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12 **IN THE SUPREME COURT**
13 **STATE OF ARIZONA**

15 In the matter of:

16 **PETITION TO AMEND VARIOUS**
17 **RULES OF PROCEDURE**
18 **RELATED TO THE PEREMPTORY**
19 **CHANGE OF JUDGE**

Supreme Court No. R-21-0006

COMMENT RE: PROPOSED
RULE CHANGES

21 Pursuant to Rule 28(e), Rules of the Supreme Court, Greg Sakall,
22 Judge, Division 23 of the Pima County Superior Court,¹ along with
23

24 _____
25 ¹ The court is listed for identification purposes only. The opinions
26 expressed in this Comment are those of the individual undersigned
judges and attorneys and do not necessarily reflect the views of the court
or their law offices.

1 Andrew Jacobs, the Hon. Kenneth Lee, and the Hon. Richard Gordon
2 (collectively, “Commenters”) respectfully submit this Comment
3 recommending against adopting the proposed changes to the rules
4 governing the practice for the peremptory change of judge in Petition 21-
5 0006 (“the Petition”).

6 The Petition may or may not be right as a matter of policy. The
7 Petition and comments about it demonstrate that reasonable people can
8 and do differ about whether litigants should have a right to change of
9 judge. But the point of this Comment differs greatly from the Petition
10 and comments upon it the Commenters have seen. The Petition devotes
11 the entirety of its arguments for repeal of all change of judge rules to
12 arguments that litigants simply should not have the right to change of
13 judge, for a variety of policy reasons. *See* Petition, at 2-6. Likewise,
14 comments against the Petition are generally devoted to policy arguments
15 for litigants having the right to change of judge. *See generally* Comment
16 of the Pima County Bar Association (filed February 25, 2021); Comment
17 of the Arizona State Bar.

18 With great respect to the thoughtful judges and lawyers on both
19 sides of this policy dispute, the Commenters write to suggest that the
20 policy questions both sides have focused on are not relevant. The
21 Supreme Court does not have the discretion to eliminate the right to
22 change of judge outside of criminal matters, as the Petition mistakenly
23 suggests it may do. In non-criminal matters in the Superior Court, the
24 substantial substantive right to a peremptory change of judge has existed
25 within the common law since Arizona’s days as a Territory, and the
26 Legislature codified that common law in A.R.S. § 12-409. Thus, contrary

1 to the first sentence in the Petition’s argument section—“The peremptory
2 change of judge rules confer an absolute right on parties to remove a trial
3 judge without cause” (Petition, at 2), the party’s right in non-criminal
4 matters in the Superior Court is based upon common law and statute,
5 and cannot be abrogated by simply eliminating the rules that presently
6 govern the practice.

7 Thus, granting the Petition would not advance the Petition’s goal of
8 eliminating all change of judge practice in Arizona, and it would defeat
9 the Petition’s stated purpose of improving public confidence in the courts
10 and in the law. For even if the Court were to grant the Petition, the
11 Superior Court in non-criminal matters would still have to enforce A.R.S.
12 § 12-409, as well as the pre-1972 Supreme Court caselaw interpreting
13 that statute. All that granting the Petition would accomplish would be
14 the Court ceding its constitutional right to adopt rules of procedure in
15 this area. The result would be a host of problems. Pragmatically, there
16 would be more administrative inconvenience, more delay, and increased
17 costs. But there would also be a return to a more openly accusatory and
18 critical practice of change of judge, creating bad feeling and friction
19 wisely avoided by the enactment of Ariz. R. Civ. P. 42 (now 42.1) in 1972.
20 And there would be less public trust and confidence in the judiciary,
21 flowing from all of these many problems.

1 **A. This Court's Twin Recognitions That A.R.S. § 12-409(A)**
2 **Confers a Substantive Right and That This Court Cannot**
3 **Abridge Substantive Rights Through Procedure Rules**
4 **Prevent this Court From Eliminating Change of Judge in**
5 **Non-Criminal Matters.**

6 In Arizona, a party's absolute right to a peremptory change of judge
7 in non-criminal matters in the Superior Court is based upon common law
8 and A.R.S. § 12-409, not the procedural rules. The procedural rules
9 sought to be abrogated do not create the right, but merely prescribe the
10 procedure for exercising the substantive right.

