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SUPREME COURT OF ARIZONA

In the Matter of:

PETITION TO AMEND ARIZ. R.
CRIM. P. 31.20 AND ARIZ. R. CIV.
APP. P. 22

Supreme Court No. R-25-0012

**COMMENT ON PETITION TO
AMEND ARIZ. R. CRIM. P.
31.20 AND ARIZ. R. CIV. APP.
P. 22 (EN BANC
RECONSIDERATION)**

Pursuant to Supreme Court Rule 28(e), the Arizona Attorney General's Office submits this comment on the Petition to amend the criminal and civil appellate rules to allow parties to move for en banc reconsideration of decisions in the court of appeals. While the Office appreciates the interest in promoting greater uniformity that underlies the proposed amendment, we question whether the uniformity benefit outweighs the amendment's tangible costs in the form of

time, expense, and uncertainty during the pendency of litigation. The Office therefore respectfully opposes the introduction of en banc reconsideration at this time. In the alternative, if the Court is inclined to adopt some form of en banc rehearing, the Office would favor disaggregating the panel reconsideration and en banc reconsideration rules in a manner that does not conflate the respective standards for requesting reconsideration.

I. Arizona has existing mechanisms to promote uniformity in its caselaw.

As the Petition observes (at 2), different departments and divisions of the court of appeals can sometimes issue conflicting decisions. While the Office agrees that this may sometimes be a concern, there are already mechanisms in place that mitigate the extent to which it is frequently problematic.

Most importantly, if different court of appeals panels reach different conclusions on a given issue, parties already have recourse: they may petition this Court to review the matter. While this review—like the United States Supreme Court’s review—is of course discretionary, that is where any real parallel ends. According to the U.S. Courts’ website, the U.S. Supreme Court “accepts 100-150 of the more than 7,000 cases that it is asked to review each year”¹—an acceptance rate of about 2% at the high end. Thus, in any given case, it is exceedingly likely

¹ See <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures>.

that a decision by one of the federal circuit courts of appeal will be the final say in the matter. In marked contrast, we understand this Court has recently accepted about 9% of the petitions for review it receives.² While this is still a relatively small percentage in absolute terms, many petitions, of course, concern decisions that were correctly decided and that do not involve matters of statewide importance.

The court of appeals, moreover, has discretion as to whether to publish its decisions—an additional safeguard that promotes uniformity in Arizona law. *See* Ariz. R. Civ. App. P. 28. Through this mechanism, a majority of the panel that hears a case determines whether a decision will have precedential value based on factors such as whether a decision “[e]stablishes, alters, modifies or clarifies a rule of law”; “[c]riticizes existing law”; or “[i]nvolves a legal or factual issue of unique interest or substantial public importance.” *Id.* at Rule 28(b). And regardless of the court of appeals’ publication decision, this Court may then order a decision depublished in any case that comes before it. *Id.* at Rule 28(e).

The Petition discusses a New York Bar Association Report that recommended that New York adopt en banc review. But as that Report observes, “New York stands alone amongst the fifty states in that it: (a) maintains a large intermediate appellate court; (b) does not provide for en banc review; and

² According to a panelist at the April 4, 2025 “Working with the Court of Appeals” CLE, this Court accepted 28 of the 326 petitions that it received in 2024.

(c) prohibits unpublished decisions by its appellate courts.” Takemi Ueno & Jeffrey M. Winn, *En Banc Review in New York Court*, New York City Bar Association Committee on State Courts of Superior Jurisdiction (“New York Bar Report”), at 9-10.³ Thus, “New York places the heaviest burden of any state on its intermediate appellate court when it comes to maintaining the uniformity and consistency of its decisions.” *Id.* at 10.

Notwithstanding these concerns, New York does not appear to have adopted en banc review. But even if en banc review would arguably make sense for New York, the Arizona Court of Appeals’ ability to issue unpublished memorandum decisions without precedential value substantially mitigates the threat to uniformity and consistency in this State.

