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**IN THE SUPREME COURT
STATE OF ARIZONA**

**PETITION TO AMEND RULE 3
OF THE ARIZONA RULES OF
PROCEDURE FOR SPECIAL
ACTIONS**

Supreme Court No. R-26-0011
**STATE BAR OF ARIZONA
COMMENT**

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (“State Bar”) hereby submits the following comment in opposition to the above-captioned Petition.

The Petition seeks to amend Rule 3 of the Rules of Procedure for Special Actions¹ to further clarify “that the questions that may be raised in statutory special actions are not limited to those specified in the rules for other special actions derived from common law writs.”

Several Arizona statutes allow an aggrieved party to file a special action to

¹ All future references to a “Rule” or the “Rules” are to the Rules of Procedure for Special Actions unless stated otherwise.

1 seek judicial review of a decision by a public body, officer, or person. The comment
2 to Rule 3 contains a non-exclusive list of those statutes. These are known as
3 “statutory special actions.” *See* Rule 3. The same Rules also govern suits seeking
4 relief by certiorari, mandamus, or prohibition. *See* Rule 2(c). While the Rules do
5 not give this second type of special action a name, they are generally known as
6 common law special actions or special actions seeking an extraordinary writ
7 (together with common law special actions, the “Old Writs”).
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10 Rule 4, which applies to both statutory special actions and the Old Writs,
11 limits the court’s scope of review² in a special action as follows:

12 A special action may be brought only if a lower court or a body, officer,
13 or person:

14 (a) failed to exercise discretion that they have a duty to exercise; or
15 failed to perform a duty required by law for which they have no
16 discretion;

17 (b) proceeded, or threatened to proceed, without, or in excess of,
18 jurisdiction or legal authority; or

19 (c) made a decision that was arbitrary and capricious or an abuse of
20 discretion, which can include a legal error.

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24 ² The Court of Appeals has explained that Rule 4 defines the scope of review in a
25 special action. *See Abraham v. Arizona Bd. of Regents*, 259 Ariz. 158, ¶ 37 (App.
2025), *as corrected* (Jan. 8, 2025), *review granted in part* (Sept. 9, 2025).

1 Petitioners posit that the scope of review in Rule 4 could be inconsistent with
2 the scope of review in a statutory special action – as the latter is based on statutes
3 that may include their own statutory scope of review – but offer no example of such
4 an inconsistency. Petitioners further argue that the Rules, prior to their amendment
5 in 2025 (R-25-0002), carved out statutory special actions from the scope of review
6 provided for in Rules.³ To remedy this perceived or potential problem, Petitioners
7 recommend amending Rule 3 as follows (~~strike-throughs~~ are deletions, underlines
8 are additions):
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11 **Rule 3. Statutory ~~Authority for Certain~~ Special Actions**

12 If any statute, other than those listed in Rule 2(c), authorizes filing a
13 special action, or an action for a writ of certiorari, mandamus, or
14 prohibition, that action is a special action. These special actions, known
15 as statutory special actions, may be either original or appellate special
16 actions. The questions that may be raised and considered in a statutory
17 special action are not limited to the grounds specified in Rule 4. They
18 Statutory special actions are otherwise governed by these rules unless
19 the statute authorizing a particular special action contains specific
20 procedures supplementing or contradicting these rules.

21 Petitioners attempt to illustrate the conflict between the scope of review in the
22 current rule and the scope of review in a statutory special action using the public
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24 ³ Former Rule 1(b) provided: “Where a statutory special action is involved, the
25 questions to be raised and considered are wholly unaffected by this Rule, but the
provisions of this Rule as to parties, procedure, interlocutory orders and stays, and
judgments shall apply.”

1 records statute, A.R.S. § 39-121.02(A), as an example.

2 There are several flaws with using the public records statute as an example.
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4 To start, the public records statute incorporates the scope of review from the Rules.
5 Specifically, the public records statute states: “Any person who has requested to
6 examine or copy public records pursuant to this article and who has been denied
7 access to or the right to copy such records may appeal the denial through a special
8 action in the superior court pursuant to the rules of procedure for special actions....”
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10 A.R.S. § 39-121.02(A) (emphasis added). In other words, the scope of review in a
11 statutory public records special action is the scope of review in Rule 4. There is no
12 difference or conflict to resolve.

