inconsequential that the trial court did not cite to the Administrative Order or reference an apparent conflict between the local rules and the rules governing FASTAR. As long as the trial court reached the right result, this Court will affirm its decision. *City of Phoenix v. Geyler*, 144 Ariz. 323, 330 (1985). Here, where the Supreme Court is vested with exclusive authority to promulgate rules governing procedure, the trial court reached the only permissible result by applying the FASTAR program to Petitioner's case.

CONCLUSION

Because the Arizona Supreme Court is vested with exclusive authority to promulgate rules of procedure for Arizona's courts, any conflict between the Local Rules and the Court's FASTAR program must be resolved in favor of the Supreme

Court's rules. Therefore, the trial court correctly applied the FASTAR provisions to Petitioner's case.

SUBMITTED this 17th day of September, 2018.

/s/ Renee J. Waters
Renee J. Waters
Principal Assistant City Attorney
Attorney for Real Parties in Interest

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CLAUDIA DUFF, *Petitioner*, v. HON. KENNETH LEE, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, *Respondent*, and TUCSON POLICE DEPARTMENT, a municipal agency; and the CITY OF TUCSON, a municipal corporation, *Real Parties in Interest.*	No. 2 CA-SA 2018-0058 Pima County Superior Court No. C20182262

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENT[1]

I. The Legislature Intended § 12-133(A)(1) to Require the Superior Court to Establish a Dollar Limit Above the Justice Court's "Exclusive" Range.

¶ 1 Respondent asserts that FASTAR does not run afoul of § 12-133 because the "plain language" of the statute "does not establish any minimum amount for the jurisdictional limit." (Respondent's Brief pp. 7-8.) This argument fails for two reasons. First, it is absurd in the legal sense of being irrational. *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 12 (App. 2006). This argument would allow a superior court to formally adopt a jurisdictional limit of $0, which is no limit at all, or a limit of $1, which would have the same effect. The statute cannot be construed to produce a nullifying result or allow a backdoor means of circumventing the compulsory arbitration program. *Cf. Gibson v. W.D. Parker Trust*, 22 Ariz. App. 342, 344-45 (1974) (rejecting "[i]ngenious . . . reasoning" that would allow statute of frauds to be circumvented) (quoting *Butterfield v. MacKenzie*, 37 Ariz. 227, 231 (1930)). Even a purely textual analysis of a law prohibits such absurdity. *Sell v. Gama*, 231 Ariz. 323, ¶ 16 (2013). Also, as the respondent admits, the language of a law includes its necessary implications. (Respondent's Brief p. 12.) *Accord Scheehle*, 211 Ariz. 282, ¶ 19 ("[I]mplying a limitation not explicitly stated in a

[1]Petitioner's section numbers in this reply correspond to those in the respondent's brief.

statute may be appropriate in some circumstances . . . ."). Thus, § 12-133(A)(1) mandates some positive, meaningful minimum amount.

¶ 2 Second, as if acknowledging the absurdity, the respondent's argument implies what its conclusion expressly denies—namely, that there is a minimum amount for the jurisdictional limit in § 12-133(A)(1), and that minimum is $1,000, which is the minimum for the superior court's original civil jurisdiction under Article VI, § 14(3) of the Arizona Constitution. (See Respondent's Brief p. 9.) The respondent offers this $1,000 minimum, however, as a mere assumption, misconstruing the petitioner's own points and authorities on the topic. (See id. pp. 8-10.)

¶ 3 To be clear, petitioner Duff maintains that the legislature intended the superior court's minimum amount for compulsory arbitration in § 12-133(A)(1) to be above the amount in § 22-201(B), which is $10,000; the intended minimum is not a $1,000 figure drawn from the constitution, as the respondent suggests. Abundant evidence rebuts the respondent's position on this point. Beginning with the text of § 12-133(A)(1), a superior court cannot "limit[]" its constitutionally granted "jurisdiction[]," as the statute expressly commands. Petitioner cited *Neely*, 177 Ariz. at 8, for this sole proposition. This legal impossibility underscores that § 12-133(A)(1) does not implicitly refer to Article VI, § 14(3). The legislature's choice of words in § 12-133(A)(1) affirmatively shows that lawmakers did not use the word "jurisdiction" to mean the "subject matter jurisdiction . . . addressed in

Article 6." *State v. Maldonado*, 223 Ariz. 309, ¶ 20 (2010). Rather, lawmakers invoked the somewhat "vague and outdated concept[] of 'jurisdiction'" that broadly refers to a court's ability to enter a valid judgment. *Id.* ¶ 18.