11 A.R.S. § 12-409(A) sets forth a party's substantive right to a
12 peremptory change of judge, as well as procedure to invoke the right, as
13 follows:

14 If either party to a civil action in a superior court files an
15 affidavit alleging any of the grounds specified in subsection B,
16 the judge *shall at once transfer the action* to another
17 division of the court if there is more than one division, or shall
18 request a judge of the superior court of another county to
19 preside at the trial of the action.

20 A.R.S. §12-409(A) (emphasis added). While there are multiple grounds
21 that can be asserted in the affidavit, the most common ground asserted
22 before 1972 is found in A.R.S. §12-409(B)(5) that provides as follows:

23 [T]he party filing the affidavit *has cause to believe and*
24 *does believe* that on account of the bias, prejudice, or interest
25 of the judge he cannot obtain a fair and impartial trial.

26 A.R.S. § 12-409(B)(5) (emphasis added). In order to protect this
substantive right, the Legislature has seen fit to forbid any judge or court

1 from punishing any one for “making, filing or presenting the affidavit
2 provided for by section 12-409, or any motion founded thereon.” A.R.S. §
3 12-410. It has also placed a limit of “[n]ot more than . . . one change of
4 judge” in any action.” A.R.S. § 12-411(A).

5 The roots of A.R.S. § 12-409 are found in “the common law principle
6 that a judge must withdraw from a case once a party has filed an affidavit
7 asserting the judge’s bias and prejudice” (*Brush Wellman, Inc. v. Lee*, 196
8 Ariz. 344, 347, ¶7 (App. 2000) (citations omitted)), and “has its origin in
9 the belief that litigants are entitled to a hearing before a fair and
10 impartial court.” *Hordyk v. Farley*, 94 Ariz. 189, 191-92 (1963). This
11 Court has repeatedly recognized the common law right. *Hordyk*, 94 Ariz.
12 at 191-92; *Conkling v. Crosby*, 29 Ariz. 60, 67 & 73 (1925); *Allan v. Allan*,
13 21 Ariz. 70, 74 (1919), *superseded by statute on other grounds as stated in*
14 *Hordyk*, 94 Ariz. 189; *Marsin v. Udall*, 78 Ariz. 309, 312 (1955) (criminal
15 case). While the current version of the statute was enacted in 1955,
16 former versions were contained in the territorial codes and later state
17 codes. *Brush Wellman*, 347, ¶7. *See also* Ariz. Laws, Title 17, Chapter
18 IX, 1374 (Sec. 165) (1901); Civ. Code 1913, §500; Laws 1921, Ch. 107, § 1;
19 Rev Code 1928, §3721; and Code 1939, §21-107.

20 While the Petition is correct in arguing that “[e]ffective
21 administration of the courts is essential to earning the public’s trust and
22 confidence in the judiciary,” A.R.S. § 12-409 was also motivated by “a
23 similar concern for the preservation in public confidence in the
24 judiciary.” *Disqualification of Judges by Peremptory Challenge*, 47 Yale
25 L.J. 1403, 1404 (1938). The rationale was that it is “preferable to
26 disqualify a judge when merely challenged, even though specific

1 investigation might find him possessed of all the judicial virtues” despite
2 possible abuses of the procedure. *Id.*

3 Arizona courts have recognized that the substantive right secured
4 by A.R.S. § 12-409 applies in family law cases (*Hofstra v. Mahoney*, 108
5 Ariz. 498 (1972); *West v. Superior Court*, 104 Ariz. 1 (1968)), probate cases
6 (*In re Sears’ Estate*, 54 Ariz. 52 (1939)), and juvenile cases (*Anonymous*
7 *v. Superior Court*, 14 Ariz.App. 503 (1971)).²

8 This Court has repeatedly found the right codified in A.R.S. § 12-
9 409 is a substantive right declared by the Legislature. *Marsin*, 78 Ariz.

