

1 Lisa M. Panahi
2 Bar No. 023421
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-25-0012

10 **PETITION TO AMEND RULE**
11 **31.20 OF THE ARIZONA RULES**
12 **OF CRIMINAL PROCEDURE AND**
13 **RULE 22 OF THE ARIZONA**
14 **RULES OF CIVIL APPELLATE**
15 **PROCEDURE**

STATE BAR OF ARIZONA
COMMENT

16 Pursuant to Supreme Court Rule 28(e), the State Bar of Arizona submits this
17 comment in opposition to the Petition R-25-0012 to amend Arizona Rule of Civil
18 Appellate Procedure (ARCAP) 22 and Criminal Rule 31.20 to add a procedure for
19 *en banc* review in the Arizona Court of Appeals. As explained in more detail below,
20 the State Bar believes that the current procedure for dealing with conflicting Court
21 of Appeals decisions is sufficient and the proposed amendment is not needed.
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1 **I. THE PETITION**

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3 The Petition seeks to “provide a procedure for the Arizona Court of Appeals
4 to conduct en banc reconsideration of appeals and other proceedings.” (Pet. at 1.)
5 The proposed rule amendment would create the opportunity for *en banc* review by
6 adding new subsections and conforming changes to ARCAP 22 and Criminal Rule
7 31.20. The new subsections (which are substantively identical for the civil and
8 criminal rule sets) would provide:
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11 **(a) When Reconsideration En Banc May Be Ordered:** An appeal or
12 other proceeding may be reconsidered by the Court of Appeals en banc
13 if a majority of judges within each division of the Court of Appeals vote
14 to grant reconsideration en banc. Unless one judge calls for a vote, a
15 vote need not be taken to determine whether the case will be so reheard.
16 If granted, en banc reconsideration is conducted by 11 randomly
17 selected judges from the combined divisions. An en banc
18 reconsideration is not favored and ordinarily will not be ordered unless:
19 (1) en banc reconsideration is necessary to secure or maintain
20 uniformity of the court’s decisions; or
21 (2) the proceeding involves a question of exceptional importance.

22 (Pet. App. B.)

23 The primary justification the Petition offers for the new process is avoiding
24 conflict. In particular, the Petition argues that, because the Court of Appeals sits as
25 a single court with separate divisions, it is possible for different divisions (or
different panels within the same division) to issue conflicting decisions. And,

1 because those conflicting decisions, technically issued by the same Court, are
2 entitled to the same precedential value, litigants and lower courts alike are left unsure
3 about the state of the law whenever a conflict arises. (Pet. at 2-3.) In support of its
4 feasibility, the Petition cites several other states that have similarly large
5 intermediate appellate courts and an *en banc* process that is available before an
6 appeal makes it to the state's highest court.¹ (Pet. at 5.)

9 **II. THE STATE BAR OPPOSES THE PETITION.**

10 The State Bar opposes the Petition and recommends this Court deny it
11 because: (1) to the extent conflicts arise in Court of Appeals opinions, there are
12 existing procedures that sufficiently address the issue; (2) adding an *en banc* option
13 would increase the burden on the Court of Appeals and delay resolution of appeals;
14 and (3) the language the Petition proposes to implement the new process is broad
15 and unclear.
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20 ¹ The Petition invokes this Court's rule-making authority as additional support for
21 its position. (Pet. at 3-4.) The State Bar does not dispute that this Court has the
22 power to create an *en banc* review process, should it so choose. Because the State
23 Bar encourages the Court not to create such a process, the scope of the Court's
24 authority is irrelevant to this comment. The State Bar has learned, however, that the
25 legislature is considering a bill (H.B. 2040) that would create a statutory *en banc*
review process similar to what the Petition has proposed. A copy of the bill is
attached as Exhibit A. The State Bar does not take a position on either the merits of
H.B. 2040 or the Legislature's power to create a statutory *en banc* process.