¶ 4 Additionally, the respondent's interpretation ignores the word "exclusive" in § 22-201(B), denying it any significance. Although petitioner Duff concedes this word cannot literally deprive the superior court of its original "jurisdiction" in the sense of its "power to decide a case on its merits," the phrase "exclusive . . . jurisdiction" in § 22-201(B) nevertheless might operate like a venue provision that dictates "the place where the suit may be heard." *Sil-Flo Corp. v. Bowen*, 98 Ariz. 77, 83 (1965). Thus, to the extent the legislature has any authority to limit the superior court's ability to hear cases under § 22-201(B), the language of the statute demonstrates that the legislature has chosen to exercise such authority. And the limitation in § 22-201(B) on the superior court—regardless of how that limitation is ultimately characterized—applies equally through § 12-133. In sum, both statutes purport to limit the superior court's "jurisdiction," although neither technically does, and both statutes are intended to operate in conjunction. The term "exclusive" in § 22-201(B) is not devoid of meaning with respect to legislative intent.

¶ 5 A further problem with respondent's argument is that it allows for unaccountable discrepancies. A superior court could, for example, set its § 12-133(A)(1) limit at $3,000, which would mandate compulsory arbitration for all

cases filed in that court up to that limit. Yet a case with an identical value filed in the justice court would be subject to *permissive* arbitration under § 22-201(H). The lack of any rationale for such unequal treatment further illustrates that the legislature did not intend the superior court's compulsory arbitration limit to fall within the exclusive value range of the justice court.

¶ 6 Moreover, the respondent's argument ignores the evolution of § 12-133. This law went from merely allowing compulsory arbitration programs to mandating those programs in superior courts of every county. *Scheehle*, 211 Ariz. 282, ¶¶ 6, 20. The legislature would not make this change to a mandatory system and still leave a loophole for courts to avoid compulsory arbitration entirely, as the Arizona Supreme Court and Pima County Superior Court have attempted to do here.

¶ 7 On the latter point, the respondent disputes that civil cases eligible for filing in the justice court are required to be removed from the superior court, either by dismissal or transfer. (Respondent's Brief pp. 9-11.) Petitioner notes, preliminarily, that this appears to be an open question of Arizona law. In the absence of any direct authority, petitioner cited *Arizona Podiatry Association*, 101 Ariz. at 548-49, merely as an analogous case. Although the respondent observes that superior courts in Greenlee County and Santa Cruz County have adopted $1,000 jurisdictional limits under § 12-133(A)(1) (Respondent's Brief p. 10), those local rules do not constitute precedent or authority on this matter. Indeed, they carry no probative value

whatsoever. As a contrasting example, the superior court in Mohave County has authorized the dismissal or transfer of cases valued up to $10,000, citing § 22-201(B). Ariz. Local R. Prac. Super. Ct. (Mohave) CV-15. Taking a different approach, the superior court in Coconino County has adopted a local rule that fails to establish either a truly *compulsory* arbitration program or a specific dollar limit for it, which is contrary to the dual commands of § 12-133(A). *See* Ariz. Local R. Prac. Super. Ct. (Coconino) 16 (stating civil cases "may be submitted" to arbitration when "the amount in controversy does not exceed the limit set in A.R.S. § 12-133"). Navajo County's superior court has yet to adopt any local rule addressing compulsory arbitration. *See* Ariz. Local R. Prac. Super. Ct. (Navajo) 1 to 11. Overall, these disparate rules simply illustrate that significant issues concerning courts' authority or practice might go unresolved or uncorrected for a considerable period of time, as this Court is aware. *See, e.g.*, *State v. Bejarano*, 219 Ariz. 518, ¶ 5 (App. 2008) (regarding criminal appeals by state).

