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

9 In the Matter of:

Supreme Court No. R-23-0002

10 **PETITION TO AMEND RULE 106**
11 **OF THE ARIZONA RULES OF**
12 **EVIDENCE**

COMMENT

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition. The State Bar supports the proposed amendment.

16 **I. RULE 106 AND THE PETITION’S PROPOSED CHANGES**

17 When a party introduces part of a written or recorded statement into evidence,
18 Rule 106, also known as the “Rule of Completeness,” allows the adverse party to
19 introduce any other written or recorded statement that, in fairness, ought to be
20 considered at the same time. On its face, the Rule applies only to a “writing or
21 recorded statement,” and it does not address whether the adverse party may
22 introduce a completing statement if, as introduced by the adverse party, the
23 completing statement would constitute hearsay.
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1 On June 7, 2022, the U.S. Judicial Conference Committee on Rules of Practice
2 and Procedure approved a proposed change to Federal Rule of Evidence 106, whose
3 language is currently identical to Arizona’s version of the rule. If this change takes
4 effect, the proposed change to Federal Rule 106 will address the textual limitations
5 on the type of statements to which the rule applies and will expressly address the
6 hearsay issue.¹ In particular, the proposed changes to the federal rule are as follows
7 (with deletions in ~~striketrough~~ and additions in underline):
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10 **Rule 106. Remainder of or Related ~~Writings or Recorded~~**
11 **Statements**

12 If a party introduces all or part of a ~~writing or recorded~~ statement, an
13 adverse party may require the introduction, at that time, of any other
14 part—or any other ~~writing or recorded~~ statement—that in fairness
15 ought to be considered at the same time. The adverse party may do so
over a hearsay objection.

16 The proposed federal rule change also includes a lengthy comment explaining
17 both the history of the rule of completeness and the issues the rule change is intended
18 to address.
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22 ¹ The Committee has approved the proposed amendment to Federal Rule 106 and
23 transmitted it to the United States Supreme Court. The Supreme Court has until May
24 1, 2023, to propose the amendment to Congress, and Congress will then have until
25 December 1, 2023, to approve, modify, or reject the amendment. If Congress does
not approve the amendment or defer action on it by the deadline, the amendment
will become effective on December 1, 2023.

1 The Petition proposes adopting identical changes to Arizona Rule 106,
2 without the comment approved by the Standing Committee.

3 **II. THE STATE BAR SUPPORTS THE PETITION**

4 The State Bar supports the amendments proposed by the Petition for three
5 reasons.
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7 First, by removing the references to written or recorded statements, the
8 proposed amended rule would reflect the reality that many statements (*e.g.*, oral
9 statements, sign language, and non-verbal gestures), are neither written nor recorded.
10 Substantively, there is no difference between these types of statements and, thus, no
11 reason to distinguish between them in a rule intended to promote fairness.
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13 Second, the proposed amendments will conform Rule 106 to the common law.
14 As the Petition outlines, since at least 2005, Arizona Courts have held that
15 completing statements can be admitted over hearsay objections. *See State v.*
16 *Prasertphong*, 210 Ariz. 496, 499 ¶ 15 (2005); *State v. Reed*, 1 CA-CR 08-0097,
17 2009 WL 1025572, **3-4 ¶¶10-19 (App. Apr. 16, 2009) (mem. dec.). A rule of
18 evidence that comports with the common law promotes both judicial efficiency and
19 fairness.
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22 Third, and again assuming the proposed change to Federal Rule 106 becomes
23 effective, adopting the amendments proposed by the Petition will ensure that
24 Arizona's rule continues to conform with its federal counterpart. This is consistent
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1 with the charge this Court gave to the Advisory Committee to “compare the rules to
2 the Federal Rules of Evidence” and “recommend revisions and additional rules as
3 the Committee deems appropriate.” Ariz. S. Ct. Admin. Order 2012-43 (June 11,
4 2012).

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6 In sum, the amendments proposed by the Petition are consistent with existing
7 law, make good sense, and promote Arizona public policy.

8 **III. THE COMMENT TO THE PROPOSED FEDERAL AMENDMENT**

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10 The Petition acknowledges that the proposed amendment to Federal Rule 106
11 includes a comment but omits that comment from the proposed change to Arizona
12 Rule 106. The State Bar agrees that the comment should not be included in any
13 change to Arizona Rule 106. Not only is the proposed amended Rule 106 clear on
14 its face, practitioners will have the benefit of the comment if the proposed
15 amendment to Federal Rule 106 becomes effective.
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17 **IV. A NOTE ON THE EFFECTIVENESS OF THE PROPOSED FEDERAL** 18 **AMENDMENT**

19 As explained in footnote 1, *supra*, it is possible that the proposed amendment
20 to Federal Rule 106 will not become effective. The historical adoption of proposed
21 rule changes that have been approved by the U.S. Judicial Conference and
22 transmitted to the Supreme Court suggests it is highly likely the proposed
23 amendments to Federal Rule 106 will become effective. If, however, Congress
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1 either amends, rejects, or defers the proposed amendments, the State Bar
2 recommends that this Court nonetheless adopt the Petition's proposed changes to
3 Arizona's Rule 106, or at least revisit the proposed changes before they would
4 otherwise become effective on January 1, 2024.
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6 **V. CONCLUSION**

7 The State Bar therefore fully supports the Petition and the amendments to Rule
8 106 that it proposes.
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10 RESPECTFULLY SUBMITTED this 1st day of May, 2023.
11

12 */s/ Lisa M. Panahi*

13 Lisa M. Panahi
14 General Counsel
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16 Electronic copy filed with the
17 Clerk of the Supreme Court of Arizona
18 this 1st day of May, 2023.

19 by: PSeguin
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