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

9 In the Matter of:

Supreme Court No. R-19-0005

10 **PETITION TO AMEND RULES**  
11 **32(c) AND (d) OF THE ARIZONA**  
12 **RULES OF SUPREME COURT**

**COMMENT OF THE**  
**STATE BAR OF ARIZONA**

13 Pursuant to Rule 28(d), Ariz. R. Sup. Ct., the State Bar of Arizona (“State  
14 Bar”) hereby submits its Comment in opposition to the Petition in the above-  
15 captioned matter.

16 The Petition, substantially similar to a prior petition filed by Petitioner in  
17 2017, again seeks to change the current structure of the integrated State Bar by  
18 splitting the functions of the State Bar into two subsets: a mandatory bar and a  
19 voluntary bar. The Petition proposes to: (1) eliminate mandatory membership fees  
20 for what Petitioner deems to be non-regulatory functions; (2) convert fees to  
21 voluntary contributions for all non-regulatory functions, as defined by Petitioner;  
22 and (3) provide for an audit of fees.  
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25 While the State Bar agrees that this Court is the appropriate body to decide

1 this issue, the State Bar opposes Petitioner’s proposed amendments to Rule 32 and  
2 highlights the misplaced reliance on *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), as  
3 support for Petitioner’s proposed changes to the current structure of the State Bar.  
4

## 5 DISCUSSION

### 6 I. The Supreme Court of Arizona maintains under its direction and 7 control the State Bar of Arizona.

8 Effective January 1, 2017, the Court amended Rule 32, revising the State  
9 Bar’s mission by directing that the State Bar “*exists to serve and protect the public*  
10 *with respect to the provision of legal services and access to justice.*” Rule 32(a)(2)  
11 (emphasis added.) The Petition fails to address the mission and purpose of the State  
12 Bar. Petitioner also incorrectly summarily concludes that the State Bar is a union.  
13 Pet. at 3. The State Bar is not a labor union. Additionally, lawyers, unlike union-  
14 members, are officers of the court and play an important governmental role in the  
15 administration of justice.  
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18 The State Bar is sui generis – it is neither a governmental agency nor an  
19 employee union. Petitioner purports to argue that the State Bar is a union because  
20 case law analyzing the constitutionality of mandatory state bar fees draws analogies  
21 between bar fees and union agency assessments. See *Keller v. State Bar of*  
22 *California*, 496 U.S. 1, 8-9 (1990). The State Bar is not like a labor organization,  
23 which exists primarily to bargain with employers for the benefit of the organization’s  
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1 members; the State Bar does not exist to speak in a unified voice on behalf of our  
2 membership; and the State Bar does not engage in partisan advocacy or take political  
3 positions that are not germane to the Bar’s mission and purpose. Petitioner’s  
4 argument that the State Bar “does not and cannot reasonably be expected to speak  
5 for all lawyers on all matters” (Pet. at 4) misconstrues the very mission set forth by  
6 this Court in Rule 32, which is to protect the public with respect to the provision of  
7 legal services and access to justice. The State Bar does not purport to speak for the  
8 individual interests of our members – State Bar members are free to speak for  
9 themselves. Unlike union-members, State Bar members have full opportunity to  
10 participate in State Bar speech, and to speak in opposition to the State Bar’s position.  
11 No lawyer is prohibited from speaking against a position the State Bar takes. The  
12 Petition and this Comment are an example of this dichotomy.

16 **II. A bifurcated bar will not support the amended mission and**  
17 **empowerments of the State Bar, as set forth in Rule 32.**

18 **A. The mission and governance of the State Bar was recently**  
19 **studied, as directed by this Court.**

20 The State Bar is organized by this Court to promote activities that fulfill the  
21 responsibilities of the legal profession; to promote access to justice; to aid in the  
22 administration of justice; to assist in the regulation and discipline of attorneys; to  
23 conduct educational programs; and to provide forums for the discussion of subjects  
24 pertaining to the practice of law. Rule 32(a)(2).  
25