¶ 8 In any event, this uncertainty in the law does not adversely affect the petitioner's argument. Contrary to the respondent's suggestion, the superior court in Pima County has in fact adopted a policy or practice of not hearing cases in which it shares concurrent jurisdiction with the justice court—that is, cases valued between $1,000 and $10,000. (Respondent's Brief pp. 10-11.) This practice is illustrated by the memorandum decision of *Merit Foods, Inc. v. Atlantis Dining Group, LLC*, Nos.

2-CA-CV 2015-0155 & 2 CA-CV 2015-0189, 2016 WL 853727 (Ariz. App. Mar. 4, 2016). In that decision, two separate judges of the Pima County superior court respectively dismissed and transferred cases valued around $4,000. *Id.* ¶¶ 1-3. In so doing, both judges cited § 22-201(B) and a lack of superior court jurisdiction as the grounds for their rulings. *Merit Foods, supra,* ¶¶ 1-3. One of those superior court judges served on the CCJR as the Chair of Compulsory Arbitration Reform. (Petitioner's APP. 061.) Thus, ample evidence exists that Pima County's new $1,000 jurisdictional limit was enacted with the understanding that it would eliminate compulsory arbitration in the superior court and promote trials there instead. This specific component of FASTAR is meant to "replac[e] compulsory arbitration" with elective arbitration. Hon. Jeffrey T. Bergin, *Pilot FASTAR Program Aims for Improved Civil Justice*, ARIZONA ATTORNEY 28, 30 (Feb. 2018). Yet § 12-133 prohibits this.

¶ 9 To summarize, this Court need not decide the full ramifications of concurrent jurisdiction in order to resolve this special action. If § 22-201(B) requires a superior court to dismiss or transfer cases valued up to $10,000, then the petitioner prevails, because this would render the $1,000 jurisdictional limit a nullity. *Supra* ¶ 1. But even if § 22-201(B) does not require such dismissal or transfer, then the petitioner still prevails, because the legislature has clearly demonstrated its intent to create a compulsory arbitration program that is tailored to the superior court for cases above

the justice court's $10,000 limit. *Supra* ¶¶ 3-6. Ultimately, the validity of a $1,000 limit pursuant to § 12-133(A)(1) is not a true question of "jurisdiction," especially subject matter jurisdiction. It is a question of legislative intent that is resolved by the full text of § 12-133, the related statutes, and the history and purpose of the compulsory arbitration system.

II. FASTAR Conflicts with § 12-133 by Selectively Applying the Statute; FASTAR also Violates Separation-of-Powers Principles.

¶ 10 Respondent asserts that the FASTAR rules do not conflict with § 12-133 because FASTAR applies only to cases that fall outside the jurisdictional limit for compulsory arbitration set by local rule. (Respondent's Brief p. 12.) In essence, the respondent contends the FASTAR program is separate from and unrelated to § 12-133.

¶ 11 This contention overlooks the internal inconsistency of the FASTAR rules themselves. On the one hand, as the respondent notes, the FASTAR program does not technically exempt any cases from the superior court's jurisdictional limit for compulsory arbitration. FASTAR only applies to cases above that limit—i.e., cases that do not meet the criteria of, and therefore are not subject to, § 12-133. *See* FASTAR 101(b)(2). On the other hand, FASTAR specifies when plaintiffs do and do not "retain[]" their preexisting rights of review, *see* FASTAR 103(b)(2), (d)(2); and FASTAR continues to apply the various provisions of § 12-133 to defendants whenever alternative-resolution arbitration is chosen by plaintiffs, *see*

FASTAR 126. Thus, the terms of the pilot program show inconsistent applications of the compulsory arbitration statute.

¶ 12 In order to deny these conflicts and inconsistencies, the respondent must maintain that FASTAR is independent from § 12-133 and that similarities between the different arbitration programs are merely coincidental. Petitioner Duff interprets the program differently, as an unlawful attempt to selectively apply § 12-133. But FASTAR's arbitration program fails under either characterization. In particular, the respondent's position fails to account for the substantive features of FASTAR arbitration, *see* Section III *infra*, as well as the funding mechanism of the program, *see* Section IV *infra*.