II. En banc review would likely entail significant costs.

The New York Bar Report references Justice Frankfurter’s warning that petitions for rehearing en banc were (in 1953) “filed almost as a matter of course” in some circuits, resulting in “needless delay” and “false hopes.” New York Bar Report at 6 (quoting *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 257 (1953)). To address this problem, the federal courts later adopted the modern federal en banc rule. *Id.* at 6-7.

³ https://www.nycbar.org/wp-content/uploads/2023/05/En_Banc_Article.pdf.

The proposed rule here provides that en banc reconsideration “is not favored and ordinarily will not be granted unless” it “is necessary to secure or maintain uniformity of the court’s decisions” or it “involves a question of exceptional importance.” Pet. at Appendix A & B. This is similar to the federal rule and sets a seemingly high (if fairly discretionary) standard for *granting* en banc reconsideration. The proposed rule, however, further provides that “[a] party may *file* a motion for . . . reconsideration en banc . . . requesting an appellate court to reconsider whether its decision contained *erroneous determinations of fact or law*.” Proposed Rule 31.20(b) (emphasis added).

Nearly every losing party in every appeal likely believes that there is at least arguably an erroneous determination of fact or law in the decision. And while attorneys are conditioned to understand that traditional motions for reconsideration are rarely granted (and therefore not worth filing), it is easy to foresee the proliferation of requests for rehearing en banc as attorneys and parties deem their matters “exceptionally important” and believe that there was some kind of error.

While it is impossible to project how many requests for en banc reconsideration the court of appeals would see, it does not seem farfetched to expect en banc rehearing requests in many, if not most, cases, at least for a period of time as parties calibrate their expectations. After all, the procedure would provide an additional bite at the apple that prudent attorneys will feel compelled to take if there

is any colorable basis to do so. For clients that have retained private counsel, this may mean tens of thousands of dollars in additional fees—and for everyone, it will mean additional time and delay.

In general terms, there are a few possible outcomes after a party requests en banc review, at least two of which militate strongly against the rule change. First, to the extent litigants file a high number of unmeritorious and longshot motions, the vast majority of these will presumably be denied after a lot of wasted time, expense, and “false hope,” as Justice Frankfurter warned.

Second, the court of appeals will presumably accept en banc review of a subset of the requests and then have the opportunity to preserve uniformity and resolve questions of exceptional importance, just as the proposed rule change intends. But that will almost certainly not be the end of the story, given that a matter important enough for en banc review will very likely be important enough for a petition to this Court—and in many cases for this Court to grant review. And in those cases—where this Court will ultimately have the final say, in any event—en banc review is largely superfluous.

Third, there will also surely be cases where the court of appeals corrects a significant error or patches up a uniformity problem en banc, and this Court then declines review (or there is no petition, for whatever reason). These scenarios provide the strongest rationale for the rule change, but they do not persuade the

Office to support it given the likely predominance of the first two scenarios. Nor does legal error or non-uniformity need to be forever. If this Court declines review in a given case and it subsequently becomes clear that there is a problem, this Court can fix it in the next case. In the meantime, it is not the end of the world for lower courts “to ‘use [their] discretion to adopt the decision that most persuasively interprets the law.’” Pet. at 3 (quoting *State v. Patterson*, 222 Ariz. 574, 580, ¶ 20 (App. 2009)). After all, this is something that lawyers and judges do as a matter of course whenever there are potentially controlling or persuasive cases that appear to reach different results.

And irrespective of how en banc review plays out in a given case, there is another, less-obvious risk lurking here. At present, there is a familiar symmetry in Arizona’s appeals process—trial court, court of appeals, Supreme Court. Litigants understand that the court of appeals corrects trial court errors, and that this Court has the final say on Arizona law. This structure is predictable and it instills confidence in each level of review. With en banc review however, if a case begins in the trial court, parties may receive at least four different opinions in their case—and possibly more if a case begins in an administrative tribunal or if there is a remand along the way.