1 In 2014, this Court convened by Administrative Order No. 2014-79, the Task  
2 Force on the Review of the Role and Governance Structure of the State Bar of  
3 Arizona (“Task Force”). The Task Force was charged with examining the Rules of  
4 the Supreme Court on the mission, governance, and structure of the State Bar. On  
5 September 1, 2015, the Task Force submitted its final report to this Court. In this  
6 report, the Task Force summarized the important interplay between the services the  
7 State Bar provides as an integrated bar and protection of the public as follows:  
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10 An integrated bar benefits not only the Court and the bar, but the public  
11 as well. The Court has adopted ethical rules for the protection of the  
12 public, and the bar’s regulatory function assists the Court in enforcing  
13 those rules. But what is equally important is that the bar works  
14 proactively to assure that its attorney members comply with the rules.  
15 The bar educates it [sic] members on professionalism and ethics and  
16 provides an ethics hotline so that attorneys may receive advice on  
17 specific ethics questions. It assists attorneys with trust account  
18 regulations and law office management. It promotes the competence of  
19 its members by establishing sections in specific areas of practice and  
20 by educating members in substantive matters of law. The bar is not  
21 required to provide these services to fulfill its regulatory function, yet  
22 these services promote attorney competence, and they therefore play an  
23 important role in consumer protection and serving public interest.  
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26 Report at 7. Pages 4-9 of the report, analyzing the organization of the State  
27 Bar as an integrated bar, are attached as Appendix A. Programs like the  
28 conservatorship program, which returns thousands of client files and trust account  
29 funds to clients each year; the member assistance and law office management  
30 programs, which help struggling lawyers; educational publications and continuing

1 legal education programs; and the Find A Lawyer program, matching consumers  
2 with attorneys who can address their legal needs and provide pro bono services, all  
3 help ensure Arizona attorneys meet the legal needs of Arizonans and the standards  
4 of competence and professionalism expected of this profession.  
5

6       Following the Task Force’s report, this Court substantially revised Rule 32,  
7 the details of which are outside the scope of the Petition and this Comment, but this  
8 Court kept intact the current integrated structure of the State Bar. Eliminating the  
9 integrated bar will eviscerate funding for the aforementioned programs that protect  
10 the public.  
11

12                   **B. The Petition overlooks how the State Bar’s programs and**  
13                   **functions, beyond lawyer regulation, further the State Bar’s**  
14                   **mission and purpose.**

15       Petitioner’s assertion that bar membership is a “fad of the past century” cannot  
16 be true if most states, like Arizona, require bar membership as a condition to practice  
17 law. Pet. at 11. The Petition proposes two subsets of the State Bar; the first  
18 characterized as “mandatory” by Petitioner, and defined as: “admissions testing,  
19 character and fitness, specialty certification, minimum requirements for and  
20 oversight of continuing legal education, and attorney discipline.” Pet. at 5. The  
21 Petition defines the second, “voluntary” subset as all other functions, including  
22 lobbying. Id. The Petition’s cursory attempt to categorize these functions fails to  
23 address essential programs of the State Bar and the important overlap of the  
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1 regulatory functions<sup>1</sup> with these programs that Petitioner presumably characterizes  
2 as “voluntary,” although not specifically mentioned in the Petition.

3  
4 The first example is the State Bar’s Ethics Hotline. This Hotline operates  
5 outside of the Lawyer Regulation Division and addresses approximately 2,400 ethics  
6 inquiries a year. At times, attorneys facing discipline are advised to seek advice  
7 through the Ethics Hotline to ensure that ethical improprieties during the pendency  
8 of a disciplinary investigation are not compounded by the attorney’s  
9 misunderstanding of ethical obligations pertaining to prospective conduct. The  
10 Ethics Hotline serves as a resource that disciplinary counsel can direct a member to,  
11 to receive ethical guidance, and hopefully avoid the necessity of further remedial  
12 action by the State Bar. The Ethics Hotline is an example of a service that Petitioner  
13 may characterize as “voluntary” but is a shared resource that both the regulatory  
14 division and attorneys can use as part of a holistic regulatory program.  
15  
16

17 The State Bar also operates a Member Assistance Program and Law Office  
18 Management Program. These programs serve as critical resources for the Lawyer  
19 Regulation Division to direct members who have been identified with practice  
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23 <sup>1</sup> As this Court is aware, the State Bar does not administer lawyer admissions, testing,  
24 or character and fitness – which are administered at the Supreme Court. Therefore,  
25 this Comment will focus on the functions currently under the purview of the State  
Bar and characterized as “regulatory” by Petitioner.