III. By Claiming FASTAR Is Authorized by Article VI of the Arizona Constitution, Not by Statute, Respondent Ignores Precedent Regarding Substantive Law and the Powers of the Legislature.

¶ 13 Although the respondent does not expressly concede the point, the parties agree that § 12-133(L) is not the source of authority for the FASTAR program. (Petition for Special Action pp. 23-26; Petitioner's APP. 027; Respondent's Brief pp. 13-15.) Respondent does not dispute that the authority for FASTAR is not found in statutory law.

¶ 14 Instead, the respondent advances the argument that the FASTAR arbitration program "did not need legislative authorization." (Respondent's Brief p. 13.) Respondent claims that FASTAR's arbitration program is an exercise of the Arizona

Supreme Court's power "to make rules relative to all procedural matters in any court," Ariz. Const. art. VI, § 5(5), and to exert "administrative supervision over all the courts of the state," Ariz. Const. art. VI, § 3. (Respondent's Brief p. 14.) This is, of course, a novel theory of the supreme court's powers, and the respondent's failure to offer any case law in support of this new theory is telling.

¶ 15 Before the FASTAR pilot program was enacted, our courts understood arbitration programs as advancing a public policy of nonjudicial dispute resolution that fell squarely within the legislative domain. This public policy is generally reflected in both the Uniform Arbitration Act, A.R.S. §§ 12-1501 to 12-1518, and the Revised Uniform Arbitration Act, A.R.S. §§ 12-3001 to 12-3029. *See RS Indus., Inc. v. Candrian*, 240 Ariz. 132, ¶ 7 (App. 2016). For actions properly filed within the courts, the public policy is also reflected in § 12-133, *see Jeanes*, 16 Ariz. App. at 591, a statute that specifically concerns "arbitration," as opposed to other forms of ADR.

¶ 16 In *Fisher*, this Court determined that the arbitration program for pending civil actions represents a valid exercise of legislative power "to regulate the right to a jury trial." 236 Ariz. 71, ¶ 34. In *Graf*, this Court likewise held that a trial de novo after arbitration is a "substantive right" that is not subject to judicial control. 192 Ariz. 403, ¶ 9. "[S]ubstantive law," meaning "the law which creates, defines and regulates rights," falls within the legislature's exclusive power under Article III of the state

constitution. *Seisinger*, 220 Ariz. 85, ¶ 29 (quoting *Birmingham*, 96 Ariz. at 110). It therefore follows that FASTAR's arbitration program is a substantive, regulatory law that commandeers the legislative power. The respondent has provided no compelling reason to depart from these precedents or recharacterize the main components of FASTAR arbitration as procedural rather than substantive—specifically, the involuntary submission of disputes to arbitration for defendants, *see* FASTAR 103(a), (d)(1); the allowance of a trial de novo thereafter, *see* FASTAR 126(a)(2), (d); and the sanctions for an unsuccessful de novo "appeal," *see* FASTAR 126(h).

¶ 17 Furthermore, to the extent that the distinction between substantive and procedural enactments can sometimes be "elusive," *Seisinger*, 220 Ariz. 85, ¶ 29 (quoting *In re Shane B.*, 198 Ariz. 85, 88 ¶ 9 (2000)), the FASTAR program does not provide an especially close case. The judiciary may develop the substantive law and play a "supplementary legislative role," but such "judge-made substantive law is subordinated to contrary legislative acts." *Id.* ¶¶ 27-28. As noted, the FASTAR arbitration program attempts to enact a new public policy in favor of trials that is directly contrary to the legislature's long-established public policy in favor of arbitration. (Petition for Special Action pp. 17-19, 31-32.) Respondent admits that FASTAR is designed "to encourage parties to choose the FAST-Trial option." (Respondent's Brief p. 23.) Article VI simply does not empower the judiciary to

reverse the success of arbitration and promote a contrary public policy that favors more trials, more judicial involvement in cases, and more trial experience for attorneys.

