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**IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA**

In the matter of:

Petition to Amend Ariz. R. Crim. P.
31.20 and Ariz. R. Civ. App. P. 22

Arizona Supreme Court
No. R-25-0012

**Petitioner's Reply: Petition to
Amend Ariz. R. Crim. P. 31.20 and
Ariz. R. Civ. App. P. 22 to Provide
En Banc Reconsideration by the
Court of Appeals**

Pursuant to Rule 28(e)(5) of the Arizona Supreme Court Rules, undersigned counsel submits this reply in support of his petition asking this Court to provide a procedure for the Arizona Court of Appeals to conduct en banc reconsideration of appeals and other proceedings by amending Rule 31.20 of the Arizona Rules of Criminal Procedure and Rule 22 of the Arizona Rules of Civil Appellate Procedure.

A. Existing mechanisms fail to provide a complete or sufficient remedy for conflicts within the Court of Appeals.

Both the Attorney General and State Bar argue that Arizona’s existing appellate tools—selective publication, panel reconsideration, and Supreme Court review—are sufficient to manage conflicts. But these mechanisms are partial and reactive. They do not address the core issue: a single appellate court issuing conflicting, precedential decisions without any internal mechanism to resolve the split.

The Attorney General concedes this reality when quoting *Patterson*, which leaves lower courts to choose among conflicting Court of Appeals precedents by adopting whichever decision “most persuasively interprets the law.” That outcome is not judicial uniformity—it is a patchwork of legal standards applied inconsistently throughout the state. The State Bar’s reliance on informal internal circulation of draft opinions (in Division One only) cannot substitute for a formal, transparent, rule-based process that ensures uniformity statewide.

Furthermore, the State Bar acknowledges that only published opinions can generate binding precedent and therefore conflict. That point strengthens the need for en banc review: where conflict arises in precedential decisions, there is currently no internal judicial mechanism to resolve it before parties must seek this Court’s discretionary review. En banc review is an internally available tool to resolve such conflicts efficiently and uniformly.

B. The costs cited are speculative, overstated, and easily mitigated by the narrow scope of the proposed rule.

The Attorney General warns of a flood of en banc petitions causing delay and expense. This is speculative and inconsistent with the proposed rule's built-in limitations. The rule mirrors the federal en banc standard, which has is tested and proven workable. Moreover:

- The rule clearly states en banc reconsideration is “not favored and ordinarily will not be ordered” unless necessary to maintain uniformity or address an issue of “exceptional importance.”
- No vote need be taken unless a judge calls for one. Most motions will be summarily denied.
- A majority of judges from each division must vote to grant review, ensuring that only issues of genuine statewide importance proceed.

The concern that most motions would be denied is not an argument against the rule—it is a reflection of the rule's effective screening process. The purpose of the rule is not to increase the volume of litigation but to provide a necessary safety valve for the small number of cases that raise systemic concerns.

Moreover, the claim that adding this review level undermines finality ignores the reality that true finality requires public confidence in legal consistency. A fragmented and contradictory intermediate appellate system undermines faith in justice more than the possibility of one more level of discretionary review ever could.

C. The proposed structure is appropriate and modeled on federal best practices.

Both comments argue that the proposed rule conflates panel and en banc reconsideration. But that is a misreading. The proposed rule adds en banc review as an additional path—not a replacement or substitute—for panel reconsideration. It adopts a narrower standard for en banc review than for ordinary reconsideration:

- Panel reconsideration may be granted for “erroneous determinations of fact or law.”
- En banc review is only appropriate to “maintain uniformity” or resolve questions of “exceptional importance.”

The rule merely allows a party to request either or both forms of review, subject to different standards. This reflects the approach of Federal Rule of Appellate Procedure 40, which the petition explicitly mirrors. The suggestion that this structure will cause confusion or misuse underestimates the clarity of the rule’s language and overestimates the ability of attorneys to exploit it in bad faith, particularly when en banc review requires a majority vote of all judges in both divisions.

If refinements to language would improve clarity, such amendments are welcome—but they are not reasons to reject the proposal outright.