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14 Most importantly, Petitioners’ key premise – that there are statutory special
15 actions that demonstrably fall outside the scope of Rule 4 – is incorrect. They claim
16 several issues that “might arise in public records special actions” do not fit within
17 Rule 4’s parameters, but the issues track those listed in the Rule. If a public official
18 is under a legal duty to provide a public record and does not, then the official “failed
19 to perform a duty required by law for which they have no discretion.” Rule 4(a).
20 Likewise, if a judicial decision or pre-judicial decision on this subject was in any
21 respect legally incorrect, then the decision “was arbitrary and capricious or an abuse
22 of discretion, which can include a legal error.” Rule 4(c). Petitioners appear to agree
23 — they concede that public records issues “could implicate more than one” of the
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1 subparts of Rule 4, “or maybe even all three.”

2 Given that the Petition would authorize special actions that do not fit within
3 one of the categories of special action used since the Old Writs, it should provide
4 examples of where the rules are limiting. Yet the Petition’s core example is incorrect
5 and its Reply is not the time to raise others, to which the public cannot respond. This
6 Court should not take the Petition’s invitation to address what has not been shown
7 to be a problem by authorizing new special actions that do not fit within the time-
8 tested and statutorily-derived subparts of Rule 4. *See* A.R.S. § 12-2021 (authorizing
9 issuance of writ of mandamus “to any person . . . to compel, when there is not a
10 plain, adequate and speedy remedy at law, performance of an act which the law
11 specially imposes as a duty resulting from an office, trust or station”). Indeed,
12 because the special action rules are to give procedural expression to the Old Writs,
13 authorizing new special actions beyond their scope would fundamentally alter what
14 the Rules do, and would effect a rules-based expansion of important bedrock
15 statutes.

16 Public records case law confirms this analysis. Whether “requested records
17 are public records at all” is a legal question, which is currently covered in Rule 4,
18 and “the courts, rather than government officials, are the final arbiter of what
19 qualifies as a public record.” *Griffis v. Pinal County*, 215 Ariz. 1, 5 ¶ 15 (2007). And
20 if “denial of access is wrongful,” that means “that the person denied records was, in
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1 fact, entitled to them.” *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993).
2 So, if a government official wrongly determined that a record was not a public
3 record, or that the requestor was not otherwise entitled to the record, that official’s
4 determination is subject to review for “an abuse of discretion, which can include a
5 legal error,” under Rule 4(c). *See Abraham*, 259 Ariz. at 168 ¶ 40 (“This procedure
6 is not at odds with the existing or new special-action rules’ requirement for abuse-
7 of-discretion review, because an error of law is an abuse of discretion.”).

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10 Petitioners fail to cite any statutory special actions where the scope of review
11 is different from the scope of review in Rule 4. The Rule 4 grounds are broad by
12 design and derive from the statutes that created the Old Writs. They do not preclude
13 a court from hearing the case-specific issues that might arise in a statutory special
14 action simply because there may not be a word-to-word match. Petitioners’ proposal
15 seems to be a solution in search of a problem.

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17 The State Bar is concerned that the Court’s adoption of Petitioners’ proposal
18 will result in confusion. By specifying that Rule 4 does not limit the scope of review
19 in statutory special actions, the proposed amendment may create uncertainty about
20 whether the Rule 4 grounds apply at all or are somehow superseded by statute. As
21 explained above, that result is not contemplated by the public records statute, A.R.S.
22 § 39-121.02(A), which incorporates the scope of review set forth in the Rules. And
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24 it also raises the specter of unnecessary litigation over whether any statute
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1 authorizing a special action “conflicts with or tends to engulf,” the Court’s
2 “constitutionally vested rulemaking authority.” *State ex rel. Napolitano v. Brown*,
3 194 Ariz. 340, 342 ¶ 6 (1999) (citation modified) (itself a special action).
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5 **Conclusion**

6 Based on the foregoing, the State Bar respectfully requests that the Court deny
7 the Petition.
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9 RESPECTFULLY SUBMITTED this 1st day of May, 2026.

10 *Jessica J. Fotinos*

11 _____
12 Jessica J. Fotinos
13 General Counsel
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15 Electronic copy filed with the
16 Clerk of the Supreme Court of Arizona
17 this 1st day of May, 2026.

18 by: PSequin
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