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2023 JPR Task Force
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In the Matter of:	)
	) SUPREME COURT NO. R-23-0036
PETITION TO AMEND RULES	)
OF PROCEDURE FOR JUDICIAL	)
PERFORMANCE REVIEW IN THE	) Comment on Petition to Amend Rules
STATE OF ARIZONA (ALL)	) of Procedure for Judicial
	) Performance Review in the State of
	) Arizona
	)
_____	)

Pursuant to Rule 28, Rules of the Supreme Court, Kathryn Townsend, member of the JPR Task force established by Administrative Order 2023-24 respectfully petitions this Court to adopt amendments to the proposed Rules of Procedure for the Commission on Judicial Performance Review.

I. Reasons Proposed Rules should be Amended

It is not an exaggeration to say that merit selection in Arizona is in jeopardy due to the efforts of a few bad actors. In the last election, retention of Arizona judges was politicized in a way that undermines the independent judiciary that merit selection was established to protect. Not only was there an effort to politicize judicial retention, those bad actors used Judicial Performance Review as a weapon against the judges they had targeted. If something isn't done to address the weaknesses of the current JPR system in a

meaningful way, we will see campaigns against judges like those in other states where thousands, if not millions, of dollars are spent. In response, judges will have to figure out how to raise money, campaign within the constraints of the judicial code of conduct, and defend themselves if they want to keep their jobs. Some judges currently on the bench have said that if something isn't done, they will simply leave the bench prior to their retention election because they are unwilling to risk the reputational hit of losing a retention election. They are also unwilling to engage in a political fight for a job that pays far less than private practice, offers a miserly retirement, and opens them to condemnation from the left and the right. Not only will a failure to meaningfully reform the JPR process result in the loss of experienced judges, it also will result in difficulty recruiting qualified judges to join the bench.

No matter how good the merit selection process is in Arizona, the judiciary will only be as good as the people who are willing to serve. The citizens of Arizona deserve a sincere effort to protect merit selection from politicization so that good people continue to be willing to serve and new people will be willing to join the bench.

In order to protect merit selection, it's essential that the systemic vulnerabilities the 2022 retention election revealed are addressed by making reformational changes to the way JPR is done in this state. Unfortunately, the efforts of the JPR task force established by Administrative Order 2023-24 are a sincere attempt to refine the JPR process, but they are not an attempt to reform it.

This response contains two possible revisions of the proposed rules from the 2023 task force. The two revisions address the need for reform in different ways.

Appendix A changes the written standards by which a judge is evaluated in a significant way and, as a corollary, also changes who is surveyed regarding a judge's performance and what evaluation tools are used. It also requires the Commission to use a Court approved survey instrument. It addresses how votes are counted and reported and it requires a Commission member to explain a vote against retention.

Appendix B changes the way survey data is collected, analyzed, voted on and reported in a significant way. Both proposals go much farther than the task force recommendations in addressing the weaknesses of the current system and either proposal would be more effective in deweaponizing the JPR process than the task force proposals. They are being submitted as two separate appendices because they are not compatible with one another, but either would go further to protect merit selection than the task force proposal does.

II. Alternative Proposal Appendix A

The task force's proposed Rule 5(a) attempts to address the constitutionally required written standards by offering a set of attributes that the task force felt judges should display. Unfortunately, all of the attributes the task force identified lack a metric by which a justice or judge can determine if he or she is conducting him or herself in a way that will meet the subjective expectations of a widely divergent set of people who will be evaluating him or her. They also lack a metric by which survey respondents can determine if a justice or judge meets any of the standards.

In an era when a US Supreme Court nominee is unwilling to provide a definition for the word "woman," and being born with white skin is seen as evidence of bias, how

can we expect that there is going to be agreement from attorneys, witnesses, juries, parties, and court staff who all have different world views, different life experiences, and different political opinions on what impartiality and freedom from bias means, whether or not written and oral communication is clear, or if someone's judicial temperament leads them to show the proper amount of respect for everyone?

A list of attributes, however important those attributes may be, is not the written standards the Arizona Constitution calls for. What the task force has done is continue the error of the prior rules, which is to conflate conduct with performance. The two are not the same. Labeling judicial attributes performance standards doesn't transform attributes into performance standards any more than calling beef a flower turns a hamburger into a rose.

When evaluating performance, the focus is on what was done. When evaluating conduct, the focus is on how it was done. Think of an athlete. If we want to evaluate his athletic performance, we look at measurable data points. We can measure the outcomes of the race. We can determine how fast he ran. We can compare his time to the others in his heat and to the others in that event. If it's a relay, we can evaluate how fast he ran his leg compared to his teammates. We obtain data that tells us exactly how he performed.

However, if we want to assess his conduct it's no longer about measurable data, it's about evaluations of behavior. Someone can have outstanding athletic performance and also engage in unsportsmanlike conduct. The relay anchor can throw the baton in disgust. The distance runner can block another runner. The shot putter can swear at the judge.

Although performance can impact conduct and conduct can impact performance, the essential difference between the two is that performance can be measured and conduct cannot, which is why the phrase “performance measurements” is common in the HR world and “conduct measurements,” is not.