11 ² Early in our statehood, criminal codes contained provisions similar,
12 but not identical, to A.R.S. § 12-409. *See, e.g.*, Section 999, Penal Code of
13 1913 (requiring a defendant to file an affidavit “supported by the
14 affidavits of three resident electors of the county that he cannot have a
15 fair and impartial trial because of the bias and prejudice of the superior
16 judge of the county wherein such case is pending); *Sam v. State*, 33 Ariz.
17 383, 402-03 (1928); Rev. Code 1928 §5022, Code 1939, §44-1202 (when
18 made by the state, affidavit had to be submitted by the county attorney,
19 and when by defendant, it had to be accompanied by counsel’s certificate
20 that the affidavit was made in good faith). More recently, the right to a
21 peremptory change of judge in criminal cases has been described as “a
22 procedural right created by the supreme court.” *Bergeron ex. rel. Perez v.*
23 *O’Neil*, 205 Ariz. 640, 650, ¶ 31 (App. 2003). As such, courts have treated
24 the procedural right “as a matter of grace under the rules of criminal
25 procedure.” *Higuera v. Lee*, 241 Ariz. 76, 82 (App. 2016). *But see*
26 discussion *supra* regarding the common law nature of the right; A.R.S. §
1-201; *Ross v. Bumstead*, 65 Ariz. 61, 64 (1946) (noting Arizona court will
follow an established common law until changed by statute). As a result,
the Supreme Court has continued to study and, when appropriate, modify
Rule 10.2, Arizona Rules of Criminal Procedure.

1 at 312; *Hordyk*, 94 Ariz. at 194, n. 2; *Itule v. Farley*, 94 Ariz. 242, 243
2 (1963); *Daou v. Harris*, 138 Ariz. 353 (1984). It has further explained
3 that the right to a peremptory change of judge is a “*valuable substantive*
4 *right*” (*Marsin*, 78 Ariz. at 312 (emphasis added)), and an “*absolute right.*”
5 *American Buyers Life Ins. Co. v. Superior Court*, 84 Ariz. 377, 380 (1958)
6 (emphasis added). The Court has also interpreted the statute as
7 “mandatory.” *In re Sears’ Estate*, 54 Ariz. at 54.

8 While acknowledging that the judiciary has the authority to make
9 rules of practice and procedure, this Court has previously acknowledged
10 that its authority “is limited to rules which do not abridge, enlarge or
11 modify substantive rights.” *Hordyk*, 94 Ariz. at 194, n. 2. Specifically, as
12 it relates to A.R.S. § 12-409, the Court has held that “[a] court is limited
13 to passing rules which prescribe procedure for exercising the right. *Any*
14 *rule of court that operates to lessen or eliminate the right is of no legal*
15 *force.*” *Marsin*, 78 Ariz. at 312 (emphasis added).

16 **B. The Suggestion That This Court May Abolish the Right To**
17 **Change of Judge Emanates From an Understandable**
18 **Misunderstanding Grounded in the Complex History of the**
19 **Rules Governing Change of Judge.**

20 **1. The Pre-1972 Practice Governing Change of Judge**
21 **Drew Directly Upon A.R.S. § 12-409, and Was Rounded**
22 **Out By Case Law Construing and Guiding the Superior**
23 **Court in its Application of the Statute.**

24 Before 1972, the procedure for a party to invoke a right to a
25 peremptory change of judge in a non-criminal matter in Superior Court
26 was governed by the limited procedures set forth in Title 12.

