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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 3, RULES OF PROCEDURE FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS**	Supreme Court No. R-__-_____ **PETITION TO AMEND RULE 3, RULES OF PROCEDURE FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the New Civil Liberties Alliance ("NCLA") petitions this Court to amend Arizona Rule of Procedure for Judicial Review of Administrative Decisions 3 ("JRAD Rule 3"). NCLA is a nonprofit civil-rights organization and public-interest law firm devoted to defending constitutional freedoms. NCLA was founded to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other means of advocacy.

The proposed amendments to JRAD Rule 3 will remedy the inadvertent adoption of the preliminary-injunction standard as the "good cause" standard under

A.R.S. § 12-911 for stays of administrative decisions ("2018 JRAD Rule 3 Amendment"). The proposed rule would replace the preliminary-injunction standard with the court-recognized "colorable claim" standard for stays adopted under A.R.S. § 12-911. The standard for evaluating preliminary injunctions is a more exacting standard of review than the "good cause" standard contemplated by the legislature and prevailing caselaw when the 2018 JRAD Rule 3 Amendment was adopted. Thus, amending JRAD Rule 3 to recognize the "colorable claim" standard would protect litigants' statutory right to the stay remedy and give practical effect to the legislature's design. The proposed amendment to JRAD Rule 3 would also accomplish the goal of the 2018 JRAD Rule 3 Amendment—to aid litigants seeking stays of administrative decisions by including core factors courts apply when addressing and evaluating stays.

I. Background and Purpose of the Proposed Rule Amendments

In 1993, the Supreme Court promulgated the JRAD rules, which remained in original form until 2012 when the Arizona State Legislature ("Legislature") amended the Judicial Review of Administrative Decisions Statutes ("JRAD statutes") (A.R.S. §§ 12-910 to -914). *See* Petition to Amend the Rules of Procedure for Judicial Review of Administrative Decisions, Arizona Supreme Court No. R-17-0013 at 1 (Jan. 4, 2017) *available at* https://www.azcourts.gov/Rules-Forum/aft/660 ("2018 JRAD Amendment Petition"). In 1995, the Legislature had established the Office of Administrative Hearings ("OAH"). *Id.* Later in 2012, after the Legislature amended the

JRAD statutes, the Court adopted revisions to the JRAD rules, "but the revisions were not intended and were not sufficient to address all of the Legislature's 2012 changes or the changes previously enacted in 1995 to the JRAD statutes and the OAH statutes." *Id.*

In 2018, the State Bar of Arizona ("State Bar") proposed comprehensive amendments to the JRAD procedural rules. *Id.* at 1. The proposed amendments were the product of the State Bar's JRAD Rules Study Group's broad review of the JRAD rules and were designed to "help litigants more easily navigate the process of appealing administrative decisions under the JRAD statutes." *Id.* at 2. The State Bar's proposal included the 2018 JRAD Rule 3 Amendment. *Id.* at 4, Appendix A. The language developed for the 2018 JRAD Rule 3 Amendment is based on "the standard announced by the Supreme Court in *Smith v. Arizona Citizens Clean Elections Com'n*, 212 Ariz. 407 (2006)." *Id.* The Court adopted the State Bar's proposal, and the amended JRAD Rule 3 became effective on January 1, 2018. Order Amending the Rules of Procedure for Judicial Review of Administrative Decisions, Arizona Supreme Court No. R-17-0013 (Aug. 31, 2017) *available at* https://www.azcourts.gov/Rules-Forum/aft/660 ("JRAD Final Order").

NCLA now requests that the Court amend JRAD Rule 3 for the reasons discussed below. The proposed changes are attached. Appendix A is a redlined version of the proposed changes and Appendix B is a clean version of the proposed changes. Appendix C is the Proposed Form 3.

