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

9 In the Matter of:

Supreme Court No. R-21-0006

10 **COMMENT OF**
11 **THE STATE BAR OF ARIZONA**

12 **PETITION TO AMEND RULES**
13 **10.2, 17.4, 32.10(a), 33.10(a), and**
14 **35.4, RULES OF CRIMINAL**
15 **PROCEDURE; RULE 42.1, RULES**
16 **OF CIVIL PROCEDURE FOR THE**
17 **SUPERIOR COURTS; RULE 6,**
18 **RULES OF FAMILY LAW**
19 **PROCEDURE; RULE 2(B) RULES**
20 **OF PROCEDURE FOR THE**
21 **JUVENILE COURT; RULE 9(c),**
22 **RULES OF PROCEDURE FOR**
23 **EVICITION ACTIONS; RULE**
24 **133(d) JUSTICE COURT RULES**
25 **OF CIVIL PROCEDURE; RULE 7,**
RULES OF COURT PROCEDURE
FOR CIVIL TRAFFIC AND CIVIL
BOATING VIOLATIONS; AND
ETHICAL RULE 8.4(g) OF RULE
42, RULES OF THE SUPREME
COURT.

20 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
21 of Arizona (the “State Bar”) hereby submits the following as its comment to the
22 above-captioned Petition.
23

24 The Criminal, Civil and Family Law Practice & Procedure Committees of the
25 State Bar each submitted comments in opposition of the Petition. Because the State

1 Bar believes that the Court would benefit from the input provided by each of these
2 committees, the State Bar has attached each committee's input as Exhibits A, B and
3 C of this Comment.
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5 The State Bar of Arizona respectfully requests that this Petition be denied.
6

7 RESPECTFULLY SUBMITTED this 30th day of April 2021.
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Lisa M. Panahi
11 General Counsel
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14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 30th day of April 2021.

17 by: PSeguin
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1 **EXHIBIT A:**

2 **VIEW OF THE CIVIL PRACTICE & PROCEDURE COMMITTEE**

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4 Pursuant to Rule 28(e) of the Arizona Rules of the Supreme Court, the Civil
5 Practice Procedure Committee of the State Bar of Arizona (the “CPPC”) hereby
6 submits the following committee-comment to the above-captioned Petition, which
7 seeks to undo a 120-year old practice in Arizona courts on the asserted basis that the
8 longstanding practice somehow hurts public confidence in the law. It does not. The
9 CPPC opposes the Petition and respectfully requests that the Court deny it, for the
10 reasons stated below.
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13 **I. BACKGROUND OF THE PETITION**

14 On January 7, 2021, the Supreme Court Committee of Presiding Judges filed
15 a Petition (the “Petition”) to abrogate the preemptory change-of-judge rule in every
16 set of rules governing the judicial process in Arizona (e.g., Rules of Criminal
17 Procedure, Rules of Civil Procedure, Rules of Family Law Procedure, Rules of
18 Procedure for the Juvenile Court, etc.).
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20 The Petition itself is predominantly concerned with “perceived and potential
21 abuses and problems with Rule [of Criminal Procedure] 10.2”—as opposed to any
22 of the other rules it seeks to abrogate. Petition at 2. According to the Petition,
23 “lawyers and law firms were filing notices in a blanket fashion thereby keeping some
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1 judges off the criminal bench entirely” or were filing notices for another improper
2 purpose (e.g., delay, severance, more convenient geographical location, advantage
3 in plea bargaining, etc.). *Id.* at 3.
4

5 The Petition also focuses more generally on the asserted administrative
6 challenges posed by peremptory change-of-judge rules. *Id.* at 4. The Petition
7 emphasizes that these challenges “seriously threaten judges’ ability to meet case
8 processing time frames, and to effectively control their calendars” and cause a
9 “significant increase in the cost of managing a court.” *Id.* The Petition concludes
10 by asserting that the “[e]ffective administration of the courts is essential to earning
11 the public’s trust and confidence in the judiciary.” *Id.* at 6.
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14 **II. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS**
15 **TO UNDO A WISE AND USEFUL 120-YEAR PRACTICE IN**
16 **ARIZONA LAW WITHOUT ANY SOUND JUSTIFICATION.**

17 **A. Arizona Has a Longstanding Tradition of Affording Litigants the**
18 **Right to a Peremptory Change of Judge.**

19 Arizona has afforded litigants the ability to exercise a right to a peremptory
20 change of judge since 1901 when Arizona was only a territory. *See* Larry C. Berkson
21 et al., U.S. Dep’t Of Justice, “Judicial Substitution: An Examination Of Judicial
22 Peremptory Challenges In The States” at 8 (1986),
23 <https://www.ncjrs.gov/pdffiles1/Digitization/101943NCJRS.pdf> (citing Letter to
24 Larry Berkson from Justice James Cameron, Arizona Supreme Court, March 6,
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1 1985; Ariz. Laws, Title 17, ch. 10, sec. 1380 (1901); Kraig J. Marton, “Peremptory
2 Challenges of Judges: The Arizona Experience,” *Law and the Social Order* at 95
3 (1973)). When Arizona entered the Union in 1912, the Legislature codified the right
4 to a peremptory change of judge for civil cases upon the filing of an affidavit. *Id.*
5 (citing Revised Stats. of Ariz., Civil Code, Title 6, sec. 500 (1913)). The Arizona
6 Supreme Court just three years later clarified that the “truth of the affidavit [in a civil
7 case] is not what disqualifies the judge, but the affidavit itself.” *Id.* (citing *Stephens*
8 *v. Stephens*, 17 Ariz. 306 (1915)).

11 The framers of Arizona’s Constitution left no doubt that our state’s legal
12 system has a far more populist design than does the federal judicial and legal system,
13 with which change of judge comports closely. Arizona’s Constitution makes
14 Arizona’s citizens sovereign in a more real and direct way than does the U.S.
15 Constitution. In Arizona, in stark contrast to our federal Congress, the voters have
16 the right to bypass the Arizona Legislature and enact state laws directly. *See* Ariz.
17 Const. art. IV, pt. 1, sec. 1(4), Initiative and Referendum Petitions. In Arizona, in
18 stark contrast to the federal Constitution’s guarantee of life tenure for judges
19 (originally proposed in the Federalist Papers), our Constitution requires judges to
20 stand for retention, where voters can (and very rarely, but occasionally do) exercise
21 their sovereign right to end a particular officer’s judicial service. Ariz. Const. art.
22 VI, sec. 38. To inform the voters’ decisions on whether to renew or end the service
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1 of particular judicial officers, the Arizona Constitution even requires the Supreme
2 Court to administer Judicial Performance Review through a process in which “[t]he
3 public shall be afforded a full and fair opportunity for participation in the evaluation
4 process through public hearings” Ariz. Const. art. VI, sec. 42.