1 To obtain a peremptory change of judge, a party or counsel merely
2 needed to file an affidavit that complied with A.R.S. § 12-409. *Conkling*
3 *v. Crosby*, 29 Ariz. 60, 73 (1925); *King v. Superior Court*, 108 Ariz. 492
4 (1972); *Consolidated Carpet Corp. v. Superior Court*, 13 Ariz.App. 429
5 (1970). The only language that needed to be included in the affidavit was
6 that of the statute. *Stephens v. Stephens*, 17 Ariz. 306, 309
7 (1915). Acceptable language was cursory and did not need to include
8 specific facts supporting the allegations of bias and prejudice as
9 demonstrated by the following affidavit language that was held sufficient
10 by the Court of Appeals:

11 Beverly J. McConnell, being first duly sworn upon her oath,
12 deposes and says:

13
14 I am the attorney for the plaintiff in the above entitled action,
15 and as such make this affidavit on their behalf. I have reason
16 to believe and do believe that on account of the bias, prejudice
17 or interest of the Honorable John E. Burke, Judge of the above
18 entitled action, to whom the above action has been assigned,
19 that plaintiff cannot attain a fair and impartial trial on
20 determination herein.

21 Plaintiff does therefore request that this action be transferred
22 to another division of the above entitled Court.

23 *Consolidated Carpet Corp. v. Superior Court*, 13 Ariz.App. at 430.

24 Consistent with the clear, mandatory language of A.R.S. § 12-409,
25 actions were transferred to another judge. There were no hearings, and
26 no testing of the veracity of the affidavit. “Upon a proper affidavit being
filed, the judge though he might feel the claims [were] without merit and
the affidavit [was] filed to harass the court, ha[d] only one thing he

1 [could] do—transfer the case to another judge.” *Itule*, 94 Ariz. at 243,
2 citing *Stephens v. Stephens*, 17 Ariz. 306 (1915). “The affidavit of bias . .
3 .cannot be questioned, import[ed] verity, [could not] be challenged, and
4 operate[d] to disqualify.” *Anonymous*, 14 Ariz.App. at 503.

5 While A.R.S. § 12-409 requires an affidavit, courts generally did not
6 require an affidavit for a party to exercise the right to a peremptory
7 change of judge. In practice, there was a “wholesome practice” and
8 “tendency . . . except under exceptional circumstances, for judges to
9 recognize informal requests for disqualification.” *American Buyers Life*
10 *Ins. Co.*, 84 Ariz. at 380-81. *See also* State Bar Committee Note, 1971
11 Amendments, Rule 42(f)(1)(A) (noting that “[v]oluntary disqualification
12 upon oral request has been recognized as an exercise of the right to
13 change of judge.”). Arizona courts had “recognized a peremptory right to
14 a change of judge, even though §12-409 required the filing of an affidavit
15 of bias and prejudice, and had acknowledged that the affidavit had
16 become a fiction in cases in which such peremptory changes were
17 sought.” *Brush Wellman*, 347, ¶9 (citations omitted). The pre-1972
18 approach was seen as “salutary” as it was “not necessary to embarrass
19 the judge by setting forth in detail the facts of bias, prejudice or interests
20 which may disqualify him nor [was] it necessary for the judge, litigant
21 and attorney to involve themselves in an imbroglio which might result in
22 everlasting bitterness on the part of the judge and the
23 lawyer.” *Anonymous*, 14 Ariz.App. at 503.

24 The procedure for change of judge was governed by the language of
25 A.R.S. §§ 12-409-411 and interpretative caselaw. Judicial interpretation
26 of A.R.S. § 12-411 recognized the right as one change of judge per side,

1 rather than per case. *Brush Wellman*, 348, ¶13 (citations
2 omitted). Affidavits could be filed before the final trial on the merits
3 commenced (*see Allan v. Allan*, 21 Ariz. 70, 75 (1919)), and had to honor
4 requests filed on the day set for hearing (*see, e.g., Huck v. Haralambie*,
5 122 Ariz. 63, 64-65 (1979)). Also, the Superior Court could not enforce a
6 local rule requiring the affidavit to be filed five days before trial. *Hordyk*
7 *v. Farley*, 94 Ariz. 189, 194 (1963). However, Arizona courts found that a
8 party could waive the right by not timely filing an affidavit (*see, e.g., Del*
9 *Castillo v. Wells*, 22 Ariz.App. 41, 43 (1974)), and generally found a
10 waiver “when evidence [was] taken . . . if the evidence [was] to be used in
11 the final determination of the case on its merits.” *Id.*, at 43 quoting
12 *Marsin*, 78 Ariz. at 313 (quotation marks omitted). It was further
13 explained that the hearing had to be a contested hearing involving an
14 issue of law or fact. *Itasca State Bank v. Superior Court*, 8 Ariz.App. 279,
15 281 (1968). The intent of the waiver provisions was to avoid judge-
16 shopping. *Id.*