A. Judicial Review of Administrative Decisions Is Governed by A.R.S. and JRAD

A.R.S. § 12-911(A)(1) authorizes the Superior Court to "stay the decision" of the administrative agency "for good cause shown." The stay may be granted "[w]ith or without bond, … and before or after the [appellee's] filing of the notice of appearance." *Id.* Prior to the 2018 JRAD Rule 3 Amendment, JRAD Rule 3(a) similarly read that: "The motion for stay of an administrative decision shall not be granted without good cause and without reasonable notice to all parties." Pre-amendment JRAD Rule 3 also stated that: "A stay of an administrative decision may be conditioned upon the filing of a bond in superior court by the moving party or upon such other conditions as the court directs. A stay, if granted, shall be effective upon compliance with all conditions imposed by the court."

In 2018, the State Bar petitioned to amend JRAD Rule 3 to "provide[] the framework for motions to stay." *See* JRAD Amendment Petition at 4. The State Bar developed its proposal to aid—not hinder—litigants seeking to stay administrative decisions by including the "core factors" courts apply when addressing and evaluating stays. Its language derived from the standard articulated by the Supreme Court in *Smith v. Arizona Clean Elections Com'n*, 212 Ariz. 407, 132 P.3d 1187 (2006). *Id.* In August 2017, the Court adopted the amended rule, and it became effective on January 1, 2018. *See* JRAD Final Order.

However, at the time the 2018 JRAD Rule 3 Amendment came into effect, the standard articulated in *Smith* was inapplicable to judicial review of administrative decisions. *Smith* expressly adopted the four-factor test for preliminary injunctions articulated in *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787 (App. 1990), for granting stays under the Arizona Rules of Civil Appellate Procedure ("ARCAP")—*not* under JRAD Rule 3. *See Smith*, 212 Ariz. at 410, 132 P.2d 1190 (appealing under ARCAP 7(c)); *see also Shoen*, 167 Ariz. at 63, 804 P.2d 792 (applying "traditional equitable criteria" to a request for preliminary injunction). ARCAP only "govern[s] procedures in civil appeals to the Arizona Court of Appeals and the Arizona Supreme Court, as well as appeals and special actions governed by other rules that expressly incorporate the provisions of these Rules." ARCAP 1(b).

Critically, ARCAP *does not* govern judicial review of administrative decisions in Arizona Superior Court under JRAD. As JRAD Rule 1(a)–(b) states, "These rules govern the procedure in all appeals from final administrative decisions brought to the superior court pursuant to A.R.S. §§ 12-901 to -914" and "[e]xcept as provided elsewhere in these rules, the Arizona Rules of Civil Procedure *do not apply* to proceedings held pursuant to A.R.S. §§ 12-901 to -914." *Id.* (emphasis added); *see also Campbell v. Chatwin*, 4 Ariz. App. 504, 509, 421 P.2d 937, 942 (1966), *reversed on other grounds*, 102 Ariz. 251, 428 P.2d 108 (1967) (The JRAD Act, specifically A.R.S. § 12-911, "prevails over" Arizona Rule of Civil Procedure). JRAD Rule 13 further confirms this and clarifies that ARCAP applies only "to appeals from a final decision, order,

judgment, or decree of the superior court in an action to review a final administrative decision. Such appeals must be to the court of appeals in the first instance." *See* JRAD Rule 13(a). It follows from the usual application of the *expressio-unius-est-exclusio-alterius* principle that by expressly *not* incorporating ARCAP into JRAD, JRAD precludes applying ARCAP in superior-court JRAD administrative appeals.

B. The Standard Adopted by the 2018 JRAD Rule 3 Amendment Was Inapplicable and the Court Should Amend the Rule Under the Appropriate Standard as Articulated in *P&P Mehta*

At the time the 2018 JRAD Rule 3 Amendment was adopted, the *Smith/Shoen* standard that formed the amended rule's basis was inapplicable to judicial review of administrative decisions. The *Smith/Shoen* standard not only developed under procedural rules not relevant here, but it was also established under a completely different procedural posture. *See Smith*, 212 Ariz. at 410, 132 P.2d 1190 (applying "the traditional criteria for the issuance of preliminary injunctions" to "requests for stays in the appellate context"). Moreover, the standard for evaluating preliminary injunctions is a more exacting standard of review than the "good cause" standard contemplated by the legislature in A.R.S. § 12-911(A)(1) and prevailing caselaw at the time the 2018 JRAD Rule 3 Amendment went into effect.