6 None of this is remotely like the federal legal and judicial system, and all of
7 it is by design. Arizona is a more populist state jurisdiction, less focused on
8 separating legislation and law from its sovereign citizens than is the federal legal and
9 judicial system. Change of judge is simply part of that, recognizing the common
10 wisdom of Arizona’s citizens and wisely declining—among eighteen other largely
11 Western states, with like populist cultures—to place its lawgivers and judges
12 unreviewably above the people.

15 The Arizona Supreme Court wisely enshrined the practice—deeply consistent
16 with that populist wisdom and dating back to Territorial days—of permitting one
17 peremptory change of judge. *See Tyler v. Fred Harvey, Inc.*, 20 Ariz. App. 515, 517
18 n.1 (1973) (noting that the Supreme Court memorialized a litigant’s right to a
19 peremptory change of judge by adding Rule 42(f) to the Arizona Rules of Civil
20 Procedure on March 1, 1972). The Supreme Court moved Rule 42(f) to Rule 42.1
21 under the Court’s 2016 restyling efforts.

24 Arizona’s history and Constitutional design leave no doubt that change of
25 judge is far from a tired anachronism, or a purposeless remnant. It is part and parcel

1 of the sovereignty of Arizonans as lawgivers, and as the ultimate determiners of who
2 may judge in Arizona. To strip this right that has been enjoyed by every living
3 Arizonan throughout their life and experience with the law from the fabric of our
4 law should require meeting a high burden of demonstration. Unfortunately, the
5 Petition fails to provide a reasonable basis for abrogating this venerable practice.
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8 **B. The Petition Is Demonstrably a Solution For Which There Is No
9 Problem, And Should Be Denied For That Reason.**

10 The Petition incorrectly raises the specter that the public's respect for law is
11 somehow being diminished by the presence of a change-of-judge procedure, and that
12 efficiency is greatly disserved by that. Those charges are not demonstrated and are
13 in fact rebutted by Court data in substantial part.
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15 First, the procedure is so uncommonly used in the civil system as to defeat the
16 Petition's claims that it is a problem at all, much less the Petition's sweeping and
17 unsupported claims that it somehow erodes public confidence in law or that it
18 meaningfully injures judicial efficiency. Of the 30,649 pre-judgment civil filings in
19 Maricopa County in FY2019, *there were only 228 Notice of Change of Judge*
20 *filings*, which amounts to parties exercising their peremptory right to a change of
21 judge in only **.74%** of all civil cases in Maricopa County for FY2019. Santa Cruz
22 County's clerk's office volunteers that Santa Cruz County, which has two superior
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1 court judges, has seen only 4 changes of judge in civil matters in FY19 out of 489
2 civil cases filed that year, which amounts to **.82%** of all civil cases, and only 6
3 changes of judge in FY20. In civil practice, lawyers and litigants—far from abusing
4 this important right—exercise it very rarely and sparingly. This infrequency of use
5 shows that the practice cannot fairly be said to be eroding public confidence in law
6 or the courts, and that it hardly injures efficiency.
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8 Second, the Petition’s assertion that public confidence in the law is somehow
9 harmed by the existence of this time-honored rule fails on many levels. For one
10 thing, no member of the public raised the supposed corrosion of public respect for
11 the law to this Court’s attention. The public itself (or the lawyers working for the
12 public) would be the avenues through which such a concern would logically arise.
13 Instead, it is judicial leaders—whom the CPPC respects greatly and regards fondly,
14 but who are judicial leaders with a judicial and institutional perspective—who are
15 the ones raising the supposed difficulties imposed on the public by a rule that
16 sometimes takes cases from individual judges. The CPPC, despite its great respect
17 and regard for Petitioners and the important work and service they perform, believes
18 this Court should rely more on the public’s lack of complaint about this procedure if
19 it is concerned with the public’s satisfaction with its recourse to this right, and not
20 judges. To put it plainly, there is no data supporting Petitioners’ assertion that
21 respect for the law is reduced by this practice.
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1 Third, the timing of the Petition raises the question as to why now the Court
2 must suddenly change this longstanding feature of Arizona law. One answer is
3 apparently that change of judge was momentarily suspended because the COVID-
4 19 pandemic created temporary additional burdens on trial judges that will not exist
5 when the pandemic is over.¹ As it stated, Administrative Order No. 2020-75 was
6 predicated on suspending the peremptory change-of-judge rules only to “reduce the
7 risk of virus exposure inherent in out-of-county judges’ travel” and “to ensure
8 adequate judicial resources for backlog reduction.” Once the COVID-19 pandemic
9 is resolved, the concerns over judicial travel and the backlog associated with the
10 pandemic are no longer necessary. The timing and association of the pandemic with
11 suggesting permanently undoing a 120-year old practice demonstrate that the
12 suggestion is not well-grounded.
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18 ¹ Importantly, given that the Petition seems to rely on the brief suspension of
19 change of judge during the pandemic as a justification for ending the practice, the
20 Superior Court in Maricopa County has wisely enacted a *contrary* administrative
21 order during the pandemic showing the Superior Court’s awareness that litigant
22 choice of judge is essential to litigant satisfaction. *See* Maricopa Superior Court
23 Administrative Order 2020-72, In the Matter of Late Case Fair Limits Proceedings.
24 Critically, one of the tools it used to do so was permitting agreements to “proceed
25 by a bench trial before a different judge of the Court or a neutral,” to assure the
litigants a sense of control and the best experience they could design by agreement
with their opposing party. *See id.* at 2, part (F). Thus, the Petition itself, while
seeking to remove change of judge on the basis that it erodes respect for the law, has
simultaneously extended litigants more choice in judge, by allowing litigants to
stipulate late in their case to “a different judge of the Court or a neutral.” *See id.*

1 Moreover, the Petition’s comment that since this Court’s Administrative
2 Order No. 2020-75 suspending the peremptory change-of-judge rules, there has been
3 no “apparent effect upon the justice afforded to litigants” mistakes the public’s
4 limited acquiescence of such measures during a time of national emergency for an
5 indefinite acceptance. Since the beginning of the COVID-19 pandemic, every
6 Arizonan—including practitioners, parties, court personnel—has risen to the
7 challenge of limited social contact in exercise of the administration of justice, like
8 conducting oral argument and even trials via Court Connect, Zoom, etc. But the
9 public’s willingness to accept these challenges during the time-limited exigency of
10 the COVID-19 pandemic does not mean that the public agrees to allow these
11 measures to go on forever.
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15 **C. To The Contrary, The Public’s Confidence In The Judicial System**
16 **Would Be Diminished By Taking Away The Public’s Right To**
17 **Peremptorily Remove A Judge.**