17 While affidavits under A.R.S. § 12-409 could be used to invoke a
18 peremptory change of judge, they could also use it as affidavits are now
19 used under Ariz. R. Civ. P. 42.2 for “true challenges for cause” (*Taliaferro*
20 *v. Taliaferro*, 186 Ariz. 221, 222 (1996) (quotation omitted)) wherein a
21 party would have to prove grounds for actual disqualification (State Bar
22 Committee Note, 1971 Amendments, Rule 42(f)(1)(D)), and when a party
23 had already used a peremptory challenge. *Del Castillo v. Wells*, 22
24 Ariz.App. at 45, n. 1; *Hickox v. Superior Court*, 19 Ariz.App. 195 (1973).

1 **2. The Amendments to Civil Rule 42 in 1972 Merely**
2 **Modified the Procedures to Enforce the Right Under**
3 **A.R.S. § 12-409.**

4 The inclusion of procedural provisions relating to the substantive
5 right of A.R.S. § 12-409 in the Rules of Civil Procedure was first made in
6 December 1971, with an effective date of March 1, 1972. *See* Civil Rule
7 42 (2016); State Bar Committee Note to 1971 Amendment, Rule 42(f).
8 The change-of-judge amendments to Civil Rule 42 (renumbered as Rules
9 42.1 and 42.2 in 2017) did not create the substantive right to a
10 peremptory change of judge; rather, they merely modified the procedure.

11 Arizona courts have held that the adoption of Rule 42(f) did “not
12 create a separate and distinct remedy from § 12-409; it simply modifie[d]
13 the procedure to be followed.” *Lewis v. Kelliher*, 171 Ariz. 228, 229 (App.
14 1992) (citations and quotation marks omitted). *See also Del Castillo*, 22
15 Ariz.App. at 44 (“We cannot hold that the Supreme Court, after
16 promulgating Rule 42(f), intended § 12-409 to coexist as a separate and
17 distinct remedy. It would be both cumbersome and confusing to have two
18 methods to effectuate a change of judge.”); *Brush Wellman*, 348, ¶13. In
19 other words, “Rule 42(f) merely codified these [prior] holdings under
20 [A.R.S. § 12-409], eliminating the fiction of bias and prejudice and
21 making the change automatic on request, without the necessity of any
22 affidavit.” *Hofstra*, 108 Ariz. at 499. Furthermore, “[t]he old affidavit of
23 bias and prejudice was really the same thing [as the Notice of Change of
24 Judge].” *King*, 108 Ariz. at 494. *See also* 47 Yale L.J. 1403, 1406-08
25 (“there is little basis for differentiating between an affidavit without
26 proof and a peremptory challenge. In either one, the operative factor is

1 the demand for removal, not the actual disqualifying circumstances[,]”
2 “[t]he only effective restraint is to limit the time of filing and the number
3 of challenges[,]” and “courts might well approve a shift to peremptory
4 challenge as a comparatively minor simplification of the process.”).

5 **3. The Present Confusion About the Court’s Ability to**
6 **Eliminate the Right to Change of Judge Comes From**
7 **Misunderstanding the Complex Architecture of the**
8 **Rules Governing Change of Judge.**

9 When this Court created rules governing change of judge in 1972,
10 it did so carefully and clearly keeping in the forefront of its collective
11 mind its own teaching that procedural rules cannot modify or abrogate
12 substantive rights conferred by statute. *Marsin*, 78 Ariz. at 312
13 (analyzing A.R.S. § 12-409 and holding that “[a] court is limited to
14 passing rules which prescribe procedure for exercising the right. *Any rule*
15 *of court that operates to lessen or eliminate the right is of no legal force.*”)
16 (emphasis added). Mindful that in fashioning rules it needed to honor
17 the litigant’s right, unreviewable by judges, to change of judge, the Court
18 broke the right into two components. Creating Ariz. R. Civ. P. 42.1, this
19 Court assured litigants that they could strike a judge unreviewably, and
20 fully consistent with the statute.