The standard for determining "good cause" under A.R.S. § 12-911(A)(1) was articulated in *P&P Mehta v. Jones*, 211 Ariz. 505, 507 ¶ 5, 123 P.3d 1142 (App. 2005). The court in *P&P Mehta* was asked to adopt the same "stringent test" used for

preliminary injunctions, but it instead adopted a "less exacting approach." *Id.* at 506 ¶ 2, 123 P.3d at 1143. It concluded that in the context of A.R.S. § 12-911(A)(1), the four-factor test for granting stays articulated in *Shoen*, 167 Ariz. 58, 804 P.2d 787, "*does not* provide an appropriate template by which to judge whether a stay of an administrative agency's decision should be granted." *P&P Mehta*, 211 Ariz. at 508 ¶ 15, 123 P.3d at 1145 (emphasis added). Instead the court adopted a two-factor test: the petitioner must show "a colorable claim and that the balance of harm favors granting the stay." *Id.* at 510 ¶ 25, 123 P.3d at 1147.

Establishing a colorable claim of error "does not mean a showing that the petitioner is reasonably likely to prevail on appeal." *Id.* at 510 ¶ 21, 123 P.3d at 1147 (cleaned up). Rather "it requires something less": "an assertion that is seemingly valid, genuine, or plausible, under the circumstances of the case." *Id.* (cleaned up). Thus, "a petitioner seeking a stay of an agency decision must demonstrate, as regards substantive merit, that his petition presents a seemingly valid, genuine, or plausible claim under the circumstances of the case." *Id.* at 510 ¶ 22, 123 P.3d at 1147.

With regard to the "balance of harm" factor, *P&P Mehta* concluded that "[a] degree of harm such as 'irreparable,' is not required, but it is not enough for the petitioner simply to demonstrate some harm." *Id.* at 510 ¶ 23, 123 P.3d at 1147. "[T]he petitioner's harm must be weighed against the harm that would accrue to the agency or other parties to the proceedings. Only if the court concludes that the balance of harm tips in favor of the petitioner has he shown the 'harm' necessary to constitute 'good

cause.'" *Id.* Furthermore, the court can "mitigate potential harm to the agency's interest or that of another party" by employing other "tools at its disposal," such as JRAD Rule 3(c) which "permits the court to set appropriate conditions upon a stay request and, if monetary or performance considerations are involved, require a security or performance bond of the petitioner." *Id.* at 510 ¶ 24, 123 P.3d at 1147. "Employing" such tools "may allay the harm to others sufficiently to permit the court to find that the balance of harm favors a petitioner." *Id.*

While the language and reasoning of *P&P Mehta* is clear, the amended text of JRAD Rule 3(b) contradicts it:

> The superior court may grant the motion for stay pending appeal for good cause shown. The motion for stay must address the following: 1. The strong likelihood of success on the merits;
> 2. The irreparable harm if the stay is not granted;
> 3. The harm to the requesting party outweighs the harm to the party opposing the stay; and
> 4. Whether the public policy favors the granting of the stay.

The inclusion of *Smith/Shoen* in the 2018 JRAD Rule 3 Amendment makes little sense, especially because there is already another appellate case precisely on point providing the test for granting stays under A.R.S. § 12-911 and JRAD Rule 3—*P&P Mehta*. The Supreme Court in *Smith* (which adopted the *Shoen* standard under ARCAP 7(c)) *did not vacate* the Court of Appeals' decision in *P&P Mehta* (which adopted the aforementioned two-factor test under JRAD Rule 3). They are not even decisions on "the same legal issue." *Cf. Francis v. Ariz. Dep't of Transp.*, 192 Ariz. 269, 271 ¶¶ 10–11, 963 P.2d 1092, 1094 (App. 1998) (discussing doctrine of stare decisis and binding precedent). Further,

there is absolutely *no indication* in *Smith* that *Shoen* governs stay requests filed under JRAD Rule 3. The inclusion of *Smith/Shoen* was simply a mistake that the Court should now correct. In fact, ARCAP 7(c) governs only stays of proceedings "while an appeal is pending" in the Court of Appeals or in the Supreme Court, and *Smith* applies only in that context.