1 management or personal issues that could lead to ethical violations. Disciplinary  
2 counsel will utilize these programs as a means to explore proactive assistance for  
3 members in lieu of harsher sanctions, where appropriate. The public is better  
4 protected when lawyers under difficult or stressful circumstances are able to obtain  
5 the help they need, and continue to practice as healthy and competent attorneys.  
6

7         The State Bar’s integrated status and its intricacies cannot be summarily  
8 separated into two subsets without a thorough understanding and thoughtful  
9 contemplation of what should be deemed regulatory and what could constitute the  
10 “other functions” voluntary approach the Petition takes. The benefits of the State  
11 Bar’s programs to our members and the public is too important to break apart with  
12 a cavalier approach.  
13  
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15                 **C. The Nebraska State Bar Association’s deunification resulted in**  
16                 **an immediate slash to pro bono initiatives and other programs**  
17                 **that serve the court and the public.**

18         The hybrid system proposed by Petitioner is based on Nebraska’s recently  
19 deunified State Bar Association. Pet. at 7-8. Nebraska’s State Bar was deunified in  
20 2013. Contrary to Petitioner’s assertion that this model can be achieved without  
21 “undue adverse effect” on the State Bar, the very organization that Petitioner seeks  
22 to replicate suffered immediate undue adverse effect following deunification. As  
23 explained by Liz Neeley, Executive Director of the Nebraska State Bar Association,  
24 “the impact on the bar has been considerable . . . much of the reduction was in  
25

1 programs such as pro bono efforts and the bar’s minority justice commission.”<sup>2</sup> The  
2 Nebraska Bar was hit with a 25 percent reduction to its budget in the first year of  
3 implementation of this hybrid system. “So the programs that we were forced to  
4 reduce or cut because of our new budget reality were those that serve the court and  
5 the public,” explained Neeley.<sup>3</sup>

7 Modeling our State Bar after Nebraska’s hybrid-system warrants a complete  
8 evaluation of the benefits and consequences associated with such a system. Shortly  
9 after deunification, Nebraska was forced to cut programs that protect the public and  
10 advance access to justice initiatives. Cuts to programs like these undermine the  
11 programs that further the State Bar’s mission pursuant to Rule 32. Such realities  
12 must be considered in determining what State Bar model best serves the Arizona  
13 public, courts, and legal professionals.

16 **III. Petitioner’s reliance on *Janus* to support the proposed Rule 32**  
17 **Amendment is misplaced.**

18 **A. The impact of the *Janus* decision on state bars, if any, is**  
19 **currently under review in the Eighth Circuit.**

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22 <sup>2</sup> Dan Kittay, *Deunification challenge in Michigan, big changes in Nebraska: Part*  
23 *of a trend?* BAR LEADER, May-June 2014,  
24 [http://www.americanbar.org/publications/bar\\_leader/2013-](http://www.americanbar.org/publications/bar_leader/2013-14/may_june/deunification_challenge_michigan_big_changes_nebraska_part_trend.html)  
25 [14/may\\_june/deunification\\_challenge\\_michigan\\_big\\_changes\\_nebraska\\_part\\_tren](http://www.americanbar.org/publications/bar_leader/2013-14/may_june/deunification_challenge_michigan_big_changes_nebraska_part_trend.html)  
[d.html](http://www.americanbar.org/publications/bar_leader/2013-14/may_june/deunification_challenge_michigan_big_changes_nebraska_part_trend.html)