IV. FASTAR Improperly Uses General Funds from the County.

¶ 18 Again, even though the respondent does not expressly concede the point, he does not dispute that FASTAR's alternative-resolution arbitration program may not use monies from the county's general fund, as this would constitute an unauthorized allocation. *Supra* ¶ 13. (See Petition for Special Action pp. 19-23; Respondent's Brief pp. 16-18.) The parties agree on this proposition.

¶ 19 The respondent maintains, however, that FASTAR's alternative-resolution arbitration program is not necessarily funded by Pima County's general fund. (Respondent's Brief p. 18.) Although the respondent avoids making an affirmative argument about the funding source for this pilot program, he repeatedly suggests that it might be "from an alternative dispute resolution fund." (Id. pp. 17-18.)

¶ 20 In regard to the general fund, the respondent's position ignores the fact that FASTAR 126(h)(1) explicitly authorizes reimbursement "to the county" for "the compensation actually paid to the arbitrator." This reimbursement provision is not superfluous. Rather, the rule's language entails that Pima County will actually pay for FASTAR's arbitrators. This meaning is confirmed by the FASTAR rules' exclusive citation to § 12-133(G) with respect to arbitrator compensation. *See*

FASTAR 125(a). Together, these FASTAR rules provide that Pima County is to pay for the arbitrator's compensation in the same manner as the county would pay for statutory arbitration pursuant to § 12-133(G). The operative language of FASTAR 126(h)(1) is identical to that in § 12-133 because the intended funding mechanism is the same: "the county" provides "the compensation actually paid to the arbitrator." § 12-133(I)(1), (J). And "the county" specifically pays "from its general revenues." § 12-133(G).

¶ 21 If, as the respondent suggests, FASTAR 126(h)(1) were instead meant to authorize repayment to the local ADR fund, then the rule would have to be redrafted. Specifically, it would have to use language directing repayment "to the *county treasurer* for deposit in the local alternative dispute resolution fund established pursuant to § 12-135.01," as provided by § 12-134. (Emphasis added.) As the rules are written, payment to *the county* is distinct from payment to a dedicated fund that involves, but is not actually administered by, the *county treasurer*. *See* § 12-135.01(B). The rules of construction do not permit a rule to be rewritten under the guise of interpretation. *See New Sun Bus. Park, LLC v. Yuma County*, 221 Ariz. 43, ¶ 16 (App. 2009); *see also Ruben M. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 236, ¶ 20 (App. 2012).

¶ 22 Also, as petitioner previously noted, the legislature has distinguished arbitration from other forms of ADR, and lawmakers have specified the funding

sources for arbitration. (Petition for Special Action ¶¶ 31-33, 35-41.) For all these reasons, FASTAR improperly uses general funds from Pima County. It is therefore an invalid, improperly funded pilot program that is not independent from § 12-133 as the respondent maintains.

V. The FASTAR Rules Diminish and Alter the Substantive Right to Appeal to the Arizona Court of Appeals.

¶ 23 Respondent contends that our supreme court may enact procedural rules that determine when plaintiffs "waive their right to appeal." (Respondent's Brief p. 18.) This contention is incorrect, and it misdirects attention to the plaintiff's behavior, which is irrelevant, rather than the supreme court's authority over the right to appeal, which is dispositive.

¶ 24 By emphasizing the language regarding "choice" and "waiver" within the FASTAR rules, the respondent overlooks the overarching principle that the right to appeal is a substantive, statutory right that "cannot be enlarged or diminished by judicial rule." *Graf*, 192 Ariz. 403, ¶ 9. Except for certain forcible entry and detainer cases, the right of appeal has been given as an unqualified, unconditioned right in all civil actions "commenced in a superior court" that result in a "final judgment." § 12-2101(A)(1). Thus, absent some other statutory authority, the supreme court cannot create a rule by which a superior court may render a final civil judgment from which no right of appeal lies for the plaintiff. This diminishes the right to appeal.

