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10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

12 In the Matter of:

Supreme Court No. R-21-0020

13 **PETITION TO AMEND RULES**
14 **18.4 AND 18.5 OF ARIZONA**
15 **RULES OF CRIMINAL**
16 **PROCEDURE AND RULE 47(E)**
17 **OF THE ARIZONA RULES OF**
18 **CIVIL PROCEDURE**

19 **COMMENT OF**
20 **THE ARIZONA PROSECUTING**
21 **ATTORNEYS' ADVISORY**
22 **COUNCIL**

23 This Petition seems to be offered in lieu of the proposals in R 21-0008. To
24 the extent that is true, we refer to the Arizona Prosecuting Attorneys' Advisory
25 Council ("APAAC") Comment filed in opposition of R 21-0008. APAAC does not
believe this Petition is in the best interests of the criminal justice system and writes
in opposition of eliminating peremptory strikes in jury selection.

While APAAC very much respects the authors of the Petition and some of the
points being made, we believe that eliminating peremptory strikes could lead to
selection of biased jurors. Parties typically use preemptory strikes on jurors who
have given answers during the jury selection process that suggest that they would

1 potentially favor the opposing side, do not respect the gravity of the process, or are
2 just not interested in being jurors. Empaneling these types of jurors should be
3 concerning for the litigants, the Court, and the community at large. Courts are often
4 reluctant to strike these jurors for cause when the juror ultimately says that they can
5 be fair and impartial, despite their answers to specific questions that indicate the
6 contrary. Trial attorneys and judges know that many prospective jurors say those
7 words because they do not want to think of themselves as unfair or biased, or express
8 their true opinion in front of a large group of people, even if they clearly are biased
9 based on their past life experiences. This should not be surprising, what reasonable
10 minded person would want to publicly admit on the record, in front of a group of
11 strangers that they did not even judge themselves to be fair? While those jurors
12 might try to be fair, it may be very difficult for them based on their prior answers
13 during jury selection. Those are the types of jurors that peremptory strikes are
14 designed for and which make it more likely that both sides can get a fair and
15 impartial jury, which is truly the whole goal of the process.

20 Every experienced trial attorney and judge has encountered jurors who make
21 statements in jury selection indicating a bias, only to insist they can be fair and
22 impartial. For example, a prospective juror states that she distrusts large
23 corporations, but claims she can be fair (in a dispute involving a large local
24 corporation). Additional questioning may shed light on the juror's true mindset, but
25

1 if the juror ultimately says she can be fair and impartial, then the trial court is in a
2 difficult situation. The court either has to substitute its judgement for the juror and
3 dismiss her for cause or keep the juror on the panel, with fear that she will remain
4 on the panel and possibly let her bias interfere. This is precisely the type of situation
5 where peremptory strikes promote fairness and trial courts know this option is
6 currently available for these difficult situations.
7

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9 A few prospective jurors intentionally misrepresent their true position in the
10 hope that they will be selected. Whatever the juror's motivation, every experienced
11 trial attorney and judge has experienced a "stealth" juror—a juror who stated during
12 selection that they could be fair and impartial but whose personal biases or opinions
13 prevented them from fully considering the evidence or deliberating in good faith.
14

15 These "stealth" jurors get through even with peremptory strikes. This
16 phenomenon will only be exacerbated without them. The end result will then be
17 increased mistrials and more wasted court, litigant and juror time and resources.
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19 If there is a real concern that the number of peremptory strikes currently
20 allowed to each party is too cumbersome and/or excludes too many members of the
21 community from serving as jurors, perhaps an alternative is to reduce the number
22 allowed, rather than eliminating them altogether.
23

24 Any large group of Arizonans will invariably have different opinions about
25 matters of public concern. Peremptory strikes empower the litigants to apply what

1 they have learned about the venire panel assigned to the case in an effort to select
2 the fairest jury possible from the venire. For example, in a group of fifty venire
3 jurors those who have perceived sympathy for the plaintiff can be removed and those
4 who have perceived sympathy for the defense can likewise be removed. What
5 remains is a fairer, more neutral collection of jurors from which to decide the case.
6 When properly administered, peremptory strikes help promote fairness and
7 neutrality. Arizonans should not be forced to trade fairness and neutrality for
8 efficiency in jury selection. APAAC respectfully opposes this petition.
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11 RESPECTFULLY SUBMITTED this 30th day of April, 2021.
12

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17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 30th day of April, 2021, by:

20 By: *Diana Cooney*
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