1 **A. Existing procedural mechanisms are sufficient to deal with**
2 **conflicting opinions from the Court of Appeals.**

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4 The single most significant reason *en banc* review is unnecessary is that the
5 primary justification the Petition offers for the process—resolving conflicts—is
6 already addressed by existing procedures.

7 First, at least in Division One, where 85% of published opinions were issued
8 in 2023, the Court of Appeals circulates draft opinions before they are published to
9 elicit comments from judges who are not members of the panel deciding the case.
10 *See* Court of Appeals Case Activity Report, Fiscal Year 2023, at 10 (Div. I), 14 (Div.
11 II) (hereafter “2023 Activity Report”).² Among other things, the purpose of this
12 process is to identify potential conflicts with other decisions that can be addressed,
13 if necessary, before an opinion is published.
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16 Second, if the Court of Appeals issues a decision that a party believes
17 erroneously conflicts with another Court of Appeals decision, the aggrieved party
18 can seek reconsideration. *See* A.R.S. § 12-120.24 (“A party against whom a decision
19 has been rendered . . . may file in such court a motion for rehearing after the rendition
20 of the decision or order of dismissal, setting forth with particularity the reasons why
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24 ² Available at:
25 https://www.azcourts.gov/Portals/39/2023DR/General%20Jurisdiction/AppellateCaseActivityFY23.pdf?ver=TgVLWh2-Mz_FYG5l7NR_Xw%3d%3d#page=12.

1 he believes the decision or order of dismissal erroneous.”); ARCAP 22 (“A motion
2 for reconsideration requests an appellate court to consider whether its decision
3 contained erroneous determinations of fact or law.”). The number of instances in
4 which reconsideration is granted is not insignificant. In 2023, for example, litigants
5 filed 214 motions for reconsideration in Division One, 32 of which (or 15%) were
6 granted. *See* Arizona Court of Appeals Division One 2023: The Year in Review, at
7 16 (*available at*:

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10 [https://www.azcourts.gov/Portals/89/Annual%20Report/2023ANNUAL%20REPO](https://www.azcourts.gov/Portals/89/Annual%20Report/2023ANNUAL%20REPORT%20Clean%20Draft%202024FINAL.pdf?ver=s_h7F6Ma472lPL1NB7EpIA%3d%3d)
11 [RT%20Clean%20Draft%202024FINAL.pdf?ver=s_h7F6Ma472lPL1NB7EpIA%3](https://www.azcourts.gov/Portals/89/Annual%20Report/2023ANNUAL%20REPORT%20Clean%20Draft%202024FINAL.pdf?ver=s_h7F6Ma472lPL1NB7EpIA%3d%3d)
12 [d%3d](https://www.azcourts.gov/Portals/89/Annual%20Report/2023ANNUAL%20REPORT%20Clean%20Draft%202024FINAL.pdf?ver=s_h7F6Ma472lPL1NB7EpIA%3d%3d)).
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14 Finally, one of the enumerated reasons for this Court to accept a petition for
15 review is if it presents “conflicting decisions by the Court of Appeals.” ARCAP
16 23(d)(3). Unsurprisingly, this Court regularly invokes this rule as its reason for
17 accepting review. Although the list is not comprehensive (and is not intended to be),
18 the State Bar identified 36 decisions in which this Court granted a petition for review
19 expressly to resolve a conflict among Court of Appeals decisions.³ There are likely
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23 ³ *David C. v. Alexis S.*, 240 Ariz. 53 (2016); *State v. Bonfiglio*, 231 Ariz. 371 (2013);
24 *State v. Valverde*, 220 Ariz. 582 (2009); *Ariz. Minority Coal. for Fair Redistricting*
25 *v. Ariz. Indep. Redistricting Comm’n*, 220 Ariz. 587 (2009); *State v. Stummer*, 219
Ariz. 137 (2008); *State v. Cox*, 217 Ariz. 353 (2007); *Bilke v. State*, 206 Ariz. 462
(2003); *State v. Estrada*, 201 Ariz. 247 (2001); *State v. Powers*, 200 Ariz. 363