18 Although the Petition summarily asserts that taking away peremptory changes
19 of judge is necessary to earn the public’s trust in the judiciary, Arizona civil
20 practitioners overwhelmingly believe that abrogation would do just the opposite.
21 Allowing parties to exercise their limited right to a peremptory change of judge
22 actually *encourages* the public’s confidence in the judiciary because parties and
23 practitioners are more confident that such a right affords them a fair and impartial
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1 judge overseeing their case. The rule encourages public confidence because there
2 are many reasons—either objectively valid or valid to them—that parties or
3 practitioners may choose to exercise the right to a peremptory change of judge. *See*
4 Stempel, Jeffrey W., “Judicial Peremptory Challenges as Access Enhancers,” 86
5 *Fordham L. Rev.* 2263, 2270 (April 2018) (“A procedural device that gives litigants
6 an opportunity to attempt to improve the quality of trial court judging—or at least to
7 avoid judges seen as hostile to the case—logically expands access to adjudication
8 and justice by increasing the odds that a claim will receive a full and fair hearing.”).

11 The Petition’s contrary position is necessarily that peremptory changes of
12 judge are knee-jerk reactions to prior adverse rulings or personality conflicts. Surely
13 this is not always so. And even if it was, the CPPC asks this Court to do what Ariz.
14 S. Ct. R. 81, at Canon 2.11(A) suggests—to consider that someone outside the
15 judiciary might conceivably be wrong, but might have a reasonable basis nonetheless
16 to believe that a judge is biased as to their cause. For the few occasions that a
17 peremptory challenge is due to a practitioner’s personal disagreement with a
18 particular judge, surely the client should not be disadvantaged because the client’s
19 choice of counsel and assigned judge may be at odds. The public should receive a
20 fair trial, regardless of any personality conflict or past professional conflict between
21 a practitioner and judge—perceived or real. *See Wheat v. United States*, 486 U.S.
22 153, 160 (1988) (proceedings must “appear fair to all who observe them”). This Court
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1 should exercise the wisdom of recognizing that sometimes the lawyer or litigant can
2 be right when the judge does not see it, and that that promotes public regard for the
3 law.
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5 **E. The Petition’s Arguments That Forcing More Litigation Over “For**
6 **Cause” Changes Of Judge Is A Good Idea, Or That Peremptory**
7 **Change Of Judge Appropriates The Voters’ Rights To Remove**
8 **Judges, Likewise Fail.**

9 While arguing for the elimination of the peremptory change of judge, the
10 Petition appears to urge an expansion of litigation over changing judges for cause.
11 It argues that the right to a peremptory change of judge operates “to hide the truth
12 when a judge needs to be removed for cause.” Petition at 4. This implies that the
13 public—and confidence in Arizona law—is better served by pitched battles in
14 motion practice over alleged judicial bias.
15

16 Forcing parties to have to clear the substantial hurdles toward removing a
17 judge for cause, which requires filing an affidavit for cause and proving their
18 concerns by an “objective standard” to the presiding judge, should not be the
19 proposed solution. A change of judge *for cause* is extraordinarily difficult to prove.
20 The stakes for seeking to remove a judge for cause are high—if the presiding judge
21 does not agree that grounds exist for removal, then “the named judge may proceed
22 with the action.” Ariz. R. Civ. P. 42.2(e)(5). The stakes are even higher for the
23 Arizona counties with only one judge (Apache and Graham), as the party has to
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1 advocate that the assigned judge must be removed for cause *to that very same judge*.
2 *See* Ariz. R. Civ. P. 42.2 (e)(3).

3
4 Parties and practitioners do not want to publicly identify their misgivings
5 about a particular judge for a particular case. And they should not have to, given the
6 bad feeling such motions engender, and the very real risks such motions impose on
7 those filing them. The Petitioners likely appreciate that the real effect of urging
8 more “for cause” motion practice in the name of truth would be to squelch, stifle,
9 and suppress all but the most outrageous instances of alleged bias, given the great
10 risk of bringing and losing such motions. Where no evidence of actual bias can be
11 proven by an objective standard, judges would be left with an incomplete record: they
12 would remain uninformed in circumstances where the prohibited “unconstitutional
13 potential for bias” exists. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

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16 The Petition’s concern that preemptory changes of judge are “hiding the
17 truth,” overlooks the fact that preemptory changes of judge do the opposite. If a
18 particular judge is consistently the subject of a preemptory change of judge notice, the
19 Presiding Judge—responsible for the “immediate” reassignment of the case to another
20 judge—is on notice that a problem with the subject judge may exist and warrant further
21 inquiry. There should be no “unintended consequence.”
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24 To the extent the judiciary wishes to receive public feedback (as opposed to
25 receiving a “no-fault” preemptory challenge), the Judicial Performance Review

1 already serves as a constitutionally mandated and well-established method for
2 allowing the public to provide insight into the temperament and legal reasoning of a
3 significant majority of Arizona’s judges (e.g., those in Coconino, Maricopa, Pinal,
4 and Pima Counties).

6 Remarkably, the Petition contends that since many Superior Court judges and
7 all Justices of the Peace are elected in Arizona, the preemptory change-of-judge rules
8 “contraven[e] the will of the voters” in those jurisdictions. Petition at 4. The Petition
9 also argues that preemptory challenges to judges “undermine the constitutionally
10 prescribed and conscientious efforts of the Commission on Trial Court
11 Appointments.” *Id.* As this Comment reminds, the practice of preemptory change
12 of judge *actually subsisted in Arizona’s law before the election of judges and*
13 *before the existence of the Commission on Trial Court Appointments.* How the
14 institution of Judicial Performance Review and merit selection could somehow
15 repeal this practice, which has existed side-by-side with them at all times, is not
16 explained. They are not inconsistent in any way.

20 **F. The Asserted Administrative Challenges in the Small Number of**
21 **Cases With Change of Judge are Necessary and a Minor Cost to**
22 **Preserving This Important Public Right.**

23 While practitioners are sympathetic to the administrative challenges of
24 Arizona courts, any administrative difficulty in administering the preemptory
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1 change-of-judge rules should not be a reason to abrogate the public’s right that it has
2 had since before statehood.