21 Then comes the confusing part. Having fashioned a procedure
22 governing and assuring litigants of their substantive legal right to one
23 change of judge, this Court then fashioned a companion procedure for the
24 removal of a judge for circumstances other than the exercise of the
25 substantive right to remove a judge once without judicial review or
26 oversight. Confusingly, that separate procedure, housed in the civil rules

1 in Ariz. R. Civ. P. 42.2, requires the invocation of A.R.S. § 12-409, but
2 allows the denial of requests for change of judge, which is inconsistent
3 with the statute. Because Ariz. R. Civ. P. 42.1 guarantees litigants the
4 substantive right in A.R.S. § 12-409, there is nothing wrong – and much
5 right – with having a procedure in Ariz. R. Civ. P. 42.2 to move for the
6 removal of a judge for stated grounds that must be shown, and giving the
7 Superior Court a chance to deny that motion.

8 But the reference in Ariz. R. Civ. P. 42.2 to A.R.S. § 12-409 has
9 seemingly engendered the mistaken belief that Ariz. R. Civ. P. 42.2 gives
10 effect to the rights conferred in the statute, and that the judiciary is
11 allowed to restrict a litigant’s exercise of the substantive right in A.R.S.
12 § 12-409. Yet as this Court has previously explained, it may not do so.
13 *Marsin*, 78 Ariz. at 312 (“Any rule of court that operates to lessen or
14 eliminate the right is of no legal force.”). Because Ariz. R. Civ. P. 42.2
15 gatekeeps a litigant’s strike, reserving to the Superior Court the right to
16 deny a motion to remove a judge, it is not an expression by rule of the
17 substantive right in the statute. Instead, it is Ariz. R. Civ. P. 42.1 – which
18 doesn’t mention the statute – which actually gives effect to the
19 substantive right in the statute.

20 It is also likely that the very lack of reference in Ariz. R. Civ. P. 42.1
21 to A.R.S. § 12-409 has engendered a parallel and mistaken belief that
22 Ariz. R. Civ. P. 42.1 sets forth a mere judge-created right that judges are
23 free to undo. Again, this is wrong. Ariz. R. Civ. P. 42.1 effectuates the
24 right in the statute. And this Court has previously explained that judges
25 are not free to abridge or undo the substantive right in A.R.S. § 12-409.
26 *See Marsin, supra.*

1 In sum, a half-century ago, this Court bifurcated the substantive
2 right to change of judge that has existed since Territorial days. It housed
3 that right in Ariz. R. Civ. P. 42.1, confusingly without referencing the
4 statute codifying the right in that rule. It housed a parallel and
5 complementary procedure going beyond that statute in Ariz. R. Civ. P.
6 42.2, while referencing the statute in the latter but not the former rule.
7 This has created for some the misleading appearance that this Court is
8 free to abolish Ariz. R. Civ. P. 42.1, and its juvenile court and family court
9 analogs, and with them, a litigant's right to change of judge. This is the
10 gravamen of the Petition, and of comment supporting it. Yet as this
11 Court's teachings show, that premise is mistaken.