D. The reform addresses a structural gap in Arizona’s appellate process.

Arizona's two-division appellate court lacks a mechanism to resolve internal conflicts between panels or divisions issuing precedential decisions. Unlike other jurisdictions with similarly structured intermediate courts, Arizona provides no

method short of Supreme Court intervention to harmonize conflicting legal authority issued within a single appellate body.

The proposal builds a framework for ensuring the Court of Appeals can resolve intra-court conflicts and clarify questions of statewide legal importance. En banc reconsideration will not replace Supreme Court review but will enhance the consistency and coherence of appellate jurisprudence and improve the quality of issues ultimately presented to this Court.

E. Neither commenting party disputes this Court’s constitutional authority to enact the proposed rule.

Importantly, neither the Arizona Attorney General’s Office nor the State Bar of Arizona challenges this Court’s authority to adopt a rule permitting en banc reconsideration. The Petition grounds its proposal in Article VI, § 5(5) of the Arizona Constitution, which vests this Court with plenary power over procedural matters in Arizona courts. That includes the authority to define the procedures governing appellate review within the Court of Appeals.

The State Bar concedes this point directly:

“The Petition invokes this Court’s rule-making authority as additional support for its position. [...] The State Bar does not dispute that this Court has the power to create an en banc review process, should it so choose.” (State Bar Comment at 3 n.1.)

Likewise, the Attorney General’s comment offers no challenge to the Court’s authority. Its concerns are framed exclusively in terms of policy, practical consequences, and procedural structure—not constitutional limits.

This agreement underscores that the question before the Court is not whether it can adopt the proposed rule, but whether it should. The Court has long exercised its rulemaking power to shape and improve judicial procedure, and en banc reconsideration fits squarely within that purview.

F. Finality must not come at the expense of fairness and the consistent application of law.

Both comments suggest that the potential for prolonged litigation and lack of finality weighs against en banc reconsideration. But finality is not an end in itself—it is a value that must be balanced against the overarching purposes of appellate review: fairness, accuracy, and the uniform application of the law.

An appellate system that prioritizes efficient finality over justice invites arbitrary outcomes and undermines public trust. When panels within the same appellate court reach materially inconsistent conclusions on questions of law, it is more disruptive to the legal system—and to litigants—to allow those inconsistencies to persist than to provide a mechanism for internal correction.

Moreover, en banc reconsideration is not designed to re-litigate every case but to address rare and exceptional circumstances where the integrity and consistency of the appellate process are at stake. Finality that rests on conflicting or erroneous

precedent is not true finality—it is the appearance of closure at the cost of confidence in the system.

CONCLUSION

For the reasons stated in the Petition¹ and clarified here, the Court should adopt the proposed amendments to Ariz. R. Crim. P. 31.20 and Ariz. R. Civ. App. P. 22 to provide a mechanism for en banc reconsideration in the Court of Appeals.

Respectfully submitted this 29th day of May, 2025

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¹ Since filing the Petition, it has come to undersigned counsel’s attention that the data in the New York survey cited on page 5 of the Petition is likely inaccurate. The Petition cited the survey as establishing that “23 states, the District of Columbia, and the entire federal court system provide en banc review by their intermediate appellate courts.” Petition at 5 (citing *En Banc Review in New York Court*, New York City Bar Association Committee on State Courts of Superior Jurisdiction, (available at https://www.nycbar.org/wp-content/uploads/2023/05/En_Banc_Article.pdf) (last accessed Jan. 03, 2025)).

But at a meeting of the State Bar’s Civil Practice and Procedure Committee held on February 06, 2025, the accuracy of this assertion (“23 states”) was disputed. Based on data collected for the meeting, it appears that at least 17 states do provide en banc review at the intermediate level. Whether en banc review exists for the other 6 jurisdictions cited in the New York survey likely depends on whether the courts at issue ever issue hear cases as panels, whether the data errantly includes en banc review by a state’s highest court, as opposed to intermediate court, or was erroneous for other reasons.