3 The data cut decisively against the idea that changes of judge meaningfully
4 inconvenience the courts. The Petition provides no information regarding their
5 frequency, so it is hard to assess the scope and extent of the asserted administrative
6 difficulties. Yet as noted above, for one of the few counties that does maintain these
7 types of records (Maricopa County, the largest in the state), out of the 30,649 pre-
8 judgment civil filings in FY2019, there were only 228 Notice of Change of Judge
9 filings. Although reassigning judges for these 228 cases does cause an additional
10 procedural hurdle for the court’s administration, Maricopa County has a well-
11 established practice of judicial rotation, which rotates judges every two to three
12 years. *See* Commercial Court Review Committee Report to the Arizona Judicial
13 Council at 12, available at
14 https://www.ncsc.org/__data/assets/pdf_file/0020/25355/azccrreport.pdf (June 18,
15 2018). Additionally, as noted above, Santa Cruz County saw only 4 changes of
16 judge in civil matters in FY19 and only 6 changes of judge in FY20. This is truly
17 an infrequent problem to the extent it is one at all.

18 It is certainly understandable that of the two counties in Arizona that only
19 have one superior court judge (Apache and Graham), it is likely procedurally
20 difficult to assign a visiting judge to oversee a case where a party has exercised its
21

1 right to a peremptory change of judge. However, considering that in those two
2 counties there is only one judge that practitioners will encounter for *every* case, it is
3 unlikely that practitioners seriously abuse the right to a peremptory change of judge,
4 nor has the Petition asserted that this is a problem. Instead, it is more likely that such
5 a right is only exercised when a party truly feels that a change of judge is necessary
6 to fair and impartial justice due to unique circumstances, as is evident in its rare use
7 in Maricopa and Santa Cruz Counties. At minimum, the Petition cites no evidence
8 to demonstrate an abuse of the peremptory challenge in Apache or Graham Counties
9 to justify abrogation.
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12 The Petition will probably make any administrative problems far worse if it
13 correctly forecasts a rise in pitched motion battles about reassignment, which are
14 obviously more time-consuming and administratively burdensome. The Petition
15 assumes that abrogation of the peremptory change-of-judge rules would alleviate
16 administrative difficulties. But parties almost certainly employ the peremptory
17 change-of-judge rules *instead of* seeking to remove a judge for cause for the very
18 reasons identified above. Abrogating the peremptory right might actually force
19 parties to seek to remove a judge for cause (where appropriate)—an outcome the
20 Petition seems to suggest is a good idea. But that outcome would almost certainly
21 require far more administrative difficulty, at least for the presiding judges, who are
22 required to adjudicate such motions.
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1 The Petition also relies on the fact that the peremptory change-of-judge rules
2 can “seriously threaten judge’s ability to meet case processing time frames,” Petition
3 at 4, but does not cite any evidence to show such delays, so the extent of the alleged
4 delays is unclear. From the practitioner’s perspective, notices filed in smaller
5 counties might cause *some* delay, but notices filed in larger counties (Maricopa, Pinal,
6 and Pima) are immediately acted upon and cause little or no delay at all. In either
7 event, any delay arising from a peremptory notice is far less than that which arises from
8 a Notice of Change of Judge *for cause*—which requires a hearing before the Presiding
9 Judge or another judge independent of the judge being challenged. Yet Petitioners do
10 not assail Rule 42.2.
11

12 In any event, it is unclear whether the peremptory change-of-judge rules are
13 the proximate cause of threatening judges’ ability to meet case processing time
14 frames or whether there are other procedural rules that bear such responsibility. This
15 is especially true given that a party must exercise its peremptory right to a change of
16 judge at the outset of the case. *See* Ariz. R. Civ. P. 42.1(c) (notice must be filed
17 *within 90 days* after a party’s first appearance in a case, within 10 days of a judge
18 being assigned if they are assigned after the 90-day period).
19

20 The Petition alleges that peremptory challenges amount to a “significant
21 increase in the cost of managing a court,” Petition at 4, but declines to set forth any
22 data identifying such costs. Even assuming that the unspecified costs associated
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1 with the peremptory change-of-judge rules are “significant” as asserted in the
2 Petition, these costs are not a legitimate reason to support abrogation of a right that
3 the public has enjoyed for 120 years. Admittedly, the administration of the public’s
4 procedural rights *is* costly to the public fisc, but the public is not asking for
5 abrogation. In fact, the Petition does not cite any interest or comment from the public
6 on this issue at all.
7

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9 **G. The Petition’s Reliance on Wyoming’s Order for Abrogating**
10 **Peremptory Challenges in *All* Types of Cases Is Misplaced.**

11 The Petition relies heavily on the findings of the Wyoming Supreme Court in
12 its Order Repealing Rule 21.1(a) of the Wyoming Rules of Criminal Procedure and
13 Order Amending Rule 40.1 of the Wyoming Rules of Civil Procedure (Nov. 26,
14 2013) (hereinafter, “Wyoming Order”), *available at*
15 https://www.courts.state.wy.us/wpcontent/uploads/2017/05/mult_2013112600.pdf,
16 concluding that the findings “apply equally to Arizona.” Petition at 5. Notably,
17 however, the Wyoming Supreme Court affirmed that it had “not identified any
18 problems or concerns with peremptory challenges in the civil arena,” so it “chose[]
19 not to curtail, in any manner, the use of peremptory disqualifications in civil cases.”
20 Wyoming Order at 1, n.1. Yet, the Petition here seeks to do just that.
21

22
23 The CPPC continues to support retention of the rules permitting peremptory
24 change of judge as of right in all civil proceedings. In all disciplines, these rules avoid
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1 the embarrassment of for-cause challenges and preserve the public’s confidence that a
2 particular case will not be prejudiced—real or perceived. Although the Petition’s
3 administrative concerns may be accurate, such concerns cannot override a well-
4 established right that the public has had for over 120 years. The CPPC respectfully
5 requests that this Court deny the Petition.
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1 **EXHIBIT B:**
2 **VIEW OF THE CRIMINAL PRACTICE & PROCEDURE COMMITTEE**
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4 **I. BACKGROUND OF PETITION**
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6 This Petition, from the perspective of the several Superior Courts, seeks to
7 abrogate litigants’ procedural right to a peremptory change of judge in criminal cases.
8 This issue has been presented before, and previously withstood these challenges. The
9 criminal change-of-judge right has existed, in some form, for at least 82 years. *See,*
10 *e.g.,* Ariz. Code Ann. §§ 44-1202, 44-1205 (1939) (right to a peremptory change of
11 judge for criminal cases).
12

