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IN THE SUPREME COURT

STATE OF ARIZONA

In the matter of:	Supreme Court No. R-21-0006
PETITION TO AMEND VARIOUS RULES OF PROCEDURE RELATED TO THE PEREMPTORY CHANGE OF JUDGE	**COMMENT OF THE PIMA COUNTY BAR ASSOCIATION IN OPPOSITION TO THE PROPOSED RULE CHANGES**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association respectfully submits the following comment in opposition to Petition R-21-0006 filed by the Committee of Presiding Judges ("Committee"). The Committee justifies its position on two grounds: administrative convenience and the public trust. Neither withstand scrutiny. Our justice system recognizes higher values than speed and efficiency. Moreover, our peremptory change-of-judge rules are one of the only means for the community to hold judges accountable. Notwithstanding the good work of our appointment commissions and the high standards embodied by many judges, these rules encourage rather than diminish the public trust. This Petition should be rejected.

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I. Introduction

The Petition is nothing if not brief. The Committee's entire argument rests on administrative convenience and its *ipse dixit* that the existing rules undermine the public's perception of our courts and encourage judge-shopping. *Petition* at 5-6. Respectfully, these claims are unpersuasive. Administrative convenience is hardly a higher value than substantial justice or accountability, which is precisely the reason for these rules' existence. These rules therefore enhance, not diminish, the public's perception of the courts as a forum for impartial justice. As for the fear of judge-shopping, it is not well-founded or borne out in practice. One can only use a single peremptory strike; thus, attorneys have no incentive to use them willy-nilly lest they find themselves before an even less favorably disposed judge.

Contrary to the dire picture that the Committee paints in its Petition, these rules provide an indispensable counterweight to the power of the bench. As to the Committee's claim that they are abused by criminal defense attorneys, we would hazard a guess that abuse is in the eye of the beholder: what the Committee calls abuse the bar would likely call judicious and tactical. And contrary to the rosy portrait it paints of our judges, they are human the same as any of us and susceptible to the same idiosyncrasies and biases. Our state officials and voters are no different. In theory, we should all be equally content regardless of who presides over our cases safe in the knowledge that all judges apply the law equally and mechanically. Until this theory is a reality, the existing rules should remain in effect.

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II. The efficient administration of our courts is a weighty interest, but in no legal system can it outweigh substantive justice.

At the dedication of Georgetown University's law library in 1920, student speaker Joseph Cantrel said words that would later become the Law School's motto: "Law is but a means, justice is the end." [1] This ethos permeates our common law. It was as much a fixture in Georgian Britain as it was during our own emergence from the swamp of classical legal thought into the age of Legal Realism:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Oliver Wendell Holmes, Jr., The Common Law 1 (1881). It persists today in contemporary equal protection jurisprudence. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("[T]here can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.") (citations omitted); *Corbitt v. Taylor*, No. 2:18cv91-MHT, 2021 U.S. Dist. LEXIS 8316, at *16 (M.D. Ala. Jan. 15, 2021) (rejecting the rationale of "administrative ease and convenience" for a law that targeted trans people in Alabama). Although ours is a much more anodyne dispute than the ones cited, the principle is the same: substantial justice is the north star in our legal system. It should not be lightly discarded, least of all for convenience's sake.

When we say substantial justice, what we mean in this context is the ability for lawyers to ensure a level playing field for their clients and ensure that the men and women who judge their cases have at least some level of accountability. While there is no right to a change of judge in federal court, this is not a standard we should accept for our state

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[1] Said more dramatically by Lord Mansfield in *Somerset's Case*, "…*fiat justitia, ruat cœlum*, let justice be done whatever be the consequence." 98 ER 499, 509 (1772).

courts—indeed, Article III judges aren't in the practice of hearing custody disputes, garden-variety DUIs, or a family's feud over a deceased grandmother's estate. More fundamentally, the Committee misapprehends the role of the federal judiciary. It was fashioned and, at least in theory, exists to provide a forum for aggrieved parties to seek justice when legislatures trample on their rights. Alexander Hamilton said as much in Federalist 78:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

The Federalist No. 78. Being able to strike a federal judge would greatly frustrate this end.[2] Comparing the two systems makes little sense in this context.