<sup>3</sup> *Id.*

1           In *Janus*, the United States Supreme Court overruled *Abood v. Detroit Bd. of*  
2 *Ed.*, 431 U.S. 209 (1977), and held that public-sector unions could no longer extract  
3 agency fees from nonconsenting employees. 138 S. Ct. at 2486. *Janus* is silent on  
4 fees paid by members of bar associations. *Janus* does not overrule controlling  
5 precedent establishing the constitutionality of compelled membership in an  
6 integrated bar association as a condition to practice law. See *Lathrop v. Donohue*,  
7 367 U.S. 820, 842-843; and *Keller v. State Bar of California*, 496 U.S. 1, 8 (1990).  
8  
9 It is inappropriate to assume that *Janus* silently overruled *Keller*.  
10

11           As provided in the Petition, the United States Supreme Court recently granted  
12 certiorari on appeal from the Eighth Circuit, where a member of the State Bar of  
13 North Dakota asked the Court to review the constitutionality of the State Bar of  
14 North Dakota's fee structure and to overrule *Lathrop* and *Keller*. See *Fleck v. Wetch*,  
15 U.S.S.C. No. 17-886, \_\_\_ S. Ct. \_\_\_, 2018 WL6272044 (December 3, 2018). The Court  
16 vacated the Eighth Circuit's judgment and remanded to the Eighth Circuit for further  
17 consideration in light of *Janus*. How this matter will ultimately be decided by the  
18 Eighth Circuit, and whether these questions of law will be before the United States  
19 Supreme Court again are unknown at this time. What remains controlling Supreme  
20 Court precedent, in the meantime, are *Lathrop* and *Keller*.  
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1                   **B. *Keller* remains controlling authority.**

2                   In *Keller*, demurring members of the State Bar of California challenged the  
3 California Bar’s use of compulsory dues to engage in political lobbying on topics  
4 such as gun control, a nuclear weapons freeze initiative, abortion, and public school  
5 prayer. 496 U.S. 1, 15. The Court looked to *Abood* – now overruled – to hold that a  
6 State Bar could not use mandatory fees to fund activities ideological in nature that  
7 fall outside the purpose of regulating the legal profession or improving the quality  
8 of legal services. *Id.* at 13-14.  
9

10  
11                   In 2014, the Supreme Court affirmed that the *Keller*-test described above can  
12 exist independent of *Abood*. In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court  
13 held that the State of Illinois did not have a compelling state interest to justify  
14 compelling non-union home-care personal assistants, who were not full-fledged  
15 public employees, to pay union fees. The Court declined to follow *Abood*, stating  
16 that the Court was “confining *Abood*’s reach to full-fledged state employees” – and  
17 because these personal assistants were not full-fledged public employees, *Abood* was  
18 not controlling in this case. *Id.* at 2638.  
19

20  
21                   In *Harris*, the Court specifically addressed how the refusal to extend *Abood*  
22 to the situation presented in that case cannot be interpreted as calling *Keller* into  
23 question with respect to membership and the associated fees as a condition to  
24 practice law. *Id.* at 2643. The Court reaffirmed that states have an interest in  
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1 regulating the legal profession and improving the quality of legal services, as well  
2 as ensuring that attorneys – not the general public – fund the expense of ensuring  
3 ethical attorney conduct. The *Harris* Court concluded that their decision was  
4 “wholly consistent with our holding in *Keller*.” *Id.* Therefore, Petitioner’s attempt to  
5 take piecemeal holdings and dicta from public union cases does not fit the First  
6 Amendment framework applied by the Supreme Court to integrated bars.  
7

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9 **C. The State Bar carries out its mission and activities in conformity  
10 with *Keller*, with a focus on protection of the public.**

11 As a mandatory bar, the State Bar follows a “*Keller*-pure” policy and does not  
12 use membership fees to fund activities of a political or ideological nature that are not  
13 reasonably related to the legal profession or improving the quality of legal services.  
14 This is now explicitly set forth in amended Rule 32(c)(8).