1 many more decisions in which resolution of a petition for review involved
2 reconciling a conflict, or potential conflict, despite that it was not the reason stated
3 for accepting review. Given the relatively few instances in which a true conflict can
4 arise (*see* Sec. II.B, *infra*), this Court’s demonstrated willingness to accept review
5 expressly to resolve a conflict is sufficient to address the primary concern animating
6 the Petition.
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9 **B. *En banc* review would add unnecessary burden and delay to the**
10 **appellate process.**

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12 Even if existing procedures did not allow the Court of Appeals and Supreme
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15 (2001); *State v. O’Meara*, 198 Ariz. 294 (2000); *State v. Eagle*, 196 Ariz. 188
16 (2000); *State ex rel. Romley v. Galati ex rel. Cnty. of Maricopa*, 195 Ariz. 9 (1999);
17 *Hall v. Lalli*, 194 Ariz. 54 (1999); *State v. Riggs*, 189 Ariz. 327 (1997); *Curtis v.*
18 *Morris*, 186 Ariz. 534 (1996); *Vega v. Morris*, 184 Ariz. 461 (1996); *Gouldner v.*
19 *Ariz. Dep’t of Transp. Motor Vehicle Div.*, 179 Ariz. 181 (1994); *State v.*
20 *Pennington*, 178 Ariz. 301 (1994); *Ariz. Dep’t of Pub. Safety v. Indus. Comm’n of*
21 *Ariz.*, 176 Ariz. 318 (1993); *El Paso Elec. Co. v. Maricopa Cnty.*, 172 Ariz. 335
22 (1992); *Salt River Project Agr. Imp. & Power Dist. v. Apache Cnty.*, 172 Ariz. 337
23 (1992); *State v. Reynolds*, 170 Ariz. 233 (1992); *State v. Barnes*, 167 Ariz. 186, 188
24 (1991); *Ft. Lowell-NSS Ltd. P’ship v. Kelly*, 166 Ariz. 96 (1990); *Schroeder v.*
25 *Schroeder*, 161 Ariz. 316 (1989); *Martin v. Martin*, 156 Ariz. 452 (1988); *State v.*
Fallon, 151 Ariz. 192 (1986); *Nat’l Indem. Co. v. St. Paul Ins. Companies*, 150 Ariz.
458 (1986); *Marcus v. Fox*, 150 Ariz. 333 (1986); *Focal Point, Inc. v. Ct. of Appeals*
of State of Ariz., Div. One, 149 Ariz. 128 (1986); *Wistuber v. Paradise Valley Unified*
Sch. Dist., 141 Ariz. 346 (1984); *Donnelly Const. Co. v. Oberg/Hunt/Gilleland*, 139
Ariz. 184 (1984); *Word v. Motorola, Inc.*, 135 Ariz. 517 (1983); *State v. Wallis*, 132
Ariz. 445 (1982); *Bouldin v. Turek*, 125 Ariz. 77 (1979); *State v. Norris*, 113 Ariz.
558 (1976).

1 Court to deal with conflicting Court of Appeals’ decisions, adding *en banc* review
2 is not the appropriate mechanism for dealing with that issue. Two considerations,
3 when taken together, drive a concern that such a process would add unnecessary
4 burden and delay to an already burdened appellate process.

6 On the one hand, a true “conflict” can only exist between two or more
7 published opinions. *See* Ariz. Sup. Ct. R. 111(c)(1) (“Memorandum decisions of
8 Arizona state courts are not precedential . . .”). In 2023, Divisions One and Two
9 terminated a total of 3,375 appeals. *See* 2023 Activity Report, at 10 (Div. I), 14
10 (Div. II). Of those, only 93 (2.75%) resulted in published opinions that could have
11 resulted in a conflict. (*Id.*) Granted, each of those 93 decisions had the potential to
12 create a conflict with an existing opinion, but given the tiny proportion of cases that
13 can even possibly result in a conflict, the potential for a new conflict each year is
14 exceedingly minimal. And, in those instances where a conflict is created, the
15 processes above remain available to prevent or resolve it.