It is only natural that our presiding judges are sensitive to the public's perception that their cases move too slowly. But they overstate their position. The wheels of justice turn slowly not because of peremptory strikes of judges, but because of the dozens of other thorny rules and procedures that were crafted to provide due process and ensure that everyone gets their day in court. Criminal Rule 15 interviews and *Brady* disclosure take time; civil depositions and written discovery take time; joint pretrial statements take time; motions practice and interlocutory appeals take even more time. If the Committee truly wants to reduce wait times and speed cases through our justice system without sacrificing just outcomes, there are much more straightforward and common-sense remedies. They could petition to reduce the amount of time allotted to judges for drafting under advisement

[2] While it is true that our state courts share this mandate to check the political branches of government, constitutional litigation much more often takes place in the federal forum. This is in part because our federal courts have historically demonstrated much greater independence than state courts and in part because state courts historically have lagged behind their federal counterparts in recognizing new rights.

opinions. They could petition to truncate motions and discovery deadlines. They could lobby for the expansion of our courts, which, regardless of one's politics, we sorely need both at the federal and state levels, particularly among our trial and mid-level appellate benches. But instead, the Committee approaches the problem obliquely and proposes to eliminate one of the only means the bar has to hold judges accountable. Their Petition, moreover, isn't buttressed by any facts. We are essentially told that the current rules are unworkable in every county and in every one of our trial courts, from the 100-judge-strong Maricopa County Superior Court down to our most rural single-judge courthouses. But there are no statistics from which to compare apples to apples. At least anecdotally, it would be news to the bar in Pima County that peremptory strikes were wreaking any havoc.

The Committee complains that judges lack a remedy for bad faith peremptory strikes. But what is the bar's remedy when a lawyer strikes a judge for cause yet is countermanded by a presiding judge? The cost to the bench is measured perhaps in wounded feelings and a potential delay. The cost to the bar and the community is to have one's case and client judged by someone perceived to be so biased that that lawyer had to go on record and say so. Indeed, the cost will be a gun-shy bar that puts up with biased or simply bad judging rather than make powerful potential enemies on the bench. It is easy for the Committee to encourage the bar to strike judges for cause, but when one considers just what that entails and what the risks are for lawyers—particularly in small communities with relatively few judges—the stakes are much clearer and far weightier than mere administrative ease.

Finally, we would note that the time limits provided in the rules cut against any argument that peremptory changes in judges are a serious impediment to timely justice. *See, e.g.,* Ariz. R. Crim. P. 10.1(c) (a party must file a notice of change of judge no later than 10 days after the arraignment or actual notice to the requesting party of the assignment of the case to a judge); Ariz. R. Civ. P. 42.1(c) (notice must be filed within 90 days after a

party's first appearance in a case, within 10 days of a judge being assigned if they are assigned after the 90-day period); Ariz. R. Fam. Law. P. 6(d) (notice must be filed within 60 days of a scheduled contested hearing); Ariz. R. P. Juv. Ct. 2(B)(2) (requiring that notice of change of judge be given within 5 days after notice to the requesting party of the assignment of a case); Ariz. R. P. Evic. Action 9(c) ("A request is timely if it is made prior to or at the time of the first court appearance or upon reassignment of the matter to a new judge for trial."); J. Ct. R. Civ. P. 133(d) (notice of change of judge must be filed within 10 days of the court providing notice to the parties of the assignment of judge).[3] If there remained any doubts as to how little the change-of-judge rules impact the lifespan of a case, the rules themselves dispel them.

III. Peremptory strikes do not undermine the public's view of the judiciary. Exactly the opposite is true. The public understands what we lawyers understand: judges are human beings and are not immune to biased or simply bad judging any more than attorneys are to biased or bad lawyering.