C. Failing to Amend JRAD Rule 3 in Conformity with *P&P Mehta* Would Strip Petitioners of Substantive Rights Granted by the Legislature

At the time the 2018 JRAD Rule 3 Amendment was proposed and adopted, *P&P Mehta* provided the test for evaluating stay requests under A.R.S. § 12-911(A)(1). *P&P Mehta* remains the definitive and directly on-point implementation of the "good cause" language the legislature enacted in A.R.S. § 12-911(A)(1). To harmonize the court rule and the statute, courts look to the "primary intent of the statute." *Id.* The *P&P Mehta* court did exactly that when it concluded that using the *Shoen* factors "would simply not be a plausible construction of legislative intent." 211 Ariz. at 507 ¶ 11, 123 P.3d at 1144.

Yet, applying the *Shoen* factors inadvertently embedded in JRAD Rule 3(b) would "abridge, enlarge, or modify" a petitioner's "substantive rights created by statute," which is inappropriate for mere rules of procedure. *Id.* Indeed, "[r]ules promulgated by the Arizona Supreme Court, such as [JRAD Rule 3(b)], can only affect procedural matters and cannot abridge, enlarge, or modify substantive rights created by statute. … If a rule and a statute appear in conflict, the rule is construed in harmony with the

statute." *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433, 937 P.2d 353, 355 (App. 1996). Applying *Shoen* in the JRAD context "asks the near-impossible" of petitioners seeking review of administrative decisions in Arizona Superior Court under JRAD. *P&P Mehta* at ¶ 10. The legislature did not intend the "'good cause' standard to mirror *Shoen*'s 'traditional equitable criteria.'" *Id.* at ¶ 8. Moreover, the *P&P Mehta* court "decline[d] to attribute to [the Legislature] an intention to incorporate the 'strong likelihood of success/irreparable harm' test into the meaning of 'good cause'" because it would "effectively render illusory the stay remedy it created." *Id.* at ¶ 19, 123 P.3d at 1146 (noting that "the legislature intended 'good cause' to involve a less exacting standard). The *Shoen* standard, which has been inadvertently embedded in JRAD Rule 3(b) is not apposite under A.R.S. § 12-911(A)(1). The Court should correct this error promptly.

II. Contents of Proposed Rule Amendment

The proposed changes are attached. Appendix A is a redlined version of the proposed changes. Appendix B is a clean version of the proposed changes. Appendix C is a redlined version of Form 3. Appendix D is a clean version of proposed Form 3.

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RESPECTFULLY SUBMITTED this 9th day of January, 2020.

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APPENDIX A

Rule 3. Stay of an Administrative Decision

(a) Motion for Stay Pending Appeal. A party may file with the clerk of the superior court a motion to stay a final administrative decision, in whole or in part, pending the final disposition of the appeal, pursuant to A.R.S. § 12–911. The motion for stay must be a separate filing from the notice of appeal required by A.R.S. § 12–904. The party filing the motion for stay must provide proper notice to the agency affected and all other parties to the proceeding before the agency. Form 3 is a template for the motion for stay.

(b) Standard for Issuance of Stay Pending Appeal. The superior court may grant the motion for stay pending appeal for good cause shown. The motion for stay must ~~address the following~~show:

1. ~~The strong likelihood of success on the merits;~~A colorable claim demonstrating, as regards substantive merit, a seemingly valid, genuine, or plausible claim under the circumstances of the case; and

2. ~~The irreparable harm if the stay is not granted;~~That the balance of harm favors granting the stay.

~~3. The harm to the requesting party outweighs the harm to the party opposing the stay; and~~

~~4. Whether the public policy favors the granting of the stay.~~

(c) Bond on Appeal. A stay of an administrative decision may be entered in superior court with or without bond, except if otherwise provided by statute.