13 The State Bar of Arizona (“State Bar”) has consistently opposed such petitions.
14 For example, in 2001, the Board of Governors objected based on the view that since
15 the requirements for a change of judge for cause (under Ariz. R. Crim. P. 10.1) were
16 so difficult to meet, that “some mechanism is necessary to replace judges without
17 acrimony and confrontation.” *In re Rule 10.2, R-00-0025*, comment filed by the State
18 Bar of Arizona (March 16, 2001).
19

20
21 The stakeholders, consisting of Arizona’s criminal law practitioners, once again
22 uniformly oppose abolishment of the procedural right to peremptory change of judge.
23 Consistent with guarantees provided by the United States Constitution, as well as the
24 Arizona Constitution, there must remain a procedural mechanism to replace judges
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1 possessing a *potential* for bias without triggering unnecessary disturbance between
2 judges, lawyers, and litigants.

3 4 **II. DISCUSSION and ANALYSIS**

5 The right to disqualify a judge is grounded in the Due Process Clause of the
6 United States Constitution. U.S. Const., amend V, VI, XIV; *cf.*, Ariz. Const., art. 2, §§
7 4, 24. The fundamental right to a fair trial includes “the right to have the trial presided
8 over by a judge who is completely impartial and free of bias or prejudice.” *State v.*
9 *Neil*, 102 Ariz. 110, 112 (1967). For decades, Arizona’s procedural rules have
10 provided two ways in which a party may protect and enforce that fundamental right
11 through mandatory judicial recusal. As it stands, Arizona’s procedural methodology
12 obviates the need for a due process based judicial recusal as the third way in which that
13 fundamental right is honored and enforced.

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17 The first way Arizona litigants may remove a judge from a case involves filing
18 a change of judge *for cause*. This requires a party to file a motion, accompanied by a
19 lawyer-affidavit, evidencing that the judge is *actually* biased. The matter is then
20 transferred to the Presiding Judge for a hearing and ruling. Ariz. R. Crim. P. 10.1.
21 Regardless of the motion’s success, the evidence used to support the motion frequently
22 involves matters which are personal and potentially embarrassing to the judge at issue
23 or is otherwise destructive to the public’s confidence in that judge or in the justice
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1 system as a whole. Because *actual bias* is difficult to prove, this method of removing
2 a judge is seldom utilized.

3 The second way Arizona litigants may remove a judge from a case involves a
4 party's invocation of the right to peremptory change. This requires the filing of a
5 "Notice of Change of Judge." Ariz. R. Crim. P. 10.2. The Notice requires the filing
6 party to avow that the rule is not being invoked for improper purposes such as delay,
7 to interfere with the judge's reasonable case management practices, to obtain a more
8 convenient geographical location, or to obtain other forms of case-related advantage.
9

10 *Id.* The rule does not require the noticing party to explain motive or enunciate reasons
11 why a change-of-judge is sought. As this Court observed: "Arizona's rule permitting
12 peremptory change of judge has historically been viewed as 'salutary' on the grounds
13 that 'it is not necessary to embarrass the judge by setting forth in detail the facts of
14 bias, prejudice or interests . . . nor is it necessary for judge, litigant and attorney to
15 involve themselves in an imbroglio which might result in everlasting bitterness on the
16 part of the judge and the lawyer.'" Cmt. to 2004 amendment to Rule 10.2, quoting
17 *Anonymous v. Superior Court*, 14 Ariz. App. 502, 504 (1971). The instant petition
18 seeks to do-away with this peremptory right.
19

20 Arizona's peremptory change-of-judge right aligns with the Due Process Clause
21 of the United States Constitution, as applied to the states by the Fourteenth
22 Amendment. "The Due Process Clause demarks . . . the outer boundaries of judicial
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1 disqualifications.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009).
2 When recusal is sought under that Clause, proof of *actual bias* is *not required*. *Id.* at
3 883 (emphasis added). Rather, where “as an objective matter . . . there is an
4 unconstitutional *potential* for bias,” recusal under the Due Process Clause is warranted.
5 *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2016) (internal quotation marks
6 omitted, and emphasis added). “Any failure to consider objective standards requiring
7 recusal is not consistent with the imperatives of due process.” *Caperton*, 556 U.S. at
8 887. Properly applied, the standard governing judicial recusal “may sometimes bar
9 trial by judges who have no actual bias and who would do their very best to weigh the
10 scales of justice equally between contending parties.” *Id.* at 886. This construct
11 controls whether there exists a state-created procedural right to a peremptory change
12 of judge or not. However, the state-created right to a peremptory change-of-judge
13 obviates a party’s need to assert the Due Process Clause and/or assert grounds when
14 seeking judicial recusal. This is because the exercise of a peremptory change of judge
15 does not require a litigant to show even the *potential* for bias on the part of the judge.

20 The peremptory change-of-judge right is grounded in the Due Process Clause
21 and acts as the “constitutional floor” on judicial recusal claims. *Caperton*, 556 U.S. at
22 889. And while states are free to “adopt recusal standards more rigorous than due
23 process requires”—such as the peremptory right as codified in Rule 10.2—states
24 cannot adopt standards providing less protection than that afforded by the Due Process
25

1 Clause. *Id.* at 889-90.

2 Granting the Petition would allow for judicial removal only where *actual* bias
3 can be shown to exist. Absent empirical data, the Petition contends that Rule 10.2
4 causes delay in proceedings. Also, the Petition further suggests that the attorneys'
5 avowals cannot be trusted. *See, e.g., Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640,
6 649 (App. 2003) (observing “[o]n the record before us, respondents offer nothing more
7 than speculation about petitioners’ motives for repeatedly striking particular judges.”).
8 The right to peremptory change-of-judge has, quite correctly, been maintained in
9 Arizona’s criminal procedure and should remain so now.

12 The real question presented here is whether the *value* of litigants’ fundamental
13 right to a judge free of potential bias—which the peremptory change of judge rule is
14 designed to protect—is outweighed by administrative practicalities arising out of
15 implementation of said rule. The criminal litigants’ assert that the right to a fair trial
16 and public confidence in our system of justice requires the peremptory challenge
17 remain intact so as to preserve and protect the constitutionally guaranteed fair trial
18 right. Litigants should not be forced to resort to a showing a *potential* for bias under
19 the Due Process Clause, because doing so would give rise to the very embarrassment
20 and imbroglio concerns that the peremptory change of judge right seeks to avoid.