Then-Circuit Judge Neil Gorsuch said before the Senate Judiciary Committee in 2017 that "[o]urs is a judiciary of honest black polyester…As Alexander Hamilton explained, liberty can have nothing to fear from judges who apply the law, but liberty has everything to fear if judges try to legislate too." (quotations omitted.) Or as Chief Justice Roberts said more succinctly at his own confirmation hearing in 2005, "My job is to call balls and strikes and not to pitch or bat." The Committee evidently subscribes to this view of judging: "[T]he rules undermine the constitutionally prescribed and conscientious efforts of the Commission on Trial Court Appointments in selecting only the best-qualified candidates and the Governor's appointment." *Petition* at 4. (As they also argue, the rules

[3] Litigants do not have a peremptory right to notice a judge in civil traffic and civil boating cases. Ariz. R. P. Civ. Tr. & Boat. 7.

permitting peremptory strikes thwart the will of the voters in courts with elected judges). This reasoning is specious on multiple levels.

First, few members of the community, legal or otherwise, operate under the illusion that a judge's robe is a talisman that converts ordinary humans into unbiased neutrals. Even us former law clerks, many of whom still have a quasi-hero worship of our judges that lasts long beyond our clerkships, recognize that even our most cherished mentors are human. They have biases, flaws, and foibles that are part of who they are, and the best of them understood that and took peremptory strikes in stride. It is no argument at all to start from the premise that judges and the people who elect and appoint them are anything other than human.

Second, it is hard to believe that the public's confidence in our courts would be enhanced by less accountability for our judges. Peremptory strikes, however imperfect, are one of the only means lawyers and their clients have to mitigate judicial bias—real or perceived—and combat the randomness of case assignments.[4] If a lawyer or client perceived a judge to be biased against their case, it would not help public confidence in our courts if they knew that the only immediate remedy was a strike for cause—an extraordinary step that would require the lawyer to openly and publicly move against a sitting judge. It requires that the lawyer show by a preponderance of evidence that the assigned judge is biased, and it also requires that the presiding judge enter specific findings justifying the strike. *See, e.g.,* Ariz. R. Crim. P. 10.1(c)(1); Ariz. R. Civ. P. 42.2(e)(4). In short, it requires a lawyer to put a sitting judge on trial for all to see. These are barriers that would ultimately force litigants in front of judges whom they genuinely believed to be

[4] It is no answer to say that the Judicial Performance Review Commission provides a remedy. It is extremely rare that the Commission recommends against retaining a judge and even rarer still that the voters follow suit. We also note that the appearance of bias or impropriety can be just as damaging as the real thing.

prejudiced against them or their case. It is hard to believe that this would enhance an already skeptical public's view of our courts. It would certainly not engender trust by the bar.

CONCLUSION

The Committee was tasked with reviewing possible abuse of Criminal Rule 10.2, and what came of it was a broadside against peremptory strikes in every practice area. The Committee's justification? These strikes undermine public confidence in the courts by implying that results may differ depending on one's judge. Their argument logically presupposes the unimpeachable character and acumen of all of our judges and those who appoint or elect them. Respectfully, this is not a reasonable assumption. In spite of the genuine and deep respect we have for our bench and its members, few if any lawyers would endorse this view. The same is true even for those of us who clerked and will always feel on some level that our judges can do no wrong. Peremptory strikes should nevertheless remain an option for everyone. We should not discard them because they're inconvenient. Substantial justice often is. We certainly should not do so without the overwhelming support of the people whom these rule changes would affect: trial lawyers and their clients.

We would close with the words of the Lord Chancellor in Gilbert and Sullivan's *Iolanthe*. He sang many sugared words about being a model barrister and then judge, but we daresay most theatergoers would conclude by the final act that he too was an ordinary and fallible man—just like the rest of us and, as they say, "down to the feet":

> The Law is the true embodiment
> Of everything that's excellent.
> It has no kind of fault or flaw,
> And I, my Lords, embody the Law.

Unless and until we achieve this lofty standard, peremptory strikes should remain an option for everyone. The Petition should be rejected.

RESPECTFULLY SUBMITTED this 25th day of February 2021.

PIMA COUNTY BAR ASSOCIATION

By *s/James W. Rappaport*
James W. Rappaport
Rules Committee Chair

By *s/Abbe M. Goncharsky*
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