No one wants to protect judges who have temperament issues, but the Commission on Judicial Conduct is much better equipped to evaluate whether there are temperament issues that ought to lead to removal from office than the Commission on Judicial Performance Review is. Not only does the Commission on Judicial Conduct have a greater ability to conduct a meaningful investigation, it can move much more quickly to protect the public from a judge who ought not to be on the bench than the Commission on Judicial Performance Review can. JPR ought not to be asked, or expected, to do the job the Commission on Judicial Conduct is Constitutionally mandated to do.

The written standards by which a judge is evaluated found in this revision of the proposed rules are based on the performance standards used in Utah and found in Utah Code Jud. Admin. 3-101. The Utah rules that the Appendix A revision draws from can be read in Appendix C. Arizona would neither be the first nor alone in using measurable metrics as performance standards for judges.

There are additional changes, mentioned in Section I of this response, which are present to reinforce the goals of the revisions to the proposed rules found in Appendix A

III. Alternative Proposal Appendix B

In addition to using attributes in place of standards, the proposed rules revisions by the task force fail to address the problems that arise out of the low survey response rate.

The way surveys are done means that there is not, and it is unlikely that there will ever be, a response rate that is statistically significant for every justice or judge subject to retention.

There's no real attempt to address, never mind overcome, the issue of non-response bias in the proposed revised rule. The only plan the task force could agree on for addressing the issue of non-response bias was to try to increase the number of responses. Unfortunately, as a whole, the task force did not, and would not, acknowledge that the lack of statistical significance resulting from the failure to overcome a non-response bias consequently misleads the public regarding the import of the survey results.

So fundamental is the lack of understanding regarding the issue of statistical significance that, after interviewing members of the task force, consisting primarily of current JPR Commissioners, Satrix, the company hired by the task force to assist with designing new surveys came to the conclusion that statistical significance wasn't important to JPR and that Satrix didn't need to worry about the issue of statistical significance, either. In addition to acknowledging that statistical significance would be difficult to achieve, the Satrix report said "statistical significance is not very important for the Arizona Judicial Performance Review surveys because the purpose of the surveys is not to meet a threshold of responses or to achieve a certain level of statistical significance. Instead, the goal of the surveys is to gather feedback from a broad range of stakeholders and use that feedback to improve individual judge performance."

It is blatantly false to state that the purpose of the surveys is to use feedback to improve judicial performance. The purpose of the surveys is to determine whether or not

a judge meets standards. Decisions to bring judges in for interviews arise directly out of those surveys. There is, admittedly, a process by which the survey information is shared with judges during conference team meetings, but that's an outgrowth of the existence of the surveys, not the reason they are administered. Because decisions with enormous consequences for Arizona citizens, the judiciary as a whole, as well as for individual judges rest on the survey results, it is critical that if we cannot achieve statistical significance by overcoming the existing non-response bias, we address that gap in a way that gives judges the benefit of the doubt.

The current system is the equivalent of Yelp for judges. Very happy and very unhappy people respond in disproportionate numbers. People who don't have strong feelings don't respond as frequently. Appendix C addresses that by counting nonresponses as positive responses based on the fact unhappy people are more likely to respond to a survey than happy people. This policy imputes non-responses to be positive experiences.

Appendix C puts the responsibility for approving survey forms with the court, not the commission. It requires that the information provided to the public be consistent between dissemination platforms because it doesn't make sense to publish two different sets of data. It clarifies how abstentions should be calculated and reported because abstentions were used as a way to attack judges standing for retention in the 2022 election. It requires that the survey data report be interpreted in accordance with data validity standards published in the rules. It requires that Commissioners explain "does not meet standards" votes because it's unfair to expect a judge to defend himself or herself

against a secret objection. It removes the requirement to report judges if the Commission finds the judge to be un-cooperative because the reporting of cooperation really serves no purpose other than to provide the Commission with an additional way to penalize a judge who chooses not to appear in front of the Commission. It also changes the reasons the Commission can release information for discipline purposes. Since the purpose of the JPR Commission is to provide the check and balance on the merit selection process, if the Commission discovers a judge has temperament or competence issues, that information ought to be disclosed to the Commission on Judicial Conduct so that the people responsible for overseeing judicial conduct know that there is a potential problem and can make the determination whether or not to investigate further or take disciplinary action.

IV. Conclusion

There is a need for reform, not revision, of the JPR process in order to protect the integrity of Arizona's merit selection process. The 2023 task force's proposals simply do not take the decisive action necessary to thwart bad actors intent on corrupting JPR so that it is a weapon that can be used to harm judges. While it is impossible, and undesirable, to keep people from exercising their first amendment rights to criticize a judge and the decisions he or she has made, there is absolutely no reason to hand such people ammunition in the form of subjective surveys conducted in a way practically guaranteed to result in statistically unsound conclusions. Either of the two amended proposed rules would address the weaknesses in the JPR process in a more deliberate way than the task force could agree upon.

RESPECTFULLY SUBMITTED this 6th day of June, 2023.

By /s/ Kathryn Townsend

Kathryn Townsend, Member

2023 JPR Task Force