24 The instant Petition commences with the notation of “perceived and potential
25 abuses,” asserting that the rule “prohibits a trial court from determining the propriety

1 of [the] reasons for the notice.” Pet. 3. But *Bergeron* overtly rejected such speculation
2 concerning abuses of Rule 10.2, *id.*, at 651-652. Petitioners here offer no evidence of
3 actual abuse or that judges are unable or unwilling to report such abuses to the State
4 Bar.
5

6 As to a court’s inability to conduct hearings to discern the veracity of attorney
7 avowals, Arizona courts have recognized that: (1) court orders demanding attorneys
8 defend the propriety of a Notice of Change of Judge “carry an inherent challenge to an
9 attorney’s credibility and thereby ensure[s] the very acrimony Rule 10.2 was designed
10 to prevent,” and (2) “[t]hose few attorneys who would submit an untruthful avowal are
11 not likely to demonstrate any greater honesty in the face of a judicial inquiry.”
12 *Bergeron*, 205 Ariz. at n.5, 9. Neither judicial suspicion concerning the veracity of
13 attorney avowals, nor the inability to inquire into the reasons, justifies terminating the
14 rule. The constitutional guarantee of fundamental fairness and judicial impartiality,
15 paramount to the integrity of the process, is bolstered and effectuated by the
16 procedural, peremptory change-of-judge right that has long existed.
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20 Petitioners contend that the peremptory change-of-judge right “*can* seriously
21 threaten judges’ ability to meet case processing time frames and to effectively control
22 their calendars,” and “*can* cause workload disparities.” Pet. 4 (emphasis added).
23 Again, Petitioners do not affirmatively assert that the peremptory change-of-judge
24 right *does* meaningfully result in these eventualities nor do they provide data
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1 supportive of their stance. Nonetheless, it must be acknowledged that the peremptory
2 change-of-judge right may cause a measure of delay in some circumstances. Notices
3 filed in smaller counties might cause *some* delay, but notices filed in larger counties
4 (*e.g.*, Maricopa, Pinal and Pima) are immediately acted upon and cause little or no
5 delay. Any delay arising from the exercise of the peremptory change-of-judge right
6 per Rule 10.2 is far less than that which arises from a motion seeking change-of-judge
7 for cause per Rule 10.1—which requires a hearing before the Presiding Judge or
8 another judge independent of the judge being challenged. Yet Petitioners do not assail
9 the change of judge for cause procedure, nor could they. Abrogating the peremptory
10 challenge will introduce other delay and procedural complexity due to the
11 corresponding increase in recusal motions filed pursuant to the Due Process Clause.
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15 The assertion that public confidence in Arizona’s judicial system is somehow
16 harmed by the existence of Rule 10.2 is overbroad. While there may be some
17 anecdotal concerns, it is doubtful the public is aware such a rule even exists. Indeed,
18 without so much of a mention of the constitutionally-guaranteed abrogation of the rule
19 does not properly preserve the right of a fair trial by an impartial judge; recognize the
20 impact of the procedural, peremptory right on effectuating that constitutional
21 guarantee; or the criminal litigants’ unwavering interest in that guarantee. The true
22 impact of the rule allows: (1) effectively recusing judges possessing a potential for
23 bias; (2) expediently quelling the possibility of judicial embarrassment and acrimony
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1 between lawyers and judges; and (3) preserving the integrity of the process, the fair
2 trial guarantee, and the public's confidence in the judicial system as a whole. The
3 criminal practitioner stakeholders assert that the very existence of Rule 10.2 fosters,
4 rather than impinges upon, public confidence in our judicial system. *See infra*.

6 The Petitioners assert that taking away peremptory challenges of judge is
7 necessary to earn the public's trust in the judiciary. The criminal bar uniformly
8 believes abrogation would do just the opposite. Allowing parties to exercise their
9 limited right to a peremptory change of judge actually *encourages* the public's
10 confidence in the judiciary because parties and practitioners gain confidence that
11 their right to a fair and impartial judge overseeing their case is preserved. As one
12 commentator has observed: "A procedural device that gives litigants an opportunity
13 to attempt to improve the quality of trial court judging—or at least to avoid judges
14 seen as hostile to the case—logically expands access to adjudication and justice by
15 increasing the odds that a claim will receive a full and fair hearing." Stempel, Jeffrey
16 W., "Judicial Peremptory Challenges as Access Enhancers," 86 *Fordham L. Rev.*
17 2263, 2270 (April 2018).

21 The public's confidence in the judiciary is heightened by the peremptory
22 change of judge right:

24 Judges, obviously impartial, may have orientations
25 (toward lawyers, litigants, institutes, individuals, beliefs)

1 that make them sufficiently undesirable and thus merit the
2 use of a peremptory challenge. The judicial system should
3 respect this and provide for a reasonable outlet for lawyer
and litigant efforts to avoid such judges in particular cases.

4 *Id.* The right to a peremptory change of judge provides that “reasonable outlet” to
5 allow the prosecution and the defense to avoid those judges who might possess
6 undesirable orientations in a particular case, thereby instilling public confidence in
7 the fairness and integrity in our system of law.

8
9 Petitioners’ assertion that the public’s respect for the law or confidence in the
10 judiciary is reduced by the peremptory change of judge right is overbroad. To the
11 contrary, Rule 10.2 also has the effect of improving judicial conduct over time—a fact
12 on which all experienced criminal practitioners agree. The constitutional right to a fair
13 trial, presided over by an even potentially biased judge, does not bow to claims of
14 minor administrative delay resulting from Rule 10.2’s enforcement. The *value* of the
15 procedural change-of-judge right and its constitutional underpinnings are of far greater
16 import.
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19 Petitioners next contend the peremptory change of judge right usurps the will of
20 the voters in counties that elect judges and undermines the judicial appointment
21 process in counties where judges are appointed by the governor. Pet. 4. The fact is
22 that both Arizona’s voters and its governor operate under the presumption that all
23 judges are competent, courteous, fair and impartial at all times. So too do the voters
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1 and the governor expect Arizona’s judges to faithfully apply the law. Yet these
2 expectations should not be absolute. In the criminal context, judges who have family
3 members, friends, or have themselves been victims of crime may not be publicly
4 perceived as the best fit to adjudicate a particular case alleging a similar crime. A
5 judge whose spouse was killed by a drunk driver would understandably not be
6 publicly perceived as the best fit to try a case alleging drunk driving.