¶ 25 The fact that a plaintiff may "choose one of two methods of resolving the action" under FASTAR is beside the point. (Respondent's Brief p. 19.) By way of illustration, a plaintiff who chooses to waive a jury trial and who selects a bench trial under Rules 38 and 39, ARCP, nonetheless retains, and must always retain, the right to appeal.[2] A plaintiff who chooses to change a judge as a matter of right under Rule 42.1, ARCP, likewise must always retain the right to appeal. For the same reason that the supreme court cannot deprive plaintiffs of the right to appeal based on these procedural choices, the high court also cannot deprive plaintiffs of the right to appeal when they choose arbitration. The statute provides an unqualified right to appeal in all such cases "commenced in a superior court," with no limitations. § 12-2101(A)(1); *see Burnett*, 135 Ariz. at 308. Accordingly, the fact that a plaintiff is presented with a choice of waiving or preserving the right of appeal under FASTAR carries no significance when that choice is unauthorized by statute, contrary to law, and therefore unconstitutional.

¶ 26 To the extent the respondent suggests that a plaintiff's choice of FASTAR arbitration is analogous to an agreement to "[b]inding arbitration," and enforceable against the plaintiff for the same reasons (Respondent's Brief p. 21), this argument has been largely anticipated and rebutted (Petition for Special Action ¶¶ 59-60). In

[2]Recent amendments to the rules of civil procedure cited in this paragraph take effect in 2019, but those changes are immaterial to petitioner's argument. *See* Ariz. Sup. Ct. Orders R-18-0006 & R-18-0018 (Aug. 28, 2018).

short, agreements to submit to binding arbitration fall within an exception to the general appeal statute created by § 12-133(D) and related laws; but even so, the arbitration award remains subject to challenge pursuant to §§ 12-3023 and 12-3024 of the Revised Uniform Arbitration Act ("RUAA"), with a limited right of appeal available thereafter under § 12-2101.01(A). Notably, this limited right of appeal cannot be waived or varied under the RUAA. § 12-3004(C). Yet FASTAR neither derives from nor harmonizes with these statutes.

¶ 27 In sum, absent a mutual agreement between the parties to an action, only the legislature may regulate or restrict appeals with respect to arbitration. The supreme court cannot specify when parties do and do not possess or waive the right to appeal, because "[t]he right to appeal 'can only be given or denied by [the] constitution or the legislature of the state.'" *Ehrlich*, 214 Ariz. 114, ¶ 9 (quoting *Birmingham*, 96 Ariz. at 111) (second alteration in *Ehrlich*).

¶ 28 The respondent claims that because the FASTAR program "gives plaintiffs the opportunity to exercise the right" to appeal, "the FASTAR rules do not deprive a plaintiff of the right that section 12-2101(A) creates." (Respondent's Brief p. 20.) This reasoning is faulty, because the relevant inquiry is simply whether the substantive right has been "diminish[ed] or alter[ed]." *Pima Cty. No. S-933*, 135 Ariz. at 280. A limited preservation of the right to appeal does not justify a court's limitation of that substantive right.

¶ 29 Last, the respondent maintains that FASTAR's limitations on plaintiffs' appeal rights are permissible if they are understood as mere "mode[s] of procedure." (Respondent's Brief p. 23.) Legitimate court rules on this topic concern the "procedural aspects of processing an appeal." *Pima Cty. No. S-933*, 135 Ariz. at 280. The respondent does not claim that the FASTAR rules are designed to process plaintiffs' appeals from arbitration or facilitate appeals in all civil actions "commenced in a superior court." § 12-2101(A)(1). Rather, the respondent admits FASTAR "attaches conditions" to arbitration so as "to encourage parties to choose the Fast-Trial option." (Respondent's Brief p. 23.) Those conditions, as noted, qualify the otherwise unqualified statutory right to appeal in order to discourage resolutions by arbitration. *Supra* ¶¶ 24-25. This is precisely what it means to improperly "diminish or alter" the substantive right to appeal. *Pima Cty. No. S-933*, 135 Ariz. at 280.