12 **C. The Court Should Not Abrogate the Current Civil, Family,
13 and Juvenile Rules that Regulate the Procedure Regarding
14 a Party's Substantive Right to a Peremptory Change of
15 Judge.**

16 If the Court were to abrogate the rules which have been the subject
17 of nearly four decades of fine-tuning to address abuses as well as evolving
18 pretrial management of case filings, A.R.S. § 12-409 would still exist. A
19 party in a non-criminal matter in Superior Court could still assert the
20 right. The Superior Court would have no court-made procedural rules in
21 place, and as a result, the Superior Court would have to apply the
22 procedural rules in A.R.S. § 12-409, and the appellate courts'
23 interpretations of that statute. *See, e.g., Seisinger v. Siebel*, 220 Ariz. 85,
24 88-89, ¶ 8 (2009) (holding that the Legislature and the Supreme Court
25 both have rulemaking power and the courts "recognize reasonable and
26 workable statutory enactments that supplement rather than conflict

1 with the rules [this Court] has promulgated” (quotation marks and
2 citation omitted); *Duff v. Lee*, 250 Ariz. 135, ¶12 (2020).

3 The resulting situation would be worse for the Superior Court than
4 with the current rules. Administratively, a party could file an affidavit
5 of bias and prejudice potentially as late as the morning of trial if there
6 had not been a prior contested, evidentiary hearing. *See, e.g., Huck v.*
7 *Haralambie*, 122 Ariz. 63, 64-65 (1979). It would even more “seriously
8 threaten judges’ ability to meet case processing time frames, and to
9 effectively control their calendars” (Petition, p. 4) than it does with the
10 procedures in the current rules which generally set much earlier
11 deadlines and provisions for waivers. *See, e.g., Civil Rule 42.1(c)-(d)*. It
12 will also create more, not less, delay, and increase the costs of litigation.
13 In addition, when the Legislature has spoken and has affirmed the
14 common law right to a peremptory change of judge based upon a party’s
15 belief that a judge cannot be fair and impartial, all considerations of
16 judicial efficiency should be secondary. *State v. Waters*, 971 P.2d 538,
17 541 (Wash. App. 1999) (citing *Marine Power & Equip Co. v. Department*
18 *of Transp.*, 687 P.2d 202 (Wash. 1984)).

19 Furthermore, a reversion to the statutory process would not
20 increase public trust and confidence in the judiciary – it would do just the
21 reverse. Rather than a Notice of Change of Judge, files would again
22 contain sworn, yet untested, allegations that a party or counsel believes
23 a judge is biased and prejudiced.³ The Commenters believe that a return
24

25
26 ³ *See, e.g., State v. Holmes*, 315 N.W.2d 706-716-17 (Wis. 1982) (“The
legislative purpose in adopting [the statute regarding peremptory

1 to that practice would increase friction between the bench and the bar,
2 and for no good reason. This Court’s wise institution in 1972 of a
3 frictionless procedure akin to the roughly contemporaneous innovation of
4 no-fault divorce made the practice smoother and more congenial.
5 Litigants were no longer called upon to incant accusations to obtain their
6 automatic strike, which could only aid cooperation among the bench and
7 bar. And judges in the current moment who dislike the current practice
8 are not apt to prefer the reinstatement of a far more accusatory ancestor
9 of it.

10 The Petition also raises concerns that the current procedures allow
11 parties to contravene the will of voters and the merit selection process
12 (Petition, p. 4),⁴ that “they can operate to hide the truth when a judge
13

14
15 challenges] was to remedy the ills caused by the affidavit of prejudice
16 statute. Because the Wisconsin affidavit of prejudice statutes required
17 no substantiation of or determination of the allegation of prejudice, many
18 thought the procedure unjustly impugned the integrity of judge to whom
19 the affidavits were addressed and that the unchallenged and
undetermined charges of judicial prejudice spread on the court records
gave the public a distorted picture of judicial impartiality.”).

20 ⁴ *But see State ex. rel. Oliver v. Crookham*, 731 P.2d 1018, 1021 (Or.
21 1987) (holding procedures for disqualifying judge for bias or prejudice do
22 not infringe upon voters’ right to elect judges under state constitution;
23 “The public has no right to have a particular judge preside over a
24 particular case, especially when the judge is believed to be prejudiced or
25 biased against a party.”); *Johnson v. Superior Court*, 329 P.2d 5, 7-8 (Cal.
26 1958) (upholding against constitutional challenge California peremptory
change of judge statute based upon arguments including that the statute
was an unconstitutional delegation of legislative and judicial powers to
litigants).