7
8 The Petition’s concern for the voters’ will and the judicial appointment process
9 ignores the very thing that the Due Process Clause’s test for judicial disqualification
10 recognizes:
11

12 Bias is easy to attribute to others and difficult to discern in
13 oneself. To establish an enforceable and workable
14 framework, the Court’s precedents apply an objective
15 standard that, in the usual case, avoids having to determine
16 whether actual bias is present. The Court asks not whether
17 a judge harbors an actual, subjective bias, but instead
whether as an objective matter . . . there is an
unconstitutional potential for bias.

18 *Williams*, 136 S.Ct. at 1905 (internal quotations and citation omitted). It simply cannot
19 be contended that either the voters or the governor intended that judges possessing an
20 “unconstitutional potential for bias” be nonetheless permitted to preside over *every*
21 criminal case.
22

23 Next is the contention that an “unintended consequence” of the peremptory
24 change-of-judge right is that it operates to “hide the truth when a judge needs to be
25

1 removed for cause or needs to address deficiencies in areas such as judicial demeanor
2 or knowledge of the law.” Pet. 4. The peremptory change of judge right “ensure[s] a
3 party’s right to have a matter heard before a fair and impartial judge without the
4 necessity of divulging details that could cause needless embarrassment and antagonism
5 or showing actual bias which may be difficult to prove.” Court Comment to
6 Experimental 2001 Amendments to Rule 10.2, Ariz. R. Crim. P. Thus, if a particular
7 judge is consistently the subject of Rule 10.2 notices, the Presiding Judge—responsible
8 for the “immediate” reassignment of the case to another judge—is on notice that a
9 problem with the subject judge may exist, warranting further inquiry. This should not
10 be thought of as an “unintended consequence.”

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14 The inescapable fact is that, in seeking to abolish the peremptory change-of-
15 judge right, the Petition seeks a process where litigants may request judicial recusal
16 *only* when actual bias can be proved. Where no evidence of actual bias exists,
17 abrogation of the peremptory challenge frustrates showing any *potential for bias*,
18 giving the presiding judges an incomplete history for a specific judge. Such a result
19 diminishes the guarantees of the Due Process Clause and the goals of public confidence
20 in the justice system, where concerns are unheeded or *unknown* by our courts.
21

22
23 The Petition asserts that the suspension of the peremptory change-of-judge right
24 during COVID-19 has been “without any apparent effect upon the justice afforded to
25 litigants who might otherwise exercise a peremptory challenge.” Pet. 4. While the

1 rule is currently temporarily suspended, lawyers cannot be expected to announce in
2 open court a desire for change of judge but-for the rule’s suspension. Such an action
3 would certainly invite the very acrimony the rule was designed to avoid. In Maricopa
4 County, by way of example, criminal lawyers intending to exercise their peremptory
5 right to change of judge once the suspension is lifted are noting on their Joint Case
6 Status forms (filed with the superior court) their reservation of their peremptory change
7 of judge right to use in the future once the moratorium is lifted. Lawyers in other
8 counties have recently and successfully filed change of judge notices, erroneously
9 believing that the rule’s suspension expired December 31, 2020—as did those courts
10 in honoring those Notices and reassigning the cases to different judges.
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14 This Court should not deem that the temporary suspension of the Rule 10.2, in
15 the midst of a pandemic, has somehow proven the rule unnecessary in criminal cases.

16 Finally, the Petition relies on the findings of the Wyoming Supreme Court’s
17 recent order repealing the peremptory change-of-judge rule in criminal cases.
18 Petitioners conclude Wyoming’s findings “apply equally to Arizona.” Pet. 5. We
19 respectfully disagree. As the first sentence of the Wyoming order reveals, it was
20 “[t]he *blanket* use of the disqualification rules” which wreaked havoc on Wyoming’s
21 criminal justice system. In contrast, Arizona’s procedure specifically disallows
22 blanket disqualifications and affirmatively requires a party’s avowal that, *inter alia*,
23 the change of judge right is *not* being invoked “for the purpose of using the rule
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1 against a particular judge *in a blanket fashion* by a prosecuting agency, defender
2 group, or law firm.” Ariz. R. Crim. P. 10.2(B)(2)(E).

3
4 And unlike the Wyoming system, “delay in criminal proceedings resulting
5 from a judge’s removal” does not “impact a defendant’s speedy trial rights” in
6 Arizona. Any delay occasioned by the defense is automatically excluded from
7 Arizona’s speedy trial time computation, as is delay occasioned by “trial calendar
8 congestion.” Ariz. R. Crim. P. 8.4, Arizona criminal procedure is not on equal
9 footing as Wyoming criminal procedure.

10
11 The peremptory change-of-judge right, aligned with the Due Process Clause of
12 the United States Constitution and its Arizona counterpart, has served Arizona’s
13 criminal justice system well for over eight decades. Critically, it has served to protect
14 judges from public airing of perceived biases and the grounds therefor. Whether based
15 on past personal or professional circumstances, peremptory challenges avoid the
16 divulgence of the underlying reasons. In such a circumstance, the *lawyer* simply
17 removes the judge from the case by invoking the peremptory change-of-judge right.

18
19 Criminal bar stakeholders are strongly united in their determination to ensure
20 that proceedings not only *are* fair but *also* “appear fair to all who observe them.” *Wheat*
21 *v. United States*, 486 U.S. 153, 160 (1988). They are strongly united in the view that,
22 at a minimum, the peremptory change-of-judge right avoids the airing of embarrassing
23 circumstances which must often come to light, in a public forum, as the basis for a
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1 change of judge *for cause* motion. No lawyer or litigant wants that. They are strongly
2 united in their stance that the peremptory change of judge right should be maintained.