19 On the other hand, the process that the Petition proposes would likely result
20 in a significantly greater percentage of requests for *en banc* review than the
21 percentage of case terminations that could lead to a potential conflict. For one, as
22 the proposed rule is drafted, litigants are not limited to only seeking *en banc* review
23 when a conflict arises, which means litigants will inevitably file petitions for *en banc*
24 review for any number of reasons that have nothing to do with the reason for creating
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1 the process. Furthermore, litigants are likely to view *en banc* review as just another
2 form of reconsideration, rather than a truly unique process that should be pursued in
3 rare circumstances. And every time a petition for *en banc* review is filed, the entire
4 division where the petition is filed will be forced to consider the petition because the
5 proposed rule says a petition can be granted only if a majority of judges in the
6 division agree. Taking these considerations together with the relatively few
7 instances in which a true conflict can be created, the State Bar foresees a situation in
8 which *en banc* petitions would be abused—or at the very least, overused—creating
9 delay and adding burden to an already taxed appellate court system.
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13 **C. The language of the proposed new rule is broad and unclear.**
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15 If the Court decides an *en banc* review process is worthwhile, it should
16 nonetheless deny the Petition and investigate other avenues for implementing the
17 process because the language proposed in the Petition is too broad and unclear.
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19 As implied above, there are insufficient guardrails built into the rule to ensure
20 it is not abused or over-used. Although the proposed rule states the process is “not
21 favored,” it does not limit the *types* of decisions that can be reconsidered *en banc*.
22 As explained above, only published opinions can create true conflicts, yet there is
23 nothing in the proposed rule to clarify that only published opinions should be subject
24 to a request for *en banc* review grounded in a quest for “uniformity.” Litigants are
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1 thus likely to bog down the Court of Appeals with requests for *en banc*
2 reconsideration of memorandum decisions that, as a matter of law, cannot pose any
3 real threat to “uniformity.”
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5 The scope of the rule, and particularly the impact on motions for
6 reconsideration, is also unclear. The proposed rule would add a new Subsection (a),
7 titled “When Reconsideration En Banc May Be Ordered,” but there is no
8 corresponding section to explain when standard reconsideration may be ordered.
9 Nor does the proposed rule explain when it is appropriate to file a standard motion
10 for reconsideration, as opposed to reconsideration *en banc*. Like *en banc* motions,
11 standard motions for reconsideration are already “disfavored.” So, under this
12 proposal, would a standard motion for reconsideration ever be necessary? If so,
13 when? It is also unclear how the two kinds of motions would work together, if at
14 all. Would the proposed new language require a litigant to choose one kind of
15 motion or the other? Can litigants file each kind of motion in succession, seeking
16 reconsideration first and reconsideration *en banc* second, only if the first request is
17 denied? Can litigants file a standard motion for reconsideration and a motion for
18 reconsideration *en banc* at the same time? If so, must the grounds supporting each
19 motion differ?
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24 The State Bar does not purport to know the answers to these questions, but
25 they highlight just some of the issues that need to be considered and addressed before

1 a new rule, if any, is adopted. If the Court is inclined to consider an *en banc* process,
2 it should thus first investigate how best to address these issues and solicit a new
3 proposal with these (and potentially other) concerns in mind.
4

5 **III. CONCLUSION**

6 The State Bar opposes the Petition to amend ARCAP 22 and Criminal Rule
7 32.10 to add a process for seeking *en banc* reconsideration in the Court of Appeals.
8 If the Court is inclined to implement such a process, it should investigate the issue
9 further and seek proposals for rule language that better address the concerns
10 identified in this comment.
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13 RESPECTFULLY SUBMITTED this 1st day of May 2025.

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15 Lisa M. Panahi
16 FOR THE STATE BAR OF ARIZONA
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18 Electronic copy filed with the
19 Clerk of the Supreme Court of Arizona
20 this 1st day of May 2025.

21 by: PSequin
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