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Legislator claiming temporary immunity

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PHOENIX — A state legislator ruled to have violated campaign finance laws says a court case to decide whether he must surrender his office must be put on hold for months because of a state constitutional provision giving temporary legal immunity to lawmakers during the legislative session.

Rep. David Burnell Smith, R-Scottsdale, filed a motion asking the state Court of Appeals to immediately stay all court proceedings until the end of the Legislature's 2006 regular session, which starts Jan. 9. Regular sessions usually last three to five months.

Smith's motion was filed in conjunction with his pending appeal of a trial judge's Dec. 7 ruling that Smith is illegally holding the elected office. A state commission ordered him to forfeit the post because of overspending in his publicly funded 2004 primary election campaign.

The motion sought to invoke a constitutional provision that says Arizona legislators can't be "subject to any civil process during the session of the Legislature, nor for 15 days" before the commencement of each session.

Smith attorney David Abney first raised the immunity issue in a motion filed Thursday, within the 15-day period preceding the session.

Smith's case "falls squarely within the scope of the immunity provision," Abney wrote.

The attorney cited other states' similar immunity provisions and court rulings that described them as intended to prevent lawmakers from being distracted by worries, time and trouble associated with court proceedings during legislative sessions.

"This is not just a private right — but one belonging to legislators as part of the separation of powers and as part of the essential functions of government," Abney wrote.

Jessica Funkhouser, attorney general's special counsel, said Friday the state would vigorously oppose the motion on grounds that the immunity provision doesn't apply to Smith and that he'd taken steps in the court case that means he now can't claim the legal privilege.

Funkhouser said the provision "only applies to members of the Legislature, and he's not a member of the Legislature and he's been usurping (office) since October."

The head of a group that advocates for public campaign funding called Smith's motion an act of legal desperation.

"It's like his 'hail Mary' pass," said Barbara Lubin, executive director of the Clean Elections Institute.

Attorney Toni McClory, a Glendale Community College faculty member who wrote a book on the Arizona Constitution, agreed with Smith's motion that immunity provisions for lawmakers are intended to allow them to minimize distractions so they can focus on their official duties.

While temporarily delaying the start of a new lawsuit for several months would allow the balancing of rights of litigants and the public interest, applying the provision to a pending case could open the door to delay tactics, she said.

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