REPLY TO REAL PARTIES IN INTEREST

¶ 30 The real parties in interest, Tucson Police Department and City of Tucson (collectively "the City"), address the technical question raised by petitioner Duff regarding which jurisdictional limit applies to her case, given the dates that she filed her complaint and motion for compulsory arbitration: the $50,000 limit set by Pima

County's then-existing Local Rule 4.2(a) or the $1,000 limit set by the Arizona Supreme Court in its October 2017 administrative order.[3]

¶ 31 The City claims the superior court's local rule was in conflict with the supreme court's "rule" on the same subject; hence, the supreme court's rule controlled, because it was a valid exercise of that court's constitutional rule-making power. (City's Brief pp. 1-4.) The City specifically denies that the supreme court lacked authority to establish a jurisdictional limit under the terms of § 12-133. (City's Brief p. 4 n.2.) The City reasons that the process by which an amount-in-controversy limit is adopted must be a procedural matter, meaning that the "Arizona Supreme Court's . . . authority is paramount" in this area. (City's Brief p. 4 n.2.)

¶ 32 This argument is misplaced. For the same reason that the legislature could create a compulsory arbitration program in the first instance, the legislature could also dictate the process for setting an amount-in-controversy figure for that program. Just as the legislature may use the services or incorporate the rules of the American

[3]The respondent suggests the supreme court's October 26, 2017 administrative order "included . . . amended local rules . . . approved for use in the Pima County Superior Court to implement the FASTAR pilot program." (Respondent's Brief p. 5.) As the respondent's appendix demonstrates, however, the petition to amend those local rules was only circulated later that week, on October 31. (R. App. 006.) This began the 60-day comment period that precedes any "act[ion] on a proposed local rule or amendment." Ariz. R. Sup. Ct. 28.1(h). The proposed amendments to the local rules for Pima County were not approved until March 2018, and they only took effect in July of this year, as petitioner maintained. Ariz. Sup. Ct. Order R-17-0051 (Mar. 26, 2018). (R. App. 009.)

Arbitration Association, without any involvement of or infringement upon the supreme court, *see, e.g.* A.R.S. §§ 12-1518(A), 15-541(A), 32-2186(H)(1)(c), the legislature may similarly provide a process for determining an arbitration limit that does not involve our high court. The legislature could have equally set a limit for compulsory arbitration that depended on "the median wage by county as determined annually by the Arizona commerce authority," A.R.S. § 41-1545(9), or on the median family income determined annually by the department of economic security, *see* A.R.S. § 35-706(I). Under any scenario, the legislature's method for setting the arbitration limit is exclusively the legislature's prerogative. The fact that the limit in § 12-133(A)(1) happens to depend on a figure created by a local superior court is of no consequence.

¶ 33 When it comes to statutory arbitration, the supreme court has incidental or supplemental rulemaking authority over this quasi-judicial system, because the system necessarily depends on such rulemaking to effectuate the legislature's intent. *See Phillips*, 237 Ariz. 407, ¶ 16 (observing § 12-133 "relies on 'judicial rulemaking to implement a workable arbitration scheme'") (quoting *Graf*, 192 Ariz. 403, ¶ 13). With respect to jurisdictional limits, no supplemental rule from the supreme court is required, because the legislature has expressed its clear intent about how to determine this figure. The particular means chosen by the legislature in

§ 12-133(A)(1) do not in any way encroach upon or diminish the proper authority of the supreme court.

¶ 34 It therefore follows that the superior court, not the supreme court, possessed the authority under § 12-133(A)(1) to set the jurisdictional limit for compulsory arbitration by local rule. Because that limit was unchanged, at $50,000, the petitioner's case is subject to that amount and must be directed into compulsory arbitration by the terms of § 12-133(A)(1) and former Local Rule 4.2(a) in Arizona Supreme Court Order R-08-0023 (Sept. 30, 2008). (Petitioner's APP. 233, 238.) No separation-of-powers analysis is required on this point, because the supreme court was not acting in accordance with any statutory or constitutional authority when it attempted to set the limit of $1,000 pursuant to § 12-133(A)(1). The plain text of that provision controls this question, which is independent from the larger question of the FASTAR program's validity.

RESPECTFULLY SUBMITTED this 1st day of October, 2018.

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