3
4 If the peremptory right is abolished, Arizona courts will see many more motions
5 for change of judge *for cause* under Rule 10.1, requiring presentation of demonstrable
6 evidence of judicial bias set forth in a hearing. This will create greater delay in
7 processing cases than any delay noted in the Petition, whether the motions are
8 ultimately successful or not. Where there exists no basis for change-of-judge *for cause*,
9 criminal practitioners will seek judicial recusal based on the Due Process Clause as
10 interpreted by Supreme Court precedents. Unlike the Rule 10.2, such motions have no
11 filing deadline; require a showing of only *a potential* for bias; may potentially involve
12 embarrassing disclosures; and could create conflict between the judge and the lawyer.
13
14 All of which could impact future cases between that judge and the lawyer. The current
15 peremptory change of judge right avoids all of this and should be maintained.
16

17
18 The criminal practitioner stakeholders unanimously oppose abrogation of
19 Rule 10.2 and its codification of the peremptory change-of-judge right. The rule
20 protects the constitutionality and integrity of the criminal trial process in general;
21 highlights judicial deficiencies which are worthy of redress; avoids embarrassment of
22 judges and the criminal justice system overall; and eviscerates the possibility that
23 judges, litigants and their attorneys will become embroiled in “an imbroglio which
24 might result in everlasting bitterness on the part of the judge and the lawyer.”
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1 Comment to the 2004 Amendments to Rule 10.2, Ariz. R. Crim. P. The rule improves
2 the functioning of Arizona's system of justice and public confidence in that system as
3 a whole and should remain untouched.
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1 **EXHIBIT C:**

2 **VIEW OF THE FAMILY LAW PRACTICE & PROCEDURE COMMITTEE**

3 **Preliminary Comment:**

4
5 The Family Law Bar has expressed an overwhelming negative reaction to the
6 Petition to abrogate litigants' procedural right to peremptory change of judge in family
7 law matters. The State Bar of Arizona's Family Law Practice & Procedure Committee
8 met and by unanimous vote submits its comment and objection to the Petition. The
9 Family Law Practice & Procedure Committee supports and echoes the positions and
10 comments of the Criminal and Civil Bars attached hereto as Exhibits A and B and adds
11 the following additional reasons that the Petition should not be granted.
12

13
14 1. Signal to Presiding Judge

15 Using the preemptory Notice of Change of Judge is one of the most important
16 ways that lawyers can communicate to the Presiding Judge that there may be a
17 problem or challenge with a specific judge. Most attorneys use Change of Judge
18 Notices sparingly and only after thoughtful consideration, and frequently regarding
19 the same few judges. The Rule itself, as well as interpretive case law, provides for
20 safety catches to avoid overuse as there are limits as to when a Notice of Change of
21 Judge can be filed. If these Rules are not sufficient, they can be amended to address
22 any concerns regarding a notice.
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1 In addition, some judges may not be strong on a particular bench, may have
2 problems with timeliness in setting hearings or rulings, or may have unconscious
3 biases which lawyers and parties are able to ascertain and have found troubling.
4 When a judge is frequently noticed, the Presiding Judge is being told that there is a
5 problem which needs to be addressed. Without this mechanism, we are left with
6 Judicial Performance Review, which occurs once every two years and is limited to
7 the judges we have been in front of recently. It does not send the strong and
8 consistent signal to the Presiding Judge that a particular judge is not meeting the
9 standards expected by the legal profession and deserved by the parties.
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12 2. Family Law Specific/Strategic

13 Family law is unlike most other practice areas in that the Judges are the only
14 available trier of fact and come to the bench with their personal experiences. While
15 judges are expected to be neutral, it is impossible to completely discount personal
16 experience and feelings on issues related to families. Judges are parents, stepparents,
17 co-parents, and may have had their own divorces. Their inherent feelings about the
18 issues in family law, for example, spousal maintenance (alimony) or the role of a
19 stepparent, can frequently be determined by their consistent rulings in those areas in
20 a variety of cases. Thus, as an advocate, part of the Family Law Bar's job is to try
21 to present the case in the most favorable way for the clients. When we have a fact
22 finder who we have experienced to have a particular tendency about an issue in the
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1 case, we may want a different judge who does not hold such tendencies. In addition,
2 part of the expectation of parties is that their lawyer will bring not just their
3 knowledge of the law, but their knowledge of the judges. Where the issue is one of
4 a contract, in contrast, Judges do not frequently bring strongly held personal beliefs
5 to the bench which may unknowingly influence their decision.
6

7 In addition, there is no option for a jury trial in family law. A jury trial setting
8 allows the parties an opportunity to question potential fact finders and exclude those
9 who appear to have a personal bias or belief which could influence their decision.
10 A jury trial also provides its own safety net such that it is never just one juror making
11 the decision rather a consensus amongst more than one juror is needed. There is no
12 such option when the judge is the only available fact finder in family law matters.
13 A right to change judge gives family lawyers and parties an opportunity to exclude
14 a fact finder who experience has shown them has some particular bias or belief that
15 could influence the decision, particularly if it is an unconscious influence.
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18 3. Less Occupied Counties

19 Some counties may be comprised of various cities located numerous miles
20 apart for which domestic relations cases may be heard. For example, Mohave
21 County has one superior court judge and one commissioner in Lake Havasu City,
22 one superior court judge in Bullhead City, and one superior court judge and one
23 commissioner in Kingman who all handle domestic relations cases. This limitation
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1 of Judges in less occupied counties can and does create problems that cannot easily
2 be tactfully remedied without the ability to notice the judge. For example, Mohave
3 County is a relatively small county population wise, it is not uncommon for a judge
4 to have a current or previous relationship, whether personal or business, with a
5 litigant. The judge would then normally recuse himself and the case will be
6 reassigned. However, if the judge fails to do so, the attorney or litigant can more
7 efficiently notice the judge and have the case reassigned without the need for a for
8 cause hearing and angst between the parties/attorneys and the judge.

11 4. Personal

12 Some judges and lawyers simply do not get along well. Although all are
13 expected to be professional, a lawyer may have had a particularly bad experience
14 with a judge (or a judge with that lawyer) such that the interaction could
15 unknowingly prejudice future clients of that lawyer. A lawyer would then be put in
16 the position of having to decide whether to give up a potential client or appearing in
17 front of a judge who could make the case more difficult or unpleasant for them.

18 A right to change judge allows the attorney to avoid appearing in front of a
19 judge when there may be mutual dislike between the judge and attorney such that it
20 could impact the case. This helps ensure that parties receive a fair trial, regardless
21 of any personality conflicts or past conflict between the attorney and the judge.

22 5. Appeals

1 Under the current Rules, if a case is remanded from appeal, a party has a right
2 to change the judge. This helps parties feel that they are truly being granted a new
3 trial, and not having to rely on the judge who made an erroneous ruling previously.
4
5 The Court of Appeals decision may have been unflattering to the trial court judge,
6 or the trial court judge may have certain feelings about having been reversed. In
7 order for the party to obtain a truly new trial, they should have the opportunity for a
8 new judge.
9

10 Taking away the option for a new judge after a remand could be a disincentive
11 for an appeal. If a party knows that the case will be sent back to the same judge,
12 they may choose not to appeal. This will result in erroneous rulings being left
13 uncorrected, and new and clarifying case law is less likely to develop.
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