The potential whipsaw effect—where the trial court issues a judgment that is reversed by the court of appeals, which is then reversed by the court of appeals en

banc, which is then reversed by the Supreme Court—can only tend to undermine public confidence in the judiciary. And while it is important for courts to get decisions “right,” finality is also important—for both parties and lawyers. If a party loses decisively in the court of appeals, the party’s current options are to walk away or to file a petition to this Court. If counsel perceives only a 10% chance of acceptance and reversal, perhaps the walk-away option looks attractive. But if there are two levels of review available, the longshots will collectively look more attractive—to the detriment of the prevailing party waiting for final relief, and more often than not to the losing party that expends money and mental capital in a futile effort.

III. The proposed rule change’s structure is problematic.

The Petition (at 8) explains that the proposed rule is modeled on the federal en banc rule—but there is at least one significant difference. Federal Rule of Appellate Procedure 40 differentiates between a petition for panel rehearing and a petition for en banc rehearing, and it provides for very different contents in the respective petitions. *See* FRAP 40(b)(1) (petition for panel rehearing must “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended”); FRAP 40(b)(2) (petition for en banc rehearing must identify a conflicting circuit, Supreme Court, or other authoritative decision—or alternatively identify a question “of exceptional importance”).

By contrast, the proposed rule here would establish a unified reconsideration standard—that a “decision contain[s] erroneous determinations of fact or law”—for either panel or en banc reconsideration. Pet. at Appendix A & B. And as a predicate for either motion, the proposed rule also requires parties to “state with particularity” either “the points of law or fact that the party believes the appellate court has erroneously determined” or “any changes in the law . . . that may entitle the party to relief.” *Id.* The proposed rule then separately establishes that en banc reconsideration may only be *ordered* when necessary to maintain uniformity or where there is a question of exceptional importance. *Id.*

While the intent might have been to mirror the federal rule without wholesale revisions to the existing state rules, the practical result is problematic in a few respects. First, if panel reconsideration and en banc reconsideration are meant to serve different purposes (as they clearly are), it is confusing for them to be accessible based on identical standards. And the facial invitation to file motions for en banc reconsideration based on vanilla “erroneous determinations of fact or law” may promote a multiplicity of these motions, as discussed previously.

Second, the disconnect between the standard for moving for en banc review and the standard for granting en banc review is unusual. Typically, of course, both sides of that coin are closely aligned—either expressly or by implication. *See, e.g.*, FRAP 40(c) (establishing criteria to move for en banc rehearing and stating that en

banc rehearing will typically “be allowed only if one of the criteria . . . is met”); Ariz. R. Civ. P. 56 (providing that “[a] party may move for summary judgment” and establishing the standard for granting summary judgment). By reciting disparate standards, the proposed rule appears to invite motions for reconsideration en banc that should only be brought (if at all) as motions for panel reconsideration and that have little or no chance of success.

Third, because the proposed rule requires as a threshold matter that the movant identify “erroneous determinations of fact or law,” this implies that the present decision must always be “wrong” and that a prior decision must always be “right” (or conceivably wrong in a different way) to obtain en banc review. But it is not clear why this should be the case. While exceedingly rare, it is possible that a party with an institutional interest in uniformity may wish for en banc review even after prevailing, in much the same way that parties rarely (but occasionally) encourage the Supreme Court to grant review of a decision in which they prevailed. But as written, the proposed rule would preclude all motions for en banc reconsideration of a correct-but-inconsistent decision in blanket fashion. Even if such motions are exceedingly rare, it is not conceptually clear why they should be barred altogether.

Conclusion

While the Office is not dismissive of the uniformity concern underlying the Petition, we nonetheless oppose the proposed change because we question whether

the uniformity benefit will outweigh the downside risks and costs discussed above. We also think that it would be a mistake to conflate the criteria for requesting panel and en banc reconsideration; if the Court is inclined to adopt en banc review, the panel and en banc reconsideration rules should be distinct and internally consistent, as in the federal rules.

Respectfully submitted this 25th day of April 2025.

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