1 needs to be removed for cause or needs to address deficiencies” (*id.*),⁵ and
2 that the pandemic-related suspension of the rules has occurred “without
3 any apparent effect upon the justice afforded to litigants.” *Id.* In light of
4 our state’s common law history and statutory provisions regarding the
5 substantive right to a peremptory change of judge, the people through
6 the Legislature have spoken, and the statute should be applied with
7 reasonable procedural rules. If the Legislature finds it appropriate to
8 abrogate A.R.S. § 12-409 in light of the Petition’s concerns, it may do so;
9 however, until it does so, the courts cannot “*lessen or eliminate the*
10 *right.*” *Marsin*, 78 Ariz. at 312 (emphasis added).

11 While, if presented with the issue in a given case, the Arizona
12 Supreme Court could reverse its long-established lines of cases
13 interpreting A.R.S. § 12-409 as a substantive right and hold that the
14 statute provides only a procedural right to the underlying substantive
15 right of a litigant to a fair and impartial trial (*see, e.g., Quality*
16 *Automotive Center, LLC, v. Arrieta*, 309 P.3d 80, 87 (N.M. 2013)), the
17 current proposal for the abrogation of the existing procedural rules does
18 not solve the problem. The Petition does not propose alternative
19 procedural rights as was done in *Quality Automotive Center*. As a result,
20 if the Court grants the Petition, the only remaining procedure regarding
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23 ⁵ *But see In re Marriage of O’Brien*, 958 N.E.2d 647, 659, ¶ 43, n. 8
24 (Ill. 2011) (“The Code of Judicial Conduct is aspirational and represents
25 this court’s attempt to provide for recusal provisions for the benefit of
26 preserving the integrity of the courts on a general scale. The substitution
statute represents the General Assembly’s attempt to prevent bias in
individual cases.”).

1 the continuing right is contained in the statute—the affidavit of bias
2 under A.R.S. § 12-409.

3 The Petition, if granted, would also create confusion because it
4 neither takes account of A.R.S. § 12-409, nor does it anticipate or account
5 for the disruption to Ariz. R. Civ. P. 42.2 that would occur in the absence
6 of Ariz. R. Civ. P. 42.1. Rule 42.2 would still be in place, and within it,
7 references to A.R.S. § 12-409. Yet as explained above, litigants would
8 still be able to file A.R.S. § 12-409 affidavits to secure changes of judge.
9 It would at minimum sow substantial confusion to have a procedural rule
10 on the books in Ariz. R. Civ. P. 42.2, which would require citing that same
11 statute but ignoring its command, while litigants remained free to invoke
12 that statute to exercise the right it confers outside the vehicle of Rule
13 42.2 motions the Superior Court could deny.

14 Finally, the Petition’s proposed elimination of the right to change
15 of judge would also conflict with A.R.S. § 12-411, through which the
16 Legislature conferred a right on litigants to stipulate to a different judge
17 or county in which to proceed, in the event a party invoked their
18 substantive right to change judge under A.R.S. § 12-409. The
19 Legislature’s design is litigant choice, and it forecloses rules that are
20 designed to defeat the choices thus permitted to Arizona litigants.
21 Whether wise or not in the view of some, those rights are enshrined in
22 the positive law of Arizona, until repealed by the representatives of the
23 people.
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1 For the foregoing reasons, the Court should deny the Petition
2 insofar as it seeks abrogation of Ariz. R. Civ. P. 42.1, Family Rule 6, and
3 Juvenile Rule 2(B).

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5 RESPECTFULLY SUBMITTED this 20th day of April, 2021.

6 By /s/Greg Sakall
7 Hon. Greg Sakall

8 By /s/Andrew Jacobs
9 Andrew Jacobs

10 By /s/Kenneth Lee
11 Hon. Kenneth Lee

12 By /s/Richard Gordon
13 Hon. Richard Gordon
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