Testimony on House Bill 4073
House Judiciary Committee
February 4, 2022

Chair Bynum and members of the Committee:

Thank you for the opportunity to provide written testimony on House Bill 4073. My name is Jennifer Schemm Williams. I practiced law for 22 years, focusing on research and writing motions and appeals in both state and federal courts. I respectfully request that, if you agree with OCLDA Legislative Director Mae Lee Browning that a work group should be formed to discuss the presented issues including judge disqualifications, I be included in the committee in whatever capacity you see fit. I believe I can provide an important, unique perspective as a research lawyer and spouse of a judge being blanket disqualified by a district attorney.

I am the spouse of Wes Williams, a circuit court judge from the 10th judicial district who for almost two years now, has been blanket challenged/disqualified by the Union County district attorney from hearing any criminal cases. Prior to winning a contested judicial race in 2018, Wes was a general practitioner for 22 years, with approximately a third of his practice consisting of criminal litigation. He was hugely successful in litigation against this district attorney's office, including winning high profile cases. The district attorney was a vocal opponent of Wes during his judicial campaign. She actively supported Wes' opponent, another long time district attorney from Wallowa County (the other county within the 10th judicial district). The district attorney's basis for blanket challenging Wes was provided in a lengthy memorandum, which became the basis of a bar complaint because of the myriad of misrepresentations the district attorney made about Wes' conduct. Ultimately, the complaint was dismissed because under the current law, ORS 14.250-14.260, all that matters is the lawyer's subjective belief of bias. Thus, the district attorney needed to include only facts in the memo supporting her belief, omitting the facts that provided context to Wes' conduct and proof that his actions were reasonable and not evidence of actual bias against the district attorney.

After Wes was disqualified, I started researching the legality of blanket challenges. There are few cases in Oregon because ORS 14.250-14.260 only requires a subjective belief of bias. It is virtually impossible for a judge to challenge the good faith of an attorney or party's subjective belief. In contrast, federal judges

can be removed only when the attorney or party's claim of bias is objectively reasonable. Rightfully, judicial philosophy is *not* considered objectively reasonable. This protects the independence of the judiciary from pressure to rule certain ways to avoid blanket challenges.

When looking to other states, as well as a seminal case in Oregon, *U'Ren v. Bagley*, 118 Or 77 (1926), it is clear that this law is being abused – challenging judges for their judicial philosophies versus actual bias against a party or a lawyer. The cases predominantly involve prosecutors' offices issuing the blanket challenges. This creates a chilling effect on the judiciary because no judge wants to be removed from all criminal cases.

For example, the Arizona Supreme Court called a prosecutor's office policy of blanket challenging one particular judge:

> "an attempt to intimidate not only [the judge] *but by example the entire [circuit court]*. As such the policy was an abuse of the rules and a threat to the independence and integrity of the judiciary which cannot be allowed."

State v. City Court of Tucson, 722 P.2d 267, 270-71 (Ariz. 1986)(emphasis added); *see also Bower v. Morden*, 880 P2d 245, 251 (Idaho 1994) (dissent elaborating on the discussion in *City Court of Tucson*, regarding the intimidation judges may feel: the blanket challenge of one judge "puts [the other judges] on notice that if their rulings should become less acceptable to [the district attorney] . . . ,[the district attorney] has the power to redirect his blanket motions and remove an individual judge from the criminal bench").

In addition to the chilling effect on the judiciary caused by blanket challenges, there are other considerations regarding district attorneys' use of blanket challenges of judges. District attorneys are not like any other class of lawyers. In addition to being part of the executive branch (which should not interfere with the judicial branch), district attorneys already have immense, disproportional power over criminal cases – deciding who to charge, what to charge, what pleas to offer. They have the power of the government behind them – unlimited resources and access to police officers and investigators, and they can hire experts without any concern of cost. They should not also be able to judge shop by eliminating judges based on their judicial philosophies. These judges were chosen by the state; *i.e.,*

the plaintiff in criminal cases, to adjudicate *all* cases (either through the governor by appointment or the citizens of a judicial district by election).

In close, I can contribute to a working group on the issue of Oregon's judge disqualification law by providing nationwide research on abuses of this type of law (by any class of lawyers) and potential alternative statutory language. I can provide a perspective to your committee that will not be voiced by the district attorneys association, the OCDLA or the Oregon Judicial Department. I do not believe the judicial department would take a position against one class of attorneys, even if the class is abusing the law or should be treated differently because of its status as officers of the government's executive branch. If it did so, the OJD and its circuit court judges, may then be perceived by that class of attorneys as unfair and biased. It is not right to put the department in that position.

Please allow me to provide another important perspective.

Respectfully submitted,

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