15  
16 This Court wisely incorporated the *Keller* standard at Rule 32(c)(8) when this  
17 Court revised the Rule in 2017. Having this *Keller*-pure standard codified in Rule  
18 32, ensures that both the State Bar and the public understand the State Bar’s mandate  
19 to serve and protect the public, and not for the purpose of advancing any faction of  
20 our memberships’ agenda. This Court, through Rule 32, has made the State Bar’s  
21 mandate to serve and protect the public unequivocal.  
22

23 However, the State Bar has followed the Supreme Court’s *Keller*-pure  
24 mandate long before the incorporation of the explicit reference in Rule 32. The State  
25

1 Bar observes *Keller* by ensuring that membership fees are expended for activities  
2 that are germane to the goals of regulating the legal profession and improving the  
3 quality of legal services. Even though the State Bar uses annual fees only for *Keller*-  
4 pure lobbying activities, under amended Rule 32, a member may still object to and  
5 receive a refund of the annual fee allocable to those activities. *See* Rule 32(c)(8).  
6  
7 Petitioner’s citation to case law regarding union loans from union members to  
8 compare to Rule 32’s opt-out provision is misplaced, since the State Bar is not a  
9 union and does not function as a union.  
10

11         The integrated bar allows the State Bar to carry out the mission and  
12 empowerments of Rule 32 in a nonpartisan manner. Because the State Bar must  
13 comply with *Keller*, the State Bar must focus its programs and activities on  
14 protection of the public – setting aside political or ideological deliberations that  
15 distract from our core endeavors to advance our members’ competency, ethics and  
16 professionalism, and promote access to justice.  
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19         Placing these programs and services under the umbrella of a voluntary bar not  
20 only dilutes the efficacy of these well established and constructive programs, but  
21 also undermines the Bar’s mission statement. Protection of the public should not  
22 depend on how “attractive” (e.g., “low”) membership fees are. An integrated bar  
23 benefits from economies of scale to provide quality services to members and the  
24 public in the most economically efficient manner. Placing some of the most valuable  
25

1 community-oriented programs under a “voluntary” budget will diminish funds for  
2 them, and detract from the value and purpose of the legal profession as a whole.

3 A voluntary bar will also position the State Bar outside the obligations of  
4 *Keller*. Like other voluntary bars that must heed the political and ideological  
5 inclinations of their membership to retain members, the “voluntary” portion of the  
6 Arizona State Bar would have to shift focus from protection of the public to  
7 membership retention. Making services available for those who need it the most and  
8 are the least able to afford it is a duty all members of the profession should bear, or  
9 these services will become unavailable.

12 **IV. The State Bar is fully transparent with finances and makes**  
13 **information accessible to the public.**

14 **A. Annual fees are established by administrative order, and the**  
15 **State Bar posts its approved annual budget, IRS Form 990, and**  
16 **financial audit reports to its website.**

17 This Court, after receiving a recommendation from the State Bar’s Board of  
18 Governors, sets by administrative order, the respective membership fee amount for  
19 each membership category. The latest administrative order addressing fees was  
20 issued by this Court in 2018, and ordered that there be no increase in any of the  
21 membership fee categories until further order of the Court. Administrative Order No.  
22 2018-67.

24 The State Bar’s budgeted expenditures funded by these fees is available to  
25

1 Petitioner and the general public on the State Bar's website at  
2 <https://www.azbar.org/AboutUs/FinancialStatements>. Included on this webpage is a  
3 current, approved State Bar Budget. This Budget provides actual numbers for  
4 revenue and expenses – by category in detail – for the past two years, projections,  
5 and the approved budget for the budget-year. The information contained in this  
6 statement of operations provides far more transparency with respect to the State  
7 Bar's expenditures than what Petitioner seeks by way of Petitioner's proposed  
8 amendments to Rule 32.  
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11 Additionally, the State Bar recently started posting a Lobbying Report. This  
12 Report contains information regarding the State Bar's lobbying activities in the prior  
13 year, including the breakdown of the lobbying cost per member. This Lobbying  
14 Report can be found at:  
15

16 <https://www.azbar.org/media/1873917/2018legislativeannualreport-lobbying.pdf>.