APPENDIX B

Rule 3. Stay of an Administrative Decision

(a) Motion for Stay Pending Appeal. A party may file with the clerk of the superior court a motion to stay a final administrative decision, in whole or in part, pending the final disposition of the appeal, pursuant to A.R.S. § 12–911. The motion for stay must be a separate filing from the notice of appeal required by A.R.S. § 12–904. The party filing the motion for stay must provide proper notice to the agency affected and all other parties to the proceeding before the agency. Form 3 is a template for the motion for stay.

(b) Standard for Issuance of Stay Pending Appeal. The superior court may grant the motion for stay pending appeal for good cause shown. The motion for stay must show:

1. A colorable claim demonstrating, as regards substantive merit, a seemingly valid, genuine, or plausible claim under the circumstances of the case; and

2. That the balance of harm favors granting the stay.

(c) Bond on Appeal. A stay of an administrative decision may be entered in superior court with or without bond, except if otherwise provided by statute.

APPENDIX C

Form 3 – Motion for Stay

A.R.S. § 12-911(A)(1)
Distribution:
Clerk of Superior Court—Original
Judge—1
Each party—1

Attorney or Party Name
State Bar No. (if any)
Law Firm Name (if any)
Complete Mailing Address
Telephone Number
Email Address
Attorney for _____ (party name)

SUPERIOR COURT OF ARIZONA
_____ COUNTY

_____ Appellant,	)	Case No. _____
vs.	)	MOTION FOR STAY OF AGENCY DECISION
_____ Appellee.	)	
_____	)	

Appellant moves the Court pursuant to A.R.S. § 12-911(A)(1) and JRAD Rule 3 for a stay of decision of [name of agency] of [date of entry] until final disposition of this action for review of that decision. This motion is made for the reasons stated in the attached Memorandum of Points and Authorities.

DATED this _____day of _____, 20__

_____
Signature of Attorney or
Self-Represented Party

Continued

Form 3 *Continued*

MEMORANDUM OF POINTS AND AUTHORITIES [State procedural background, facts and argument. Pursuant to Rule 3(b), the memorandum must address ~~1. A strong likelihood of success on the merits; 2. Irreparable harm if the stay is not granted; 3. That the harm to the requesting party outweighs the harm to the party opposing the stay; and 4. That the public policy favors the granting of the stay.~~ 1. A colorable claim demonstrating, as regards to substantive merit, a seemingly valid, genuine, or plausible claim under the circumstances of the case; and 2. That the balance of harm favors granting the stay.]

_____
Signature of Attorney or
Self-Represented Party

Copy of the foregoing [mailed/delivered]
this _____ day of _____, 20 ___, to:
[Attorney or Party Name]
by: _____

APPENDIX D

Form 3 – Motion for Stay

A.R.S. § 12-911(A)(1)
Distribution:
Clerk of Superior Court—Original
Judge—1
Each party—1

Attorney or Party Name
State Bar No. (if any)
Law Firm Name (if any)
Complete Mailing Address
Telephone Number
Email Address
Attorney for _____ (party name)

SUPERIOR COURT OF ARIZONA
_____ COUNTY

_____ Appellant,	)	Case No. _____
vs.	)	MOTION FOR STAY OF AGENCY DECISION
_____ Appellee.	)	
_____	)	

Appellant moves the Court pursuant to A.R.S. § 12-911(A)(1) and JRAD Rule 3 for a stay of decision of [name of agency] of [date of entry] until final disposition of this action for review of that decision. This motion is made for the reasons stated in the attached Memorandum of Points and Authorities.

DATED this _____day of _____, 20__

_____
Signature of Attorney or
Self-Represented Party

Continued

Form 3 *Continued*

MEMORANDUM OF POINTS AND AUTHORITIES [State procedural background, facts and argument. Pursuant to Rule 3(b), the memorandum must address 1. A colorable claim demonstrating, as regards to substantive merit, a seemingly valid, genuine, or plausible claim under the circumstances of the case; and 2. That the balance of harm favors granting the stay.]

_____
Signature of Attorney or
Self-Represented Party

Copy of the foregoing [mailed/delivered]
this _____ day of _____, 20 ___, to:
[Attorney or Party Name]
by: _____