17 The State Bar is also subject to public access policies, including a Public  
18 Records Policy. Ariz. Sup. Ct. Admin. Order 2017-102. If Petitioner, or anybody,  
19 seeks information not provided on the State Bar's website, a public records request  
20 can be made for such disclosure.  
21

22 To ensure transparency, the State Bar's Board of Governors must take actions  
23 in public meetings. Ariz. Sup. Ct. Admin. Order 2017-34. Members and the public  
24 may speak at Board meetings, and the minutes from these meetings are kept and  
25

1 published.

2 **B. Because the State Bar does not expend mandatory fees on**  
3 **nonchargeable expenditures, the opt-in system proposed in the**  
4 **Petition is futile.**

5 In *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298,  
6 302 (2012), the Court faced the question of “whether the First Amendment allows a  
7 public-sector union to require objecting members to pay a special fee for the purpose  
8 of financing the union’s *political and ideological activities*.” (emphasis added.) The  
9 Court held that public-sector employees cannot be compelled to pay, even  
10 temporarily, special assessments *to fund political speech* – therefore, unions must  
11 file the notice procedures set forth in *Teachers v. Hudson*, 475 U.S. 292 (1986) prior  
12 to charging a union assessments for *political expenditures*. *Id.* at 321-322.

13  
14  
15 As explained in detail *supra*, the State Bar strictly adheres to *Keller* and  
16 *Keller’s* progeny with respect to programs and activities, including lobbying,  
17 supported by membership fees. If a member, like Petitioner, disagrees with a  
18 position the State Bar takes or an activity the State Bar funds, this disagreement  
19 alone does not make the position or activity per se nonchargeable. The Petition  
20 conflates the obligation to itemize chargeable expenditures with the mandate  
21 established by First Amendment jurisprudence for public unions and associations to  
22 itemize nonchargeable assessments prior to collecting these fees from nonconsenting  
23  
24  
25 members.

1           **V.    Audit of State Bar financial records.**

2           Petitioner’s proposed incorporation of audit-language into Rule 32 is  
3 fundamentally flawed for several reasons, as addressed below.  
4


5           First, under Petitioner’s proposed mandatory subset, Petitioner defines  
6 “regulation” as admissions, testing, character and fitness – all three of which are  
7 currently under the purview of the Supreme Court – specialty certification, oversight  
8 of CLE, and attorney discipline. This would essentially convert the State Bar into a  
9 regulatory and licensing agency – agencies of which are not contemplated in First  
10 Amendment case law drawing analogies between unions, state bars, and trade  
11 associations. The justification for incorporating this type of *Hudson* notice  
12 requirement proposed in the Petition to this mandatory subset is perplexing,  
13 especially in light of the vast financial information that the State Bar currently  
14 provides, itemizing all revenue and expenditures by category.  
15  
16

17           In contrast, if the voluntary subset is supported by purely voluntary  
18 assessments, why would this voluntary subset be required to ensure that lobbying  
19 and other activities are in furtherance of improving the quality of legal services (the  
20 second prong of the two-prong *Keller* test), as proposed by Petitioner? See Pet. at  
21 15. This voluntary subset could take political and ideological positions without  
22 worry of impingement on the First Amendment rights of its members because  
23 participation would be purely voluntary.  
24  
25

1 **CONCLUSION**

2 The State Bar agrees with Petitioner that this Court is the proper forum to  
3 decide the mission, structure, and governance of the State Bar. However, the State  
4 Bar disagrees with Petitioner's recommendation in all other respects. For the  
5 reasons stated in this Comment, the State Bar opposes the proposed Rule 32  
6 amendments requested by Petitioner and respectfully requests that the Court deny  
7 the Petition.  
8  
9

10  
11 RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of April, 2019.

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13   
14 Lisa M. Panahi  
15 General Counsel  
16

17 Electronic copy filed with the  
18 Clerk of the Supreme Court of Arizona  
19 this 22<sup>nd</sup> day of April, 2019.

20 by:   
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